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## Bolstering Juliana: Enforceability of Environmental Claims Through International Treaty Obligations in U.S. Courts

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## COMMENT

### **BOLSTERING *JULIANA*: ENFORCEABILITY OF ENVIRONMENTAL CLAIMS THROUGH INTERNATIONAL TREATY OBLIGATIONS IN U.S. COURTS**

LINDSEY LAIELLI\*

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## I. INTRODUCTION

Climate change is no longer a “future” problem.<sup>1</sup> People are impacted by climate change every day, ranging from catastrophic natural disasters<sup>2</sup> to continuous nuisances relating to air quality.<sup>3</sup> Currently, judicial recourse for these climate change injuries is inadequate.<sup>4</sup> Until recently, overcoming the issue of standing, as required for any judicial proceeding, has been nearly impossible in environmental lawsuits.<sup>5</sup> Utilizing standing as a scapegoat has led to millions being injured and deprived of their right to property and preservation of their environment without the ability to hold anyone accountable.<sup>6</sup> The overwhelming significance of the fundamental right to property and the elusive right to life throughout national and international law demonstrates the crucial need for adequate protection.<sup>7</sup> Thus, this Comment seeks to enhance the availability of private right of actions in environmental international treaties and customs.

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1. See Cristine Russell, *A Scary Year for Climate Change*, SCI. AM. (Nov. 2, 2019), <https://blogs.scientificamerican.com/observations/a-scary-year-for-climate-change/> [<https://perma.cc/H5X7-D57P>] (stressing the urgency of climate change as the “future came faster than science had predicted”).

2. Eric Mack, *In 2019 Climate Change Made These 15 Natural Disasters Even Worse*, FORBES (Dec. 27, 2019, 2:40 PM), <https://www.forbes.com/sites/ericmack/2019/12/27/climate-change-drove-the-price-tag-for-15-disasters-over-a-billion-dollars-each/#796eff5d7844> [<https://perma.cc/66AB-AULT>] (“The British charity Christian Aid reports that climate change amplified 15 extreme weather disasters in 2019 that caused at least a billion dollars in damage in each case . . .”); see also Tara Law, *Australia’s Wildfires and Climate Change Are Making One Another Worse in a Vicious, Devastating Circle*, TIME (Jan. 7, 2020), <https://time.com/5759964/australian-bushfires-climate-change/> [<https://perma.cc/G9SZ-3L7Z>] (“Climate scientists warn that the scale and devastation of the [Australian] wildfires are clear examples of the way climate change can intensify natural disasters.”).

3. See, e.g., Complaint at 8–38, *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. Aug. 12, 2015) (highlighting each plaintiff’s individual injuries because of climate change, including aggravation of environmental allergies).

4. *Id.*

5. See William Blake Ogden, Note, *Improving Standing Doctrine to Better Protect the Environment: How the United States Can Learn from Ecuador’s Rights of Nature*, 46 GA. J. INT’L & COMP. L. 1, 2 (2018) (identifying standing as the biggest issue facing environmental plaintiffs).

6. See *id.* (identifying standing as the biggest issue facing environmental plaintiffs).

7. See U.S. CONST. amend. V (solidifying the constitutional guarantee of the right to life, liberty, and property); see also National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (2012) (codifying the United States’ declaration to protect the environment for future generations); North American Agreement on Environmental Cooperation, Jan. 1, 1994, 32 I.L.M. 1480, 2 (emphasizing the importance of physical environmental conditions in sustaining the “well-being of present and future generations”); Convention on the Rights of the Child art. 6, Sept. 2, 1990, 1577 U.N.T.S. 3 (recognizing every child’s “inherent right to life”); *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) (classifying the Due Process rights as “fundamental” to American society); *Lessee of Pollard’s Heirs v. Kibbe*, 39 U.S. 353, 355–56 (1840) (granting property rights to descendants under an international treaty).

Recognizing the environmental obligations in international treaties only bolsters liability against the United States if a private right of action exists. International treaties are carefully vetted and debated before the legislature after being negotiated by the executive branch.<sup>8</sup> Nevertheless, recent Supreme Court decisions emphasize an insufficiency of treaty enforcement without additional legislative approval.<sup>9</sup> The additional approval is unnecessary as treaties are on the same playing field as the Constitution, which has never been held to require legislative approval prior to enforcement.

Similarly, reclaiming the public trust doctrine—which emphasizes future generations as the beneficiaries of the environment—under the internationally recognized custom of intergenerational equity, would add another layer to environmental litigation.<sup>10</sup> The United States government pledged to act as trustee and preserve the environment for the beneficiaries.<sup>11</sup> Preservation of the environment for future generations is also conceptualized in international law as the principle of intergenerational equity.<sup>12</sup> As the beneficiary of the environment, present and future generations retain a property right in the sanctity of the environment. While the details of trust law are beyond the scope of this Comment, the trustee is generally legally accountable for property rights held by a beneficiary.

Beginning with an analysis of the national claims brought by environmental litigants will provide a general basis for the international treaty arguments. To fully grasp the national claims, this Comment will provide a brief summary of the current environmental statutes enacted. This summary will include an explanation of the history and context of the public trust doctrine and the constitutional right to life and property under the Fifth Amendment. This Comment will then discuss the international equivalents showing that intergenerational equity and treaty obligations are

8. U.S. CONST. art. I, § 5, cl. 1.; U.S. CONST. art. II, § 2.

9. See *Medellin v. Texas*, 552 U.S. 491, 515 (2008) (“Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances.”) (citing CONST. art. II, § 7).

10. See 42 U.S.C. § 4331(a) (2012) (codifying the public trust doctrine).

11. See 42 U.S.C. § 9607(f)(2)(A) (2012) (“The President shall designate . . . federal officials who shall act on behalf of the public as trustees for natural resources[.]”).

12. Lynda M. Collins, *Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance*, 30 DALHOUSIE L.J. 79, 93 (Aug. 25, 2010) (citing Edith Brown Weiss, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989) (defining intergenerational equity as the present generation acting as beneficiary and trustee of the Earth’s resources).

binding on the United States. Explanation of these principles will be followed by a high-level summary of the groundbreaking *Juliana v. United States*<sup>13</sup> case, which utilizes environmental claims under the United States Constitution. Finally, this Comment will then demonstrate the necessity of a private right of action under international treaties to bolster the *Juliana* claims and ensure governmental liability for our depreciating environment. Declining to recognize these treaty obligations essentially renders the fundamental right to life due to unsafe living conditions and the right to property a mere façade enforcement wise.

## II. HISTORICAL BACKGROUND

### A. *A Summary of Climate Change and Current United States Policies*

Climate change has been deemed one of the greatest public policy concerns of this generation.<sup>14</sup> The effects of climate change are impossible to ignore with rising sea levels,<sup>15</sup> escalating temperatures,<sup>16</sup> and more catastrophic weather events than ever before.<sup>17</sup> However, these increasingly horrific events are not enough to instigate proper measures on an international scale. At the United Nations Climate Change Summit in December 2019, frustrations arose at the blatant disconnect between

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13. *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018).

14. See UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, REPORT OF THE CONFERENCE OF THE PARTIES ON ITS FIFTEENTH SESSION, HELD IN COPENHAGEN FROM 7 TO 19 DECEMBER 2009 at 5, (March 30, 2010), <https://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf> [<https://perma.cc/45NK-4FE5>] (categorizing climate change as “one of the greatest challenges of our time”); see also Elaine Kamarck, *The Challenging Politics of Climate Change*, BROOKINGS (Sept. 23, 2019), <https://www.brookings.edu/research/the-challenging-politics-of-climate-change/> [<https://perma.cc/ZW2T-W8F8>] (explaining climate change is the “toughest, most intractable political issue we, as a society, have ever faced”).

15. See R.S. Nerem et al., *Climate-Change—Driven Accelerated Sea-Level Rise Detected in the Altimeter Era*, PROCEEDINGS OF THE NAT'L ACAD. OF SCI. OF THE U.S. (Feb. 27, 2018), <https://www.pnas.org/content/115/9/2022> [<https://perma.cc/6JHS-HM5Q>] (summarizing scientific data demonstrating the increased sea levels over a twenty-five-year period).

16. See NASA, *NOAA Data Show 2016 Warmest Year on Record Globally*, NASA (Jan. 18, 2017), <https://www.giss.nasa.gov/research/news/20170118/> [<https://perma.cc/XU85-YGLC>] (proving the average temperature of the Earth has risen two degrees Fahrenheit from 1880–2016).

17. See 1 D.J. WUEBBLES ET AL., CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT 257–76 (2017), [https://science2017.globalchange.gov/downloads/CSSR\\_Ch9\\_Extreme\\_Storms.pdf](https://science2017.globalchange.gov/downloads/CSSR_Ch9_Extreme_Storms.pdf) [<https://perma.cc/P552-YVPU>] (demonstrating significant increase in severity and frequency of storms throughout the U.S.).

national leaders and reality.<sup>18</sup> “Instead of leading the charge for more ambition, most of the large emitters were missing in action or obstructive.”<sup>19</sup> In particular, the United States was the “major resistor” when the topic of liability for damages caused by climate change was discussed.<sup>20</sup>

Despite being one of the largest carbon emitters in the world, the United States continuously refuses to implement *effective* measures to reduce their contributions to climate change.<sup>21</sup> In fact, the current administration is actually taking steps backwards by removing measures previously enacted.<sup>22</sup> Not only are we failing to implement domestic measures to combat global warming, but the United States is now in direct violation of several prominent environmental treaties.<sup>23</sup> The domestic measures that remain in place are outdated<sup>24</sup> and essentially ineffective.

