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Precedent, Politics, or Priorities: Are Courts Stepping out of Their Traditional Judicial Bounds when Addressing Climate Change?

*Mary Haley Ousley**

Abstract

There is consensus in the scientific community that climate change is in fact occurring and is primarily driven by human activities. Despite this consensus, the executive branch under President Trump has engaged in scrapping environmental regulations and increasing fossil fuel consumption, while the legislative branch has refused to take any beneficial action. This leaves the judicial branch as the primary avenue for Americans seeking to force action on climate change.

This paper will focus on the judicial response toward climate change litigation. More specifically, it will analyze how some courts—and the litigants who bring their suits—are stepping outside of their traditional judicial bounds when addressing climate change suits. In some cases, courts are using their positions to bring publicity to certain issues or are allowing unusual complaints to move forward. Further, this paper argues that until the other branches take action to combat climate change, the judicial branch ought to continue to provide a place for debate and response to climate change, no matter how limited its response may be. When two branches of government systematically deny and obstruct such action, it is in the collective interest to allow and encourage the third branch to remain open to such claims.

When a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government.

– Judge Ann Aiken¹

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1. *Juliana v. U.S.*, No. 6:15-cv-0517-TC (D. Or. filed Nov. 10, 2016), <https://perma.cc/BK2K-U7DW>.

Introduction

As of this writing, California is fighting the most destructive and deadly wildfire in its history.² The fire originated in Butte County, California and is one of three fires currently raging through the Golden State.³ Its effects are felt over one hundred miles south, in San Francisco, where a blanket of smoke is currently covering the city—prompting officials to urge residents to stay indoors and limit physical activity.⁴ Living with and responding to the effects of wildfires is becoming the new normal for Californians who have seen the wildfire season grow longer and more devastating.⁵

In the midst of smoke and fire, President Donald Trump has blamed poor forest management and has threatened to eliminate federal aid to California.⁶ Similarly, during last year’s massive wildfires, President Trump blamed California’s “bad environmental laws” for the roaring fires.⁷ Although wildfires in general are normal phenomena in California, scientists have found that at least one factor has led to the increased size and frequency of the apocalyptic flames—climate change.⁸ And it is estimated that if greenhouse gas emissions continue rising, the frequency of massive wildfires will increase fifty percent by the end of the century, with the average area burned increasing by seventy-seven percent.⁹

2. Jack Nicas & Thomas Fuller, *Wildfire Becomes Deadliest in California History*, N.Y. TIMES (Nov. 12, 2018), <https://perma.cc/WN9G-RPFF>.

3. Nicole Chavez et al., *California Wildfire Wipes Out Much of One Town, Kills 9*, CNN (Nov. 10, 2018, 2:22 AM), <https://perma.cc/B75Q-7ZZN>.

4. Ashley McBride, *Butte County Fire May Make Bay Area’s Air Quality Even Worse*, S.F. GATE (Nov. 1, 2018, 11:04 PM), <https://www.sfgate.com/california-wildfires/article/Butte-County-fire-continues-to-make-Bay-Area-air-13381998.php>.

5. April Glaser, *The Worst Fires in Recent California History*, SLATE (July 31, 2018, 3:29 PM), <https://perma.cc/XQ56-CDAR>.

6. Trapper Byrne & Kurtis Alexander, *Trump on California’s Wildfires: ‘Forest Management is So Poor’*, S.F. CHRON. (Nov. 10, 2018, 7:16 PM), <https://perma.cc/APN9-RTA6>.

7. Rachel Withers, *Trump Responds to Worst Fires in California’s History by Threatening to Withhold Federal Aid*, VOX (Nov. 10, 2018, 3:21 PM), <https://perma.cc/5JR9-NE8R>.

8. GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA ENERGY COMMISSION, CALIFORNIA NATURAL RESOURCES AGENCY, CALIFORNIA’S FOURTH CLIMATE CHANGE ASSESSMENT: STATEWIDE SUMMARY REPORT 1, 9 (2018), <https://perma.cc/M62D-JMAM>.

9. *Id.*

Here, wildfires are merely one example of the extreme weather events to be expected as our climate changes.¹⁰ The executive branch's response to this extreme weather event is indicative of the culture of climate change denial that currently pervades the political branches.¹¹ This paper attempts to track whether the third branch of government—the courts—have responded to a lack of policy action since the beginning of the Trump administration using nontraditional means. It also tracks how particular litigants have used the judicial system to advocate for environmental protections by asserting novel or extraordinary claims. This paper will proceed as follows: Part I will discuss current climate change science, how the American public perceives climate change, how the public wants the government to respond, and how the federal and some state and local governments have responded given the science and public sentiment. Part II will analyze how certain courts have handled climate change litigation in nontraditional ways. Part III will argue that the nontraditional actions that courts have taken are proper responses to the political branches that are either actively dismantling environmental regulations related to climate change or inactively regulating greenhouse gas emissions. Finally, this paper will conclude with the limitations of the courts in relation to regulating climate change.

I. Climate Change: A Brief Overview

We are currently living in the warmest period “in the history of modern civilization.”¹² What is causing this warming and what are the effects? There is broad consensus in the scientific community that human activity, principally emissions of greenhouse gases, is the primary driver of climate change.¹³ There does not appear to be any credible alternative explanation for the amount of change currently being observed.¹⁴ As temperatures climb, we can expect to observe rising sea levels; more extreme weather events, such as increasingly intense wildfires, hurricanes,

10. *See id.* at 8–12.

11. Georgina Gustin, *Climate Denial Pervades the Trump White House, But It's Hitting Some Limits*, INSIDE CLIMATE NEWS (Jan. 8, 2018), <https://perma.cc/B3QZ-C5UG>.

12. Donald J. Wuebbles et al., *Climate Science Special Report: Fourth National Climate Assessment: Executive Summary*, CSSR, <https://perma.cc/39NH-KZ6S> (last visited Feb. 15, 2019, 9:44 PM).

13. NASA, *Scientific Consensus: Earth's Climate is Warming*, CLIMATE NASA, <https://perma.cc/7MYP-GRKW>.

14. Wuebbles et al., *supra* note 12, Chapter 1, <https://perma.cc/J89Y-YSEJ> (last visited Dec. 19, 2018, 2:17 PM).

heat waves, flooding, and droughts; and other impacts.¹⁵ We have already seen global sea levels rise by seven to eight inches since 1900, three of them since 1993.¹⁶ Additionally, we have seen an increase in snowmelt, glacial retreat, ocean acidification, changes in animal migration, and negative impacts to agriculture.¹⁷

In 2015, 184 states (including the three largest emitters of greenhouse gases: China, the European Union, and the United States)¹⁸ reached an agreement—commonly known as the Paris Agreement—aimed at limiting global temperature rise to below two degrees Celsius above pre-industrial levels, with a more specific goal of limiting temperature change to 1.5 degrees.¹⁹ To reach this goal, the agreement requires each country to reduce its national emissions and “adapt to the impacts of climate change.”²⁰ The temperature of Earth is currently one degree Celsius above preindustrial levels.²¹ In October of 2018, the Intergovernmental Panel on Climate Change (IPCC) released a report indicating that, to limit temperature increases to 1.5 degrees, fossil-fuel use must be reduced by half by 2030, and eliminated by 2050.²² If temperatures rise above this level, vanishing coral reefs, fresh water deficits, agricultural devastation, melting ice sheets, and dangerous sea level rise are only a few of the impacts we will see.²³ Humans must act quickly and vigorously to limit greenhouse gas emissions or we risk devastating consequences.

15. Union of Concerned Scientists, *Global Warming Impacts*, UCSUSA, <https://perma.cc/2Q56-LZXX> (last visited Dec. 19, 2018, 2:19 PM).

