

EDITOR'S NOTE

ENVIRONMENTAL LAW IN A CLIMATE-ALTERED WORLD

BY
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Welcome to the fifty-fourth year of *Environmental Law*, the nation's oldest student-edited environmental law review. Since the journal's inception in 1970, it has traversed wide terrain, from Oregon-specific environmental laws to international treaties. But even since our journal celebrated its half-century anniversary just four years ago, the climate crisis has worsened and our tools to deal with it have been increasingly frustrated by statutory, regulatory, and judicial changes. We sit again at an election year, on the precipice of a Supreme Court decision that could upend administrative law as we know it.¹

The stakes have never been higher.

Of course, this is now true every year: the stakes are always getting higher. Climate change means that we are caught in a positive feedback loop where increasing destabilization leads to structural uncertainty, frustrating any "horizon" on which we seek to ground our work.² The

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¹ *Loper Bright Enterprises v. Raimondo*, No. 22-451 (S.C. argued Jan. 17, 2024); Amy Howe, *Supreme Court Likely to Discard Chevron*, SCOTUSBLOG (Jan. 17, 2024, 6:58 PM), <https://perma.cc/2JWJ-8PVT>.

² ADRIANA PETRYNA, HORIZON WORK: AT THE EDGES OF KNOWLEDGE IN AN AGE OF RUNAWAY CLIMATE Change 39 (2022).

worst is yet to come.³ And despite this apparent danger, the law still signals an unwillingness to adapt. I would not be alone in claiming that our current legal structures are ill-suited to the scale, complexity, and urgency of the climate crisis and its attendant impacts.⁴ The law must take on a more transformative capacity if we are to have a chance at minimizing the disproportionate,⁵ historic impacts of climate change.

This may require fundamentally reframing previous strategies. Old statutory friends are no longer so kind to environmentalists. The National Environmental Policy Act—which has long held only a procedural, not substantive, environmental guarantee—has seen immense criticism and regulatory changes that have prevented it from being broadly applicable and effective.⁶ The Supreme Court has dramatically weakened the protections of the Clean Water Act, altering the Environmental Protection Agency’s ability to safeguard ecologically-significant wetlands.⁷ Exemptions from the Clean Air Act have meant that a significant portion of the United States’ total emissions—methane from cows—has gone almost completely unregulated and unreported for decades.⁸

Environmentalists have adapted to this new legal ecosystem in important ways, leveraging creative legal strategies to address new and old environmental problems. Youth plaintiffs have brought groundbreaking suits seeking to vindicate the climate rights of future generations, leading to unprecedented judicial decisions and a serious

³ Doyle Rice, ‘Worst is Yet to Come’: *Disastrous Future Ahead for Millions Worldwide Due to Climate Change, Report Warns*, USA TODAY (June 24, 2021, 12:15 PM), <https://perma.cc/JY3H-U2LB>.

⁴ In fact, this claim finds support in this very issue. See Cox, *infra* at 79.

⁵ Of course, one of the greatest evils of climate change is that it has the most profoundly negative impacts on those who contribute least to its causes. See generally Lucas Chancel, *Global Carbon Inequality Over 1990–2019*, 5 NATURE SUSTAINABILITY 931 (2022). The legal field is especially ill-equipped to deal with “slow” violences, such as forms of toxic contamination, where inequitable physical and affective impacts go unrecognized and uncalculated within current legal frameworks. ROB NIXON, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR* 2 (2011). Oftentimes, the uncertainty of these effects is purposeful. See Javier Auyero & Debora Swistun, *The Social Production of Toxic Uncertainty*, 73 AM. SOCIO. REV. 357 (2008).

⁶ Compare Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020) with National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55757 (Oct. 7, 2021).

⁷ Sackett v. Env’t Prot. Agency, 598 U.S. 651 (2023); Amy Howe, *Supreme Court Curtails Clean Water Act*, SCOTUSBLOG (May 25, 2023, 11:40 AM), <https://perma.cc/CGX7-U3ZK>.

