DEMOCRACY DEFENSE AS CLIMATE CHANGE LAW

by Craig Holt Segall

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In 1990, when the Clean Air Act (CAA)[1] was last substantially amended, atmospheric carbon dioxide levels stood at about 350 parts per million (ppm). Now they are close to 414 ppm,[2] and the U.S. Congress has not amended the CAA despite broad public support for action.[3] Climate lawyers should ask whether something has gone wrong with our democracy. Why can't Congress act?

The law of democracy and the law of climate change are fundamentally intertwined: how politics and law will be able to adjust to the future turns on who decides the law, and so on the health of our democracy. So far, the prognosis is mixed: a vital protest movement, active state responses, and growing economic pressure for action are balanced against powerful political actors seeking stasis and a sclerotic jurisprudence that limits democratic responsiveness.

Tipping the balance toward action requires climate advocates to consider which theories of popular democracy and judicial review best support responsive government. Durable climate solutions will require deep attention to equity and must attend to many varied interests. As the Nobel laureate Elinor Ostrom, a specialist in the economics of cooperation, observed, the climate crisis is inherently "polycentric"—it emerges from choices at all levels of government and society, and so must be addressed by choices at all levels.[4] Lawyers should insist that government at every level is responsive.

There is little hope of equity in a climate-altered future unless the law recognizes that solutions to the crisis must win majority support while protecting minority rights. Climate law cannot just be the technocratic law of emissions reduction and infrastructure adaptation. The most important mitigation actions we take may be those that mitigate trends toward oligarchy in a democracy under threat; our most important adaptations may be actions to support egalitarianism in the face of worsening inequalities of wealth and power.[5]

This Comment moves in several steps. First, I briefly discuss the ways inequities in climate change risk and in democratic representation mirror each other. Next, I turn to the U.S. Supreme Court's inconsistent and unhelpful jurisprudence on democracy and agency action and how it tends to reinforce this crisis of democracy. I then suggest alternate theories of judicial action that would better reinforce democratic responsiveness, providing examples from cases on the dormant Commerce Clause (DCC) and agency deference. I close with reflections on a broadened conceptual framework for climate law—as a legal framework fundamentally concerned with preserving equity and democracy in the face of climate change, and as a foundation for climate action.

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1. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
2. *See* Rebecca Lindsey, *Climate Change: Atmospheric Carbon Dioxide*, Climate.gov, Sept. 19, 2019, https://www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide.
3. On public attitudes on climate change, I have drawn heavily on the Yale Program on Climate Change Communication, which has developed comprehensive survey data. For the proposition that the public is overwhelmingly concerned with climate change and favors substantial action, see, e.g., Anthony Leiserowitz et al., Yale Program on Climate Change Communication, Climate Change in the American Mind: April 2019 (2019). The Resources for the Future think-tank confirms this core conclusion, while recognizing that support is softer for more radical interventions. *See* Resources for the Future, Public Backs Action on Climate Change but With Cost Concerns and Muted Urgency (2018). Both groups' work (as well as a quick look at the news) will confirm another premise of this Comment—that the modern Republican party in the United States and its members are vastly less supportive of climate action (and, indeed, less unwilling to "believe" basic climate science) than members of the Democratic party or of the majority of the American public as a whole. *See*, *e.g.*, Anthony Leiserowitz et al., Yale Program on Climate Change Communication, Politics & Global Warming 4-6 (2019) (For instance: 70% of voters believe climate change is happening, but only 38% of conservative Republicans agree; 67% of voters but only 46% of Republicans support carbon pricing. Notably, even many Republicans support technology investments in renewables and the like).
4. Elinor Ostrom, *A Polycentric Approach for Coping With Climate Change*, 15 Annals Econ. & Fin. 92 (2014).
5. These ideas are elaborated in Joel Wainwright & Geoff Mann, Climate Leviathan: A Political Theory of Our Planetary Future (2018). As they put it:
   > Surely if "adaptation" means "correction" or "adjustment," then the most important adaptation that the world could make to address climate change would be to redistribute wealth and power to end fossil fuel use and force those responsible for climate change to reallocate the wealth its drivers have helped them accumulate at the cost of billions of people suffering.

   Id. at 73.

I. Law for the Few: An Equity Gap in Law and Policy

The climate crisis is most dangerous to those who are least powerful and who have done the least to cause it.[6] The majority of global emissions are linked to the economic activities of companies run by a global elite. Those who suffer disproportionately are those who contributed least to the problem: women, children, the poor, and black and brown and Native communities. But because the structures of power in our country largely correspond to the historic arrangements of capital, those most harmed by the crisis remain strikingly underrepresented in Congress, the courts, and the presidency.

Implementing climate justice begins with recognizing that the United States is among the most unequal of the developed nations.[7] That wealth inequality has been exacerbated by America's long history of racism and sexism. The United States built its wealth substantially upon chattel slavery and a long Native genocide, while denying women meaningful political power. It remains true that white men control the vast majority of American wealth[8] and hence political power and appointments, a trend substantially worsened by the Donald Trump Administration.

Yet, distributional equity has not been the focus of mainstream environmental law. As Prof. Jedediah Purdy observes, the main environmental statutes were developed at a time when the ruling elite were relatively unconcerned with these issues, and without many minority voices—resulting in statutes that focus on the technical matter of regional pollution reduction rather than distributional impacts or democratic decisionmaking.[9] The CAA, for example, considers air quality at the regional air basin level, not the neighborhood level at which America's long history of residential segregation results in marked differences in pollution exposure.[10] The same pattern pertains in the other major environmental statutes. It is telling that America's environmental justice priorities are still largely embodied in an Executive Order rather than statute.[11]

Climate lawyers should reinforce an alternate tradition of environmental law rooted in environmental justice that extends well beyond the core statutes and arises from intersectional community organizing across the country. Consider, for instance, the way communities are organizing against fossil-fuel power plants and other fossil technology and for a greener future in concert with demands for labor equity and direct democracy that reflects marginalized communities. This "climate justice" movement has articulated principles worthy of support, which are increasingly becoming part of forming environmental legal strategies.[12]

This connection between the ruling elite and fossil-fuel interests is particularly striking because the current president and his party do not reflect majority will on climate change. President Trump, the second Republican president of this century to lose the popular vote in the election, is supported by two other institutions without majority support. In the U.S. Senate, the Republican majority represents fewer Americans than the Democratic minority.[13] In the Supreme Court, four of the current Justices (John G. Roberts, Samuel A. Alito, Neil M. Gorsuch, and Brett M. Kavanaugh) were appointed by presidents elected by a minority of the public, and confirmed by a Senate representing a minority of the public.[14]

Control of the Court reflects a long story of homogeneity. The Court has had 114 white male Justices, despite that group being a demographic minority. Since its foundation, it has had four female members and three people of color (one of whom is also a woman) for a grand total of six non-white male members.[15] Certainly, demographics do not tell the entire story—the two African-American members of the Court expressed profoundly different views, while it was an entirely white male Court that ended *de jure* school segregation—but they do provide a guide to the outline of that story.

