The Judicial Activism of Inaction: India's National Green Tribunal and the Reeducation of U.S. Jurists

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Abstract

Around the world, a spate of successful and pending climate change lawsuits based on human rights and constitutional claims offers new hope as a means to compel meaningful government action to reduce global warming. This trend stands in stark contrast to environmental jurisprudence in the United States, where not a single climate-related suit has been litigated on the merits. This Comment challenges the conventional portrayal of the U.S. judiciary as exercising restraint in rejecting such suits for lack of standing. It argues instead that judicial activism since the 1990s usurped legislative and executive action that supported not only carbon emissions reductions specifically but also, more generally, encouraged citizen access to federal courts as a tool for achieving environmental justice and protecting natural resources. The following comparative analysis focuses on the approach of India's National Green Tribunal as the quintessential embodiment of three principles that serve as a counterpoint to the rigidity of contemporary U.S. jurisprudence: environmental constitutional rights premised on due process and equal protection as opposed

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to the Commerce Clause, public interest litigation versus strict standing, and scientific expertise versus so-called judicial generalism. The purpose of the analysis is to demonstrate the federal judiciary's role in making the United States a global outlier in climate change policy. It also argues for the need to reintroduce these principles, which inspired both India's public interest litigators and amendments to key U.S. environmental statutes in the 1970s. A return to these three principles would offer the best hope of unlocking courthouse doors to federal climate change litigation in the United States.

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Introduction

> *As a citizen of America, I have the same right to life, liberty, property as [my] forefathers. But what life do I have if I die twenty years early from carcinogenic smog? What liberty, if I must stay indoors all day to avoid the stroke-inducing heat? What property, if the land itself is burned to ash?*
>
> *–Leon Zha, 17, California resident.*[1]

Juliana v. United States[2] is the seminal case charging federal agencies and officials with violating citizens' rights to a healthy climate. It has been called the trial of the century, pathbreaking, and the Scopes trial for climate change. Yet, it is unlikely that the young

1. Brief for Sunrise Movement Education Fund as Amicus Curiae Supporting Respondent at 24, Juliana v. United States, 947 F.3d 1159 (9th Cir. 2018) (No. 18-36082). Zha was 17 at the time the brief was filed.

2. Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

plaintiffs—attempting to compel a federal plan to reduce carbon emissions—will ever cross a courthouse threshold.

No U.S. court has heard a climate change suit on its merits—whether plaintiffs sought an injunction to force regulatory action, a declaratory judgment, or damages against the government or industry defendants. Meanwhile, around the world, lawsuits stemming from climate change impacts are challenging judicial bodies to reexamine their role in protecting natural resources. This Comment explains how the same principles that inspired movements for access to justice and rights for nature on a global scale have perversely inspired a judicial backlash in the United States, which once pioneered those principals as legal concepts, that has almost completely foreclosed future climate litigation in federal courts.

While prevailing legal scholarship characterizes the U.S. approach as 'conservative,' this Comment argues that current federal environmental jurisprudence is a form of judicial activism that insulates government and industry from liability for destructive practices, making the United States an outlier in global climate jurisprudence. Part I discusses the procedural obstacles climate change plaintiffs face in federal courts. Part II describes climate litigation in Environmental Courts and Tribunals (ECTs) around the world, focusing on India's National Green Tribunal as a benchmark for three important principles driving such litigation: constitutionally based environmental rights, relaxed standing for public interest suits, and judicial specialization. Part III engages in a comparative analysis of those three principles that inform modern Indian jurisprudence and recent resistance against climate litigation in the United States. It also explores these principles' roots in U.S. constitutional law prior to the 1970s.

Whether or not a separate court system for environmental litigation is a feasible solution in the United States is debatable; what is beyond debate, however, is that a fundamental philosophical shift in modern judicial thought is the only way to unlock the courthouse doors to U.S. climate litigants.

I. Standing in "Our Children's" Way

> *Reluctantly, we conclude that such relief is beyond our constitutional power.*
>
> *–Andrew Hurwitz, Circuit Judge on the United States Court of Appeals for the Ninth Circuit*[3]

In *Juliana*, the nongovernmental organization (NGO) Our Children's Trust and the 21 child plaintiffs allege, "[t]hrough its policies and

3. Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020).

practices, the Federal Government bears a higher degree of responsibility than any other individual, entity, or country for exposing [p]laintiffs to the present dangerous atmospheric CO_2 concentration."[4] They seek declaratory and injunctive relief to compel the federal government to reduce carbon emissions from fossil fuels,[5] based on a novel theory that would recognize a federal duty called Atmospheric Trust.[6]

The *Juliana* plaintiffs advance this novel legal theory because they must. Modern U.S. standing doctrine represents an insurmountable procedural barrier for redressing climate-related harms through traditional tort claims. In *Lujan v. Defenders of Wildlife*, the controlling case on Article III standing, the U.S. Supreme Court held that a triable claim must show an injury in fact that is (1) concrete, particularized, and actual or imminent, (2) fairly traceable to the defendant, and (3) redressable by the courts.[7] Though a high bar for any pretrial plaintiff, the *Lujan* test is impossible for would-be climate litigants to meet because of the exceptional nature of climate-related harms. The need for scientific modelling to predict the full impacts of future climate harms complicates proving the fact-based injury burden; such evidence founders against a strict interpretation of imminence, on which *Lujan's* injury factor turns.[8] Even when courts are willing to analyze scientific evidence of imminent climate harms,[9] the global impact of transboundary[10] carbon emissions makes it difficult for potential plaintiffs to

4. First Amended Complaint for Declaratory & Injunctive Relief ¶ 7, *Juliana*, 217 F. Supp. 3d 1224 (D. Or. 2015) (No. 6:15-cv-01517-TC).

5. *Juliana*, 217 F. Supp. 3d at 1248 (quoting First Amended Complaint, *supra* note 4, ¶ 12).

6. Discussed *infra* note 18 and accompanying text. *See also* Michael C. Blumm & Mary Christina Wood, "*No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 Am. U.L. Rev. 1, 25–27 (2017).

7. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

8. *But see* Massachusetts v. EPA, 549 U.S. 497, 520 (2007) (granting "special solicitude" to sue over the future loss of coastal land from climate related sea level rise).

9. *See, e.g.*, Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 318 (D. Vt. 2007) (applying the factors for reliable scientific testimony from Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579 (1993) to find that the predictive nature of climate change evidence, although precluding the possibility of controlled scientific testing [did] not undermine the reliability of expert testimony).

10. The state obligation to avoid causing transboundary harm is a foundational concept in International Environmental Law and is premised on the broader principle of *sic utere tuo ut alienum non laedus* (use your own property in such a manner as not to injure that of another). Lakshman D. Guruswamy et al., International Environmental Law in a Nutshell 20 (5th ed. 2017); *see also* U.N. Conference on the Human Environment, *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, princ. 21 (1973), *reprinted in* 11 I.L.M. 1416 (1972); Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1938 (1941).

establish particularity.[11] Even the plaintiffs who manage to establish particularity now shoulder the post-*Lujan* burden to show a causal link between climate harms and defendants' activities.[12] Finally, the redressability factor raises prudential questions that blur into a second strain of the standing inquiry, whereby U.S. courts have resisted hearing climate suits that may implicate political questions[13] and separation of powers doctrines.[14]

A study of more than two hundred federal climate suits revealed that judicial opinions overwhelmingly favor corporate defendants over private plaintiffs.[15] The number of regulatory challenges to agency permits far exceed private tort claims and, among these regulatory suits, those most likely to receive a hearing are carbon-emitting companies that challenge agency efforts to enforce emissions controls.[16]

In contrast to this "business-as-usual"[17] approach to emerging environmental concerns, Atmospheric Trust litigation represents a challenge to judicial imagination. Modelled after the public trust doctrine, Atmospheric Trust suits assert that the atmosphere is a resource, collectively belonging to all citizens, that the government holds in trust now and for future generations; failure to effectively regulate and steward

11. *See, e.g.*, Conservation L. Found. v. EPA, 964 F. Supp. 2d 175, 186, 188 (D. Mass. 2013) (holding that citizens who petitioned the EPA in order to compel certain climate policy action did not have standing because they did not allege a specific injury affecting only them, as opposed to one affecting the public at large).

12. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012), *cert denied*, 569 U.S. 1000 (2013) (denying standing to plaintiffs who proved melting Arctic Sea ice would imminently submerge their entire village because they could not prove harms caused by a single oil company, in part because the effects of carbon emissions are cumulative); Transcript of Hearing on Defendants' Motions to Dismiss at 36, Comer v. Murphy Oil, USA, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (denying standing to plaintiffs for damages sustained during Hurricane Katrina because "all of us are responsible for the emission of CO2 and ultimately greenhouse gases which cause global warming.").

