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State-Created Environmental Dangers and Substantive Due Process

Shannon Roesler
University of Iowa College of Law

STATE-CREATED ENVIRONMENTAL DANGERS AND SUBSTANTIVE DUE PROCESS

*Shannon Roesler**

Abstract

This Article focuses on litigation arising out of contaminated drinking water in Flint, Michigan, lead paint in New York City public housing, and harms to young people from the impacts of climate change. At the heart of each case is a claim that state officials violated the plaintiffs' substantive due process rights by creating or enhancing an environmental danger and then deliberately failing to mitigate the risk to the plaintiffs. Although the plaintiffs characterize their claims in similar fashion, the three cases are not likely to enjoy the same success as they move through the courts.

The scholarly commentary thus far does not offer satisfying answers to why plaintiffs might state a claim against officials for contaminated drinking water but not for an unstable climate. Although these cases involve novel applications of substantive due process doctrine, scholars have yet to examine exactly if and how they depart from other substantive due process cases. To fill this gap in the literature, this Article seeks to situate these cases in existing doctrine. In doing so, it exposes doctrinal confusion regarding which standards and tests apply to state-created danger claims. In addition, to provide courts with necessary guidance, this Article proposes a framework for state-created danger claims, limited by established common law principles and grounded in the important distinction between challenges to official misconduct and challenges to governmental law or policy.

INTRODUCTION

This Article closely examines an emerging trend in civil rights litigation: suits against the government for harms resulting from state-created environmental dangers. This Article details the facts of three such cases and analyzes the judicial application of substantive due process doctrine to the claims they present. The first case involves the well-known tragedy of contaminated drinking water in Flint, Michigan. In April 2014, the state-appointed emergency manager for the city of Flint, Michigan, decided to cut costs by switching the city's drinking water source from the Detroit Water and Sewerage Department to the Flint River, a source that required reviving the city's dormant water treatment facility. Officials then disregarded recommendations to treat Flint River water with anticorrosive agents, a decision that caused iron water supply pipes to corrode and exposed the city's citizens to dangerous amounts of lead and disease-causing bacteria such as *Legionella*.[1]

* Professor of Law, University of Iowa College of Law. The Author would like to thank the participants of the Eleventh Annual Colloquium on Environmental Scholarship for their helpful feedback on an earlier draft of this Article.

1. *See infra* Section I.A.

Similarly, for the last two decades, the New York City Housing Authority (NYCHA) has disregarded and routinely challenged tests done by the city health department that indicated lead paint hazards in apartments where young children live. For years, NYCHA not only ignored federal laws requiring routine annual testing, but also refused to investigate tenants' complaints and actively fought health department tests indicating the presence of lead.[2] When NYCHA changed course, the contractors it hired found lead paint hazards (peeling paint or dust) in 80% of the 8,300 apartments that they inspected.[3]

The third case involves climate-related harms. Since at least 1990, the U.S. government has known that the emission of greenhouse gases from the burning of fossil fuels contributes to the warming of the planet and that the more fossil fuel we burn, the greater the detrimental impacts of climate change will be.[4] Despite this knowledge, U.S. officials subsidized the fossil-fuel energy structure, impeding the integration into the market of renewable and low-carbon sources of energy and encouraging fossil-fuel dominance.

In all three cases, plaintiffs have sued some combination of local, state, and federal officials for violating their constitutional rights and sought equitable remedies to redress their injuries. In the Flint and New York litigation, plaintiffs sued local and state officials under a well-known federal statute, 42 U.S.C. § 1983, for violations of their constitutional rights, including their substantive due process rights under the Fourteenth Amendment.[5] In the climate change lawsuit, *Juliana v. United States*,[6] a class of young people sued various federal defendants directly under the federal Constitution.[7] Although the plaintiffs in these cases allege a range of legal claims, at the heart of each case is a legal claim grounded in substantive due process. In essence, the plaintiffs argue that state officials knowingly created or enhanced a danger that has deprived them of constitutionally protected liberty interests.

Although these cases similarly involve governmental failures to mitigate a public health or environmental danger, they are not likely to enjoy the same success as they move through the courts. The Sixth Circuit Court of Appeals recently upheld the district court's decision that

2. *See infra* Section I.B.

3. J. David Goodman et al., *Tests Showed Children Were Exposed to Lead. The Official Response: Challenge the Tests*, N.Y. TIMES (Nov. 18, 2018), https://www.nytimes.com/2018/11/18/nyregion/NYCHA-lead-paint.html [perma.cc/FTE7-6F65].

4. *See infra* Section I.C.

5. *See* Guertin v. Michigan, 912 F.3d 907, 915 (6th Cir. 2019); Paige v. N.Y.C. Hous. Auth., No. 17cv7481, 2018 WL 3863451, at *1 (S.D.N.Y. Aug. 14, 2018).

6. 947 F.3d 1159 (9th Cir. 2020).

7. *See* Complaint for Declaratory and Injunctive Relief at 94, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. Aug. 12, 2015), *rev'd*, 947 F.3d 1159 (9th Cir. 2020) (No. 6:15-cv-o1517) [hereinafter *Juliana* Complaint].

plaintiffs in the Flint litigation had stated legally cognizable claims for substantive due process violations,[8] while a federal court recently dismissed the substantive due process claim in the NYCHA litigation.[9] Although the *Juliana* case survived initial challenges, the Supreme Court has twice signaled that it has concerns about the litigation, and a divided panel on the Ninth Circuit Court of Appeals recently held that the plaintiffs lacked standing to sue.[10] After the plaintiffs sought to stay the Ninth Circuit's mandate and amend their original complaint in the district court, the judge ordered the parties to engage in a settlement conference.[11] The plaintiffs may file a petition for a writ of certiorari in the Supreme Court, but commentators predict that the plaintiffs are unlikely to prevail on the merits.[12]

But why? Commentators treat the probable dismissal of the *Juliana* case as inevitable and obvious. In contrast, the substantive due process claim in the Flint litigation has not provoked the same response. Perhaps the key differences between the two cases have to do with traditional tort concepts such as intent, duty, and causation. Perhaps the *Juliana* case is really a failure-to-regulate claim dressed up as affirmative misfeasance by the government; such a case seems inherently political—an attempt to hold Congress, rather than executive officials, accountable.

The commentary thus far has not delved deeply into these questions, and it has not explained how plaintiffs might state a claim against officials for contaminated drinking water but not for an unstable climate. Although Supreme Court precedent urges courts to find violations of substantive due process only in limited circumstances, the likelihood that the Court will continue to limit these claims does not provide judges with much-needed guidance about how they should analyze environmental danger cases. Moreover, although civil rights plaintiffs have in recent decades chosen federal statutes over constitutional litigation, a new trend is on the horizon. As state and federal governments have assumed responsibility for protecting the public from myriad harms, their constituencies understandably demand that they carry out these duties in a way that—at the very least—does not enhance environmental and public health risks.

This Article is the first to acknowledge the need to interrogate the doctrinal and theoretical challenges behind substantive due process claims that governmental officials are responsible for environmental injuries. Rather than dismissing all or a subset of these claims as novel

8. *See Guertin*, 912 F.3d at 925.

9. *See Paige*, 2018 WL 3863451, at *1.

10. *See Juliana*, 947 F.3d at 1165.

11. *See Juliana v. United States*, OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/juliana-v-us [https://perma.cc/38AS-HDSN] (describing the scheduling of the status conference).

12. *See infra* note 329.

applications of substantive due process, this Article steps back and analyzes where these cases fit within current substantive due process doctrine. In doing so, it exposes doctrinal confusion regarding which standards and tests apply to state-created danger claims. It also lends support to arguments in recent scholarship that courts often incorrectly assume that substantive due process applies only to fundamental rights, a misconception that could be remedied by distinguishing between claims alleging executive misconduct and claims alleging that laws or policies violate substantive due process.[13]

This Article proceeds as follows. Part I provides a detailed overview of the three cases involving state-created environmental dangers. Part II analyzes the two theories of state liability raised in these cases: (1) the theory that defendants violated substantive due process because they created a danger (lead in water, lead in housing, climate change) and then failed to mitigate that danger and (2) the theory that the defendants' actions violated the plaintiffs' fundamental rights. The objective is to uncover the doctrinal confusion that plagues state-created danger claims. Part III seeks to provide courts and commentators with a more coherent framework for state-created danger claims, guided by common law concepts and grounded in the important distinction between challenges to official misconduct and challenges to governmental law or policy.

I. STATE-CREATED ENVIRONMENTAL DANGER: THREE CASES

The likelihood that plaintiffs will survive the government's motion to dismiss on threshold issues in constitutional tort litigation depends on whether they allege facts that closely track relevant precedent. This is especially true of substantive due process claims. As the discussion in Part II illustrates, the doctrine in this area is unsettled. In addition to struggling to define the liberty and property interests that warrant constitutional protection, courts grapple with Supreme Court statements that constitutional liability is not coextensive with common law tort liability but lack guidance that explains how to limit tort concepts such as duty and causation in the due process context.

13. *See, e.g.*, Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 309 (2015) (arguing that "courts insist inappropriately on an initial showing that the claimant's fundamental rights were violated before applying" rational basis review or the shocks-the-conscience test); Toni M. Massaro & Ellen Elizabeth Brooks, *Flint of Outrage*, 93 NOTRE DAME L. REV. 155, 187 (2017) (arguing that judges in cases arising out of the Flint drinking water crisis have incorrectly required that plaintiffs allege the deprivation of a fundamental right); Timothy M. Tymkovich et al., *A Workable Substantive Due Process*, 95 NOTRE DAME L. REV. 1961, 1964 (2020) (identifying circuit courts' confusion regarding which tests to apply in a given case and arguing that separate tests govern substantive due process challenges involving legislative, executive, and judicial action).

For this reason, courts often seek to allow litigation to proceed only if it closely fits the facts of past cases.[14] If it is a close call, this opens the door to a qualified immunity defense that the alleged constitutional violation was not clearly established at the time of the relevant conduct.[15] Because the facts are critical to mapping the contours of substantive due process, this Part provides a factual overview of the three cases. The facts are taken from court opinions and in-depth news reporting. At this stage, none of the facts have met the civil burden of proof in court because all three cases are in the early stages of litigation. But to explore the contours of a substantive due process claim for environmental harm, this Article adopts the presumption of truth that a court applies to a plaintiff's complaint on a motion to dismiss for failure to state a claim. The following overview also selects facts that are central to critical doctrinal questions such as duty and culpability discussed in the next Part.

A. *Flint, Michigan: Exposure to Lead and Other Contaminants in Drinking Water*

Flint was once a thriving city thanks to the financial success of General Motors (GM), founded in Flint in 1908.[16] But in the late twentieth century, most of the GM plants in Flint closed, resulting in substantial job losses.[17] As other businesses suffered or closed, more than half of Flint's population left, leaving behind vacant homes, empty schools, and a water infrastructure designed to serve twice the current population.[18] The remaining residents, at least 40% of whom lived below the federal poverty level, saw their water bills increase as the city tried to spread the costs among a smaller citizenry.[19]

The state's solution to failing cities such as Flint was not to provide much-needed financial assistance, but to appoint an emergency manager authorized by state law to manage the city in place of locally elected officials.[20] In 2013, under emergency management, the city of Flint decided to join with neighboring communities and build a new water

14. *See, e.g.*, Baxter v. Bracey, 751 F. App'x 869, 872 (6th Cir. 2018) (concluding that plaintiff, who was bitten by a police dog despite the fact that he raised his hands in the air and made no attempt to flee, had not alleged any "clearly established" constitutional violation, even though the court had previously found a violation where a police dog bit two suspects who were not fleeing).

15. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

16. *See* Anna Clark, *"Nothing to Worry About. The Water is Fine": How Flint Poisoned Its People*, GUARDIAN (July 3, 2018, 1:00 PM), https://www.theguardian.com/news/2018/jul/03/nothing-to-worry-about-the-water-is-fine-how-flint-michigan-poisoned-its-people [perma.cc/ZX88-Q7GJ].

17. *Id.*

18. *See id.*

19. *Id.*

20. *See* Boler v. Earley, 865 F.3d 391, 397 (6th Cir. 2017).

supply system that would draw water from Lake Huron.[21] Although the Detroit Water and Sewerage Department (DWSD) had been supplying Flint with clean water for almost fifty years, decisionmakers were searching for a cheaper option.[22] But though the new system would be cheaper, it would not be ready when the city's contract with DWSD ended in April 2014.[23] Flint needed an interim solution. Despite knowledge of the risks the use of the river water posed, local and state officials, including state officials in charge of drinking water regulation at the Michigan Department of Environmental Quality (MDEQ), decided that Flint River water was the solution.[24] And in April 2014, Flint's emergency manager, Darnell Earley, oversaw the switch from DWSD to the Flint River.[25]

Unlike DWSD water, Flint River water was untreated.[26] Local and state officials knew that the switch to the Flint River would require the revival of the city's water treatment plant, which the city had not used since the 1960s.[27] In fact, in 2011, the city had commissioned a report to evaluate the costs of using the Flint River as a water source.[28] The report warned that the river water would require "significant treatment, including the addition of anti-corrosive agents and treatment for microbial contaminants" before it was safe.[29] Despite this knowledge, officials began running river water through the treatment plant in April 2014 without the necessary upgrades and corrosion control.[30] State officials at the MDEQ also ignored an e-mail from the city's utilities administrator warning that it was too soon to distribute water from the city's treatment plant, but that decisionmakers with more authority seemed poised to disregard his advice.[31]

A month or so after the switch, residents began to complain about the color, taste, and smell of the water.[32] There were reports of skin rashes, nausea, and vomiting.[33] In late summer 2014, tests detected fecal

21. *Id.*
22. *See* Clark, *supra* note 16.
23. *See Boler*, 865 F.3d at 397.
24. *See In re* Flint Water Cases, 329 F. Supp. 3d 369, 383–84 (E.D. Mich. 2018), *vacated*, No. 16-cv-10444, 2018 U.S. Dist. LEXIS 192371 (E.D. Mich. Nov. 9, 2018) (accepting, for procedural purposes, plaintiffs' assertions that an MDEQ district supervisor sent an e-mail in March 2013 to MDEQ officials explaining the serious health risks the use of Flint River water posed and the upgrades to Flint's treatment plant regulations required).
25. *Boler*, 865 F.3d at 397.
26. *See id.*
27. *See* Clark, *supra* note 16.
28. *Boler*, 865 F.3d at 397.
29. *See id.* at 398.
30. *Id.*
31. *See* Clark, *supra* note 16.
32. *See Boler*, 865 F.3d at 398.
33. *See* Clark, *supra* note 16.

coliform bacteria (otherwise known as *E. coli*) in the water.[34] In response, the city increased the chlorine treatment used as a disinfectant.[35] This actually compounded problems because of the decision not to use anticorrosive agents.[36] These agents form a protective coating that prevents metals from leaching into the water as it runs through old iron pipes.[37] Without corrosion control, Flint's water filled with iron, which rendered the chlorine treatment ineffective and actually led to unsafe levels of trihalomethanes, or TTHMs, a disinfecting byproduct.[38] Further corrosion caused the leaching of lead into the water.[39] As early as September 2014, elevated blood lead levels were detected in Flint's children under sixteen.[40] In October of that year, GM discontinued use of Flint River water because of its corrosive nature.[41] At this point, officials in the governor's office were aware of the problem and some urged a return to the DWSD, but the emergency manager rejected the idea.[42]

High levels of iron also provided a breeding ground for other bacteria, including *Legionella*, which causes a serious and sometimes deadly disease called Legionnaire's disease.[43] In October 2014, the water was linked to an outbreak of Legionnaire's disease.[44] Over the next two years, at least 90 people contracted the disease and 12 people died as a result.[45]

In the months that followed, city and state officials told residents the water was safe to drink.[46] In December 2014, water testing indicated the presence of lead at levels exceeding the federal action level.[47] In late January 2015, a new emergency manager turned down an offer to reconnect Flint to the DWSD water supply.[48] Around this time, MDEQ officials told the EPA that the city was using a corrosion-control additive as federal law required and forwarded false information in support of this representation.[49] In March 2015, the Flint City Council voted to reconnect to DWSD but the emergency manager overruled its decision.[50] Finally,

34. *See Boler*, 865 F.3d at 398.
35. *See* Clark, *supra* note 16.
36. *See id.*
37. *Id.*
38. *See id.*
39. *Id.*
40. *In re* Flint Water Cases, 329 F. Supp. 3d 369, 386 (E.D. Mich. 2018), *vacated*, No. 16-cv-10444, 2018 U.S. Dist. LEXIS 192371 (E.D. Mich. Nov. 9, 2018).
41. Boler v. Earley, 865 F.3d 391, 398 (6th Cir. 2017).
42. *See Flint Water Cases*, 329 F. Supp. 3d at 386.
43. *See* Clark, *supra* note 16.
44. *Boler*, 865 F.3d at 398.
45. Clark, *supra* note 16.
46. *See id.*
47. *Flint Water Cases*, 329 F.Supp.3d at 386.
48. *See id.* at 386–87.
49. *Id.* at 388.
50. *See* Clark, *supra* note 16.

as a result of citizen advocacy, the EPA performed tests that showed high levels of lead in the water; the agency issued a warning in June 2015.[51] MDEQ officials continued to deny the lead contamination and made statements that the water was safe.[52] They also modified water quality reports and test results to cover up high lead levels and engaged in a campaign to discredit private researchers whose work indicated that the Flint water system was seriously contaminated with lead and posed dangerous health risks.[53]

In October 2015—eighteen months after switching the water supply—the governor finally ordered reconnection with the DWSD.[54] The city's mayor declared a state of emergency in December, followed by emergency declarations by the county and state in January.[55] But by this time, the protective coating in the iron pipes was irreparably damaged and lead continued to leach into the water.[56] In February 2016, the EPA issued an advisory stating that unfiltered water was unsafe and urging residents to use bottled water.[57]

Exposure to lead can result in serious bodily harm. It can affect nearly every system in the body and is especially dangerous for young children for whom it can cause injuries such as nervous system damage, cognitive and behavioral problems, anemia, kidney damage, and hypertension.[58] At higher levels of exposure, lead poisoning can result in coma and even death.[59] The scientific community has not identified any safe level of lead in the bloodstream.[60] Unfortunately, officials report that up to 12,000 children in Flint were exposed.[61] The highest lead level recorded in Flint was 13,000 parts per billion (ppb) in 2015, a level more than 866 times the federal guideline of 15 ppb.[62] Between 2013 and 2017, the number of

51. *See id.* In January 2015, a resident of Flint, LeeAnn Walters, contacted the EPA. *Flint Water Cases*, 329 F. Supp. 3d at 387. As a result, tests were done that showed lead contamination of 104 ppb, well exceeding the federal action level of 15 ppb. *Id.*

52. *See Flint Water Cases*, 329 F. Supp. 3d at 387–88.