16. Wuebbles et al., *supra* note 12.

17. Alina Bradford & Stephanie Pappas, *Effects of Global Warming*, LIVE SCIENCE (Aug. 12, 2017, 9:12 AM), <https://perma.cc/8QSL-9YTH>.

18. Johannes Friedrich et al., *This Interactive Chart Explains World's Top 10 Emitters, and How They've Changed*, WORLD RES. INST. (Apr. 11, 2017), <https://perma.cc/T6TM-GMJ5>.

19. UNITED NATIONS, *What is the Paris Agreement*, UNFCCC, perma.cc/Q8TS-YJFJ (last visited Dec. 19, 2018, 2:47 PM).

20. UNITED NATIONS, *Nationally Determined Contributions*, UNFCCC, <https://perma.cc/H93Z-2773> (last visited Dec. 19, 2018, 2:48 PM).

21. Stephen Leahy, *Climate Change Impacts Worse Than Expected, Global Report Warns*, NAT'L GEOGRAPHIC (Oct. 7, 2018), <https://perma.cc/P2PS-T4UG>.

22. *Id.*

23. Bob Silberg, *Why a Half-degree Temperature Rise is a Big Deal*, CLIMATE NASA (June 29, 2016), <https://perma.cc/P2UV-S4PK>.

A. Public Sentiment

Given the scientific consensus that climate change is in fact occurring, and the disastrous effects if it is not curbed, how has the public perceived this dire warning? The Yale Program on Climate Change Communication conducted a study describing how registered voters across the political spectrum view global warming.²⁴ They found that seventy-three percent of voters believe global warming is in fact occurring, and fifty-nine percent believe it is mainly caused by human activities.²⁵ These percentages vary amongst party lines, with forty percent and twenty-six percent, respectively, of conservative republicans holding these views, while over eighty percent of liberal democrats hold the same.²⁶ Additionally, the survey found that “large majorities of registered voters across the political spectrum support a range of policies that promote clean energy . . . reduce carbon pollution and dependence on fossil fuels.”²⁷ Moreover, it found that seventy percent of registered voters, including fifty-five percent of Republicans, believe that corporations and industry “should do more to address global warming.”²⁸ While fifty-four percent of voters believe that global warming ought to be a high priority for the President and Congress, seventy percent believe “the United States should reduce its greenhouse gas emissions, regardless of what other countries do.”²⁹ This survey indicates that while there is a range of beliefs depending on political affiliation, a majority of registered voters surveyed believe that global warming and climate change are real threats that must be addressed.

B. Federal Government Response

Given that climate change beliefs and the want for policy are essentially held by a majority of the voting public, how has the federal government responded? It does not appear that the legislature nor the executive are listening to the majority of American voters who want more to be done about climate change. During the past two years, since 2016,

24. Anthony Leiserowitz et al., *Politics & Global Warming*, March 2018, CLIMATE COMM’N YALE (May 8, 2018), <https://perma.cc/KB76-QXLD>.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

these branches have systematically rolled back climate change regulations and policies.³⁰

i. The Legislature

Since the Republican party took full control over both houses of Congress, it does not appear that they have positively contributed to the regulation of greenhouse gases. To the contrary, they passed a resolution denouncing a carbon tax on the grounds that it would be “detrimental to American families and businesses and is not in the best interest of the United States,”³¹ they voted to overturn President Obama’s Clean Power Plan,³² opened up the Arctic National Wildlife Refuge to oil drilling,³³ and voted to prohibit funds for implementing the Social Cost of Carbon rule.³⁴ Nevertheless, there has been a bipartisan step toward establishing climate change policy with the creation of the Climate Solutions Caucus (“Caucus”) in 2016.³⁵ Their mission is to “educate members on economically-viable options to reduce climate risk and to explore bipartisan policy options that address the impacts, causes, and challenges of our changing climate.”³⁶ However, the Caucus has been deeply criticized for being a group where at-risk Republicans show outward support while continuing to oppose climate change policies on the floor.³⁷ Since the midterm election in November of 2018, twenty-three Republican members of the Caucus retired or lost their bid for reelection, leaving the future of the Caucus uncertain.³⁸ Nevertheless, with a new Democratic majority in

30. Nadja Popovich, *78 Environmental Rules on the Way out Under Trump*, N.Y. TIMES (Dec. 28, 2018), <https://perma.cc/43GP-5MH2>.

31. H.R. Con. Res. 119, 115th Cong. (2018).

32. Alan Neuhauser, *Welcome Back, Mr. President: House Votes to Scrap Environmental Regs*, U.S. NEWS (Dec. 1, 2015, 6:10 PM), <https://www.usnews.com/news/articles/2015/12/01/house-votes-to-scrap-obamas-clean-power-plan>.

33. Elizabeth Harball, *Arctic National Wildlife Refuge Battle Ends, But Drilling Not a Given*, NPR (Dec. 21, 2017), <https://perma.cc/7AFR-98P2>.

34. H.R. Res. 3354, 115th Cong. (2017).

35. Climate Solutions Caucus, *What Is the Climate Solutions Caucus*, CITIZENS’ CLIMATE LOBBY, <https://perma.cc/2HPC-HD57> (last visited Dec. 19, 2018, 3:08 PM).

36. Emily Wirzba, *Who is in the Bipartisan Climate Solutions Caucus?*, FRIENDS COMM. ON NAT’L LEGIS., perma.cc/8B3F-SX8W (last visited Dec. 19, 2018, 3:10 PM).

37. Natasha Geiling, *A Caucus and Bull Story*, GRIST (Oct. 23, 2018), <https://perma.cc/2QJV-5J4H>.

38. Jeremy Bloom, *GOP Members of Climate Solutions Caucus Lose Big in Blue Wave*, CLEAN TECHNICA (Nov. 8, 2018), <https://perma.cc/HZA5-5C44>.

the House following the November 2018 midterms, we may see renewed momentum in the realm of policy aimed at combatting climate change.³⁹

ii. The Executive

In contrast to the legislature, the Trump Administration has been very active in the climate change policy realm.⁴⁰ However, this activity has principally been aimed at weakening or reversing climate change regulations.⁴¹ One of the first blows to climate protections was the nomination and confirmation of Scott Pruitt to the Environmental Protection Agency, the government agency tasked with enforcing federal environmental laws.⁴² During his time as the Administrator of the EPA, Pruitt attempted to cut the agency's budget, pushed to lower fuel emissions standards, urged President Trump to withdraw from the Paris Climate Agreement, and opposed the Clean Power Plan.⁴³ The Clean Power Plan, an Obama Administration policy that set limits on carbon pollution from U.S. power plants, was projected to cut emissions from such plants thirty-two percent by 2030.⁴⁴ The Trump Administration issued an order to cancel the plan, which Pruitt carried out.⁴⁵ The Administration's replacement, the Affordable Clean Energy Rule, is expected to reduce emissions by up to 1.5 percent if the rule is adopted.⁴⁶ In addition, in June 2017, President Trump announced that the United States would be withdrawing from the 2015 Paris Climate Agreement—which makes the United States the only country in the world to reject and withdraw from the agreement.⁴⁷ While

39. Marianne Lavelle, *With Democratic Majority, Climate Change is Back on U.S. House Agenda*, INSIDE CLIMATE NEWS (Nov. 7, 2018), <https://perma.cc/9XAC-6KEX>.

40. Jillian Kestler-D'Amours, *One Year Under Trump: 'Attack' on Climate Change Fight*, ALJAZEERA (Jan. 17, 2018), <https://perma.cc/34NK-KCVS>.

41. *Id.*

42. Coral Davenport, *Senate Confirms Scott Pruitt as E.P.A. Head*, N.Y. TIMES (Feb. 17, 2017), <https://perma.cc/VJ2Z-AWJC>.

