

**AN APPLICATION OF SOCIAL THEORY TO FOREIGN
AND DOMESTIC CLIMATE CHANGE LAW**

Climate Change Law, Research & Writing (Spring 2023): Final Paper

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“Time after time we lose sight of the way our causes can’t see their effects.”

RUSH, NATURAL SCIENCE (Anthem Records 1980).



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I. INTRODUCTION

The European Union has chosen a *proactive* approach to the social climate crisis by creating a legal regime based on novel techniques in international and domestic law, which prioritize collective action for societal-wide benefits. By contrast, the United States remains *reactive* in regulating the social disruptions caused by climate, which has stagnated legal progress in this area. One of the results of this reactive approach might be an imminent breakdown of social structures and institutions of American society. This loss of values and norms, or “social death,” is best described using Emile Durkheim’s anomie theory. However, as shown here, rather than societal-wide approaches which prioritize collective action and are regarded with suspicion by our legislators and judiciary, such imminent societal breakdown can be avoided. In tune with American pragmatism, this paper advocates for incrementally implementing industry-specific changes.

II. EMILE DURKHEIM’S ANOMIE THEORY

French sociologist Emile Durkheim’s anomie theory can be applied to international legal approaches to combating climate change. In *The Division of Labor in Society*, Durkheim began his exploration of the manner in which social change impacts individual behavior.¹ With this work, Durkheim sought to explore behavioral changes as affected by one significant cultural event: the Industrial Revolution.² Durkheim theorized that the urbanization resulting from the Industrial Revolution would contribute to a decrease in solidarity grown out of shared societal experiences; in its stead would emerge a form of labor-based solidarity, whereby labor serves as society’s driving force rather than shared experiences and values.³ Thus, at a ground level, Durkheim sought to simultaneously conceptualize individual actions and societal changes to address the larger change he was witnessing. Because of the emphasis Durkheim placed on individual action and social change, an analysis of social expectations and norms played a critical role in his theories.

Durkheim’s social theory emphasized the notion that an increase in societal complexity would contribute to a decrease in homogeneity in individual behaviors.⁴

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1. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (Free Press ed. 1964) (1893).
 2. See generally ANTHONY GIDDENS, *CAPITALISM AND MODERN SOCIAL THEORY: AN ANALYSIS OF THE WRITINGS OF MARX, DURKHEIM, AND MAX WEBER* 14 (1971) (explaining that Durkheim was attempting to explain the relationship between the growth of cities as a product of the Industrial Revolution and consequent changes in social patterns).
 3. DURKHEIM, *supra* note at 283.
 4. *Id.* at 283-84. Specifically, Durkheim theorized that an increase in deviant behavior caused by an increase in societal complexity lessened behavioral homogeneity. *Id.*



This is due in part to the fact that urbanization and its consequences give rise to situations in which individuals are “left with no essential characteristics in common except those they get from their intrinsic quality of human nature.”⁵ The absence of commonly-held characteristics among individuals unsurprisingly leads to a reduction in harmony with respect to norms, and this lack of consensus has further dire implications, for it also reduces consequences for violating norms.⁶ Enforcement of traditional norms depends upon “public sentiment;”⁷ thus, where there is an absence of consensus, individuals are more likely to engage in divergent behaviors, and the homogeneity of societal values vanishes. With a reduction in consensus over the norms that regulate individual behavior comes an increase in individual desires.⁸ This is precisely where Durkheim’s anomie theory becomes relevant.

Anomie has been defined as “[a]n absence, breakdown, confusion, or conflict in the norms of society.”⁹ More generally, however, anomie can be understood to encompass a state of “personal unrest, alienation, and uncertainty that comes from a lack of purpose or ideals.”¹⁰ Anomie can come from a range of causes, but for some, it can be directly attributed to societal conditions that remove consensus about norms.¹¹ Applicable here, however, is the anomie that arises due to a “dissociation between culturally defined aspirations and socially structured means” to accomplish those culturally-targeted goals.¹² When individuals encounter a state of normlessness as Durkheim described, it leads to a system wherein individuals feel disconnected from those around them and from their social institutions. This instability ultimately breaks down ties between individuals and their social institutions, contributing to a

5. EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 112 (Bryan S. Turner ed., Routledge 1957) (1900).

6. See Stephen D. Webb, *Crime and the Division of Labor: Testing a Durkheimian Model*, 78 AM. J. SOC. 643, 644 (1972).

7. *Id.*

8. See Peter A. Corning, *Durkheim and Spencer*, 33 BRIT. J. SOC. 359, 364-65 (1982).

9. JOHN SCOTT & GORDON MARSHALL, *A DICTIONARY OF SOCIOLOGY* (Oxford Univ. Press 3d ed. 2009).

10. *Anomie Definition and Meaning*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/anomie> (last visited Mar. 1, 2023).

