AN ENDURING AMERICAN HERITAGE: A SUBSTANTIVE DUE PROCESS RIGHT TO PUBLIC WILD LANDS

by Ariel Strauss

Ariel Strauss is Of Counsel at Greenfire Law, P.C., in Berkeley, California.

Imagine, on account of an economic downturn associated with massive defense spending,[1] or a change in regulatory philosophy,[2] or a pandemic,[3] the U.S. Congress enacted legislation duly signed by the president to sell virtually all federal wild lands to the highest bidder without restriction. Would such action be constitutional?

The principles behind this question are now of monumental importance. In the absence of significant changes in federal land management practices and a coordinated program to reverse the buildup of greenhouse gases in the atmosphere, several studies predict that significant portions of the nation's wild lands will be irreparably and drastically altered from their historic natural state.[4] Congressman Raúl Grijalva (D-AZ) explains: "It's really difficult to imagine Glacier National Park without glaciers, Joshua Tree National Park without these trees. Yet, the evidence is clear that we may be facing just that kind of future."[5] In light of the pattern of government refusal to address climate change's effect on federal lands, it may fall to citizens to overcome petrochemical and agribusiness support for current policies, by directly vindicating public rights to wild lands in the courts.[6]

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1. Following proposed resolutions in the U.S. House of Representatives (H.R. Res. 265, 97th Cong. (1981)) and the U.S. Senate (S. Res. 231, 97th Cong. (1981)) to sell off federal property to reduce the national debt, in 1982, President Ronald Reagan directed federal agencies to sell off excess property. Exec. Order No. 12348, 47 Fed. Reg. 8547 (Mar. 1, 1982) (directing disposition of "real property holdings no longer essential to their activities and responsibilities"), *revoked by* Exec. Order No.12512, §4, 50 Fed. Reg. 18453 (Mar. 5, 1985); *see also* James Muhn & Hanson R. Stuart, Opportunity and Challenge: The Story of BLM 220-231 (1988); *Sales of Public Land: A Problem in Legislative and Judicial Control of Administrative Action*, 96 Harv. L. Rev. 927 (1983) (contending executive policy of sale violated 43 U.S.C. §1701(a)(i)).
2. Ideological and practical opposition to "absentee" federal land ownership gained increased support in recent election cycles, though not to the degree of total divestment from federal holdings. Heather Hansman, *Congress Moves to Give Away National Lands, Discounting Billions in Revenue*, Guardian, Jan. 19, 2017, https://www.theguardian.com/environment/2017/jan/19/bureau-land-management-federal-lease; Jonathan B. Jarvis & Destry Jarvis, *The Great Dismantling of America's National Parks Is Under Way*, Guardian, Jan. 10, 2020, https://www.theguardian.com/environment/2020/jan/10/us-national-parks-dismantling-under-way (former director of the National Park Service (NPS) describing "systematic dismantling of a beloved institution" to enable mineral extraction); *see generally* Richard D. Clayton, *The Sagebrush Rebellion: Who Should Control the Public Lands*, 1980 Utah L. Rev. 505 (1980) (discussing historical source of western opposition to federal land control).
3. Exec. Order No. 13927, Accelerating the Nation's Economic Recovery From the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities, 85 Fed. Reg. 35165 (June 9, 2020); *see, e.g.*, Paul Hannon, *Global Economy Faces Hard Winter Despite Covid-19 Vaccine Hopes*, Wall St. J., Dec. 1, 2020, https://www.wsj.com/articles/global-economy-faces-difficult-winter-despite-covid-19-vaccine-hopes-11606822321?st=u0jg8syr4uhkg6y&reflink=desktopwebshare_permalink (global economy shrunk by over 4% in 2020).
4. Stephen Saunders et al., Natural Resources Defense Council & Rocky Mountain Climate Organization, National Parks in Peril: The Threats of Climate Disruption (2009), *available at* https://rockymountainclimate.org/website%20pictures/National-Parks-In-Peril-final.pdf; Press Release, NPS, National Park Service Report Confirms Climate Change in National Parks (July 2, 2014), https://www.nps.gov/aboutus/news/release.htm?id=1609 (NPS director: "This report shows that climate change continues to be the most far-reaching and consequential challenge ever faced by our national parks."); Patrick Gonzalez et al., *Disproportionate Magnitude of Climate Change in United States National Parks*, 13 Env't Rsch. Letters 104001 (2018) (special analysis of historic and projected temperatures across 417 national parks shows special vulnerability because they set aside extreme environments), *available at* https://iopscience.iop.org/article/10.1088/1748-9326/aade09/pdf; Alex Horton, *Climate Change Is Destroying Our National Parks at an Alarming Rate, Study Finds*, Wash. Post, Sept. 25, 2018, https://www.washingtonpost.com/energy-environment/2018/09/25/climate-change-is-destroying-our-national-parks-an-alarming-rate-study-finds/ (discussing research); Kara Manke, *National Parks Bear the Brunt of Climate Change*, Berkeley News, Sept. 24, 2018, https://news.berkeley.edu/2018/09/24/national-parks-bear-the-brunt-of-climate-change/ ("National parks aren't a random sample—they are remarkable places and many happen to be in extreme environments" especially vulnerable to climate change.).
5. *The Impacts of Climate Change on America's National Parks: Hearing Before the House Subcomm. on National Parks, Forests, and Public Lands*, 111th Cong. (2009) (statement of Rep. Raúl Grijalva), *available at* https://www.govinfo.gov/content/pkg/CHRG-111hhrg48662/html/CHRG-111hhrg48662.htm.
6. This Comment does not address the political question doctrine or other jurisprudential impediments to substantive court review of this question. *But see* Juliana v. United States, 947 F.3d 1159, 1174 n.9, 50 ELR 20025 (9th Cir. 2020) (petition for rehearing pending Nov. 16, 2020) (lawsuit against federal government for fossil fuel policies causing climate change harms is not a political question but lacks justiciability). For an example of a legislative proposal addressing some of these issues, see the American Public Lands and Waters Climate Solution Act of 2019, sponsored by Rep. Raúl Grijalva (D-Ariz.) (H.R. 5435, 116th Cong. (introduced Dec. 16, 2019))

In 2019, researchers, hikers, and outdoor enthusiasts facing unsafe avalanche, fire, and flash flood conditions on federal lands and the loss of natural spaces essential for their professional activities, recreation, and psychological well-being brought suit against the federal land management authorities for violating the plaintiffs' "right to wilderness."[7] The district court judge in *Animal Legal Defense Fund v. United States* held that "there exists no clearly established 'right to wilderness,'" and dismissed the suit.[8] The case is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit. Much of the thinking in this Comment derives from the legal arguments at issue in that lawsuit. Despite the district court's terse rejection, perhaps unintuitively, a right to wilderness has significant grounding in due process principles, which provide a relevant framework for forcing the government to seriously weigh climate change impacts when formulating federal policy.

Part I of this Comment provides background. Part II is an overview of substantive due process. Part III discusses the connection between wild lands and our scheme of ordered liberty, and Part IV, the heart of the Comment, discusses the deep and evolving history and tradition of federal wild land preservation. Part V addresses potential objections based on the Property Clause, and Part VI explains the justification for recognizing an affirmative right. Finally, Part VII offers preliminary observations on standards for evaluating the right, and a brief conclusion.

I. Background

In 1971, Judge Garnett Thomas Eisele of the Eastern District of Arkansas considered the contention that the "right to enjoy the beauty of God's creation, and to live in an environment that preserves the unquantified amenities of life, is part of the liberty protected by the Fifth and Fourteenth Amendments," which should prohibit the building of a dam on state land.[9] Judge Eisele explained that such claims "are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition," but declined to recognize a broad doctrine that "may be in the womb of time, but whose birth is distant."[10]

Little has changed in formal precedent. There have been few published opinions addressing a fundamental right to nature since the 1970s.[11] Moreover, older cases offer little guidance because they involved arenas without a deep history of federal action and were decided prior to the development of the current fundamental rights framework.[12]

Unlike the constitutions of many countries[13] and several U.S. states,[14] the public interest in wild lands[15] enjoys no explicit constitutional protections at the federal level.[16] Presumably, imposing a congressional death sentence on federal wild lands could have a rational basis. Yet the overwhelming majority of the public,[17] including the millions of Americans who visit federal wild lands each year, would consider it "unthinkable"[18] that Congress could deprive present and future generations of the nation's natural beauty without serious justification. Nevertheless, legally speaking, while courts appear to unofficially treat congressionally designated wilderness with special solicitude,[19] the question of a specific fundamental right has not squarely

(curtailing fossil fuel extraction on public lands and proposing "public lands greenhouse gas reduction strategic plan").

