HEALTHY ENVIRONMENT, HEALTHY MIND: CONSTITUTIONALLY GUARANTEEING CHILDREN THE RIGHT TO A HEALTHFUL ENVIRONMENT

Sarah Hyde[*]

In 2018, New Mexico's focus on child wellbeing drastically shifted after a district court judge held that public education was unconstitutionally inadequate for many of the state's children. However, the state's focus on other aspects of child wellbeing, such as the impact of environmental contamination on child development, is still lacking. As federal environmental regulation and enforcement become scarcer, states are forced to develop their own innovative solutions in order to protect future generations from environmental harms. States are better served to protect children because they are familiar with their communities' specific strengths and needs. Moreover, while legislative reform is always necessary, judicial action can spur powerful waves of change. State constitutions are a crucial and underutilized tool in developing new rights to better protect classes of people without special protections granted by the federal government. Using Due Process and Equal Protection claims, litigants can expand state definitions of liberty to advocate for new rights to protect children's growth and futures. Essentially, if a state's children have a fundamental right to adequate education, the constitution should give children the right to grow in a healthful environment that supports learning. This article primarily relies on New Mexico as an example, but all concepts can be applied to states with similar constitutional provisions.

INTRODUCTION

For years, New Mexico has failed in protecting its future generations. From children's health to public education to food insecurity, New Mexico annually ranks among the worst states in the county.[1] However, advocates and public officials recognized these trends and placed specific focus on

---

[*] University of New Mexico School of Law Class of 2021. She would like to thank Professor Clifford Villa for inspiring her to study the intersections between constitutional rights and environmental justice and encouraging her to think broadly and creatively. She would also like to thank Dr. Ruth Etzel for her cross-disciplinary ideas and contributions.

[1] In 2019, the Annie E. Casey National Kids Count ranked New Mexico as the worst state for child wellbeing. New Mexico ranked 50th in education, 48th in health, 50th in family and community, and 49th in economic well-being. *New Mexico's 2019 Kids Count Profile*, N.M. VOICES FOR CHILDREN (Jun. 2019), https://www.nmvoices.org/archives/13018 [https://perma.cc/XLL9-CWD6].

educational outcomes in recent years. In 2018, former District Judge Sarah Singleton held in the landmark case known as *Yazzie v. State* that public education systems in New Mexico were unconstitutionally failing their students, especially those who identify as Native American, English Language Learners, economically disadvantaged students, and those with unique learning needs.[2]

However, public education alone does not predict children's future ability to thrive. Ultimately, to protect future generations, states must recognize that all aspects of development are connected. States' priorities should be on children's basic needs and ensuring these children have access to things such as food, shelter, and a healthy place to grow with clean air and water. For this reason, this article argues that environmental health and wellbeing for children is a state priority that deserves higher rank. A healthy environment to grow up in is like the foundation of a house; it affects children's ability to thrive in school, live a healthy life, and develop in ways that influence lifelong outcomes. Essentially, if children cannot drink water, play in the dirt, or breathe without contaminants invading their bodies, they will never learn, study, play, or work to their full potential.

The environment is often defined broadly in relation to human experiences. One definition of the environment frequently used by activists is "where we live, work, play, learn, and pray."[3] Thinking of the environment in this intersectional framework highlights how environmental safety does more than keep children healthy; it influences physical and cognitive development, therefore impacting a child's ability to learn, grow, and contribute to the greater community.[4] The relationship between the quality of a child's environment and their ability to learn is not a novel idea. Medical professionals began to see relationships between the environment and child wellbeing decades ago, even though child development is a fairly new area of research.[5] A leading expert on this connection is Mount Sinai Medical School's Dr. Philip Landrigan, who originally argued that

---

[2] Yazzie v. State, No. D-101-CV-2014-02224, slip op. at 70 (N.M. 1st Jud. Dist. Ct. July 20, 2018) (consolidated with Martinez v. State, No. D-101-CV-2014-00793, whereby plaintiffs contend a lack of sufficient means to receive a proper education for Native American, Hispanic, and English Learner students) https://www.maldef.org/wp-content/uploads/2018/11/2018-07-20d-101-cv-2014-00793_Decision_and_Order-1.pdf [https://perma.cc/HC7W-K957].

[3] Eileen Gauna, *El Día de Los Muertos: The Death and Rebirth of the Environmental Movement*, 38 ENV'T L. 457, 466 n.55 (2008).

[4] Mia Hammersley, *The Right to a Healthy and Stable Climate: Fundamental or Unfounded?*, 7 ARIZ. J. ENV'T L. & POL'Y 117 (2017).

[5] *See, e.g.*, Major Thomas F. Zimmerman, *The Regulation of Lead-Based Paint in Air Force Housing*, 44 A.F. L. REV. 169 (1998).

environmental justice is inherently child justice.[6] According to Dr. Landrigan, all leading causes of child mortality, including asthma, birth defects, preterm birth, neurodevelopmental disorders, brain cancer, and obesity, can be a result of growing up in an unhealthy environment.[7] Moreover, because of industrialization and rapidly developing technology, children today are at a far greater risk of exposure to toxic chemicals compared to fifty years ago. Toxic industry materials are now frequently found "in air, food, water, homes, schools, and communities."[8] Therefore, many children are exposed to environmental hazards on a daily basis, whether the exposure is occurring from the air at home, the water at school, or the soil at the nearby park.

The state of New Mexico acknowledges that environmental hazards disproportionately affect certain members of communities, including children. The state constitution includes a provision stating:

> The protection of the state's beautiful and healthful environment is . . . of fundamental importance to the public interest, health, safety, and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water, and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.[9]

In fact, New Mexico is not alone in recognizing the need for environmental wellness in its state constitution. Apart from New Mexico, forty-one states include some mention of the environment in their constitution, with provisions ranging from declarations of a right to statements placing public policy responsibility on legislatures.[10] However,

---

[6] Philip J. Landrigan et al., *Environmental Justice and the Health of Children*, 77 MT. SINAI J. MED. 178, 179 (2010) (For more on Dr. Landrigan's work, see his contributions to the *Yoss* litigation, which arose after numerous children who lived near a smelter in Idaho were seriously injured by lead poisoning). *See also* CLIFFORD J. VILLA ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 27 (3rd ed. 2020); Bradley Dean Snow, Living with Lead: An Environmental History of Idaho's Coeur D' Alenes, 1885-2011(April, 2012) (Ph.D. dissertation, Montana State University) http://www.montana.edu/history/documents/papers/2012B.Snow_Dissertation.pdf [https://perma.cc/RA2Z-MQQG].

[7] Landrigan, *supra* note 6, at 179. *See also* Villa, supra note 6.

[8] Landrigan, *supra* note 6, at 180.

[9] N.M. CONST. art. XX, § 21.

[10] 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 (2005).

rarely are environmental health, safety, and wellbeing given the same legal weight as rights such as education that are recognized as fundamental in constitutions.

Thus, this article examines how states that do not identify environmental safety as a right, such as New Mexico, are failing their future generations. This article begins by identifying why new state litigation strategies in the environmental context are necessary. Next, it provides an overview of environmentally focused constitutional law litigation in other states. Finally, it proposes new solutions and analyzes potential roadblocks. By imagining a new fundamental right, this article introduces litigation routes that may create change as effectively as education funding litigation. In states where there is an explicit constitutional right to education, environmental health and safety should also be included as a constitutional right because education and environmental health are equally crucial to children's development and future outcomes. This article argues that to establish environmental health as a constitutional right like public education, litigants must assert that environmental health is both (1) a substantive Due Process right under the penumbra of the constitution's inherent rights provision, and (2) an Equal Protection right under the state's Equal Protection clause.