13. To justify its prudential retreat from climate change litigation, U.S. courts have relied heavily on stilted interpretations of political question doctrine. *See* Baker v. Carr, 369 U.S. 186 (1962) (developing a six-factor test to determine whether a court's exercise of jurisdiction infringes on powers of consigned to the legislative or executive branches). In the context of climate change, U.S. courts have found two *Baker* factors particularly irksome: (1) a lack of judicially discoverable and manageable standards for resolution, and (2) the impossibility of deciding a case without making an initial policy determination of a kind clearly beyond judicial expertise. *Id.*

14. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011). The Court also held that all federal common law torts related to air emissions are displaced by the Clean Air Act, foreclosing all such future suits.

15. David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business As Usual?*, 64 Fla. L. Rev. 15, 66–69 (2012).

16. *Id.* at 31–32.

17. *Id.* at 85.

that resource violates the public trust and the fundamental rights of individual citizens.[18]

The first attempt by U.S. plaintiffs to extend public trust doctrine to the atmosphere failed.[19] In *Alec L. v. Jackson*, a federal district court declined to hear climate claims brought by five children and two NGOs.[20] The *Alec* court relied heavily on *American Electric v. Connecticut*, an earlier case where the Supreme Court held that the Clean Air Act displaced any federal common law right to seek abatement of carbon-dioxide emissions from fossil fuel-fired power plants.[21] Though the *Alec* court found it unnecessary to rule on the prudential standing defense to the suit, the majority stated in dicta that the political question doctrine was clearly implicated.[22]

In an effort to expand the principles rejected in *Alec*, the *Juliana* plaintiffs ground their Atmospheric Trust theory in due process and equal protection claims.[23] However, U.S. courts have never upheld a constitutional right to a healthy environment.[24] *Juliana* now joins a number of ill-fated climate suits exploring an array of theories from common law nuisance to endangered species protection in an attempt to force federal action on climate policy.[25] Still, given the Ninth Circuit's reluctant dismissal[26] of the case, plaintiffs plan to appeal to the Supreme Court, which has already signaled its skepticism against the claims.[27]

18. *See* David S. Rubinton, *Save Yourselves, Kids: The Atmospheric Trust Litigation*, 32 Nat. Res. & Env't (Oct. 1, 2017), https://www.americanbar.org/groups/environment_energy_resources/publications/natural_resources_environment/2017-18/fall/save-yourselves-kids-atmospheric-trust-litigation [https://perma.cc/2H2Q-5PP9].

19. *See* Alec L. v. Jackson, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd sub nom.* Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014).

20. *See id.*

21. *Id.* at 16 (citing Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423–24 (2011).

22. *Id.* at 17 n.5.

23. Plaintiffs argue the Due Process clause imposes on the government an affirmative duty to act to protect life, liberty, and property interests, and that future generations constitute a suspect class under the Equal Protection clause of the Fourteenth Amendment. *See* Rubinton, *supra* note 18; Ylan Nguyen, *Constitutional Protection for Future Generations From Climate Change*, 44 Hastings Const. L.Q. 347, 366–67 (2017).

24. *See* J. Michael Angstadt, *Securing Access to Justice Through Environmental Courts and Tribunals: A Case in Diversity*, 17 Vt. J. Env't L. 345, 358 (2016) (collecting cases).

25. *See* Markell & Ruhl, *supra* note 15, at 68 (arguing, with empirical data, that "scattershot" climate suits have a low probability of success).

26. Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020).

27. United States v. U.S. Dist. Court for Dist. of Or., 139 S. Ct. 1, 1 (2018) (Kennedy, J.) (calling the breadth of plaintiffs' claims "striking" but casting doubt on their justiciability, "The District Court should take these concerns into account in assessing the burdens of discovery and trial"). In another attempt at mandamus, Chief Justice John Roberts denied

Meanwhile, climate litigants around the world are growing in frequency and in optimism. In the most promising domestic climate case from abroad, *State of the Netherlands v. Urgenda*, the Dutch Supreme Court upheld a historic Hague district court ruling in which, for the first time anywhere, citizens established that their national government has a human rights-based obligation to reduce carbon emissions.[28] *Urgenda's* lower court victories in 2015[29] and 2018[30] inspired similar rights-based climate suits[31] in Belgium,[32] Canada,[33] Colombia,[34] France,[35] Germany,[36]

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the government's stay, while Justices Gorsuch and Thomas would have granted it. In re U.S., 139 S. Ct. 452, 453 (2018).

28. HR 20 december 2019, ECLI:NL:HR:2019:2007 (The State of the Netherlands/Stichting Urgenda) (upholding lower court decisions that ordered the federal government to reduce greenhouse gas emissions to 25 percent below 1990 levels by 2020).

29. Rb.'s-Gravenhage 24 juni 2015, AB 2015, 336 m.nt. (Urgenda Foundation/The State of The Netherlands).

30. Rb.'s-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen (The State of The Netherlands/Urgenda Foundation).

31. A comprehensive database tracking such suits is available at *Data Library*, Int'l Rsch. Inst. Climate & Soc'y, https://iri.columbia.edu/resources/data-library [https://perma.cc/E9E8-AHDW].

32. A Belgian NGO sued federal and regional governments for failing to reduce emissions and violating obligations under the Belgian civil code, the Belgian Constitution, and European Convention for the Protection of Human Rights (ECHR). VZW Klimaatzaak v. Kingdom of Belgium, Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Brussels, 2015.

33. Fifteen children and youths sued the Queen and Attorney General of Canada, alleging that Canada's carbon emitting activities violated their rights under the Charter of Rights and Freedom. *See* Statement of Claim to the Defendants ¶ 6, La Rose v. Her Majesty the Queen, [2019] No. T-1750-19 (Fed. Ct.) (Can.).

34. In *Demanda Generaciones Futuras v. Minambiente*, twenty-five youth plaintiffs allege that the government's failure to reduce deforestation and ensure compliance with a target for zero-net deforestation in the Colombian Amazon by the year 2020 (as agreed under the Paris Agreement and the National Development Plan 2014–2018), threatens plaintiffs' fundamental rights. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil abril 5, 2018, M.P.: L.A.T. Villabona, Radicación No. 11001-22-03-000-2018-00319-01 (Colom.).

35. Several NGOs, including the French Chapters of Greenpeace and OxFam argue the federal government breached legal duties to take action on climate change arising under the French Charter for the Environment, the ECHR and Fundamental Freedoms, and "the general principle of law providing the right of every person to live in a preserved climate system." *Notre Affaire à Tous and Others v. France*, Climate Change L. on the World, https://climate-laws.org/cclow/geographies/france/litigation_cases/notre-affaire-a-tous-and-others-v-france [https://perma.cc/B7ZR-RV83].

36. In *Friends of the Earth Germany v. Germany*, NGOs sued the federal government, alleging constitutional violations for failing to meet emissions targets and alleging targets based on a goal of limiting warming to two degrees Celsius will not avert climate disaster. Constitutional Complaint, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 26, 2018, http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181122_Not-Available_complaint-1.pdf [https://perma.cc/H7VB-JHAV] (Ger.).

Ireland,[37] New Zealand,[38] Switzerland,[39] Uganda[40] and in the European Union's courts.[41] The next Part discusses the emergence of environmental courts as a means for domestic legal systems to structurally integrate the principles driving rights-based climate litigation around the world.

II. Counterpoint: Climate Litigation in Environmental Courts and Tribunals

Generally speaking, effective environmental law is balanced between comprehensive legislation, active administration, and a vigilant judiciary to whom citizens can appeal when enforcement efforts fail. Scholars have tracked the growing prominence of domestic courts specializing in climate litigation, without which the development of a vast body of environmental law across the globe over the last fifty years runs the risk of remaining unenforced.[42] The early twenty-first century saw an explosion of Environmental Courts and Tribunals (ECTs)—there are now more than 350 in 41 countries around the world.[43] This accelerated growth can be partly traced to the development of international soft law, which guaranteed the normative autonomy of environmental laws.[44] The consolidation of international environmental law principles at the domestic level encourages judicial relevance because of judges'

37. Friends of the Irish Environment CLG v. Government of Ireland [2019] IEHC 747 (H. Ct.), https://www.climatecaseireland.ie/wp-content/uploads/2019/11/Climate-case-approved-FIE-v-Government-of-Ireland-2019_IEHC_747.pdf [https://perma.cc/GF6Q-SV37] (rejecting plaintiffs' claims that Ireland's National Mitigation Plan violated statutory and constitutional law and human rights obligations).

38. *Thomson v. Minister for Climate Change Issues* [2017] NZHC 733 (N.Z.).

39. *See* Petition (Summary in English), ¶ 1(a), Bundesverwaltungsgericht [BVGE] [Federal Administrative Court] Nov. 27, 2018, No. A-2992/2017 (Switz.).