11. See Stephen R. Marks, *Durkheim’s Theory of Anomie*, 80 AM. J. SOC. 329, 333 (1974). Marks further defines anomie as “the situation in which . . . normative boundaries are thrown awry.” *Id.*

12. Robert K. Merton, *Social Structure and Anomie*, 3 AM. SOC. REV. 672, 674 (1938). Merton’s definition is particularly relevant because it emphasizes individual desires and the absence of methods to accomplish those desires, which can be directly related to the climate crisis.



society-wide feeling of detachment. One modern-day crisis that illuminates these feelings of estrangement from our social institutions is climate change.¹³

To illustrate how Durkheim’s anomie theory can be directly applied to climate change, consider pollution. Pollution involves a harmful agent entering an otherwise healthy system and subsequently weakening that system until it brings about its death.¹⁴ Just as pollution involves bringing about biological death, Durkheim’s anomie theory conceptualizes the notion that rapid social change causes the social body—which composes all aspects communal life—to become unhealthful to the point of social death.¹⁵

Scholars have begun to address the human-environment interaction specifically as it relates to Durkheim’s anomie theory,¹⁶ because “the human environment relationship has become an increasingly important focus in studying how people understand themselves[,] . . . their community,” and their social institutions.¹⁷ Studying the human-environment interaction reveals further insights into understanding communities as a whole,¹⁸ since the physical environment provides an important backdrop for social interaction.¹⁹

One important example of anomie as it relates to the human-environment interaction is in the aftermath of weather disasters.²⁰ This should come as no surprise; environmental chaos inherently causes disruption in society, and people are tremendously affected. Consider, for example, weather disasters that lead to displacement and require relocation. One study conducted in the aftermath of

13. See generally Cary Funk & Meg Hefferon, *U.S. Public Views on Climate and Energy*, PEW RESEARCH CENTER (Nov. 25, 2019), <https://www.pewresearch.org/science/2019/11/25/u-s-public-views-on-climate-and-energy/> (reporting that sixty-seven percent of Americans say the federal government is not doing enough to protect the environment or reduce the effects of global climate change).

14. See *Environmental Agents*, NAT’L INST. OF ENV’T HEALTH SCIENCES, <https://www.niehs.nih.gov/health/topics/agents/index.cfm> (last visited Mar. 1, 2023).

15. See generally EMILE DURKHEIM, *SUICIDE* (Free Press ed., 1963) (1897); see also Ashley Crossman, *The Study of Suicide by Emile Durkheim*, THOUGHTCO. (Jan. 6, 2020), <https://www.thoughtco.com/study-of-suicide-by-emile-durkheim> (noting that Durkheim’s theory of “anomic suicide” connotes a response by which disconnection from society contributes to individual suicide, and on a larger scale, social death).

16. See Adrienne R. Brown, *Environmental Anomie and the Disruption of Physical Norms During Disaster*, CURRENT SOCIO. 1 (2022).

17. *Id.* at 3.

18. *Id.* at 4.

19. See Brian W. Eisenhauer et al., *Attachments to Special Places on Public Lands: An Analysis of Activities, Reasons for Attachments, and Community Connections*, 13 SOC’Y AND NAT. RES. 421, 422 (2000).

20. Brown, *supra* note 16 at 5.



Hurricane Katrina, which is among the most destructive hurricanes in United States history,²¹ examined the feelings of social isolation as a consequence of the anomie that followed the physical devastation of the victims' environment.²² But beyond the social isolation that results from such disasters, these disruptions extend much further and “undermine order[,] because traditional modes of authority, decision-making and information circulation do not apply.”²³ Once these disruptions occur and are exacerbated as time passes, society loses faith in its institutions, thereby proceeding down a path toward anomie. The resultant chaos and uncertainty erode trust in authority, transforming decision-making from collective action to an individual process.²⁴

The issue thus becomes how to address these disruptions proactively, rather than reactively. An example of the United States' response to such disruptions is Federal Emergency Management Agency (FEMA) support in the aftermath of weather disasters.²⁵ FEMA is, by its nature, as reactive as it gets; it provides “assistance to individuals and families who have lost their homes as a result of a presidentially declared disaster, and also helps with other needs such as disaster-caused childcare, medical expenses or clean-up items.”²⁶ Emergency aid in the aftermath of weather disasters—as useful as it may be—is not enough to address social disruptions because it is always reactive, it is always limited, and it is always taking resources from others and directing them to another purpose. It becomes evident with each additional year that our purely reactive responses to weather disasters and emergencies are insufficient.²⁷ Environmental anomie is thus present in the United States, as “sudden changes to the physical environment coalesce[] to

21. *Public Health Response to Hurricanes Katrina and Rita – Louisiana, 2005*, CENTER FOR DISEASE CONTROL AND PREVENTION (Jan. 6, 2006), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5502a1.htm>. In addition to displacement and relocation, Hurricane Katrina also disrupted basic utilities, food distribution systems, healthcare, and communications systems. *Id.*

22. *See generally* Brent Teasdale et al., *The Effect of Hurricane Katrina on Adolescent Feelings of Social Isolation*, 94 SOC. SCIENCE Q. 2 (2013).

