

CLIMATE CREEP

by Cinnamon P. Carlarne

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Creep is the imperceptibly slow, steady, downward movement of slope-forming soil or rock. Movement is caused by shear stress sufficient to produce permanent deformation, but too small to produce shear failure.

— U.S. Geological Survey¹

I. (Climate) Change Is Coming

In the early days, the effects were not cataclysmic. They were too subtle and too uncertain to motivate decisive action. But just as gravity and time slowly pull soil down the slopes, our understanding of the effects of climate change has steadily crept up on us. By now, we know that climate change is ongoing and unavoidable—that climate change is not just coming, but is here and is reshaping our world before our eyes.² Despite the punctuated moments we experience as storms and fires and water scarcity,³ climate change is changing the planetary circumstances in slow and incremental ways—imperceptible shifts in average temperatures, droughts, desertification, sea-level rise, ocean acidification, ecosystem migration, biodiversity loss, and land and forest degradation.⁴

At this point in time, climate change pervades every aspect of contemporary life. It is a persistent current through our lives and, increasingly, throughout the law. By now, one would be hard-pressed to find any area of law that has not or will not soon be touched by climate change.⁵

Author's Note: Many thanks to Prof. Keith Hirokawa for his thoughtful read and for helping me distill the thrust of the argument.

1. U.S. GEOLOGICAL SURVEY, LANDSLIDE TYPES AND PROCESSES (2004) (Fact Sheet 2004-3072), <https://pubs.usgs.gov/fs/2004/3072/pdf/fs2004-3072.pdf>.
2. See, e.g., HANS-O. PÖRTNER ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION, AND VULNERABILITY: SUMMARY FOR POLICYMAKERS 7-8 (2022), https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_SummaryForPolicymakers.pdf [hereinafter SUMMARY FOR POLICYMAKERS].
3. See Sophie Marjanac & Lindene Patton, *Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?*, 36 J. ENERGY & NAT. RES. L. 265 (2018).
4. United Nations Climate Change, *Slow Onset Events*, <https://unfccc.int/wim-excom/areas-of-work/slow-onset-events> (last visited Mar. 20, 2022); Human Rights Council, *The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants*, U.N. Doc. A/HRC/37/CRP.4 (Mar. 22, 2018).
5. We are all climate lawyers now, or soon will be. See, e.g., Lisa Benjamin & Sara Seck, *The Escalating Risks of Climate Litigation for Corporations*, A.B.A. SciTECH LAW., Fall 2021, at 10, 14.

The onset of climate change has prompted decades worth of deep and wide efforts to reshape law and policy. Amidst the torrid fluxes and flows of presidential climate politics,⁶ climate-responsive laws and policies have amassed. Some of these changes have been bold and obvious—the Clean Air Act (CAA)⁷ greenhouse gas regulatory regime, the polar bear listing,⁸ and the *Juliana* litigation.⁹ However, many—if not most—of these changes have been more subtle and less visible.

From federal legislation,¹⁰ judicial¹¹ and executive actions,¹² to the plethora of actions at the subnational level, every branch and just about every corner of our government has responded in some way to climate change. Moreover, in recent years, the pace of legal development has intensified and diversified as pressure has grown from swelling social movements,¹³ progressive politicians, and the private sector.¹⁴ Indeed, what we are witnessing is that the creep of governmental action on climate change, like the creep of climate change itself, is accelerating.

Yet, alongside this development, there is also erosion. Erosion by political forces is expected; the Donald Trump Administration demonstrated this in dramatic fashion.¹⁵ What is more surprising, in 2022, is the potential role

