PRESERVING TOMORROW: CAN CLIMATE LITIGATION UNDER STATE CONSTITUTIONS FORCE GOVERNMENTS TO CONSIDER YOUTH AND FUTURE GENERATIONS?

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The burdens of climate change will fall more heavily on youth and future generations. However, governance regimes are disincentivized from considering their interests. This makes it more likely that governance regimes will disregard future interests while making policy decisions about climate change and exacerbate the harms future interests face. Recent litigation brought under state constitutional provisions guaranteeing environmental rights has tried to address this problem of disregard. This Note analyzes three examples of such litigation in Montana, Hawaii, and Pennsylvania to assess whether litigation under state constitutions can help remedy the disregard of future interests in climate change governance. To do so, this Note will assess each case under Richard Stewart's framework of disregard. This Note ultimately argues that litigation under state constitutions that guarantee environmental rights—and particularly those that place the state's environment in a public trust—has promising potential to help remedy the disregard of future interests.

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Introduction

In the 2020 lawsuit *Held v. State*, sixteen young people between the ages of two and eighteen filed an ambitious challenge to protect the future of their environment. These plaintiffs fought to strike down legislation that would facilitate new fossil fuel projects, and to do so, turned to a relatively novel legal strategy for environmental rights litigation: state constitutional law.[1] In 2024, they prevailed in the Montana Supreme Court, earning a landmark victory for environmental rights on behalf of youth and future generations.[2]

While the impacts of climate change are already being felt, climate change presents a particular challenge for youth and future generations.[3] The effects of current emissions will primarily be felt in the future, and current inaction multiplies future harm.[4] According to the Intergovernmental Panel on Climate Change, while "children aged ten or younger in the year 2020 are projected to experience a nearly four-fold increase in extreme events under 1.5°C of global warming by 2100," someone fifty-five years or older in 2020 would not experience that exposure in their lifetime under any warming scenario.[5] Moreover, "the percentage of the population exposed to deadly heat stress is projected to increase from today's 30% to 48–76% by the end of the

1. Sam Bookman, *What We Learned in Held v. Montana*, Harv. Env't L. Rev. Online (Apr. 7, 2024), https://journals.law.harvard.edu/elr/2024/04/07/what-we-learned-in-held-v-montana/ [https://perma.cc/83AJ-5VJW] (describing *Held* and its novel move to sue under state constitutional law).

2. *See infra* Section II.B.

3. *See* Stephen M. Gardiner, *A Perfect Moral Storm: Climate Change, Intergenerational Ethics and the Problem of Moral Corruption*, 15 Env't Values 397, 402 (2006).

4. *Id.* at 402–05.

5. Intergovernmental Panel on Climate Change, Sixth Assessment Report Overarching Frequently Asked Questions and Answers 1 (2023), https://www.ipcc.ch/report/ar6/wg2/downloads/faqs/IPCC_AR6_WGII_Overaching_OutreachFAQ2.pdf.

century."[6] Climate change will also disproportionately impact youth and future generations in other ways, including changes to food availability and water quality.[7]

Additionally—and what is at the core of this Note—is the argument that, because of this lagging effect, the inability of future interests to access accountability mechanisms, and the absence of future generations from current climate deliberations, governance regimes are disincentivized from considering future interests which can lead to decisions that cause youth and future generations serious harm.[8]

State courts in the United States are particularly important in addressing this problem because federal courts appear to be a "dead end."[9] In *Juliana v. United States*, youth plaintiffs alleged the federal government's contributions to climate change violated their right to life, liberty, and property, but the Ninth Circuit held that the "plaintiffs . . . lacked standing because no remedy . . . could redress [their] climate related injuries."[10] By precluding relief on standing grounds, *Juliana* largely eliminated the federal courts as an avenue to address the disregard of future interests in the climate context.[11] Following *Juliana*,

6. *Id.*

7. *Id.* at 2.

8. *See* Gardiner, *supra* note 3, at 403, 405 (arguing that governance regimes are not motivated to create climate policy protecting future generations because they lack access to mechanisms to hold current generations accountable, the fact that future generations do not exist at the same time as current generations so they cannot interact and influence their behavior, and the lagging effect of climate change). While Gardiner highlights the inability of future generations to impose sanctions, youth underrepresentation in politics also prevents youth and future generations from accessing accountability mechanisms. *See* Anurit Kanti, *Why Youth Need to Be Drivers of Policymaking for Climate Action*, World Econ. F. (July 15, 2025), https://www.weforum.org/stories/2025/07/why-youth-need-to-be-drivers-of-policymaking-for-climate-action/ [https://perma.cc/4AXY-PVTU] (describing youth underrepresentation in climate policymaking).

9. Bookman, *supra* note 1 ("Most notably, in *Juliana v. United States*, the Ninth Circuit in 2020 found that plaintiffs challenging federal climate policy lacked standing, because no remedy from the court could redress the plaintiffs' climate-related injuries. These cases have seemed increasingly at a dead end.").

10. *Id.*

11. *Id.* (discussing how *Juliana v. United States* and previous cases including *Kanuk v. Alaska* and *Aji P. v. State*, in which the court "[declined] to expand the public trust doctrine to include the climate system," marked federal courts as a dead end because they have found climate-related claims to violate standing rules and the political questions doctrine, and remedial relief requires courts to engage in policymaking). Ultimately, the Supreme Court denied the plaintiffs' petition for certiorari without ruling on the merits. *See Supreme Court Denies Cert in Juliana; Legacy of Youth-Led Climate Lawsuit Lives On*, Our Children's Tr. (Mar. 24, 2025), https://static1.squarespace.com/static/655a2d016eb74e41dc292ed5/t/67e16f3acf84c27786e9c14e/1742827322618/2025.24.03.JulianaCertDeniedPR.FINAL.pdf [https://perma.cc/AHD3-UXUM].

Held and other lawsuits brought under state constitutional provisions have sought to hold state governments accountable for future climate change harms.[12]

This raises the question of whether the turn to litigation under state constitutional law has actually helped to remedy the disregard of future interests in climate change governance. In the field of global governance, *disregard* stands for the idea that governance bodies give inadequate regard to the interests and concerns of vulnerable and less powerful groups and individuals, resulting in decisions that cause them harm.[13] While scholarship has explored this question, this Note is the first to systematically apply a set framework for assessing disregard to a series of cases.[14]

To fill this gap, this Note will use Richard Stewart's framework for analyzing disregard in global governance regimes.[15] Although this Note assesses domestic litigation, Stewart's global governance framework is still apt for the following three reasons. First, climate change is a global issue,[16] and there is strong interplay between domestic and global environmental concerns and governance.[17] Second, Stewart specifically noted the relevance of domestic litigation to his framework because he argued that legal accountability, including through domestic courts, can help remedy the disregard that harms vulnerable groups.[18] Third, while Stewart did not focus on future interests, he was concerned with the disregard of other vulnerable groups, particularly low-income communities in "developing countries,"[19] that face parallel structural barriers to regard.[20] Consequently, this Note will not only expand on

12. Held v. State, 2024 MT 312, 419 Mont. 403, 560 P.3d 1235; Complaint at 2–3, Navahine F. v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 1, 2022); Pennsylvania Env't Def. Found. v. Commonwealth, 161 A.3d 911, 916 (Pa. 2017).

13. *See infra* notes 22–23 and accompanying text.

14. *See* Bookman, *supra* note 1 (discussing broadly the impact of *Held* on other potential state constitutional claims and how the *Held* decision acknowledged future interests, but not systematically analyzing how such litigation has addressed disregard); Sam Bookman, *Defensive Environmental Constitutionalism: American Possibilities*, 26 J. Const. L. 1284, 1294–97 (2024) (arguing that constitutional litigation can help buttress regulation of broad harms like climate change without systematically analyzing how actual cases have addressed disregard); Gardiner, *supra* note 3 (describing the problem of disregard of future interests without systematically analyzing how actual cases have addressed disregard).

15. *See* Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 Am. J. Int'l L. 211, 211–12 (2014) (describing the main argument and objectives of Stewart's disregard framework).

16. *See* Intergovernmental Panel on Climate Change, *supra* note 5.

17. *See infra* notes 245–46 and accompanying text.

18. *See infra* Part I.

19. Stewart, *supra* note 15, at 231.

20. *See infra* Part I.

existing scholarship, but also bring Stewart's work into a new context by applying it to new groups it has not been applied to before.

This Note argues that examples of litigation in Montana, Hawai'i, and Pennsylvania demonstrate that while such litigation can have pitfalls, particularly a limited remedial scope, litigation under state constitutional provisions guaranteeing environmental rights, and especially those placing the environment in a public trust, can help address the disregard of future interests in climate change governance. Part I will outline Stewart's framework of disregard and explain why it is useful to apply his framework to this new context. Part II will explore three examples of litigation from three different states: Montana, Hawai'i, and Pennsylvania. As described below, each of those states' constitutions guarantees the right to a healthy environment similar in structure to a fundamental right in the Bill of Rights. Hawai'i's and Pennsylvania's constitutions also establish a public trust for environmental resources.[21] The historical background of these provisions, laid out in Section II.A, is relevant because it illustrates the roots of the disregard that the litigation discussed in this Note sought to address. It also highlights the role of grassroots movements, which may be central to enacting future provisions that facilitate litigation with a similar impact. Section II.B describes the factual and legal background for each case, the relief sought by the plaintiffs, and how each court ultimately ruled. Section II.C then analyzes the pathways for future plaintiffs to bring subsequent lawsuits in each of the three states discussed to assess whether domestic litigation is an accessible tool for future interests to address disregard. Finally, Part III uses Stewart's framework to analyze the ways in which these cases succeed or fail to address the disregard of future interests.

I. Stewart's Framework for Disregard

In a series of articles, former New York University School of Law professor of environmental law Richard Stewart developed the concept of disregard as the pattern of global governance regimes "giving inadequate regard to the interests and concerns of vulnerable and politically weak groups, diffuse and less well-organized and resourced societal interests, and vulnerable individuals, which has resulted in decision making that causes unjustified harm or disadvantage."[22] In other words, Stewart is

21. *See infra* notes 48–50 and accompanying text.

22. Stewart, *supra* note 15, at 220; Richard B. Stewart, *Addressing Problems of Disregard in Global Regulatory Governance: Accountability, Participation and Responsiveness* (Inst. Int'l L. & Just., Working Paper No. 2014/2, 2014), https://iilj.org/wp-content/uploads/2016/08/Stewart-Addressing-Problems-of-Disregard-in-Global-Regulatory-Governance-IILJ-WP-2014_2-GAL.pdf [https://perma.cc/H8FX-ECAA].

concerned that global governance regimes have a tendency to harm vulnerable parties because they do not sufficiently consider their interests.[23] For example, he states that "multilateral development banks have regularly funded infrastructure projects such as dams that displaced local populations and destroyed local communities" without giving them adequate consideration or compensation.[24] Similarly, Stewart points to the fact that when the U.N. Security Council lists individuals or entities suspected of financial terrorism to freeze their assets, those listed lack procedural rights because they are not told they are under suspicion until the process is over, which can cause serious harm.[25] For instance, after the banking network Al-Barakaat was placed on the financial terrorism list because it handled money transfers to Somalia, tens of thousands of innocent Somalians could not access funds they received from relatives that they depended on, and had no opportunity to express their concern.[26]

Stewart's framework breaks down disregard into two categories: procedural disregard and substantive disregard.[27] Procedural disregard can occur in both the processes leading up to a decision by a governance regime and in its aftermath, and manifests itself in three main ways.[28] First, procedural disregard occurs if decision makers fail or refuse to gather information about either the concerns of impacted groups, or how government decisions might impact these groups and individuals.[29] Second, procedural disregard occurs if regimes refuse or fail to provide groups or individuals with "access to relevant information and the opportunity to submit evidence and argument on proposed decisions or to play any other role in the organization's decision-making processes."[30] I will call this *participatory disregard*. Finally, procedural disregard occurs if regimes fail to "address the interests and concerns of groups or individuals in explaining or giving reasons for the decisions

23. *See* Natalie Jones, *Safeguarding Against Environmental Injustice: 1.5°C Scenarios, Negative Emissions, and Unintended Consequences*, 12 Carbon & Climate L. Rev. 23, 29 (2018) (citing Stewart's concerns and applying them to the climate context: "If those most liable to be affected by negative unintended consequences of emissions reductions and negative emissions measures . . . are able to participate in the relevant policymaking processes, it is more likely that these negative unintended consequences will be avoided").

