

The Emperor's New Clothes: The Variety of Stakeholders in Climate Change Regulation Assuming the Mantle of Federal and International Authority

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In June 2017, President Donald Trump announced the United States would be withdrawing from the Paris Climate Accord. President Trump believes the United States should be more focused on its economic well-being than on environmental concerns. Since being elected, President Trump has, with the help of the Environmental Protection Agency, been rolling back, or attempting to roll back, major climate change regulations. However, this Article points out that due to factors such as international law, the United States Constitution, and the Administrative Procedure Act, one cannot just simply withdraw from an international agreement, such as the Paris Accord, or take back previously created environmental regulations, such as Obama's Clean Power Plan; Congress has also played a role in blocking some of President Trump's objectives. According to the United Nations Framework Convention on Climate Change Paris Agreement, no party is allowed to withdraw until three years after the agreement went into force for such party; the withdraw then does not take effect for an additional year. Thus, the United States' withdraw cannot legally take effect until November 2020. Additionally, when it comes to final regulations, various factors including the notice-and-comment rules of the Administrative Procedure Act provide blocks and strict guidelines when attempting to overturn such regulations; reversals can be a long and drawn out process.

As will be further discussed, as a result of recent attempted federal government rollbacks and changes, states, other countries, such as China, and the public in general have been stepping up and taking on the initiative to fight climate change and reduce emissions, thus altering the historical pattern of environmental regulation. There is a definite increase in state participation when it comes to climate change. Yet, despite local progress there are still federal roadblocks that must be overcome.

Keywords: *Paris Climate Accord, Parexit, Administrative Procedure Act, United Nations, Environmental Protection Agency, Clean Power Plan, environmental law, constitutional law, international agreement, international law, climate change, emissions, regulations*

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I. INTRODUCTION

Over the past year, there have been drastic changes in the political atmosphere concerning climate change and environmental law as a whole.¹ Upon being elected President of the United States, Donald Trump set forth pushing back environmental laws and regulations enacted by the Obama Administration.² President Trump has made major changes and reversals of federal regulations through the use of the Congressional Review Act and continues to do so as his term stretches on.³ However, the restrictions set forth in the United States Constitution and the Administrative Procedure Act (APA)

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¹ See *infra* notes 48–52 and accompanying text.

² E.g., *Regulatory Rollback Tracker*, ENVTL. L. HARV., <http://environment.law.harvard.edu/policy-initiative/regulatory-rollback-tracker/> [<https://perma.cc/6L2U-6PYQ>]; Sabin Ctr. for Climate Change Law, *Climate Deregulation Tracker*, COLUM. L. SCH., <http://columbiaclimatelaw.com/resorces/climate-deregulation-tracker/> [<https://perma.cc/JW5X-9B33>]. As of July 6, 2018, the Trump Administration has overturned forty-six rules, and thirty rollbacks are in progress. Nadja Popovich et al., 76 *Environmental Rules on the Way Out Under Trump*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html> [on file with *Ohio State Law Journal*]; see also *infra* notes 12–30 and accompanying text (discussing the efforts by the Trump Administration to undo programs, agreements, and regulations that were in place). As of May 17, 2018, the Trump Administration has issued more proposals, regulatory actions, and executive orders. Sabin Ctr. for Climate Change Law, *supra*.

³ See *infra* notes 26–29, 33–35 and accompanying text.

have made it difficult for President Trump to completely overturn formal regulations, such as the Clean Power Plan.⁴

In June 2017, President Trump announced the United States' withdrawal from the Paris Climate Accord (Paris Accord), an international agreement that established goals for countries to meet in order to combat and limit the effects of greenhouse gas emissions.⁵ Although other countries and presidential advisors resoundingly disapproved, President Trump ultimately decided that the economic well-being of the United States should come before global environmental concerns.⁶ However, despite President Trump's withdrawal, parties may not formally withdraw from the Paris Accord until November 4, 2019, at the earliest, thus potentially rendering his withdrawal a violation of international law.⁷

States have responded to these federal changes by enacting their own regulations that are more stringent than federal regulations, thus shifting the historical pattern of environmental regulation.⁸ States have taken on the responsibility of battling these climate change issues in the face of an Administration that denies they exist.⁹ Moreover, due to the federal government rolling back climate change mitigation efforts and regulation, China has even stepped into first place in the international community for environmental efforts.¹⁰ While certain states have made efforts to reduce emissions, with such a fundamental shift in environmental protections, both constitutional and international concerns begin to arise.¹¹

II. THE EMPEROR'S NEW CLOTHES: THE VARIETY OF STAKEHOLDERS IN CLIMATE CHANGE REGULATION ASSUMING THE MANTLE OF FEDERAL AND INTERNATIONAL AUTHORITY

The United States' foreign relations and United States–China relations in environmental law and policy, in particular, have undergone a monumental sea-change since October 2016. At that time, the possibility of a Trump Administration and its openly anti-environmental agenda seemed unlikely as a political matter. Now that the Trump Administration has tried to put that agenda into place, the entire situation and the roles played by China and the United States in environmental stewardship and leadership must be totally re-assessed.

⁴ See *infra* Part IV.

⁵ See *infra* notes 43–45 and accompanying text.

⁶ See *infra* notes 43–48 and accompanying text.

⁷ See *infra* Part V.

⁸ See *infra* notes Parts VI–VII.

⁹ See *supra* note 8 and accompanying text.

¹⁰ See *infra* notes 183–85 and accompanying text.

¹¹ See *infra* Parts IV–V.

I do so as objectively as possible, but assuming (as a matter of science) that anthropocentric climate disruption is a major environmental problem.¹²

President Trump is a self-proclaimed “climate change denier”¹³ and has put Scott Pruitt, also a self-proclaimed denier, in charge of the Environmental Protection Agency (EPA).¹⁴ Pruitt has also denied that climate change will have a detrimental effect on humanity, instead saying that rising temperatures are “not necessarily a bad thing.”¹⁵ Among other signaled actions, Pruitt has even indicated that he will seek regulatory modification of what constitutes a major “modification,”¹⁶ triggering new source review of industrial facilities and more stringent emission limitations for older coal-burning plants.¹⁷ Furthermore,

¹² A simple introduction to climate change questions may be found at Justin Gillis, *Climate Change Is Complex. We've Got Answers to Your Questions*, N.Y. TIMES (Sept. 19, 2017), <https://www.nytimes.com/interactive/2017/climate/what-is-climate-change.html> [on file with *Ohio State Law Journal*]. The scientific literature is voluminous and overwhelmingly of the view that climate disruption is occurring and is attributable to anthropocentric emissions. See, e.g., U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 165 (entered into force March 21, 1994) (acknowledging climate change and its adverse effects).

¹³ See Tim Marcin, *What Has Trump Said About Global Warming? Eight Quotes on Climate Change as He Announces Paris Agreement Decision*, NEWSWEEK (June 1, 2017), <http://www.newsweek.com/what-has-trump-said-about-global-warming-quotes-climate-change-paris-agreement-618898> [on file with *Ohio State Law Journal*]; see also Lisa Friedman, *Trump May Find Some Allies on Climate Change at G-20 Meeting*, N.Y. TIMES (July 5, 2017), <https://www.nytimes.com/2017/07/05/climate/g20-climate-change-paris-agreement-trump-merkel-germany.html> [on file with *Ohio State Law Journal*] (discussing how “[t]he Trump administration refused to support language calling the Paris agreement ‘irreversible’ and central to the ‘security and prosperity of our planet’”). When asked about his belief in climate change, Trump responded that there “is a cooling and there is a heating...[global warming as a term] wasn’t working too well, because it was getting too cold all over the place.” John Schwartz, *Trump Says Climate Is Both ‘Cooling’ and ‘Heating.’ He’s Only Half Right*, N.Y. TIMES (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/climate/trump-climate-change.html> [on file with *Ohio State Law Journal*].

¹⁴ Coral Davenport, *Senate Confirms Scott Pruitt as E.P.A. Head*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/us/politics/scott-pruitt-environmental-protection-agency.html> [on file with *Ohio State Law Journal*]. See 163 CONG. REC. S1223 (daily ed. Feb. 16, 2017) (statement of Sen. McConnell) (nominating Scott Pruitt as head of the EPA). Scott Pruitt has since resigned from his position as head of the EPA. Jeremy Diamond et al., *EPA Chief Scott Pruitt Resigns Amid Scandals, Citing ‘Unrelenting Attacks,’* CNN (July 5, 2018), <https://www.cnn.com/2018/07/05/politics/scott-pruitt-epa-resigns/index.html> [<https://perma.cc/68T3-D288>].

¹⁵ Lisa Friedman, *How to Read Between the Lines When Scott Pruitt Talks About Climate Science*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/2018/02/08/climate/pruitt-climate-change.html> [on file with *Ohio State Law Journal*] (discussing how Pruitt has made his opinions about climate change very clear—he does not believe that humans have caused climate change, even when presented with scientific evidence saying otherwise, and does not believe that it should be mitigated).

¹⁶ Clean Air Act, 42 U.S.C. §§ 7411–12 (2012).

¹⁷ See Jennifer Lu, *Pruitt Eyes Changes to Air Pollution Permitting Regime*, BLOOMBERG ENV’T (Sept. 20, 2017), <https://www.bna.com/pruitt-eyes-changes-n57982>

more recently in March 2018, President Trump nominated Mike Pompeo to be the Secretary of State for the current Administration,¹⁸ and the Senate officially confirmed him at the end of April.¹⁹ Not shockingly, Mike Pompeo too is a climate skeptic.²⁰

Just as President Obama used the full reach of his executive powers to remedy climate disruption, President Trump is using that same authority to undo programs, international agreements, and regulations that attempt to mitigate human effects on climate change.²¹ The outcome is, for at least the next four years, largely a matter of U.S. constitutional law, but other bodies of law and non-legal factors may play an equally significant role.²² What has the Trump Administration attempted so far? Page constraints limit that analysis to a very abbreviated list:

EXECUTIVE ORDERS AND OTHER EFFORTS BY THE TRUMP ADMINISTRATION:

1. Ordering the EPA to reverse the Obama Clean Power Plan regulation.²³

088234/ [https://perma.cc/9DW2-FDAV].

¹⁸ 164 CONG. REC. S2447 (daily ed. Apr. 26, 2018) (statement of Sen. McConnell) (considering Mike Pompeo's nomination).

¹⁹ Press Release, *What They Are Saying: Support for Nomination of Mike Pompeo for Secretary of State* (Mar. 14, 2018), <https://www.whitehouse.gov/briefings-statements/saying-support-president-trumps-nomination-mike-pompeo-secretary-state/> [https://perma.cc/6P6J-KALA].

²⁰ See Lisa Friedman & Coral Davenport, *Pompeo, Trump's Pick for Secretary of State, Is a 'Great Climate Skeptic'*, N.Y. TIMES (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/climate/pompeo-state-department-climate-change.html> [on file with *Ohio State Law Journal*] (discussing Pompeo's opposition to the Paris Agreement and the determination that climate change is a result of human activity).

²¹ See, e.g., Stephen Lee, *Panel Sends Clean Air Carve-Out Bills to House Floor*, BLOOMBERG ENV'T (Dec. 6, 2017), <https://bna.com/news/bna.com/environment-and-energy/panel-sends-clean-air-carve-out-bills-to-house-floor> [https://perma.cc/J59F-FX64] (discussing seven environmental bills that were introduced to the House on December 6, 2017, which would provide additional exemptions from air regulations); Coral Davenport, *E.P.A. Blocks Obama-Era Clean Water Rule*, N.Y. TIMES (Jan. 31, 2018), https://www.nytimes.com/2018/01/31/climate/trump-water-wotus.html?ref=collection%2Fbyline%2Fcoral-davenport&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=37&pgtype=collection [on file with *Ohio State Law Journal*]; Coral Davenport, *Planned Rollback of Climate Rules Unlikely to Achieve All Trump's Goals*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/climate/planned-rollback-of-climate-rules-unlikely-to-achieve-all-trumps-goals.html> [on file with *Ohio State Law Journal*]; Nadja Popovich, *Trump's Executive Order Pushes the U.S. Climate Pledge Further Out of Reach*, N.Y. TIMES (Mar. 28, 2017), <https://www.nytimes.com/interactive/2017/03/28/climate/trumps-executive-order-pushes-the-us-climate-pledge-further-out-of-reach.html> [on file with *Ohio State Law Journal*].

