

A Human Rights Framework for the Anthropocene

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For the first time in history or pre-history, humanity is the primary driver of physical change in the biosphere. The advent of the Anthropocene—and the climate crisis at its core—is a profound shift with deep moral implications across a multitude of dimensions.¹ Weighty moral duties flow from the rich and powerful, who have burned fossil fuels with abandon, to the poor and powerless, whose contributions of planet warming gases have been miniscule in comparison and yet who are the primary victims of a climate spinning out of control. Such duties also flow from current to future generations and from humanity to every other species.

If each century has its defining moral issue, the climate crisis is that issue for the twenty-first century. In the twentieth century, the defining moral bad was arguably the subordination of stigmatized groups, with efforts to combat that evil perhaps reaching an apex mid-century, as the high profile successes of the U.S. Civil Rights Movement inspired other liberation movements across the globe, and as world leaders cooperated on a set of political and economic institutions aimed at promoting world peace and embraced a “second generation” of human rights norms fueled in large part by the horrors of the Holocaust.

To the extent law played a role in these twentieth century moral struggles, rights—in the form of human rights at the international level and constitutional rights at the domestic level²—were one of the law’s primary tools, and perhaps the most important one. Human and constitutional rights, at least rhetorically if not always operationally, have been the law’s best response to unthinkable, far-reaching moral transgression and the law’s strongest condemnation of the exploitation of the weak by the powerful. This is perhaps in part because, rhetorically, rights have about them an aura of absolutism, which is satisfying in the context big, high stakes moral issues. Operationally, they literally stand above and outside ordinary law, allowing an independent judiciary to override ordinary lawmaking by legislatures and executives. Accordingly, just as human and constitutional rights were central to the twentieth century’s defining moral struggle against subordination of stigmatized groups, they may also be an important component of the twenty-first century’s struggle against the political forces that continue to perpetuate and exacerbate the climate crisis.

¹ While invasive species and the spread of toxins are important components of anthropogenic change, and the nuclear arsenal certainly holds the potential to cause catastrophic destruction, climate disruption is the most profound and far-reaching in its effects.

² I use the term “human rights” to connote both the human rights enshrined in international human rights instruments, and also what are commonly called “constitutional rights,” those rights articulated in domestic constitutions. These are all rights that are special in that they stand outside of and above the state; they have the capacity to nullify actions taken by a state’s executive or legislature through otherwise ordinary legal channels.

As we begin to define a human right to security from climate disruption, it may be tempting to try to locate such a right in the tradition of the second and third generation rights of the post-war era. Second generation human rights, after all, often include a right to health, or even a right to a healthy environment. And third generation rights often include a right to the free and equitable use of natural resources. But these second and third generation human rights are not nearly as well accepted or enforceable as first generation civil and political rights, legally, or even just rhetorically. This is especially so in the United States, which has historically been the primary locus of the fossil fuel based economic activity (and related political activity) most responsible for the continuing failure of the global polity to address the climate crisis.

Locating a right to security from climate disruption instead in the first-generation tradition of Political and Civil Rights holds far more promise for creating a legally effective tool. Such a right also holds more promise as a rhetorically and politically effective tool insofar as it helps to shift the focus of the political conversation away from the myth of scientific uncertainty that so often frames the debate, onto the fundamental power imbalance that is actually at the heart of the political failure that has stymied global action for so long. Two recent cases from United States courts—*Juliana v. United States*³ and *Pennsylvania Environmental Defense Fund v. Commonwealth*⁴—have actually begun to move in this direction. Both cases recognized climate change or environmental rights and located those rights squarely within the Civil and Political Rights tradition, though without elaborating much of a justification for this move. In the following pages, I begin to fill in some of the analysis that was missing from those cases, investigating some of the challenges and sketching the contours of some potential approaches for justifying the recognition of a right to security from climate disruption within the Civil and Political Rights tradition.

Part II briefly describes the three generations of human rights and the two recent cases. Part III examines the fundamental concerns and values that animate the Civil and Political Rights tradition. Finally, Part IV investigates the possibility that these same concerns and values might justify the inclusion of a human right to security from climate disruption within the Civil and Political Rights tradition. This discussion is necessarily tentative, sketching the broad outlines of some possible arguments in an attempt to begin rather than end a conversation.

II. The Climate Change Right and the Human Rights Tradition

I use the term “human rights” to connote both the human rights enshrined in international human rights instruments, and also what are commonly called “constitutional rights,” those rights articulated in domestic constitutions. These are all rights that are special in that they stand outside of and above the state; they have

³ 217 F. Supp. 1224 (D. Or. 2016).

⁴ 161 A.3d 911 (Pa. 2017).

the capacity to nullify actions taken by a state's executive or legislature through otherwise ordinary legal channels.

Historically, the recognition of human rights has come in waves. The first wave occurred during the Enlightenment and gave birth to the what are now commonly called the Civil and Political Rights. These rights stress the protection of individual autonomy and dignity from government interference, and are most famously articulated in the U.S. Constitution's Bill of Rights and the French Declaration of the Rights of Man. The second wave occurred primarily in the aftermath of World War II and comprises what are now generally called the Economic and Social Rights. These rights are rooted in the notion that government has affirmative obligations to protect individuals from deprivations of the basic material necessities of life, including food, shelter, and health care. More recently, a third generation of human rights have begun to emerge centered around group rights to the protection of cultural identity and self-determination.⁵

Civil and Political Rights impose negative duties on government—to refrain from taking certain actions that will harm individuals. Prototypical examples include a police officer beating a suspect or government banning certain speech. Social and Economic Rights, in contrast, are positive in that they impose affirmative duties on government—to provide food or shelter, for example. At first blush, these second-generation rights would seem to provide the easiest fit for environmental rights.⁶ It's easy to conceptualize an environmental protection right as an affirmative right—the individual saying to the government, “protect me from (largely private) polluters.” Indeed, many instruments conferring Economic and Social Rights already include a right to health, or even a right to a healthy environment.⁷ Similarly, in those instances in which environmental harm threatens the cultural heritage of an indigenous group, particularly with respect to the free and equitable use of natural resources, environmental human rights might fit comfortably within the third-generation framework as well.

But these second and third generation rights are not nearly as well accepted or enforceable as first generation Civil and Political Rights. Civil and Political Rights are, after all, the rights with the longest historical pedigree. They are also the rights that command the most respect and acceptance around the world. This is particularly true in the United States. And since the U.S. is arguably ground zero for the economic and political activities revolving around fossil fuel use and extraction that have been most responsible for the world's failure to tackle the climate crisis, the perspective from the U.S. legal system is particularly important.

Moreover, second and third generation rights are typically expressed in less binding terms. The International Covenant on Economic, Social, and Cultural Rights, for example only calls on States to “take steps” to achieve the enumerated rights “up to the maximum of available resources.”⁸ The International Covenant on Civil and

⁵ Morton E. Winston (ed.), *The Philosophy of Human Rights* (Belmont, CA: Wadsworth 1989) 4-5, 18-19; Tom Campbell, *Rights: A Critical Introduction* (New York: Routledge, 2006) 5-10.

⁶ Joseph L. Sax, 'The Search for Environmental Rights' (1990) 6 J. Land Use & Envtl. L. 93.

⁷ See 1988 Protocol to the American Convention on Human Rights, Art. 11 (“Everyone shall have the right to live in a healthy environment”).

⁸ International Covenant on Economic, Social and Cultural Rights, Art. 2(1).