24. Stewart, *supra* note 15, at 221.

25. *Id.* at 222–23.

26. *Id.* at 223.

27. *Id.* at 224.

28. *Id.*

29. *Id.*

30. *Id.*

made."[31] Under Stewart's framework, disregard is "more strongly shown when other groups and individuals are treated more favorably in these [respects]."[32]

Comparatively, substantive disregard is about the impact of a regime's decisions, rather than how they are made or disseminated.[33] For Stewart, substantive disregard occurs when a regime makes decisions that "unjustifiably harm or disadvantage those whose interests and concerns have been procedurally disregarded, where decisions have been adopted as a consequence of such disregard."[34] Thus, procedural disregard and substantive disregard work in tandem because procedural disregard leads to decisions that exhibit substantive disregard.

In contrast to disregard, demonstrating *regard* requires that regimes review available information about the impact of proposed decisions on parties entitled to consideration, "[weigh] the benefits for and burdens on them of alternatives," and only make decisions that disadvantage or harm impacted parties if they are "justified by relevant decisional norms."[35] Under Stewart's framework, individuals or groups have an "overwhelming" moral claim for regard if decisions target them for serious harm.[36] As a result, because decisions that exacerbate climate change especially harm youth and future generations,[37] these groups are entitled to strong regard under Stewart's framework.

Additionally, Stewart argues that one way to help promote regard is through "accountability mechanisms."[38] He claims that legal accountability, compared to other accountability mechanisms that are controlled by powerful interests, is more accessible to disregarded parties because they can ideally obtain review by an independent body.[39]

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31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*; *see also* Christopher Campbell-Duruflé, *Clouds or Sunshine in Katowice? Transparency in the Paris Agreement Rulebook*, 12 CARBON & CLIMATE L. REV. 209, 214 (2018) (applying Stewart's framework to analyze the implementation of the Paris Agreement, saying that if compliance is assessed without considering its environmental outcomes then disregard will occur, which will have an adverse impact on "the rights and interests of less powerful actors").
35. Stewart, *supra* note 15, at 224–25.
36. *Id.* at 226.
37. *See* Gardiner, *supra* note 3, at 403–04 (describing the disproportionate impact of climate change on youth and future generations).
38. Stewart, *supra* note 15, at 212.
39. *Id.* at 234; *see also* David Zaring, *Response to Richard Stewart, "Remedying Disregard in Global Regulatory Governance,"* 108 AJIL UNBOUND 145, 146 (2014) (agreeing with Stewart that global regulation is "increasingly susceptible to legal review").

Specifically, Stewart cites domestic courts as a potentially receptive forum to problems of disregard.[40]

Overall, Stewart applies his framework to vulnerable groups that lack the political and economic power necessary to hold decision makers accountable and incentivize them to consider their interests.[41] Moreover, in discussing climate change specifically, Stewart highlights how disregard could lead to harm for poor and marginalized communities in "developing countries."[42] Although Stewart does not focus on the disregard of future interests specifically, his framework is well suited to address their concerns because the structural barriers they face to achieve regard parallel those of the marginalized groups he writes about. Similar to the groups discussed in Stewart's work, youth and future generations are vulnerable because they face barriers that prevent them from advocating for themselves and holding decision makers accountable, although their barriers primarily stem from temporality[43] rather than systemic inequality. Both groups are also particularly vulnerable to the threat of climate change—for Stewart's group, because low-income communities disproportionately bear the burden of harm, and for future generations, because the cumulative effect of emissions will be amplified in the future.[44] Thus, while Stewart does not apply his framework specifically to youth and future generations, and their case raises unique problems of disregard, they have similar broad concerns to the groups he analyzed, making his framework applicable.

II. State Constitutions and Environmental Litigation: Montana, Hawai'i, Pennsylvania

In 2020, *Juliana* largely shut the door on cases that would redress youth-specific injuries caused by climate change in federal court by reinforcing "stringent federal standing requirements."[45] This caused

40. Stewart, *supra* note 15, at 232 (explaining that "the disregarded may be able to use domestic courts, administrative bodies, and legislatures as fora to voice opposition" and describing domestic courts as an example of "receptive domestic fora").

41. *Id.* at 220, 233.

42. *Id.* at 230–31.

43. *See* Gardiner, *supra* note 3, at 403–04. Gardiner argues here that youth and future generations lack access to mechanisms to hold current generations accountable and that future generations do not exist at the same time as current generations. *Id.* Consequently, they cannot interact and influence their behavior, exacerbating the lagging effects of climate change. *Id.*

44. *See* Sushree Mishra, *Climate Change's Unequal Burden: Why Do Low-Income Communities Bear the Brunt?*, Earth.Org (Oct. 9, 2023), https://earth.org/climate-changes-unequal-burden-why-do-low-income-communities-bear-the-brunt/ [https://perma.cc/QSH4-ACX9]; Gardiner, *supra* notes 3–4 and accompanying text; Intergovernmental Panel on Climate Change, *supra* notes 5–7 and accompanying text.

45. *See* Iris Wu, *Withstanding Standing Scrutiny: How Climate Litigation Can Survive Juliana's Federal Beatdown*, Colum. Undergraduate L. Rev. Online (Aug. 17, 2025),

youth climate activists to pivot to the largely untested field of state law.[46] Compared to the U.S. Constitution, state constitutions guarantee "abundant rights," and are typically much easier to amend, often through public participation.[47] Reflecting this flexibility, six state constitutions currently guarantee the right to a clean and healthy environment.[48] Of the six, this Note analyzes the environmental rights provisions in Montana, Hawai'i, and Pennsylvania because they were all utilized in litigation recently, resulting in landmark victories for future interests. While Montana's and Hawai'i's constitutions specifically guarantee "the right to a clean and healthful environment," Pennsylvania's protects the "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."[49] Additionally, both Hawai'i's and Pennsylvania's constitutions place all public natural resources in a trust held for the benefit of the people.[50] In other words, the public natural resources in each state are owned by the people of the state and placed under the care of the government, which must use them for the purpose of benefitting the people of the state.[51] In both cases "the people" includes future generations.[52] The following section first analyzes the historical background and driving forces behind these

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https://www.culawreview.org/journal/withstanding-standing-scrutiny-how-climate-litigation-can-survive-julianas-federal-beatdown [https://perma.cc/4XSL-ZQST] (arguing that *Juliana*'s stringent standing requirements barred federal climate cases for the "foreseeable future"); *see also* Bookman, *supra* note 1 (discussing *Juliana v. United States*, *Kanuk v. Alaska*, and *Aji P. v. State*, in which the courts "[declined] to expand the public trust doctrine to include the climate system").

46. *See* Bookman, *supra* note 1 ("But activists–especially youth-led activists–have not given up. In *Held v. State*, they turned to a largely untested source of authority: state constitutional law."); *see also* Dana Drugmand, *Top US Court Officially Ends Landmark Youth Climate Suit Against the Federal Government*, CLIMATE IN THE COURTS (Mar. 24, 2025), https://www.climateinthecourts.com/top-us-court-officially-ends-landmark-youth-climate-suit-against-the-federal-government/ [https://perma.cc/92EF-L445] (noting that *Held* represented "the first-ever trial in a youth constitutional climate case in the US").

47. Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J. 191, 194, 196 (2023) (explaining that state constitutions guarantee abundant rights and describing the two main ways public participation generates amendments).

48. *See* Bookman, *supra* note 1 (listing New York, Pennsylvania, Hawai'i, Illinois, and Massachusetts as the other state constitutions that guarantee this right).

49. MONT. CONST. art. II, § 3; HAW. CONST. art. XI, § 9; PA. CONST. art. I, § 27.

50. HAW. CONST. art. XI, § 1; PA. CONST. art. I, § 27.

51. Pennsylvania Env't Def. Found. v. Commonwealth, 161 A.3d 911, 932 (Pa. 2017) ("[T]he natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries."); *see also id.* at 931 ("The second right reserved by Section 27, set forth in its second sentence, is the common ownership by the people, including future generations, of Pennsylvania's public natural resources.").

52. HAW. CONST. art. XI, § 1 ("[f]or the benefit of present and future generations"); PA. CONST. art. I, § 27 ("including generations yet to come").

provisions, most notably grassroots movements. Then, this section discusses the factual and legal background for each lawsuit, the relief sought by the plaintiffs, and how each court ultimately ruled, followed by pathways to future litigation in each state.

A. People Power and Environmental Concerns Generating New Constitutional Protections

Despite their geographic distance, Montana, Hawai'i, and Pennsylvania have something in common: all three states have constitutional provisions that explicitly guarantee environmental rights. Further, all three provisions were enacted in response to acute environmental threats from industry with powerful political support. Additionally, the enactment of each provision reflected moments of a political shift toward grassroots power.

In the twentieth century, Montana was home to a large copper mining industry.[53] The mining industry had so much political power that William A. Clark, who had his own personal "mining empire" within the state, was the president of the 1889 Montana constitutional convention.[54] The mining industry degraded Montana's "land, water, and air" and in some cases caused so much pollution that it "blotted out the sun."[55] After almost a century of environmental degradation since Clark's reign at the 1889 convention, the people of Montana convened again in 1972. According to University of Montana Law Professor Michelle Bryan, pollution "was a big reason for wanting to hold our government accountable for setting up a legal system that would protect, even restore, the environment in places where it had been harmed."[56] Therefore, the 1972 convention itself happened in large part because of environmental concerns, a sentiment that was also reflected by the delegates. In transcripts of the convention, delegates describe being personally impacted by pollution, and also influenced by youth voices advocating for environmental protection from future harm because "they're the ones that [were] going to have to live with it."[57] Thus, while the convention was inspired by past environmental harms, the constitutional provision it created which enshrined the right to a "clean

53. *See* Micah Drew, *'To a Clean and Healthful Environment,'* MONT. FREE PRESS (June 5, 2023), https://montanafreepress.org/2023/06/05/to-a-clean-and-healthful-environment/ [https://perma.cc/U2FV-L9FM].

54. *William Andrews Clark (1839–1925)*, PBS, https://www.pbs.org/wgbh/americanexperience/features/lasvegas-clark/ [https://perma.cc/V2ZG-ZGES] (last visited Oct. 25, 2026).

55. Drew, *supra* note 53.

56. *Id.*

57. *Id.*

and healthful environment" had future interests in mind. Today, even though Montana is a "deep-red state[,] . . . a majority of Montanans revealed that they are worried about climate change, and two-thirds of Montanans believed it will harm future generations," demonstrating the staying power of the ideology behind the provision.[58]

The 1972 convention reflected grassroots power in multiple ways. First, because the 1889 constitution prevented individuals from holding multiple political offices at once, including constitutional delegates, the 1972 convention delegates were selected through a special election and made up of members of the general public.[59] This led to a collection of delegates that was more representative of the average Montanan than the state legislature, and included "twenty farmers and ranchers, seventeen business owners, thirteen housewives, five clergymen, four media employees, [and] a beekeeper."[60] It also included nineteen women in total as compared to just two in the General Assembly at the time.[61] Second, the delegates chose to hold the convention in a more transparent manner than the General Assembly. All floor votes were recorded, lobbyists were not allowed on the House floor, and "anyone spending money to lobby delegates had to file a financial disclosure report."[62] Delegates also encouraged the public to share their ideas, and these ideas were heard "by committees, just like delegates' proposals."[63]

Like Montana, Pennsylvania's provisions were also enacted after industry, bolstered by political influence, desecrated the state's land for decades. As described by the court in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, "from the middle of the nineteenth and well into twentieth century . . . coal was a reigning monarch," and the industry "operated 'virtually unrestricted' by either the state or federal government."[64] Unregulated mining "scarred the natural environment of coal-rich areas with banks of burning coal and refuse, underground mine fires, water

58. Bookman, *supra* note 1 ("[A] 2021 national survey found that a majority of Montanans revealed that they are worried about climate change, and two-thirds of Montanans believed it will harm future generations . . . the very existence of the environmental rights amendment in the Montana Constitution shows that environmental concerns, and environmental organizing, can bear fruit[.]").

