



# Climate Change: What's Law Got To Do With It?

An Introduction to the Emerging Field of Climate Law

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## Executive Summary

The scale and significance of anthropogenic climate change—politically, economically, and otherwise—is difficult to overstate. Efforts to combat it will succeed, or falter, across multiple generations, jurisdictions, and fields of human endeavor. The law is one essential, though by itself insufficient, tool for promoting climate justice. This paper provides an overview of the current legal framework of the United States as it relates to climate change, as well as tentative proposals for the effective use of legal tools by the climate movement.

The United States does not currently have federal legislation which directly regulates greenhouse gas emissions, the main contributor to climate change. Regulatory efforts to leverage aging environmental statutes such as the Clean Air Act have been mired in legal battles, and several attempts to pass new legislation have died in Congress. Though it was until recently a signatory to the Paris Agreement, which unites over 200 nations in an effort to limit global temperature increases, the United States recently withdrew from the agreement, and commitments under the agreement are in any case legally non-binding.

Against the backdrop of political paralysis, litigation has emerged as a critical tool to advance climate policy. As legal practitioners and scholars extend existing legal arguments and craft new ones, a new field of law is emerging. While climate law is still relatively new and untested, and its various components fragmented, it is expanding rapidly thanks in part to an ever-stronger national and global movement for climate justice.

Part I of this paper discusses laws and principles which have traditionally been deployed to combat climate change in the United States, together with recent political developments and their implications for traditional climate-legal strategies. Parts II and III turn to a discussion of more novel approaches, both in the United States and internationally. Part IV provides a brief outline of some of the most promising legal strategies for the future.



## I. The Patchwork of Climate Law in the United States

To date, U.S.-based legal responses to climate change have largely unfolded within a patchwork of statutory and administrative provisions, common law doctrines, and constitutional principles. Climate-legal efforts have primarily focused on extending existing law to the newly prevalent phenomenon of climate-related harms and holding polluters responsible for the greenhouse gas emissions created by their activities.

### A. The National Environmental Policy Act, Clean Air Act, and Other Statutes

The National Environmental Policy Act (“NEPA”) requires federal agencies to prepare reviews, in the form of assessments and impact statements, outlining the potential environmental effects of proposed activities (for example, the building or funding of infrastructure projects such as pipelines or dams). Those reviews, which are made available to the public, must be considered before action is taken and are intended to play a significant role in the decision-making of federal agencies. The review process is intended to create public awareness of potential environmental effects rather than to ensure a particular outcome, and agencies are not required to follow the path least harmful to the environment. But the review process does have the potential to increase the political costs of destructive projects and to discourage agencies from acting hastily or planning poorly. In the last 20 years, reviews have been challenged in the courts for failing to adequately consider greenhouse gas emissions and climate impact. Such challenges have had important results, including the suspension of oil and gas leases across various states.<sup>1</sup>

NEPA also requires federal agencies to engage with local communities before and during a project’s development. This democratic requirement, together with the transparency provided by the reporting process, tends to encourage and empower people to actively campaign on matters which will have an adverse effect on their communities and the climate.

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<sup>1</sup> See, e.g., <http://legal-planet.org/2013/04/09/u-s-bureau-of-land-management-violated-nepa-when-selling-oil-and-gas-leases-in-california/>.



The Clean Air Act (“CAA”), passed in 1963 and amended in 1970, 1977, and 1990, governs air pollution in the United States. In *Massachusetts v. Environmental Protection Agency*,<sup>2</sup> the Supreme Court ruled that greenhouse gas emissions constitute air pollutants under the CAA and, accordingly, that the EPA was required to determine whether greenhouse gases contribute to air pollution in such a way as to endanger public health or welfare (provided the science was settled enough to make a reasoned decision on the matter). On this basis, the EPA conducted an analysis and, in 2009, found that greenhouse gases do indeed pose a threat to health and welfare and are therefore subject to regulation under the CAA.

Since this finding, regulations governing greenhouse gas emissions have come into effect in the form of fuel economy and emissions standards for cars, trucks, and other vehicles. And in relation to major stationary sources of air pollution (such as plants, factories, and refineries), owners and operators are required to obtain permits prior to their construction or modification, which require, among other things, the use of the best available technology to restrict emissions. It is expected that these regulations will prevent billions of metric tons of CO<sub>2</sub>-equivalent gas from being released into the atmosphere. However, such reductions are insufficient to prevent catastrophic warming, even at the optimistic end of estimates, and cover only a modest percentage of total U.S. greenhouse gas emissions.