53. *See id.* at 405–06.

54. *See* Boler v. Earley, 865 F.3d 391, 398, 412 (6th Cir. 2017).

55. *Flint Water Cases*, 329 F. Supp. 3d at 389.

56. *See Boler*, 865 F.3d at 398.

57. *Id.*

58. *See Lead Poisoning and Health*, WORLD HEALTH ORG. (Aug. 23, 2019), https://www.who.int/news-room/fact-sheets/detail/lead-poisoning-and-health [https://perma.cc/P3T5-3HHL].

59. *Id.*

60. *Id.*

61. Matthew Daly, *House Dem: GOP Leaders Refuse to Help Flint Because of Race*, AP NEWS (Sept. 27, 2016), https://apnews.com/dbff1eaa23ac44aab7c957ef062adc83 [https://perma.cc/9JWR-SSTT].

62. Irwin Redlener, *We Still Haven't Made Things Right in Flint*, WASH. POST (Mar. 7, 2018, 4:48 PM), https://www.washingtonpost.com/opinions/we-still-havent-made-things-right-

Flint's third-graders who could read at grade level fell from 41.8% to 10.7%.[63] The harms from lead exposure are serious in both the acute and chronic sense; they are harms that will affect these children for the rest of their lives.[64]

Seeking various forms of equitable relief, Flint residents who purchased the contaminated water brought multiple class action suits against various local and state officials in federal court. They alleged several causes of action, including Section 1983 claims for violations of their right to contract, procedural and substantive due process, and equal protection.[65] They also alleged a range of state law claims.[66] On appeal from the district court's decision that it lacked federal subject matter jurisdiction, the Sixth Circuit held that the plaintiffs' Section 1983 claims against state officials were not preempted by the Safe Drinking Water Act.[67] On remand, several class actions were consolidated, and the district court ruled on motions to dismiss for failure to state a claim as to various private and public defendants.[68] Although the court rejected the plaintiffs' equal protection arguments as to all defendants, it held that the plaintiffs had stated a claim that several of the individual local and state defendants had violated their substantive due process right to bodily integrity.[69] In a split-panel decision, the Sixth Circuit upheld the district court's decision.[70]

B. *New York City Public Housing: Exposure to Lead Paint Hazards*

Like the story of Flint's water crisis, the story of lead exposure in New York City's public housing is a story shaped by a long history of economic and political challenges. The New York City Public Housing Authority (NYCHA) was born in 1934 in response to the housing crisis of the Great Depression.[71] The developments built under its authority became the country's largest public housing system.[72] By the 1960s, NYCHA was housing roughly 500,000 people.[73] Managing something at

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in-flint/2018/03/07/5c700692-2211-11e8-badd-7c9f29a55815_story.html?noredirect=on&utm_term=.7f9b471b45d5 [https://perma.cc/9PPS-R4NA].

63. *Id.*

64. *See id.*

65. *See* Boler v. Earley, 865 F.3d 391, 399 (6th Cir. 2017).

66. *See id.*

67. *See id.*

68. *See* Guertin v. Michigan, 912 F.3d 907, 915 (6th Cir. 2019).

69. *See id.* at 916.

70. *See id.* at 925.

71. Luis Ferré-Sadurní, *The Rise and Fall of New York Public Housing: An Oral History*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/interactive/2018/06/25/nyregion/new-york-city-public-housing-history.html [https://perma.cc/CQG8-3227].

72. *See id.*

73. *Id.*

this scale is inherently challenging, but the problems of the 1980s—rising drug use and criminal violence—took a toll on public housing everywhere.[74] Then, at the dawn of the twenty-first century, governmental subsidies for public housing dropped dramatically, leaving NYCHA with insufficient resources to manage 2,462 buildings, all aging and in need of maintenance and repair.[75] According to the city, NYCHA now needs more than $20 billion to address years of deferred maintenance.[76]

Today, more than 400,000 people live in public housing in New York City, and for many people, the conditions are dire.[77] Repairs take a long time if they happen at all.[78] Residents must endure lack of heat, water leaks, pests, mold, and lead paint hazards.[79] These conditions prompted a federal complaint in June 2018, alleging that NYCHA repeatedly violated federal health and safety regulations, made false statements to the U.S. Department of Housing and Urban Development (HUD) and to the public, and misled HUD inspectors.[80] The complaint identified the victims of NYCHA's "misconduct" as "its residents, including lead-poisoned children; elderly residents without heat in winter; asthma sufferers whose condition is worsened by moldy and pest-infested apartments; and disabled residents without functioning elevators."[81]

Children's exposure to lead in peeling paint and lead-contaminated dust was at the heart of the complaint. The complaint outlined NYCHA's general multiyear failure to inspect and abate lead hazards in apartments with children under six years of age as federal law required.[82] NYCHA's methodology for identifying at-risk apartments was also inadequate because 8 of the 19 children that health department inspectors determined had been exposed to lead paint hazards in NYCHA apartments between 2010 and 2016 lived in developments that NYCHA had concluded were "lead free."[83] During this same time period, NYCHA failed to report any

74. *See id.*

75. *Id.*

76. J. David Goodman, *After Years of Disinvestment, City Public Housing Is Poised to Get U.S. Oversight*, N.Y. TIMES (June 1, 2018), https://www.nytimes.com/2018/06/01/nyregion/after-years-of-disinvestment-us-to-take-oversight-role-in-city-public-housing.html [https://perma.cc/5Q5Q-WUL3].

77. *See* Ferré-Sadurní, *supra* note 71.

78. *See id.*

79. *See id.*

80. Complaint ¶ 1, United States v. N.Y.C. Hous. Auth., 347 F. Supp. 3d 182 (S.D.N.Y. 2018) (No. 18-cv-05213) [hereinafter NYCHA Complaint].

81. *Id.* ¶ 2.

82. *See id.* ¶¶ 53–90.

83. *Id.* ¶ 56.

cases of children with elevated blood lead levels to HUD as federal regulations required.[84]

The facts went beyond simple inaction such as failure to inspect or report. The city health department found that 202 children living in NYCHA housing had elevated blood lead levels of 10 micrograms per deciliter or more between 2010 and 2015.[85] The department inspected the homes of 121 of these children, finding peeling lead paint in 68 cases.[86] But when the department ordered NYCHA to abate the lead paint hazards in these children's environments, NYCHA actively contested the department's findings.[87] The health department ordered NYCHA to abate lead paint hazards in children's apartments an average of two dozen times per year between 2010 and 2017.[88] Although private landlords routinely abate when receiving such orders, NYCHA's policy was to contest them by sending paint chips to a third-party lab.[89] More times than not—in 50 of the cases—the health department withdrew its original finding as a result of NYCHA's pushback.[90]

NYCHA also authorized maintenance work that disturbed lead paint and increased the risk of lead exposure by using contractors and workers that NYCHA officials knew were not trained in and did not engage in lead-safe practices such as sealing doors, windows, and vents with protective covering and properly cleaning the work area to remove paint chips and dust.[91] In developments known to have lead paint, thousands of "paint and plaster-related jobs" were conducted in 2016 alone, but only a small percentage of these jobs were done by workers trained in lead-safe practices.[92]

Disturbing lead paint without containing it increased the risk of exposure. For example, when the health department inspected the home of a child with elevated blood lead levels in 2018, it found a "huge hole . . . with severe chipping paint resulting in gross dust from the paint."[93] Workers had previously fixed a burst pipe in the wall, but in doing so, left a hole and created a serious lead paint hazard.[94] The federal complaint also alleged that a city health "inspector visited an apartment undergoing abatement" in 2015 and witnessed NYCHA workers' disregard for safety

84. *See id.* ¶ 76.
85. *Id.* ¶ 84.
86. *Id.* ¶ 85.
87. *See id.*
88. Goodman et al., *supra* note 3.
89. *See id.*
90. NYCHA Complaint, *supra* note 80, ¶ 85.
91. *See id.* ¶ 69.
92. *Id.* ¶ 72.
93. *Id.* ¶ 86.
94. *See id.*

rules, including the absence of warning signs and enclosures and "stripped paint shavings on the floor which had no plastic covering."[95]

City officials (such as the mayor) knew that NYCHA had been failing to inspect and abate lead hazards by 2016;[96] NYCHA officials were aware even sooner.[97] In 2016, the city hired contractors to inspect for lead.[98] By the end of 2017, they had inspected 8,300 apartments and discovered peeling paint or dust in 80% of them.[99] A new round of visual inspections in 2018 found potential lead paint hazards in 92% of inspected apartments.[100]

Despite the officials' knowledge of environmental hazards, they repeatedly lied to residents, other city officials, and the federal government about their existence. For example, in 2015, following the instigation of the federal investigation and news stories about children with elevated lead blood levels, NYCHA officials "told residents and NYCHA employees that the 'vast majority of NYCHA developments' do not have lead paint and that NYCHA takes 'extra safeguards' in the developments that do."[101] NYCHA officials also submitted false certifications of compliance with lead paint regulations to HUD and responded to HUD inquiries with false assurances that NYCHA complied with city, state, and federal laws governing lead paint hazards.[102] Moreover, the federal complaint detailed the ways in which NYCHA officials actively concealed hazards in the apartments and sought to undermine HUD inspections.[103] Discovery of lead paint and other hazards during HUD inspections might have resulted in the appointment of a federal receiver who could have overseen lead-abatement efforts.[104] Instead, under a court-approved consent decree, a court-appointed monitor will track NYCHA's progress as it works to comply with applicable laws.[105]

As the federal investigation unfolded, a group of private plaintiffs also sued NYCHA, NYCHA officials, and city officials in federal court, alleging violations of the Fair Housing Act, the Residential Lead-Based

95. *Id.* ¶ 80.
96. *See* Goodman et al., *supra* note 3.
97. NYCHA Complaint, *supra* note 80, ¶¶ 94–102.
98. *See* Goodman et al., *supra* note 3.
99. *Id.*
100. *Id.*
101. NYCHA Complaint, *supra* note 80, ¶ 107.
102. *Id.* ¶¶ 109–10.
103. *See id.* ¶¶ 118–56.
104. *See id.* ¶ 122.
105. *See* Notice of Dismissal Without Prejudice Pursuant to Rule 41(a)(1)(A)(i) at 2–3, United States v. N.Y.C. Hous. Auth., No. 18-cv-5213 (S.D.N.Y. Mar. 15, 2019), ECF No. 75 (providing notice of voluntary dismissal by the government based on a settlement agreement).

Paint Hazard Reduction Act, and Section 1983.[106] All four plaintiffs were NYCHA residents with young children who alleged that their elevated blood lead levels were the result of exposure to lead paint hazards in NYCHA housing.[107] Although some of the plaintiffs' statutory claims survived the defendants' motion to dismiss, the district court granted the defendants' motion with respect to the Section 1983 claims, including those for violations of procedural and substantive due process.[108]

C. *Juliana v. United States: Exposure to an Unstable Climate*

In August 2015, 21 plaintiffs, ages 8 to 19, along with representative organizations, filed suit in federal district in Eugene, Oregon, against the United States, the President, various federal agencies, and the heads of these agencies.[109] They alleged that for 50 years the defendants had knowingly engaged in actions that threaten to destabilize the climate system, harming the plaintiffs and future generations.[110] Specifically, they argued that governmental actors had engaged in affirmative acts that enabled the production and combustion of fossil fuels, causing CO_2 levels to rise beyond the safe threshold of 350 parts per million.[111] Rather than focusing on the defendants' *failure* to reduce carbon emissions, the plaintiffs characterized their actions in *affirmative* terms, emphasizing that—although the defendants knew that their actions would lead to an unstable climate—they "continued to permit, authorize, and subsidize fossil fuel extraction, development, consumption and exportation."[112]

The complaint identified numerous personal injuries connected to climate change. Many of the plaintiffs reside in Oregon, where they engage in a range of outdoor recreational activities such as hiking, camping, fishing, swimming, snowboarding, skiing, and rafting.[113] Climate impacts such as drought, heat waves, ocean acidification, and reduced snowfall have detrimentally affected their ability to enjoy these activities.[114] Some plaintiffs live on farms or use their family's land to garden.[115] Again, drought, heat waves, and other climate impacts have resulted in water scarcity and wildfires that affect both their well-being and their property interests.[116] A few plaintiffs live or were born in coastal

106. Paige v. N.Y.C. Hous. Auth., No. 17cv7481, 2018 WL 3863451, at *1 (S.D.N.Y. Aug. 14, 2018).

107. *See id.* at *1–2.

108. *See id.* at *13.

109. *Juliana* Complaint, *supra* note 7, at 6–34, 36–50.

110. *See id.* ¶ 1.

111. *See id.* ¶¶ 4–7.

112. *Id.* ¶ 7.

113. *See, e.g.*, *id.* ¶¶ 16–18, 31–33, 36.

114. *See, e.g.*, *id.* ¶¶ 16–18, 33, 36, 41, 47, 51, 61, 69.

115. *See, e.g.*, *id.* ¶¶ 24, 31.

116. *See, e.g.*, *id.* ¶¶ 23–24, 31–32, 90.

areas where property values are depreciating in response to the dangers of more extreme weather and inundation by sea-level rise.[117] In addition, the plaintiffs asserted harms to property and well-being caused by extreme weather, including flooding and storm surges,[118] as well as harms to spiritual and cultural practices associated with the natural environment.[119]

The complaint originally alleged four bases for liability: (1) violations of the plaintiffs' liberty and property interests under the Due Process Clause of the Fifth Amendment; (2) an equal protection violation under the Fifth Amendment; (3) violations of their rights under the Ninth Amendment; and (4) violations of the public-trust doctrine.[120] The plaintiffs sought both a declaration that the defendants were violating the Constitution and an injunction requiring the defendants to draft and "implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2."[121] The complaint also asked the court to retain jurisdiction to monitor the defendants' compliance.[122]

The district court eventually dismissed part of the equal protection claim and the standalone Ninth Amendment claim but denied the defendants' motion to dismiss the due process and public-trust claims.[123] Specifically, the court held that the plaintiffs had stated a substantive due process claim based on a fundamental right, in addition to stating due process claims based on a state-created danger theory and the public-trust doctrine.[124] The court also held that the plaintiffs' claims were justiciable, rejecting the defendants' arguments that the plaintiffs lacked standing and that their claims presented political questions.[125]

Although the district court originally rejected the government's motion to certify its orders for interlocutory appeal to the Ninth Circuit, it changed course and certified the case for interlocutory appeal after the Supreme Court twice signaled that the case presented justiciability concerns.[126] On interlocutory appeal, in a split-panel decision, the Ninth

117. *See, e.g.*, *id.* ¶¶ 58, 68, 82–84.

118. *See, e.g.*, *id.* ¶¶ 63, 72, 86–87.

119. *See, e.g.*, *id.* ¶¶ 21, 66, 69–70.

120. *See id.* at ii; *see also* Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020) (summarizing original claims).

121. *Juliana* Complaint, *supra* note 7, at 94.

122. *See id.*

123. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1252, 1261 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

124. *See id.* at 1251–52, 1259.

125. *See id.* at 1242, 1248.

126. Juliana v. United States, No. 6:15-cv-01517, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018) (emphasizing that the court "stands by its prior rulings on jurisdictional and merits issues,

Circuit held that the plaintiffs had not established that their injuries were "redressable" by a federal court; they therefore lacked standing to proceed.[127] The plaintiffs' petition for rehearing en banc was denied,[128] and they may eventually file a petition for a writ of certiorari in the Supreme Court.

II. JUDICIAL APPLICATIONS OF SUBSTANTIVE DUE PROCESS IN STATE-CREATED ENVIRONMENTAL DANGER CASES

The fact that these three cases all raise substantive due process claims against governmental action signals a trend in civil rights litigation—one that seeks to hold governmental actors accountable for environmental harms. As commentators have noted, the *Juliana* litigation is often likened to *Brown v. Board of Education*[129] because it uses the courts as the frontline in a movement to force legal and political change.[130] Although courts are reluctant to broaden substantive due process, we may be at a tipping point; judges may be more inclined to consider these claims in light of political gridlock at the state and federal levels.

Unfortunately, the state-created danger doctrine is in a state of disarray, and the application of this muddled doctrine to new terrain threatens to create even more confusion. Using the decisions in the cases Part II describes, this Part identifies points of confusion in the state-created danger doctrine, including some courts' insistence that it only applies to cases involving private acts of violence. The analysis also reveals that courts applying this doctrine often incorrectly apply tort-law concepts of duty and proximate causation and have yet to develop clear doctrines governing the requisite level of culpability for constitutional liability. It concludes with an examination of how the fundamental-rights analysis functions in these cases.

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as well as its belief that this case would be better served by further factual development at trial," but noting that the Supreme Court and Ninth Circuit orders provided "sufficient cause to revisit the question of interlocutory appeal").

127. *See Juliana*, 947 F.3d at 1171, 1175.

128. Juliana v. United States, No. 18-36082 (9th Cir. Feb. 10, 2021).

129. 347 U.S. 483 (1954).

130. This includes the dissenting judge in the Ninth Circuit's recent decision. Juliana v. United States, 947 F.3d at 1188 (Staton, J., dissenting); *see also* Darlene Ricker, *Lawyers Are Unleashing a Flurry of Lawsuits to Step Up the Fight Against Climate Change*, A.B.A. J. (Nov. 1, 2019, 12:00 AM), https://www.abajournal.com/magazine/article/lawyers-are-unleashing-a-flurry-of-lawsuits-to-step-up-the-fight-against-climate-change [https://perma.cc/CR8Q-MYA2] ("Today's cases elevate climate change to the same shelf as *Brown v. Board of Education*, a comparison that has been expressly raised in recent pleadings.").

