

C O M M E N T S

THE ACCELERATION OF CLIMATE CREEP: THE COURT CRASHES, CONGRESS SURGES

by Cinnamon P. Carlarne

Cinnamon P. Carlarne is Associate Dean for Faculty and Intellectual Life and the Robert J. Lynn Chair in Law, Moritz College of Law, The Ohio State University.

In May 2022, I published *Climate Creep* in these pages.¹ There, I argued two things: (1) climate law has been undergoing a steady and incremental process of creep, resulting in the creation of a thick and expansive body of law that limits the ability of political actors (including the U.S. Supreme Court) to undercut legal progress; and (2) nonetheless, the Court was likely to issue a decision in *West Virginia v. Environmental Protection Agency*² that would attempt to undercut the emerging rule of law around climate change.

At the time of publication, we left off with the Court having just heard oral arguments in *West Virginia*. I posited at the time that the new majority was likely to issue an opinion that would be out of step with law, science, and society, and even with the Court's own precedent.³ Moreover, I suggested that the Court was kidding itself if it thought it could stem the tide on the development of climate law, because "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."⁴

In May, what we knew was that the Court was likely to make a devastating intervention into the development of climate law. What we did not know was what effect that intervention would have, and whether it would impact the "pace with which the creep of climate law [would] continue

to accelerate and flow over any obstacles that the Court (and others) throws in its path."⁵ Now, a few months later, we have definitive answers both as to the Court's intentions with respect to climate law jurisprudence, and as to the effect of the Court's messy intrusion into the evolving field of climate law.

There is bad news and there is good news. The bad news is that the Court's decision in *West Virginia* was every bit as reactionary and backward-looking as pundits expected it to be, and it sets the scene for ongoing judicial efforts to undercut regulatory authority on climate change (and well beyond). The good news is that the decision failed to stem the tide of the development of climate law.

In fact, it failed dramatically. In the immediate wake of the Court's attempt to constrain the federal government's hand in addressing climate change, the almost unthinkable happened: the U.S. Congress passed climate legislation in the form of the Inflation Reduction Act (IRA).⁶ Climate creep hit the third slope, moving from the executive branch to the courts to the legislature. And now, for the first time, the United States has a federal legislative backbone for climate action.

This Comment takes up these two recent conflicting developments: the Court's decision in *West Virginia*, which was designed to undercut present and future federal climate action, and Congress' surprising countermove, which has dramatically accelerated development of the rule of law around climate change in the United States. It suggests that climate creep has taken hold, and that we have entered a new era in the development of climate law that not only limits the ability of the Court to obstruct legal progress, but also creates a firmer foundation for systemwide change.

Author's Note: Special thanks to Prof. Keith Hirokawa for helping me think through how to anticipate the difficult challenges by managing the easy ones. And thanks to everyone out there who has been fighting so long and so hard for meaningful climate action.

1. Cinnamon P. Carlarne, *Climate Creep*, 52 ELR 10374 (May 2022).

2. 142 S. Ct. 2587, 52 ELR 20077 (2022).

3. *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 Clean Air Act (CAA) and can be regulated by the U.S. Environmental Protection Agency (EPA)).

4. Carlarne, *supra* note 1, at 10378.

5. *Id.* at 10379.

6. The bill passed the U.S. Senate on August 7, 2022, and the U.S. House of Representatives on August 12, 2022. President Joe Biden signed it into law on August 16, 2022. An Act to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 14, H.R. 5376, 117th Cong. (2022), available at https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_of_2022.pdf [hereinafter IRA].

The Comment proceeds as follows. Part I provides a brief overview of the Court’s decision in *West Virginia*, and shows how the Court is doing jurisprudential backbends to try to limit the U.S. Environmental Protection Agency’s (EPA’s) ability to develop an expansive greenhouse gas (GHG) regulatory regime. Part II then turns to the surprising move by Congress to help fill the climate law gap by passing the IRA. Here, I argue that the IRA is not only climate law, but also that it is the most sweeping federal climate law to date, and puts the United States on a firmer trajectory toward creating a federal foundation for climate law. With passage of the IRA, the United States now has a legislative climate core despite, or perhaps because of, the Court’s intransigence. Finally, Part III concludes by celebrating the success of climate law creep, but also urging continuing efforts to build out the rule of law around climate change at every level of governance.