43. Joey Mendolia & Daniel Bush, *All of the Ways Scott Pruitt Changed Energy Policy*, PBS (July 5, 2018), <https://perma.cc/BQ9E-VNBP>.

44. Nat'l Res. Def. Council, *What is the Clean Power Plan*, NRDC (Sept. 29, 2017), <https://perma.cc/XM49-SKH5>.

45. Ryan Cooper, *Obama's Clean Power Plan is Dead. Time to Get Serious on Climate Change*, THE WEEK, <https://perma.cc/7DKZ-2NUE>.

46. EPA, *EPA Proposes Affordable Clean Energy (ACE) Rule* (Aug. 8, 2018), <https://perma.cc/6LNL-HWXF>.

47. Robinson Meyer, *Syria is Joining the Paris Agreement. Now What?*, THE ATLANTIC (Nov. 8, 2017), <https://perma.cc/YP7F-ZUQG>.

the climate change policy rollbacks listed above are not exhaustive,⁴⁸ they are a few of the most alarming and threatening to the fight against climate change.

C. State and Local Government Response

While the Federal Government continues curtailing climate change regulations and policies, states and cities have stepped in, vowing to reduce emissions in their respective communities.⁴⁹ The Governors of seventeen states have pledged to uphold and implement the policies of the Paris Climate Agreement.⁵⁰ Twelve U.S. cities have joined C40, a global network of cities committed to the Paris Agreement and decreasing emissions.⁵¹ In addition to state and local governments, We Are Still In, a community of over 3,500 investors, universities, tribes, etc., has vowed to uphold the Paris Agreement.⁵² Nine northeastern states have joined an initiative to “cap and reduce CO2 emissions from the power sector.”⁵³ And four-hundred U.S. mayors have banded together as “Climate Mayors,” committing to making progress on climate change policy actions.⁵⁴ Again, this list is not comprehensive but it demonstrates that many states and localities are committed to reducing greenhouse gas emissions and combatting climate change.

D. The Court: Pre/Post Trump Administration

In 2007, the Supreme Court of the United States handed down a landmark decision in *Massachusetts v. Environmental Protection Agency*.⁵⁵

48. Environmental & Energy Law Program, *Regulatory Rollback Tracker*, HARV. LAW, <https://perma.cc/9MCG-JH7E> (last visited Dec. 19, 2018, 3:30 PM).

49. Liza Ramrayka, *US Activists Launch Climate Change Initiatives in Absence of Federal Leadership*, THE GUARDIAN (Sept. 12, 2018, 3:34 PM), <https://perma.cc/7V5C-WLVW>.

50. See U.S. CLIMATE ALLIANCE, <https://perma.cc/X8VR-M6B3> (last visited Dec. 22, 2018, 2:48 PM).

51. See C40 CITIES, <https://perma.cc/BEZ3-AZTL> (last visited Dec. 19, 2018, 3:35 PM).

52. See WE ARE STILL IN, <https://perma.cc/9SQK-G7RK> (last visited Dec. 19, 2018, 3:38 PM).

53. See Reg'l Greenhouse Gas Initiative, RGGI, <https://perma.cc/5XEJ-QAPV> (last visited Dec. 19, 2018, 3:40 PM).

54. See CLIMATE MAYORS, <https://perma.cc/6PXB-283Y> (last visited Dec. 19, 2018, 3:42 PM).

55. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

The plaintiffs were a “group of States, local governments, and private organizations” who argued that the EPA had abandoned its “responsibility under the Clean Air Act to regulate the emissions of . . . greenhouse gases.”⁵⁶ Massachusetts, the lead plaintiff, argued that the rise in sea level along its coastline caused by the unregulated emissions of greenhouse gases had and would continue to threaten its coastal land.⁵⁷ In a 5-4 decision, the majority sided with the plaintiffs, and for the first time in history, acknowledged the issue of climate change.⁵⁸ Justice Kennedy, who sided with the liberal wing of the Court, provided the fifth vote, giving the EPA “the authority under the Clean Air Act to regulate the greenhouse gases that cause global warming.”⁵⁹

With Justice Anthony Kennedy’s departure from the Court in the summer of 2018, there are only two remaining Justices who voted with the majority of the Court in *Massachusetts v. EPA*.⁶⁰ Currently, there are only four “liberal” members of the Court.⁶¹ However, three of the dissenting Justices from *Massachusetts v. EPA* are currently still on the Court, and the Trump Administration has appointed two additional “conservative” Justices.⁶² What does this mean for cases involving climate change policy or litigation? While there always remains some uncertainty as to how a new Justice will decide to vote on a case, their prior judicial decisions are likely to be good indicators of future judicial inclinations.

Justice Neil Gorsuch, who took a seat on the high Court in April 2017, does not appear to have a strong stance in favor of or against environmental agendas.⁶³ However, while on the Tenth Circuit Court of Appeals, then-Judge Gorsuch wrote in a concurring opinion for a non-environmental case that he saw *Chevron Deference* as an “abdication of judicial duty”—and

56. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

57. *Id.* at 515.

58. Lisa Heinzerling, *Climate Change in the Supreme Court*, 38 ENVTL. L. 1, 14 (2008).

59. Brad Plumer, *How Brett Kavanaugh Could Reshape Environmental Law From the Supreme Court*, N.Y. TIMES (July 10, 2018), <https://perma.cc/887X-U4GM>.

60. *See Massachusetts v. EPA*, 549 U.S. 497 (2007) (indicating which Justices voted with the majority).

61. *Justices*, OYEZ, <https://perma.cc/TYH9-BSF4> (last visited Dec. 21, 2018, 6:50 PM).

62. *Id.*; *see Massachusetts v. EPA*, 549 U.S. 497 (2007) (indicating which Justices dissented).

63. Dan Farber, *Gorsuch and the Environment: A Closer Look*, LEGAL PLANET (March 20, 2017), <https://perma.cc/U9SY-SFAG>.

essentially called for the dissolution of the doctrine.⁶⁴ While the doctrine does not always favor environmentalists, if it were overturned, it would be hard to predict how some Justices might vote on particular agency actions.⁶⁵ The second new Justice to be seated on the high Court, Brett Kavanaugh, was confirmed in October 2018.⁶⁶ While Justice Kavanaugh has stated that he believes that climate change is real,⁶⁷ his rulings while judge on the D.C. Circuit Court of Appeals were regularly unfavorable to the EPA and the administrative agencies.⁶⁸ When his court heard arguments over the Clean Power Plan, then-Judge Kavanaugh stated “‘global warming isn’t a blank check’ for the president.”⁶⁹ Justice Kavanaugh’s view on the limited power that statutes and administrative agencies hold is likely to be a concern for environmental groups contemplating bringing suit in federal courts. Coupled with the uncertainty over the staying power of Chevron Deference, both Justice Gorsuch’s and Justice Kavanaugh’s views likely create a majority who may consistently vote against environmental objectives. Further, even if Chevron is not overturned, as used presently, the high level of deference that the doctrine provides to agency interpretations would likely undermine any legal challenges to the policies and deregulatory agenda of the current administration.⁷⁰ As a result, it is likely that environmental groups will push to keep such suits away from the Supreme Court so that deleterious precedent is not created.⁷¹

For various reasons, this paper does not analyze cases based on federal statutory law. First, environmental groups asserting novel or unconventional claims—as climate change suits tend to be—may attempt to keep their distance from the Supreme Court due to its current ideological arrangement, as discussed above. If defendants appeal decisions of lower courts, and the Supreme Court agrees to hear the cases, the Supreme Court

64. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (2016).

65. John H. Cushman Jr., *Why Environmentalists Are So Worried About Trump’s Supreme Court Pick*, INSIDE CLIMATE NEWS (Feb. 1, 2017), <https://perma.cc/F5W7-TVDA>.