59. *See* Chuck Johnson, *The Montana Constitution, Up Close and Personal*, Mont. Free Press (Mar. 25, 2022), https://montanafreepress.org/2022/03/25/reporter-chuck-johnson-recalls-montana-constitutional-convention-of-1972/ [https://perma.cc/94RM-FWGM].

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Pennsylvania Env't Def. Found. v. Commonwealth, 161 A.3d 911, 917 (Pa. 2017).

pollution from acid mine drainage, strip mining pits, and acid water impoundments."[65] The coal industry's activities also caused a series of local environmental disasters throughout the mid-1900s.[66] Per the court, the drafters of the Pennsylvania provisions recognized this history, and had it in mind when they proposed these constitutional provisions.[67]

Although Pennsylvania did not enact its environmental rights amendment through a constitutional convention, its enactment still reflected grassroots political power. First, the legislative history of the amendment shows that the House chamber incorporated a powerful civilian account of the coal industry's destruction of Pennsylvania's environment into its record.[68] Second, after the amendment was proposed by the legislature following unanimous votes in both chambers, it was ratified by a margin of nearly four to one in 1971, demonstrating strong public support for the amendment.[69] Pennsylvania was also a catalyst for the national environmental activism taking place at this time, as Pennsylvania native Rachel Carson's book, *Silent Spring*, "helped start the modern era of environmentalism."[70]

In Hawai'i, powerful business interests also created environmental concerns that strongly influenced the 1978 Hawai'i constitutional convention, referred to as "con con." At the time, tourism and commercial development fueled by outsider money was expanding in Hawai'i and generating fears about how it would shape the state's landscape.[71] In describing the development, one delegate's staffer quoted Joni Mitchell, stating that "they paved paradise and put up a parking lot."[72] The United States government was also desecrating the island itself by using it as a bombing range.[73]

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65. *Environmental Rights Amendment*, PennFuture, https://www.pennfuture.org/environmental-rights-amendment [https://perma.cc/B47V-NMWB].

66. *Pennsylvania Env't Def. Found.*, 161 A.3d at 917.

67. *Id.* at 918.

68. *Id.* at 917–18.

69. *Id.* at 918.

70. *Environmental Heritage*, Commonwealth of Pa., https://www.pa.gov/agencies/dep/residents/environmental-education/environmental-heritage [https://perma.cc/8PXV-THPX].

71. *See* Anita Hofschneider, *'Fragile Aloha': Why Hawaii's Last Constitutional Convention Was Important*, Honolulu Civ. Beat (Sep. 13, 2018), https://www.civilbeat.org/2018/09/fragile-aloha-why-hawaiis-last-constitutional-convention-was-important/ [https://perma.cc/4T6G-BUKD] ("[F]ear of how outsiders were changing the islands was another backdrop to the convention that influenced proposals. Foreigners and mainlanders were buying land and businesses and high-rises were popping up across the city.").

72. *Id.*

73. *Id.*

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Similar to Montana, Hawai'i's enactment of environmental rights through a constitutional convention was driven by grassroots power because the convention was comprised of members of the general public. The convention, referred to as "con con," took place only ten years after the previous constitutional convention.[74] Much like Montana's 1972 convention, con con consisted of a very different set of delegates than the one prior. In contrast to the 1968 convention, which was "very much a political establishment-run convention,"[75] the group of 1978 delegates only included four people who had previously held political office.[76] Some of the delegates, such as Frenchy De Soto, were even leaders of a strong protest movement that had developed in response to the recent environmental threats.[77] The delegates' values also skewed toward embracing a government that was more accessible to the public because in the same convention, they came close to enacting a citizens initiative provision that would allow the public to bypass the legislature and put legislation on the ballot, a proposal that was briskly rejected in 1968.[78]

Further, con con reflected grassroots power because it overlapped with a powerful indigenous rights movement. The convention coincided with the release of a pamphlet called "Palaka Power," which was described by Hawaiian media as an "ideological defense of local people trying to maintain and hold some power against institutional forces such as the outside media, outside economic forces."[79] At the convention, some delegates wore "palaka shirts" with a distinctive pattern to represent Hawai'i's plantation history.[80] Thus, the battle against the development of Hawai'i's natural landscape was rooted in the history of harms that threatened indigenous culture, and was focused on preserving both for the future. As discussed below, the recent Hawai'i lawsuit reflects this history as indigenous youth cited the impact of climate change on their traditional cultural practices in their litigation under the 1978 provisions.[81]

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74. *Id.*
75. *Id.*
76. *See* Susan Jaworowski, The Hawai'i Legal System 6 (2023).
77. *See* Hofschneider, *supra* note 71.
78. *Id.*
79. *Id.*
80. *Id.*
81. Complaint at 6, 12, Navahine F. v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 1, 2022); *see also Navahine v. Hawai'i DOT*, Our Children's Tr., https://navahinevhawaiidot.ourchildrenstrust.org/ [https://perma.cc/E7FB-7EXU] (According to Our Children's Trust, who also represented the *Navahine* plaintiffs, "roads and sacred ancestral burial grounds have been swept into the sea. People in Hawai'i have witnessed coral reefs die, beaches erode, and traditional practices like cultivating lo'i kalo (taro fields) and loko i'a (fishponds) threatened or lost.").

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Overall, each of these constitutional provisions was enacted by political movements that fought powerful establishment interests and were driven in part by concerns for the future. Additionally, the political processes in Montana and Hawai'i uplifted marginalized communities such as women, indigenous people, and people from low-income backgrounds that are more likely to be subject to disregard. Thus, the history of these provisions shows a hope for the heightened regard of marginalized communities in environmental issues. While these provisions lay dormant for decades, modern litigation demonstrates an effort to utilize these provisions to try and realize their hopes of heightened regard for historically marginalized communities today.

B. Litigation Backgrounds of Held*,* Navahine*, and* Pennsylvania Environmental Defense Foundation

Each of the lawsuits in Montana, Hawai'i, and Pennsylvania challenged state policies that showed disregard for future interests by ignoring their constitutional environmental rights in favor of the fossil fuel industry. In *Held*, the challenged policy limited governmental review of the environmental impacts caused by energy projects; in *Navahine*, the plaintiffs challenged a series of transportation policy choices that prioritized fossil fuels over renewable energy; and in *Pennsylvania Environmental Defense Foundation*, the plaintiffs challenged legislation that removed restrictions on funding that was previously required to be used for promoting conservation and mitigating harms caused by natural gas extraction.[82] Additionally, all of the plaintiffs sought relief that would promote regard of future interests, and while each case either was successful on the merits or led to a robust settlement, the range of available relief varied, and was particularly limited in *Held*.

In 1971, Montana enacted the Montana Environmental Policy Act ("MEPA") to support the "development, implementation and enforcement of state environmental policy."[83] In an effort to "allow energy projects to proceed," it was amended in 2011 to prevent review of environmental impacts "beyond Montana's borders," or "actual or potential impacts that are regional, national, or global in nature" ("MEPA Limitation").[84] In response, sixteen youth plaintiffs filed suit

82. Held v. State, 2024 MT 312, ¶ 7, 419 Mont. 403, 414, 560 P.3d 1235, 1243; Complaint at 4, *Navahine*, No. 1CCV-22-0000631; Pennsylvania Env't Def. Found. v. Commonwealth, 161 A.3d 911, 926 (Pa. 2017).

83. Erin C. Ferguson, Held v. State of Montana: *A Constitutional Rights Turn in Climate Change Litigation?*, 36 J. Env't L. 453, 456 (2023) (discussing the purpose of MEPA).

84. *Id.*; *Held*, 560 P.3d at 1243.

against the state of Montana in *Held v. State*.[85] The plaintiffs represented a diverse range of Montanans, including a plaintiff who was a member of the Confederated Salish and Kootenai Tribes,[86] and each one of these plaintiffs testified.[87] Their argument also drew extensively on scientific evidence, some of which was cited in the court's decision.[88] The plaintiffs alleged that by "promoting and supporting the extraction and burning of fossil fuels,"[89] the MEPA Limitation violated their constitutional right to a clean and healthful environment because it "exacerbated the harm [they] were feeling from climate change."[90]

In 2023, after the Montana Supreme Court ruled in a separate case that the MEPA Limitation did not absolve the state of its duty to evaluate a project's environmental impacts within Montana, the

85. In describing why she joined the lawsuit, Rikki Held emphasized her desire to protect her generation and those coming after her, saying: "[w]e can't keep passing it on to the next generation when we're being told about all the impacts that are already happening . . . . In some ways, our generation feels a lot of pressure, kind of a burden, to make something happen because it's our lives that are at risk." Micah Drew, *Who Is 'Held' of Held v. State of Montana?*, MONT. FREE PRESS (June 5, 2023), https://montanafreepress.org/2023/06/05/who-is-held-of-held-v-state-of-montana/ [https://perma.cc/2FR5-V88D].

86. Ferguson, *supra* note 83, at 454–55.

87. Per Melissa Hornbein, an attorney at one of the firms representing the plaintiffs, the court's decision in the wake of this strategy represented "an endorsement of those youth telling their stories with such courage and grace." David Brown, *Montana's Climate Change Lawsuit May See Sequels Across America*, STATE CT. REP. (June 26, 2025), https://statecourtreport.org/our-work/analysis-opinion/montanas-climate-change-lawsuit-may-see-sequels-across-america [https://perma.cc/2JGG-7LTS].

88. Lauren E. Sancken, *Lessons in Advocacy from Held v. Montana*, WASH. STATE BAR NEWS (Feb. 8, 2024), https://wabarnews.org/2024/02/08/lessons-in-advocacy-from-held-v-montana/ [https://perma.cc/SME6-KXZ7] (describing how the plaintiffs used "an extensive overview of climate science as well as expert testimony from scientists, medical professionals, and environmental policy-makers to show evidence of climate impacts, both globally and locally in Montana").

89. *Montana Youth Win*, OUR CHILDREN'S TR., https://heldvmontana.ourchildrenstrust.org/ [https://perma.cc/3N9X-CNDN] (statement from the organization that brought the lawsuit on behalf of the plaintiffs describing their claims).

90. Held v. State, 2024 MT 312, ¶ 5, 419 Mont. 403, 414, 560 P.3d 1235, 1243. *Held* was not the first time that the right to a clean and healthful environment was enforced in Montana. However, such cases had been few and far between. The state constitutional provision was largely dormant for two decades after it was enacted, but it was reinvigorated in 1999 in *MEIC v. DEQ*, a case that prevented a mining company from discharging polluted water. *See* Micah Drew, *How Montana's Constitution Laid the Groundwork for a Landmark Climate Change Lawsuit*, SIERRA (June 8, 2023), https://tinyurl.com/yc86pecc [https://perma.cc/NNM3-JVGQ]. Following *MEIC* and before *Held*, two other significant decisions involving drilling companies, decided respectively in 2001 and 2020, reaffirmed the provision's preventative protections. *See Id.*; *Montana Supreme Court Rejects Lucky Minerals' Last Bid to Mine Near Yellowstone*, EARTHJUSTICE (Dec. 9, 2020), https://earthjustice.org/press/2020/montana-supreme-court-rejects-lucky-minerals-last-bid-to-mine-near-yellowstone.