Political Rights, by contrast, directs each State to “undertake to respect and to ensure [the enumerated rights] to every individual within its territory.”⁹ In addition, human rights instruments often frame second and third generation rights in explicitly non-justiciable terms. Many constitutions, for example, include them in a separate section designated for non-justiciable rights.¹⁰ Second and third generation human rights may also simply be inherently less amenable to judicial enforcement than negative rights.¹¹

Another strategy would be to try to fit climate disruption issues within the negative rights rubric of Civil and Political Rights by selectively choosing the facts on which to bring such a claim. After all, governments are routinely involved in at least some affirmative acts that cause harm to the climate, including operating government vehicles, buildings and other facilities that produce greenhouse gas emissions, and subsidizing the use and/or extraction of fossil fuels. One could limit one’s claims simply to those affirmative acts and frame the right as a negative one—protecting individuals from those harms affirmatively inflicted by the government.¹² But that’s not really getting at the root of the problem. Since the vast majority of emissions (and destruction of carbon sinks) come from private activities, the central work that we need a right to security from climate change to perform is to impose a duty on government to regulate private parties. And that is something that does not fit obviously within the negative rights tradition of Civil and Political Human Rights.

Instead, we need a new way to conceptualize a human right to security from climate change that fits it within the Civil and Political Rights tradition and yet frames it so as to demand government regulation of private parties. Even just ten years ago, this may have seemed like a pipe dream, particularly the United States, which has remained tightly rooted in a negative rights tradition. But in recent years there have been a couple of court decisions from the U.S. that have taken significant steps in that direction. In *Juliana v. United States*, in which a group of children and a *guardian ad litem* for future generations sued the President of the United States and various executive agencies, a federal district court in Oregon recognized a fundamental substantive due process “right to a climate system capable of sustaining human life.”¹³ While the ruling occurred at the motion to dismiss stage, and thus simply allows the plaintiffs’ claims to proceed (at this writing, the case is still awaiting trial), the court’s decision was particularly notable in allowing plaintiffs to challenge not only that the government’s affirmative contributions to atmospheric carbon levels, but its “failure to limit third-party CO2 emissions.”

In *Pennsylvania Environmental Defense Fund v. Commonwealth*, the supreme court of Pennsylvania interpreted that state’s constitutional environmental rights amendment to impose meaningful substantive duties on all branches and all levels

⁹ International Covenant on Civil and Political Rights, Art. 2(1).

¹⁰ Barry E. Hill, Steve Wolfson, Nicholas Targ, ‘Human Rights and The Environment: A Synopsis and Some Predictions,’ (2004) 16 Geo. Int’l Env’tl. L. Rev. 359, 381-82; Michael R. Anderson, ‘Individual Rights to Environmental Protection in India’ in Alan E. Boyle & Michael R. Anderson (eds.) *Human Rights Approaches to Environmental Protection* (1996) 199, 213-14 (discussing constitution of India).

¹¹ Frank B. Cross, ‘The Error of Positive Rights’ (2001) 48 UCLA L. Rev. 857.

¹² Indeed, one of the claims in the *Juliana* case is framed in precisely that way. 217 F.Supp. at --.

¹³ 217 F. Supp. 1224 (D. Or. 2016).

of state government to protect the rights of current citizens and future generations to “clean air, pure water, and . . . the natural . . . environment,” as well as to protect the state’s natural resources.¹⁴ In so doing, the court suggested, at least in dicta, that these duties include both affirmative duties to restrain the harmful actions of private parties as well as negative duties to refrain from directly causing harm. While this case arose in the context of a challenge to the Pennsylvania General Assembly’s misuse of funds generated from the leasing of state lands for gas drilling, its language recognizing broad environmental rights is arguably expansive enough to encompass a right to security from climate disruption.¹⁵

Both these cases contain sweeping language that unmistakably situates the environmental rights recognized within the Civil and Political Rights tradition. The *Juliana* decision called the right to security from climate change “fundamental” and located it squarely within the Due Process Clause of the U.S. Bill of Rights. The *PEDF* decision also called the environmental rights recognized there “fundamental,” as well as “inherent and infeasible,” and of a piece with the rest of Article I of the Pennsylvania Constitution, which contains generally the standard litany of civil and political rights found in the U.S. Bill of Rights.¹⁶

Neither opinion, however, went into much depth to fully elaborate a justification for locating an environmental right—particularly an affirmative environmental right—within the Civil and Political Rights tradition. The *PEDF* decision justified the treatment such rights as Civil and Political Rights simply by reference to the text of the Environmental Rights Amendment and its placement in Article 1 of the Pennsylvania Constitution, alongside the other standard rights of the Civil and Political Rights tradition. The *Juliana* court’s justification consisted primarily of identifying the right to security from climate change as a fundamental right warranting strict scrutiny review under the Due Process Clause. And the court’s justification for calling it fundamental simply appealed to the enormity of the climate crisis. “I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. . . . [It] is quite literally the foundation ‘of society, without which there would be neither civilization nor progress.’”

I certainly do not mean to discount the immensity of the climate crisis as one aspect of the argument for recognizing a Civil and Political Right to security from climate disruption. But I’m not sure that fully answers the question—why should a climate right be treated as a Civil and Political Right? The next Part begins to think about how we might approach a fuller and more satisfying answer to that question

¹⁴ 161 A.3d 911 (Pa. 2017)(quoting PA. CONST. art. I, § 27).

¹⁵ Robert B. McKinstry, Jr. & John C. Dernbach, ‘Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption’ (forthcoming) – Mich. J. Env’tl. & Admin. L. --.

¹⁶ 161 A.3d at 930-31. Indeed, the court explicitly endorsed the reasoning of an earlier plurality opinion on this point. *See id.* at 930 (“[W]e rely here upon the statement of basic principles thoughtfully developed in [the] plurality opinion [in *Robinson Twp. V. Commonwealth*]. The earlier opinion stated: “The right delineated in the first clause of [the Environmental Rights Amendment—the “right to clean air, pure water and . . . the natural . . . environment”] presumptively is on par with, and enforceable to the same extent as, any other right reserved to the people in Article I.” 83 A.3d at 953-54.

by examining a preliminary set of questions: What defines Civil and Political Rights? What are the values and concerns that underlie these rights and distinguish them from other kinds of rights?

III. The Justifications Animating the Civil and Political Rights Tradition

Much has been written about the basis and justification for the long-established lexicon of Civil and Political Rights. From that literature, two dominant strands consistently emerge from efforts to identify the concerns and values that underlie and animate those rights. We might label them “the individual autonomy strand” and “the process strand.”

A. The Individual Autonomy Strand

Efforts to articulate the values and concerns that underlie the Civil and Political Rights tradition most often frame those values around the idea of individual autonomy. Under this approach, civil and political rights are said to “reason[] out” from the conception of the person, viewing the integrity, dignity and autonomy of the individual as paramount.¹⁷

At first blush, this sounds like an easy fit for a climate change right. There are certainly myriad ways that climate disruption will invade individual integrity, autonomy, and dignity—from people being killed, injured or driven from their homes by storms and sea level rise, to mortality from heat waves and the spread of infectious disease—the list goes on and on. And this is essentially the approach the *Juliana* court took, reasoning that a climate right is “necessary to enable [the individual to] exercise . . . other rights” and “fundamental to a free and ordered society.”¹⁸

But framing these rights solely in terms of the protection of individual autonomy doesn’t offer a full enough explanation. Civil and Political Rights are not just about protecting individual autonomy from all comers. The identity of the perpetrator matters. If my neighbor hits me over the head with a stick, she certainly invades my autonomy, and for that I could sue her in tort. But I could not sue her for violating my *constitutional* or *human* rights. It is only when person wearing the

¹⁷ Richard H. Pildes, ‘Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism (1998) 27 J. Leg. Stud. 725, 729. Pildes argues that instead of reasoning out from a conception of personhood, we should “reason in” from an experience of actual government practices and from the risk that government will abuse power, arguing that the framers actually took the latter approach. *Id.* at 730. *See also* Frederick Schauer, *Free Speech: A Philosophical Inquiry* (1982) 47–72 (discussing arguments for free speech grounded in notions of individual self-realization, the “good life,” and individual autonomy); C. Edwin Baker, ‘Scope of the First Amendment Freedom of Speech,’ 25 U.C.L.A. L. Rev. 964, 990-1009 (1978) (grounding First Amendment in self expression and self fulfillment); Thomas Scanlon, ‘A Theory of Freedom of Expression,’ 1 Phil. & Pub. Affairs 204, 215-22 (1972) (arguing from individual autonomy); *Whitney v. California*, 274 U.S. 357, 375 (1927) (“Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . They values liberty both as an end and as a means. They believed liberty to be the secret of happiness.”).