A variety of other statutes, such as the Clean Water Act and Energy Independence and Security Act, which have an incidental relationship to climate change, can also be utilized in climate litigation, albeit with limited potential to impact greenhouse gas emissions.

## B. The Clean Power Plan

Building on the momentum of *Massachusetts v. Environmental Protection Agency*,<sup>3</sup> in 2014 the EPA, exercising its statutory authority under the CAA, finalized a suite of regulations known as the Clean Power Plan (“CPP”). The CPP takes the unprecedented step of imposing limits on greenhouse gas emissions from coal- and natural gas-fired power plants, with an aim to reduce emissions in forty-seven states to thirty-two percent below 2005 levels by 2030. The CPP recognizes, through the varying targets it sets for states, differences in

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<sup>2</sup> 127 S. Ct. 1438 (2007).

<sup>3</sup> *Ibid.*



energy dependency, infrastructure, and financial resources at the state level. It also offers a flexible framework allowing states to meet their targets by adopting a variety of measures, including investments in renewables, increased energy efficiency, and emissions trading with carbon credits.

Given that power plants account for nearly a third of U.S. greenhouse gas emissions, the CPP represents the most ambitious regulatory effort focused on climate change in the U.S. to date. Nevertheless, its mandates are likely insufficient to ensure compliance even with the Paris Agreement's non-binding emissions levels. In addition, the CPP has come under sustained legal challenge, particularly from the coal industry, and its implementation was stayed by the Supreme Court in February 2016 pending judicial review.<sup>4</sup>

### C. The Trump Administration: Recent Developments

It would be charitable to describe the Trump administration as merely agnostic on climate change, although that is its official position.

The newly appointed head of the EPA, Scott Pruitt, doubts that human activity plays a role in climate change and has sued the agency several times in the past, openly criticizing what he perceives to be an activist agenda.<sup>5</sup> Mr. Pruitt's appointment has caused consternation among environmentalists and EPA staff: the agency charged with protecting the environment is now led by someone ideologically opposed to its mission.

Of even greater concern is an executive order, issued in March 2017, which seeks to dismantle or slow many key federal actions to tackle climate change. Under the order, Mr. Pruitt is tasked with conducting a review of the CPP and, "if appropriate," suspending, revising, or rescinding it.<sup>6</sup> Despite the open-ended nature of the review, the intention behind the order is clear. (President Trump's proposed 2018 federal budget defunds the CPP and terminates all climate change research programs and partnerships.) The order also lifts a moratorium on coal mining leases on federal lands, relaxes emissions standards for new

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<sup>4</sup> See [https://www.washingtonpost.com/news/voikh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm\\_term=.426a98b97263](https://www.washingtonpost.com/news/voikh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm_term=.426a98b97263).

<sup>5</sup> See <http://www.cnbc.com/2017/03/09/epa-chief-scott-pruitt.html>.

<sup>6</sup> See <http://columbiaclimatelaw.com/climate-deregulation-tracker/trump-issues-executive-order-on-climate-change/>.



coal-fired power plants (standards that had been based on newly available carbon sequestration technology), loosens restrictions on methane emissions from oil and gas extraction, and gives agencies broad discretion to review, modify, and even rescind regulations which they deem to be overly burdensome to domestic energy sources such as coal. The Climate Action Plan, designed to prepare for and mitigate the effects of climate change, will likely be scrapped along with President Obama's other climate-related executive orders.

#### D. Structural Obstacles

Beyond the limitations of particular statutes and regulations, there are structural obstacles to the protection of the climate. In addition to state and federal government subsidies to the fossil fuel industry amounting to billions of dollars per year, the law vests corporations with legal personhood. Decades of neoliberal economic policy and concurrent changes to legal doctrine have systematically broken down barriers to corporate wealth creation and externalization of costs. Corporations frequently have a virtually unfettered ability to build pipelines or otherwise exploit natural resources for profit. Rarely do their legal responsibilities—such as cleaning up ecosystems damaged by their activities—mirror the privileges their personhood affords them. The ease with which corporate entities have acquired drilling rights, mineral rights, leases, easements, and other property rights, combined with lax oversight of extractive activities by government regulators, has laid bare the failings of a legal system that has long privileged market transactions. Environmental and climate lawyers are working, however, to reverse this trend.