I. The Court as “the” Climate Creep: *West Virginia v. Environmental Protection Agency*

It is helpful to situate the Court’s decision in *West Virginia* within the context of the physical, political, and social spaces that it impacts (that is, the spaces outside the Court). We are living in a world defined by climate change. As the Justices were reading briefs for the case, the Intergovernmental Panel on Climate Change (IPCC) was warning us that “[i]t is unequivocal that human influence has warmed the atmosphere, ocean and land,” and that human-induced climate change is “affecting many weather and climate extremes in every region across the globe,” bringing about “changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones.”⁷ Projected climatic risks include, among others, temperature increases, extreme weather events, sea-level changes, drought, food scarcity, freshwater shortages, extreme precipitation, changing patterns of disease, ocean acidification, and wildfires.

And in the weeks preceding and following the decision, climate-related disasters devastated communities across America. Flooding in eastern Kentucky,⁸ wildfires in California,⁹ and the ongoing megadrought in the Southwest¹⁰ brought not just entire communities, but entire regions of the country to their knees. This is the context

within which the Court issued its decision in one of the most important climate change cases of the decade.

Here, I will briefly summarize *West Virginia*, bearing in mind that the case has already been examined elsewhere in the *Environmental Law Reporter*, including this issue’s Dialogue. To start at the conclusion, the Court’s decision in *West Virginia* restricts EPA’s ability to limit one of the most significant sources of GHG emissions—power plant emissions—with the effect of undercutting critical climate mitigation efforts and shifting the terrain of federal rule-making more broadly.

The Court’s decision to hear this case surprised many because, at the time the petition for certiorari was granted, the Barack Obama-era rule at issue, the Clean Power Plan, was not in effect and the Joe Biden Administration had indicated it had no intention of reviving the rule. The Court agreed to hear the case not to settle an active regulatory dispute, but as a vehicle for exerting its influence on the future operation of federal administrative law in the climate context (and beyond).

The core issue involved a challenge to EPA’s ability to regulate GHG emissions from power plants under §111(d) of the Clean Air Act (CAA),¹¹ a previously little-used provision of the Act. Section 111(d) provides that EPA can require states to submit plans to control emissions—including emissions of GHGs—from existing power plants once it has issued a standard for new sources in the same category under §111(b) of the CAA, which it had done in 2015.¹² The plans are supposed to be based on the standard of performance for the industry—that is, the best “system of continuous emission reduction” that has been “adequately demonstrated.”

A crucial issue in *West Virginia* involved the scope of the term “system.” More specifically, the Court was focused on whether the term “system” limited regulatory controls to plant-specific emission control measures, or whether it could be defined more broadly to encompass changes that would occur off-site, including “generation-shifting,” given that the Clean Power Plan determined the best system of emission reduction for existing units using three building blocks: (1) efficiency improvements in coal-fired plants, (2) substitution of natural gas generation for coal-fired generation when feasible, and (3) increased use of renewables.

On June 30, in a 6-3 decision authored by Chief Justice John Roberts, the Court invoked the “major questions doctrine” to uphold an earlier decision rescinding the Clean Power Plan. Under this doctrine, the history and parameters of which remain squishy at best, the Court states that it will “greet assertions of extravagant statutory power over the national economy with skepticism.”¹³ In practice, when the Court determines that a rule involves a major question,

7. IPCC, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS, HEADLINE STATEMENTS 1 (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Headline_Statements.pdf.