¹⁸ 217 F. Supp. at --.

uniform of the state hits me with a stick that I can say my constitutional or human rights have been violated.

Thus, human rights are defined not solely by reference to the victim. It is also necessary to expand the field of view to the actor who is violating those rights. In addition to requiring certain kinds of harms to individual autonomy, human rights also require a certain kind of perpetrator, one clothed in the authority of the state and wielding state power. In U.S. constitutional law, for example, the state action doctrine prevents the assertion of constitutional rights claims against private actors. And with only a few discrete exceptions for human rights against genocide, war crimes, and crimes against humanity, international human rights have also been defined solely against states.¹⁹ This raises another question: Why do human rights aim specifically at protecting us from state rather than private actors? What makes the state so special? First, states are enormously powerful, and, second, they are unique.

Although today there are many multi-national corporations that wield more wealth and power than many states, during the Enlightenment, when Civil and Political Rights were born, the state was the largest aggregation of power in society.²⁰ And the rights that emerged from that era were primarily built on David and Goliath stories about protecting the little guy—the individual—from the overwhelming power and authority of the state.²¹ Criminal proceedings are perhaps the context in which this asymmetrical confrontation between individual and state power is most palpable. Thus, it is no surprise that so many of the rights in the civil and political rights lexicon deal with the rights of criminal defendants. The right to counsel,²² the right against self-incrimination,²³ the double jeopardy guarantee,²⁴

¹⁹ See Campbell and Seumas Miller (eds.), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations* (Boston: Kluwer Academic Publishers, 2004), pp. 63, 14; Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', *Yale Law Journal* 111 (2001), 443, 465-66. There are a few exceptions. Human rights against genocide, war crimes and crimes against humanity have, since the aftermath of World War II, been enforceable against individuals: see *ibid.* at 466-68; Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. 4, S. Exec. Doc. O, 81-1 (1949) ('[P]ersons committing genocide ... shall be punished whether they are constitutionally responsible rulers, public officials, or private individuals').

²⁰ Private corporations were relatively few in number at the time of the framing of the U.S. Constitution. See James Stancliffe Davis, *Essays in the Earlier History of American Corporations: Number IV, Eighteenth Century Business Corporations in the United States* (1917) 4-8, 332 (very few corporations in U.S. before 1789).

²¹ Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (Liveright, 2018) 4 ("[T]he founders worried about all sorts of concentrations of power, including concentrations of wealth.")

²² See *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (right to counsel aimed at correcting the imbalance of power between the government and the accused).

²³ See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (right against self incrimination aimed at ensuring 'the proper scope of governmental power over the citizen ... and maintaining a fair state-individual balance').

²⁴ See *Green v. United States*, 355 U.S. 184, 187-88 (1957) ("The underlying idea [behind the double jeopardy clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to

and the beyond-a-reasonable-doubt standard can all be traced to the need to counteract the vast disparity of power between the state and the accused.²⁵

Of course, there have always been organizations in the private sphere that also amass large amounts of wealth and power. The Catholic Church is one obvious example. And even in the eighteenth century, before the advent of the multinational corporations we know today, there were undoubtedly corporations—the East India Company and others—that wielded substantial wealth and power.²⁶ But state power is unique. The state controls the justice system, along with the military and the police—“the full panoply of state power.”²⁷ While private wealth and power undeniably influences the state to varying degrees, it is ultimately—at least in theory and sometimes in practice—answerable to state power. Witness the recent conviction and incarceration of the CEO of Massey Energy, one of the largest coal companies in the United States, for his role in the Upper Big Branch Mine disaster, in which 29 miners lost their lives.

When the state abuses power, on the other hand, there is no higher power to appeal to; the state is the final decision maker.²⁸ Accordingly, state power uniquely

convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety’).

²⁵ See Andrew Ashworth, *Principles of Criminal Law* (New York: Oxford University Press, 1991), p. 74. See *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (right to counsel aimed at correcting the imbalance of power between the government and the accused); *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (right against self incrimination aimed at ensuring “the proper scope of governmental power over the citizen . . . and maintaining a fair state-individual balance”); *Green v. United States*, 355 U.S. 184, 187–88 (1957) (“The underlying idea [behind the double jeopardy clause], one that is deeply ingrained in at least the Anglo- American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety . . .”); Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on “the most Pervasive Right of an Accused,”* 30 U. CHI. L. REV. 1, 7 (1962) (“It is helpful to view criminal procedural due process as containing two great values or objectives: “The attainment of justice and the containment of power.”) (quoting Barth, *The Price of Liberty* 26 (1961)); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U. L. Q. 279, 280 (arguing that constitutional criminal procedural “safeguards are checks upon government – to guarantee that government shall remain the servant and not the master of us all”); Susan Bandes, *We the People” and Our Enduring Values*, 96 MICH. L. REV. 1376, 1389, 1391 (1998) (arguing that the criminal procedure amendments “serve to address the inequality of power between the government and the individual and the need to curtail abuse of that power”).

²⁶ Adam Smith warned about corporate power in his 1776 book, *The Wealth of Nations*. And Thomas Jefferson worried about corporate power as well. See Letter from Thomas Jefferson to Tom Logan (Nov. 12, 1816), in P. Ford (ed.), 12 *The Works of Thomas Jefferson* 42, 44 (1905) (“I hope we shall ... crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country”). On perceptions of corporate power in the early years of the U.S., see generally Eric Hilt, ‘Early American Corporations and the State,’ in Naomi R. Lamoreaux & William J. Novak (eds.), *Corporations and American Democracy* (Harvard, 2017) 37-73. See also Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (Liveright, 2018) 3-31.

²⁷ *Shelly v. Kreimer*.

²⁸ See *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388, 394 (1971) (“[W]e may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance ... [but] the mere invocation of [government] power by a ... law enforcement official will normally render futile any

requires some institution like constitutional and human rights that can stand outside of and above the apparatus of the state and thereby constrain exercises of its ultimate and unappealable power.

So the individual autonomy strand views the function of human rights as protecting individual autonomy and dignity, but not from all comers—specifically from invasions by the state. The state is singled out as the target both because of its enormous power but also because of the uniqueness of that power. Under this view, Civil and Political Rights aim to correct the imbalance of power between the individual and the state by placing a thumb on the scale in favor of the individual.