6. See Cinnamon Carlarne, *U.S. Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 AM. U. L. REV. 387, 402-39 (2019) [hereinafter *U.S. Climate Change Law: A Decade of Flux*]; Cinnamon Carlarne, *Notes From a Climate Change Pressure-Cooker: Sub-Federal Attempts at Transformation Meet National Resistance in the USA*, 40 CONN. L. REV. 1351, 1354-64 (2008) [hereinafter *Notes From a Climate Change Pressure-Cooker*].
7. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.
8. See, e.g., Center for Biological Diversity, *Petition to List the Polar Bear (*Ursus Maritimus*) as a Threatened Species Under the Endangered Species Act* ii (Feb. 16, 2005), https://www.biologicaldiversity.org/species/mammals/polar_bear/pdfs/15976_7338.pdf [<http://perma.cc/8UYE-8PHB>].
9. See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1262-63 (D. Or. 2015); 947 F.3d 1159, 50 ELR 20025 (9th Cir. 2020).
10. See, e.g., Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).
11. See, e.g., *Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 37 ELR 20075 (2007) (holding that carbon dioxide and greenhouse gases are air pollutants under the CAA and can be regulated by the U.S. Environmental Protection Agency (EPA)).
12. See, e.g., Press Release, The White House, Executive Order on Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.
13. See Cinnamon P. Carlarne, *Climate Courage: Remaking Environmental Law*, 41 STAN. ENV'T L.J. ____ (forthcoming 2022).
14. See, e.g., Michael P. Vandenbergh et al., *The Gap-Filling Role of Private Environmental Governance*, 38 VA. ENV'T L.J. 1 (2020); Jonathan M. Gilligan & Michael P. Vandenbergh, *A Framework for Assessing the Impact of Private Climate Governance*, 60 ENERGY RSCH. & SOC. SCI. 101400 (2020).
15. See, e.g., *U.S. Climate Change Law: A Decade of Flux*, *supra* note 6, at 130-47.

that the U.S. Supreme Court looks ready to play in trying to erode—or, more accurately, smash—the bedrock of domestic climate change law. On February 28, 2022, the Court heard oral arguments in the case of *West Virginia v. Environmental Protection Agency*,¹⁶ a case challenging the U.S. Environmental Protection Agency’s (EPA’s) ability to regulate greenhouse gas emissions from power plants under the CAA.

The Court’s decision to hear this case when the Barack Obama-era rule at issue, the Clean Power Plan, has been abandoned by the Joe Biden Administration signals interest on the part of certain justices to use the case as a vehicle to dismantle EPA’s authority to regulate one of the most significant sources of greenhouse gas emissions—authority that EPA has legally exercised since the 2007 decision in *Massachusetts v. Environmental Protection Agency*.¹⁷ A decision limiting EPA’s authority in this way would not only undercut critical climate mitigation efforts with real impact on human health and well-being, but would also represent a dramatic backtracking in the Court’s jurisprudence on climate change. Such a move would be out of step with law, science, and society. Yet, such a move is exactly what we can expect following oral arguments in the case.

This Comment takes up these two competing trends: the steady development of climate-related legal and political measures versus countermoves designed to undercut the emerging rule of law around climate change. It suggests that, despite the lack of climate-specific legislation, there is a growing body of law that advances efforts to limit climate change, and limits the ability of political actors (here, including the Court) to undercut legal progress.

The Comment proceeds by very briefly introducing how climate laws and policies have been steadily building up over time. Next, it turns to recent developments—namely the Green New Deal (GND) and the Infrastructure Investment and Jobs Act (Infrastructure Act)—that demonstrate how climate-related law making is accelerating. Finally, it turns to the decision by the Court to hear *West Virginia*, and suggests that this decision, and the Court’s likely use of the case to constrain EPA’s regulatory authority over greenhouse gas emissions, are out of step with the trajectory of legal development in the United States.

II. The Creep of Climate Law

We might justifiably bemoan the failure of the U.S. Congress to design a comprehensive federal response to climate change. After three decades of climate law making around the world,¹⁸ the United States has failed to adopt

any climate-specific legislation.¹⁹ We lack a legislative core. At best, the federal approach to climate change has been inconsistent and fragmented. At worst, it could be characterized as lacking, irresponsible, and self-destructive.

However, just as common law “evolves to take into account new developments in the law’s consciousness,”²⁰ a body of law has emerged to reflect the creeping consciousness of climate change. Even as attention swirls around the legislative hole, lawmakers have been steadily building climate law in concentric circles around this gap. The result is an amassing body of laws that vary in form and function but are bound together by the constant of climate change.