A. *Claims Based on State-Created Dangers*

The circuit courts have placed restrictions—such as the private-actor and special-danger requirements—on the state-created danger doctrine. These limitations resemble the limitations courts often impose when analyzing issues of duty and proximate causation in tort law. But in cases involving state-created environmental dangers, plaintiffs allege that governmental actors engaged in affirmative misconduct. In other words, these are cases of misfeasance rather than nonfeasance. Consequently, these limitations are misplaced. Courts should instead focus on the defendants' level of culpability to determine whether the misconduct constitutes the kind of abuse of power that the due process clauses prohibit.

1. From Private Actors to Environmental Dangers

In all three cases, the plaintiffs have characterized their substantive due process claims in terms of "state-created dangers." This confusing strand of due process doctrine grew out of dicta in a Supreme Court case that established the rough contours of the state's duty to protect its citizens from known risks of violence by private actors. In *DeShaney v. Winnebago County Department of Social Services*,[131] the Court acknowledged the "undeniably tragic" facts that resulted in four-year-old Joshua's permanent, serious brain injuries.[132] Despite numerous trips to the hospital and his caseworker's documented suspicions, the state agency did not remove Joshua from his father's custody.[133] Joshua and his mother brought a Section 1983 suit against state actors for failing to intervene to protect Joshua from his physically abusive father.[134]

The Court held that the state actors had no constitutional duty to protect Joshua from his father's abuse.[135] Distinguishing precedent that imposes a duty to protect in custodial settings, the Court refused to recognize a constitutional duty to protect based on the state's awareness of the danger or its previous "expressions of intent to help."[136] Writing for the Court, Chief Justice William Rehnquist stressed that the duty to protect arises from the deprivation of liberty associated with "restraining the individual's freedom to act on his own behalf."[137] Thus, in custodial settings, a "special relationship" exists that gives rise to a governmental

131. 489 U.S. 189 (1989).
132. *Id.* at 191.
133. *See id.* at 192–93.
134. *Id.* at 193.
135. *Id.* at 201.
136. *Id.* at 200.
137. *Id.*

duty to meet the basic needs of individuals whose liberty is restrained.[138] Joshua was not in state custody, so state actors did not have a duty to protect him.

For the majority in *DeShaney*, the facts presented a case of nonfeasance, one in which state actors failed to act, and "the harm was inflicted not by the State of Wisconsin, but by Joshua's father."[139] According to the majority, if Wisconsin citizens wished to hold state actors accountable for failing to act, the answer was to change state tort law, not impose constitutional obligations.[140] Constitutional liability requires more than knowledge of specific dangers: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it [do anything to] render him any more vulnerable to them."[141] This is consistent with the well-established tort rule that an individual is under no duty to protect or rescue another.[142] In the realm of tort law, however, courts have gone beyond the danger-creation exception and found duties to act based on a number of special relationships, an approach *DeShaney* rejects.[143]

Instead of enlarging the category of "special relationship[s]" to define a state's duty to protect, lower courts built on *DeShaney*'s implicit recognition of the danger-creation exception to impose a constitutional

138. DeShaney *ex rel.* First v. Winnebago Cty. Dep't of Soc. Servs., 812 F.2d 298, 303–04 (7th Cir. 1987), *aff'd sub nom. DeShaney*, 489 U.S. 189.

139. *Id.* at 203.

140. *See id.* Of course, as the dissenting Justices argued, the action–inaction distinction turns on how lawyers and judges characterize the facts. In his dissent, Justice William J. Brennan Jr. catalogued myriad actions by the state agency including home visits and custody decisions that would signal to others that the state was assuming a duty to protect Joshua. *See id.* at 209–10 (Brennan, J., dissenting); *see also* Julie Shapiro, *Snake Pits and Unseen Actors: Constitutional Liability for Indirect Harm*, 62 U. CINN. L. REV. 883, 904 (1994) (noting that the distinction is easy to manipulate and arguing that the *DeShaney* majority framed the case as one of inaction—the failure to protect—because the lower courts had been framing "indirect harm" cases in this way).

141. Wood v. Ostrander, 879 F.2d 583, 599 (9th Cir. 1989) (quoting *DeShaney*, 849 U.S. at 201). Whether state action renders a plaintiff more vulnerable is often a contested issue. Indeed, in a Ninth Circuit case decided shortly after *DeShaney*, a police officer left the plaintiff in a "high-crime" area without a ride home in the middle of the night after arresting the driver of the vehicle in which she was a passenger. *Id.* at 588. She eventually accepted a ride from a stranger, who took her to an isolated area and raped her. *Id.* at 586. In a two–one panel decision, the court cited the *DeShaney* dicta and held that the plaintiff had presented genuine issues of material fact regarding whether the officer knowingly placed the plaintiff in a "position of danger." *Id.* at 589–90 (quoting Ketchum v. County of Alameda, 811 F.2d 1243, 1247 (9th Cir. 1987)). In contrast, the dissenting judge argued that *DeShaney*'s rejection of affirmative duties to protect precluded liability. *See id.* at 606 (Carroll, J., dissenting).

142. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965).

143. *See id.*

duty to protect or mitigate risk.[144] Some of these tests incorporated a "private actor" requirement into the characterization of the danger even though the *DeShaney* language did not clearly limit state-created dangers to acts of private violence.[145] The private-actor requirement likely evolved not only from the facts of *DeShaney* (the plaintiff was endangered by a private actor), but also the reality that the vast majority of state-created danger cases involved violent acts by third parties. That is, the circuit courts crafted their state-created danger doctrines by applying them to factual scenarios involving state responsibility for private violence. In many of these cases, the private act of violence was one of domestic violence, child abuse, or drunk driving.[146] A fair number involved confidential informants or witnesses who were harmed by private individuals when they cooperated with law enforcement.[147] In cases that most clearly established state-created dangers, police officers enhanced the risk of violence by directly assisting or condoning private violence.[148]

Only a few of these cases involved "environmental" dangers that plaintiffs alleged state actors caused or enhanced. For example, at least two circuits have recognized substantive due process claims based on state-created dangers when police officers prevented severely intoxicated plaintiffs from driving and instead left them exposed to harsh weather

144. Irish v. Maine, 849 F.3d 521, 526 n.3 (1st Cir. 2017) (quoting Rivera v. Rhode Island, 402 F.3d 27, 35 n.5 (1st Cir. 2005)); *see also id.* at 526 (noting that "at least eight sister circuits have recognized the existence of the state-created danger theory").

145. *See infra* note 165 and accompanying text.

146. *See, e.g.*, Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 430 (2d Cir. 2009) (finding genuine issue of material fact as to whether police encouraged domestic abuser's acts of violence against plaintiff); Currier v. Doran, 242 F.3d 905, 918–19 (10th Cir. 2001) (holding that social workers who transferred custody of a child from the mother to the abusive father who then killed him could be liable under the state-created danger doctrine); Saenz v. Heldenfels Bros., Inc., 183 F.3d 389, 391–92 (5th Cir. 1999) (rejecting a state-created danger claim when plaintiffs were killed by a drunk driver that police had declined to stop). Most of these cases do not survive summary judgment either because courts conclude that the facts are similar to *DeShaney* or the defendants are protected by qualified immunity. *See, e.g.*, *Currier*, 242 F.3d at 925; *Saenz*, 183 F.3d at 392–93.

147. *See, e.g.*, *Rivera*, 402 F.3d at 37–38 (holding the state did not enhance the risk to a plaintiff whom police promised to protect when she testified against a criminal defendant who subsequently killed her); Butera v. District of Columbia, 235 F.3d 637, 641, 654 (D.C. Cir. 2001) (holding that plaintiff who was killed while serving as an undercover state agent stated a state-created danger claim, but defendants were protected by qualified immunity).

148. *See, e.g.*, Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993) (holding that plaintiff had alleged a state-created danger claim when police agreed to allow a group known as "skinheads" to attack protesters), *abrogated on other grounds by* Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163 (1993).

conditions that caused hypothermia.[149] In a related line of cases, courts have recognized a substantive due process claim when an officer's conduct foreclosed the possibility of aid by private individuals.[150] Although state actors, including police officers, have no constitutional duty to rescue, actions that place a plaintiff in a more vulnerable position by reducing the likelihood of self-help or rescue by others may create dangers that give rise to due process violations.[151]

Furthermore, cases involving environmental harms the state allegedly created often fall victim to the action–inaction distinction from *DeShaney*, particularly when the danger or risk results from state actors' failure to fulfill their job responsibilities.[152] For example, in *Carlton v. Cleburne County*,[153] the plaintiffs alleged that Cleburne County owned and promoted a historic, deteriorating bridge as a tourist attraction, and although the county knew the bridge was dangerous, it did not repair or

149. *See, e.g.*, Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1087 (9th Cir. 2000) (denying officers qualified immunity when an intoxicated plaintiff died from hypothermia after officers ejected him from a bar and prevented him from driving home); Kneipp v. Tedder, 95 F.3d 1199, 1208–09 (3d Cir. 1996) (holding that police rendered a severely intoxicated plaintiff more vulnerable to hypothermia when they sent her home without an escort).

150. *See, e.g.*, Penilla v. City of Huntington Park, 115 F.3d 707, 710 (9th Cir. 1997) (finding that officers could be liable where they canceled a 911 call and left a seriously ill plaintiff alone in a locked, empty house); Ross v. United States, 910 F.2d 1422, 1431 (7th Cir. 1990) (finding a cognizable claim where the county had a policy preventing private persons from attempting to rescue a person at risk of drowning). *But see* Andrews v. Wilkins, 934 F.2d 1267, 1270–71 (D.C. Cir. 1991) (holding that police officers did not violate the Constitution by preventing private rescue when they were seeking to secure the safety of the rescuer), *abrogated on other grounds by Leatherman*, 507 U.S. 163.

151. In fact, courts had held state defendants liable for placing plaintiffs in more vulnerable, dangerous positions before *DeShaney*. In *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), the Seventh Circuit rejected the "tenuous metaphysical construct which differentiates sins of omission and commission" in holding that child plaintiffs stated a due process claim against officers who left them alone in a car on a cold evening. *Id.* at 384. Because there is no general constitutional duty to protect, these cases turn on whether plaintiffs are alleging that the state created a danger to the public generally or to the plaintiff specifically. Before *DeShaney*, Judge Richard Posner cautioned that the correct inquiry was not one of action vs. inaction, but one of personal vs. public danger:

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

152. The action–inaction distinction troubles courts in most state-created danger cases. In many of these cases, courts avoid resolution of the issue by simply finding that defendants are entitled to qualified immunity. *See, e.g.*, Soto v. Flores, 103 F.3d 1056, 1064–65 (1st Cir. 1997) (noting that the plaintiff had pleaded affirmative acts by the defendant police officer leading to the death of her children but declining to resolve issues regarding the scope of a state-created danger claim).

153. 93 F.3d 505 (8th Cir. 1996).

maintain it.[154] The bridge collapsed, killing 5 people and injuring several others.[155] The court held that promoting the bridge as a tourist attraction was not an affirmative act sufficient to support a duty to protect.[156] According to the court, the county did not cause the bridge cables to break; rather, "the bridge cables broke because of internal corrosion caused by rust."[157]

In *Collins v. City of Harker Heights*,[158] the Supreme Court drew a similar distinction.[159] In that case, an employee of the city sanitation department died of asphyxia after entering a manhole to unplug a sewer line.[160] His widow brought a Section 1983 suit against the city alleging that it created the danger by failing to warn him of the risks of working in sewer lines and failing to provide safety training.[161] Quoting *DeShaney*, the Court emphasized that substantive due process is "a limitation on the State's power to act, not . . . a guarantee of certain minimal levels of safety and security."[162] Furthermore, the Court characterized the city's failure to warn about known risks as an *omission* potentially actionable under state tort law, but outside the purview of the Due Process Clause.[163]

Given this rather scant precedent, it is not surprising that the district court in the Flint litigation limited the state-created danger theory to cases involving private acts of violence.[164] Indeed, as the court noted, other circuits (though not all) have tests with similar language regarding private actors.[165] Because contaminated water—rather than private-actor

154. *See id.* at 507.

155. *Id.*

156. *See id.* at 509.

157. *Id.* Conversely, a Fifth Circuit panel held that state defendants did create a danger in a case where a bonfire structure collapsed, killing 12 students and injuring 27 students. Breen v. Tex. A&M Univ., 485 F.3d 325, 329, 338 (5th Cir.), *withdrawn in part*, 494 F.3d 516 (5th Cir. 2007). The nature of the defendants' conduct was similar to the county's in *Carlton*; the plaintiffs alleged that university officials had inadequately supervised the building and maintenance of the structure. *See id.* at 330. In response to a petition for rehearing, the panel vacated the holding regarding state-created danger, leaving only its holding that university officials were protected by qualified immunity. *Breen*, 494 F.3d at 518.

158. 503 U.S. 115 (1992).

159. *See id.* at 126.

160. *Id.* at 117.

161. *See id.* at 117–18.

162. *Id.* at 126 (quoting DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989)).

163. *See id.* at 128.

164. *See In re* Flint Water Cases, No. 17-10164, No. 17-10342, 2019 WL 3530874, at *32 (E.D. Mich. Aug. 2, 2019), *aff'd in part*, 969 F.3d 298 (6th Cir. 2020).

165. *See, e.g.*, Gray v. Univ. of Colo. Hosp. Auth., 672 F.3d 909, 927 (10th Cir. 2012) (holding that the state-created danger doctrine was inapplicable because the complaint did not allege acts of private violence). For an overview of the various circuits' tests, see Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 15–18 (2007).

violence—caused the harm to the plaintiffs, the court held that they had failed to state a substantive due process claim based on a theory of state-created danger.[166] In addition, the court held that the plaintiffs failed to plead facts showing that the defendants placed the plaintiffs, as opposed to the public, in "special danger."[167] Other circuits have also adopted the special danger limitation, which functions like a tort-law proximate cause analysis by limiting liability to the foreseeable risks of a defendant's conduct, including foreseeable plaintiffs.[168]

Although the private-actor requirement has no clear basis in due process doctrine, the special danger requirement may serve an important purpose if it serves to limit the scope of liability to foreseeable plaintiffs.[169] Thus, if state actors knowingly create or enhance a risk to foreseeable plaintiffs (even if this includes an entire city), they have engaged in misfeasance; these are not cases of nonfeasance where courts must decide whether to impose an affirmative duty to protect or rescue. Instead, in these cases, plaintiffs allege that state actors have engaged in affirmative acts that created environmental dangers and then failed to prevent foreseeable harm to plaintiffs' liberty interests. By analyzing the defendants' connection to third-party violence and special dangers to plaintiffs, courts are implicitly addressing underlying questions of duty and proximate causation.[170] In tort law, for example, a defendant's relationship with either the plaintiff or a dangerous third party could give rise to a duty to assist or protect when one would not otherwise exist.[171]

166. *See Flint Water Cases*, 2019 WL 3530874, at *34.

167. *Id.* at *34–35 (quoting *In re* Flint Water Cases, 384 F. Supp. 3d 802, 864 (E.D. Mich. 2019), *aff'd in part*, 969 F.3d 298 (6th Cir. 2020)).

168. *See, e.g.*, Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 914 (3d Cir. 1997) ("[T]here would appear to be no principled distinction between a discrete plaintiff and a discrete class of plaintiffs. The ultimate test is one of foreseeability."). In a case that predates *DeShaney*, the Supreme Court dismissed a due process claim because the harm was "too remote a consequence" of state action. Martinez v. California, 444 U.S. 277, 284–85 (1980) (holding that parole officers did not deprive decedent of her life when a parolee they released killed her 5 months after his release).

169. Unfortunately, the district court in the Flint litigation held that the Flint residents were not a small enough group to meet the special danger limitation. *Flint Water Cases*, 2019 WL 3530874, at *34–35. Because the purpose of the limitation is to ensure that the defendants' liability is limited to foreseeable plaintiffs, it is difficult to justify this conclusion. The foreseeable risks the defendants' conduct created clearly extended to all city residents.

170. For example, in one case involving a woman's abduction and murder, the police allegedly told the decedent's daughter that they had investigated leads when they had not, thereby rendering her mother more vulnerable and enhancing the risk of her death. *See* Gazette v. City of Pontiac, 41 F.3d 1061, 1063 (6th Cir. 1994). The court concluded that the causal connection between the police misrepresentations and the mother's death was too remote to support proximate causation. *See id.* at 1066.

171. *See* W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1877 (2011).

Similarly, duty and proximate cause principles seek to limit liability to *foreseeable* plaintiffs and harms.[172]

The Flint litigation does not, however, present questions of duty or proximate causation; it is not a case about the government's nonfeasance, but about affirmative state actions that directly exposed the plaintiffs to contaminated drinking water. The defendants made affirmative decisions to save money by switching to unsafe water and to continue exposing residents to the water once it was undeniably causing harm. It is this risk creation that gives rise to a clear duty to mitigate or prevent harm. By applying limitations such as the private actor and special danger requirements when duty and proximate cause are not at issue, courts have distorted the state-created danger doctrine and created unnecessary confusion for plaintiffs seeking to state cognizable claims.