8. See, e.g., Julia Jacobo & Melissa Griffin, *Scientists Explain How the Deadly Flooding in Kentucky Got So Bad: “It Was Bound to Be Catastrophic,”* ABC NEWS (Aug. 3, 2022), <https://abcnews.go.com/US/scientists-explain-deadly-flooding-kentucky-bad-bound-catastrophic/story?id=87832020>.

9. See, e.g., Winston Choi-Schagrin & Elena Shao, *Why Does the American West Have So Many Wildfires?*, N.Y. TIMES (Aug. 1, 2022), <https://www.nytimes.com/2022/08/01/climate/wildfire-risk-california-west.html>.

10. A. Park Williams et al., *Large Contribution From Anthropogenic Warming to an Emerging North American Megadrought*, 368 SCIENCE 314, 314 (2020). See also Greg Shirah & Cheng Zhang, *Megadrought in U.S. West Projected to Be Worst of the Millennium*, NASA SCI. VISUALIZATION STUDIO (Feb. 12, 2015), <https://svs.gsfc.nasa.gov/cgi-bin/details.cgi?aid=4270>.

11. 42 U.S.C. §7411(d), ELR STAT. CAA §111(d).

12. In common with other provisions of the statute, under §112(d), if a state fails to submit a plan, EPA is required to develop its own enforceable plans for that state.

13. *West Virginia v. Environmental Prot. Agency*, No. 20-1530, slip op. at 19 (U.S. June 30, 2022) (quoting *Utility Air Regul. Grp. v. Environmental Prot. Agency*, 573 U.S. 302, 324, 44 ELR 20132 (2014)) (internal quotation marks omitted).

it will require an agency to demonstrate a clear delegation of authority from Congress in order to sustain its authority.

What constitutes a major question has not been clearly defined, but the Court held that the Clean Power Plan was an interpretation of regulatory authority that would empower EPA to “substantially restructure the American energy market.”¹⁴ Having found that the “major questions doctrine” applied to the Clean Power Plan, the Court then concluded that whatever “system” means in §111 (which the Court fails to clarify), it cannot include generation-shifting as its primary purpose. The majority went on to find that whatever “vague statutory grant” EPA has to treat generation-shifting as a system “is not close to the sort of clear authorization” the Court now purported its precedents to require.¹⁵

In a scathing dissent authored by Justice Elena Kagan and joined by Justices Stephen Breyer and Sonia Sotomayor, the dissenting Justices took issue with nearly every part of the majority’s reasoning. As Prof. Shelley Welton succinctly summarized, Justice Kagan’s dissent

disagrees with the majority’s methodology, reasoning, and each of its conclusions. Kagan accuses the majority of creating a new major questions doctrine of dubious pedigree, applying it through questionable factors, and ignoring considerable textual and historical evidence that Congress did in fact intend to accord EPA flexibility through its use of the term “system” in Section 111. Her reasoning is undergirded by a simple observation: “A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems.”¹⁶

Summing up, Justice Kagan states: “The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening.”¹⁷ Justice Kagan’s response distills the power the Court is trying to capture over both the operation of democracy in general, and the substantive issue of climate change specifically. That is, as she suggests, the Court’s decision is not a humble act of deference to Congress and the democratic process of checks and balances.¹⁸ It is not a decision designed to create room for Congress to act on climate change. Rather, it is the new

majority trying to snatch as much power as possible over the federal rulemaking process.

The decision in *West Virginia* dealt a clear blow to EPA’s ability to develop an efficient and effective GHG regulatory regime under the CAA.¹⁹ It constrained EPA’s ability to draw upon the CAA as a tool to curb climate change, and it advanced the “major questions doctrine” in a way that makes it likely the Court will wield it in the future to curtail federal rulemaking in other contexts, including other areas related to climate change.²⁰ That is, the decision limited EPA’s ability to exercise its regulatory authority under the CAA, while also setting the scene for future (and indefinitely ongoing) efforts by the new majority to whittle away at regulatory authority across the board in ways that will limit agencies’ abilities to fulfill their congressional mandates. In short, the Court tried to obstruct climate law creep. In doing so, the Court became the climate creep.

