INTERNATIONAL CONSENSUS AND U.S. CLIMATE CHANGE LITIGATION

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INTRODUCTION: DOMESTIC LITIGATION ON A GLOBAL ISSUE

Increasing recognition of global interdependence and the global nature of several major issue areas has sparked sharp debate over the role of international and foreign law in U.S. courts. The debate reached a boiling point with several recent U.S. Supreme Court opinions, as abundant commentary attests. The major task for scholars in this context is to distill the value that can be extracted for both the U.S. legal system and the international regimes from greater cognizance of international legal sources by U.S. judges, as well as identifying the form that such cognizance should take.

Transnational questions are arising in many issue areas and often cross-cut among them. Human rights questions have been most prominent in focusing domestic judicial attention on international regimes. The questions raised cut across the domestic constitutional, criminal and procedural landscapes. Other major areas include financial regulation, response to terrorism, and environmental protection.

In the last of these areas, one particular issue has commanded more global attention than perhaps any environmental problem in history: climate change. At the same time, the U.S. political branches have utterly failed to respond to the threat in anything approaching an effective and unified manner. Largely because of this failure, climate change has steadily made its way onto the federal court docket as an issue to be reckoned with.

Climate change is clearly a *global* problem, affecting a global public good.[1] The causes and effects plainly transcend national boundaries.[2] As is widely recognized, a solution to climate change must also be global in the sense that any successful effort to avert the negative impacts of climate change on natural, socio-political and economic systems will require global coordination.[3] Despite the absence of significant federal law on climate change, U.S. courts addressing climate change issues have given scant attention to the burgeoning international regime.

International efforts to address climate change have played a major role in shaping domestic perceptions and reactions to the issue. For example, the scientific case for climate change was advanced most prominently at the international level through the Intergovernmental Panel on Climate Change ("IPCC"),[4] which U.S. reports and legislation have since relied on. Based on international negotiations and the reception of scientific evidence by the international community, an international consensus has emerged

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[1] *E.g.,* Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1554 (2006) ("[I]n recent decades a series of inescapably international problems have emerged, including climate change, thinning of the Earth's protective ozone layer, loss of biodiversity, and depletion of fisheries in the world's oceans.").

[2] *E.g.,* Michelle M. Betsill, *Global Climate Change Policy: Making Progress or Spinning Wheels?*, *in* THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY 103, 103 (Regina S. Axelrod et. al eds., 2005).

[3] *E.g.,* Esty, *supra* note 1, at 1500-01.

> Some international externalities are best understood as a function of the workings of the natural world rather than policy choices. Certain environmental problems, such as climate change, are inescapably global. Absent policy cooperation at the international scale, these 'super-externalities' will result in market failures, economic inefficiency, and social welfare loss, not to mention environmental degradation. Similarly, without international policy cooperation, shared resources such as the oceans and their fisheries will be overexploited and global public goods (such as public health and environmental protection programs) will be underproduced.

Id. See also Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1962 (2007) (arguing that global coordination is necessary and local or state-level action can only have limited value). *But see* Hari M. Osofsky, *Is Climate Change 'International'? Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. (forthcoming 2008). In any event, climate change is plainly contributing to the globalization of environmental issues and legal responses.

[4] *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2007: SYNTHESIS REPORT (2007) [hereinafter Fourth Assessment Report] (describing observations of climate change and their effects, assessment of the causes, and projections of future changes based on different scenarios).

concerning both the threat posed by climate change and the need to take regulatory action aimed at controlling it.[5]

Since at least 2001, however, the U.S. federal government failed to keep pace with emerging legal principles by rejecting the Kyoto Protocol, failing to adopt any significant domestic regulation of greenhouse gases, and avoiding leadership on, if not impeding, ongoing international negotiations.[6] Municipalities, states, and multi-state regional entities within the United States have worked to fill this void.[7] Thus, the United States' approach to climate change is unusual among environmental problems in that lawmaking is occurring above and below the national government, at the international and the sub-national levels, but no significant federal climate change policy exists.[8]

At the same time, federal litigation on issues of climate change has become a major feature of the push to increase U.S. action toward a solution.[9] These cases raise novel questions of domestic law and rely upon acceptance of scientific understanding of the complex mechanisms and likely impacts of climate change. Recently, a number of federal court opinions recognized climate change as a major environmental threat requiring governmental attention. Several cases, most prominently *Massachusetts v. EPA*, require federal agencies to directly confront evidence of climate change and the need for regulation.[10] Other decisions require agencies to consider climate change effects in planning and decision-making, or uphold state action on climate change in the face of challenges. Although most U.S. climate change cases do not explicitly

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[5] *See id.* at 62; *see also* Asheline Appleton et al., *Summary of the Thirteenth Conference of the Parties to the UN Framework Convention on Climate Change and the Third Meeting of the Parties to the Kyoto Protocol: 3-15 December 2007*, Earth Negotiations Bulletin, Dec. 18, 2007, at 1, [hereinafter ENB Summary] *available at* http://www.iisd.ca/download/pdf/enb12354e.pdf (discussing the December 2007 negotiations in Bali).

[6] *See* ENB Summary, *supra* note 5, at 19 (discussing efforts to re-engage the United States in negotiations).

[7] Notably, some of these efforts borrow directly from the international climate change regime. *See infra* notes 43-46 and accompanying text.

[8] This article maintains that climate change norms have been established primarily at the international level, but depend upon national and sub-national government implementation. This arrangement requires international norms to enter into domestic legal systems. In the absence of national action by the political branches, federal courts are beginning to take the lead on judicial internalization of climate change in the United States. *See* discussion *infra* Parts IV & V.

[9] Hari M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, 43A STAN. J. INT'L L. 181, 182-83 (2007).

[10] 127 S. Ct. 1438, 1438 (2007).

employ international law they are nonetheless informed by it and contribute to it in an indirect way.

The Supreme Court's opinion in *Massachusetts v. EPA* contributes significantly to the legal status of climate change in the United States. It also set the parameters for the domestic climate change cases that have followed in its wake. I suggest that the case can be understood as responding to international consensus on the issue.[11] International law plays no formal role in the case, but international norms are implicitly reflected in the *Massachusetts* majority's opinion and may grow more explicit in the reasoning of future cases. The context of the case is so thick with global significance that one must acknowledge at least an indirect relationship between the case and the international norms bearing on climate change.

The question whether international norms should play a role in domestic climate change cases falls within a broader context of scholarship examining the proper role of international or foreign legal sources in domestic U.S. litigation more generally. Much of the hotly contested debate addresses human rights norms and constitutional protections because that is where incorporation of external sources is most prominent.

Environmental issues, particularly those of global importance, present an equally appropriate and relatively unexplored forum for contributing to the dialogue. Indeed, on questions of climate change, the global community is inexorably linked, law is developing in multiple fora simultaneously, and many arguments raised against U.S. judicial use of foreign sources for constitutional interpretation have no force.

Accordingly, this Article has two principle aims. First, situating a positive assessment of the extent to which U.S. courts have invoked international environmental law, particularly in the recent wave of climate change litigation, within the context of the U.S. Supreme Court's invocation of foreign and international human rights sources. Second, advancing a normative argument employing international environmental law in domestic climate change cases, including an examination of the legitimacy and value of looking to the international regime to understand how climate change should affect interpretation of U.S. domestic law.[12]

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[11] *See infra* Part IV.B.1.

[12] Melissa Waters notes that much of the debate over the use of foreign and international sources adopts a "wide lens" approach that conflates the different types of sources. She advocates "a narrow lens approach [that] focuses on one particular source of legal authority and explores the range of specific techniques that enable courts to utilize that

Part I of this Article documents the growth of international environmental law by highlighting its normativity, the United States' role in its creation, and the relevance of international environmental norms for sub-national action in the United States. Part II discusses transnational legal developments, including the constitutional and historical relevance of transnationalism for U.S. courts. Part III highlights recent human rights cases in which the U.S. Supreme Court has referred to foreign or international legal sources and moderate theories of how these sources could be more fruitfully used in that context. Part IV provides a primer on the courts' interactions with international environmental law, then analyzes the role of international norms in recent U.S. climate change litigation. Part V presents my argument for greater use of international sources in climate change cases. Specifically, I demonstrate the legitimacy of such practice, identify the relevant norms, establish advantages for the United States both at home and abroad, and detail how specific international norms can be valuable in deciding cases.

In essence, I conclude that explicitly analyzing international climate change norms in domestic climate change cases would increase uniformity and clarity of the basis for judicial consideration of climate change issues and legal responses, enhance the international standing and influence of the United States, and foster the development of more effective international and foreign climate regimes.[13] Increased judicial use of the international regime should not replace domestic bases for decisions, but can inform them.

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source in interpreting domestic law." Melissa Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 632 (2007). This article examines only the climate change context and looks primarily at the value of using norms enshrined in the UNFCCC to understand and enhance domestic environmental law.

[13] Greater discussion of international norms in U.S. courts could also benefit the international regime by providing additional tests and application of its framework, and simultaneously make the United States a greater player in the international regime by contributing to it through judicial interpretation. It would also potentially prod legislative and executive actions, but that is more a matter of strategy than law and, accordingly, is not developed here.

I. INTERNATIONAL ENVIRONMENTAL LAW: CONTEXT, GROWTH AND RELEVANCE

The core concept of international environmental law is the obligation to avoid transboundary harm. This norm was stated as follows in Principle 21 of the 1972 Stockholm Declaration: "States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[14] Although the principle appears to pull in two directions, the second part of the statement remains one of the most compelling features of international environmental law. The principle was adopted, almost verbatim, in the 1992 Rio Declaration.[15] Its roots date back to at least the *Trail Smelter* arbitration.[16] This obligation to respect the environment beyond areas of national jurisdictions was recognized as a principle of customary international law by the International Court of Justice in 1996.[17]

International environmental law has grown dramatically since the Stockholm Declaration, as have other areas of global regulation. "Environmental issues were long thought to be largely local, [b]ut in recent decades" several inescapably global problems have emerged.[18] "Thinning of the Earth's protective ozone layer" galvanized the international community into action, producing one of the most complex and successful multilateral environmental regimes, expressed most completely in the Montreal Protocol.[19] Climate change must create a similarly effective response and,

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[14] Report of the United Nations Conference on the Human Environment, Declaration of Principles, Session of June 5-16, 1972, Principle 21, U.N. Doc. A/CONF.48/14, reprinted in 11 I.L.M. 1416, 1420 (1972); *see also* PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 235-36 (2d ed. 2003).