I. A NEED FOR NEW LITIGATION STRATEGIES

In this political arena, innovative solutions are essential to obtain environmental justice for younger generations. With federal enforcement declining, state action is more necessary than ever.[11] Moreover, state action must take a more pragmatic approach than waiting for local environmental departments to solve the problem. Agency failures at both federal and state levels highlight the need to view environmental health in a new paradigm.

A. Federal Failures

> "My inability to consistently exercise outdoors due to asthma has made it hard for me to get in shape and stay physically healthy, which has other adverse health effects. I am overweight and I do not feel strong in my body as a result. My immune system is also weaker from my increased incidence of asthma and my resulting overweight and I worry about my longer-term health and my ability to prevent disease through exercise, like heart disease or diabetes. [As a result

[11] *Civil Cases and Settlements*, U.S. ENV'T PROT. AGENCY, https://cfpub.epa.gov/enforcement/cases/ [https://perma.cc/SFU5-423T] (last visited Mar. 8, 2020, 10:02 AM).

> of] particularly bad asthma attacks, I develop bronchitis-like coughs, which regularly cause me to miss multiple weeks of school at a time, each school year."[12] Nicholas V., 17-year-old Colorado resident and plaintiff in *Juliana v. United States*.

Federal failures to protect children are numerous.[13] For example, students in Flint, Michigan, are still struggling to overcome the neurological effects of lead poisoning: "the percentage of the city's students who qualify for special education services has nearly doubled, to 28 percent, from 15 percent the year the lead crisis began, and the city's screening center has received more than 1,300 referrals since December 2018."[14] In Montana, preschool students were evacuated from their building in 2019 after investigations revealed "asbestos on surfaces [of classrooms], in one case 80 times higher than a federal cleanup threshold for residences."[15] Diseases related to asbestos typically do not develop for about fifty years after exposure. Because of this, it is difficult to determine whether the exposure will affect the children, but trends show high likelihoods of serious diseases later in life.[16]

Another way the federal system fails is through lacking adequate air pollution regulation. In the U.S., "pediatric asthma results in 14 million missed days of school each year."[17] Heightened asthma rates occur in both

---

[12] Decl. of Nicolas V. in Supp. of Pls.' Urgent Mot. for Prelim. Inj. ¶¶ 6-7, Juliana v. United States, 949 F.3d 1125 (2018) (No. 18-80176), https://www.ourchildrenstrust.org/court-orders-and-pleadings (choose "Declaration of Plaintiff Nicolas V.") [https://perma.cc/977Z-MRRZ].

[13] This does not come as a surprise, as the Trump administration has shown blatant disregard for children's health and the environment in recent years. In 2018, Trump placed Dr. Ruth Etzel, the head of EPA's Office of Children's Health, on leave. Telephone Interview with Dr. Ruth Etzel, Director, EPA Office of Children's Health (Mar. 20, 2020).

[14] Erica L. Green, *Flint's Children Suffer in Class After Years of Drinking the Lead-Poisoned Water*, N.Y. TIMES (Apr. 1, 2020), https://www.nytimes.com/2019/11/06/us/politics/flint-michigan-schools.html [https://perma.cc/GF4P-CSQ6].

[15] Keila Szpaller, *University of Montana Finds Asbestos in Second Child Care Center*, MISSOULIAN (Feb. 19, 2019), https://missoulian.com/news/local/university-of-montana-finds-asbestos-in-second-child-care-center/article_72d4dc88-776b-573a-86d9-926569bcd442.html [https://perma.cc/3JDU-UU2Q].

[16] *Id.*

[17] Ruby Pawankar, *Allergic Diseases and Asthma: A Global Public Health Concern and Call to Action*, WORLD ALLERGY ORG. J. 7, 1-3 (2014). The number is likely greater than 14 million because proving causation in the environmental context is often difficult. According to Dr. Ruth Etzel, head of EPA's Office of Children's Health and professor of Epidemiology and children's environmental health, there is a stark disconnect between causation in the Epidemiological context and legal context. While attorneys and judges are focused on proof, Epidemiology does not use the word proof since there are so many compounding factors that can contribute to a cause. Dr. Etzel advocates for a paradigm

rural communities, often due to pesticides or dust, and in urban communities, often due to industrial pollution and high levels of smoke and emissions.[18] Each of these illustrate how the federal government alone cannot protect children from environmental hazards. No child should be put in a situation where they frequently miss activities because of asthma, spend years worrying about future cancer risks, or need extra academic help as a direct effect of drinking contaminated water.

B. State Failures in New Mexico

> "When I found out the school I teach at had lead in its water, it made me feel like the [agencies involved] needed to take the proper steps to test every school and really fix the problem. Our reading and math scores are so low as it is, so I really hope this problem did not impact our kids because there can be lasting detrimental effects on top of everything else they have to go through."[19] Lori Bourque, Reginald Chavez Elementary School, Albuquerque, New Mexico.[20]

Considering federal patterns, it is no surprise that in a poverty-stricken state like New Mexico, there is an abundance of environmental issues that federal and state agencies have failed to adequately address. In 2019, many public elementary and middle schools in Albuquerque that were built before 1990 had higher levels of lead in water than federal regulations permitted.[21] Lead was found in water fountains, bathroom sinks, and classroom sinks.[22] Young children consumed water from each of these sources for years, and teachers expressed their concerns that the proposed solutions are impeding on learning time. One elementary school teacher explained "there are five water fountains in [the school] that students can now drink from, with two of them having water bottle dispensers. 'On the second day of school, there was a line of three classes waiting to get water and refill water bottles at one

---

shift in this area of law; legal structures must do better to catch up to the forever changing social science areas of study. Telephone Interview with Dr. Ruth Etzel, *supra* note 13.

[18] Pawankar, *supra* note 17.

[19] In 2019, 75% of fourth graders were not proficient in reading and 80% of eighth graders were not proficient in math. N.M. VOICES FOR CHILDREN, *supra* note 1.

[20] Telephone Interview with Lori Bourque, Speech and Language Pathologist, Reginald Chavez Elementary School (Apr. 3, 2020).

[21] Although research findings highlight that any traces of lead in water sources can be consequential, the federal regulations are still higher than zero. 40 C.F.R. § 141.11 (2001).

