

Constitutional Environmental Rights as Tools of Environmental Justice: Applications in the United States Based on Examples from Brazil and France

SARA ZAAT*

ABSTRACT

What can the movement toward federal constitutional environmental rights in the United States learn from the implementation of such rights in Brazil and France? Importantly, are these rights effective tools for advancing environmental justice among underserved communities, including in the battle against climate change? This Note compares the constitutional environmental rights in Brazil and France, focusing on their efficacy in rectifying environmental injustice, and infers whether these rights would be similarly effective in the United States. The comparison of Brazilian and French law reveals the potential benefits of constitutional environmental rights to the American environmental justice movement and insights into overcoming the challenges that the United States would likely face in implementing these rights. In terms of benefits, Brazil and France offer evidence of how constitutional environmental rights advance environmental justice by strengthening public participation; protecting animals whose health is intertwined with those of people; compelling the execution of robust climate change policy; and defending the environment against threats imposed by the freedom of enterprise. Challenges the United States might face in implementing these rights relate to justiciability; the positive versus negative rights dichotomy; the political composition of the U.S. Supreme Court; and the social limitations of constitutions in general. The comparative analysis supports the conclusion that, given the qualified benefits seen in Brazil and France, as well as the insights these countries provide toward overcoming challenges,

* Georgetown University Law Center, J.D. 2022; University of California, Berkeley, B.S. 2019. © 2023, Sara Zaat.

I am deeply grateful for the guidance I received in preparing the initial version of this Note from Professor Yvonne Tew and my colleagues in her spring 2021 Comparative Constitutional Law seminar. I am grateful also to Professor Edith Brown Weiss for teaching me international environmental law, inspiring me to write about constitutional environmental rights, and providing guidance and background materials as I developed the topic for this Note. Additionally, I thank Professor William W. Buzbee for teaching me U.S. environmental law, including the question of federal constitutional environmental rights, and introducing me to and explaining *Mays v. Governor of Michigan*. Finally, I thank the *Georgetown Environmental Law Review* staff and editors for their valuable input and for the opportunity to improve this Note through participation in their Spring 2022 Symposium. Any and all opinions and errors in this Note are my own.

constitutional environmental rights would likely be valuable tools to advance environmental justice in the United States.

TABLE OF CONTENTS

Introduction	544
I. Environmental Justice by Country: Overview of Contemporary Concerns	550
A. Brazil	550
B. France	551
C. United States.	552
II. Constitutional Environmental Rights in France and Brazil Compared	553
A. Text of the Provisions	553
B. Case Law	554
III. Applying Constitutional Environmental Rights in the American Context.	559
A. The Contested Status of Constitutional Environmental Rights in the United States.	559
B. Likely Benefits of Constitutional Environmental Rights in the United States Based on Those Experienced in Brazil and France	562
1. Public Participation	563
2. Protections at the Human-Animal Nexus	563
3. Governmental Action on Climate Change	564
4. Checks on Corporate Power	565
C. Potential Challenges of Constitutional Environmental Rights in the United States and Instructive Insights from Brazil and France	566
1. Justiciability	567
2. Positive Rights in a Constitution of Negative Rights.	568
3. Political Perils of Litigation	569
4. Social Limitations of Constitutional Rights	570
IV. The Way Forward: Using Constitutional Environmental Rights to Advance Environmental Justice in the United States	571
Conclusion	573

INTRODUCTION

“[T]he environment is not just something else to worry about. It is connected to all the things we already worry about—our children, our health, our homeland—and love with all our hearts.”¹

Why else must those in a position of power “worry about” our environment?² One reason that scholars have recognized is this: inattention to environmental

1. SANDRA STEINGRABER, *LIVING DOWNSTREAM* 289 (2d ed. 1997).

2. *Id.*

health by the privileged few causes disproportionate harm to many others.³ The inequitable impact of environmental harms on underserved communities—such as people of color, lower-income people, women, immigrants, and many others—is the concern of environmental justice.⁴ The United States Environmental Protection Agency (“EPA”) is known to address environmental justice nationally,⁵ but scholarship shows that environmental injustice also extends internationally.⁶ In a given country, and according to existing definitions in the literature, environmental justice generally entails promoting the power of underserved communities who face environmental threats to access protections through the legal system.⁷

In response to the impacts of environmental harms on underserved communities, plaintiffs worldwide are demanding environmental justice through enforcement of constitutional environmental rights.⁸ Most countries have constitutional environmental provisions: as of 2019, researchers found that at least 150 countries had some form of constitutional environmental provisions, and eighty-eight

3. See, e.g., Luz Claudio, *Standing on principle: The Global Push for Environmental Justice*, 115 ENV'T HEALTH PERSPS. A500, A501–02 (2007).

4. See, e.g., *id.* (citing ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 138 (Routledge, 3d ed. 2000) (1990)).

5. See *Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY (Sept. 22, 2021), <https://perma.cc/U2BF-B8W5>. For background on the U.S. environmental justice movement, see Deepa Badrinarayana, *The “Right” Right to Environmental Protection: What We Can Discern from the American and Indian Constitutional Experience*, 43 BROOK. J. INT'L L. 75, 83–86 (2017); Davor Petrić, ENVIRONMENTAL JUSTICE IN THE EUROPEAN UNION: A CRITICAL REASSESSMENT, 15 CROATIAN Y.B. EUR. L. & POL'Y 215, 215–19 (2019); Mehmet K. Konar-Steenberg, *Root and Branch: The Thirteenth Amendment and Environmental Justice*, 19 NEV. L.J. 509, 513–14 (2018).

6. See, e.g., Claudio, *supra* note 3; Petrić, *supra* note 5, at 218–19. In this Note, “environmental injustice” is the opposite of environmental justice. Similarly, Petrić describes environmental injustice as “the negation of environmental justice.” Petrić, *supra* note 5, at 216.

7. See, e.g., *Learn About Environmental Justice*, *supra* note 5; Claudio, *supra* note 3, at A501 (citing BULLARD, *supra* note 4). Cf. Petrić, *supra* note 5, at 216 (“[E]nvironmental injustice . . . is a situation where a societal group which is the least responsible for environmental harms bears the greatest burden in dealing or living with those harms, at the same time having the least political clout or influence in decision-making on environmental matters.”).

8. See, e.g., E. Matthew Comer, *Constitutional Rights and Environmental Justice—A Comparative Analysis*, 8 J. ANIMAL & ENV'T L. 94, 111, 116 (2016); see also cases cited *infra* notes 78, 87, 94, 104 and accompanying text. In this Note, “constitutional environmental rights” encompasses the many variations of substantive and procedural environmental rights and duties, like the rights to a healthy environment, clean environment, or sustainable climate, as well as individual and governmental duties to protect the environment. See DAVID R. BOYD, *THE STATUS OF CONSTITUTIONAL PROTECTION FOR THE ENVIRONMENT IN OTHER NATIONS* 10–17 (David Suzuki Foundation 2013) [hereinafter BOYD, *THE STATUS*]. This Note also recognizes that constitutional environmental rights are not limited to humans; as scholars note, there is a linked movement to protect the rights of non-human fauna against environmental harm. See, e.g., Jessica Eisen, *Animals in the Constitutional State*, 15 INT'L J. CONST. L. 909, 914–15, 951–52 (2017). See generally Helen Kopnina, *Environmental Justice and Biospheric Egalitarianism: Reflecting on a Normative-Philosophical View of Human-Nature Relationship*, 1 EARTH PERSPS. 1 (2014).

of these countries specifically conferred constitutional environmental rights.⁹ Some countries' constitutional environmental rights are considered more protective than others.¹⁰ For example, according to one scholar, France and Brazil have expansive environmental rights embedded in their constitutions; that is, these rights are procedural, substantive, and establish both individual and governmental duties of environmental protection.¹¹ In recent cases, litigants in these countries invoked their constitutional environmental rights, directly or indirectly pursuing environmental justice for underserved communities.¹² The growing body of foreign case law upholding the use of constitutional environmental rights against environmental harms, as well as other commentary, suggest that constitutional environmental rights have the potential to advance environmental justice.¹³

Yet, in contrast to many other countries, the United States currently has no federal constitutional environmental rights, only state ones.¹⁴ As of 2011, scholars found that over sixty percent of U.S. state constitutions conferred some form of constitutional environmental rights or duties.¹⁵ In at least one state lacking explicit constitutional environmental rights—Michigan—advocates are seeking implicit constitutional environmental rights in court.¹⁶ Recently, in *Mays v.*

9. U.N. ENV'T PROGRAMME, ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT 156, 156 n.95 (2019) [hereinafter UNEP ENVIRONMENTAL RULE OF LAW REPORT]. At the international level, the United Nations is reportedly considering a Global Pact for the Environment, which would include environmental rights. See *Global Pact for the Environment*, INT'L UNION FOR CONSERVATION OF NATURE, <https://perma.cc/MKG2-5YEQ> (last visited May 17, 2021). Notably, in October 2021, the Human Rights Council of the United Nations recognized environmental rights in a non-binding resolution. See United Nations, *The Human Right to a Clean and Healthy Environment: 6 Things You Need to Know*, U.N. NEWS (Oct. 15, 2021), <https://perma.cc/T9ML-JD7Z>.

10. See BOYD, THE STATUS, *supra* note 8, at 17, app.A at 25–26.

11. See *id.* at 10, 17, app.A at 25–26.

12. See, e.g., cases cited *infra* notes 78, 87, 94, 104 and accompanying text.

13. See, e.g., cases cited *infra* notes 78, 87, 94, 104 and accompanying text; Corinne Bell, *Every State Should Have a Right to a Healthy Environment*, NAT. RES. DEF. COUNCIL (Mar. 29, 2021), <https://perma.cc/4KUS-77M2> (citing Angela Guyadeen, *New York's Constitutional Right to Water: A First Step*, NAT. RES. DEF. COUNCIL: EXPERT BLOG (Mar. 18, 2021), <https://perma.cc/Q52E-MTFJ>) (arguing that “[state constitutional environmental rights] could help communities of color level the playing field and protect their drinking water”); Maya K. van Rossum & Kacy C. Manahan, *Constitutional Green Amendments: Making Environmental Justice a Reality*, 36 AM. BAR. ASS'N, NAT. RES. & ENV'T. 27–31 (2021) (arguing for state and federal constitutional environmental rights to combat environmental injustice in America and explaining how they should be crafted).

14. See, e.g., Donald K. Anton & Dinah L. Shelton, *Problems in Environmental Protection and Human Rights: A Human Right to the Environment* 3–4, ANU COLLEGE OF LAW RESEARCH PAPER SERIES (2011), <https://perma.cc/8WJG-X5L3>; Kirsten Williams, *Fundamental Environmental Rights: State Constitutions as a Vehicle of Change*, JURIST (Nov. 1, 2021, 3:19 PM) (Katherine Gemmingen, ed.), <https://perma.cc/Z9VV-AT3Y>.

15. See Anton & Shelton, *supra* note 14, at 4. In 2021, other scholars reported that over eighty percent of states “address the environment in their constitutions,” though not necessarily through rights or duties. See van Rossum & Manahan, *supra* note 13, at 28.

16. See *Mays v. Governor of Michigan*, 954 N.W.2d 139, 144 (Mich. 2020). For background on implied constitutional environmental rights, see generally David R. Boyd, *The Implicit Constitutional Right to a Healthy Environment*, 20 REV. EURO. CMTY & INT'L ENV'T L. 171 (2011), cited in BOYD, THE STATUS, *supra* note 8, at 39 n.95; Hope M. Babcock, *The Federal Government Has an Implied*

Governor of Michigan, litigants invoked an implied state constitutional right—the right to bodily integrity—and successfully argued that this right encompasses protection against water contamination inflicted by the government.¹⁷ At the federal level, plaintiffs have argued for implied constitutional environmental rights in at least two cases: *Guertin v. Michigan*¹⁸ and *Juliana v. United States*.¹⁹ With most U.S. state constitutions found to provide environmental protections,²⁰ and given the increasing consideration of these rights in state and federal courts,²¹ the United States is poised to join other countries in recognizing constitutional environmental rights.²²

This Note will analyze relatively recent case law to evaluate the effectiveness of constitutional environmental rights in advancing environmental justice in Brazil and France, thereby inferring whether an American version of these rights would benefit the environmental justice movement in the United States. This Note's analysis is premised on two supportive points from the literature, the first of which is the value of comparative legal arguments.²³ Although at least one U.S. Supreme Court justice, Justice Scalia, criticizes the use of non-old-English foreign law,²⁴ another, Justice Breyer, contends that the approaches of foreign jurisdictions to similar legal questions can inform and enrich American jurisprudence.²⁵ Thus, under Breyer's theory, Brazilian and French law are relevant to

Moral Constitutional Duty to Protect Individuals from Harm Due to Climate Change: Throwing Spaghetti Against the Wall to See What Sticks, 45 *ECOLOGY L.Q.* 735 (2018).