[15] Principle 2 of the Rio Declaration. Rio Declaration on Environment and Development, U.N. CED, Session of June 3-14, 1992, Principle 2, Agenda Item 9, at 1, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 876, 876 (1992); *see also* SANDS, *supra* note 14, at 236.

[16] *Id.* at 241.

[17] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 241-42 (July 8) ("The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.").

[18] Esty, *supra* note 1, at 1554.

[19] *Id. See generally,* SANDS, *supra* note 14, at 342-56.

indeed, the Kyoto Protocol builds on many elements of the Montreal Protocol.[20] Yet, climate change is a problem presenting much more complex challenges that are similar to global natural resources problems, such as loss of biodiversity and depletion of ocean fisheries, for which a solution has long remained elusive.[21] All three problems involve global public goods that are perceived to be directly at odds with national economic development goals.

In 1992, 155 nations, including the United States, entered the United Nations Framework Convention on Climate Change ("UNFCCC"), which has been described as "the first international environmental agreement to be negotiated by virtually the whole of the international community."[22] The UNFCCC, which was ratified by the U.S. Congress but does not contain binding commitments to reduce emissions, seeks "stabilization of greenhouse gas concentrations in the atmosphere."[23] The UNFCCC requires parties to adopt measures and policies toward this end.[24] "These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions" of greenhouse gases.[25]

Negotiation of the UNFCCC's 1997 Kyoto Protocol involved over 150 states and seeks to reduce the emission of greenhouse gases through mandatory reductions by developed nations that are parties.[26] It permits emissions allowance trading and offsetting through, among other means, supporting "clean development" in developing nations and creates administrative oversight bodies. With these flexibility mechanisms and other innovative design features, the Kyoto Protocol contains "an unprecedented level of detail and complexity" for an international instrument regulating environmental issues.[27] For these reasons, international law

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[20] *See* SANDS, *supra* note 14, at 357-81.
[21] All three problems are global commons issues that have thus far defied effective control. *See, e.g.*, *id.* at 497-98, 615-17.
[22] *Id.* at 359.
[23] United Nations Framework Convention on Climate Change, art. 2, *opened for signature* June 4, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC] (entered into force on Mar. 21, 1994).
[24] *Id.* art. 4.2(a).
[25] *Id.*
[26] Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol U.N. Doc. No. FCCC/CP/1997/L.7/Add.1 (Dec. 10, 1997), 1998 37 I.L.M. 32; *see also* Philippe Sands & Jacqueline Peel, *Environmental Protection in the Twenty-First Century: Sustainable Development and International Law*, *in* THE GLOBAL ENVIRONMENT 43, 44 (Regina S. Axelrod et al. eds., 2d ed. 2005).
[27] *Id.* at 48.

addressed toward solving the problem of global warming represents the cutting edge of international environmental law, both in terms of consensus on policy goals and the sophistication of international mechanisms agreed to by most states excluding the United States.[28]

International environmental law includes concepts of varying degrees of legal obligation. This "relative normativitiy" can be usefully analyzed through the lens of policies, which for our purposes we may assume have nothing more than political persuasive force, and rules or principles, which have different degrees of *legal* force. This framework, initially developed by Ronald Dworkin,[29] is applied to international environmental law by Ulirch Beyerlin to assess various general norms and policies.[30] For the purposes of the argument I develop, we need only be concerned with identifying principles and rules. Further, the distinction between rules and principles, with which Dworkin and Beyerlin are primarily concerned, is of only secondary importance here.[31]

The norm against transboundary environmental damage, discussed at the outset of this section, is arguably the most firmly entrenched norm of international environmental law. It is both enshrined in treaties and recognized as customary international law. Other norms relevant to this article arise from treaty obligations and depend, for their legally significant character in U.S. courts, on the degree to which the United States has embraced an internationally recognized and formalized rule or principle. These conditions are met for basic climate change norms.[32]

Evidence of the global consensus on the need for measures in response to global warming is plentiful. Among the most recent illustrations are the Fourth Assessment Report of the IPCC and extensive negotiations under the UNFCCC and Kyoto Protocol in December 2007. The IPCC report is a widely accepted and scientifically rigorous report that paints a grim portrait of climate change impacts and demonstrates the need for greater international cooperation and effective regulation.[33]

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[28] *Id.* at 59-60.

[29] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22-28 (Harvard Univ. Press 1977).

[30] Ulrich Beyerlin, *Different Types of Norms in International Environmental Law: Policies, Principles and Rules*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Daniel Bodansky et al. eds., 2007).

[31] In Dworkin's framework, rules are "all-or-nothing" norms, whereas principles are taken into acocount by decision-makers and incline them in one direction or another. DWROKIN, *supra* note 29, at 22-26.

[32] The precise definition and application of the norms is discussed further in Part V, *infra*.

[33] *See* Fourth Assessment Report, *supra* note 4.

The theme was re-emphasized during recent negotiations in Bali, serving as a meeting of the parties to the UNFCCC and a conference of the parties to the Kyoto Protocol.[34]

The United States has joined only the UNFCCC, and rejected the Kyoto Protocol, but it remains involved in the regime addressing climate change.[35] The United States played a strong role in the negotiations leading to the Kyoto Protocol, ultimately exerting a significant influence on the shape of the final agreement and accepting, albeit not ratifying, an emissions quota limitation.[36] Even after President Bush's rejection of the Kyoto Protocol, the United States has remained an important player in climate change negotiations, including the meeting in Bali in December 2007.[37] Despite advancing a preference for non-binding measures, the United States has repeatedly acknowledged the threat posed by climate change and the need for action to redress it.[38]

More importantly, "[t]he UNFCCC's provisions have been agreed to by Congress and are now part of a binding treaty. They therefore constitute fully vetted U.S. promises about how it will approach global warming."[39] Likewise, by its ratification of the UNFCC, the United States has accepted a good faith obligation to move forward with climate change policy.[40] Thus, although one might argue that the United States has repudiated any global consensus concerning the need for an internationally binding emissions quota, it is beyond dispute that the U.S. has acceded to the global norm demanding action at the domestic level.[41]

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[34] *See generally* ENB Summary, *supra* note 5.

[35] *See* David Leonard Downie, *Global Environmental Policy: Governance Through Regimes*, *in* THE GLOBAL ENVIRONMENT 64, 64 (Regina S. Axelrod et al. eds., 2d ed. 2005). Individuals "would fail to understand global environmental policy in a given issue area if they focused only on a single treaty rather than the entire evolving set of principles, norms, rules, procedures, and institutions—the 'international regime'—that countries and other actors create and implement for a specific issue." *Id.*

[36] *E.g.,* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW 676-79 (3d ed. 2007).

[37] *E.g.,* ENB Summary, *supra* note 5, at 18-19.

[38] *See* Lawrence J. Speer, *United States Committed to Discussing Post-Kyoto Framework, U.S. Negotiation Says,* 30 INT'L ENV'T REP. 687, 687 (2007) (discussing the Bush administration's strategy for international climate change negotiations).

[39] Donald A. Brown, *The U.S. Performance in Achieving Its 1992 Earth Summit Global Warming Commitments,* 32 ENVTL L. REP. 10,741, 10,741 (2002).

[40] *See* Osofsky, *supra* note 9, at 203.

[41] Indeed, the Bush Administration claims to embrace a climate change policy that emphasizes voluntary emissions reductions programs, despite its rejection of binding international regulation of emissions. Press Release, The White House Office of the Press Secretary, Fact Sheet: Taking Additional Acton to Confront Climate Change (Apr. 16, 2008) (on file at http://www.whitehouse.gov/news/releases/2008/04/20080416-7.html).

In the absence of a coherent federal approach to climate change, sub-national efforts have arisen. "[E]very state in the country has adopted some sort of law or policy addressed to climate change."[42] Eleven western states and Canadian provinces entered an agreement to collectively reduce their emissions through a regional cap-and-trade program similar to the Kyoto Protocol's framework.[43] California has been particularly aggressive, adopting a variety of mechanisms, including overall emissions targets.[44] Hundreds of U.S. cities have entered into agreements with each other and cities around the world to develop more climate-friendly practices and encourage higher-level action on climate change.[45] While the value of these initiatives may be questioned, they support the view that norms demanding action on climate change have taken hold in the United States.[46]

II. THE INTERFACE OF NATIONAL AND INTERNATIONAL LAW

The growth of environmental law in the international arena is part of a larger change in shape of international law generally. Increasing transnational issues and threats, such as terrorism and the growth of an interconnected global economy, have spurred similar developments in other areas. One of the features of this growth is an increasing penetration of international lawmaking into the traditionally domestic sphere. Transnational threats and the attendant growth of international institutions in many areas, including the environment, has created a need to re-examine the relationship between domestic and international law. Among other things, this need has spawned scholarship that examines and re-conceptualizes the relationship of national courts to each other and to international bodies, as well as the penetration of international law into domestic legal systems.

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[42] David Hodas, *State Initiatives*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW 343, 343 (Michael B. Gerrard ed., 2007).

[43] *See* Western Climate Initiative Homepage, http://www.westernclimateinitiative.org (last visited Oct. 5, 2008).

[44] *See* California Air Resources Board, Climate Change–Background, http://www.arb.ca.gov/cc/cc.htm (last visited Oct. 5, 2008).

[45] *See* Lesley Wexler, *Take the Long Way Home: Sub-Federal Integration of Unratified and Non-Self-Executing Treaty Law*, 28 MICH. J. INT'L L. 1, 18-20 (2006).

[46] For a critique of these initiatives see Cary Coglianese & Joceyln D'Ambrosio, *Policymaking Under Pressure: The Perils of Incremental Responses to Climate Change*, 41 CONN. L. REV (forthcoming 2009).