[22] Shelby Perea, *Teacher*: *APS Fixes for Lead in Water Fall Short*, ALBUQUERQUE J. (Aug. 18, 2019, 12:05 AM), https://www.abqjournal.com/1355223/concerns-remain-after-aps-claims-lead-in-water-fix.html [https://perma.cc/K7QT-FCP2].

of the water fountains.'"[23] According to the teacher, the contaminated water sources were not fixed, but rather they were designated as "handwashing only."[24]

To address this issue, the New Mexico Environment Department urged schools to instruct parents to send their children with a reusable, filled water bottle each day. This solution ignores the realities the low-income state faces. A quarter of children in the state live in a food insecure household, so their families likely do not have the resources to purchase a reusable water bottle for them.[25] In fact, many children in the state may not have any access to clean drinking water when they are not in school, their tap water at home could be even more polluted, or they may not have running water.[26]

Children in rural parts of the state are being harmed by environmental hazards as well. In Southeastern New Mexico, multiple communities near air force bases are struggling to combat poly-fluoroalkyl substance ("PFAS") contamination in the groundwater. These toxic chemicals were used at Cannon and Holloman Air Force bases in firefighting foam until 2016, and communities' livelihood and public health are now being threatened.[27] The toxic plume is slowly spreading across the Ogallala aquifer, the largest aquifer in the nation, which spans 174 thousand miles and eight states.[28] Dairy farmers in Curry County, New Mexico, have literally watched their incomes go down the drain. In an already low-income county, families are suffering after dumping thousands of gallons of cow milk per day and euthanizing thousands of cows with the chemicals in their systems.[29] To date, the Air Force has been uncooperative in efforts to clean the spreading plume, even though experts warn that exposure to PFAS can increase the chances of testicular, kidney, and thyroid cancers.[30]

---

[23] *Id.*

[24] *Id.*

[25] *Health Indicator Report of Food Insecurity*, N.M. DEP'T HEALTH (Apr. 29, 2019), https://ibis.health.state.nm.us/indicator/view/FoodInsec.Overall.Year.NM_US.html [https://perma.cc/ZC2P-R27N].

[26] Marisa DeMarco, *Pajarito Mesa Residents Fight to Keep Their Homes*, KUNM (Apr. 12, 2020, 2:02 PM), https://www.kunm.org/post/pajarito-mesa-residents-fight-keep-their-homes [https://perma.cc/BS8V-SXQN].

[27] Amy Linn, *Groundwater Contamination Devastates a New Mexico Dairy – and Threatens Public Health*, N.M. POL. REP. (Feb. 19, 2019), https://nmpoliticalreport.com/2019/02/19/groundwater-contamination-devastates-a-new-mexico-dairy-and-threatens-public-health/ [https://perma.cc/29T9-TN2U].

[28] *Id.*

[29] *Id.*

[30] Kendra Chamberlain, *'Everyone is Watching New Mexico': Update Shows No Progress on PFAS Cleanup*, N.M. POL. REP. (Nov. 7, 2019), https://nmpoliticalreport.com

In the Navajo Nation, uranium contamination from mining sites continues to cause a multitude of health problems, even though the mining facilities have not operated for forty years.[31] While normal amounts of uranium found in the ground are approximately three milligrams per unit, levels at contaminated sites in Western New Mexico are far higher.[32] Uranium levels in the Northeast Church Rock Mine area were almost seventeen milligrams per unit in 2013, and levels near the Red Water Pond Road area were at a soaring thirty-two milligrams the same year.[33] Members of the Navajo Nation are extremely at risk of health issues resulting from uranium exposure. Contamination can enter one's body through breathing or eating, can be absorbed through the skin, and can be transferred through the placenta.[34] Effects on fetuses are especially alarming, since Native American women historically experience the highest rates of hypertensive disorders, preeclampsia, and gestational diabetes among pregnant women in the United States.[35] Data is lacking in terms of birth outcomes and uranium exposure, but experts continue to demonstrate that exposure increases miscarriages, stillbirths, and birth defects.[36] Birth defects include cleft lips and palates, chromosomal abnormalities, and changes in membrane structures.[37]

Additionally, uranium frequently settles in the lungs and kidneys, so rates of cancer in those organs are heightened as well.[38] In recent years, the Environmental Protection Agency ("EPA") has initiated massive site clean-up projects to lessen the impacts of uranium, but an end to this work is not in sight as the metal continues to travel deeper into the ground.[39] In a community where electricity and water are not guaranteed, schools are

---

/2019/11/07/everyone-is-watching-new-mexico-update-shows-no-progress-on-pfas-clean-up/ [https://perma.cc/5QSY-CCBM].

[31] Erin Klauk, *Human Health Impacts on the Navajo Nation from Uranium Mining*, MONT. STATE U., https://serc.carleton.edu/research_education/nativelands/navajo/humanhealth.html.

[32] *Id.*

[33] Chris Shuey et al., Panel Presentation at the Tribal Lands and Environmental National Forum: Environmental Health Research on the Navajo Nation: Navajo Birth Cohort Study (Aug. 13, 2013) (presentation available in the Northern Arizona University ORCA Database), https://www7.nau.edu/itep/main/iteps/ORCA/6016_ORCA.pdf.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Jere Millard, et al., *The Church Rock Uranium Mill Tailings Spill: A Health and Environmental Assessment Summary Report*, N.M. ENV'T IMPROVEMENT DIV., HEALTH AND ENV'T DEPT. (Sept. 1983), https://semspub.epa.gov/work/06/1000720.pdf [https://perma.cc/ME3E-X8VF].

lacking resources, and food deserts are rampant, children are faced with yet another barrier: physical, cognitive, and developmental challenges as a result of a century-old industry.

C. Decentralization of Environmental Litigation

Environmental regulation can function in two paradigms. "One is decentralization - moving decision making from large federal bureaucracies to the private sector or to smaller units of government. The other is to streamline the federal regulatory process – trying to perform the proverbial organizational task of 'teaching the elephant to dance.'"[40] Decentralization is advocated for in a variety of contexts and is often most supported by legal scholars grounded in federalist ideals.[41] Additionally, in today's political arena, many advocates from both sides of the aisle are arguing that decentralization may be a method to make environmental enforcement more successful.[42]

Decentralization of decision-making and litigation routes can improve environmental law in a variety of ways. First, most environmental issues are regional in nature, with the exception of overarching patterns, such as climate change.[43] Regional issues often call for location-specific solutions. In many ways, federal environmental law and policy epitomizes the notion that "[o]ne-size-fits-all policy approaches too easily become one-size-fits nobody."[44] Second, decentralization of law and policy can lead to unique and innovative solutions; states and localities are often referred to as laboratories for experimentation.[45]

Moreover, states have a better sense of best approaches because they are familiar with each branch of their state government. For example, in a state like New Mexico, a judicial route may be preferable to a legislative route because the legislature has short sessions, is not paid, and is slow in passing

---

[40] Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791, 798 (1994).

[41] Federalism is defined as "the legal relationship and distribution of power between the national and regional governments within a federal system of government." *Black's Law Dictionary* 284 (3rd ed. 1996). Those supporting federalism often argue that states should have the lead role in regional enforcement and regulation.

[42] Mary Ellen Cusack, *Comment: Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENV'T AFF. L. REV. 173, 196 (1993).

[43] Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENV'T L. REV. 237, 244-45 (2000).

[44] Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 DUKE ENV'T L. & POL'Y F. 253, 279 (2013).

[45] Weiland, *supra* note 43, at 245.

comprehensive legislation. Conversely, a judicial approach may allow for more creative ideas and faster moving initiatives, especially if there is vast public interest. States also know the unique needs of individual communities, unlike federal governmental agencies like the EPA, so they are more likely to address needs in culturally competent ways and focus on disproportionately affected parts of the population.[46]

D. Decentralization Success in New Mexico

Shifting focus from federal statutes and the U.S. Constitution to state resources has already proven to be impactful in New Mexico. One of the most far-reaching New Mexico cases of the decade, *Yazzie v. State*, succeeded partially because the legal argument used relied on the state constitution, not the U.S. Constitution.[47] State constitutions are growing in popularity because they tend to be more expansive than the U.S. Constitution; there is more room for creativity and the development of new common law, especially in states with limited precedent, like New Mexico. *Yazzie v. State* would not have been nearly as successful if public education claims were brought in federal court because of limits to federal Equal Protection and Due Process claims.