To see how these misplaced restrictions muddle due process analysis in state-created environmental danger cases, consider the argument that plaintiffs' counsel was forced to make in the Flint litigation. According to the district court, the plaintiffs "argued that the third-party requirement could be satisfied by, for instance, a situation where a mother fed her child formula mixed with tainted Flint water."[173] In this scenario, the mother serves as the "private actor" inflicting violence upon her child. As the court rightly acknowledged, this would mean that all the Flint residents who used contaminated water were engaging in acts of violence against themselves and others—a result that "the state-created danger theory was [not] developed to address."[174] Unfortunately, instead of questioning the applicability of the third-party and special danger limitations, the court dismissed their claim.[175]

The district court for the Southern District of New York made similar analytical mistakes in dismissing the public housing plaintiffs' substantive due process claim based on a state-created danger, but this time the court couched its conclusions in the inaction–action distinction.[176] Characterizing the defendants' conduct as a "failure to prevent lead paint poisoning," the court held that the plaintiffs had failed

172. Despite the Restatement's approach to plaintiff foreseeability as a matter of proximate causation, courts tend to treat the issue as one of duty, and in some cases, they send the issue to the jury, despite the conventional understanding that duty is a question the judge resolves. *See* Cardi, *supra* note 171, at 1912. Plaintiff foreseeability is often an issue in state-created danger cases; the confusion about its doctrinal home in tort law is likely to spill over into civil rights litigation.

173. *Flint Water Cases*, 2019 WL 3530874, at *34 (quoting *In re* Flint Water Cases, 384 F. Supp. 3d 802, 864 (E.D. Mich. 2019), *aff'd in part*, 969 F.3d 298 (6th Cir. 2020)).

174. *Id.* (quoting *Flint Water Cases*, 384 F. Supp. 3d at 864).

175. *See id.*

176. *See* Paige v. N.Y.C. Hous. Auth., No. 17cv7481, 2018 WL 3863451, at *11 (S.D.N.Y. Aug. 14, 2018).

to allege affirmative conduct that created a danger.[177] All that the complaint established, according to the court, was "bureaucratic dishonesty and inaction at the highest levels."[178]

But this was arguably an inaccurate reading of the complaint. NYCHA actively contested the city health department's findings of widespread risk of exposure to lead-paint hazards.[179] NYCHA also authorized maintenance work that disturbed lead paint and increased the risk of lead exposure in some homes.[180] And perhaps most alarmingly, NYCHA officials repeatedly lied to residents, other city officials, and the federal government about known risks of lead exposure, a fact arguably analogous to cases in which police officers placed individuals in a more vulnerable position by interfering with other means of assistance or rescue.[181] Why would residents seek outside assistance in abating the lead hazards if the government is telling them they have nothing to fear?

The plaintiffs emphasized that they relied on those knowing misrepresentations, urging the court to consider dicta in a Second Circuit Court of Appeals decision involving claims by individuals who worked at the World Trade Center site following September 11, 2001.[182] In *Lombardi v. Whitman*,[183] the plaintiffs alleged that they had been harmed by various pollutants present in the air and water as a result of the collapse of the towers.[184] Because numerous governmental officials from the EPA and other federal agencies falsely assured them that air and water at the site were safe and that contaminants at the site posed no significant health risk to workers, they did not take any safety measures and were exposed to environmental hazards.[185] The court noted that state-created danger cases typically involved acts of private violence, but in this case, "plaintiffs appear[ed] to cast environmental conditions as the wrongdoer."[186]

Instead, however, of turning a frequent factual element of these cases (private violence) into a requirement, the *Lombardi* court noted that the cases involving law enforcement interference with self-help "furnish some support for the idea that a substantive due process violation can be made out when a private individual derives a false sense of security from an intentional misrepresentation by an executive official if foreseeable

177. *Id.*

178. *Id.* at *12.

179. *See supra* text accompanying notes 85–103.

180. *See supra* text accompanying notes 85–103.

181. *See supra* text accompanying notes 85–103.

182. *See Paige*, 2018 WL 3863451, at *12; Lombardi v. Whitman, 485 F.3d 73, 75 (2d Cir. 2007).

183. 485 F.3d 73 (2d Cir. 2007).

184. *See id.* at 75.

185. *See id.*

186. *Id.* at 80.

bodily harm directly results and if the official's conduct shocks the conscience."[187] Although the court dismissed the claim because the conduct failed to meet the shocks-the-conscience requirement, it analyzed the questions of duty and causation according to established common law doctrine.[188] It characterized the misrepresentations as affirmative acts of misfeasance, and it recognized that the plaintiffs would confront issues of causation if the case were allowed to proceed.[189] But it did not make the same mistake as the Flint and New York City public housing litigation courts; it did not characterize affirmative governmental action as nonfeasance and dismiss the case because the governmental officials did not create or enhance the environmental hazards.

The court in the lead paint litigation dismissed the *Lombardi* reasoning, noting the circuit court's concerns regarding causation.[190] Without explanation, the court then concluded that the lead paint case involved only inaction.[191] Perhaps it pivoted to the nonfeasance conclusion to avoid acknowledging that causation may not present the same challenges in the lead paint litigation that it would in *Lombardi*. At least in some cases, the plaintiffs' exposure was increased by state-sanctioned work on their homes, a fact that strongly supported factual causation.[192] The plaintiffs had also alleged facts supporting proximate causation, namely that their harms were the foreseeable result of affirmative acts increasing their exposure to lead paint hazards.[193] As the *Lombardi* court noted, even if the causal connections were "fairly debatable,"[194] that should have been enough to survive a motion to dismiss.[195]

In the *Juliana* case, the district court concluded that debatable connections were indeed enough to survive the defendants' motion to dismiss.[196] The plaintiffs characterized the defendants' conduct as

187. *Id.* at 81.

188. *See id.*

189. *See id.*

190. Paige v. N.Y.C. Hous. Auth., No. 17cv7481, 2018 WL 3863451, at *12 (S.D.N.Y. Aug. 14, 2018).

191. *Id.*

192. *See supra* notes 91–95 and accompanying text.

193. *See Paige*, 2018 WL 3863451, at *5.

194. 485 F.3d at 81.

195. If the court had allowed their substantive due process claim to move forward, the plaintiffs would have also had to meet Section 1983's requirements governing municipal liability. For example, they would have had to show that the municipal entities' failure to supervise workers sent to investigate and remediate lead paint hazards amounted to an official custom or policy. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).

196. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1246 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

affirmative acts rather than omissions.[197] In light of the remedy they sought (a plan to stabilize the climate), a court might have been tempted to recharacterize the governmental conduct at issue as nonfeasance—that is, the failure to act to mitigate emissions. But the plaintiffs skillfully alleged that the federal agencies and agency heads had engaged in affirmative actions by approving permits, leases, and subsidies in support of the fossil-fuel industry.[198] They had therefore enhanced the risk of an unstable climate and had a duty to mitigate that risk.[199] As discussed below, mere negligence in failing to mitigate the risk is insufficient; the government's failure to prevent the harm violates due process only when it acts with deliberate indifference or intent. The court noted that the plaintiffs would face challenges in *proving* the elements of a state-created danger claim at trial but that they had alleged facts sufficient to survive a motion to dismiss.[200]

2. State of Mind Requirements

For some time, it has been settled law that a deprivation of due process requires proof of more than negligence on the part of state defendants. In *Daniels v. Williams*,[201] the Supreme Court considered whether an inmate stated a claim for deprivation "of his 'liberty' interest in freedom from bodily injury" based on injuries he sustained when he slipped on a pillow that a deputy sheriff left on the stairs.[202] The Court explained that although Section 1983 did not contain a state-of-mind requirement, "deprivation" under the Due Process Clause suggested more than negligence.[203] Moreover, a fair reading of the Court's precedent suggested that a due process violation arose from deliberate or intentional governmental conduct that could be characterized as an arbitrary abuse of power.[204] The Fourteenth Amendment may have guaranteed certain individual rights against the government, "but it d[id] not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in

197. *See id.* at 1246.

198. *See id.* at 1251.

199. *See id.* at 1251–52.

200. *See id.* at 1252 (holding that plaintiffs had stated a state-created danger claim by "alleg[ing] that defendants played a significant role in creating the current climate crisis, that defendants acted with full knowledge of the consequences of their actions, and that defendants have failed to correct or mitigate the harms they helped create in deliberate indifference to the injuries caused by climate change").

201. 474 U.S. 327 (1986).

202. *Id.* at 328.

203. *Id.* at 329–30 (quoting Parratt v. Taylor, 451 U.S. 527, 548 (1981) (Powell, J., concurring)).

204. *See id.* at 331.

society."[205] The Court emphasized its earlier pronouncements that such an expansion would make "the Fourteenth Amendment a font of tort law."[206]

Daniels and its companion case, *Davidson v. Cannon*,[207] did not clarify whether something more than negligence but short of intentional conduct would suffice to establish governmental liability under the due process clauses.[208] But in *County of Sacramento v. Lewis*,[209] the Court explored the issue in some detail. In Justice David Souter's majority opinion, he emphasized that the "core" of due process was "protection against arbitrary action" by government.[210] Executive officials engaged in arbitrary action when they abused their power to the extent that it "shock[ed] the conscience."[211] But the meaning of this test turns on context. When officials have time to deliberate, a lower standard of "deliberate indifference" may satisfy the state-of-mind requirement.[212] The prototypical case where this standard has been satisfied is a prisoner suit alleging prison officials' deliberate indifference to a prisoner's basic needs and well-being.[213] In these situations, "forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner."[214]

The standard changes, however, when the context prevents actual deliberation. In *Lewis*, the plaintiffs sued on behalf of their son who was killed when a police car "skidded into him at 40 miles an hour" at the end of a high-speed chase.[215] The complaint alleged that the police actions met the standard of deliberate or reckless indifference.[216] Writing for the Court, Justice Souter explained that more was required to "rise to a constitutionally shocking level" when the context required "fast action" and the weighing of "obligations that tend to tug against each other."[217] The police in this case had to make instant decisions that balanced the need to apprehend a suspect against the threat to others' safety.[218] Under such circumstances, deliberate indifference is not enough; the police would have to act with the intent to harm to shock the

205. *Id.* at 332.
206. *Id.* (quoting *Parratt*, 451 U.S. at 544).
207. 474 U.S. 344 (1986).
208. *See Daniels*, 474 U.S. at 328; *Davidson*, 474 U.S. at 347–48.
209. 523 U.S. 833 (1998).
210. *Id.* at 845.
211. *Id.* at 846.
212. *Id.* at 851.
213. *See id.* at 851–52.
214. *Id.* at 851.
215. *Id.* at 837.
216. *See id.* at 837–38.
217. *Id.* at 852–53.
218. *See id.* at 853.

conscience.[219] Because the officer's intent was not to kill the plaintiffs' son, the Court held that his conduct did not meet this threshold.[220]

Today, courts deciding state-created danger claims routinely require that plaintiffs allege facts supporting at least deliberate indifference on the part of defendants, as did the courts in the three environmental danger cases that are the focus of this Article. In the New York lead paint case, the district court appeared to characterize the governmental conduct as negligent at best, describing it as a "failure to provide a safe environment" and distinguishing it from cases of intentional, *affirmative* action.[221] Of course, the court's analysis of the conduct as inaction insufficient to create or cause the danger is misplaced in a discussion regarding the defendants' state of mind. Assuming the defendants knew that they enhanced the risk of exposure, their state of mind in failing to mitigate that risk should be a separate inquiry. A failure to act can meet the deliberate indifference threshold of the shocks-the-conscious test; the Supreme Court has, for example, held that failing to treat the "serious medical needs of prisoners" violates the Eighth Amendment when officials act with deliberate indifference.[222]

The district court in the Flint litigation applied a deliberate indifference standard but did so using the wrong analytical framework for the plaintiffs' substantive due process claim. After dismissing the plaintiffs' state-created danger theory, the court held that the plaintiffs nevertheless stated a substantive due process claim against some defendants for violations of their "right to bodily integrity."[223] According to the court, the plaintiffs successfully pleaded that "defendants were deliberately indifferent to the risk of harm they faced, creating and exacerbating their exposure to Flint's contaminated water."[224] But even though the court explicitly described the facts in terms of the defendants' creation of an environmental danger, it nevertheless characterized them as a "bodily integrity claim."[225] As

219. *See id.* at 854.

220. *See id.* at 855.

221. Paige v. N.Y.C. Hous. Auth., No. 17cv7481, 2018 WL 3863451, at *11 (S.D.N.Y. Aug. 14, 2018).

222. Estelle v. Gamble, 429 U.S. 97, 104–05 (1976). The Court subsequently extended this duty to provide basic services via the Due Process Clause to individuals who were involuntarily committed to mental institutions, *see* Youngberg v. Romeo, 457 U.S. 307, 324 (1982), and individuals injured in police custody, *see* City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

223. *In re* Flint Water Cases, No. 17-10164, No. 17-103442, 2019 WL 3530874, at *14 (E.D. Mich. Aug. 2, 2019).

224. *Id.* at *35, *39.

225. *Id.* at *39. In a previous opinion, the district court had already held that private violence was a component of a state-created danger theory and that a separate right to "bodily integrity"

discussed below, whether a general "fundamental" right to bodily integrity exists is far from settled. What matters for purposes of a state-created danger claim is that "freedom from bodily injury" is a cognizable liberty interest; it need not be fundamental.[226]

In a handful of opinions, judges in the Flint litigation have concluded that defendants acted with the requisite state of mind to support a substantive due process claim.[227] On appeal, the Sixth Circuit affirmed the district court's conclusion that plaintiffs had alleged conduct "so egregious that it can be said to be 'arbitrary in the constitutional sense.'"[228] In reaching this conclusion, the court cited the importance of three factors: (1) the defendants' "[e]xtensive time to deliberate"; (2) the "involuntary" nature of the plaintiffs' water consumption; and (3) the lack of a legitimate governmental purpose behind the decision to switch the water supply.[229] In analyzing each defendant's conduct, the court asked whether the plaintiffs had alleged facts that showed that the defendant had a "subjective awareness of substantial risk of serious injury" and acted without a legitimate governmental purpose.[230] For example, in addressing the emergency manager's conduct, the court noted that he allegedly "'forced the transition through' despite knowing how important it was that 'the treatment plant be ready to treat Flint River water' and that '[t]he treatment plant was not ready.'"[231] These actions could not be justified by any legitimate governmental purpose.[232]

A comparison of the defendants' alleged conduct in the Flint litigation with the defendants' alleged actions in *Juliana* highlights how a deliberate indifference standard can provide a meaningful limit on

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could support a substantive due process claim. Guertin v. Michigan, No. 16-cv-12412, 2017 WL 2418007, at *24 (E.D. Mich. June 5, 2017) (quoting Heinrich *ex rel.* Heinrich v. Sweet, 62 F. Supp. 2d 282, 313 (D. Mass. 1999)), *aff'd in part, rev'd in part*, 912 F.3d 907 (6th Cir. 2019). Subsequently, in a split-panel decision, the Sixth Circuit affirmed the district court's recognition of a right to "bodily integrity" as a separate basis for a substantive due process claim. Guertin v. Michigan, 912 F.3d 907, 925 (6th Cir. 2019). In response, the plaintiffs sought to amend their complaint to restyle the state-created danger claim as a bodily integrity claim. *See Flint Water Cases*, 2019 WL 3530874, at *14.

226. Ingraham v. Wright, 430 U.S. 651, 673–74 (1977) ("Among the historic liberties so protected was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security. While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment.").

227. *See, e.g.*, *Guertin*, 2017 WL 2418007, at *24.

228. *Guertin*, 912 F.3d at 925 (quoting Schroder v. City of Fort Thomas, 412 F.3d 724, 730 (6th Cir. 2005)).

229. *Id.* at 925–26 (emphasis omitted).

230. *Id.* at 926 (quoting Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ., 542 F.3d 529, 541 (6th Cir. 2008)).

231. *Id.* at 926–27 (alteration in original).

232. *See id.* at 926 ("[J]ealously guarding the public's purse cannot, under any circumstances, justify the yearlong contamination of an entire community.").

liability for executive decision-making. In *Juliana*, the court applied state-of-mind requirements to both the creation of the danger and the failure to mitigate it.[233] In holding that the plaintiffs had stated a claim, the court noted that they had "allege[d] defendants played a unique and central role in the creation of our current climate crisis" and "that they contributed to the crisis with full knowledge of the significant and unreasonable risks posed by climate change."[234] In other words, the plaintiffs alleged that the defendants *knowingly* created the environmental danger. Moreover, assuming that they knowingly created the danger, "the Due Process Clause . . . impose[d] a special duty on defendants to use their statutory and regulatory authority to reduce greenhouse gas emissions."[235]

In response to the defendants' concerns about the scope of this duty, the court emphasized the "stringent standards" of the state-created danger doctrine.[236] First, the plaintiffs will have to prove that the defendants' actions "created the danger."[237] In the Flint litigation, several defendants made decisions that caused the switch in water supply.[238] In *Juliana*, the plaintiffs may struggle to establish the necessary causal connections between the administrative actions at issue and global climate change; they will have to show that but for the defendants' actions, they would not be exposed to climate harms.

If the plaintiffs succeed in proving the defendants created the danger, they will then have to show that the defendants *knew* their actions created the danger and that they were deliberately indifferent in failing to mitigate the danger.[239] Again, in the Flint litigation, the alleged facts support the conclusion that some defendants knew that their actions had created unsafe drinking water, and despite this knowledge, they failed to even warn affected residents. In *Juliana*, even if the plaintiffs can show that the government knew about the dangers of climate change, they will have to show that the defendants engaged in routine administrative actions with the intent to expose the plaintiffs to climate harms and then acted with deliberate indifference in failing to prevent those harms.

B. *Claims Based on Fundamental Rights*

In both the Flint litigation and the *Juliana* case, plaintiffs also characterized the substantive due process violations as violations of a

233. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1251–52 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

234. *Id.* at 1251.

235. *Id.* at 1252.

236. *Id.*

237. *Id.*

238. *See* Guertin v. Michigan, 912 F.3d 907, 926–27 (6th Cir. 2019).