40. Mbabazi v. The Attorney General and National Environmental Management Authority, Civil Suit No. 283 (High Ct. 2012) (Uganda).

41. *See, e.g.*, Case T-330/18, Armando Ferrão Carvalho v. The European Parliament and the Council, ECLI:EU:T:2019:324 (May 9, 2019).). In an action known as "The People's Climate Case," ten families, including children, from Portugal, Germany, France, Italy, Romania, Kenya, Fiji, and the Swedish Sami Youth Association Sáminuorra, sought to compel the European Union to enforce more stringent emissions reductions. The claims were rejected and plaintiffs have appealed.

42. Domenico Amirante, *Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India*, 29 Pace Env't L. Rev. 441, 442 (2012) (citing Paul Stein, *Why Judges are Essential to the Rule of Law and Environmental Protection*, *in* Judges and the Rule of Law: Creating the Links: Environment, Human Rights and Poverty 57 (Thomas Breiber ed., 2006)).

43. George (Rock) Pring & Catherine (Kitty) Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, Access initiative 11 (2009), https://www.eufje.org/images/DocDivers/Rapport%20Pring.pdf [https://perma.cc/E54C-GDYK].

44. Amirante, *supra* note 42, at 444.

power to apply those principles to discrete controversies.[45] As such, judges have an uncommon ability to apply otherwise "rarefied" international legal principles, such as the right to a healthy environment, to hard domestic law for the benefit of vulnerable populations.[46]

At the Earth Summit in Rio de Janeiro in 1992, 178 governments, including the United States and India, signed a declaration affirming the idea that environmental decisions are best made with the participation of all relevant stakeholders.[47] The Rio Declaration was a flashpoint for the emergence of ECTs around the world. In particular, the Declaration's Principal 10 catalyzed the movement by providing in relevant part that, "[s]tates shall facilitate and encourage public awareness and participation," specifically emphasizing "[e]ffective access to judicial and administrative proceedings, including redress and remedy."[48] This Part highlights the importance of domestic judiciaries in breathing life into Principle 10's mandate, by increasing access to justice as a tool for environmental law enforcement through ECTs.[49]

A. ECTs Around the World

No two ECTs are exactly alike, as each country has considered its particular jurisdictional needs when incorporating ECTs into its domestic legal system. A typology of ECTs pioneered by George and Catherine Pring, codirectors of the University of Denver's ECT study, was the first to comprehensively identify and define the various types of ECTs as Specialized Green Chambers, Green Judges, Independent Tribunals, Quasi-Independent Tribunals, Captive Tribunals, Ombudsmen, and Other Specialized Environmental Fora.[50] Although the intricacies vary from one jurisdiction to the next, consolidating the

45. *Id.*; Angstadt, *supra* note 24.

46. Angstadt, *supra* note 24.

47. *See* U.N. Conference on Environment and Development, *Agenda 21* (1992), https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf [https://perma.cc/KU5R-V3BK]. The preamble of the NGT's founding legislation invokes the treaty, in part as the basis for its formation. The National Green Tribunal Act, 2010, pmbl. (June 2, 2010) [hereinafter NGT Act] ("AND WHEREAS decisions were taken at the United Nations Conference on Environment and Development held at *Rio de Janeiro* in June, 1992, in which India participated, calling upon the States to provide effective access to judicial and administrative proceedings, including redress and remedy and to develop national laws regarding liability and compensation for the victims of pollution and other environmental damage").

48. United Nations Conference on Environment and Development, 1992 Rio Declaration on Environment and Development Principle 10, available at http://www.unep.org/unep/rio.htm (last visited Nov. 11, 2020).

49. Pring, *supra* note 43, at x–xi.

50. *Id.* at 22–26.

Pring typology here, three distinct categories of ECTs emerge: the Euro-American model, the intermediate model, and free-standing environmental courts.[51]

Legal systems within the Euro-American model allocate environmental litigation among their existing judicial bodies—civil, criminal, administrative, or constitutional—depending on the specific action in each case.[52] This model prevails in countries with constitutions that predate the development of ancillary environmental statutes.[53] For example, most major U.S. environmental laws were codified around two hundred years after the U.S. Constitution was ratified. As the U.S. cases described above illustrate,[54] the unique complexity of climate litigation poses a particular challenge for this model, which one scholar has called ossified.[55] This model's legal taxonomies—linear views of causation, strict jurisdictional parameters, and aversion to specialization—fail to grasp the interconnectedness of natural systems implicated by climate change litigation.[56]

The intermediate model consists of a specialized panel, or a judge within a general court, that hears environmental cases.[57] These specialized chambers generally operate at the will and direction of the chief justice of the supreme or parent court; their establishment does not require originating legislation or a separate budget. Plaintiffs file in the same jurisdiction in which they would file any other civil suit.[58] The intermediate model better fits nations with deeply entrenched judicial systems that are similar to those of Western Europe and the United States, but which are more open to specialization and innovation.[59] Examples include courts in Sweden, the Netherlands, Finland, Belgium, and Greece.[60]

The third model, known as the freestanding model, consists of independent ECTs, specializing solely in environmental cases.[61] This

51. *See also* Amirante, *supra* note 42, at 446–48 (whose typology, also based on the Prings' research, distinguishes between systems that adjudicate environmental matters as part of their general jurisdiction, those that rely on judicial specialization within their existing systems, and those that reform their system to create new ECTs) .

52. *Id.* at 447.

53. *Id.*

54. See discussion *supra* Part II.

55. Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 Harv. C.R.-C.L. L. Rev. 445, 458–59 (2018).

56. *Id.*

57. *See* Pring, *supra* note 43, at 23–24.

58. *Id.*

59. Amirante, *supra* note 42, at 447.

60. Pring, *supra* note 43, at 23.

61. *Id.* at 25.

model, widespread across the Global South,[62] is easier to integrate into newer democracies with recently written or recently amended constitutions that recognize individual environmental rights. The result is an organically integrated legal system that structurally overlays a framework of environmental laws derived from a nation's constitutional rights and fundamental values.[63] In one such jurisdiction, an environmental court held that the Pakistani government violated a farmer's right to life when it delayed implementation of a national carbon reduction policy.[64] Notably, the Pakistani court invoked constitutional rights to life and dignity and international principles, including intergenerational equity and the precautionary principle.[65] The ruling required federal ministries to appoint a "focal person" on climate change to appear before the court with a list of adaptation measures, and it established a Climate Change Commission to help the court monitor progress and compliance with guidelines set forth in the ruling.[66]

The third model is perhaps best exemplified by the structure of India's National Green Tribunal (NGT).[67] The next Subpart discusses how the NGT embodies three principles—constitutional environmental rights, relaxed standing, and judicial specialization—that serve as a direct counterpoint to the obstacles facing U.S. climate litigants.

B. The Indian ECT Experiment

The NGT is a federal judicial body whose mission is the effective and expeditious resolution of cases relating to environmental protection and the conservation of forests and other natural resources.[68] The NGT is independent in that it functions under its own statute as a freestanding court, rather than as a part of India's Supreme Court, but its decisions are reviewable by the Supreme Court, making it a mixed-model ECT.[69] The NGT differs from many other ECTs around the world in that the Indian legislature did not impose its creation upon

62. *See generally* Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 Am. J. Int'l L. 679 (2019).

63. Amirante, *supra* note 42, at 448.

64. Order Sheet, Asghar Leghari v. Fed'n of Pak., (Sept. 4, 2015) W.P. 25501/2015 (Pak.).

65. *Id.*

66. *Id.*

67. *See* Angstadt, *supra* note 24, at 364.

68. *See* NGT Act, *supra* note 47.

69. The Principal Bench is based in New Delhi with regional benches in various states and provinces to reach remote parts of India. Ministry of Environment and Forests, S.O.1003 E (Notified on May 5, 2011); *Green Tribunal*, World Wildlife Fund India, https://www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal [https://perma.cc/2JXD-3BRM].

the judiciary. Rather, the Supreme Court pushed for the parliamentary measure to address nationwide problems with enforcing existing environmental laws.[70] Indian environmental laws are comparable to those of the United States, in that there is a general statutory regime for natural resources, supplemented by several issue-specific laws, such as India's Air Pollution Control Act.[71] However, the Indian statutes lack citizen standing provisions.[72] Whereas U.S. courts narrowly construed environmental statutes, the Indian Supreme Court created alternative venues to litigate them by broadly interpreting constitutional provisions on standing and on fundamental rights.[73] The NGT was the logical outgrowth of those venues.

The NGT's originating statute includes three key innovations to address governmental failures to enforce rights-based environmental laws and regulations. First, the preamble to the National Green Tribunal Act grounds environmental law in constitutional rights to life and property.[74] While India's constitution reflects reverence to the U.S. Constitution's Fifth and Fourteenth Amendments, India was one of the first countries to recognize the rights encapsulated by those amendments as implicated by environmental harm—an interpretation no U.S. court has yet adopted.