State constitutional provisions guaranteeing a fundamental right to an adequate public education allowed for a suit of this nature to be brought in state district court. New Mexico was not the first state to use this litigation strategy, but the unique provisions in the constitution allowed litigants to tailor the claim to meet plaintiffs' needs. One of the education provisions in the state's constitution reads:

> Children of Spanish descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public education institutions of the state . . . but shall forever enjoy perfect

---

[46] For example, the EPA is engaging in culturally insensitive practices while attempting to clean up the Red Pond Road contaminated site in western New Mexico on the Navajo Nation. In its rehousing efforts, the EPA has ignored the Native American community's traditional ways of living and need to stay proximally close to each other, and instead is spreading the community out and housing them in low-quality mobile homes and motels. Will Ford, *A Radioactive legacy Haunts this Navajo Village, Which Fears a Fractured Future*, WASH. POST (Jan. 18, 2020, 3:43 PM), https://www.washingtonpost.com/national/a-radioactive-legacy-haunts-this-navajo-village-which-fears-a-fractured-future/2020/01/18/84c6066e-37e0-11ea-9541-9107303481a4_story.html [https://perma.cc/G7R6-976W].

[47] *Yazzie v. State* will be discussed in further detail below.

> equality with other children in all public schools and education institutions of the state.[48]

Without this provision, combined with other education clauses, litigants would have had a far more difficult time arguing that certain populations of students, including English Language Learners, were being deprived of their constitutional rights.

The full impact of *Yazzie* is yet to be seen. However, a judge ruling that New Mexican children are being deprived of a constitutional right alone is powerful because it sparked momentum to improve laws and policies. While the decision is only two years old, changes to funding, standardized testing, teacher training, and student resources have already occurred.[49] This decision demonstrates that innovative litigation at the state level – using tools from the state's legal toolbox – have the potential to create systemic change. *Yazzie* proves state constitution-based litigation should not cease but should be used to address other injustices affecting the state's children as well.

II. PROPOSED SOLUTION

The previous section highlights that environmental strategies at state and federal levels are not protecting our children enough. Therefore, like the litigants in *Yazzie*, attorneys and advocates must create new routes of litigation to help improve New Mexican children's wellbeing. Because state constitutions are a powerful and often under-utilized resource, advocates should focus on them as a key legal tool. In New Mexico, the inherent rights provision of the state constitution states, "[a]ll persons are born equally free, and have certain natural, inherent, and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of seeking and obtaining safety and happiness." Combining this provision with the constitution's environmental provision may create new state rights through constitutional law arguments. Because many aspects of constitutional law are abstract and constantly evolving, arguments grounded in Equal Protection and Due Process principles can lead to meaningful rulings.

---

[48] NM CONST. art. XII, § 10.

[49] *Educational Plan and Budget Submission Process 2020-2021*, N.M. PUB. EDUC. DEP'T (Spring 2020), https://webnew.ped.state.nm.us/wp-content/uploads/2020/04/EDUCATIONAL-PLAN-AND-BUDGET-SUBMISSION-PROCESS.pdf [https://perma.cc/4GLQ-CRD3].

A. An Overview of State Constitutional Law Cases Across the Country

> "Every day I feel more pressure to successfully address this climate crisis. As a young person, that is a tough burden to carry. Sometimes every hour of every day feels like there is more pressure building. I have been waiting for over three years to get the climate science evidence and our stories into court, to have our case heard, and to start the process of healing our climate. All the while the clock has been ticking and the pressure has been building."[50] Aji P., 19-year-old Washington resident and co-plaintiff in *Juliana v. United States* and *Aji P. v. State of Washington*.

State constitutional law claims aiming to develop or strengthen environmental rights are not novel. However, case law demonstrates that there are many common pitfalls, such as standing and proving disparate impact claims. The following cases give insight into various degrees of success and patterns that occur in litigation with the goal of protecting children and families.

Juliana v. United States has received the most press in recent years because the plaintiffs consist of young adults across the country who are fighting against climate change and the federal government's general lack of response. *Juliana* was filed against the federal government, but sister cases have been filed against multiple states.[51] In *Aji P. v. State of Washington*, twelve plaintiffs under the age of twenty alleged deprivations of their constitutional rights to "life, liberty, property, and a healthful and pleasant environment, including a stable climate system . . . ."[52] Plaintiffs argued that state's actions, such as usage of a fossil fuel based energy and transportation, are contributing to climate change, which affects plaintiffs' wellbeing and ". . . ability to grow to adulthood safely and enjoy the rights, benefits, and privileges of past generations of Washingtonians . . . ."[53] At the trial court, the judge granted the State's motion to dismiss based on a

---

[50] Decl. of Aji P. in Supp. of Pls.' Urgent Mot. for Prelim. Inj. ¶ 5, Juliana v. United States, 947 F.3d 1159 (2020) (No. 18-36082) https://www.ourchildrenstrust.org/court-orders-and-pleadings ("Declaration of Plaintiff Aji P.") [https://perma.cc/GS6S-J286].

[51] State Legal Actions: Washington, OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/washington (last visited Mar. 30, 2020) [https://perma.cc/SV9L-PVUH].

[52] Compl. at 1, Aji P. v. Washington, No. 18-36082 (King Cty. Super. Ct. Aug. 14, 2018), https://www.ourchildrenstrust.org/washington (select "filed" then "complaint") [https://perma.cc/85Y3-SNEY].

[53] *Id.*

lack of standing, and plaintiffs filed a timely appeal.[54] The case is currently pending on appeal, and a multitude of advocates, including Native American tribes, environmental organizations, and faith-based groups have filed amici briefs in support of the plaintiffs.[55]

In a 2001 Michigan case, community members filed suit against Detroit Public Schools ("DPS") after discovering that DPS was planning on building a new school building on property contaminated with ". . . volatile organic chemicals (VOCs), semi-volatile organic chemicals, petroleum-related materials, polychlorinated biphenyls (PCBs), chlorinated solvents, various heavy metals and radioactive paints . . . ."[56] Community members were especially concerned because the student body consisted of 61% Hispanic students and 13% African American students.[57]

Legal claims asserted included an Equal Protection disparate impact claim based on race and ethnicity, a violation of Title VI of the Civil Rights Act, and violations of ". . . the Fifth and Fourteenth Amendment rights to be free from unreasonable interference with [a] liberty interest in bodily integrity."[58] The court denied the plaintiffs' request for a preliminary injunction because the allegations were speculative since the school was not yet built.[59] However, plaintiffs were successful because the court reasoned that DPS receives federal funding, so the district is subject to Title VI of the Civil Rights Act. For this reason, the court mandated that DPS stay in compliance with a "Due Care Plan."[60] The court also reasoned that an Equal Protection argument is likely not meritorious because the disparate impact was a result of factors outside the state's control, such as "residential housing patterns."[61] Finally, the court reasoned that the plaintiffs' substantive Due Process right to bodily integrity failed because plaintiffs failed to show the "outrageous and shocking character that is required."[62] Although this case was unsuccessful for plaintiffs in many ways, it demonstrated that if plaintiffs were suffering irreparable harm, or if DPS' actions shocked the court, their claim may have been more meritorious.