66. *Justices*, *supra* note 61.

67. Robinson Meyer, *Brett Kavanaugh Could Extend Trump’s Environmental Legacy by Decades*, THE ATLANTIC (Oct. 9, 2018), <https://perma.cc/E5L2-CUY2>.

68. Fatima Hussein, *Supreme Court Nominee Kavanaugh Could Reinterpret Environmental Law*, BLOOMBERG (July 9, 2018), <https://perma.cc/W2ZJ-7BGE>.

69. Emily Holden, *Analysis: EPA Emerges from Court Battle with the Edge*, E&E NEWS (Sept. 28, 2016), <https://perma.cc/7FBT-FZQK>.

70. Phillip Dane Warren, *The Impact of Weakening Chevron Deference on Environmental Deregulation*, 118 COLUM. L. REV. 62, 72 (2018).

71. Amanda Reilly, *Is Massachusetts v. EPA a Goner?*, E&E NEWS (June 28, 2018), <https://perma.cc/4H4D-4UQQ>.

may create precedent unfavorable to environmental advocates. Second, statutory claims are litigated under different standards of review than other types of cases.⁷² These standards, particularly the standard under Chevron Deference, are intended to reduce partisan judicial decisionmaking, and thus constrain judges to look only at the delegations given in the statute and the actions of agencies.⁷³ Therefore, for plaintiffs to succeed in a climate change lawsuit that may be unprecedented, they likely either need a sympathetic administration or judges willing to be more flexible in their decisions. If the current administration is unsympathetic to environmental regulations, and the administrative agencies that have authority over such regulations issue rules that are contrary to environmental goals but are in accordance with their delegated authority, judges have little leeway to rule against such agency decisions.⁷⁴ Due to these considerations, this paper will focus on cases that are not primarily focused on statutory law and interpretation.

II. Courts' Actions During the Trump Administration

While many States and localities have committed to regulating greenhouse gas emissions, the legislative and executive branches have continually rescinded or have attempted to rescind important emissions regulations and policies. Has the judicial branch stepped in to compensate in any way? Should they? Some argue that courts are a good place to present climate science, as the other branches may openly reject the science based on disbelief or skepticism.⁷⁵ This section will briefly discuss the increasing number of climate suits reaching the courts as well as actions that a minority of courts have taken that may be viewed as nontraditional court actions.

72. Todd Garvey, *A Brief Overview of Rulemaking and Judicial Review*, CONG. RESEARCH SERV. 1, 13 (Mar. 27, 2017), <https://perma.cc/BD8P-XQVK>.

73. Kent Barnett et al., *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1463 (2018).

74. *Id.* at 1471.

75. Dean Kuipers, *Three Ways to Combat Climate Change Through the Courts*, THE ATLANTIC (Oct. 30, 2018), <https://perma.cc/H4TR-BXD3>.

A. The Number of Climate Change Suits Has Soared

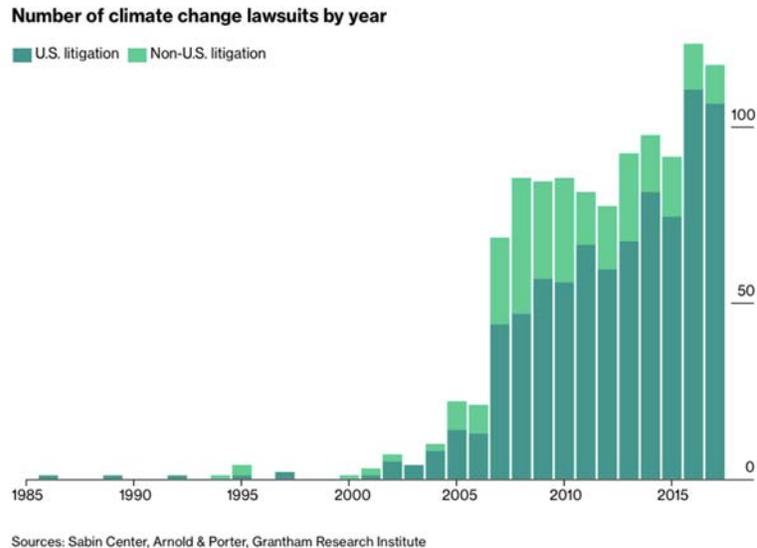


Table: Number of Climate Change Suits Since 1985.⁷⁶

Recently, the number of lawsuits concerning climate change has soared.⁷⁷ In the past two years since the Trump Administration has been in the White House, the number of lawsuits has remained high relative to the number of lawsuits dating to pre-2010.⁷⁸ In 2017, there were one-hundred and fifteen climate lawsuits filed, while in 2018, at time of writing, there have been eighty-three such suits.⁷⁹ These statistics do not mean that every case listed in the chart was brought to enforce environmental protection or climate change regulation. In 2017, plaintiffs who opposed environmental protections brought twenty-seven percent of the cases in the United States.⁸⁰ However, that leaves a remaining seventy-three percent of cases that support such protections. Moreover, the claims fall under many

76. Jeremy Hodges et al., *Climate Change Warriors' Latest Weapon of Choice is Litigation*, BLOOMBERG (May 24, 2018), <https://www.bloomberg.com/graphics/2018-climate-change-lawsuits/>.

77. *Id.*

78. *Climate Case Chart*, SABIN CENTER FOR CLIMATE CHANGE LAW, http://climatecasechart.com/search/?fwp_filing_year=2017%2C2018 (last visited Dec. 21, 2018, 7:40 PM) (showing the number of climate cases filed in 2017 and 2018).

79. *Id.*

80. Hodges et al., *supra* note 76.

different categories: federal statutory claims, constitutional claims, state law claims, etc.⁸¹ What this shows, according to Michael Gerrard, the director of Columbia University's Sabin Center for Climate Change Law, is that "as people who care about climate change become more frustrated at the failure of the administration and Congress to act, they increasingly turn to the courts for relief."⁸²

B. The Curious Courts

The focus of this paper is on litigants and courts who have stepped outside of their traditional bounds when addressing climate change. The number of these cases, as compared to the total amount of climate change cases brought in 2017 and 2018, is very low.⁸³ The cases that follow are some examples of nontraditional actions that judges have taken when faced with climate change suits. While these cases may not necessarily represent legal victories for the environmental plaintiffs, they do represent a deviation—however mild—from strict application of legal norms. More specifically, the cases that follow appear to present judges, aware of the impacts and dangers of climate change, as oscillating between scientific evidence, legal constraints, and a gray area of their judicial authority.

i. *People of State of California v. BP P.L.C.*

In September of 2017, the City Attorney for San Francisco filed a public nuisance suit against the five largest "investor-owned fossil fuel corporations in the world."⁸⁴ The plaintiffs alleged that the defendants had "produced massive amounts of fossil fuels for many years" despite having known since at least the late 1970s that usage of fossil fuels causes global warming.⁸⁵ Further, the plaintiffs argued that the "continued production of massive amounts of fossil fuels will exacerbate global warming, increase

81. *U.S. Climate Change Litigation*, SABIN CENTER FOR CLIMATE CHANGE LAW, <https://perma.cc/Y68M-SDHS> (last visited Dec. 21, 2018, 7:40 PM) (showing all of the different types of climate change claims).

82. James Rainey, *With Congress and Trump on Sidelines, Climate Change Battle Moves to Courts*, NBC NEWS (Oct. 26, 2018), <https://perma.cc/82GB-RFDA>.

83. See *Climate Case Chart*, *supra* note 78; the only notable nontraditional actions by courts at this time are discussed within this article, see discussion *infra* Sections II.B.i – II.B.iii.