7. Animal Legal Def. Fund v. United States, 404 F. Supp. 3d 1294, 1301-02, 49 ELR 20129 (D. Or. 2019), *appeal filed*, No. 19-35708 (9th Cir. Aug. 21, 2019). The author participated in the briefing of the case.
8. *Id.* at 1298.
9. Environmental Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army, 325 F. Supp. 728, 739, 1 ELR 20130 (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972).
10. *Id.* (quoting Spector Motor Serv. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1944) (Hand, J., dissenting)).
11. *See*, *e.g.*, Ely v. Velde, 451 F.2d 1130, 1138, 1 ELR 20612 (4th Cir. 1971) ("While a growing number of commentators argue in support of a constitutional protection for the environment, this newly-advanced constitutional doctrine has not yet been accorded judicial sanction; and appellants do not present a convincing case for doing so."); Tanner v. Armco Steel Corp., 340 F. Supp. 532, 536, 2 ELR 20246 (S.D. Tex. 1972) (declining to find Fourteenth Amendment right to prevent personal injury from defendant's refineries).
12. Presently, there is a lawsuit in the U.S. District Court for the District of Columbia brought by environmental groups and tribes contending President Donald Trump lacked independent executive authority under the Antiquities Act of 1906 to reverse the previous expansion of Grand Staircase-Escalante National Monument by President Barack Obama. However, that case does not address any constitutionally protected status of the land. Wilderness Soc'y v. Trump, No. 1:17-cv-02587 (D.D.C. filed Dec. 4, 2017); *see also* Benjamin Hayes, Congressional Research Service, The Antiquities Act: History, Current Litigation, and Considerations for the 116th Congress (2019), *available at* https://fas.org/sgp/crs/misc/R45718.pdf.
13. *See*, *e.g.*, Port. Const. art. 66, §2(c) ("the state shall be charged with: . . . Creating . . . parks . . . in such a way as to guarantee the conservation of nature and the preservation of cultural values and assets"); Braz. Const. art. 225 ("Everyone is entitled to an ecologically balanced environment, which is an asset of everyday use to the common man . . .; this imposes a duty on the government . . . to protect and preserve it for the present and future generations . . . and arrange for the ecological management of species and ecosystems."); *see generally* Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 Harv. Env't L. Rev. 1 (1992); Lawrence v. Texas, 539 U.S. 558, 572-73 (2003) (reviewing European laws for guidance on scope of due process liberty interest).
14. See discussion *infra* Section III.A.
15. This Comment uses the term "wild lands" to refer to federal lands substantially in their natural state. Federal lands are held under various regimes and agencies. While in common parlance "wilderness" might be the most appropriate label reflective of the public perception that lands with wild character are particularly important, this term has taken on a restrictive, technical meaning under the Wilderness Act that would exclude even the most popular national parks from inclusion in the category of land discussed here.
16. Constitutional amendments were proposed in 1968 and 1970 to assure a right to a "decent environment." H.R.J. Res. 1321, 90th Cong. (1968); H.R.J. Res. 1205, 91st Cong. (1970); Mary E. Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. Env't Aff. L. Rev. 173, 174 (1993).
17. Surveys demonstrate consistently high prioritization of preservation of national parks. *See*, *e.g.*, Carl Brown, *See America First: Public Opinion and National Parks*, Roper Center, https://ropercenter.cornell.edu/see-america-first-public-opinion-and-national-parks (last visited Nov. 18, 2020). "Preserving the ability to have a 'wilderness' experience on forests and grasslands" is a broadly recognized important objective. Deborah J. Shields et al., U.S. Department of Agriculture (USDA), Survey Results of the American Public's Values, Objectives, Beliefs, and Attitudes Regarding Forests and Grasslands: A Technical Document Supporting the 2000 USDA Forest Service RPA Assessment 12 (2002), https://www.fs.fed.us/rm/pubs/rmrs_gtr095.pdf (mean score of 4.15/5 in national telephone survey of 7,069 people).
18. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).
19. *See infra* Section IV.C; Peter A. Appel, *Wilderness and the Courts*, 29 Stan. Env't L.J. 62, 98 (2010) (courts in Wilderness Act cases "employ a more exacting standard of judicial review than may be expected based on the stated standard of review").

been presented to the federal courts until now. Since 1990, it also does not appear that any published article has considered whether federal power is restricted in this domain.[20]

For more than 150 years, the federal government has invoked the underlying principle that certain wild lands constitute a national heritage, mandating a responsibility for perpetual conservation.[21] The number and scope of such properties has expanded, along with the growing demographic, technological, and commercial threats arrayed against the continued existence of wild lands inside and outside of federal stewardship. As recently as August 2020, President Donald Trump declared:

> America's natural landscapes belong to the American people. . . . We will preserve the stunning beauty of the American and the Americas and this nation . . . these exquisite resources [are] "the most glorious heritage a people ever received."[22]

A right to enjoyment of land is one of the oldest protected categories of legal interests. Intangible, experiential, and associational benefits also constitute protectable property and liberty interests.[23] "[D]isruptions to settled expectations grounded in law" is a primary factor implicating questions of substantive due process property rights.[24] If the federal wild lands are a declared heritage, does it not follow that the American people share an expectation interest and the Fifth Amendment serves as a mechanism for preventing waste of this property without proper justification?

The purpose of this Comment is to consider the case for Fifth Amendment protection if substantial portions of federal wild lands were at clear and present risk of destruction, as much research suggests it is. Perhaps easy facts will make for good law.[25] Once basic principles are established in a simplified context, later analysis can engage in finer line drawing.[26]

II. Substantive Due Process Basics

The Fifth Amendment declares that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." The Due Process Clause protects substantive rights to unspecified forms of liberty and property that cannot be infringed upon without appropriate justification. There is nothing in the language of the Fifth Amendment, nor in current jurisprudence, that limits these unenumerated rights to marriage,[27] sexual intimacy,[28] procreation,[29] abortion,[30] travel,[31] loiter,[32] choose a profession,[33] possession of a handgun,[34] child-rearing,[35] bodily integrity,[36] avoidance of excessive punitive damages,[37] freedom from unnecessary confinement,[38] or any other fixed realm.

"To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges."[39] When determining whether a previously unrecognized right implicates due process concerns, the right must first be carefully described.[40] Then, analysis turns on whether the identified right is "fundamental to *our* scheme of ordered liberty . . . or . . . deeply rooted in this Nation's history and tradition."[41]

As explained below, the right of perpetual public access to federal wild lands in a state of natural vitality fits within both of these theories, but principally the second. The availability of wilderness for use and enjoyment was initially fundamental to our conceptual scheme of ordered liberty, with lasting cultural implications; and its preservation as flourishing property for present and future generations is deeply rooted in this nation's history and tradition, even more so than the right to abortion, contraception, and same-sex marriage, which were actively criminalized for much of U.S. history.[42]