17. See *Mays*, 954 N.W.2d at 159–62.

18. See 912 F.3d 907, 922, 932 (6th Cir. 2019), cited in Corbett, *Substantive Due Process, Climate Change, and Flint, Michigan*, *LEGAL PLANET* (Feb. 3, 2020), <https://perma.cc/2U4G-GSZ9>.

19. See 947 F.3d 1159, 1164 (9th Cir. 2020), cited in OUR CHILDREN'S TRUST, <https://perma.cc/52CC-64JE> (last visited Dec. 23, 2021), and discussed in JOANA SETZER & REBECCA BYRNES, GRANTHAM RESEARCH INST. ON CLIMATE CHANGE AND THE ENV'T, *GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2020 SNAPSHOT 18* (2020), <https://perma.cc/XQ96-AU5J>.

20. See Anton & Shelton, *supra* note 14, at 4.

21. See cases cited *supra* notes 16–19 and accompanying text.

22. See Badrinarayana, *supra* note 5, at 76–77, 96; Babcock, *supra* note 16, at 762–66, 786; van Rossum & Manahan, *supra* note 13. Cf. Bell, *supra* note 13. But see Comer, *supra* note 8, at 121, 121 n.144–48, 122, 122 n.149–53 (citing Bruce Ledewitz, *Establishing A Federal Constitutional Right to a Healthy Environment in Us and in Our Posterity*, 68 *MISS. L.J.* 565, 590–92, 637 (1998); and then citing Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 *B.C. ENV'T AFF. L. REV.* 631, 640–42 (2000)).

23. See Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 *INT'L J. CONST. L.* 519, 522–24 (2005), <https://perma.cc/KR5X-AEV8> (quoting Justice Breyer).

24. See *id.* at 524–25 (quoting Justice Scalia).

25. See *id.* at 522–24 (quoting Justice Breyer). Cf., e.g., Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 *AM. J. OF COMP. LAW* 125, 129 (2005), <https://perma.cc/FE3W-VC8R> (“By studying various manifestations of and solutions to roughly analogous constitutional challenges, our understanding of key concepts in constitutional law . . . becomes more sophisticated and analytically sharper.”). In Justice Breyer's words:

[Foreign] cases sometimes involve a human being working as a judge concerned with a legal problem, often similar to problems that arise here, which problem involves the application of a legal

shaping constitutional environmental rights in the United States.²⁶ This Note is also premised on general findings in the literature of a positive association between constitutional environmental rights and better environmental laws,²⁷ suggesting these rights hold power to influence the environmental justice movement.²⁸ Brazil and France were selected as the countries for the comparative analysis because they exhibit this positive association,²⁹ and they have relatively recent case law involving constitutional environmental rights and environmental justice.³⁰

Brazil and France are also appropriate countries for analyzing the utility of constitutional environmental rights as compared to the United States because these countries share sufficient legal similarities; namely, they have democratic systems;³¹ their courts use some form of judicial review;³² and they are parties to the Paris Agreement at the time of this writing, obligating these three countries to mitigate climate change under international law.³³ The United States and Brazil are also home to indigenous or traditional populations who are impacted by environmental injustice.³⁴ These similarities serve as controls, under a research design

text, often similar to the text of our own Constitution, seeking to protect certain basic human rights, often similar to the rights that our own Constitution seeks to protect.

Id. at 523 (quoting Justice Breyer).

26. *See id.* at 522–24 (quoting Justice Breyer).

27. *See* UNEP ENVIRONMENTAL RULE OF LAW REPORT, *supra* note 9, at 157, 157 n.103 (citing David Boyd, *The Effectiveness of Constitutional Rights*, YALE UNITAR WORKSHOP 6 (2013)). *But see* Badrinarayana, *supra* note 5, at 76 (“A constitutional right to environmental protection can protect individuals from environmental harm, but does not necessarily correlate to better or stronger environmental protection.”). The effectiveness of environmental rights in improving environmental justice specifically has been disputed. *See, e.g.*, Comer, *supra* note 8, at 96, 125–26 (assessing constitutional environmental rights in various jurisdictions around the world; offering a qualified, skeptical appraisal of the enforceability of these rights in certain jurisdictions; and asserting the conditions generally necessary to potentiate these rights); Badrinarayana, *supra* note 5, at 114–18.

28. *See* Bell, *supra* note 13 (citing Guyadeen, *supra* note 13).

29. *See* UNEP ENVIRONMENTAL RULE OF LAW REPORT, *supra* note 9, at 157, 157 n.103 (citing Boyd, *supra* note 27) (noting that certain countries, including Brazil and France, made environmental laws after they added a constitutional environmental right).

30. *See, e.g.*, cases cited *infra* notes 78, 87, 94, 104 and accompanying text.

31. *See The Global State of Democracy Indices*, INT’L IDEA, <https://perma.cc/D6BH-UWHB> (last visited Dec. 29, 2021).

32. *About the Supreme Court*, UNITED STATES COURTS, <https://perma.cc/L9QD-NRKS> (last visited Dec. 29, 2021); Neil Montgomery, *Legal Systems in Brazil: Overview*, THOMSON REUTERS PRACTICAL LAW (Mar. 1, 2021), <https://perma.cc/H29K-K66R>; *General Overview*, CONSEIL CONSTITUTIONNEL, <https://perma.cc/78SD-PZBQ> (last visited Dec. 29, 2021).

33. *See* Paris Agreement 7.d., *adopted* Dec. 12, 2015, 3156 U.N.T.S. 27 (Apr. 6, 2022, 9:15 AM), <https://perma.cc/2SBY-8BKY> (listing parties to the Paris Agreement); Paris Agreement to the United Nations Framework Convention on Climate Change art. 4, Dec. 12, 2015, T.I.A.S. No. 16-1104. These countries also share an important economic similarity: they rank among the top fifteen countries with the highest gross domestic product as of 2020. *See* WORLD BANK, GROSS DOMESTIC PRODUCT 2020 (2021), <https://perma.cc/RSN8-5U6M>.

34. *See, e.g.*, *The Standing Rock Sioux Tribe’s Litigation on the Dakota Access Pipeline*, EARTHJUSTICE, <https://perma.cc/5LJM-VD9Q> (last visited May 16, 2021); Sandra de Souza Hacon et al., *Mercury Exposure through Fish Consumption in Traditional Communities in the Brazilian Northern*

Ran Hirschl has helped to explain, that assist in determining whether insights about the rights-justice relationship in Brazil and France are applicable to the development of environmental rights in the United States.³⁵ Of course, no three countries are entirely comparable; accordingly, this Note will address the distinction between the American negative rights tradition versus the Brazilian and French positive law traditions.³⁶ Nonetheless, several key similarities between these countries suggest Brazilian and French law have some applicability to the United States and can thus be used to help guide and validate American efforts to recognize constitutional environmental rights as tools of environmental justice.³⁷

What this Note does not seek to accomplish should also be specified. Instead of proposing the most effective approach to implementing environmental rights in different countries, as some scholars have attempted to do,³⁸ this Note focuses on how the approaches in France and Brazil could inform the development of constitutional environmental rights and influence the environmental justice movement in the United States—a narrow question.³⁹ Additionally, this Note does not assert whether constitutional environmental rights *could* emerge in the United States,

Amazon, 17 INT. J. ENV'T. RES. PUB. HEALTH 1, 12 (July 22, 2020); see also Kevin S. Parikh, *Eco-Rights: Creating a Right to a Clean Environment*, 1 ECO-NOTES 9, 11 (1995) (comparing environmental concerns in Brazil and the United States). Notwithstanding the importance of future research into the particular experience of indigenous people living outside of mainland France, this Note considers only those indigenous populations living on the mainland within Brazil for comparison with those in the United States. See, e.g., Alexandre Sommer-Schaechtele & Vincent Ploton, *French Guiana: France Grilled by UN on Controversial Mining Project*, INT'L SERV. FOR HUMAN RIGHTS (Jan. 11, 2019), <https://perma.cc/92MW-LSA7>. *The Standing Rock Sioux Tribe's Litigation on the Dakota Access Pipeline*, *supra*; sources cited *infra* note 82 and accompanying text.

35. For an explanation of this type of research design, see Hirschl, *supra* note 25, at 133–34 (“By controlling for variables [...] that are not central to the study, the most similar cases principle helps ‘isolate’ the great significance of the variance on the key independent variable in determining the variance on the dependent variable, thereby allowing for partial substitute for statistical or experimental control.”).

36. See discussion *infra* Section III.C.2; BOYD, THE STATUS, *supra* note 8, at app.A at 25–26 (displaying differences between countries’ constitutions); Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28, 36 (2018) (noting inherent differences between countries’ constitutions). Another difference, which is not discussed here but may be the subject of other scholarship, is that the United States is a common law country, whereas Brazil and France are civil law countries. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION, AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 1 (4th ed. 2019).

37. See sources cited *supra* notes 23–36, 31–35 and accompanying text.

38. See, e.g., Comer, *supra* note 8, at 125–26; Badrinarayana, *supra* note 5, at 118–29.

39. For some examples of this type of comparative approach, see generally Laura Schimmöller, *Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador*, 9 TRANSNAT'L ENV'T L. 569 (2020); Puneet K. Sandhu, *A Legal Right to Health Care: What Can the United States Learn from Foreign Models of Health Rights Jurisprudence*, 95 CALIF. L. REV. 1151 (2007); Steven F. Huefner, *What Can the United States Learn from Abroad about Resolving Disputed Elections*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 523 (2010).

for scholars have already proposed viable options;⁴⁰ rather, it argues *why* these rights should be recognized in some form based on whether they advance environmental justice in two similar countries, Brazil and France.⁴¹

Part I describes some of the contemporary environmental justice issues in Brazil, France, and the United States to illustrate the extent and severity of this social ill. Part II compares the text of the Brazilian and French constitutional environmental rights, as well as several recent environmental justice cases in the countries. Part III discusses the contested status of the development of constitutional environmental rights in the United States and explains how the foreign cases illustrate the benefits of environmental rights, as well as offer responses to the challenges expected in the American context. Part IV outlines a path toward developing constitutional environmental rights in the United States based on the Brazilian and French examples. The Conclusion asserts that the comparative analysis justifies introducing environmental rights to American constitutional jurisprudence to advance environmental justice in the United States.

I. ENVIRONMENTAL JUSTICE BY COUNTRY: OVERVIEW OF CONTEMPORARY CONCERNS

This Part provides an overview of modern environmental justice challenges in Brazil, France, and the United States. Global climate change disproportionately impacts underserved people in each country.⁴² Accordingly, this Part demonstrates the need to empower affected communities in the face of both global climate change and more country-specific environmental justice concerns.

A. BRAZIL

Many of the environmental justice concerns that have been noted in Brazil arise from mining, the energy industry, development projects, and industrial agriculture.⁴³ Recent data show that there is increasing deforestation of the Amazon in Brazil⁴⁴

40. For examples of plausible proposals that scholars have been discussing, see Babcock, *supra* note 16, at 771–84, and Konar-Steenberg, *supra* note 5, at 524–34.

41. For related analyses and materials, see sources cited *supra* note 13 and accompanying text. Babcock argues that an American environmental right could support environmental justice. See Babcock, *supra* note 16, at 748, 748 n.78, 762–66 (quoting Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENV'T L.J. 107, 152 (1997)). Comer and Badrinayara ultimately support adopting certain forms of environmental rights in America to advance environmental justice, but Comer seems less optimistic. See Comer, *supra* note 8, at 125–26; Badrinarayana, *supra* note 5, at 128–29.

42. See, e.g., *Climate Justice*, U.N. ENVIRONMENTAL PROGRAMME: SUSTAINABLE DEVELOPMENT GOALS (May 31, 2019), <https://perma.cc/F6W5-X298> (“The impacts of climate change will not be borne equally or fairly, between rich and poor, women and men, and older and younger generations.”).

43. See Diogo Ferreira da Rocha et al., *The Map of Conflicts Related to Environmental Injustice and Health in Brazil*, 13 SUSTAINABILITY SCI. 709, 709, 711–13 (2017).