84. Complaint for Public Nuisance, *California v. BP P.L.C.*, No. CGC-17-561370 (Cal. Super. Sept. 19, 2017), <https://perma.cc/8Y8X-5FKC>.

85. *Id.* at 2.

sea level rise and result in grave harm to San Francisco.”⁸⁶ The City of Oakland brought a similar suit against the same defendants.⁸⁷ The defendants removed the suits to federal court,⁸⁸ where they were heard by Judge William Alsup of the United States District Court, Northern District of California.⁸⁹ In what is described as an “unprecedented move in a federal lawsuit,”⁹⁰ Alsup called for a climate change tutorial presentation held in the courtroom.⁹¹ The tutorial was to be conducted in two parts: the first would be the history of climate change science from both sides, the second part would then allow each side to present the best currently available science on climate change.⁹² While Alsup stated that the court “accepts the science behind global warming,” he ultimately found that “it remains true that our federal courts have authority to fashion common law remedies for claims based on global warming, [however] courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches.”⁹³

Despite Judge Alsup’s ultimate dismissal of the cities’ cases, the climate change tutorial that he ordered was extraordinary in the literal definition of the word. The tutorial received a considerable amount of publicity; from national newspapers such as the *New York Times*,⁹⁴ to British newspaper *The Guardian*,⁹⁵ to conservative political commentator

86. Complaint for Public Nuisance, *supra* note 84, at 32.

87. *Id.*

88. Notice of Removal, California v. BP P.L.C., No. 3:17-cv-06011-JCS (N.D. Cal. Oct. 20, 2017), <https://perma.cc/WDD6-FT5D>.

89. Order Denying Motions to Remand, California v. BP P.L.C., No. 3:17-cv-06012-WHA (N.D. Cal. Feb. 27, 2018), <https://perma.cc/EB9X-72C6>.

90. Warren Cornwall, *In a San Francisco Courtroom, Climate Science Gets its Day on the Docket*, SCIENCE (Mar. 22, 2018, 4:00 PM), <https://perma.cc/D3AM-P2HW>.

91. Notice Re Tutorial, California v. BP P.L.C., No. 3:17-cv-06012-WHA (N.D. Cal. Feb. 27, 2018), <https://perma.cc/P36Y-6H65>.

92. *Id.* at 1.

93. Order Granting Motion to Dismiss Amended Complaints at 15-16, California v. BP P.L.C., No. 3:17-cv-06012-WHA 1 (N.D. Cal. June 25, 2018), <https://perma.cc/ZE7S-D2CM>.

94. John Schwartz, *Judge Dismisses Suit Against Oil Companies Over Climate Change Costs*, N.Y. TIMES (June 25, 2018), <https://perma.cc/S838-XM5S>.

95. Oliver Milman, *A Judge Asks Basic Questions About Climate Change. We Answer Them*, THE GUARDIAN (Mar. 21, 2018), <https://perma.cc/BQY2-UVKT>.

Rush Limbaugh.⁹⁶ Moreover, both the court and the defendant oil companies acknowledged that climate change is occurring and that human activities are the likely cause.⁹⁷ And while losing any case is generally undesirable, to have members of an industry—who have not only denied but have funded the denial of climate change⁹⁸—accept the science behind climate change in front of a judge is no small feat. Perhaps Judge Alsup could have decided the case without the tutorial, or perhaps he did not feel that he was qualified to decide without it. Whatever his reason, his tutorial obliged a very powerful industry to teach him a very public and very anticipated science lesson. Though this case did not yield a direct win for environmentalists, it is a peculiar example of a court taking a nontraditional role in a lawsuit.

Moreover, this type of judicial response can further the policy making process by publicizing the issues surrounding climate change. Where the political branches have remained either antagonistic to or idle in mitigating climate change, political science professor Jeb Barnes states that the judicial branch may provide a forum for “mobilization, agenda setting, and information gathering.”⁹⁹ This is especially true where the choice is between “litigation or nothing at all.”¹⁰⁰ While other forums may be preferable, “rule making by the courts may be the only available option.”¹⁰¹ Although ultimately Judge Alsup did not force the fossil fuel companies to compensate for their contribution to climate change, he did publicize the issue and provided a very public forum for information gathering. It is possible that Judge Alsup’s tutorial, the publicity that stemmed from it, and his opinion stating that the other branches are best suited to address climate change, will send policy signals to those branches and oblige them to act. Additionally, his actions and the information gathered from them may provide the impetus for similar suits if the elected branches do not act. In pursuit of combatting climate change, where the choice increasingly

96. Rush Limbaugh, *Climate Change Wackos Exposed in California Court*, RUSH LIMBAUGH (Apr. 2, 2018), <https://perma.cc/2VHC-D4QW>.

97. Order Granting Motion to Dismiss Amended Complaints, *supra* note 93, at 12; see Notice of Submission, *California v. BP P.L.*, No. 317-cv-06012-WHA (N.D. Cal. Mar. 21, 2018), <https://perma.cc/5LT2-XHBC>.

98. Dana Nuccitelli, *Two-Faced Exxon: The Misinformation Campaign Against its Own Scientists*, THE GUARDIAN (Nov. 25, 2015), <https://perma.cc/7NCE-B3PQ>.

99. Jeb Barnes, *In Defense of Asbestos Tort Litigation: Rethinking Legal Process Analysis in a World of Uncertainty, Second Bests, and Shared Policy-Making Responsibility*, 34 LAW & SOC. INQUIRY 5, 6 (2009).

100. *Id.* at 22.

101. *Id.*

appears to be litigation over nothing at all and the elected branches remain unreceptive to policy signals, courts may need to acknowledge that they can be a legitimate catalyst in this pursuit.

Litigants likely also realize that courts may provide an appropriate forum, as cities in California are not alone in pursuing lawsuits against fossil fuel companies for their role in contributing to and exacerbating climate change. Similar suits have been filed in Colorado,¹⁰² Maryland,¹⁰³ New York,¹⁰⁴ Rhode Island,¹⁰⁵ and Washington.¹⁰⁶ While it does not appear that any of the judges in these cases have behaved in nontraditional ways like Judge Alsup, litigants are increasingly turning to the courts for relief, though the ultimate outcome of the suits remains to be seen.

ii. *Washington v. Brockway*

In September of 2014, five activists trespassed on private property where rail cars—including those containing oil and coal—are dispatched to various locations.¹⁰⁷ These activists then essentially chained themselves to the railroad tracks to block the cargo from moving past.¹⁰⁸ They were later charged with Criminal Trespass and Obstructing or Delaying a Train.¹⁰⁹ During their trial in 2016, the activist defendants sought to use the affirmative defense of necessity for their acts of civil disobedience.¹¹⁰ They claimed that they had “exhausted all legal effective means to protest and that civil disobedience was the only means by which they could minimize the harms of climate change.”¹¹¹ Initially the judge rejected this argument, but later allowed the activist defendants to “put on expert testimony in

102. See Complaint, *Boulder County v. Suncor Energy*, No. 2018CV030349 (Colo. Dist. Ct. Apr. 17, 2018), <https://perma.cc/2HUJ-NM37>.

103. See Complaint, *Baltimore v. BP P.L.C.*, No. 24-C-18-004219 (Md. Cir. Ct. July 20, 2018), <https://perma.cc/V4M3-FQ8G>.

104. See Complaint, *New York v. BP P.L.C.*, No.1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018), <https://perma.cc/2MR3-DAV9>.

105. See Complaint, *Rhode Island v. Chevron*, No. PC-2018-4716 (R.I. Super. Ct. July 2, 2018), <https://perma.cc/9QTY-VPWX>.

106. See Complaint, *King County v. BP P.L.C.*, No. 18-2-11859 (Wash. Super. Ct. May 9, 2018), <https://perma.cc/P3HY-L5GR>.