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20. Joseph Sax, *The Search for Environmental Rights*, 6 J. Land Use & Env't L. 93 (1990) (arguing a fundamental environmental right is based in democratic values); *see also* James Huffman, *Wilderness and Freedom*, 16 Idaho L. Rev. 407 (1980).
21. *See* Frederick Law Olmsted, Yosemite and the Mariposa Grove: A Preliminary Report (1865).
22. Remarks by President Trump at Signing of H.R. 1957, the Great American Outdoors Act (Aug. 4, 2020) (quoting Theodore Roosevelt); *see also* News Release, NPS, National Park Service Visitation Tops 318 Million in 2018 (Mar. 5, 2019), https://www.nps.gov/orgs/1207/03-05-2019-visitation-numbers.htm ("America's national parks are national treasures that tell the story of our nation and celebrate its beauty, history and culture.").
23. *See*, *e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (residents of housing complex have implied legally cognizable interest in the relational benefits of an integrated community to permit enjoining landlord's racially discriminatory leasing practices).
24. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 988 (2000).
25. Recognizing a right to wild lands will raise a host of new questions, but one ought not decline to "make a sound decision today, for fear of having to draw a sound distinction tomorrow." Eugene Volokh, *The Mechanism of the Slippery Slope*, 116 Harv. L. Rev. 1026, 1030 (2002) (quoting Roy Schotland); *see also* Massachusetts v. Environmental Prot. Agency, 549 U.S. 497, 524, 37 ELR 20075 (2007) (dismissing argument as resting "on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum").
26. The Comment does not evaluate the climate change science, nor consider the evidentiary standards of certainty and immediacy of harm. Nor does it seek to determine precisely how much wild land must remain unimpaired to avoid violation of a fundamental right.
27. Obergefell v. Hodges, 576 U.S. 644 (2015); Loving v. Virginia, 388 U.S. 1 (1967).
28. Lawrence v. Texas, 539 U.S. 558 (2003).
29. Skinner v. Oklahoma, 316 U.S. 535 (1942) (compulsory sterilization of criminals prohibited on equal protection grounds); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to contraception for married persons but not on due process grounds).
30. Roe v. Wade, 410 U.S. 113 (1973).
31. Kent v. Dulles, 357 U.S. 116, 126 (1958).
32. City of Chicago v. Morales, 527 U.S. 41, 54 (1999) (Stevens, Souter & Ginsberg, JJ.) ("the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment").
33. Meyer v. Nebraska, 262 U.S. 390 (1923); Schware v. Board of Bar Exam'rs, 353 U.S. 232 (1957).
34. McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).
35. Troxel v. Granville, 530 U.S. 57, 65 (2000); M.L.B. v. S.L.J., 519 U.S. 102 (1996).
36. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 270 (1990).
37. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).
38. O'Connor v. Donaldson, 422 U.S. 563 (1975).
39. Rochin v. California, 342 U.S. 165, 171-72 (1952).
40. Washington v. Glucksberg, 521 U.S. 702, 708 (1997).
41. McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).
42. *See*, *e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding criminalization of oral and anal sex).

III. Wild Lands Were Fundamental to Our Scheme of Ordered Liberty

A. *Lockean Origins of a Right to Wild Lands*

As a foremost scholar of American environmental history puts it, "Wilderness was the basic ingredient of American culture. From the raw materials of the physical wilderness, Americans built a civilization. With the idea of wilderness they sought to give their civilization identity and meaning."[43] When drafting the Declaration of Independence,[44] the framers relied heavily on John Locke's concept of the social contract, which theorizes an implicit agreement among the members of a society to cooperate for social benefits predicated on the ability of members to exit and return to "a state of nature."[45] European colonists had previously arrived in the "New World" highly conscious of Locke's notion of the state of nature, and understood it literally as a state that "did exist at the time of his writing, amongst the Indians of America."[46]

Indeed, many colonial charters and constitutions included the right to exit and form a new community or state.[47] Thus, the freedom to travel is guaranteed by the Fifth Amendment: "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. . . . It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads."[48] From both a practical and philosophical standpoint, open public lands were essential to early European settlers. The later formation of the country was predicated on federal control of western lands—Maryland refused to ratify the Articles of Confederation until states with western land claims ceded them to the federal government.[49]

The British closing of the western frontier to unrestricted settlement in 1763 to resolve the French and Indian War was a primary driver of the Revolutionary War.[50] It was specifically and intentionally within this environmental setting that the colonists sought to form a representative democracy, distinct from the European governing structures that existed on European lands already denuded of wilderness for hundreds of years. The existence and proximity to wilderness was critical to developing as a polity protective of individual rights, autonomy, and privacy that explicitly embodied Lockean principles in the Declaration of Independence.

B. *Federal Wild Lands Provide Important Opportunities to Express Individual Liberty*

For much of the 18th and 19th centuries, the western frontier allowed European Americans to withdraw, to a meaningful extent, from the existing social and governmental intrusions. Wilderness was viewed as an essential, but dangerous and foreboding, utilitarian asset.[51] But as governmental control necessarily expanded to cover all annexed lands, it became infeasible for individuals to withdraw to their own portion of wilderness. Similar to the shift away from private firearms serving as a recognized "check against the usurpation and arbitrary power of rulers," yet retaining their fundamental status,[52] federal wild lands increasingly took on a less-literal Lockean meaning. Yet they continue to provide critical opportunities to express and experience core liberty and privacy values. As explained by Justice William Douglas, in wilderness, one "is free of the restraints of society and free of its safeguards too."[53]

The U.S. Constitution's protections are not limited to the forms or technologies available at the nation's founding. Put simply: "We do not interpret constitutional rights that way."[54] The function of the Fifth Amendment is to allow "future generations [to] protect . . . the right of all persons to enjoy liberty as we learn its meaning."[55] In Justice Anthony Kennedy's formulation, "As the Constitution

43. Roderick Nash, Wilderness and the American Mind xi (4th ed. 2001).
44. The Declaration of Independence states:
> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the Consent of the governed . . .

The Declaration of Independence para. 2 (U.S. 1776).
45. *See* John Locke, The Second Treatise on Government 267-68 (David Wooton ed., Hackett Pub. Co. 2003) (1690).
46. Joshua Dienstag, *Between History and Nature: Social Contract Theory in Locke and the Founders*, 58 J. Pol. 985, 993-94 (1996); Morag Barbara Arneil, All the World Was America (1992) (Ph.D. dissertation, University College of London), https://discovery.ucl.ac.uk/id/eprint/1317765/1/283910.pdf.
47. Liberties of the Massachusetts Colonies in New England (1641), art. 17, *available at* http:// history.hanover.edu/texts/masslib.html ("Every man of or within this Jurisdiction shall have free liberties . . . to remove both himself, and his family at their pleasure out of the same."); Pa. Const. of 1776, Declaration of Rights, art. XV, *reprinted in* 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 3081, 3084 (Francis Newton Thorpe ed., 1909) ("That all men have a natural inherent right to . . . form a new state in vacant countries, or in such countries as they can purchase, whenever they think that thereby they may promote their own happiness."); Vt. Const. art. XVII (1777), *available at* http:// avalon.law.yale.edu/18th_century/vt01.asp ("That all people have a natural and inherent right . . . to form a new State in vacant countries, or in such countries as they can purchase[ ] whenever they think that thereby they can promote their own happiness."); William Blackstone, Commentaries on the Laws of England 130 (1765) (right to move "to whatsoever place one's own inclination may direct").
48. Kent v. Dulles, 357 U.S. 116, 126 (1958).
49. Paul W. Gates & Robert W. Swenson, History of Public Land Law Development 49-50 (1968); *see also* Muhn & Stuart, *supra* note 1, at 2, 275.
50. *See*, *e.g.*, Gordon Wood, The American Revolution 22 (2002).
51. Nash, *supra* note 43, at 35; Green v. Liter, 12 U.S. (8 Cranch) 229, 248 (1814) (holding no obligation for actual possession of land in 1779 to confer title: "Kentucky was a wilderness. It was the haunt of savages and beasts of prey. Actual entry or possession was impracticable, and if practicable it could answer no beneficial purpose.").
52. McDonald v. City of Chicago, 561 U.S. 742, 769-70 (2010); *see also id.* at 770 ("By the 1850s, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern.").
53. William Douglas, Men and Mountains (1950).
54. District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (finding the notion that only 18th-century arms are protected by the Second Amendment as "bordering on the frivolous").
55. Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

endures, persons in every generation can invoke its principles in their own search for greater freedom."[56]

President George W. Bush succinctly reflected, "Americans are united in the belief that we must preserve this treasured heritage."[57] National parks and other federal protected wild lands are visited hundreds of millions of times each year.[58] And in recognition of its deep value, public opinion surveys show that protecting wilderness "for future generations," protecting a "future option to visit" the area, and "[j]ust knowing it exists" all still polled higher than actually using the area for present recreation.[59]