44. See, e.g., Celso H. L. Silva Junior et al., *The Brazilian Amazon Deforestation Rate in 2020 is the Greatest of the Decade*, 5 NATURE, ECOLOGY & EVOLUTION – CORRESPONDENCE 144, 144, 145 n.1 (2021) (citing *Portal TerraBrasilis*, INSTITUTO NACIONAL DE PESQUISAS ESPACIAIS (INPE), <https://perma.cc/8MCG-58PE> (last visited Jan. 9, 2022)).

despite resistance to this exploitation.⁴⁵ Brazilian forests also suffer from wildfires, such as the wildfires that swept through the Pantanal wetland in 2020, which scientists report killed an estimated seventeen million vertebrates.⁴⁶ Traditional communities in the Amazon rainforest are susceptible to environmental harms, too; for example, scholars found that illegal mining in Brazil contaminated traditional communities' waterways with toxic levels of mercury.⁴⁷ Hence, these harms in Brazil burden the environment, animals, and underserved communities.⁴⁸

B. FRANCE

Threats to environmental justice are also apparent in France.⁴⁹ According to scholars, air pollution, chemical and noise pollution, resource access, and natural disaster exposure vary with socioeconomic status in the country.⁵⁰ One study assessing the link between hazardous sites and socioeconomic characteristics of people living near them in 36,600 French towns found that “towns with higher proportions of immigrants are more likely to have a variety of hazardous sites and to host greater numbers of sites, even after controlling for income, town size, level of industrialization and region.”⁵¹ Noise pollution is also considered an environmental concern in the country, with underserved communities more likely to be exposed to airport noise pollution.⁵² In terms of resources, researchers estimate that three to eight million people suffer from energy poverty in France, and as such lack adequate access to necessary energy resources for their use at

45. See, e.g., *id.* at 144, 145 n.10 (citing ASSOCIAÇÃO NACIONAL DOS SERVIDORES DE MEIO AMBIENTE (ASCEMA), *CRONOLOGIA DE UM DESASTRE ANUNCIADO: AÇÕES DO GOVERNO BOLSONARO PARA DESMONTAR AS POLÍTICAS DE MEIO AMBIENTE NO BRASIL 3* (2021), <https://perma.cc/67HF-E93J>); da Rocha et al., *supra* note 43, at 714.

46. Walfrido Moraes Tomas et al., *Distance Sampling Surveys Reveal 17 Million Vertebrates Directly Killed by the 2020's Wildfires in the Pantanal, Brazil*, 11 *SCI. REP.* 1, 1 (2021), <https://perma.cc/6QX5-KVQL>, cited in Deepa Shivaram, *Nearly 17 Million Animals Died in Wildfires in Brazil's Wetlands Last Year*, *NAT'L PUB. RADIO* (Dec. 17, 2021, 5:06 PM ET), <https://perma.cc/22HU-AGZR>.

47. See Sandra de Souza Hacon et al., *supra* note 34.

48. See sources cited *supra* notes 43–47 and accompanying text.

49. See Petrić, *supra* note 5, at 223, 223 n.29, 224, 224 n.31 (citing Lucie Laurian, *Environmental Injustice in France*, 51 *J. ENV'T PLANNING AND MGMT.* 55, 59 (2008); and then citing Jean-Francois Viel et al., *Environmental Justice in a French Industrial Region: Are Polluting Industrial Facilities Equally Distributed?*, 17 *HEALTH & PLACE* 257 (2011)).

50. See Éloi Laurent, *Environmental Inequality in France: A Theoretical, Empirical and Policy Perspective*, *ANAYSE & KRITIK* 251, 254–58 (2014), <https://perma.cc/SJ52-2Q8C>, cited in Richard Funderburg & Lucie Laurian, *Bolstering Environmental (In)justice Claims with a Quasi-Experimental Research Design*, 49 *LAND USE POL'Y* 511, 511, 524 (2015).

51. Laurian, *supra* note 49, at 55, 73, cited in Petrić, *supra* note 5, at 224 n.31, and Laurent, *supra* note 50, at 256.

52. Laurent, *supra* note 50, at 256 (citing Anne Pelletier et al., *SURVOL Part 3: Environmental Pollution (Air, Noise) Exposure and Social Deprivation Around the Major Ile-de-France Airports* 1, 1, 10 (2013), <https://perma.cc/JV87-FZSS>), cited in Funderburg & Laurian, *supra* note 50, at 511, 524.

home.⁵³ Thus, studies show that underserved communities in France endure numerous environmental inequities.⁵⁴

C. UNITED STATES

Underserved Americans face a wide range of environmental vulnerabilities aggravated by the activities of different industries.⁵⁵ Like in France,⁵⁶ energy poverty is a serious concern in the United States, where “[n]early 37 million American homes suffer from energy poverty This makes them susceptible to detrimental health effects during periods of intense heat or cold.”⁵⁷ In terms of pollution concerns, indigenous communities are actively opposing pipelines crossing their lands.⁵⁸ Additionally, researchers found that communities of color have a higher risk of being exposed to pollution than white communities; for example, people of color were found to constitute fifty-six percent of the population in areas where Toxic Release Inventory facilities are found as compared to thirty percent in areas without these sources of pollution.⁵⁹ The EPA addresses how lead and other forms of pollution in drinking water, poor air quality, and hazardous waste disproportionately impact underserved communities;⁶⁰ however, more powerful tools of leverage are likely needed to effectively rectify the multifarious environmental injustices in the United States.⁶¹

53. Stéphane Hallegatte & Éloi Laurent, *Quelles Politiques Sociales-écologiques Pour les Villes Françaises?* in *VERS L'ÉGALITÉ DES TERRITOIRES* 502, 518–19 (2013), <https://perma.cc/YQ3J-FP3E> (citing ALAIN DE QUERO, BERTRAND LAPOSTOLET & PHILIPPE PELLETIER, GROUPE DE TRAVAIL PRÉCARITÉ ÉNERGÉTIQUE: RAPPORT 16, 39 (2009), <https://perma.cc/UQR4-TYML>), cited in Laurent, *supra* note 50, at 257.

54. See sources cited *supra* notes 49–53 and accompanying text.

55. See generally CENTER FOR SUSTAINABLE SYSTEMS, UNIVERSITY OF MICHIGAN, ENVIRONMENTAL JUSTICE FACTSHEET (2021), <https://perma.cc/YQ4B-5BVD> [hereinafter EJ FACTSHEET].

56. See Hallegatte & Laurent, *supra* note 53 (citing ALAIN DE QUERO, BERTRAND LAPOSTOLET & PHILIPPE PELLETIER, GROUPE DE TRAVAIL PRÉCARITÉ ÉNERGÉTIQUE: RAPPORT 16, 39 (2009), http://www.hclpd.gouv.fr/IMG/pdf/Rapport_Pelletier_prekarite_energetique_cle0ddb6a.pdf), cited in Laurent, *supra* note 50, at 257.

57. EJ FACTSHEET, *supra* note 55, at 1, 2 n.22–23 (citing Dominic J. Bednar & Tony G. Reames, *Recognition of and Response to Energy Poverty in the United States*, 5 NATURE ENERGY 432–39 (2020)).

58. See, e.g., *The Standing Rock Sioux Tribe's Litigation on the Dakota Access Pipeline*, *supra* note 34.

59. EJ FACTSHEET, *supra* note 55, at 2 n.7 (citing Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENV'T L. 371, 396 (2008)).

60. See EJ 2020: *National EJ Challenges*, U.S. ENV'T PROT. AGENCY (Nov. 18, 2020), <https://perma.cc/4764-BERTZ>.

61. See, e.g., UNEP ENVIRONMENTAL RULE OF LAW REPORT, *supra* note 9, at 156 (discussing the relative power of constitutional environmental rights as compared to other forms of law in general, but not specifically in the United States).

II. CONSTITUTIONAL ENVIRONMENTAL RIGHTS IN FRANCE AND BRAZIL COMPARED

This Part compares the text of the constitutional environmental rights in Brazil and France,⁶² as well as case law in which these rights were employed to directly or indirectly address environmental injustices.⁶³ This analysis informs the subsequent discussion in Part III of how constitutional environmental rights would manifest in the United States based on the Brazilian and French approaches to crafting and utilizing these rights.⁶⁴

A. TEXT OF THE PROVISIONS

Both Brazil's and France's constitutional environmental rights are substantive, procedural, and establish individual and governmental duties of environmental protection.⁶⁵ Brazil's provision appears in article 225 and provides the following substantive rights and duties: "Everyone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life, and both the Government and the community have a duty to defend and to preserve [the environment] for present and future generations."⁶⁶ The text also extends environmental rights to plants and animals by obligating the government to protect flora and fauna.⁶⁷ The French provision was reportedly incorporated into the constitution's preamble through the Charter for the Environment,⁶⁸ which provides similar substantive rights and duties: "Everyone has the right to live in a balanced environment that respects health"⁶⁹ and "has a duty to take part in the preservation and improvement of the environment."⁷⁰

62. See *infra* Section II.A.

63. See *infra* Section II.B.

64. See *infra* Part III.

65. See BOYD, THE STATUS, *supra* note 8, at 10–17, app.A at 25–26 (providing overview of procedural and substantive rights and individual and governmental duties, noting how they apply in France and Brazil).

66. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020), *cited in* Mariana Almeida Passos de Freitas, *Access to Environmental Justice in Brazil*, 8 INT'L J. CT. ADMIN. 1, 3, 3 n.9 (2017).

67. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 § 1, VII (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020), *cited in* Passos de Freitas, *supra* note 66.

68. See *Les Réformes Constitutionnelles depuis 1958*, L'ASSEMBLÉE NATIONALE, <https://perma.cc/XS7E-LZU9> (last visited May 18, 2021) (select "English" in the Google pop-up, if desired, and click on "Charte de l'environnement - 2005" in the left-side panel); David Marrani & Stephen Turner, *The French Charter of the Environment and Standards of Environmental Protection*, in ENV'T RIGHTS 309–10, 310 n.3 (2019); 1958 CONST. preamble (Fr.), *cited in* Marrani & Turner, *supra*, and discussed in *Les Réformes Constitutionnelles depuis 1958*, *supra*.

69. Loi 2005-205 du 1er mars 2005 relative à la Charte de L'environnement [Law 2005-205 of March 1, 2005 concerning the Charter for the Environment], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], 3697, art. 1 (Mar. 2, 2005), [hereinafter French Charter for the Environment], *cited in* *Les Réformes Constitutionnelles depuis 1958*, *supra* note 68, and Marrani & Turner, *supra* note 68, at 309 n.1.

70. French Charter for the Environment, *supra* note 69, at art. 2, *cited in* *Les Réformes Constitutionnelles depuis 1958*, *supra* note 68, and Marrani & Turner, *supra* note 68, at 309 n.1.

Procedurally, the French and Brazilian constitutions confer the rights to access information and to prior risk assessments. The French constitution specifically includes the right to access information as part of the environmental provisions in the Charter,⁷¹ whereas Brazil's constitution includes a general right of access to information in article 5.⁷² The more specific French provision reads that "[e]veryone has the right, under the conditions and within the limits defined by law, to access information relating to the environment held by public authorities and to participate in the development of public decisions having an impact on the environment."⁷³ The Brazilian and French constitutions also mandate that the government perform a risk assessment, like a prior environmental impact study, for activities that may damage the environment.⁷⁴ Covering procedures, substance, and duties,⁷⁵ the Brazilian and French constitutional environmental rights are considered expansive.⁷⁶

B. CASE LAW

This section compares recent case law in Brazil and France on a variety of issues relating to environmental justice and evaluates whether such case law is responsive to environmental justice concerns.

In the proceedings of Brazil's first case on climate change to make it to the country's Supreme Court,⁷⁷ scholars report that this tribunal was receptive to using constitutional environmental rights to improve access to justice and judicial deference to environmental concerns.⁷⁸ The plaintiffs comprised several political

71. *Id.* at art. 7, cited in *Les Réformes Constitutionnelles depuis 1958*, *supra* note 68, and Marrani & Turner, *supra* note 68, at 309 n.1.

72. See David N. Cassuto & Romulo S.R. Sampaio, *The Importance of Information and Participation Principles in Environmental Law in Brazil*, 22 REV. EUR. CMTY. & INT'L ENV'T L. 68, 74, 74 n.38 (2013) (citing CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020)).

73. See French Charter for the Environment, *supra* note 69, at art. 7, cited in *Les Réformes Constitutionnelles depuis 1958*, *supra* note 68, and Marrani & Turner, *supra* note 68, at 309 n.1.

74. See, e.g., *id.* at art. 5; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 § 1, IV (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020), cited in Passos de Freitas, *supra* note 66; Cassuto & Sampaio, *supra* note 72, at 74, 74 n.39 (citing CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020)).

75. See BOYD, THE STATUS, *supra* note 8, at app.A at 25–26.

76. See *id.* at 17.

77. See Joana Setzer, *First Climate Case Reaches Brazil's Supreme Court*, THE LONDON SCH. OF ECON. AND POL. SCI. & GRANTHAM RESEARCH INST. ON CLIMATE CHANGE AND THE ENV'T: COMMENTARY (Sept. 30, 2020), <https://perma.cc/3VKF-ASVW>, cited in Maria Antonia Tigre, *Brazil's First Climate Case to Reach the Supreme Court*, OPINIO JURIS (Oct. 13, 2020), <https://perma.cc/5PNY-G5ZB>.