Next, the Act grants the NGT broad jurisdiction over all civil cases implicating a "substantial question relating to the environment,"[75] including enforcement of any legal right relating to the environment,[76] and dispenses with procedural barriers to accessing the court.[77] A substantial question is broadly defined as any issue that falls within one of three categories: (1) where the community at large other than an

70. Deepa Badrinarayana, *The"Right" Right to Environmental Protection: What We Can Discern from the American and Indian Constitutional Experience*, 43 Brook. J. Int'l L. 75, 96 (2017).

71. *Id.* at 97.

72. *Id.*

73. *Id.*

74. NGT Act, *supra* note 47, pmbl.

75. Jonathan Zasloff, *W(h)ither Environmental Justice?*, UCLA L. Rev. (Feb. 7, 2019), https://www.uclalawreview.org/whither-environmental-justice [https://perma.cc/T5CD-CD8G].

76. The Tribunal has original jurisdiction over cases relating to several acts such as Forest Conservation Act, Biological Diversity Act, Environment Protection Act, Water & Air Prevention & Control of Pollution Acts and also has appellate jurisdiction related to the above acts. *See* Praveen Bhargav, *Everything You Need to Know About the National Green Tribunal (NGT)*, Conservation India, http://www.conservationindia.org/resources/ngt [https://perma.cc/ZP5X-KEBP].

77. "The Tribunal shall not be bound by the procedure laid down under the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by principles of natural justice." NGT Act, *supra* note 47, ch. III, § 19.

individual or group of individuals is affected or likely to be affected by the environmental consequences, (2) the gravity of damage to the environment or property is substantial, or (3) the damage to public health is broadly measurable.[78]

Finally, the NGT's composition itself, a mix of judges and technical experts, emphasizes the role of science in resolving the unique legal issues raised by climate change, particularly those implicating causation.[79] The composition of the NGT varies from 21 to 41 members, including a chairperson, who must be a judge, between ten and twenty fulltime judges, and between ten and twenty expert members, all chosen by the federal government.[80] The NGT's structure relies on strict balance and strict qualifications. Balance is achieved by requiring an equal number of judges and experts on the bench at all times.[81] Each judge must hold a Master in Science with a Doctorate Degree (in the physical sciences or life sciences) or a Master of Engineering or Technology, and they must have a minimum of fifteen years of experience in a relevant field, including five years of practical experience in the environmental or forestry field.[82] Meanwhile, the experts may come from the administrative field with the requirement that they possess fifteen years of administrative experience, including five years of handling environmental matters on behalf of a government institution or a civil society organization.[83]

This insistence on scientific rigor in the NGT's decision making has bolstered the credibility of the Indian judiciary in the eyes of many citizens, who were previously locked out of the justice system by procedural barriers.[84] Disputes over land use, pollution levels, and lax enforcement of environmental laws and regulations represent 90 percent of the NGT's caseload.[85] Suits brought by impacted communities, individuals, and NGOs are usually successful.[86] Thanks to its broad jurisdiction, the NGT has also resolved a number of suits brought by individuals on behalf of general classes of the Indian population.[87]

78. *Id.* ch. I, § 2(m), ch. III, § 14.
79. *Id.* ch. II, §§ 4–5.
80. *Id.* ch. II, § 4.
81. *Id.* 47, ch. II, § 4(4)(c).
82. *Id.* ch. II, § 5(2)(a).
83. *Id.* ch. II, § 5(2)(b).
84. Zasloff, *supra* note 75.
85. *Id.*
86. Success rates for affected citizen-plaintiffs or communities is 56.3 percent, compared to 38.4 percent for NGOs. *Id.*
87. *See, e.g.*, Unreported Judgments, Himanshu R. Barot v. State of Gujarat / App. No. 109 (THC) Of 2013, decided on Apr. 22, 2014 (NGT), at *3 (India) (granting standing to journalist with "no personal interest in the litigation"); *see also* Unreported Judgments,

Through these suits, citizens have been able to secure recognition of environmental claims on behalf of their neighbors and fellow villagers and to protect shared resources, such as waters relied upon by subsistence fishermen.[88] In the context of climate change, in a bold exercise of *suo motu* jurisdiction, the NGT imposed a national vehicular emissions tax, out of concern for black carbon deposition in the Himalayas.[89]

Given the Indian judiciary's more faithful approach to environmental constitutionalism, there was strong reason to expect that suits raising similar claims to those raised by the *Juliana* plaintiffs would at least receive a hearing. Instead, the NGT's first rights-based climate suit brought by an Indian citizen was recently dismissed.[90] Nine-year-old Ridhima Pandey had asked the court to issue a directive, under Articles 14 and 15 of the Indian Constitution, requiring the federal government to set a time frame for aggressive emissions reductions.[91] Dismissing the complaint, the NGT reasoned such a directive was unnecessary because federal authority to accomplish mitigation goals arises under an existing environmental impact assessment—a policy schema that the complaint did not challenge.[92] However, the NGT could take up a more properly-pleaded complaint asserting the same legal theory as Pandey's for several reasons.

As a threshold matter, India's constitutional proscription against writs of mandamus over legislative action is not applied where, as in *Pandey*, a plaintiff grounds her claim in fundamental rights.[93] Moreover, the broad language of § 14 of the NGT Act, which defines jurisdiction in sweeping terms, imposes no limits on the court's ability to resolve any environmental litigation, including climate change suits.[94] Next, Indian courts have the power to compel the government to comply with international obligations.[95] Finally, and most specifically, Article 20 of the Act places climate change complaints like Pandey's

Rohit Choudhury v. Union of India / App. No. 38 Of 2011, decided on Sept. 7, 2012 (NGT), at *6 (granting standing to citizen seeking protection of Kaziranga National Park from "unregulated quarrying and mining" that imperiled the Park's existence).

88. Angstadt, *supra* note 24, at 359.

89. *See* Unreported Judgments, Court on Its Own Motion v. State of Himachal Pradesh / App. No. 237 (THC) Of 2013, decided on Feb. 6, 2014 (NGT), ¶ 38(i).

90. *See* Unreported Judgments, Ridhima Pandey v. Union of India / App. No. 187 Of 2017, decided on Jan. 15, 2019 (NGT).

91. *Id.*

92. *Id.*

93. *See* India Const. art. 32, cls. 1, 4, art. 32A.

94. NGT Act, *supra*, note 47, ch. III, § 14 ("The Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment)").

95. *See* India Const. art. 253.

within the NGT's jurisdiction by stipulating all NGT orders and decisions "shall" apply sustainable development principles, the polluter pays principle, and the precautionary principle.[96] According to Justice Swatanter Kumar, Chairperson of the NGT from 2012–2017, that provision places Atmospheric Trust litigation "squarely within the Tribunal's wide jurisdiction and ambit."[97] Justice Kumar noted that "the intergenerational equity principle is inbuilt in the precautionary principle, so why would you not say that there was an obligation [to exercise jurisdiction over a suit based on intergenerational equity]?"[98] Justice Kumar also said the NGT provides an appropriate forum for Atmospheric Trust litigation, even if decisions are appealable to the Supreme Court, because the panel's technical expertise would provide the higher court with a fully developed scientific and legal record.[99]

A properly pleaded claim similar to Pandey's, if successful, would demonstrate a rational application of constitutional principles heavily influenced by U.S. doctrines on due process and equal protection, that the U.S. judiciary has itself resisted in the context of environmental law.

III. The False Dichotomy of Judicial Activism vs. Judicial Restraint

Scholars should resist the urge to dismiss the potential for these principles to influence climate litigation in the United States based on a facile differentiation between the two legal cultures. More nuanced comparative analyses reveal commonalities between the United States' and India's legal, administrative, and constitutional structure; social stratification; energy and development goals; and international obligations.

Like the United States, India's expansive land area and its centralized environmental regulatory agency present challenges to consistent regulatory enforcement.[100] Existing legal scholarship fails to present a convincing textual or structural explanation for why the Indian judiciary embraced its role in addressing this enforcement gap as one of challenging existing power structures,[101] while the U.S. judiciary saw its

96. *See* NGT Act, *supra* note 47, ch. III, § 14.

97. Videoconference Interview Justice Swatanter Kumar, Chairperson of the NGT (Aug. 25, 2020) [hereinafter Interview]. As a former justice of the NGT, Kumar would not comment on the *Pandey* case specifically.