A. *Transnational Legal Process and Engaging Domestic Institutions (Norm Internalization)*

Many aspects of the interface between domestic and international law can be understood in terms of the development of "transnational legal process."[47] This framework, as articulated by Harold Hongju Koh, involves norms that arise from international interactions, negotiations and regimes becoming internalized into domestic legal systems and ultimately influencing the shape of domestic responses to international problems.[48] In Koh's articulation of the framework, internalization of norms occurs through social, political and legal processes and can be driven by a variety of actors.[49] There is no standard formula for norm internalization, but rather norms enter domestic systems through a mix of potential corridors.[50] Thus, a norm developed in the international arena may secure a degree of social acceptance, or internalization, as the public begins to adhere to it and advocate for its greater incorporation into domestic legal and political systems.[51] It may then obtain a degree of political internalization as the political elite begin to urge the norm's "adoption as a matter of government policy."[52] Legal internalization occurs as the norm becomes established as a facet of the domestic legal system, whether through executive action, legislative process, or judicial internalization by incorporating the norms into domestic law.[53] Judicial internalization may involve common law holdings derived from the international norm, use of the norm to interpret statutes, or drawing upon the international norm to shed light on domestic constitutional norms.[54] In other words, national courts can be understood as part of a "complex process . . . whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes."[55]

In a related norm-based conception of the domestic-international interface, Anne-Marie Slaughter has advanced a framework for understanding international law that relies on its direct engagement with

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[47] *E.g.,* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 205 (1996).
[48] *See* Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 624, 626-27 (1998).
[49] *Id.* at 642-43.
[50] *See id.* at 643.
[51] *See id.*
[52] *Id.* at 642.
[53] *Id. a*t 642-43.
[54] *See* Koh, *supra* note 48, at 643.
[55] Koh, *supra* note 47, at 205.

domestic institutions.[56] Much of Slaughter's work examines the development of transnational networks, including transnational judicial dialogue.[57] The growth of transnationalism, Slaughter and others posit, creates a need to re-conceptualize the role of domestic institutions in international law.[58] Thus, she argues that the ability of the international legal system to effectively respond to emerging transnational problems, including environmental problems, demands that "the international legal system . . . be able to influence the domestic policies of states and harness national institutions in pursuit of global objectives."[59] Along these lines, she has noted that it is valuable for domestic legal and political actors to be able to point to international regimes as providing a spur or consequence regarding particular legal outcomes or policy results.[60]

Judith Resnik demonstrates that legal developments outside of the United States inevitably seep into our law and that such seepage occurs through multiple entry points.[61] Litigation is but one forum for acknowledging the significance of developments beyond our borders in developing domestic legal principles and rules. Litigation is particularly important for U.S. climate change law, however, because of the national political branches failure to take meaningful action.[62] In this instance, as in others, "[n]ational courts are the vehicles through which international treaties and customary law that have not been independently incorporated into domestic statutes enter domestic legal systems."[63] Further, "the trend toward interpretive incorporation [of international sources into domestic cases] has the potential to transform the world's common law courts into increasingly powerful mediators between the domestic and international legal regimes."[64]

Other scholars are developing these core conceptions of transnational networks and norm internalization in various directions relevant

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[56] *See* Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or The European Way of Law)*, 47 HARV. INT'L L.J. 327, 328 (2006).
[57] *See id.* at 327-28. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).
[58] *See* Slaughter & Burke-White, *supra* note 56, at 327; *see also* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 31 (2005).
[59] Slaughter & Burke-White, *supra* note 56, at 328.
[60] *See id.* at 350.
[61] *See* Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Posts of Entry,* 115 YALE L.J. 1564, 1670 (2006).
[62] *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1103 (2000).
[63] *Id.*
[64] Waters, *supra* note 12, at 694-95.

to this Article. Lesley Wexler, for example, examines how treaty norms enter non-member legal systems through sub-national law embracing the internationally articulated norms.[65] A leading example is the sub-national embrace of elements of the Kyoto Protocol in the United States despite failure to ratify at the federal level.[66] Among other values, Wexler identifies a non-ratified treaty as providing "a fully articulated framework by which to understand the problem" and "offering evidence of an international consensus on the existence of, and approach to, a problem" that may then be imported into domestic institutions.[67]

Although much of the work analyzing the relationship of domestic courts to international law focuses on how domestic courts may use international law, "domestic courts worldwide are becoming active participants in the dynamic process of developing international law."[68] Melissa Waters thus conceives of domestic courts as "mediators between international and domestic legal norms" that not only receive and translate international norms into the domestic legal system, but also possess "the opportunity and ability . . . to participate in the creation, development and enforcement of international law."[69] In Waters' conception, a co-constitutive process occurs in which "various 'law-declaring fora' [including courts] . . . articulate and champion domestic norms at the transnational level, . . . [that] become part of the international legal discourse, and . . . modified to a greater or lesser extent by the international legal discourse, [these norms] return to the domestic fora to be internalized into domestic law."[70] This co-constitutive theory depends upon norm export and norm convergence. Norm export depends upon "soft power" to persuade other institutions to adopt the domestic norm, while norm convergence describes the tendency toward creation of a single worldwide standard.[71]

Transgovernmental networks involve much more than transnational judicial dialogue. Regulatory networks, for example, are particularly important in environmental law and other areas. Unlike U.S. courts, U.S. agencies have actively encouraged and participated in these networks.[72]

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[65] *See* Wexler, *supra* note 45, at 3; Resnik, *supra* note 61, at 1633-34.
[66] *See* Wexler, *supra* note 45, at 12-13.
[67] *Id.* at 13.
[68] Melissa Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 490 (2004).
[69] *Id.* at 490, 491.
[70] *Id.* at 502.
[71] *See id.* at 502-03.
[72] *See* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental*

The astounding growth of international law and supranational institutions over the last few decades, as well as the increasingly close relationship between international concerns and domestic lawmaking, exacerbate difficulties of accountability at the domestic-international interface. The question of accountability is perhaps most cogently addressed through an application of administrative law analysis that incorporates domestic, international and supranational administrative implementation.[73] This global administrative law perspective highlights that "U.S. domestic regulation [may be] increasingly shaped by . . . [g]lobal regulatory norms and practices" in particular issue areas.[74] Relatedly, where a nation participates in an international regime "domestic regulatory agencies act . . . on issues of foreign or global concern" as well as domestic concern.[75] Thus,

> national environmental regulators concerned with biodiversity conservation or greenhouse gas emissions are today often part of a global administration, as well as part of a purely national one: they are responsible for implementing international environmental law for the achievement of common objectives, and their decisions are thus of concern to governments (and publics) in other states, as well as to the international environmental regime they are implementing.[76]

While much of the concern arising from increased interaction between the international and national spheres, both popularly and in scholarship, centers on a reduction of domestic protections or accountability that may result, an equally compelling question is whether and how domestic decision-makers can be held accountable for declining to

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Networks and the Future of International Law, 43 VA. J. INT'L L. 1, 44-49 (2002) (discussing the transgovernmental activity of agencies in environmental regulation).

[73] *See generally* Kingsbury et al., *supra* note 58, at 16-18 (exploring the parameters of global administrative law and highlighting the mechanisms of imposing administrative discipline on supranational bodies, and the relatively informal pathways or mechanisms through which the international and national systems influence each other). *See also* INST. FOR INT'L LAW AND JUSTICE, GLOBAL ADMINISTRATIVE LAW: CASES, MATERIALS, ISSUES xxii-xxiv (Cassese et al., eds., 2d. ed. 2008).

[74] Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695, 697 (2005).

[75] Kingsbury et al., *supra* note 58, at 21.

[76] *Id.* at 22.

act in accord with international norms that they have helped to create and acceded to. The role of national courts in such instances can be to preserve legitimacy of international norms.[77] One of the few avenues to directly challenge domestic responses to global environmental norms arises when an agency reaches a conclusion on domestic regulatory responses to global problems, thus providing a potential mechanism for legal accountability through judicial review.[78]

B. U.S. Courts and International Law: Constitution and History

Scholars debate the extent to which the constitution embraces dualism.[79] Its text merely establishes the procedure for entering into a treaty and includes treaties, along with the constitution and federal laws, as the supreme law.[80]

Harold Koh explains that "[t]he framers and early Justices understood that the global legitimacy of a fledgling nation crucially depended upon the compatibility of its domestic law with the rules of the international system within which it sought acceptance."[81] Accordingly, "the early Supreme Court saw the judicial branch as a central channel for making international law part of U.S. law."[82] Further, "[t]he original design and early practice of our courts envisioned that they would not merely accept, but would actively pursue, an understanding and incorporation of international law standards out of a decent respect for the opinions of mankind."[83]

Some of the Supreme Court's earliest jurisprudence recognizes that international law may be applied in U.S. courts and may influence the construction of U.S. law.[84] Famously, in the *Charming Betsy* case of 1804,

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[77] *See* John B. Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 373, 383 (Thomas M. Franck & Gregory H. Fox eds., 1996).
[78] *See infra* Part IV.A.
[79] For an argument that a dualist tradition should guide the Court's treatment of international sources, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Constitutional Consent*, 149 U. PA. L. REV. 399 (2000).
[80] U.S. CONST. art. II, § 2, cl. 2.; U.S. CONST. art. VI, cl. 2.
[81] Harold H. Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004).
[82] *Id.*
[83] *Id.*
[84] *E.g.,* Chisholm v. Georgia, 2 U.S. 419, 474 (1793) ("[T]he United States had, by taking a place among the nations of the earth, become amenable to the laws of nations. . ."); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) ("Till [a contrary] act be passed [by Congress], the Court is bound by the law of nations which is a part of the law of the land.").

the Court stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[85] This doctrine remains significant in the Court's jurisprudence, although its scope is open to some debate.[86] By the late-nineteenth century, the Supreme Court construed the supremacy clause to permit domestic law to prevail over pre-existing international obligations, thereby embracing a dualist vision of international law.[87] Nonetheless, in 1900, the Supreme Court stated that "[i]nternational law is part of our law, and must be ascertained and administered by the courts . . . . [W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[88]

Although the Court's conception of the relationship of international or foreign sources to domestic law may have changed, "the Court has relied on such sources to some extent throughout its history."[89]

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[85] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[86] For recent cases employing the doctrine, see Hartford Fire Ins. Co. v. California, 509 U.S. 764, 816 (1993) (Scalia, J., dissenting); Weinberger v. Rossi, 456 U.S. 25, 32 (1982). For a thorough treatment of the case and its progeny see Ralph G. Steinhardt, *The Role of International Law as a Canon of Statutory Interpretation*, 43 VAND. L. REV. 1103 (1990).