For decades, local, state, and federal actors have engaged in law and policymaking that creates this increasingly thick legal foundation.²¹ The extent of the creep of climate law is systemwide. It can be found across federal environmental and energy law. From environmental assessments pursuant to the National Environmental Policy Act (NEPA),²² to listing decisions under the Endangered Species Act (ESA),²³ to decisions as to whether natural gas pipelines are in the public interest,²⁴ climate considerations now pervade federal decisionmaking. These federal developments are eclipsed by legal developments at the state and local level.²⁵

The effect of these composite changes is a dense system of law that would take decades to unravel. Much like the creep of sediment down a slope, this amassing of climate law builds a mass of pressure and momentum that move forward together. As one area of law changes, it motivates parallel evolution in other parts of the law. Thus, even as laws emerge and operate distinctly, they also interact to create a complexly intertwined, always evolving system. This system is uneven, and different parts move at different speeds with varying effects, but they creep forward together.²⁶

The aggregate impact of these legal developments is not enough; much more is needed to limit warming and adapt

19. The closest Congress got to adopting climate legislation was in 2009 and 2010 with the Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009).

20. J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENV’T L. 363, 399 (2010).

21. See generally *Notes From a Climate Change Pressure-Cooker*, supra note 6.

22. See Memorandum Opinion, *Friends of the Earth v. Haaland*, No. 21-2317 (RC), 52 ELR 20016 (Jan. 27, 2022), available at <https://int.nyt.com/data/documenttools/78-memorandum-opinion-1-27/b0903c94e57b0cb5/full.pdf>; NEPA.gov, *Guidance on Consideration of Greenhouse Gases*, https://ceq.doe.gov/guidance/ceq_guidance_nepa-ghg.html (last visited Mar. 20, 2022); 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.

23. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, 73 Fed. Reg. 28212 (May 15, 2008); 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18. See also J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. REV. 1, 2 (2008).

24. Press Release, Federal Energy Regulatory Commission, Fact Sheet: Interim Greenhouse Gas (GHG) Emissions Policy Statement (PL21-3-000) (Feb. 17, 2022), <https://www.ferc.gov/news-events/news/fact-sheet-interim-greenhouse-gas-ghg-emissions-policy-statement-pl21-3-000>.

25. See, e.g., California Governor’s Office of Planning and Research, *CEQA & Climate Change*, <https://opr.ca.gov/ceqa/ceqa-climate-change.html> (last visited Mar. 20, 2022).

26. The Court’s seeming efforts to treat a key component of this system in isolation belies the underlying truth of how the component parts are intertwined and how the system will continue to creep forward even if the Court manages to dismantle one piece.

16. Petition for Writ of Certiorari, *West Virginia v. Environmental Prot. Agency*, No. 20-1530 (U.S. Apr. 29, 2021), https://www.supremecourt.gov/DocketPDF/20/20-1530/176915/20210429133443663_2021.04.29%20-%20West%20Virginia%20v.%20EPA%20Petition.pdf.

17. See, e.g., *Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 37 ELR 20075 (2007) (holding that carbon dioxide and greenhouse gases are air pollutants under the CAA and can be regulated by EPA).

18. United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107.

to climate change, but the cumulative effect of this legal construction is an increasingly thick body of judicial precedent, federal regulations, executive initiatives, state and local initiatives,²⁷ and public-private partnerships to combat climate change.

At the federal level, much of the climate construction has been driven and underpinned by executive-level actions, making it vulnerable to dismantling, which is what the Trump Administration set out to do. Yet as extensive as the Trump Administration's efforts to undermine existing climate policy were, they were resisted at every step.²⁸ Not only did the expansive nature of President Obama's climate policies limit the Trump Administration's ability to dismantle existing climate law, but the Administration also faced significant losses in the courts²⁹ and persistent push-back from the public and private sectors. This multilayered resistance was possible due to the creep of climate law that created a system capable of resisting erosion and maintaining forward momentum.