Environmental awareness became a prominent issue in the 1970s.<sup>25</sup> With the invention of televisions, the American public was given immediate

18. Laurel Wamsley, *U.N. Climate Summit Goes To Extra Time, But Ends With Major Questions Unresolved*, NPR (Dec. 15, 2019, 2:30 PM), <https://www.npr.org/2019/12/15/788241846/u-n-climate-summit-goes-to-extra-time-but-ends-with-major-questions-unresolved> [https://perma.cc/T6EG-FNE8].

19. *Id.*

20. *Id.*

21. Complaint at 4–7, *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. Aug. 12, 2015).

22. See Rebecca Hersher, *U.S. Formally Begins to Leave the Paris Climate Agreement*, NPR (Nov. 4, 2019), <https://www.npr.org/2019/11/04/773474657/u-s-formally-begins-to-leave-the-paris-climate-agreement> [https://perma.cc/DC34-CE1D] (revealing the Trump administrations withdrawal from the Paris Agreement and systematic attempts to “roll back federal limits on carbon emissions . . .”); see also Nadia Popovich et al., *95 Environmental Rules Being Rolled Back Under Trump*, NY TIMES (Dec. 21, 2019), <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html> [https://perma.cc/M3QE-2YTG] (listing specific environmental statutes being “rolled back” under the Trump Administration).

23. See United Nations Framework Convention on Climate Change art. 4(2)(a)–(b), March 21, 1994, 1771 U.N.T.S. 107 (failing to reach 1990 greenhouse gas emissions is a treaty violation); see also North American Agreement on Environmental Cooperation art. 6, Jan. 1, 1994, 32 I.L.M. 1480 (making the denial of private access to judicial proceedings within the United States a treaty violation); Vienna Convention for the Protection of the Ozone Layer art. 2(2)(b), Sept. 22, 1988, 1513 U.N.T.S. 293 (making the failure to take “appropriate” legislative action to ensure climate protection a treaty violation).

24. See David W. Case, *The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication*, 25 DUKE ENV'T L. & POL'Y F. 49, 51 (2014) (explaining the last major federal environmental statute was enacted in 1990).

25. See Richard N. L. Andrews, *The EPA at 40: An Historical Perspective*, 21 DUKE ENV'T L. & POL'Y F. 223, 226 (2011) (analyzing the creation of the EPA through the historical context of environmental concerns).

first-hand knowledge of several environmental catastrophes.<sup>26</sup> As a result of this newly acquired knowledge, the government was met with strong public demand for action to protect and restore the deteriorating environment.<sup>27</sup> It was against this backdrop that President Nixon and Congress created the Environmental Protection Agency (EPA) to begin brainstorming resolutions to meet the public demand.<sup>28</sup>

Congress responded almost immediately by enacting the National Environmental Policy Act (NEPA) on January 1, 1970, which ignited “an explosion” of environmental regulations.<sup>29</sup> Within five years, more than ten major environmental acts were passed by Congress.<sup>30</sup> This trend continued until 1990, which was the last year any major federal environmental legislation was passed.<sup>31</sup> “Since that time, the political consensus necessary for enactment of statutory authority for new or expanded mandatory regulatory programs to achieve desired environmental outcomes has been *impossible* to obtain.”<sup>32</sup> Therefore, the outdated policies, with only minor adjustments, remain the exclusive statutory authority regulating environmental protection despite the increasing complexity and scale of environmental challenges.

NEPA was enacted to provide a basic framework for governmental awareness of environmental concerns prior to implementation of major

26. *See id.* (referencing smog, radioactive fallout, pesticide use, oil spills, fires, oxygen depletion in Lake Erie, and elsewhere).

27. *See id.* (“[A]n extraordinary outburst of mass public pressure for federal action to address the widespread pollution problems that had resulted from the vast post-war growth in industrial production and mass consumption.”).

28. *See id.* (describing the creation of the EPA spurred by President Nixon on the heels of the environmental awareness movement in 1970).

29. *See Case, supra* note 24, at 50 (quoting President Nixon declaring the 1970s the “decade of the environment” and summarizing the “explosion of legislative activity” that followed the execution of the NEPA).

30. *See* Phil Wisman, *EPA History (1970–1985)*, EPA (Nov. 1985), <https://archive.epa.gov/epa/aboutepa/epa-history-1970-1985.html> [<https://perma.cc/YU47-D7KA>] (listing examples of environmental acts enacted in the 1970s: the Coastal Zone Management Act, the Marine Protection Research and Sanctuaries Act, the Endangered Species Act, the Wild and Scenic Rivers Act, the Marine Mammal Protection Act, the Deepwater Ports and Waterways Safety Act, the Fish and Wildlife Coordination Act, the Water Resources Planning act, the Water Resources Research Act, and the Environmental Quality Improvement Act).

31. *See Case, supra* note 24, at 51 (generalizing the three decades of environmental legislative activity from 1970–1990).

32. *Id.* (emphasis added).



federal projects.<sup>33</sup> Any obligation under NEPA is limited to the implementation of major federal activities context.<sup>34</sup> Therefore, NEPA does not require the government to enforce “the responsibilities of each generation as trustee of the environment for succeeding generations” or “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.”<sup>35</sup> More pertinent to this Comment is the fact that NEPA also does not provide a private right of action against the government itself for any violations.<sup>36</sup> Instead, civilians must bring violation actions under the Administrative Procedure Act against the EPA.<sup>37</sup>

NEPA's liability and enforcement shortcomings remain active and substantively unchanged to this day. One of the supplemental legislative enactments on the coat tails of NEPA was the Clean Air Act.<sup>38</sup> The Clean Air Act was enacted “to protect and enhance the quality of the Nation's air resources[.]”<sup>39</sup> Section 7604 of the Clean Air Act also provides a private cause of action under the citizens suit provision.<sup>40</sup> The citizens suit provision allows for any person to sue the United States or any other governmental agency violating the Clean Air Act.<sup>41</sup>

Nevertheless, litigation under the Clean Air Act has resulted in piecemeal litigation that is ineffective for several reasons. First, the courts are hesitant to enjoin activities approved by the EPA due to the technical nature of environmental regulations.<sup>42</sup> Second, courts are also unlikely to interfere based on the amount of deference given to agency discretion and

33. See 42 U.S.C. § 4331(b) (2012) (codifying the government's “continuing responsibility . . . to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources”).

34. See Case, *supra* note 24, at 56 (explaining NEPA's primary function was mandating agencies to “begin considering environmental concerns when making decisions about major federal activities”).

35. 42 U.S.C. §§ 4331(b)(1)–(2) (utilizing the word “may” to negate liability).

36. *Sierra Club v. Slater*, 120 F.3d 623, 630 (6th Cir. 1997).

37. *Id.* at 630–31.

38. See Case, *supra* note 24, at 56 (summarizing environmental acts enacted between 1970–1980, with the first after NEPA being the Clean Air Act).

39. 42 U.S.C. § 7401(b)(1) (2012).

40. See 42 U.S.C. § 7604 (2012) (“[A]ny person may commence a civil action on his own behalf[.]”).

41. 42 U.S.C. § 7604(a)(1).

42. See *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981) (acknowledging the courts are reluctant to enjoin “activities which have been considered and specifically authorized by the government” because it implicates complex areas of law).

interpretation of its own regulations.<sup>43</sup> Therefore, if the main allegation is that the EPA's regulations are insufficient, then there is truly no remedy to provide because courts refuse to interfere or defer to the EPA to interpret compliance.<sup>44</sup> Inadequate judicial remedies for violations have left the American people vulnerable to the environmental repercussions of ineffective regulations.

B. *The Government's Commitment Under the Public Trust Doctrine*

In addition to specific environmental regulations, the United States also recognizes the public trust doctrine.<sup>45</sup> The public trust doctrine is “the principle that certain natural resources are preserved for public use, and that the government must protect and maintain these resources for the people.”<sup>46</sup> Congress's declaring the federal government will act in a manner that ensures the welfare of the climate for present and future generations<sup>47</sup> clearly illustrates a commitment to the public trust doctrine. This declaration solidified the government's role as the environmental trustee for forthcoming generations.<sup>48</sup> Certain federal agencies have been designated by the president to act as trustee for certain natural resources.<sup>49</sup> Collectively, these governmental actions demonstrate support of the public trust doctrine, which has long been recognized by the judiciary.<sup>50</sup>

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43. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (reiterating that a challenge to an agency's reasonable statutory construction centered on “wisdom of the agency's policy” will fail).

44. See *Castle*, 666 F.2d at 33 (“Congress has indicated that regulation may be better achieved through a comprehensive statutory approach than through ad hoc common law remedies.”).

