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Why climate change litigation matters

> Everything is litigated, everything will be litigated. And that's the starting point and the presumption. No matter how small the rule is or how big the rule is. It's going to be litigated. And it's going to be decided by the D.C. Circuit if it's a federal rule and if it's a state rule it's going to be decided somewhere else in some court. It's just the nature of America! I mean, I am gainfully employed, likely, because of the degree to which we rely upon law to guide regulatory development as opposed to other countries, which are policy-driven.
>
> – US Interview Participant 5

> I take a long-term view [of] climate litigation. I really think we are like lawyers in Alabama in 1950 fighting for black civil rights or . . . lawyers at the early stages of cigarette and asbestos litigation, trying to establish a causal link between cigarettes and lung cancer. And, you know, you get looked at like you've got two heads and you're green by the courts to start with and you get lots of bad decisions. But the issues are so enormous and the science is so strong; it's not like the problem is going away. So I take a long-term view to these cases that we will have many losses and it's about doing the right thing. Even if at the end of the day we don't change and our society just continues on this suicidal approach of burning fossil fuels, I think we have to do what we can now, with the tools we have, to try and protect the future.
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> – Australian Interview Participant 4

1.1 Introduction

Courtrooms have become a key battleground in the public debate over climate change around the world. Lawsuits over climate change have been brought in eighteen countries on six continents, as well as in international tribunals.[1] In the United States alone, which has more of these cases than

[1] For details, see Richard Lord, Silke Goldberg, Lavanya Rajamani, and Jutta Brunnée (eds.), *Climate Change Liability: Transnational Law and Practice* (2011, Cambridge University Press, Cambridge); Arnold and Porter LLP, "U.S. Climate Change Litigation Chart" and

any other country, more than five hundred cases under many different laws in state and federal courts have raised climate change mitigation and adaptation issues.[2] These lawsuits – brought by both those supporting climate change regulation and those fighting it – and the media attention surrounding them have shaped regulation in these countries directly through mandate and indirectly through influencing corporate behavior and social norms.

The most prominent example of climate change litigation is *Massachusetts v. EPA*, the first US Supreme Court decision on climate change, which provided the basis for federal regulation by the US Environmental Protection Agency (EPA) of motor vehicle and power plant greenhouse gas emissions.[3] This decision may be "the most important environmental case of the century, if ever," issued by the US Supreme Court.[4] For those working in the field of climate and energy law – such as the regulators, lawyers, judges, energy company representatives, planners, insurance risk managers, and environmental campaigners whom we interviewed for this book – the case is "bedrock by now."[5] It established that the Clean Air Act provides the US government with the authority to regulate greenhouse gas pollution, the principal contributor to global climate change.[6] No less momentous was the US Supreme Court's endorsement of climate change as a serious public policy issue. A decision like that "causes everybody to perk up and take notice; so, at least in the deliberations and corporate boardrooms, they say we can't completely dismiss this anymore."[7]

Because *Massachusetts v. EPA* was such an important decision, though, it tends to overshadow the fact that hundreds of other US cases have had a variety of impacts on the country's regulation of climate change. Moreover, litigation has also been an important influence on climate regulation in other major developed-country greenhouse gas emitters. Australia is one such nation; it has seen an enormous growth in climate

"Non-U.S. Climate Change Litigation Chart," www.climatecasechart.com; and Climate Justice Programme, "Cases," www.climatelaw.org/cases.

[2] A comprehensive database of climate change cases filed and decided in US courts, including links to judgments, is maintained by the Columbia Climate Change Law Center. See, further, Arnold and Porter LLP, "U.S. Climate Change Litigation Chart." Climate change "mitigation" refers to efforts to reduce greenhouse gas emissions from human sources, whereas climate change "adaptation" focuses on managing the impacts of climate change on communities, infrastructure, and the environment.

[3] *Massachusetts v. EPA*, 549 U.S. 497 (2007).