B. The Process Strand

Several of the most prominent and influential general theories of rights put forward in the past few decades have cast the constitutional or human rights of the Civil and Political Rights tradition specifically as correctives for distortions in the processes of government decision-making caused by power imbalance. These include the work of John Hart Ely, Ronald Dworkin, and authors associated with the late-twentieth-century revival of civic republicanism.

i. John Hart Ely

John Hart Ely's "process view" of the Constitution provides perhaps the most prominent example of this literature.²⁹ Ely began with the fundamental dilemma of judicial review: Where can unelected judges look for principles of interpretation to "fill in the Constitution's open texture"³⁰ without violating the basic democratic tenet of majority rule? According to Ely, rather than measuring democratically produced legislation against to any particular substantive values, judicially enforceable constitutional rights serve instead to simply ensure that the process of representative democracy is functioning such that no group or individual is denied the ability to participate in the political process.

In this view, First Amendment freedoms are protected "because they are critical to the functioning of an open and effective democratic process."³¹ The voting-rights cases seek to "unblock[] stoppages in the democratic process,"³² recognizing that the legislature cannot be trusted to police such stoppages because "those in power have a vested interest in keeping things the way they are."³³ Article IV's Privileges and Immunities Clause and the Commerce Clause both seek to protect out-of-state residents who are unrepresented in state legislatures and are thus "a

attempt to resist an unlawful entry or arrest by resort to the local police, and a claim of authority to enter is likely to unlock the door as well').

²⁹ Ely, *Distrust*, *supra* note **Error! Bookmark not defined.**, at 87 (arguing for a "participation oriented, representation reinforcing approach to judicial review."); *see also id.* at 102-03 (rights serve to correct systematic malfunctions of the "political market").

³⁰ *Ibid* 73.

³¹ *Ibid* 105.

³² *Ibid* 123-24;

³³ *Ibid* 120

paradigmatically powerless class politically.”³⁴ And the Equal Protection Clause seeks to correct distortions in democratic decision making that occur when prejudice operates to “bar[] [some minority group] from the pluralist’s bazaar”³⁵ – the bargaining process by which minorities join forces with others in the political process to protect themselves from the tyranny of the majority.

Ely framed his analysis as a kind of reformulation of the famous *Carolene Products* footnote 4, in which U.S. Supreme Court Justice Stone suggested two situations requiring heightened judicial scrutiny: 1) “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” and 2) “prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”³⁶ Ely distilled this into two permissible functions for judicial review: the first procedural—to clear the channels of political participation and representation from obstacles erected by those in power—the second substantive—to correct for distortions in the political process caused by prejudice.³⁷

Ely was cognizant that Footnote 4’s touchstone, “discrete and insular minorities,” was too restrictive. Although understandable in light of the history and context of the time, if taken literally, it leaves out many of the groups that are in fact most powerless in the political process. The poor are diffuse rather than insular, and gays and lesbians are often anonymous rather than discrete. Ely’s focus on “prejudice” broadened Footnote 4’s focus somewhat, allowing him, for example, to argue for heightened scrutiny of gender-based classifications despite the fact that women are neither discrete and insular, nor a minority.³⁸ As “a lens that distorts reality,”³⁹ Ely viewed prejudice as a force that would prevent other groups from joining forces with certain disadvantaged groups even where their interests coincide and would thereby shut the disadvantaged groups out of the pluralist bazaar that otherwise prevents more powerful groups from entirely ignoring the interests of the less powerful.

But even Ely’s formulation was arguably too narrow. Several authors subsequently argued for an expanded view of the kinds of political process malfunctions that warrant judicial review. Bruce Ackerman argued that judicial review is appropriate in all circumstances in which “some groups suffer from systematic disadvantages in pursuing their interests in the pluralist bargaining process normally central to American politics.”⁴⁰ In his view, by enforcing rights,

³⁴ Ibid 83.

³⁵ Ibid 152.

³⁶ *United States v. Carolene Products Co.*, 304 U.S. 144, 152–52 n. 4 (1938)

³⁷ Ely, 104–34, 135–79.

³⁸ Ibid. 164. Although the Supreme Court has never explicitly adopted his approach to constitutional rights, at least one observer has concluded that Ely’s process perspective “has shaped the universe of constitutional discourse” and “become the background against which constitutional questions themselves are framed.” Barbara J. Flagg, ‘Enduring Principle: On Race, Process, and Constitutional Law,’ 82 Cal. L. Rev. 935, 949–50 (1994).

³⁹ Ely, *Distrust*, *supra* note **Error! Bookmark not defined.**, at 153.

⁴⁰ Bruce A. Ackerman, ‘Beyond Carolene Products,’ (1985) 98 Harv. L. Rev. 713, 740–42.

the courts act as “perfector[s] of pluralist democracy, . . . correct[ing] the political results generated by unfair bargaining advantages.”⁴¹ Prejudice against discrete and insular minorities was one example of the kinds of malfunctions in the political process justifying judicial intervention, but the principle is broad enough to encompass other malfunctions as well. Two that Ackerman specifically discussed—the political ineffectiveness of diffuse majorities and the distorting effect of wealth on democratic processes—are particularly prevalent in environmental disputes.⁴² Richard Parker similarly criticized Ely’s narrow focus on prejudice, arguing that the theory should be expanded to account also for “inequalities in power, wealth, status, and education” and the ability of politically powerful minorities, like industry, to routinely control diffuse and non-mobilized majorities.⁴³

It is perhaps no surprise that for Ely the most salient process malfunctions were those traceable to the defining moral issue of his century—prejudice against discrete and insular minorities. But viewed from the distinctly twenty-first century vantage-point of the Anthropocene, Ely’s theory appears susceptible to a more capacious reading that might create space for the imagining of a climate change right. Under this broader vision, Civil and Political Rights function to correct malfunctions in the democratic process that occur when politically powerless groups suffer from a “systematic bargaining disadvantage”⁴⁴ that effectively shuts them out of the democratic process.

ii. Ronald Dworkin

A similar concern for correcting distortions in government decision making is evident in the writings of Ronald Dworkin, perhaps the most influential rights theorist of the late twentieth century. Like Ely, Dworkin focused the bulk of his attention on distortions stemming from prejudice. But his theory was ultimately grounded in broader concerns about power imbalance.

In Dworkin’s view, rights serve as a necessary corrective to the inevitable defects in the utilitarianism that ordinarily provides the basis for democratic lawmaking.⁴⁵ In general terms, utilitarianism embraces the equality principle and,

⁴¹ Ibid.

⁴² Ackerman, 722-723.

⁴³ Richard Davies Parker, ‘The Past of Constitutional Theory—And its Future’ (1981) 42 Ohio St. L. J. 223, 241–46. Frank Michelman also argues for an expanded view of Ely’s theory that takes a republican rather than pluralist view of the political process. *See generally* Michelman,

⁴⁴ Ackerman, *Beyond Carolene*, *supra* note **Error! Bookmark not defined.**, at 741.

⁴⁵ *See* Ronald Dworkin, *Taking Rights Seriously* (1977) 277. Dworkin articulates the two strands of rights jurisprudence that track the two strands I describe above. In Dworkin’s terms, the first is the vague but powerful idea of human dignity . . . associated with Kant . . . The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves.

Dworkin, 199. He argues that the idea of rights can be grounded in one or both strands. Both strands appear at various points in Dworkin’s writing. *Compare* Dworkin, *Taking Rights*, *supra* at 201 (characterizing a certain right as an “invasion of personality” and free speech as protecting “the

indeed, gains much of its appeal from that embrace, weighing the preferences of each individual on the same scales and thus “treat[ing] the wishes of each member of the community on a par with the wishes of any other.”⁴⁶ Defects arise when utilitarianism violates this equality principle. When certain members of the community hold racist or Nazi views, for example, their preferences include not only those “personal” to them (concerning the availability of goods or opportunities to themselves) but also those that are “external” (concerning the availability of goods and opportunities to others.) These external preferences take the form of preferring that members of the disfavored group (Blacks or Jews) have fewer of their preferences fulfilled.