239. *See Juliana*, 217 F. Supp. 3d at 1252.

fundamental right. In the Flint cases, the plaintiffs alleged that the defendants deprived them of their fundamental right to bodily integrity.[240] In the *Juliana* case, the plaintiffs asked the court to recognize a new fundamental right: "the right to a climate system capable of sustaining human life."[241]

As the Supreme Court has recognized, "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint."[242] In a number of cases, the Court has recognized that due process protections extend beyond the rights enumerated in the Bill of Rights to certain unenumerated rights that it often describes as "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[243] Many of the fundamental rights grounded in substantive due process implicate personal liberties involving intimate personal decisions such as the right to marry and the right to have children.[244] When governmental action infringes upon one of these fundamental rights, courts typically subject it to a "heightened" level of scrutiny, requiring that the governmental invasion be "narrowly tailored to serve a compelling state interest."[245]

The concept of personal autonomy or "bodily integrity" is clearly implicated by fundamental rights such as the right to contraception, the right to abortion, and the putative right to refuse life-sustaining medical treatment.[246] But the Supreme Court has not clearly recognized a more general *fundamental* right to bodily integrity. *Rochin v. California*,[247] the case often cited as the foundation for the right, did not recognize a freestanding right to bodily integrity.[248] In *Rochin*, the Court focused on the conduct of police officers who secured evidence by ordering a doctor to pump the stomach of a nonconsenting suspect.[249] The Court held that the state actors secured a conviction by "methods that offend the Due

240. *See Guertin*, 912 F.3d at 918.

241. *Juliana*, 217 F. Supp. 3d at 1250.

242. Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

243. *Id.* at 720–21 (first quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

244. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (implicating the right to marry); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (implicating the right to have children).

245. *Washington*, 521 U.S. at 720–21 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

246. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (implicating the right to use contraception); Roe v. Wade, 410 U.S. 113, 164 (1973) (implicating the right to abortion); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990) (assuming a right to refuse life-sustaining medical treatment).

247. 342 U.S. 165 (1952).

248. *See id.* at 173–74.

249. *See id.* at 171–74.

Process Clause."[250] According to the Court, their methods—breaking into the suspect's home, forcing open his mouth, and ultimately pumping his stomach—"shock[ed] the conscience" and could not be distinguished from "the rack and the screw."[251] In other words, the Court focused on the defendants' conduct rather than the significance of the liberty interest. The Court has never recognized an unqualified right to bodily integrity, though more specific fundamental rights such as the right to abortion and the right to be free from unlawful bodily restraint are undoubtedly grounded in a recognition of bodily integrity as a cognizable liberty interest.[252]

Indeed, the Sixth Circuit's lengthy analysis of the "right to bodily integrity" in the Flint litigation is completely unnecessary.[253] The liberty interest need not be fundamental to support a claim for deprivation without due process of law.[254] It is enough to say that the plaintiffs were deprived of their bodily integrity when involuntarily exposed to lead and other toxins. The key question is not whether this interest is fundamental, but whether the defendants deprived the plaintiffs of a recognized liberty interest in bodily integrity by methods that were shocking to the judicial conscience. As the dissenting judge acknowledged, Sixth Circuit caselaw has sometimes treated the fundamental-rights analysis separately from the conduct analysis, while in other cases concluding that both are required.[255]

Unfortunately, the doctrinal confusion is not confined to the Sixth Circuit. The *Juliana* court committed the same error. According to the court, it had to resolve the question of whether a fundamental right exists because this distinction determined the level of scrutiny the court would apply to the plaintiffs' substantive due process claims.[256] As the court acknowledged, governmental invasions of fundamental rights generally do not survive judicial scrutiny "unless the infringement is narrowly

250. *Id.* at 174.

251. *Id.* at 172.

252. *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); Ingraham v. Wright, 430 U.S. 651, 673–74 (1977) (noting that the liberty interest in freedom from "unjustified intrusions on personal security" is not well defined but clearly includes "freedom from bodily restraint and punishment" without due process of law).

253. Guertin v. State, 912 F.3d 907, 918–35 (6th Cir. 2019). Other commentators have argued that state courts in cases involving the Flint crisis have made the same mistake. *See, e.g.*, Massaro & Brooks, *supra* note 13, at 186–87 (noting that an "inalienable right to bodily integrity may be both descriptively and normatively wrong" and that courts should not "require a fundamental right *plus* shocking conduct").

254. *See* Massaro & Brooks, *supra* note 13, at 187.

255. *See Guertin*, 912 F.3d at 946 (6th Cir. 2019) (McKeague, J., concurring in part and dissenting in part).

256. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1249 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

tailored to serve a compelling state interest."[257] Because the court concluded that the governmental actions would survive the more deferential "rational basis review" afforded to nonfundamental rights, it reasoned that the plaintiffs' due process claims could not move forward unless they had alleged "infringement of a fundamental right."[258]

The court's subsequent analysis illustrates the confusion at the heart of substantive due process doctrine. Once the court found a fundamental right to a climate capable of sustaining human life, it turned to a discussion of the state-created danger theory, treating it as a second step in the analysis, rather than a separate theory of liability.[259] As discussed above, the court concluded that the plaintiffs had stated a claim under this theory. They had asserted facts that, if true, would support a finding that the defendants acted with "deliberate indifference to the injuries caused by climate change."[260] The court reached this conclusion even though it had previously determined that these same actions would survive rational basis review. But how could the defendants' conduct be both rational and deliberately indifferent? As the next Part explains, this contradiction is a result of courts' failure to recognize that substantive due process analysis turns on whether the governmental action at issue is executive or legislative in nature.

III. TOWARD A MORE COHERENT APPROACH TO SUBSTANTIVE DUE PROCESS IN STATE-CREATED ENVIRONMENTAL DANGER CASES

Aspiring to offer a "more coherent" substantive due process doctrine is ambitious to say the least. As many commentators and judges have acknowledged, substantive due process cannot be reduced to one test or even set of principles. Scholars today rigorously debate its historical origins and contours, and these histories support doctrines of varying breadth and application.

Although the discussion that follows is situated within this larger literature, the ultimate goal is not to construct an overarching doctrine of substantive due process. Instead, the intent is to highlight the contradictions and inconsistencies in the environmental danger cases as a means of illustrating core problems with strands of substantive due process doctrine. Some of the confusion in the environmental danger cases results from the courts' failure to recognize the distinction between executive and legislative action, a distinction that commentators have recently argued is critical to untangling substantive due process doctrine

257. *Id.* at 1248–49 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).
258. *Id.* at 1249.
259. *See id.* at 1250–51.
260. *Id.* at 1252.

generally.[261] Once this is corrected, courts can focus on creating a more coherent state-created danger doctrine. To quell fears about judicial overreach in these cases, this Part argues that courts can easily limit the doctrine by drawing from common law limitations on official liability. Correcting these failures is a step *toward* a more coherent approach to substantive due process litigation, although a modest one.

A. *Substantive Due Process Applied to Official Misconduct Creating Environmental Dangers*

To determine whether executive misconduct violates the due process clauses, courts apply the "shocks-the-conscience" test. This standard requires more than negligence. In some cases, it requires intentional conduct; in others, it requires something less—often "deliberate indifference." Which level of culpability applies is not always clear, raising concerns about the reach of state-created danger claims. But courts could draw from tort law doctrines that shield state actors from liability when they act as policymakers to impose limits on the reach of the state-created danger doctrine. These limitations would ensure that the doctrine does not present separation-of-powers concerns.

1. Supreme Court Precedent and the Shocks-the-Conscience Test

Writing for the Court in *County of Sacramento v. Lewis*, Justice Souter drew on the Court's repeated recognition of due process as a check on arbitrary governmental action and abuse of power.[262] He emphasized that due process imposed both procedural and substantive limitations on the exercise of both legislative and executive power, but "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."[263] When executive action is at issue, "only the most egregious official conduct" that "shocks the conscience" will constitute a violation of due process.[264] What "shocks the conscience" may vary with context but requires a level of culpability "at the ends of the tort law's spectrum of culpability."[265] This clearly includes intentional conduct and may under certain conditions include deliberate indifference, which the Court seems to equate with

261. *See* Tymkovich et al., *supra* note 13, at 1964. *But see* Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981, 1018 (2000) (arguing for a unitary standard for evaluating executive and legislative action).

262. *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845 (1998).

263. *Id.* at 846.

264. *Id.*

265. *Id.* at 846, 848.

recklessness.[266] The Court held that the police conduct at issue in *Lewis* did not shock the conscience.[267]

Concurring only in the judgment, Justice Antonin Scalia denounced the "shocks-the-conscience" test as subjective and a departure from the Court's approach to substantive due process in *Washington v. Glucksberg*,[268] a case challenging a state statute prohibiting physician-assisted suicide as infringing patients' substantive due process rights.[269] In seeking to determine whether the challengers asserted a fundamental right under the Due Process Clause, the *Glucksberg* majority emphasized the need for "careful description" of the fundamental right and the importance of the "Nation's history, legal traditions, and practices" as constraints on judicial recognition of new rights.[270] In *Lewis*, Justice Scalia would have applied this methodology to ask whether history or text supported "a substantive right to be free from 'deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender.'"[271] He concurred in the judgment because "there is no precedential support for a substantive-due-process right to be free from reckless police conduct during a car chase."[272] More generally, he expressed deep skepticism that anything less than intentional action on the part of the government could violate the Due Process Clause.[273]

His concurring opinion committed the same unfortunate error that the courts have committed in the Flint and *Juliana* cases: it assumed that a fundamental rights analysis was necessary in every case alleging a substantive due process violation.[274] This leads to a confused framing of the right at issue because it merges the description of the specific governmental conduct at issue with the alleged liberty interest. In *Lewis*, the plaintiffs alleged a deprivation of their son's right to life.[275] They did not allege that their son had a right to be free from specific governmental conduct. Instead, the appropriate inquiry focused on the conduct of state officials and asked whether that conduct rose to an abuse of power.[276] In *Lewis,* the Court did not even analyze the liberty interest because the

266. *See id.* at 849.

267. *Id.* at 855.

268. 521 U.S. 702 (1997).

269. *Lewis*, 523 U.S. at 861; *see Glucksberg*, 521 U.S. at 708.

270. *Glucksberg*, 521 U.S. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

271. *Lewis*, 523 U.S. at 862 (Scalia, J., concurring) (quoting *id.* at 836 (majority opinion)).

272. *Id.* at 863.

273. *See id.*

274. As scholars have documented, courts unfortunately make this mistake with some frequency. *See* Bambauer & Massaro, *supra* note 13, at 312.

275. *See Lewis*, 523 U.S. at 837.

276. *See id.* at 840.

governmental conduct at issue did not meet the requisite culpability threshold.[277]

Glucksberg's endorsement of a "careful description" of the fundamental liberty interest does not therefore extend to cases of executive or administrative action. When courts make this mistake, it leads to the confusion that we see in the Flint and *Juliana* cases. The Sixth Circuit unnecessarily declared a fundamental right to bodily integrity, and the U.S. District Court for the District of Oregon concluded that without a fundamental right, the plaintiffs would not have stated a claim.[278] But in both cases, the challenge is to executive conduct that the plaintiffs argue constitutes an abuse of power because it deliberately infringes a liberty interest without a legitimate justification. In the Flint litigation, the fact that the plaintiffs were involuntarily exposed to contaminants supports the claim that they were deprived of a liberty interest in personal autonomy or bodily integrity, an interest that need not be "fundamental." In *Juliana*, the plaintiffs alleged deprivations of their property interests as well as health-related harms that implicated the liberty interest in bodily integrity. Again, for purposes of the state-created danger claim, they need not allege infringement of a *fundamental* right because the focus is on the nature of the governmental conduct.

Moreover, the fundamental-rights approach Justice Scalia advocated threatens to conflate the right with the remedy in official conduct cases. Although this danger was not present in *Lewis* because the plaintiffs sought damages,[279] the logic of importing the conduct analysis into the rights analysis necessarily leads to this result. In the Flint litigation, Justice Scalia's approach would frame the right as a right to be free from contaminated drinking water, a short step away from an affirmative right to clean water, which the courts have rejected[280] (though clean water is at the heart of the remedy that the plaintiffs seek). In *Juliana*, this approach would frame the liberty interest as a right to be free from a dangerous level of greenhouse gas emissions, which is precisely the remedy the plaintiffs seek. But if courts define the liberty interest in this way, they will merge the rights analysis with the analysis of the equitable remedy.[281]

277. *See id.* at 847 n.8 ("Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action, and only then might there be a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways.").

278. *See supra* notes 253–258 and accompanying text.

279. *See Lewis*, 523 U.S. at 858 (Breyer, J., concurring).

280. *Cf.* Lewis v. United States, No. 17-1644-RLB, 2018 WL 11239696, at *8 (M.D. La. Aug. 17, 2018).

281. The merging of the right with the remedy raises a host of issues. First, despite the well-known aphorism that every right deserves a remedy, courts analyzing equitable remedies often balance the public interest against the infringement of a private right; in other words, a remedy is

More importantly, they will fail to focus on the critical question of whether the governmental conduct actually violates due process—that is, whether executive action "shocks the conscience" and is therefore unconstitutional. Anxieties about the subjective nature of this test have undoubtedly contributed to the doctrine's distortion; courts likely tack on the fundamental rights analysis in an effort to limit its application. But as other scholars have forcefully argued, the concern that courts will use the shocks-the-conscience standard to turn every governmental tort into a substantive due process violation is unfounded.[282] In the vast majority of cases, courts have held that the standard is not met.[283]

The subjectivity concern is also mitigated by precedent that narrows the universe of substantive due process claims based on executive conduct. The Court has made clear that if the facts implicate a more specific constitutional right, such as the Fourth Amendment's guarantee against unreasonable searches and seizures, a court must analyze the claim under the law that applies to the more specific right rather than substantive due process.[284] In fact, *Rochin v. California*, often cited as the seminal case for the shocks-the-conscience standard, would today be analyzed as a Fourth Amendment case.[285] The development of law under these more specific rights leaves less room for substantive due process to apply to official misconduct.

The space that remains, however, is the home for claims involving executive actors' failure to mitigate a state-enhanced risk. Most constitutionally enumerated rights are limitations on the government, rather than affirmative duties, and courts have long avoided the recognition of "positive" rights even as a matter of substantive due

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not a given. Indeed, we need look no further than *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to discover that other factors sometimes foreclose remedies, despite the recognition of a right. *See id.* at 175–76 (holding that the Court lacked jurisdiction to enforce the mandamus remedy). Moreover, in the context of constitutional litigation, the definition of the "right" should not depend on whether the plaintiff seeks legal or equitable relief. If courts tailor the right to the equitable relief sought, it will create confusion in damages cases and enlarge the already expansive qualified immunity defense. The more specific the right, the more likely a court will find that a defendant's misconduct falls outside "clearly established" law.

282. *See* Bambauer & Massaro, *supra* note 13, at 333.

283. *See id.* at 293–95 (discussing facts of cases involving serious governmental misconduct that did not meet the shocks-the-conscience test); *see also* Jones v. Byrnes, 585 F.3d 971, 978 (6th Cir. 2009) (per curiam) (noting that the standard had not been met in any case involving a high-speed police chase).

284. *See* Graham v. Connor, 490 U.S. 386, 388 (1989). Interestingly, Chief Justice Rehnquist authored the majority opinion in *Graham* (limiting substantive due process) but also wrote a brief concurring opinion in *Lewis* to emphasize that the shocks-the-conscience test associated with substantive due process was the correct standard to apply. *See id.*; *Lewis*, 523 U.S. at 855–56 (1998) (Rehnquist, C.J., concurring).

285. *See Lewis*, 523 U.S. at 849 n.9 (noting that *Rochin* would be analyzed under the Fourth Amendment today).

process.[286] But the two exceptions *DeShaney* recognized—the special relationship and state-created danger exceptions—are grounded in the idea that the government may have a limited affirmative duty to act when governmental action makes an individual particularly vulnerable to known risks. The source of the governmental duty to provide basic services to prisoners is analytically similar to the logic of a duty to protect individuals from state-created dangers: in both cases, the state has placed the individual in a vulnerable position (either through physical restraint or enhanced risk) and therefore has an affirmative duty to assist.[287]

Even so, a state actor's failure to act cannot constitute an abuse of power without meeting the shocks-the-conscience threshold, which requires a context-specific assessment.[288] What might shock the conscience in one context might not in another. In *Lewis*, the Court majority reasoned that in the context of high-speed chases, police officers could not be liable unless they *intended* to cause harm.[289] This was so because police officers responding to emergencies and seeking to restore order were subject to both time constraints and conflicting obligations: "Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs."[290] Reckless conduct under these circumstances may have violated tort law, but it did not rise to an abuse of power given the high-pressure context of a car chase.

The Court contrasted this factual context to custodial cases in which prisoners and pretrial detainees alleged substantive due process violations for state actors' failure to meet their basic medical needs.[291] In these cases, the Court has indicated that deliberate indifference (a kind of "midlevel fault") may have been sufficient to shock the conscience because state actors did not face time pressures and conflicting obligations, but could "make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations."[292] Because they had time to reflect, their deliberate failure to mitigate a known risk when a prisoner could not engage in self-help may have shocked the conscience.[293] Indeed, in this situation, the failure

286. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 205 (1989) (Brennan, J., dissenting).

287. *See id.* at 200 (majority opinion) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.").

288. *See Lewis*, 523 U.S. at 847 n.8.

289. *See id.* at 854.

290. *Id.* at 853.

291. *See id.* at 853–54.

292. *Id.* at 853.

293. *See id.*

to assist does not seem less like an abuse of power than affirmative acts such as stomach-pumping, which the Court has said could not be distinguished from "the rack and the screw."[294] Because the critical question is whether state actors abused their power, it makes little sense to draw a distinction between harm caused by withholding medical treatment and harm caused by pumping a suspect's stomach. In either case, the government's conduct is objectionable because of its deliberate disregard of the risks under circumstances that provide sufficient time for reflection.

2. Lessons from the Common Law Regarding Questions of Duty and Culpability

Although the Supreme Court has repeatedly said that governmental liability for constitutional violations under Section 1983 or its federal counterpart[295] is not governed by common law rules of tort law, it has also recognized the "gap-filling" role of tort law and turned to common law generally as a source of the history and tradition that define the contours of constitutional rights.[296] Common law doctrines such as the public-duty rule and governmental immunity resonate just beneath the surface in *DeShaney* and *Lewis*. If we consider their full implications, we can place meaningful limitations on the state-created danger doctrine and allow courts to address the separation-of-powers concerns that a less defined standard would raise.

a. What the Special Danger Exception Can Learn from the Public-Duty Rule

Although the Court emphasizes the limits of substantive due process, *DeShaney*'s holding that the government had no constitutional duty to protect is consistent with the public-duty rule in tort law. Under the public-duty rule, some state courts limit governmental tort liability when the government obligation runs to the public generally, rather than a particular person or group.[297] Even if state statutes or local ordinances

294. Rochin v. California, 342 U.S. 165, 172 (1952).

295. The Supreme Court has implied rights of action for damages to redress constitutional violations in two cases. Davis v. Passman, 442 U.S. 228, 247 (1979) (suit for violation of equal protection component of the Fifth Amendment's Due Process Clause); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 396 (1971) (suit for violation of the Fourth Amendment).