In a recent example of civil rights being invoked to curtail the exercise of corporate rights, the Community Environmental Legal Defense Fund, a non-profit public interest law firm, drafted a bill of rights charter in 2010 for Pittsburgh, Pennsylvania, which banned hydraulic fracturing (colloquially known as "fracking") and established a range of environmental rights for residents of the city, such as rights to clean water and freedom from chemical trespass. The city council unanimously approved the charter, and Pittsburgh became the first city in the U.S. to ban fracking and other novel extraction methods, such as shale gas drilling. Similar progress has been made in other municipalities, although it has been the subject of challenge on the ground that state oil and gas laws preempt, or take precedence over, local charters. These challenges provide an opportunity for communities to defend and elaborate



their state and federal constitutional rights to self-governance. More recently, efforts have been made to extend community bills of rights to include a right to a healthy climate, which would permit non-violent direct action in defense of the environment should fossil fuel infrastructure continue to be built.<sup>7</sup>



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<sup>7</sup> See <http://www.coloradoindependent.com/163192/lafayette-colorado-climate-bill-of-rights>.



## II. Climate Legal Activism To Date

Laws change over time, as do courts' interpretations of them. Despite persistent obstacles in our legal system, attorneys throughout the U.S. are devising new approaches to protecting the climate, paving the way for more-comprehensive developments in the future.

### A. Criminal Cases

Environmental activism has a long and rich history of civil disobedience. That trend continues to the present, with climate activists challenging some of the planet's biggest energy companies through non-violent direct action. Such action can take many forms, including protests, blockades, valve-turning, and other ways of disrupting the construction or operation of fossil fuel infrastructure. Direct action is taking place at refineries, mines, pipelines, and power stations all over the world. Recently, a thousand activists closed the world's largest coal-exporting port in Newcastle, Australia,<sup>8</sup> and there have been large and sustained protests at the Standing Rock Reservation, in North Dakota, in opposition to the proposed Dakota Access Pipeline.<sup>9</sup> Over time, these actions will likely increase in audaciousness and number.

Climate activists rightly regard such acts of mass disobedience as crucial to forcing change in the face of governmental inaction. Although individual instances of activism may have only a small impact, collectively they can create a ripple effect which leads to an upsurge in public concern and pressure on public officials such that, eventually, civil disobedience is normalized. That is how social movements have historically advanced their cause: rights are won by people on the ground, not generously bestowed from above.<sup>10</sup>

It is both perverse and predictable, in a legal system marked by corporatism and centered upon private property rights, that those seeking to protect the climate are punished while fossil fuel companies profit at its expense. Climate activists are frequently arrested while engaging in civil disobedience. They may ultimately be jailed or made to pay restitution for

<sup>8</sup> See <http://af.reuters.com/article/worldNews/idAFTRE68P00X20100926>.

<sup>9</sup> See <https://www.theguardian.com/us-news/2016/nov/21/standing-rock-protest-hundreds-clash-with-police-over-dakota-access-pipeline>.

<sup>10</sup> Particularly in the case of the civil rights movement. See, e.g., <https://www.thenation.com/article/the-civil-rights-movement-had-one-powerful-tool-that-we-dont-have/>.



the financial losses their actions cause. Tim DeChristopher, a prominent climate activist, served nearly two years in federal prison for successfully bidding on parcels of land during an oil lease auction in Utah despite having no intention of paying for them.<sup>11</sup> (His action led to the preservation of large swathes of pristine redrock country.) Prosecutors have gone as far as to target individuals who are merely providing a support function, as in the case of Deia Schlosberg, a documentary filmmaker who faced three felony conspiracy charges for videotaping pipeline protests in Washington state in 2016 (the charges were eventually dropped).<sup>12</sup>

Those who are able to engage in civil disobedience need support, and for attorneys, that means representing activists in court. While many attorneys have utilized traditional legal defenses, more recently the climate necessity defense has been gaining traction. A successful defense of necessity exonerates a defendant who has committed a crime in order to avoid a greater harm, having exhausted all legal alternatives. Applied to climate activism, the argument is that unconventional and even illegal tactics must be employed when all other means of effecting change, from the courts to the political sphere, have been exhausted without bringing the necessary shift in climate change policy, and when government failure has catastrophic ramifications.