If anything, this period of aggressive federal erosion prompted an acceleration of efforts to address climate change. These efforts included extralegal initiatives such as We Are Still In³⁰ and the Climate Alliance,³¹ through which "more than 2,500 non-federal actors representing more than half the U.S. economy . . . pledged their support for the Paris Agreement goals."³² At the same time, the private sector was rapidly coming on board, making significant voluntary commitments to reduce greenhouse gas emissions.³³ Moreover, during this period, subnational climate leadership flourished, with increasing numbers of states and cities adopting greenhouse gas reduction targets, developing climate action plans and climate adaptation plans, and investing in renewable energy. Both New York³⁴ and California,³⁵ for example, committed to reducing greenhouse gas emissions down to nearly zero by 2050, and Hawaii passed a law committing to achieving

the goals of the Paris Agreement and becoming carbon-neutral by 2045.³⁶

Also during this time, climate justice and youth climate movements were swelling worldwide and increasingly succeeding in disrupting politics as usual, and fueling new energy around climate law and policy.³⁷ The cumulative impact of these efforts helped shore up domestic action on climate change even against the tidal wave of the Trump Administration's attack. This is climate law creep.

III. The Accelerating Creep of Climate Law

The law evolves to accommodate change.³⁸ It evolves to accommodate changing social norms, changing political and economic conditions, changing physical and ecological realities. Sometimes, the evolution is fast; sometimes, it is slow. As climate science matured, patterns of climate change progressed, and social consciousness of climate change deepened, the law evolved in a manner and at a pace that reflected our steadily deepening understanding and appreciation for the challenge.

We are now entering a new phase in the creep of climate law. The impacts of climate change and the legal responses to climate change alike are accelerating. Unaddressed, climate change will bring about unparalleled changes to our planetary system, with potentially devastating consequences to life as we know it. The science tells us this, and this message is increasingly widespread throughout society and projected loudly to lawmakers. As a result, we are reaching a tipping point³⁹ in the evolution of climate law.

Ongoing developments in climate law position us to move forward at an accelerated pace: progressive lawmakers captured this momentum to launch a set of GND proposals that have reshaped how we approach climate change law making.⁴⁰

GND proposals approach climate change as a social, political, and economic challenge that demands a mix of legal and policy measures to address overlapping needs for economic recovery, just energy transition, social equality, and environmental sustainability. In the United States, the GND is a set of policies advanced by Rep. Alexandria Ocasio-Cortez (D-N.Y.) and Sen. Ed Markey (D-Mass.), which "see[k] to align environmental and climate policy with a wide range of progressive social policy goals, such as labor protections, racial justice, and greater wealth equality."⁴¹ As advanced in Congress in 2019, the GND proposed a sweeping new national, social, industrial, and economic response

27. See, e.g., Vicki Arroyo, *State and Local Climate Leadership in the Trumpocene*, 11 CARBON & CLIMATE L. REV. 303 (2017); Vicki Arroyo et al., *State Innovation on Climate Change: Reducing Emissions From Key Sectors While Preparing for a "New Normal,"* 10 HARV. L. & POL'Y REV. 385 (2016).

28. See U.S. *Climate Change Law: A Decade of Flux*, supra note 6, at 130-47.

29. See Ann Carlson, *The Trump Administration Is on an Environmental Losing Streak*, LEGAL PLANET (Aug. 17, 2018), <https://legal-planet.org/2018/08/17/the-trump-administration-is-on-an-environmental-losing-streak> [https://perma.cc/YC2W-6E9E].

30. We Are Still In, *Home Page*, <https://www.wearstillin.com> [https://perma.cc/B3UR-LSQH] (last visited Mar. 20, 2022) (providing a platform where-by government officials, faith leaders, academics, and business executives can affirm their commitment to achieving the United States' objectives under the Paris Agreement).

31. United States Climate Alliance, *Home Page*, <https://www.usclimatealliance.org> [https://perma.cc/G7F3-HR23] (last visited Mar. 20, 2022).

32. Kristin Igusky & Kevin Kennedy, *By the Numbers: America's Pledge Shows How US Is Taking Climate Action Without Trump*, WORLD RES. INST. (Nov. 11, 2017), <https://www.wri.org/blog/2017/11/numbers-americas-pledge-shows-us-moving-forward-climate-action> [https://perma.cc/J345-UZH8].

