

Climate Change Law: The Impact of Recent Cases on Climate Security

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Who's responsible for addressing climate change?

Do we have a right to a healthy climate?

Evolution of Climate Change Law: More and more connections to Climate Security

+

What are the remedies for current and future generations?

How much authority do U.S. agencies really have?



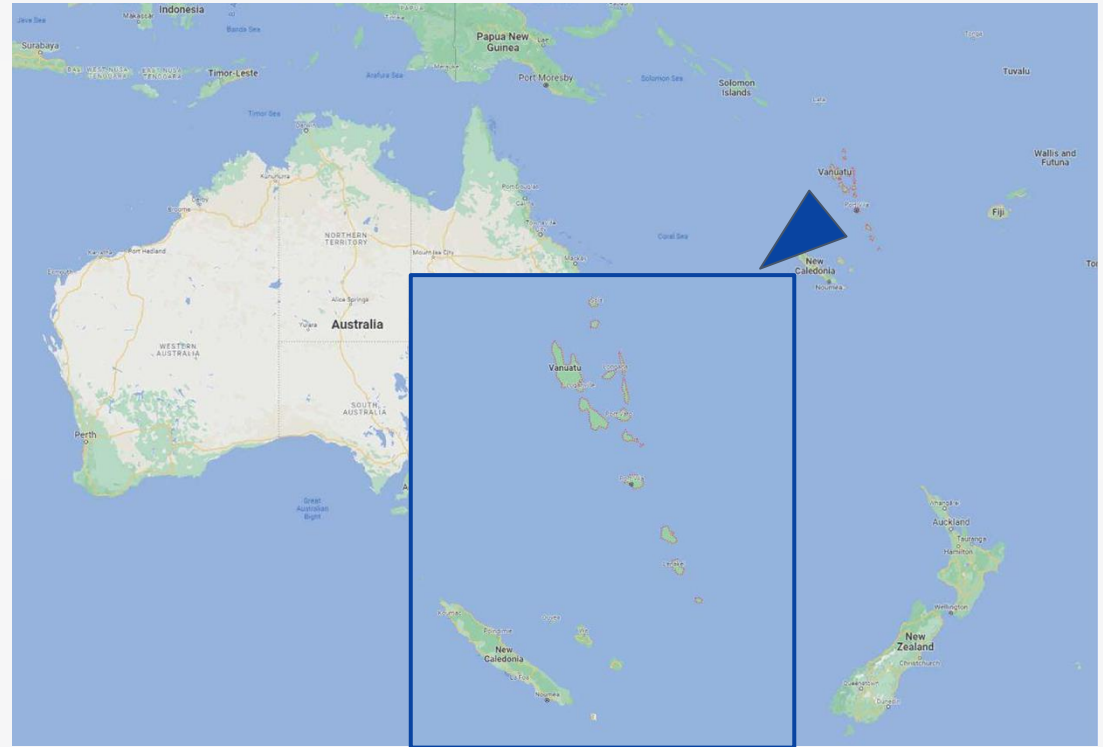
UN Resolution

Led by: Republic of Vanuatu

- + 130 other countries, including Australia, Canada, Germany, UK
- not including U.S. or China

United Nations adopts landmark resolution on climate justice

Resolution hailed as 'win for climate justice of epic proportions' should make it easier to hold countries accountable for failures



UN Coverage & State Responses

ICJ Advisory Opinion

(a) What obligations do States have under international law to protect the climate system from the adverse effects of the emissions of greenhouse gases for States and for present and future generations;

Does int'l law require states to protect the climate system from GHG emissions?

(a) What are the consequences for these obligations if a State acts in a way that harms or significantly harms parts of the environment, with respect to:

If so, what are the consequences for states that - by action or inaction - harm the climate system & environment?

(i) States, including, in particular, small island developing States, which due to their geographical location and economic development, are injured or specially affected by the adverse effects of climate change?

especially for small island developing states and others vulnerable to climate change... and to present and future generations...

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?



European Court of Human Rights

Claim: Government's failure to sufficiently reduce the country's greenhouse gas emissions has violated their human rights.