78. See Setzer, *supra* note 77 (citing a YouTube channel containing various videos of the hearings, each initially entitled "Audiências Públicas do STF – Fundo do Clima," parts one through four: STF, YOUTUBE, <https://perma.cc/4EX6-MJSW> (last visited Dec. 22, 2021)); Tigre, *supra* note 77. For the petition, see S.T.F., No. 0024408-68.2020.1.00.0000, Relator: Min. Roberto Barroso, 05.06.2020 (Braz.), <https://perma.cc/6LUU-848A> [hereinafter *Brazil Climate Case*], cited in U.N. ENV'T PROGRAMME &

parties that contended the government failed to administer the Climate Fund, thus violating, *inter alia*, the government's constitutional duty to ensure a healthy environment.⁷⁹ The Brazilian Supreme Court held public hearings—the first to ever focus on climate change, scholars report—in September 2020.⁸⁰ Two salient features of the *Brazil Climate Case* that scholars highlight are its unprecedented expansion of public participation in defense of constitutional environmental rights and its deflection of separation of powers concerns.⁸¹ At the public hearing, scholars note, an unusually diverse array of speakers appeared, including “scientists, environmentalists, indigenous people, businesspeople from the agribusiness and financial sectors, NGO representatives, economists, researchers, parliamentarians, and representatives of the federal and state governments.”⁸² Scholars also highlight that Minister Barroso based his decision to hold such an expansive hearing in part on the constitutional duty to protect the environment.⁸³ Minister Barroso reportedly relied on the government's constitutional—not merely political—duty in dismissing concerns that the court was overstepping its powers in expanding public participation.⁸⁴ If the environment were not protected under the supreme source of domestic law, Minister Barroso might not have felt compelled to broaden public participation and take judicial action to uphold environmental protections.⁸⁵ Thus, scholars' analyses of the *Brazil Climate Case* demonstrate how environmental rights can motivate judiciaries to improve access to the legal system and support underserved communities.⁸⁶

In another case, the Brazilian Supreme Court displayed its willingness to uphold constitutional environmental rights—not just for humans, but also for animals, as scholar Jessica Eisen illuminates.⁸⁷ Perhaps no plaintiff is more

SABIN CTR. FOR CLIMATE CHANGE LAW, GLOBAL CLIMATE LITIG. REPORT: 2020 STATUS REVIEW 15, 15 n.24, and discussed in Setzer, *supra* note 77, and Tigre, *supra* note 77. For a summary of the Brazilian Supreme Court's decision on the case, see *STF decides that the Paris Agreement is a treaty of human rights in Brazil*, INSTITUTE FOR CLIMATE AND SOCIETY (Oct. 29, 2022), <https://perma.cc/V4RT-3SAT/>. For the full text of the opinion, issued on July 1, 2022, see *PSB et al. v. Brazil (on Climate Fund)*, CLIMATE CASE CHART, SABIN CENTER FOR CLIMATE CHANGE LAW, <https://perma.cc/W7K7-C7PK>.

79. *Brazil Climate Case*, *supra* note 78, at 1–2 (citing CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225, § 1, I, III, V, VII (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020)); Tigre, *supra* note 77; Setzer, *supra* note 77.

80. Tigre, *supra* note 77; Setzer, *supra* note 77 (citing *STF*, *supra* note 78).

81. Tigre, *supra* note 77; Setzer, *supra* note 77 (citing *STF*, *supra* note 78).

82. Tigre, *supra* note 77; Setzer, *supra* note 77 (citing *STF*, *supra* note 78).

83. See Tigre, *supra* note 677; Setzer, *supra* note 77 (citing *STF*, *supra* note 78).

84. Tigre, *supra* note 77; Setzer, *supra* note 77 (citing *STF*, *supra* note 78).

85. See Tigre, *supra* note 77; Setzer, *supra* note 77 (citing *STF*, *supra* note 78).

86. See Tigre, *supra* note 77; Setzer, *supra* note 77 (citing *STF*, *supra* note 78).

87. See S.T.F., No. 0002212-33.1998.01.0000, Relator: Min. Celso de Mello, 26.05.2011, 1, AÇÃO DIRETA DE INCONSTITUCIONALIDADE [A.D.I.], 14.10.2011, 275, <https://perma.cc/M99W-QXD6> [hereinafter *Brazil Rooster Case*] (citing CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225, § 1, VII (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020)), cited in Eisen, *supra* note 8, at 915, 915 n.23, 918; Eisen, *supra* note 8, at 915, 915 n.23, 918.

underserved and voiceless than an animal.⁸⁸ But Eisen notes that Brazil's highest court gave animals a voice in the *Brazil Rooster Case* to protect both animal and human environmental rights.⁸⁹ The Attorney General of the Republic brought the case in response to legislation that permitted rooster fighting,⁹⁰ enacted by the state of Rio de Janeiro.⁹¹ The court struck down the law, Eisen notes, finding rooster fighting violative of animal and human rights to ecological safety.⁹² As Eisen summarizes, the court emphasized the interdependent link between humans and animals, explaining that a healthy environment for humans is often only possible if fauna within that environment is sufficiently protected.⁹³ The *Brazil Rooster Case*, as described by Eisen, illustrates how animals and the humans dependent upon them for a healthy existence can share the benefits of environmental rights.⁹⁴

Although the French right does not extend to fauna or flora, France recently saw a case in which constitutional environmental rights were used to contest governmental inaction on climate change that could harm underserved communities,⁹⁵ much like

88. See Eisen, *supra* note 8, at 945, 945 n.223, 946, 952 (citing VOICELESS (2021), <https://voiceless.org.au/>). For an explanation of how environmental justice includes justice for humans and animals alike, see Lee Miller, *Environmental Justice is Climate Justice is Justice for Animals*, THE LAW AND POLITICAL ECON. PROJECT (Dec. 2, 2020), <https://perma.cc/WV4U-2BVM>. Other organisms and non-living matter are perhaps more voiceless than animals. For descriptions of the rights of nature, see generally Schimmöller, *supra* note 39; Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 ECOLOGY L.Q. 1 (2016).

89. See *Brazil Rooster Case*, *supra* note 87, at 295 (citing CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225, § 1, VII (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020)); Eisen, *supra* note 8, at 915, 915 n.23. For other examples of the Brazilian judiciary's approach to animal rights, see Eisen, *supra* note 8, at 915, 918, 938.

90. See *Brazil Rooster Case*, *supra* note 87, at 277; Eisen, *supra* note 8, at 915, 915 n.23; Carolina Carnerio Lima & Beatriz Souza Costa, *A Rinha de Galos, o Direito dos Animais e o Meio Ambiente na ótica do STF – Uma Análise da ADI 1856/RJ [Rooster Fighting, Animal Rights and the Environment for The Brazilian Federal Supreme Court – A Review of the Adi 1856/Rj]*, 10 REVISTA DO DIREITO PÚBLICO 91, 91–92, ResearchGate, 10.5433/1980-511X.2015v10n3p91.

91. See *Brazil Rooster Case*, *supra* note 87, at 277; Lima & Costa, *supra* note 90, at 91.

92. *Brazil Rooster Case*, *supra* note 87, at 295 (citing CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225, § 1, VII (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020)); see also Eisen, *supra* note 8, at 915, 915 n.23.

93. *Brazil Rooster Case*, *supra* note 87, at 295 (citing CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225, § 1, VII (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020)); see Eisen, *supra* note 8, at 915, 915 n.23.

94. *Brazil Rooster Case*, *supra* note 87, at 295 (citing CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225, § 1, VII (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020)); see Eisen, *supra* note 8, at 915, 915 n.23.

95. See Tribunal Administratif de Paris, Feb. 3, 2021, 1904967, 1904968, 1904972, 1904976/4-1, <https://perma.cc/UAQ8-VD9C> (Claudine Guiraud, Noémie Garrigoux & Bénédicte Kahlat, trans.) [hereinafter *Notre Affaire à Tous v. France*], cited in L. Lavrysen, *The French Climate Cases: Legal Basis and Broader Meaning*, INT'L UNION FOR THE CONSERVATION OF NATURE (Feb. 12, 2021), <https://perma.cc/GAJ8-MHG5>, and discussed in Edith Brown Weiss & Vicki Arroyo, *Addressing Climate Change from the Bottom-Up in a Kaleidoscopic World*, LA REVUE DES JURISTES DE SCIENCES PO N° 18, 22 (2020).

in the *Brazil Climate Case*.⁹⁶ In *Notre Affaire à Tous v. France*, four non-profits sued the French government for failing to act sufficiently on climate change.⁹⁷ As Lavrysen notes, France has national legislation implementing its international obligations to reduce greenhouse gas emissions under the Paris Agreement.⁹⁸ Lavrysen explains that, in asserting that France must improve its climate change legislation, the plaintiffs invoked their constitutional right to a healthy environment and the government's duties to protect this right.⁹⁹ In 2021, the Administrative Court of Paris ruled in favor of the plaintiffs, awarding them each one euro for the "moral prejudice" they experienced.¹⁰⁰ In its reasoning, the court quoted the Charter for the Environment provision on the individual duty to protect the environment.¹⁰¹ In the final decision, issued later in 2021, the Administrative Court of Paris ordered the government to pursue its climate targets and awarded each of the four non-profit plaintiffs two thousand euros pursuant to the code of administrative justice.¹⁰² Although the plaintiffs did not receive substantial financial compensation in either ruling, they helped to compel the government to act on climate change.¹⁰³ Thus, *Notre Affaire à Tous v. France* illustrates that environmental rights can be powerful enough to influence climate change policy at the federal level.¹⁰⁴

In another case, the *French Export Ban Case*, the French Constitutional Court strengthened constitutional environmental rights in a way that could favor more environmental justice litigation.¹⁰⁵ As commenters explain, the Plant Protection

96. See *Brazil Climate Case*, *supra* note 78, at 1–2; Setzer, *supra* note 77; Tigre, *supra* note 77.

97. *Notre Affaire à Tous v. France*, *supra* note 95, at 1; Lavrysen, *supra* note 95; Weiss & Arroyo, *supra* note 95. A French municipality, Grande-Synthe, brought a similar case against the government to compel it to address climate change. See Conseil d'État [CE], Nov. 19, 2020, 427301, *cited in* Lavrysen, *supra* note 95, and *discussed in* Weiss & Arroyo, *supra* note 95. For two French judges' discussion of these two cases, see generally Sabin Center for Climate Change Law, *The Grande-Synthe Decisions: A Conversation with the Judges of the French Council of State*, YOUTUBE (Nov. 2, 2021), <https://perma.cc/J8QQ-A3RT>.

98. *Notre Affaire à Tous v. France*, *supra* note 95, at 2; Lavrysen, *supra* note 95.

99. *Notre Affaire à Tous v. France*, *supra* note 95, at 2 (citing French Charter for the Environment, *supra* note 69, arts. 1, 2, 3, 5); Lavrysen, *supra* note 95.

100. *Notre Affaire à Tous v. France*, *supra* note 95, at 33; Lavrysen, *supra* note 95.

101. *Notre Affaire à Tous v. France*, *supra* note 95, at 27 (quoting French Charter for the Environment, *supra* note 69, at art. 3); Lavrysen, *supra* note 95.

102. See Tribunal Administratif de Paris, Oct. 14, 2021, 1904967, 1904968, 1904972, 1904976/4-1, at 31–32, <https://perma.cc/CCG2-ZWY6>; see also *Notre Affaire à Tous and Others v. France* ('*L'affaire du siècle*'), CLIMATE RIGHTS DATABASE (Oct. 14, 2021), <https://perma.cc/F98M-SCET>.

103. *Notre Affaire à Tous v. France*, *supra* note 95, at 27, 33 (quoting French Charter for the Environment, *supra* note 69, at art. 3); Lavrysen, *supra* note 95; sources cited *supra* note 102.

104. See sources cited *supra* notes 95–103 and accompanying text.

105. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2019-823 QPC, Jan. 31, 2020, 1, 1–2, <https://perma.cc/KV8T-EWU7> [hereinafter *French Export Ban Case*], *cited in* Paul A. Davies, Fabrice Fages & Michael D. Green, *French Constitutional Court Issues Landmark Decision on Environmental Protection vs. Freedom of Enterprise*, ENV'T, LAND & RES., LATHAM & WATKINS LLP (Feb. 18, 2020), <https://perma.cc/WW6X-4PG6>, and *discussed in* Press Release, Conseil Constitutionnel,

Industries Union brought this action in response to a governmental export ban made in the interest of health.¹⁰⁶ The company alleged the export ban was unconstitutional because it conflicted with constitutionally protected freedom of enterprise.¹⁰⁷ In January 2020, the court ruled that legislation based on the right to a healthy environment, such as this health-related export ban, could lawfully limit freedom of enterprise.¹⁰⁸ This decision, commenters note, effectively warns polluting companies that they cannot necessarily rely on business interests when constitutional environmental rights are at stake.¹⁰⁹ Such checks on industries, often powerful entities that could be difficult for underserved plaintiffs to challenge, are critical to advancing environmental justice.¹¹⁰

In summary, scholarship and commentary show that the application of environmental rights provisions in Brazil and France has helped litigants respond to environmental injustices in four key ways: strengthening public participation in climate change disputes;¹¹¹ demonstrating how animal well-being relates to environmental protections for humans;¹¹² compelling the government to pursue climate change action plans;¹¹³ and checking corporate power.¹¹⁴

Decision no. 2019-823 QPC of 31 January 2020, <https://perma.cc/3ZGN-EEZ5> (last visited Dec. 30, 2021) [hereinafter Press Release].