107. Order at 2-3, *Washington v. Brockway*, No. 5035A-14D (Wash. Dist. Ct. Jan 6, 2016), <https://perma.cc/YED2-DXE8>.

108. *Id.* at 2–3.

109. *Id.* at 1.

110. *Id.*

111. *Id.* at 2.

support of the necessity defense.”¹¹² This would mark the first time an American court allowed the necessity defense to be argued to justify criminal acts done in response to the threats of climate change.¹¹³ Later, the Judge ruled that because the defendants had not established that there was “no reasonable legal alternative to their actions,” the jury would not be instructed on the necessity defense.¹¹⁴

While, again, the court ruled against the party with the environmental agenda, it is still noteworthy that it allowed the activist defendants to put on expert testimony in support of their necessity defense. When the judge issued his ruling rejecting the use of the defense, he stated “frankly the court is convinced that the defendants are far from the problem and are part of the solution to the problem of climate change . . . [but] I am bound by legal precedent, no matter what my personal beliefs might be.”¹¹⁵ He further stated that he hoped that the defendants found “some value in having been able to present their beliefs in a public forum.”¹¹⁶ This type of action from a sympathetic judge had previously been atypical in this area, and the suit was the first time activist defendants have been able to bring expert testimony for the necessity defense. In a sense, the decision helped to lay the legal framework for future use of the defense. Since then, there have been three successful judicial decisions granting use of the necessity defense for climate activists (out of eight attempts in total).¹¹⁷ However, none of the three successful cases have been fully litigated: in one, the ruling allowing the necessity defense is currently being appealed by the prosecutor’s office;¹¹⁸ in another, the charges were downgraded from criminal to civil—so the defendants were not able to mount the full

112. Opinion at 3, *Washington v. Brockway*, No. 76242-7 (Wash. Ct. App. May 29, 2018), <https://perma.cc/5MXC-TEXT>.

113. Julia Carrie Wong, *A Crime Justified by Climate Change? Activists Caught in Legal Showdown*, THE GUARDIAN (Jan. 14, 2016), <https://perma.cc/WXT9-FUUF>.

114. Opinion, *supra* note 112, at 6.

115. Julia Carrie Wong, *Activists Lose Criminal Case on Climate Change Defense – but Judge Praises Effort*, THE GUARDIAN, (Jan. 15, 2016), <https://perma.cc/5DST-QX4Y>.

116. *Id.*

117. *U.S. Climate Change Litigation*, SABIN CENTER FOR CLIMATE CHANGE LAW, http://climatecasechart.com/search/?fwp_filing_year=2016%2C2017&fwp_search=necessity%20defense (showing eight necessity defense cases filed between 2016 and 2017).

118. Notice of Appeal, *Washington v. Taylor*, No. 6Z0117975 (Wash. Dist. Ct. Mar. 30, 2018), <https://perma.cc/U384-HLML>.

necessity defense;¹¹⁹ and in the last, the judge dismissed the case before the activist defendants could present their arguments, finding that there was insufficient evidence that the activists had actually caused any damage.¹²⁰

iii. *Juliana v. United States*

In what is now being called a “landmark precedent,” twenty-one plaintiffs, aged eight to nineteen, filed suit against the United States, then President Barack Obama, and various executive agencies for failing to regulate climate change.¹²¹ Admittedly, this suit falls slightly outside the scope of the previously discussed cases, as this case was initiated during the previous Administration and is being pursued in federal court. However, as it is one of the most ambitious climate lawsuits of our time, it would be imprudent to not discuss such a significant case displaying nontraditional court actions. The case has garnered national and international attention¹²² and has been the catalyst behind protests and rallies across the nation.¹²³ It is also one of many such lawsuits around the nation, with similar suits filed in nine different states and their respective courts.¹²⁴

The case was originally filed in the United States District Court for the District of Oregon in 2015.¹²⁵ The plaintiffs claimed specifically that,

119. Natasha Geiling, *Judge Rules Civil Disobedience a ‘Necessity’ to Prevent Climate Change*, THINK PROGRESS (Mar. 28, 2018, 12:08 PM), <https://perma.cc/R9AE-8WLD>.

120. Kelsey Skaggs, *Victory in Minnesota: Valve Turners Acquitted of All Charges*, CLIMATE DEF. PROJECT (Oct. 9, 2018), <https://perma.cc/J9HW-926F>.

121. Gabriela Steier, *No Ordinary Lawsuit: Juliana v. United States is a Landmark Precedent for Climate Change Legislation*, JURIST (Jan. 6, 2017, 6:02 PM), <https://perma.cc/497C-VRQM>.

122. *Written Media Coverage*, OUR CHILDREN’S TRUST, <https://perma.cc/ZC6J-6MZE>.

123. See Daniel Moritz-Rabson, *100 Protesters Disrupt U.N. Climate Event to Promote ‘Clean’ Fossil Fuels*, NEWSWEEK (Dec. 10, 2018), <https://perma.cc/N47R-MX8B>; see also Ravenna Koenig, *Alaskans Rally in Support of Youth Climate Lawsuit, Currently in Limbo*, ALASKA PUB. MEDIA (Oct. 30, 2018), <https://perma.cc/78LY-TC9L>; see also Aakshi Chaba, *Students, New Haveners Rally for Juliana v. U.S.*, YALE NEWS (Oct. 30, 2018), <https://perma.cc/GHT8-2F6U>; see also Jack Moran, *Hundreds Rally for ‘Climate Kids’ Lawsuit in Eugene*, THE REGISTER GUARD (Oct. 30, 2018, 9:29 AM), <https://perma.cc/H9QP-JRQU>.

124. See *State Judicial Actions Now Pending*, OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org/pending-state-actions> (last visited Dec. 21, 2018, 10:16 PM).

125. Complaint, *Juliana v. U.S.*, No. 6:15-cv-01517-TC (D. Or. Sept. 10, 2015), <https://perma.cc/5E8R-UQ4P>.

“through the government’s affirmative actions that cause climate change, it has violated the youngest generation’s constitutional rights to life, liberty, and property, as well as failed to protect essential public trust resources.”¹²⁶ There have been numerous attempts by the defendants to have the case dismissed, including in the Ninth Circuit Court of Appeals,¹²⁷ and the United States Supreme Court,¹²⁸ but ultimately, the courts have denied the motions.¹²⁹ In November of 2016, U.S. District Court Judge Ann Aiken denied the defendant’s motions to dismiss, stating in her opinion and order, “this is no ordinary lawsuit.”¹³⁰ Judge Aiken found that the case did not raise a nonjusticiable political question, that the plaintiffs had adequately alleged they had standing to sue, and that plaintiffs could proceed with their due process challenge and public trust claims.¹³¹ In her conclusion, Judge Aiken wrote, “federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it . . . when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government.”¹³²

It is surprising that, despite the broad and novel nature of the claims, the case has yet to be dismissed. Further, Judge Aiken’s opinion is a biting retort against both the aridity and reticence of the judicial system. Similar to the previously discussed cases, Judge Aiken is outwardly sympathetic to the plaintiffs’ claims. However, unlike Judge Alsup in the big oil suits, Judge Aiken has permitted politically sensitive and contentious claims to move forward. Instead of relegating the claims to the other branches, Aiken stated, “courts have an obligation not to overstep the bounds of their jurisdiction, but they have an equally important duty to fulfill their role as a check on any unconstitutional actions of the other branches of

126. *Juliana v. U.S.—Climate Suit*, OUR CHILDREN’S TRUST, <https://perma.cc/NGP9-CHW8> (last visited Dec. 21, 2018, 10:20 PM).