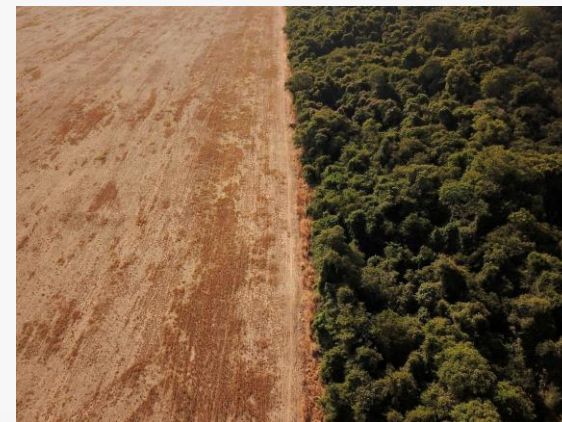
Key Climate Impact:
Heat Waves



[Case Summaries](#)

PSB et al. v. Brazil (on Climate Fund)

- **Brazil:** fifth highest carbon emitter
 - largest source is deforestation
- **Significance:**
 - Constitutional duty to allocate funds aimed at fighting climate change → creates a duty to mitigate climate change
 - Paris Agreement as a human rights treaty
- **Other South American cases:**
 - Institute of Amazonian Studies v. Brazil - *pending opinion*
 - Future Generations v. Ministry of the Environment and Others - *decided*



[Deforestation in Brazil's Amazon](#)

Resources:

[Climate constitutionalism by country](#)
[Extreme drought in the Amazon](#)

Held v. Montana

- Constitutional right to a clean and healthful environment
- Other youth cases regarding climate constitutionalism:
 - [Juliana v. U.S.](#) - *pending trial*
 - [Navahine v. the Hawaii Department of Transportation](#) - *pending trial*
- [In re Hawai'i Elec. Light Co.](#) - *decided*



[Living and dead whitebark pine at U.S. Forest Service restoration site in Montana](#)



[Youth plaintiffs and supporters after the Navahine vs the Hawai'i Dept. of Transportation court hearing](#)

Resources:

[Climate Constitutionalism in Montana](#)

[Climate Constitutionalism in Hawaii](#)

Administrative Law Cases

U.S. Supreme Court

Massachusetts v. EPA
(2007) (5-4)

- States have “standing” to sue over climate change.
- CO2 is a pollutant under the Clean Air Act.
- EPA must base CO2 regulation or inaction on a consideration of “whether greenhouse gas emissions contribute to climate change.”

**Env’t Law’s
Brown v. Board of Education...
lays groundwork for federal climate actions**

West Virginia v. EPA
(2022) (6-3)

- Limits EPA authority only to emission reduction technologies under Clean Air Act §111(d).
- Cannot require shifting to different energy sources “outside the fence line”
- No active rule to judge.

Court limits EPA authority to address climate change; wants clear Congressional authorization

Sackett v. EPA
(2023) (9-0, 5-4)

- Under Clean Water Act, “waters of the U.S.” does not include wetlands that are too far away from a federally protected body of water.
- Define “adjacent” as adjoining.
- Kavanaugh Concurrence/*dissent*

Further limits on EPA authority; wetlands have direct connection to climate impacts

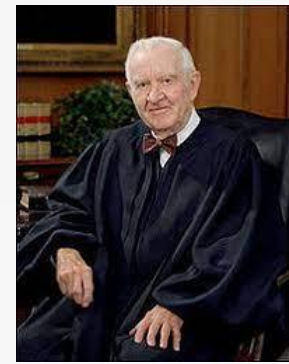
Chevron v. NRDC
(1984) (9-0)

- Defining stationary sources under Clean Air Act.
- Legacy: Courts should defer to a federal agency’s reasonable interpretation of an ambiguous statute.
- Cert granted in *Loper Bright Enterprises v. Raimondo* re: fishing industry paying cost of observers.

39 years of precedent at risk and less deference to all agencies, including those implementing climate security actions



Massachusetts v. EPA



U.S.

Justice
Stevens

2007 Supreme Court Decision re: Climate Change (5-4)

- Established standing for State of Massachusetts
- Established that CO₂ is an air pollutant under the Clean Air Act
- Found that EPA must base CO₂ regulation or inaction on a consideration of “whether greenhouse gas emissions contribute to climate change.”

Concurrences/Dissents Offer Important Clues

Roberts dissent: Potential injuries from global warming not concrete enough.

Scalia dissent: Act was not intended to combat global climate change.

[Opinion](#) / [Video](#)

West Virginia v. EPA

2022 Supreme Court Decision re: Emissions (6-3)

2015 Clean Power Plan (Obama)

- Generation-shifting regulations at issue
- Stayed by the courts

2019 Affordable Clean Power Rule (Trump)

- Less aggressive but similar approach
- Stayed by the courts

2021 Intent to develop new rules (Biden)

- Intent to include outside the fence line
- Granted cert by Supreme Court

2022 Decision limits EPA authority only to emission reduction technologies under Clean Air Act §111(d)



U.S.