[87] *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 863-64 (1987); Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 932 (1986). Dualism is underlain by separation of powers and sovereignty concerns. *See* Waters, *supra* note 12, at 696-97. For an argument that separation of powers should underlie U.S. dualism see Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 186 (1993). In the United States, separation of powers concerns are tempered by the constitutional role of the Senate in treaty ratification. Waters, *supra* note 182, at 696. Nonetheless, dualism as articulated in U.S. law retains a connection to the separation of powers doctrine through, for example, the courts' reluctance to intrude upon the executive's foreign affairs power or to address political questions. The sovereignty issues underlying dualism are being eroded by increasing globalization, but this may explain the ferocity with which many dualist have recently stated their positions. *See id.* at 696-97. Dualism now faces increasing pressure as the nature of international law and its relationship to domestic institutions change. *C.f.* Kingsbury et al., *supra* note 58, at 31 ("the traditional dualist separation between the domestic and the international is not sustainable in the integrated global administrative space"). Indeed, "the relationship between these requires both continuous pragmatic readjustment and deeper re-theorizing." *Id.*

[88] The Paquete Habana, 175 U.S. 677, 700 (1900). The Court further reasoned that, in divining the existence of customary law, it should (as is established in international law) look "to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." *Id.*

[89] Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 755 (2005). *See generally id.* (extensively demonstrating the

III. RECENT COURT TREATMENT OF INTERNATIONAL SOURCES: HUMAN RIGHTS

Several recent constitutional human rights cases are important to understanding the debate over international sources in the U.S. courts. The issues are far removed from the climate change regime, but the cases illuminate the current status of global norms in U.S. domestic litigation.

A. *International and Foreign Sources in Recent Human Rights Cases*

Recently, the Court has employed international norms in assessing U.S. human rights law. This use is part of a trend occurring throughout common law countries.[90] It has stirred fierce debate among publics, academics, politicians, and judges in the United States and elsewhere.[91] The divide is apparent on the Supreme Court, with several Justices, such as Breyer, advancing an internationalist vision that is aggressively disputed by others.[92]

In *Washington v. Glucksberg*, Chief Justice Rehnquist's majority opinion refers to a decision of the Supreme Court of Canada, which upheld a ban on assisted suicide, and observes that "in almost every western democracy[,] it is a crime to assist a suicide."[93] In *Lawrence v. Texas*, Justice Kennedy's opinion discusses precedent from the European Court of Human Rights to establish that claims of homosexuals challenging sodomy laws are not considered insubstantial in "our Western civilization."[94] In *Sosa v. Alvarez-Machain*, the Court reaffirmed that "the domestic law of the United States recognizes the law of nations" and explained that

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Court's use of foreign and international authority throughout the nation's history); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006) (examining the role of international law in the Supreme Court's interpretation of the U.S. Constitution); Daniel A. Farber, *The Supreme Court, The Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335, 1364-64 (2007) ("Citing foreign law is an American tradition that goes back to the first days of the Republic . . .").

[90] Professor Waters has characterized this trend as "creeping monism." *See* Waters, *supra* note 12, at 633.

[91] On the U.S. debate see Farber, *supra* note 89, 124 at 1340-44.

[92] *See, e.g.,* Stephen Breyer, Associate Justice Supreme Court of the United States, Keynote Address Before the 97th Annual Meeting of the American Society of International Law (Apr. 2-5, 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265, 265-68 (2003).

[93] 521 U.S. 702, 710 (1997).

[94] 539 U.S. 558, 573 (2003) (responding to references made to "Western civilization" in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

federal courts retain the power to recognize and enforce a narrow class of international norms under the Alien Tort Claims Act.[95] The next year, in *Roper v. Simmons*, the Court ruled that the juvenile death penalty violates the 8th Amendment.[96] Following a discussion of domestic law, the Court highlighted the international prohibition on the juvenile death pen-alty in the UN Convention on Rights of the Child, which has been ratified by all nations except the United States and Somalia.[97] The Court explained that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty," continuing that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[98]

The Court's use of international law in human rights cases is limited to what can be described as "gild[ing] the domestic lily"[99] because the international or foreign sources merely support for independently-derived domestic law conclusions. The citations of international law are not merely "ridiculous excess," however.[100] Instead, the Court's use of international law may serve not only to signal "willingness to participate in transnational judicial dialogue on human rights issues" or "emphasize the importance or fundamental character of a particular domestic norm," but may also serve as a buttress to "shore up what would otherwise be a shaky argument, if based on domestic sources alone."[101]

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[95] *Id.* at 729.
[96] *See* 543 U.S. 551, 575, 578 (2005).
[97] *See id.* at 576.
[98] *Id.* at 578; *see also id.* at 605 (O'Connor, J., dissenting) (discussing the relationship between domestic and international laws and values in interpreting the Eighth Amendment). This use of foreign or international authority has been roundly criticized by some Justices, most ardently Justice Scalia. *See, e.g.*, *id.* at 627-28 (Scalia, J., dissenting). Recently, the Court emphasized the United States' dualist tradition. In *Medellin v. Texas*, Chief Justice Roberts' majority opinion reasoned that "[A] treaty is, of course, primarily a compact between independent nations. It ordinarily depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it . . . . [W]ith all this the judicial courts have nothing to do and can give no redress." 128 S. Ct. 1346, 1357 (2008) (internal quotation marks and citations omitted). The Court thus held that a judgment of the International Court of Justice ("ICJ") was not binding on U.S. courts despite the United States submission to ICJ jurisdiction through its ratification of the relevant portions of the Vienna Conventions. *See id.* at 1358. Justice Breyer, joined by Justices Souter and Ginsberg, issued a well-reasoned dissent resting on a long history of judicial application of treaties. *See id.* at 1375-82.
[99] Waters, *supra* note 12, at 654; *see also* WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF KING JOHN act 4, sc. 2 (source of the phrase "gild the lily").
[100] *See* SHAKESPEARE, *supra* note 99.
[101] Waters, *supra* note 12, at 657-58.

B. Theorizing Supreme Court Citation of Foreign and International Sources in Human Rights Cases

Barrels of ink and forests of trees have been expended in the debate surrounding the Court's citations of foreign and international sources in the human rights cases. I touch on just a few points from this vast literature that are relevant to the topic at hand.

Most importantly, neither the Justices of the U.S. Supreme Court nor the scholars commenting on their decisions have thus articulated an accepted "general theory of the citation and authority of foreign law."[102] The same can be said of the use of international law in domestically-focused cases. The lack of a unified and accepted theory complicates the debate because many different uses of international and foreign sources are possible.[103] Below, I sketch two moderate positions on how the U.S. courts should use foreign and international sources.[104] These approaches are close to the proposal I outline in Section V.C describing the application of international climate change norms for the interpretation of domestic statutes and evaluation of domestic administrative actions.

Melissa Waters suggests a framework in which judges remain "deeply rooted, first and foremost, in the domestic legal regime" and then "explore—on a case-by-case basis—the extent to which they can legitimately reach out to specific international sources for assistance, and what techniques can legitimately be used."[105] She urges that courts take account of the extent to which an unincorporated treaty reflects domestic norms when determining whether, and to what extent, it can be used.[106] More specifically, Waters urges U.S. courts using international or foreign sources to consider the relative strength of conflicting domestic and international or foreign norms, as well as the democracy risks of employing international norms to assess domestic law made by the political branches.[107] With these cautions, she urges use of international sources to interpret domestic law.

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[102] Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 129 (2005); *cf.* Waters, *supra* note 12, at 705 ("What is needed is a fully articulated theory regarding judicial use of human rights treaties.").

[103] See Waters, *supra* note 12, for a systematic discussion of the approaches pursued by several common law courts.

[104] A strong monist position is not only highly unlikely to take hold in the U.S., but also constitutionally problematic and, arguably, undesirable even in the climate change context. For further discussion of monist positions, see Steinhardt, *supra* note 86, at 1127-28.

[105] Waters, *supra* note 12, at 701.

[106] *Id.*

[107] *See* Waters, *supra* note 68, at 559-64.

Jeremy Waldron paints potential U.S. court use of foreign authority as an analogy to scientific pursuit.[108] In Waldron's view, recognition that U.S. judges derive their legitimacy from U.S. law and directly shape only U.S. law "does not preclude turning to the legal consensus of civilized nations for assistance any more than the American origin of an epidemic precludes Americans' turning to foreign scientists for guidance."[109] Although U.S. circumstances such as history and culture may be unique on a given problem, he urges that "we should respond on a scientific basis to ascertain which peculiarities should be taken into account and how."[110] To simply ignore legal developments elsewhere in the world on the various problems facing a U.S. court demonstrates, for Waldron, "not just an objectionable parochialism, but an obtuseness as to the nature of the problems we face."[111] According to Waldron, the law of other nations, or international law, can be "a source of normative insight" that is "relevant to the solution of legal problems in this country."[112] Ultimately, Waldron looks to the ius gentium—the law of nations—as repository of global consensus in the scientific sense of a "dense and mutually reinforced consensus."[113] For Waldron, then, law is "essentially a problem-solving enterprise" that should be approached "in a scientific spirit that relies not just on our own reasoning but on some rational relation between what we are wrestling with and what others have figured out."[114]

IV. U.S. COURTS AND THE GLOBAL ENVIRONMENT: RELUCTANCE TO EXAMINE INTERNATIONAL LAW AND THE ADVENT OF CLIMATE CHANGE LITIGATION

A. *International Environmental Law in the U.S. Courts*

Direct discussion of international environmental law in U.S. courts has been very limited.[115] Most of the cases directly address only

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[108] *See* Waldron, *supra* note 102, at 143-46. Waldron's argument is fashioned for foreign law sources, but the points discussed here are directly relevant to use of international sources in climate change cases. *See id.*
[109] *Id.* at 144.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 143.
[113] Waldron, *supra* note 102, at 145.
[114] *Id.* at 146, 147.
[115] The number of cases involving issues of international environmental law has been on the rise in recent decades, and some predict that this trend will continue. *E.g.*, Carl Bruch, *Is International Environmental Law Really "Law"?: An Analysis of Application*

implementing legislation, but some look to international sources for guidance.

Missouri v. Holland, the first international environmental law case to reach the U.S. Supreme Court, upheld the Migratory Bird Treaty Act—a statute implementing the Migratory Bird Treaty—on the basis of the federal treaty power.[116] The Court described migratory birds as "a national interest of very nearly the first magnitude" that "can be protected only by national action in concert with that of another power."[117] Thus, the treaty power trumped traditional state regulation of wildlife.