Like it or not, climate advocates face a convergence of minority control with climate denial—by which I mean the practice of denying that climate change is caused by human greenhouse gas (GHG) emissions, or of denying the importance of action.[16] For most of the past 30 years, the presidency, or at least one house of Congress, has been controlled by a party representing a minority of Americans.

6. *See*, *e.g.*, Glenn Althor et al., *Global Mismatch Between Greenhouse Gas Emissions and the Burden of Climate Change*, 6 Sci. Rep. art. no. 20281 (2016).
7. World Bank, *GINI Index (World Bank Estimate)—United States*, https://data.worldbank.org/indicator/SI.POV.GINI?end=2016&locations=US&start=1979 (last visited Dec. 3, 2019).
8. *See*, *e.g.*, Ray Boshara et al., The Federal Reserve Bank of St. Louis, The Demographics of Wealth (2015).
9. *See generally* Jedediah Purdy, *The Long Environmental Justice Movement*, 44 Ecology L.Q. 809 (2018).
10. *See* 42 U.S.C. §7410 (setting out the Act's core regional air quality planning processes that focus on air basin attainment with health standards). Prof. Ann Carlson has explored this point in careful detail. *See* Ann Carlson, *The Clean Air Act's Blind Spot: Microclimates and Hotspot Pollution*, 65 UCLA L. Rev. 1036 (2018).
11. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).
12. *See*, *e.g.*, Equitable and Just National Climate Platform, *Home Page*, https://ajustclimate.org/ (last visited Dec. 3, 2019).
13. *See*, *e.g.*, Sabrina Siddiqui, *Democrats Got Millions More Votes—So How Did Republicans Win the Senate?*, Guardian, Nov. 8, 2018. Ian Millhiser's pieces on this malapportionment include useful data tables, including data showing that as America's population concentrates in cities, this malapportionment will get worse. *See*, *e.g.*, Ian Millhiser, *The Senate Is so Rigged That Democrats May Never Control It Ever Again*, ThinkProgress, Nov. 7, 2018, https://thinkprogress.org/the-senate-is-so-rigged-that-democrats-may-never-control-it-ever-again-14ede9ac5f01/.
14. *See*, *e.g.*, Ronald Brownstein, *Small States Are Getting a Much Bigger Say in Who Gets on Supreme Court*, CNN, July 10, 2018 (noting that Democratic senators represented more than 40 million more Americans at the time of publication, but that Republicans hold a Senate majority), https://www.cnn.com/2018/07/10/politics/small-states-supreme-court/index.html.
15. Jessica Campisi & Brandon Griggs, *Of the 113 Supreme Court Justices in US History, All but 6 Have Been White Men*, CNN, Sept. 5, 2018, https://www.cnn.com/2018/07/09/politics/supreme-court-justice-minorities-trnd/index.html. Brett Kavanaugh was the 114th Justice.
16. *See supra* note 3. *See also*, from the horse's mouth, Republican National Committee, Republican Platform 2016, 22 (2016), *available at* https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf (wrongly stating that "the United Nations' Intergovernmental Panel on Climate Change is a political mechanism, not an unbiased scientific institution" and demanding its defunding); William C. Tucker, *Deceitful Tongues: Is Climate Denial a Crime?*, 39 Ecology L.Q. 831 (2012) (suggesting yes, and describing the history of the practice); Cale Jaffe, *Melting the Polarization Around Climate Change Politics*, 30 Geo. Envtl. L. Rev. 455 (2018) (concurring in the problem, but suggesting a coalition-building response).

Since 1994, unified Democratic control of both houses of Congress and the presidency has occurred only between 2008 and 2010—and even then, the filibuster rule in the Senate empowered the Republican minority at a time when H.R. 2454,[17] introduced by Reps. Henry Waxman (D-Cal.) and Ed Markey (D-Mass.), might have moved forward after passage in the U.S. House of Representatives. Although climate advocates have still had marked success in implementing the broad mandates of the CAA, it is not surprising that they have not succeeded in amending it with new tools commensurate with the climate crisis, despite increasingly broad public support for action.

Because climate change is an accelerating crisis, with each year of emissions worsening the problem,[18] the current configuration of power presents a crisis now, even if it is subject to change. Moreover, even were the current dynamic to change, the problem is more than a contingent one. Because climate change is a polycentric problem that affects many equities, addressing it through durable policy requires majority support—and the sorts of logrolling and interagency collaborations that legislation ultimately needs to foster at the federal level. A federal government unresponsive to the majority will not produce a just, equitable, and well-supported climate platform. It is, therefore, critical that climate law's major focus continue to expand from the implementation of environmental statutes to the defense and deepening of democracy.

II. The Court's Fractured Jurisprudence on Democracy

The Supreme Court is critical to this struggle. But its jurisprudence, though claiming to reinforce democratic norms, shows marked fractures that ultimately reinforce oligarchy rather than democracy.

On the one hand, the Court's conservative majority has displayed steadily greater skepticism of administrative agency actions, often while rooting its reasoning in the defense of democracy and the rule of law. The Court portrays itself as defending Congress' prerogatives against a dubiously constitutional administrative state. Thus, it reads administrative remedial climate actions skeptically, and appears ready to revive nondelegation doctrines that limit the scope and call for more searching scrutiny of agencies (perhaps especially those enacting environmental protections).[19] Here, the Court positions itself as defending popular sovereignty by hewing close to the intent of the democratically elected Congress.

