

12-1-2020

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### **Recommended Citation**

Katherine G. Horner, *“A Climate Of Lawlessness”: Upholding a Government’s Affirmative Duty to Protect the Environment Using Deshaney’s Special Relationship Exception*, 29 J. L. & Pol’y 285 (2020).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol29/iss1/7>

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**“A CLIMATE OF LAWLESSNESS”: UPHOLDING A  
GOVERNMENT’S AFFIRMATIVE DUTY TO PROTECT  
THE ENVIRONMENT USING *DESHANEY’S* SPECIAL  
RELATIONSHIP EXCEPTION**

*Katherine G. Horner*<sup>\*</sup>

[T]he direct consequences of the [federal Office of Surface Mining’s] decade-long delay [are] thousands of acres of unreclaimed strip-mined land, untreated polluted water, and millions (potentially billions) of dollars of State liabilities. The indirect results, however, may be more damaging: *a climate of lawlessness*, which creates a pervasive impression that continued disregard for federal law and statutory requirements goes unpunished, or possibly unnoticed. Agency warnings have no more effect than a wink and a nod, a deadline is just an arbitrary date on the calendar and, once passed, not to be mentioned again. Financial benefits accrue to the owners and operators who were not required to incur the statutory burden and costs attendant to surface mining; political benefits accrue to the state executive and legislators who escape accountability while the mining industry gets a free pass. Why should the state actors do otherwise when the federal regulatory enforcers’ findings, requirements, and warnings remain toothless and without effect?

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– Hon. Charles Haden, *United States District Court for the Southern District of West Virginia*<sup>1</sup>

*The Industrial Revolution introduced an era of exceptional technological advances. However, it also led to rampant environmental pollution and degradation. The proliferation of toxic pollutants in the air, water and soil has led us to the precipice of an unimaginable future; a future defined by climate change. This Note argues for the use of the special relationship exception, affirmed by the Supreme Court in *DeShaney v. Winnebago*, in environmental litigation in order to uphold governments' affirmative duty to protect the environment. As federal and state governments have the sole power to regulate environmental pollution and enforce environmental protections, individuals are left completely dependent on governments to provide for the basic necessities of safe and sustainable water, food, and air. Governments have restrained an individual's liberty to provide for these basic needs; as such, they should be under an obligation to "fill the gap."*

#### INTRODUCTION

About 250 million years ago, the largest mass extinction in Earth's recorded paleontological history eliminated 97% of all living organisms.<sup>2</sup> The Permian-Triassic extinction resulted from a mass release of carbon dioxide into the atmosphere following a colossal volcanic eruption.<sup>3</sup> As the oceans absorbed the emitted carbon dioxide, their waters warmed and became increasingly anoxic, encouraging the proliferation of certain microbes conducive

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<sup>1</sup> *W. Va. Highlands Conservancy v. Norton*, 161 F.Supp. 2d 676, 683–84 (S.D.W. Va. 2001) (emphasis added).

<sup>2</sup> David Wallace-Wells, *The Uninhabitable Earth*, N.Y. MAG. (July 10, 2017), <https://nymag.com/intelligencer/2017/07/climate-change-earth-too-hot-for-humans.html>; Michael Greshko, *What Are Mass Extinctions, and What Causes Them?*, NAT'L GEOGRAPHIC (Sept. 26, 2019), <https://www.nationalgeographic.com/science/prehistoric-world/mass-extinction/>.

<sup>3</sup> Greshko, *supra* note 2.

to under-oxygenated waters.<sup>4</sup> The lack of oxygen suffocated marine life and created swelling “dead zones.”<sup>5</sup> At the same time, greater amounts of pole ice melted into the heated oceans, which raised sea levels, slowed circulating jet streams, and interrupted ocean currents.<sup>6</sup> From the stagnant waters—now infested with oxygen-eating bacteria—poisonous hydrogen sulfide leached into the air, wiping out almost all life on the planet.<sup>7</sup>

This story comes from a past pieced together from archaeological remains; one that is far from the daily thoughts of most humans. And yet, scientists today predict that humanity is on the brink of a similar demise—one made possible by its own actions.<sup>8</sup> The Permian-Triassic extinction occurred after volcanic carbon and methane emissions inundated the air and the oceans, warming the atmosphere by five degrees Celsius.<sup>9</sup> To put this into perspective, a recent report released by the United Nations projects that under circumstances of continuously high greenhouse gas emissions global surface temperature could increase by 4.8 degrees Celsius by the end of the century.<sup>10</sup>

The international community, including the United States government, was well aware of the dire risks involved in accelerating such global warming and climate change in the late

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<sup>4</sup> *Oxygen-Depleted Toxic Oceans Had Key Role in Mass Extinction Over 200 Million Years Ago*, SCIENCE NEWS (Apr. 1, 2015), <https://www.sciencedaily.com/releases/2015/04/150401084049.htm>.

<sup>5</sup> Hannah Hickey, *What Caused Earth's Biggest Mass Extinction?*, STAN. EARTH MATTERS MAG. (Dec. 6, 2018), <https://earth.stanford.edu/news/what-caused-earths-biggest-mass-extinction#gs.hohyup>.

<sup>6</sup> Hillel J. Hoffman, *The Permian Extinction—When Life Nearly Came to an End*, NAT'L GEOGRAPHIC (June 6, 2019), <https://www.nationalgeographic.org/article/permian-extinction-when-life-nearly-came-end/>.

<sup>7</sup> *Id.*; SCIENCE NEWS, *supra* note 4.

<sup>8</sup> David Wallace-Wells, *The Cautious Case for Climate Optimism*, N.Y. MAG. (Feb. 4, 2019), <https://nymag.com/intelligencer/2019/02/book-excerpt-the-uninhabitable-earth-david-wallace-wells.html>.

<sup>9</sup> Wallace-Wells, *supra* note 2.

<sup>10</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT 60 (The Core Writing Team, Rajendra K. Pachauri, & Leo Meyer, eds. 2014), [https://www.ipcc.ch/site/assets/uploads/2018/05/SYR\\_AR5\\_FINAL\\_full\\_wcover.pdf](https://www.ipcc.ch/site/assets/uploads/2018/05/SYR_AR5_FINAL_full_wcover.pdf).

1970s.<sup>11</sup> And yet, over the past three decades, humans have released more than half of the total carbon dioxide emissions since the Industrial Revolution began more than 250 years ago.<sup>12</sup> A 2018 report compiled by the U.N. Intergovernmental Panel on Climate Change (“IPCC”) has predicted global warming of 1.5 degrees Celsius by 2040, resulting in instability of the Greenland ice sheet,<sup>13</sup> permanent loss of marine ecosystems, including a decline in coral reefs by 70–90%, mass food shortages, and wildfires.<sup>14</sup> Scientists further predict that by 2080, southern Europe, portions of China, and the most populated areas of the Middle East, Australia, Africa, and South America—areas responsible for supplying the majority of the world’s food—will be in permanent drought.<sup>15</sup>

Hotter climates will increase the spread of diseases by creating an environment in which parasites thrive, promoting the

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<sup>11</sup> Nathaniel Rich, *Losing Earth: The Decade We Almost Stopped Climate Change*, N.Y. TIMES MAG. (Aug. 1, 2018), <https://www.nytimes.com/interactive/2018/08/01/magazine/climate-change-losing-earth.html>.

<sup>12</sup> Wallace-Wells, *supra* note 2.

<sup>13</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C 41, 178 (Valerie Masson-Delmotte et al. eds., 2018), [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Full\\_Report\\_High\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf).

<sup>14</sup> In 2020, media outlets have reported severe and prolonged episodes of wildfires in the western United States, as well as worldwide. *See* Coral Davenport, *Major Climate Report Describes a Strong Risk of Crisis as Early as 2040*, N.Y. TIMES (Oct. 7, 2018), <https://www.nytimes.com/2018/10/07/climate/ipcc-climate-report-2040.html>; Thomas Fuller & Christopher Flavelle, *A Climate Reckoning in Fire-Stricken California*, N.Y. TIMES (Sept. 10, 2020), <https://www.nytimes.com/2020/09/10/us/climate-change-california-wildfires.html>; Veronica Penney, *It’s Not Just the West. These Places Are Also on Fire.*, N.Y. TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/09/16/climate/wildfires-globally.html>. Far from isolated incidents, researchers contend that wildfires have been steadily increasing over the past few years and will likely continue as global warming escalates. *See* A. Park Williams et al., *Observed Impacts of Anthropogenic Climate Change on Wildfire in California*, 7 EARTH’S FUTURE 892, 892 (2019), <https://agupubs.onlinelibrary.wiley.com/doi/epdf/10.1029/2019EF001210> (“During 1972–2018, California experienced a fivefold increase in annual burned area, mainly due to more than an eightfold increase in summer forest-fire extent.”).

<sup>15</sup> Wallace-Wells, *supra* note 2.

proliferation of disease-carrying insects.<sup>16</sup> According to the World Bank, climate change could increase the number of individuals vulnerable to malaria transmission to 5.2 billion by 2050.<sup>17</sup> Temperature increases will lead to dryer climates, which will increase the frequency and intensity of wildfires.<sup>18</sup> Recent events prove even the Amazon is at risk—in 2015, it experienced its third “hundred-year drought” in the span of only ten years.<sup>19</sup>

What can we do as a society to prevent the worst effects of this escalating catastrophe? We could attempt an escape to a new planet;<sup>20</sup> or, we could preserve the planet where we currently reside by initiating large-scale mitigative efforts, requiring governments to commit to statewide institutional reform.<sup>21</sup> The IPCC report put this in perspective when it warned that keeping global temperatures below two degrees Celsius would necessitate action at the scale of

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<sup>16</sup> See Emily K. Shuman, *Global Climate Change and Infectious Diseases*, 362 *NEW ENG. J. MED.* 1061 (2010), <https://www.nejm.org/doi/full/10.1056/NEJMp0912931> (explaining that warming temperatures in East Africa, due to climate change, have allowed for mosquitos carrying malaria to thrive and spread the disease into this “largely nonimmune population”).

<sup>17</sup> Wallace-Wells, *supra* note 2.