98. *Id.*

99. *Id.*

100. Angstadt, *supra* note 24.

101. Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities & Contradictions*, 25 S. Cal. Interdisc. L.J. 107, 125 (2016).

role as one of preserving them.[102] In fact, India's constitutional framers borrowed heavily from the U.S. Constitution, incorporating concepts such as entrenched individual rights, separation of powers, federalism, and its basic structure.[103] Both countries' Supreme Courts reserve to themselves the power to interpret what is constitutional.[104] Consequently, the environmental legal divergence is interpretational, rather than structural. Moreover, an examination of the principles of environmental constitutionalism, relaxed standing, and judicial specialization—and their roots in American legal thought—eviscerates the false dichotomy between India's so-called judicial activism and the United States' judicial restraint by exposing the latter as simply a different kind of judicial activism.

A. Environmental Constitutionalism: Due Process and Equal Protection vs. the Commerce Clause

The Indian judiciary is widely regarded as setting the pace for a movement of environmental constitutionalism that is spreading throughout the world, particularly over the last two decades.[105] Yet India's environmental constitutionalism dates back farther: during the 1970s, while U.S. NGOs were advocating for legislative protections of natural resources at the federal level, India amended its constitution to explicitly recognize both state and individual obligations to protect the environment.[106]

More influential than the constitutional amendments were a series of Indian Supreme Court decisions holding that the right to life under Article 21 of the Indian Constitution[107] includes the positive right to a

102. Though not in the environmental context, one scholar has distinguished post-colonial legal culture in the United States and India as a distinction between one group of colonizers breaking off English ties (in the U.S. instance) and the struggle for independence of a colonized people (in the Indian case). *See* Mitra Sharafi, *Why the US Can't Claim to Have Been India's Colonial Cousin in Its Struggle Against the British*, Scroll.in (Jul. 4, 2016, 8:20 AM), https://scroll.in/article/811107/colonial-cousins-why-the-had-little-in-common-with-indias-us-anti-imperialist-struggle [https://perma.cc/4SX3-F67T].

103. Narain, *supra* note 101.

104. *Compare* India Judges' Association III, (2003) 5 SCR 712 (India) *with* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

105. *See generally* Erin Daly, *Environmental Constitutionalism in Defense of Nature*, 53 Wake Forest L. Rev. 667 (2018).

106. India Const. arts. 48, 51A(g), amended by The Constitution (Forty-Second Amendment) Act, 2007. The amendment inserted a "green article," stating that "the State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country." *Id.* art. 48A. But the amendment also imposed a fundamental duty to every citizen of India "to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures." *Id.* art. 51A(g).

107. Like the United States' Fifth Amendment, India's constitutional language

healthy environment.[108] Reasoning that the right to life should mean more than "mere animal existence,"[109] the Indian Supreme Court has consistently upheld the fundamental right of citizens to be free from the harms caused by pollution and degradation of natural resources.[110]

While universally credited for this judicial innovation, the Indian Supreme Court has explicitly acknowledged its influences from the U.S. Constitution and U.S. Supreme Court constitutional interpretation.[111] In one of its earliest cases expanding its interpretation of the right to life, *Mullin v. Administrator, Union Territory of Delhi*, the Indian Supreme Court cited to a U.S. Supreme Court opinion when interpreting the right to life arguably more broadly than any U.S. federal court has to date, "The deprivation not only of life, but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited . . . if its efficacy be not frittered away by judicial decision."[112] Quoting directly from *Munn v. Illinois*, the *Mullin* court upheld the expansion of Article 21 of the Indian Constitution to include a positive right to a healthy environment.[113]

The idea that the right to life includes a healthy environment is gaining normative steam, as evidenced by the cases discussed above[114] and by the emergence of this interpretation in national jurisdictions[115] and

phrases the rights to life and property in the negative. *See* Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 Harv. Env't L. Rev. 1, 9 (1992).

108. Naznen Rahman, *A Comparative Analysis of Air Pollution Control in Delhi and Beijing: Can India's Model of Judicial Activism Affect Environmental Change in China?*, 27 Tul. J. Int'l & Comp. L. 151, 156–57 (2018).

109. Mullin v. Administrator, Union Territory of Delhi, (1981) 2 SCR 516, 528–29 (quoting Munn v. Illinois, 94 U.S. 113, 142 (1876)).

110. *See* Virendra Gaur v. State of Haryana, (1994) 6 SCR 78 (holding that an action causing "environmental, ecological, air, water pollution, etc., was a violation of Article 21"); Subhash Kumar v. State of Bihar, (1991) 1 SCR 5, 7 (holding fundamental right under Article 21 includes the right to enjoy pollution free water and air); Charan Lal Sahu v. Union of India, AIR 1990 SC 1480 (1989) (holding government has an obligation to protect citizens' rights to clean air and water); M.C. Mehta v. Union of India, (1987) 1 SCR 819 (holding the right to environmental protection under Article 21 may be enforced against a private corporation; the court did not reach the issue of whether that right extended to damages).

111. Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295 (1962) (reasoning Article 21 was modeled after the Due Process Clause of the U.S. Constitution's Fifth and Fourteenth Amendments).

112. *See Munn*, 94 U.S. at 142. Likewise, the Court reasoned the constitutional term liberty meant "more . . . than mere freedom from physical restraint or the bounds of a prison. It means freedom . . . to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment." *Id.*

113. *Mullin*, 2 SCR at 528–29.

114. *See* discussion *supra* Subpart III.A; *supra* notes 23–25 and accompanying text.

115. Such jurisdictions include those in the Global North such as Switzerland, the Netherlands, Greece, Spain, Portugal, and Turkey, which all recently amended their constitutions to recognize the right to a healthy environment. Brandl & Bungert, *supra* note 107,

international human rights bodies around the world.[116] Yet, modern U.S. courts have retreated from the philosophy embraced by *Munn*. Rather, U.S. courts have held that the government's relatively robust suite of federal environmental regulations find their constitutional roots in the Commerce Clause.[117] The result is a confusing body of jurisprudence—where natural resources are sometimes regulated as a commodity and other times as a public resource—that has severely limited both state and federal attempts at environmental protection.[118] In the United States, no environmental lawsuit has succeeded on constitutional grounds.[119] Moreover, federal courts have demonstrated greater willingness to protect industrial polluters from regulation than to provide remedy for private land owners claiming those pollutants are a nuisance.[120]

Article 14 of the Indian Constitution, similar to the U.S. Constitution's Fourteenth Amendment guarantees citizens equal protection under domestic laws.[121] Likewise, Article 15 is comparable to Title VI of the U.S. Civil Rights Act, section 601, in that it prohibits discrimination on the basis of religion, race, sex, and birthplace. In both nations, scholars have documented the disproportionate impacts of pollution on low-income communities.[122] However, U.S. federal courts have required

at 7.

116. The seminal international instrument linking human rights to climate change harms is a 2009 report by the Office of the U.N. High Commissioner for Human Rights (OHCHR). UNHRC, Rep. of OHCHR on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

117. *See, e.g.*, C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 393 (1994) (striking down state regulation of solid waste under the dormant commerce clause); *cf.* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 677 (2001) (striking down federal regulation of solid waste under the Commerce Clause).

118. *See* Christine A. Klein, *The Environmental Commerce Clause*, 27 Harv. Env't L. Rev. 1, 4–5, 66 (2003).

119. *See* Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971) (holding environmental rights are a newly-advanced constitutional doctrine that has not yet been accorded judicial sanction); *see also* Lake v. City of Southgate, No. 16-10251, 2017 WL 767879, at *4 (E.D. Mich. Feb. 28, 2017) (finding that U.S. courts have consistently rejected claims alleging a constitutional right to a healthy environment); In re Agent Orange Prod. Liab. Litig., 475 F. Supp. 928, 934 (E.D.N.Y. 1979) (holding that there is no constitutional right to a healthful environment); Pinkney v. Ohio EPA, 375 F. Supp. 305, 310 (N.D. Ohio 1974) (holding no fundamental right to a healthful environment implicitly or explicitly in the [U.S.] Constitution); Tanner v. Armco Steel Corp., 340 F. Supp. 532, 537 (S.D. Tex. 1972) (holding that the U.S. Constitution does not provide a legally enforceable right to a healthful environment); Env't Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army, 325 F. Supp. 728, 739–40 (E.D. Ark. 1971) (finding that the right to a healthy environment is not protected by the U.S. Constitution and deferring to the legislative and executive branches of government to make this determination).

120. *See generally* Markell & Ruhl, *supra* note 15 and corresponding discussion.