The Court’s decision reverberated widely and amplified concern about the ability to address dangerous climate change.²¹ But, inevitably, the law evolves to accommodate change.²² Climate law outside the Court and outside Congress has been evolving for decades.²³ And now, in the wake of the Court’s seemingly devastating decision, it is evolving in Congress. Whether the Court forced Congress’ hand, or whether Congress simply crept to this point at its own pace, we suddenly find ourselves on the precipice of change.

II. Climate Creep Reaches Congress

Just a few months ago, it was easy to “bemoan the failure of Congress to design a comprehensive federal response

14. *Id.* at 20.

15. *Id.* at 28.

16. Shelley Welton, *A Dangerous, Even if Expected, Opinion on Climate*, REGULATORY REV. (July 12, 2022), <https://www.theregreview.org/2022/07/12/welton-a-dangerous-even-if-expected-opinion-on-climate/> (citing *West Virginia*, slip op. at 5 (Kagan, J., dissenting)).

17. *West Virginia*, slip op. at 33 (Kagan, J., dissenting).

18. I am cognizant of the possibility that some will be reading the Court’s decision primarily to discern its impact on constitutional process and shared authority among the branches of government. While that discussion is important, it asks a fundamentally different question than the one addressed by the *Climate Creep* framework. Here, I am less concerned with the relative powers of government in creating law (although I align with Justice Kagan in thinking that this is not a decision that sees the Court deferring to Congress), and more concerned with the types of actions and statements that force law to evolve.

19. For a more in-depth discussion of the case in the context of larger regulatory efforts under the CAA, see DANIEL A. FARBER & CINNAMON P. CARLARNE, CLIMATE CHANGE LAW (2d ed. forthcoming 2022), explaining:

If the bad news is the Court’s rejection of the Obama Administration’s broad view of section 111(d), the good news is that it did not embrace the Trump Administration’s extremely narrow view either. Unlike the Trump Administration, the Court left open the possibility that EPA could use cap and trade, at least as a compliance method. The Court also rejected the view that regulation was strictly limited to requirements “inside the fenceline.” The Court said, “We have no occasion to decide whether the statutory phrase “system of emission reduction” refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER [best system of emission reduction].”

(quoting *West Virginia*, slip op. at 30).

20. See, e.g., Dan Farber, *Climate Change and the Major Question Doctrine*, LEGAL PLANET (July 12, 2022), <https://legal-planet.org/2022/07/12/the-major-question-doctrine-and-climate-change/> (exploring whether and how the “major questions doctrine” might apply to other climate-related administrative rules).

21. For an in-depth discussion of how deeply destabilizing unconstrained climate change could be, see J.B. Ruhl & Robin Kundis Craig, 4°C, 106 MINN. L. REV. 191 (2021).

22. See Karrigan S. Börk, *An Evolutionary Theory of Administrative Law*, 72 SMU L. REV. 81 (2019); J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENV’T L. 363, 399 (2010); E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 38 (1985).

23. See, e.g., Cinnamon Carlarne, *U.S. Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 AM. U. L. REV. 387 (2019); 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).

to climate change.”²⁴ For the first 30 years of the development of climate law,²⁵ Congress persistently failed to recognize and respond to climate change in any meaningful way. Until 2022, the United States lacked any kind of legislative framework for responding to climate change. This, of course, is why the Court’s decision in *West Virginia* appeared so devastating; it pulled the rug out from under our primary legislative tool for addressing climate change—the CAA. But sometimes, law evolves quickly.

We began to see the tendrils of change in fall 2021, when Congress passed the \$1.2 trillion Infrastructure Investment and Jobs Act (Infrastructure Act).²⁶ The Infrastructure Act was the closest we had yet come to congressional climate law.²⁷ It prioritized funding for transitioning to a clean energy economy and investing in climate-friendly infrastructure and climate resiliency. It offered the largest investment to date in limiting GHG emissions and creating a climate-resilient economy. It was an important first step.