Protected public wild lands are the product of a history and tradition reflecting a recognition of the unique liberty and property interests that these lands offer the American people, which are unavailable elsewhere. Experiences in wild nature provide "freedom of individual development."[60] While no longer affording a literal Lockean escape, unstructured experiences offer opportunities for risk-taking and self-directedness that "satisfy the desire for variety and novelty of experience, and leave room for feats of ingenuity and invention."[61] Such amenities are in decline in the wider, technologically addled society, and engage "aspirations toward honor, nobility, integrity and courage."[62] As the Ninth Circuit explained in recognizing a right to protection against warrantless searches in national parks, "one of the primary purposes of our national parks" is to allow expression of "visitors' fundamental right to be left alone."[63]

Tens of millions of Americans each year interact with wilderness in a variety of recreational and professional modes and in varying levels of intensity and duration. Like other rights—such as political speech, procreation, abortion, travel, teaching, learning a foreign language, accessing a loaded pistol, same-sex-marriage, or interracial marriage—this right is not exercised, desired, understood, or utilized equally by all people. But this does not detract from its fundamental character. Public wild lands are long appreciated as a place to be let alone; to experience solitude or an absence of coercive human control; to commune with nature, a spirituality greater than one's self, and people of one's choosing; to observe beauty and appreciate other life forms; to recognize an order that contrasts with the society created by people; and to function independently and self-sufficiently.[64] "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[65]

For generations, for millions of Americans, this liberty is embodied in the enjoyment of federal wild lands in a natural sustained state. Collapse of ecological systems central to the character and vitality of these reserves would fundamentally alter this experience. It is for these deep-seated cultural and philosophical reasons that the protection of wild lands is deeply rooted in the American history and tradition, as discussed in the next part.

IV. Protection of Wild Lands Is Deeply Rooted in American History and Tradition

The right to enjoy public wild lands is independent of any specific legislation. Yet fundamental rights can be recognized in "the usual repositories of our freedom, such as federal and state constitutional provisions, constitutional doctrines, statutory provisions, common-law doctrines, and the like."[66] Since coming under recognized threat of extensive infringement in the mid-19th century, wild lands have been subject to increasing management by the federal government as a heritage for the American people in the national parks, national forests, and other federally protected wild lands. A failure by the federal government to protect those lands from the ravages of climate change, or engaging in a greenhouse gas-intensive pattern and practice that exacerbates climate change, would undermine this extensive history.[67]

A. Pre-Civil War: Awakening of a Wild Lands Consciousness

In the colonial period and early years of the nation's founding, the availability of vast western lands to European settlers and the near-doubling of the land area claimed by the United States through the Louisiana Purchase resulted in minimal practical concern that the continent's "superabundance" would soon be exhausted.[68] Yet amid explosive national expansion and the rapid levelling of wilderness to create farms and rangelands, cut timber, and extract minerals, and well before increased appreciation of the prob-

56. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).
57. Presidential Proclamation No. 7665, National Park Week, 2003, 68 Fed. Reg. 19929 (Apr. 23, 2003).
58. News Release, NPS, *supra* note 22; Bureau of Land Management, U.S. Department of the Interior, Public Land Statistics 2017, at 178 (2018), *available at* https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2017.pdf (estimating 67,000,000 recreational visits in fiscal year 2017 to Bureau of Land Management (BLM) lands).
59. Appel, *supra* note 19, at 92; *see also* Douglas W. Scott, Campaign for America's Wilderness, A Mandate to Protect America's Wilderness 1, 36 (2003), *available at* https://www.pewtrusts.org/~/media/legacy/uploadedfiles/peg/publications/report/mandate-to-protect-americas-wilderness.pdf (citing April 2001 *Los Angeles Times* national poll of 813 adults showing 91% stating preserving wilderness areas and open spaces is personally important).
60. Joseph Sax, *Freedom: Voices From the Wilderness*, 7 Env't L. 565, 569 (1977).
61. *Id.* (quoting John Rawls, A Theory of Justice 426-27 (1971)).
62. *Id.* at 573.
63. United States v. Munoz, 701 F.2d 1293, 1298 (9th Cir. 1983); *see also* Hill v. Colorado, 530 U.S. 703, 716-17 (2000) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (as "'the right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men'"); Carter Dillard, *The Primary Right*, 29 Pace Envtl. L. Rev. 860, 891 (2012) (discussing wilderness as the ultimate expression of right to be let alone).
64. John Copeland Nagle, *The Spiritual Values of Wilderness*, 35 Env't L. 955, 979 (2005).
65. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992).
66. Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1244 (11th Cir. 2004); *see generally* Lawrence v. Texas, 539 U.S. 558, 570-71 (2003) (surveying state sodomy laws).
67. Jarvis & Jarvis, *supra* note 2 (former director of NPS describing "systematic dismantling of a beloved institution" to enable mineral extraction).
68. Craig Allin, The Politics of Wilderness Preservation 12 (1982); *see also* Muhn & Stuart, *supra* note 1, at 1-9.

lem of ecosystem loss in the latter half of the 19th century, there developed broadening public appreciation of the intrinsic experiential, religious, and aesthetic value of wild nature.[69] As would be expected, this was expressed across a wide range of cultural venues and consciously connected to Lockean values of liberty,[70] in contrast with monarchy and lack of wilderness in the Old World.[71]

As early as the 1830s, some naturalists and explorers, such as George Perkins Marsh, a congressman from Vermont, minister to the Ottoman Empire, and ambassador to Italy, began to warn of the ecological dangers of degradation of nature.[72] While urban commons and parks were features of the first European settlements,[73] painter George Catlin in 1832 is credited as the first to propose the creation of a "Nation's Park" to preserve grasslands "in their pristine beauty and wildness" for perpetuity.[74]

Painting and literature played a central role in bringing public awareness to the beauty of distant wilderness in an era before safe, rapid, and inexpensive personal travel.[75] Obvious, and still well-known, examples of the depiction of nature as an American treasure include the Hudson River School paintings by Thomas Cole (b. 1801) and Fredrick Edwin Church (b. 1826), the popular writings and lectures of Henry David Thoreau (b. 1817) and Ralph Waldo Emerson (b. 1803) praising virtue of "essences unchanged by man; space, the air, the river, the leaf,"[76] and the western frontier-facing poetry of Walt Whitman (b. 1819), the leading poet of his day. Simultaneously, travelogues and illustrations by naturalists such as John Audubon (b. 1785), and earlier botanist John Bartram (b. 1699) and explorer Daniel Boone (his alleged-autobiography was published in 1787), emphasizing the majestic diversity of American plant and animal life, gained increased national attention.[77] These cultural figures and motifs were central to the eventual development of a broad consensus that the federal government had a duty to protect wild lands for future generations.

B. *Post-Civil War: Development of a Federal Preservation Regime*

Wild lands are deeply rooted in American tradition, transitioning in the 19th century from a place of physical, political refuge, to an idea, ideal and experience, central to American identity. During the population and economic growth and urbanization that followed the Civil War, public recognition of the need to safeguard nature accompanied growing awareness of its obliteration.[78] One source of growing nature appreciation was, as Cole said in 1853, "the wilderness passing away, and the necessity of saving and perpetuating its features."[79]

The U.S. Supreme Court, in *District of Columbia v. Heller,* recognized that some constitutional issues remain unresolved because "[f]or most of our history the question did not present itself."[80] Just as there was no need to specify the type of small arms that could be borne when militia weapons and hunting weapons were alike, the public and legislature saw little need to set aside land for the first 100 years of the country's existence when wilderness was so abundant. However, as irreplaceable wild, scenic lands became scarce, a consensus arose on the need for affirmative conservation.[81]

In 1864, in the midst of the Civil War, Congress declared the necessity of preserving Yosemite and Mariposa Grove by deeding it to the state of California for "public use, resort and recreation," because it was assumed that the state could more effectively protect it.[82] In 1872, Yellowstone was "reserved . . . and dedicated and set apart as a public park" with regulations to preserve natural elements within the park "in their natural condition."[83] Congress soon designated additional parks.[84]

In 1891, the president was granted authority to "set apart and reserve" "permanent" federal forest lands for the public.[85] Immediately upon passage of the Forest Reserve Act, the first national forests, then known as public forest reservations, were established by President Benjamin Har-