[4] In-person interview, US Participant 5 (Nov. 14, 2012).

[5] Ibid.

[6] The findings of the case and its subsequent impact on US climate regulation are described in depth in Chapter 3.

[7] Telephone interview, US Participant 8 (Nov. 26, 2012).

change litigation over the past decade and has the second most climate cases in the world.[8] As this litigation continues to expand around the globe, and particularly in these two countries, the need to understand its role in broader climate change efforts grows. This need is particularly strong in the United States and Australia because they are major carbon polluters and fossil fuel producers, disproportionately contributing to climate change. Both also face significant challenges – social, political, and economic – in their efforts to transition to cleaner energy from their currently carbon-dominated economies.

This book asks how litigation on climate change issues influences regulatory pathways to a cleaner energy future. It focuses on the United States and Australia because they have more of these lawsuits than any other countries, and enough commonalities in both their legal systems and approaches to climate change to provide useful points of comparison. The book attempts to understand the extent to which litigation in each country has affected government regulation and corporate behavior and the pathways by which these effects have occurred, and likely will occur, in the future. In this regard, we are interested in direct legal change brought about by cases and how the case law might help change social and business norms in ways that motivate action by governments and other key stakeholders.

To answer these questions, we not only examined cases and accompanying regulation but also talked with those bringing, adjudicating, and responding to these cases. Our interviewees from the United States and Australia provided valuable insights into the direct and indirect effects of the litigation. Throughout the book, we attempt to take a balanced approach that recognizes that litigation over climate change may have mixed effects on regulatory efforts. While the majority of the litigation in both the United States and Australia has been brought by pro-regulatory litigants who want to advance climate change regulation, a growing body of antiregulatory cases launched by business groups and the fossil fuel industry has emerged in response to decisions like *Massachusetts v. EPA* and the regulation it has spawned as well as proactive action by state governments.[9] The book considers how these antiregulatory cases, and

[8] For details of Australian climate change cases, see the database maintained by the Centre for Resources, Energy, and Environmental Law (CREEL) at Melbourne Law School: Jacqueline Peel, "Australian Climate Change Litigation," CREEL, www.law.unimelb.edu.au/creel/research/climate-change. Judgments in many of the cases are freely available online from the Austlii website: www.austlii.edu.au.

[9] David Markell and J.B. Ruhl, "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual" (2012) 64 *Fla. L. Rev.* 15.

other barriers to and backlash against litigation, might limit the progress achieved by pro-regulatory lawsuits.

This chapter sets the scene for the book's discussion of these issues. We begin by describing what we mean by climate change litigation. This is a far from straightforward question because "when you're talking about climate change litigation it's very much a broad spectrum, so it really does depend on what your focus is."[10] Because the book is concerned with the regulatory significance of climate change litigation, our focus has been on cases that have the issue of climate change at the "core" and generally raise climate-specific arguments or contain judicial analysis referencing climate change.

The next part of the chapter discusses how climate change litigation fits into the broader picture of climate change governance. Climate change is a problem regulated at multiple levels – from the international to the local – that involves complex interactions among the activities of multiple actors, governmental and nongovernmental. Although climate change is a global issue in the sense that the accumulation of greenhouse gas emissions from human activities around the world causes impacts in every jurisdiction, many of the most important responses take place at the domestic level. Climate change litigation has tended to have its greatest impact at this level and is a mechanism that is especially well suited for bringing together different levels of government.

Chapter 4 introduces our two national case studies – the United States and Australia – and explains why litigation in these two countries, and the role it plays in shaping their respective regulatory paths, is particularly important in assessing domestic efforts to move toward cleaner energy. We also discuss how the common challenges that Australia and the United States face in transitioning away from fossil fuels and preparing their communities for the effects of climate change make them good subjects for comparative study. The final part of the chapter provides an outline of the remainder of the book.