23. Brown, *supra* note 16 at 5.

24. *See* KE Weick, *The Collapse of Sensemaking in Organizations: the Mann Gulch Disaster*, 38 ADMIN. SCIENCE Q. 628, 633 (1993) (reviewing the aftermath of the Mann Gulch fire disaster and analyzing the unraveling of norms of respectful interaction).

25. *See* 6 U.S.C. § 313. FEMA has a primary mission of “reduc[ing] the loss of life and property and protect the Nation from all hazards, including natural disasters . . .” *Id.*

26. *Programs to Support Disaster Survivors*, FEDERAL EMERGENCY MANAGEMENT AGENCY, <https://www.fema.gov/assistance/individual/disaster-survivors> (last visited Mar. 1, 2023).

27. *See generally* Will Englund et al., *Texas, the Go-It-Alone State, is Rattled by the Failure to Keep the Lights On*, THE WASH. POST (Feb. 18, 2021), <https://www.washingtonpost.com/business/2021/02/18/texas-electric-grid-failure>. With electricity generation being tested by heat waves, intense flooding, and other parts of the changing climate, Texans critiqued their leadership and demonstrated a lack of confidence in those in charge. *Id.*



undermine feelings of security and connection to place, as well as the social structure's ability to respond effectively."²⁸

What is now required is what Jedidiah Purdy refers to as “environmental ethic,” which involves the melding of values to practices and commitments already in place.²⁹ The environmental ethic is not a new concept. As Purdy notes, this was the path taken in the post-1970s wave of environmental ideas and lawmaking, where industrial pollution was presented as a public health crisis.³⁰ Despite trying to adopt such an approach decades ago, Purdy states that the new environmental laws at the time did little to secure ecological values in social and personal life.³¹ Thus, the United States is presently faced with an issue it has previously confronted. It is aware of the problems and the dangers, but has done little—and, in some cases, nothing—to address them. Climate change is therefore “exceptional because it exemplifies some of the problems that have stood in the way of environmental success” for quite some time.³² Because anomie is in part due to societal change, it can be ascribed to the Anthropocene as discussed by Purdy. He states, “This is why climate change is the emblematic problem of the Anthropocene: it is both a driver and a symbol of a thoroughly transformed world.”³³

The difficulty in combatting climate is that its forces are complex, and combatting it does not immediately yield benefits. However, society should find comfort and security in knowing that the actions it takes today will preserve the world for tomorrow. Given the repetitive nature of the government's failures, it is not difficult for American citizens to disbelieve that our government will take the problems and dangers of climate change seriously. The notion that climate needs to be worked into other identities and institutions, as well as integrated into other dispositions and commitments, could not be more abundantly clear. Fortunately, the United States has an example to which it can look. The European Union has taken precisely this approach in its fight to combat the climate crisis. Durkheim's theories can be a guiding principle: “*One cannot help looking beyond one's own position when the ground underfoot does not feel secure.*”³⁴

28. Brown, *supra* note 16 at 2.

29. JEDIDIAH PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE*, 232-33 (Harv. Univ. Press 2015).

30. *Id.* at 233.

31. *Id.*

32. *Id.* at 255.

33. *Id.* at 249.

34. DURKHEIM, *supra* note 1 (emphasis added).



III. THE EUROPEAN UNION APPROACH TO COMBATTING CLIMATE CHANGE

The European Union’s approach to climate change simultaneously prioritizes the environment and society at large under Durkheim’s anomie theory, and thus illuminates a commitment to shared values and aspirations through comprehensive legislation and judicial opinions. While this is a novel approach to combatting climate change, the courts and the European Union itself are taking action to ensure that climate goals come to fruition.

The European Climate Law provides the European Union’s most recent regulations for establishing a framework aimed at achieving climate neutrality.³⁵ It establishes as a legally-binding requirement the goal of the European Green Deal for Europe’s economy and society to become climate-neutral by 2050, and it sets the intermediate target of reducing net greenhouse gas emissions by at least fifty-five percent by 2040 as compared to 1990 levels.³⁶ The European Climate Law includes additional goals of stronger provisions and adaptation to climate change, strong coherence across EU policies with a climate neutrality objective, and a commitment to engage with sectors to prepare for sector-specific roadmaps charting the path to climate neutrality for different areas of the economy.³⁷ And most importantly, “[t]he law aims to ensure that all EU policies contribute to this goal and that all sectors of the economy and society play their part.”³⁸ The European Union is truly implementing a collective approach: it is integrating its climate objectives into various areas of society in pursuit of a goal that is advantageous for all, thereby accomplishing Purdy’s “environmental ethic.”³⁹

Beyond its climate law, the European Union has implemented additional mechanisms to ensure that its climate objectives are legally binding and its people are protected. The European Convention on Human Rights was the first legal instrument to give citizens legally-binding rights as stated in the Universal Declaration of Human Rights.⁴⁰ Because the Convention gives binding effect to the rights set out in the Universal Declaration of Human Rights,⁴¹ it lays down absolute

35. 2021 O.J. (L 243) 1.