In one of the Court's first encounters with a truly global environmental issue, *Japan Whaling Association v. American Cetacean Society*, the Court examined the question whether implementing legislation compelled the Secretary of Commerce to certify that Japanese action was diminishing the effectiveness of the International Convention for the Regulation of Whaling.[118] The Court rejected the Japanese defendants' argument that the case should be dismissed as a political question.[119] On the merits, however, the Court decided in favor of the agency with no significant discussion of the international law.[120] Justice Marshall's dissent is more careful in considering the international context, stating: "Such gross disregard for international norms set for the benefit of the entire world represents the core of what Congress set about to punish and to deter with the weapon of reduced fishing rights in United States waters."[121]

Lujan v. Defenders of Wildlife, a major standing case, is also an international environmental law case.[122] It arose as a challenge to an agency determination that the Endangered Species Act does not apply to foreign aid decisions that could hasten the extirpation of species elsewhere

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in Domestic Courts, 23 PACE ENVTL L. REV. 423, 461 (2006). Whether such invocation is appropriate, perhaps even necessary, is a subject of increasing attention. *See, e.g.*, *North America: Symposium on the Judiciary and Environmental Law*, 35 ENVTL. POL'Y & L. 45 (2004) (reporting on a conference of North American judges hosted by the New York State Judicial Institute that concerned issues such as "use of international norms by domestic courts" in common environmental problems).

[116] 252 U.S. 416 (1920).

[117] *Id.* at 435.

[118] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 223 (1986). Justice Marhsall, dissenting, characterized the issue as one of "intense worldwide concern." *Id.* at 242.

[119] *Id.* at 229.

[120] *See id.* at 240-41.

[121] *Id.* at 249.

[122] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

on the planet.[123] Justice Scalia's opinion, part of which held for the majority, essentially relied upon the international nature of the case to conclude that the plaintiffs did not have standing.[124] He reasoned that the plaintiffs had not demonstrated injury-in-fact because they did not demonstrate concrete plans to visit the affected areas—a line of reasoning that would be difficult to apply in a purely domestic context.[125] Further, Justice Scalia concluded that redressability did not exist because, among other reasons, decisions affecting U.S. foreign aid might not stop challenged projects if other nations could still provide funds.[126]

Several appellate cases have addressed the more complicated question of the relationship between international environmental law and domestic enforcement involving the role of post-ratification decisions by Conferences of the Parties to treaties that the United States has ratified.[127] In *Castlewood Products v. Norton*, the D.C. Circuit concluded that post-ratification decisions could be helpful in determining the meaning of provisions of the Convention on International Trade in Endangered Species ("CITES"), but were not binding on domestic agencies.[128] More recently, in *Natural Resources Defense Council v. EPA*, the D.C. Circuit

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[123] *Id.* at 557-58. Although not apparent from Justice Scalia's opinion, this type of issue is pressing. Scientists predict as much as fifty percent of all currently extant species may be extinct by the end of the century. *See* Colin Woodward, *Earth in the Balance - Could Tilt Either Way*, CHRISTIAN SCI. MONITOR, Jan. 17, 2002, http://www.csmonitor.com/2002/0117/p15s01-bogn.html; Sanjida O'Connell, *The Killer Oceans: What Really Wiped Out the Dinosaurs?*, INDEP. (London), July 23, 2008, http://www.independent.co.uk/news/science/the-killer-oceans-what-really-wiped-out-the-dinosaurs-874661.html. In addition, "[t]he conservation of biodiversity probably presents greater regulatory challenges to international law than any other environmental issue." SANDS, *supra* note 14, at 615. Climate change alone may result in extinction of fifteen to thirty percent of species by 2050. Stuart L. Pimm et al., *What Is Biodiversity?*, *in* SUSTAINING LIFE: HOW HUMAN HEALTH DEPENDS ON BIODIVERSITY (Eric Chivian & Aaron Bernstein eds., 2008).

[124] *See Lujan*, 504 U.S. at 571-78. Andrew Long, *Standing & Consensus: Globalism in Massachusetts v. EPA*, 23 J. ENVTL L. & LIT. 73 (2008) (discussing this interpretation of the case in greater detail); *see also* Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247, 1251-54 (1996).

[125] *Lujan*, 504 U.S. at 564.

[126] *Id.* at 571.

[127] Several cases have also examined, and rejected, application of environmental treaties or international environmental norms to create private liability for alleged torts committed in other nations. *See, e.g.,* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 166-67 (5th Cir. 1999) (regarding Indonesian mining operations); *In re* "Agent Orange" Prod. Liab. Litig., 373 F.Supp.2d 7, 127-30 (E.D.N.Y. 2005) (regarding the application of agent orange in Vietnam).

[128] Castlewood Prod. v. Norton, 365 F.3d 1076, 1084 (D.C. Cir. 2004).

rejected the plaintiffs' attempt to challenge an EPA decision regarding the production and consumption of methyl bromide on the basis of an alleged conflict between the EPA rule and decisions of the parties to the Montreal Protocol entered after treaty ratification.[129] The court held that the "post-ratification agreements of the parties are not 'law,'" and, thus, cannot form the basis of a review of EPA action.[130] The court reasoned that enforcing such decisions in domestic courts could conflict with the non-delegation doctrine, constitutional lawmaking requirements, and separation of powers.[131] In an exceedingly dualist characterization of the Protocol body's power, the court characterized these "decisions" under the Montreal Protocol as "international political commitments rather than judicially enforceable domestic law."[132] More generally, the court concluded that "[without congressional action . . . side agreements reached after a treaty has been ratified are not the law of the land; they are enforceable not through the federal courts, but through international negotiations."[133]

B. U.S. Climate Change Litigation

As noted above, litigation has recently become a very important element of the legal, political and social dialogue concerning climate change.[134] This trend seems attributable, in large part, to the lack of a coherent national approach to addressing climate change. It is also an opportunity for judicial internalization of broadly accepted international environmental norms that demand action on climate change.

U.S. climate change cases have, by and large, not relied on international environmental law. This can be explained by the United States' refusal to ratify the Kyoto Protocol, and dualist separation of powers concerns.[135]

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[129] NRDC v. EPA, 464 F.3d 1, 10-11 (D.C. Cir. 2007). This opinion was issued upon reargument of the court's initial decision, which dismissed the suit on standing grounds.
[130] *Id.* at 11.
[131] *Id.* at 9.
[132] *Id.* at 10.
[133] *Id.*
[134] *E.g.*, William C.G. Burns, *A Voice for the Fish? Climate Change Litigation and Potential Causes of Action for Impacts Under the United Nations Fish Stocks Agreement*, 48 SANTA CLARA L. REV. 605, 605 (2008) ("Climate change litigation has been transformed from a creative lawyering strategy to a major force in transnational regulatory governance of greenhouse gas emissions over the last couple of years.").
[135] Also for these reasons, domestic climate change litigation based on entirely international environmental law—even the bedrock obligation to refrain from damaging

Nonetheless, climate change litigation presents a particularly compelling context for considering the international backdrop of domestic legal action. Law at the international, national, and sub-national level addresses a common physical problem in climate change, one in which the causes and effects are intermingled and dispersed among all nations of the globe.

1. *Massachusetts v. EPA*

The most important climate change litigation to date is *Massachusetts v. EPA*.[136] The Court issued three holdings, each of which is significant in its own right. First, the Court held that plaintiffs had standing to challenge EPA's decision to decline a rulemaking petition for regulation of greenhouse gases emissions under the Clean Air Act.[137] On the merits, the Court held that EPA has authority to regulate greenhouse gases under the Clean Air Act[138] and rejected its reasons for not doing so as insufficiently grounded in the statute.[139] The Court's decision was formally based entirely in domestic law, yet the conclusions it embraces may be understood as forcing the EPA to directly address the international norm requiring action on climate change.[140] However, the opinion falls short of explicitly giving international environmental law any direct role in either the reasoning or the outcome of the case. Nonetheless, *Massachusetts* can be understood as a step toward greater consideration of international environmental concerns in domestic litigation because it embraces a vision of the United States as a global actor whose actions will contribute to larger events.[141] Justice Stevens begins his analysis of the injury in *Massachusetts* by quoting from the globally significant harms of climate change: "reduction in snow-cover extent, the global retreat of mountain glaciers,

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areas beyond national jurisdiction—would be unlikely to succeed.

[136] 127 S. Ct. 1438 (2007).

[137] *Id.* at 1452-58.

[138] *Id.* at 1459-62.

[139] *Id.* at 1462-63.

[140] Jonathan M. Zasloff, *International Decisions: Massachusetts v. Environmental Protection Agency*, 102 AM. J. INT'L L. 134, 138 (2008) ("Formally, *Massachusetts v. EPA* is a domestic administrative law decision; . . . [but] the international and foreign relations aspects of the case . . . could well turn out to be more important than the domestic ones."). *Cf.* Long, *supra* note 124, at 121-23 ("*Massachusetts* could be a jumping-off point for greater judicial consideration of domestic regulation of global problems and, perhaps, international regimes addressing those problems."); Osofsky, *supra* note 9, at 203 (discussing how judicial interpretation of federal statutes engages international law and policy).

[141] *See* Long, *supra* note 124, at 121-23.

the earlier spring melting of rivers and lakes, the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years,"[142] as well as "severe and irreversible changes to natural ecosystems, and an increase in the spread of disease."[143]

For causation, Justice Stevens rejects as "erroneous" EPA's "assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum."[144] Similarly, and seemingly contrary to the plurality view in *Lujan*,[145] the majority reasons in discussing redressability: the fact "that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century" does not destroy redressability because "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[146] In this way, the Court construes Article III to permit litigation of cases relying upon an injury that is both shared and caused by the entire international community. This threshold determination enables a construction of the domestic statute that accords with overarching international principles and norms by enabling domestic action to "stabiliz[e] greenhouse gas concentrations in the atmosphere."[147]

The Court's reading of Article III and the Clean Air Act are both fair readings of domestic law. They are also a mechanism that furthers the nation's international legal obligations. Although EPA's rejection of the petition to regulate greenhouse gases was a domestic decision harming domestic parties, it also declined to take action supported by international norms.[148] By seeking judicial review, the petitioners might be understood to seek an avenue for indirectly holding domestic regulators accountable

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[142] *Massachusetts*, 127 S. Ct. at 1455 (quoting NATIONAL RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 16 (2001)).
[143] *Id.* at 1456 (quoting MacCracken Decl. ¶¶ 5(d), 28; Pet. Stdg.App. 209, 218-19).
[144] *Id.* at 1457.
[145] See *Lujan*, 504 U.S. at 562, 568-71.
[146] *Id.* at 1458.
[147] UNFCCC, art. 2.
[148] *Cf.* Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law's Growing Shadow*, SUP. CT. REV., 2008, at 111, 147-48.