Following enactment of the Infrastructure Act, efforts floundered to push through a more expansive bill based on President Biden’s Build Back Better Framework,²⁸ which would have complemented the Infrastructure Act and invested in additional climate actions. And in the weeks following the decision in *West Virginia*, it first seemed as if climate creep would have to persist primarily at the local and state levels, with intermittent and unreliable help from the now-handcuffed EPA.

Reaffirming the decades-old gaping hole in congressional leadership, on July 15, chronically intractable Sen. Joe Manchin (D-W. Va.) declared that he “unequivocally” refused to support sweeping legislative action that included climate (or tax) provisions.²⁹ This left the possibility of passing climate legislation in 2022 all but dead in the water. The intersecting climate failures of the Court and Congress threatened to derail the acceleration of climate law creep, and to undermine efforts to avoid a worst-case climate scenario that would “presen[t] an existential threat to democratic governance.”³⁰ But then, on July 27, Senator

Manchin changed his mind.³¹ And, just like that, “climate legislation went from being impossible to inevitable in roughly 2 weeks.”³² After 30 long years of failed efforts,³³ Congress was poised to pass a bill containing extensive climate provisions.

But, of course, it was not just like that. While Senator Manchin’s abrupt about-face allowed the climate bill to proceed (finally), three decades’ worth of effort inside and outside the Hill³⁴ made the bill possible. This bill represents the ultimate manifestation of climate law creep. It is a bill that builds on local and state efforts, litigation, executive action, the stubborn persistence of a handful of senators and representatives, and a swelling climate social movement.³⁵ Even so, it remained a partisan effort—not one single Republican in the U.S. Senate or the U.S. House of Representatives voted for the bill.³⁶

So, what is this bill? It is not called the Climate Change Act. It is not the climate legislation that many climate law advocates would have envisioned a decade ago. It does not, for example, include a cap-and-trade regime or a carbon tax.³⁷ Nevertheless, it is a sweeping climate law that contains dozens of measures designed to move the United States toward a clean energy and climate-resilient future. The bill is the Inflation Reduction Act of 2022.³⁸ The IRA

24. Carlarne, *supra* note 1, at 10375.

25. The United Nations Framework Convention on Climate Change (UNFCCC) was negotiated 30 years ago in 1992. May 9, 1992, S. TREATY DOC. No. 102-38, 1771 U.N.T.S. 107, reprinted in 31 I.L.M. 849, art. 2 (1992).

26. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

27. Fact Sheet, The White House, 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/> (suggesting that the Act would “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”).

28. The White House, *The Build Back Better Framework*, <https://www.whitehouse.gov/build-back-better/> (last visited Aug. 25, 2022).

29. Betsy Klein et al., *Biden Vows to Use Executive Action After Manchin Torpedoes Climate Agenda*, CNN (July 15, 2022), <https://www.cnn.com/2022/07/14/politics/joe-manchin-wont-support-climate-or-tax-provisions/index.html>.

30. Ruhl & Craig, *supra* note 21, at 195.

31. Nick Sobczyk & Jeremy Dillon, *Manchin Revives Climate Deal: What’s in the \$369B Bill*, E&E NEWS (July 28, 2022), <https://www.eenews.net/articles/manchin-revives-climate-deal-whats-in-the-369b-bill/>; Kelsey Snell, *After Spiking Early Talks, Manchin Agrees to a New Deal on Climate and Taxes*, NPR (July 27, 2022), <https://www.npr.org/2022/07/27/1114108340/manchin-deal-inflation-reduction-act>.

32. Vicki Arroyo (@Vicki_A_Arroyo), TWITTER (Aug. 12, 2022, 10:03 PM), https://twitter.com/Vicki_A_Arroyo/status/1558272968681308165.