But other strains of jurisprudence falsify this premise. The Court has acted to limit the responsiveness of Congress (and the government generally) to democratic control. Lines of cases that limit oversight of money in politics, ignore gerrymandering, and constrain federal ability to protect voting rights draw the government steadily further from the people it represents. These cases reinforce control by the ruling oligarchy. Yet, strikingly, the Court justifies these actions too in democracy-valorizing rhetoric, but with a twist: in these cases, the Court largely purports to limit *congressional* power as against the abstract liberties of citizens or the states, by striking down or limiting Congress' enactments. This abstract defense of "federalism" or individual liberty, however, comes at the cost of democratically responsive government (and so at the cost of real liberty).

These competing case lines are hard to reconcile within a theory of democratic sovereignty. To be sure, one might support enhancing congressional control over the bureaucracy *if* Congress reliably reflected the will of the people. But while Congress is indeed becoming more diverse and representative, it has far to go—and control of Congress remains firmly in the hands of the ruling minority. The Court's jurisprudence is reinforcing this control. When the Court purports to defer to the people, in the form of Congress and its duly enacted laws, it is not; it is deferring to power held by another oligarchic group.

As a result, climate lawyers are in a double bind. The Court limits administrative action even as it limits the chance of new statutory enactments on climate. Though the Court confirmed, by a 5-4 vote after hard-fought litigation, that the CAA covers GHGs,[20] it has also cut off federal common-law nuisance claims against major polluters[21] and barely countenanced the actual use of the CAA for GHG permitting.[22] It seems likely to limit further administrative actions as beyond the proper scope of statutory law. The Court paints itself as deferring to Congress (and hence upholding democratic norms), even as it limits the U.S. Environmental Protection Agency (EPA) from using existing authorities to implement policies that a popular majority of the country wants.

In its most recent consideration of GHG matters, *Utility Air Regulatory Group v. Environmental Protection Agency* (*UARG*) regarding EPA's permitting program for large sources, the Court declared that any truly sweeping solution (even if apparently required by statute) would raise questions because it would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[23] Instead, the Court "expect[ed] Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and politi-

17. H.R. 2454, 111th Cong. (2009).
18. *See generally Summary for Policymakers*, *in* Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty (Valérie Masson-Delmotte et al eds., Intergovernmental Panel on Climate Change 2018) (establishing that major emissions reductions are needed immediately to keep climate change within moderate levels), https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf.
19. Justice Kavanaugh has announced that he would join a majority on this issue. *See* Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., dissenting from denial of certiorari).
20. Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 37 ELR 20075 (2007).
21. Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 41 ELR 20210 (2011).
22. Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 573 U.S. 302, 44 ELR 20132 (2014).
23. *Id.* at 323-24.

cal significance."[24] But the Court is also strengthening the structures that render Congress unlikely to act to create new statutes.

Climate lawyers are fighting a holding action to maintain administrative rules against erosion. For now, this action has been successful: the Trump Administration has lost many environmental law cases because its decisions have failed minimal standards of rationality.[25] But affirmative climate litigation, rather than defense efforts, will not force durable federal change. Even a new president acting without new statutes will have to confront a conservative Court that will act as a potent check on administrative ambition. As GHG concentrations climb, this stalemate is untenable.

A. Cases and Rhetoric Limiting Congressional Power and Responsiveness

To broaden our view of this stalemate, we must look squarely at how law erodes under elite pressure. Elite institutions do not announce that they are eroding democratic accountability directly. Instead, they act *in the name* of democratic accountability. The Court tends to chip away at deep democracy while using the language of democracy as its rationale.

This rhetorical move repeats in many of the Court's recent actions limiting congressional power, nominally in the name of liberty. The *Citizens United v. Federal Election Commission* decision, which increased corporate influence in elections, is shot through with recognitions of how "political speech is 'indispensable to decision-making in democracy'" even if the speech "'comes from a corporation rather than an individual.'"[26] Likewise, as the Court eviscerated the Voting Rights Act in *Shelby County v. Holder*, it claimed to be protecting the "power, dignity, and authority" of the states.[27] The Court in *Rucho v. Common Cause* opted to deem any effort to arrest political gerrymandering a non-justiciable political question, while vesting its faith in the people consistent with what it deemed the "avenue for reform established by the Framers."[28] At each step, the Court restricts democratic functioning in the name of democratic principles and the abstract dignity of sovereign states.

In *Citizens United*, for instance, the Court explains that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others"[29]; it tells us we must protect the "open marketplace of ideas protected by the First Amendment."[30] It concludes that it would be wrong to "muffle the voices that best represent the most significant sections of the economy"—those of corporate mega-donors, as it surprisingly turns out.[31] The Court dismisses any danger of corruption, explaining without evidence that "[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy."[32] The reason for this, surprisingly, is that the willingness of corporations "to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials."[33]

The same rhetoric appears in *Common Cause*. After dismissing potential judicial standards to correct gerrymandering, the Court announces that democratic correction is available for real abuses despite the ways gerrymandering undermines democracy. It explains that the Court must not intrude into "one of the most intensely partisan aspects of American political life," because this would have an untoward "impact . . . on democratic principles" by injecting the "unelected and politically unaccountable" judiciary into these matters.[34]

Never mind that litigants had turned to the Court precisely *because* gerrymandering ensures such democratic correction is nearly unavailing. The Court still proclaims that all will be well because the people can take initiative measures, and perhaps secure laws to restrict gerrymandering.[35] In a bit of grim irony, the Court points particularly to H.R. 1, the Democratic House's democracy-protection bill, as prime evidence that the problem could be solved beyond the courts.[36] H.R. 1, however, has almost immediately foundered in the Senate—where the GOP majority holds sway.[37] That that majority is substantially maintained by corporate support authorized by *Citizens United* goes unmentioned.