106. *French Export Ban Case*, *supra* note 105, at 1; Davies, Fages & Green, *supra* note 105; Press Release, *supra* note 105.

107. *French Export Ban Case*, *supra* note 105, at 1–2 (citing Déclaration des Droits de L’homme et du Citoyen de 1789, art. 4); Davies, Fages & Green, *supra* note 105; Press Release *supra* note 105.

108. *French Export Ban Case*, *supra* note 105, at 2 (citing French Charter for the Environment, *supra* note 69, preamble; and then citing 1946 CONST. preamble (Fr.)); Davies, Fages & Green, *supra* note 105; Press Release, *supra* note 105.

109. See *French Export Ban Case*, *supra* note 105, at 2 (citing French Charter for the Environment, *supra* note 69, preamble; and then citing 1946 CONST. preamble (Fr.)); Davies, Fages & Green, *supra* note 105; Press Release, *supra* note 105. The power of environmental rights to elevate environmental interests over economic ones has also been recognized in other contexts. See, e.g., UNEP ENVIRONMENTAL RULE OF LAW REPORT, *supra* note 9, at 156, 156 n.87 (citing John H. Knox (Independent Expert), Rep. of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/HRC/28/61, at 15, 15 n.6 (2012)); then citing David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver, UBC Press, 2012); JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2014); and then citing CARL BRUCH, WOLE COKER & CHRIS VAN ARSDALE, CONSTITUTIONAL ENVIRONMENTAL LAW: GIVING FORCE TO FUNDAMENTAL PRINCIPLES IN AFRICA (Environmental Law Institute, 2d ed. 2007)). Another scholar notes that rights of nature, like environmental rights, are meant to “rebalance dominant economic and governance structures.” See Schimmöller, *supra* note 39, at 591; accord Babcock, *supra* note 88, at 21 n. 118 (citing Stone, *supra* note 155, at 461).

110. See, e.g., *The Standing Rock Sioux Tribe’s Litigation on the Dakota Access Pipeline*, *supra* note 34.

111. See sources cited *supra* notes 77–86 and accompanying text.

112. See sources cited *supra* notes 87–94 and accompanying text.

113. See sources cited *supra* notes 95–103 and accompanying text.

114. See sources cited *supra* notes 105–10 and accompanying text.

III. APPLYING CONSTITUTIONAL ENVIRONMENTAL RIGHTS IN THE AMERICAN CONTEXT

Can the environmental justice movement in the United States expect to similarly benefit from constitutional environmental rights? What might be the challenges of implementing such rights, and how could the insights from Brazil and France help the United States navigate any obstacles that may arise? The following Sections describe the status of the development of American constitutional environmental rights,¹¹⁵ then use the Brazilian and French experiences to predict the benefits¹¹⁶ and challenges of realizing these rights in the United States.¹¹⁷

A. THE CONTESTED STATUS OF CONSTITUTIONAL ENVIRONMENTAL RIGHTS IN THE UNITED STATES

Although the United States has no federal constitutional environmental rights,¹¹⁸ decades of legislative and executive actions suggest the country is politically ready for such rights.¹¹⁹ Over fifty years ago, Congress expressed the belief that Americans ought to live in a healthy environment through the National Environmental Policy Act of 1970 (“NEPA”), which reads that “each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”¹²⁰ On the executive side, President Clinton promoted environmental justice in 1994 by issuing Executive Order No. 12,898, asserting that federal agencies must address environmental justice.¹²¹ In 2021, President Biden issued an executive order concerning the importance of responding to environmental justice in climate change policy.¹²² Yet, scholars note that these are but aspirational statutory provisions and revocable orders—not actionable, enduring rights.¹²³ As commenters

115. See *infra* Part III.A.

116. See *infra* Part III.B.

117. See *infra* Part III.C.

118. See, e.g., Anton & Shelton, *supra* note 14, at 3; Williams, *supra* note 14.

119. See Parikh, *supra* note 34, at 9 (describing legislative and executive actions, and underscoring the importance of grassroots activism); Anton & Shelton, *supra* note 14, at 3 (describing legislative actions).

120. 42 U.S.C. § 4331(c), cited in UNEP ENVIRONMENTAL RULE OF LAW REPORT, *supra* note 9, at 156, n.97, and Parikh, *supra* note 34, at 9, 11 n.4.

121. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994), cited in Parikh, *supra* note 34, at 12 n.13.

122. See Exec. Order No. 14,008, 86 Fed. Reg. 7,619, 7,622 (Jan. 27, 2021) (“We must deliver environmental justice in communities all across America.”), reprinted in *Executive Order on Tackling the Climate Crisis at Home and Abroad*, THE WHITE HOUSE (Jan. 27, 2021), <https://perma.cc/K44J-357N>.

123. See, e.g., UNEP ENVIRONMENTAL RULE OF LAW REPORT, *supra* note 9, at 156 n.97 (citing 42 U.S.C. § 4331(c)); Parikh, *supra* note 34, at 9; CONG. RSCH. SERV., IF10529, ROLE OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY IN ENVIRONMENTAL JUSTICE 1 (Jan. 21, 2021) (citing Vivian S. Chu & Todd Garvey, CONG. RSCH. SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 1 (2014)); 86 Fed. Reg. 7,619, 7,632–7,633.

suggest, a constitutional right would give more force to the enduring American aspiration for nationwide environmental justice.¹²⁴

Beyond federal action, at the state level, scholars note that most states have already supported constitutional environmental rights or related rights.¹²⁵ Scholars have specifically found that Montana, New York, and Pennsylvania have strong, explicit constitutional environmental rights.¹²⁶ But constitutional environmental rights can take more discreet forms as well;¹²⁷ for example, in 2020, in *Mays v. Governor of Michigan*, the Supreme Court of Michigan held that the government's release of toxic municipal water violated the state's constitutional tort doctrine of bodily integrity and allowed economic damages as a remedy¹²⁸—an environmental justice victory for the plaintiffs.¹²⁹ By holding that environmental harms could be redressed as violations of the implied constitutional right to bodily integrity, this part of the decision in *Mays* (although non-binding, a commenter notes) arguably supports the case for implied constitutional environmental rights, if not explicit ones.¹³⁰

In the absence of an explicit U.S. environmental right, arguments for federal implied environmental rights are swirling in academia and the courts. Legal scholars argue that environmental rights may be implied in the U.S. Constitution as a whole or through its specific provisions, such as the Due Process Clauses of

124. See UNEP ENVIRONMENTAL RULE OF LAW REPORT, *supra* note 9, at 156; sources cited *supra* notes 119–23 and accompanying text; Bell, *supra* note 13 (citing *California's Human Right to Water Unrealized in Many Communities*, AM. CIVIL. LIB. UNION NORCAL (Apr. 19, 2018), <https://perma.cc/H2M2-WGAK>).

125. See, e.g., Anton & Shelton, *supra* note 14, at 4 (finding that most state constitutions show this); see also Babcock, *supra* note 16, at 762–64 (arguing that federal constitutional environmental rights are justified because of findings in the literature that, inter alia, most state constitutions already support them).

126. See van Rossum & Manahan, *supra* note 13, at 28–29.

127. For background on implicit environmental rights, see generally Boyd, *supra* note 16; Babcock, *supra* note 16.

128. See *Mays v. Governor of Michigan*, 954 N.W.2d 139, 158–62 (Mich. 2020) (quoting *Mays v. Snyder*, 916 N.W.2d 227, 261–63 (2018), *aff'd sub nom. Mays v. Governor of Michigan*, 506 Mich. 157, 954 N.W.2d 139 (2020) (first citing *Smith v. Dep't of Pub. Health*, 410 N.W.2d 749, 750 (Mich. 1987), *aff'd sub nom. Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989); and then citing *Smith*, 410 N.W.2d at 796–99 (Boyle, J., concurring in part and dissenting in part)).

129. Cf. Bell, *supra* note 13 (citing Guyadeen, *supra* note 13). But see Brown et al., *A Long Way from Justice: Reflections from Flint on the \$600 Million Settlement Proposal*, 13 ENV'T JUSTICE 222, 223 (2020), Mary Ann Liebert, Inc., <https://doi.org/10.1089/env.2020.0048> (“[W]e must keep coming back to the question of what justice looks like to those who have been treated unjustly. Even with the best possible settlement, we will still be expecting state and other actors to be held criminally liable.”).

130. See *Mays*, 954 N.W.2d at 158–62 (quoting *Mays*, 916 N.W.2d at 261–63, *aff'd sub nom. Mays*, 954 N.W.2d (first citing *Smith*, 410 N.W.2d at 750, *aff'd sub nom. Will*, 491 U.S. 58; and then citing *Smith*, 410 N.W.2d at 796–99 (Boyle, J., concurring in part and dissenting in part)); Alexander Collingsworth, *The Flint Water Settlement and Implications of the Michigan Supreme Court's Reaffirmation of State Constitutional Tort Claims*, GEO. ENV'T L. REV.: BLOG (Dec. 1, 2020), <https://perma.cc/7GUK-WGXF>.

the Fifth and Fourteenth Amendments,¹³¹ which protect people from being deprived of “life, liberty, or property, without due process of law.”¹³² Litigants tested such theories of implied constitutional environmental rights in federal court in a case involving essentially the same facts as *Mays*,¹³³ *Guertin v. Michigan*.¹³⁴ As legal scholar Charles R. Corbett explains, the *Guertin* plaintiffs successfully argued before the U.S. Court of Appeals for the Sixth Circuit (“Sixth Circuit”) that the state government’s release of contaminated water violated plaintiffs’ implied, “substantive due process right to bodily integrity” under the Fourteenth Amendment.¹³⁵ The *Guertin* court’s affirmation of an implied right to bodily integrity arguably supports the recognition of implied constitutional environmental rights at the federal level.¹³⁶

In another case, *Juliana v. United States*, the youth plaintiffs argue, inter alia, that federal government actions that exacerbate climate change violate a new, substantive due process right to a sustainable climate implied in the Fifth Amendment.¹³⁷ In the initial decision on the case, Judge Aiken of the U.S. District Court for the District of Oregon recognized the plaintiffs’ “fundamental right to a climate system capable of sustaining human life.”¹³⁸ On appeal,

131. See, e.g., Babcock, *supra* note 16, at 771. Additionally, Konar-Steenberg argues that the Thirteenth Amendment could be used to advance environmental justice. See Konar-Steenberg, *supra* note 5, at 524–34.

132. See U.S. CONST. amend. V, XIV, cited in Babcock, *supra* note 16, at 771. Comer supports a due process form of constitutional environmental rights to advance environmental justice. See Comer, *supra* note 8, at 125, 125 n.168 (citing Bruce Ledewitz, *Establishing A Federal Constitutional Right to A Healthy Environment in Us and in Our Posterity*, 68 Miss. L.J. 565, 590–92 (1998)).

133. See *Mays*, 954 N.W.2d at 233 (Viviano, J., concurring and dissenting in part).

134. 912 F.3d 907, 915–16 (6th Cir. 2019), cited in Corbett, *supra* note 18, cert. denied 140 U.S. 933 (2020); Corbett, *supra* note 18.

135. *Guertin*, 912 F.3d at 915–16, 916 n.1, 918, 922, 932 (first citing *In re Flint Water Cases*, 329 F. Supp.3d 369 (E.D. Mich. 2018), vacated on other grounds (Nov. 9, 2018); then citing *Guertin v. Michigan*, No. 16-cv-12412, 2017 WL 2418007 (E.D. Mich. June 4, 2017); then citing *Mays v. Snyder*, 916 N.W.2d at 261; then citing *Mays v. Snyder*, No. 16-000017-MM (Mich. Ct. Cl. Oct. 26, 2016); and then citing *Lake v. City of Southgate*, No. 16-10251, 2017 WL 767879, at *4 (E.D. Mich. Feb. 28, 2017)) (holding that the government violated certain plaintiffs’ right to bodily integrity, but declining to recognize a constitutional right to a healthy environment), cited in Corbett, *supra* note 18; Corbett, *supra* note 18.

136. See *Guertin*, 912 F.3d at 915–16, 916 n.1, 918, 922, 932 (first citing *In re Flint Water Cases*, 329 F. Supp.3d; then citing *Guertin v. Michigan*, 2017 WL 2418007; then citing *Mays*, 916 N.W.2d at 261; then citing *Mays v. Snyder*, No. 16-000017-MM; and then citing *Lake*, 2017 WL 767879, at *4), cited in Corbett, *supra* note 18; Corbett, *supra* note 18.

137. See *Juliana v. United States*, 947 F.3d 1159, 1164, 1167, 1171 (9th Cir. 2020), cited in OUR CHILDREN’S TRUST, *supra* note 19, and discussed in SETZER & BYRNES, *supra* note 19; *Youth Climate Litigation: Juliana vs. United States*, ENVIRONMENTAL LAW INSTITUTE, at 14:00 (June 2, 2021), <https://perma.cc/9DKH-RU25>; see also Corbett, *supra* note 18.