33. BLOOMBERG PHILANTHROPIES, AMERICA'S PLEDGE: PHASE 1 REPORT—STATES, CITIES, AND BUSINESSES IN THE UNITED STATES ARE STEPPING UP ON CLIMATE ACTION 14-15 (2017).

34. See Jesse McKinley & Brad Plumer, *New York to Approve One of the World's Most Ambitious Climate Plans*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/18/nyregion/greenhouse-gases-ny.html>.

35. See Clean Energy Act of 2018, S.B. 100, 2017 Leg., Reg. Sess. (Cal. 2018).

36. S.B. 559, 29th Leg., Reg. Sess. (Haw. 2017).

37. See Carlarne, supra note 13.

38. See Karrigan S. Börk, *An Evolutionary Theory of Administrative Law*, 72 SMU L. REV. 81 (2019); E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 38 (1985).

39. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 1463 (Thomas Stocker et al. eds., 2013), https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_all_final.pdf.

40. See, e.g., Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

41. Wyatt G. Sassman & Danielle C. Jefferis, *Beyond Emissions: Migration, Prisons, and the Green New Deal*, 51 ENV'T L. 161, 163 (2021).

along the lines of President Franklin D. Roosevelt's New Deal that would invest enormous resources in programs to achieve net-zero greenhouse gas emissions through a fair and just transition for all communities and workers.⁴²

When the GND was first rolled out in 2019, it failed to gain traction in Congress, but it provoked widespread conversation about how we think about and approach climate law making.⁴³ As Senator Markey said when he and Representative Ocasio-Cortez reintroduced the initiative in 2021, the GND is not “just a resolution—it is a revolution.”⁴⁴ The objective of the GND is to give voice to a growing chorus of diverse movement actors fighting for a reframing of climate change, while creating a framework for addressing climate change that focuses on economywide changes from the energy sector, to housing, to health care, and beyond. This justice-oriented, economywide approach created a framework that the Biden Administration now draws upon heavily in its efforts to address climate change.

In fall 2021, these efforts culminated in the passage of the Infrastructure Act. The \$1.2-trillion Infrastructure Investment and Jobs Act is a comprehensive bipartisan effort to fortify and expand U.S. infrastructure. The Infrastructure Act is arguably the most sweeping climate law to date. As characterized by the Biden White House, the Act will “strengthen our nation’s resilience to extreme weather and climate change while reducing greenhouse gas emissions, expanding access to clean drinking water, building up a clean power grid, and more.”⁴⁵ When paired with the other components of President Biden’s executive and legislative strategy—including plans for a Civilian Climate Corps⁴⁶ and ongoing efforts to advance a Build Back Better Framework⁴⁷—the Infrastructure Act advances transformational change that institutionalizes climate action as never before.⁴⁸

Although the Infrastructure Act sets out to do much more than address climate change, it creates the most comprehensive framework to date for transitioning to a clean energy economy, reducing greenhouse gas emissions, and creating a climate-resilient society. While it is beyond the remit of this Comment to detail the climate-responsive components of the Infrastructure Act, in addition to providing the largest-ever federal investment in clean energy transmission and the electric grid (\$64 billion), the Act provides significant economic investment in public transit; electric vehicle infrastructure; zero emission school buses; modernizing physical infrastructure (e.g., ports, airports, freight) to make it more sustainable and resilient; improving community resiliency through investments in weatherization of homes and other efforts to protect against drought, heat, and floods; improving access to clean drinking water; and addressing legacy pollution sites.

The Infrastructure Act is climate law. And it is the product of climate law creep.

IV. Climate Creep Meets the Court

Climate change is inevitable.⁴⁹ However, we can still avoid most devastating effects, if we act in time.⁵⁰ Potentially catastrophic but manageable challenges such as climate change compel legal responses.⁵¹ It is axiomatic that law evolves in response to change, including ecological change,⁵² and this is the pattern of legal development that we have witnessed in the climate context. As our understanding of climate change has grown, so too has the body of climate law. As the pace of climate change accelerates, we similarly expect

that combats climate change, advances environmental justice, and creates good-paying, union jobs.