69. Donald Worster, The Wilderness of History 225 (1997).
70. Nash, *supra* note 43, at 69, 78-79.
71. Frederick Jackson Turner's *The Significance of the Frontier in American History* (1893) argued that continual re-exposure to wilderness during the westward expansion was the driving force in developing distinctively American institutions and sensibilities about liberty and individualism. Though justly criticized for its oversimplification and elevation of a racist and genocidal Manifest Destiny, see generally John Opie, *Frederick Jackson Turner, the Old West, and the Formation of a National Mythology*, 5 Env't Hist. Rev. 79 (1981), which has been recognized as the text with "a more profound influence on thought about American history than any other essay or volume written on the subject." Richard Hofstadter, *Turner and the Frontier Myth*, 18 Am. Scholar 433 (1949) (quoting Charles A. Beard); *see also* Martin Ridge, *The Life of an Idea: The Significance of Frederick Jackson Turner's Frontier Thesis*, 41 Mont.: Mag. W. Hist. 2 (1991).
72. James Turner, The Promise of Wilderness: American Environmental Politics Since 1964, at 20 (2012).
73. Hans Huth, *The American and Nature*, 13 J. Warburg & Courtauld Inst. 101, 141 (1950).
74. Allin, *supra* note 68, at 14; *see also* Jurretta Heckscher, *Documentary Chronology of Selected Events in the Development of the American Conservation Movement, 1847-1920*, Libr. Congress, http://memory.loc.gov/ammem/amrvhtml/cnchron1.html (last visited Nov. 18, 2020); *but see also* John Ise, Our National Park Policy 13 (1961) (Hot Springs National Reservation, established by the federal government in Garland County, Arkansas, in 1832, was the first federally protected land, but it was intended to protect recreational access, not natural character.).
75. Huth, *supra* note 73, at 147.
76. Ralph Waldo Emerson, Nature 7 (1837).
77. Nash, *supra* note 43, at 53, 55, 63; Huth, *supra* note 73, at 108.
78. *See*, *e.g.*, Allin, *supra* note 68, at 19; *see also* Joseph L. Sax, *Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England*, 78 Cal. L. Rev. 1543 (1990) (discussing parallel movement to preserve antiquities in England in later 18th century in which "preservation is conceived as a duty of the modem state").
79. Huth, *supra* note 73, at 120.
80. 554 U.S. 570, 626 (2008).
81. *See* Sax, *supra* note 20, at 103-04 (discussing ancient tradition of "safeguarding and passing on cultural capital"); Mark Stoll, *"Sagacious" Bernard Palissy: Pinchot, Marsh, and the Connecticut Origins of American Conservation*, 16 Env't Hist. 4, 18 (2011) (discussing colonial tradition of stewardship).
82. An Act Authorizing a Grant to the State of California of the Yo-Semite Valley, 13 Stat. 325 (1864).
83. An Act to Set Apart a Certain Tract of Land Lying Near the Headwaters of the Yellowstone River as a Public Park, 17 Stat. 32 (1872).
84. Mackinac National Park was formed in 1875 (later deeded to the state of Michigan). In 1890, General Grant National Park (renamed Kings Canyon National Park in 1940), 26 Stat. 650 (1890), and Sequoia National Park, 26 Stat. 478 (1890), were established.
85. An Act to Repeal Timber-Culture Laws, and for Other Purposes, §24, 26 Stat. 1095 (1891) (known as the Forest Reserve Act).

rison. Initially, these forests were held largely as a timber resource, and, unlike in national parks where extraction is prohibited, logging is permitted but they have increasingly transitioned to recreational sites. Presently, there are more than 150 national forests and national grasslands.[86]

The protection of wild lands for the public occurred alongside the ongoing divestment and development of federal lands under the Homestead Act of 1862, General Mining Law of 1872, and Desert Land Act of 1877. This is no coincidence. The national parks and national forests were necessary specifically to ensure that some wild lands remained protected for the enjoyment of all Americans. After all, why seek to preserve that which is ubiquitous and needs no protecting?

In 1903, President Theodore Roosevelt explained the philosophy of park development: "We should keep the trees as we should keep great stretches of the wildernesses as a heritage for our children and our children's children. Our aim should be to preserve them for use, to preserve them for beauty, for the sake of the nation hereafter."[87] The pace of dedication of land for public enjoyment increased rapidly in the 20th century with the creation of the U.S. Forest Service, National Park Service, and other land management agencies.[88]

The National Park Service Organic Act of 1916 declares that the purpose of the Park Service is "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as *will leave them unimpaired for the enjoyment of future generations*."[89] Under the Act, all national parks are part of "one National Park System" that is a "cumulative expression[ ] of a single national heritage," to be "preserved and managed for the benefit and inspiration of all the people of the United States."[90] Currently, there are 417 areas within the National Park System.

In the last years of the 19th century and first years of the 20th, states created their own nature preserves at a furious pace to claw back land that had been lost and to protect it from imminent encroachment.[91] The conservationist and public rights trend only continued to expand with the establishment of numerous state and federal recreation areas during the 1920s, then under the New Deal and upon increased concern for nature in the later part of the century.[92]

Nearly all statutes governing and designating federal public lands declare that the lands are intended to remain available for public recreation and other types of personal enjoyment by future generations.[93] This is a common denominator of federal public lands policy, and particularly codified in the terminology of national parks legislation.[94]

Notably, it does not appear that any national park unit established on account of its exceptional ecological character, as opposed to geological or historical distinction, was ever removed from governmental (federal or state) recreation stewardship.[95] Some parks have been transferred to other federal departments or became part of state parks.[96] In contrast, parks created for purely historical reasons have been disbanded. For instance, Mar-a-Lago, Marjorie Merriweather Post's 115-room mansion deeded to the United States in 1972 as a presidential retreat, was briefly a

86. USDA, *Find National Forests and Grasslands*, https://www.fs.fed.us/recreation/map/finder.shtml (last visited Dec. 3, 2020).
87. Address of President Roosevelt at Santa Cruz, California (May 11, 1903).
88. The long lag between creation of the first national park and establishment of the Forest Service stemmed largely "from concerns about increasing the size and cost of the federal government." Richard Sellers, Preserving Nature in the National Parks: A History 35 (1997).
89. National Park Service Organic Act §1, 39 Stat. 535 (1916), 54 U.S.C. §100101(a) (emphasis added); *see generally* Eric Biber & Elisabeth Long Esposito, *The National Park Service Organic Act and Climate Change*, 56 Nat. Res. J. 193 (2016) (discussing purpose of Act and NPS authority to address climate change).
90. 54 U.S.C. §100101(b)(1)(B), (C) (Pub. L. No. 91-383, §1, 84 Stat. 825 (1970)).
91. *See* John Henneberger, *State Park Beginnings*, 17 Geo. Wright F. 9 (2000), *available at* http://www.georgewright.org/173.pdf (discussing early state parks). Early state parks include Putnam Memorial State Park, Connecticut (1887); Greylock State Reservation, Massachusetts (1893); Itasca State Park, Minnesota (1891); and Palisades Interstate Park, New Jersey and New York (1895).
92. Allin, *supra* note 68, at 77, 94.
93. *See, e.g.*, National Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-541, 82 Stat. 906 (preserving free-flowing waterways for public enjoyment); National Trails System Act of 1968, Pub. L. No. 90-543, 82 Stat. 919 (establishing trails to "promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas") (16 U.S.C. §1241(a)); National Forest Management Act of 1976 (NFMA), Pub. L. No. 94-588, 90 Stat. 2949, 16 U.S.C. §§1600-1687, ELR Stat. NFMA §§2-16 (mandating that forest planning include wildlife, wilderness, and recreation use planning); Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743, 43 U.S.C. §§1701-1785, ELR Stat. FLPMA §§102-603 (including purpose to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource . . . preserve and protect certain public lands in their natural condition . . . provide for outdoor recreation") (43 U.S.C. §1701 note)); National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3468 (establishing new parks, wilderness area, and scenic rivers); National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (stating mission to conserve, manage, and restore habitats "for the benefit of present and future generations of Americans") (16 U.S.C. §668dd(a)(2)); Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (stating purpose to "conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations") (16 U.S.C. §7202(a)).
94. Here is a small but representative sample of the preservation language in some national park legislation:

> Jean Lafitte National Historical Park and Preserve is established "[i]n order to preserve for the education, inspiration, and benefit of present and future generations significant examples of natural and historical resources of the Mississippi Delta region," and for other reasons. 16 U.S.C. §230.
>
> "In order to preserve for the benefit, use, and inspiration of present and future generations certain majestic mountain scenery, snow fields, glaciers, alpine meadows, and other unique natural features in the North Cascade Mountains of the State of Washington, there is hereby established, subject to valid existing rights, the North Cascades National Park." *Id*. §90.
>
> Mount Rainier National Park is "dedicated and set apart as a public park . . . for the benefit and enjoyment of the people." *Id*. §91.
>
> Lewis and Clark National Historic Park is established "[i]n order to preserve for the benefit of the people of the United States the historic, cultural, scenic, and natural resources associated with the arrival of the Lewis and Clark Expedition in the lower Columbia River area." *Id*. §410kkk-1(a).