The climate necessity defense was recently put forward in the case of the Delta Five, who in 2014 blockaded a train at a railyard near Seattle used to transport crude oil. Unfortunately, after the judge had permitted the defense to be argued, it was ultimately quashed because the defendants were, in the judge's view, unable to show that reasonable alternatives to civil disobedience had been exhausted. The defendants were convicted of trespass but acquitted of the more serious charge of obstruction.<sup>13</sup> The necessity defense has yet to be used successfully to acquit climate activists in the U.S., though in 2008 six Greenpeace activists were acquitted by a British jury on this basis after being prosecuted for shutting down a power station.<sup>14</sup> With persistent refinement of the legal arguments which buttress it, the defense may eventually lead to acquittals of climate activists in U.S. courts. Proffering the

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<sup>11</sup> See <http://articles.latimes.com/2011/jul/27/nation/la-na-oil-leases-20110727>.

<sup>12</sup> See <https://www.theguardian.com/us-news/2016/oct/20/north-dakota-oil-pipeline-protest-film-makers-face-prison>.

<sup>13</sup> *Washington v. Brockway* (Snohomish Co. Dist. Ct., Wash., No. 5053A- 14D, (2016)).

<sup>14</sup> *R. v. Hewke* (Maidstone Crown Court, UK, No. T20080116 (2008)).



climate necessity defense, even unsuccessfully, has the additional benefit of increasing public awareness of climate change and its political dimensions.

## B. Civil Cases

In the realm of civil litigation, attorneys have attempted to hold industry and government accountable for climate harms under existing environmental laws, with mixed results.

In *Kivalina v. ExxonMobil Corp.*,<sup>15</sup> the Inupiat village of Kivalina launched a federal lawsuit against various coal, oil, and gas companies. As sea ice has thinned over time, intense storm surges have frequently breached Kivalina's walls and inundated its coastline. The plaintiffs argued that the damage is directly attributable to the greenhouse gas emissions of the defendants. Scientists have estimated that Kivalina will be uninhabitable by 2025 due to the changing Alaskan climate, and the cost of relocating the village may run into the tens of millions or more. Comparable arguments were raised in *California v. General Motors*,<sup>16</sup> where the State of California sued six car manufacturers on the basis that the emissions their vehicles produced, by contributing significantly to climate change, created coastal erosion and other environmental impacts in California. Both cases were dismissed, with grounds for dismissal including the legal principle that federal courts should not attempt to remedy a problem that a federal agency—in this case, the EPA—has already begun to regulate.

In *Comer v. Murphy*,<sup>17</sup> Mississippi homeowners sued a range of energy and utility companies for damage sustained to their properties as a result of Hurricane Katrina. The homeowners alleged that the defendants, through their contributions to climate change, were partly responsible for the rise in air and sea temperatures which led to Katrina's unprecedented magnitude. In *American Electric Power v. Connecticut*,<sup>18</sup> eight states, three land trusts, and the City of New York separately sued a variety of companies operating coal- and gas- fired power plants, arguing that the plants' greenhouse gas emissions constituted a public nuisance.

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<sup>15</sup> 696 F.3d 849 (2012).

<sup>16</sup> U.S. Dist. LEXIS 68547 (2007).

<sup>17</sup> 607 F.3d 1049 (2010).

<sup>18</sup> 131 S. Ct. 2527 (2011).



Both cases went through a series of appeals and, eventually, were lost. But during this process there were disjunctures, frictions, and openings that revealed cracks in the edifice of the current legal paradigm. By the end, two federal courts of appeal had found in the plaintiffs' favor in important, distinct areas. First, they found that the plaintiffs had standing to sue, which is to say that they demonstrated, among other things, sufficient personal injury and a causal relationship between that injury and the defendants' behavior. Equally momentous was the finding that the cases did not run afoul of the political question doctrine, which holds that courts may not decide issues which are a matter of policy best left to the executive or legislative branches of government.

More recent civil litigation against ExxonMobil is poised to break the legal impasse, with efforts on multiple fronts creating a cascading effect. Following reports in 2015 that the company had studied and been aware of climate change for decades,<sup>19</sup> a coalition of seventeen state attorneys general began investigating whether the public had been misled about the risks of fossil fuel products. In a campaign reminiscent of the tactics employed by the tobacco industry, ExxonMobil continued to lobby against climate regulation rather than incorporating climate risks into its business planning and practices. Even worse, until 2009, the company funded a disinformation campaign, along with think tanks and advocacy groups, to manufacture public uncertainty about climate change.<sup>20</sup> The investigation has prompted an escalated battle against companies promoting climate denialism and engaging in other fraudulent activities.