Press Release, The White House, Fact Sheet: President Biden Signs Executive Order Catalyzing America’s Clean Energy Economy Through Federal Sustainability (Dec. 8, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/08/fact-sheet-president-biden-signs-executive-order-catalyzing-americas-clean-energy-economy-through-federal-sustainability/>.

42. See RHIANA GUNN-WRIGHT & ROBERT HOCKETT, *NEW CONSENSUS, THE GREEN NEW DEAL: MOBILIZING FOR A JUST, PROSPEROUS, AND SUSTAINABLE ECONOMY* (2019), https://s3.us-east-2.amazonaws.com/ncsite/new_conesnsus_gnd_14_pager.pdf.

43. See, e.g., Matt Huber, *Why the Green New Deal Has Failed—So Far*, JACOBIN (May 10, 2021), <https://jacobinmag.com/2021/05/green-new-deal-climate-change>.

44. Jenna Amatulli, *The Squad’s Here to Stay: Ocasio-Cortez, Pressley, Omar, and Tlaib Win Reelection*, HUFFPOST (Nov. 4, 2020, 12:46 AM), https://www.huffpost.com/entry/squad-aoc-ilhan-omar-rashida-tlaib-ayanna-pressley_n_5fa23296c5b63dc9a5c22f64.

45. Press Release, The White House, Fact Sheet: The Bipartisan Infrastructure Deal Boosts Clean Energy Jobs, Strengthens Resilience, and Advances Environmental Justice (Nov. 8, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/08/fact-sheet-the-bipartisan-infrastructure-deal-boosts-clean-energy-jobs-strengthens-resilience-and-advances-environmental-justice/>.

46. See Press Release, The White House, *Executive Order on Tackling the Climate Crisis at Home and Abroad*, *supra* note 12.

47. The White House, *The Build Back Better Framework*, <https://www.whitehouse.gov/build-back-better/> (last visited Mar. 20, 2022); Build Back Better Act, H.R. 5365, 117th Cong. (2021/2022).

48. According to the White House fact sheet:

When paired with the Build Back Better Framework which the President also looks forward to signing into law, these once-in-a-generation investments will reduce our emissions by well over one gigaton this decade—ensuring we meet President Biden’s commitment to reduce U.S. emissions by 50-52% from 2005 levels in 2030 and unlock the full potential of a clean energy economy

49. See, e.g., SUMMARY FOR POLICYMAKERS, *supra* note 2, at 7-8:

Human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability. Some development and adaptation efforts have reduced vulnerability. Across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected. The rise in weather and climate extremes has led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt (high confidence).

50. See *id.* at 30 (“Evidence of observed impacts, projected risks, levels and trends in vulnerability, and adaptation limits, demonstrate that worldwide climate resilient development action is more urgent than previously assessed in AR5 [the Fifth Assessment Report]. . . . There is a rapidly narrowing window of opportunity to enable climate resilient development.”).

51. As Judge Josephine Staton reminded us in dissent in *Juliana*, “the Constitution does not condone the Nation’s willful destruction.” *Juliana v. United States*, 947 F.3d 1159, 1176, 50 ELR 20025 (9th Cir. 2020) (Staton, J., dissenting).

52. E.g., “[W]e have only to say tempora mutantur; and if men themselves change with the times, why should not also laws undergo an alteration?” *Pierson v. Post*, 3 Cai. R. 175, 181 (N.Y. Sup. Ct. 1805) (Livingston, J., dissenting). See also John G. Sprankling, *Property Law for the Anthropocene Era*, 59 ARIZ. L. REV. 737, 744 (2017) (it is axiomatic that physical conditions, such as geography and climate, influence how law evolves).

this change to be accompanied by an acceleration in the development of legal responses.

Of course, as climate change accelerates and presents more obvious risks, political and legal forces continue to push in the opposite direction. By design, political resistance and space for debate and opposition is part of our democracy. However, the pushback appears more disruptive, and perhaps more disingenuous, when it occurs in the Supreme Court. This is particularly true when there is no urgent need or compelling reason for the Court to intervene⁵³ and when the primary reason for doing so seems to be to explore the possibility of gutting existing legal authority, as appears to be the case with the decision to grant certiorari in *West Virginia*.