45. See Rebecca LaGrandeur Harms, *Preserving the Common Law Public Trust Doctrine: Maintaining Flexibility in an Era of Increasing Statutes*, 39 UC DAVIS 97, 98 (Jan. 25, 2016, 1:07 PM), <https://law.ucdavis.edu/centers/environmental/files/Doremus%20Writing%20Winners/2015LaGrandeur.pdf> [<https://perma.cc/92U2-DZ5G>] (“The United States adopted the doctrine from England's common law system.”).

46. *Id.*

47. 42 U.S.C. § 4331(a) (2012).

48. *Id.* (b)(1).

49. See 42 U.S.C. § 9607(f)(2)(A) (2012) (“The President shall designate . . . Federal officials who shall act on behalf of the public as trustees for natural resources[.]”); see also Complaint at 82, *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. Aug. 12, 2015) (listing the USDA, Department of Defense, Department of Energy, and Department of the Interior as federal agencies acting on behalf of public as trustees).

50. Even though the context of these statutory trust provisions involves the government seeking compensation on behalf of the public as trustee, it seems analogous that the government would also have a duty to protect the land from destruction as well. See Complaint at 82, *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. Aug. 12, 2015) (relying on the trust

C. *The Fifth Amendment's Guarantee to Life, Liberty, and Property*

The underlying rationale mentioned in each of the policies above is rooted in the Constitution. The Fifth Amendment of the Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property.”<sup>51</sup> As reinforced throughout history, life, liberty, and property are fundamental rights given to all United States citizens.<sup>52</sup> These fundamental rights are unconstitutionally infringed by the failure to protect the Earth’s environment.<sup>53</sup> Climate change infringes on the inherent right to resources held in public trust and loss of life or property due to increased flooding and storm damage caused by catastrophic weather events.<sup>54</sup>

D. *An Overlap Between Domestic Law and International Law*

Intergenerational equity is an international customary law principle that significantly overlaps with the public trust doctrine. Intergenerational equity is the responsibility of the present generation—acting as both beneficiary and trustee of the Earth’s resources—to protect the environment for future generations.<sup>55</sup> A balance must be struck between the present generation’s right to use and enjoy resources while adhering to the trustee obligation to conserve the same resources for future generations.<sup>56</sup> Recognition of the obligation to future generations can be seen in diverse cultures and political regimes across the world, including the United States.<sup>57</sup>

Likewise, the right to life is overwhelmingly pervasive throughout international law. Specifically, many universally accepted treaties contain the

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provisions to argue the government was holding the environment in public trust for future generations); *see also* *Juliana v. United States*, 339 F. Supp. 3d 1062, 1102 (D. Or. 2018) (refusing to grant summary judgment on the public trust claim because the “doctrine is deeply rooted in our nation’s history and that plaintiffs’ claims are viable was [not] clearly erroneous”).

51. U.S. CONST. amend. V.

52. *See* *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) (emphasizing the Due Process rights are “based on moral principles so deeply embedded in the traditions and feelings . . . as to be deemed fundamental to a civilized society as conceived by our whole history”); *see also* U.S. GOV’T PUBL’G OFF., FIFTH AMENDMENT: RIGHT OF PERSONS 1356 (1992) (showing the guaranties of the Fifth Amendment are rooted in the Magna Carta).

53. Complaint at 91–92, *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705-TC (D. Or. Aug. 12, 2015).

54. *Id.*

55. *See* Collins, *supra* note 12, at 87 (defining intergenerational equity).

56. *Id.*

57. *See id.* at 88–90 (providing historical examples in various cultures of the intergenerational equity principle, including evidence of the United States acknowledging the principle in the context of future debt passing to future generations).

fundamental right not to have one's life arbitrarily ended.<sup>58</sup> Shockingly, the United States has been reluctant to execute treaties preserving the right to life.<sup>59</sup> However, there is one treaty recognizing the right to life that the United States did eventually ratify,<sup>60</sup> obviously with express reservations.

#### E. *The True Meaning of the Supremacy Clause*

By virtue of the Supremacy Clause, any treaty signed and ratified by the United States becomes the “supreme Law of the Land.”<sup>61</sup> Notably, the Supremacy Clause explicitly provides for “all treaties” to be the “supreme Law of the Land.”<sup>62</sup> The historical context of the Supremacy Clause solidifies the Founders’ intent to have all treaties be judicially enforceable. Justice Story surmised the congressional intention behind the Supremacy Clause was to eliminate the historical disregard of treaty obligations by states.<sup>63</sup> Intentionally and deliberately giving treaties the status of “law” made them “enforceable in the ordinary courts.”<sup>64</sup>

### III. *JULIANA V. UNITED STATES*—THE GOLDEN ENVIRONMENTAL CASE

“A livable future includes the opportunity to drink clean water, to grow food, to be free from direct and imminent property damage caused by extreme weather events, to benefit from the use of property, and to enjoy

58. See International Covenant on Civil and Political Rights art. 6, Mar. 23, 1976, 99 U.N.T.S. 171 [hereinafter Civil and Political Rights] (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”); see also Convention on the Rights of the Child art. 6, Sept. 2, 1990, 1577 U.N.T.S. 3 (“States Parties recognize that every child has the inherent right to life.”).

59. See *Where the United States Stands on 10 International Human Rights Treaties*, CIVILRIGHTS.ORG (Dec. 10, 2013), <https://civilrights.org/edfund/resource/where-the-united-states-stands-on-10-international-human-rights-treaties/> [https://perma.cc/3Q2D-EE62] [hereinafter *Where the United States Stands*] (showing the United States signed the International Covenant on Economic, Social and Cultural Rights in 1977, and the Convention on the Rights of the Child in 1995 but, despite near universal acceptance, have refused to ratify either treaty).

60. Civil and Political Rights, *supra* note 58, at 111.

61. U.S. CONST. art. VI, cl. 2.

62. *Id.*; see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796) (“It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State[.]”) (emphasis added).

63. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION, 696 (1833).

64. Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1085 (1992).

the abundant and rich biodiversity of our nation.”<sup>65</sup> Youths from across the country have come together to hold their government accountable for the unprecedented damage caused by global warming.<sup>66</sup> The Youth Plaintiffs aimed their legal claims against the United States—the sovereign trustee under the public trust doctrine—the President, and numerous governmental and state agencies.<sup>67</sup>

Initially, *Juliana* plaintiffs sought relief under the Due Process and Equal Protection clauses of the Fifth Amendment.<sup>68</sup> Specifically, defendants’ willful actions over the past fifty years infringed on plaintiffs’ rights to life, liberty, and property.<sup>69</sup> Particular damages asserted include the infringement of multiple basic human rights ranging from access to clean air, water, and food to encroaching on religious practices and raising a family.<sup>70</sup> Plaintiffs request future generations be treated as a protected class due to their inability to vote or to truly influence defendants’ actions.<sup>71</sup> Because the majority of plaintiffs “reside in this division of the judicial district, and events, omissions, and harms giving rise to the claims herein arise in substantial part in this division,” the only avenue for redress concerning the infringement of these basic human rights lies with the District Court of Oregon.<sup>72</sup>

The other most notable claim in *Juliana* fell under the public trust doctrine.<sup>73</sup> “As sovereign trustees, [d]efendants have” failed in their responsibility to safeguard future beneficiaries’ property interest in natural resources.<sup>74</sup> In fact, Youth Plaintiffs, as future beneficiaries, claimed that Defendants contributed to the substantial impairment of natural resources when they required affirmative action to preserve the resources was necessary.<sup>75</sup>

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65. Complaint at 96, *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. Aug. 12, 2015).

66. *See id.* at 16–92 (introducing individual plaintiffs from Oregon, Colorado, Pennsylvania, Arizona, South Dakota, Hawaii, New York, Alaska, Washington, Florida, and Louisiana).

67. *Id.* at 98–130.

68. *Id.* at 278, 291.

69. *Id.* at 286.

70. *Id.* at 283.

71. *Id.* at 297.

72. *Id.* at 15.

73. *Id.* at 308.

74. *Id.* at 309.

75. *Id.* at 308–09.

IV. THE NEED FOR TREATY OBLIGATIONS AS A SUPPLEMENT  
TO CURRENT ENVIRONMENTAL LITIGATION

Prior to *Juliana*, most environmental lawsuits in the United States met similar fates. Challenges to NEPA, the Clean Air Act, and the public trust doctrine have all been dismissed under the guise of standing deficiencies.<sup>76</sup> Reliance on the standing doctrine effectively removes “any direct claim to justice.”<sup>77</sup> Standing issues in environmental lawsuits can be gleaned from an overview of three prominent cases.