121. India Const. art. 14.

122. Badrinarayana, *supra* note 70, at 122–23.

plaintiffs to prove discriminatory intent when challenging disparate environmental protections, severely limiting the opportunity to have those cases heard.[123] Prompted by these similarities, legal scholars in the United States are closely watching the NGT to determine the court's effectiveness in advancing environmental justice for the people of India.[124]

B. Public Interest Litigation vs. Strict Standing

The NGT's lax standing doctrine reflects a profoundly rich judicial movement that transcends environmental law. After a period of political upheaval, Indian judges and legal scholars helped initiate the age of public interest litigation (also called social action litigation) in an effort to maximize access to justice.[125] Reasoning that official recognition of rights is useless without access to courts for redress, the Indian Supreme Court created epistolary jurisdiction, which allows representative standing and citizen standing under Article 32 of the Indian Constitution.[126]

The Court's approach in environmental cases, beginning with *Calcutta v. W. Bengal*,[127] ushered in a new doctrinal era in which any member of the Indian public with sufficient interest in the matter has standing to assert diffused and meta-individual rights concerning environmental problems.[128] The Indian Supreme Court also sought to ease the costs and complexity of filing legal actions by allowing plaintiffs to initiate suits by writing a note to the court and by allowing the court to self-refer cases *suo motu*.[129] This rationale extended to regulatory enforcement, as the Supreme Court exercised its jurisdiction to compel

123. *Id.* at 78–79.

124. *See, e.g.*, Zasloff, *supra* note 75.

125. "From 1975 until 1977, India had strained under Indira Gandhi's state of Emergency. This experience seared itself into the collective memory, particularly for the Indian legal profession, which prided its policy on avoiding the authoritarianism of so many states in the region since independence." Mitra Sharafi, *South Asian Legal History*, 11 Ann. Rev. L. & Soc. Sci. 309, 313 (2015).

126. The seminal case was Calcutta Gas Co. (Prop.) Ltd. v. State of West Bengal, AIR 1962 SC 1044, 1047 (1962).

127. *Id.*

128. *Id.*

129. *See* Sharafi, *supra* note 125, at 313 (citing Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 Third World Legal Stud. 107 (1985)); Jeremy Cooper, *Poverty and Constitutional Justice: The Indian Experience*, 44 Mercer L. Rev. 611, 624 (1993); *see also* Bandhua Mukti Morcha v. Union of India, (1984) 2 SCR 67, 105 (holding any member of the public may petition for relief "so that the fundamental rights may become meaningful not only for the rich and the well-to-do who have the means to approach the court but also for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress.").

more robust federal environmental agency administration.[130] The resulting increase in litigants exposed inequalities in the distribution of court resources; the NGT was established in part to relieve the burdens of that increase on the court system.[131]

Meanwhile, private standing for environmental suits in the United States was a legislative innovation, rather than judicial.[132] During the 1970s, Congress added citizen suit provisions to key pieces of environmental legislation, including the Clean Air Act, the National Environmental Protection Act, and the Endangered Species Act.[133] These statutes have accumulated decades of interpretive jurisprudence narrowing both statutory and Article III standing. Such jurisprudence now limits the latitude for current courts to chart novel interpretations to meet the new challenges of climate litigation.[134] Prior to the passage of those statutes, challenges to federal jurisdiction turned largely on prudential concerns about violating separation of powers.[135] Shortly thereafter, the U.S. Supreme Court began narrowing the types of harms it would hear.[136] In 1974, for the first time in two hundred years of Article III jurisprudence, the Court introduced causation as an element of standing in *Warth v. Seldin*.[137]

Writing for the *Warth* majority, Justice Powell characterized the standing issue as a "threshold question in every federal case."[138]

130. *See* People's Union for Democratic Rts. v. Union of India, AIR 1982 SC 1473, 1483 (1982); *see also* Gupta v. Union of India, AIR 1982 SC 149 (1981); Fertilizer Corp. v. Union of India, AIR 1981 SC 344 (1980); D.S. Nakara v. Union of India, AIR 1983 SC 130 (1982).

131. *See* Jayanth K. Krishnan et. al., *Grappling at the Grassroots: Access to Justice in India's Lower Tier*, 27 Harv. Hum. Rts. J. 151, 165 (2014) (summarizing research finding lower-tier courts are characterized by poor court infrastructure, heavily backlogged dockets, excessive continuances, an insufficient quantity of judges, and inadequate legal training); Badrinarayana, *supra* note 70, at 125.

132. Sharafi, *supra* note 125, at 309 (discussing convergence of American and Indian legal thought, beginning with a wave of American lawyers and legal scholars working in India and being inspired by Indian practice in the area of dispute resolution).

133. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. §§ 1540(g)(1)–(g)(2).

134. *See* Mary Kathryn Nagle, *Tracing the Origins of Fairly Traceable: The Black Hole of Private Climate Change Litigation*, 85 Tul. L. Rev. 477, 478–79 (2010).

135. *See* Baker v. Carr, 369 U.S. 186 (1962).

136. Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 218 (1974); *see also* Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 299 (2008) (arguing the absence of any mention of an injury-in-fact requirement for over one hundred years after the adoption of the Constitution suggests that the requirement is not essential to the exercise of the federal judicial power).

137. *See* Warth v. Seldin, 422 U.S. 490, 507 (1974) (holding plaintiffs could not bring equal protection claim against housing authority because actions of third party not named as a defendant broke the chain of causation).

138. *Id*. at 498.

Decades later in *Lujan*, Justice Scalia consecrated Powell's causation analysis into today's rigid standard, which now requires causation evidence at the pretrial stage.[139] While originally crafted to preserve separation of governmental powers,[140] standing doctrine has inexplicably migrated towards private torts, resulting in the body of adverse precedent discussed above.[141]

The Indian judiciary's evolution from strict to relaxed standing serves as a closely calibrated counterpoint to U.S. rigidity. In early Indian jurisprudence, the phrase "appropriate proceedings"[142] was construed narrowly to permit only those individuals whose rights had been directly infringed to bring suit.[143] Just as India's early standing doctrine was heavily influenced by Anglo-American legal traditions,[144] its public interest litigation likewise developed to address the same justice issues that moved the U.S. Congress to enshrine its support for citizen suits.[145]

As early as the 1960s, legal scholars noted that racial and wealth inequality in the United States created a social stratification not unlike India's caste system.[146] In India, the federal judiciary recognized that strict standing analysis had rendered certain classes of its citizenry essentially invisible before the courts and introduced the reforms described above to expand access to justice.[147] Meanwhile in the United States, rising litigation costs and strict standing narrowed the path to justice and disadvantaged private citizens against "repeat players," such as industries and government entities that face frequent litigation with relatively low stakes.[148]

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139. See *supra* note 7 and accompanying text that explicates the holding in Lujan.

140. Powell's proffered concern was that Congress usurped the executive by allowing private citizens to sue federal agencies as a means of compelling executive action. Cass R. Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432, 1446 (1988); "Prior to 1970, no court had questioned legislative power to authorize public interest citizen suits against agencies in the Executive Branch." Nagle, supra note 134, at 483.

141. *Id*. at 482.

142. India Const. art. 32.

143. Rehan Abeyratne, *Socioeconomic Rights in the Indian Const.: Toward A Broader Conception of Legitimacy*, 39 Brook. J. Int'l L. 1, 32 (2014).

144. Much like the framers who were strongly influenced by British notions of judicial conservatism, the Supreme Court borrowed from the Anglo-American legal tradition to adopt strict standing requirements under Article 32. *Id.*

145. Gerald D. Berreman, *Caste in India and the United States*, 66 Am. J. Soc. 120, 120–27 (1960).

146. *Id.*

147. *See generally* Marc Galanter & Jayanth K. Krishnan, *"Bread for the Poor": Access to Justice and the Rights of the Needy in India*, 55 Hastings L.J. 789 (2004).

148. Marc Galanter, *Why the Haves Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95, 98 (1974).

Nowhere is this divergence in standing interpretation starker than in the innovation of juridical personhood for natural resources. In 2012, the Indian Supreme Court recognized the Ganga River as a legal person and allowed citizens to file legal claims on its behalf.[149] Far from a novel or alien concept, the modern rights-for-nature legal movement was born in California in 1972.[150] In fact, many of the legal instruments recognizing such rights around the world mirror language from a Pennsylvania statute crafted by a U.S.-based NGO in 2010.[151] That statute inspired similar actions in Ecuador, Colombia, New Zealand, Nepal, Sweden, and the North American Ho-Chunk Nation.[152] Despite its U.S. roots, this movement never reached the U.S. judiciary, which has reserved legal personhood for the sole benefit of corporations.[153] Scholars who shrug off this divergence as attributable to an ontological difference in belief systems[154] not only elide the significance of environmental stewardship in Judeo-Christian ethics,[155] on which U.S. laws are often based, but they also ignore both the jurisprudential and legislative history, described above, that philosophically and historically link the two legal cultures.

149. Mohd. Salim v. State of Uttarakhand, PIL No. 126 of 2014 (2016).

150. *Rights of Nature: Timeline*, Cmty. Env't Legal Def. Fund (Nov. 9, 2016) http://celdf.org/rights/rights-of-nature/rights-nature-timeline [https://perma.cc/YN6M-XJDM].