36. *Id.*

37. *Id.*

38. *European Climate Law*, EUROPEAN COMMISSION, https://climate.ec.europa.eu/eu-action/european-green-deal/european-climate-law_en (last visited Feb. 13, 2023).

39. PURDY, *supra* note 29 at 232-33. To reiterate, Purdy’s environmental ethic refers to the melding of values to practices and commitments that are already in place. *Id.*

40. *European Convention on Human Rights*, EUROPEAN COURT OF HUMAN RIGHTS, <https://www.echr.coe.int/Pages/home.aspx> (last visited Mar. 5, 2023).

41. G.A. Res. 217(III) A, Universal Declaration of Human Rights (Dec. 10, 1948).



rights which can never be breached by the States, and it protects certain rights and freedoms which can only be restricted by law when necessary in a democratic society.⁴² Of the provisions that are binding on the States, the two most important for this paper’s purposes are Article 2 and Article 8. Article 2 protects the “right to life,” and provides that everyone’s right to life is protected by law.⁴³ Article 8 provides for the “right to respect for private and family life,” thus granting all persons the right to respect for their private and family lives, their homes, and their correspondence.⁴⁴

The enforcement of obligations under the Convention is undertaken in part by the European Commission of Human Rights and the European Court of Human Rights.⁴⁵ Perhaps most admirably, each body incorporates the notion of shared values and collective action into its practices, for it emphasizes the doctrine of legal common ground and state practices reflecting common values.⁴⁶

This is best illustrated through the rise of human rights-based litigation for climate action that has been occurring through the courts of European Union member states.⁴⁷ The following cases best exemplify the groundbreaking approach to climate change progress sweeping throughout the European Union and its courts: *Neubauer et al. v. Germany*,⁴⁸ *State of the Netherlands v. Urgenda Foundation*,⁴⁹ and *Demir and Baykara v. Turkey*.⁵⁰ *Neubauer* was a recent landmark case from the German Constitutional Court, wherein the Court held that “the national climate targets and the annual emission amounts allowed [by the Federal Climate Change Act] until 2030 are incompatible with fundamental rights insofar as they lack sufficient specifications

42. *The European Convention on Human Rights: A Living Instrument*, EUROPEAN COURT OF HUMAN RIGHTS (2022).

43. UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 41 at Art. 2.

44. *Id.* at Art. 8.

45. EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 40.

46. THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A LIVING INSTRUMENT, *supra* note

42.

47. *See generally* CESAR RODRIGUEZ-GARAVITO, LITIGATING THE CLIMATE EMERGENCY: HOW HUMAN RIGHTS, COURTS, AND LEGAL MOBILIZATION CAN BOLSTER CLIMATE ACTION (Cambridge Univ. Press 2022).

48. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 24, 2021, Case No. 1 BvR 25656/18/1, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210324_11817_order-1.pdf (hereinafter *Neubauer*).

49. Hoge Raad der Nederlanden [Supreme Court of the Netherlands], Dec. 12, 2019, Case No. [2015]HAZA C/09/00456689, (hereinafter *Urgenda*).

50. Judgment, *Case of Demir and Baykara/Turkey*, App. No. 34503/97, IHRL 3281 (2008) (hereinafter *Demir and Baykara*) (emphasis added).



for further emissions reductions from 2031 onwards.”⁵¹ The landmark ruling in *Urgenda*, which emphasized a “minimum fair share” norm, held that “the Netherlands is obliged to do ‘its part’ in order to prevent dangerous climate change, even if it is a global problem.”⁵² And in *Demir*, the European Court of Human Rights stated:

It is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that *the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern society.*⁵³

Each of these landmark cases demonstrate a number of admirable notions. First and foremost, the relevant courts are holding their governments accountable so that their climate commitments are ultimately achieved, and are not merely goals. Second, each decision recognizes that all countries comprising the European Union have a role to play in combatting climate change, and thus collective action is crucial. Third, and specifically relevant to Durkheim’s anomie theory, these decisions recognize the importance of social norms and values, and thereby incorporate them into judicial opinions. Both legislatively and jurisprudentially, the European Union is achieving Purdy’s “environmental ethic.”⁵⁴

The European Union approach, while utilizing novel methods in international law, fosters a collective approach to combatting climate change. This is one of the only ways that we can truly combat the climate crisis. However, as noted below, this is not what the United States has prioritized in its efforts to combat climate change.

IV. THE U.S. REACTIVE APPROACH TO COMBATTING CLIMATE CHANGE

While significant progress has been made recently regarding the United States’ commitment to combating climate change, the social crisis brought by the environmental changes caused by industrial, agricultural, and human pollution needs to be addressed in ways matching its magnitude. The Revolutionary War and

51. *Constitutional Complaints Against the Federal Climate Change Act Partially Successful*, BUNDESVERFASSUNGSGERICHT (Apr. 29, 2021), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021>

52. *Urgenda*, *supra* note 49 at ¶5.7.1.

