

THE LAW OF CLIMATE CHANGE—A SELECTED BIBLIOGRAPHY

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Reported Climate Change Decisions²

Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007).

Center for Biological Diversity v. NHTSA, 538 F.3d 1172 (9th Cir. 2008).

Central Valley Chrysler Jeep v. Goldstene, 529 F.Supp.2d 1151 (E.D. Cal. 2007).

Green Mountain Chrysler Plymouth v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007).

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Pacific Coast Federation of Fishermen's Assn. v. Gutierrez, 606 F. Supp. 2d 1122 (E.D. Cal. 2008).

California v. General Motors Corp., _ F.Supp.2d _, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. 2007), *appeal pending*.

¹ Mr. Frank gratefully acknowledges the contributions of research assistant Holly Wagenet (Berkeley Law '10) in the preparation of these materials.

² These cases will be summarized briefly by Mr. Frank at the outset of the panel discussion.

Law Journal Articles

John C. Dernbach & Seema Kakade, *Climate Change Law: An Introduction*, 29 Energy L.J. 1 (2008).

This article provides an overview of climate change law, including explanations of key milestones and recent legislative proposals. Dernbach and Kakade explain how and why climate change law exists at the nexus of environmental, energy, business and international law. The authors also address issues of jurisdiction and federalism. Part one provides a layperson's introduction to climate change science and the Intergovernmental Panel on Climate Change (IPCC). Part two describes the international legal framework for climate change, including the Kyoto Protocol and the European Union Emissions Trading System. Part three describes state level efforts in the United States, and the regulatory and tax tools used. Part four discusses existing federal laws that address climate change. Part five explores the potential of national climate change legislation.

Kristen H. Engle, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets Into Common Law Remedies*, 115 U. Pa. L. Rev. 1563 (2007).

This article explores the role of climate change litigation, specifically greenhouse gas emissions lawsuits, as a tool to trigger federal legislative action, and as a component of a broader regulatory strategy. Engle also argues that the courts could incorporate emissions offsets as a compliance option in public nuisance climate change litigation, and addresses the courts' potential reluctance to adopt such a remedy.

Daniel Farber, *Climate Change, Federalism, and the Constitution*, 50 Ariz. L. Rev. 879 (2008)

This article discusses approaches that courts may take to state regulation of climate change *after* passage of federal climate change legislation. Farber argues that courts should reject state regulation where there is clear statutory preemption, discrimination against interstate commerce, significant conflict with federal cap-and-trade schemes, or interference with international agreements. He concludes that in the remaining cases, there should be a strong presumption of the validity of a state's own climate change regulations. In addition, Farber provides a detailed analysis of ways in which California has pursued its own climate change initiatives through regulation and litigation.

Daniel Farber, *The Case for Climate Compensation: Justice for Climate Change Victims in a Complex World*, 2 Utah L. Rev. 377 (2008).

This article is Farber's response to Posner and Sunstein's *Climate Change Justice* [see below]. Farber argues that the United States has a moral duty to be accountable to the world community for its contribution to greenhouse gas emissions, regardless of whether or not it benefits the United States to do so. He further details international demands for climate change compensation and support of mitigation programs.

David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Env't'l. L. 3 (2003)

In this article Grossman applies tort law to climate change. He concludes that claims based on product liability and public nuisance are potentially viable litigation strategies.

Mary Ellen Hogan, *California Climate Change Initiatives Leading the West and the Nation*, 22 Nat. Resources & Env't'l Law 14 (2008)

Hogan provides a detailed analysis of California's various climate change initiatives. She explains the relevant agencies and key pieces of legislation behind California's emissions reduction goals, before moving on to a discussion of the regional Western Climate Initiative. This article provides the reader with a Western U.S.-centric understanding of the policy backdrop for future climate change litigation.

David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 115 U. Pa. L. Rev. 1741 (2007).

This article addresses tort law through the lens of climate change. Hunter and Salzman first explain how negligence claims would operate in the context of climate change litigation, and then evaluate potential defendants and plaintiffs for climate change tort actions. They then provide a survey of climate change tort actions filed as of 2007, and elaborate a risk-utility analysis framework for climate change cases. This article also includes a detailed "Climate Change Law and Policy Timeline" for quick reference of key dates. Hunter and Salzman conclude that future climate change litigation will likely choose more specific entities for defendants, rather than industries as a whole.

Alexandra B. Klass & Elizabeth J. Wilson, *Climate Change and Carbon Sequestration: Assessing a Liability Regime for Long-Term Storage of Carbon Dioxide*, 58 Emory L.J. 1 (2008).

This article argues against legislative initiatives to limit liability for carbon sequestration companies as being a misguided effort to encourage the growth of the carbon sequestration industry. Rather, Klass and Wilson argue that liability should be maintained as a key aspect of an adaptive governance model for this new industry.

Sarah Jane Morath, *The Endangered Species Act: A New Avenue for Climate Change Litigation?* 29 Pub. Land & Resources L. Rev. 24 (2008)

Morath argues that the federal Endangered Species Act can be coupled with recent scientific studies linking human activity and production of carbon dioxide to climate change. She concludes that this will provide an ESA climate change litigation claim against actors who modify habitat by emitting carbon dioxide and contribute to climate change, thereby harming endangered species.

Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*. 115 U. Pa. L. Rev. 1563 (2007).

Posner argues against using a human rights framework for climate change litigation to reduce greenhouse gas emissions. He also critiques other approaches to climate change litigation, such as tort law and international law. Posner warns American courts against making climate change policy “for the world” by regulating foreign companies operating on American soil.

Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 Geo. L.J. 1565 (2008).

This article concerns legal claims that nations may make against one another for responsibility for climate change. Posner and Sunstein evaluate the arguments for a corrective versus distributive justice approach to climate change mitigation, and conclude by stating their preference for “welfarist considerations.”

Gregory Sergienko, *Property Law & Climate Change*, 22 Nat. Resources & Env't 25 (2008).

Sergienko contends that property law has an important role to play in climate change litigation, in addition to the more typical administrative and legislative approaches. He further argues that property law must evolve to encompass the non-tangible aspects of property, such as sun and wind, in order to mitigate climate change by promoting renewable energy development. Sergienko then discusses land use controls in the context of renewable energy development. Finally, he considers potential property law responses to inefficient uses of land that contribute to climate change.

Other Secondary Sources

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