²² See *infra*, notes 59–75 and accompanying text.

²³ See Exec. Order No. 13783, 82 Fed. Reg. 16093, 16094–95 (Mar. 31, 2017).

2. Ordering the EPA to reconsider fuel economy standards after 2021 (by regulation those standards are locked in through 2021).²⁴

3. The EPA's decision to stay the implementation of a rule on greenhouse gas and methane emissions, where owners and operators of regulated entities must conduct and submit reports and surveys on fugitive emissions (e.g., methane) and leaks.²⁵ In *Clean Air Council v. Pruitt*, the D.C. Circuit Court of Appeals held that the EPA could not indefinitely delay the effective date of a final regulation without following the notice-and-comment requirements of the APA for reconsideration of a final rule generally and, specifically in this case, the requirements of the Clean Air Act for a stay of a final rule.²⁶

²⁴See The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42986, 42986 (Aug. 24, 2018) (to be codified at 40 C.F.R. pts. 85, 86); see also Chris Stanford, *Russia, E.P.A., Laura Ingraham: Your Friday Briefing*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/briefing/russia-epa-laura-ingraham.html> [on file with *Ohio State Law Journal*] (discussing the EPA's fight with California based on the federal government's proposed rollback of standards).

²⁵40 C.F.R. § 60.5397a(f)(1) (2017) (requiring that affected facilities "conduct an initial monitoring survey within 60 days of the startup . . . for each collection of fugitive emissions components . . . or by June 3, 2017"). On March 2, 2017, the EPA also provided notice that it was withdrawing its previous requests that operators and owners of the natural gas and oil industries give information about their emissions and equipment at current gas and oil operations. Notice Regarding Withdrawal of Obligation to Submit Information, 82 Fed. Reg. 12817, 12817 (Mar. 7, 2017).

²⁶See *Clean Air Council v. Pruitt*, 862 F.3d 1, 2-3, 8 (D.C. Cir. 2017) (overturning ninety-day stay, as it would be "arbitrary, capricious, [and] in excess of [the EPA's] authority"); Lisa Friedman, *Court Blocks E.P.A. Effort to Suspend Obama-Era Methane Rule*, N.Y. TIMES (July 3, 2017), <https://www.nytimes.com/2017/07/03/climate/court-blocks-epa-effort-to-suspend-obama-era-methane-rule.html> [on file with *Ohio State Law Journal*]. In a similar legal challenge, two environmental groups successfully challenged the EPA's failure to compel five states to comply with a December 2015 deadline for compliance with air quality standards for fine particulates or soot. Abby Smith, *Air Pollution: EPA Must Issue Soot Plans for States: Court*, 48 ENV'T REP. 1493, 1493 (Sept. 22, 2017), <https://bna.com/news/bna.com/environment-and-energy/epa-must-issue-soot-plans-for-states-court?context=search&query=Air%20Pollution%3A%20EPA%20Must%20Issue%20Soot%20Plans%20For%20States&startDate&endDate&limit=10&order=Relevancy&offset> [https://perma.cc/YQF3-7HDN]; see *Ctr. for Biological Diversity v. Pruitt*, No. 16-cv-04092-PJH, 2017 WL 3782696, at *3 (N.D. Cal. Aug. 31, 2017). Building on *Clean Air Council v. Pruitt*, California and seven other states have sued in federal district court to compel the EPA to perform an allegedly non-discretionary duty to set greenhouse gas targets for national highways. See Complaint at 2, *California v. U.S. Dep't of Trans.*, No. 4:17-cv-05439 (N.D. Cal. Sept. 20, 2017). These states allege that the EPA delayed and then suspended a regulation without undertaking the APA notice-and-comment process. *Id.*; Abby Smith, *Transportation Officials Can't Suspend Obama Climate Rule: States*, 48 ENV'T REP. 1497, 1497 (Sept. 20, 2017), <https://news.bloombergenvironment.com/environment-and-energy/transportation-officials-cant-suspend-obama-climate-rule-states?context=search&query=Abby%20Smith,%20Transportation%20Officials%20Can%E2%80%99t%20Suspend%20Obama%20Climate%20Rule%3A%20States&startDate&endDate&limit=2&order=Relevancy&offset> [https://perma.cc/F4S8-YBQV].

4. Attempting to reverse a regulation, which empowered the Interior Department's Bureau of Land Management (BLM) to address methane from fossil-fuel operations on public and tribal lands.²⁷ On May 10, 2017, the Senate, with three Republican supporters, surprisingly voted to uphold the 2016 Obama-era methane regulation and block efforts to repeal, or reverse, the rule.²⁸ Since then, BLM has made multiple attempts to postpone the rule and on February 22, 2018, posted a proposed rule to replace the 2016 Obama-era methane regulation (the rulemaking process is yet to be finalized).²⁹

5. A freeze on new or pending regulations for a number of eco-friendlier regulations.³⁰

There have been many other such executive orders and administrative agency proposals, which are not included due to their essentially domestic impact of lesser relevance to climate change, although with international consequences.³¹ Some particularly distinct proposed budgets include severe cuts to the EPA, restriction of scientific information used in development and implementation of policies (proposing that underlying data used by the EPA for scientific studies be made available to the public),³² and removal of information

²⁷ *Methane Waste Prevention Rule*, ENVTL. L. HARV. (2017), <http://environment.law.harvard.edu/2017/09/methane-waste-prevention-rule/> [<https://perma.cc/6LXR-B47W>].

²⁸ See Coral Davenport, *In Win for Environmentalists, Senate Keeps an Obama-Era Climate Change Rule*, N.Y. TIMES (May 10, 2017), <https://www.nytimes.com/2017/05/10/us/politics/regulations-methane-climate-change.html> [on file with *Ohio State Law Journal*].

²⁹ See Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924, 7924 (Feb. 22, 2018) (to be codified at 43 C.F.R. pts. 3160, 3170); *Methane Waste Prevention Rule*, ENVTL. L. HARV. (2018), <http://environment.law.harvard.edu/2017/09/methane-waste-prevention-rule/> [<https://perma.cc/6LXR-B47W>].

³⁰ See Mark Sandy, *Memorandum on the Implementation of the Regulatory Freeze, Off. Mgmt. & Budget*, EXEC. OFF. PRESIDENT 1 (Jan. 24, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-16.pdf> [<https://perma.cc/XTF9-VUPT>]; Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (outlining the types of regulations subject to review); see also Exec. Order No. 13422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (amending Executive Order 12866 but was revoked in 2009).

³¹ Sabin Ctr. for Climate Change Law, *Climate Deregulation Tracker*, COLUM. L. SCH., <http://columbiaclimatelaw.com/resources/climate-deregulation-tracker/> [<https://perma.cc/JW5X-9B33>].

³² See Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18768–74, 18768 (Apr. 30, 2018) (to be codified at 40 C.F.R. pt. 30); Exec. Order No. 13783, 82 Fed. Reg. 16093, 16093 (Mar. 31, 2017); Lisa Friedman, *E.P.A. Announces a New Rule. One Likely Effect: Less Science in Policymaking*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/climate/epa-science-transparency-pruitt.html> [on file with *Ohio State Law Journal*]; Hiroko Tabuchi, *What's at Stake in Trump's Proposed E.P.A. Cuts*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/climate/trump-epa-budget-cuts.html> [on file with *Ohio State Law Journal*]. Public hearing for the proposed rule took place on July 17, 2018. *EPA Announces Extended Comment Period and Public Hearing*, EPA (May 24, 2018), <https://www.epa.gov/newsreleases/epa-announces-extended-comment-period-and-public-hearing-proposed-rule-strengthen> [<https://perma.cc/AT86->

on climate change from the EPA site (although there has been an academic and nonprofit effort to preserve that data).³³ Moreover, efforts to identify who in federal agencies have been involved in climate change issues have been very alarming to the scientific community and those agencies.³⁴ Yet, as time has progressed, Scott Pruitt's haste to roll back environmental regulations has led to poorly drafted legal arguments that objectors may quash in court.³⁵

Congress has made it clear that not all of President Trump's objectives are to be a reality. For instance, President Trump proposed a 31% budget decrease for the EPA, yet Congress left the budget as it was rather than increase or decrease it.³⁶ Programs for renewable energy faced a proposed 70% budget decrease, yet Congress increased the budget.³⁷ Congress also increased the \$64 million budget for the Land and Water Conservation Fund to \$425 million.³⁸

YUUA]. The public hearing resulted in a plethora of oral comments, both in support and opposition of the proposed rule. *Regulatory Developments: EPA Convenes Public Hearing on Proposed Rule: Strengthening Transparency in Regulatory Science*, BERGESON & CAMPBELL, P.C. (July 19, 2018), <https://www.regulations.gov/docket?D=EPA-HQ-OA-2018-0259> [<https://perma.cc/23AS-NHKL>]. Ultimately, the issues presented are unable to be immediately resolved and will require further action in the months to come. *See id.* Additionally, the comment deadline initially had a deadline of May 30, 2018, but was extended to August 16, 2018, at which point over 500,000 comments were submitted regarding the proposed rule. *Strengthening Transparency in Regulatory Science*, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=EPA-HQ-OA-2018-0259> (last visited Aug. 26, 2018).

³³ *See* Coral Davenport, *How Much Has 'Climate Change' Been Scrubbed from Federal Websites? A Lot*, N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/climate/climate-change-trump.html> [on file with *Ohio State Law Journal*].

³⁴ John Schwartz, *Under Fire, Climate Scientists Unite with Lawyers to Fight Back*, N.Y. TIMES (May 15, 2017), <https://www.nytimes.com/2017/05/15/science/under-fire-climate-scientists-unite-with-lawyers-to-fight-back.html> [on file with *Ohio State Law Journal*].

³⁵ *See* Coral Davenport & Lisa Friedman, *In His Haste to Roll Back Rules, Scott Pruitt, E.P.A. Chief, Risks His Agenda*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/climate/scott-pruitt-epa-rollbacks.html> [on file with *Ohio State Law Journal*] (noting that courts have already struck down six of his efforts to block President's Obama's regulations as a result of missing important pieces of legislation and law in arguments and how environmental policy experts have expressed their shock at the EPA's lack of data analysis and justification in the arguments presented thus far). As a result of such actions, John F. Kelly, the White House Chief of Staff has advised President Trump to fire Pruitt. Julie Hirschfeld Davis & Lisa Friedman, *Chief of Staff Advised a Resistant Trump to Fire the E.P.A. Chief*, N.Y. TIMES (Apr. 6, 2018), <https://www.nytimes.com/2018/04/06/us/politics/trump-kelly-pruitt-fired.html> [on file with *Ohio State Law Journal*]. President Trump disregarded the advice, as he believes that Pruitt is handling matters at the EPA well, stating that "he's done a fantastic job at E.P.A." *Id.* However, Pruitt has since resigned amid ethical scandals. *See* Diamond et al., *supra* note 14, at 6.

³⁶ The Editorial Bd., *Congress Resists the President, for a Change*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/congress-trump-omnibus.html> [on file with *Ohio State Law Journal*].

³⁷ *Id.*

³⁸ *Id.*

While President Trump is still able to propose such cuts,³⁹ it is a promising future if Congress continues to protect the environment, even at Trump's opposition.