A. *Previous Environmental Cases—Legitimate Holdings or Scapegoating?*

*Lujan v. National Wildlife Federation*<sup>78</sup> is one of the most prominent and widely cited environmental lawsuits in the United States. *Lujan* was a case brought by the National Wildlife Federation alleging that several federal parties violated the Federal Land Policy and Management Act of 1976 and NEPA.<sup>79</sup> As NEPA does not provide a private right of action, the Wildlife Federation used the Administrative Procedure Act (APA) to bring these allegations against the federal agencies.<sup>80</sup> Standing under the APA is a two-prong test.<sup>81</sup> First, the party seeking a right to sue must establish that the federal agency took action that affected him “in [a] specified fashion.”<sup>82</sup> Second, the party must show that he suffered legal injury or that he was “adversely affected or aggrieved . . . within the meaning of a relevant statute.”<sup>83</sup>

*Lujan* met its demise when the Supreme Court held the injury requirement had not been met.<sup>84</sup> While the Court acknowledges judicial intervention “may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole ‘program’ to be revised by the agency in order

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76. See Ogden, *supra* note 5, at 2 (citing Holly Doremus, *The Persistent Problem of Standing in Environmental Law*, 40 ENV'T L. REP. NEWS & ANALYSIS 10956 (2010)) (categorizing standing requirements as the “most persistent constitutional quandary for environmental law”).

77. Francisco Benzoni, Note, *Environmental Standing: Who Determines the Value of Other Life?*, 18 DUKE ENV'T L. & POL'Y F. 347, 347 (2008).

78. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

79. *Id.* at 875.

80. *Id.* at 872, 882 (discussing standing requirements under Section 702 of the Administrative Procedure Act “[s]ince neither the FLPMA nor NEPA provides a private right of action”).

81. *Id.* at 882.

82. *Id.*

83. *Id.* at 883.

84. See *id.* at 892 (“[A]ctions will not be ripe for challenge until some further agency action or inaction more immediately harming the plaintiff occurs.”).

to avoid the unlawful result,” the Court ultimately held these “sweeping actions” should be left to other governmental branches.<sup>85</sup> This holding had detrimental effects on the environmental lawsuits that followed.

Thirteen years after *Lujan*, the Ninth Circuit heard *Washington Environmental Council v. Bellon*.<sup>86</sup> *Bellon* was a direct action under the citizen-suit provision of the Clean Air Act.<sup>87</sup> Under the citizen-suit provision, standing is established based on Article III requirements: “(1) he or she suffered an injury-in-fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision.”<sup>88</sup> For an environmental plaintiff, the injury-in-fact requirement may be satisfied by showing the alleged governmental conduct “impairs” the plaintiff’s “economic interests or [a]esthetic and environmental well-being” or could cause future harm to those interests.<sup>89</sup>

Unlike *Lujan*,<sup>90</sup> the *Bellon* court found sufficient injury to satisfy the first standing prong.<sup>91</sup> However, the court ultimately determined that Washington Environmental Council failed to satisfy the remaining two standing prongs.<sup>92</sup> While analyzing the causality prong, the court enunciated a critical standing hurdle to deny plaintiffs any sort of relief.<sup>93</sup> The court stated, “[i]t is currently beyond the scope of existing science to identify a specific source of [greenhouse gas] emissions and designate it as the cause of specific climate impacts at an exact location.”<sup>94</sup> Relying on this same scientific uncertainty hurdle, the court also determined that plaintiff’s injuries would continue regardless of an injunction against defendants.<sup>95</sup>

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85. *Id.* at 894.

86. *Wash. Env’t Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013).

87. *Id.* at 1135.

88. *Id.* at 1139–40 (citing *Lujan*, 504 U.S. at 560–61).

89. *Id.* at 1140 (citing *Nat. Res. Def. Council v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008)).

90. *Lujan*, 497 U.S. at 892.

91. *See Wash. Env’t Council*, 732 F.3d at 1141 (finding plaintiffs satisfied the injury prong under the citizens suit provision).

92. *See id.* at 1147 (“Plaintiffs have not met their burden in satisfying the ‘irreducible constitutional minimum’ requirements for Article III standing under either the causality or redressability prong.”).

93. *See id.* at 1144 (blaming the “multitude of independent third parties” as contributing factors to plaintiffs’ injuries).

94. *See id.* at 1143 (citing Letter from Dir., U.S. Geological Surv., to Dir., U.S. Fish & Wildlife Serv. (May 14, 2008)).

95. *See id.* at 1146–47 (determining Plaintiff’s injuries to be ongoing, regardless of an injunction).

Public trust doctrine claims have been met with similar unfortunate results. In *Kanuk v. State Department of Natural Resources*,<sup>96</sup> a group of minors from Alaska claimed the state violated the public trust doctrine by failing to protect the atmosphere.<sup>97</sup> The *Kanuk* court found the plaintiffs had proper standing and did not raise a political question.<sup>98</sup> Nevertheless, the court still affirmed the dismissal of plaintiffs' suit on prudential grounds that a "court that 'know[s] at the commencement of litigation that it will exercise its broad statutory discretion to decline declaratory relief[]' need not undertake a 'wasteful expenditure of judicial resources' in 'the futile exercise of hearing a case on the merits first.'"<sup>99</sup> The court reasoned that the declaratory relief sought would be insufficient to remedy the public trust situation and to provide the plaintiffs relief.<sup>100</sup>

It is obvious the courts are dutifully relying on the holding in *Lujan*,<sup>101</sup> but the tides could rightfully change. *Juliana* is a monumental case, regardless of how the case is ultimately resolved.<sup>102</sup> Even though *Juliana* was dismissed for lack of standing by a strongly divided Ninth Circuit panel, the court made unprecedented remarks on the sufficiency of evidence pertaining to the injury and causation elements.<sup>103</sup> For the first time, a court actually discussed the merits of an environmental suit and the government's undeniable infringement on fundamental rights.<sup>104</sup> Ensuring that *Juliana*<sup>105</sup> is not just an anomaly may require enforcement of stronger obligations on the United States government as one court has already denounced the actions of the *Juliana* court.<sup>106</sup> Reviving the Court's

96. *Kanuk v. State Dep't of Nat. Res.*, 335 P.3d 1088 (Alaska 2014).

97. *Id.* at 1090.

98. *Id.* at 1099.

99. *See id.* at 1101 (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287–88 (1995)).

100. *See id.* at 1102 (declaring the atmosphere subject to public trust doctrine would not have a sufficient impact on greenhouse gas emissions in Alaska and would not provide proper relief or protection from plaintiffs' injuries).

101. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

102. *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018) (awaiting a ruling on plaintiff's motion to amend their complaint to adjust the remedy sought).

103. *Juliana v. United States*, 947 F.3d 1159, 1166–67 (9th Cir. 2020) (finding copious evidence of the "havoc on the Earth's climate" caused by fossil fuels and conclusive evidence that the federal government has "long understood the risks of fossil fuel use" while affirmatively promoting such use).

104. *Id.*

105. *Id.*

106. *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 254 (E.D. Pa. 2019) (finding the reasoning of the *Juliana* court unpersuasive and refusing to acknowledge the federal government has "an affirmative duty to protect all land and resources within the United States—enforceable as a substantive due process right under the Fifth and Ninth Amendments").



willingness to recognize a private right of action in international treaties may be the enforcement needed to see true change in American environmental policy.

#### B. *Recognition of Individual Rights Under International Treaties*

Individual rights under international treaties and customs are not novel. Other countries utilize these rights to force governmental compliance with environmental obligations.<sup>107</sup> Recently, The Hague Court of Appeal upheld a judgment forcing the Netherlands to comply with environmental obligations based on a lawsuit brought by a citizen's foundation, Urgenda.<sup>108</sup> The court found that, by failing to meet sufficient emission reduction goals, the Netherlands had not done enough to prevent climate change.<sup>109</sup> Relying on the right to life obligation under Article 2 of the European Convention on Human Rights (ECHR),<sup>110</sup> and the fact the Netherlands is an Annex I state under the UN Framework Convention on Climate Change (UNFCCC), the court determined the Netherlands had a "positive obligation" to protect citizens, notwithstanding scientific uncertainty<sup>111</sup> or any possible reduction being a mere "drop in the ocean" globally.<sup>112</sup>

The European Union is not the only judicial body enforcing environmental treaty obligations. The International Court of Justice (ICJ) has also imposed liability on countries found committing environmental law violations.<sup>113</sup> Despite having made similar international commitments to

107. *See, e.g.*, Netherlands v. Urgenda Foundation, C/09/456689/HA ZA 13-1396, Ruling, ¶ 71 (The Hague Court of Appeal Oct. 9, 2018), [https://elaw.org/system/files/attachments/public\\_resource/Urgenda\\_2018\\_Appeal\\_Decision\\_Eng.pdf?\\_ga=2.199993575.856741879.1571441224-564306796.1571441224](https://elaw.org/system/files/attachments/public_resource/Urgenda_2018_Appeal_Decision_Eng.pdf?_ga=2.199993575.856741879.1571441224-564306796.1571441224) (relying on the European Convention on Human Rights and United Nations Framework Convention on Climate Change to hold Netherlands liable for insufficient action relating to environmental protection).

108. *See id.* at ¶ 76 (upholding the district court's determination that the Netherlands was acting unlawfully and "should reduce emissions by at least 25% by end-2020").

109. *Id.* at ¶ 71.

110. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Sept. 3, 1953, ETS 5.

111. *See* source cited *supra* note 107 ("[T]he State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR . . . If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible.").

112. *Id.* at ¶ 28.