33. See, e.g., Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009). See also Danielle Kurtzleben, *Rep. Alexandria Ocasio-Cortez Releases Green New Deal Outline*, NPR (Feb. 7, 2019, 5:01 AM), <https://www.npr.org/2019/02/07/691997301/rep-alexandria-ocasio-cortez-releases-green-new-deal-outline>; David Roberts, *Sen. Ed Markey: “We Are Now in the Era of the Green New Deal.”* VOX (Apr. 16, 2019, 10:00 AM), <https://www.vox.com/energy-and-environment/2019/4/16/18306596/green-new-deal-climate-change-ed-markey>; Robinson Meyer, *The Millennial Era of Climate Politics Has Arrived*, ATLANTIC (Feb. 7, 2019), <https://www.theatlantic.com/science/archive/2019/02/aocgreen-new-deal-new-era-millennial-climate-politics/582295>.

34. See generally Cinnamon P. Carlarne, *Climate Courage: Remaking Environmental Law*, 41 STAN. ENV’T L.J. 125 (2022).

35. See *id.*

36. Robinson Meyer, *Not Even a Single Republican Voted for the Climate Bill*, ATLANTIC (Aug. 12, 2022), <https://www.theatlantic.com/science/archive/2022/08/ira-climate-bill-house-vote-republicans/671133/>.

37. See, e.g., Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 20 (2014) (“The general consensus among economists is that an economy-wide cap-and-trade regime, or a carbon tax, would reduce GHG emissions more cost-effectively than deploying the CAA as-is.”); J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CAL. L. REV. 59, 105 (2010) (“Climate change is also fueling debate in the environmental policy arena about instrument choice, with prescriptive regulation of greenhouse gas emissions squaring up against carbon taxes and market-based cap-and-trade programs for policy dominance.”); Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENV’T L. REV. 293 (2008).

38. The bill passed the Senate on August 7, 2022, and the House of Representatives on August 12, 2022. IRA, H.R. 5376, 117th Cong. (2022). See also SENATE DEMOCRATS, SUMMARY: THE INFLATION REDUCTION ACT OF 2022 (2022), https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_one_page_summary.pdf; Rebecca Leber, *The US Finally Has a Law to Tackle Climate Change*, VOX (Aug. 16, 2022), <https://www.vox.com/policy-and-politics/2022/7/28/23281757/whats-in-cli>

is most notable for providing historic climate investments, notably \$369 billion in tax credits and direct spending to support clean energy and climate resilience, and for containing provisions that will reduce domestic carbon emissions by roughly 40% by 2030.

It should be said from the outset that, as historic as the IRA is, it inevitably reflects the compromises necessary to get holdouts like Senator Manchin onboard. For example, it mandates auctions of oil and gas leases on federal lands and in federal waters prior to auctions for renewable energy projects, as well as the completion of some 2022 fossil fuel lease auctions that were previously canceled. Moreover, despite historic investments in environmental justice (roughly \$60 billion),³⁹ critiques of the IRA suggest that it continues to sacrifice many Black, Indigenous, People of Color, and frontline communities that will bear the brunt of continuing investments in fossil fuels and the neglect of legacy sites and systemic environmental harms.⁴⁰

As leading climate policy advocate⁴¹ Rhiana Gunn-Wright summarizes, the IRA

contains some very good, very needed investments [I]t also weds those investments to very major harms whether that's fossil fuel leases or the mountain valley pipeline or permitting reform or technologies that directly and indirectly harm frontline communities. . . . [T]his bill contains investments that will help decarbonize and, in doing so, save some lives. [T]hose investments come at tremendous, racist costs, the full scope of which we don't yet know but could very likely take some lives, and yet, this is the only major climate legislation in front of us at what is likely the last opportunity to pass major climate legislation for the foreseeable political future. It's all very . . . [A]merican.⁴²

But for all its imperfections, the IRA creates the conditions for a flood of federal climate law making. It is beyond the remit of this Comment to offer a detailed breakdown of the climate-related provisions of the IRA, but the bill has been the subject of extensive review by leading policy

mate-bill-inflation-reduction-act; Nick Sobczyk, *House Passes Landmark Climate Bill, Sending It to Biden*, E&E NEWS (Aug. 12, 2022), <https://subscriber.politicopro.com/article/eenews/2022/08/12/house-passes-landmark-climate-bill-sending-it-to-biden-00051509>.