<sup>18</sup> *Id.*

<sup>19</sup> Juan C. Jimenez, Renata Libonati & Leonardo F. Peres, *Droughts Over Amazonia in 2005, 2010, and 2015: A Cloud Cover Perspective*, 6 *FRONTIERS EARTH SCI.* 1 (2018), <https://www.frontiersin.org/articles/10.3389/feart.2018.00227/full> (“During the early years of the twenty-first century, a large portion of Amazon rainforest has experienced three of the most severe droughts in its climate record of the last 100 years.”); *id.* (reporting that though the Amazon historically was in drought only once every hundred years, it had suffered two such droughts in the space of only five years).

<sup>20</sup> See Sarah Knapton, *Tomorrow’s World Returns to BBC with Startling Warning from Stephen Hawking—We Must Leave Earth*, *TELEGRAPH* (May 2, 2017), <https://www.telegraph.co.uk/science/2017/05/02/tomorrows-world-returns-bbc-startling-warning-stephen-hawking/> (“Humans will need to colonise another planet within one hundred years to ensure our survival, according to Professor Stephen Hawking.”).

<sup>21</sup> See generally Wallace-Wells, *supra* note 8 (discussing what would be required to remain under two degrees Celsius: “a comprehensively decarbonized economy, a perfectly renewable energy system, a reimagined system of agriculture, . . . [and] overhauls of the world’s transportation systems and infrastructure”).

the “mobilization of World War II.”<sup>22</sup> Unfortunately, such a mobilization seems unlikely to be reached voluntarily. In the United States, the federal government has typically been reticent, if not fully opposed to, preserving a sustainable environment.<sup>23</sup> Even in enforcing federal policies, regulating local pollution, or ensuring accessibility to clean water, the government has too often failed or refused to act.

During his term in office, President Donald Trump repealed more than fifty regulations, including those that enforced the monitoring of methane emission release, restricted offshore drilling, imposed climate change adaptation efforts in federal construction projects, and prevented coal companies from releasing toxic by-products directly into streams.<sup>24</sup> Without acute federal oversight, state governments followed suit, ignoring threats to their citizens’ health and even refusing outright to acknowledge obvious threats.<sup>25</sup>

Since the birth of industrialization more than two hundred years ago,<sup>26</sup> industry emissions, waste, and pollutants have contaminated the environment<sup>27</sup> to the extent that water, air, and food can no

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<sup>22</sup> *Id.*

<sup>23</sup> See MARY CHRISTINA WOOD, *NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* 70–71 (Cambridge Univ. Press ed., 2014) (discussing the discretion with which federal agencies capitulate to industry pressure, from “rule-making” to “enforcement choices”).

<sup>24</sup> Nadja Popovich et al., *The Trump Administration Is Reversing 100 Environmental Rules. Here’s the Full List*, N.Y. TIMES (Oct. 15, 2020), <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html?action=click&module=RelatedLinks&pgtype=Article>.

<sup>25</sup> E.g., Russ Zimmer, *NJ’s Largest City Sued Over Lead Tainting Its Tap Water*, USA TODAY (Apr. 24, 2018), <https://www.usatoday.com/story/news/health/2018/04/24/newark-nj-lead-poisoning-water/546559002/> (following water sample testing that showed 20% as having lead concentrations above Safe Drinking Water Act standards, the director of the city’s water and sewer utilities wrote a statement declaring that the “water is safe”).

<sup>26</sup> *Industrial Revolution*, HISTORY (July 1, 2019), [https://www.history.com/topics/industrial-revolution/industrial-revolution#section\\_6](https://www.history.com/topics/industrial-revolution/industrial-revolution#section_6).

<sup>27</sup> See generally Tord Kjellstrom et al., *Chapter 43: Air and Water Pollution: Burden and Strategies for Control*, in *DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES* 817, 818–20 (Dean T. Jamison et al. eds., 2nd ed., Oxford Univ. Press 2006), <https://www.ncbi.nlm.nih.gov/books/NBK11769/> (identifying industrial sources of outdoor air pollution and chemical water

longer be procured in their original state. As a result, filtration and purification measures are now required to protect human health.<sup>28</sup> Further, pollutants have permanently altered the stability of the environment, placing the future of the human species at risk.<sup>29</sup> Unfortunately, this mass scale of industrialization requires regulation through federal government oversight; individual citizens have neither the authority nor the ability to govern complex and widespread industry processes.<sup>30</sup> Though United States citizens are immersed in and confined to the natural environment that surrounds them, they are wholly dependent on the federal government to ensure the environment remains safe and sustainable.<sup>31</sup>

This Note argues that the federal government should have an affirmative duty to sustain a clean environment, and that citizens should have access to federal courts for redress both when the government fails to protect them against dangerous pollution, and when it refuses to mitigate climate change. While, generally, the Constitution does not enforce an affirmative duty on governments to protect their citizens from harm,<sup>32</sup> the Supreme Court articulated two exceptions to this rule in the landmark case, *DeShaney v. Winnebago*.<sup>33</sup> One of these exceptions—the “special relationship exception”—states that “when [a government] . . . so restrains an individual’s liberty that it renders him unable to care for himself,” that government is now under an obligation to “provide for his basic

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pollution and the resultant negative health effects on local human populations); see also discussion *infra* Parts I.A–B.

<sup>28</sup> *Id.* at 826.

<sup>29</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 13.

<sup>30</sup> See Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, THE ATLANTIC (Mar. 29, 2017), <https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/>.

<sup>31</sup> See Richard Grove, *Climatic Fears: Colonialism and the History of Environmentalism*, 2002 HARV. INT’L REV. 52 (2002) (“The 1764 Tobago ordinance specifically recognized the need to restrict profits to sustain an environment in the long term. Moreover, the mechanisms used to set up forest reserves . . . implied a permanent role for the state, rather than the individual, in conserving forests and the atmosphere.”).

<sup>32</sup> *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989).

<sup>33</sup> *Id.* at 198–99.

human needs.”<sup>34</sup> Given the United States government’s assumed power over environmental protection and regulation, and citizens’ subsequent powerlessness in the face of toxic pollution and global warming, the special relationship exception should be applied to uphold the government’s duty to mitigate these harms.

Part I of this Note begins by analyzing the federal government’s failure to regulate environmental pollutants, including its habitual prioritization of industry interests and financial benefits over citizens’ health and wellbeing. Part II analyzes the history and tradition of environmentalism worldwide and in the United States. Part III introduces the Supreme Court case, *DeShaney v. Winnebago*.<sup>35</sup> Part IV discusses how recent cases have defined and utilized the *DeShaney* special relationship exception, and proposes utilizing this exception to impose an affirmative duty on the government to protect the environment. Finally, Part V considers the recent Ninth Circuit decision in the case *Juliana v. United States* and its potential effect on future environmental litigation claims brought under *DeShaney*.

#### I. GOVERNMENT’S EXCLUSIVE CONTROL OF ENVIRONMENTAL REGULATION RESTRICTS THE PUBLIC’S ABILITY TO PROTECT ITSELF FROM POLLUTION

When contaminated air and water is not easily discernible, individuals are forced to rely on the competence of federal and state-level monitoring and regulation of environmental pollutants.<sup>36</sup> In other words, the public is at the mercy of the government’s initiative—or lack thereof—in maintaining a safe and healthy environment.

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<sup>34</sup> *Id.* at 200.

<sup>35</sup> *Id.*

<sup>36</sup> Meyer, *supra* note 30. *But see* Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NRDC (Nov. 8, 2018), <https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know> (describing how Flint residents were not at the mercy of their government’s meek attempts to regulate the water contamination, because the “foul-smelling, discolored, and off-tasting water” provided the evidence with which residents could seek redress through the courts).

*A. Governments' Repeated Failure to Regulate Pollution and Protect Public Health*

The National Resources Defense Council (“NRDC”) has analyzed and documented nationwide violations of the Safe Drinking Water Act, a federal law established in 1974 that regulates nearly 100 contaminants in drinking water.<sup>37</sup> The NRDC found that in 2015, there were 80,000 reported violations of the Safe Drinking Water Act, including 12,000 health-based violations.<sup>38</sup> The violations included drinking water reportedly contaminated by such pollutants as nitrites and nitrates, disinfectants, lead, copper, and arsenic.<sup>39</sup> Exacerbating the failure to curb contamination is the fact that the Safe Drinking Water Act only regulates certain contaminants, leaving unknown the existence of other potentially hazardous chemicals present in drinking water.<sup>40</sup> The NRDC reports on its website that perchlorate, a thyroid-disrupting chemical used in rocket fuel and explosives, is one such pollutant.<sup>41</sup> According to the NRDC, perchlorate is present in the drinking water of twenty-six states.<sup>42</sup>

The Environmental Protection Agency (“EPA”) is the main regulatory agency in the field of environmental protection.<sup>43</sup> Throughout the years, Congress has enacted legislation, like the Safe Drinking Water Act, that assigned new responsibilities to the agency or modified its role to carry out its statutory mandates.<sup>44</sup>

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<sup>37</sup> Kristi Pullen Fedinick et al., *Threats on Tap: Widespread Violations Highlight Need for Investment in Water Infrastructure and Protections*, NRDC (May 2, 2017), <https://www.nrdc.org/resources/threats-tap-widespread-violations-water-infrastructure>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Amanda MacMillan, *What's In Your Drinking Water?*, NRDC (May 2, 2017), <https://www.nrdc.org/stories/whats-your-drinking-water>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Mark Atlas, *Enforcement Principles and Environmental Agencies: Principal-Agent Relationships in a Delegated Environmental Program*, 41 LAW & SOC'Y REV. 939, 941 (2007).

<sup>44</sup> *Summary of the Safe Drinking Water Act*, ENV'T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-safe-drinking-water-act> (last visited Nov. 29, 2020).

Beyond Congress, the EPA has full discretion in how it sets standards, monitors pollution, and implements regulation.<sup>45</sup> As discussed above, it also determines which pollutants will be monitored.<sup>46</sup> Admittedly, state governments have some agency in directing their environmental protection practices.<sup>47</sup> The Clean Water Act, for instance, gives states the power to implement regulation programs for pollutants within their borders.<sup>48</sup> However, they are still required to defer to the EPA's approved or promulgated state-specific water quality standards and must regularly provide the agency with updates concerning the efficacy of their programs.<sup>49</sup> Ordinary citizens, for their part, possess very little power when it comes to protecting their environment and regulating polluters, and are thus completely reliant upon federal and state governments to secure a safe environment.<sup>50</sup> Unfortunately, economic incentives and a failure to prioritize environmental protection have prevented

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<sup>45</sup> *The Basics of the Regulatory Process*, ENV'T PROT. AGENCY, <https://www.epa.gov/laws-regulations/basics-regulatory-process> (last visited Nov. 29, 2020).