Lawsuits have been filed by the state attorneys general of New York and Massachusetts alleging that ExxonMobil violated state securities and consumer protection laws in failing to disclose to consumers and investors pertinent information about the impact of its activities on the climate. Similar action is expected from other state attorneys general despite recent efforts by the House Science Committee to hamper proceedings and intimidate plaintiffs by issuing subpoenas (ostensibly to investigate ties between state prosecutors, climate

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<sup>19</sup> See <https://www.theguardian.com/environment/2015/jul/08/exxon-climate-change-1981-climate-denier-funding>.

<sup>20</sup> See <https://www.bloomberg.com/news/articles/2016-09-07/will-exxonmobil-have-to-pay-for-misleading-the-public-on-climate-change>.



attorneys, and environmental non-profits on the grounds of protecting ExxonMobil's free speech rights under the First Amendment).<sup>21</sup>

ExxonMobil is also being sued by its shareholders, who allege that the company, in failing to disclose the risks posed to its business by climate change, breached its fiduciary duties and misled investors, causing them to pay inflated stock prices and suffer financial losses. Given the likelihood, even inevitability, of future regulations restricting oil exploration and use of existing oil reserves, ExxonMobil's assets should, shareholders argue, have been long ago recognized as overvalued and written down in the company's accounts. The case may well open the door to class action lawsuits by shareholders of other fossil fuel companies. A separate SEC probe, founded upon similar concerns, is also underway.<sup>22</sup>

In addition, the Conservation Law Foundation, an environmental group based in Boston, is suing ExxonMobil for violating the Clean Water Act and hazardous waste laws. It is alleged that, having known of the risks of climate change, the company failed to adequately prepare for impacts, such as violent storms or rising seas, which could cause the release of harmful contaminants from a coastal facility it operates in Massachusetts.

Lawsuits such as these provide an opportunity for U.S. jurisprudence to develop. Regardless of their outcome, legal challenges create awareness and lay the groundwork for future efforts, legal or otherwise.

Attorneys and climate activists can also take advantage of administrative law and community engagement to disrupt and delay fossil fuel projects. An example of this strategy is the Sierra Club's Beyond Coal campaign, which aims to replace coal, responsible for around a third of U.S. greenhouse gas emissions, with clean energy.<sup>23</sup> The campaign mounts legal challenges to permits issued under the Clean Air Act and mobilizes grassroots activists at the local level to retire outdated plants and prevent new plants from being built. The campaign aims to retire one-third of coal-fired plants in the U.S. by 2020, replacing them with cleaner sources of energy such as wind farms, solar farms, or geothermal power stations.

<sup>21</sup> See <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-lamar-smith-20170303-story.html>.

<sup>22</sup> See <http://www.cnbc.com/2016/10/28/exxon-mobil-says-it-may-write-down-assets-after-sec-probe-into-its-reserves.html>.

<sup>23</sup> See <https://content.sierraclub.org/coal/about-the-campaign>.



Similar tactics have been adopted by climate activists in the Pacific Northwest, together with First Nations tribes. Those efforts have ensured that, of numerous applications to build export terminals in the region and to transport coal by rail to Washington and British Columbia, nearly all have been denied or withdrawn from consideration.

### III. New Legal Paradigms

Climate change is an illustration of a classic dilemma known as the “tragedy of the commons,” in which shared access to a common resource, combined with individual self-interest, results in the gradual destruction of that resource. Though initially conceived in relation to over-grazing publicly owned lands, the tragedy of the commons principle can be applied on a larger scale to any unregulated resource, such as the oceans, the atmosphere or, more broadly, the earth’s climate.

Our current legal architecture entrenches the tragedy of the commons dynamic. Priority is given to holders of property rights, with few mechanisms existing for re-allocating the costs of activities that erode public resources. The result is that, while holders of property rights gain private benefits from exploiting natural resources, the harms associated with such exploitation are externalized and absorbed by society as a whole. (Economists refer to these harms as “negative externalities.”)

To understand the dynamic in practical terms, imagine a coal-fired power plant. Any profit generated by the plant belongs primarily to the company and, ultimately, the company’s shareholders. However, the company and its shareholders are not, generally speaking, required to pay for the damage caused by greenhouse gas emissions emanating from the plant. Instead, society pays. Even if a single plant plays only a small role in global emissions, it is not difficult to see how such a scenario might create a tragedy of the commons from the perspective of climate change.