> Perhaps because climate change is now considered a global environmental crisis far more serious than the problem of acid rain, the Court is unwilling to tolerate continued executive inaction. It also rejects what in this age of globalization could become a nearly universally applicable excuse for agency inaction—that domestic regulation might interfere with the President's ability to negotiate a global approach to a problem.

Id. at 147-48.

for failing to address a pressing global issue in accord with the international consensus requiring regulation. Indeed, *Massachusetts* seems to be decided in the shadow of the international context. The decision can be understood as part of a global legal dialogue.[149] Viewed in this light, the majority opinion might suggest injection of global concern into interpretation of domestic environmental statutes[150]—an implicit application of the *Charming Betsy* principle.[151]

One of the most repeated charges leveled at the majority opinion in *Massachusetts* is that the case addresses a political question or is otherwise politically motivated.[152] The aspects of the decision that the dissenters and some commentators suggest are political could be understood, instead, as the Court's acceptance of internationally recognized climate change norms which emphasize the scientific evidence of global warming, the urgency of the threat and the attendant need for action.[153] The Court majority could have preemptively rebutted the charge that the case was political through more explicit consideration of the significance of international law in the opinion.[154] The Court could have looked to the UNFCCC and the United States' related good faith obligation, as well as the consensus that has emerged among all other developed nations, and the principle that states have an obligation to avoid harm to the global commons, as support for its conclusion that the Clean Air Act's definition of "pollutant" encompasses CO_2. Much like *Roper* or *Lawrence* in the human rights context,[155] such reasoning would have brought the United States more fully within the international community on shared environmental problems.

The Court did not take this approach, however. Thus, alternative explanations for the case may be more useful for understanding its imme-

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[149] *See* Osofsky, *supra* note 9, at 203.

[150] Yet, the Court does not develop this theme and does not, in any significant way, consider the relationship of its opinion to the international context.

[151] *See supra* note 85 and accompanying text. *See generally* Waters, *supra* note 12, at 660-68 (discussing the *Charming Betsy* principle in the human rights context).

[152] *See, e.g.*, *Massachusetts*, 127 S. Ct. at 1471 (Roberts, C.J., dissenting); Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 75 (2007), *available at* http://www.virginialawreview.org/inbrief/2007/05/21/cass.pdf.

[153] This reading, at least as applied to Justice Kennedy, could also explain the conflict between *Massachusetts*' apparently flexible reading of the Clean Air Act and the Court's greater rigidity in defining the Endangered Species Act's relationship to the Clean Water Act several months later in *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007). *See* Percival, *supra* note 148, at 143-44.

[154] *Cf.* Waters, *supra* note 12, at 660-68 (discussing a "rights-conscious" *Charming Betsy* principle).

[155] *See supra* Part III.A.

diate administrative law impacts. However, that the global norms on climate change could have played an implicit role in the decision. On this view, the question is whether explicitly employing global norms would serve a useful function.

2. Climate Change Litigation in the Lower Courts

Circuit and district court cases have begun to integrate climate change into domestic environmental statutes. Not surprisingly, most climate change cases in the circuit and district courts after *Massachusetts v. EPA* contain no greater discussion of international environmental law than *Massachusetts* did. In *Center for Biological Diversity v. National Highway Traffic and Safety Administration*, the Ninth Circuit required the agency to reconsider its fuel efficiency standards for light trucks.[156] The court stated that "[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA re-quires agencies to conduct,"[157] thus integrating climate change considerations into a domestic environmental statute. The court cited *Massachusetts* for its discussion of scientific progress in understanding climate change and that the harms resulting from it are "well recognized."[158] It also hints at the relevance of international consensus by referring to IPCC reports, but goes no further in employing the international context in its decision.[159]

In the Endangered Species Act context, the district court in *Natural Resources Defense Council v. Kempthorne* held that the Fish and Wildlife Service ("FWS") erred by failing to consider the impact of climate change in a biological opinion concluding that water diversion planned for the California Bay Delta would not jeopardize a listed species, the Delta smelt.[160] Essentially, plaintiffs argued, as they had before the agency, that the biological opinion was flawed because it assumed hydrology to be constant over the next twenty years despite strong scientific evidence suggesting that climate change will affect the hydrology through reduced winter snowpack.[161] Not unlike the EPA in *Massachusetts*, FWS argued that it

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[156] Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508, 514 (9th Cir 2007).
[157] *Id.* at 550.
[158] *Id.* at 530 n.41.
[159] *Id.* at 522-23, 554-55.
[160] NRDC v. Kempthorne, 506 F.Supp.2d 322, 387-88 (E.D. Cal. 2007).
[161] *Id.* at 367-68.

"responsibly refused to engage in sheer guesswork, and properly declined to speculate as to how global warming might affect delta smelt."[162] Unlike *Center for Biological Diversity*, the court in *Kempthorne* did not cite *Massachusetts* nor elaborate the strength of scientific consensus on climate change.[163] It did, however, conclude that "[a]t the very least, . . . studies [in the record] suggest that climate change will be an important aspect of the problem meriting analysis in the BiOp."[164] On this basis, after rejecting an argument that other factors in the BiOp were sufficient proxies for climate change, the court granted plaintiffs' summary adjudication on the ground, among others, that the BiOp failed to consider the effects of climate change.[165] The case lacked any relevant attention to the potential significance of the international climate change regime.

These two cases illustrate the role of litigation in firmly establishing the legal acceptance of climate change as a scientifically demonstrated phenomenon. They bolster *Massachusetts*' impact in putting an end to claims that climate change is too scientifically uncertain to play a role in agency planning. They draw upon the international regime, if at all, as evidence of the scientific consensus. It is difficult to see how a greater discussion of international environmental law could strengthen the result from an environmental plaintiff's point of view. However, such a discussion could serve some of the other functions identified earlier, such as providing a more direct internalization of international norms through reliance on activities that have occurred elsewhere as support for the need to evaluate climate change impacts.

Another type of climate change litigation, cases based on public nuisance, has been far less successful for environmental plaintiffs and also illustrates the limits of relying upon international environmental law. In *California v. General Motors*, the State of California sought damages from various auto manufacturers on a public nuisance theory.[166] The district court dismissed the claim as a non-justiciable political question and concluded that resolution of the claim would require a policy decision, intrude upon the commerce and foreign affairs powers of the political branches, and was not available under a well-established legal framework.[167] A similar

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[162] *Id.* at 369. *See Massachusetts*, 127 S. Ct. at 1451.
[163] *See supra* text accompanying notes 156-159.
[164] *Kempthorne*, 506 F.Supp.2d at 369 (internal quotation marks omitted).
[165] *Id.* at 387-88.
[166] California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at *2 (N.D. Cal. Sept. 17, 2007).
[167] *Id.* at *41, *46-47.

nuisance action, *Connecticut v. American Electric Power Company*, filed by several states against electric power generating companies was also rejected as raising a non-justiciable political question.[168] In that case, decided before *Massachusetts v. EPA*, the plaintiffs' cited the UNFCCC as evidence of U.S. policy to reduce greenhouse gas emissions.[169] The court, however, rejected this argument, looked to domestic law, including the Clean Air Act, and concluded that the question must be left to the political branches.[170]

In these tort cases, a greater recognition of international environmental law could have, conceivably, avoided dismissal on political question grounds. The courts might have looked to either the general obligation to avoid transboundary environmental impacts or the United States' obligation to address climate change under UNFCCC as stating relevant law. Among other problems with this approach, however, the defendants in these cases were private parties and the obligation that could be attached would run to the federal government. Accordingly, it is difficult to envision these international obligations as creating a duty on the part of private parties. Other problems, such as establishing causation and fashioning an appropriate remedy, are at least equally troublesome. The significance of climate change-based tort claims lies elsewhere.[171]

The best illustration of the use of international considerations in climate change cases came in *Green Mountain Chrysler Plymouth Dodge v. Crombie*, in which the Vermont district court concluded that state regulations governing greenhouse gas emissions were not preempted by the Energy Policy and Conservation Act and that issues regarding preemption by the Clean Air Act were moot.[172] The case relied heavily upon the Supreme Court's decision in *Massachusetts v. EPA*.[173] Yet, the court also discussed the UNFCCC, in conjunction with domestic law, to conclude that "national foreign policy on global warming encourages the development of international support for reducing GHG emissions, and that garnering international support depends in part on informing other nations of this

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[168] Connecticut v. Am. Elec. Power Co., Inc., 406 F.Supp.2d 265, 267 (S.D.N.Y. 2005).
[169] *Id.* at 274; Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Complaints for Lack of Subject Matter Jurisdiction and for Failure to State a Claim upon Which Relief Can Be Granted at 20-21, Connecticut v. Am. Elec. Power Co., Inc., 406 F.Supp.2d 265, 267 (S.D.N.Y. 2005) (04 CV 05669 (LAP)).
[170] *Connecticut*, 406 F.Supp. 2d at 269-70, 274.
[171] *E.g.*, David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. PA. L. REV. 1741, 1744-45 (2007).
[172] Green Mountain Chrysler Plymouth Dodge v. Crombie, 508 F.Supp.2d 295, 354, 399 (D.Vt. 2007).
[173] *See id.* at 307-10, 320, 339 n.44, 341, 344, 351, 355, 356, 395 n.104, 397.

country's commitment to this task on the national, state and local level."[174] The court continued: "The United States remains committed to the UNFCCC . . . and the United States considers that state and local efforts in concert with federal programs contribute to the UNFCCC's ultimate objective."[175] This discussion illustrates the use of international law to support sub-national efforts in accord with an international norm. The approach pro-vides an example of how international environmental law can be mingled with domestic law in climate change cases to provide additional support, and to signal consistency between domestic law and international environmental norms.

V. MAKING THE ROLE OF INTERNATIONAL CONSENSUS EXPLICIT IN DOMESTIC LITIGATION

Using foreign or international sources in domestic U.S. litigation will be controversial in any context. It is particularly explosive where it has made the most headway—human rights questions—but we would expect similarly heated debate if international norms enter formally domestic U.S. environmental cases.[176] The controversy is "part of larger battles about the role of judges in the American polity and the role of this nation in the world."[177] If the United States is going to address climate change, and it must, international cooperation will be required. In that light, domestic climate change cases seem a particularly relevant venue for the consideration of how international law may influence domestic judicial decision-making.