<sup>46</sup> See MacMillan, *supra* note 40.

<sup>47</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO/RCED-00-54, WATER QUALITY KEY EPA AND STATE DECISIONS LIMITED BY INCONSISTENT AND INCOMPLETE DATA 4 (2000), <https://www.gao.gov/assets/160/156770.pdf> (“The Clean Water Act makes states responsible for developing programs to manage water quality; the programs are intended to achieve the act’s goals of supporting aquatic communities, protecting human health, and sustaining other uses and provides for funding to implement the act.”).

<sup>48</sup> *Id.* at 4–5.

<sup>49</sup> *Id.*; *State-Specific Water Quality Standards Effective Under the Clean Water Act (CWA)*, ENV'T PROT. AGENCY, <https://www.epa.gov/wqs-tech/state-specific-water-quality-standards-effective-under-clean-water-act-cwa> (last visited Oct. 26, 2020).

<sup>50</sup> See Denchak, *supra* note 36 (discussing how the residents of Flint, Michigan were harmed by the state’s ineffective governance of pollutants in the city’s drinking water which residents were unable to remedy without the cooperation of the state and federal government); Meyer, *supra* note 30 (explaining the history and development of congressional and state environmental protection laws).

the EPA, Congress, and state governments from adequately fulfilling this responsibility.<sup>51</sup>

State governments are accountable to the EPA and Congress and must demonstrate that they have taken adequate measures to meet the requirements set by environmental protection legislation, such as the Clean Air Act and the Clean Water Act.<sup>52</sup> However, the EPA has failed to implement uniform standards by which states must monitor and regulate pollutants,<sup>53</sup> or to properly oversee their compliance.<sup>54</sup> Rather, states are given wide latitude in developing regulation plans and assessing the health of the waterways within their borders.<sup>55</sup> The EPA has even afforded states discretion in how much of the water within their borders they test for contamination and hazardous pollutants.<sup>56</sup> In 1996, for example, the states submitted test results to the EPA that amounted to covering only 19% of the nation's rivers and streams and only 6% of its ocean shorelines.<sup>57</sup>

As the federal government continues to disregard its enforcement obligations, states have correspondingly neglected to control hazardous pollution within their borders. A recent example occurred in 2014, when the state of Michigan decided to change the

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<sup>51</sup> See WOOD, *supra* note 23, at 81–82 (detailing the economic and political incentives that deter environmental agencies from prioritizing environmental protection).

<sup>52</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-335, GREATER OVERSIGHT AND ADDITIONAL DATA NEEDED FOR KEY EPA WATER PROGRAM 1, 6 (2012).

<sup>53</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 47.

<sup>54</sup> See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 52, at 34–35 (“Notwithstanding the variation in regional offices’ reviews of nonpoint source management program plans and annual work plans, regional offices have almost always determined that states have made satisfactory progress in achieving their program goals . . . Officials with one regional office told [the U.S. Government Accountability Office] that the determination of satisfactory progress is a fairly low bar and that they were generally reluctant to withhold this determination because states would then not receive funds . . .”).

<sup>55</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 47, at 24.

<sup>56</sup> See *id.* at 25 (explaining that, to reduce costs, states choose to assess water quality in only a subset of their waters and that “the result is that a majority of U.S. waters remain unassessed”).

<sup>57</sup> *Id.*

source of Flint's water supply to save money.<sup>58</sup> The city would now pump water directly from the Flint River, which had been used as an unofficial dump site for factory waste and raw sewage from nearby treatment plants, as well as toxic runoff from agricultural sites.<sup>59</sup> In an all too common example of a government prioritizing fiscal savings over public safety, the city began pumping Flint River water into citizens' homes without installing appropriate filtration and treatment systems capable of purifying the water.<sup>60</sup>

The "highly corrosive" water then "leached [lead] out from aging pipes into thousands of homes."<sup>61</sup> Residents soon began experiencing physical reactions to the contaminated water, including "skin rashes, hair loss, and itchy skin."<sup>62</sup> The contamination also led to the Nation's third-largest outbreak of Legionnaire's disease—a severe form of pneumonia<sup>63</sup>—that resulted in the deaths of twelve people.<sup>64</sup> The government's response was simply to ignore the contamination and maintain the water was safe.<sup>65</sup> It was not until Virginia Tech conducted its own independent study that the extent of the problem was revealed: of the samples it took from 252 homes, 17% contained lead levels greater than fifteen parts per billion, or the federal "action level" at which the EPA requires that corrective measures be taken.<sup>66</sup> That same year, a Flint pediatrician reported that the number of children with elevated blood-lead levels had nearly doubled citywide from the previous year.<sup>67</sup> While lead exposure is detrimental to the health of all humans, it is particularly damaging to children, causing

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<sup>58</sup> Denchak, *supra* note 36.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Legionnaires' Disease*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/legionnaires-disease/symptoms-causes/syc-20351747> (last visited Oct. 29, 2020).

<sup>64</sup> Denchak, *supra* note 36.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; *Basic Information About Lead in Drinking Water*, ENV'T PROT. AGENCY, <https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#regs> (last visited Nov. 29, 2020).

<sup>67</sup> *Id.*

irreversible neurological damage,<sup>68</sup> including “reduc[ed] IQ and physical growth[,] and contributing to anemia, hearing impairment, cardiovascular disease, and behavioral problems.”<sup>69</sup>

In the wake of government inaction, denial, and incompetent responses to the crisis, Flint residents were forced to petition the EPA for assistance—pleas that were promptly refused—before turning to litigation for adequate redress.<sup>70</sup> For the past three years, litigation has proved successful in compelling the government to provide water filters and bottled water, and finally, to begin replacing the city’s lead pipes.<sup>71</sup> However, far from being a success story, these results serve as a daunting reminder of governments’ reluctance to sacrifice their pocketbooks for the public good.

This reminder is reinforced by the Newark, New Jersey, water crisis; one that is almost identical to that of Flint.<sup>72</sup> In 2017, water samples from the city of Newark first reported elevated lead levels.<sup>73</sup> Like Flint, the high lead levels were caused by the city’s failure to properly treat highly corrosive water.<sup>74</sup> However, it was not until 2018, after one and a half years of denying the severity of the problem, that Newark officials began distributing water filters to residents.<sup>75</sup> A study conducted a year later clarified the extent of the contamination: half of the water samples taken from homes across

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<sup>68</sup> Fedinick, *supra* note 37.

<sup>69</sup> Denchak, *supra* note 36.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Emma G. Fitzsimmons, *In Echo of Flint Lead Crisis, Newark Offers Bottled Water*, N.Y. TIMES (Aug. 11, 2019), <https://www.nytimes.com/2019/08/11/nyregion/newark-water-lead.html>.

<sup>73</sup> Liz Leyden, *A Water Crisis in Newark Brings New Worries*, N.Y. TIMES (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/nyregion/newark-drinking-water-lead.html>.

<sup>74</sup> *Id.*; see also Nick Corasaniti et al., *Tainted Water, Ignored Warnings and a Boss With a Criminal Past*, N.Y. TIMES (Aug. 24, 2019), <https://www.nytimes.com/2019/08/24/nyregion/newark-lead-water-crisis.html> (explaining that, though “city and state officials” knew “for years that the infrastructure was a major risk,” a lack of funding forced the city to turn “to an approved chemical, sodium silicate,” to control the corrosion, which stopped working in 2016, leading to the raised lead levels).

<sup>75</sup> *Id.*

the city contained fifteen parts per billion of lead.<sup>76</sup> Rather than take action to protect its citizens from further harm, Newark's mayor disregarded the mounting evidence and announced that the information they had was insufficient to make any conclusions.<sup>77</sup> His sole admonition was that pregnant women and young children should begin to use bottled water.<sup>78</sup>

*B. How the Federal Government Has Prioritized Economic and Business Interests Over Public Health and Safety*

Though human-made climate change and the dangers presented by accelerating global warming have been known to scientists for fifty years, the federal government has either stubbornly refused to act or chosen to cater to industry's economic interests.<sup>79</sup> For example, in his book, *Crimes Against Nature*, Robert F. Kennedy Jr. criticized President George W. Bush's capitulation to industry pressure.<sup>80</sup> During his campaign and after entering office, President Bush received more than \$100 million in contributions from energy companies.<sup>81</sup> These investments did not go unrewarded.<sup>82</sup> After his inauguration, Bush appointed industry leaders to the highest government offices, including selecting Phil Cooney, a long-time

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<sup>76</sup> Fitzsimmons, *supra* note 72.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> See Rich, *supra* note 11 ("When [the reporter] asked John Sununu [President Bush's Chief of Staff] about his part in this history—whether he considered himself personally responsible for killing the best chance at an effective global-warming treaty— . . . [he responded,] 'It couldn't have happened . . . because, frankly, the leaders in the world at that time were at a stage where they were all looking how to seem like they were supporting the policy without having to make hard commitments that would cost their nations serious resources.' He added, 'Frankly, that's about where we are today.'").

<sup>80</sup> See WOOD, *supra* note 23, at 22 ("In a detailed exposé, Kennedy describes the president's environmental policy as one massive payback to the powerful industries that put him in office.").

<sup>81</sup> *Id.* ("In the 2000 election, energy interests contributed more than \$48.3 million to Bush and the Republican Party, and then contributed another \$58 million after President Bush took office.").