113. *See* Certain Activities Carried Out by Nicaragua in the Border Area (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665 (Dec. 16) (holding Nicaragua liable for international environmental law violations in Costa Rica); *see also* Whaling in the Antarctic (Australia v. Japan), Judgment, 2014 I.C.J.

environmental preservation and every citizen's right to life, the United States fails to judicially recognize these obligations in the context of litigation.<sup>114</sup> As discussed above, the judiciary refuses to hold the United States government accountable for environmental preservation while using standing as an excuse.<sup>115</sup> Therefore, enforcement of these international commitments should produce results similar to those found in the Hague appellate court and the ICJ.

C. *A Summary of International Treaties and Policies at Play*

1. North American Agreement on Environmental Cooperation

One potential treaty violation can be found by the United States' non-compliance with the North American Agreement on Environmental Cooperation (NAAEC). NAAEC is the environmental side agreement to the North American Free Trade Agreement (NAFTA).<sup>116</sup> Under the NAAEC, the United States, Canada, and Mexico created a framework for enhancing environmental protection within their respective territories.<sup>117</sup> The framework obligates each country to "ensure that its laws and regulations provide for high levels of environmental protection[.]"<sup>118</sup> While "high levels" of protection is not defined within the treaty, the current

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Rep. 348 (March 31) (separate opinion by Cançado Trindade, J.) (applying intergenerational equity, international environmental law, and international human rights law, even in the face of scientific uncertainty).

114. See North American Agreement on Environmental Cooperation, *supra* note 7, at art. 3 (ensuring the laws and regulations in the United States provide for a "high level" of environmental protection); Vienna Convention for the Protection of the Ozone Layer, *supra* note 23, at art. 2(1) (promising adequate measures will be implemented to protect "human health and the environment"); Civil and Political Rights, *supra* note 58, at art. 6 ("Every human being has the inherent right to life.").

115. See generally *supra* Part II ("Utilizing standing as a scapegoat has led to millions being injured and deprived of their right property and preservation of their environment without the ability to hold anyone accountable.").

116. See Clifford T. Cosgrove, *The NAAEC After Ten Years: A Qualitative Assessment of the North American Agreement on Environmental Cooperation*, in Graduate Student Theses, Dissertations, & Professional Papers 8629, 2 (2005) (discussing the NAAEC in relation to the NAFTA and expressing the interconnectivity of NAFTA and the NAAEC); see also North American Agreement on Environmental Cooperation, *supra* note 7, at pmb1. ("acknowledging" and "reconfirming" NAFTA).

117. See North American Agreement on Environmental Cooperation, *supra* note 7, at pmb1, ("Convinced of the benefits to be derived from a framework . . . to facilitate effective cooperation on the conversation, protection and enhancement of the environment in their territories[.]").

118. See *id.* at art. 3.

administration's complete disregard for the environment cannot sufficiently satisfy this obligation.<sup>119</sup>

Under the NAAEC, the United States also agreed to monitor and investigate any perceived violation of the environmental laws and regulations, as well as police and enforce those affirmed violations.<sup>120</sup> The policing and enforcing of laws and regulations are the biggest glaring violations of the NAAEC. Article 6 of the NAAEC ensures all "interested persons" have the right to private judicial remedies for violations of environmental laws and regulations.<sup>121</sup> Despite the United States agreeing to "ensure that persons with a legally recognized interest under its law . . . have appropriate access to . . . judicial proceedings for the enforcement of the Party's environmental laws and regulations,"<sup>122</sup> the United States has continuously failed to provide access to adequate judicial proceedings.<sup>123</sup> Because individuals have a legally recognized interest in the preservation of their environment under the public trust doctrine, violations of the NAAEC will continue until the judiciary provides proper access to judiciary proceedings.

## 2. Vienna Convention for the Protection of the Ozone Layer

While NAAEC is the most recently executed environmental treaty, it is not the only binding treaty upon this country. The United States is also a party to the Vienna Convention for the Protection of the Ozone Layer (Vienna Convention), which entered into force in 1988.<sup>124</sup> After ratifying and executing the Vienna Convention, the United States became obligated to "take appropriate measures . . . to protect human health and the

119. See Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *95 Environmental Rules Being Rolled Back Under Trump*, NY TIMES (Dec. 21, 2019), <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html> [<https://perma.cc/M6F6-TBLK>] (identifying ninety-five environmental "rollbacks" that will increase greenhouse gas emissions and poor air quality).

120. See North American Agreement on Environmental Cooperation, *supra* note 7, at art. 5(1)(b), 5(1)(j) (outlining the required government enforcement mechanisms).

121. See *id.* at art. 6, (requiring the United States to provide private access to judicial proceedings).

122. See *id.* at art. 6(2).

123. See *Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1147 (9th Cir. 2013) (finding causality and redressability of injury insufficient to maintain standing); *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250 (E.D. Pa. 2019) (dismissing claims for lack of standing without reaching merits); *Kanuk v. State Dep't of Nat. Res.*, 335 P.3d 1088, 1103 (Alaska 2014) (holding minors proved sufficient standing to bring suit against the state, but ultimately dismissing case because declaratory relief sought would not have remedied the situation).

124. See Vienna Convention for the Protection of the Ozone Layer, *supra* note 23.

environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.”<sup>125</sup> Appropriate measures contemplated by the Vienna Convention included legislative measures ensuring environmental protection.<sup>126</sup> Legislative measures must be appropriate in the context of each parties’ capabilities.<sup>127</sup>

While the United States has enacted legislative measures concerning environmental preservation,<sup>128</sup> the adequacy of those measures is clearly at issue. Despite environmental regulations being in place, carbon emissions have reached an all-time high.<sup>129</sup> Considering the United States contributes over twenty-five percent of world-wide carbon emissions,<sup>130</sup> our efforts to protect the environment should not be “critically insufficient.”<sup>131</sup> The lack of adequate environmental efforts in correlation with what the United States is capable of is a direct violation of the Vienna Convention.

### 3. United Nations Framework Convention on Climate Change

One of the biggest indicators that the United States agrees that global cooperation is necessary to protect the environment for future generations is the ratification of the United Nations Framework Convention on Climate Change (UNFCCC).<sup>132</sup> Beginning with the preamble, the UNFCCC is infiltrated with the importance of proper regulation of climate change.<sup>133</sup> The overall objective of the UNFCCC is to stabilize greenhouse gas

125. *See id.* at art. 2(1).

126. *See id.* at art. 2(2)(b) (obligating parties to “adopt appropriate legislative or administrative measures . . . to control, limit, reduce, or prevent” harm to the ozone layer).

127. *See id.* at art. 2(2).

128. For a summary of environmental legislation: *see* Case, *supra* note 23, at 56 (discussing the environmental measures of the United States) (explaining the preventative measures taken by the United States).

129. *See* Russell, *supra* note 1.

130. Complaint at 151, *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. Aug. 12, 2015).

131. *See* Kieran Mulvaney, *Climate Change Report Card: These Countries Are Reaching Targets*, NAT’L GEOGRAPHIC (Sept. 19, 2019), <https://www.nationalgeographic.com/environment/2019/09/climate-change-report-card-co2-emissions/> [<https://perma.cc/R8LU-RJVK>] (highlighting the current Administration’s hostility toward climate policy and categorizing our efforts as “barely trying”).

132. *See* Complaint at 145, *Juliana*, (discussing ratification of UNFCCC as evidence of “overwhelming weight” in support of protecting the atmosphere under the principles of intergenerational equity).

133. *See* United Nations Framework Convention on Climate Change, *supra* note 23, at pmb1. (beginning with the acknowledgment of the effect Earth’s climate has on humankind, followed by the recognition that effective environmental regulation is crucial).

emissions.<sup>134</sup> In achieving a stabilization of gas emissions, each country<sup>135</sup> committed to adopting policies which would return emissions to 1990 levels.<sup>136</sup> While the full scientific analysis of 1990 greenhouse gas emission levels are beyond the scope of this Comment, the most recent EPA report to UNFCCC shows emissions were still well above 1990 levels.<sup>137</sup>

Several years after ratification of the UNFCCC, the UNFCCC parties negotiated the Kyoto Protocol expanding the affirmative actions required by Annex I countries.<sup>138</sup> While other Annex I countries went on to ratify the Kyoto Protocol, the United States was noticeably missing.<sup>139</sup> Other prominent Annex I countries followed suit and withdrew their signatures from the Protocol.<sup>140</sup> This domino effect shows the enormous impact and influence the United States has on global environmental goals. A laissez-faire attitude towards environmental concerns by such an influential country will only exacerbate an already dire situation.

#### 4. Copenhagen Accord

Although the United States did not ratify the Kyoto Protocol, in 2009 the United States participated in the Copenhagen Accord under the UNFCCC.<sup>141</sup> In response to the Copenhagen Accord, the United States pledged to reduce its 2005 greenhouse gas emission levels by seventeen percent.<sup>142</sup> While seventeen percent seems ideal, the measurement of 2005 levels truly only results in a three percent deduction from 1990 levels—the

134. *See id.* at art. 2.

135. *See id.* at Annex I (explaining the United States was named an Annex I country).

136. *See id.* at art. 4(2)(a)–(b) (outlining the process from implementing national policies for Annex I countries).

137. EPA INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS 1990–2017, 4 (2019).

138. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Feb. 16, 2005, 2303 U.N.T.S. 162 (implementing affirmative action by signatories to satisfy quantified emission reduction percentage).