127. *See* Opinion, *Juliana v. U.S.*, No. 17-71692 (9th Cir. Mar. 7, 2018), <https://perma.cc/KBY5-FEE5>; *see also* Opinion, *Juliana v. U.S.*, No. 18-71928 (9th Cir. July 20, 2018), <https://perma.cc/JU23-4EDQ>.

128. *See* Order, *Juliana v. U.S.*, No. 18A-410 (U.S. July 30, 2018), <https://perma.cc/LJQ4-PU2R>; *see also* Order, No. 18A-410 (U.S. Nov. 2, 2018), <https://perma.cc/H5EZ-XYQQ>.

129. *Id.*

130. Opinion and Order, *supra* note 1, at 3.

131. *Id.* at 18–51.

132. *Id.* at 52, 54.

government.”¹³³ And unlike the other cases, Judge Aiken has taken nontraditional actions that have a substantive impact. She has allowed the plaintiffs’ claims to move forward instead of sympathizing with the plaintiffs and their causes, but ultimately dismissing them. In response, Judge Aiken has been criticized for not having the constitutional authority to reach her decision, for being an activist judge, and her judicial stance has been equated with the autocracy of a monarch.¹³⁴ While the case is still moving through the judicial system, it will be interesting to see how higher courts will rule on the legal issues.

All of the aforementioned cases provide insight into the unfamiliar territory judges must navigate when addressing climate change litigation. Each of the judges in the cases above stepped out of their traditional bounds, whether it was turning a courtroom into a classroom, allowing a defense that was previously inconceivable to be pleaded, or accepting a novel constitutional claim seeking a right to a clean environment against the United States government. It is not difficult to recognize the internal conflict between their desire to act and the confines of the system in which they are working. They must decide whether they will, or even can, adapt the legal system to yield any sort of positive environmental outcome. Through their own words and actions, it is apparent that they understand the gravity of the effects of climate change yet are hindered by precedent and by priorities of the political branches.

III. Eccentric Courts vs. Erratic Climate

Some may argue that these decisions are “activist” in the most negative sense of the term. But are these actions, and others like them in relation to climate change suits, truly troublesome? Do they reach the level of impermissible overreaching by the judicial branch? Does it matter that climate change is currently considered to be one of the biggest threats to humankind?¹³⁵ I argue that these actions are not impermissible but are presently necessary to combat one of the most pressing issues facing sustainable life on our planet—climate change. When combatting climate change turned from a bipartisan effort into a highly polarized one,¹³⁶ when

133. Opinion and Order at 27, *Juliana v. U.S.*, No.6:15-cv-01517-AA, (D. Or. Oct. 15, 2018), <https://perma.cc/TT4J-A3HD>.

134. James Huffman, *Another Take on Juliana*, A.B.A., <https://perma.cc/6N7R-LPZ8>.

135. Somini Sengupta, *Biggest Threat to Humanity? Climate Change*, *U.N. Chief Says*, N.Y. TIMES (Mar. 29, 2018), <https://perma.cc/4EUW-ANAY>.

136. Cale Jaffe, *Melting the Polarization Around Climate Change Politics*, 30 GEO. ENVTL. LAW. REV. 455, 456 (2018).

the leaders of the political branches began actively rejecting climate science,¹³⁷ and when they further began to rescind environmental regulations,¹³⁸ they placed the courts in the unenviable position as potential defenders of the environment.

A. Activist Judges or an Inactive Legislature

The idea of judges as activists or policy makers tends to be treated with disdain and distrust.¹³⁹ Political scientist Malcolm Feeley and attorney Edward Rubin state that judicial activism is often characterized as “unprincipled,” denoting the personal predilections of judges and a “legal error” judges make when failing to “follow proper interpretive principles.”¹⁴⁰ Further, judges are perceived negatively due to their often unelected, life-tenured positions.¹⁴¹ At first thought, the idea of judicial policy making or activism does seem quite undemocratic. If the people do not elect them and cannot force them out of office, what is to stop judges from establishing complete governmental control? Of course, this is a very catastrophist perception of judges and their power that is galvanized by unfamiliarity with the judicial system. The concept of judicial policy making is neither novel nor extreme; there is a strong basis in literature that supports such policy making as a natural “institutional role of modern courts.”¹⁴² Moreover, judges do in fact have constraints on their power. If a judge did create a new rule based off his or her own predilections, it would be “reversed by a higher court, or distinguished by lower ones.”¹⁴³ Further, it is unlikely that a judge would risk his or her reputation on creating a new rule that is likely to be reversed or distinguished, in order to impose such “personal views on others.”¹⁴⁴ The ideas or new rules that judges create

137. Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came to View Climate Change as Fake Science*, N.Y. TIMES (June 3, 2017), <https://perma.cc/AHN7-ACGT>.

138. Dave Keating, *Trump’s Lasting Damage to the Environment*, DW (June 21, 2018), <https://perma.cc/7WA5-AKK4>.

139. MALCOM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW COURT’S REFORMED AMERICA’S PRISONS 1 (Alfred Blumstein & David Farrington eds., 1998).

140. *Id.* at 2.

141. Suzanna Sherry, *Why We Need More Judicial Activism* 6 (Vand. Pub. Law Research Paper, Working Paper No. 13-3, 2013), <https://perma.cc/3ZHD-EJ5K>.

142. FEELEY & RUBIN, *supra* note 139, at 3; *see also* Barnes, *supra* note 99.

143. FEELEY & RUBIN, *supra* note 139, at 353.

144. *Id.*

must be tied to the law, for the new rule would not be recognized as such without some connection or interpretation of existing law.¹⁴⁵ Further, once the new rule is established, it will be constrained by the same interpretive principles that were used to establish the new rule.¹⁴⁶ Thus, even when judges create new rules, those rules will be confined to the structures of the legal system.

The legal theories and complaints in climate change cases follow the concept that new ideas or rules must have a connection to existing law. As we have seen, they contain traditional claims such as public nuisance and traditional defenses such as necessity. Moreover, the constitutional claim to a healthy environment is not necessarily novel if we look to the larger sphere of judicially created constitutional rights. Judges have created the right of bodily autonomy for women,¹⁴⁷ marriage equality,¹⁴⁸ and racial equalities,¹⁴⁹ to name a few. In each of those cases, the newly established rights were tied to existing doctrine yet represent a progression in law that was not otherwise provided by the political branches. Despite their unpopularity with particular political factions, the decisions in those cases arguably made our country more just and equitable.

Further, there are circumstances in which the political branches simply will not or cannot act. Political actors are often constrained by the very process that makes them suitable for policy making, as “the enormous institutional power that elected officials have to make social policy cannot be separated from the incentives that lead them not to do so.”¹⁵⁰ These incentives could be particularly powerful coalitions, constituents, and even the President.¹⁵¹ The current political dynamics have shown that the legislature has almost consistently acquiesced to the will of the Administration.¹⁵² Thus any departure from this dynamic will likely be met with political vitriol and public backlash. This is especially likely in the realm of climate change regulation, as the current Administration has, as

145. FEELEY & RUBIN, *supra* note 139, at 346.

146. *Id.*

147. *See* *Roe v. Wade*, 410 U.S. 113 (1973).

148. *See* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

149. *See* *Brown v. Board of Education*, 347 U.S. 483 (1954).

150. Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85*, 97 AM. POL. SCIENCE REV. 483, 495 (2003).

151. *Id.*

152. Doug Sosnik, *Why Congress Rolls over for Trump*, POLITICO (Aug. 2, 2018), <https://perma.cc/MRJ9-Z6N2>.

discussed, steadily targeted environmental regulations aimed at reducing greenhouse gas emissions.¹⁵³ This dynamic does not necessarily control the judicial branch. What some may fear about judges—their appointment and tenure—also insulates them in certain ways from political pressures.¹⁵⁴ The judiciary may provide “a viable alternative forum for decision-making” in situations where politicians are restrained by political forces.¹⁵⁵ Given the almost certain dangers of inaction with regards to climate change, if the legislature is not acting due to political ramifications, perhaps the judiciary is, at the very least, obliged to take some action, however limited.