138. *Juliana v. United States*, 339 F. Supp. 3d 1062, 1098, 1104 (D. Or. 2018) (quoting *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), rev’d and remanded, 947 F.3d 1159 (9th Cir. 2020) (citing *Juliana v. United States*, No. 6:15-CV-01517-TC, 2017 WL 2483705, *2 (D. Or. June 8, 2017), on reconsideration, No. 6:15-CV-01517-AA, 2018 WL 6303774 (D. Or. Nov. 21, 2018)), cited in OUR CHILDREN’S TRUST, *supra* note 19, and Jeff Todd, A “Sense of Equity” in *Environmental Justice Litigation*, 44 HARV. ENV’T L. REV. 169, 215 n.317; OUR CHILDREN’S TRUST, *supra* note 19.

however, the U.S. Court of Appeals for the Ninth Circuit (“Ninth Circuit”) reversed for lack of redressability, contending that courts lacked the authority to order the government to implement an emissions reduction plan—a task better suited to the political branches.¹³⁹ As legal scholar Charles Corbett summarizes, the Ninth Circuit has thus far rejected a theory of implied constitutional environmental rights,¹⁴⁰ whereas the Sixth Circuit recognized a narrower right to bodily integrity against state-inflicted pollution.¹⁴¹

One can only guess how the U.S. Supreme Court would weigh in on the constitutional environmental rights question if the *Juliana* plaintiffs appealed their defeat.¹⁴² Some scholars caution against asserting an implied constitutional environmental right before the U.S. Supreme Court because the current conservative supermajority could decide to further limit standing in environmental cases, frustrating future climate change litigation.¹⁴³ Despite challenges, litigants in these recent cases have fought for explicit or implied environmental rights in the United States at both the state and federal levels, with varying degrees of success.¹⁴⁴

B. LIKELY BENEFITS OF CONSTITUTIONAL ENVIRONMENTAL RIGHTS IN THE UNITED STATES BASED ON THOSE EXPERIENCED IN BRAZIL AND FRANCE

Like Brazil and France, the United States might see these benefits after recognizing constitutional environmental rights: stronger rights to public participation in environmental disputes;¹⁴⁵ recognition of how protections for animals help

139. *Juliana*, 947 F.3d at 1171–72 (first citing *M.S. v. Brown*, 902 F.3d 1076, 1086 (9th Cir. 2018); then citing *Collins v. City of Harker Heights*, 503 U.S. 115, 128–29 (1992); and then citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992)), cited in *OUR CHILDREN’S TRUST*, *supra* note 19, and discussed in *SETZER & BYRNES*, *supra* note 19; see also Corbett, *supra* note 18. The issue of court-ordered climate policy has been noted in other countries as well. See *Comer*, *supra* note 8, at 110–11, 111 n.81 (citing JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 28–31 (2003)).

140. *Juliana*, 947 F.3d at 1171–72 (first citing *M.S.*, 902 F.3d at 1086; then citing *Collins*, 503 U.S. at 128–29; and then citing *Lujan*, 504 U.S. at 559–60), cited in *OUR CHILDREN’S TRUST*, *supra* note 19, and discussed in *SETZER & BYRNES*, *supra* note 19; see also Corbett, *supra* note 18.

141. See sources cited *supra* note 136 and accompanying text.

142. See Ellen M. Gilmer, *Kids’ Climate Plaintiffs Eye Supreme Court After Defeat (2)*, *BLOOMBERG LAW* (Feb. 10, 2021), <https://perma.cc/S7DX-BVQQ>.

143. See *id.* (citing Ellen M. Gilmer, *Youth Climate Plaintiffs Face Continued Legal Risks After Defeat*, *BLOOMBERG LAW* (Jan. 23, 2020), <https://perma.cc/9X9E-VXPU>). Cf. BOYD, *THE STATUS*, *supra* note 8, at 21 (“A nation’s judiciary may be extremely conservative or even unfamiliar with judicial review of government action.”).

144. See sources cited *supra* notes 133–41 and accompanying text.

145. See sources cited *supra* notes 77–86 and accompanying text; *infra* Section III.B.1. Although the French and Brazilian provisions also confer procedural rights to a prior environmental impact assessment, see sources cited *supra* note 74 and accompanying text, this aspect of environmental rights is not as applicable in the American context because such assessments are already required under NEPA, see 42 U.S.C. § 4332, cited in *UNEP ENVIRONMENTAL RULE OF LAW REPORT*, *supra* note 9, at 156, n.97, and Parikh, *supra* note 34, at 9, 11 n.4. Advocates have noted, however, that NEPA is oft-attacked, which could suggest that its protections might be better assured if elevated to a constitutional status. See *The People’s Environmental Law: The National Environmental Policy Act*, *EARTHJUSTICE*, <https://>

balance the environment;¹⁴⁶ judicial instructions to the government to pursue environmental action plans;¹⁴⁷ and checks on corporate abuses of power.¹⁴⁸ The following Subsections discuss these four potential benefits to environmental justice in the United States.

1. Public Participation

First, Constitutional environmental rights may broaden public participation among Americans. It is uncertain whether American judges would feel compelled to arrange for an expansive public hearing like the one Minister Barroso convened¹⁴⁹ (in *Juliana*, broad public participation manifested as amicus curiae briefs);¹⁵⁰ but, commenters note this type of increased engagement with the legal system is possible.¹⁵¹ Thus, as commenters suggest, a constitutional environmental right could bolster effective participation in the United States' citizen suits, as it did in Brazil.¹⁵²

2. Protections at the Human-Animal Nexus

Additionally, recognition of how environmental protections for people also help animals may come to fruition if the United States adopts a constitutional environmental right. Intuitively, an American constitutional environmental right is unlikely to extend to flora and fauna before the human right is established.¹⁵³ But a constitutional environmental right for humans may still strengthen

perma.cc/JGA4-KYU5 (last visited May 16, 2021) (noting attacks under the Trump Administration); *NEPA Under Attack*, PROTECT NEPA, <https://perma.cc/EN29-EB84> (last visited May 19, 2022) (noting 180 congressional threats to NEPA in a six-year span); Sam Kalen, *NEPA's Trajectory: Our Waning Environmental Charter from Nixon to Trump?*, 50 ENV'T L. REPORTER 10398, 10399 (2020) (noting an "almost relentless attack on NEPA over . . . several decades"), *reprinted in* ENV'T L. INST., <https://perma.cc/Z9NF-DQW2>.

146. See sources cited *supra* notes 87–94 and accompanying text; *infra* Section III.B.2.

147. See sources cited *supra* notes 95–103 and accompanying text; *infra* Section III.B.3.

148. See sources cited *supra* notes 105–10 and accompanying text; *infra* Section III.B.4.

149. *But see* Setzer, *supra* note 77 ("[I]n the United States, when deciding on a lawsuit brought by the cities of San Francisco and Oakland against five major oil companies for public nuisance, U.S. District Court Judge William Alsup ordered a climate science tutorial to inform him of the scientific issues at hand in the case."), *cited in* Tigre, *supra* note 77.

150. For a list of the various briefs from civil society and academia submitted in *Juliana*, see *Juliana v. United States*, CLIMATE CASE CHART, SABIN CENTER FOR CLIMATE CHANGE LAW, <https://perma.cc/A8LX-F5UN> (last visited May 15, 2021).

151. See Setzer, *supra* note 77, *cited in* Tigre, *supra* note 77; UNEP ENVIRONMENTAL RULE OF LAW REPORT, *supra* note 9, at 156, 156 n.87 (first citing Knox, *supra* note 109; then citing Boyd, *supra* note 109; then citing MAY & DALY, *supra* note 109; and then citing BRUCH, COKER & VAN ARSDALE, *supra* note 109); Babcock, *supra* note 16, at 765–66, n. 211 (quoting David R. Boyd, *The Constitutional Right to a Healthy Environment*, 54 ENV'T SCI. & POL'Y FOR SUSTAINABLE DEVELOPMENT 3, 8 (2012), <https://perma.cc/VB2K-2ZZT>).

152. See sources cited *supra* note 151 and accompanying text.

153. See Kopnina, *supra* note 8, at 1 ("[T]he rights of non-human species lags behind social justice debates . . .").

arguments in animal protection cases; for example, humans' constitutional environmental rights may be indirectly threatened when animals are harmed in ways that disrupt the ecosystem, as the Brazilian court noted in the *Brazilian Rooster Case*.¹⁵⁴ In such cases, as scholars suggest, an environmental right in the United States may be used to defend not just environmental justice for humans affected by harm to animals,¹⁵⁵ such as the underserved communities that have been found to be more likely to live near noxious concentrated animal feeding operations ("CAFOs"),¹⁵⁶ but also environmental justice for the susceptible animals themselves.¹⁵⁷

3. Governmental Action on Climate Change

An American environmental right, like the French one, could also be used to fight climate change. Notably, the Biden Administration reports that it aims to reduce the country's greenhouse gas emissions to about half of 2005 levels by 2030, a goal that is considered the country's nationally determined contribution under the Paris Agreement.¹⁵⁸ As a legal scholar notes, if such objectives are written into binding legislation,¹⁵⁹ American civil society could bring suit and invoke constitutional environmental rights to compel the government to fulfill its

154. See *Brazil Rooster Case*, *supra* note 87, at 295 (citing CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225, § 1, VII (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020)); see also Eisen, *supra* note 8, at 915, 915 n.23. Schimmöller also notes the connection between humans' rights and those of nature. See Schimmöller, *supra* note 39, at 574 ("Granting legal rights to nature can overcome the anthropocentric conditioning of law and create a holistic perspective, reflecting our knowledge of ecology as well as human rights values regarding the protection of people most vulnerable to environmental degradation.").

155. See Eisen, *supra* note 8, at 915, 915 n.23, 951–52. Cf. Schimmöller, *supra* note 39, at 574 (noting how rights of nature relate to people); Babcock, *supra* note 88, at 21 (quoting Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 492 (1972)) (noting the benefits of rights of nature for people).

156. See Miller, *supra* note 88 (citing Steve Wing et al., *Community Based Collaboration for Environmental Justice: Southeast Halifax Environmental Reawakening*, 8 ENV'T & URBANIZATION 129, 129 (1996)); see also Nydia Gutiérrez, *Mexican Supreme Court Ruled in Favor of Mayan Community, Suspends 49,000 Hog Farm*, EARTHJUSTICE (May 20, 2021), <https://perma.cc/5DRG-NPPV>.

157. See Eisen, *supra* note 8, at 915, 915 n.23, 951–52 (noting the interrelated concerns of animals and underserved communities); *Brazil Rooster Case*, *supra* note 87, at 295 (citing CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020)). Cf. Schimmöller, *supra* note 39, at 574; Babcock, *supra* note 88, at 18–24. For an in-depth analysis of the concept of environmental justice for all species, see generally Kopnina, *supra* note 8.

158. See *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*, THE WHITE HOUSE (Apr. 22, 2021), <https://perma.cc/7JSH-UHWH> [hereinafter *Biden Fact Sheet*].

159. See Corbett, *supra* note 18. In August 2022, Congress passed the Inflation Reduction Act, a reconciliation bill that does not set binding emission reduction targets, but does provide enormous funding to reduce U.S. greenhouse gas emissions and advance environmental justice. See *Inflation Reduction Act of 2022*, H.R. 5376, 117th Cong. (2022); *What the Inflation Reduction Act Means for Climate*, EARTHJUSTICE (Aug 16, 2022), <https://perma.cc/QHJ5-RA9E>.

obligations,¹⁶⁰ just as the plaintiffs successfully did in *Notre Affaire à Tous*.¹⁶¹ Therefore, this case and related scholarship suggest that underserved plaintiffs in the United States could use constitutional environmental rights to help hold the government accountable to the environmental commitments needed to safeguard these plaintiffs' communities from climate change.¹⁶²

4. Checks on Corporate Power

Finally, the ability of constitutional environmental rights to check corporate power, as seen in France, could also apply in the United States. Although the U.S. Constitution, unlike the French one,¹⁶³ “hardly mention[s]” freedom of enterprise, a scholar notes that the Framers contemplated such freedom.¹⁶⁴ Indeed, suits like the *French Export Ban Case* that involve a company disputing governmental regulations and asserting its business interests over environmental concerns¹⁶⁵ also exist in the United States.¹⁶⁶ Armed with constitutional environmental rights, underserved litigants in America might stand a better chance of successfully deflecting such suits and compelling businesses to abide by environmental regulations and laws.¹⁶⁷ Cases and scholarship suggest that doing so may require

160. See Corbett, *supra* note 18.

161. See *Notre Affaire à Tous v. France*, *supra* note 95, at 27, 33 (quoting French Charter for the Environment, *supra* note 69, at art. 3); Lavrysen, *supra* note 95.