The pattern repeats in *Shelby County*, which struck down the preclearance requirements of the Voting Rights Act. The warrant for that decision was that "the Framers of the [U.S.] Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections."[38] The "integrity, dignity, and residual sovereignty" of the states[39] was supposedly offended by the Voting Rights Act, which the Court viewed as "sharply depart[ing]" from these dignity-pro-

24. *Id.* at 324 (internal citations omitted).
25. *See, e.g.*, Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, Wash. Post, Mar. 19, 2019, https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html.
26. 558 U.S. 310, 349 (2010).
27. 570 U.S. 529, 544 (2013) (internal quotations, citations, and emphases omitted). Sometime earlier, the Court rather similarly relied on the dignity of the states to determine the states could not be sued by laborers for overtime violations because the states "retain the dignity" of their sovereignty. *See* Alden v. Maine, 527 U.S. 706, 715 (1999).
28. 139 S. Ct. 2484, 2508 (2019).
29. *Citizens United*, 559 U.S. at 349 (citations omitted).
30. *Id.* at 354.
31. *Id.*
32. *Id.* at 360.
33. *Id.*
34. Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).
35. *Id.* at 2507-08.
36. *Id.* at 2508.
37. *See* H.R. 1, 116th Cong. (2019), *available at* https://www.congress.gov/bill/116th-congress/house-bill/1/text.
38. Shelby County v. Holder, 570 U.S. 529, 543 (2013). The contrast with *Bush v. Gore*, 531 U.S. 98 (2000), in which the Court directly intervened into state election processes to shut down vote counting, is instructive when considering whether these decisions have discernible principles or are outcome-driven. The Court's Republican-appointed majority is not always consistent in its principles, especially when interference in a state's elections might swing the balance toward further consolidation of power.
39. *Id.*

tecting principles on the basis of insufficient evidence. The *concrete* interests of minority voters yielded to the high-flown abstract dignity of the states. Regardless of the abstract rhetoric of the decision, a wave of real voting restrictions followed shortly thereafter.[40]

The Court thus points to the people and their supposed democratic power even as it takes concrete steps that limit that power. Over the same period, however, it has developed separate case lines that, while also limiting popular control of government, are at least more candid about the Court's disdain for democratic control—at least, by any means other than the elections that the Court has failed to police.

Alden v. Maine, one of a series of cases extending sovereign immunity broadly to the states, perhaps shows this view in its starkest light. Confronted with a suit against Maine by police officers seeking overtime due them, the Court had to decide whether to extend immunity under the Eleventh Amendment, which does not by its terms protect states from suits by their own citizens. Justice Anthony Kennedy, writing for the Court, blew past this restriction, explaining that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."[41] Instead, that immunity arises from a quasi-contract theory. The idea is that the states were once "sovereigns" who have contracted to enter the Constitution, and that at the time of this contract, would not have understood themselves to be surrendering sovereign immunity—and therefore have not done so.[42] Maintaining this immunity is essential to the "sovereign dignity" of the states.[43]

This rationale is offered as a natural outgrowth of a theory of sovereignty linked not to the people but to the "Crown[s]" of absolute monarchs.[44] Quoting Justice William Blackstone, the Court explains that "the law ascribes to the king the attribute of sovereignty," and the king cannot be sued without his consent.[45] One might wonder why kings have showed up in our democracy; the Court explains that "although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified."[46]

The Constitution thus is transformed into a compact between states, rather than an instrument ensuring the people can control both state and federal governments. Might the overworked police officers' interests in *Alden*, say, merit a share of concern? Apparently not. Here, wholly divorced from the Court's invocations of democratic control in other instances, we find government by dignified rule by the elite, rather than pluralistic democracy. Nor is this rhetoric an artifact; in a recent case further extending sovereign immunity, the Court again explained that its doctrines arise from bars on suits "against the king" and that the states must not be "humiliate[ed] and degrad[ed]," as if they were individual people, by being hailed before courts of law.[47]

When the Court is attending to the sensitivities of the states in their guise as latter-day monarchs, the people do not benefit. Moreover, the rhetoric of state or federal dignity masks the real historical struggle for *personal* dignity in a democracy that should drive our questions of when the people may be heard against the state. Both state and federal sovereigns have, after all, not granted civil rights or personal integrity to non-white men for most of their histories, and so have not acted with the democratic legitimacy that springs from the full people's consent.

Before considering the sovereign dignity of, say, California, consider this representative incident from the formation of the state during a Native genocide.[48] On the north coast of California, Sally Bell, a member of the Sinkyone nation, reported:

> They killed my grandfather, and my mother and my father. I saw them do it. I was a big girl at that time. Then they killed my baby sister and cut her heart out and threw it in the bush where I ran and hid. My little sister was a baby, just crawling around. I didn't know what to do. I was so scared that I guess I just hid there a long time with my little sister's heart in my hands.[49]

Before upholding the abstract dignity of the sovereign over the real interests of the people, think of Bell waiting with her sister's body.

The Court instead remains in the realm of abstraction, hesitating to disturb the sovereign dignity of the states. It valorizes democracy while limiting access *to democracy*—reinforcing an elite rule more familiar in monarchies than in democracies. The result, repeatedly, is to construct an ahistorical and limited conception of liberty. The Court locates citizen control of government primarily in congressional elections, rather than in participation in litigation or in agency regulatory processes. Agencies, too, are subordinated to Congress, with steadily less deference granted to them. Meanwhile, Congress finds itself less able to act. And, critically, elections themselves become far less open to deliberative democracy.

These conditions render climate politics brittle and slow. Federal agency actions are unstable, and rarely capable of the sort of packaging and logrolling necessary to achieve broad political consensus. Meanwhile, the Supreme Court continues to limit federal agency power,

40. *See*, *e.g.*, National Association for the Advancement of Colored People Legal Defense Fund, Democracy Diminished: State and Local Threats to Voting Post-*Shelby County, Alabama v. Holder* (2018), https://www.naacpldf.org/wp-content/uploads/Statess-responses-post-Shelby-08.14.18-3.pdf.
41. Alden v. Maine, 527 U.S. 706, 713 (1999).
42. *Id.* at 713-15.
43. *Id.* at 715.
44. *See id.*
45. *Id.*
46. *Id.* at 715-16.
47. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1493-95 (2019) (internal quotations and citations omitted).
48. Jill Cowan, *"It's Called Genocide": Newsom Apologizes to the State's Native Americans*, N.Y. Times, June 19, 2019.
49. The Way We Lived: California Indian Stories, Songs & Reminiscences 166 (Malcolm Margolin ed., 1993).

claiming that Congress is best positioned to sort out these matters even as it simultaneously limits Congress' own democratic responsiveness.