<sup>82</sup> *Id.*

lobbyist for the American Petroleum Institute, as chief of staff for the White House Council on Environmental Quality.<sup>83</sup>

The ensuing eight years of the Bush Administration entailed protecting the fossil fuel industry through “a systematic effort to manipulate climate change science and mislead policymakers and the public about the dangers of global warming . . . .”<sup>84</sup> Far from denouncing the fossil fuel industry’s own efforts to stifle climate change science, which was considered “the most sophisticated and most successful disinformation campaign” since that of the tobacco industry, the Bush Administration directly assisted the endeavor.<sup>85</sup> In fact, according to a congressional investigation, the “White House edits to climate change documents mirror [the American Petroleum Institute’s] stated strategy on [the climate change issue].”<sup>86</sup>

Even in the face of international pressure to take action against the environmental crisis, the Bush Administration never wavered from prioritizing its industry ties over the lives of the people.<sup>87</sup> Specifically, in 2007, leaders from industrialized nations met to proclaim their commitment to reducing greenhouse gas emissions in a pact called the Kyoto Protocol.<sup>88</sup> The Bush Administration refused to participate, citing concerns that it would hurt the economy and that it lacked economic incentives to encourage industry compliance.<sup>89</sup>

The Bush Administration, however, was only one generation in a long tradition of executives valuing money interests over public

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<sup>83</sup> *Id.* at 25.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 26.

<sup>86</sup> *Id.*

<sup>87</sup> See David Malakoff & Erin Marie Williams, *Q & A: An Examination of the Kyoto Protocol*, NAT’L PUB. RADIO (June 6, 2007, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=5042766> (discussing how the Bush Administration justified its refusal to participate in the Kyoto Protocol by arguing that “the pace and scale of cuts required by Kyoto would hurt the U.S. economy” and that “there should be a greater emphasis on economic incentives and more flexible, voluntary measures” in order to “attract the backing of industry”).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

health concerns. A more recent example is that of the Trump Administration, which, citing similar economic and business-related concerns, removed the United States from the Paris Climate Accord.<sup>90</sup> Caitlin McCoy, at the Environmental and Energy Law Program at Harvard Law School, classified the Trump Administration's calculated rollback of emissions regulation as a "one-two punch" technique wherein the Administration first utilized "a delay rule to buy some time, and then [issued] a final substantive rule."<sup>91</sup>

As the federal government continues to disregard the indisputable evidence of the serious risk to human safety posed by climate change, while simultaneously continuing to retain the sole authority to remedy the crisis, the question becomes, what can regular citizens do? One response has been to utilize the courts, as can be seen in the public response to the Newark water crisis.<sup>92</sup> Generally, while individuals may bring actions in the form of state tort claims, the law does not impose an affirmative duty on governments to protect individuals from harm.<sup>93</sup> However, the Supreme Court created two exceptions to this rule in its landmark decision, *DeShaney v. Winnebago*: the "state-created danger exception" and the "special relationship exception."<sup>94</sup>

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<sup>90</sup> See *Statement by President Trump on the Paris Climate Accord*, WHITE HOUSE (June 1, 2017), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-trump-paris-climate-agreement/> (transcribing President Trump's speech following the withdrawal of the United States from the Paris Climate Accord in which he vociferously denounces the "draconian financial and economic burdens" required under the Paris Accord and the Green Climate Fund, while disregarding the risks to United States citizens by refusing to respond to the growing environmental crisis).

<sup>91</sup> Chris White, *Trump Axes Nearly 100 Environmental Regulations in Three Years*, NAT'L INT. (Jan. 2, 2020), <https://nationalinterest.org/blog/buzz/trump-axes-nearly-100-environmental-regulations-three-years-110406>.

<sup>92</sup> See Fitzsimmons, *supra* note 72.

<sup>93</sup> *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989); *Morrow v. Balaski*, 719 F.3d 160, 166 (3d Cir. 2013); *Doe v. Covington Cty. Sch. Dist.*, 675 F.3d 849, 855 (5th Cir. 2012).

<sup>94</sup> *DeShaney*, 489 U.S. at 201–02.

## II. A HISTORY AND TRADITION OF GOVERNMENTAL PROTECTION AND APPRECIATION FOR NATURE

As will be discussed below, the Supreme Court's paramount decision in *DeShaney* endowed a specific class of individuals with a much-needed road to redress and ratified developing jurisprudence affirming a government's duty to protect individuals from harm when it has restrained their ability to protect themselves.<sup>95</sup> While case law in this area has been primarily confined to claims from prisoners,<sup>96</sup> involuntarily committed individuals,<sup>97</sup> foster children,<sup>98</sup> and children harmed while attending school,<sup>99</sup> this Note argues for applying the special relationship exception to environmental and climate change litigation.

However, the Supreme Court has made it clear that any attempt to expand substantive due process to protect rights not yet explicitly delineated by the Constitution or Court precedent requires a showing that the right is "deeply rooted in this Nation's history and

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<sup>95</sup> See *id.* at 200 ("The affirmative duty to protect arises . . . from the limitation which [the State] has imposed on [the individual's] freedom to act on his own behalf.").

<sup>96</sup> *Multiple Claimants v. N.C. HHS, Div. of Facility Servs.*, 646 S.E.2d 356, 360 (N.C. 2007) (holding that a special relationship exists between the state's Department of Health and Human Services and inmates because "DHHS has a statutory duty to inspect jails to ensure their compliance with minimum standards for fire safety").

<sup>97</sup> See generally *A.M. v. N.M. Dep't of Health*, 65 F. Supp. 3d 1206 (D.N.M. 2014) (holding that when a developmentally disabled individual is involuntarily committed by the state, the state then has a duty to protect his or her safety).

<sup>98</sup> See generally *Matthews v. Bergdorf*, 889 F.3d 1136 (10th Cir. 2018) (affirming the creation of a special relationship when the government places a child in involuntary foster care).

<sup>99</sup> See *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 973 (9th Cir. 2011) (holding that "compulsory school attendance does not restrict a student's liberty such that the student nor the parents can attend to the student's basic needs"); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997) (holding that compulsory school attendance laws do not create a special relationship between school officials and student abused by custodian); *J.O. v. Alton Cmty. Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990) (holding that "the government, acting through local school administrations, has not rendered its schoolchildren so helpless that an affirmative constitutional duty to protect arises").

tradition.”<sup>100</sup> As the Third Circuit once articulated it in *D.R. v. Middle Bucks*, “[a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful ‘respect for the teachings of history [and] solid recognition of the basic values that underlie our society.’”<sup>101</sup> Accordingly, before engaging in an analysis of the case law concerning *DeShaney*’s special relationship exception, it is important to first discuss the tradition and history of environmentalism worldwide and within the United States.

Conservation of environmental resources has been a consistent element of western civilization, particularly when European societies began to accelerate the expansion of their “capitalist ‘world system.’”<sup>102</sup> The exploration and subsequent exploitation of environmental “Edens,” such as those on uninhabited islands in the modern day Caribbean, intensified at the height of European colonialism beginning in the thirteenth century.<sup>103</sup> Eager to profit from these rich, seemingly untouched resources, settlers began harvesting indiscriminately and in complete disregard of the effect of their practices on the health of the ecosystem.<sup>104</sup>

However, an island’s resources are limited, and in little time the devastating consequences of unrelenting land cultivation became clear.<sup>105</sup> Settlers were suddenly aware of the severity of the physical changes and environmental harm they had instigated, including the extinctions of native animal species, such as the dodo bird.<sup>106</sup> Initially, piecemeal regulations were instituted simply to prevent overuse of resources to the extent land would be rendered profitless.<sup>107</sup> However, with continued economic globalization and

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<sup>100</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

<sup>101</sup> *D.R. v. Middle Bucks Area Vocational Sch.*, 972 F.2d 1364, 1383 (3d Cir. 1991) (Sloviter, C.J., dissenting).

<sup>102</sup> *Grove*, *supra* note 31, at 51.

<sup>103</sup> *Id.* at 51.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 51–52.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

advancements in science, Europe realized that more comprehensive environmental protection legislation was needed.<sup>108</sup>

In France, Pierre Poivre discovered that systematic deforestation had an impact on rainfall and the climate as a whole.<sup>109</sup> His research compelled the British to constrain forest clearance on their Caribbean islands for fear that it would reduce precious rainfall in the area.<sup>110</sup> Specifically, Britain passed an ordinance designating a portion of Tobago a “protected forest, ‘reserved in wood for rains.’”<sup>111</sup> Further support for such regulations came from a paper prepared for a meeting of the British Association for the Advancement of Science, which validated Poivre’s original theories on the connection between vegetation and precipitation.<sup>112</sup> Similar environmental protection programs were administered in India, where the British founded a countrywide Forest Department, which became “one of the most durable achievements of British rule in India,” without which “no significant forest cover would have survived in South Asia.”<sup>113</sup>

A reverence for pristine landscapes and bountiful natural resources was not restricted to the British and French. The founding fathers of the United States were effusive in their appreciation for the country’s natural gifts.<sup>114</sup> Like many American citizens in the eighteenth century, some of the framers of the Constitution were avid farmers and agriculturalists.<sup>115</sup> This occupation excited in at

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<sup>108</sup> Richard Grove, *Conserving Eden: The (European) East India Companies and Their Environmental Policies on St. Helena, Mauritius and in Western India, 1660 to 1854*, 35 COMP. STUD. IN SOC’Y AND HIST. 318, 333–35 (1993).

<sup>109</sup> Grove, *supra* note 31, at 52.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 54; *see also* Grove, *supra* note 108, at 341 (citing Alexander von Humboldt’s scientific work “linking deforestation, increasing aridity, and temperature change on a global scale”).

<sup>113</sup> Grove, *supra* note 31, at 54.

<sup>114</sup> *See* JEDEDIAH PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE* 102, 109 (Harvard Univ. Press ed., 2015) (discussing the writings of Thomas Jefferson and John Quincy Adams and the beauty they saw in the American landscape).

<sup>115</sup> *See* Mark Sturges, *Founding Farmers: Jefferson, Washington, and the Rhetoric of Agricultural Reform*, 50 EARLY AM. LITERATURE 681, 681 (2015)

least one framer, John Adams, a respect for the source of their endeavors: the environment.<sup>116</sup> Reflecting on the effects of a farming life, John Adams wrote in the *American Review*:

The kindly affections first awakened in the bosom of the shepherd, for the cattle of his flock . . . extend their influence even to the inanimate nature that surrounds him. . . . [T]he streamlet that courses through the neighboring vale; the trees planted by his hand, which, as they rise and flourish, and yield their delicious fruits, or spread forth their refreshing shades, seem like children grateful to parental care; the mountain that borders the horizon, immovable and unchanging in the lapse of years, and insensibly leading the mind from the transient objects of time to the boundless ages of eternity, all silent witnesses of the first emotions of infancy and the dearest joys of youth, grappled to the soul by ever multiplying recollections, chain the heart of man to his home, and become the primary elements in that strong, beneficent and virtuous impulse, the love of his country.<sup>117</sup>

Thomas Jefferson was also not immune to the aesthetic pleasures of the environment that surrounded him.<sup>118</sup> In his *Notes on the State of Virginia*, Jefferson exclaimed that the state's "arched-stone 'natural bridge' was 'the most sublime of nature's works,' where 'the rapture of the spectator is really indescribable!'"<sup>119</sup> Further, George Washington regularly wrote letters to Arthur Young, who later became secretary to the Board of Agriculture,<sup>120</sup> in which he argued for sustainable farming practices in order to

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(detailing the efforts by George Washington and Thomas Jefferson to promote sustainable, ecologically friendly agricultural practices).