Although of less international importance, an anomaly of U.S. law deserves mention. A relatively obscure law, the Congressional Review Act, allows Congress within sixty legislative days to overturn any federal regulation by a majority vote.⁴⁰ President Trump has used this law to erase rules that focus primarily on the protection and conservation of the environment (such as the rejection of the Obama-era Stream Protection Rule), as well as labor, immigration, financial protections, Internet privacy, abortion, education, and gun rights.⁴¹ Prior to 2017, the Congressional Review Act had only been successfully invoked once in 2001 on a regulation on workplace injuries.⁴²

III. "PAREXIT" AND THE U.S. WITHDRAWAL EFFORTS FROM THE PARIS ACCORD

Despite campaign promises to remove the United States from the Paris Accord, President Trump did not officially announce that the United States would withdraw from the Paris Accord until June 2017.⁴³ The Paris Accord is a treaty under international law,⁴⁴ yet an agreement which is deliberately not a

³⁹ See John Hudak, *How Do Presidents Use Their Influence in the Budgeting Process to Influence Political Outcomes?*, FORBES (Apr. 8, 2014), <https://www.forbes.com/sites/quora/2014/04/08/how-do-presidents-use-their-influence-in-the-budgeting-process-to-influence-political-outcomes/#51c7a5176f45> [<https://perma.cc/F7JZ-AMEG>].

⁴⁰ See 5 U.S.C. § 801(a)(3) (2012).

⁴¹ See Disapproval of Stream Protection Rule, Pub. L. No. 115-5, 131 Stat. 10 (2017); Michael D. Shear, *Trump Discards Obama Legacy, One Rule at a Time*, N.Y. TIMES (May 1, 2017), <https://www.nytimes.com/2017/05/01/us/politics/trump-overturning-regulations.html> [on file with *Ohio State Law Journal*]; Eric Lipton & Jasmine C. Lee, *Which Obama-Era Rules Are Being Reversed in the Trump Era*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html> [on file with *Ohio State Law Journal*].

⁴² See Emmarie Huetteman, *How Republicans Will Try to Roll Back Obama Regulations*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/politics/congressional-review-act-obama-regulations.html> [on file with *Ohio State Law Journal*].

⁴³ *Statement by President Trump on the Paris Climate Accord*, WHITE HOUSE (June 1, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/> [<https://perma.cc/NDN7-AJF5>]; The Editorial Bd., *Our Disgraceful Exit from the Paris Accord*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/opinion/trump-paris-climate-change-agreement.html> [on file with *Ohio State Law Journal*]; Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html> [on file with *Ohio State Law Journal*].

⁴⁴ U.N. Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 180 (“[T]reaty means an international agreement concluded between States in written form and governed by international law.”). One hundred ninety-five countries signed onto the Paris Accord in order to help mitigate the effects of climate change and slow the process of

treaty under U.S. law, because the Obama Administration recognized that no climate change “treaty” (as U.S. law has vaguely formulated that term) could receive Senate approval as required.⁴⁵ As a result, world leaders carefully negotiated and phrased the agreement in terms of goals, not requirements, in recognition of the cooperation of President Obama,⁴⁶ a former constitutional law professor.⁴⁷ By setting goals rather than concrete requirements, the global community was ensuring under U.S. constitutional law that the Paris Accord would not require Senate approval.⁴⁸

Despite President Trump’s campaign promises, some of his advisors, even those against the Paris Accord, advocated staying in the Paris Accord.⁴⁹ Staying in the Paris Accord would have been a strategic, if hypocritical, strategy. As the Paris Accord only has goals, the Trump Administration could just fail to meet those goals but stay in the Paris Accord to avoid the political blowback of withdrawing,⁵⁰ while also maintaining a place at the table in future

global temperatures rising. Brad Plumer, *What’s at Stake in the Bonn Climate Talks*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/climate/bonn-climate-change-conference.html> [on file with *Ohio State Law Journal*].

⁴⁵ See Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 12, 2015), <https://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html> [on file with *Ohio State Law Journal*]; Brad Plumer, *What to Expect as U.S. Leaves Paris Climate Accord*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/us-paris-accord-what-happens-next.html> [on file with *Ohio State Law Journal*].

⁴⁶ See Davenport, *supra* note 45. Unfortunately, as of November 2017, no major country has met the goals set by parties to the Paris Accord. Brad Plumer & Nadja Popovich, *Here’s How Far the World Is from Meeting Its Climate Goals*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/interactive/2017/11/06/climate/world-emissions-goals-far-off-course.html> [on file with *Ohio State Law Journal*]. It is projected that even if countries are able to get on track with the set goals, world temperatures will still exceed two degrees Celsius over pre-industrial levels. *Id.* See generally Paris Tango. *Climate Action So Far in 2018*, CLIMATE ACTION TRACKER (May 3, 2018), <https://climateactiontracker.org/publications/paris-tango-climate-action-so-far-2018-individual-countries-step-forward-others-backward-risking-stranded-coal-assets/> [https://perma.cc/H4HH-NT74] (providing updated climate information for countries as of May 2018).

⁴⁷ Jodi Kantor, *Teaching Law, Testing Ideas, Obama Stood Slightly Apart*, N.Y. TIMES (July 30, 2008), <https://www.nytimes.com/2008/07/30/us/politics/30law.html> [on file with *Ohio State Law Journal*].

⁴⁸ See Davenport, *supra* note 45.

⁴⁹ See Coral Davenport, *Policy Advisers Urge Trump to Keep U.S. in Paris Accord*, N.Y. TIMES (Apr. 18, 2017), <https://www.nytimes.com/2017/04/18/us/politics/trump-advisers-paris-climate-accord.html> [on file with *Ohio State Law Journal*].

⁵⁰ The international community is concerned about President Trump’s unpredictability, and Europeans stand behind Angela Merkel’s statement that “we Europeans must really take our destiny into our own hands.” Sylvie Kauffmann, *Why Europe Is Giving Up on Trump’s America*, N.Y. TIMES (Mar. 8, 2018), <https://www.nytimes.com/2018/03/08/opinion/europe-giving-up-trump.html> [on file with *Ohio State Law Journal*]. In response to the withdrawal from the Paris Accord, countries have begun working with American cities, states, and corporations, rather than the American federal government. *Id.*

negotiations.⁵¹ In that case, however, the United States would be running afoul of its international law obligations discussed below to act in good faith.⁵² In any event, as this Accord is an executive agreement, whatever this Administration decides, a future Administration could choose to either continue or reverse.⁵³

The United States has discussed possible renegotiations, but the precise details of the United States' involvement, or progress, with such renegotiations in regards to the Paris Accord remain unclear.⁵⁴ During the September 2017 opening session of the United Nations General Assembly, Gary Cohn, the highest-ranking White House economic advisor, stated that the United States is "unambiguous" about withdrawing from the Paris Accord unless the U.N. negotiates new terms.⁵⁵ What those terms would be, and whether the global community would even consider such negotiations, are even less clear.⁵⁶ Additionally, with or without negotiations, those in the White House who oppose any involvement in the Accord have reportedly raised concerns in regards to a 213-year-old Supreme Court decision in the *Murray v. The Schooner Charming Betsy* case.⁵⁷ *Murray* requires that U.S. law be interpreted, whenever possible, in accordance with international law obligations, and the fact that it could endanger regulatory rollbacks, or court efforts to cut back on industry regulation, brings up some questions and doubts.⁵⁸

⁵¹ See Davenport, *supra* note 49.

⁵² See *infra* notes 95, 98 and accompanying text.

⁵³ See Davenport, *supra* note 28.

⁵⁴ See Lisa Friedman, *Trump Adviser Tells Ministers U.S. Will Leave Paris Accord*, N.Y. TIMES (Sept. 18, 2017), <https://www.nytimes.com/2017/09/18/climate/trump-adviser-un-paris-climate-agreement.html> [on file with *Ohio State Law Journal*].

⁵⁵ *Id.* However, Mr. Cohn is reported to have drafted a resignation letter after President Trump's response to racial violence in Charlottesville, Virginia, casting reasonable doubt on his relationship with the President and insight into his plans. See Kate Kelly & Maggie Haberman, *Gary Cohn, Trump's Adviser, Said to Have Drafted Resignation Letter After Charlottesville*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/gary-cohn-trump-charlottesville.html> [<https://perma.cc/2R55-P52J>]. Mr. Cohn has since resigned from his position. See Kate Kelly & Maggie Haberman, *Gary Cohn Says He Will Resign as Trump's Top Economic Adviser*, N.Y. TIMES (Mar. 6, 2018), <https://www.nytimes.com/2018/03/06/us/politics/gary-cohn-resigns.html?login=email&auth=login-email> [on file with *Ohio State Law Journal*].

⁵⁶ There have also been some suggestions that climate change emissions are more likely to be reduced without the Trump Administration's involvement through renegotiations, as the global response to the withdrawal has been a re-energized commitment to global and national reductions. See Ewa Krukowska, *Climate Change: U.S. Exit from Paris Deal Better for World, Researcher Says*, 48 ENV'T REP. 1499, 1499 (Sept. 22, 2017).

⁵⁷ *Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804) (stating, in a case involving the non-intercourse act and rights on search and seizure, that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood").

⁵⁸ See Jennifer Jacobs, *U.S. Exiting Climate Accord, Trump Adviser Tells World Leaders*, 48 ENV'T REP. (BNA) 1498-99, 48 ENR 1498-99 (BL) (2017).

IV. INTERNATIONAL AGREEMENTS AND DOMESTIC REGULATIONS UNDER U.S. LAW

As a matter of U.S. constitutional law, what can be done by executive, in this case sole Presidential, authority in international relations and the definition of a treaty that requires Senate approval is very unclear outside of trade and a few other matters. Not surprisingly, the drafters of the Constitution did not even consider the variety of processes by which international agreements are made. The brief Treaty Clause of the U.S. Constitution was intended to reserve international matters to the federal government rather than the states, without specifying the extent of authority of the federal branches of government to enter into (or out of) international agreements.⁵⁹ Historically, the treaty/executive agreement distinction came to the forefront of constitutional issues only when questions were raised as to whether the Charter of the United Nations could be accepted by the President without Senate approval, avoiding the prior failure of the Senate to ratify the Treaty of Versailles.⁶⁰

With the current congressional gridlock and divisiveness even within and between the main political parties,⁶¹ the question of what qualifies as a binding agreement as a matter of U.S. constitutional law is critical. Falling back momentarily, for purposes of this discussion on vague U.S. constitutional standards, the difference has to do with concrete commitments and requirements versus generalized goals (my own rough characterization). Thus, there is the Paris “Accord,” not the Paris “Treaty.”

U.S. constitutional law is not the only legal check on sole executive agreements. Despite the political currency of the flurry of Trump executive orders, the legal reality is that final regulations of the Obama Administration are not easily reversed under the notice-and-comment rules of the APA.⁶² Most

⁵⁹U.S. Const. art. II, § 2, cl. 2; *id.* at art. VI, cl. 2; see Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1677–78, 1684–85 (2017); see also Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 188–89 (1945); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II*, 54 YALE L.J. 534, 536 (1945).

⁶⁰Galbraith, *supra* note 59, at 1685 (discussing failure of U.S. Senate to ratify the Treaty of Versailles); see Treaty of Peace with Germany, Jan. 10, 1920, 2 Bevans 43 [hereinafter Treaty of Versailles].

⁶¹See, e.g., Sheryl Gay Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html> [on file with *Ohio State Law Journal*].