---

[54] Decl. of Aji P., *supra* note 50.
[55] *Id.*
[56] Lucero v. Detroit Pub. Sch., 160 F. Supp. 2d 767, 772 (E.D. Mich. 2001).
[57] *Id.* at 771.
[58] *Id. See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
[59] *Id.* at 805.
[60] *Id.*
[61] *Id.* at 789. In doing so, the Michigan court failed to recognize that residential housing patterns today directly reflect decades of deliberate race discrimination by federal and state actors. For a thorough examination of this racist history, see RICHARD ROTHSTEIN, THE COLOR OF LAW (2017).
[62] *Id.* at 799.

Multiple other states have been successful in developing environmental health as a fundamental right through litigation as well. In *Montana Environmental Information Center v. Department of Environmental Quality*, the Supreme Court of Montana held that a clean and healthful environment is fundamental under the state's constitution.[63] The court interpreted provisions under the constitution's Declaration of Rights, such as "[a]ll persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment."[64] The court reasoned that " . . . in order to be fundamental, a right must be found within Montana's Declaration of Rights or be a right 'without which other constitutionally guaranteed rights would have little meaning.'"[65] Furthermore, the court explained that because the state's constitution guarantees the right to a clean and healthful environment, when the right is violated, the court must use a strict scrutiny standard and balance compelling government interests.[66] This case demonstrates that state courts vary in ways of interpreting the state constitution. In this case, the court ruled that rights can only be fundamental if they are included in the constitution's Declaration of Rights. However, other states may be more flexible and expansive in their constitutional interpretation.

In 2017, a Hawaii case determined whether the state's constitution protects procedural Due Process interests to persons asserting the "constitutional right to a clean and healthful environment."[67] The court held, in relevant part, that (1) Plaintiffs Sierra Club asserted a protected property interest in a clean and healthful environment; (2) the property interest necessitated a Due Process hearing; and (3) Sierra Club had

---

[63] Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1249 (1999). This case arose after a group of environmental organizations filed an injunction to suspend a mining company's exploratory license approved by the Department of Environmental Quality. The mining company's exploration of a potential mining area resulted in heightened levels of arsenic in discharged water. For more background on this case, see Jack R. Tuholske, *U.S. State Constitutions and Environmental Protections: Diamonds in the Rough*, 21 WIDENER L. REV. 239 (2015).

[64] *Id.* at 1243.

[65] *Id.* at 1245.

[66] *Id.* at 1246.

[67] This case arose out of a dispute between environmental organizations, including a local Sierra Club chapter and the Public Utilities Commission. Residents living nearby a power plant owned by an electric utility company sought representation from the Sierra Club after they began to worry about the health impacts of coal being burned at the plant. The Sierra Club relied on a procedural due process argument and Hawaii's environmental safety constitutional provision to argue that residents were entitled to a hearing about whether the plant could continue burning high amounts of coal. *In re* Maui Elec. Co., 408 P.3d 1, 9 (2017).

standing because they demonstrated threatened injury to their right to a clean and healthful environment.[68] The court reasoned that because Due Process requires an opportunity to be meaningfully heard, the defendant Commission was required to hold a hearing and allow Sierra Club to present evidence that the potential for harmful emissions deprived them of their property rights.[69]

Upon comparison of *Lucero v. Detroit Public Schools* and *In re Application of Maui Electric Company*, the fact that *Lucero* considered environmental health an Equal Protection right while *Maui Electric* considered a healthful environment to be a Due Process property interest is noteworthy. Both cases highlight that individual states situate environmental rights differently in the context of constitutional rights. A comparison of these cases also demonstrates that some states, like Hawaii, are more lenient on the issue of standing. *Montana Environmental Information Center v. Department of Environmental Quality* differs from *Lucero* and *Maui Electric* in that it established a fundamental right, instead of arguing that a right was being violated. However, based on the analysis in *Montana Environmental Information Center*, if an individual or group in Montana thought they were being deprived of the fundamental right to a healthful environment, they could likely bring an adequacy claim, simply arguing that the Montana constitution was being violated, instead of a Due Process or Equal Protection claim.

B. New Mexico Constitutional Claim – Unpacking Yazzie v. State

As illustrated above, three commonly used constitutional routes in environmental rights litigation are adequacy claims, Due Process claims, and Equal Protection claims. In New Mexico, the landmark public education rights case of *Yazzie v. State* relied on a mixture of all three claims; however, in the aftermath of the decision, advocates and lawmakers most frequently refer to adequacy clause arguments. Adequacy claims have been brought "in more than twenty states," and "plaintiffs have enjoyed success in increasing numbers of states, including most notably New Jersey, Ohio, Kentucky, and Wyoming.[70]

In *Yazzie*, plaintiffs, consisting of parents and school districts, alleged inadequate school funding formulas and inadequate implementation of

[68] *Id.* at 22.
[69] *Id.* at 21.
[70] *Constitutional Requirements Governing American Education*, STATEUNIVERSITY.COM, https://education.stateuniversity.com/pages/1882/Constitutional-Requirements-Governing-American-Education.html [https://perma.cc/G7C5-CEG2].

programming "designed to meet statutory mandates."[71] In Judge Singleton's decision, she noted that this litigation route is known as the "third wave" of school finance litigation, which bolsters adequacy claims and devotes less time on federal and state Equal Protection claims, unlike the first wave of school finance litigation.[72] Judge Singleton also clarified that while many states have chosen to defer to legislatures when defining "adequacy," the duty of New Mexico courts is to "interpret and enforce the State Constitution."[73] The standard of review in an adequacy claim is a preponderance of evidence; there is no need for plaintiffs to prove that the government acted unconstitutionally beyond a reasonable doubt, or that "the state must meet a strict scrutiny test in justifying its actions."[74] This lowered burden for plaintiffs highlights why adequacy claims are increasing in popularity across the country.

Plaintiffs also brought a state Equal Protection claim and "compare[d] education given to economically disadvantaged students and ELL students to that given to non-ED and [n]on-ELL students" to frame the issue.[75] The District Court used the New Mexico Supreme Court's own standard for the state constitution's Equal Protection clause:

> We have previously recognized that the Equal Protection Clause of the New Mexico Constitution affords 'rights and protections' independent of the United States Constitution . . . While we take guidance from the Equal Protection Clause of the United States Constitution and the federal courts'

[71] *Yazzie*, slip op. at 5. Standing was not an issue in this case because the districts "demonstrated they have been injured by the inadequacy of funding." Moreover, "even if the Districts do not have standing, the school boards and parents do have standing." *Yazzie*, slip op. at 5 n.8. For more background on *Yazzie*, see Preston Sanchez & Rebecca Blum Martinez, *A Watershed Moment in the Education of American Indians: A Judicial Strategy to Mandate the State Of New Mexico to Meet the Unique Cultural and Linguistic Needs of American Indians in New Mexico Public Schools*, 27 AM. U. J. GENDER SOC. POL'Y & L. 183 (2019).

[72] *Yazzie*, slip op. at 7. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), ended federal Equal Protection education claims, holding there is no fundamental right to education under the U.S. Constitution and socioeconomic status is not a suspect class.

[73] *Yazzie*, slip op. at 8. Judge Singleton reasons that "'[w]hen a citizen sues the state on the theory that the state has failed to fulfill its constitutional obligation to provide for adequate education, the judiciary has the institutional duty to interpret the education clause to determine whether the state has complied with its constitutional obligation.'" *Id*. at 9 (quoting William F. Dietz, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L.Q. 1193, 1194 (1996)).