296. *See* Malley v. Briggs, 475 U.S. 335, 344 n.7 (1986) (noting that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions" (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978))).

297. *See* 57 AM. JUR. 2D *Municipal, etc., Tort Liability* § 79 (2020). Some courts have abolished the doctrine as inconsistent with state statutes abrogating sovereign immunity. *See, e.g.*,

require localities to provide fire, police, or other services, the public-duty rule bars a plaintiff injured by the negligent provision of these services from recovering unless the plaintiff can establish an exception that gives rise to a duty.[298] Just like *DeShaney*, the public-duty rule often bars recovery in cases where state actors have failed to protect plaintiffs in some way.[299] The two exceptions *DeShaney* recognized—special custodial relationship and state-created danger—are examples of these "special duty" exceptions, but tort law recognizes a longer list, imposing affirmative duties for a broader range of special relationships.[300]

Not surprisingly, both the *DeShaney* doctrine and the public-duty rule often impose limitations that are easy to manipulate. The best example is the special danger rule circuit courts developed under the state-created danger doctrine. This limitation mirrors the public-duty rule's exception for duties owed to individuals and particularized groups. For example, in one case, a state supreme court held that a state statute requiring police officers to use due care in high-speed chases created a special relationship with an innocent pedestrian the fleeing suspect injured.[301] The court reasoned that the statute "not only imposes a duty on drivers of emergency vehicles, but likewise, creates a special class of persons—those, who by use of the streets and highways are potential victims of a high speed chase—to whom the duty is owed."[302] That same court later interpreted a state medical licensing statute as creating a public duty only, even though it could have narrowed the class in a similar way to individuals who are potential victims of medical negligence.[303]

Coleman v. E. Joliet Fire Prot. Dist., 46 N.E.3d 741, 757 (Ill. 2016) (reasoning that "the public policy behind the judicially created public duty rule and its special duty exception have largely been supplanted by the legislature's enactment of statutory immunities").

298. *See, e.g.*, Cuffy v. City of New York, 505 N.E.2d 937, 940 (N.Y. 1987) (delineating the elements of a special duty exception based on the special relationship created when a municipality assumes a duty to a particular plaintiff).

299. *See, e.g.*, Ezell v. Cockrell, 902 S.W.2d 394, 403 (Tenn. 1995) (barring liability under public-duty rule for police officer's failure to arrest intoxicated driver).

300. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 40–44 (AM. L. INST. 2012). The dissenting Justices in *DeShaney* would have broadened constitutional liability according to established tort principles by holding that state social workers had essentially assumed a duty of care for Joshua. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting) (arguing that the state had undertaken a duty to Joshua and then abandoned it); *see also* RESTATEMENT (THIRD) OF TORTS, *supra*, § 42 (explaining the "Duty Based on Undertaking" to include a duty of due care when an actor renders assistance another relies on).

301. *See* Eklund v. Trost, 151 P.3d 870, 880 (Mont. 2006).

302. *Id.*

303. *See* Nelson v. State, 195 P.3d 293, 302 (Mont. 2008). Other courts have interpreted state statutes creating public duties to require more than negligence, another way of limiting liability without barring all recovery. *See, e.g.*, Robbins v. City of Wichita, 172 P.3d 1187, 1197 (Kan. 2007) (interpreting state statute regarding emergency vehicle drivers to require recklessness).

The ability to manipulate the "class" of persons the state endangered also undermines the special danger limitation to the state-created danger doctrine. In the Flint litigation, the district court held that an entire city was not particularized enough, but it could have easily characterized the class the contaminated drinking water endangered as a subset of the general population. The same is true for lead paint hazards in public housing; the class is easily limited to public housing residents. In *Juliana*, however, a special danger limitation would seriously undermine the plaintiffs' state-created danger claim; the enhanced risk of an unstable climate places the entire global population in danger, making it difficult to narrow the class.

Furthermore, these limits on duty are not well justified. The public-duty rule originated in English common law; courts reasoned that a breach of a public duty could be redressed only by public prosecution.[304] In addition, the public-duty rule is sometimes justified as a means of constraining judicial interference with executive and legislative judgments about how to allocate public resources and as a means of preventing litigation that could deter governments from providing services.[305] The special danger limitation on state-created danger claims might be justified by similar horizontal separation-of-powers concerns. Moreover, in cases involving state actors, the special danger limitation arguably ensures that federal courts do not meddle in state decisions about how to allocate their public resources for the health, safety and well-being of their citizens—a rationale grounded in the vertical separation of powers between states and the federal government.

The justifications fail, however, to support the court's narrow application of the special danger limitation in the Flint litigation. The Flint decision-makers were not making discretionary judgments about how to allocate resources; the plaintiffs allege that they made a decision to endanger them through the use of public resources. The litigation is also unlikely to deter local governments from providing their citizens with drinking water. Similar arguments could be made in favor of the plaintiffs in the lead paint litigation. Moreover, in both cases, the plaintiffs were foreseeable victims of the defendants' alleged misconduct.

Just as some state courts have abolished the public-duty rule, courts should avoid the temptation to use a similar rule in state-created danger cases. Identifying the "class" of people a governmental duty protects is an impossibly subjective exercise and fails to further separation-of-powers principles. In addition, it is simply unnecessary. The culpability

304. *See* South v. Maryland, 59 U.S. (18 How.) 396, 402–03 (1856).

305. *See, e.g.*, Sawicki v. Village of Ottawa Hills, 525 N.E.2d 468, 477 (Ohio 1988), *superseded by statute*, OHIO REV. CODE § 2744 (2020) ("It is most often asserted that because the available public resources are limited by the resources possessed by the community, the deployment of them must remain in the realm of policy decision.").

requirements of the shocks-the-conscience standard, along with basic tort principles of foreseeability, shield executive officials from liability for all but the most egregious conduct. It makes little sense to shield state actors from liability when they endanger an entire city just because the class of foreseeable plaintiffs is large—especially when elevated culpability requirements can ensure that substantive due process claims do not become "a font of tort law."[306]

b. What the Shocks-the-Conscience Standard Can Learn from Immunity Doctrines

In fact, because the shocks-the-conscience test is the heart of a state-created danger claim against official misconduct, courts and commentators should focus on further developing it. The state-of-mind requirements that the test imposes illuminate the abuses of power that substantive due process prohibits while also ensuring that judges do not second-guess the political branches' policy decisions and discretionary judgments. This is precisely why the test imposes varying requirements based on context. As Justice Souter explained in *Lewis*, the judgments police engaged in a high-speed chase make are different in kind from those prison officials make when responding to prisoners' basic needs.[307] In the former situation, state actors have neither time nor clear mandates; in the other, they have the benefit of both time and clear objectives.

The Court clearly articulated the limited applicability of the shocks-the-conscience test to the policy-making context in *Collins v. City of Harker Heights*, the case involving a city's alleged failure to warn or train of the dangers of working in sewer lines.[308] In rejecting the characterization of the city's conduct as arbitrary or "conscience shocking," the Court emphasized that "the administration of government programs [was] based on a rational decision-making process that [took] account of competing social, political, and economic forces."[309] Judges should not second-guess these policy decisions: "Decisions concerning the allocation of resources to individual programs, such as sewer maintenance . . . involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country."[310] In other words, both federalism values and institutional concerns about the courts' role place discretionary decisions regarding competing policy issues outside the purview of constitutional review.

306. Daniels v. Williams, 474 U.S. 327, 332 (1986) (quoting Parratt v. Taylor, 451 U.S. 527, 544 (1981)).

307. *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 853 (1998).

308. 503 U.S. 115, 117, 128 (1992).

309. *Id.* at 128.

310. *Id.* at 128–29.

This line of reasoning closely resembles state discretionary immunity doctrines in tort law. Discretionary immunity is an exception to state and federal statutes abrogating sovereign immunity for governmental entities.[311] It protects states and localities when they engage in decision-making involving discretionary judgments that require weighing economic, social, and political factors.[312] This immunity's rationale is that it preserves the separation of powers; judges should not second-guess executive and legislative decisions about the proper allocation of public resources.[313] The strongest cases are therefore those involving regulatory judgments of administrative agencies—for example, decisions about whether to grant a permit or how to conduct an inspection.[314] Provided the agency is acting according to the statutory authority, these kinds of decisions necessarily involve policy judgments about how to balance economic, social, and political factors.

Courts have unfortunately expanded discretionary immunity to cases where true policy judgments are not at issue.[315] In fact, the high-speed police chase is one such factual scenario. Although police officers are exercising discretion in weighing the risks and benefits of a high-speed chase, they are not weighing competing policy considerations. Rather, they are engaging in the kind of decision-making that tort law, especially negligence law, is best equipped to evaluate in terms of reasonableness.[316] In other words, a court may evaluate a police officer's decision to risk

311. *See* 63C AM. JUR. 2D *Public Officers and Employees* § 312 (2020). In the federal context, discretionary immunity is an exception recognized in the Federal Tort Claims Act (FTCA), the statute that waives the United States' immunity from suit for some torts its employees commit. 28 U.S.C. § 2680(a). Discretionary immunity under the FTCA requires that the governmental action only be "susceptible to policy analysis," and therefore applies even in the absence of evidence that governmental decision makers actually used their discretion to analyze policy. United States v. Gaubert, 499 U.S. 315, 324–25 (1991). Conversely, some state courts require evidence that the governmental entity actually made a policy choice. *See, e.g.*, Turner v. State, 375 P.3d 508, 520 (Or. 2016) (en banc) (holding that genuine issues of material fact regarding whether the agency actually made a policy choice precluded summary judgment for defendants).

312. *See* DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 22.3 (2d ed. 2016).

313. *See id.*

314. *See id.* (citing cases under the FTCA involving "an agency's decision to regulate a financial institution, to carry out safety inspections, to interdict foreign fruit suspected of containing poisons, to issue or deny a grazing permit, to fire employees, to delegate hazardous waste disposal to an independent contractor, or to parole a prisoner" (footnotes omitted)).

315. *See id.* § 22.8 (noting that "courts sometimes . . . characteriz[e] rather minor and routine decisions of a governmental agency as decisions of social, economic and political policy . . . thus barring trial to discover whether the agency's acts were negligent").

316. *See id.* § 22.10 (explaining that although some courts resolve these cases on immunity grounds, "it is possible to resolve such cases under ordinary negligence rules, holding the public entity subject to liability when the dangers of the chase outweigh the advantages of capturing a suspect").

injury to an innocent bystander by asking whether a reasonable officer could have made the same judgment under the circumstances.

Interestingly, then, although *Lewis* is similar to discretionary immunity in its insistence on a contextualized inquiry, it is best understood as a lowering of the degree of care required in an emergency situation, an approach some state courts have also taken in the context of high-speed chases.[317] The critical takeaway from *Lewis* is that not all executive actor decision-making is the same. The discretionary immunity exception state and federal tort law broadly recognizes acknowledges this as well and attempts to draw distinctions that shield policy judgments, thereby safeguarding the separation of powers. Because discretionary immunity is justified by the same separation-of-powers concerns that place limits on substantive due process, the immunity cases may shed some light on how the "shocks-the-conscience" test applies to the different executive decision-making contexts.

For example, judgments that disregard safety and professional standards should not enjoy discretionary immunity, as some courts have recognized.[318] A governmental entity should not be shielded from common law liability for medical negligence because a doctor's departure from the professional standard of care is not a policy judgment.[319] The same is true for governmental decision-making that violates clear health and safety laws.[320] These decisions may involve "discretion," but they are not policy choices when safety standards dictate

317. *See id.* ("Such decisions, like many other negligence cases, call for a balancing of risks and utilities, so if the pursuer is a dangerous criminal and the risks to innocent people are low, the chase may not be negligent at all.").

318. *See id.* § 22.3.

319. *See id.* This is essentially the standard Justice Brennan argued should apply in *DeShaney*; he would have allowed the plaintiffs an opportunity to show that the defendants failed to exercise professional judgment. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 211 (1989) (Brennan, J., dissenting). But because he did not distinguish this test from negligence, it cannot be the basis for a substantive due process violation. Rather, in the due process context, professional judgment cases should be cases subject to the deliberate indifference standard because they do not involve policy judgments.

320. *See, e.g.*, Kim v. United States, 940 F.3d 484, 489–90 (9th Cir. 2019) (excluding matters of scientific and professional judgment from discretionary immunity in suit against federal officials for failing to prevent the deaths of two boys killed by a fallen tree limb at a national park); Sanders v. United States, 937 F.3d 316, 329 (4th Cir. 2019) (holding that federal government was not entitled to discretionary immunity because the government's mandatory procedures removed all discretion in conducting background checks). There are cases, however, that treat health and safety decisions as policy judgments because they involve the allocation of public resources. *See, e.g.*, Rich v. United States, 119 F.3d 447, 452 (6th Cir. 1997) (holding that the Army Corps' decision to replace a handrail was not governed by mandatory procedures and was therefore a discretionary policy judgment about the allocation of public resources). For purposes of a due process analysis, courts would not face these issues because negligence is insufficient. To meet the level of culpability the shocks-the-conscience test requires, the governmental misconduct would have to violate a clear, mandatory health or safety standard.

the result. Thus, recognition of a policy-making limitation in the context of substantive due process would not protect decisions to poison city residents with contaminated water or expose public housing residents to lead paint hazards. In both cases, state actors violated state and federal health and safety regulations designed to reduce human exposure to lead. Because their decisions did not require resolving competing policy considerations, they are subject to the deliberate indifference standard, rather than the more demanding intentional-conduct standard in *Lewis*.

In contrast, most of the decisions at issue in the climate litigation are regulatory decisions that require a governmental entity's exercise of policy-making discretion. The complaint includes a number of affirmative acts by executive agencies, but all of them are lawful exercises of agency decision-making under federal statutes. For example, the complaint alleges that the Department of Energy "issues short-term and long-term authorizations for the import and export of natural gas," "permits domestic energy production and interstate commerce of fossil fuels," and "sets energy efficiency standards" under various federal statutes.[321] Similarly, the Bureau of Land Management and the U.S. Forest Service have authorized leases for extraction and development of oil and gas on federal public lands.[322] The Department of Transportation sets fuel economy standards for vehicles, and the Department of State issues presidential permits for the export and import of oil and gas.[323] Perhaps most striking is the complaint's characterization of the Obama Administration's signature climate regulation, the Clean Power Plan, as deficient because it only limits emissions from the power plants and "does nothing to halt or otherwise diminish fossil fuel extraction, production, and exportation in the United States."[324] Of course, completely halting fossil-fuel extraction would be outside the Environmental Protection Agency's authority under the Clean Air Act to regulate greenhouse gas emissions.

321. *Juliana* Complaint, *supra* note 7, ¶ 105. This Article is using the discretionary immunity concept here to bolster culpability distinctions in due process doctrine (rather than as an independent limitation), but the plaintiffs may face actual sovereign immunity defenses in the climate litigation. Although the federal agencies have apparently not raised sovereign immunity as a defense, the waiver of immunity in the Administrative Procedure Act (APA), 5 U.S.C. § 702, may not apply outside of APA cases, although courts have often assumed that it does. *See* Kathryn E. Kovacs, *Scalia's Bargain*, 77 OHIO ST. L.J. 1155, 1157 (2016). If the agencies are immune, that would leave only the agency heads as defendants, and they are entitled to qualified immunity unless they violate "clearly established" law. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Because the court recognized a new fundamental right, the plaintiffs will have difficulty showing that these defendants violated "clearly established" law.

322. *See Juliana* Complaint, *supra* note 7, ¶¶ 110, 117.

323. *See id.* ¶¶ 114, 123.

324. *Id.* ¶ 127.

In each case, executive officials have either made an adjudicatory decision to grant a permit, lease, or other authorization, or issued a regulation pursuant to the agency's statutory rulemaking authority. The complaint does not allege that agency officials violated statutory standards or otherwise exceeded the authority Congress granted to them. In fact, these are the kinds of decisions that courts routinely review under a range of deference doctrines that recognize administrative agencies' policy-making role. To avoid encroaching on Congress's delegation of this policy-making role or on the President's power to oversee agency decision-making, courts defer to agency judgments that must reconcile competing social, economic, and political factors, as long as they are reasoned applications of the statutes authorizing agency action.[325]

Because these agency actions would likely survive routine challenges under various statutes, including the Administrative Procedure Act (APA), it is difficult to imagine how a court could hold that they constitute arbitrary abuses of power that "shock the conscience." They may be regrettable policy judgments, but they are discretionary policy judgments nevertheless. The statutes governing these actions give agencies broad latitude to balance public health against economic and political factors; none of them dictate a particular outcome but instead allow for consideration of competing policy factors. Moreover, to act according to the plaintiffs' preferences would, in many cases, require an agency to push the boundaries of its statutory authority.

In this circumstance, when a court would have to second-guess the executive and legislative branches' political judgments, separation-of-powers concerns require some line drawing. When governmental actors make deliberate choices about competing policy considerations, courts should adopt *Lewis*'s requirement that plaintiffs show that the defendants intended harm, rather than deliberate indifference to harm. Requiring proof that the federal government actually *intended* to cause the climate-related harms plaintiffs suffered will likely be impossible, but this is because the federal agencies were not engaged in the kind of abuse of power that the Fourteenth Amendment prohibits. Limiting state-created danger claims in this way protects the political branches' decision-making by ensuring that courts can separate claims involving bad policies from claims involving true executive power abuses.

325. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (holding that courts should defer to agencies' reasonable statutory constructions where Congress has left "gap[s]" for the agencies to resolve as matters of policy); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (emphasizing that a court may not "substitute its judgment for that of the agency" under the APA's arbitrary and capricious standard for review of agency decisions), *overruled on other grounds by* Califano v. Sanders, 430 U.S. 99, 105 (1977).

B. *Substantive Due Process Applied to Laws and Policies Creating Environmental Risks*

If policy decisions are not subject to the shocks-the-conscience test, where does this leave the *Juliana* litigation? The state-created danger doctrine provides a coherent framework for analyzing the executive action in the Flint and New York cases because these cases involve allegations of official misconduct meeting culpability thresholds of intent or deliberate indifference. Conversely, the regulatory decisions at issue in *Juliana* are a poor fit for this approach to substantive due process. Instead, they look like the kinds of executive and legislative lawmaking that the courts have long analyzed by balancing the government's interests against the burdens the law imposes on liberty interests. The balancing approach shifts the focus from the governmental actor's state of mind to the nature and strength of the government's asserted interest; culpability is irrelevant.[326]

Because the climate litigation seems to call for traditional balancing, the characterization of the liberty interest as fundamental affects the level of judicial scrutiny challenged regulations and laws receive. Although courts assess the "arbitrariness" of any law or policy under the Due Process Clauses using a means-end test, they may require a closer fit between the means employed and the governmental objective if the liberty interest is fundamental. Courts often apply heightened, even "strict," scrutiny to laws that infringe rights or liberties deemed "fundamental." Strict scrutiny "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[327] If the liberty infringed is not fundamental, a court is likely to apply rational basis review, a form of review typically understood to be highly deferential to the government.[328] In fact, the district court in the *Juliana* litigation clearly understood rational basis in this way,

326. Professors Bambauer and Massaro argue that both tests are "floor tests," which are highly deferential to government. Bambauer & Massaro, *supra* note 13, at 283. They do not, however, see a need to separate rational basis review from the shocks-the-conscience test. *See id.* at 307. Conversely, other commentators have argued that the courts should apply different tests based on whether the challenged action is executive, legislative, or judicial. *See* Tymkovich et al., *supra* note 13, at 1964. This Article lends support to the latter view. A culpability threshold is poorly suited to evaluating legislation or regulations. Instead, culpability is relevant to assessing the governmental actors' individual conduct, making the shocks-the-conscience test a logical means of evaluating official misconduct. In this regard, it exhibits a synergy with qualified immunity doctrine, which shields executive officials from liability when the law is not clearly established. The implication here is that abuse of power cannot occur if officials have no reason to know that they are breaking the law.

327. Reno v. Flores, 507 U.S. 292, 302 (1993).

328. *See* Romer v. Evans, 517 U.S. 620, 635 (1996).

concluding that the plaintiffs could not succeed without establishing a fundamental right.

But in truth, *Juliana* raises a number of questions that are far from settled. What makes a right "fundamental"? What is the role of history and tradition in this analysis? Does the Constitution support recognition of positive fundamental rights? In the absence of a fundamental right, may a court review administrative actions like those in *Juliana* for substantive rationality? The *Juliana* litigation provides an opportunity to interrogate some of our basic assumptions about substantive due process review.

For example, many commentators do not think that courts will (or should) recognize a fundamental right to a stable climate.[329] This Part addresses key assumptions upon which they base this conclusion and analyzes the most salient doctrinal obstacles to recognition of a right against the federal government. It then turns to the question of whether substantive review is possible here without the recognition of a fundamental right. Because the *Juliana* plaintiffs are challenging a collection of administrative decisions and federal statutes, a court cannot practically apply the means-end tests of substantive due process. Each governmental decision or policy would have to be challenged individually for the governmental defendants to assert which interests are furthered. What the plaintiffs are really doing is alleging that the federal Executive Branch is collectively failing to faithfully execute the laws under Article II of the Constitution, but this obligation may not be enforceable as a matter of constitutional law.

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329. *See, e.g.*, Bradford C. Mank, *Does the Evolving Concept of Due Process in* Obergefell *Justify Judicial Regulation of Greenhouse Gases and Climate Change?:* Juliana v. United States, 52 U.C. DAVIS L. REV. 855, 858 (2018) (arguing that the *Juliana* decision infringes on the legislature's role); R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 353 (2017) (arguing that even though environmental cases like *Juliana* may fail on the merits, merit determinations are valuable because they can "rouse other branches of government to action" and "dignify the narratives of individual litigants"); Daniel Farber, *What's Wrong with* Juliana *(and What's Right?)*, CTR. FOR PROGRESSIVE REFORM: CPRBLOG (Jan. 22, 2019), http://www.progressivereform.org/CPRBlog.cfm?idBlog=A6644A55-9B8B-D096-2BF612F2E8FB772C [https://perma.cc/2GUM-U5EL] (expressing skepticism that the Supreme Court would uphold the plaintiffs' due process claims because of separation-of-powers concerns). *See generally* Erin Ryan et al., Juliana v. United States*: Debating the Fundamentals of the Fundamental Right to a Sustainable Environment*, 46 FLA. ST. L. REV. ONLINE 1 (2018) (transcribing live discussion among legal scholars regarding the case). Scholars often point to the *DeShaney* case as the main obstacle to recognition of positive rights as a matter of due process. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272–73 (1990). In *DeShaney*, the Court drew a line between negative and positive rights: "[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989).

1. Obstacles to Recognizing a Right—Fundamental or Not—to a Stable Climate

The Court often emphasizes the importance of history and tradition in determining whether a right is fundamental. For example, in *Washington v. Glucksberg*, the Court established a two-part inquiry for identifying whether governmental action implicates a fundamental right and should therefore be subject to strict scrutiny.[330] First, a court asks whether the right or liberty is "'deeply rooted in this Nation's history and tradition'"[331] and whether it is "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[332] The second step requires a "'careful description' of the asserted fundamental liberty interest."[333] If the court determines that the challenged governmental action affects a fundamental right, it must apply strict scrutiny.[334] Some Justices have applied the history-and-tradition requirement so that a fundamental right must have a well-established historical pedigree.[335] This approach clearly presents a serious obstacle to the recognition of a fundamental right to a stable climate. But it is not necessarily true to precedent or the Fourteenth Amendment's history.

The precedent on which this emphasis on history and tradition relies has its origins in Justice John Marshall Harlan II's dissent in a 1961 case involving a married couple's right to contraception, a right the Court recognized four years later in *Griswold v. Connecticut*.[336] In his dissent, Justice Harlan argued that due process protected more than the liberties enumerated in the Bill of Rights, and to identify the fundamental liberties it protects, judges must balance "liberty and the demands of organized society."[337] He then described the role of history and tradition in this judicial balancing:

> The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has

330. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

331. *Id.* at 721 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

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

333. *Id.* (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

334. *See id.*

335. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 706 (2015) (Roberts, C.J., dissenting).

336. 381 U.S. 479, 485–86 (1965).

337. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

> survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[338]

For Justice Harlan, a court's due process inquiry cannot be "reduced to any formula."[339] Furthermore, the tradition he references is not a static tradition from some past time, nor is it restrained by common law rights or historical norms. It is a "*living thing*."[340]

Indeed, the meaning of tradition has always been contested. For example, in 1977, Justice Lewis F. Powell described the liberty interest in forming a family as "deeply rooted in this Nation's history and tradition."[341] In referring to history and tradition, he relied in part on Justice Harlan's prior opinions.[342] In a footnote, however, he defined history narrowly by reference to cases that recognized rights when they were part of an "enduring American tradition" or "old . . . as our entire civilization" or "based on the Anglo-American legal tradition."[343] This footnote was intended as a response to Justice Byron White's dissenting argument that basing rights on tradition will "broaden enormously the horizons of the [Due Process] Clause."[344] In Justice White's view, "[w]hat the deeply rooted traditions of the country are is arguable, which of them deserve the protection of the Due Process Clause is even more debatable."[345] Justice Harlan would likely have agreed that tradition is debatable; the judge's role is to evaluate "living" tradition against the changing social landscape.

Today, however, the Supreme Court's more conservative Justices appear to understand the role of history and tradition in the more restricted sense, rather than Justice Harlan's sense of living traditions balanced against governmental interests in an "organized society."[346] In *Obergefell v. Hodges*,[347] the case striking down state laws that did not

338. *Id.*

339. *Id.*

340. *Id.* (emphasis added).

341. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

342. *See id.*

343. *Id.* at 503 n.12 (first quoting Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); and then quoting Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)) (citing Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968)). In cases incorporating enumerated rights into the Fourteenth Amendment's Due Process Clause, analysis of history and tradition, whether broadly or narrowly defined, tends to support incorporation because the rights enumerated in the Bill of Rights had well-established histories. *See, e.g.*, *Duncan*, 391 U.S. at 151–53 (1968) (recounting the history of the right to jury trial in criminal cases). Interestingly, Justice Harlan dissented in *Duncan*; his opinion surveyed a much broader history of the jury trial, including debates about its vices and virtues in more recent history than that cited by Justice White in his majority opinion. *See id.* at 187–88 (Harlan, J., dissenting).

344. *Moore*, 431 U.S. at 549–50 (White, J., dissenting).

345. *Id.* at 549.

346. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

347. 576 U.S. 644 (2015).

allow same-sex couples to marry as a violation of the Due Process Clause, the four dissenting Justices each wrote separately.[348] In addition to sharing concerns that the Court was supplanting democratic processes, each opinion emphasized the importance of history and tradition as a means of restraining judicial decision-making. For Chief Justice John Roberts, the relevant history was the long history recognizing marriage only for opposite-sex couples, not the more recent recognition of same-sex marriage in several states.[349] For Justice Scalia (a consistent opponent of substantive due process generally), the challenged laws were supported by "a long tradition of open, widespread, and unchallenged use dating back to the [Fourteenth] Amendment's ratification."[350] Justices Clarence Thomas and Samuel Alito also found no basis for the right in history or tradition.[351]

But the meaning of history and tradition is not fixed. For example, which history counts? If courts focus on the history surrounding the drafting and ratification of the Fourteenth Amendment, their views of history and tradition will necessarily expand beyond common law rights or some notion of rights long recognized by the "Anglo-American legal tradition." This is so because the Fourteenth Amendment was understood as a departure from tradition. The simple fact that we refer to the Reconstruction Amendments as the "Second Founding" underscores their disruptive nature.[352] The "rights" or "privileges" protected by the Fourteenth Amendment were debated at the time, but the historical record suggests that many understood them to be quite expansive.[353] Indeed, if we were to follow Justice Scalia's view of the Fourteenth Amendment,

348. *Id.* at 675–76.

349. *See id.* at 691–92 (Roberts, C.J., dissenting).

350. *Id.* at 716 (Scalia, J., dissenting).

351. *See id.* at 722 (Thomas, J., dissenting) (reasoning that the historical understanding of "liberty" did not encompass the asserted right); *id.* at 738 (Alito, J., dissenting) (emphasizing that the right lacks "deep roots" in history and "is contrary to long-established tradition").

352. *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019) (recounting the history of the Reconstruction Amendments and the efforts by the Supreme Court and certain states to undermine them).

353. *See* Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 594 (2015) (noting that "originalists have recently produced extensive historical research purporting to demonstrate that a reasonable observer at the time of the enactment of the Fourteenth Amendment would have understood that amendment to provide constitutional protection to unenumerated rights"); *see also* FONER, *supra* note 352, at 76 ("[B]y the mid-1870s the idea that the Fourteenth Amendment 'incorporated' the Bill of Rights had become, as far as Republicans were concerned, a virtually uncontroversial minimum interpretation of the amendment's purposes."). As Foner explained, the basic citizenship rights were debated during Reconstruction. *See id.* at 40–41. In fact, early in the debates, the right to vote was considered a "privilege" that could be restricted, rather than a basic political right. *See id.* at 40. The Fifteenth Amendment partially resolved this by guaranteeing universal male suffrage. *See id.* at 112–13 (noting that despite the efforts of the women's movement, the amendment did not enfranchise women).

we would fail to remedy the very harms that the Amendment was designed to prevent. For example, because laws prohibiting interracial marriage were "open [and] widespread"[354] at the Amendment's ratification, they would not violate the Due Process Clause. The Supreme Court fortunately, though belatedly, reached the opposite conclusion in *Loving v. Virginia*[355] in 1967.[356]

Indeed, portions of the Civil Rights Act of 1866,[357] along with the Enforcement Acts of 1870 and 1871,[358] guaranteed not only negative liberties, but also affirmative rights to state protection from private discrimination and violence.[359] Section 1983 was originally part of the Civil Rights Act of 1871,[360] commonly known as the Ku Klux Klan Act, a statute intended to give the federal government the power to prosecute mob violence against African Americans that was condoned and encouraged by state actors in the South.[361] Indeed, as scholars have long acknowledged, the Reconstruction amendments and statutes do not support Justice Rehnquist's view in *DeShaney* that the Fourteenth Amendment's "purpose was to protect the people from the State, not to ensure that the State protected them from each other."[362]

Limitations on the reach of the Fourteenth Amendment such as the state-action doctrine[363] are a result of Supreme Court opinions in the late nineteenth century that seriously undermined Reconstruction legislation and created a legal foundation for the Jim Crow era.[364] For this reason,

354. *Obergefell*, 576 U.S. at 716 (Scalia, J., dissenting).

355. 388 U.S. 1 (1967).

356. *See id.* at 12. The Court also struck down Virginia's statute under the Equal Protection Clause. *See id.*

357. Ch. 31, 14 Stat. 27.

358. Ch. 114, 16 Stat. 140 (1870); ch. 99, 16 Stat. 433 (1871); ch. 22, 17 Stat. 13 (1871).

359. *See* FONER, *supra* note 352, at 67, 116–18.

360. Pub. L. 42-22, 17 Stat. 13.

361. As Foner detailed, Klan violence increased after ratification of the Fourteenth and Fifteenth Amendments and was widespread: "Especially in counties where the black and white populations were more or less equal and the balance of power uncertain, the Klan's actions metastasized into extreme violence against anyone accused of flouting the conventions of white supremacy." FONER, *supra* note 352, at 116. The Enforcement Act of 1871 gave the federal government the power to intervene when states failed to act. *See id.* at 118–19.

362. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989). The Supreme Court's *DeShaney* decision sparked a torrent of scholarly criticism on doctrinal, historical, and moral grounds. *See* Susan S. Kuo, *Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence*, 79 IND. L.J. 177, 182 n.28 (2004) (citing numerous journal articles criticizing *DeShaney*).

363. In 1883, the Court struck down most of the Civil Rights Act of 1875, ch. 114, 18 Stat. 335—an act guaranteeing equal access to transportation, hotels, and other venues—as unconstitutional because it targeted "private" discrimination, and the Thirteenth and Fourteenth Amendments only gave Congress the power to regulate state action. The Civil Rights Cases, 109 U.S. 3, 24–25 (1883).

364. *See* FONER, *supra* note 352, at 160.

historian Eric Foner has described this period of Supreme Court jurisprudence as "a sad chapter in the history of race, citizenship, and democracy in the United States."[365] Indeed, as Foner explained, "[t]he Court's narrow reading of the constitutional amendments was a choice, not something predetermined by public opinion or historical context."[366] Instead of giving effect to the Reconstruction amendments' commitments to equality and individual rights, the Court essentially ignored them and used the Fourteenth Amendment to further the economic rights of corporations well into the twentieth century.[367] It took nearly a century to overrule or repudiate many of these late nineteenth-century decisions, but some doctrinal vestiges remain.

The Fourteenth Amendment's Privileges and Immunities Clause is one casualty of this era. The Court essentially nullified this clause in the *Slaughter-House Cases*,[368] which involved challenges to a state law giving one corporation a monopoly over the slaughter of livestock.[369] The challengers argued that their right to pursue a lawful occupation was a "privilege[]" or "immunit[y]" guaranteed to them as U.S. citizens by the Fourteenth Amendment.[370] The Supreme Court, in a five–four decision, interpreted the clause narrowly, holding that it protected only those rights federal law created explicitly, such as the right to use navigable waters and seek redress of the federal government.[371] Because civil and political rights at the time derived from state laws, the Court rendered the clause meaningless. The Reconstruction architects drafted the Fourteenth Amendment to change the power balance so that the federal government, not the states, would be the protector of citizens' rights.[372] But a majority of Supreme Court Justices were committed to preserving a pre-Reconstruction view of federal power over the states.[373]

The takeaway from this precedent and history recount for purposes of a right to a stable climate is that it pushes back on two doctrinal obstacles to the right's recognition: the assumption that rights must have deep historical roots and the limitation on recognition of so-called

365. *Id.* at 131.

366. *Id.*

367. *See id.* at 160.

368. 83 U.S. 36 (1873).

369. *See id.* at 48.

370. *Id.* at 54.

371. *See id.* at 76–77.

372. *See* FONER, *supra* note 352, at 91, 134; *see also* Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 413 (1990) ("The plan of Reconstruction was to invest the federal government with plenary authority to define and enforce the fundamental rights of United States citizens against state and private action and to leave the states to protect their own interests in the federal political process.").

373. *See* FONER, *supra* note 352, at 134.

"affirmative" or positive rights. The right to a stable climate can easily draw from Justice Harlan's "living" tradition. The Fourteenth Amendment was part of an effort to dismantle the disgraceful social institution of slavery, one of the "traditions from which [this country] broke."[374] Social structures and institutions that support the fossil-fuel economy are another tradition from which we must break.

But historical arguments based on the Fourteenth Amendment's history may not extend to the Due Process Clause of the Fifth Amendment, which is the source of the right against the *federal* government in the *Juliana* case. Scholars have acknowledged differences in the original understanding of due process in the two clauses.[375] Many have argued that the earlier understanding of due process embodied in the Fifth Amendment more closely aligned with the view that the Constitution protected citizens from governmental abuse of power by guaranteeing certain negative liberties.[376] In *Juliana*, a right to a stable climate would impose affirmative obligations on the federal government. This may be the most daunting of the doctrinal obstacles to recognizing a federal right. The Fourteenth Amendment's history arguably supports (or at least does not foreclose) a capacious view of rights—both negative and affirmative—but these rights would be enforceable only against the states.