This inaction is a crisis for the climate. And it is a crisis, too, for the Court, which earns its legitimacy in our democracy not from the pedigrees of its members,[50] but by its actions protecting that democracy under law; if it fails to do so, it fails its central obligation.

B. *Limits on Agency Power in the Name of Democracy*

The situation is worsened by the Court's other major strain of jurisprudence, which is steadily stripping away agency power, again in the name of democracy. Practitioners will be amply familiar with the Court's increasingly close scrutiny of agency action here, so a few recent examples suffice to illustrate.

In *Kisor v. Wilkie*, for instance, the Court considered whether to maintain *Auer* deference, under which courts defer to agencies' own interpretations of their ambiguous regulations.[51] Though Justice Elena Kagan wrote for a plurality that narrowly preserved the doctrine (albeit within a vitiating set of constraints on its use), the Chief Justice concurred only in part, and Justice Gorsuch offered a long dissent that seems likely to be a future majority opinion.[52] Justice Gorsuch's objection, generally speaking, is that apolitical actors—courts—are better suited than the agencies themselves to read and interpret substantive rules, and that affording the agencies some deference impairs separation-of-powers principles.[53]

Justice Gorsuch goes on to suggest that there may be even stronger concerns with the related *Chevron* deference doctrine, under which courts defer to agency interpretations of ambiguous *statutes*. This is all well and good—if one supposes that Congress can swiftly step in to address the results of a judicial decision that departs in ways that Congress did not anticipate from either a regulatory or a statutory scheme otherwise entrusted to the executive. But can Congress, and will congressional action reflect oligarchy or popular will?

This question does not appear to concern the Court's conservative wing in another recent decision, *Gundy v. United States*, where Justice Kagan declined to re-animate the long-moribund nondelegation doctrine.[54] That doctrine, advanced by the anti-New-Deal Court of the early 20th century, barred Congress from delegating its powers to the executive and was applied to stop agency action; it has been moribund for nearly nine decades. Instead, agencies are generally deemed to act properly so long as there is an "intelligible principle" in a statute for them to apply.

Nonetheless, all five GOP-appointed Justices appear ready to revitalize this doctrine.[55] Again, the rationale is rooted in a supposed concern for the democratic powers of Congress. As Justice Gorsuch propounds, in a dissenting opinion filled with citations of the *Federalist* papers, "[t]he Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty."[56] Accordingly, the conservative members of the Court would, as they put it, "respect[ ] the people's sovereign choice to vest the legislative power in Congress alone" to protect "liberties, minority rights, fair notice, and the rule of law."[57]

A larger universe of other cases regarding access to the courts and the scope of judicial review support this trend eroding democratic accountability: thematically, cases regarding, for instance, sovereign immunity,[58] limitations on class actions,[59] and standing[60] have further limited direct challenge to government priorities. Citizens find it difficult to activate agency action, and agency action itself is constrained—with that restraint rhetorically defended with appeals to the prerogatives of Congress.

Although Congress can perhaps be clear about its current intent, the voice of Congress these days has been systematically distorted by the decisions discussed above. Whomever Congress is speaking for, it is not the majority of the country that is demanding climate action. Thus, we come to the crux of the problem: the Court, in one set of rulings, is limiting popular control of government in the name of democracy, and in another set of rulings also in the name of democracy, is insisting that administrative agencies may not exceed the will of Congress, even as Congress becomes ever more untethered from the majority of the electorate. As Justice Kagan in the gerrymandering case put it, regarding this creeping divorce between public and Congress, "someplace along this road, 'we the people' become sovereign no longer."[61]

III. Dignity Through Accountability

A coherent theory of democratic accountability, and of the responsibility of democratic sovereigns, should begin with the people. James Madison puts this point in *Federalist* No. 45, writing:

> It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object.[62]

50. Far from it; the Court's legitimacy in the eyes of Americans is at a low ebb. *See*, *e.g.*, Dahlia Lithwick, *Why I Haven't Gone Back to SCOTUS Since Kavanaugh*, Slate, Oct. 30, 2019, https://slate.com/news-and-politics/2019/10/year-after-kavanaugh-cant-go-back-to-scotus.html. Women, the majority of Americans, face a Court that not only is overwhelmingly male, but contains two men credibly accused of sexual assault who are in a position to adjudicate women's rights to participate fully in our democratic society.
51. 139 S. Ct. 2400, 49 ELR 20113 (2019).
52. *Id.* at 2425 et seq. (Gorsuch, J., dissenting).
53. *Id.*
54. *See* Gundy v. United States, 139 S. Ct. 2116 (2019).
55. *See also supra* note 19.
56. *Id.* at 2131.
57. *Id.* at 2135.
58. *See*, *e.g.*, Alden v. Maine, 527 U.S. 706, 715 (1999).
59. *See*, *e.g.*, Wal-Mart v. Dukes, 564 U.S. 338 (2011).
60. *See*, *e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 22 ELR 20913 (1992).
61. Rucho v. Common Cause, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting).
62. The Federalist No. 45 (James Madison).

The puzzle we are trying to solve as we pursue democratic governance is, to borrow from Karl Popper, "[h]ow can we so organize political institutions that bad or incompetent rulers can be prevented from doing too much damage?"[63]

This sort of question helps us focus on whether the Court's jurisprudence is actually limiting harm to the people. It also helps us to separate questions about the *effects* of power structures from those that ask abstractly, and unhelpfully, about the abstract dignity of institutions. If we focus our questions around structuring power and its effects, we can avoid the sorts of confusions that the Court has been subject to when it privileged the dignity of states over the interests of actual human beings. We need not determine whether, say, the "dignity" of southern states (which their bloody history does not support) in *Shelby County* warrants stripping away voting protections. We can instead ask whether legal rulings yielding such results actually support democratic governance and the public good.