[74] *Yazzie*, slip op. at 17.

[75] *Id*. at 60.

> interpretation of it, we will nonetheless interpret the New Mexico Constitution's Equal Protection Clause independently when appropriate . . . Federal case law is certainly informative, but only to the extent it is persuasive . . . In analyzing Equal Protection guarantees, we have looked to federal case law for the basic definitions for the three-tiered approach, but we have applied those definitions to different groups and rights than the federal courts.[76]

The New Mexico Supreme Court's standard clarifies that even though education is not a fundamental right under the U.S. Constitution, it is under the state's constitution.[77] Therefore, the court engaged in an Equal Protection test. The first prong of the Equal Protection test asks "whether the legislation creates a class of similarly situated individuals who are treated dissimilarly."[78] Judge Singleton determined that economically disadvantaged and English language learning students are treated dissimilarly based on performance and graduation rates.[79] Next, the court must determine "what level of scrutiny should be applied."[80] The court used an intermediate scrutiny basis for review, because it does not use rational basis for "fundamental or important constitutional right[s]."[81] The court held that the current funding system fails an intermediate scrutiny test; "[s]ingling out for adverse treatment a class of children who are economically disadvantaged or English language learners does not bear a substantial relationship to any legitimate purpose to be achieved by the various education statutes."[82] Finally, while the state argued that Plaintiffs must show animus for their Equal Protection claim to prevail, Judge Singleton held that "no New Mexico authority has been cited for the proposition that under the state constitution equal protection clause animus must be shown to prove a violation, it is presumed that no New Mexico authority exists."[83] Therefore, Plaintiffs met their burden of proving a state Equal Protection violation in this case.[84] Because the state Due Process

---

[76] Breen v. Carlsbad Mun. Schools, 2005-NMSC-028, ¶ 14, 138 N.M. 331, 120 P.3d 413.

[77] *Yazzie*, slip op, at 61.

[78] *Breen*, 2005-NMSC-028, ¶ 10, 138 N.M. at 335.

[79] *Yazzie*, slip op. at 62.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 63. The requirement of animus, or intent, creates an additional barrier for plaintiffs in Equal Protection cases because plaintiffs must show that the defendant acted intentionally in treating similar classes dissimilarly. When animus is not required, plaintiffs' burden of proof is lowered.

[84] *Id.* at 66.

analysis is the same as the state Equal Protection analysis, Plaintiff's Due Process claim was sustained as well.[85]

C. *Creating Environmental Claims Paralleling* Yazzie

Yazzie demonstrates that many state decision makers currently in office are validating community interest in children's wellbeing, so the time is ripe for more creative state constitution-based litigation. Groups representing children suffering irreparable harm to their ability to grow, learn, or engage in activities make ideal plaintiffs to fulfill preliminary requirements like standing.[86] For example, a Southern New Mexico family of dairy farmers who lost their sole income due to PFAS contamination could bring suit against the United States Air Force, among other agencies, if they had evidence that this loss of income affected their children's development or that consumption of the chemicals affected their health. Similarly, Albuquerque students or teachers could bring suit against the State and file an injunction to better resolve issues with water in school buildings. Plaintiffs in a case of this nature could demonstrate that students are losing class time because of a lack of water fountains, are suffering from dehydration, or were exposed to unsafe amounts of lead before recent data showed heightened levels of lead in school buildings. Finally, Native Americans, such as members of the Navajo Nation, could achieve standing by identifying data on birth effects of uranium exposure.[87]

Leaders and decision-makers must be reminded that environmental health is a key pillar in child development for litigation of this nature to be successful. To make this clear, litigation should parallel the constitutional routes taken in *Yazzie* to establish that, if public education is recognized as a fundamental right, environmental wellness as a fundamental or important right should be protected by the state constitution as well. In the remainder

---

[85] *Id.*

[86] *Lujan v. Defenders of Wildlife* enumerates the three elements required to prove standing. First, a plaintiff must have suffered an actual injury. An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent . . . Second, the plaintiff must show a causal link between the harm and the conduct complained of – the injury has to be 'fairly traceable to the challenged action of the defendant . . . and not the result of the independent action of some third party . . .' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" 504 U.S. 555, 560-561 (1992).

[87] It is worth noting that even fear of adverse effects is enough to show injury-in-fact. Therefore, a member of the Navajo Nation who would like to have a child in the future could establish injury-in-fact. *See* Friends of the Earth, Inc v. Laidlaw Env't Serv. (TOC), Inc., 528 U.S. 167, 181 (2000) ("The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff.")

of this section, the three legal routes taken in *Yazzie* will be envisioned in an environmental context, followed by recommendations to practitioners regarding the routes most likely leading to development of a new fundamental right.

First, an adequacy clause argument is unlikely to succeed in New Mexico courts. While the first education provision in the state constitution says "[a] uniform system of free public schools *sufficient* for the education of, and open to, all children of school age in the state must be established and maintained," there is no comparable language about sufficiency or adequacy in the state's environmental provision.[88] Moreover, adequacy clause arguments are only effective when the provision in question is self-executing.[89] To be self-executing, the judiciary alone must be able to enforce a provision.[90] The environmental provision in New Mexico's constitution is unlikely to be self-executing because it gives the legislature, not judiciary, responsibility to protect environmental wellness, so it takes the form of a public policy statement.[91] For these reasons, Equal Protection and Due Process claims are likely to be far more successful than an adequacy clause argument.

The second route worth consideration is an Equal Protection claim against state agencies including New Mexico Environment Department, alleging children are being disproportionately impacted by environmental harms. In *Yazzie*, Judge Singleton held that according to case law, there is no animus requirement for a state Equal Protection claim, which significantly lowers the burden for plaintiffs.[92] Theoretically, higher courts could reverse this ruling, but with support from the governor, a decision could be reached to not appeal a decision, as the parties did in *Yazzie*.[93]

---

[88] N.M. CONST. art. XII, § 1 (emphasis added). The general understanding of "adequate," or "sufficient" must shift if a state recognizes that schools without money for textbooks are insufficient and that schools with low graduation rates are insufficient but does not recognize that unclean water in schools is insufficient.

[89] Klee, *supra* note 10, at 162.

[90] *Id.* at 175.

[91] In relevant part, the provision states, "[t]he legislature shall provide for control of pollution and control of despoilment of the air, water, and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people." N.M. Const. art. XX, § 21.

[92] *Yazzie*, slip op. at 63.

[93] Governor Lujan Grisham's promise not to appeal *Yazzie* further justifies that the political time is right to bring more impact litigation to the state's courts. *Martinez and Yazzie Consolidated Lawsuit Updates*, N. M. PUB. EDUC. DEP'T, https://webnew.ped.state.nm.us/bureaus/yazzie-martinez-updates/ (Jul. 14, 2020) [https://perma.cc/V7FG-7W4S].