Typically, our laws provide a remedy only when a legal person directly suffers harm at the hands of another (for instance, following a motor vehicle accident). However, it is difficult to apply conventional legal principles to climate change, where questions of causation and culpability are more complex. An intractable problem has been the attribution of damage caused by climate change to a particular set of greenhouse gas emissions: a defendant’s



emissions inevitably combine with other emissions, some natural and some anthropogenic, over decades. We are unable to attribute any given storm surge, drought, or forest fire to an individual defendant.

Climate change's long time horizon also fits poorly within existing legal paradigms. Though many of the environmental consequences of climate change (including droughts, floods, sea level rise, coastal erosion, ocean acidification, and extreme weather events) have been observed for decades, it is only recently that much of the public has begun to notice those changes in daily life. Virtually all climatologists predict that adverse climate impacts will increase in severity over time, but the fact remains that future generations will suffer most. Aside from narrow classes of cases involving property and tort law, our legal system is not accustomed to providing remedies to plaintiffs who do not yet exist or for harms that have not yet occurred.

The result has been a liability vacuum that our current jurisprudence is not yet equipped to fill. Fortunately, creative legal arguments are being deployed to reverse this trend. Battling entrenched property- and market-centric ideologies will require ingenuity and persistence. But dramatic, previously unforeseeable legal developments have occurred throughout history, such as those born of the work of the suffragettes, the abolitionists, and the civil rights movement. Climate change presents another opportunity to bring our legal system into sync with the times in which we live. The work of reimagining legal rights and responsibilities also presents an opportunity to educate the public about the legal, intellectual, and structural forces which have impeded progress.

#### A. Statutory and Tort Claims

Norms of inter-generational responsibility, applied to legal frameworks, have sometimes allowed governments to be sued by current and future generations for causing or overlooking environmental harms. In *Opposa v. Factoran*,<sup>24</sup> minors sued the Philippines' environment minister on the grounds that continued deforestation would infringe citizens' rights to self-preservation and a healthy environment.

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<sup>24</sup> 33 ILM 173 (1994).



Some lawsuits have targeted climate harms more directly. In *Urgenda Foundation v. The State of the Netherlands*,<sup>25</sup> a national environmental group sued the Dutch government, alleging that the government was required to take further measures to combat climate change beyond an emissions reduction pledge of a fourteen to seventeen percent reduction from 1990 levels by 2020. The court sided with the plaintiffs, holding that the government's pledge was inadequate given the scale of the threat and that a twenty-five percent reduction within five years was more appropriate. *Urgenda* provides a template for future legal challenges against governments which fail to take adequate steps to mitigate climate change. The case demonstrates that an active citizenry can exercise legal rights against the state without recourse to international agreements (which do not, by and large, provide private rights of action).

## B. Public Trust and Constitutional Claims

In recent years, attorneys have sought to apply what is known as the “public trust doctrine” to climate change. The doctrine’s origins are in Roman law, where it was understood that the state has a duty to regulate, preserve, and protect common resources for its citizens, now and in perpetuity. The idea is comparable to trusts typically encountered in financial arrangements, where a trustee is duty-bound to protect trust assets for a beneficiary. The public trust is an established legal doctrine across the world, including in the U.S. In practice, it has seldom led to court rulings compelling greater government oversight of industrial activities with harmful environmental effects. But the affirmative obligations it creates are clear, and its potential is significant. Attorneys have argued that the doctrine should be extended to the atmosphere and, in some cases, have secured judicial pronouncements to that effect.

In *Robinson Township v. Pennsylvania*,<sup>26</sup> the court ruled that provisions of a state law that permitted fracking violated citizens’ public trust rights to water, air, and natural resources and improperly curtailed local governments’ ability to regulate the impacts of oil and gas operations within their jurisdictions. In 2014, the Hawaii Supreme Court cited the public trust doctrine when ruling that the Kauai Planning Commission acted lawfully in denying a bottling

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<sup>25</sup> C/09/456689 / HA ZA 13-1396 (2015).

<sup>26</sup> 63 MAP (2012).



company permits for its operations on environmental grounds.<sup>27</sup> In 2015, a state appellate court held that the California State Lands Commission failed to adequately safeguard the public trust when approving a private sands mining project in San Francisco Bay.<sup>28</sup>

In an especially promising recent development, a series of cases have been filed in U.S. state and federal courts by the non-profit organization Our Children's Trust on behalf of young plaintiffs and future generations. (Cases have also been filed internationally in the Ukraine, Uganda, the Philippines, and Pakistan). The cases allege that the continuing, unabated rise in U.S. greenhouse gas emissions represents a breach of citizens' rights to a stable climate, enshrined in provisions of the federal constitution and those of the states, and is a violation of state and federal governments' duties to mitigate climate change under the public trust doctrine. The cases demand implementation of a comprehensive climate change action plan.