West Virginia centers on EPA's authority to regulate greenhouse gas emissions from power plants under the CAA. The case is nominally distinct from *Massachusetts*, which involved EPA's authority to regulate greenhouse gas emissions from automobiles under the CAA. But the Court seems primed to use *West Virginia* as a vehicle for gutting the effect of *Massachusetts*, dramatically curbing EPA's authority to regulate the pollutants that drive climate change, and constraining future efforts to draw upon the CAA as a tool to curb climate change.⁵⁴

That is, this Court has telegraphed an intention to push climate law in the opposite direction from what the Court previously has endorsed, and perhaps even in the opposite direction from the ongoing evolution of climate law that has, by most accounts, become normalized. It seems the Court is kidding itself. Climate creep has taken hold, and the widespread patterns of climate law are as likely to be disrupted by a single decision of the Court as is the downward march of sediment, silt, and rocks as gravity forces them down the hill. A much more immovable force would be required to reverse such a trend.

When the Court decided *Massachusetts* in 2007, much of the case centered around the science of climate change,⁵⁵ but it also directly addressed questions of regulatory authority and created a legal pathway for EPA to regulate greenhouse gas emissions under the CAA. In *West Virginia*, in 2022, the questions of science do not need rehashing (if

anything, they are more well-settled by now), nor do the questions of regulatory authority. The case does not offer an opportunity to fine-tune existing precedent; it does not offer a necessary point of intervention for refining an active rule. Instead, it provides a vehicle for legal reversal and deconstruction. The decision to hear the case, even aside from the ultimate outcome, signals that the Court is out of step with the tide of legal development on climate change. The case positions the Court as trying to stem the current of climate law development even as the stream flows heavier and faster than ever.

Oral arguments in *West Virginia* took place on February 28. Earlier that same morning, the Intergovernmental Panel on Climate Change (IPCC) released the second chapter of its Sixth Assessment Report, *Climate Change 2022: Impacts, Adaptation, and Vulnerability*. The report offered “a dire warning about the consequences of inaction,” and revealed that there is a “brief and rapidly closing window to secure a liveable future.”⁵⁶ As the echoes of the sobering report reverberated across society, the Justices entered the courtroom to hear a challenge to a forsaken, out-of-date rule, with the primary driving force being—presumably—to limit EPA's ability to mitigate climate change.

Going into oral arguments, pundits offered many possible scenarios for how the Court might respond to *West Virginia*. Three stood out. First, the Court could dismiss the case by deciding that the issue is not ripe, since the Biden EPA has not yet taken a position on how it will regulate greenhouse gas emissions from power plants. Second, the Court could limit EPA's authority to regulate greenhouse gas emissions from power plants based on a technical reading of the statute. Third, the Court could invoke the “major questions doctrine” to more aggressively limit EPA's authority to regulate greenhouse gas emissions under the CAA absent clear congressional intent.⁵⁷

At the end of two hours of intense, sprawling, sometimes humorous⁵⁸ but often abstract (in the absence of an active rule) debate, only two things seem clear. First, it is unlikely that the Court will dismiss the case. Second, a majority of the justices appear keen to limit EPA's authority to regulate greenhouse gas emissions, but unclear about both how to accomplish that (i.e., a limited statutory finding or invoking the “major questions doctrine”), and how to ground the basis for their decision (i.e., EPA exceeded its regulatory authority under the statute, or the statute impermissibly gives EPA transformative power over the energy industry).

53. As Richard Revesz states, “the justices can't properly evaluate the legality of EPA's limits on the power sector's emissions—because no such limits currently exist.” Richard L. Revesz, *Greenhouse Gas Regulation: SCOTUS Should Decide Not to Decide*, BLOOMBERG L. (Feb. 24, 2022), <https://news.bloomberglaw.com/environment-and-energy/green-house-gas-regulation-scotus-should-decide-not-to-decide>.