53. *Demir and Baykara*, *supra* note 50 at ¶86 (emphasis added).

54. PURDY, *supra* note 29 at 232-33.



breakup from England, for example, required a new Constitution, prescribing legal values and norms to guide the nation prospectively. What this current social crisis requires is something similar. The new pragmatic approach can encompass specifically-targeted, incrementally implemented measures. The key answer is that each measure responds to a specific problem, such that it combats the continued breakdown of social structures and institutions in America.

A recent example of domestic legislation to combat climate change in a specifically-targeted manner is the Consolidated Appropriations Act.⁵⁵ While the Act consists predominantly of COVID relief provisions, it also contains provisions phasing out the use of hydrofluorocarbons.⁵⁶ Generally speaking, hydrofluorocarbons are highly potent greenhouse gases typically used as refrigerants.⁵⁷ The provisions of the Act targeting hydrofluorocarbons seek to accomplish progress in three ways: phasing down the production and consumption of certain listed hydrofluorocarbons; maximizing reclamation and minimizing releases of the listed hydrofluorocarbons and their substitutes; and facilitating the transition to next-generation technologies by restricting the use of hydrofluorocarbons in specific sectors.⁵⁸ The Act is a prime example of the benefits of specifically-targeted climate legislation, as the EPA notes that it will be particularly beneficial for populations that may be especially vulnerable to damages associated with the effects of climate change.⁵⁹ Moreover, the Act is one of the more significant environmental policies passed by the United States government, and can therefore serve as a model prospectively.

Another recent (and tremendously significant) example of progress being made by the United States in combating climate change is the Inflation Reduction Act.⁶⁰ The Inflation Reduction Act is the single largest investment Congress has made into climate and clean energy in its history, as it includes approximately \$369 billion in incentives for climate-related and clean energy programs.⁶¹ The most significant provisions are as follows: (1) tax rebates and credits to lower energy costs for households;⁶² (2) tax credits, research loans, and grants to increase domestic

55. Consolidated Appropriations Act of 2021, H.R. 133, 116th Cong. (2021).

56. *Id.*

57. *EPA Moves Forward with Phase Down of Climate-Damaging Hydrofluorocarbons*, ENVIRONMENTAL PROTECTION AGENCY (May 3, 2021), <https://www.epa.gov/newsreleases/epa-moves-forward-phase-down-climate-damaging-hydrofluorocarbons>.

58. *Id.*

59. *Id.* Specifically, the EPA notes that the very young, elderly, poor, disabled, and indigenous populations are the at-risk communities that will benefit from the Act. *Id.*

60. Inflation Reduction Act, Pub. L. 117-169, 117th Congress (2022).

61. Hunter Voegelé & Ander Ugalde, *What's in the Inflation Reduction Act?*, THE NATIONAL LAW REVIEW (Aug. 24, 2022), <https://www.natlawreview.com/article/what-s-inflation-reduction-act>.

62. 42 U.S.C. § 18795.



manufacturing capacity for wind turbines, solar panels, batteries, and other essential components of clean energy storage;⁶³ (3) tax credits to reduce carbon emissions;⁶⁴ and (4) programs to reduce the environmental impact of agriculture.⁶⁵ The Inflation Reduction Act further contains investments for specifically-targeted industries. For example, the EPA notes that the Inflation Reduction Act invests \$350 million for grants, technical assistances, and tools, including carbon labeling, to help manufacturers and others measure, report, and substantially lower the levels of carbon and other greenhouse gas emissions associated with all relevant stages of production, use and disposal of construction materials and products including steel, concrete, asphalt, and glass.⁶⁶

The Inflation Reduction Act will enable the United States to tackle the climate crisis domestically, advance environmental justice, maintain our position as a world leader in clean energy manufacturing, and put the United States on a path to achieving net-zero admission by 2050.⁶⁷ And with so much federal funding available, the citizens of the United States should feel a renewed sense of confidence in the role the United States government is playing in combating climate change, both domestically and internationally.

Problems arise, however, with accessing the funding available under the Inflation Reduction Act. The funding, programs, and incentives available to accelerate the United States' transition to a clean energy economy are part of a complex web of tax credit monetization.⁶⁸ Therefore, accessing the available funding to implement the benevolent goals and targets of the Inflation Reduction Act can be characterized as an impediment, since understanding the complexities of tax credit monetization may be beyond the ordinary American citizen. Thus, it is now critical to expedite this process and formulate measures to assist individuals and institutions in securing the vast amount of available funding. The United States has made the funding available, and it is time to assist with access.

63. 42 U.S.C. § 3006.

64. 26 U.S.C. § 45.

65. 7 U.S.C. § 6936.