95. *See* Bob Janiskee, *Gone and Mostly Forgotten: 26 Abolished National Parks*, Nat'l Parks Traveler, Dec. 30, 2011, https://www.nationalparkstraveler.org/2011/12/gone-and-mostly-forgotten-26-abolished-national-parks9202 (Shoshone Cavern National Monument, cave system of mere 210 acres established by the president in 1909, was transferred by Congress in 1954 to the city of Cody, Wyoming).
96. *Id.*

national historic site before being sold to President Trump in 1985 due to excessive upkeep cost.[97]

Just as the Supreme Court in *Brown v. Board of Education* held that in addressing segregated education "we cannot turn the clock back to 1868, when the Amendment was adopted . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation"[98]; so the status of federal wild lands must be analyzed based not only on land practices at the time of enactment of the Fifth Amendment, but rather on their significance to the public today, which, like public education, "is certainly both so long-standing and uniform as to be taken for granted in twenty-first-century America."[99] A failure to rein in climate change will incrementally defeat the statutory schemes intended to maintain nature unimpaired. As Aldo Leopold asked nearly a century ago, "Shall we now exterminate this thing that made us American?"[100]

The dynamics that drove the initial federal conservation legislation 150 years ago continue unabated. With expanding urbanization, deeper ecological awareness, and easier access to federal lands, public concern for nature and wildlife is commonplace and continually becoming an even higher priority. Yet, unchecked, national policies favoring emissions-intensive activity may denude federal wild lands of their natural character, making these lands unsuitable for safe public enjoyment within a state of wilderness.

C. *Wilderness Act Jurisprudence Implicitly Recognizes Wilderness as a Special Category*

The Court in *Lawrence v. Texas* emphasized the importance of more recent history in identifying an "emerging awareness" of a given right.[101] While the "dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right,"[102] *Lawrence* highlighted that constitutional trends can be discerned by legislative behavior.[103] At the same time, the import of this evidence, or lack thereof, must be considered carefully because courts do not simply provide a constitutional rubber stamp to popular legislation: "An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act."[104]

To date, the right to wild lands has been most clearly expressed in the Wilderness Act of 1964,[105] which protects a unique subset of federal wild lands defined as "wilderness."[106] The title of the Act declares the purpose to preserve wilderness "for the permanent good of the whole people," and the first subsection states that "it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."[107] The Act was overwhelmingly approved by Congress, passing in the Senate 73-12 and in the House 373-1.[108] Passage "was rooted in long-standing concerns for conservation and preservation"[109]:

> The campaign was not won with careful research briefs on the state of the nation's timber or petroleum supply or the diversity of wildlife in wilderness. Instead, it appealed to national values—patriotism, spirituality, outdoor recreation, and a respect for nature—and the responsibility of the people and government to protect them.[110]

Since 1964, every president, including President Trump, has approved legislation adding land to the National Wilderness Preservation System.[111]

If federal wild lands implicate fundamental property and liberty interests, court cases involving the Wilderness Act are where the application of "due process" is likely to be most evident. The case law does not disappoint. Justice John Harlan, in his concurrence to *Gideon v. Wainwright*,[112] recognized that constitutional norms can be identified by the level of scrutiny applied, even when the formal judicial explanations do not yet speak in those terms. There, he was referring to the decision to overturn *Betts v. Brady*, and to guarantee state criminal defendants an affirmative right to counsel. "In truth," he said, referring to the numerous exceptions that have been invoked in federal cases, "the *Betts v. Brady* rule is no longer a reality. This evolution, however, appears not to have been fully recognized by many state courts."[113]

97. Bob Janiskee, *Pruning the Parks: Mar-a-Lago National Historic Site (1972-1980) Was a Gift the National Park Service Couldn't Afford to Keep*, Nat'l Parks Traveler, Oct. 13, 2008, https://www.nationalparkstraveler.org/2008/10/pruning-parks-mar-lago-national-historic-site-1972-1980-was-gift-national-park-service-could.
98. 347 U.S. 483, 492-93 (1954); *see also* District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (discussing development of firearm technology).
99. Gary B. v. Whitmer, 957 F.3d 616, 650 (6th Cir. 2020) (discussing public education), *vacated by* 958 F.3d 1216 (2020) (see 6th Cir. R. 35(b) (vacating decision upon acceptance for rehearing)), *and* No. 18-1855, 2020 U.S. App. LEXIS 18312, at *10 (6th Cir. June 10, 2020) (dismissing rehearing due to settlement by the parties rendered case moot).
100. Aldo Leopold, Wilderness as a Form of Land Use 78 (1925).
101. 539 U.S. 558, 571-72 (2003). Even before *Bowers v. Hardwick*, 478 U.S. 186 (1986), upheld Georgia's statute criminalizing sodomy, the Supreme Court had considered the constitutionality of such laws so obvious that it unanimously summarily affirmed Virginia's felony criminalization without discussion in *Doe v. Commonwealth's Attorney of Richmond*, 425 U.S. 901 (1976).
102. Obergefell v. Hodges, 576 U.S. 644, 677 (2015).
103. *Lawrence*, 539 U.S. at 573.
104. *Obergefell*, 576 U.S. at 677.
105. 16 U.S.C. §§1131-1136 (Pub. L. No. 88-577, 78 Stat. 890); 110 Cong. Rec. 17438 (1964) (statement of Rep. Bennett on passage of the Wilderness Act) (the federal government holds title to a "priceless wilderness heritage, a heritage that once destroyed can never be replaced").
106. Formal "wilderness" constitutes a small fraction of federal land and is defined as an area that
> (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition.

16 U.S.C. §1131(c).
107. *Id.* §1131(a).
108. Turner, *supra* note 72, at 18.
109. *Id.*
110. *Id.* at 18-19.
111. Appel, *supra* note 19, at 65.
112. Gideon v. Wainwright, 372 U.S. 335, 352 (1963).
113. *Id.*

Similarly, one indication that wild lands protection implicates fundamental values is that courts "employ a more exacting standard of judicial review" to Wilderness Act cases "than may be expected based on the stated standard of review."[114] Despite the lip service given to the deferential *Chevron* standard that normally applies to agency actions, a searching study by the late Prof. Peter Appel documented that between 1964 and 2010, agencies *lost* most cases against environmental organizations that were claiming insufficient wilderness protection under the Act, yet *won* the vast majority (88%) of cases brought by individuals challenging restrictions as overly protective.[115] This pro-protection win rate is inconsistent with win rates documented in studies on other areas of environmental law, leading Professor Appel to conclude that other systemic factors must be at play.[116] He surmised that judges are risk-averse to approving wilderness destruction and have a bipartisan pro-wilderness protection bias.[117]

Perhaps, the most obvious deeper explanation for this "bias" is that judges implicitly recognize that wilderness is not simply another resource, but implicates a special right of present and future generations.[118] Much as the Supreme Court has recognized in death-penalty cases, "death is different."[119] When the permanent destruction of federal wild lands is at stake, cases must be handled differently as well. Heralding the National Environmental Policy Act (NEPA),[120] President Richard Nixon said more than 50 years ago in his 1970 New Year's resolution: these "must be the years when America pays its debt to the past . . . It is literally now or never."[121] Unfortunately, federal subsidization of greenhouse gas-emitting activities and federal inaction threatens to undermine formal protection of designated wilderness.