Democratic law, arising from consent, derives its legitimacy from the continued consent of the governed.[64] As Hannah Arendt writes, "Power is never the property of an individual; it belongs to a group and remains in existence only so long as the group keeps together."[65] Thus, we are charged with rooting our law in democratic consent by all the people. As Popper puts it, the proper focus falls upon how to reinforce the "various equalitarian methods of democratic control, such as general elections and representative government."[66]

Climate advocates can find a theory of judicial review consistent with this fundamental focus on democratic control in John Hart Ely's classic *Democracy and Distrust*.[67] In that work, Ely focused on courts not as guarantors of sovereign dignity, but as guarantors of democratic rule. This approach would begin to correct the Court's errors by helping to bring the structure of government back into sync with the popular will—which, in turn, would help to protect democratic government against the stresses of climate change.

We need a jurisprudence that reinforces the rights of politically disadvantaged minorities and strengthens democratic accountability. Ely's theory, based upon the *United States v. Carolene Products* footnote four analysis,[68] focuses judicial review on impediments to democratic control. His core insight is that while courts, as inherently anti-majoritarian institutions, need to be chary about altering democratic policy decisions, their distance from democratic control renders them well-suited to repair democratic deficits.

As Ely put it, a proper theory for judicial review arises from a "representation-reinforcing orientation."[69] Such a view seeks to be "supportive of[ ] the American system of representative democracy,"[70] and "recogniz[ing] the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values than elected representatives, [it devotes itself] instead to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent."[71] Judges are viewed as acting properly, at least in the context of constitutional law, when they focus not upon questioning democratically settled policy judgments, but when they ensure the system of producing these judgments functions properly.

Carolene Products footnote four sounds in the same measure. In that case, the Court offered its view that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" might warrant enhanced judicial scrutiny.[72] The opinion offered the examples of restrictions on the right to vote, on information flow, on political organizations, and on the right to assemble.[73] Legislation designed to "prejudice discrete and insular minorities," including racial and religious minorities, also fell within this zone of concern.[74] In the absence of such concerns, courts were to presume a rational basis existed for legislative judgments.[75]

Under this view, courts are to concern themselves primarily with the reality of the democratic process, but intervene when the process itself appears to be departing from public control. As Ely puts it:

> The pursuit of these "participational" goals of broadened access to the processes and bounty of representational government, as opposed to the more traditional and academically and popular insistence upon the provision of series of particular substantive goods or values deemed fundamental, was what marked the work of the Warren Court.[76]

This approach is also consistent with the procedural focus Popper suggests is proper as a way of assessing and strengthening democratic role; it makes the Court not a referee, nor a tyrant, but a mechanic—able to reach hard-to-access portions of our system and ensure they are working well.

IV. Examples of a Democracy-Focused Climate Jurisprudence

A participation-reinforcing climate jurisprudence would look quite different from the Court's current approach. At a minimum, one would expect opinions that reinforce

63. Karl Popper, The Open Society and Its Enemies 115 (1945).
64. Hannah Arendt, On Violence 40 (1970).
65. *Id.* at 44.
66. *Id.* at 119.
67. *See generally* John Hart Ely, Democracy and Distrust (1980).
68. 304 U.S. 144, 152 n.4 (1938).
69. Ely, *supra* note 67, at 101-02.
70. *Id.*
71. *Id.* For a recent, illuminating, debate testing the limits of how courts should act on climate in the face of government inaction, *compare Juliana v. United States*, No. 17-36082, slip op. at 29-32 (9th Cir. 2020) (majority stating that arguments for climate action beyond existing statute must be addressed by "political branches or to the electorate at large," not the courts), *with* slip. op. at 43 (Judge Staton, dissenting) ("[T]elling plaintiffs that they must vindicate their right to a habitable United States through the political branches will rightfully be perceived as telling them they have no recourse."). Judicial actions that render the democratic branches more capable of acting on climate change consistent with popular will may be one way to address concerns raised by both the majority and the dissent.
72. *Carolene Prods. Co.*, 304 U.S. at 152 n.4.
73. *Id.*
74. *Id.*
75. *Id.* at 152.
76. Ely, *supra* note 67, at 74.

democratic accountability within Congress. The opinions I have discussed as reinforcing oligarchy would likely have come out the other way.

I draw out two further sets of implications as exemplars, still hewing closely to the mainstream of administrative law—though questions of democracy in the law obviously extend more broadly. First, I discuss how cases addressing constraints on democratic policy choices in the states might come out, attending to a frequently invoked objection to state policy—the DCC. Second, I consider what this sort of analysis could mean for agency deference doctrines.

A. DCC Cases

Climate advocates should care about restraints on the states because the states have, historically, been where much of climate policy is decided. State and local governments make the primary decisions on electricity generation siting, on industrial policy, and on transportation and urban planning, and so control the sources of the majority of GHG emissions. To be sure, federal policy frames these choices and can constrain them, but the vast sweep of state police power means that the federal influence is necessarily limited.

The DCC jurisprudence considering attacks on state prerogatives provides a good analytic set of examples. The concept behind the DCC is that Congress alone can regulate *interstate* commerce; by implication, states are deemed constitutionally prohibited from doing so—at the least to the extent that they impose undue burdens, regulate in protectionist ways, or impermissibly regulate conduct beyond their borders.[77] The DCC bears a striking resemblance to the *Lochner*-era cases in which the Court also found itself enforcing an economic principle it claimed to discover in the Constitution (there freedom of contract). In both lines, the Court has found the doctrine so embedded in the Constitution as to be worthy of striking down democratically enacted policies. Justice Gorsuch has skeptically described the DCC as "embodying a sort of judicial free trade policy," noting that "[d]etractors find dormant commerce clause doctrine absent from the Constitution's text and incompatible with its structure."[78]

The results of this judicial free trade policy include continued uncertainty for state climate policy. For instance, in California and Oregon, low-carbon fuel standard (LCFS) programs have repeatedly been litigated. These programs work by mandating a life-cycle decrease in the total emissions of fuels—of their "carbon intensity."[79] Because the fuel production system extends far beyond the boundaries of a particular state, LCFS programs may have the incidental effect of changing incentives for fuel producers in many places, to the extent these producers wish to sell fuels within LCFS states. Producers who perceived themselves to be disadvantaged by these programs litigated repeatedly on DCC theories. The litigation took nearly a decade and very considerable resources, likely slowing the adoption of LCFS programs in other places.