66. *Inflation Reduction Act Programs to Fight Climate Change by Reducing Embodied Greenhouse Gas Emissions of Construction Materials and Products*, ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/inflation-reduction-act/inflation-reduction-act-programs-fight-climate-change-reducing-embodied> (last visited Feb. 13, 2023).

67. *Inflation Reduction Act of 2022*, DEPARTMENT OF ENERGY, <https://www.energy.gov/lpo/inflation-reduction-act-2022> (last visited Mar. 2, 2023).

68. *The Inflation Reduction Act*, ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/green-power-markets/inflation-reduction-act> (last visited Mar. 2, 2023).



V. *A PRAGMATIC APPROACH TO COMBATTING CLIMATE CHANGE*

One manner through which the United States can accomplish more significant industry-specific progress is to incorporate a pragmatic response to the climate-caused social crisis. A step-by-step implemented climate response might happen more successfully through tightening emissions standards where administrative agency authority already exists.

a. AMERICAN PRAGMATISM AND THE LAW

Pragmatism has its roots in the United States and provides an analytical tool for philosophical traditions worldwide.⁶⁹ The core of pragmatism is the “Pragmatic Maxim,” which can be understood as a canon for “clarifying the meaning of hypotheses by tracing their practical consequences—their implications for experience in specific situations.”⁷⁰ The theories of John Dewey—one of the early founders of American pragmatism—regarding political philosophy are particularly insightful. Dewey presumed that individuals subsist transactionally with their social environment and can use inquiry to solve problems in hypothetical and experimental ways.⁷¹ Other scholars and philosophers have noted that Dewey’s pragmatic approach involves “*a philosophy rooted in common sense and dedicated to the transformation of culture, to the resolution of the conflicts that divide us.*”⁷² What is most helpful about Dewey’s pragmatism, however, is the fact that it prioritizes a “common denominator” which emphasizes “a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action.”⁷³ Dewey’s instrumentalist approach to pragmatism can thus be fundamentally understood as an approach that views knowledge as “arising from an active adaptation of the human organism to its environment.”⁷⁴

For Dewey, the logic and attitude of scientific inquiries, when properly conceived and performed, could be applied in other areas such as politics, for example,

69. *Pragmatism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (last updated Apr. 6, 2021) <https://plato.stanford.edu/entries/pragmatism/>.

70. *Id.*

71. *Id.*

72. *See generally* R.W. SLEEPER, THE NECESSITY OF PRAGMATISM: JOH DEWEY’S CONCEPTION OF PHILOSOPHY 8-9 (1986) (emphasis added).

73. C. WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM 5 (1989).

74. *John Dewey (1859-1952)*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://iep.utm.edu/john-dewey> (last visited Apr. 7, 2023).



to establish and enable proper action.⁷⁵ Thus, Dewey’s objective philosophical approach provides a method for discerning what is the proper course of action to be taken in a given circumstance.⁷⁶ And beyond that, it implicates a perspective that evaluates policies and regulations by looking at how they work upon actual implementation.⁷⁷

Pragmatism was not confined to the philosophical realm, as it left an imprint on the writings of legal academics and jurists alike.⁷⁸ Dewey’s pragmatism can be seen in the writings and jurisprudential approach of former Justice Benjamin Cardozo, whose 1921 book *The Nature of the Judicial Process* illustrates the impact that Dewey’s philosophy had on legal thinkers of the time.⁷⁹ If there is one quote that is particularly applicable for the interaction of climate change and the law, it is as follows: “*The final cause of law is the welfare of society.*”⁸⁰ It is precisely this principle that should be used to guide the United States’ approach to climate change prospectively. Justice Cardozo’s opinions further reflect his commitment to pragmatic jurisprudence in analysis. For example, in *A.L.A. Schechter Poultry Corp. v. United States*,⁸¹ Cardozo expresses in dissent the importance of “inquir[ing] into evils and upon discovery correct[ing] them.”⁸²

Former Justice Stephen Breyer is another jurist who adopted a pragmatic jurisprudential approach. In his book *Making Our Democracy Work: A Judge’s View*, Justice Breyer expresses that “Judges should use traditional legal tools, such as text, history, tradition, precedent, and purposes and related consequences, to help find proper legal answers. *But courts should emphasize certain of these tools, particularly purposes and consequences . . .*”⁸³ For Justice Breyer, what was imperative was an understanding that actions “can have real-world consequences and [by] taking those consequences into account, the Court can help make the law work more effectively . . .”⁸⁴ Breyer, Cardozo, and Dewey alike acknowledged the importance of the end

75. Kory Sorrell, *Pragmatism and Moral Progress: John Dewey’s Theory of Social Inquiry*, 39 PHIL. AND SOC. CRITICISM 1, 8 (2013).

76. WEST, *supra* note 73 at 5.

77. Ronald M. Levin, *Administrative Law Pragmatism*, 37 WASH. U. J. L & POL’Y 227, 228 (2011).

78. See generally Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653 (1990).

79. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

80. *Id.* at 66 (emphasis added).