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legislature amended the MEPA Limitation to ban consideration of such environmental impacts apart from "narrowly defined exceptions."[91] The legislature further amended MEPA to limit judicial redressability if an agency violated its requirements to conduct adequate environmental review.[92] Although the state petitioned to stay *Held* following these amendments, the court rejected the petition because the amendments did not change the lawsuit's underlying theory that "prohibiting consideration of the impacts of climate change in environmental review violated the Montana Constitution."[93]

In *Held*, the plaintiffs initially requested a broad range of relief. They sought a declaration that the MEPA Limitation violated environmental rights guaranteed by the Montana Constitution.[94] They also requested a declaration that the right to a clean and healthful environment "includes a stable climate system that sustains human lives and liberties," and that Montana had violated this right.[95] The plaintiffs also sought broad injunctive relief including "(1) enjoining the State from acting in conformance with the unconstitutional laws; (2) an order requiring a full accounting of Montana's GHG emissions; (3) an order requiring the State to develop a remedial plan to reduce GHG emissions and to submit the plan to the court; (4) an order for a special master to be appointed to review the remedial plan; and (5) an order retaining jurisdiction until the State has fully complied with the plan."[96] The state district court narrowed the possible scope of their remedies by holding that it was beyond its power to order an accounting, require the development of a remedial plan, or appoint a special master.[97] The district court ruled in favor of the plaintiffs, and held that "the fundamental constitutional right to a clean and healthful environment includes climate as part of the environmental life support system, [and] that Plaintiffs had legal standing to bring their claims."[98] The court also enjoined the state from following

91. Ferguson, *supra* note 83, at 456; *Held*, 560 P.3d at 1244.

92. *Held*, 560 P.3d at 1244. Roger Sullivan, one of the plaintiffs' lawyers, framed the limitations as a "double-headed hydra that closes the eyes of Montana's environmental agencies to the most serious environmental crisis Montana has ever experienced . . . [and] closes Montana's courthouse doors to those seeking redress." *See* Brown, *supra* note 87.

93. *Held*, 560 P.3d at 1245.

94. *Id.* at 1243.

95. *Id.* at 1244.

96. *Id.* at 1243–44. Per Hornbein, the way in which the plaintiffs characterized their request for relief was shaped by the failings of *Juliana*. Brown, *supra* note 87.

97. *Held*, 560 P.3d at 1245.

98. *Id.* The State had argued that the plaintiffs failed to meet standing because invalidating MEPA would "[do] nothing to redress the physical and mental health injuries the youths said they have suffered as a result of climate change." However, the plaintiffs countered that an invalidation would redress injuries by allowing the state to

the MEPA Limitation because it was unconstitutional.[99] On appeal, the Montana Supreme Court affirmed, holding that the MEPA Limitation was unconstitutional and enjoining the state from acting in accordance with it.[100]

Comparatively, *Navahine v. Department of Transportation*,[101] a lawsuit filed in 2022, challenged the promotion of fossil fuel use in the Hawai'i transportation sector. In Hawai'i, the transportation sector is projected to make up sixty percent of the state's total greenhouse gas emissions by 2030.[102] Despite the threat that greenhouse gas emissions pose, the complaint alleges that the Hawai'i Department of Transportation ("HDOT") engaged in a "pattern and practice of promoting, funding, and implementing transportation projects that lock in and escalate the use of fossil fuels."[103] For instance, HDOT has added vehicle lanes in Hawai'i at a rate of thirty-one new miles each year since 2000, instead of funding "projects that enable multi-modal travel, electrification of transportation, and the use of alternative fuels."[104] The complaint also alleges that HDOT "regularly fails to solicit input from the public in order to better serve the diversified transportation needs and interests of individual communities."[105] Moreover, since 2008, HDOT allegedly consistently failed to comply with numerous legislative directives prescribing HDOT to set certain emissions goals, take measures to lower emissions, and take adequate steps to complete the state's statutory goal of zero emissions by 2045.[106]

In response, a group of thirteen youth plaintiffs filed *Navahine v. Department of Transportation*, alleging that HDOT breached its public trust duties to "preserve, protect, and maintain public trust resources for present and future generations," as defined by the relevant laws relating to environmental quality.[107] The plaintiffs alleged youth-specific harms like heightened anxiety about climate change and despair about the

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make constitutionally compliant decisions. Hornbein said that the plaintiffs' standing argument was also influenced by the failings of *Juliana*. Brown, *supra* note 87.

99. *Held*, 560 P.3d at 1245.

100. *Id.* at 1261. Montana does not have an intermediate appellate court. *About Us,* Montana Judicial Branch (last visited Apr. 24, 2026), https://courts.mt.gov/aboutus [https://perma.cc/CQT7-WM7U].

101. *Navahine v. Dep't of Transp.* ultimately settled, so the following information is based on the initial complaint, the circuit court's denial of a motion to dismiss, and the settlement agreement.

102. Complaint at 4, Navahine F. v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 1, 2022).

103. *Id.* at 4.

104. *Id.* at 4, 61.

105. *Id.* at 63–64.

106. *Id.* at 3, 59–60.

107. *Id.* at 67.

prospects of their children.[108] They also alleged other future-oriented harms such as long-term threats to endangered species and food scarcity.[109] Additionally, the plaintiffs represented a diverse group of communities and included multiple persons identified as "Native Hawaiian cultural practitioners."[110] Consequently, many of the harms cited in the complaint related to the threat that climate change posed to the sustainability of traditional indigenous cultural practices such as fishing and farming.[111] Like the *Held* plaintiffs, the *Navahine* plaintiffs also placed scientific evidence at the center of their argument.[112]

Similar to the plaintiffs in *Held*, the *Navahine* plaintiffs sought broad relief. However, unlike in *Held*, the court in *Navahine* did not significantly limit the relief plaintiffs could obtain, and they reached a settlement agreement that included much of what they initially requested. The plaintiffs request that the court do the following:

> Ordering Defendants to cease establishing, maintaining, and operating the state transportation system in a manner that breaches Defendants' mandatory duty under the constitutional public trust doctrine, fails to align with the Zero Emissions Target and other climate mitigation mandates, and infringes upon Youth Plaintiffs' constitutional right to a clean and healthful environment; Compelling Defendants to take concrete action steps under prescribed deadlines to conform the state transportation system with Defendants' constitutional duties and Youth Plaintiffs' constitutional rights; and Exercising continuing jurisdiction and oversight as necessary, including the appointment of a special master to oversee and report to the Court on Defendants' compliance and progress.[113]

On June 20, 2024, the Circuit Court approved a robust settlement that required HDOT to take steps to achieve the zero emissions target in 2045 as required by law, set interim reduction goals, provide opportunities for youth and broader public feedback, establish a youth

108. *Id.* at 13, 20.
109. *Id.* at 8, 16.
110. *Id.* at 6–26 (describing each of the named plaintiffs individually and identifying multiple of them in this way).
111. *Id.* at 6, 12; *see also Navahine v. Hawai'i DOT*, *supra* note 81.
112. *See* Complaint at 26–27, Navahine F. v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 1, 2022) (articulating an obligation for the state to use the "best available science"); Dara Albrecht, *Landmark Climate Settlement Highlights Relevance of Climate Science for Judges*, Env'l L. Inst. (Sep. 19, 2024), https://www.eli.org/vibrant-environment-blog/landmark-climate-settlement-highlights-relevance-climate-science-judges [https://perma.cc/76HK-GYWT] (stating that "climate science was featured prominently in court filings throughout the lawsuit").
113. Complaint at 70, *Navahine*, No. 1CCV-22-0000631.

advisory council, and take a series of actions to facilitate the expansion of alternative transportation modes.[114] The *Navahine* settlement was also historic because it was the first time "government defendants have decided to resolve a constitutional climate case in partnership with youth plaintiffs."[115]

Like the other two cases, *Pennsylvania Environmental Defense Foundation v. Commonwealth* was filed in response to legislation that ignored the rights of future interests. In 1955, the Pennsylvania General Assembly passed the Oil and Gas Lease Fund Act ("Lease Fund Act"), which required "[a]ll rents and royalties from oil and gas leases of Commonwealth land to be deposited in the Oil and Gas Lease Fund" ("Lease Fund").[116] Per the Lease Fund Act, all of the money in the Lease Fund was appropriated to the Department of Forests and Waters to be "exclusively used for conservation, recreation, dams, or flood control or to match any Federal grants which may be made for any of the aforementioned purposes."[117] In 1995, the General Assembly passed the Conservation and Natural Resources Act which created the Pennsylvania Department of Conservation and Natural Resources ("DCNR").[118] The mission of the DCNR is conservation-focused, and includes maintaining state parks, managing forest lands to "assure their long-term health," providing information on the Commonwealth's natural resources, and administering grant and technical assistance for conservation programs.[119] With its creation, the DCNR replaced the Department of Forests and Waters as the exclusive recipient of Lease Fund appropriations, and was "empowered to make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any valuable minerals [found] in State forests

114. *See* Settlement Agreement at 4–5, 9, Navahine F. v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 20, 2024). Earthjustice, who brought the suit alongside Our Children's Trust, stated that the agreement represents an "exemplary and replicable model for decarbonizing transportation systems around the U.S., and the world." *See Historic Agreement Reached in Hawai'i Youth-Led Constitutional Climate Complaint*, EARTHJUSTICE (June 20, 2024), https://earthjustice.org/press/2024/historic-agreement-settles-hawaii-youth-led-constitutional-climate-complaint [https://perma.cc/M6F2-DYMF]. The settlement press conference also reflected the plaintiffs' arguments about climate change's impact on cultural practices. As Ed Sniffen, the Director of Transportation, stated, "climate change is indisputable, burying our heads in the sand and making it the next generation's problem is not pono" (a Hawaiian word for righteousness). *Id.*

115. EARTHJUSTICE, *supra* note 114.

116. Pennsylvania Env't Def. Found. v. Commonwealth, 161 A.3d 911, 919–20 (Pa. 2017) (internal quotation marks omitted).

117. *Id.*

118. *Id.*

119. *Id.* at 920.

if the DCNR determines that it 'would be for the best interests of this Commonwealth.'"[120]

In 2008, the DCNR decided to pause further leases that extracted natural gas from the Marcellus Shale region of the state, which had been extremely lucrative, because of fears that the department could not sufficiently monitor such large-scale extraction activity.[121] After this pause, the Legislature passed a series of legislation that diminished DCNR's control over the Lease Fund and reduced its appropriations from the Lease Fund. Specifically, Sections 1602-E and 1603-E of the Fiscal Code gave the General Assembly the power to appropriate money from the Lease Fund, removed the requirement that Lease Fund money exclusively be used for conservation and instead gave only a preference "to the operation and maintenance of State parks and forests," and placed a $50 million limit on appropriations from the Lease Fund to DCNR "subject to availability."[122] Subsequent amendments appropriated money from the Lease Fund to the General Fund, which was not limited to conservation purposes, and as a result required DCNR to use more of its own budget for management expenditures.[123]

Following this legislation, in 2012, the Pennsylvania Environmental Defense Foundation filed suit in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, alleging that this legislation violated the Commonwealth's public trust duties because it took away DCNR's ability to use Lease Fund revenues to mitigate harms from extraction, placed funds in the General Fund without conservation restrictions, and eliminated revenues that would have been added to the trust and used to protect natural resources.[124]

Unlike in *Held*, the plaintiff's request for relief in *Pennsylvania Environmental Defense Foundation* was granted, although it was

120. *Id.* (internal quotation marks omitted).
121. *Id.* at 921.
122. *Id.* at 922, 926.
123. *Id.* at 922; *see also* John C. Dernbach et al., *Recognition of Environmental Rights for Pennsylvania Citizens: Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 70 Rutgers L. Rev. 803, 817 (2018) ("The state received $926 million in oil and gas lease revenues between Fiscal Years 2008–2009 and 2014–2015. DCNR received about half of that. The rest was spent as part of the General Fund."); Ad Crable, *Group Sues PA for Violating State's Environmental Rights Amendment*, Bay J. (Dec. 2, 2019), https://www.bayjournal.com/news/policy/group-sues-pa-for-violating-state-s-environmental-rights-amendment/article_af11c8eb-b642-522f-9ac3-49a966601d88.html [https://perma.cc/AZ98-YF3P] (The plaintiff's attorney, John Childe, described the legislation's impact as "threatening that core forest with this continued oil and natural gas extraction, [without] putting any of the money back in dealing with the degradation and diminution that's occurring.").
124. *Pennsylvania Env't Def. Found.*, 161 A.3d at 927.

narrower because plaintiffs demanded the court invalidate the statutes at issue for violating the rights of youth and future generations, as opposed to also demanding affirmative government action.[125] Thus, it is unclear how far the remedial power of Pennsylvania courts extends in this area. Initially, the Circuit Court applied the defendant-friendly test from a previous case, *Payne I*, which asks if the Commonwealth complied with all applicable statutes, demonstrated reasonable efforts to minimize environmental incursions, and if the resulting harm "so clearly [outweighed] the benefits . . . that to proceed further would be an abuse of discretion."[126] The Circuit Court ruled that the state's actions did not violate its public trust duties because the Lease Fund was not a part of the public trust, and the Constitution did not mandate that money from leasing state lands for extraction be reinvested in conservation and maintenance of natural resources.[127] But the Pennsylvania Supreme Court reversed and rejected the *Payne I* test, holding that as a trustee, the state was subject to a fiduciary duty to exclusively use the corpus of the trust, which included royalties from the Lease Fund, for the purpose of the trust, which is "the conservation and maintenance of our public natural resources."[128] Consequently, it held that §§ 1602-E and 1603-E violated this duty by allowing assets of the trust to be used for non-trust purposes, and remanded to the lower court to determine if the diversions of funds also violated § 27 (the environmental rights provision) because it appropriated funds to an initiative that was not dedicated to carrying out the trust's purpose.[129]

125. *Pennsylvania Env't Def. Found.*, 161 A.3d at 916, 937; *see also* Dernbach et al., *supra* note 123, at 818 ("[S]eeking declaratory relief that a variety of legislative and administrative decisions to lease state land for oil and gas development, and divert funds from oil and gas leasing to the General Fund, are unlawful.").