C. Courts May Constrain the Tyranny of the Majority

The American political system is ideologically tied to a fair democratic process.¹⁵⁶ It follows that, in a democracy, the will of the majority should generally govern.¹⁵⁷ The United States Constitution, however, limits the majority’s power and places checks on all-consuming majority control.¹⁵⁸ The judiciary is a protection from such majority tyranny, sheltering the people from “irrational prejudices” or “illegitimate motives” of the political branches.¹⁵⁹ History has exposed many cases that are now considered to be universally wrong, where courts, particularly the Supreme Court, have decided to err on the side of caution and defer to actions the political branches.¹⁶⁰ The Court has upheld laws that kept women “in a state of subordination for almost a century,”¹⁶¹ has upheld racial segregation,¹⁶² has allowed the censorship of political ideas,¹⁶³ and

153. Kestler-D’Amours, *supra* note 40.

154. Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. IN AM. POL. DEV.* 35, 41 (1993).

155. *Id.* at 69.

156. Reid Wilson, *Survey: Most Say US Not Living up to Its Democratic Ideals*, THE HILL (Apr. 26, 2018, 3:45 PM), <https://perma.cc/FC4S-WSJG>.

157. Sherry, *supra* note 141, at 4.

158. *Id.* at 7.

159. *Id.* at 8.

160. *Id.* at 15.

161. *Id.*; see also *Bradwell v. State*, 83 U.S. 130 (1872); see also *Minor v. Happersett*, 88 U.S. 162 (1874).

162. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

163. See *Abrams v. United States*, 250 U.S. 616 (1919).

has upheld involuntary sterilization,¹⁶⁴ to name a few cases that have been recognized as deeply wrong and damaging.¹⁶⁵ These cases were all a product of the Court refusing to be activist or too aggressive.¹⁶⁶ It follows that, “when the court fails to act—instead deferring to the elected branches—it abdicates its role as guardian of enduring principles against the temporary passions and prejudices of popular majorities.”¹⁶⁷

It is not difficult to make a similar connection to climate change cases that reach the courts. The political branches—now the majority—are steadily rescinding environmental protections while the earth becomes warmer, more unstable, and more dangerous.¹⁶⁸ They have consistently denied accepted scientific evidence behind climate change and have appointed decision-makers who do not hold such evidence as compelling or legitimate.¹⁶⁹ The specific motives that drive those in the political branches to deny the scientific evidence falls outside the scope of this paper as that would likely require extensive research into campaign finance, donors, political maneuvering—amongst other considerations. However, whatever motives that do in fact drive them to deregulate or to remain passive may likely be deemed illegitimate or irrational given the extraordinary risks at stake. We are at an extremely delicate and urgent point in the history of our planet—where something must be done to mitigate climate change or we likely face a “disaster of global scale.”¹⁷⁰ If the political branches refuse to act, or are actively rescinding the mitigation measures that are currently in place, it is up to the judicial branch to guard against these irrational and illegitimate actions. Without judicial interference, we may face another universally wrong outcome, one in which hindsight cannot restore.

D. The Limits of Courts

At present, courts may be the only body capable of providing an avenue to mitigate climate change, but they cannot act in a vacuum. In order

164. See *Buck v. Bell*, 274 U.S. 200 (1927).

165. Sherry, *supra* note 141, at 15.

166. *Id.*

167. *Id.* at 16.

168. Popovich, *supra* note 30; Union of Concerned Scientists, *supra* note 15.

169. Jonathan M. Samet & Alistair Woodward, *National Government Denial of Climate Change and State and Local Public Health Action in a Federalist System*, AM. PUB. HEALTH. ASS'N (Apr. 26, 2018), <https://perma.cc/UZ92-FBDS>.

170. Frank Jordans & Monika Scisłowska, *UN Leader Issues Urgent Call to Action on Climate Change*, S.F. CHRON. (Dec. 3, 2018), <https://perma.cc/9EQK-VR9G>.

for their decisions to have strength and promote action, they need political support from the executive and legislature.¹⁷¹ Courts are constrained by their lack of implementation powers.¹⁷² If their decisions are not supported, or at least accepted by the political branches, they may be ignored.¹⁷³ However, given the relatively strong public support for regulating emissions and mitigating climate change, the support may come from the bottom up: from the people up to their public servants. This may be even more probable given that the effects of climate change are only expected to increase without a substantial decrease in emission rates.¹⁷⁴ Though the courts may not be able to act alone, they can provide a forum to mobilize environmental advocates, place greater relevance on environmental issues that reach them, and collect information while simultaneously sending policy signals to the political branches.¹⁷⁵ Policy signals, delivered by the courts and supported by the people, could compel or at least pressure the political branches to act. As worldwide temperature increases, sea levels rise, severe weather patterns become commonplace, negative health impacts escalate, and food shortages become prevalent, perhaps those with political power will attempt to mitigate the effects of climate change.¹⁷⁶ If there is any hope in avoiding the most damaging effects of climate change however, action must be taken now.¹⁷⁷ The political branches have demonstrated not only that they will not take positive action, but are actively exacerbating the problem.¹⁷⁸ And while courts are certainly not the most preferred avenue for making policy decisions to combat climate change, they currently provide the best—and only opportunity—if we are to avert the most disastrous effects of an increasingly sweltering planet. Climate change will affect every person on earth—the absolute existence of our sustainable environment at risk—and if our elected branches will not act, the judicial branch can act, and perhaps it will.

171. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 420 (Benjamin I. Page, ed., 2nd ed. 2008).

172. *Id.*

173. *Id.* at 421.

174. Chris Mooney & Brady Dennis, *The world has just over a decade to get climate change under control, U.N. scientists say*, WASH. POST (Oct. 7, 2018), <https://perma.cc/X6KZ-C785>.

175. Barnes, *supra* note 99, at 6.

176. Union of Concerned Scientists, *supra* note 15.

177. *Id.*

178. Popovich, *supra* note 30.

Conclusion

Climate change cases ought to shine a unique perspective on judicial policy making. What makes climate change cases difficult to resolve is the nature of its causes and effects.¹⁷⁹ It often becomes a question of how to relegate the burdens and who must do so. Should fossil fuel companies shoulder the responsibility when there are over two hundred million licensed drivers in the United States who contribute to the rise in greenhouse gases, and thus climate change?¹⁸⁰ Is it the responsibility of the United States government to regulate greenhouse gases while the emission rates in other countries continue to increase?¹⁸¹ If the United States government actively promotes the increased use of fossil fuels, should courts step in and attempt to regulate this usage? Just as there is no simple way to curb the effects of climate change, there are no simple answers to these questions. However, we are at a very critical point in combatting climate change. As discussed, in order to avoid unstable temperature increases, we must take dramatic action now. Climate change will affect every person on the planet, whether or not they don black robes or sit in the oval office. If the judicial branch is able and willing to make even limited progress in the realm of climate change, we ought to encourage it to do so, as the other branches will not.

179. Damian Carrington, *Can climate litigation save the world?*, THE GUARDIAN (Mar. 20, 2018), <https://perma.cc/7VMW-T3VC>.

180. *Total number of licensed drivers in the U.S. in 2016, by state*, STATISTA, <https://perma.cc/8LCM-PWS5> (last visited Feb. 10, 2019, 2:47 PM).

181. Phil McKenna, *Global Emissions Rose in 2017, But U.S. and China Both Made Progress*, INSIDE CLIMATE NEWS (Mar. 22, 2018), <https://perma.cc/8MHN-BPFX>.