139. *See* Hersher, *supra* note 22 (explaining how the United States failed to ratify the Kyoto Protocol despite playing an “instrumental” role in the drafting of the treaty).

140. *See* Jessica F. Green, *Trump Is Officially Withdrawing from the Paris Climate Agreement. That Won't Change Much*, WASH. POST (Oct. 30, 2019, 5:00 AM), <https://www.washingtonpost.com/politics/2019/10/30/trumps-officially-withdrawing-paris-climate-agreement-that-wont-change-much/> [https://perma.cc/V4Z5-MSYJ] (“The United States did not join the Kyoto Protocol, and major emitters such as Canada and Australia either withdrew or did not sign on to its continuation.”); *see also* United Nations Framework Convention on Climate Change, *supra* note 23, at 107 (listing Canada and Australia as Annex I countries).

141. *See* UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, *supra* note 14.

142. Letter from Todd Stern to Yvo de Boer (Jan. 28, 2010) (on file with author).

levels initially used under the UNFCCC.<sup>143</sup> Even though there was “near universal” attendance in Copenhagen, the Copenhagen Accord was regarded as a failure.<sup>144</sup>

### 5. Paris Agreement

Just six years after the Copenhagen Accord, the parties of the UNFCCC met again and negotiated the Paris Agreement.<sup>145</sup> Ironically, the United States played an integral part in drafting the Paris Agreement, specifically pushing for more “transparency and accountability.”<sup>146</sup> Upon ratification, the United States became obligated to carry out “economy-wide absolute emission reduction targets.”<sup>147</sup> The targets were individually tailored and voluntarily pledged by each country.<sup>148</sup> Under the Paris Agreement, the United States pledged to reduce 2005 greenhouse gas emission levels by more than a quarter before 2025.<sup>149</sup>

Clearly the obligations under the Paris Agreement offered enormous flexibility when contrasted with the Kyoto Protocol.<sup>150</sup> The Kyoto Protocol’s centralized enforcement scheme became obsolete by the Paris Agreement’s decentralized approach, which promoted tailor-made legislation pursuant to each country’s individual needs and economic positions.<sup>151</sup> However, even the flexibility and country-centered approach

143. Richard L. Ottinger, *Introduction: Copenhagen Climate Change Conference—Success or Failure?*, 27 PAGE ENV’T L.R. 411, 416 (April 2010).

144. *See id.* at 411–12, 415–16 (explaining frustrations with “large emitters” making insufficient reduction commitments and resulting in no binding agreement).

145. *See What Is the Paris Agreement?*, UNFCCC, <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement> [<https://perma.cc/3VHB-3P6D>] (“The Paris Agreement establishes binding commitments by all Parties to prepare, communicate and maintain a nationally determined contribution (NDC) . . . Parties shall communicate their NDCs every 5 years.”).

146. *See* Hersher, *supra* note 139.

147. U.N. Framework Convention on Climate Change Conference of Parties art. 4, Twenty-First Session, Adoption of the Paris Agreement, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015); *see also* *What Is the Paris Agreement?*, *supra* note 145 (summarizing Article 4 of the Paris Agreement).

148. *See What Is the Paris Agreement?*, *supra* note 145 (using terms like “should” and “encourages all Parties” when summarizing the Paris Agreement).

149. *See* Hersher, *supra* note 139.

150. *See* Green, *supra* note 140 (explaining the “flexible framework” of the Paris Agreement only requires “some action” in the direction of overall “ambitions”).

151. *See id.* at 2 (“[E]mphasizing national and subnational action, means that climate policy can be tailored to domestic economic concerns and political constraints.”).

was not enough to ensure compliance, as the Trump Administration officially withdrew from the Paris Agreement on November 4, 2019.<sup>152</sup>

Regardless of the failed, or revoked attempts of the Kyoto Protocol, the Copenhagen Accord, and the Paris Agreement; the United States is still responsible for adhering to the UNFCCC reduction standards. The United States is currently violating the UNFCCC by not having adequate environmental regulations to reduce carbon emissions to 1990 levels.

#### 6. Customary International Law—Intergenerational Equity

Intergenerational equity is a prominent international law principal strongly recognized by the United States. Intergenerational equity invades the context of environmental law because “the power of the present generation to unilaterally inflict enormous environmental harm on generations yet unborn” cannot be unrestricted.<sup>153</sup> The pervasive use and acknowledgment of this doctrine by the United States can be seen in a plethora of ratified treaties,<sup>154</sup> as well as domestic law.<sup>155</sup>

### V. SOLUTION—JUDICIAL RECOGNITION AND ENFORCEMENT OF INDIVIDUAL TREATY RIGHTS UNDER ENVIRONMENTAL TREATIES

Pursuant to the Supremacy Clause, treaty violations are identical to constitutional or federal statutory violations.<sup>156</sup> Reverting to judicial precedence accentuating the Framers’ intent to make treaties law—parallel to the Constitution—would prevent *Juliana*-type<sup>157</sup> claims from dismissal under the guise of standing. *Juliana*-type<sup>158</sup> claims encompass an obligation,

152. Press Statement, Michael R. Pompeo, Sec’y of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019).

153. See Collins, *supra* note 12, at 92.

154. See United Nations Framework Convention on Climate Change, *supra* note 23, at pmb1. (“Determined to protect the climate system for present and future generations.”); North American Agreement on Environmental Cooperation, *supra* note 6, at pmb1. (acknowledging “the importance of the conservation, protection and enhancement of the environment in their territories and the essential role of cooperation in these areas in achieving sustainable development for the well-being of present and future generations”).

155. See 42 U.S.C. § 4331(a) (2012) (ensuring the government will act in a manner conducive to the preservation of the environment for present and future generations).

156. U.S. CONST. art. VI, cl. 2.

157. *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018).

158. *Id.*

a breach of that obligation, and an injury.<sup>159</sup> Similarly, treaties place obligations on the United States, and when there is non-compliance with that obligation resulting in an injury, the injured individual should have a cause of action before the court.

#### A. *Sufficiency of Treaty Ratification Process*

However, enforcement of treaties as the “supreme Law of the Land” has been severely diluted by the judiciary. Courts have continuously required an additional step before most treaties can be grounds for a domestic lawsuit.<sup>160</sup> In the words of one Supreme Court Justice, requiring an additional act of Congress before giving the Supremacy Clause effect would be a “bold proposition.”<sup>161</sup> The constitutional ratification process combined with the Supremacy Clause, indicates that treaties binding and enforceable on the United States internationally should also be binding and enforceable domestically.

“Under U.S. law, a treaty is an agreement negotiated and signed by a member of the executive branch that enters into force if it is approved by a two-thirds majority of the Senate and is subsequently ratified by the President.”<sup>162</sup> The two-thirds majority vote of the Senate means that all treaties must overcome bi-partisanship before ratification by the President.<sup>163</sup> Before reaching the Senate, treaties are negotiated by the executive branch.<sup>164</sup> Although the president can maintain negotiating power individually, historically, negotiations have involved numerous congressional members with specialized knowledge of relevant treaty

159. See Complaint at 8, *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. Aug. 12, 2015) (summarizing governmental “actions have caused damage to and continue to threaten the resources on which [plaintiff] relies for her survival and wellbeing”).

160. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 515, 525–26 (2008) (Beyer, J., dissenting) (implying the only basis for domestic adjudication of treaty claims lies with Congress to either declare a treaty self-executing or create federal law recognizing a private right of action).

161. *Id.* (citing *Lessee of Pollard’s Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 388 (1840) (Baldwin, J., concurring)).

162. STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 3 (2018); see also U.S. CONST. art. II, § 2 (authorizing the President “by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur”).

163. See *Treaties: A Historical Overview*, UNITED STATES SENATE, <https://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm> [<https://perma.cc/ZBG2-B48U>] (expressing bi-partisanship is required for pure change in the realm of treaties) (highlighting the historical nature of treaties and the ability to have governmental approval).

164. See U.S. CONST. art. II, § 2 (making treaties is a constitutional presidential power).



topics.<sup>165</sup> Between treaty negotiation and the two-thirds vote obligation, the approval of a treaty requires above and beyond any approval required for any domestic law.<sup>166</sup>

Therefore, treaties are negotiated by the executive branch, scrutinized and approved by the legislative branch, and then completely untouchable by the judiciary without additional legislative approval. The inability of the judiciary to participate, validate, or enforce treaties seems to go directly against the coveted checks and balances of the United States government. The carefully vetted treaty ratification process used to be sufficient to mandate enforceability of the treaty by the judiciary regardless of self-execution status.<sup>167</sup>

B. *The Safeguard—The Government's Ability to Refuse to Ratify Treaties or to Ratify Treaties Only if the Treaty is Non-Self-Executing*

Additional evidence of the sufficiency of the treaty ratification process is shown by the governments adamant refusal to ratify treaties—or ratifying only upon the condition that the treaty is rendered basically useless—they find incompatible with U.S. policy. For example, the International Convention on Civil and Political Rights (ICCPR) is a prominent human rights treaty, which the United States drag its feet to ratify.<sup>168</sup> While the United States eventually ratified the ICCPR—twenty-six years after approval by the United Nations—ratification only occurred after the United States submitted reservations rendering the treaty utterly useless under

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165. See Louis Fisher, *Treaty Negotiation: A Presidential Monopoly?*, 38 PRESIDENTIAL STUD. Q. 144, 150–55 (March 2008) (navigating various treaty negotiation examples to demonstrate vast congressional involvement, especially in recent treaties involving trade).