39. See, e.g., Lew Daly, *The Inflation Reduction Act: A Climate Down Payment, but Doubts on Environmental Justice*, ROOSEVELT INST. (Aug. 5, 2022), <https://rooseveltinstitute.org/2022/08/05/a-climate-down-payment-but-doubts-on-environmental-justice/> (also suggesting that the IRA's "heavy reliance on energy tax credits, rather than direct investment in communities, curtails the potential for a just energy transition").

40. See, e.g., Policy Position, Indigenous Environmental Network, Indigenous Environmental Network Statement re Proposed Inflation Reduction Act (Aug. 2022), <https://www.ienearth.org/indigenous-environmental-network-statement-re-proposed-inflation-reduction-act/>.

41. Gunn-Wright is the Director of Climate Policy at the Roosevelt Institute and a leading voice on climate policy, particularly at the intersection of climate policy, public investment, racial equity, and public power. See, e.g., RHIANA GUNN-WRIGHT & ROBERT HOCKETT, CONSENSUS, THE GREEN NEW DEAL: MOBILIZING FOR A JUST, PROSPEROUS, AND SUSTAINABLE ECONOMY (2019).

42. Rhiana Gunn-Wright (@rgunns), TWITTER (Aug. 2, 2022, 10:08 PM), <https://twitter.com/rgunns/status/155465034222176256?s=10&t=OSMIc3UZEJl4jguXivhRKQ>.

groups.⁴³ Key takeaways from these analyses of the bill suggest that the IRA would:

- Cut annual emissions in 2030 by an additional ~one billion metric tons below current policy;
- Close two-thirds of the remaining emissions gap between current policy and the nation's 2030 climate target (50% below 2005);
- Get the United States to within ~0.5 billion tons of the 2030 climate target; and
- Reduce cumulative GHG emissions by about 6.3 billion tons over the next decade (through 2032).⁴⁴

The bill achieves these results through extensive investments across the energy sector, including long-term extensions of clean energy tax credits and a host of incentives for technologies like nuclear, hydrogen, carbon capture, and battery storage. As Megan Mahajan et al. summarize, the emissions-reducing provisions in the IRA "run the gamut from clean energy and electric vehicle tax credits to large-scale investments in domestic manufacturing of clean technologies and environmental justice."⁴⁵ Moreover, in addition to focusing on energy production, the IRA focuses on demand side measures and offers consumers a range of rebates for investing in clean energy technologies, including:

- Up to \$1,750 for a heat pump water heater;
- Up to \$8,000 for a heat pump for space heating or cooling;
- Up to \$840 for an electric stove, cooktop, range, or oven, or for an electric heat pump clothes dryer;
- Up to \$4,000 for a breaker box upgrade;
- Up to \$1,600 for insulation, air sealing, and ventilation;
- Up to \$2,500 for electric wiring.⁴⁶

43. See JESSE D. JENKINS ET AL., PRINCETON UNIVERSITY ZERO LAB, PRELIMINARY REPORT: THE CLIMATE AND ENERGY IMPACTS OF THE INFLATION REDUCTION ACT OF 2022 (2022), https://repeatproject.org/docs/REPEAT_IRA_Preliminary_Report_2022-08-04.pdf; MEGAN MAHAJAN ET AL., ENERGY INNOVATION, MODELING THE INFLATION REDUCTION ACT USING THE ENERGY POLICY SIMULATOR (2022), https://energyinnovation.org/wp-content/uploads/2022/08/Modeling-the-Inflation-Reduction-Act-with-the-US-Energy-Policy-Simulator_August.pdf; Ben King et al., *A Congressional Climate Breakthrough*, RHODIUM GRP. (July 28, 2022), <https://rhg.com/research/inflation-reduction-act/>.