⁶²Administrative Procedure Act §§ 553, 551(5), 5 U.S.C. § 553 (2012) (requiring full notice-and-comment rulemaking for a repeal of a final regulation). Cf. Eric Lipton, *G.O.P. Hurries to Slash Oil and Gas Rules, Ending Industries' 8-Year Wait*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/us/politics/republicans-oil-gas-regulations>.

importantly, with respect to climate change, it would include the multi-year, carefully manufactured, final EPA regulation on the Clean Power Plan. As will be explained, in addition to consequences of a non-legal nature, overturning a final regulation is often a prolonged legal process of at least a year or two, longer for controversial environmental regulations, with public notice, comments, a draft regulation, and the final regulation.⁶³ In addition, sudden reversal of a final regulation promulgated over several years requires a plausible explanation as to what factual premises underlying the regulation have changed as to justify a new rule.⁶⁴ The federal courts are already heavily involved in challenges by states and environmental organizations under the APA⁶⁵ that address the attempted non-enforcement or indefinite delay by EPA of Obama-era regulations.

As noted earlier, the D.C. Circuit Court of Appeals in *Clean Air Council v. Pruitt* refused to allow the EPA to delay the effective date of a regulation for two years without going through the public notice-and-comment procedures of the APA.⁶⁶ Decisions of the D.C. Circuit Court of Appeals (despite a multiplicity of three-judge panels) are noteworthy, as any rulemaking or decision-making of national scope must first be brought before that Court, with the possibility of en banc review and ultimately Supreme Court review.⁶⁷ Likewise, the Tenth Circuit Court of Appeals also has a highly visible role in legal challenges to federal agency minimization of climate change consequences in agency decision-making.

In *WildEarth Guardians v. U.S. Bureau of Land Management* (BLM), the court of appeals sent back to the EPA a draft environmental impact statement required under the National Environmental Policy Act (NEPA)⁶⁸ extending the BLM approval of permit extensions for two mines in Wyoming.⁶⁹ The two mines produce nearly 20% of U.S. coal, and the Power River Basin region produces 38.5% of all U.S. coal.⁷⁰ The BLM took the position that extension of the two leases would not increase coal emissions, as there are “multiple other

html [on file with *Ohio State Law Journal*] (detailing President Trump’s plans to repeal Obama-era environmental regulations and his likely strategies for doing so).

⁶³ Administrative Procedure Act § 553; cf. Ben Protess & Julie Hirschfeld Davis, *Trump Moves to Roll Back Obama-Era Financial Regulations*, N.Y. TIMES (Feb. 3, 2017), <https://www.nytimes.com/2017/02/03/business/dealbook/trump-congress-financial-regulations.html> [on file with *Ohio State Law Journal*] (discussing President Trump’s attempts to undo Obama-era financial regulations promulgated under the Dodd-Frank Act).

⁶⁴ See *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

⁶⁵ Administrative Procedure Act § 702; e.g., *New York v. Pruitt*, Case No. 1:18-cv-1030 (S.D.N.Y. filed Feb. 6, 2018).

⁶⁶ *Clean Air Council v. Pruitt*, 862 F.3d 1, 8–9 (D.C. Cir. 2017); see also Administrative Procedure Act § 553(c).

⁶⁷ Clean Air Act, 42 U.S.C. § 7607(b) (2012).

⁶⁸ National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2012).

⁶⁹ *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1240 (10th Cir. 2017).

⁷⁰ See *id.* at 1227.

sources of coal.”⁷¹ The court was not swayed by this bare assertion, referencing the requirement of NEPA that agency decisions be based on the best available scientific evidence.⁷² The broader implication of the decision is that federal agencies must reach decisions with potential climate change effects based on meaningful consideration of those consequences utilizing the best available scientific evidence under NEPA and the APA. Failure to do so risks the agency being sent back to the drawing board for the decision, as it were, with attendant costs and delays.⁷³

The Freedom of Information Act (FOIA)⁷⁴ has also become a weapon in that it has the potential to fight against what might be described as de facto repeal through inaction. For instance, a proposed regulation to control aircraft emissions,⁷⁵ backed by more than 190 countries in the International Civil Aviation Organization and the industry group General Aviation Manufacturers Association, was languishing in the EPA’s agenda and without fanfare, placed into a list of inactive regulations.⁷⁶ However, after the Center for Biological Diversity filed a FOIA request seeking the EPA’s basis for moving away from the regulation on aircraft emissions and classifying it as inactive, an EPA spokesperson stated it was going to be placed on the 2018 active list again by the end of the year.⁷⁷

In February 2018, President Trump released information about a plan that would build and restore national infrastructure.⁷⁸ Although the nation’s infrastructure does need improvement, the Trump Administration has not indicated that it will address the environmental concerns that go hand-in-hand with the improvements.⁷⁹ Climate change is leaving communities vulnerable to threats such as flooding, and building roads in these vulnerable places would be detrimental. Thus far, concern has been abundant, as various academics have

⁷¹ *Id.* at 1228–29.

⁷² *Cf. id.* at 1236–37 (finding that the BLM did not use the best available information on climate change when analyzing carbon emissions).

⁷³ *See id.* at 1237 (holding that the BLM’s failure to consider recent climate modeling technology in evaluating carbon emissions was, in part, grounds for finding the agency action invalid).

⁷⁴ Freedom of Information Act, 5 U.S.C. § 552 (2012).

⁷⁵ Air sector regulations meant to curb aircraft greenhouse gas emissions that were put into a regulatory graveyard include a regulation titled “Control of Air Pollution From Aircraft and Aircraft Engines.” 40 C.F.R. §§ 87.1-87.64 (2017); Reconsideration of Finding That Greenhouse Gas Emissions From Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated To Endanger Public Health and Welfare, 81 Fed. Reg. 96413 (Dec. 30, 2016); Dean Scott, *Airline Climate Emissions Rule Not Dead Yet: EPA*, 48 ENV’T REP. (BNA) 1502, 48 ENR 1502 (BL) (Sept. 22, 2017).

⁷⁶ Scott, *supra* note 75, at 1502.

⁷⁷ Scott, *supra* note 75.

⁷⁸ Coral Davenport, *Trump’s Infrastructure Plan May Ignore Climate Change. It Could Be Costly*, N.Y. TIMES (Feb. 10, 2018), <https://www.nytimes.com/2018/02/10/climate/trump-infrastructure-climate-change.html> [on file with *Ohio State Law Journal*].

⁷⁹ *Id.*

offered studies to show the potential effects of climate change on infrastructure.⁸⁰

Moreover, following Executive Order 13778 instructing Scott Pruitt to begin the process of rescinding or revising an Obama-era Clean Water Rule (Waters of the United States), the Trump Administration has now formally suspended the regulation with Scott Pruitt's filing of the required documents on January 31, 2018.⁸¹ The Obama-era regulation was to be implemented within weeks, however EPA finalized the delay of the regulation six days after Pruitt filed the documents, pushing the applicability date to February 6, 2020.⁸² Upon the finalization of this suspension, a number of states and environmental groups filed, or threatened to file, suit against EPA, with one being a multi-state lawsuit, led by the New York attorney general (as of early June 2018, the litigation is still ongoing for the multi-state lawsuit against EPA).⁸³ The EPA is drafting changes to the regulation, which are expected to include fewer requirements, and this new proposal for the regulation is expected to be released later in 2018.⁸⁴ With that being said, the Trump Administration cannot just easily take away or overturn all Obama-era regulations whenever they want; there is a long and involved process.

Given the inevitable litigation over any attempts to overturn the Obama Administration's regulations through neglect, delay, suspension, or formally revised regulations, it is doubtful that in one term the Trump Administration can totally undo the Clean Power Plan. Thus, the courts and U.S. laws still impose checks on sole executive authority, and the challenges to the Clean Power Plan will act as a critical case study.

⁸⁰ *E.g.*, ENVIRONMENTAL PROTECTION AGENCY, MULTI-MODEL FRAMEWORK FOR QUANTITATIVE SECTORAL IMPACTS ANALYSIS: A TECHNICAL REPORT FOR THE FOURTH NATIONAL CLIMATE ASSESSMENT 79 (2017), https://cfpub.epa.gov/si/si_public_record_Report.cfm?dirEntryId=335095 (stating that by the end of the century about \$230 billion will be required in order to adapt the nation's infrastructure to the adverse effects of the climate's increased temperatures).

⁸¹ Exec. Order No. 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017); Coral Davenport, *E.P.A. Blocks Obama-Era Clean Water Rule*, N.Y. TIMES (Jan. 31, 2018), https://www.nytimes.com/2018/01/31/climate/trump-water-wotus.html?rref=collection%2Fbyline%2Fcoral-davenport&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=37&pgtype=collection [on file with *Ohio State Law Journal*].

⁸² Davenport, *supra* note 81; *Defining Waters of the United States/Clean Water Rule*, ENVTL. L. HARV. (2018), <http://environment.law.harvard.edu/2018/07/defining-waters-united-states-clean-water-rule-information/> [<https://perma.cc/6HZB-W8SU>].

⁸³ *See* New York v. Pruitt, Case No. 1:18-cv-1030 (S.D.N.Y. filed Feb. 6, 2018) (including the states of New York, California, Connecticut, Maryland, New Jersey, Oregon, Rhode Island, Vermont, Washington, Massachusetts, and the District of Columbia); ENVTL. L. HARV., *supra* note 82.

⁸⁴ *See* ENVTL. L. HARV., *supra* note 82 (stating the comment period closed on August 13, 2018).

V. THE LEGAL REALITY OF PAREXIT

The legal effect under international law (and most probably U.S. law) of President Trump's denunciation of the Paris Accord is, in a word . . . nothing. In fact, when it comes to efforts towards improving the environment, in March 2018, United Nations Secretary General António Guterres stated that Trump's withdrawal was not very meaningful, as the American people were doing enough to combat climate change stressors.⁸⁵ Moreover, either way, Article 28 of the Paris Accord provides that no party may withdraw from the Paris Accord until after three years from the date on which the agreement entered into force for that party.⁸⁶ That withdrawal then only takes effect one year after the United Nations secretary general receives that notification.⁸⁷

The agreement went into effect for the United States on November 4, 2016.⁸⁸ No notice of withdrawal is acceptable for three years after that date, or November 4, 2019.⁸⁹ In accordance with the requirements in Article 28, such withdrawal notice then cannot take effect for one year.⁹⁰ Thus, the bottom line is that the United States withdrawal cannot take effect under the agreement until November 4, 2020 . . . one day after the next United States' next Presidential election. Parexit certainly illustrates the constraints international law imposes on sole executive attempts to *withdraw* from an international obligation.⁹¹ International agreements set the terms for denunciation, notice, and withdrawal.⁹² International law governing treaties also has a number of provisions that restrict a state party's attempts to evade an international obligation.⁹³

Looking solely to the Vienna Convention on the Law of Treaties: Article 18 provides that a state must "refrain from acts that would defeat the object and purpose of a treaty" (defined to include essentially any written international agreement) when it has signed the agreement until it has made "clear" its

⁸⁵ Somini Sengupta, *Biggest Threat to Humanity? Climate Change, U.N. Chief Says*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/climate/united-nations-climate-change.html>. [on file with Ohio State Law Journal]. See also U.N. Secretary-General, *Secretary-General's Press Encounter on Climate Change*, UNITED NATIONS (Mar. 29, 2018), <https://www.un.org/sg/en/content/sg/press-encounter/2018-03-29/secretary-generals-press-encounter-climate-change-qa> [<https://perma.cc/5UE4-A6NX>].

⁸⁶ Paris Agreement to the United Nations Framework Convention on Climate Change art. 2, Dec. 12, 2015, 55 I.L.M. 743.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*; see David Wright, *Stephen Hawking, 375 Scientists Slam Trump for Backing 'Parexit'*, CNN (Sept. 21, 2016), <http://www.cnn.com/2016/09/21/politics/scientists-open-letter-trump-climate-change/index.html>. [<https://perma.cc/M58J-QEBW>].