To date, there have been mixed results. In Iowa, courts refused to extend the public trust doctrine to the atmosphere, and other cases have been dismissed outright on jurisdictional grounds.<sup>29</sup> However, the Massachusetts Supreme Judicial Court found that the state had breached its duties in failing to take measures against climate change, requiring that it establish regulations to curb greenhouse gas emissions.<sup>30</sup> Similarly, Washington state courts have found a constitutional obligation under the public trust doctrine to protect natural resources from climate change, requiring that the state department of ecology create a rigorous emissions reduction plan.<sup>31</sup>

In a federal case, *Juliana v. United States*, a hugely important victory was won in November 2016.<sup>32</sup> The defendants, the federal government and agencies such as the EPA, had filed a motion to dismiss the case. The court denied the motion and held instead that the public trust doctrine may be extended to the federal government. The court also held that the U.S.

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<sup>27</sup> *Kauai Springs, Inc. v. Planning Commission of the County of Kauai* (324 P.3d 951 (2014)).

<sup>28</sup> *San Francisco Baykeeper, Inc. v. State Lands Commission* (242 Cal.App.4th 202 (2015)).

<sup>29</sup> *Filippone ex rel. Filippone v. Iowa Dept. of Natural Resources* (829 N.W.2d 589 (2013)).

<sup>30</sup> *Kain et al. v. Massachusetts Department of Environmental Protection* (474 Mass. 278 (2016)).

<sup>31</sup> *Zoe and Stella Foster, et al. v. Washington Department of Ecology* (No. 14-2-25295-1 SEA (2015)).

<sup>32</sup> 2016 WL 6661146 (2016).



constitution grants citizens a substantive due process right to a stable climate capable of sustaining human life. These are unprecedented findings: no court has ever before found that government inaction in the face of climate change violates the U.S. constitution. Should the public trust doctrine have been violated, the court wrote, the federal government may be required to prepare a national climate recovery plan. The outcome of the case, which may go to trial as early as late 2017, will be decisive.

### C. Community Rights

Another promising legal development lies in the concept of “rights of nature.” The reasoning behind the concept can be summarized succinctly: when a person or thing is given legal personality, it is harder to destroy or degrade. The traditional view is that the environment and its constituent parts--wetlands and forests, say--are merely a resource, incapable of possessing rights. But ecosystems must be protected for future generations, and non-human entities (most notably, corporations) have long been vested with personhood for certain legal purposes. Rights of nature laws permit individuals to bring legal action on nature’s behalf.

The concept may sound radical but is gaining traction domestically and internationally. In Ecuador, the national constitution codifies and explicitly guarantees certain inalienable rights of nature, and a court ruled in 2011 that the Vilcabamba River’s rights had been infringed as a result of a road widening project.<sup>33</sup> In New Zealand, following a long-running dispute with the indigenous Maori population, the government agreed in 2017 to a legal settlement in which the Whanganui river was declared to be a living entity with full legal rights, duties and responsibilities, to be permanently represented by a member of the Maori community and a representative of the Crown (who are to speak on the river’s behalf and promote its wellbeing).<sup>34</sup> The financial elements of the settlement comprise an \$80 million compensation payment, a \$30 million contribution towards a fund dedicated to the river’s protection and enhancement, and a \$1 million payment to help establish a legal framework for the river. In India, a court ruled in 2017 that the Ganges river and its main tributary, the Yumana, have legal personality.<sup>35</sup> While progress has been slower in the U.S., the Community Environmental Legal Defense Fund is working with communities to advocate for nature rights and ensure their place in the legal system.

<sup>33</sup> <http://therightsofnature.org/first-ron-case-ecuador/>.

<sup>34</sup> [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11818858](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11818858).

<sup>35</sup> <http://www.newshub.co.nz/home/world/2017/03/india-follows-new-zealand-grants-legal-rights-to-rivers.html>.



## D. Limits on Corporate Personhood

A corporation has a legal obligation to maximize profits for its shareholders, whatever the consequences for the public good. Granting corporations legal personality vests in them certain inalienable constitutional rights indistinguishable from those of human beings. Some activists have begun to advocate against treating corporations as persons under the law in certain circumstances.<sup>36</sup> As well as weakening the ability of corporations to harm the environment without legal sanction, such a shift could allow directors and employees to be held personally liable for certain environmental harms. Given the important role of corporate activities in the development and entrenchment of the fossil fuel economy—not to mention other social ills—revoking corporate legal personhood might go some way towards insuring against further harm to the climate. However, given the dependency of modern legal relations on corporate personhood, reform efforts may be more practicable if they are narrowly tailored, at least in the short term.