<sup>116</sup> Purdy, *supra* note 114, at 109.

<sup>117</sup> *Id.*

<sup>118</sup> *See id.* at 102.

<sup>119</sup> *Id.*

<sup>120</sup> Gwendolyn K. White, *Arthur Young*, MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/arthur-young/> (last visited Jan. 13, 2021).

preserve the land's precious resources.<sup>121</sup> Often indignant of his fellow Americans' harsh treatment of the land, Washington complained at one point that the consequence of the "bad habits" of American farmers had resulted in the ground being merely "*scratched* over & none cultivated or improved as it ought to have been."<sup>122</sup>

One could argue that had the founding fathers been concerned with protecting a vulnerable environment from which they derived so much pleasure, they would have endorsed this view in the Constitution. They could not have known, however, the pervasive environmental degradation that would come of large-scale industrialization. By 1790, when the Constitution was formally ratified, the population of the United States was approximately 3.9 million people.<sup>123</sup> With industrialization, the population grew at an exponential rate—an estimated 23 million by 1850, about 75 million by 1900, and just over 150 million by 1950.<sup>124</sup>

Industrialization during this time effectuated a movement out of farm life and into urban factories, resulting in a society increasingly isolated from the natural world.<sup>125</sup> However, while the few who profited promoted the transition in the name of progress, many protested the proliferation of these "dark satanic mills"<sup>126</sup> and suffered in urban living conditions that "would not have been unusual to Dante."<sup>127</sup>

Those who migrated to New England cities like Lowell, Massachusetts, in the late nineteenth century to work in these burgeoning factories quickly became disillusioned by their

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<sup>121</sup> Sturges, *supra* note 115, at 693–95.

<sup>122</sup> *From George Washington to Arthur Young, 5 December 1791*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/05-09-02-0153> (last visited Oct. 29, 2020).

<sup>123</sup> U.S. DEP'T OF COM., BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 8 (1975).

<sup>124</sup> *Id.*

<sup>125</sup> CHAD MONTRIE, A PEOPLE'S HISTORY OF ENVIRONMENTALISM IN THE UNITED STATES 15 (Continuum Int'l Pub. Grp. ed., 2011).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 58.

confinement within the factories’ “prison walls.”<sup>128</sup> Beyond the emotional effect of constant seclusion from “wholesome pure air,” mill workers bemoaned the physical effects of the poor labor conditions in which they worked, including air polluted by “cotton-dust” and “lamp smoke.”<sup>129</sup> Toxic by-products of manufacturing were not restricted to the environment within the factories. Beyond those walls, enormous quantities of pollutants were being discharged into New England waterways.<sup>130</sup>

In response, the Massachusetts and Connecticut state boards of health made profound declarations sanctifying a citizen’s right to a clean and healthy environment.<sup>131</sup> The Massachusetts State Board of Health (“MSBH”), for instance, asserted that “all citizens have an inherent right to the enjoyment of these gifts—pure water, air, and soil—a right belonging to every individual, and every community upon which no one should be allowed to trespass through carelessness, ignorance, or other cause.”<sup>132</sup> The Connecticut board confirmed this privilege for its own citizens, declaring “the duty of government to protect the weak from oppression of the strong,” particularly the poor “who suffered the most from ‘unwholesome surroundings and other unsanitary conditions.’”<sup>133</sup>

However, when the MSBH compelled the state’s legislature to pass legislation regulating factory emissions, industry interests relentlessly lobbied against the restrictions.<sup>134</sup> In what would become a common narrative throughout the ensuing century, the state legislature succumbed to industry pressure.<sup>135</sup> The MSBH as a separate entity was dissolved and replaced by a new board, incorporated with the board of lunacy and the board of charity, and Charles Francis Donnelly—a corporate lawyer with strong ties in textile manufacturing—was installed as its chair.<sup>136</sup>

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<sup>128</sup> KEVIN C. ARMITAGE, *THIS GREEN AND GROWING LAND: ENVIRONMENTAL ACTIVISM IN AMERICAN HISTORY* 27 (2018).

<sup>129</sup> *Id.*

<sup>130</sup> MONTRIE, *supra* note 125, at 31.

<sup>131</sup> *Id.* at 30–31.

<sup>132</sup> *Id.* at 29–30.

<sup>133</sup> *Id.* at 30.

<sup>134</sup> *Id.* at 30–31.

<sup>135</sup> *Id.* at 31–32.

<sup>136</sup> *Id.* at 32.

Governments at the federal and state level have continued to fall prey to this ping-pong effect: one moment propagating a commitment to a sustainable, clean environment for the continued health and wellbeing of its citizens,<sup>137</sup> and the next, faltering under industry reprisals and economic interests.<sup>138</sup> Because of these inconsistencies in regulation and enforcement, legal remedies must be expanded. Now is the time, when pollution and climate change present a threat greater than anything lawmakers could have imagined a century ago, for the Supreme Court to prescribe an affirmative duty on governments to maintain a sustainable environment. Such a proclamation is properly rooted in the history and traditions of the country, as evidenced by the demonstrated beliefs of the founders and stated commitments of state governments, such as Massachusetts and New Hampshire, and would endow courts with the necessary authority to force obstinate governments to act.

### III. *DESHANEY* AND THE GOVERNMENT'S AFFIRMATIVE DUTY TO PROTECT

Prior to its decision in *DeShaney*, the Supreme Court had already been grappling with questions presented by cases arguing for a state duty to protect individuals unable to protect themselves.<sup>139</sup> In *Estelle v. Gamble*, the Court was presented with an Eighth Amendment claim by an inmate who alleged that prison officials had failed to

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<sup>137</sup> See S. TREATY DOC. No. 102-38 (1992) (ratifying the United Nations Framework Convention on Climate Change).

<sup>138</sup> See WHITE HOUSE, *supra* note 90; see also JOHN C. DERNBACH, AGENDA FOR A SUSTAINABLE AMERICA 2-3, 41 (ELI Press ed., 2009) (criticizing the federal government's failure to develop a national strategy for attaining sustainable development per its agreement under the UNFCCC, as well as its continued dependence on fossil fuel consumption, *ten years* following ratification).

<sup>139</sup> See generally *Estelle v. Gamble*, 429 U.S. 97 (1976) (affirming the "government's obligation to provide medical care" to prisoners as "an inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met"); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (affirming that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause" that supports "a claim to safe conditions" in mental institutions).

adequately treat his back injury.<sup>140</sup> The Court determined that the inmate's claim failed because, as it found, medical personnel had, in fact, provided sufficient medical care.<sup>141</sup> However, in its decision, the Court's discussion laid the framework within which *DeShaney* would later be decided.<sup>142</sup>

In *Estelle*, the Court acknowledged that the Eighth Amendment prohibits "cruel and unusual punishment," which included inadequate medical care.<sup>143</sup> Accordingly, the Court held that because prisoners are wholly dependent on the prison for basic medical treatment, the prison has an affirmative duty to provide such care.<sup>144</sup> Thus, a prison may be held constitutionally liable for violating the Eighth Amendment by failing to provide or providing insufficient medical care, causing the prisoner unnecessary suffering, after it had restricted the individual's ability (by imprisoning him) to access outside care.<sup>145</sup>

Six years later, the Supreme Court considered an alternative scenario in which a state may owe an individual an affirmative duty of care.<sup>146</sup> In *Youngberg v. Romeo*, the mother of a mentally disabled individual brought a Fourteenth Amendment claim alleging that the state mental institution owed her son "habilitation," or basic training in self-care.<sup>147</sup> Her son, who had been institutionalized due to his inability to care for himself, would often unleash his frustration in episodes of physical aggression, causing harm to himself and other patients.<sup>148</sup> The institution's response to this behavior was to place him in physical restraints.<sup>149</sup> However, his mother argued that the institution had an obligation to supply basic self-care training in

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<sup>140</sup> *Estelle*, 429 U.S. at 97–98. The failure to provide adequate medical care may "constitute[] the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment." *Id.* at 104.

<sup>141</sup> *Id.* at 107.

<sup>142</sup> *Id.* at 103–05; *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989).

<sup>143</sup> *Estelle*, 429 U.S. at 103–04.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 103–05.

<sup>146</sup> *Youngberg v. Romeo*, 457 U.S. 307 (1982).

<sup>147</sup> *Id.* at 316.

<sup>148</sup> *Id.* at 309 n.2, 310.

<sup>149</sup> *Id.* at 310–11.

order to prevent against continually infringing upon his liberty through bodily restraints.<sup>150</sup> In its opinion, the Court reiterated its conclusions in *Estelle*, that even when confined by the state, an individual is still afforded substantive due process liberty interests, including the right to reasonable safety and basic necessities.<sup>151</sup> The Court concluded that the state's obligation to provide safe conditions for committed individuals included basic training necessary to prevent violence and preserve freedom from undue bodily restraint.<sup>152</sup>

In these cases, the Supreme Court established that governments have an affirmative duty to protect the constitutional rights of their citizens when they have restricted those citizens' capacity to provide for themselves.<sup>153</sup> The Supreme Court at this time was not alone in acknowledging such an affirmative duty.<sup>154</sup> In *White v. Rochford*, for instance, the Seventh Circuit found that police officers had a duty to protect children from harm after they removed the children's sole means of safety by arresting their uncle.<sup>155</sup> It found that by leaving the children unsupervised and alone on a highway during a cold, winter night,<sup>156</sup> the police officers had violated the children's constitutional "right to be free from unjustified intrusions upon physical and emotional well-being."<sup>157</sup>

These previous cases likely motivated the Supreme Court's extensive analysis in *DeShaney v. Winnebago*, in which it declared that government acts that restrain an individual's freedom to provide for her basic necessities may negate the traditional principle that a government has no affirmative constitutional duty to protect her from harm.<sup>158</sup> In *DeShaney*, Joshua DeShaney and his mother

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<sup>150</sup> *Id.* at 317–18.