⁹² *E.g.*, United Nations Vienna Convention on the Law of Treaties art. 42, May 23, 1969, 1155 U.N.T.S. 331.

⁹³ See *id.* at art. 18, 44.

intention not to be a party.⁹⁴ Under the Article 26 principle of *pacta sunt servanda*, every treaty is binding and must be performed in good faith.⁹⁵ Significantly, Article 27 states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁹⁶ Article 27 is, however, subject to one exception under Article 46: a state may not invoke its internal law as invalidating its consent “unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”⁹⁷ Moreover, a “violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”⁹⁸ Is the convoluted constitutional law of treaties and executive agreements not only of fundamental importance but manifest to anyone? International law understandably does not specify what processes a state must follow to express its consent, leaving that to domestic law.⁹⁹ Article 11 says the consent of a state “may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”¹⁰⁰ International law thus specifies not only when and how a state can withdraw but requires compliance with those procedures until effectively repudiated.¹⁰¹ Does U.S. constitutional law require the same compliance with agreement procedures? Or is that an inherent executive authority with an executive agreement?

Thus far, a worst case scenario, legally, for the Paris Agreement has yet come to pass. The Paris Agreement was negotiated under the umbrella of the treaty (under U.S. and international law), the United Nations Framework Convention on Climate Change (UNFCCC).¹⁰² The United States has been a party to the UNFCCC since 1994.¹⁰³ Under Article 25 of that treaty, as in the Paris Agreement, no state may give withdrawal notification before the treaty has been in force for three years; such notification takes effect one year after being received by the United Nations Secretary General.¹⁰⁴ Article 25 goes on to say that any such withdrawal from the UNFCCC will also be considered a withdrawal

⁹⁴ *Id.* at art. 18. *See also id.* at art. 2. (defining the terms used for the purposes of the convention).

⁹⁵ *Id.* at art. 26.

⁹⁶ *Id.* at art. 27.

⁹⁷ *Id.* at art. 46.

⁹⁸ United Nations Vienna Convention on the Law of Treaties art. 46, May 23, 1969, 1155 U.N.T.S. 331.

⁹⁹ *Id.* at art. 2.

¹⁰⁰ *Id.* at art. 11.

¹⁰¹ *Id.* at art. 11, 18, 26, 27, 46.

¹⁰² Paris Agreement to the United Nations Framework Convention on Climate Change art. 2, Dec. 12, 2015, 55 I.L.M. 743. *See generally* United Nations Framework Convention on Climate Change, Mar. 21, 1994, 1771 U.N.T.S. 165 S. TREAT DOC. NO. 102-38 (setting forth the principles and framework for reducing greenhouse gas emissions).

¹⁰³ United Nations Framework, *supra* note 102, at 165.

¹⁰⁴ *Id.* at art. 25; Paris Agreement, *supra* note 102, at art. 28.

“from any protocol to which [the state] is a Party.”¹⁰⁵ In effect, it would seem that within one year of withdrawing from the UNFCCC, the United States would also be withdrawn from the Paris Agreement.¹⁰⁶ Could President Trump withdraw from the UNFCCC, clearly a treaty under U.S. constitutional law, without Senate ratification? If not, would the Senate ratify the withdrawal? Once again, the need for some clarification of the reach of sole executive authority to rescind treaties or even specific provisions of international agreements is sorely needed.¹⁰⁷

VI. A SHIFT IN LEADERSHIP AND STEWARDSHIP LEGALLY, POLITICALLY, AND PRACTICALLY

Aside from the legal reality that final regulations, more specifically environmental statutes, are not easily reversed or stayed under U.S. administrative law, there are other non-legal factors at play. First and foremost, fundamental changes in the energy industry are not finalized or completed overnight.¹⁰⁸ As a result, most states in the United States had already been conforming to the proposed regulations of the Clean Power Plan, even before its promulgation, to be in compliance in the chance it passed.¹⁰⁹ There have been states (especially coal-dependent states) that have been resistant to and been litigating against the Plan, but most have sought to comply for a variety of reasons, including economic considerations of cheaper, cleaner energy.¹¹⁰

¹⁰⁵ United Nations Framework, *supra* note 102, at art. 25.

¹⁰⁶ *Id.*

¹⁰⁷ See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1579 (2005) (analyzing the under-explored phenomenon of unilaterally exiting from international agreements). See generally Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675 (2017) (describing “the reconfigured landscape of checks and balances, which are spread across the negotiation, domestic approval, and implementation of international commitments”).

¹⁰⁸ See Coral Davenport, *Fighting Obama’s Climate Plan, but Quietly Preparing to Comply*, N.Y. TIMES (July 19, 2016), <https://www.nytimes.com/2016/07/20/us/obama-clean-power-plan.html> [on file with *Ohio State Law Journal*].

¹⁰⁹ *Id.*

¹¹⁰ See Clifford Krauss & Diane Cardwell, *Policy Shift Helps Coal, but Other Forces May Limit Effect*, N.Y. TIMES (Mar. 28, 2017), <https://www.nytimes.com/2017/03/28/business/energy-environment/trump-coal-executive-order-impact.html> [on file with *Ohio State Law Journal*]. Although industrial states supported Trump in the Presidential election, environmental cutbacks have negatively impacted some communities and the states are pleading for federal action. Eric Lipton & Danielle Ivory, *Under Trump, E.P.A. Has Slowed Actions Against Polluters, and Put Limits on Enforcement Officers*, N.Y. TIMES (Dec. 10, 2017), <https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html> [on file with *Ohio State Law Journal*]. In Ohio, a hazardous waste incinerator illegally released hazardous pollutants into the air on numerous occasions. *Id.* Although the state reported the facility and its harmful actions to the EPA, the EPA has not acted to remedy the situation. *Id.*

There is also the very significant hurdle where, in order to replace the Clean Power Plan regulation, there must be a replacement regulation of some kind, and that requires some scientific evidentiary basis for such a quick reversal of a regulation that has been many years in the making.¹¹¹ Although the Trump Administration claims that rules regarding greenhouse emissions will be implemented, the most likely outcome is that the Clean Power Plan will not be replaced for years.¹¹² With that said, many criticisms of the administration have been raised, including that “[d]elaying is the policy [of actions that concern climate change].”¹¹³ Moreover, it is also important to note that unlike the thus far unsuccessful “repeal and replacement” of the Affordable Care Act, requiring agreement in Congress on replacement legislation, the call for a less stringent replacement Clean Power Plan is in the D.C. Circuit Court of Appeals and then ultimately the Supreme Court.¹¹⁴

Equally important, one especially damaging scenario for remedying climate disruption that could arise is the possibility that the EPA might withdraw the Agency finding that greenhouse gas emissions endanger the public health and welfare, this being a precondition to the regulation of greenhouse gases under the Clean Air Act¹¹⁵ and upheld by the Supreme Court in *Massachusetts v. EPA*.¹¹⁶ Even industry groups, such as the Chamber of Commerce and National Association of Manufacturers, have expressed some concerns that such an extreme reversal of EPA policy and regulation would lead to judicial invalidation and perhaps even stricter regulation in 2020 with a future Democratic president.¹¹⁷

States, regions, and localities had, for a period of time before the second term of the Obama Administration, been more aggressive in addressing climate

¹¹¹ Clean Air Act, 42 U.S.C. §§ 7408(b), 7412(d) (2012).

¹¹² Lisa Friedman, *E.P.A. Says It Will Write a New Carbon Rule, but No One Can Say When*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/climate/epa-pruitt-climate-rule.html> [on file with *Ohio State Law Journal*] (Scott Pruitt’s declaration that the “war on coal is over” and further statements that Clean Power Plan regulations had no reasoning backing them. Additionally, the EPA may not currently have enough senior officials to design a replacement rule).

¹¹³ *See id.*

¹¹⁴ *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015); Clean Air Act, 42 U.S.C. § 7609 (2012). In other words, environmental groups and pro-original Clean Power Plan states would follow the same litigation path previously pursued by the states resistant to the Plan. *See also* Alan Rappoport, *Trump Says He Got Rid of Obamacare. The I.R.S. Doesn’t Agree.*, N.Y. TIMES (May 6, 2018), <https://www.nytimes.com/2018/05/06/business/trump-obamacare-irs.html> [on file with *Ohio State Law Journal*] (discussing how despite President Trump’s efforts and assertions, Congress has failed to repeal and replace Obama’s Affordable Care Act; changes have been made but many parts of the Act still remain).

¹¹⁵ Clean Air Act, 42 U.S.C. § 7521(a)(1) (2012).

¹¹⁶ *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

¹¹⁷ *See* Lisa Friedman, *Trump Wants to Repeal Obama’s Climate Plan. The Next Fight: Its Replacement*, N.Y. TIMES (Sept. 28, 2017), <https://www.nytimes.com/2017/09/28/climate/clean-power-plan.html> [on file with *Ohio State Law Journal*].

disruption than the federal government.¹¹⁸ This reaction is not surprising due to the predicted effects of climate change becoming more recognizable on a local level. As will be discussed later, California, for example, is forging its own path to challenge any reversal on climate change control.¹¹⁹ Moreover, city leaders from over fifty cities nationwide met in Chicago on December 5, 2017, to further state action in reducing emissions in an effort to drive the climate policies without federal involvement.¹²⁰ Additionally, on June 7, 2018, about two dozen mayors and city leaders came together at the international summit on climate change in Boston to discuss greenhouse gas emissions, ways to potentially cut the cost of renewable energy, and how to prepare for the challenges produced by climate change.¹²¹ There is, however, a definite schism between the coal states and other states¹²² but, in my opinion, in that struggling economic sector there is little or no future in coal for future energy development.

Along with increased state and local action and recognition of climate effects, a promising sign for environmental regulation arose in March 2018 when United Nations Secretary General, António Guterres, appointed former New York City Mayor Michael Bloomberg to be a special envoy for climate change action.¹²³ Bloomberg is a major critic of Trump's approach to climate

¹¹⁸ See Lisa Friedman, *A Shadow Delegation Stalks the Official U.S. Team at Climate Talks*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/climate/un-climate-talks-bonn.html> [on file with *Ohio State Law Journal*] (discussing the involvement of governments at the state level to reduce carbon dioxide emissions); Hiroko Tabuchi, *California Upholds Auto Emissions Standards, Setting Up Face-Off With Trump*, N.Y. TIMES (Mar. 24, 2017), <https://www.nytimes.com/2017/03/24/business/energy-environment/california-upholds-emissions-standards-setting-up-face-off-with-trump.html> [on file with *Ohio State Law Journal*]; The Editorial Bd., *States Dare to Think Big on Climate Change*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/opinion/climate-change-states-trump.html> [on file with *Ohio State Law Journal*].

¹¹⁹ See Coral Davenport & Adam Nagourney, *Fighting Trump on Climate, California Becomes a Global Force*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/us/california-engages-world-and-fights-washington-on-climate-change.html> [on file with *Ohio State Law Journal*]; Noah S. Diffenbaugh, *Climate Lessons from California*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/opinion/california-climate-snow-heat-trump.html> [on file with *Ohio State Law Journal*] (opinion).

¹²⁰ Stephen Joyce, *International Climate: Cities Vow to Fill U.S. Void on Climate Change*, 48 ENV'T REP. (BNA), No. 48 at 1816 (Dec. 8, 2017).

¹²¹ See *International Mayors Climate Summit*, CITY OF BOS., <https://www.boston.gov/international-mayors-climate-summit> (last updated June 6, 2018) [<https://perma.cc/JK6H-7ZSP>]; Steve LeBlanc, *Boston, Other Cities, to Work to Curb Renewable Energy Costs*, N.Y. TIMES (June 7, 2018), <https://phys.org/news/2018-06-boston-cities-curb-renewable-energy.html> [on file with *Ohio State Law Journal*].