Under a state Equal Protection analysis, plaintiffs would first have to prove that they were being treated dissimilarly to similarly situated individuals. Plaintiffs could argue that children are being treated dissimilarly to similarly situated New Mexicans in different age categories because environmental issues often have more devastating and long-term effects on children. However, children and adults may not be considered similarly situated classes by a court. Therefore, plaintiffs comparing different groups of children should closely follow *Yazzie*. Plaintiffs in the Navajo Nation could argue that they are treated dissimilarly to non-native children, or they could argue that rural children are treated differently from urban children. In Albuquerque, plaintiffs experiencing effects of lead in their school's water could argue that their school is being treated dissimilarly to schools in more affluent parts of town. Because each of these scenarios closely follows the reasoning of *Yazzie*, plaintiffs would likely meet their burden on the initial part of the Equal Protection analysis, depending on the judge's jurisprudential understanding of the state's Equal Protection analysis.[94]

The next prong of an Equal Protection claim considers what level of scrutiny the court should use if it finds that similar groups are being treated dissimilarly. Rational basis is not an appropriate level of scrutiny here because harmed children do not fall within the "economic or social" category.[95] Furthermore, because there is currently no fundamental right to environmental health, strict scrutiny is not fitting either. Therefore, the court is likely to use an intermediate scrutiny standard and follow *Yazzie*. If the court followed *Yazzie* closely in this part of the analysis, the court would find that no legitimate state interest is furthered by exposing children to life-altering toxic substances. Thus, an Equal Protection argument could prevail, especially if it was in front of a judge who interprets state constitutional law similarly to Judge Singleton.

The third route leading to a new environmental right is arguably the most uncharted and creative. A Due Process claim can take various avenues. First, plaintiffs could argue that a Due Process analysis under New Mexico law is the same as an Equal Protection analysis, so if plaintiffs' Equal Protection rights are violated, Due Process would be violated as well.[96] Second, plaintiffs could use existing state and federal Due Process

---

[94] Because *Yazzie* is a District Court decision, other judges are under no obligation to follow Judge Singleton's holdings. The plaintiffs would therefore have to use a fair deal of strategy in selecting venues.

[95] *Yazzie*, slip op. at 63.

[96] *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

theories, in conjunction with New Mexico's Inherent Rights Provision, to argue that environmental health is an unenumerated right created by penumbras. The Supreme Court case *Griswold v. Connecticut*, 381 U.S. 479 (1965) introduced the idea of penumbras. *Griswold* defines penumbras as a group of rights derived by implication from other explicitly protected rights.[97] According to Justice Harlan, there are basic values "implicit in the concept of ordered liberty."[98]

Here, plaintiffs should argue that the umbrella of rights derived from other explicitly protected rights under the state constitution is even greater than those under the federal constitution for two reasons. First, the state constitution is more expansive than the federal constitution, and includes rights not federally guaranteed, such as the right to public education. Second, the Inherent Rights Provision includes the rights of life, liberty, happiness, property, and safety, which cultivates an expanded umbrella of rights as well.[99] Environmental health and wellbeing falls under each right included in the Inherent Rights Provision. If New Mexicans have a right to life, they should have a right to clean air and safe drinking water that will support life. Similarly, New Mexicans' liberty and happiness interests should allow children to go outside whenever and wherever they want and drink clean water from any school fountain. The air that New Mexican children breathe, the water they drink, the food they consume, and the community they live in should all be protected by their property rights. Finally, and most significantly, New Mexicans' safety rights are being

---

[97] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[98] *Id.* at 500. "In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and to abortion, [*Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)]. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278–79, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990)]." Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

[99] "All persons are born equally free, and have certain natural, inherent, and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of seeking and obtaining safety and happiness." N.M. CONST. Art II § 4.

violated if children's development and health are suffering as a result of environmental injustices.

The Inherent Rights Provision has only been interpreted by New Mexico courts a handful of times.[100] However, it is far less of a stretch to argue that a right to safety is being infringed upon if the air, ground, and water around us is unsafe. If an inherent rights argument fails, there is still a constitutional basis for an argument that the rights to public education and liberty found elsewhere in the state constitution give rise to a right to environmental health on their own. The right to public education itself should ignite the recognition of other rights necessary to achieve an adequate public education. Ultimately, students struggling with developmental issues and lack of access to clean water are never going to receive an adequate education if the world they live in is hurting them every day. Therefore, litigants should rely upon the interconnected relationships between existing state constitutional rights to advocate for a new right to a healthful environment. In creating litigation, litigants must propose a series of constitutional arguments to increase the chances that at least one argument will resonate with state judges.

III. LOOKING FORWARD: DISTINGUISHING *MORRIS V. BRANDENBURG*

Courts do not freely develop new constitutional rights; arguments must be compelling and have constitutional support. The most recent litigation strategy aiming to create a new constitutional right was ultimately unsuccessful, not because the state's Supreme Court Justices did not find the argument compelling or have a desire to find a new right, but because they could not legally justify the proposed right.[101] It is therefore important that litigants advocating for an environmental right bolster their claims by distinguishing a right to a healthful environment from a right to physician aid in dying.

---

[100] *See* Cal. First Bank v. State, 1990-NMSC-106 ¶¶ 42-44, 11 N.M. 64, 801 P.2d 646 (dismissing appellant's argument that Inherent Rights Provision protects persons from violence by a private party). *But see* Reed v. State *ex rel.* Ortiz*,* 1997–NMSC–055, ¶ 105, 124 N.M. 129, 947 P.2d 86 (recognizing that "[o]ur courts have not fully defined the scope of this constitutional provision"), *rev'd sub nom. on other grounds by* New Mexico *ex rel.* Ortiz v. Reed*,* 524 U.S. 151 (1998)."

[101] Reflecting upon this decision four years later, retired New Mexico Supreme Court Justice Edward Chávez indicated that the court wanted to hold that a right to physician assisted suicide existed but felt as though it could not constitutionally justify the decision. Comments of New Mexico Supreme Court Justice (ret.) Edward Chávez at Medical Legal Day, University of New Mexico School of Law (Mar. 6, 2020).

In *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 58, the New Mexico Supreme Court held that there is no fundamental or important right to physician aid in dying under the Inherent Rights Clause or Due Process clause of the state constitution. The court reiterated liberty rights defined by U.S. Supreme Court precedent and relied upon three key factors that could give support to creating a new right. The factors were (1) the state's history of supporting the proposed right; (2) case law supporting the proposed right; and (3) whether the state has a rational basis for not creating the proposed right.[102]

First, appellants argued that the state's history of valuing patient autonomy and dignity illustrated support for physician aid in dying, but the court was unpersuaded and reasoned that respect for patient autonomy does not guarantee aid in dying.[103] This line of reasoning is immediately distinguishable from the right to a healthful environment right because the state constitution explicitly values protecting the environment and protecting people from environmental harm. Additionally, New Mexican culture has always respected and relied upon the environment. This is evident from the multitude of state and national parks, agricultural reliance on the land, indigenous connections to land, and scholars' commitment to environmental science and law.[104] Finally, the recent momentum to improve children's futures should also support reasoning that the state cares about children's wellbeing and health.

Next, the court reasoned that none of the case law in the state supported a right to die or the notion that this right falls under the Inherent Rights Provision.[105] Importantly, the court stated "the Inherent Rights Clause has never been interpreted to be the exclusive source for a fundamental or important constitutional right, and on its own has always been subject to reasonable regulation."[106] Therefore, it is crucial for litigants to argue that a combination of Due Process penumbras and Inherent Rights penumbras

---

[102] Morris v. Brandenburg, 2016-NMSC-027, ¶¶ 35, 51-52, 367 P.3d 836, 849, 855.

[103] *Id.* ¶¶ 35-36, 367 P.3d at 849.