166. See U.S. CONST. art. I, § 5, cl. 1 (explaining a simple majority—not two-thirds—is required for either House to conduct business).

167. See *Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961) (enforcing succession rights to individual property pursuant to an 1881 Treaty between the United States and Serbia); *Clark v. Allen*, 331 U.S. 503, 508 (1947) (recognizing succession rights to property under the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany); *Hauenstein v. Lynham*, 100 U.S. 483, 485–86 (1879) (“The first part of the article is devoted to personal property, and gives to the citizens of each country the fullest power touching such property belonging to them in the other.”).

168. See Katrina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. J. INT'L HUM. RTS. 1, n. 13 (2005) (stating 114 countries approved of the ICCPR before the United States became a party 26 years after initial approval by the United Nations).

domestic law.<sup>169</sup> Specifically, the United States refused to ratify the ICCPR without making it a non-self-executing treaty.<sup>170</sup>

The particulars of self-execution status are discussed below. However, a non-self-executing treaty has no enforceability in the United States judiciary without an act of Congress.<sup>171</sup> Therefore, the simple declaration of a treaty being “non-self-executing” completely removes a citizen’s ability to bring any enforcement action against the government despite any violation thereof.<sup>172</sup> While the United States claims to be committed to preserving an individual’s “right to life,”<sup>173</sup> the ability to enforce that right is negated by the judiciary’s refusal to take any action against violators. Not recognizing a private right of action leaves the citizens of the United States unable to hold their own government accountable.

Nevertheless, a declaration against domestic enforcement does not prevent another country from enforcing ICCPR obligations against the United States.<sup>174</sup> For example, another country could claim the United States violated Article 6 of the ICCPR for failing to implement appropriate laws protecting the inherent right to life.<sup>175</sup> Even more so, the United States could be found in violation of “arbitrarily” depriving citizens in other countries of the right to life by significantly affecting the environment to the point resources become scarce.<sup>176</sup> It seems hard to fathom, but currently, another country has more power to hold the United States government

169. *See id.* at ¶ 11.

170. S. COMM. ON FOREIGN REL., REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 23, 1 (102d Sess. 1992), *reprinted in* 31 I.L.M. 645 (1992); *see also id.* at ¶ 17 (summarizing the various reservations and declarations as pre-requisites for ratification).

171. *See* *Medellin v. Texas*, 552 U.S. 491, 514 (2008) (encapsulating the elusive definition of “self-executing” and “non-self-executing” treaties).

172. *See id.* at 514 (enunciating the requirement that the legislature create a private right of action in non-self-executing treaties); *see also* MULLIGAN, *supra* note 162 (“[M]any treaties and executive agreements are not self-executing, meaning that implementing legislation is required to render the agreement’s provisions judicially enforceable in the United States.”).

173. *See* U.S. CONST. amend. V (guaranteeing the right to “life, liberty, [and] property”); *see also* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS art. 6, March 23, 1976, 99 U.N.T.S. 171 (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

174. *See* United Nations, *Statute of the International Court of Justice* art. 36(2), April 18, 1946 (authorizing the International Court of Justice to hear legal disputes concerning the breach of international obligations).

175. *See* Civil and Political Rights, *supra* note 58, at 171 (“Every human being has the inherent right to life. This right shall be protected by law.”).

176. *See id.* (“No one shall be arbitrarily deprived of his life.”).

accountable for their contributions to detrimental climate change than a United States citizen.<sup>177</sup>

The United States has also demonstrated the ratification process's sufficiency of the by downright refusing to ratify some of the most prominent human rights treaties to date.<sup>178</sup> Most notably, the refusal to ratify the International Convention on Economic, Social, and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC).<sup>179</sup> These two treaties are overwhelmingly accepted in the international community.<sup>180</sup>

Despite an alleged commitment to environmental protection,<sup>181</sup> the United States refuses to ratify a treaty that would guarantee appropriate measures are taken to preserve the “right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”<sup>182</sup> These actions are directly adverse to a universally accepted principle—that everyone has a right to adequate living standards—by

177. See CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665 (Dec. 16) (allowing Nicaragua to sue Costa Rica over international environmental law violations); see also WHALING IN THE ANTARCTIC (Australia v. Japan), Judgment, 2014 I.C.J. Rep. 348 (March 31) (separate opinion by Cançado Trindade, J.) (allowing Australia to sue Japan over alleged violations of intergenerational equity, international environmental law, and international human rights law violations).

178. See *Where the United States Stands*, *supra* note 59 (showing the United States signed the International Covenant on Economic, Social, and Cultural Rights in 1977, and the Convention on the Rights of the Child in 1995, but—despite near universal acceptance—have refused to ratify either treaty).

179. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3; Convention on the Rights of the Child art. 6, Sept. 2, 1990, 1577 U.N.T.S. 3 [hereinafter Economic, Social and Cultural Rights]; see also *id.* (stating “nearly every country in the world is a party” to the ICESCR and every United Nations member is a party to the CRC except the United States and Somalia).

180. See *Where the United States Stands*, *supra* note 59 (demonstrating near universal acceptance of the ICESCR and classifying the CRC as “the most widely accepted human rights treaty”).

181. See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (2012) (establishing a broad framework for protecting the environment); see also Pollution Prevention Act, 42 U.S.C. §§ 13101 *et seq.* (2012) (focusing industry, government, and public attention on reducing pollution through cost-effective changes to energy efficiency and conservation); Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (2012) (regulating air emissions from mobile sources to protect public health and welfare).

182. Economic, Social and Cultural Rights, *supra* note 179, at 3.

destroying the very resources necessary to maintain that right.<sup>183</sup>

### C. *Irrelevancy of Self-Execution Status*

Currently, the ability to bring a private right of action in the United States depends on whether the treaty is self-executing.<sup>184</sup> Relying on self-executing treaty status allows the United States to create obligations and rights while avoiding all liability for non-compliance. A self-executing treaty is the “equivalent [of] an act of the legislature, whenever it operates by itself without the aid of any legislative provision.”<sup>185</sup> The self-execution doctrine first appeared in *Foster v. Neilson*.<sup>186</sup> The *Foster* Court interpreted the treaty provision requiring the United States to “ratify or confirm” as a promise of future action.<sup>187</sup> The promise of future action means execution by the legislature before the Court could enforce the treaty.<sup>188</sup> However, *Foster* was overturned when the Spanish version of the treaty showed the provision truly read: “remain ratified and confirmed.”<sup>189</sup>

Conversely, a non-self-executing treaty requires a legislative act before any obligation under the treaty can be enforced judicially.<sup>190</sup> The distinction between self-executing and non-self-executing has created immense confusion.<sup>191</sup> While Congress has the power to issue reservations expressly stating a treaty is not self-executing,<sup>192</sup> many treaties do not contain any such language. Without express non-self-executing language, courts have been left to decipher congressional intent to determine self-executing status when faced with treaty violations.<sup>193</sup>

183. See Complaint at 8, *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. Aug. 12, 2015) (summarizing governmental actions that “have caused damage to and continue to threaten the resources on which [plaintiff] relies for her survival and wellbeing”).

184. See MULLIGAN, *supra* note 162 (equating self-executing treaties with federal statutes in the context of judicial enforcement).

185. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 254 (1829).

186. *Id.* at 253.

187. See Vázquez, *Treaty-Based Rights*, *supra* note 64, at 1125.

188. *Id.* at 1125.

189. See *id.* (referencing *U.S. v. Percheman*, 32 U.S. 51, 88 (1833)).

190. *Medellín v. Texas*, 552 U.S. 491, 514 (2008).

191. See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995) (emphasizing numerous federal court opinions that treat classify this distinction as the “most confounding” in the United States law of treaties”).

192. See David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135, 170 (2012) (referencing the “treaty makers” ability to add non-self-executing treaty provisions).

193. See Vázquez, *supra* note 191 at 705 (explaining the “increasing willingness” of courts to look at legislative history when determining whether a treaty is self-executing).

The lack of clarity surrounding the distinction between self-executing and non-self-executing treaties is an unnecessary wormhole.<sup>194</sup> Instead, the analysis should require an assessment of the treaty's subject matter and whether the litigant is a "beneficiary" under the treaty.<sup>195</sup> If a treaty addresses "traditional private legal rights such as rights to own property," the correct place to enforce those rights is before the judiciary.<sup>196</sup> Courts have upheld individual property rights in treaties for over 200 years.<sup>197</sup> An overwhelming majority of those cases involved beneficiary inheritance rights.<sup>198</sup>

For over 170 of those years, the Supreme Court recognized an enforceable private right of action in treaties.<sup>199</sup> These actions typically stemmed from property or inheritance rights.<sup>200</sup> For example, the Supreme Court in *Clark v. Allen*<sup>201</sup> recognized an individual right under the Treaty on Friendship, Commerce, and Consular Rights for disposition of realty through inheritance.<sup>202</sup> Under the public trust doctrine and intergenerational equity, individuals are ultimately seeking preservation of

194. See Vázquez, *supra* note 64 at 1120 ("[T]he doctrine of self-executing treaties . . . is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts.").