The courts in those cases instead adopted a democracy-focused view that preserved the programs. In the challenge to the California standard, the U.S. Court of Appeals for the Ninth Circuit explained that there is real value for a state to, "if its citizens choose, serve as a laboratory" for policy, and that such experiments "may often be adopted by other states without Balkanizing the national market."[80] Actuated by its view that California "should be encouraged to continue and to expand its efforts" to combat climate change to protect "California residents and people worldwide from great harm," and after a thorough review of the record, the court upheld the LCFS,[81] as did later panels focusing on other aspects of the California rule and on the Oregon rule.[82] The court showed solicitude for the "California legislature,"[83] emphasizing that policy decisions of this sort were for the people, and not a "question for the courts."[84]

This same solicitude appears in then-Circuit Judge Gorsuch's reasoning on a somewhat similar challenge to Colorado's renewable portfolio standard. Although petitioners argued that the standard could impermissibly affect prices of power in other states, Judge Gorsuch dismissed this point, explaining that "[i]n today's interconnected national marketplace such a suggestion would be beyond naive."[85] In the absence of any clear per se discrimination, or of any truly extraterritorial regulation, the U.S. Court of Appeals for the Tenth Circuit declined to take up a "novel lawmaking project" that would begin to substitute judicial economic intuitions for democratically decided state policies.[86]

But not all state policies have resulted in this happy conclusion. Minnesota found its efforts to limit the carbon content of power used in the state struck down by a divided U.S. Court of Appeals for the Eighth Circuit panel.[87] Although there was not a shared rationale among the judges, one found that the DCC barred effects on the out-of-state electricity market for electricity.[88] Maryland encountered similar difficulties in a non-environmental context in its efforts to prevent price gouging on pharmaceutical drugs, with the U.S. Court of Appeals for the Fourth Circuit striking down the Maryland rule on the ground that it impermissibly interfered with economic activity in other states.[89]

The Supreme Court too recently affirmed—over the dissent of Justices Gorsuch and Clarence Thomas—that

77. See, e.g., the discussion of the doctrine in *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 43 ELR 20216 (9th Cir. 2013), and other cases discussed in this section.
78. Energy & Envtl. Legal Inst. v. Epel, 793 F.2d 1169, 45 ELR 20134 (10th Cir. 2015).
79. *See Corey*, 730 F.3d 1070.
80. *Id.*
81. *Id.* at 1107.
82. *See* Rocky Mountain Famers Union v. Corey, 913 F.3d 940, 49 ELR 20010 (9th Cir. 2019); Am. Fuel & Petrochemical Mfrs. v. O'Keefe, 903 F.3d 903, 48 ELR 20158 (9th Cir. 2018).
83. See cases cited *supra* notes 77-78 and 82, and *Corey*, 730 F.3d at 1105.
84. *Corey*, 730 F.3d at 1105.
85. Energy & Envtl. Legal Inst. v. Epel, 793 F.2d 1169, 1173, 45 ELR 20134 (10th Cir. 2015).
86. *Id.* at 1175.
87. North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2016).
88. *Id.* at 920-22.
89. Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664 (4th Cir. 2018).

an anti-protectionist policy was "deeply rooted" in the case law, striking down a Tennessee liquor licensing law on DCC grounds.[90] The dissent protested that though courts may be "sorely tempted to 'rationalize' the law and impose our own free-trade rules," the better course was for judges to respect "democratic compromises."[91] Thus far, the remainder of the Supreme Court has not been persuaded, and so judicial enforcement of commerce policy (narrowly construed) continues to exist as a potentially potent check on democratic decisionmaking.

A better approach here would be to focus on the democratically decided purposes of state government. Though there may be some judicial role in enforcing the outer bounds of the supposed reach of the Commerce Clause, the focus should be upon a realistic appreciation of the problems the states are trying to solve democratically. As the Ninth Circuit wrote, the DCC is not a "blindfold. It does not invalidate . . . state laws or regulations that incorporate state boundaries for good and non-discriminatory reason. It does not require that reality be ignored in lawmaking."[92] As that court reminds us, consistent with *Federalist* No. 45, the Constitution is not a "suicide pact" whose "archaic formalism" should be used to "prevent action against a new type of harm."[93] Respecting democratically decided outcomes, rather than reinforcing abstract appeals to federalism, produces results more consistent with the will of the people.

B. Agency Deference Doctrines

A second example concerns the judicial assault on deference to administrative agencies. Deference doctrine, solidified by Justice John Paul Stevens in the *Chevron* case,[94] is rooted in sensible democratic intuitions. Congress has opted not to unduly bureaucratize itself, as would be necessary to write sufficiently complex regulatory statutes. Instead, it has adopted principles for agencies to enforce and elucidate. Thus the will of the people in Congress is implemented by agency heads, themselves appointed by a democratically elected president, with deviations from this will subject to correction by election and by new legislation. Agencies are to be constrained to rationality by the precepts set forth in the Administrative Procedure Act.

In an echo of the *Democracy and Distrust* framework for statutory review, courts traditionally step in to ensure that this process is working (with rules grounded in the statute and in the record to an acceptable degree), but avoid imposing their own policy judgments. Judicial deference to agency judgments in cases of ambiguous statutes or unclear technical problems, on this account, is sensible; judges are not experts in technical matters and other means of democratic control exist to constrain agencies so long as they are operating within a basically rational framework.

As suggested above, the Court has begun to chip away at these principles. In *Kisor*, only a bare majority upheld the milder deference principle that courts should defer to agencies when the agencies are interpreting latent ambiguities in their own regulations.[95] The vigorous dissenters in that case raised questions about whether unelected agencies should receive any such deference, and hinted that *Chevron*, too, was in the crosshairs. They wrote that judges should be saying what the law is, and that this new formulation is more democratic because it buttresses the authority of Congress. Congress makes the laws, these new radicals point out, and so it must be held strictly to account for them by the courts; should agencies diverge from congressional direction, they too must be held to account.