1.2 What is climate change litigation?

As noted earlier, climate change is a complex problem that cuts across multiple levels of governance, areas of law, and sectors of the economy. Taking a broad approach, then, "virtually all litigation could be conceived of as [climate change litigation]," given that "climate change is the

[10] Skype interview, Australian Participant 6 (Apr. 5, 2013).

consequence of billions of everyday human actions, personal, commercial, and industrial."[11] However, the climate change litigation that has arisen in countries like the United States and Australia tends to have a much more direct link to climate change, by addressing either the greenhouse gas emissions that cause the problem (mitigation-related litigation) or the predicted impacts of climate change on ecosystems, communities, and infrastructure (adaptation-related litigation). Litigants in such cases may be seeking to promote climate change regulation (proactive litigation) or to oppose existing or proposed regulatory measures (antiregulatory litigation).

More difficult to classify are cases at the edges of these categories. A good example is the many claims that have been brought – both in the United States and Australia – concerning the environmental effects of hydraulic fracturing ("fracking") for unconventional energy sources such as shale or coal seam gas.[12] As we discuss further in Chapter 3, the explosion in natural gas production facilitated by fracking has major implications for the future of clean energy. Although many in the industry argue that "we're advancing the cause for climate change by our emissions being less than other fossil fuels, like coal," the relationship between fracking and climate change is more complex.[13] This expansion may decrease emissions in the short term through coal-to-gas substitution in energy systems. Over the longer term, though, reliance on natural gas – without major technological shifts – will still result in rising greenhouse gas emissions.[14]

[11] Chris Hilson, "Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back In)" in F. Fracchia and M. Occhiena (eds.), *Climate Change: La Riposta del Diritto* (2010, Editoriale Scientifica, Naples), 421. Hilson also makes the point that litigation itself is a broad concept that can connote many different things. It extends from the formal resolution of a dispute by a court or tribunal on the basis of adjudicative procedures to more informal proceedings before an independent decision maker, as well as to judicial proceedings that have been commenced but settle before they reach the stage of a full hearing and judgment. Because our focus is on the regulatory impact, direct and indirect, of climate change litigation rather than on its form, we have taken a broad view of what litigation involves and include decided cases, cases before administrative tribunals, and settled cases in our discussion.

[12] US fracking cases are tracked in Arnold and Porter LLP, "Hydraulic Fracturing Case Chart," "US Climate Change Litigation Chart." For examples of cases over fracking and coal seam gas exploitation in Australia, see Peel, "Australian Climate Change Litigation." In the United States, coal seam gas is referred to as coal bed methane.

[13] Skype interview, Australian Participant 7 (Apr. 11, 2013).

[14] International Energy Agency, "Are We Entering a Golden Age of Gas? Special Report" in *World Energy Outlook 2011* (2011, OECD/IEA, Paris), 8 ("An increased share of natural gas in the global energy mix is far from enough on its own to put us on a carbon emissions path consistent with an average global temperature rise of no more than 2°C"). See

Fracking cases have not (yet) been litigated on an explicit climate action platform, with plaintiffs instead favoring arguments about the impacts on water resources and wildlife.[15] Nonetheless, at least some groups bringing antifracking claims in the United States and Australia are doing so as part of broader climate change campaigns.[16]

Other scholars who have evaluated climate change litigation, such as Professors J.B. Ruhl and David Markell, have been hesitant to rely on the motivation of litigants bringing claims as a basis for categorizing cases as "climate change litigation." They worry that this approach requires uninformed judgments about litigants' mental state. Hence, in their empirical studies of climate change litigation in the United States, these authors have limited their analysis to "any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts."[17] As Markell and Ruhl acknowledge, this approach "has some limiting effects on the pool of cases included."[18] For instance, their definition excludes challenges to coal-fired power plants that are motivated by a concern over climate change but litigated on other grounds, such as the plants' contribution to air pollution or their impacts on water. Markell and Ruhl argue that such cases are likely to influence the law and policy of climate change only "in the broadest sense" and "would not be contributing to any discrete body of law bearing a direct connection to climate change issues."[19]

In our view, however, this approach is too narrow where the purpose is to understand the linkage between litigation and climate change

also recent scientific evidence suggesting that fugitive methane emissions associated with unconventional gas exploitation may outweigh any climate benefits from its substitution for coal. See Robert W. Howarth, Renee Santoro, and Anthony Ingraffea, "Methane and the Greenhouse-Gas Footprint of Natural Gas from Shale Formations" (2011) 106 *Clim. Change* 679.