162. See *Notre Affaire à Tous v. France*, *supra* note 95, at 27, 33 (quoting French Charter for the Environment, *supra* note 69, at art. 3); Lavrysen, *supra* note 95; Corbett, *supra* note 18; Babcock, *supra* note 16, at 785 (“Given the government’s abdication of responsibility, constitutionalizing such a norm is the only way that individuals, particularly the country’s most vulnerable ones and those unborn, and the environment are going to be protected from the growing threat of climate change.”); see also Badrinayara, *supra* note 5, at 125–26.

163. See *French Export Ban Case*, *supra* note 105, at 1–2 (citing Déclaration Des Droits de L’homme et du Citoyen de 1789, art. 4); Davies, Fages & Green, *supra* note 105; Press Release, *supra* note 105.

164. See Louis Henkin, *Economic Rights under the United States Constitution*, 32 COLUM. J. TRANSNAT’L L. 97, 98, 107 (1994). For further background on economic rights more broadly, see generally Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL’Y 5 (2012).

165. See *French Export Ban Case*, *supra* note 105, at 1; Davies, Fages & Green, *supra* note 105; Press Release, *supra* note 105.

166. See, e.g., *Standing Rock Sioux Tribe v. United States Army Corps of Eng’rs*, 985 F.3d 1032, 1040, 1051 (D.C. Cir. 2021) (holding that the obligation to comply with NEPA outweighed the “economic harm” to Dakota Access LCC that may result from the court’s halting the construction of the company’s oil pipeline through federal waters, upon which the Standing Rock Sioux Tribe relies for physical and cultural sustenance), cited in *The Standing Rock Sioux Tribe’s Litigation on the Dakota Access Pipeline*, *supra* note 34.

167. Cf. *French Export Ban Case*, *supra* note 105, at 2 (first citing French Charter for the Environment, *supra* note 69, preamble; and then citing 1946 CONST. preamble (Fr.)); Davies, Fages & Green, *supra* note 105; Press Release, *supra* note 105; Schimmöller, *supra* note 39, at 591; accord Babcock, *supra* note 88, at 21 n.118 (citing Stone, *supra* note 155, at 461); see also UNEP ENVIRONMENTAL RULE OF LAW REPORT, *supra* note 9, at 156, 156 n.87 (first citing Knox, *supra* note 109; then citing Boyd, *supra* note 109; then citing MAY & DALY, *supra* note 109; and then citing BRUCH, COKER & VAN ARSDALE, *supra* note 109); Bell, *supra* note 13 (citing Guyadeen, *supra* note 13).

courts to balance environmental rights against economic ones.¹⁶⁸ As legal scholar Jamal Greene explains, although the U.S. Supreme Court, unlike courts in other developed countries, tends to treat rights as absolute, the Court already balances rights against each other;¹⁶⁹ hence, Greene argues, American courts should eventually adopt a proportional approach to rights.¹⁷⁰ This scholarship suggests that the court's balancing in the *French Export Ban Case* is compatible with, although not completely analogous to, American constitutional jurisprudence; thus, this balancing can be emulated in the United States to uphold constitutional environmental rights against other rights.¹⁷¹

In these four respects—public participation, protections at the human-animal nexus, governmental action on climate change, and checks on corporate power—the United States is positioned to advance environmental justice through constitutional environmental rights.¹⁷²

C. POTENTIAL CHALLENGES OF CONSTITUTIONAL ENVIRONMENTAL RIGHTS IN THE UNITED STATES AND INSTRUCTIVE INSIGHTS FROM BRAZIL AND FRANCE

This Section discusses the challenges the United States may encounter in using constitutional environmental rights: justiciability;¹⁷³ the unusualness of adding positive rights to a Constitution of negative rights;¹⁷⁴ unintended consequences that could hinder environmental litigation;¹⁷⁵ and the social limitations of constitutions.¹⁷⁶ The United States can learn from the assertion of environmental rights in France and Brazil to address these challenges¹⁷⁷ and justify its efforts to recognize constitutional environmental rights in service of environmental justice.¹⁷⁸

168. See, e.g., *Standing Rock Sioux Tribe*, 985 F.3d at 1040, 1051; see also sources cited *supra* note 167 and accompanying text; Badrinayara, *supra* note 5, at 116–17, 127 (“Undeniably, siting decisions, and environmental protection policies generally require a careful balancing . . .”). Cf. Schimmöller, *supra* note 39, at 591. See generally Greene, *supra* note 36 (discussing two theories of rights, one seeing rights as absolute and the other seeing rights as limited).

169. See Greene, *supra* note 36, at 30, 34–35.

170. See *id.* at 84–85.

171. See sources cited *supra* notes 165–70 and accompanying text.

172. See sources cited *supra* notes 149–70 and accompanying text.

173. See *infra* Section III.C.1.

174. See *infra* Section III.C.2.

175. See *infra* Section III.C.3.

176. See *infra* Section III.C.4.

177. See sources cited *supra* notes 77–110 and accompanying text.

178. For scholarship supporting the use of U.S. constitutional environmental rights to further environmental justice, see Badrinarayana, *supra* note 5, at 128–29; Babcock, *supra* note 16, at 748, 748 n.78 (quoting Gallagher, *supra* note 41); van Rossum & Manahan, *supra* note 13. Cf., e.g., Bell, *supra* note 13 (citing Guyadeen, *supra* note 13) (concerning U.S. states' rights); Schimmöller, *supra* note 39, at 590, 590 n.173, 591 (citing U. Ramsauer, *Eigenrechte der Natur: Verwaltungsrechtliche Überlegungen*, in E. SEIDEL, GEORG WINTER: PIONIER DER UMWELTBEWUSSTEN UNTERNEHMENSFÜHRUNG 446 (Metropolis, 2011)) (noting similar difficulties in using rights of nature in Germany, but ultimately supporting their use). But see Comer, *supra* note 8, at 121, 121 n.144–48, 122, 122 n. 149–53 (first citing Ledewitz, *supra* note 22; and then citing Latham Worsham, *supra* note 22) (casting doubt on the viability of U.S. constitutional environmental rights in environmental justice cases).

1. Justiciability

First, scholarship suggests that justiciability may be an issue in more abstract environmental justice cases like those involving climate change.¹⁷⁹ Indeed, a scholar notes that justiciability was a crucial concern in *Juliana v. United States* because the Ninth Circuit claimed separation of powers limited its authority to order the government to reduce greenhouse gas emissions and redress plaintiffs' climate change concerns.¹⁸⁰ This decision signals other American courts to be wary of compelling the political branches of government to act on climate change.¹⁸¹ Scholarship suggests, however, that an express environmental right that imposes a duty on the government to protect the environment could justify the judicial power to compel governmental action.¹⁸² Specifically, regarding the *Brazil Climate Case*, scholars note that the court relied on the government's constitutional duty to preserve environmental rights in dismissing concerns that the court was overstepping its powers by accepting the case and expanding public participation in it.¹⁸³ Scholars also note that separation of powers issues appear in both *Juliana* and the *Brazil Climate Case*.¹⁸⁴ These scholars point out that the power of the constitutional duty to protect the environment recognized in the *Brazil Climate Case* could similarly resolve the court's separation of powers concerns in *Juliana*.¹⁸⁵ Even an environmental right that does not impose duties could be sufficient to empower courts to compel the government to take protective action to assure enjoyment of that right—much like how, as attorneys comparing *Juliana* and *Brown v. Board of Education* have noted, equal protection rights justified court-ordered desegregation of public schools in the 1950s.¹⁸⁶

179. See Corbett, *supra* note 18; see also Marrani & Turner, *supra* note 68, at 316–18 (discussing separation of powers concerns arising from the French constitutional environmental right); Babcock, *supra* note 16, at 752–53 (citing Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L.J. 203, 229 (1974)); Comer, *supra* note 8, at 121, 121 n.146 (citing Ledewitz, *supra* note 22, at 592). Similar justiciability issues relating to rights of nature have also been noted. See Babcock, *supra* note 88, at 3, 6, 44–49.

180. *Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020), cited in OUR CHILDREN'S TRUST, *supra* note 19, and discussed in SETZER & BYRNES, *supra* note 19; Corbett, *supra* note 18.

181. See *Juliana*, 947 F.3d at 1171, cited in OUR CHILDREN'S TRUST, *supra* note 19, and discussed in SETZER & BYRNES, *supra* note 19; Corbett, *supra* note 18. The issue of court-ordered climate policy has been noted in other countries as well. See Comer, *supra* note 8, at 110–11, 111 n.81 (citing JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 28–31 (2003)).

182. See Tigre, *supra* note 77; Alessandra Lehman & Caio Borges, *Climate Fund Case: Climate Litigation reaches the Brazilian Supreme Court*, OXFORD HUMAN RIGHTS HUB (July 24, 2020), <https://perma.cc/8W5W-ULAY>. Babcock also somewhat prefers a governmental duty rather than an individual right. See Babcock, *supra* note 16, at 785.

183. See Tigre, *supra* note 77; Setzer, *supra* note 77 (citing STF, *supra* note 78); Lehman & Borges, *supra* note 182.

184. See Lehman & Borges, *supra* note 182.

185. See *id.*; see also Setzer, *supra* note 77 (citing STF, *supra* note 78); Tigre, *supra* note 77.

186. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954), discussed in *Youth Climate Litigation: Juliana vs. United States*, *supra* note 137, at 22:50 (Julia Olson, Executive Director and Chief Legal Counsel for Our Children's Trust, discusses *Brown* in this webinar, available for ELI

However, even if the American environmental right imposes a duty on the government like the Brazilian one does,¹⁸⁷ this right alone may not cure separation of powers concerns;¹⁸⁸ instead, as a legal scholar notes, environmental policy obligating the government to act might be necessary to empower the judiciary to compel governmental action on climate change.¹⁸⁹ Legislation that could potentiate an environmental right in the context of climate change seems imminent because the United States has rejoined the Paris Agreement, set preliminary climate goals, and passed legislation to make investments toward reaching those non-statutory goals.¹⁹⁰ In sum, the scholarship suggests that climate change claims based on environmental rights can be justiciable in the United States, especially if the constitutional provision imposes a governmental duty to act,¹⁹¹ or if it is accompanied by climate policy.¹⁹² In such circumstances, constitutional environmental rights may be an especially useful tool to redress climate-related harms inflicted upon underserved communities.¹⁹³

2. Positive Rights in a Constitution of Negative Rights

Another challenge to advancing environmental rights in the United States lies in the negative nature of U.S. constitutional rights. A key difference between France and Brazil versus the United States is that the former two countries recognize positive environmental rights and duties to protect the environment,¹⁹⁴ whereas the latter uses negative rights against harm.¹⁹⁵ Although scholars note that the U.S. Constitution does not explicitly provide positive rights,¹⁹⁶ legal

members); *Juliana*, 947 F.3d at 1188–89, 1191 (Staton, J., dissenting) (analogizing court-ordered climate change action to court-ordered desegregation in *Brown*), cited in OUR CHILDREN’S TRUST, *supra* note 19, and discussed in SETZER & BYRNES, *supra* note 19, and *Youth Climate Litigation: Juliana vs. United States*, *supra* note 137, at 21:57; Pls.-Appellees’ Answering Br. 30 (analogizing court-ordered climate change action to court-ordered desegregation in *Brown*), discussed in *Youth Climate Litigation: Juliana vs. United States*, *supra* note 137, at 22:50.

187. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.) (Jefri Jay Ruchti, ed., Keith S. Rosenn, trans., HeinOnline World Constitutions Illustrated 2020), cited in Passos de Freitas, *supra* note 66, at 3, 3 n.9 (2017).

188. See Corbett, *supra* note 18. But see Lehman & Borges, *supra* note 181; Tigre, *supra* note 77; Setzer, *supra* note 77 (citing *STF*, *supra* note 78).

189. See Corbett, *supra* note 18 (“Climate change is too vast a problem, and fossil fuels are too tightly intertwined with every aspect of economic life, for the courts to demand wide-scale decarbonization in the absence of federal climate policy.”).

190. See *Biden Fact Sheet*, *supra* note 158; sources cited *supra* note 159 and accompanying text.

191. See sources cited *supra* notes 187–88 and accompanying text.

192. See Corbett, *supra* note 18.

193. See sources cited *supra* notes 187–89 and accompanying text. Cf. Bell, *supra* note 13 (citing Guyadeen, *supra* note 13); van Rossum & Manahan, *supra* note 13.

194. See BOYD, THE STATUS, *supra* note 8, at app.A at 25–26; sources cited *supra* notes 66–74 and accompanying text. For a brief comparison of positive and negative rights, see Comer, *supra* note 8, at 107–08.