<sup>151</sup> *Id.* at 316, 324.

<sup>152</sup> *Id.* at 324.

<sup>153</sup> *Id.*; *Estelle v. Gamble*, 429 U.S. 97, 103–05 (1976).

<sup>154</sup> *See White v. Rochford*, 592 F.2d 381, 382 (7th Cir. 1979) (holding that "the unjustified and arbitrary refusal of police officers to lend aid to children endangered by the performance of official duty violates the constitution").

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 385.

<sup>157</sup> *Id.* at 386.

<sup>158</sup> *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989).

brought a 42 U.S.C. § 1983 claim alleging that the Winnebago County Department of Social Services (“DSS”) had violated his liberty interest under the Due Process Clause of the Fourteenth Amendment.<sup>159</sup> Specifically, they alleged that DSS had failed to protect DeShaney from physical abuse at the hands of his father, which resulted in the boy’s severe brain damage and subsequent diagnosis of severe mental disability, rendering him incapable of living on his own.<sup>160</sup> Preceding the final physical confrontation with his father that led to the litigation, DSS had ample opportunity to separate DeShaney from his father.<sup>161</sup> Specifically, DSS was informed of DeShaney’s abuse by police officers and hospital staff following three instances of his being admitted to the hospital for severe physical injuries.<sup>162</sup> Its response was to investigate the allegations through interviews with the father and to assign a case worker to conduct monthly home visits.<sup>163</sup> Unfortunately, it failed to consider the evidence gathered as sufficient to prove physical abuse and take custody of DeShaney.<sup>164</sup>

The Supreme Court granted certiorari, and beginning its analysis, first reaffirmed that the substantive component of the Due Process Clause does not create an affirmative duty for governments to protect citizens from private harm.<sup>165</sup> However, in the second part of its analysis, the Court considered the arguments presented by DeShaney and his mother. Specifically, they argued that such an affirmative duty to protect existed here because of the special relationship created between DeShaney and DSS when the DSS became aware of DeShaney’s physical injuries, investigated the alleged abuse, and if corroborated, undertook to protect him from such abuse.<sup>166</sup> Ultimately, the Court concluded that no such relationship existed between DeShaney and DSS—and accordingly, held that the state could not be found liable. In doing so, however, the Court did acknowledge two exceptions to the general rule that

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<sup>159</sup> *Id.* at 193.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 192–93.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 195–96.

<sup>166</sup> *Id.* at 197.

the Due Process Clause of the Fifth and Fourteenth Amendments do not create an affirmative duty to protect: (1) the “state-created danger exception” and (2) the “special relationship exception.”<sup>167</sup>

In its deliberation, the Court considered relevant the fact that the state’s actions had not created the danger from which DeShaney was injured.<sup>168</sup> By removing DeShaney from the hospital and returning him to his father’s custody, it reasoned, the state did not place DeShaney in a more vulnerable position than he had been in before.<sup>169</sup> As such, the Court determined that the state had not owed DeShaney an affirmative duty to protect him from harm at his father’s hands, and, thus, it was not liable for the resulting injury.<sup>170</sup> While this argument did not aid DeShaney, it created the first avenue by which a future individual may hold a government liable for failing to protect him from third-party harm: the “state-created danger exception.”<sup>171</sup>

The second avenue materialized when the Court declared that a “special relationship exception” may be triggered when the state deprives an individual of “his liberty [to] care for himself.”<sup>172</sup> The Court’s language expanding on this definition has been used consistently by lower courts in subsequent holdings concerning the special relationship exception,<sup>173</sup> and as such, is vital in analyzing the legitimacy of any alternative applications of the exception:

The rationale for this principle is simple enough:  
when 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

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<sup>167</sup> *Id.* at 198; *Matthews v. Bergdorf*, 889 F.3d 1136, 1143 (10th Cir. 2018); *Morrow v. Balaski*, 719 F.3d 160, 167 (3d Cir. 2013); *Doe v. Covington Cnty. Sch. Dist.*, 675 F.3d 849, 863 (5th Cir. 2012); *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1368–74 (10th Cir. 1992).

<sup>168</sup> *DeShaney*, 489 U.S. at 201.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Morrow*, 719 F.3d at 177; *Doe*, 675 F.3d at 863; *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995); *Middle Bucks*, 972 F.2d at 1373.

<sup>172</sup> *DeShaney*, 489 U.S. at 200.

<sup>173</sup> *See Doe*, 675 F.3d at 859–60; *Middle Bucks*, 972 F.2d at 1372, 1379; *J.O. v. Alton Cmty. Unit Sch. Dist.*, 909 F.2d 267, 272 (7th Cir. 1990); *A.M. v. N.M. Dep’t of Health*, 65 F. Supp. 3d 1206, 1254 (D.N.M. 2014).

same time fails to provide for his basic human needs—*e.g.* food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the . . . Due Process Clause. . . . [I]t is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the “deprivation of liberty” triggering the protections of the Due Process Clause . . . .<sup>174</sup>

#### IV. *JULIANA* AND POST-*DESHANEY* APPLICATIONS OF THE SPECIAL RELATIONSHIP EXCEPTION AND ITS UTILITY IN AN ENVIRONMENTAL PROTECTION CONTEXT

In a ground-breaking recent case, *Juliana v. United States*, the plaintiffs argue that *DeShaney* should be applied to individuals injured as a result of pollution and climate change.<sup>175</sup> Specifically, the litigants in *Juliana* claim that the federal government violated their Fifth Amendment substantive due process rights by creating and perpetuating the danger of pollution and climate change, which inflicts present and future injuries on the plaintiffs.<sup>176</sup> In other words, *Juliana* attempts to utilize the first *DeShaney* exception—the “state-created danger exception”—in order to assert an obligation on the part of the government to protect individuals from the effects of a polluted environment.

This case has introduced the potential for *DeShaney* to hold governments accountable for harm caused by third parties as a result of environmental contamination. In furtherance of the same cause—to assert a governmental duty to maintain a safe and clean

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<sup>174</sup> *DeShaney*, 489 U.S. at 200.

<sup>175</sup> *Juliana v. United States*, 339 F. Supp. 3d 1062, 1075 (D. Or. 2018), *rev’d and remanded*, 947 F.3d 1159 (9th Cir. 2020).

<sup>176</sup> *Id.*; *see also* First Amended Complaint for Declaratory and Injunctive Relief at 85, *id.* (“[D]efendants knowingly caused, and continue to cause, dangerous interference with our atmosphere and climate system. Defendants have knowingly endangered Plaintiffs’ health and welfare by approving and promoting fossil fuel development . . .”).

environment—the “special relationship exception” should also be considered when litigating such cases.

Following the decision in *DeShaney* and the Supreme Court’s declaration of exceptions to the general rule denying a government’s affirmative constitutional duty to protect its citizens from harm, lower courts were left to define the applicability of the special relationship exception in the face of novel fact patterns. Over the past thirty years, the result has been a progressive narrowing of its scope. For example, recent court decisions have held that the special relationship exception requires evidence of involuntary physical custody,<sup>177</sup> despite no such language appearing anywhere in the *DeShaney* opinion.<sup>178</sup> This has resulted in several discrepancies within courts’ interpretations<sup>179</sup> of the “affirmative act” necessary to

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<sup>177</sup> See *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 973 (9th Cir. 2011) (reasoning that a school does not owe an affirmative duty to protect where students remain in the custody of their parents); *Wooten v. Campbell*, 49 F.3d 696, 701 (11th Cir. 1995) (holding that no affirmative duty arises where a child remains in the physical custody of their parents); *Middle Bucks*, 972 F.2d at 1372 (“[T]he school defendants did not restrict D.R.’s freedom to the extent that she was prevented from meeting her basic needs . . . . Thus, the school defendants’ authority over D.R. during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in *DeShaney*.”); *A.S. v. Tellus*, 22 F. Supp. 2d 1217, 1221 (D. Kan. 1998) (“[L]egal custody without physical custody is insufficient to create a ‘special relationship.’”).

<sup>178</sup> See *Middle Bucks*, 972 F.2d at 1379 (Sloviter, C.J., dissenting) (“[A]s the majority itself recognizes, the Supreme Court stated that a duty to protect can arise from ‘the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty . . . .’ *DeShaney* contains no language to support the majority’s holding that the duty to protect can be triggered only by involuntary, round-the-clock, legal custody.”).

<sup>179</sup> Compare *Morrow v. Balaski*, 719 F.3d 160, 173 (3d Cir. 2013) (denying a special relationship exception for the student plaintiff, as restrictions placed on students are “different in kind” from those placed on prisoners or institutionalized individuals), and *A.M. v. N.M. Dep’t of Health*, 65 F. Supp. 3d 1206, 1241 (D.N.M. 2014) (“A plaintiff must show that they were involuntarily committed to state custody to establish a duty to protect under the special-relationship doctrine.”), with *Walton v. Alexander*, 20 F.3d 1350, 1354 (5th Cir. 1994) (“[*Estelle* and *Youngberg*] leave open the possibility that the duty owed by a state to prisoners and the institutionalized might also be owed to other categories of persons in custody by means of similar restraints of personal liberty.”), and *Morrow*, 719 F.3d at 188–89 (Fuentes, C.J. dissenting) (“[*Middle Bucks* provides

sufficiently “restrain[] the individual’s freedom to act on his own behalf . . . triggering the protections of the Due Process Clause.”<sup>180</sup>

To demonstrate how the special relationship exception can be used to implicate a government’s duty to protect from environmental harm, it is necessary to analyze the applicability of the special relationship exception in the environmental protection context. In this context, the liberty restraint identified in *DeShaney* and necessary to satisfy the special relationship exception would refer to the federal and state governments’ restraint on an individual’s liberty to protect the sanctity of her water, air and food supplied by the natural environment within which she is confined. Such an examination leads to the conclusion that the “limitation . . . imposed [by the federal government] on [individuals’] freedom to act on [their] own behalf,” in maintaining a clean environment that provides for their basic needs, is sufficient to assert an affirmative duty under the *DeShaney* exception.<sup>181</sup>

*DeShaney* followed the Supreme Court decisions in *Estelle* and *Youngberg*, which it directly referenced.<sup>182</sup> Both cases dealt with individuals who had been physically confined, either within a prison or mental institution, and whose basic necessities, following confinement, had not been provided for, resulting in the alleged injury.<sup>183</sup> As such, it is unsurprising that the Supreme Court cited those particular conditions of confinement—imprisonment and institutionalization—as eliciting a special relationship in its *DeShaney* opinion. However, the Supreme Court acknowledged the breadth of situations in which an individual may find her liberty restrained and her rights infringed by adding that a “similar restraint of personal liberty” may trigger the exception.<sup>184</sup>

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no basis to conclude that *DeShaney* endorses an all-or-nothing approach that turns on the existence of ‘round-the-clock’ physical custody or on who remained the primary caregiver.”).