126. *Pennsylvania Env't Def. Found.*, 161 A.3d at 928. *Payne* had proved to be a strong barrier for plaintiffs. Only one of the 24 reported cases between the time of the *Payne* decision and 2015 that involved a challenge under § 27 (the environmental rights provision) found that the government's decision failed the *Payne* test. Consequently, rejecting its application to § 27 is a boon for any future cases brought under this provision. In an earlier case, *Robinson Township*, the Pennsylvania Supreme Court held in a plurality opinion that § 27's environmental protections were on par with other fundamental rights. However, because it was a plurality decision, it was not binding precedent. *Pennsylvania Env't Def. Found.* was the first time the court "confronted the implications of *Robinson Township*," and the plaintiff's arguments evolved in response to *Robinson*. *See* Dernbach et al., *supra* note 123, at 813–14, 818 (discussing how *Robinson* "partially restored § 27's status as constitutional law," and how while the court in *Pennsylvania Env't Def. Found.* recognized *Robinson's* critique of *Payne*, it said that without a majority opinion *Payne* was still binding law).

127. *Pennsylvania Env't Def. Found.*, 161 A.3d at 928.

128. *Id.* at 936.

129. *Id.* at 938–39.

C. Potential Pathways for Future Lawsuits in Each State

In articulating his framework, Stewart argues that compared to other mechanisms to address disregard, one of the benefits of legal accountability is that it can be more accessible to marginalized groups.[130] Thus, analyzing pathways to litigation can help assess whether domestic litigation under state constitutional provisions can address regard because it will illustrate whether these provisions establish accountability mechanisms that are accessible to future interests. Although Part III will further analyze the regard exhibited by these pathways, the pathways themselves are described below. Overall, there are fewer actionable violations for plaintiffs to sue under in Montana than in Hawai'i and Pennsylvania, but each pathway exhibits plaintiff-friendly standing requirements that promote accessibility for people with future interests.

Per *Held*, individuals can bring suit in Montana if the state enacts legislation that "prohibit[s] environmental reviews from evaluating GHG emissions."[131] Although this is a narrow area, and the court specifically stated its ruling was limited to this issue,[132] future plaintiffs could potentially bring claims in other contexts that the court mentioned. In particular, the court repeatedly stated that the environmental rights provision was intended to protect against environmental degradation, and that the state cannot adequately protect the environment if it could not make informed decisions.[133] Consequently, a plaintiff could potentially bring a successful claim if the government takes direct action to harm the environment, or, if similarly to *Held* itself, government action or legislation inhibits comprehensive review of environmental risks.[134]

Additionally, the court stated that the government must take affirmative steps to protect the right to a clean and healthful environment and that Montanans have a right to be free from environmental harms occurring in the first place.[135] Thus, it seems

130. *See supra* Part I.

131. Held v. State, 2024 MT 312, ¶ 43, 419 Mont. 403, 440, 560 P.3d 1235, 1260.

132. *Id.*

133. *Id.* at 1246, 1260–61.

134. *See* Hailey Rizzo, *From Petrostate to Precedent: The Impact of Held v. Montana on Future Climate Litigation and the Urgent Need for Federal Climate Action*, 30 Ocean & Coastal L.J. 219, 244–45 (2025) (noting that, for example, any legislation that lessens the requirement to consider greenhouse emissions in MEPA reviews would also be unconstitutional, and any agency conducting review must "at the very least . . . produce an [environmental assessment] addressing the impacts from greenhouse gas emissions and determine whether those impacts are significant or not").

135. *Held*, 560 P.3d at 1250, 1255; Held v. State*, 560 P.3d 1235 (Mt. 2024)*, ESCR-Net (Dec. 18, 2024), https://www.escr-net.org/caselaw/2024/held-v-state-of-montana-560-p-3d-1235-mt-2024/ [https://perma.cc/VX3R-SL4W] (claiming that *Held* will

a plaintiff could bring suit if the government passively allows environmental degradation or curtails the state's ability to prevent harms.[136] However, given that the issue in *Held* was limited to unconstitutional legislation, courts may interpret *Held* to only create a precedent to sue for claims based on unconstitutional action, not inaction, despite its language about affirmative obligations.[137] If the right to a clean and healthful environment is triggered, the plaintiff would have a strong position because a strict scrutiny test would apply,[138] although given the court's limited remedial power in *Held*, a successful suit may only result in an injunction on unconstitutional conduct at most.[139]

If a constitutional violation does occur along these grounds, an individual would face limited barriers to meet standing. In Montana, if an injury is premised on the violation of a constitutional right directed at the general public, which the environmental rights provision is, a member of the general public does not have to show they suffered a unique harm to bring suit.[140] Moreover, for this provision, the general public includes future generations.[141] Further, the *Held* court applied a "but-for" standard of causation, so a suit could succeed if the plaintiff

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"prevent state officials from ignoring their affirmative obligations under the Montana Constitution. Moreover, the substantive permitting decisions from the agencies must be consistent with their affirmative constitutional obligation to 'maintain and improve' Montana's environment and natural resources").

136. In the case of the former, some version of a deliberate indifference claim against the state government may be applicable by alleging officials were deliberately indifferent to the harm the state was causing. Although such a claim did not succeed in *Reynolds v. Florida*, Montana courts may be more amenable to this type of claim after *Held*. *See* Barry E. Hill & Jarryd C. Page, *Climate Science and Law for Judges: Fundamental Rights*, ENV'T L. INST. 19 (Paul A. Hanle & Sandra Nichols Thiam eds., 2023).

137. One of the plaintiffs' lawyers, Nate Bellinger, stated that *Held* was such a strong and worthwhile case in part because the government was not "sitting by idly" but acting more egregiously by "actively causing and contributing to climate change through various laws and policies." *See* Drew, *supra* note 90.

138. *Held*, 560 P.3d at 1245.

139. *See supra* Section II.B text and accompanying notes describing the remedial relief in *Held*.

140. *Held*, 560 P.3d at 1250–51; Rizzo, *supra* note 134, at 244 (arguing that *Held* establishes a "three-chain causal link" that can be replicated to meet standing "from not considering greenhouse gases to producing greenhouse gas emissions; from producing greenhouse gas emissions to contributing to global climate change"); *see also* Sam Bookman, *Held v. Montana: A Win for Young Climate Advocates and What It Means for Future Litigation*, EMMET ENV'T L. CTR. (Aug. 30, 2023), https://eelp.law.harvard.edu/held-v-montana/ [https://perma.cc/Q3VC-3P7C] ("[T]he injuries of each individual plaintiff derived from global fossil fuel emissions; the share of those emissions caused by Montanan fossil fuels was significant; and the MEPA Limitation made it more likely that Montana would continue to be a significant source of emissions, thus aggravating the plaintiffs' injuries.").

141. *Held*, 560 P.3d at 1246.

shows that harm would not have occurred but for the government's action, even if other causes contributed too.[142] Additionally, plaintiffs advocating for future interests face minimal barriers to standing because they can bring claims based on harms unique to youth, such as anxiety about the environment's future.[143]

Overall, a plaintiff could bring suit if the government directly harmed the environment or limited environmental review, and could possibly bring suit if the government passively allowed environmental degradation. Under either claim they could succeed by showing but-for causation, and Montana state courts also have plaintiff-friendly standing requirements.[144] However, it remains an open question as to how limited the relief might be.

Comparatively, plaintiffs can bring suit in Hawai'i under its respective constitutional provisions based on a much broader range of conduct. Per *Navahine*, a plaintiff could bring a claim under the right to a clean and healthful environment for violations of statutes relating to environmental quality.[145] This covers a wide range of statutes, including ones that aim to move Hawai'i "away from fossil fuel-generated power and [curb] climate change."[146] The right to a clean and healthful environment as defined by these statutes also subsumes the right to a life-sustaining climate system.[147] The Hawai'i constitutional provision has the potential to cover a wide range of conduct because it allows plaintiffs to sue any party, public or private.[148] In sum, to have a viable cause of action, a potential plaintiff would have to identify a statute that relates to environmental quality and then demonstrate that the challenged conduct violates that statute.[149] Based on *Navahine*, plaintiffs can point to statutes about transitioning to alternative energy

142. *Id.* at 1253.

143. Bookman, *supra* note 1 (in determining injury, "the court observed that many of the present effects of climate change, such as climate anxiety, are particularly harmful to children . . . because of their unique vulnerabilities, their stages of development as youth, and their average longevity on the planet in the future, Plaintiffs face lifelong hardships resulting from climate change").

144. *Held*, 560 P.3d at 1253 ("[B]ut for the MEPA Limitation, state agencies *would be able* to conduct evaluations of GHG emissions in their environmental reviews[.]").

145. Complaint at 31, Navahine F. v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 1, 2022).

146. *Id.*

147. *Id.* at 32 (citing In re Maui Elec. Co., 506 P.3d 192, 202 (Haw. 2022)).

148. *Id.* at 31 (stating that the Hawai'i Constitution "provides for the enforcement of that right by 'any person' against 'any party, public or private.'").

149. *Id.* at 31–32 (stating that the right is "established not by judicial decisions but rather 'as defined by laws relating to environmental quality'" and identifying the statutes *Navahine* is brought under and the rights those statutes confer).

sources,[150] and possibly statutes that seek to protect environmental elements necessary to sustain life, such as water.[151]

If a plaintiff brought a claim under Hawai'i's public trust provision, they would have to first point to something included in the public trust, which definitively includes "*all natural resources*, including land, water, air, mineral, and energy sources" and possibly includes the climate itself.[152] They would then need to demonstrate that the government acted in a way that failed to preserve the cited resource.[153] A plaintiff could prove this by showing that the government failed to do any of the following: "[do] enough, fast enough" to address impacts on trust resources, reasonably monitor trust resources, choose presumptions that favor trust resources in a case of uncertainty, affirmatively demonstrate its actions would not harm resources beyond just the absence of evidence of harm, "take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision making process," or take steps to prevent the trust resources from falling into disrepair.[154] Overall, while suits under this provision are limited to suing the state,[155] it offers many avenues to achieve relief.

Hawai'i's provisions also exhibit plaintiff-friendly standing requirements. First, per *Navahine*, a suit can be brought under the environmental rights provision by "any person."[156] Additionally, the cases the *Navahine* court cites state that plaintiffs can bring claims

150. *Id.*

151. *See* Andrea K. Rodgers & Maria Beaucage, *Navahine v. Hawai'i Department of Transportation: Redressing Constitutional Youth Climate Change Injuries Through a Court-Enforced Settlement Agreement*, 33 INT'L J. CHILD.'S RTS. 617, 631 (2025) (emphasizing the ability of plaintiffs to enforce statutes that protect the environment by saying "the Court also held that Hawai'i's legislatively enacted climate mitigation goals were legally enforceable, rejecting the defendants' argument that such goals were merely aspirational").