44. JENKINS ET AL., *supra* note 43.

45. MAHAJAN ET AL., *supra* note 43, at 1.

46. Laura Benshoff, *Three Ways the Inflation Reduction Act Would Pay You to Help Fight Climate Change*, NPR (Aug. 13, 2022), <https://www.npr.org/2022/08/11/1116769983/3-ways-the-inflation-reduction-act-would-pay-you-to-help-fight-climate-change>.

The IRA is ambitious. Its effectiveness and justness, of course, will turn largely on how it is implemented in the years to come. Early analyses of the bill, however, suggest that it is “the most significant federal climate and clean energy legislation in U.S. history.”⁴⁷ It is a historic achievement, and it lays the groundwork for a cascade of future federal law making efforts. As Kate Aronoff suggests, “[t]he IRA’s passage doesn’t close the book on U.S. climate policy so much as open it.”⁴⁸

The IRA offsets the immediate effect of the Court’s decision in *West Virginia* by harnessing the federal government’s spending power to address climate change. Of course, only so much can be achieved through spending alone, and much still hinges on EPA’s ability to carve out regulatory space to regulate carbon emissions and, ultimately, to do the work the Agency is tasked with doing under the CAA. As game-opening pitches go, however, the IRA is an impressively ambitious one.

The IRA represents the first meaningful stage of congressional climate law creep. But from a broader climate law perspective, it is much more than incremental change. It is the moment that imperceptible climate law creep turned into a landslide. And the Court, arguably, is an important precipitator of that sudden shift. Perhaps for this, we owe the Court thanks.

III. Conclusion

Congress is coming from behind to claim space in ongoing efforts to shape the rule of law around climate change. Its first major climate law intervention demonstrates a few key things. First, climate creep has taken hold. In 2022, there is no denying the profound challenges that climate

change poses to human health and well-being, or the depth of mounting efforts to draw upon the rule of law to address climate change. Second, addressing climate change will require continuing, systemwide efforts. It will require policies focused on changing how we produce energy, how we consume energy, how we plan our cities, how we move from place to place, and how we protect (all) our communities.

The IRA, with its vast range of provisions focused on energy, resiliency, and community-building reflects the need to embrace complexity in climate planning. It does not get us where we need to go, but it begins the process. And it limits the ability of the Court to single-handedly derail decades’ worth of efforts to construct a thick legal foundation for responding to climate change.

We have moved into a new era of climate law creep. All the major federal players are on the field. And at least for now, we know where they stand. We know that the Court’s oppositional stance means that congressional action is critically important. But we also know that the climate consensus in Congress is tenuous, at best. Moreover, we know that we have a climate-friendly executive branch. But this too could change.

The oppositional, tenuous, and changeable nature of our federal actors means that even as we celebrate historic climate law victories, the process of climate law creep remains essential. Every hard-fought legal development matters at every level of governance. It is this accretion of law making and consensus-building that allowed Congress, in 2022, to “suddenly” find the political will to address climate change. And it is this accretion of law, policy, and community-building around climate change that will keep us moving forward toward a safer and more equitable climate future.

47. MAHAJAN ET AL., *supra* note 43, at 1 (also noting “The IRA could create at least 1.5 million new jobs in 2030 concentrated in the manufacturing, construction, and service industries. Through greater clean energy deployment, the bill could avoid up to 3,900 premature deaths and up to 100,000 asthma attacks annually by 2030.” *Id.* at 3.). Similarly, Ben King et al. suggest “[o]ur preliminary assessment of the IRA is that its policies, including the new leasing provisions, reduce net GHG emissions by 31% to 44% below 2005 levels in 2030.” King et al., *supra* note 43.

48. Kate Aronoff, *The Bitter Triumph of the Inflation Reduction Act*, NEW REPUBLIC (Aug. 8, 2022), <https://newrepublic.com/article/167337/bitter-triumph-inflation-reduction-act>.