<sup>180</sup> *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989).

<sup>181</sup> *Id.*

<sup>182</sup> *See id.* at 198–201.

<sup>183</sup> *See Youngberg v. Romeo*, 457 U.S. 307, 310–11 (1982); *Estelle v. Gamble*, 429 U.S. 97, 100–01 (1976).

<sup>184</sup> *DeShaney*, 489 U.S. at 200.

United States citizens are *confined* to the natural environment and depend upon it for their survival. The federal government's refusal to protect the environment exacerbates environmental degradation not only within its borders, but worldwide. People may be confined within country lines defined by political and international concerns, but the environment—and subsequently, environmental pollution—is perpetually cycling through, over, and across the planet.<sup>185</sup> Unregulated pollution and emissions in the United States inevitably percolates into the waterways, air currents, and soil of every other country.<sup>186</sup> Even within the United States, the EPA has had to manage the effect of wind currents transporting air pollutants across state lines and exacerbating negative health impacts on citizens in those downwind states.<sup>187</sup> As such, American citizens are trapped within the environment of the country, as well as within the environment of the global commons; the conditions of both being directly impacted by the federal government's decision

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<sup>185</sup> See Md. Masud Rana et al., *Investigating Incursion of Transboundary Pollution into the Atmosphere of Dhaka, Bangladesh*, ADVANCES IN METEOROLOGY 1 (2016), <http://downloads.hindawi.com/journals/amete/2016/8318453.pdf> (“Transboundary transport of [particulate matter] is crucial in such a continental pollution scenario as fine particles . . . having days to weeks of lifetime in the atmosphere can travel hundreds or thousands of kilometers and can pollute transboundary regions.”); Joseph Stromberg, *Air Pollution in China is Spreading Across the Pacific to the U.S.*, SMITHSONIAN MAG. (Jan. 21, 2014), <https://www.smithsonianmag.com/science-nature/air-pollution-china-is-spreading-across-pacific-us-180949395/> (asserting that “air pollution doesn't respect international borders”).

<sup>186</sup> *Transboundary Air Pollution*, ENV'T PROT. AGENCY, <https://www.epa.gov/international-cooperation/transboundary-air-pollution> (last visited Oct. 29, 2020) (“Transboundary flows of pollutants occur between the United States and our closest neighbors, Mexico and Canada, as well as between North America, other continents, and other sources in the global commons . . .”); *Transboundary Pollution*, SAFE DRINKING WATER FOUND., <https://www.safewater.org/fact-sheets-1/2017/1/23/transboundary-pollution> (last visited Oct. 29, 2020) (defining the ways in which pollutants travel: “wind transportation,” “river transportation,” “ocean transportation,” “Grasshopper Effect,” and through the droppings of “Arctic seabirds”).

<sup>187</sup> Kate C. Shouse, *The Clean Air Act's Good Neighbor Provision: Overview of Interstate Air Pollution Control*, CONG. RSCH. SERV., <https://fas.org/sgp/crs/misc/R45299.pdf> (last updated Aug. 30, 2018) (discussing the congressional response to the “interstate transport” of air pollutants).

to remediate or ignore hazardous contamination. Due to the nature of this confinement, the Supreme Court should recognize the affirmative duty of the government to sustain safe environmental conditions through pollution regulation and climate change mitigation.<sup>188</sup>

Comparing confinement within the environment to confinement within a prison may seem far-fetched. It is true that the environment presents no barbed wire, barred windows, or concrete walls to physically restrain an individual's freedom. Regardless, the foundational element of confinement is present: it is not possible for a person to escape the natural world—like a fish within the ocean, human life is dependent upon, and cannot exist outside of, this planet's biosphere.

Additionally, courts have approved varying degrees of "custody," beyond a prisoner's long-term physical confinement,<sup>189</sup> as creating a special relationship.<sup>190</sup> For instance, the special relationship exception has been upheld when an injury was sustained *after* release from short-term police custody,<sup>191</sup> as well as when the state had been found to merely approve of the short-term

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<sup>188</sup> Cf. *Farmer v. Brennan*, 511 U.S. 825, 856 (1994) (concurring, Blackmun, J.) ("As Judge Noonan observed: 'The Framers were . . . *familiar with the cruelty that came from bureaucratic indifference to the conditions of confinement*. The Framers understood that cruel and unusual punishment can be administered by the failure of those in charge to give heed to the impact of their actions on those within their care.'").

<sup>189</sup> See generally *Youngberg v. Romeo*, 457 U.S. 307 (1982) (finding special relationship in institutionalization); *Estelle v. Gamble*, 429 U.S. 97 (1976) (finding special relationship in imprisonment).

<sup>190</sup> *Doe v. Covington Cty. Sch. Dist.*, 675 F.3d 849, 881 (5th Cir. 2012) (dissenting, Wiener, C.J.) ("We and other courts have held that . . . a state has a special relationship with a minor it places in foster care, a burglary suspect it temporarily places in the custody of a private club owner, and a woman it threatens with arrest and physically places in her intoxicated boyfriend's truck.").

<sup>191</sup> See *Kovacic v. Larry Brown Enters.*, Civil Action No. L-09-2, 2009 U.S. Dist. LEXIS 118780, at \*14, \*18 (S.D. Tex. Dec. 22, 2009) (holding that the individual being "handcuffed, placed in the back of a police car, and transported against his will" satisfies the physical custody requirement of the special relationship exception, and that the police officers' subsequent failure to release the individual into a safe environment was an impermissible violation of the government's duty to protect him from harm).

confinement of an employee within his employer's establishment.<sup>192</sup> The various circumstances from which the custody requirement and special relationship exception have been upheld belie any hardline rule governing the applicability of the exception. Rather, courts have considered evidence of physical custody alongside a general comparison of the fact pattern to the required special relationship exception factors set down in *DeShaney*.

Under *DeShaney*, courts' analyses must consider both the restraints imposed on the individual's liberty as well as those restricting his ability to provide for his basic needs.<sup>193</sup> *DeShaney* lists examples of basic needs, including clothing, shelter and medical care. However, one could argue that a human's most basic needs are air, water, and food—necessities that not only protect life, but sustain it. The availability of these needs is inexorably dependent upon the state of the natural environment, as a polluted environment will not produce the air, water, and food that sustain human life.<sup>194</sup>

In fact, the Supreme Court has already acknowledged that the harm posed by polluted air may be sufficient for an individual to bring a claim against the State under the *DeShaney* special relationship exception. In *Helling v. McKinney*,<sup>195</sup> an inmate brought an Eighth Amendment claim against prison officials for

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<sup>192</sup> See *Horton v. Flenory*, 889 F.2d 454, 458 (3d Cir. 1989) (finding “state custody” where an employee was held and interrogated by his employer at his place of business, and state police affirmed the employer's power to do so).

<sup>193</sup> *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989).

<sup>194</sup> See, e.g., *Rising CO<sub>2</sub>, Climate Change Projected to Reduce Availability of Nutrients Worldwide*, SCIENCE DAILY (July 18, 2019), <https://www.sciencedaily.com/releases/2019/07/190718085308.htm> (predicting an average 3% nutrient loss in “wheat, rice, maize, barley, potatoes, soybeans, and vegetables . . . by 2050 due to elevated CO<sub>2</sub> concentration”); Helena Bottemiller Evich, *The Great Nutrient Collapse*, POLITICO (Sept. 13, 2017, 5:03 AM), <https://www.politico.com/agenda/story/2017/09/13/food-nutrients-carbon-dioxide-000511> (reporting on a 2014 study—“the largest study in the world on rising CO<sub>2</sub> and its impact on plant nutrients”—that found that “[a]cross nearly 130 varieties of plants and more than 15,000 samples collected . . . over the past three decades, the overall concentration of minerals like calcium, magnesium, potassium, zinc and iron had dropped by 8% on average”).

<sup>195</sup> *Helling v. McKinney*, 509 U.S. 25 (1993).

housing him with a prisoner who smoked five packs of cigarettes a day, causing an “unreasonable risk to his health.”<sup>196</sup> The Court first reaffirmed its opinion in *DeShaney* that a state becomes responsible for an individual’s basic needs when it restrains that individual’s liberty.<sup>197</sup> Then, it held that this duty extends to maintaining a clean and healthy prison environment and protecting inmates from both immediate and potential future harm due to unsafe environmental conditions:

We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate’s current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year. . . . We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery.<sup>198</sup>

In the case law considering whether a special relationship exists between schools and their students,<sup>199</sup> courts have looked to whether the institution “limited in some way the liberty of a citizen to act on his own behalf.”<sup>200</sup> In such cases, courts have generally held that the special relationship exception does not apply because parents retain the freedom to move their children to a different school, and students return home every day to their parents’ custody. In other words, schools do not prevent parents from “meeting [their children’s] basic needs.”<sup>201</sup>

One could argue that, similarly, the federal government does not restrict American citizens’ range of movement and that they are

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<sup>196</sup> *Id.* at 28.

<sup>197</sup> *Id.* at 32.

<sup>198</sup> *Id.* at 33.

<sup>199</sup> See *Walton v. Alexander*, 20 F.3d 1350, 1355 (5th Cir. 1994) (upholding the special relationship exception in regard to a residential special education school that maintained a “significant custodial component wherein [its students were] dependent on the School for [their] basic needs and lost a substantial measure of [their] freedom to act”).

<sup>200</sup> *Doe v. Covington Cty. Sch. Dist.*, 675 F.3d 849, 862–63 (5th Cir. 2012).