D. *The Constitutional Status of Nature Has Been Recognized in State Law*

After briefly surveying federal enactments above, it is appropriate to look also to state laws embedding the history and tradition of wild land preservation.[122] All states have established state parks to preserve wild lands for public enjoyment. The early example of New York is particularly instructive.

The state took Niagara Falls in 1885 by eminent domain after a commission that included the sitting U.S. vice president, ex-governor of New York, and president of Columbia College recommended that the falls be preserved in a "state of nature" for "access to all mankind."[123] The commission declared that the question of preservation "cannot be regarded simply as an economical one . . . gifts of nature which appeal to the higher sensibilities of mankind by their beauty and by their grandeur, are entitled to reverential protection."[124] The state "holds it under sacred obligations to mankind . . . It cannot be doubted that another generation will hold us greatly to account if we so neglect or so badly administer our trust that the Falls of Niagara lose their beauty and human interest."[125] This was followed by the establishment of Adirondack Park, in which the lands "shall be forever kept as wild forest lands" under an amendment to the New York Constitution, which won mass electoral support in 1894.[126] While these areas are certainly of outstanding scenic value, the notion of an ongoing state obligation of protection is not by any means unique to these pronouncements and is the standard formula of land conservation laws as discussed above.

Moreover, at least 15 states have enshrined protection of wild lands within their constitutions, primarily in the past 50 years.[127] States with constitutional protections include Florida, Hawaii, Illinois, Louisiana, Massachusetts, Michigan, Montana, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, Texas, Utah, and Virginia.[128]

114. Appel, *supra* note 19, at 98.
115. *Id.* at 66-67.
116. *Id.* at 114-15.
117. *Id.* at 119, 124.
118. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution. But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation.").
119. Ford v. Wainwright, 477 U.S. 389, 411 (1986); *see also* Lockett v. Ohio, 438 U.S. 586, 605 (1978) (individualized analysis needed in capital sentencing because "nonavailability of corrective or modifying mechanisms").
120. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
121. Statement of President Nixon About the National Environmental Policy Act of 1969 (Jan. 1, 1970).
122. *See* Lawrence v. Texas, 539 U.S. 558, 570-71 (2003).
123. *The Preservation of Niagara*, 5 Science 398 (1885).
124. Horatio Seymour, Special Report of the New York State Survey on the Preservation of the Scenery of Niagara Falls 15 (1880).
125. *Id.*
126. Louise A. Halper, *A Rich Man's Paradise: Constitutional Preservation of New York State's Adirondack Forest, a Centenary Consideration*, 19 Ecology L.Q. 193, 196 (1992).
127. *See* McDonald v. City of Chicago, 561 U.S. 742, 777 (2010) (considering state constitutions in analyzing whether Due Process Clause protects right to bear arms).
128. Fla. Const. art II, §7(a) ("It shall be the policy of the state to conserve and protect its natural resources and scenic beauty."); Haw. Const. art. XI, §1 (The state "shall conserve and protect Hawaii's natural beauty and all natural resources."); Ill. Const. art. XI, §1 ("The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations."); La. Const. art. IX, §1 ("The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved . . ."); Mass. Const. art. XCVII ("The people shall have the right to . . . natural, scenic, historic, and esthetic qualities of their environment."); Mich. Const. art. IV, §52 ("The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern."); Mont. Const. art. IX, §1(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."); N.M. Const. art. XX, §21 ("The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest."); N.Y. Const. art. XIV, §4 (The "policy of the state shall be to conserve and protect its natural resources and scenic beauty."); *id.* §1 (Adirondack Park "shall be forever kept as wild forest lands."); N.C. Const. art. XXIV, §5 ("It shall be the policy of this State . . . to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, open lands, and places of beauty."); Pa. Const. art. 1, §27 ("The people have a right to . . . the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."); Tex. Const. art. XVI, §59 ("development of parks and recreational facilities, . . . the conservation and development of its forests, . . . [are] hereby declared public rights and duties"); R.I. Const. art. I, §17 (The people "shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preserva-

While analysis of judicial interpretation of these provisions and their varying applicability to specific lands is beyond the scope of this Comment, the enactments themselves are widespread legal recognition that wild lands are not mere property, but a fundamental endowment of the people. As noted above, the federal history of wild land preservation is deeper than that of any state.

V. The Property Clause Does Not Undermine a Public Right to Wild Lands

Having identified the evidence for a Fifth Amendment right, it is necessary to dispel a potential, perceived impediment to such a right: the Property Clause. The language of the Constitution authorizing Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"[129] grants the government plenary authority. Yet it is limited to "needful" laws, as opposed to those that would violate any of the Bill of Rights, as proposed the year after the Constitution was ratified or as subsequently interpreted.

For instance, clearly the federal government could not establish a national church or impose racial segregation on military bases on authority of the Property Clause. Similar language in Article I, Section 8, granting Congress "exclusive Legislation" over Washington, D.C., did not prevent the Court in *Bolling v. Sharpe* from holding school segregation in the district a violation of due process. As an indication of its irrelevance, the Court in *Bolling* did not even bother to mention Congress' Article I authority at all.

In *Juliana v. United States*, a recent climate change case considering "a right to a climate system capable of sustaining human life," U.S. District Judge Ann Aiken examined the intersection of the Due Process Clause and Property Clause.[130] Her opinion explained that the federal government could be liable for greenhouse gas emissions originating on federal land, since no case has held that "the Constitution grants the federal government unlimited authority to do whatever it wants with any parcel of federal land, regardless of whether its actions violate individual constitutional rights."[131]

VI. Federal Control Over Wild Lands Imposes an Affirmative Obligation to Protect Them

Prof. Joseph Sax opened his analysis of a fundamental environmental right with the observation that "the goal would not be government abstention, but rather a call for affirmative action by the state, a demand that it assure, as a right of each individual, some level of freedom from environmental hazards or some degree of access to environmental benefits."[132]

However, unlike the provision of welfare resources that, in a market economy, are usually obtained from private actors, or even protection of the air that is ownerless, the *res* at issue here is itself federal land. A historical commitment to preserve a meaningful quantity of wild lands in a natural state for public enjoyment entails a corresponding duty on the government to prevent interference with that condition. Failure to curb greenhouse gas emissions will render void and functionally repeal an entire constellation of conservation laws. The government possesses broad authority to protect its own property from outside harms.[133] As with the First Amendment, the Fifth Amendment's "freedoms can no more validly be taken away by degrees than by one fell swoop."[134]

Despite establishing a general rule of no due process right to governmental protection against third-party action,[135] the Supreme Court "has recognized affirmative fundamental rights."[136] Where individuals are unable to exercise their own private rights, the state has a positive obligation to assist them. For instance, to give effect to individual First Amendment guarantees of freedom of religion, despite the prohibition in the Establishment Clause, the government has an affirmative obligation to provide state-funded clergy to incarcerated persons, military personnel, and hospitalized patients.[137] Similar affirmative obligations are imposed in other contexts as well.[138]

Late last year, the U.S. Court of Appeals for the Sixth Circuit in *Gary B. v. Whitmer* held that children have a substantive due process right to a basic public education as a necessary antecedent to political and economic participation in a contemporary democratic society.[139] While depublished on nonsubstantive grounds, the panel's opinion provides support for a public right to minimum access to protected, federal wild lands as well. To overcome the general presumption that there is no duty to provide affir-

tion of their values."); Utah Const. art. XVIII, §1 ("The Legislature shall enact laws to prevent the destruction of and to preserve the Forests on the lands of the State."); Va. Const. art. II, §1 ("[T]he people have . . . the use and enjoyment for recreation of adequate public lands, waters, and other natural resources . . .").

129. U.S. Const. art. IV, §3, cl. 2.

130. 217 F. Supp. 3d 1224, 1260, 46 ELR 20175 (D. Or. 2016), *overturned on unrelated standing grounds*, 947 F.3d 1159, 1174 n.9, 50 ELR 20025 (9th Cir. 2020) (petition for rehearing filed Mar. 4, 2020).

131. *Id.* at 1259.

132. Sax, *supra* note 20, at 95.

133. *See* Kleppe v. New Mexico, 426 U.S. 529, 6 ELR 20545 (1976) (authority to protect federal wildlife even after it leaves federal property); *Protecting National Parks From Developments Beyond Their Borders*, 132 U. Pa. L. Rev. 1189 (1984).