[15] See, e.g., *Fullerton Cove Residents Action Group Incorporated v. Dart Energy Ltd.* (No. 2) (2013) NSWLEC 38.

[16] See, e.g., Center for Biological Diversity, "California Fracking," available at www.biologicaldiversity.org/campaigns/california_fracking/. In an Australian context, see "Lock the Gate Alliance," www.lockthegate.org.au/.

[17] David Markell and J.B. Ruhl, "An Empirical Survey of Climate Change Litigation in the United States" (2010) 40(7) *Environ. L. Rep.* 10644, 10647. See also Markell and Ruhl, "A New Jurisprudence or Business as Usual," 27.

[18] Markell and Ruhl, "A New Jurisprudence or Business as Usual," 27.

[19] Markell and Ruhl, "An Empirical Survey," 10647; Markell and Ruhl, "A New Jurisprudence or Business as Usual," 26–27.

regulation. Although discerning a climate change–related motivation for litigation is not always straightforward when the parties' pleadings or the judgment do not mention it directly, a range of other materials, including case briefings and media releases, can aid in identifying the ultimate reasons behind particular litigation.[20] Our interviews with litigants, particularly those from environmental groups, also indicate that the way a case is framed in argument is often dictated by what are perceived to be the strongest legal points for a claim, which may not be the climate change issue at stake. Nonetheless, the litigation itself is designated within the organization or by the litigants concerned as contributing to a climate change or anticoal campaign.[21] Taken on an individual basis, a case focused on challenging a particular fossil fuel project is often relatively small scale and narrow in scope, which tends to limit its discrete impact. However, excluding these cases from consideration may miss their cumulative regulatory influence. No single case may achieve a "home run," but collectively they work to "forc[e] coal plants to account for some of their unrealized externalities."[22]

At the opposite end of the spectrum from cases motivated by climate concerns but litigated on alternative non–climate grounds are lawsuits that only peripherally touch on climate change issues. In some of these cases, climate-related concerns may be thrown into pleadings as another plausible argument, but without such concerns being the main focus of the litigation.[23] In others, responses to climate change created the regulatory issue being litigated, but climate change itself is not central to the case. Interviewees mentioned private litigation over carbon trading contracts as an example of this category of cases. Although such litigation is a by-product of carbon trading schemes under climate regulatory instruments such as the Kyoto Protocol[24] or the European Emissions

[20] Hilson, "Climate Change Litigation in the UK."

[21] See, e.g., in-person interview, Australian Participant 1 (Mar. 7, 2013) ("The contribution of coal to climate change was one of our motivations for taking on the litigation and discussing the issue, even though the cases did not directly address climate change issues").

[22] Telephone interview, US Participant 1 (Oct. 20, 2012).

[23] Skype interview, Australian Participant 18 (Jul. 18, 2013). Another interviewee gave the example of cases against animal factories: "there the hook was smog forming pollution from big dairies or a big meat chicken factory. But the same processes at the dairies that emit a lot of smog forming emissions also emit a lot of methane. So there's this two-for-one aspect sometimes in some cases." In-person interview, US Participant 10 (Jan. 14, 2013).

[24] This international treaty, discussed further later, provides for trading of emissions units between nations that are Protocol parties.