¹²² See Eric Lipton & Barry Meier, *Under Trump, Coal Mining Gets New Life on U.S. Lands*, N.Y. TIMES (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/us/politics/under-trump-coal-mining-gets-new-life-on-us-lands.html> [on file with *Ohio State Law Journal*].

¹²³ United Nations Secretary-General, *Mr. Michael R. Bloomberg of the United States of America-Special Envoy for Climate Action*, UNITED NATIONS, <https://www.un.org/sg/en/content/sg/personnel-appointments/2018-03-05/mr-michael-r-bloomberg-united-states-america-special> (Mar. 5, 2018) [<https://perma.cc/F7TX-FVHT>]; Somini Sengupta, *U.N.*

change and hopes to assist the United Nations with reducing global greenhouse gas emissions.¹²⁴ Bloomberg said he plans to take action by working with local actors in order to help decrease overall emissions as well as build reliance to climate change.¹²⁵

What also has to be assessed, as best it can be, is the invigorated public embrace of environmental protection.¹²⁶ There have been significant public marches in support of climate change recognition, and more generally of science itself.¹²⁷ Universities and colleges have also pursued carbon emission initiatives in response to pressure from students, academics, and other stakeholders in academic institutions.¹²⁸ For instance, Yale University became the first university in the world to impose a campus-wide carbon control program that carries financial obligations; buildings exceeding Yale's historical average are compelled to pay a carbon fine into a fund, from which buildings coming in below the average may receive a rebate.¹²⁹

VII. STATE'S RIGHTS ENVIRONMENTALISM AND THE SHIFT IN FEDERALISM

The vacuum of non-regulation and inactivity at the federal level in the U.S. has led to a reversal in authority over environmental regulation, with many environmental groups and states now challenging the Administration's actions, particularly when it comes to the Obama-era regulation on carbon emissions.¹³⁰ Nowhere is this reversal more apparent than in California's aggressive pursuit of greenhouse gas regulation, both globally and in-state, more generally.¹³¹ In a

Chief Picks a Very Rich New Yorker (Not Named Trump) for Climate Job, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/climate/bloomberg-un-climate.html> [on file with *Ohio State Law Journal*].

¹²⁴ Sengupta, *supra* note 123.

¹²⁵ *Id.*

¹²⁶ See Nicholas Fandos, *Climate March Draws Thousands of Protesters Alarmed by Trump's Environmental Agenda*, N.Y. TIMES (Apr. 29, 2017), <https://www.nytimes.com/2017/04/29/us/politics/peoples-climate-march-trump.html> [on file with *Ohio State Law Journal*].

¹²⁷ *Id.*

¹²⁸ See Justin Gillis, *To Stop Climate Change, Students Aim at College Portfolios*, N.Y. TIMES (Dec. 4, 2012), <https://www.nytimes.com/2012/12/05/business/energy-environment/to-fight-climate-change-college-students-take-aim-at-the-endowment-portfolio.html> [on file with *Ohio State Law Journal*].

¹²⁹ See Victoria Graham, *Climate Change: Yale's Carbon-Neutral Goals May Be Costly, Leave Students Cold*, 48 ENV'T REP. (BNA), No. 37 at 1502–03 (Sept. 22, 2017).

¹³⁰ See, e.g., Lisa Friedman & Brad Plumer, *E.P.A. Announces Repeal of Major Obama-Era Carbon Emissions Rule*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/climate/clean-power-plan.html> [on file with *Ohio State Law Journal*].

¹³¹ See Javier C. Hernández & Adam Nagourney, *As Trump Steps Back, Jerry Brown Talks Climate Change in China*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/world/asia/xi-jinping-china-jerry-brown-california-climate.html> [on file with *Ohio State Law Journal*]; Hiroko Tabuchi, *U.S. Climate Change Policy: Made in California*, N.Y.

larger sense, this shift completes a cycle of state/federal authority in environmental regulation, ironically occurring in the context of the most significant global threat to the environment in the modern era.¹³² In the late 1960s, the rise of environmentalism in public awareness led to a flurry of federal environmental regulation, from the National Environmental Policy Act (NEPA)¹³³ to the Clean Air¹³⁴ and Clean Water Acts.¹³⁵

For decades, regulation of transboundary environmental problems (that is environmental problems crossing state boundaries) was assumed to be the necessary province of the federal government.¹³⁶ This assumption eventually led to increased federal assumption of authority over that most quintessential element of state and local regulation: land use regulation.¹³⁷ Politically, this perceived expansion of federal authority encountered resistance from advocates of state rights, objecting to the intrusion on state and local authority through “big government.”¹³⁸

With climate change, the cycle has come back full circle to state and local governments.¹³⁹ Although states and cities have various reasons to regulate in

TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/climate/california-climate-change.html> [on file with *Ohio State Law Journal*]; The Editorial Bd., *supra* note 116.

¹³² See U.S. GLOB. CHANGE RES. PROGRAM, CLIMATE SCI. SPECIAL REP. (CSSR): FIFTH-ORDER DRAFT (5OD) I, 53, 161–62 (June 2017) (detailing a climate change report approved by the White House, but in contradiction with assertions made by Donald Trump, that discusses, among other things, increased annual temperatures and sea level rises); Lisa Friedman, *Scientists Fear Trump Will Dismiss Blunt Climate Report*, N.Y. TIMES (Aug. 7, 2017), <https://www.nytimes.com/2017/08/07/climate/climate-change-drastic-warming-trump.html> [on file with *Ohio State Law Journal*]. See also Maggie Astor, *10 Hurricanes in 10 Weeks: With Ophelia, a 124-Year-Old Record is Matched*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/climate/hurricane-ophelia.html> [on file with *Ohio State Law Journal*] (attributing the sharp increase in amount and severity of hurricanes to global climate change); Henry Fountain, *Arctic's Winter Sea Ice Drops to Its Lowest Recorded Level*, N.Y. TIMES (Mar. 22, 2017), <https://www.nytimes.com/2017/03/22/climate/arctic-winter-sea-ice-record-low-global-warming.html> [on file with *Ohio State Law Journal*] (noting that global warming is increasingly impacting the Arctic region and depleting sea ice).

¹³³ National Environmental Policy Act § 102, 83 Stat. at 852.

¹³⁴ Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963); Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954 (1966); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

¹³⁵ Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204 (1961); Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (1966).

¹³⁶ See LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE 4 (2017).

¹³⁷ *Id.* at 1.

¹³⁸ *Id.* at 4.

¹³⁹ See Mitch Smith, *4 Takeaways From a Gathering of Mayors on Climate Change*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/us/climate-change-mayors-chicago.html> [on file with *Ohio State Law Journal*] (discussing a gathering of over forty-five mayors and former President Barack Obama, in which the mayors committed their cities to follow the standards set forth in the Paris Agreement with foreign mayors from

the absence of federal action, one common incentive sticks out and prevails: economics. Renewable, alternative sources of energy are becoming cheaper than coal.¹⁴⁰ Even as red conservative states formally repealed their emissions laws and regulations, those same states also actively shifted towards the use of clean energy (some of the furthest progress on clean energy is taking place in states with Republican legislators and governors, and those who supported Trump during the presidential election).¹⁴¹ The five states who harness the highest percentage of their energy from wind all supported and voted for Trump, as did Texas which produces the most wind power quantitatively.¹⁴² Most states are set to meet their emission control targets or to exceed them.¹⁴³ Accordingly, in the context of climate change regulation, state initiatives defy the traditional categorization of red conservative and blue progressive states.¹⁴⁴

California has stepped up and implemented regulations more stringent than federal regulations in an effort to do its part to combat climate change.¹⁴⁵ The state's goal is to curb greenhouse gas emissions more than any other state, while continuing to enjoy benefits of economic growth.¹⁴⁶ In California, two counties and a city have sued thirty-seven fossil fuel companies for polluting and, thus, majorly contributing to climate change.¹⁴⁷ California officials recognize that overstepping the boundaries of federal regulation may open them up to challenges from the federal government, such as federal preemption of electric vehicle mandates, yet they have not let that deter them in their emission controls.¹⁴⁸

countries such as Mexico, France, Canada, and other countries who joined in the Paris Agreement).

¹⁴⁰ See The Editorial Bd., *A Renewable Energy Boom*, N.Y. TIMES (Apr. 4, 2016), <https://www.nytimes.com/2016/04/04/opinion/a-renewable-energy-boom.html> [on file with *Ohio State Law Journal*].

¹⁴¹ See Justin Gillis & Nadja Popovich, *In Trump Country, Renewable Energy Is Thriving*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/climate/renewable-energy-push-is-strongest-in-the-reddest-states.html> [on file with *Ohio State Law Journal*].

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See *id.*

¹⁴⁵ See Brad Plumer, *Just How Far Can California Possibly Go on Climate?*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/climate/california-climate-policy-cap-trade.html> [on file with *Ohio State Law Journal*].

¹⁴⁶ See *id.*

¹⁴⁷ See John Schwartz, *Students, Cities and States Take the Climate Fight to Court*, N.Y. TIMES (Aug. 10, 2017), <https://www.nytimes.com/2017/08/10/climate/climate-change-lawsuits-courts.html> [on file with *Ohio State Law Journal*].

¹⁴⁸ See Brad Plumer, *How Can U.S. States Fight Climate Change if Trump Quits the Paris Accord?*, N.Y. TIMES (Sept. 20, 2017), <https://www.nytimes.com/2017/09/20/climate/paris-climate-accord-trump.html> [on file with *Ohio State Law Journal*]. See also Hiroko Tabuchi et al., *E.P.A. Readies Plan to Weaken Rules That Require Cars to Be Cleaner*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/climate/epa-emissions-california.html> [on file with *Ohio State Law Journal*] (noting the potential challenge to

In fact, in April 2018, President Trump's Administration attempted to roll back California's auto emissions reduction program and sanctuary laws that would make it harder for the federal government to drill offshore.¹⁴⁹ The emissions reductions in place require automakers to meet both emissions and mileage standards by 2025 (authority from the Clean Air Act of 1970 gives the state the power to determine its own air pollution regulations).¹⁵⁰ President Trump has stated that California is "out of control,"¹⁵¹ and he has effectively waged war on the state.¹⁵² Although the federal administration has made its intentions of subduing California's environmental activism known, state officials are still determined to fight to uphold their standards.¹⁵³ Just recently, in May 2018, a coalition led by California filed a lawsuit in the U.S. Court of Appeals for the District of Columbia in an attempt to fight against the administration's efforts to reduce current auto emission rules, and to retain the right to set their own emissions regulations.¹⁵⁴

In 2009, even before California launched its ambitious programs, nine northeastern states established the first regional carbon trading system, the Regional Greenhouse Gas Initiative, known as R.G.G.I. ("Reggie").¹⁵⁵ Having

California's air pollution rules if more lenient standards are enacted by the federal government).

¹⁴⁹ Adam Nagourney, *As Trump Leads a 'War' on California, Who Will Lead California?*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/california-governor-villaraigosa-newsom-trump.html> [on file with *Ohio State Law Journal*].

¹⁵⁰ Hiroko Tabuchi, *Calling Car Pollution Standards 'Too High,' E.P.A. Sets Up Fight With California*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/climate/trump-auto-emissions-rules.html> [on file with *Ohio State Law Journal*].

¹⁵¹ Peter Baker & Tim Arango, *In California, Trump Attacks Jerry Brown and 'Sanctuary Policies'*, N.Y. TIMES (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/us/politics/trump-california-jerry-brown-sanctuary-cities.html> [on file with *Ohio State Law Journal*].

¹⁵² Governor Brown of California explicitly stated that "Washington was 'basically going to war against the State of California.'" Nagourney, *supra* note 149.

¹⁵³ Tabuchi, *supra* note 148.