134. National Lab. Rel. Bd. v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. 58, 80 (1964) (Black, J., concurring).

135. *See*, *e.g.*, DeShaney v. Winnebago County, 489 U.S. 189 (1989).

136. Gary B. v. Whitmer, 957 F.3d 616, 656 (6th Cir. 2020).

137. Hartmann v. California Dep't of Corr. & Rehab., 707 F.3d 1114, 1126 (9th Cir. 2013) (citing Johnson-Bey v. Lane, 863 F.2d 1308, 1312 (7th Cir. 1988)).

138. *See* Obergefell v. Hodges, 576 U.S. 644, 702 (2015) (rejecting the dissent's reliance on *DeShaney*, and holding affirmative provision of governmental sanction of same-sex marriages necessary to avoid denial of right to marriage); Lewis v. Casey, 581 U.S. 343, 350-51 (1996) (obligation to waive filing and transcript fees for criminal defendants to allow right to petition even though indigency is not a suspect class); Romer v. Evans, 517 U.S. 620 (1996) (states not obligated to pass laws protecting homosexual persons from discrimination but cannot wholesale undermine all existing protections); Bounds v. Smith, 430 U.S. 817 (1977) (duty to provide law libraries to prisoners to effectuate right to access courts); Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938) (affirmative duty to pay for defense counsel).

139. 957 F.3d at 655.

mative services, the court emphasized that "the state has come to effectively occupy the field in public education, and so is the only practical source of learning for the vast majority of students."[140] The court came to this conclusion despite the relatively recent vintage of universal compulsory education and widespread use of private education.

As with public education, when the primary means of enjoying access to wilderness now runs through the federal lands,[141] making it impossible for the public to independently protect their interest without government assistance, the federal government likewise takes on an affirmative, proprietary duty, as it has demonstrated over the past 150 years of increasing legislative practice, to protect these lands on behalf of the American people.

VII. Preliminary Observations on Specific Standards and Conclusion

This Comment operates on the expectation that widespread destruction of the natural character of the federal wild lands and a clear causal connection to federal action can be factually proven in a court of law.[142] Given the current incipient state of the jurisprudence, the fine lines that will delineate the exact acreage of destruction that implicates a due process right; whether the quantity should be considered collectively or by park, forest, or other unit; and the specific characteristics of the land will need to be addressed on a case-by-case basis. These complications, however, do not nullify the explicit recognition of an essential duty to protect from waste irreplaceable environmental properties, which the public is unable to safeguard, and to preserve them for the enjoyment of present and future generations. Nor does it permit ignoring the established, historical expectations that such lands will remain in an intact, natural state. Yet, for simplicity, the starting point of possible lawsuits will likely be showing that an express statutory preservation objective (e.g., in national parks, "unimpaired for future enjoyment") is collaterally undermined by federally abetted climate-harming conduct. The court will then be called on to recognize this conflict and give force to the fundamental values motivating these conservation enactments by requiring the government to appropriately justify infringement. The approach of treating the Due Process Clause as essentially an expanded private cause of action to enforce these long-standing declarations offers the courts "guideposts for responsible decisionmaking."[143]

In *Animal Legal Defense Fund*, the plaintiffs presented particularized evidence of their inability to achieve the recreational and experiential purposes set forth for the recreational areas under the government's own policies due to wildfires, extreme smoke, unstable ice, and other dangerous conditions. In cases such as these, under a fundamental rights standard, the federal government would be charged to consider the impact on the vitality of federal wild lands prior to enabling actions that significantly contribute to climate change that threatens these lands.

Of course, recognizing a right as fundamental does not mean that the state has no power to limit it. Rather, due process only requires that the state provide sufficient justifications prior to any impairment. The clause itself does not specify what "process" is due. It offers no assurance that the right will in fact remain intact under all circumstances, nor should it. Looking to the history of the federal lands and the various standards applied to other fundamental rights, several observations about the scope of the right can be offered.

More exacting rational basis scrutiny was famously applied in *Lawrence v. Texas*, where the majority did not clarify what standard of review it employed.[144] While "rational basis with bite" is most associated with cases of discriminatory treatment potentially motivated by animus,[145] one factor for invoking enhanced scrutiny has been the interference with quasi-fundamental rights, such as education because the "[l]egislation burdens the important right of a group."[146] It is possible that courts are already taking this approach when carefully scrutinizing Wilderness Act cases, as discussed above in Part IV.C. Given the competing interests of securing the nation's heritage and other economic interests, courts would be justified in following a tradition-specific approach as in more recent due process cases, such as *McDonald v. City of Chicago*.[147] It appears that the strict scrutiny versus rational basis dichotomy is less rigidly applied in the substantive due process arena.

In this light, existing access fees or reasonable occupancy limitations, consistent with the traditional difficulties of visiting often-remote wilderness locations and legitimate interest in funding and protecting wild lands, would remain consistent with this right.[148] Similarly, limited destruction or impairment and continued traditional multiple use should not infringe fundamental rights, so long as it "leave[s] open ample alternative channels for"

140. *Id.* at 658.

141. Twenty-eight percent of land in the United States is owned by the federal government, with roughly 95% held by BLM, the Forest Service, the U.S. Fish and Wildlife Service, and NPS. Congressional Research Service, Federal Land Ownership: Overview and Data 1 (2020).

142. *See* Saunders et al., *supra* note 4; *see* Juliana v. United States, 947 F.3d 1159, 1168, 50 ELR 20025 (9th Cir. 2020) ("These injuries are not simply '"conjectural" or "hypothetical;"' at least some of the plaintiffs have presented evidence that climate change is affecting them now in concrete ways and will continue to do so unless checked.").

143. Collins v. Harker Heights, 503 U.S. 115, 125 (1992).

144. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (arguing majority applied "an unheard-of form of rational-basis review").

145. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); *see generally* Marc P. Florman, *The Harmless Pursuit of Happiness: Why "Rational Basis With Bite" Review Makes Sense for Challenges to Occupational Licenses*, 58 Loy. L. Rev. 721, 743-44 (2012) (discussing due process).

146. *See* Gayle L. Pettinga, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 Ind. L.J. 779, 801 (1987) (discussing Plyler v. Doe, 457 U.S. 202, 221 (1982)); *see also* Zobel v. Williams, 457 U.S. 55, 60 (1982) (applying enhanced rational basis standard to strike down law burdening fundamental right to travel where the restriction was indirect and court emphasized Equal Protection rather than Due Process).

147. 561 U.S. 742, 804 (2010) (Scalia, J., concurring) (justifying history-specific standard); *id.* at 904 (Stevens, J., dissenting) (arguing that case was decided "under a standard of review we have not even established").

148. *See, e.g.*, 42 U.S.C. §12207(c)(1) (wheelchairs are allowed in designated wilderness but "no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use").

comparable wild land access,[149] and does not impose an "undue burden" on access.[150] In contrast, for instance, fossil fuel extraction and large-scale animal agriculture on federal lands, leading drivers themselves of the existential threat posed to the character of federal wild lands, would probably not be justified under a new due process standard.

More than 150 years ago, Congress, in concert with the Executive, began to protect wild lands as a heritage for the American people. The government has repeatedly declared it was acting out of a fundamental duty, and the courts should "hold the government to its word."[151] As explained at establishment of the nation's first scenic national park:

> It is the main duty of government, if it is not the sole duty of government, to provide means of protection [for] all citizens in the pursuit of happiness against the obstacles, otherwise insurmountable, which the selfishness of individuals or combinations of individuals is liable to interpose to that pursuit.[152]

Anthropogenic climate change, enabled and encouraged by government policies, now threatens to destroy the character of the great repository of lands that have been statutorily set aside under federal stewardship. Failure to substantially protect non-fungible property that is dear to the American public and acknowledged as a treasure for future generations cannot be subject to conventional policymaking preferences, but should be recognized by courts as implicating fundamental due process protections under the Fifth Amendment.

149. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (regarding time, place, and manner restrictions on First Amendment activities in public fora).

150. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 874 (1992) (regarding regulation of a woman's right to abortion).

151. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (regarding treaty rights of Native Americans).

152. Frederick Law Olmsted, Yosemite and the Mariposa Grove: A Preliminary Report (1865).