Because Utilitarianism has no principled basis on which to exclude such preferences, they must be counted, the result of which is to “corrupt” the “egalitarian character of the argument.”⁴⁷ For Dworkin, the problem is that in such a “corrupted” calculus, “the chance that anyone’s preferences have to succeed will . . . depend, not only on the demands that the personal preferences of others make on scarce resources, but on the respect or affection [or lack thereof] they have for him or for his way of life.”⁴⁸ When external preferences based on prejudice cancel out the personal preferences of the disfavored group in this way, members of that group have less influence on the decision-making process, and this violates the principle of equality.⁴⁹

Thus, Dworkin’s theory, like Ely’s, focuses on prejudice and its distorting effect on democratic decision making. Dworkin talks in terms of utilitarianism rather than the democratic process, but his concern with utilitarianism arises ultimately from the fact that he views it as constituting the basis, at least in rough form, of democratic decision making.⁵⁰ Rights provide a corrective for defects in the utilitarian calculus (as expressed through the democratic process) that occur when prejudice causes some people to have less influence because their preferences count for less. The concept of political power is less evident on the surface of Dworkin’s writings, but this may stem from the level of abstraction on which he operates. Ely describes and considers the actual workings of the legislative process—the pluralist tug of war among contending political interests—while Dworkin’s analysis avoids the realities of political struggle and considers instead the utilitarian theory that he

dignity of dissenters”) *with id.* at 277 (arguing that rights are necessary to correct for the philosophical defects of the utilitarianism that drives democratic decision making).

⁴⁶ *Ibid* 234, 275.

⁴⁷ *Ibid* 235.

⁴⁸ *Ibid* 235.

⁴⁹ Dworkin’s external-preference argument has come under attack, particularly his extension of the concept to cover altruistic preferences for the assignment of goods and opportunities to others, as well as prejudicial preferences. *Id.* at 235. See H. L. A. Hart, ‘Between Utility and Rights’ in *Essays in Jurisprudence and Philosophy* 198 208-21 (1983); see generally C. Edwin Baker, ‘Counting Preferences in Collective Choice Situations,’ 25 U.C.L.A. L. REV. 381 (1978); John Hart Ely, ‘Professor Dworkin’s External/Personal Preference Distinction,’ 1983 DUKE L. J. 959.

⁵⁰ Dworkin, Taking Rights, *supra* note 45, at 277 (arguing that democratic decision making “enforc[es] [an] unrefined or overall utilitarianism”). Ely agrees that “there exists a rough congruence between utilitarianism and democratic models of public choice.” Ely, Professor Dworkin’s, above at 979.

views democratic legislatures as roughly approximating. Thus, Ely envisions the rough and tumble of the legislative process, while Dworkin conjures the sanitized image of preferences being delivered to the “utilitarian computer.”⁵¹ Nonetheless, when translated into the realities of the political world, Dworkin’s theory parallels rather closely Ely’s theory that rights provide a corrective for the distorting effect of power imbalance on democratic decision making.⁵²

iii. Civic Republicanism

Like Ely and Dworkin, the twentieth-century civic republicans view rights as essential to the maintenance of a properly functioning democratic process.⁵³ For civic republicans, that process is one by which citizens come together (either directly or through their representatives) to engage in reasoned dialogue and deliberation in order to discern the “public good.” This vision depends on a measure of political equality. Large disparities in wealth or power may allow some voices to drown out others, or worse, allow some powerful groups to subvert the process to their own private ends and thus destroy the integrity of the deliberative ideal.⁵⁴

Cass Sunstein was one prominent participant in this civic republican revival. In a series of works in the 1980’s and early 1990’s, he made the case that constitutional rights are fundamentally concerned with “the problem of faction” — the concern that “groups seeking to use government power to promote their own private ends might come to dominate the political process.”⁵⁵ Indeed, he viewed “much of modern constitutional doctrine [as] reflect[ing this] single perception of the underlying evil: the distribution of resources or opportunities to one group rather than another solely because those benefited have exercised the raw power to obtain government assistance.”⁵⁶ Many of the individual rights in the Constitution could, in his view, be understood as aiming to correct that underlying evil.⁵⁷

For Sunstein, both rationality review and strict scrutiny represent an embrace of republicanism and a rejection of the politics of raw power. By demanding some rational basis for legislation, rationality review assumes the existence of some independent “public interest,” and requires government to show that something other than private power justified its decision. Strict scrutiny under either the First Amendment or the Equal Protection Clause does not necessarily turn on the raw power question per se. Statutes discriminating against a suspect class or abridging freedom of speech will be struck down even without a demonstration that

⁵¹ Dworkin, *Rights as Trumps*, *supra* note **Error! Bookmark not defined.**, at 160.

⁵² Or perhaps it is more accurate to say that Ely’s theory parallels Dworkin’s. *See* Ely, *Professor Dworkin’s*, *supra* note 49, at 979 (noting parallels between his argument and Dworkin’s).

⁵³ *See* Michelman, at 1505.

⁵⁴ *See* Cass R. Sunstein, ‘Beyond the Republican Revival’ (1988) 97 *Yale L. J.* 1539, 1552; Cass R. Sunstein, ‘Interest Groups in American Public Law’ (1985) 38 *Stan. L. Rev.* 29, 32.

⁵⁵ Sunstein, *Interest Groups* 29-32 (“The problem of faction has been a central concern of constitutional law and theory since the time of the American Revolution.”).

⁵⁶ *Ibid.* 50-51.

⁵⁷ Cass R. Sunstein, *The Partial Constitution* (1993) 25.

they actually resulted from exercises of raw power. But, argued Sunstein, “[u]nderlying the Court’s approach is a perception that classifications in this context are likely to reflect private power.” When, for example, “a statute discriminates against women, there is a special likelihood that it is not an effort to promote the public good, but is instead an unthinking reflection of existing relations of power.”⁵⁸ Like Ely and Dworkin, for Sunstein, it was this distorting effect of power imbalance on government decision-making processes that constitutional rights seek to redress.

But Sunstein’s vision of the kinds of power disparities that give rise to the need for constitutional or human rights was broader. He recognized a parallel between the protection of disadvantaged groups against social subordination and the protection of “non-commodity values,” like the protection of future generations from irreversible environmental losses.⁵⁹ Both involve politically weak groups, and efforts to protect each of these values tend to produce similar kinds of political failure. Moreover, in both instances “the very problems that make [protecting such values necessary] in the first instance tend to undermine enforcement.”⁶⁰

* * *

In sum, two strands of the literature investigating the values and concerns that underlie the Political and Civil Rights tradition provide related but distinct explanations/visions. The Individual Autonomy strand takes the protection of individual autonomy and dignity as its starting point, but also apparent in this literature is some explanation of Political and Civil Rights’ traditional focus on the state as the sole perpetrator of concern. Two reasons are evident for singling out the state—both the enormity and the uniqueness of state power. Thus, the individual autonomy strand views Civil and Political Rights as primarily aimed at putting a thumb on the scale in order to protect individual autonomy and dignity in the institutional settings where those interests confront state power. Concerns about power imbalance also play a large role in the Process strand, which views human rights as a corrective for distortions government decision making processes caused by power imbalance.⁶¹ But while the individual autonomy strand focuses on power disparities between the state and the individual, the Process Strand conceptualizes the problem of power imbalance in broader terms to also encompass power disparities between private groups. State action is, of course, still required, but where the state acts based on decision making that has been distorted by private power (by, for example, passing a discriminatory statute), Civil and Political Rights step in to restrain the state’s action.