151. Pa. Const. art. 1, § 27; Gwendolyn J. Gordon, *Environmental Personhood*, 43 Colum. J. Env't L. 49, 58 (2018) (citing *Rights of Nature: Timeline*, *Community Envtl. Legal Def. Fund (Nov. 9, 2016), http://celdf.org/rights/rights-of-nature/rights-nature-timeline* /https://perma.cc/QD34-CL6U] ("In 2006, CELDF worked with the small community of Tamaqua Borough, in Schuylkill County, Pennsylvania, as it sought to ban waste corporations from dumping toxic sewage sludge in the community. CELDF assisted Tamaqua to draft a Rights of Nature law which banned sludging as a violation of the Rights of Nature. With the vote of the Borough Council, Tamaqua became the very first place in the United States, and the world, to recognize the Rights of Nature in law.").

152. *Rights of Nature: Timeline, supra* note 151.

153. *See* Citizens United v. FEC, 558 U.S. 310 (2010) (recognizing corporations are legal persons with constitutional rights).

154. Josh Gellers, *Righting Environmental Wrongs: Assessing the Role of Legal Systems in Redressing Environmental Grievances*, 26 J. Env't L. & Litig. 461, 477–78 (2011) (noting Hindu scriptures ordained "it was the dharma of each individual in society to protect Nature, so much so that people worshipped the objects of Nature.") (citing Madan Lokur, Judge, Delhi High Court, IX Green Law Lecture at Convocation Ceremony of Centre for Environmental Law Students of WWF-India: Environmental Law: Its Development and Jurisprudence (2006)).

155. *See, e.g.*, Pope Francis, *Encyclical Letter Laudato si' of the Holy Father Francis on Care for Our Common Home* (2015), https://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf [https://perma.cc/9CNQ-EK7X].

C. Scientific Expertise vs. the Myth of the Generalist

> *I'm not a scientist. That's why I don't want to have to deal with global warming, to tell you the truth.*
>
> *–Supreme Court Justice Antonin Scalia*[156]

> *If somebody has come to [the court] with a climate change case, then you need to look at it. You can't just say, 'Oh, I am not wearing good glasses; I don't want to look at it'—impossibly not! You have to find a solution. The time to check is today, not when the damage is done.*
>
> *–Former NGT Chairman Justice Swatanter Kumar*[157]

Even before the NGT's founding, the Indian judiciary pushed its jurisdictional boundaries into matters far beyond where U.S. courts still fear to tread.[158] From its founding, India's Supreme Court sought to establish a check on unelected administrative bodies by cultivating judicial specialization to navigate complex litigation, rather than insisting on a rigid separation of powers.[159] In this context, the NGT is an organic solution to the need for scientific expertise in adjudicating environmental controversies, while still preserving the judiciary's role in environmental protection.

In addition to stacking NGT panels with field experts and establishing educational requirements, the NGT produced a number of procedural innovations, including appointing expert committees to consult on cases and monitor implementation of verdicts, making spot visits to assess environmental degradation claims at ground level, and compensating petitioners and lawyers for drawing the courts' attention to environmental problems.[160]

Although U.S. legal culture is well known for its deep aversion to this type of specialization,[161] a groundbreaking study found that the ideal of judicial generalism is not only insufficient to meet the growing complexity of modern litigation, it also fails to reflect how federal

156. Transcript of Oral Argument at 23:1–5, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120).

157. Interview, *supra*, note 97.

158. J. Mijin Cha, *A Critical Examination of the Environmental Jurisprudence of the Courts of India*, 10 Alb. L. Env't Outlook J. 197, 222 (2005) (arguing Indian courts create confusion and sow mistrust for the government by wading into legislative issues in which it lacks technical or administrative expertise).

159. Alex Sarsfield, *Legitimizing the Modern American Democracy Through "Fourth-Branch" Institutions*, 26 J. Transnat'l L. & Pol'y 125, 139 n.87 (2017) ("The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity." (citing Rai Sahib Ram Jawaya Kapur v. Punjab, (1955) 2 SCR 225, 235)).

160. Amirante, *supra* note 42, at 456–57.

161. *See, e.g.*, Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. Chi. L. Rev. 603, 634 (1989).

courts actually function.[162] Along with a number of specialized Article I courts in the United States,[163] opinion specialization is already a regular part of federal appellate practice.[164] Beginning in 1995, a decade-long study of opinion assignment distribution in every circuit found that circuit panels increasingly distribute opinions based on panel members' area of expertise or interest.[165] Opinion assignments are not randomly distributed; judges may base decisions on colleagues' area of preference or expertise and, in some circuits, judges may request their preferences. As a result, the frequency in which certain judges write in a specific area may be wildly disproportionate to that of their colleagues.[166]

By bridging this gulf between the myth of the generalist and the reality of federal court practice, the U.S. judiciary can confront the legal barrier of *Lujan*'s fairly traceable prong. Otherwise, climate suits will continue to languish in a legal limbo that requires plaintiffs to bring highly specialized causation evidence, while simultaneously insisting that courts lack the capacity to analyze it. The Indian judiciary's willingness to embrace judicial specialization is an apt remedy for confronting the expense of expert witnesses and the reality that private plaintiffs can rarely match resources with corporate and government defendants.[167] Distinguishing between judicial overreach and judicial expansion, Justice Kumar emphasized the need for "judicial creativity" in reviewing climate-based claims. Melting glaciers, rising temperatures, and deforestation "are not ordinary problems. How do you give justice to the people? The vehicle is the judiciary."[168] As frequently criticized as it is lauded,[169] this innovative approach to mandating specialization and scientific expertise on the bench stands in stark contrast to U.S. courts' approach, which often eschews scientific inquiry regarding reductions in greenhouse gas emissions[170] as determinations

162. Edward K. Cheng, *The Myth of the Generalist Judge*, 61 Stan. L. Rev. 519, 562, 524 (2008) (arguing "archetypes like the generalist judge are powerful mental images that constrain the imagination").

163. *See* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 Admin. L. Rev. 329, 332–42 (1991), for a brief history of the principals and architecture of specialized adjudication in the United States.

164. Cheng, *supra* note 162.

165. *Id.* at 540 (arguing, with empirical data, that opinion specialization is alive and well in the federal appellate judiciary).

166. *Id.*

167. *See* Galanter & Krishnan, *supra* note 148, at 808 (arguing the merits of public interest litigation based on the "extortionate expense" to private citizens wishing to bring suit).

168. Interview, *supra* note 97.

169. *See, e.g.*, Cha, *supra* note 158.

170. *See, e.g.*, Sophie Marjanac & Lindene Patton, *Extreme Weather Event Attribution*

that are best left to more qualified federal agencies.[171] Legal stalemates can result from deference to federal agencies, as legislators wait for the agencies to act and, in turn, the courts wait on Congress.

In addition to the structural and philosophical similarities discussed above, modern realities implicating both countries' energy development goals and international climate obligations also present compelling arguments to reintegrate constitutional environmental rights, relaxed standing, and judicial specialization into U.S. jurisprudence. Accusations of industry capture and of entrenched corporate interests at the federal level fail to explain U.S. judges' reluctance to embrace their role in protecting natural resources and providing a check on regulatory bodies.[172] The temptation to protect Indian developers is arguably no less palpable: the Indian government is under tremendous pressure to rapidly develop energy resources as a matter of equality,[173] and the NGT will likely become increasingly entwined in the nexus of energy justice and environmental justice.[174]

Furthermore, as members of the United Nations Framework Convention on Climate Change, both countries have international legal and ethical obligations to implement federal carbon mitigation schemes. While U.S. President Donald Trump announced his intention to withdraw the United States from the Paris Agreement, India remains a

Science and Climate Change Litigation: An Essential Step in the Causal Chain?, 36 J. Energy & Nat. Resources L. 265 (2018) (discussing how the emerging science of weather attribution can and will impact climate litigation).

171. *See, e.g.*, Alec L. v. Jackson, 863 F. Supp. 2d 11, 16–17 (D.D.C. 2012), *aff'd sub nom.* Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014) (reasoning that resolving a climate claim would require the court to impermissibly make determinations regarding "to what extent carbon-dioxide emissions should be reduced" and then "order federal agencies to effectuate a policy of its own making;" federal courts are not equipped to make such determinations).

172. *See* Daniel A. Farber, *Trump, EPA, and the Anti-Regulatory State*, Regul. Rev., (Jan. 24, 2018) https://www.theregreview.org/2018/01/24/farber-trump-epa-anti-regulatory-state [https://perma.cc/G3VJ-EC7E]; *see also* Myanna Dellinger, *See You in Court: Around the World in Eight Climate Change Lawsuits*, 42 Wm. & Mary Env't L. & Pol'y Rev. 525, 539 (2018) (lauding judicial focus on environmentally sustainable development in developing nations, where climate litigants have managed to get a hearing, unlike litigants in the United States, a country arguably better able to afford sounder development practices).