81. 295 U.S. 495 (1935)

82. *Id.* at 551 (Cardozo, J., dissenting).

83. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 80 (2010) (emphasis added).

84. *Id.* at 74.



result, and what links the three is the implementation of processes to secure better outcomes.

The collective action approach of the European Union, while admirable, is not the sole approach that the United States has at its disposal in combatting the climate crisis. Rather, an approach implementing American pragmatism could help the United States in avoiding the further breakdown of social structures and institutions in our society. The ideal manner to implement pragmatism is through one principal, concerted effort: tighten emissions standards where administrative agency authority already exists. Such an approach will accomplish social ends effectively through the use of the administrative process because it will afford an opportunity to restore faith in our social and political institutions.⁸⁵

b. AGENCY INCREMENTALISM

Administrative law works best if its legislative mandate is clear. Consider, for example, motor vehicles and their emissions: per the EPA, motor vehicles remain the single largest source of domestic greenhouse gas emissions.⁸⁶ The EPA and the National Highway Traffic Safety Administration both have explicit statutory authority to regulate motor vehicles; thus, the tightening of emissions standards for each administrative body is possible. The EPA, for example, has authority to set air pollution emissions standards under the Clean Air Act.⁸⁷ Additionally, the National Highway Traffic Safety Administration establishes fuel economy standards under the Energy Policy and Conservation Act.⁸⁸ Because the authority to establish emissions standards and fuel economy standards is already well-within the purview of both the EPA,⁸⁹ and the National Highway Traffic Safety Administration,⁹⁰ there exists a simple solution: incrementally tighten emission standards for motor vehicles.

President Biden and his administration have acknowledged and begun the process of implementing such a simple solution. On April 12, 2023, the EPA announced new proposed federal vehicle emissions standards that “will accelerate the ongoing transition to a clean vehicles future and tackle the climate crisis.”⁹¹ The EPA

85. See Levin, *supra* note 77 at 231.

86. See EPA, *Inventory of Greenhouse Gas Emissions and Sinks, 1990-2018* (2020).

87. 42 U.S.C. § 7521.

88. 42 U.S.C. §§ 6201-6422.

89. 42 U.S.C. § 7521.

90. 42 U.S.C. §§ 6201-6422.

91. *Biden-Harris Administration Proposes Strongest-Ever Pollution Standards for Cars and Trucks to Accelerate Transition to a Clean-Transportation Future*, EPA (Apr. 12, 2023), <https://www.epa.gov/newsreleases/biden-harris-administration-proposes-strongest-ever-pollution-standards-cars-and>.



projects that the tightened vehicle emissions standards will improve air quality for communities across the nation, as well as avoid nearly 10 billion tons of CO₂ emissions—equivalent to more than twice the total CO₂ emissions in 2022.⁹² Due in part to the Inflation Reduction Act, the EPA notes that the new standards “reflect the advancements and investments in clean vehicle manufacturing, which have been accelerated by President Biden’s Investing in America agenda and complement the ongoing transition in the market towards cleaner vehicles.”⁹³

Coal and natural gas are additional areas where specifically-targeted and incrementally implemented responses are imperative. Coal-fired power plants are currently the second largest source of greenhouse gas emissions in the United States.⁹⁴ Similar to emissions from motor vehicles, the EPA already possesses statutory authority under the Clean Air Act to impose stricter regulations on coal.⁹⁵ While coal consumption has declined since its peak in 2007, it remains an important source for generating electricity, as well as for use by the steel industry to smelt iron ore into iron to make steel.⁹⁶ What should now be done is utilizing the EPA’s authority under the Clean Air Act to impose stricter regulations on the coal industry. As one scholar notes, this can be accomplished through (1) increasing the costs for coal plants by further controlling emissions; (2) lowering national ambient air quality standards for fine particulate matter and ozone; (3) imposing stricter emissions controls on mercury, a contaminant in coal; (4) requiring coal plants to meet the same emissions standards as natural gas plants; and (5) strengthening measures against cross-state air pollution and regional haze.⁹⁷ As for natural gas, it is still a fossil fuel which generates carbon dioxide when burned, and the chief component of natural gas is methane.⁹⁸ Therefore, the same EPA authority under the Clean Air Act could hypothetically be used to impose stricter regulations on natural gas.

However, even if tightened emissions standards were to be established, one major impediment remains: the United States Supreme Court. The Supreme Court has historically not been kind to environmentalists and climate initiatives, subject to

92. *Id.*

93. *Id.*

94. *Inventory of Greenhouse Gas Emissions, supra* note 86.

95. *See* 42 U.S.C. § 7411(b).

96. *Use of Coal*, UNITED STATES ENERGY INFO. ADMIN. (last updated June 6, 2022), <https://www.eia.gov/energyexplained/coal/use-of-coal.php>.