54. The primary concern is that the Court will employ the “major questions doctrine” to undercut EPA's authority to regulate carbon emissions from power plants, which would dramatically constrain the utility of the CAA as a tool for limiting greenhouse gas emissions. For helpful discussions of the case, see Albert C. Lin, *The Supreme Court Could Hamstring Federal Agencies' Regulatory Power in a High-Profile Air Pollution Case*, CONVERSATION (Feb. 18, 2022), <https://theconversation.com/the-supreme-court-could-hamstring-federal-agencies-regulatory-power-in-a-high-profile-air-pollution-case-171475>.

55. Here, remembering Justice Antonin Scalia's famous expression of frustration with climate science: “Troposphere, whatever. I told you before I'm not a scientist. That's why I don't want to have to deal with global warming, to tell you the truth.” *Stratosphere, Troposphere, Whatever—Looking Back at Mass. v. EPA (2007)*, SCOTUS Now (Feb. 24, 2014), <http://blogs.kentlaw.iit.edu/iscotus/stratosphere-troposphere-whatever-looking-back-at-mass-v-epa-2007/>.

56. Press Release, IPCC, *Climate Change: A Threat to Human Wellbeing and Health of the Planet. Taking Action Now Can Secure Our Future* (Feb. 28, 2022), <https://www.ipcc.ch/2022/02/28/pr-wgii-ar6/>.

57. Prior to oral arguments, a fourth possibility being discussed was the possibility of the Court drawing on the nondelegation doctrine to question and curtail EPA's authority more dramatically. This argument did not receive significant air time in the oral arguments, and is unlikely to shape the Court's decision.

58. At one point, Justice Stephen Breyer offered a hypothetical involving the regulation of advertising for “four-foot cigars smoked through hookahs.” See, e.g., Ian Millhiser, *The Supreme Court Appears Eager to Gut the EPA, but Can't Figure Out How to Do It*, VOX (Feb. 28, 2022), <https://www.vox.com/2022/2/28/22954696/supreme-court-epa-west-virginia-clean-power-plant-brett-kavanaugh-samuel-alito>.

In short, by the end of the day on February 28, the Court appeared poised to push back against climate creep but—not surprisingly—confused about how to do so and how to justify doing so. Meanwhile, all over the world, policymakers were scrambling to respond to the release of the IPCC report, with United Nations Secretary General António Guterres declaring, “I’ve seen many reports, but nothing like the new [IPCC] climate report, an atlas of human suffering and damning indictment of failed climate leadership.”⁵⁹

The simultaneous release of the IPCC report and oral arguments in *West Virginia* created a deep sense of dissonance and doom. More than ever the threat of climate change looms. In the face of this threat and the amassing body of climate law, the Court seems eager to intervene with a (unnecessary) countermove designed to hamstring the evolving rule of law around climate change. The Court’s impending intervention seems designed to undermine progress, but it is unlikely to make a dent in climate law momentum.⁶⁰

V. Conclusion: The Inevitability of Climate Law

The description of climate law creep I offer here does not deny gaps, pushback, or inconsistencies in the law, but instead shows that climate law is developing and will continue to develop. The problem of climate change is too big, too pervasive, and too undeniable to evade legal response. More importantly, climate law is creeping away from cost-benefit normativity, away from rigid individualism, and toward more robust systems intent on saving lives and livelihoods. An accurate picture of the evolving state of law suggests that the forces driving developments in climate law are no longer acutely vulnerable to the political whims of the Court.

What we know is that responding to climate change is essential, and that law provides a powerful tool in this fight. What we will have to wait to see is the pace with which the creep of climate law will continue to accelerate and flow over any obstacles that the Court (and others) throws in its path.

59. António Guterres (@antonioguterres), TWITTER (Feb. 28, 2022, 6:18 AM), <https://twitter.com/antonioguterres/status/1498256378506448899?s=10>.

60. See, e.g., Alex Guillén, *EPA Restores California Waiver on Vehicle Greenhouse Gas Emissions*, POLITICO (Mar. 9, 2022), <https://www.politico.com/news/2022/03/09/epa-california-waiver-car-emissions-00015704> (detailing EPA decision shortly following the oral arguments in *West Virginia* to restore “California’s authority to enforce more stringent vehicle greenhouse gas standards, undoing a Trump-era action that had stripped the state of its climate tailpipe authority”).