⁵⁸ Sunstein, *Interest Groups*, 57. See also Sunstein, *Partial Constitution*, 31.

⁵⁹ Cass R. Sunstein, *After the Rights Revolution* (1990) 171.

⁶⁰ *Ibid.* 103–05. See also *ibid.* 171 (“Courts should generously construe statutes designed to protect traditionally disadvantaged groups and noncommodity values”).

⁶¹ Some in the Critical Legal Studies Movement disputed this vision of rights, arguing instead that rights actually legitimate existing power structures. See, e.g., Allan C. Hutchinson & Patrick Monohan, “The ‘Rights’ Stuff: Roberto Unger and Beyond” (1984) 62 *Tex. L. Rev.* 1477, 1482; Roberto Unger, *The Critical Legal Studies Movement* (1986) 39.

IV. Constructing a Human Right to Security from Climate Change

How does all of this relate to the climate crisis and the Anthropocene? In this section, I draw on the literature described above to begin to tentatively sketch the outlines of two theories under which we might situate a new human right to security from climate change squarely within the Civil and political rights tradition. The first draws primarily from the Process strand described above, and emphasizes the role that distortions in government decision making fueled by power imbalance have played in creating the climate crisis. The second draws primarily from the individual autonomy strand and emphasizes the uniqueness of state power with respect to the climate crisis. Because both theories confront challenges in navigating the strict adherence to the action/inaction distinction that has traditionally been a hallmark of civil and political rights, a third subsection sketches out several arguments for answering these challenges.

A. The Climate Crisis as a Product of State Decision Making Distorted by Power Imbalance

One theory justifying the recognition of a climate right as a civil and political right would focus on the process strand of the rights literature. This theory would cast the climate crisis as a product of distorted government decision making caused by severe power imbalance between private groups. Indeed, the failure of political institutions around the globe (both states and international bodies) to take sufficient action in the face of the climate crisis traces its roots to some of the most profound power disparities of twenty-first century. Those who stand to lose the most from government action to stem the climate crisis—the global fossil fuel industry—are wealthy, powerful, and focused. On the other side, it is the poor throughout the globe who are most vulnerable to the impacts of climate change, both because they lack the resources to adapt and because of the ironic happenstance that many of climate change's most dire effects—drought, coastal flooding, and disease—are concentrated geographically in areas of the developing world. Thus, those who stand to gain the most from government action to stem the climate crisis—are poor, weak, and diffuse.

We can conceptualize these power imbalances as extending across three distinct axes: 1) wealth, 2) political influence, and 3) political effectiveness. The first of these is perhaps the most salient. The dominant players in the fossil fuel industry and other industries linked to fossil fuel combustion are literally among the wealthiest corporations in history. Exxon-mobile, Royal Dutch Shell and other fossil fuel extraction companies are consistently ranked among the top wealthiest corporations in the world, as are a number of automobile manufacturers.⁶² Second, it is perhaps no surprise that with this enormous wealth comes political influence.

⁶² 'The World's Top 25 Companies,' Forbes, <https://www.forbes.com/pictures/edjl45efeik/the-worlds-top-25-companies/#70e42d764da2> (ranking public companies based on sales, profits, assets and market value).

The examples of major players in the fossil fuel industry inserting themselves into the inner workings and decision-making circles of government are too numerous to catalogue—from the outsized role played by Halliburton and other corporate giants of the fossil fuel industry in Vice President Dick Cheney’s Energy Task Force to the innumerable ties between the fossil fuel industry and the Trump Administration.⁶³ Finally, the third axis of power imbalance, political effectiveness, follows from a straightforward application of fundamental principles of political theory. Where a group is made up of a small number of actors, each of which has a relatively large financial stake in the controversy, it will be particularly effective at political mobilization. Where, in contrast, a group has a large number of members, each with a relatively small stake in the controversy, it will be plagued by free rider problems and far less effective.⁶⁴

The result of this pervasive and multi-faceted power imbalance has been a highly distorted political process, particularly in the U.S., where many of the wealthiest and most powerful fossil fuel companies are based. The fossil fuel industry, driven by high stakes, has used its enormous wealth to fund a massive and highly effective disinformation campaign.⁶⁵ This campaign has been enormously effective. It has created significant confusion among the public, and in recent years has succeeded in making the climate crisis one of the most polarizing issues in U.S. politics.⁶⁶ The result has been to bring U.S. federal government action to address climate disruption to a virtual standstill, which has, in turn, dealt a critical blow to international efforts to stem the climate crisis.

Another way to frame the political failure on the climate crisis as a distortion of government decision making caused by power imbalance is to focus on the power disparity between current and future generations or even between humans and non-human elements of the natural environment. Like the out-of-state residents protected under the U.S. Constitution, the future generations that will bear the brunt of the climate crisis (or even non-human species, or trees, or rivers) lack direct legislative representation and therefore, in Ely’s words, “a paradigmatically powerless class politically.”⁶⁷

In *PEDF*, the Pennsylvania Supreme Court arguably moved in the direction of according rights to future generations. The court did not adopt anything like this

⁶³ Michael Abramowitz and Steven Mufson, ‘Papers Detail Industry’s Role in Cheney’s Energy Report’ (July 18, 2007) Wash. Post; Center for American Progress, ‘Dirty Deputies,’ <https://dirtydeputies.org/> (online database tracking the ties between members of Trump’s political staff and the fossil fuel industry).

⁶⁴ Mancur Olsen, *The Logic of Collective Action*

⁶⁵ Naomi Oreskes & Eric M. Conway, *Merchants of Doubt* (2010); Robert L. Glicksman, ‘Anatomy of Industry Resistance to Climate Change: A Familiar Litany’ in David M. Driesen (ed.) *Economic Thought and U.S. Climate Change Policy* (MIT, 2010) 83.

⁶⁶ Robert J. Antonio & Robert J. Brulle, ‘The Unbearable Lightness of Politics: Climate Change Denial and Political Polarization’ (2011) 52 *The Sociological Quarterly* 195; Deborah Lynn Guber, ‘Partisan Cueing and Polarization in Public Opinion about Climate Change’ in *The Oxford Encyclopedia of Climate Change Communication* (Oxford, 2017).

⁶⁷ Ely 83. See William D. Araiza, ‘Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value’ (1997) 45 *UCLA L. Rev.* 385.

kind of process-based rationale for the move, but then, it didn't need to. The court relied simply on the explicit language of the Pennsylvania Environmental Rights Amendment, which states that "Pennsylvania's public natural resources are the common property of all the people, *including generations yet to come*," and designates the commonwealth "[a]s trustee of these resources."⁶⁸ The court explicitly read this language as creating a "right" in future generations.⁶⁹ This right is perhaps akin to a property right; the court described it as a right of "ownership." But beyond that, the court did not particularly explore the content or boundaries of such a right. It did, however, give some content to the corresponding duties created in the Commonwealth: The court used the Amendment's explicit reference to future generations to reject the Commonwealth's argument that simply diverting monies generated from the sale of public trust assets to the state's general fund would comply the Amendment's command that the Commonwealth "conserve and maintain" public trust resources for the benefit of "all the people." Because "all the people" includes future generations, the court reasoned, the Commonwealth has a duty to use those funds specifically for the purpose of conserving and maintaining the state's public natural resources.⁷⁰

Certainly, efforts to accord rights to future generations, non-human species or even inanimate objects in nature are as old as the environmental movement itself.⁷¹ Such arguments have considerable appeal in some quarters while also confronting deep philosophical objections and considerable logistical challenges, not least because of the common understanding of these as collective rights and the obvious questions concerning who is qualified to represent the rights holders.⁷² Others have tackled these questions with considerable depth and I will not delve into them here, other than to note the close fit between these arguments for expanding the community of rights holders and a process view of human rights.