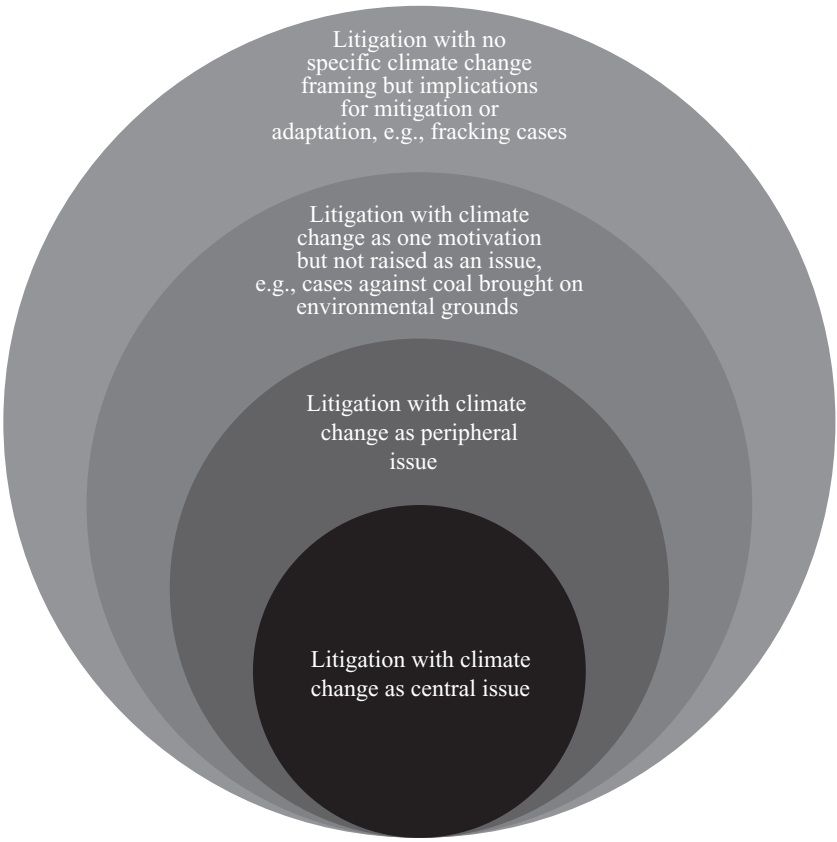

Figure 1.1 Conceptualizing climate change litigation.

Trading Scheme,[25] climate change as such is not an issue in the disputes, which largely concern the interpretation of contractual terms.[26]

In Figure 1.1, we represent our concept of climate change litigation in terms of a series of concentric circles. At the core are cases where climate change – whether relating to mitigation or adaptation and brought by pro- or antiregulatory claimants – is a central issue in the litigation. These

[25] For details of the European Emissions Trading Scheme, see European Commission, "Climate Action," http://ec.europa.eu/clima/policies/ets/index_en.htm. See also Michael Faure and Marjan Peeters (eds.), *Climate Change and European Emissions Trading: Lessons for Theory and Practice* (2008, Elgar, Cheltenham).

[26] Skype interview, Australian Participant 6 (Apr. 5, 2013).

cases tend to have some element of deliberate framing of the arguments or judgment in climate change terms. As Professor Chris Hilson points out, "climate change framing of claims is a relatively new phenomenon."[27] Challenges to fossil fuel projects or other greenhouse gas–intensive developments have been brought in both the United States and Australia for many years. But it is only in the last decade that a substantial portion of these cases has used the contribution to climate change as part of the argument or motivation for the case.[28] At the outer limits of the boundaries of climate change litigation lie cases that are not explicitly tied to specific climate change arguments but which have clear implications for climate change mitigation or adaptation. In between are cases where (1) climate change is raised, but as a peripheral issue in the litigation, and (2) concerns over climate change motivate the lawsuit, at least in part, but are not raised explicitly in the claims or decision.

As our interest lies in how litigation may serve as a pathway to improved climate change regulation, and in the process influence mitigation and adaptive behaviors, the majority of our case examples in the following chapters are drawn from the core of this broader sphere. However, on occasion, cases further from the core may have a significant regulatory impact, usually in combination with other cases or through the indirect effects they have on government or corporate behavior.