⁸ EPA has been frequently unable to utilize funds to promulgate regulation requiring Title V permitting, under 42 U.S.C. § 7661–7661f (2018), for industrial animal agriculture operations because of appropriations riders. See, e.g., Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2448 (419) (Dec. 16, 2014) (“[N]one of the funds made available in this Act or any other Act may be used to promulgate or implement any regulation requiring the issuance of permits under Title V of the Clean Air Act...for...emissions resulting from biological processes associated with livestock production.”).

public consideration of long-term climate harms.⁹ Others have organized to push for the adoption of “green” environmental rights amendments in state constitutions, taking notice of powerful victories under these provisions.¹⁰ States and municipalities have begun to bring lawsuits using state fraud, consumer protection, and investment laws, seeking to hold fossil fuel producers accountable for their decades-long climate denial.¹¹

While these efforts spark hope, their success depends on a fundamentally flawed legal system. Climate-friendly judicial outcomes remain tenuous under arguably the most anti-democratic and anti-environmental Supreme Court in recent history.¹² The Court appears skeptical of any claim that is not rooted in the nation’s “history and tradition” or an express declaration of Congressional intent.¹³ This is challenging for environmental laws, which, in many cases, have not been revised to address contemporary concerns.

Addressing the realities of climate change will thus take incredible social and cultural movement, forcing changes in larger political, economic, and legal structures. It will require amendments to constitutions, new statutes, and new ways of living. It demands international cooperation for climate disaster adaptation and mitigation, environmental justice legislation beyond temporary executive orders, and a just and swift energy transition. Using the law will mean changing the law, through policymaking, public advocacy, and protest. It will also require that we attorneys and practitioners hold fast to our uncompromising ideals about the necessity of action. It is undeniable that the majority of what we call environmental attorneys in the United States are employed representing corporate interests. It is also undeniable that many of these corporations are climate villains who utilize the law to excuse their impacts.¹⁴ It is time that we seriously ask ourselves: Does

⁹ See, e.g., *Held v. Montana*, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023); *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

¹⁰ See *About Us*, GREEN AMENDMENTS FOR THE GENERATIONS (2023), <https://perma.cc/W8WM-76Y2>.

¹¹ See, e.g., *BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532 (2021); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-1555, 2021 WL 2389739 (D. Conn. June 2, 2021); *People v. Exxon Mobil Corp.*, 119 N.Y.S.3d 829 (N.Y. Sup. Ct. 2019).

¹² Andreas Karelis, *The Supreme Court Versus the Climate*, THE HILL (July 5, 2022), <https://perma.cc/WVR2-SSHG>; David Leonhardt, *The Court vs. the Climate*, N.Y. TIMES (July 1, 2022), <https://perma.cc/Z258-MJC9>. This is not even to mention the legitimacy of the Court itself, amid unprecedented public ethics scandals including Clarence Thomas’s “errors” in financial disclosures. For a startling list of these scandals, see Alison Durkee, *Clarence Thomas: Here Are All The Ethics Scandals Involving The Supreme Court Justice Amid Unpaid RV Loan Revelations*, FORBES (Oct. 26, 2023), <https://perma.cc/VC4B-WBT9>.

¹³ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. ___ (2022); *N.Y. State Rifle & Pistol Ass’n., Inc. v. Bruen*, 597 U.S. 1 (2021).

¹⁴ Isabella Kaminsky, *Fossil Fuel Companies Paying Top Law Firms Millions to ‘Dodge Responsibility’*, GUARDIAN (Oct. 9, 2021), <https://perma.cc/P4Q5-MMSG>.

providing “zealous advocacy”¹⁵ to climate villains *really* accord with our legal ethics? If it does, might we consider changing those ethics?

It has been a great privilege to publish environmental works of such high caliber and great significance. I trust that these scholarly contributions will enrich ongoing dialogues within the field of environmental law, guiding the field towards greater stability, equity, and justice. And, ultimately, I hope that these ideas will ignite the transformative structural changes needed to address climate change at this most critical moment in time.

¹⁵ MODEL RULES OF PRO. CONDUCT r. 1.3, Comment[1]; Robinson Meyer, *Think Twice About Working for a ‘Climate Villain’*, ATLANTIC (Sept. 14, 2022), <https://perma.cc/A7NR-CQME>.