[104] White Sands in Southern New Mexico was designated as a national park on December 20, 2019, and the University of New Mexico School of Law's Natural Resources Journal – now at Volume 60 – was one of the first law journals in the field; the journal began publishing before "environmental law" entered the popular lexicon. Allen Kim, *White Sands National Monument designated as the newest US national park*, CNN (Dec. 23, 2019), https://www.cnn.com/travel/article/white-sands-national-park-trnd/index.html [https://perma.cc/4GX5-74PW]; *see generally Natural Resources Journal*, U. N.M. SCH. L., http://lawschool.unm.edu/nrj/ (last visited May 6, 2020).

[105] Morris, 2016-NMSC-027, ¶ 51, 367 P.3d at 855.

[106] *Id.*

yields a right to a healthful environment, instead of arguing two separate routes. Because New Mexico precedent thus far indicates that an Inherent Rights argument alone is insufficient, the Inherent Rights Provision must be used to lend support to larger Due Process arguments. In addition, a case striving for an environmental right could argue that *Yazzie* should be viewed as persuasive, as discussed above.

Third, in *Morris*, the court found that New Mexico has a rational basis for protecting human life. The court reasoned that the state statute preventing physician assisted suicide is constitutional because the "[s]tate does have a legitimate interest in providing positive protections to ensure that a terminally ill patient's end-of-life decision is informed, independent, and procedurally safe," even though it does not "have an interest in preserving a painful and debilitating life that will end imminently."[107] However, there is no legitimate interest in the state preventing a healthful environment from existing.[108] Conversely, the environmental provision suggests otherwise; it suggests the state has a duty to protect the environment, so people living in the environment are protected. In the case of an environmental right, no statute needs to be stricken, the state only needs to recognize that it is not doing enough to ensure a safe and clean environment.

Finally, in addition to using Judge Chávez's reasoning in *Morris* to distinguish the right to a healthful environment from the right to aid in dying, litigants should look to the appellate court's dissent, penned by Judge Vanzi.[109] In her dissent, Judge Vanzi highlights multiple compelling constitutional arguments in support of expanded liberty interest. First, the dissent discusses that in a companion case to *Roe v. Wade*, Justice Douglas' concurrence included "a freedom to care for one's own health and person" in his definition of liberty.[110] This case could be used to support the argument that children do not have the autonomy or knowledge to protect themselves, so states must take extra measures in order to protect them from environmental harms. Importantly, Judge Vanzi also recognized the

---

[107] *Id.* ¶ 52, 367 P.3d at 855.

[108] Saving money by failing to provide safe drinking water is not a rational state action, as indicated by the criminal indictments, including involuntary manslaughter, which arose from the Flint, Michigan water crisis. *Flint Water Prosecution Team Expands Investigation Based on New Evidence, Dismisses Cases Brought by Former Special Counsel*, MICH. DEP'T ATT'Y GEN. (Jun. 13, 2019), https://www.michigan.gov/ag/0,4534,7-359-92297_92299-499753--,00.html [https://perma.cc/5R49-5L76].

[109] Morris v. Brandenburg, 2015-NMCA-100, ¶71, 356 P.3d 564, 591 (Vanzi, J., dissenting), *overruled by* Morris v. Brandenburg, 2016-NMSC-027, 367 P.3d 836.

[110] Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J., concurring).

freedom given to courts in interpreting the constitution and continuing to create new rights by relying upon *Obergefell v. Hodges*, which guaranteed a fundamental right to marry for same sex couples. In terms of expanding the meaning of liberty, the *Obergefell* court reasoned:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[111]

Through the *Obergefell* reasoning, Judge Vanzi's dissent highlights that expanding constitutional rights is not a formulaic process; it involves the court's "reasoned judgment."[112] In terms of the Inherent Rights Provision, Judge Vanzi reminds the court that even though the provision has never been interpreted to protect a right alone, this "does not mean that its text may simply be read out of the Constitution," nor does it mean that its scope cannot be broadened.[113] This reasoning is crucial because it demonstrates that some judges are of the opinion that the purpose of the Inherent Rights Provision must be to expand New Mexicans' liberties.[114] Judge Vanzi thus concludes her Due Process analysis by explaining that she would hold that the Inherent Rights Provision "affords New Mexico citizens the right and agency to defend their lives and liberty by availing themselves of aid in dying." Each of these compelling constitutional arguments is vital for litigants aiming to create a new right to a healthful environment. Moreover, although *Morris* did not prevail, the dissent gives litigants a glimmer of hope by showing that judges interpret the constitution differently, so creative litigation is worthwhile.

---

[111] Obergefell v. Hodges, 576 U.S. 644, 663 (2015). Importantly, in *United States v. Juliana*, 217 F. Supp. 3d 1224 (D. Or. 2016), plaintiffs used a similar line of reasoning by relying on *Obergefell* as well, and this reasoning was *not* reversed by the court.

[112] *Morris*, 2015-NMCA-100, ¶ 89, 356 P.3d at 596.

[113] *Id.* ¶¶ 110-111, 356 P.3d at 603.

[114] *Id.* ¶ 112, 356 P.3d at 603.

CONCLUSION

> "For the last two summers, the city where I live, Seattle, was shrouded in smoke from . . . wildfires . . . I have spent most of my life in Seattle and the summers are usually the best time to be here, with the fresh breezes coming in off the Puget Sound. But the last two years have brought something much darker. The smoke was so bad in 2017 and 2018 that we were advised not to go outside because the bad air quality could make you sick. The people who did venture outside were usually wearing gas masks or other kinds of protective breathing equipment. I was told that the air quality in Seattle during these times was even worse than it was in Beijing. Not only was it upsetting to have to stay inside during the time when I prefer to be outside and enjoying the Seattle summer, it was terrifying because I know that this is going to become the new normal. I always used to look forward to summers in Seattle but now, I am afraid because I don't want to be kept hostage in my house trying not to breathe the polluted air." Aji P., 19-year-old Washington resident and co-plaintiff in *Juliana v. United States* and *Aji P. v. State of Washington* [115]

Advocates and community members should never be satisfied with settling for the "new normal" that Aji described, where children cannot spend their free time playing and exploring the outdoors like past generations have. The new normal is a false compromise, and advocates should resist that temptation because it prevents the realization of attainable judicial and legislative progress. Whether it is through declarations sent to courts or data ranking child wellbeing, our children are telling us that we are dooming future generations. As attorneys, advocates, and community members, we have a duty to use our privilege, knowledge, and skills to protect vulnerable populations by giving them a voice. Impact litigation is never straightforward or easy, but it is essential in advocating for systemic change of this nature. Moreover, the goal of impact litigation is never to win, it is to spur change. Regardless of the outcome of the environmental litigation proposed, a domino effect could ensue; publicity and support may push the legislature to focus more on environmental wellness and execute its duty to protect New Mexicans from environmental harms. Cities may enact ordinances resulting in an option to pursue administrative claims at the municipal level as well.

---

[115] Decl. of Aji P., *supra* note 50.

In order to thrive, children's basic needs, including food, shelter, and a healthy place to grow, are vital. Therefore, New Mexicans must focus on environmental health to the same extent as they focus on improving public education. For this reason, New Mexico's courts should recognize that under Due Process, Equal Protection, and the Inherent Rights provision, children have a right to a healthful environment. Without this recognition, the state will continue to rank among the worst for child wellbeing. The time to expand state constitutional rights to include the fundamental right to a healthful environment is now.

* * *