1.3 Why climate litigation matters as part of climate governance

This book examines climate change litigation and the extent to which these cases mandate, foster, or facilitate improved regulation. It moves beyond describing or cataloging the cases that have emerged to evaluate the impact of climate change litigation on government regulation of climate change and the behavior of other key actors, such as major corporate emitters. We are thus fundamentally concerned with the real-world consequences of climate change litigation for the achievement of mitigation and adaptive outcomes.

This choice of focus may invite several questions from readers; after all, the realm of climate change governance is increasingly acknowledged to

[27] Hilson, "Climate Change Litigation in the UK."
[28] Many cases against coal in both the United States and Australia continue to pursue only non-climate-related grounds, such as environmental, health, or air quality impacts.

be both complex and multidimensional.[29] Why, then, focus on litigation rather than other pieces of the governance puzzle, such as international agreements or national regulatory programs? Moreover, given that litigation is fact intensive and jurisdiction specific, can it have any broader regulatory role, especially in addressing a problem of global dimensions such as climate change? In the following sections, we argue that there are at least three reasons why climate change litigation matters as a component of the overall system of climate governance: (1) international regulatory efforts are failing, increasing reliance on domestic regulatory solutions to which litigation can contribute; (2) climate governance operates across multiple scales and involves many actors, and litigation can be a useful means of connecting these different elements; and (3) mitigation and adaptive outcomes rely on the cumulative effect of numerous smaller-scale decisions, many of which come before courts and through which litigation can play an effective shaping role.

1.3.1 Regulatory gaps created by struggling international climate negotiations

As is widely acknowledged, international solutions to the climate change problem have been slow to emerge.[30] The international climate change

[29] Among others, see Steven Bernstein and Benjamin Cashore, "Complex Global Governance and Domestic Policies: Four Pathways of Influence" (2012) 88(3) *Int. Affairs* 585; Frank Biermann, Philipp Pattberg, and Fariborz Zelli, *Global Climate Governance beyond 2012: Architecture, Agency and Adaptation* (2010, Cambridge University Press, Cambridge); Daniel C. Esty, "Climate Change and Global Environmental Governance" (2008) 14 *Global Governance* 111; Neil Gunningham, "Confronting the Challenge of Energy Governance" (2012) 1(1) *Transnatl. Environ. L.* 119; Ellen Hey and Andria Naudé Fourie, "Participation in Climate Change Governance and Its Implications for International Law" in Rosemary Rayfuse and Shirley V. Scott (eds.), *International Law in the Era of Climate Change* (2012, Edward Elgar, Cheltenham), 254; Kati Kulovesi, "Exploring the Landscape of Climate Law and Scholarship: Two Emerging Trends" in Erkki J. Hollo, Kati Kulovesi, and Michael Mehling (eds.), *Climate Change and the Law* (2013, Springer, Dordrecht), 31; Jacqueline Peel, Lee Godden, and Rodney J. Keenan, "Climate Change Law in an Era of Multi-Level Governance" (2012) 1(2) *Transnatl. Environ. Law* 245; Joanne Scott, "The Multi-level Governance of Climate Change" (2011) 5(1) *Carbon Clim. L. Rev.* 25.

[30] In the wake of the Copenhagen COP, the failures of the UNFCCC regime prompted serious discussion of the future of international climate law: see, e.g., Daniel Bodansky, "The Copenhagen Climate Change Conference: A Postmortem" (2010) 104 *Am. J. Intl. L.* 230; Sebastian Oberthür, "Global Climate Governance after Cancun: Options for EU Leadership" (2011) 46(1) *Intl. Spectator* 5; Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change: Background Paper to the 2010 World Development Report* (Policy Research Working Paper 5095) (2009, World Bank, New York); Gwyn Prins et al., *The Hartwell Paper: A New Direction for Climate Policy after the Crash of 2009* (2010,