Chief Justice
Roberts

Concurrences/Dissents Offer Important Clues

Gorsuch Concurrence: agencies must be able to point to “clear congressional authorization” ... to protect foundational constitutional guarantees

Kagan dissent: Congress gave EPA authority to determine “best system of emission reduction”;

Decision strips EPA of power to respond to most pressing issue of our time

[Opinion](#)



Sackett v. EPA

2023 Supreme Court Decision re: Wetlands (9-0, sort of)

Long standing Issues re: “Waters of the United States”

Competing interpretations since 2006:

- Scalia: navigable waters including wetlands with a continuous surface connection to federally protected body of water
- Kennedy: shared significant nexus with adjacent protected body of water

Outcome:

- Scalia’s interpretation wins out
- Adjacent means Adjoining
- possibly ½ of the 118 million acres of U.S. wetlands no longer protected



U.S.

Justice Alito

Concurrences/Dissents Offer Important Clues

Kavanaugh Concurrence: may leave long-regulated and long-accepted-to-be-regulable wetlands suddenly beyond the scope of EPA authority

Kagan Concurrence: Adjacent does not mean adjoining

[Opinion](#)

Chevron v. NRDC (1984)

1984 Supreme Court Decision re: Agency Authority (6-0)

Finding:

- Congress did not have a specific intention for the interpretation of the term “stationary source” under Clean Air Act
- EPA regulation was a reasonable policy choice

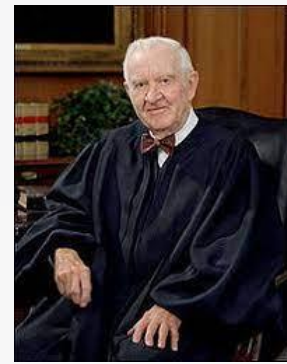
Legacy:

- Courts should defer to a federal agency’s interpretation of an ambiguous statute as long as that interpretation is reasonable

What’s Coming:

Loper Bright Enterprises v. Raimondo

- Cert granted / Likely argued in Fall 2023
- Justice Jackson recused
- Question: Applicability of Chevron in case about NMFS rules requiring fishing industry to pay for cost of observers.

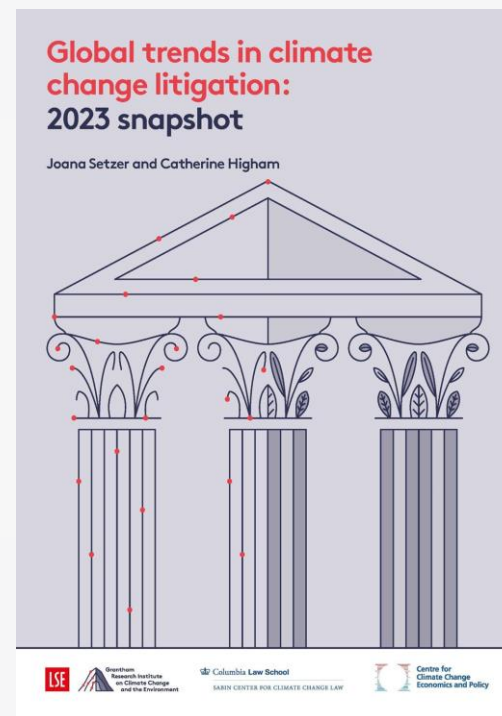


U.S.

Justice
Stevens

[Opinion](#)

Resources



- Increasing Litigation
- Strategic Litigation
- High-emitting activities most challenged + throughout lifecycle

Conclusion

Who's responsible for addressing climate change?

- Courts v. Congress v. Executive
- Youth activists

Do we have a right to a healthy climate?

- If so, what does it include?
- International & U.S. claims, recognition growing
- Youth Left holding the bag

Evolution of Climate Change Law: More and more connections to Climate Security

- Increasing climate impacts causing upheaval; military increasingly asked to address humanitarian crises

- Lack of mitigation / redress causing animosity

- Climate constitutionalism evolving; rejection of this lead to conflict?

- Courts increasingly open to climate cases and evolving causes of action include security concerns

- ICJ opinion+ will provide guidance across the globe, affect diplomacy, U.S./allies influence

What are the remedies for current and future generations?

- Policies? Money? Punitive measures?
- Who pays? Gov't? Companies? Society at large?

How much authority do executive agencies really have?

- U.S. Agencies & loss of precedent
- 40 years of deference overturned soon?



Report

- Available by end of August
- Will send out via CSN

Questions?

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