152. Complaint at 28, *Navahine*, No. 1CCV-22-0000631.

153. *Id.* at 2–3.

154. *Id.* at 29–30; Navahine v. Dep't of Transp., No. 1CCV-22-0000631, at 2 (Haw. Cir. Ct. Apr. 6, 2023) (ruling denying motion to dismiss); *see also* Isaac Moriwake, *Hawaii High Court Sides with Native Community Groups in Water Dispute*, STATE CT. REP. (Oct. 9, 2024), https://statecourtreport.org/our-work/analysis-opinion/hawaii-high-court-sides-native-community-groups-water-dispute [https://perma.cc/NNY9-2ED6] (stating that in the context of water, "the state must protect water resources, public uses, and Native rights whenever feasible," and citing a recent case where the court found a violation of the public trust when the state did not "take the initiative to protect the public trust").

155. Complaint at 28–29, *Navahine*, No. 1CCV-22-0000631 (quoting the provision itself which states: "All public natural resources are held in trust by the State for the benefit of the people" and articulating that the premise of the trust provision is that it creates duties in the state itself).

156. *Id*. at 31.

based on harms unique to youth and future generations' interests,[157] and the complaint overcame a motion to dismiss despite focusing in part on harms related to the disruption of indigenous cultural practices.[158] Further, like Montana, Hawai'i law does not deny standing just because the defendant's actions are a part of the broader problem of climate change as a whole.[159]

Overall, any person in Hawai'i can sue any party by alleging they violated a statute related to environmental quality. A plaintiff could also sue the government for failing to preserve a public natural resource. Under either constitutional provision, the plaintiff could cite injuries specific to future interests to demonstrate injury.

Although *Pennsylvania Environmental Defense Foundation* primarily centered on the public trust provision and not the state's environmental rights provision, it does hold that a plaintiff can sue if the state takes actions that violate the right to "clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment."[160] The decision also states that a plaintiff could sue the state if it enacts legislation that "unreasonably impair[s] th[is] right."[161]

In order to sue under the public trust provision, a plaintiff could allege that the state breached one of its duties as a trustee, which come from the principles of trust law, not a reasonableness test.[162] As a threshold matter, a plaintiff would have to argue that the resource at issue is a part of the trust which the court expressly says includes oil, natural

157. *See* Catherine Smith, *Navahine v. Hawai'i Dept. of Transportation: The Keiki Will Lead Us*, 48 SEATTLE U. L. REV. 1301, 1310 (2024) ("Hawai'i law and the courts' jurisprudence mandates that children and their rights be given special consideration when children bring injuries of this consequence and longevity to the court for redress.").

158. Complaint at 6, 12, *Navahine*, No. 1CCV-22-0000631.

159. *See Navahine*, No. 1CCV-22-0000631, at 3–4 (ruling denying motion to dismiss) ("To hold that the State has no trust obligation to reasonably monitor and maintain our natural resources by reducing our GHG emissions and establishing and planning alternatives to a fossil-fuel heavy transportation system—all because GHG emissions are just 'too big a problem'—'would allow the State to turn a blind eye to imminent damage, leaving beneficiaries powerless to prevent damage before it occurs.'"); *see also* Rodgers & Beaucage, *supra* note 151, at 630 (describing how the court rejected arguments that standing was not met because the problem was too big).

160. Pennsylvania Env't Def. Found. v. Commonwealth, 161 A.3d 911, 931 (Pa. 2017).

161. *Id.*; *see also* Dernbach et al., *supra* note 123, at 825 (describing how the court affirmed this principle from *Robinson*).

162. *Pennsylvania Env't Def. Found.*, 161 A.3d at 930; Dernbach et al., *supra* note 123, at 843–44 (noting that these obligations apply no matter the magnitude of the event at stake).

gas, and proceeds from the sale of trust resources, and by extension presumably includes things like timber and public waterways.[163]

According to Pennsylvania trust law, the state has general duties of prudence, loyalty, and impartiality. To bring a claim for a lack of prudence, a plaintiff would have to show that the state did not treat a public resource with "such care and skill as a man of ordinary prudence would exercise in dealing with his own property."[164] Loyalty requires the state to manage the trust solely to accomplish the trust's purposes for the benefit of the trust's beneficiaries,[165] and the purpose of the trust is to "conserve and maintain" natural resources. Thus, like in *Pennsylvania Environmental Defense Foundation*, a plaintiff could bring suit if they showed the state used any aspect of the corpus of the trust for purposes that were not to conserve or maintain natural resources, even if the state's action was to the general benefit of the people of the state.[166] This duty also prevents the state from depriving beneficiaries of funds that are necessary to protect these resources.[167] Impartiality requires the trustee to give each beneficiary's interests "due regard" in light of the trust's purpose.[168] This means that a plaintiff, such as those representing future generations, could sue the state if it does not sufficiently consider their interests when making decisions about conserving resources.[169] The trusteeship also creates a set of more specific duties, which if violated could provide grounds for a lawsuit. The state cannot prioritize profits over the interests of the beneficiaries, and the legislature has an affirmative duty to pass legislation that protects the

163. *See* Dernbach et al., *supra* note 123, at 853 (arguing that plaintiffs could "almost certainly" additionally bring a claim under § 27 by demonstrating a trustee duty was breached regarding a stable climate system).

164. *Pennsylvania Env't Def. Found.*, 161 A.3d at 932.

165. *Id.*

166. *See* Brigitte Meyer, *The People Have a Right: A Brief Overview of Environmental Rights Amendment Case Law*, PennFuture (Mar. 25, 2024), https://www.pennfuture.org/Blog-Item-The-People-Have-A-Right-A-Brief-Overview-Of-Environmental-Rights-Amendment-Case-Law [https://perma.cc/M63R-B76C] ("[T]he Commonwealth is not entitled to spend that revenue on general budgetary items in any way it sees fit; those funds must be directed toward the purpose of the trust.").

167. *Pennsylvania Env't Def. Found.*, 161 A.3d at 936.

168. *Id.* at 932–33.

169. *See* Emily Rollins, *Pennsylvania Supreme Court Rules that Drilling Revenues from State Forests Must Be Used for Conservation*, PennFuture (July 28, 2021), https://www.pennfuture.org/Blog-Item-Pennsylvania-Supreme-Court-Rules-that-Drilling-Revenues-from-State-Forests-Must-be-Used-for-Conservation [https://perma.cc/9B3G-5NB2] ("[T]he Commonwealth, as the trustee, cannot distinguish or prioritize the needs of current Pennsylvanians and future Pennsylvanians by spending trust income on general budgetary matters because 'the ERA created simultaneous beneficiaries with equal interests in the trust's management.'").

environment.[170] Further, the trustee duties of public officials supersede their other obligations.

Future interests also face minimal barriers to standing in Pennsylvania because the court repeatedly noted that the rights of the provision extend to future generations.[171] Thus, a plaintiff cannot be denied standing solely because they only represent future generations, because they are also included under "all people" as beneficiaries of the trust.[172]

Overall, a Pennsylvanian plaintiff could bring suit against the government if it unreasonably impairs the right to clean air and pure water, or the preservation of natural, scenic, historic, and esthetic values of the environment; or breaches its general or specific trustee duties regarding a natural resource or proceeds from the sale of trust resources, including the duty not to deprioritize the interests of future generations.

III. Regard Analysis Applied to the Three State Lawsuits

In light of the constitutional provisions, litigation, and litigation pathways discussed above, the following section will use Stewart's framework to analyze the ways in which each of these cases succeeds or fails in addressing the disregard of future interests. It will analyze each case under Stewart's concepts of procedural regard, substantive regard, and disregard in turn. In sum, it argues that each case successfully addresses procedural disregard and substantive disregard, although *Navahine* and *Environmental Defense Foundation* were particularly effective at addressing substantive disregard, and while the cases do not exhibit much disregard overall, they exhibit it through the relief constraints and limited scope of Hawai'i's and Pennsylvania's public trusts.

A. Addressing Procedural Disregard

As a reminder, Stewart breaks procedural disregard down into three types: when decision makers do not gather information about parties impacted by their decisions or about the impact of the decision itself on impacted parties (information gathering and consideration), when regimes do not give parties access to relevant information on

170. *Pennsylvania Env't Def. Found.*, 161 A.3d at 932–33. DCNR's trustee duties as a part of the state also carry over to its negotiation and structuring of leases. *Id.* at 936, 939.

171. *Id.* at 931 ("The second right reserved by § 27, set forth in its second sentence, is the common ownership by the people, including future generations, of Pennsylvania's public natural resources.").

172. Dernbach et al., *supra* note 123, at 835 (stating that the public trust provision creates a right to enforce it against the state even without implementing legislation and that the beneficiaries included future generations).

decisions or an opportunity to participate in the decision making process (participatory disregard), and when regimes fail to "address the interests and concerns of groups or individuals in explaining or giving reasons for the decisions made" (a lack of reason-giving).[173] Overall, each case study exhibits strong mechanisms to address procedural disregard for future interests. Thus, they offer promise that domestic litigation can help remedy procedural disregard of future interests.

First, *Held* and *Navahine* address the information gathering aspect of Stewart's first type of disregard because they establish governmental duties about gathering information on how climate change impacts future interests. Per *Held*, protecting the right to a clean and healthful environment includes preventing certain environmental harms, which requires forethought.[174] MEPA is necessary to fulfill this constitutional obligation because it enables "fully informed and considered decision making."[175] Thus, by preventing the government from gathering information about environmental impacts, the MEPA Limitation was unconstitutional because it "blindfolded" the state in situations where information was necessary to protect constitutional rights.[176] The Montana Supreme Court emphasized this point by concluding that "a clean and healthful environment cannot occur unless the State and its agencies can make adequately informed decisions."[177] The duty to not limit information gathering about ways to prevent environmental harms addresses procedural disregard of future interests because preventing harm is inherently future-oriented, and it speaks directly to Stewart's concern that regimes refuse to gather information on impacted parties. The Hawaiian government faces an even stricter standard for information gathering because the public trust doctrine requires the government to affirmatively demonstrate that its proposed actions "will not affect a protected [trust] use," and "the absence of evidence" alone is insufficient.[178] This places a strong obligation on the government because it requires it to affirmatively gather convincing evidence about the impact of decisions on the future of trust resources, and thus future interests, rather than just preventing the government from turning a blind eye.[179]

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173. *See supra* Part I.
174. Held v. State, 2024 MT 312, ¶ 60, 419 Mont. 403, 436, 560 P.3d 1235, 1257.
175. *Id.* at 1252.
176. *Id.*
177. *Id.* at 1259.
178. Complaint at 30, Navahine F. et al. v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 1, 2022).
179. Requiring affirmative steps is also important to potential pathways to litigation and addresses disregard by increasing the scope of violations that plaintiffs can sue under. *See supra* Section II.C.

Second, each state also helps address the consideration aspect of Stewart's first type of procedural disregard because their constitutions require the government to consider the impact of environmental harms on future interests during decision making. In Montana, the government must consider the impact of environmental harms on future interests because its environmental rights provision establishes inalienable and fundamental environmental rights intended to apply not just to current Montanans, but also specifically for their "posterity."[180] These rights include protection against environmental degradation, and mandate that "the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."[181] The fact that these rights are inalienable promotes procedural regard because the government must consider them at all times, and the fact that they are fundamental promotes procedural regard because they must be given substantial weight when considered.[182] The provision also mandates consideration of future interests generally because its protections are meant to be "farsighted" and both "anticipatory and preventative."[183] Hawai'i's Constitution requires the government to consider the impact of decisions on future interests because its public trust duties mandate that the government make plans and decisions from a "global, long-term perspective."[184] Moreover, because the language of the public trust provision explicitly lists future generations as one of the beneficiaries,[185] the government must specifically consider the impact of resource conservation on future generations. Similar to the case of Montana, these duties are ever-present and particularly powerful because they "exist independent of any statutory mandate and must be fulfilled regardless of whether they coincide with any other

180. *Held*, 560 P.3d at 1246–47.
181. *Id.*
182. *See* Rizzo, *supra* note 134, at 244 (noting that, for example, any legislation that lessens the requirement to consider greenhouse emissions in MEPA review would also be unconstitutional, and any agency conducting review must "at the very least . . . produce an EA addressing the impacts from greenhouse gas emissions and determine whether those impacts are significant or not"); *see also* Brown, *supra* note 87 (one of Our Children's Trust's lawyers, Phillip Gregory, argued that the ruling created a broad impact, stating "[g]oing forward, our view is that the state government will have to consider greenhouse gas emission pollution as a significant factor in permitting decisions").
183. *Held*, 560 P.3d at 1247.
184. Complaint at 30, 69, Navahine F. v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 1, 2022); *see also* EARTHJUSTICE, *supra* note 114 (reporting that at the settlement press conference, Ed Sniffen, the Director of Transportation, stated "climate change is indisputable, burying our heads in the sand and making it the next generation's problem is not pono" (a Hawaiian word for righteousness)).
185. Complaint at 28, *Navahine*, No. 1CCV-22-0000631.