195. *Id.* at 1116.

196. *Medellin v. Texas*, 552 U.S. 491, 550 (2008) (Breyer, J., dissenting).

197. See *Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961) (enforcing succession rights to individual property pursuant to an 1881 Treaty between the United States and Serbia); see also *Clark v. Allen*, 331 U.S. 503, 508 (1947) (recognizing succession rights to property under the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany); *Hauenstein v. Lynham*, 100 U.S. 483, 485–86 (1879) ("The first part of the article is devoted to personal property, and gives to the citizens of each country the fullest power touching such property belonging to them in the other[.]").

198. See *Kolovrat*, 366 U.S. at 198 (enforcing succession rights to individual property pursuant to an 1881 Treaty between the United States and Serbia); see also *Clark v. Allen*, 331 U.S. 503, 508 (1947) (recognizing succession rights to property under the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany); *Hauenstein v. Lynham*, 100 U.S. 483, 485–86 (1879) ("The first part of the article is devoted to personal property, and gives to the citizens of each country the fullest power touching such property belonging to them in the other[.]").

199. Oona A. Hathaway, Sabrina McElroy & Sara Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY 53, 56 (2012), [https://digitalcommons.law.yale.edu/fss\\_papers/3851](https://digitalcommons.law.yale.edu/fss_papers/3851) [<https://perma.cc/ZFP7-VGZN>] ("A private right of action allows a private party to seek a remedy from a court for the violation of a private right provided by a treaty.").

200. *Id.* at 58.

201. *Clark v. Allen*, 331 U.S. 503 (1947).

202. *Id.* at 508.

their inheritance rights to obtain the environment free of climate change damage.

Intergenerational equity is an acceptable foundation for governmental liability because it tracks so closely with domestic common law theories. There is precedence accepting customary international law as part of domestic law absent controlling executive, legislative, or judicial acts.<sup>203</sup> Even though statutes and judicial opinions exist regarding the public trust concept, none of them are binding enough to create liability.<sup>204</sup> However, the concept of intergenerational equity as customary international law—reinforced in treaties—is completely binding on the United States.<sup>205</sup>

#### D. *Unwarranted Presumption Shift*

Unfortunately, *Medellin v. Texas*<sup>206</sup> was the turning point of individual treaty enforcement. Even though the turning point was merely dicta, the Supreme Court, for the first time, enunciated a presumption against finding a private right of action in treaties.<sup>207</sup> The Court explained that even when a treaty was self-executing, there was still a presumption that no private right of action existed.<sup>208</sup> In determining self-execution status, the Court majority held explicit self-execution language is now required.<sup>209</sup> Contrary to precedence finding self-executing provisions absent explicit language, the majority determined the lack of self-executing language was dispositive.<sup>210</sup>

Three of the justices issued a strong, compelling dissent against the presumption shift.<sup>211</sup> Justice Breyer encouraged the Court to look at the

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203. See MULLIGAN, *supra* note 164 (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900) and referencing *Galo-Garcia v. INS*, 86 F.3d 916 (9th Cir. 1996)).

204. See 42 U.S.C. § 9607 (2012) (pronouncing the Federal Government as trustee of the environment in the context of recovering damages on behalf of future generations, but not creating a cause of action when the government causes damages); see also 42 U.S.C. § 4331(b)(1)–(2) (recognizing the present generation as trustee for succeeding generations, but utilizing the word “may” to negate a basis for a cause of action); *Kanuk v. State Dep’t of Nat. Res.*, 335 P.3d 1088, 1102 (Alaska 2014) (recognizing the legitimacy of the public trust doctrine, but determining that a declaratory judgment would not provide proper relief or protection for plaintiffs injuries).

205. See U.S. CONST. art. VI, cl. 2 (including treaties as the “supreme Law of the Land”).

206. *Medellin v. Texas*, 552 U.S. 491 (2008).

207. Hathaway, *supra* note 199, at 57.

208. *Medellin*, 552 U.S. at 506 n. 3; Hathaway, *supra* note 199, at 57.

209. See *Medellin*, 552 U.S. at 514 (relying on an early 1819 case finding a treaty non-self-executing, only to overrule that decision a few years later and determine the exact same treaty was self-executing).

210. *Id.* at 514.

211. *Id.* at 538 (Breyer, J., dissenting).

opinions written with knowledge of the “Founders’ original intent.”<sup>212</sup> The Founders’ intent to have the Supremacy Clause truly apply to all treaties is supported by prior Supreme Court decisions finding individual rights under numerous treaties, covering a wide range of subjects.<sup>213</sup>

The likely shift in presumption is partially attributed to an emergence of prominent human rights treaties.<sup>214</sup> While the surge of human rights treaties were drafted long before *Medellin*, the basic political treaty apprehension can be traced to the 1950s following the near-universal ratification of those treaties.<sup>215</sup> Human rights treaties providing a mechanism for individuals to challenge governmental policies was not something political branches openly accepted.<sup>216</sup>

#### E. *The Government Unilaterally Holds All the Enforcement Power*

Currently, the executive branch enjoys exclusive authority to enforce treaty violations against state agencies.<sup>217</sup> The government also has the sole ability to enforce environmental violations against offending agencies.<sup>218</sup> Individuals are the ones being harmed by environmental violations but have no recourse to remedy those harms. Even when environmental regulations expressly provide a private right of action, courts are refusing to acknowledge individual standing or overturn the EPA’s regulations.<sup>219</sup> Considering the United States is responsible for more than a quarter of the

212. *Id.* at 541 (Breyer, J., dissenting); see *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796) (explaining Founders’ original intent).

213. *Medellin*, 552 U.S. at 546 (Breyer, J., dissenting).

214. Hathaway, *supra* note 199, at 57.

215. See *id.* at 68–69 (identifying countless treaties prohibiting discriminatory treatment of humans and Congress’ knee jerk reaction to attempt reverse the Supremacy Clause).

216. See *id.* at 68 (arguing the “global human rights revolution and the very public backlash against it provoked increased scrutiny of treaties”).

217. *Id.* at 101; see *Medellin*, 552 U.S. at 565 (Breyer, J., dissenting) (“[T]he Executive has inherent power to bring a lawsuit ‘to carry out treaty obligations.’”).

218. See 42 U.S.C. § 9607(f)(1) (2012) (authorizing the President or “authorized representative of any State” to recover damages under the public trust doctrine); see also *Massachusetts v. E.P.A.*, 549 U.S. 497, 498 (2007) (recognizing Massachusetts satisfied “the most demanding” standing requirements of the adversarial process).

219. 42 U.S.C. § 7604(a)(1) (2012); see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (reiterating that a challenge to an agency’s reasonable statutory construction centered on “wisdom of the agency’s policy” will fail); *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981) (acknowledging courts are reluctant to enjoying “activities which have been considered and specifically authorized by the government” because it implicates complex areas of law).

entire world's CO<sub>2</sub> emissions,<sup>220</sup> something needs to be done to push substantial reduction before it is too late.

## VI. CONCLUSION

Reverting to the pre-*Medellin* presumption that every treaty is individually enforceable unless explicitly proven otherwise, aligns perfectly with the Supremacy Clause. The Founders' true intent for the Supremacy Clause was to recognize treaties as the Law of the Land. Not only has the Supreme Court negated the Founders' true intent, but the presumption shift is directly adverse to former precedence. Therefore, individual rights under environmental treaties should be recognized because they align with the Supremacy Clause and Supreme Court precedence. Without individual rights under environmental treaties, environmental claims will likely continue to meet the familiar demise under the standing doctrine or agency deference.

*Juliana* mentions the UNFCCC in the original complaint.<sup>221</sup> Citing Article 2 of the UNFCCC, the complaint alleges:

The *minimal objective* of the UNFCCC is the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.'<sup>222</sup>

The minimal objective of the UNFCCC became a binding commitment when the government decided to ratify the treaty. A binding commitment is an obligation. Failing to adhere to a Constitutional obligation would be judicially enforceable. Under the Supremacy Clause, it should follow that failing to adhere to a treaty obligation would similarly be judicially enforceable.

Leaving the fate of the environment up to the government has proven ineffective. United States citizens need as much ammunition as they can get

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220. See Complaint at 56, *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. Aug. 12, 2015) ("Between 1751 and 2014, the United States has been responsible for emitting 25.5% of the world's cumulative CO<sub>2</sub> emissions to the atmosphere from within its borders.").

221. Complaint at 55, *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. Aug. 12, 2015).

222. *Id.* (emphasis added).



to promote preservation of the environment. The United States has recognized the need to preserve the environment and should be held accountable when they violate preservation efforts.

For more than 30 years, the science has been crystal clear. How dare you continue to look away and come here saying that you're doing enough, when the politics and solutions needed are still nowhere in sight.<sup>223</sup>

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223. See Russell, *supra* note 1 (quoting Greta Thunberg, U.N. *Climate Action Summit*).