B. The Climate Crisis as Government Abdication of Unique Power

As noted above, the individual autonomy strand, like the process strand, roots human rights in concerns about power imbalance—in this instance, the power imbalance between the state and the individual. This rationale singles out the state for concern because of both the magnitude and the uniqueness of state power. The traditional view, of course, is that state power is unique insofar as the state is the highest arbiter of justice, so that when the state abuses power, it is both defendant

⁶⁸ Pa. Const. Art. I, § 27.

⁶⁹ 161 A.2d at 931.

⁷⁰ *Ibid.* 934.

⁷¹ Christopher Stone, 'Should Trees have Standing? Toward Legal Rights for Natural Objects' (1972) 45 *Calif. L. Rev.* 450; Edith Brown Weiss, *On Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1989). For a historical summary of some of these ideas, see Louis J. Kotze, *Global Environmental Constitutionalism in the Anthropocene* (Oxford, 2016) 136-151.

⁷² See Derek Parfit, 'Energy Policy and the Further Future: The Identity Problem' in Stephen M. Gardiner, et al., (eds.) *Climate Ethics: Essential Readings* (Oxford, 2010) 112.

and judge. By standing conceptually outside of and above the state, human rights provide a crucial check on abuses of state power.

But the climate crisis highlights another important sense in which state power is unique. Because the climate crisis is a textbook example of a collective action problem, it is a problem that government—particularly at the largest workable level of political jurisdiction—is uniquely situated to solve. Whether we conceptualize an atmosphere free of dangerous levels of greenhouse gases as a public good, or the continued emissions of greenhouse gases as a tragedy of the commons, well-established principles of economic and political theory make clear that the climate crisis is a problem that can only be solved by government action.⁷³

An analogy to arguments for more traditional civil and political rights rooted in the individual autonomy strand might go something like this: The individual autonomy strand justifies traditional civil and political human rights by reference to the state's unique power as the ultimate arbiter of justice. This power creates the possibility of unique harms to individual interests when the state abuses that power—harms that may be uniquely unredressable because there is no higher authority to whom the individual can appeal. That unique power therefore necessitates the creation of human rights duties that stand outside of and above state power and thus create at least the possibility of redress for those otherwise unredressable harms. In a similar way, the state's unique power to solve a global collective action problem implicate the possibility of unique harms to individual interests when the state abdicates that power—harms that may be uniquely unredressable because private actors acting alone cannot solve the problem. Here too, the unique power of the state necessitates the creation of human rights duties to stand outside of and above state power and thus create the possibility of redress for those otherwise unredressable harms.

The great American jurist, Oliver Wendell Holmes, actually hinted at such an idea over a century ago in *Missouri v. Holland*, when he observed that the global tragedy of the commons leading to the decimation of migratory bird populations was a “matter[] requiring national action” and suggested “it is not lightly to be assumed that [the power to redress this problem,] ‘a power which must belong to and somewhere reside in every civilized government[,] is not to be found” in the U.S. Constitution.⁷⁴

C. Overcoming the Action/Inaction distinction

All of these arguments, however, still confront the core problem that they seek to hold the state liable for its failure to act, something that the traditional negative rights of the Civil and Political Rights lexicon have not traditionally been

⁷³ Although the division of common resources into private property can sometimes provide an alternative to government regulation in theory, in this instance, where clear property boundaries cannot be drawn, that alternative is not viable. See Amy Sinden, ‘The Tragedy of the Commons and the Myth of a Private Property Solution’ (2007) 78 U. Colo. L. Rev. 533.

⁷⁴ 252 U.S. 416 (1920).

read to do. Even where human rights claims are grounded in concerns about power imbalance between private groups rather than between the individual and the state, they have traditionally been deployed against affirmative actions by the state, like a statute that discriminates based on some suspect class. But here, the affirmative harm-causing acts come primarily from private actors. To be effective, the climate right must be able to challenge the state's *failure* to act to regulate the harmful actions of private parties.

One response is to invoke the long-running debate about whether a distinction between government action and inaction (and the related distinction between public and private action) is even workable or in fact illusory.⁷⁵ A second is to say that Civil and Political Rights' focus on the actions of the state is simply a product of the time in which they were born, when states were, by and large, the biggest aggregations of power in society, but that in the twenty-first century, when many multi-national corporations wield more wealth and power than many nation states, that singular focus on state action needs to change. The evil at which Civil and Political Rights aim is not the abuse of state power specifically, but the abuse of power more broadly. Such arguments have been made to bolster the case for allowing the assertion of human rights claims directly against multi-national corporations for their harm-causing acts.⁷⁶ In this instance, a similar argument might be made to support the assertion of human rights claims against the state the its *failure to act* to regulate the affirmative harm-causing acts of multi-national corporations.

A third response is to argue for an exception to the state action requirement akin to the special relationship doctrine in tort law. Tort law shares the Civil and Political Rights tradition's affinity for negative rights. Thus, it typically imposes liability on parties for their "misfeasance" or affirmative acts that cause injury to others, but not for their "nonfeasance" or failure to protect or help another person. When, however, a "special relationship" between the parties exists, there is an exception to the rule of no liability for nonfeasance, and the defendant may be held liable for her failure to act in aid of another.⁷⁷ Tort law enumerates four basic types of special relationships: 1) where the defendant acts affirmatively to cause the peril faced by the plaintiff, 2) where the defendant undertakes to rescue the plaintiff, 3) where the particular status of the parties suggests a special relationship (e.g. parent-child, landlord-tenant), and 4) where there is a contract between the parties. Types 1 or 3 might have some relevance in the climate context.

Indeed, at least one version of Type 1 special relationship is recognized in U.S. constitutional law. The "state created danger" theory has been applied by U.S. federal courts as a narrow doctrinal exception to the state action requirement that

⁷⁵ Susan Bandes, 'The Negative Constitution: A Critique' (1990) 88 Mich. L. Rev. 2271; Erwin Chemerinsky, 'Rethinking State Action' (1985) 80 NW. L. Rev. 503.

⁷⁶ Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale L. J. 443; Amy Sinden, *Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs*, in Doreen McBarnet, et al. (eds.) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 501.

⁷⁷ W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser & Keeton on the Law of Torts* § 56

allows the assertion of due process claims against the state for inaction where the state is determined to have created the danger in the first place. In the words of one court:

If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.⁷⁸

This is the doctrine the *Juliana* court relied on to reject the government's state action argument in that case.⁷⁹ It has been recognized in dicta by the U.S. Supreme Court, which explained the rationale for the doctrine this way:

[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs ... it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. . . . "[I]t is the state's affirmative act of restraining the individual's freedom to act on his own behalf ... which is the 'deprivation of liberty' triggering the protections of the Due Process Clause."⁸⁰

Note that while this theory allows claims against the state for its failure to act, it does not entirely dispense with the need to show some affirmative actions by the state. In particular, the state's failure to act must be linked to some initial affirmative act (or set of acts) that created the danger to begin with. Certainly, because the energy sector is so vital to the economy, the governments of most, if not all, developed countries have historically been involved in the promotion, subsidizing, and authorization of fossil fuel development to a significant degree. The question is whether those affirmative acts by the state are substantial enough to have "created the danger" of climate disruption in the first place. While the *Juliana* court's treatment of these issues was fairly cursory, it accepted as sufficient at the motion to dismiss stage the plaintiffs' allegations that the danger of climate change "stems in substantial part from Defendants' historic and continuing permitting, authorizing, and subsidizing of fossil fuel extraction, production, transportation, and utilization."⁸¹

Alternatively, one might argue for a Type 3 special relationship in the climate context. The touchstone of the type 3 special relationship is the relationship of dependency between the plaintiff and defendant. In tort law, this doctrine is

⁷⁸ [Bowers v. DeVito, 686 F.2d 616 \(7th Cir.1982\)](#)

⁷⁹ -- F. Supp. 3d at --.