A decade ago, Daniel Bodansky noted an "impression that, at least in the United States, international environmental law still depends for its implementation primarily on political rather than legal processes."[178] Bodansky's observation came one year after Kyoto was signed. The landscape has changed, particularly in the United States. The failure of the

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[174] *Id.* at 394.
[175] *Id.* at 394-95.
[176] *See* Resnick, *supra* note 61, at 1571-72.
[177] *Id.* at 1572. Resnik continues: "[C]ongressional proposals aimed at banning foreign law provide a window not only into nationalist but also into anti-judicial sentiments in America." *Id.*
[178] Daniel Bodansky, *International Environmental Law in United States Courts*, 7 REV. EUR. CMTY. & INT'L ENVTL L. 57, 61 (1998). This view of international environmental law finds support in the D.C. Circuit's opinion in *NRDC v. EPA* (the methyl bromide case). *See supra* note 129 and accompanying discussion.

federal political branches that has driven the climate change cases makes legal application of international environmental norms in the United States attractive and, perhaps, necessary for an effective response.[179] The question is whether courts applying these norms should do so explicitly.[180] This decision "entails normative and strategic judgments" for courts as domestic institutions, and as transnational actors.[181]

The climate change cases that have been decided implicitly, even if unintentionally, incorporate some international norms on climate change into U.S. law. In effect, they prevent use of scientific uncertainty concerning climate change as a legitimate agency rationale for failing to act. This reflects, and in some cases anticipated, the very high certainty of climate change science proclaimed in the fourth IPCC synthesis report. By internalizing the scientific foundation of climate change concerns established internationally, the U.S. courts encourage the democratic branches to act. Indeed, several cases, such as *Massachusetts v. EPA*, suggest a deeper level of internalization by indirectly acknowledging the need for more robust governmental action to combat the threat, including emissions reductions and adaption planning.

The remainder of this Article poses straightforward, narrow, normtive questions: Should domestic courts explicitly use norms derived from international treaties and customary law in deciding climate change cases? If so, in what ways? The answers to these questions turn partially on the legitimacy—derived from U.S. legal tradition and constitutional principles—of using international sources in domestic decisions, and partially on a more functionalist assessment of the value or effect of such use.

A. Legitimacy of Invoking International Environmental Law in Domestic Climate Change Cases

The legitimacy of U.S. court decisions depends, first and foremost, upon fidelity to the constitution. As noted above, the constitutional text is

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[179] Jonathan Zasloff, for example, notes that in the context of climate change "agencies—and therefore the courts—necessarily take international policy into account. The difficult question remains as to *how* courts should integrate diplomatic, environmental, and scientific concerns." Zasloff, *supra* note 140, at 141. Although related, my contention does not directly address the diplomatic aspects of *policy* development, but the development and implementation of normative and legal consensus. On the relationship of legal norms and policy in international environmental law, see Beyerlin, *supra* note 30.

[180] *See* Resnik, *supra* note 61, at 1612-14.

[181] *Id.* at 1614.

not clearly dualist and, indeed, early Supreme Court opinions viewed international and domestic law as "deeply intertwined."[182] Although the extent of dualism in the United States is hotly contested,[183] even a strictly dualistic conception of the constitution is not a complete bar from judicial cognizance of certain elements of international law.[184] In any event, movement toward "a more monistic approach [to consideration of international sources in domestic cases] can be reconciled with the constitutional text"[185] and has deeper historical support than willed judicial ignorance of international law.[186]

To the extent certain traditions weigh against incorporation, we must consider that legitimacy depends as much on our narrative of what the constitution requires as it does on fidelity to doctrine.[187] "[A] constitutional culture that is open to law made elsewhere will find the doctrine to render transnational norms acceptable."[188]

Even in the current doctrinal landscape, use of climate change norms to buttress, rather than trump, domestic law decisions is constitutionally acceptable. In climate change cases as elsewhere, courts should proceed cautiously, "taking care to anchor their use of international sources in a firm commitment to view their roles as, first and foremost, domestic actors."[189] For climate change cases, the over fifteen year existence of the UNFCCC without contrary legislation supports construing domestic law as consistent with the international norm requiring state action.[190]

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[182] Farber, *supra* note 89, 124, at 1350.
[183] *See id.* at 1339.
[184] Self-executing treaties and customary international law are widely understood as a part of federal law.
[185] Waters, *supra* note 12, at 696.
[186] *See* Calabresi & Zimdahl, *supra* note 89, at 755 ("[T]hose political and journalistic commentators who say that the Court has never before cited or relied upon foreign law are clearly and demonstrably wrong. . ."); *see also* Mark Tushnet, *When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1279 (2006).
[187] *See* Resnik, *supra* note 61, at 1625-26.
[188] T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 2016 (2004).
[189] Waters, *supra* note 12, at 695.
[190] *Cf.* Donald A. Brown, *The U.S. Performance in Achieving Its 1992 Earth Summit Global Warming Commitments*, 32 ENVTL L. REP. 10741, 10742 (2002) ("UNFCCC commitments are . . . the only international obligations accepted by the United States that specifically define a national approach to global warming.").

Legitimacy of using international norms is enhanced by clear U.S. accession to them.[191] U.S. accession to basic climate change norms is evident in the UNFCCC and, to a lesser extent, domestic climate-related legislation.[192] In addition, continuing participation in, and proclaimed support for, international negotiations toward a post-2012 climate regime support a conclusion that the U.S. accepts the consensus on climate change.[193]

A preliminary requirement for incorporating international norms is definitional.[194] Just as human rights treaties provide clear evidence of international human rights norms, so evidence must exist to support definition of climate change norms before they can be legitimately incorporated into U.S. decisions. Once identified, however, a major function of international environmental norms is "providing a framework for interpretation and application of domestic environmental laws and policies."[195] In the case of climate change, the norms necessary for domestic administrative law litigation are rather easy to identify and define.

Kyoto was effectively rejected by both the legislature and the executive and, therefore, has limited value for U.S. courts.[196] However, the UNFCCC states a key norm for understanding the U.S. commitment to address climate change.[197] The norm against transboundary environmental harm may also be relevant. To a lesser extent, more recent U.S. actions in working toward a post-2012 regime may be helpful in understanding the U.S. commitment and translating it to proper interpretation of domestic law.

From these sources, we can roughly state the following general consensus norms and principles. First, the problem: anthropocentric climate change is occurring as a result of greenhouse gas emissions. This

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[191] In the interpretation of a statute, the courts must be cognizant of the context in which agencies act. It is in this sense that global climate change norms may be interpretive aids.
[192] *See* National Climate Protection Act, 15 U.S.C. § 2901 *et seq.* (2006).
[193] *See* Paula J. Dobriansky, U.S. Under Sec'y for Democracy and Global Affairs, Remarks on the Post-2012 Climate Regime, Remarks at the Fourth Ministerial Meeting of the Gleneagles Dialogue on Climate Change, Clean Energy and Sustainable Development (Mar. 16, 2008), *available at* http://www.state.gov/g/rls/rm/102319.htm.
[194] This discussion is informed by sources cited in notes 29 and 30 the accompanying text.
[195] *Final Report of the Expert Group Workshop on International Environmental Law Aiming at Sustainable Development*, Annex I, para. 29, U.N. Doc. UNEP/IEL/WS/3/2 (Oct. 4, 1996).
[196] *See infra* Part V.C.1.
[197] The UNFCC essentially lays out the commitment to address climate change through domestic measures. The Kyoto Protocol is more of a technical manual on how certain nations will meet that commitment. As such, it is the UNFCC that is more valuable for the purposes discussed here, even if the Kyoto Protocol were fair game. *See infra* Part V.C.2.

factual statement reflecting a global consensus was accepted by the Supreme Court in *Massachusetts* in a manner approaching recognition of international consensus. The normative element of problem definition was also employed by the Court: this change presents a grave threat that should be addressed. The second element of the consensus on climate change is the more pressing and le-gally significant norm: states have an *obligation* to take mitigation measures.[198] The Vermont District Court essentially recognized this norm in *Green Mountain*, but the Court skirted discussing it in *Massachusetts*.[199]

In some contexts, invoking international consensus may give rise to an "international countermajoritarian difficulty."[200] However, several considerations undermine this concern in the context of the climate change cases. First, even at its most substantive, international law would be primarily for the interpretation of domestic statutes.[201] Thus, potential countermajoritarian concerns are undermined by the direct consideration of legislative intent, which should not be overridden by consideration of international sources. Second, to the extent that Congress disagrees with a court's construction of a statute, the statute may be amended.

In short, there is no compelling reason that courts cannot look to international sources in climate change cases. The question, then, is whether making international norms explicitly relevant to domestic law adds value.

B. Advantages of Bringing International Norms into Domestic Climate Change Cases

Although domestic U.S. climate change cases to date have an important role in the international dialogue concerning climate change action, a more explicit and direct discussion of the relationship would be beneficial in several ways. In particular, such discussion would enhance the United States' leadership position in the international community, promote the effectiveness of the international climate regime, encourage

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[198] Additional norms may also be identifiable, such as heightened obligations for developed nations—common but differentiated responsibility. The legal status of such norms is far from clear, however. *E.g.* Beyerlin, *supra* note 30, at 440-46.

[199] Instead, the Court purported to construe the Clean Air Act without consideration of the international context. Adding a discussion of the international norm would have been a legitimate move, however. *See supra* Part IV.B.1.

[200] Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 59 (2004).

[201] *See infra* Part V.C.

consistency in domestic climate change law, and enable additional checks on agency actions at the domestic-global interface.[202]

1. Enhancing U.S. International Leadership

In a time of unfavorable global opinion toward the United States, explicit judicial involvement with international norms will move the United States closer to the international community by acknowledging the relevance of international environmental norms for our legal system. As in other contexts, explicit judicial internalization of climate change norms would "build[ ] U.S. 'soft power,' [enhance] its moral authority, and strengthen[ ] U.S. capacity for global leadership"[203] on climate change, and other global issues. More specifically, domestic judicial consideration of the global climate regime would reaffirm that although the United States has rejected Kyoto, we take the obligation to respect the global commons seriously by recognizing that obligation as a facet of the domestic legal system.