Of course, substantive due process doctrine does not always insist on historical ties. Justice Harlan's "living" tradition approach exists comfortably with the standard that a right is fundamental if it is "implicit in the concept of ordered liberty."[377] Indeed, the district court in the *Juliana* litigation analyzed the right to a stable climate by drawing from these due process strands, as well as recent language from *Obergefell v. Hodges* that framed the rights inquiry as one of "'reasoned [judicial]

374. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

375. *Compare* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 415 (2010) (arguing that historical evidence supports an original understanding of substantive due process under the Fourteenth Amendment but not the Fifth Amendment), *with* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 594 (2009) (arguing that an original understanding of the Fifth Amendment "encompassed judicial recognition and enforcement of unenumerated substantive rights as a limit on congressional power").

376. *See* Gerhardt, *supra* note 372, at 426; *see also* Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1630–31 (2019) (reading the Fifth Amendment's conception of due process to require federal legislation designed to give effect to constitutionally enumerated powers, while the Fourteenth Amendment's limitations on state legislation were "unspecified" and therefore required judicial construction).

377. Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

judgment'" guided by history and tradition.[378] Liberty, as Justice Anthony Kennedy explained in *Obergefell*, is a concept that evolves with society:

> The generations that wrote and ratified the Bill of Rights . . . did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.[379]

Citing this language as well as other cases recognizing unenumerated rights, the district court analogized "the right to a climate system capable of sustaining human life" to the right to marriage at issue in *Obergefell*: "Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'"[380]

A substantial scholarly literature on the topic of positive constitutional rights also supports these living tradition approaches to substantive due process. One intriguing variant of the living tradition approach looks to statutes as contemporary interpretations of the Constitution. Professor Ed Rubin has argued that the Affordable Care Act[381] passed during the Obama Administration is evidence that the "Constitution guarantees so-called positive rights, such as rights to sustenance, decent housing, an

378. Juliana v. United States, 217 F. Supp. 3d 1224, 1249 (D. Or. 2016) (quoting Obergefell v. Hodges, 576 U.S. 644, 664 (2015)), *rev'd*, 947 F.3d 1159 (9th Cir. 2020). Justice Kennedy's call for "reasoned judgment" in analyzing substantive due process rights appeared in earlier cases. *E.g.*, Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 849 (1992) (plurality opinion). Justice O'Connor concluded her plurality opinion in *Casey* with a clear statement of the living tradition approach: "Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one." *Id.* at 901. Using this language, the right to a stable climate is arguably fundamental to all constitutional commitments because, without a stable climate, future generations will not be able to enjoy these constitutional "ideas and aspirations."

379. *Obergefell*, 576 U.S. at 664.

380. *Juliana*, 217 F. Supp. 3d at 1249–50 (quoting *Obergefell*, 576 U.S. at 669). The Supreme Court's recognition of unenumerated rights protecting individual liberty in intimate relationships, including decisions about whether to have children, is evidence that history does not always constrain the fundamental rights analysis. Cognizant of the concern about the judicial role in recognizing "new" constitutional rights, the *Juliana* district court emphasized that the right to a climate "capable of sustaining human life" contemplated "climate change on a catastrophic level" and did not open the door to the "constitutionalization of all environmental claims." *Id.* at 1250.

381. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 21, 25, 26, 29, 42 U.S.C.).

adequate education, and, of course, basic health care."[382] Because these rights are now on the "political agenda," he argues that the Supreme Court will be called upon to declare them matters of constitutional law.[383] Professor Jack Beermann found support for a similar right to access health care in the Supreme Court's decision striking down the Affordable Care Act's Medicaid expansion provisions.[384] He argued that the Court's logic—that states would feel coerced into accepting federal funding—depended on the assumption that states felt obligated to provide medical care to people who could not afford it.[385] The Court's recognition of this "felt obligation" provides support for the positive right.[386]

Arguments for positive rights in the literature do not always abandon history or rely on contemporary understandings of the due process clauses. Professor Derek W. Black has, for example, argued that the Fourteenth Amendment's ratification history supports an affirmative right to education,[387] a right that the Supreme Court has disavowed in dicta.[388] He grounded this right in the Amendment's guarantee of state citizenship, arguing that Southern states and the federal government understood that readmission to the Union required states to guarantee access to education in their newly drafted constitutions as a means of ensuring the citizenship necessary for a republican government.[389] Given this history, Black argued that the right to education was "implicit" in the Fourteenth Amendment's state-citizenship guarantee.[390]

The arguments in *Juliana* that draw on the public-trust doctrine seek to find a similar historical footing. Moreover, unlike the state-created danger claim, the public-trust claim also supports affirmative governmental obligations: as trustee of a resource held in public trust, the federal defendants would have an obligation to maintain it for the public's use and enjoyment.[391] The district court agreed with the plaintiffs' contention that the public trust applied not only to the states but also to

382. Edward Rubin, *The Affordable Care Act, the Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 WM. & MARY L. REV. 1639, 1643 (2012).

383. *Id.*

384. *See* Jack M. Beermann, NFIB v. Sebelius *and the Right to Health Care: Government's Obligation to Provide for the Health, Safety, and Welfare of Its Citizens*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 277, 290 (2015).

385. *See id.* at 287 (discussing Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 583 n.14 (2012)).

386. *Id.* at 290.

387. *See* Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 744–47 (2018).

388. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

389. *See* Black, *supra* note 387, at 744.

390. *Id.*

391. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1254 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

the federal government.[392] In locating the source of the trust responsibility, the court's analysis drew on a natural rights theory and the trust's historical origins in Roman and English common law, concluding that the public trust was an "inherent aspect[] of sovereignty."[393] These origins, according to the court, supported a right of action even if substantive due process required the fundamental right at issue to be "deeply rooted in this Nation's history and tradition."[394]

A fuller account of the public-trust doctrine is outside the scope of this Article, and its origins, scope, and applicability to the federal government are debated.[395] The critical point for purposes of a substantive due process analysis is that—if it applies to the federal government—it strengthens the argument for a positive right.[396]

2. The Consequences of Failing to Establish a Fundamental Right

Without a fundamental right, a court would likely review laws and decisions affecting the climate for substantive rationality.[397] The district court in the *Juliana* litigation assumed that rational basis review would

392. *See id.* at 1259.

393. *Id.* at 1257, 1259–61.

394. *Id.* at 1261 (quoting McDonald v. City of Chicago, 561 U.S. 742, 761, 767 (2010)).

395. *See* Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 9 (2017) (supporting application of public-trust doctrine in the *Juliana* litigation); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENV'T L. & POL'Y F. 1, 2 (2007) (arguing that the doctrine as espoused by its contemporary proponents is based on a misreading of Roman and English history and is not supported by precedent); *see also* Erin Ryan, *From* Mono Lake *to the Atmospheric Trust: Navigating the Public and Private Interests in Public Trust Resource Commons*, 10 GEO. WASH. J. ENERGY & ENV'T L. 39, 61 (2019) (noting the obstacles to recognizing a public-trust obligation against the federal government).

396. In some ways, however, the public-trust right is more limited than a straightforward recognition of a right to a stable climate. Most of the public-trust cases involve submerged lands under navigable waters. *See, e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479–80, 484 (1988). Rather than deciding the difficult question of whether the "air" was a public-trust resource, the court limited its application to the climate harms such as ocean acidification and warming connected to the territorial sea to which the federal government held title. *See Juliana*, 217 F. Supp. 3d at 1256. An affirmative obligation that extends only to the territorial sea may complicate judicial efforts to craft appropriate injunctive relief. For an analysis of whether and how the Constitution's text might support an affirmative right to environmental protection, see Hope M. Babcock, *The Federal Government Has an Implied Moral Constitutional Duty to Protect Individuals from Harm Due to Climate Change: Throwing Spaghetti Against the Wall to See What Sticks*, 45 ECOLOGY L.Q. 735, 751 (2018).

397. This assumes that the plaintiffs' climate-related harms implicate the property and liberty protected by the Fifth Amendment's Due Process Clause. It also applies the conventional understanding of fundamental rights invoking strict scrutiny, but the Court has applied variations of "heightened" scrutiny, some less strict, to claims involving fundamental rights. The abortion cases are good examples; the Court has crafted a special "undue burden" test instead of traditional balancing. Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion).

be the end of the case.[398] It would indeed be an uphill battle, but a growing literature is questioning our conventional understandings of rational basis review.[399] In recent cases, courts have even struck down laws that infringe economic liberties under rational basis review[400]—an approach that jurists and scholars disavowed in the decades following the vigorous review of economic legislation most famously associated with *Lochner v. New York*.[401]

For other reasons, however, recognizing a fundamental right is essential to the substantive due process claim in *Juliana.* To begin, consider the kinds of administrative decisions and legislation being challenged: they range from individualized permit decisions to fuel economy standards and perhaps legislation such as the Energy Policy Act that the plaintiffs argue props up our fossil-fuel economy. As the federal defendants argued, these challenges to administrative decisions look like challenges that should be brought under the APA[402] or—when applicable—a more specific statute providing for judicial review of an agency's actions.[403]

Such decisions are typically subject to the APA's "arbitrary-and-capricious standard," which is arguably more stringent in modern doctrine than the rational basis review provided by substantive due process.[404] Even if courts apply the APA's standard in a highly deferential manner, it provides at least as much review as rational basis, lending support to the defendants' contention that these challenges should occur as part of the regular administrative law process. Furthermore, if these actions are subject only to APA review, many or all would be barred by

398. *See Juliana*, 217 F. Supp. 3d at 1249.

399. *See, e.g.*, Colby & Smith, *supra* note 353, at 531 (arguing that contemporary conservative thought supports "some form of robust judicial protection for economic rights"); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1319–20 (2018) (questioning the "canonical" understanding of rational basis review as "extraordinarily deferential").

400. *See, e.g.*, St. Joseph Abbey v. Castille, 712 F.3d 215, 222–23 (5th Cir. 2013) (striking down a rule granting funeral homes the exclusive right to sell caskets because economic protection of one industry is not a legitimate governmental interest).

401. 198 U.S. 45, 58 (1905), *abrogated by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

402. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

403. *See* 5 U.S.C. § 706.

404. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 n.9 (1983) ("We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate."); *see also* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 894 (2020) ("[E]arly arbitrary and capricious cases under the APA applied standards similar to rational basis review. Rational basis-type language continued into the 1960s, though it declined with the rise of hard look review in the D.C. Circuit." (footnotes omitted)).

the applicable six-year statute of limitations and other threshold determinations regarding whether agency actions are final and reviewable.[405]

The district court rejected the defendants' argument that the plaintiffs' claims must have been brought under the APA, emphasizing that the plaintiffs may have chosen to raise constitutional claims outside the APA.[406] Even if this is true, it begs the question of what authority the plaintiffs may have used to support a cause of action. In a different opinion, the district court cited *Davis v. Passman*[407] as authority for an implied cause of action directly under the Fifth Amendment.[408] *Davis* recognized an implicit cause of action under the Fifth Amendment in a *damages* action based on a governmental actor's violation of the Due Process Clause's equal protection component.[409]

If the *Juliana* plaintiffs can base their claim on a fundamental right or equal protection,[410] *Davis* and earlier cases support an implied right of action under the Fifth Amendment. If, however, the plaintiffs are entitled only to rational basis review, they may face new obstacles. First, the Court has retreated from recognizing new constitutional causes of action against the federal government.[411] Second, the Court has precluded equitable remedies for unconstitutional executive action when a federal statute can be "fairly" interpreted to foreclose them, as the APA arguably does in *Juliana*.[412] In a five–four decision, the Court in *Armstrong v. Exceptional Child Center, Inc.*[413] held that no implied right of action existed under the Supremacy Clause.[414] But because the plaintiff sought

405. *See* 28 U.S.C. § 2401 (providing that non-tort claims against the United States must be brought within six years of when the claim accrues); 5 U.S.C. § 704 (requiring "final agency action" for judicial review under the APA).

406. *See* Juliana v. United States, 339 F. Supp. 3d 1062, 1081 (D. Or. 2018), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

407. 442 U.S. 228 (1979).

408. *See id.* at 242.

409. *See id.* at 243–44.

410. The *Juliana* litigation presents potential equal protection questions. Climate change will disproportionately affect racial minorities as a result of underlying structural inequalities. *See* Mustafa Santiago Ali, *Environmental Racism Is Killing Americans of Color. Climate Change Will Make It Worse*, GUARDIAN (July 28, 2020, 5:15 AM), https://www.theguardian.com/commentisfree/2020/jul/28/climate-change-enviromental-racism-america [https://perma.cc/QE58-9VSP]. In addition, as the plaintiffs argue, young people and future generations will experience greater climate-related harms than older generations alive today. *See* Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L.Q. 731, 749 (2019) (arguing that the judiciary is "better positioned" than the political branches to consider questions of intergenerational equity).

411. *See* Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020) (noting the Court's reluctance to create new causes of action under the Constitution).

412. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 329 (2015).

413. 575 U.S. 320, 329 (2015).

414. *See id.* at 326.

injunctive relief, both the majority and dissent agreed that the case implicated the Court's equitable powers to enjoin unlawful executive action and that these powers existed unless supplanted by Congress.[415] Writing for the majority, Justice Scalia concluded that the federal statute at issue provided the sole remedy and foreclosed a private action for equitable relief.[416] A similar analysis under the APA could threaten the *Juliana* plaintiffs' request for equitable relief.[417] Indeed, if the review that the plaintiffs would receive under the APA is the same or perhaps even more stringent than rational basis review, *Armstrong*'s analysis arguably applies with even more force.

If a cause of action exists in *Juliana*, it is grounded—as *Armstrong* recognizes—in the courts' well-established equitable power to prospectively enjoin unlawful governmental action, often referred to as *Ex parte Young*[418] relief after the case that expounded the doctrine.[419] Typically, however, these cases involve discrete actions by state or federal officials. How should a court analyze the challenged actions in *Juliana*? The plaintiffs are not asking the court to enjoin the conduct of one (or even a few) officials. Indeed, prospective injunctive relief could not even remedy some of the administrative permit and lease decisions the plaintiffs cited. Instead, the plaintiffs ask for prospective relief writ large in the form of an overarching governmental policy.[420] The imperfect fit between *Ex parte Young* relief and *Juliana* is yet another illustration of the confusion created by trying to style a challenge to law and policy as a challenge to official conduct. *Juliana* is clearly not an *Ex parte Young* case.

Instead, the *Juliana* plaintiffs are challenging the federal Executive Branch's collective actions regarding climate change, a claim that looks like a generalized charge that the federal government is failing to govern in the public interest. In a recent article, three legal scholars explored the historical understanding of the language of "Faithful Execution" in Article II of the Constitution, the provision governing presidential power.[421] They concluded that this language often applied to public officials at various levels and imposed duties that looked like the fiduciary duties in private law, including the duty to execute laws in a

415. *See id.* at 329.

416. *See id.*

417. The APA provides for review of constitutional questions. 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

418. 209 U.S. 123 (1908).

419. *See id.* at 148.

420. *See* Juliana v. United States, 947 F.3d 1159, 1170 (9th Cir. 2020).

421. *See* Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2114 (2019).

good faith manner consistent with the public interest.[422] Indeed, the trust obligation that a fiduciary understanding of Article II imposes resembles the trust obligation that the public-trust doctrine imposes in the context of natural resources.

This fiduciary understanding might support challenges to executive nonenforcement of statutes for policy reasons and perhaps require courts to defer less to agencies' interpretations of congressional mandates, but it is not enforceable on its own.[423] In general, it undermines expansive notions of executive power and seeks to honor the constitutional separation of powers among the three branches. Ironically, this could undermine the *Juliana* plaintiffs' requested remedy; without clear legislative mandates, the administrative agencies' power to combat climate change under existing federal law would be constrained rather than enlarged by a fiduciary understanding of executive power.[424]

CONCLUSION

Even if substantive due process is not likely to be a successful vehicle for challenging the federal government's climate policies, the *Juliana* litigation still serves an important purpose. Literature in both law and the social sciences supports the social-change value of civil rights litigation.[425] Social movements use the language of rights to help mobilize and organize collective action that can lead to political change. The *Juliana* case has already raised awareness and planted the seeds for political change and potential judicial enforcement in the future.

Moreover, by analyzing the *Juliana* litigation alongside the Flint and New York litigation, this Article has uncovered misconceptions, confusion, and gaps in substantive due process as applied to state-created danger claims. The conduct challenged in the Flint and New York cases is precisely the type of official misconduct that the state-created danger doctrine contemplates. When executive officials engage in actions that shock the conscience, they are abusing their power. Courts can evaluate these claims using context-specific state-of-mind requirements that

422. *See id.* at 2180–81.

423. *See id.* at 2185.

424. *See id.* at 2182–83 ("This historical background may offer more weight in favor of executive deference to the legislature.").

425. *See, e.g.*, CHARLES R. EPP, THE RIGHTS REVOLUTION 197 (1998) (exploring how recognition of rights depends not just on court decisions but also material support structures for social movements); MICHAEL W. MCCANN, RIGHTS AT WORK 1–4 (1994) (examining how rights claims helped motivate and organize the social movement for pay equity); Maxine Burkett, *Litigating Separate and Equal: Climate Justice and the Fourth Branch*, 72 STAN. L. REV. ONLINE 145, 150 (2020) (examining similarities in social movement strategies that led to *Brown v. Board of Education* and *Juliana v. United States*); Eyer, *supra* note 399, at 1319–20 ("[R]ational basis review has—in modern history—constituted one of the principal entry points for social movements seeking to effectuate constitutional change.").

ensure judicial restraint and guard against concerns that constitutional litigation will become a "font of tort law."[426] There is room to develop the doctrine in a coherent manner as long as judges and commentators avoid conflating it with the balancing analysis that applies to laws and policies. The plaintiffs in the Flint and New York cases are challenging official *misconduct*, not laws or policies; it is that conduct, rather than the significance of the alleged liberty interest, that courts must assess.

426. Daniels v. Williams, 474 U.S. 327, 332 (1986) (quoting Parratt v. Taylor, 451 U.S. 527, 544 (1981)).