¹⁵⁴ Hiroko Tabuchi & Coral Davenport, *California Sues Trump Administration over Car Emissions Rules*, N.Y. TIMES (May 1, 2018), <https://www.nytimes.com/2018/05/01/climate/california-sues-trump-administration.html> [on file with *Ohio State Law Journal*]. The area of transportation is the biggest source of greenhouse gas emissions for California and its tailpipe emission regulations are essential to its overall climate goals. See California Air Resources Board, *California Greenhouse Gas Emission Inventory*, CA.GOV, <https://www.arb.ca.gov/cc/inventory/data/data.htm> (last reviewed July 11, 2018) [<https://perma.cc/7H87-64BY>]; Nadja Popovich, *California is Ready for a Fight Over Tailpipe Emissions. Here's Why.*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/interactive/2018/04/30/climate/california-auto-emissions.html> [on file with *Ohio State Law Journal*].

¹⁵⁵ The Regional Greenhouse Gas Initiative includes the following nine northeastern states: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. THE REGIONAL GREENHOUSE GAS INITIATIVE, <https://www.rggi.org/> [<https://perma.cc/M3MU-BSEF>]; see also The Editorial Bd., *supra* note 116.

already reduced their emissions by 40% since 2009 under R.G.G.I.'s cap-and-trade system, the member states agreed to an additional 30% reduction by 2030.¹⁵⁶ Additionally, at the local level, over 130 cities have joined the Global Covenant of Mayors for Climate and Energy, in order to fight climate change and advance towards the goals of the Paris Accord.¹⁵⁷ In an op-ed piece, former New York Mayor Michael Bloomberg even went on to highlight some of the ways in which local governments can go beyond the statewide energy grid to initiate reductions; these include increasing mass transit, energy efficiency in buildings, landscaping, and bike paths.¹⁵⁸ He emphasizes that state and local governments have the potential to make the United States meet its pledge under the Paris Accord without the federal government.¹⁵⁹ These types of measures at the local level are significant given that the more difficult sectors of transportation and industrial (that is, non-power plants) are more complex to decarbonize.

Although California and R.G.G.I. have been the highlighted celebrities in this state movement, a new alliance of states has emerged with a shared economic interest in energy; an alliance encompassing a broad political spectrum in voter identity, with a majority of the states' governors being Democrats.¹⁶⁰ Started by Governor Jay Inslee of Washington, Governor Andrew Cuomo of New York, and Governor Jerry Brown of California,¹⁶¹ the United States Climate Alliance currently consists of sixteen states (originally twelve to fourteen) and Puerto Rico, all of whom have pledged to meet their obligations under the Paris Accord.¹⁶² They are on schedule to lower emissions

¹⁵⁶ The Editorial Bd., *supra* note 118.

¹⁵⁷ See Michael R. Bloomberg, *Climate Progress, With or Without Trump*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/opinion/climate-progress-with-or-without-trump.html> [on file with *Ohio State Law Journal*] (discussing the Global Covenant of Mayors for Climate and Energy—an organization that is focused on improving air quality and becoming more environmentally friendly).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See Plumer, *supra* note 148 (noting that California, Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Puerto Rico are all involved in the alliance).

¹⁶¹ See *United States Climate Alliance Adds 10 New Members to Coalition Committed to Upholding the Paris Accord*, WASH. GOVERNOR'S OFFICE (June 5, 2017), <https://www.governor.wa.gov/news-media/united-states-climate-alliance-adds-10-new-members-coalition-committed-upholding-paris> [<https://perma.cc/T467-736B>].

¹⁶² U.S. CLIMATE ALLIANCE, <https://www.usclimatealliance.org/> [<https://perma.cc/2VVk-77AW>]; Brian Witte, *Maryland's GOP Governor Commits to US Climate Alliance*, U.S. NEWS (Jan. 10, 2018), <https://www.usnews.com/news/best-states/maryland/articles/2018-01-10/marylands-gop-governor-commits-to-us-climate-alliance> [<https://perma.cc/3EM8-MTDR>] (discussing how Maryland joined the Alliance in January 2018); see also The Editorial Bd., *Hope in the Era of Trump's Climate Foolishness*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/opinion/trump-paris-climate-withdrawal.html> [on file with *Ohio State Law Journal*] (discussing how New Jersey has also just joined the U.S. Climate Alliance).

by 24%–29%, in keeping with the Paris Accord’s goal of 26%–28% percent below 2005 levels by 2025.¹⁶³ In Washington, for example, Governor Inslee is pursuing implementation of a carbon tax.¹⁶⁴ If successful, this tax would be the first straight carbon tax in the nation.¹⁶⁵ This reflects a growing trend in state participation within the climate change arena.

With that being said, the new state and local leadership has not gone unnoticed internationally. For example, while Canada continues its efforts to negotiate with the Trump Administration, it is also directly reaching out to the states and localities to work toward achieving the Paris Accord’s goals.¹⁶⁶ Canadian Prime Minister Justin Trudeau also endorses the idea of a carbon tax and is trying to implement such a tax in Canada within 2018.¹⁶⁷ Ironically, this most global of environmental problems has resurrected and invigorated environmental authority at the grass-roots level.

However, there are dark clouds in this promising horizon of state, local, industrial, and business alliances and pledges. Objective scientific reports of our own government continue to paint an alarming picture of environmental degradation.¹⁶⁸ Research and innovation in new clean technologies is largely dependent upon federal funding, which is not forthcoming under current budget proposals and EPA research programs.¹⁶⁹ Federal inaction may be overcome, but aggressive federal roadblocks and litigation against state initiatives in particular, could delay and thus block emissions reduction measures.

In October 2017, the EPA’s 2017 “Tiering List” set an agenda priority repealing the Clean Power Plan, despite considerable industry lobbying to

¹⁶³ The Editorial Bd., *supra* note 118.

¹⁶⁴ See Coral Davenport, *In a Gamble to Make Climate Change a Political Win, a Governor Pursues a Carbon Tax*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/climate/jay-inslee-carbon-tax.html> [on file with *Ohio State Law Journal*].

¹⁶⁵ *Id.*

¹⁶⁶ See Ian Austen, *Canada’s Strategy on Climate Change: Work with American States*, N.Y. TIMES (June 7, 2017), <https://www.nytimes.com/2017/06/07/world/canada/canadas-strategy-on-climate-change-work-with-american-states.html> [on file with *Ohio State Law Journal*]; Max Fisher, *Canada’s Trump Strategy: Go Around Him*, N.Y. TIMES (June 22, 2017), <https://www.nytimes.com/2017/06/22/world/canada/canadas-trump-strategy-go-around-him.html> [on file with *Ohio State Law Journal*].

¹⁶⁷ Davenport, *supra* note 162.

¹⁶⁸ See generally U.S. GLOB. CHANGE RESEARCH, *supra* note 130. See also Lisa Friedman, *Climate-Altering Gases Spiked in 2016, Federal Scientists Report*, N.Y. TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/climate/greenhouse-gases-spike-noaa-global-warming.html> [on file with *Ohio State Law Journal*] (discussing how the amount of greenhouse gases increased more in the last year than they have in three decades); Lisa Friedman, *Scientists Fear Trump Will Dismiss Blunt Climate Report*, N.Y. TIMES (Aug. 7, 2017), <https://www.nytimes.com/2017/08/07/climate/climate-change-drastic-warming-trump.html> [on file with *Ohio State Law Journal*] (emphasizing the continued rise of the average temperature in the United States).

¹⁶⁹ See Coral Davenport, *Trump Budget Would Cut E.P.A. Science Programs and Slash Cleanups*, N.Y. TIMES (May 19, 2017), <https://www.nytimes.com/2017/05/19/climate/trump-epa-budget-superfund.html> [on file with *Ohio State Law Journal*].

abandon the repeal-and-replace approach for a narrower revision of the Clean Power Plan more likely to withstand judicial challenges.¹⁷⁰ Additionally, the Trump Administration terminated the Community Resilience Panel for Buildings and Infrastructure Systems, a group that was created by former President Obama in 2015 to assist local officials in protecting their communities from weather-related natural disasters.¹⁷¹

In December 2017, President Trump also authorized the reduction of national monuments in Utah, including lands that have been open to protection via legislation signed in 1906.¹⁷² President Obama created the Bears Ears National Monument in 2016, consisting of 110,000 acres of land.¹⁷³ However, President Trump reduced the monument to approximately 22,000 acres and removed the land's protected status, thereby opening it up to oil and gas exploitation.¹⁷⁴ Patagonia, an outdoor retailer, filed suit against President Trump in December 2017 to protect Bears Ears National Monument.¹⁷⁵ As of the end of spring 2018, the area is still available for drilling and mining, while the lawsuit remains tied up in court and awaiting a decision.¹⁷⁶

If the frontal attacks on state and local initiatives and protected areas are to occur, the reality of this new environmental democracy may ultimately depend on the most basic of democratic building blocks: the individual voter and public political pressure. Most recently, on February 12, 2018, the Trump Administration even moved to repeal methane emissions regulations because the oil and gas industry emphasized that it would be too costly to implement.¹⁷⁷

¹⁷⁰ See Lisa Friedman, *Trump Takes a First Step Towards Scrapping Obama's Global Warming Policy*, N.Y. TIMES (Oct. 4, 2017), <https://www.nytimes.com/2017/10/04/climate/trump-climate-change.html> [on file with *Ohio State Law Journal*].

¹⁷¹ Christopher Flavelle, *Trump Disbands Group Meant to Prepare Cities for Climate Shocks*, 48 ENV'T REP. (BNA) No. 48, at 1819–20 (Dec. 8, 2017).

¹⁷² Proclamation No. 9681, 82 Fed. Reg. 58081 (Dec. 4, 2017); Peter Blumberg, *Natural Resources: Trump Sued Over 'Unlawful' Shrinking of Utah National Monuments*, 48 ENV'T REP. (BNA) No. 48, at 1837 (Dec. 8, 2017); Eric Lipton & Lisa Friedman, *Oil Was Central in Decision to Shrink Bears Ears Monument, Emails Show*, N.Y. TIMES (Mar. 2, 2018), <https://www.nytimes.com/2018/03/02/climate/bears-ears-national-monument.html> [on file with *Ohio State Law Journal*]. Additional lawsuits have been initiated against the Trump Administration for delaying regulatory controls on greenhouse gas emissions, such as methane. Alan Kovski, *Delays on Natural Gas Emission Controls Draw Lawsuits*, 48 ENV'T REP. (BNA) No. 50, at 1887 (Dec. 8, 2017).

¹⁷³ Lipton & Friedman, *supra* note 172.

¹⁷⁴ *Id.*

¹⁷⁵ See David Gelles, *Patagonia v. Trump*, N.Y. TIMES (May 5, 2018), <https://www.nytimes.com/2018/05/05/business/patagonia-trump-bears-ears.html> [on file with *Ohio State Law Journal*].

¹⁷⁶ *Id.*

¹⁷⁷ Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. at 7924 (proposed Feb. 22, 2018) (to be codified at 43 C.F.R. pts. 3160, 3170); Lisa Friedman, *Trump Administration Targets Obama-Era Effort to Limit Methane*, N.Y. TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/climate/trump-methane-rule-repeal.html> [on file with

On February 22, 2018, the Northern District of California “overturned BLM’s suspension of the rule” and held that BLM was required to enforce the rule to its full effect.¹⁷⁸ However, on April 4, 2018, the U.S. District Court of Wyoming granted a suspension of key components of the rule (the U.S. District Court of Wyoming decision was then appealed to the 10th U.S. Circuit Court of Appeals and has yet to be decided.¹⁷⁹ The question is: what happens next?