U.S. courts' overall failure to interact with the international climate regime, as in other issue areas, has "serious consequences for their roles in international norm creation."[204] As judicial understandings of climate change law converge, the early and consistent contributors to the transnational judicial dialogue will likely play the strongest role in shaping the emerging international normative consensus.[205] As Justice L'Heureux-Dubé of the Canadian Supreme Court noted in an article describing the decline of the U.S. Supreme Court's global influence, "[d]ecisions which look only inward . . . have less relevance to those outside that jurisdic-

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[202] Most often, judicial recognition of international environmental norms pertaining to climate change would serve to bolster reasoning and outcomes derived from domestic sources. In the context of specific cases, Carl Bruch has outlined eight ways in which international law can be directly employed in domestic litigation:

> (1) upholding domestic legislation or regulations, (2) upholding other governmental or administrative actions, (3) voiding governmental actions, (4) con-straining the scope of domestic laws or regulations, (5) challenging actions by a private party, (6) assisting in interpreting domestic legal and regulatory provisions that are either vague or complex, (7) as a normative cause of action, and (8) for procedural matters such as judicial review and standing.

Carl Bruch, *Is International Environmental Law Really "Law"?: An Analysis of Application in Domestic Courts*, 23 PACE ENVTL. L. REV. 423, 430 (2006).

[203] Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480 (2003).

[204] Waters, *supra* note 68, at 557.

[205] *See id.*

tion."[206] Thus, if U.S. courts hope to participate in shaping the normative position on climate change adopted by judiciaries throughout the world, explicit recognition of the relationship between domestic and international law is vital.

With climate change in particular, norm development through domestic application should be an important aspect of global learning. The problem requires a global solution beyond the scope of any prior multilateral environmental agreements. This provides a situation in which U.S. judicial reasoning in applying aspects of climate regime thinking to concrete problems will fall into fertile international policy soil.

Accordingly, the recognition of international norms in domestic climate change litigation may play a strengthening role in the perception of U.S. leadership, encourage U.S. development and exportation of effective domestic climate strategies, and promote international agreements that will enhance consistency with such approaches. In short, explicit judicial discussion of international climate change norms as harmonious with U.S. law can enhance U.S. ability to regain a global leadership position on the issue and, thereby, more significantly shape the future of the international climate regime.

2. Promoting the Effectiveness of the International Response

Along with promoting U.S. interests and standing in the international community, climate change litigation has a direct role to play in developing the international regime if courts directly engage that regime.[207] Just as the United States as an actor may benefit from acknowledging and applying international norms, the regime in which the actions occur will benefit through application and acceptance. Indeed, a case such as *Massachusetts v. EPA* that directly engages only domestic law can nonetheless be understood to impact international lawmaking by considering its actors.[208] More important, however, will be cases in which the domestic judiciary gives life to international agreements through direct engagement—a "role [that] is particularly important as a check on the delegitimization of international legal rules that are not enforced."[209]

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[206] Claire L'Heureux-Dubé, *Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L. J. 15, 38 (1998).
[207] *See, e.g.*, Hari Osofsky, *The Geography of Climate Change Litigation Part II: Narratives of Massachusetts v. EPA*, 8 CHI. J. INT'L L. 573, 599-600 (2008).
[208] Osofsky, *supra* note 9, at 203.
[209] Slaughter, *supra* note 62, at 1103 n.1.

Assuming, as we must in the arena of climate change, that international law can only effect significant changes in behavior through penetration of the domestic sphere, domestic litigation that employs international law not only provides an instance in which the international appears effective but, more importantly, molds it into a shape that will enable further use in domestic cases or suggest necessary changes internationally.

By engaging the international, domestic cases can also provide articulation for the norms that have emerged. The precise meaning of the UNFCCC obligation that nations take measures must be hammered out on the ground. In the United States, if Congress has not acted, it is appropriate for the courts to begin this process by measuring particular actions against the standard.

3. Encouraging Consistency in Domestic Law and Policy

In the absence of national climate change law and policy, explicit discussion of international sources and norms in litigation will provide a well-developed baseline for a uniform judicial approach in the domestic realm. This could occur both within and beyond the United States.

Within the United States, bringing international environmental law into the mix of judicial reasoning would provide common grounding that unifies the decisions and begins to construct a more systematic preference for development of an effective legal response to international threats. Specifically, if an international climate change norm is found relevant to interpretation of a domestic statute, reference will be appropriate to that norm when future questions of interpretation of the domestic statute arise.[210] Thus, to the extent that climate change cases rely upon consensus concerning the scientific evidence of climate change, future cases should use that consensus as a measuring stick for claims of scientific uncertainty.[211] The same can occur with norm development. For example, had the Court in *Massachusetts* tied its jurisdictional or substantive holding to an identifiable norm, the opinion would have greater clarity and value as a precedent in other contexts within the United States.

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[210] Much as the use of foreign law regarding criminalization in *Bowers v. Hardwick* urged its use in *Roper v. Simmons*, discussion of international norms in one climate change case will suggest its use in future cases. *See* Roper v. Simmons, 125 S. Ct. 1183, 1189 (2005).
[211] An example is *Green Mountain*'s use of *Massachusetts* for this purpose. *See supra* Part IV.B.2.

Outside the United States, this approach would provide value to other, more transnationally oriented domestic courts.[212] This would serve a norm entrepreneurship function and likely increase agreement among domestic courts on how to approach climate change issues raised under statutes designed for other purposes.

4. Enabling a Check at the Domestic-International Interface

Finally, climate change litigation has something to offer for the growth of administrative law at the interface of domestic and international law. At least two points are noteworthy.

First, U.S. courts can serve a unique function of providing legal accountability for U.S. failure to honor its UNFCCC commitments.[213] Although this might be achieved implicitly, arguably the approach of *Massachusetts*, doing so explicitly would provide a check of a different magnitude. An explicit check here would serve the purposes identified above, as well as offering the practical benefit of increasing compliance.

The dualist tradition, and perhaps concerns of domestic political backlash, weigh against grounding a decision solely in the UNFCC. However, looking to it as a major point in a narrative defining the development of a partly domestic obligation to take national action for the redress of climate change would serve the same beneficial purpose. This approach has the advantage of building a significant bridge over the dualist divide between domestic and international law without ripping the Court's analysis from traditional, dualist moorings.

Secondly, bridging the dualist divide could have future advantages for an inverse problem. With a greater history of considering international obligation as it relates to domestic law, courts may become more comfortable peering into the informal regulatory role that EPA and other agencies play on the world stage.[214] While the exact contours of such review are beyond the scope of this article, it is possible to envision a review that would assure that EPA activities as a transnational actor do not contravene the agency's mandate under domestic law.

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[212] *See, e.g.*, L'Heureux-Dubé, *supra* note 206.
[213] *See* Slaughter, *supra* note 62, at 1103 n.1.
[214] *Cf.* Kingsbury et al., *supra* note 58, at 31 ("domestic institutions have often taken the lead in trying to check the global administration").

C. *How U.S. Courts Should Use International Climate Change Norms*

In the near future, climate change cases in U.S. courts are likely to increase. In the absence of a comprehensive national policy, challenges to regulatory action based on climate change concerns are likely to grow, as is the drive to find additional litigation hooks for compelling action to reduce emissions. With a new administration, a renewed push for more comprehensive climate policy is likely. If successful, any new legislative or regulatory framework will surely trigger challenges. In any of these situations, international law has something to offer domestic courts.[215]

As the discussion above demonstrates, I am not urging that U.S. courts adopt a strict monist stance. Their authority derives from a constitution that, whatever its susceptibility to monist interpretation, has been interpreted as at least partly dualist for over a century. That tradition can be respected even as courts enter into transnational dialogue on global environmental threats.[216]

International norms must be identified carefully, along with the degree of U.S. accession to them. There are now two basic sources demonstrating existing normative consensus in the international climate regime: UNFCCC and Kyoto. Each can be used by U.S. courts for a distinct purpose.

1. Kyoto and Its Implementation: Assessing Practice

The value of the Kyoto Protocol in the United States is limited because the political branches have rejected it.[217] However, as a treaty adopted by every other developed country on the planet, actions under it may offer a reference point for understanding U.S. actions toward meeting UNFCCC commitments. For example, determining whether agency action is reasonable rather than arbitrary may, in the context of a global threat with little precedent in U.S. law, be aided by examining what standards have developed internationally or in foreign jurisdictions. Pointing to similar practices throughout Kyoto nations may demonstrate an agency's reasonableness, even though Kyoto is not a substantive standard in the United States. Likewise, an agency practice that is contrary to much of the world would suggest arbitrariness, perhaps in an informal burden-shifting

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[215] *See supra* Part V.B.
[216] *See supra* Part V.A.
[217] *See supra* note 35 and accompanying text.

way. It is supported further by the role of customary international law that states should avoid transboundary environmental harm.

2. UNFCCC: Interpreting U.S. Law

The climate change cases are not likely to be constitutional, unlike human rights cases. Therefore, courts should be understood to have significant leeway in looking to global consensus in understanding the development of U.S. positions and agency actions. The norm espoused in the UNFCCC—that states have an obligation to address climate change through domestic action—can directly guide judicial understanding of the context in which U.S. statutes and administrators operate.[218]

Courts could look to the UNFCCC as an initial statement of U.S. commitment. In the absence of any significant evidence that the nation has renounced the obligation to redress climate change, the commitment should be used to interpret domestic law and frame agency obligations.

Thus, in the context of climate change, international norms should serve a *Charming Betsy* function. The Court should read domestic statutes in harmony with the norms developed in the UNFCCC and customary international law. Unless it has renounced its promises, the U.S. should be held to its obligation to take action seriously aimed at redressing climate change in order to avoid damaging the territory of other nations and the global commons. It is a collective responsibility that must, in large part, be enforced by each actor upon itself. The courts are a direct and legitimate line toward bringing the framework to fruition in the United States.

CONCLUSION

Climate change is a global commons problem that is being addressed by virtually the entire international community simultaneously. Undoubtedly, there are lessons of both practice and theory that the United States can learn from the work being done in other nations.

Largely because of the political branches' failure to confront climate change, the courts are on the front line of U.S. climate change law development. Understanding how to read U.S. environmental statutes or assess U.S. agency action in light of the growth of scientific and legal awareness of humanity's impact on the climate is a daunting task.

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[218] *See supra* text accompanying notes 39-41.

If ever there is a situation in which the U.S. courts should look outward for aid in understanding a shared problem, climate change is it. Within constitutional bounds, the court can employ the norms enshrined in the UNFCCC to understand U.S. statutes and the developments under the Kyoto Protocol to understand agency practice.

This approach will benefit the nation not only at home but internationally as well. It will strengthen soft power to guide negotiations on the climate regime and perhaps other issues. By engaging the norms of the international community, the courts can add the U.S. normative perspective into the consensus and become a leader in transnational understanding of the judicial role in tackling the emerging law of climate change.