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<sup>36</sup> See, e.g., [https://www.democracynow.org/2011/11/9/corporations\\_are\\_not\\_people\\_activists\\_push](https://www.democracynow.org/2011/11/9/corporations_are_not_people_activists_push).



## IV. Climate Legal Activism: Its Potential and Its Limits

The endemic failure of governments to mitigate climate change runs deeper than the actions of individual politicians, parties, or administrations. There is increasing evidence that ordinary political processes have become chronically unresponsive to all but the wealthiest, and many concerned citizens have begun to look beyond elections and legislation.<sup>37</sup> In recent years the legal system, for all its flaws, has become an important site of political conflict.<sup>38</sup>

A wide range of activity and ideas can flow from legal efforts. Action can be taken against governments and corporations for the harms they have caused or acquiesced to, and rights may be leveraged to take preventative measures, such as devising community charters or turning pipeline valves. When the law is successfully employed in these ways, the consequences can be significant. But to realize the full potential of legal activism, we must understand that its impact goes beyond individual verdicts, orders, and rulings.

Constitutional rights to a stable climate, the public trust doctrine, and rights of nature are legal concepts that are flexible and capable of being construed broadly and pragmatically. To combat climate change effectively, attorneys will need to deploy such concepts to bridge the accountability gap and redeem the democratic deficit left by conventional legal avenues. Novel legal arguments, when properly refined, delineated, and limited by the courts, may anchor action at every level: from communities devising bills of rights to environmental groups challenging the federal government itself.

To take just one example, arguing the climate necessity defense on behalf of the Delta Five activists had value apart from the eventual outcome of the prosecution. It afforded activists the opportunity to spread a message to the jury, and the wider public, about the realities of climate change and our collective inability to address it as a global emergency. After the trial concluded, several jurors stated that, based on what they had learned, they supported the defendants' actions and planned to engage in climate activism themselves. A courtroom battle became a means of spreading knowledge and stirring the public conscience. Since a

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<sup>37</sup> See Martin Gillens, *Affluence and Influence: Economic Inequality and Political Power in America* (2014).

<sup>38</sup> See, e.g., [https://www.theguardian.com/environment/2017/mar/08/how-climate-change-battles-are-increasingly-being-fought-and-won-in-court?mc\\_cid=8329a1ae39&mc\\_eid=0b9f078224](https://www.theguardian.com/environment/2017/mar/08/how-climate-change-battles-are-increasingly-being-fought-and-won-in-court?mc_cid=8329a1ae39&mc_eid=0b9f078224).



central purpose of civil disobedience is to mobilize citizens, legal activism can play a crucial amplifying role.

Civil cases, too, can encourage people to change their views and even take action. While not always deserved, the legal system's mantle of authority and legitimacy often prompts changes in public opinion. The prospect of lawsuits against ExxonMobil by state attorneys general, for instance, has spurred a shift in popular consciousness and helped to stigmatize the world's largest energy company.

Given the political landscape of the United States, with its deeply entrenched rights consciousness and culture of constitutionalism, constitutional concepts will be especially powerful vehicles for movement organizing. Deploying constitutional arguments and appealing to constitutional values may also help bridge the partisan political divides that have dogged climate advocacy. If the goal of climate activism is in part to help people understand the legal and political ramifications of the climate crisis, constitutional rights provide an ideal framework.





## Conclusion

Following the birth of the U.S. environmental movement in the 1960s, the 1970s saw the creation of an entirely new field of law—with new statutes, new administrative agencies, and a new generation of lawyers dedicated to environmental protection. Today, we are in a similar moment, albeit one in which grassroots political organizing is playing, if anything, a more prominent role. We are witnessing the explosive growth of the climate movement and the resulting rapid development of climate law.

Increasing awareness amongst activists and lawyers of legal concepts and strategies, and their application to climate harms, will be a key component of the global response to climate change in the years and decades ahead. New legal paradigms and movement-based models of lawyering must be leveraged to realize the full potential of those strategies. As the window for effective action to escape the most catastrophic effects of climate change closes, the range of opportunities and methods for legal and political change has grown broader. Climate legal activists must continue to press the boundaries of what the system allows.