VIII. THE LOSERS AND WINNERS POLITICALLY IN CLIMATE CHANGE IN THE UNITED STATES AND GLOBALLY

Quite clearly, the United States’ failure to support measures to reduce climate disruption has prompted widespread criticism from the global community.¹⁸⁰ Given the United States’ contribution to the global carbon pollution and the scientific assessments of its effects, any backtracking from a major contributor is a significant setback in global reductions.¹⁸¹ The United States’ failure to honor its financial commitments under the Paris Agreement is a more quantifiable and immediate detriment. In a fifteen-to-four decision, the Senate Appropriations Committee defeated a proposal to provide funding for the Green Climate Fund for developing countries, restoring only a much more

Ohio State Law Journal] (noting that the Trump administration is focusing on the continued development of the oil and gas industry rather than the environment in part because “[t]he oil and gas industry argued that the rule could cost as much as \$279 million to implement”).

¹⁷⁸ *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1058 (N.D. Cal. 2018) (holding that BLM did not provide enough evidence to contradict the reasons for implementing the Waste Prevention Rule and did not justify decision to suspend rule).

¹⁷⁹ *Wyoming v. U.S. Dep’t of Interior*, Case No. 2:16-cv-00280 (D. Wyo. Apr. 4, 2018), appeal filed, No. 2:16-cv-00280-SWS (Apr. 6, 2018); see also BLM Methane Waste Prevention Rule, ENVTL. L. HARV., <http://environment.law.harvard.edu/2017/09/methane-waste-prevention-rule/> [<https://perma.cc/6LXR-B47W>].

¹⁸⁰ See Steven Erlanger et al., *World Leaders Move Forward on Climate Change, Without U.S.*, N.Y. TIMES (July 8, 2017), <https://www.nytimes.com/2017/07/08/world/europe/group-of-20-climate-change-agreement.html> [on file with *Ohio State Law Journal*]; Somini Sengupta et al., *As Trump Exits Paris Agreement, Other Nations Are Defiant*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/world/europe/climate-paris-agreement-trump-china.html> [on file with *Ohio State Law Journal*]; Michael D. Shear & Alison Smale, *Leaders Lament U.S. Withdrawal, but Say It Won’t Stop Climate Efforts*, N.Y. TIMES (June 2, 2017), <https://www.nytimes.com/2017/06/02/climate/paris-climate-agreement-trump.html> [on file with *Ohio State Law Journal*]; The Editorial Bd., *Mr. Trump, the Climate Change Loner*, N.Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/opinion/mr-trump-the-climate-change-loner.html> [on file with *Ohio State Law Journal*].

¹⁸¹ See Justin Gillis & Nadja Popovich, *The U.S. Is the Biggest Carbon Polluter in History. It Just Walked Away from the Paris Climate Deal*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/interactive/2017/06/01/climate/us-biggest-carbon-polluter-in-history-will-it-walk-away-from-the-paris-climate-deal.html> [on file with *Ohio State Law Journal*].

limited amount to fund the Intergovernmental Panel on Climate Change (IPCC) under the Framework Convention.¹⁸²

Since the announced withdrawal, other countries have increased their involvement with regard to climate change leadership.¹⁸³ French President, Emmanuel Macron and German Chancellor Angela Merkel have pledged to honor and fulfill the terms of the Paris Agreement.¹⁸⁴ Canadian Prime Minister Justin Trudeau has also declared its commitment to fighting climate change and has even increased contributions to climate change science.¹⁸⁵ However, the biggest “winner” politically is China.¹⁸⁶

With the United States’ resistance and plans to withdraw from the Paris Accord, in terms of climate change China, who is often viewed as an environmental outlier, has now been handed the leadership position in remedying climate disruption.¹⁸⁷ As you come to this conference in a sandstorm, the reality is that climate change is affecting a significant portion of China’s population, who cannot be ignored.¹⁸⁸ China cannot ignore the increasingly vocal domestic criticism of the country’s air pollution,¹⁸⁹ much less the loss of international trade and business unwilling or unable to be exposed to the

¹⁸² See Jennifer A. Dlouhy, *Trump Wants to Steer UN Climate Cash Toward Coal Plants*, 48 ENV’T REP. (BNA) 1261–62 (July 21, 2017).

¹⁸³ Lisa Friedman, *As U.S. Sheds Role as Climate Change Leader, Who Will Fill the Void?*, N.Y. TIMES (Nov. 12, 2017), <https://www.nytimes.com/2017/11/12/climate/bonn-climate-change.html> [on file with *Ohio State Law Journal*].

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See The Editorial Bd., *China and India Make Big Strides on Climate Change*, N.Y. TIMES (May 22, 2017), <https://www.nytimes.com/2017/05/22/opinion/paris-agreement-climate-china-india.html> [on file with *Ohio State Law Journal*]; Edward Wong, *Can China Take the Lead on Climate Change? That Could Be Difficult*, N.Y. TIMES (June 2, 2017), <https://www.nytimes.com/2017/06/02/climate/china-climate-change-trump-paris-accord.html> [on file with *Ohio State Law Journal*] [hereinafter Wong, *Can China Take the Lead*]; Edward Wong, *China Poised to Take Lead on Climate After Trump’s Move to Undo Policies*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/world/asia/trump-climate-change-paris-china.html> [on file with *Ohio State Law Journal*] [hereinafter Wong, *China Poised*]. See also Brad Plumer & Nadja Popovich, *Here’s How Far the World Is from Meeting Its Climate Goals*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/interactive/2017/11/06/climate/world-emissions-goals-far-off-course.html> [on file with *Ohio State Law Journal*] (discussing China’s relative success in meeting the goals the country set in accordance with the Paris Accord—by 2030, China is expected to be receiving “20 percent of its energy from non-fossil sources”).

¹⁸⁷ See Wong, *Can China Take the Lead*, *supra* note 183; Wong, *China Poised*, *supra* note 183.

¹⁸⁸ See Eleanor Albert & Beina Xu, *China’s Environmental Crisis*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/background/chinas-environmental-crisis> (last updated Jan. 18, 2016) [<https://perma.cc/YGQ3-JMSF>].

¹⁸⁹ See *id.* (discussing how environmental damage in China has caused social unrest “rang[ing] from peaceful protest to rioting”).

frequent hazardous pollution levels.¹⁹⁰ In that sense, there has been something of a “trickle-up” concern from the perceived impacts of climate change.

Nevertheless, although China has limited its use of coal plants and other environmentally destructive activities, it has, however, increased its outsourcing of coal plants.¹⁹¹ China has outsourced hundreds of coal plants, rather than making the whole-hearted move toward renewable energy, or other environmentally friendly decisions.¹⁹² China has focused its attention towards financing and building coal-fired plants in countries that have never before seen such plants on their soil, such as Mongolia and Kenya.¹⁹³ Additionally, China’s emissions are higher than the emissions from the United States and Europe combined.¹⁹⁴

The head of the United Nations Environmental Program, among other United Nations and national leaders, has called upon the Trump Administration to acknowledge the disastrous consequences of climate change, especially with hurricanes Harvey, Irma, and Jose devastating large swaths of U.S. territory.¹⁹⁵ The 2017 United Nations Environment Assembly met from December 4 through December 6 to discuss international structures in which pollution could be addressed.¹⁹⁶ Places such as Puerto Rico have even invested into electric grids

¹⁹⁰ *Id.* (noting that China’s economic partners may “face costly environmental burdens attached with doing business in China”).

¹⁹¹ Somini Sengupta, *Why Build Kenya’s First Coal Plant? Hint: Think China*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/climate/coal-kenya-china-power.html> [on file with *Ohio State Law Journal*].

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Keith Bradsher & Lisa Friedman, *China’s Emissions: More Than U.S. Plus Europe, and Still Rising*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/business/china-davos-climate-change.html> [on file with *Ohio State Law Journal*]. See generally Trevor Houser & Peter Marsters, *China Energy Snapshot 2017*, RHODIUM GROUP, <https://rhg.com/research/china-energy-snapshot-2017/> (Jan. 25, 2018) [<https://perma.cc/A8VW-4WCS>].

¹⁹⁵ Sunil Jagtiani, *UN Says Hurricane Irma Shows Trump Needs to Re-Engage on Climate*, 48 ENV’T REP. (BNA) No. 36, at 1470 (Dec. 8, 2017). Hurricane Irma destroyed highways and left residents of the Florida Keys stranded for days. Brad Plumer, *Trump Ignores Climate Change. That’s Very Bad for Disaster Planners.*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/climate/fema-flooding-trump.html> [on file with *Ohio State Law Journal*]. The Federal Emergency Management Agency has estimated that repairs from the storms will cost over fifty billion dollars in Florida, Texas, Puerto Rico, and the Virgin Islands. *Id.* Communities are faced with the reality that climate change will increase the intensity of these storms and FEMA estimates that climate change flooding alone will cost over twenty-three billion dollars per year. *Id.*

¹⁹⁶ Wachira Kigotho, *UN Leaders Tackle Air Pollution, Call It Globe’s Greatest Threat*, 48 ENV’T REP. (BNA) No. 48, at 1810 (Dec. 8, 2017) (discussing the major implications of continued air pollutant emissions on the world while forced displacement of individuals has increased).

in response to climate-related natural disasters, such as Hurricane Maria, which nearly destroyed the territory's power on September 20, 2017.¹⁹⁷

IX. CONCLUSION

State policies, local policies, market forces, and technological advances have reduced emission roughly 12% below 2005 levels.¹⁹⁸ That said, without the Clean Power Plan, even assuming a much laxer regulation is put in its place or there are no requirements in the next three years, it has been estimated that twenty-five states are still likely to beat their state targets, ten states may do so, and twelve states may miss their targets.¹⁹⁹ However accepting or skeptical these estimates are, for purposes of the role of the federal government in environmental regulation, there has been a fundamental shift in authority and responsibility for climate change regulation, and perhaps more generally for environmental regulation.

In our democratic system, whatever the many political hurdles, is there an underlying power in our constitutional system of checks and balances to address the greatest environmental challenges not even remotely considered by our Framers? If so, climate change regulation may be that litmus test. Whatever the political affiliation of the Presidency or the Congress, or even the judiciary, is it possible that the diversity of state and local governments, and even public choice not adequately represented in one of the most democratic societies, might prevail to protect those insufficiently represented and disproportionately affected?

The effects and disastrous consequences of climate change, outside of the United States, have posed these life-determinate questions for some time. Those questions have now come to the United States on par with less developed countries, and developed countries which have experienced the consequences presumably before the United States relative national wealth and geographical isolation is no protection to a global consequence. The so-called "War on Coal"²⁰⁰ ignores the much more immediate and intense war against these same states in extreme weather and flooding with loss of life and incalculable effect

¹⁹⁷ Rebecca Kern, *Microgrids, Storage Could Make Puerto Rico Grid More Resilient*, 48 ENV'T REP. (BNA) No. 48, at 1815–16 (Dec. 8, 2017) (noting that the Department of Energy and the Army Corps are looking into installing solar and wind facilities in Puerto Rico that may better withstand the intense effects of climate-related events).

¹⁹⁸ The Editorial Bd., *Mr. Trump Nails Shut the Coffin on Climate Relief*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/opinion/trump-coal-climate-emissions.html> [on file with *Ohio State Law Journal*].

¹⁹⁹ Brad Plumer & Nadja Popovich, *How Will the Clean Power Plan Repeal Change Carbon Emissions for Your State?*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/interactive/2017/10/10/climate/clean-power-plan-emissions-your-state.html> [on file with *Ohio State Law Journal*]. See generally John Larsen & Whitney Herndon, *What the Clean Power Plan Would Have Done*, RHODIUM GROUP, <https://rhg.com/research/what-the-cpp-would-have-done/> (Oct. 9, 2017) [<https://perma.cc/CZ2S-NX8R>].

²⁰⁰ The Editorial Bd., *supra* note 198.

in dollars on lives already living on the edge of economic survival. In the absence of federal recognition of the actual threat of climate disruption, it has fallen upon the states, local governments, courts, and the public to do so in a system never visualizing such a crisis but capable of doing so.