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legal duty."[186] Like Hawai'i, Pennsylvania must consider the impact of decisions on future interests because the public trust provision includes future generations as beneficiaries. The court further noted that while the government is entitled to some discretion as trustee, it can only act in ways authorized by the trust, which are to conserve and maintain natural resources.[187] As a result, it cannot justify decisions on the basis that they benefit the public broadly, and cannot dispose of natural resources "without regard to 'generations yet to come.'"[188] Moreover, the court emphasizes the fiduciary duty of impartiality placed on the government, which "requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust."[189] Thus, the government not only has to consider the interests of future generations, but hold them in relatively equal weight to current interests.[190] As in the other two states, these duties are ever-present, and in some ways even stronger, because they also place obligations on public officials, including the governor, that supersede other obligations.[191]

Third, each of the provisions and litigation further address Stewart's first type of procedural disregard because they require the government's efforts to gather information about future interests and consider their needs to adapt to new harms and statutory obligations. In *Held*, the court stated that the Montana Constitution is not a "strait-jacket, but a living thing designed to meet the needs of a progressive society and capable of being expanded to embrace more extensive relations."[192] Similarly, the Pennsylvania amendment was written in broad and flexible terms to discourage courts from limiting what resources are covered.[193] In both cases, the provisions' flexibility addresses disregard because it prevents the government from being absolved of failing to consider harms that impact future generations just because they were not envisioned by the provision's drafters. Hawai'i's environmental rights provision achieves a similar result because the substance of the provision is defined by relevant "laws relating to environmental quality."[194] As a result, what the government must consider in fulfilling its duties must adapt to

186. *Id.* at 29.
187. Pennsylvania Env't Def. Found. v. Commonwealth, 161 A.3d 911, 938 (Pa. 2017).
188. *Id.* at 935.
189. *Id.* at 933.
190. *See* Rollins, *supra* note 169.
191. *Pennsylvania Env't Def. Found.*, 161 A.3d at 936, 939.
192. Held v. State, 2024 MT 312, ¶ 27, 419 Mont. 403, 420, 560 P.3d 1235, 1247.
193. *Pennsylvania Env't Def. Found.*, 161 A.3d at 919.
194. Complaint at 31–32, Navahine F. v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 1, 2022).

the legislation passed over time, which allows for the legislature to impose increasingly future-oriented obligations.[195] For instance, the stated purpose of the Hawai'i State Planning Act is to preserve energy resources for future generations.[196] This exemplifies procedural regard because even if the impact of energy resources on future generations was not specifically contemplated by the delegates of con con, the government must consider it when making decisions.

Fourth, each of the three examples addresses participatory disregard through plaintiff-friendly standing requirements that make it easier for future interests to be represented in court. As a reminder, standing requirements are also an important aspect of how pathways to litigation address disregard because they impact accessibility. *Navahine* also further addresses participatory disregard through the accountability mechanisms in its settlement agreement.[197]

Montana's standing rules address participatory disregard because they allow for a range of voices to represent future interests in court with minimal restrictions: Plaintiffs in Montana can bring claims for constitutional violations even if they do not have a personal stake in the policy at issue, as long as the right at stake is directed at the public.[198] The environmental rights provision falls within this category because it applies to "all persons of the state, including present *and future* generations."[199] Additionally, the court specifically noted that "the Constitution's 'farsighted environmental protections can be invoked' prior to harmful environmental effects."[200] The court also used a more lenient "but-for" rule of causation and granted standing absent a challenge of the permits issued under MEPA themselves.[201]

In Pennsylvania, the public trust provision promotes procedural regard because plaintiffs have a general right to sue under it rather than being forced to rely on potentially narrower legislation. This is because the provision is self-executing, which "create[s] a right in the people to seek to enforce the obligations," and hold the state accountable whether

195. *See* Rodgers & Beaucage, *supra* note 151, at 631 (emphasizing the ability of plaintiffs to enforce statutes that protect the environment).
196. Navahine v. Dep't of Transp., No. 1CCV-22-0000631, at 7 (Haw. Cir. Ct. Apr. 6, 2023) (ruling denying motion to dismiss).
197. *See* Settlement Agreement at 9, Navahine v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 20, 2024).
198. Held v. State, 2024 MT 312, ¶¶ 40–41, 419 Mont. 403, 425–27, 560 P.3d 1235, 1250–51.
199. *Id.* (emphasis in original).
200. *Id.* at 1246–47.
201. *Id.* at 1253–54.

or not there is supplemental legislation.[202] Further, in affirming that the leasing of property "held in trust for the benefit of all current and future Pennsylvanians is an appropriate subject of judicial scrutiny," the court supported an expansive view of the claims beneficiaries can raise.[203]

Hawai'i also has plaintiff-friendly standing rules because its environmental rights provision can be enforced by "any person against any party, public or private."[204] Hawai'i's state courts have also adopted notice pleading instead of the federal "plausibility" pleading standard, which makes it easier for Hawaiian plaintiffs, including those representing future interests, to get into court.[205] *Navahine*'s settlement agreement further established strong accountability mechanisms on behalf of future interests because it created a youth advisory council and formal procedures for youth to provide feedback on climate policy.[206] This exhibits participatory regard because it creates court-required spaces where youth can shape HDOT's decision-making process.[207] These measures also exhibit Stewart's idea of accountability mechanisms because they put legal weight behind youth critiques of HDOT.

Fifth, each case, and especially *Held* and *Navahine*, addresses participatory disregard for future interests because the courts recognized the unique harms they face, and that the provisions protect against environmental harms that will either take place in the future or are only experienced by future generations. This promotes regard because future generations do not have to raise problems affecting current interests to directly participate in judicial decision-making or impact legislative and agency decision-making.[208] In *Held*, the court stated that "children are uniquely vulnerable to the impacts and consequences of climate change," and held that the youth-specific harms cited by the plaintiffs such as fear

202. Pennsylvania Env't Def. Found. v. Commonwealth, 161 A.3d 911, 937 (Pa. 2017); *see also* Dernbach et al., *supra* note 123, at 835 (stating that the public trust provision creates a right to enforce it against the state even without implementing legislation and that the beneficiaries included future generations).

203. *Pennsylvania Env't Def. Found.*, 161 A.3d at 929; *see also* Dernbach et al., *supra* note 123, at 843–44 (noting that these obligations apply no matter the magnitude of the event at stake).

204. Complaint at 31, Navahine F. v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 1, 2022).

205. Navahine v. Dep't of Transp., No. 1CCV-22-0000631, at 1 (Haw. Cir. Ct. Apr. 6, 2023) (ruling denying motion to dismiss).

206. Settlement Agreement at 5, 9, Navahine v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 20, 2024).

207. *See* Rodgers & Beaucage, *supra* note 151, at 636–37 (describing the "several provisions specifically designed to ensure the continued involvement of youth").

208. Allowing claims based on future-specific harms is also important to potential pathways to litigation and addresses disregard by increasing the scope of violations that plaintiffs can sue under. *See supra* Section II.C.

from disappearing glaciers, anxiety about raising future generations in a more dangerous environment, and the impact of climate change on their physical development satisfied the constitutional requirements for injury.[209] Similarly, the Hawai'i Supreme Court recognized that climate change harms children and youth.[210] In *Navahine*, the court held that the range of future-oriented harms cited by the youth plaintiffs was sufficient to grant standing at the motion to dismiss stage because they "allege[d] nothing less than that they stand to inherit a world with severe climate change and the resulting damage to our natural resources," and the "destruction of the environment is a concrete interest."[211] Moreover, the court stated that at the motion to dismiss stage, the defendant's arguments that "future goals are not actionable" were illusory.[212] Thus, future interests can impact legal decision making because of harms that uniquely affect them, even if they have not yet materialized. Although the Pennsylvania Supreme Court did not cite harms as specific as those brought by the youth plaintiffs in *Held* and *Navahine*, it still repeatedly recognized future interests in isolation and mandated that the state not harm them. For instance, the court specifically noted that the government could not deprive future generations "of the funds necessary to conserve and maintain the public natural resources."[213] The duty of impartiality also particularly strengthens the standalone power of future interests by placing them on similar footing to other beneficiaries.

Lastly, Montana and Pennsylvania address procedural disregard through reason-giving. As mentioned previously, *Held* found that the MEPA Limitation violated the right to a clean and healthful environment because it prevented the public from being informed of environmental impacts.[214] Montana posts each MEPA review on its website for public viewing, and the MEPA process itself provides opportunities for public participation, so limitations on what agencies can consider during this

209. Held v. State, 2024 MT 312, ¶ 55, 419 Mont. 403, 434, 560 P.3d 1235, 1256; Bookman, *supra* note 1 ("[T]he court catalogued the unique injuries suffered by each of the plaintiffs," including "glacial loss, reduced river flow, drought, wildfires, and biodiversity loss."). Per Melissa Hornbein, an attorney at one of the firms representing the plaintiffs, the *Held* court's decision in the wake of this strategy represented "an endorsement of those youth telling their stories with such courage and grace." Brown, *supra* note 87.

210. Complaint at 42, *Navahine*, No. 1CCV-22-0000631; *see also* Smith, *supra* note 157, at 1310 ("Hawai'i law and the courts' jurisprudence mandates that children and their rights be given special consideration when children bring injuries of this consequence and longevity to the court for redress.").

211. Navahine v. Dep't of Transp., No. 1CCV-22-0000631, at 10 (Haw. Cir. Ct. Apr. 6, 2023) (ruling denying motion to dismiss).

212. *Id.* at 9.

213. Pennsylvania Env't Def. Found. v. Commonwealth, 161 A.3d 911, 936 (Pa. 2017).

214. *Held*, 560 P.3d at 1259.

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process conceal information from the public too.[215] Per the court, MEPA is "directed at the citizen: and one of its purposes is to inform 'the public' of anticipated environmental impacts of potential state action."[216] The MEPA Limitation violates this purpose because it is impossible to fulfill when the "Legislature forecloses an entire area of review proven to be harmful to Montanans' right to a clean and healthful environment."[217] This line of argument demonstrates reason-giving because it means that Montana's constitutional duties extend beyond the content of the decisions themselves and include adequately informing the public of future environmental impacts. Although *Pennsylvania Environmental Defense Foundation* did not address reason-giving to the same extent, the court noted that if the government transfers funds from the Lease Fund to the General Fund, "an accounting is likely necessary to ensure that the funds are ultimately used in accordance with the trustee's [conservation] obligation[s]."[218] Thus, while the court did not establish a mandatory duty to inform the public, it still promotes reason-giving by requiring the government to publicly defend itself in a specific scenario that has a high potential for a constitutional violation.

B. Addressing Substantive Disregard

Substantive regard is concerned with the impact of a regime's decisions, not how they are made, and occurs when a regime makes decisions that "unjustifiably harm or disadvantage those whose interests and concerns have been procedurally disregarded, where decisions have been adopted as a consequence of such disregard."[219] Under Stewart's framework, all three states, but particularly Hawai'i and Pennsylvania, successfully address substantive disregard of future interests. Thus, they offer promise that domestic litigation, especially in states that have a public trust provision, could help address the substantive disregard of future interests on climate change.