<sup>201</sup> *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1368, 1372 (10th Cir. 1992).

technically “free” in the same way that students are free to return home at the end of every school day. Yet, the dangers inherent in a polluted environment are not restricted to a place. Students may be able to escape any potential dangers from school faculty or other students by retreating to the safety of their homes. However, the water accessible at school drinking fountains or bathroom sinks is the same water that flows from household taps. The air inhaled by children on a school playground is the same air surrounding backyards and front porches. If that air and water is inundated with toxic pollutants, or if global warming has intensified life-threatening hurricanes or wildfires, those children face the same risks in the halls of a public school as they do with their parents at home, and parents remain powerless to protect them.<sup>202</sup>

Today, nationwide industrialization impacts every corner of the environment, and individuals must depend completely on the federal government to regulate pollutants and protect the safety of the water they drink, the air they breathe, and the food they eat.<sup>203</sup> Given the diversity and complexity of pollutants being released into the environment, most individuals are unaware of whether they are exposed to potentially harmful contaminants, how to prevent exposure, or even whether their injuries may be attributed to such exposure.<sup>204</sup> In these “extreme circumstances,” where individuals trapped within an environment are at the mercy of governments to protect that environment, “an expansion of the state’s liability” under the special relationship exception is warranted.<sup>205</sup>

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<sup>202</sup> See Denchak, *supra* note 36 (reporting that for nearly eighteen months Flint residents had been drinking lead contaminated water); Fitzsimmons, *supra* note 72 (reporting that Newark officials had denied its water was contaminated with lead); Leyden, *supra* note 73 (responding to the lead contamination in Newark, a resident stated, “I knew it was in the schools . . . I didn’t think it was in my house”).

<sup>203</sup> See Meyer, *supra* note 30 (detailing the extensive federal authority to control environmental pollution and enforce environmental protections).

<sup>204</sup> See Fedinick, *supra* note 37 (reporting that, in 2015, formal enforcement action was taken in only 10.3% of cases in which community water systems violated the Safe Drinking Water Act’s Public Notification Rule and Right to Know (“Consumer Confidence”) Report Rule by not informing consumers about their water quality and possible violations).

<sup>205</sup> *Doe v. Covington Cty. Sch. Dist.*, 675 F.3d 849, 857 (5th Cir. 2012).

V. *JULIANA*: WHERE ARE THEY NOW AND THE IMPLICATIONS FOR ENVIRONMENTAL LITIGATION CLAIMS UNDER *DESHANEY*

On January 17, 2020, the Ninth Circuit, in *Juliana v. United States*,<sup>206</sup> filed a decision dismissing the plaintiffs' case for lack of Article III standing.<sup>207</sup> Specifically, it decided that "it [was] beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan,"<sup>208</sup> and, as such, "the plaintiffs' case must be made to the political branches or to the electorate at large" in order to pursue their claims "through the ballot box."<sup>209</sup>

One could argue that a litigant's claim for redress from environmental pollution or climate change using the special relationship exception will receive a similar judicial determination. However, first, it is important to note that the claims presented in *Juliana* deal solely with climate change; environmental litigation focused specifically on certain geographical areas or types of pollution may require a remedy that would not present "complex policy decisions"<sup>210</sup> and would be more likely to sufficiently "ameliorate [the litigants'] injuries."<sup>211</sup> Second, as the dissent notes, courts are "constitutionally empowered to undertake [such] daunting tasks:" "[t]here is no justiciability exception for cases of great complexity and magnitude."<sup>212</sup>

It is beyond the scope of this Note to present a comprehensive discussion on redressability in environmental litigation cases; suffice it to say that courts often "weigh scientific and prudential considerations . . . to put the government on a path to constitutional compliance."<sup>213</sup> The dissent suggested two such cases: *Brown v. Plata*, in which the Supreme Court upheld an order for the State of California "to formulate a plan" to "reduce its prison population to

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<sup>206</sup> *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

<sup>207</sup> *Id.* at 1175.

<sup>208</sup> *Id.* at 1171.

<sup>209</sup> *Id.* at 1175.

<sup>210</sup> *Id.* at 1171.

<sup>211</sup> *Id.* at 1170.

<sup>212</sup> *Id.* at 1185 (Staton, J., dissenting).

<sup>213</sup> *Id.* at 1189 (Staton, J., dissenting).

137.5% of the prisons' design capacity within two years";<sup>214</sup> and *Brown v. Board of Education*,<sup>215</sup> in which the Supreme Court "mandated the racial integration of every public school" nationwide.<sup>216</sup> In considering such precedents, one should conclude that courts have the means to fashion the appropriate redress, regardless of the complexity involved, when the issue is one of "nationwide importance."<sup>217</sup> The question now is whether the courts will conclude that climate change and pervasive environmental pollution have reached that level in time.<sup>218</sup>

Finally, it is true that the separation of powers and preservation of "balance among the branches" is fundamental to the nation's governance.<sup>219</sup> However, as the dissent in *Juliana* notes, "the doctrine of judicial review compels federal courts to fashion and effectuate relief . . . even when . . . it requires that [they] instruct the other branches as to the constitutional limitations on their power."<sup>220</sup> Further, legal claims that the federal government has failed to act in the face of climate change and environmental protection have

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<sup>214</sup> *Brown v. Plata*, 563 U.S. 493, 509–10 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.").

<sup>215</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>216</sup> *Juliana*, 947 F.3d at 1188. In making its determination, the *Brown* Court stated that "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with" how best to "transition to school systems operated in accordance with [these] constitutional principles." *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955). In light of the "complexities arising from the transition to a system of public education freed of racial discrimination," including "problems related to administration, . . . the school transportation system, personnel, revision of school districts, . . . and revision of local laws and regulations," the Court merely stated that "[t]he burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." *Id.* at 299, 300.

<sup>217</sup> *Brown*, 349 U.S. at 298.

<sup>218</sup> *See Juliana*, 947 F.3d at 1191 (Staton, J., dissenting) ("Where is the hope in today's decision? Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's *own studies*, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?").

<sup>219</sup> *Id.* at 1184.

<sup>220</sup> *Id.*

persisted regardless of the particular party in power.<sup>221</sup> Abdicating the responsibility for change to the electorate will not suffice. Rather, it is time for the judiciary—the federal branch not accountable to corporate economic interests<sup>222</sup>—to step in before it is too late.

#### CONCLUSION

Appreciation for the natural world, and the subsequent tension between industrialization and preservation of the environment, has been part of the framework of human civilization for centuries.<sup>223</sup> Such evidence of a history and tradition of recognizing a right may encourage the Supreme Court to uphold an affirmative duty to protect it. However, finding a historical underpinning is far from determinative and may be insufficient in affirming the *present-day* implications of continuing to reject that duty. As the Supreme Court noted in *Obergefell v. Hodges*, “[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment 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. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim of liberty must be addressed.”<sup>224</sup>

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<sup>221</sup> See *Massachusetts v. Env’t Prot. Agency*, 549 U.S. 497, 505 (2007) (alleging that the EPA, under President George W. Bush, “has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases”); *Juliana v. U.S.*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016) (“Plaintiffs filed this action against defendants the United States, President Barack Obama, and numerous executive agencies.”).

<sup>222</sup> See *supra* notes 87, 90 and accompanying text.

<sup>223</sup> See *Grove*, *supra* note 31, at 54 (detailing the extensive deforestation perpetuated by the British in nineteenth century India and the subsequent call for a forest reserve system to protect those natural resources and support precipitation); *Sturges*, *supra* note 115 (“For Jefferson and Washington, the success of the US nation-state depended on the scientific study and sustainable harvest of its natural resources, and in their arguments for agricultural reform they advanced a doctrine of efficiency that anticipated the conservation movement of the early twentieth century.”).

<sup>224</sup> *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

The Supreme Court and lower courts have upheld a government's affirmative duty to protect from harm prisoners, institutionalized patients,<sup>225</sup> and foster children.<sup>226</sup> Under the Court's established "special relationship exception," it has held that the government's restriction of these individuals' ability to protect themselves creates a duty to "fill the gap."<sup>227</sup> Under the same rationale, the Court should establish a "claim to liberty"<sup>228</sup> from toxic environmental pollution and life-threatening climate change. In the face of "Earth's sixth mass extinction,"<sup>229</sup> the federal government should bear an affirmative duty to protect its citizens from pollution and global warming. It is time for courts to hold the government to its promise—articulated through numerous federal laws,<sup>230</sup> the Environmental Protection Agency,<sup>231</sup> and international agreements<sup>232</sup>—to protect a sustainable environment and guarantee its citizens a sustainable life.

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<sup>225</sup> See *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) ("When a person is institutionalized—and wholly dependent on the State . . . a duty to provide certain services and care does exist . . .").

<sup>226</sup> See *Matthews v. Bergdorf*, 889 F.3d 1136, 1146 (10th Cir. 2018) (recognizing "a State's affirmative act of placing a child in involuntary foster care as a similar restraint on liberty triggering constitutional protection under the exception").

<sup>227</sup> *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 198–201, 210 (1989).

<sup>228</sup> *Obergefell*, 576 U.S. at 664.

<sup>229</sup> Damian Carrington, *Earth's Sixth Mass Extinction Event Under Way, Scientists Warn*, THE GUARDIAN (July 10, 2017, 3:00 PM), <https://www.theguardian.com/environment/2017/jul/10/earths-sixth-mass-extinction-event-already-underway-scientists-warn>.

<sup>230</sup> See *Laws and Executive Orders*, ENV'T PROT. AGENCY, <https://www.epa.gov/laws-regulations/laws-and-executive-orders> (last visited Oct. 31, 2020) (listing the thirty-three federal laws "help[ing] to protect human health and the environment").

<sup>231</sup> See *Our Mission and What We Do*, ENV'T PROT. AGENCY, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Oct. 31, 2020) ("The mission of EPA is to protect human health and the environment.").

<sup>232</sup> *North American Agreement on Environmental Cooperation*, COMM'N FOR ENV'T COOPERATION, <https://ustr.gov/sites/default/files/naaec.pdf> (last visited Oct. 19, 2020); *United Nations Framework Convention on Climate Change*, U.N. (May 9, 1992), <https://unfccc.int/process-and-meetings/the->

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