⁸⁰ DeShaney, 109 S. Ct. 1005-6.

⁸¹ -- F. Supp. 3d at --.

typically applied to relationships between parents and children or landlords and tenants. In U.S. constitutional law, this theory has been invoked to recognize affirmative duties on the part of the state for those held in custody against their will (e.g., imprisonment or involuntary hospitalization).⁸² An argument applying this theory to the climate context might draw particularly on the uniqueness of the state's power to solve the collective action problem of climate: The fact that the climate crisis arises from a collective action problem that only the state has the capacity to solve, in effect creates a relationship between the state and its citizens of dependency akin to the kinds of relationships that traditionally meet the special relationship test. This special relationship creates an affirmative duty on the part of the state to regulate private parties to protect its citizens from climate harms.

Finally, a fourth response takes a page out of the *PEDF* case and appeals to the public trust doctrine. In the *PEDF* case this was relatively easy, because, as noted above, the language of the Pennsylvania Environmental Rights Amendment clearly and expressly incorporates the public trust doctrine: "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."⁸³ But perhaps there's a broader argument that public trust principles, with their ancient pedigree, incorporate a long-established understanding of the government's affirmative role with respect to the protection of natural resources that deserves recognition in the human rights context.

The Public Trust Doctrine has its roots in Roman Law. It treats certain natural resources as "held [by the state] in trust for the people of the state."⁸⁴ Traditionally, the resources protected were submerged lands and tidelands and the waters over them. They were held in trust specifically in order to protect the public's interests in fishing, navigation, and commerce. More recently, the doctrine has been expanded to cover a longer list of natural resources, including dry sand beaches, wildlife, and non-navigable tributaries, and there have even been efforts (largely unsuccessful) to expand it to cover the atmosphere. All of these resources are, of course, in some way impacted by the climate crisis. Ocean waters and tidelands are impacted by warming temperatures, sea level rise and ocean acidification, and waters in lakes and rivers, and streams is warming, harming aquatic ecosystems are associated species.⁸⁵ Indeed, in *Juliana*, where the plaintiffs have asserted a public trust claim alongside their substantive due process claim, the court avoided the question of whether the public trust applies directly to the atmosphere, but ruling instead that climate change threatens coastal zone waters through ocean acidification and rising ocean temperatures.

But for our purposes, the most interesting aspect of the doctrine is the nature of the duties it imposes on the state. The old cases primarily turned on the

⁸² *Estelle v. Gamble*, 429 U.S. 97 (1976); *Youngberg v. Romeo*, 457 U.S. 307 (1982).

⁸³ Pa. Const. Art. I, § 27.

⁸⁴ *Illinois Central RR. Co. v. Illinois*, 146 U.S. 387 (1892).

⁸⁵ Richard M. Frank, 'The Public Trust Doctrine: Assessing Its Recent Past and Charting Its Future' (2012) 45 U.C. Davis L. Rev. 665.

duty of the state to refrain from selling such resources off to private parties in ways that would interfere with public use.⁸⁶ But Professor Joseph Sax, in his pivotal 1970 article on the Public Trust, identified in the old cases two other “types of restrictions on governmental authority” imposed by the trust as well: first, that the property “be used for a public purpose” and also “held available for use by the general public, and second, that it “be maintained for particular types of uses . . . such as navigation, recreation, or fishery, or . . . that the uses . . . made of the property . . . [are] in some sense related to the natural uses peculiar to that resource.”⁸⁷ These duties to hold public trust resources available to the public and to “maintain” them for particular uses suggests affirmative duties on the part of the state.

The Pennsylvania Supreme Court certainly read the Public Trust Doctrine enshrined in the Pennsylvania Environmental Rights Amendment that way. It read Pennsylvania’s environmental trust as “impos[ing] two basic duties on the Commonwealth as trustee. . . . [(1)] a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties. [(2) a duty to] act affirmatively via legislative action to protect the environment.”⁸⁸

While the justifications for the Public Trust Doctrine as traditionally conceived are somewhat murky, Professor Sax identified several ideas in the early case law that have potential relevance to the climate crisis. “The approach with the greatest historical support holds that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than serfs. . . . An allied principle holds that certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace. . . . Finally, there is often a recognition . . . that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate.”⁸⁹ To the extent that resources like the atmosphere or the oceans are not amenable to private property boundaries and thus particularly susceptible to the tragedy of the commons, or are public goods and therefore also subject to collective action problems, an argument can be made that they fit particularly well into the second or third of these rationales.

The idea here is not to specifically make out a claim for security from climate change through the public trust doctrine. Though such a claim may well ultimately be viable, I leave its explication to others. Rather, the idea is to ask whether in the context of constructing a new human right to security from climate change, there is some wisdom that can be gleaned from the public trust doctrine about the role of government with respect to natural resources with a peculiarly public aspect. Perhaps where natural resources are involved the protection and maintenance of which can be said to be a public good, or that are not amenable to private ownership and are thus peculiarly susceptible to the tragedy of the commons, they have a

⁸⁶ Illinois Central

⁸⁷ Joseph L. Sax, ‘The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention’ (1970) 68 Mich. L. Rev. 471.

⁸⁸ 161 A. 3d 911, 933.

⁸⁹ Sax, at 484-85.

“peculiarly public nature” that requires the imposition of affirmative duties of protection on “every civilized government.”

Conclusion

The climate crisis threatens to drastically alter life on earth, not only for us, but for other species and for generations yet to come. As such, and as a crisis of our own making, it is unquestionably the defining moral challenge of the twenty-first century. If the twentieth century had a defining moral challenge, it was the oppression of stigmatized groups, from the Holocaust to Apartheid, Jim Crow, and Stonewall. Given the important role that human rights have played in the law’s response to the defining moral issue of the last century, it seems only natural to ask whether human rights might play a role in fighting the twenty-first century’s moral challenge as well. Calls for recognition of some kind of human right to security from climate change have certainly become more common, from both courts and scholars. But such a right has a far better chance to be effective, substantively and rhetorically, if it is grounded in the Civil and Political Rights tradition rather than tracing its lineage to the second or third generation rights of the post-World-War-II era.

Investigating the values and concerns that underlie our Civil and Political Rights tradition reveals that whether one views those rights as centrally concerned with the maintenance of individual autonomy and dignity or with protecting the integrity of the democratic process, civil and political rights are at bottom a response to power imbalance. While many twentieth century theorists have understandably focused on the power imbalance most emblematic of the central moral challenge of their century—that fueled by prejudice—in constructing a human right for the twenty-first century, we should broaden that lens to encompass other forms of power imbalance as well: that between the wealthy corporate interests that stand to gain from continued government paralysis in the face of the climate crisis and the poor and powerless who stand to suffer the brunt of its worst effects; that between us and other species or between us and future generations; and that between the functioning governments of the planet that possess the unique power to tackle this textbook collective action problem and the rest of us. In the preceding pages I have tried to tentatively sketch out some arguments that would situate a human right to security from climate change squarely in the civil and political rights tradition by connecting that new right to the fundamental values and concerns that have always animated that tradition.