195. See Babcock, *supra* note 16.

196. See *id.* at 766, 766 n.212 (citing and quoting Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1700 (2014)).

scholars assert that affirmative duties to protect citizens from environmental harms may be implied in the U.S. Constitution.¹⁹⁷ Thus, scholars suggest that a positive environmental right may be compatible with existing theories of American constitutional law.¹⁹⁸

But the right need not be positive to be impactful in the United States—in fact, negative rights may be more impactful than positive ones in terms of damages. One shortcoming of France’s positive rights is that they may not necessarily create opportunities for economic damages for underserved communities.¹⁹⁹ By contrast, *Mays v. Governor of Michigan* stands for the proposition that the judiciary need not apply a positive right to allow economic damages for harmed plaintiffs—a negative right like bodily integrity suffices.²⁰⁰ The United States could thus augment potential awards to plaintiffs in its environmental rights jurisprudence through a negative right.²⁰¹ In short, implied positive rights are considered compatible with U.S. constitutional law, but even if they are not, benefits to environmental justice could still accrue from negative constitutional environmental rights.²⁰²

3. Political Perils of Litigation

An additional challenge in implementing constitutional environmental rights is avoiding political perils. As scholars responding to the potential appeal of *Juliana* highlight, bringing environmental rights before the current conservative supermajority of the U.S. Supreme Court could imperil future environmental litigation.²⁰³ This challenge can be avoided altogether by seeking not for the courts to recognize an implied constitutional environmental right, but for the states to ratify an explicit right; indeed, commenters encourage states to advance

197. See *id.* at 771–85.

198. See *id.* at 756–66. *But see* Comer, *supra* note 8, at 96–97, 107–08 (generally criticizing positive rights).

199. See *supra* notes 97, 100–02 and accompanying text.

200. See *Mays v. Governor of Michigan*, 954 N.W.2d 139, 158–62 (Mich. 2020).

201. See *id.*; Collingsworth, *supra* note 130. Comer generally endorses the negative form of these rights (or a due process right) to advance environmental justice. See Comer, *supra* note 8, at 125; sources cited *supra* note 132 and accompanying text.

202. See sources cited *supra* notes 196–201 and accompanying text.

203. See Gilmer, *supra* note 142 (citing Gilmer, *supra* note 143). *Cf.* BOYD, THE STATUS, *supra* note 8, at 21 (“A nation’s judiciary may be extremely conservative or even unfamiliar with judicial review of government action.”). Schimmöller also notes that using rights of nature might not be effective. See Schimmöller, *supra* note 39, at 590, 590 n.173 (citing U. Ramsauer, *Eigenrechte der Natur: Verwaltungsrechtliche Überlegungen*, in E. SEIDEL, GEORG WINTER: PIONIER DER UMWELTBEWUSSTEN UNTERNEHMENSFÜHRUNG 455 (Metropolis, 2011)). Additionally, Badrinarayana notes that courts may not use environmental rights effectively. See Badrinayara, *supra* note 5, at 115–18; *accord* Babcock, *supra* note 16, at 770, 770 n.239 (quoting J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don’t Measure Up*, 74 NOTRE DAME L. REV. 245, 264–65 n.64 (1999)) (citing Caleb Hall, *A Right Most Dear: The Case for a Constitutional Environmental Right*, 30 TUL. ENV’T L.J. 85, 101 (2016)).

constitutional environmental rights.²⁰⁴ To be sure, the U.S. Constitution is difficult to amend, requiring ratification by three-fourths of the states.²⁰⁵ But, given the findings in the literature that over three-fifths of states already provide some form of constitutional protections of the environment or natural resources,²⁰⁶ adding an environmental right to the U.S. Constitution is more plausible than it may seem, as scholars like Professor Babcock suggest.²⁰⁷ Thus, an amendment guaranteeing environmental rights would be a plausible route to creating constitutional environmental rights in the United States²⁰⁸ while avoiding any potential unintended consequences of litigating the right before the U.S. Supreme Court.²⁰⁹

4. Social Limitations of Constitutional Rights

A final limitation of constitutional environmental rights in the United States is inherent in legal rights: laws alone may not rectify the underlying conditions of social inequality that lead to injustice, such as environmental injustice.²¹⁰ For instance, a constitutional right may help litigants respond to documented actions like the placement of factory farms next to underserved communities.²¹¹ Yet, beyond litigation, legal scholar Colin Crawford underscores that extra-legal mechanisms may help remediate economic and social inequality and the resulting power differentials these social ills create.²¹² Hence, although constitutional environmental rights have been considered useful in *responding* to environmental

204. See, e.g., Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENV'T L. 135, 136–37; Williams, *supra* note 14; Bell, *supra* note 13. Bell notes that legislators have also proposed amending the U.S. Constitution to provide environmental rights. Bell, *supra* note 13 (citing H.R. Res. 144, 115th Cong. (2018)).

205. See U.S. CONST. art. V; see, e.g., Jesse Wegman, *Thomas Jefferson Gave the Constitution 19 Years. Look Where We Are Now*, N.Y. TIMES (Aug. 4, 2021), <https://perma.cc/SL6U-G4F3> (discussing the difficulty of amending the U.S. Constitution). Schimmöller also notes that using rights of nature in Germany may require political support. See Schimmöller, *supra* note 39, at 590, 590 n.173 (citing U. Ramsauer, *Eigenrechte der Natur: Verwaltungsrechtliche Überlegungen*, in E. SEIDEL, GEORG WINTER: PIONIER DER UMWELTBEWUSSTEN UNTERNEHMENSFÜHRUNG 446 (Metropolis, 2011)).

206. See Anton & Shelton, *supra* note 14, at 4; see also van Rossum & Manahan, *supra* note 13, at 28.

207. See, e.g., Babcock, *supra* note 16, at 762–64. *Contra* Wegman, *supra* note 205.

208. See sources cited *supra* notes 204–07 and accompanying text.

209. See sources cited *supra* note 203 and accompanying text.

210. See, e.g., Colin Crawford, *Access to Justice for Four Billion: Urban and Environmental Options and Challenges*, 26 N.Y.U. ENV'T L.J. 340, 354–55, 355 n.52, 358 (2018) (quoting Stephen Golub, *A House Without a Foundation*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 106 (Thomas Carothers ed., 2006)); see also Badrinayara, *supra* note 5, at 115–18 (discussing the social shortcomings of some of the environmental justice litigation in India).

211. See Miller, *supra* note 88 (citing Wing et al., *supra* note 156); Gutiérrez, *supra* note 156; see also Eisen, *supra* note 8, at 951; Schimmöller, *supra* note 39, at 574.

212. See Crawford, *supra* note 210, at 348, 355, 358, 371 (noting that, although the legal system may help to address inequities, economic disparities could hinder access to legal relief; additionally, describing an extra-legal theory that “access to justice depends upon responding in a deliberate fashion to the most pressing social and economic needs in any given situation”).

justice concerns once they arise,²¹³ scholarship and commentary suggest that other means—like investment in lower-income communities—are likely necessary to effectively *prevent* the inequalities that precede environmental injustice.²¹⁴ Notwithstanding these limitations, this Note maintains that constitutional environmental rights are a key component, alongside other measures,²¹⁵ of advancing environmental justice in the United States.²¹⁶

IV. THE WAY FORWARD: USING CONSTITUTIONAL ENVIRONMENTAL RIGHTS TO ADVANCE ENVIRONMENTAL JUSTICE IN THE UNITED STATES

This Part summarizes this Note’s discussion of the law and literature concerning potential benefits of constitutional environmental rights in Brazil and France and insights from these countries into implementing such rights to effectively advance environmental justice in the United States.

In terms of benefits, Brazil and France offer evidence of how adding substantive constitutional environmental rights in America (but less so procedural rights, which NEPA covers)²¹⁷ can advance environmental justice by strengthening public participation, improving justice for animals with which humans interact, compelling robust governmental action on climate change, and counterbalancing environmental destruction that occurs in the name of freedom of enterprise.²¹⁸ To be sure, the manifestation of these benefits will likely be slightly different in the United States.²¹⁹ First, as the scholarship previously analyzed suggests, improvements in public participation may not be as dramatic as in Brazil,²²⁰ and specific rights for animals like those in Brazil may be less likely to emerge before merely applying the constitutional environmental right to animals through their relationship to humans.²²¹ Additionally, on climate change, as Corbett notes, once the United States enacts binding climate change legislation like that of France, litigants will likely be better positioned to seek climate justice through enforcement

213. See, e.g., Bell, *supra* note 13 (citing Guyadeen, *supra* note 13); Badrinayara, *supra* note 5, at 114–15.

214. See, e.g., Badrinayara, *supra* note 5, at 115–18; Alexandria Trimble et al., *EJNCP Releases Environmental Justice Investment Recommendations in the Appropriations Process*, EARTHJUSTICE: PRESS ROOM (May 5, 2022), <https://perma.cc/Y53L-E5VJ> (reporting on a proposal by the Equitable and Just National Climate Platform for federal funding for communities experiencing environmental injustice, such as funding for affordable housing and pollution control). Cf. Crawford, *supra* note 210, at 354–55, 355 n.52 (quoting Golub, *supra* note 210) (noting the importance of prevention to protect rights).

215. See sources cited *supra* notes 210–14 and accompanying text.

216. See sources cited *supra* notes 13, 178 and accompanying text.

217. See discussion about NEPA *supra* note 145. For a discussion of substantive and procedural rights, see BOYD, THE STATUS, *supra* note 8, at 10–16.

218. See discussion of Brazilian and French case law *supra* Sections II.B.1–II.B.4.

219. See discussion of applying the benefits in the United States *supra* Sections III.B.1–III.B.4.

220. See sources cited *supra* notes 149–52 and accompanying text.

221. See sources cited *supra* notes 153–57 and accompanying text.

of constitutional environmental rights.²²² Finally, constitutional environmental rights will have even more potential to check corporate power if the courts move farther away from an absolute approach to rights and toward one of balancing, an approach Greene supports.²²³

There are several challenges to realizing these qualified benefits; however, if carefully negotiated, American actors can overcome them. The specific hurdles discussed in this Note relate to justiciability, positive versus negative rights, political concerns, and the limitations of constitutions in general.²²⁴ As highlighted in the prior discussion of the scholarship, the justiciability concern of separation of powers may be resolved by adopting an environmental rights amendment that expressly obligates governmental protection of the environment,²²⁵ or, by enacting relevant policies that obligate the government to reduce national greenhouse gas emissions.²²⁶ As for the issue of positive versus negative rights, some of the scholarship previously analyzed suggests a positive constitutional environmental right could be embraced under certain constitutional theories,²²⁷ but other scholarship suggests it may instead be a negative right²²⁸—potentially with the added benefit of substantial economic damages.²²⁹ In the contemporary American political climate, the more prudent path to an environmental right might be pursuing the constitutional amendment process²³⁰ rather than pushing an implied right through the court system, where, as commenters warn, it risks defeat.²³¹ Some commentators encourage environmental justice advocates to support environmental rights at the state level, which could lead to recognition at the federal level.²³²

On the final challenge of constitutional limits, to address the underlying causes of environmental injustice, the critical scholarship analyzed in this Note suggests that American society will have to work earnestly to implement programs and policies that reduce inequalities to complement the responsive work of environmental rights litigation.²³³ Whether positive or negative,²³⁴ impliedly read into the U.S. Constitution or formally added by amendment,²³⁵ a constitutional environmental right can succeed based on this guidance, helping underserved

222. See sources cited *supra* notes 158–62 and accompanying text.

223. See sources cited *supra* notes 169–70 and accompanying text.

224. See discussion of Brazilian and French case law *supra* Sections III.C.1–III.C.4.

225. See sources cited *supra* notes 179–86 and accompanying text.

226. See sources cited *supra* notes 187–93 and accompanying text.

227. See sources cited *supra* notes 196–98 and accompanying text.

228. See sources cited *supra* notes 194–96, 201 and accompanying text.

229. See sources cited *supra* notes 199–201 and accompanying text.

230. See sources cited *supra* notes 204–07 and accompanying text.

231. See sources cited *supra* notes 203 and accompanying text.

232. See sources cited *supra* notes 204–07 and accompanying text.

233. See sources cited *supra* notes 210–14 and accompanying text.

234. See sources cited *supra* notes 196–201 and accompanying text.

235. See sources cited *supra* notes 203–07 and accompanying text.

communities in America achieve the protections their Brazilian and French counterparts enjoy.²³⁶

CONCLUSION

This Note's analysis of the text of constitutional environmental rights, recent case law in Brazil and France, and relevant literature and commentary indicates that such rights would likely be similarly effective tools of environmental justice in the United States. The Brazilian provision successfully strengthened rights to public participation in climate change disputes and counteracted separation of powers concerns, as well as demonstrated how animal rights are intertwined with people's constitutional environmental rights. The French provision proved powerful in a case in which a court compelled the government to address climate change, and another case in which a court checked corporate power in favor of health. To be sure, implementing constitutional environmental rights may be a challenge, particularly in terms of justiciability, positive versus negative rights traditions, political concerns, and the limited power of constitutions. Nonetheless, given the benefits of constitutional environmental rights realized in Brazil and France, as well as the insights from these countries that can be used to address any potential challenges, the United States should recognize constitutional environmental rights as an additional tool to empower its underserved populations and advance environmental justice.

236. See discussion of Brazilian and French case law *supra* Sections II.B.1–II.B.4.; discussion of the relationship between constitutional environmental rights and environmental justice *supra* notes 13, 178 and accompanying text.