173. Lakshman Guruswamy, *Energy Justice and Sustainable Development*, 21 Colo. J. Int'l Env't L. & Pol'y 231, 255–58 (2010); *see, e.g.*, Anupam Jha, *Paris Agreement and India: Dalliance or Serious Alliance?*, Nat. Resources & Env't, at 26, 29 (2018), https://www.americanbar.org/groups/environment_energy_resources/publications/natural_resources_environment/2018-19/fall/paris-agreement-and-india-dalliance-or-serious-alliance [https://perma.cc/9PJ8-X7K3] (arguing that India's "coal mining industry is notorious for receiving 'rubber-stamp' approvals for new projects, with a record number of clearances being granted in the last five years by the [Ministry of Environment and Forestry].").

174. *See* interview, *supra* note 97.

signatory.[175] However, the attainability of India's nationally-determined contribution to reduce emissions by 33 percent of 2005 levels by 2030 remains questionable.[176] Likewise, both countries are major contributors to global carbon emissions, and there is consensus in scientific and legal communities that both countries would be key players in any effective global climate solution.[177]

Indeed, climate impacts may prove to be the great equalizer. Whether or not U.S. courts relax their rigid view of the role of judges by assimilating to global standards, the potential for transnational litigation may expose both governmental and private U.S. entities to liability in foreign and international courts.[178]

Conclusion: ECTs in America?

The concept of a separate court system for environmental suits is hardly a radical notion. Federal Article I courts, and quasijudicial mechanisms of executive branch agencies, currently exist to exclusively

175. At, the time of this writing, the United States had withdrawn from the Paris Agreement effective November 4, 2020, the day after the 2020 U.S. national elections. However, President-elect Joe Biden has expressed his intention to recommit the nation to the treaty's goals. Moreover, withdrawal from the Agreement did not terminate U.S. membership in the UNFCCC, which brings with it general obligations to reduce, report, and subject to international review, its GHG annual emissions, and to provide assistance to impoverished nations that can ill afford mitigation technologies. *See*, *e.g.*, United Nations Framework Convention on Climate Change art. 4, §§ 1(a), 1(c), 1(f), May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994). Finally, the International Court of Justice recognizes a general obligation of states to ensure that activities within their jurisdiction do not damage the environment of other states. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8); *see also* Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1938 (1941). The United States has not consistently objected to this principle and generally recognizes an obligation to limit transboundary environmental harm. *See* Restatement (Third) of the Foreign Relations Law of the U.S. § 601 (Am. Law Inst. 1987).

176. *See* India's Intended Nationally Determined Contribution: Working Towards Climate Justice, UNFCCC NDC Registry (Oct. 1, 2015), https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/India%20First/INDIA%20INDC%C20TO%20UNFCCC.pdf [https://perma.cc/5AW3-C9UK]; Aniruddh Mohan & Timon Wehnert, *Is India Pulling Its Weight? India's Nationally Determined Contribution and Future Energy Plans in Global Climate Policy*, 19 Climate Pol'y 3, 275, 279 (July 2018).

177. India currently ranks third in CO2 emissions (2.8 gigatons) behind the U.S. (6.2 gigatons) and China (11 gigatons). Subrata Chakrabarty, *By the Numbers: New Emissions Data Quantify India's Climate Challenge*, World Res. Inst. (Aug. 8, 2018), https://www.wri.org/blog/2018/08/numbers-new-emissions-data-quantify-indias-climate-challenge [https://perma.cc/J7K4-AQED]; *see also* Joanna Slater, *Can India Chart a Low-Carbon Future? The World Might Depend on It.*, Wash. Post (June 12, 2020), https://www.washingtonpost.com/climate-solutions/2020/06/12/india-emissions-climate/?arc404=true [https://perma.cc/T5SE-DSRN].

178. Michael Byers et. al., *The Internationalization of Climate Damages Litigation*, 7 Wash. J. Env't L. & Pol'y 264, 296–303 (2017).

adjudicate complicated matters, including immigration law, tax law, and intellectual property law.[179] Environmental litigation can be at least as complex as litigation in these fields. In fact, a proposition to create a green court under Article I was considered and rejected by the Department of Justice in 1972,[180] in part over concerns that creation of an environmental court would encourage fragmentation of the judicial system.[181] Currently, at least four existing U.S. bodies would be included in the Prings's ECT classification. The New York City Environmental Control Board and the U.S. Government Office of Administrative Law Judges both operate as semi-independent green tribunals because they are housed within and under the direction of another agency that does not have authority to review tribunal decisions.[182] EPA's Environmental Appeals Board performs some judicial functions and qualifies as a captive tribunal, wherein adjudicators are appointed by and subject to the agency whose actions they review.[183] Finally, a fully independent court, that represents the third mixed-model discussed above, is the Vermont Environmental Court, whose justices have independent appellate review of state land-use decisions.[184] A mixed-use model like the NGT offers the opportunity to synthesize the most effective features of the three main types of ECTs: relaxed jurisdictional limits; express constitutional guidelines, and scientific expertise within judicial panels.

Given the resistance of U.S. courts to applying principles of constitutionally based environmental rights, relaxed standing, and judicial specialization, a more modest approach might prove feasible. For example, the practice of court-appointed Special Masters, described in the federal procedural code,[185] can provide the technical expertise necessary to competently analyze climate-related harms.[186] In a similar

179. This is not an exhaustive list; there are also Bankruptcy Courts, the Court of Military Appeals, the Foreign Intelligence Surveillance Court. *See* Bruff, *supra* note 163, at 329 n.1.

180. Robert V. Percival, *The "Greening" of the Global Judiciary*, 32 J. Land Use & Env't L. 333, 341 (2017).

181. Scott C. Whitney, *The Case for Creating a Special Environmental Court System—A Further Comment*, 15 Wm. & Mary L. Rev. 33, 90 (1973).

182. The New York City Environmental Control Board is a highly independent panel of judges who hear appeals concerning decisions of the city's environmental agency. The U.S. Government Office of Administrative Law Judges operates outside the EPA to provide trial-level hearings concerning agency actions. Pring, *supra* note 43, at 25.

183. Pring, *supra* note 43, at 26.

184. *Id.* at 18, 30 (describing judges' reticence in engaging in policymaking more properly reserved to the elected branches).

185. Fed. R. Civ. P. 53.

186. "Masters hold hearings and make evidentiary findings, as well as propose legal conclusions for the judiciary itself to consider." Zasloff, *supra* note 75.

vein, some scholars have argued in favor of a set of environmentally conscious amendments to the American Bar Association's Code of Judicial Conduct.[187] The proposed amendments would impose duties on continued scientific education, accuracy in factfinding, recognition of the rights of nonhuman entities, and intergenerational equity—all of which bear obvious implications in the context of climate litigation.[188]

Proponents of such innovations strenuously argue against the most common refrain in opposition to them: the fear of being branded a judicial activist.[189] Efforts by the U.S. legislative and executive branches to increase citizen participation in environmental protection expose this proffered criticism as a bad-faith claim. In refusing to hear climate lawsuits, the judiciary has in fact usurped the elected branches, both of which have—at one time or another—attempted to give U.S. citizens tools to hold polluters accountable. Where Congress provided citizens a statutory voice,[190] the courts muffled that voice by imposing judgemade burdens beyond statutory standing. Where a president directed executive branch agencies to address the disproportionality of environmental regulations,[191] the judiciary made it virtually impossible to fight such inequalities in court.[192] Where the legislature and the executive worked together to develop a national policy to address carbon emissions,[193] the Supreme Court intervened, issuing a stay of the Clean Power Plan.[194] How such action could reasonably be characterized as judicial restraint defies logic.

To the contrary, as global temperatures climb and sea levels rise, as children flood courthouses and streets around the world, as whole towns and even whole nations[195] are submerged, U.S. judicial inaction on climate change may prove to be the most radical judicial activism of all.

187. *See, e.g.*, Tom Lininger, *Green Ethics for Judges*, 86 Geo. Wash. L. Rev. 711 (2018).

188. *Id.*

189. *Id.* at 767–68.

190. *See supra* text accompanying note 132.

191. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994) (issued by President Bill Clinton, ordering federal agency action to address environmental justice in minority and low-income populations).

192. Though not explicitly in environmental lawsuits, the Supreme Court requires plaintiffs to prove government officials' intent to discriminate. *See*, *e.g.*, Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding Title VI of the Civil Rights Act does not include private right of action based upon disparate impact). Proving intent to discriminate by polluting the environment in the course of profit-generating business activities is a logically counterintuitive exercise.

193. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

194. West Virginia v. EPA, 136 S. Ct. 1000 (2016) (order granting stay).

195. *See, e.g.*, UNEP, Emerging Issues for Small Island Developing States (2014), https://sustainabledevelopment.un.org/content/documents/2173emerging%20issues%20of%20sids.pdf [https://perma.cc/84TJ-RLVU].