Their opprobrium is reserved for agencies that appear to be acting to solve large problems—"major questions" is the emerging term—without specific congressional direction, as the Court has expressed in *Gundy* and in *UARG*, discussed above. On this view, courts act to protect Congress by ensuring that its agents can do nothing sweeping without its explicit direction, as mediated by the courts. On critical climate questions, this is a recipe for stasis, worsened by the increasingly unrepresentative nature of Congress. As climate change deepens, for instance, the Court has shown steadily greater discomfort with EPA action under the CAA—even though the Act explicitly was intended to sweep broadly and to solve a wide array of air quality problems. Statutes written in the Great Society era and intended to last, investing broad authorities in executive agencies, founder on the Court's new view.

This erosion is particularly galling because these statutes continue to reflect the will of the majority of the country. The public overwhelmingly supports environmental action, but has been unable to get this Congress to act, in part because of the impacts of the Court's anti-democratic decisions. Though it might be better to have a modern congressional solution, the next-best outcome is to ensure that statutes passed by past Congresses are implemented to their full remedial breadth. Instead, we find the Court unwilling to allow agencies to follow past Congresses' direction where it leads, even as the Court also makes it steadily less likely that the current Congress will act.

C. Drawing From These Examples

A real concern with protecting democratically determined policy choices would generally support limited (at best) application of judge-made constitutional law that constrains those choices, as in the DCC cases. It would also argue strongly for agency deference when agencies are acting rationally within the control of democratically enacted statutes.

There will always be state actions worthy of review and agency actions that need some correction, but such matters are most appropriate within the context of a well-function-

90. Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).
91. *Id.*
92. *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1107, 43 ELR 20216 (9th Cir. 2013).
93. *Id.*
94. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 14 ELR 20507 (1984).
95. See discussion of *Kisor*, *supra* notes 51-53 and accompanying text.

ing democracy overseen by a vigorous Congress. Instead, we see the unelected Court vitiating Congress' connection to the people, while also eroding the ability of other power centers closer to the people. The least democratic branch ought to cease doing violence to the more democratic branches in the name of democracy.

V. Conclusions

Authoritarians of all stripes have found it easier to take power by adopting the rhetoric of freedom than by challenging it directly. Their goal, as Popper wrote, is "to take advantage of sentiments, not wasting one's energies in futile efforts to destroy them."[96] In the name of abstract freedom, we find our real freedom—freedom to enjoy our lives and to enjoy a future not increasingly darkened by climate change—is being eroded. If the courts are to be legitimate in a democracy, and play a role in protecting it as climate stresses worsen, they must serve the interests of democracy by reinforcing it.

A democracy-supporting jurisprudence encourages democratic participation, supports meaningful public power—especially for politically disadvantaged minorities and for the public at large as against narrow oligarchic interests—and seeks to avoid or correct partisan capture of democratic processes. Such a jurisprudence creates a chance for climate action by allowing all interests to be heard, and for the strong public will for action to be implemented equitably.

We need to care for democracy as we fight the climate crisis, not only because it is both just and necessary, but because it is urgent. Already, climate change is disrupting life around the world and great human migrations are beginning—whether of refugees from hurricanes on the Gulf Coast and fires in California, or of displaced families from Africa, Latin America, and the Middle East as disruptions worsen.[97] We have seen how authoritarians respond: taking children from parents and raising a wall at the border. Thus far, the Court has shown itself ready to accept such executive abuses.[98]

Advocates fighting climate change need to be ready to counter these trends and fight for those who are harmed. They need to be ready to welcome refugees, fight efforts to retreat behind walls, to insist on justice. They need to be concerned with climate change as a crisis of democracy. We need to do our work with an eye to the full scope of the crisis, and recognize that solutions must be interlocking and collectively supportive of human rights and democratic governance.

Climate advocates should honor all those who have survived this long crisis already, learning from strategies of resistance that have helped communities survive apocalypse after apocalypse during the construction of the modern world that climate change now acutely threatens. After all, though climate change is a novel crisis, the ecological crisis—and its roots in oppression—is not new. Those who survived slavery and its long aftermath, like those who survived the 500-year conquest of the Americas and the immense ecological and social disruption attendant to it, have much to teach about community survival.[99] Existential threats have already marked our history; we should learn from those who emerged from them with grace and liberty, strengthening our collective democracy.[100]

Ultimately, of course, the courts alone will not save us. But the courts can help society get closer to climate justice by maintaining the links between the people and their government, while recognizing the history of oppression and struggle that underlies our fragile democracy. Advocates can do the same, working to ensure that our democracy is as vibrant as it needs to be to address the challenges we face.

The decisions, ultimately, are, and must be, for the people themselves. Those decisions become ever sharper as the crisis worsens. If we are to make them, we will need to stop paying lip service to democracy, or hiding behind abstract appeals to sovereign "dignity" and instead ask how the sovereign and its law can be worthy of the people—*all* the people—who must decide our collective future.

96. Popper, *supra* note 63, at 268.

97. *See*, *e.g.*, Adam Wernick, *Climate Change Is the Overlooked Driver of Central American Migration*, Pub. Radio Int'l, Feb. 6, 2019, https://www.pri.org/stories/2019-02-06/climate-change-overlooked-driver-central-american-migration.

98. *See*, *e.g.*, Trump v. Sierra Club, 588 U.S. __, 49 ELR 20131 (2019) (allowing border wall construction to continue); Trump v. Hawaii, 585 U.S. __ (2018) (upholding Trump's Muslim ban).

99. *See*, *e.g.*, Mary Annaïse Heglar, *Climate Change Ain't the First Existential Threat*, Medium, Feb, 8, 2019, https://medium.com/s/story/sorry-yall-but-climate-change-ain-t-the-first-existential-threat-b3c999267aa0; Morgan Hepler & Elizabeth Ann Kronk Warner, *Learning From Tribal Innovations: Lessons in Climate Change Adaptation*, 49 ELR 11130 (Dec. 2019).

100. *See*, *e.g.*, Dina Gilio-Whitaker, As Long as Grass Grows: The Indigenous Fight for Environmental Justice From Colonization to Standing Rock 49 (2019) ("To be a person of direct Indigenous descent in the US today is to have survived a genocide of cataclysmic proportions. Some Native people have described the experience of living in today's world as postapocalyptic.").