First, each case study exhibits substantive regard because each state is constitutionally obligated to make decisions that do not degrade the environment. This demonstrates substantive regard because it regulates the impact of the decisions, not just their process. Preventing degradation relates to future interests because it protects them from inheriting a worse environment than their predecessors. In *Held*, the

215. *See MEPA Documents*, Dep't of Env't Quality, https://deq.mt.gov/public/mepa [https://perma.cc/P986-L4C5].
216. *Held*, 560 P.3d at 1251.
217. *Id.* at 1259.
218. *Pennsylvania Env't Def. Found.*, 161 A.3d at 939.
219. Stewart, *supra* note 15, at 221.

court held that the right to a clean and healthful environment includes a stable climate system, which cannot be degraded.[220] Moreover, it established an especially strong duty for the state to not degrade the environment because the state cannot justify harmful decisions solely based on the fact that other factors cause more significant harm, or because addressing the decisions at issue will not remedy all harm.[221] In Hawai'i, the public trust duties create an "obligation to reasonably monitor trust property to ensure it is not harmed."[222] Similar to *Held*, the court rejected the defendant's argument that they are absolved from this duty because the overall problem of climate change is too big.[223] However, Hawai'i's Constitution imposes further obligations because, in addition to preventing decisions that knowingly degrade the environment, it mandates that when the government is uncertain how a decision will impact natural resources, it must choose presumptions that favor resource protection.[224] In Pennsylvania, the language of the public trust provision prohibits degradation because it states that as a trustee, the government "shall conserve and maintain" the state's resources for the benefit of all people, including "generations yet to come."[225] The court further said this standard "implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources."[226] This duty is broad because it not only includes the physical degradation of resources but also the "scenic, historic and esthetic values of the environment."[227] Because the royalties in the Lease Fund constitute part of the corpus of the trust, the court held that §§ 1602-E and 1603-E facially violate the constitution because they "deprive the trust beneficiaries (the people, including future generations) of the funds necessary to conserve and maintain the public natural resources."[228] Collectively, the provision and this holding demonstrate substantive regard because they prevent the government

220. *Held*, 560 P.3d at 1247, 1249.
221. *Id.* at 1253.
222. Complaint at 29, Navahine F. v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 1, 2022).
223. Navahine v. Dep't of Transp., No. 1CCV-22-0000631, at 4 (Haw. Cir. Ct. Apr. 6, 2023) (ruling denying motion to dismiss); *see also* Rodgers & Beaucage, *supra* note 151, at 630 (describing how the court rejected arguments that standing was not met because the problem was too big).
224. Complaint at 30, *Navahine*, No. 1CCV-22-0000631 ("[W]here uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.").
225. Pennsylvania Env't Def. Found. v. Commonwealth, 161 A.3d 911, 934 (Pa. 2017).
226. *Id.* at 932.
227. *Id.* at 931.
228. *Id.* at 936.

from making decisions that harm or take away environmental resources from future generations, or limit future generations from being able to protect their environmental resources.

Second, all three states require the government to take affirmative steps to protect the environment beyond preventing degradation. This promotes substantive regard because it forces the government to make decisions that have a positive impact on future interests.[229] In *Held*, the court found that the right to a clean and healthful environment also included an "affirmative duty upon [the] government to take active steps to realize this right."[230] Although this duty encompasses reactive measures to address harm, it also includes a right to "be free of its occurrences in the first place."[231] Hawai'i's constitution imposes even stronger obligations on the government to actively protect the environment because it requires agencies to take initiative to "advance" public rights in environmental resources at "every stage of the planning and decision making process."[232] Per *Navahine*, this obligation contains implicit temporal constraints because the court was concerned that an agency did "not [do] enough, fast enough, to reduce climate change."[233] Moreover, the laws that define HDOT's obligations require decarbonization, mitigating climate change, and acting as quickly as practicable to reach Hawai'i's zero emissions target.[234] Collectively, the provision and the court decision promote substantive regard because they require timely planning and action rather than just aspirational goals, and establish a definition for future interests.[235] In Pennsylvania, the Supreme Court similarly exhibited substantive regard because it ruled

229. Requiring affirmative steps is also an important opening for future litigation pathways. *See supra* Section II.C. It means that litigation can address disregard by increasing the scope of violations that plaintiffs can sue under.

230. Held v. State, 2024 MT 312, ¶ 36, 419 Mont. 403, 424, 560 P.3d 1235, 1247, 1249–50; *see also* ESCR-Net, *supra* note 135 (claiming that *Held* will "prevent state officials from ignoring their affirmative obligations under the Montana Constitution. Moreover, the substantive permitting decisions from the agencies must be consistent with their affirmative constitutional obligation to 'maintain and improve' Montana's environment and natural resources").

231. *Held*, 560 P.3d at 1255.

232. Complaint at 30, *Navahine*, No. 1CCV-22-0000631.

233. Navahine v. Dep't of Transp., No. 1CCV-22-0000631, at 2 (Haw. Cir. Ct. Apr. 6, 2023) (ruling denying motion to dismiss); *see also* Moriwake, *supra* note 154 (explaining the duty to act proactively and in a timely manner, collecting cases where the court held that "the state must protect water resources, public uses, and Native rights whenever feasible," and where the court found a violation of the public trust when the state engaged in a "passive failure to take the initiative to protect the public trust").

234. *Navahine*, No. 1CCV-22-0000631, at 8 (ruling denying motion to dismiss).

235. *See* Rodgers & Beaucage, *supra* note 151, at 631 ("[T]he Court also held that Hawai'i's legislatively enacted climate mitigation goals were legally enforceable, rejecting the defendants' argument that such goals were merely aspirational.").

using the Lease Fund money for state park maintenance, as opposed to conservation purposes, was unconstitutional.[236] Thus, the court held that a preference for future interests during decision making alone was not constitutionally sufficient, and instead mandated decisional outcomes that protected future interests in practice.[237] Moreover, unlike in Hawai'i and Montana, the Pennsylvania General Assembly has a duty to "the Commonwealth [and] must act affirmatively via legislative action to protect the environment."[238] Consequently, Pennsylvania exhibits particularly strong substantive regard for future interests because it prescribes decisional obligations on all branches of the government.

C. Exhibiting Disregard

While each of the three case studies exhibits strong regard, it is still worth noting how they exhibit disregard. In Montana, the strongest example of disregard is the limited remedial power of the court to enforce the provision. Although the district court in *Held* ruled in the plaintiffs' favor, the court held that it was beyond its power to fulfill most of the plaintiffs' remedial requests such as an accounting, requiring the development of a remedial plan, or appointing a special master.[239] The Montana Supreme Court also did not take up any of these remedies.[240] Thus, while the court still found the MEPA Limitation unconstitutional, *Held*'s remedies exhibit disregard because they limit the mechanisms future interests can use to hold the government accountable. Further, the court emphasized that it only decided "that the Constitution does not permit the Legislature to prohibit environmental reviews from evaluating GHG emissions."[241] These constraints align with the overall nature of the decision because it focuses much more on protecting against degradation than requiring positive action. Additionally, the Hawai'i and Pennsylvania decisions both surface potential issues of disregard in terms of the scope of the public trust. Much like the impact of the narrowed remedial relief in *Held*, a narrower trust scope would demonstrate disregard by limiting the issues future interests could bring claims under, and in turn, their ability to participate in decision making. In *Navahine*, the court declined to answer whether

236. Pennsylvania Env't Def. Found. v. Commonwealth, 161 A.3d 911, 937 (Pa. 2017).
237. *See* Meyer, *supra* note 166 ("[T]he Commonwealth is not entitled to spend that revenue on general budgetary items in any way it sees fit; those funds must be directed toward the purpose of the trust.").
238. *Pennsylvania Env't Def. Found.*, 161 A.3d at 933.
239. Held v. State, 2024 MT 312, ¶ 8, 419 Mont. 403, 414, 560 P.3d 1235, 1244.
240. *Id.* at 1261.
241. *Id.* at 1260.

or not the climate itself is a part of the trust's corpus, because it was sufficient that the plaintiffs alleged climate change impacted natural resources.[242] In Pennsylvania, the scope of the trust may be limited because the provision only mentions "public natural resources," and the court only explicitly states that the implied right of action to sue under the public trust provision applies to public property.[243] Although neither text expressly says private property is not covered by § 27, it follows logically that this is the case based on *expressio unius* and common meaning. Thus, the scope of Pennsylvania's trust is narrower than Hawai'i's, which does not contain such limiting language and includes all natural resources.[244]

Conclusion

Climate change poses a serious threat to humanity, especially for youth and future generations, because of the delayed impact and cumulative nature of emissions. Thus, if governments do not have regard for future interests when making decisions today, it will cause youth and future generations serious harm. In recognizing this concern, this Note conducts a regard analysis of three state constitutional provisions, and subsequent litigation under those provisions, using Richard Stewart's framework. This analysis shows that litigation under state constitutions that protect the right to a clean and healthy environment, and especially those that also establish a public trust for the environment, is a promising tool to help remedy disregard of future interests.

This Note demonstrates that litigation under state constitutions can promote procedural regard, because in each case discussed, the courts required the government to consider future interests during decision making, facilitated the participation of parties representing the unique concerns of future interests in legal or political processes, and mandated that the government gather information about future interests or engage in reason-giving. It also shows how public trust provisions can further enhance procedural regard because Hawai'i's and Pennsylvania's provisions impose additional duties on decision making, such as impartiality, that protect future interests and supersede other

242. Navahine v. Dep't of Transp., No. 1CCV-22-0000631, at 3 (Haw. Cir. Ct. Apr. 6, 2023) (ruling denying motion to dismiss). However, Hawai'i jurisprudence has recognized that the right to a clean and healthful environment subsumes the right to a "life-sustaining climate system." Complaint at 31–32, Navahine F. v. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 1, 2022). Thus, while this right may not necessarily impact public trust duties, disregard on this issue may be diminished if plaintiffs could address similar harms under the rights provision.

243. *Pennsylvania Env't Def. Found.*, 161 A.3d at 937.

244. Complaint at 5, *Navahine*, No. 1CCV-22-0000631.

governmental obligations. This Note also reveals how litigation under state constitutions can promote substantive regard because each case enforced a constitutional duty to not degrade the environment and obligated the government to take affirmative steps to preserve a clean and healthy environment.

Additionally, it is significant that there is a throughline in each state from an inclusive grassroots political movement that helped enact rights-granting constitutional provisions to litigation that won victories for vulnerable and underrepresented interests. Consequently, these cases demonstrate the power of grassroots activism to shape legislation and build a platform for legal change. Moreover, although each case study showed promising examples of regard, they also revealed ways in which further work to address disregard is needed, such as expanding the scope of judicial remedial power. Thus, not only do they illustrate successful strategies for remedying disregard that can be replicated, but they also provide hope that additional grassroots movements in the future can expand on these efforts and address climate change in new ways.

Finally, given that climate change is a global problem, a valuable next step in assessing how state constitutional provisions and subsequent litigation address disregard of future interests would be to analyze how they can address global disregard. Although beyond the scope of this Note, a potentially helpful way to broaden analysis of domestic litigation to a global perspective is through the concept of the two-level game characterized by political scientist Robert Putnam. Putnam argued that national political leaders have to make decisions that balance protecting their country from foreign developments at an international level with their desire to maintain domestic political support.[245] Essentially, the idea is that domestic and international politics influence each other. One scholar applied this concept to global climate regulation and argued that domestic affairs, including non-international courts that hold states accountable for insufficiently addressing the harms of climate change, can influence global governance because such regimes reflect the normative environments they exist in, and these environments are shaped by domestic affairs.[246] Thus, if domestic

245. *See* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434 (1988) (discussing the relationship between international and domestic politics).

246. *See* Lavanya Rajamani, *Interpreting the Paris Agreement in Its Normative Environment*, 72 CURRENT LEGAL PROBS. 167, 180–82 (2024) (describing the shift to take normative environments into account when interpreting international laws and obligations, and how domestic affairs including court cases shape these normative environments).

litigation helps remedy domestic disregard of future interests, it may establish norms that influence global governance regimes to address global disregard in ways that reflect the litigation. In the meantime, litigation under state constitutions is a worthwhile pursuit, offering the hope of a better future in an American legal landscape that is otherwise bleak.

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