97. Michael B. Gerrard, *Presidential Progress on Climate Change: Will the Courts Interfere With What Needs To Be Done To Save Our Planet*, AMERICAN CONSTITUTION SOCIETY ISSUE BRIEF 13 (2021).

98. *Natural Gas Explained*, UNITED STATES ENERGY INFORMATION ADMINISTRATION (last updated Dec. 27, 2022), <https://www.eia.gov/energyexplained/natural-gas/>.



one notable exception.⁹⁹ Certain legal doctrines have historically been used, and likely will continue to be used, to challenge domestic environmental policy. Specifically, the administrative law doctrines of agency deference and the Major Questions Doctrine could be used to invalidate efforts to combat the destructive effects of climate change.

Consider *Chevron* deference, for example: this administrative law doctrine arises out of *Chevron U.S.A. Inc., v. National Resources Defense Council* and provides for deference to administrative agencies' interpretations of ambiguous mandate statutes, so long as the agency interpretation of a statute is reasonable.¹⁰⁰ Thus, when Congress delegates authority to an administrative agency on a particular issue, the Supreme Court is precluded from inserting and favoring its own interpretation over that of the administrative agency, provided that the agency interpretation is reasonable.¹⁰¹ *Chevron* deference has previously been used by the Supreme Court to defer to agency interpretations.¹⁰² The Supreme Court has limited, but refused to abolish, deference to agency interpretations, and two important cases illustrate this notion. First, in *Auer v. Robbins*, the Court held that an administrative agency's interpretation of its own rule is controlling unless it is "plainly erroneous or inconsistent with the regulation."¹⁰³ Second, in *Kisor v. Wilkie*, the Court declined to overrule *Auer* but held that agencies ought to receive deference to their own rules only when the rules are legitimately ambiguous and the agency's interpretation is reasonable, for not all agency interpretations are entitled to *Auer* deference.¹⁰⁴ Thus, while agencies may have a fair amount of latitude to interpret their own rules, the judiciary can intervene. In the event that the current conservative makeup on the Court determines that an agency interpretation is unreasonable, there is a prospect of judicial intervention to invalidate such administrative action.¹⁰⁵

99. See *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that Massachusetts had standing to challenge the EPA's refusal to regulate certain greenhouse gas emission from motor vehicles).

100. 467 U.S. 837, 844 (1984).

101. *Id.*

102. See, e.g., *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 226 (2009) (deferring to the EPA's determination that the Clean Water Act permitted the EPA to consider "site-specific cost variance[s]").

103. 519 U.S. 452, 461 (1997).

104. 139 S. Ct. 2400, 2418 (2019).

105. It is important to note that concerns regarding political orientation can arise within the executive branch, and within the EPA specifically. One illustrative example of this is the Bush administration's refusal to pursue greenhouse gas emissions from automobiles. See *Massachusetts v. EPA*, 549 U.S. 497 (2007); see also Douglas Jehl, *U.S. Going Empty-Handed to Meeting on Global Warming*, N.Y. TIMES (Mar. 29, 2001), <https://www.nytimes.com/2001/03/29/us/us-going-empty->



Additionally, the Major Questions Doctrine provides that, where an administrative agency seeks to decide an issue of major national significance, its authority to do so must be supported by *clear* congressional authorization.¹⁰⁶ The doctrine has been relied upon previously in environmental law and regulatory cases,¹⁰⁷ and likely will continue to be a barrier to certain environmental legislative tactics. Most recently, the Supreme Court invoked the Major Questions Doctrine in *West Virginia v. EPA* to conclude that Congress had not sufficiently delegated to the EPA authority to impose caps on carbon emission based on the premise that existing coal-fired power plants would shift their means of energy production to a less carbon-intensive source or participate in a cap-and-trade program.¹⁰⁸ As one scholar notes, *West Virginia v. EPA* can be characterized as “a superfluous political decision that deepened the perception of the Supreme Court as an ideological powerhouse fighting scientific evidence on environmental issues.”¹⁰⁹

However, the Major Questions Doctrine impediment can likely be avoided with respect to regulation of greenhouse gases. For starters, the definition of “air pollutant” under the Clean Air Act is defined broadly enough to encompass greenhouse gases.¹¹⁰ Additionally, the Act includes “effects on . . . climate” in the list of considerations when regulating air pollutants.¹¹¹ Consequently, there is a strong argument that clear congressional authorization permits the regulation of greenhouse gases, such that a stronger regulatory approach to combatting climate change would survive the Major Questions Doctrine.

As one scholar notes, Congress can avoid the Major Questions Doctrine and *Chevron* deference altogether by enacting new statutes that unambiguously authorize regulatory agencies to take certain actions against climate change.¹¹² However, such avoidance is unnecessary where administrative agency authority is

handed-to-meeting-on-global-warming.html (noting that the Bush administration was unequivocal in its refusal to support the Kyoto Protocol).

106. See *The Major Questions Doctrine*, CONG. RSCH. SERV. (last updated Nov. 2, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF12077> (emphasis added).

107. See, e.g., *Util. Air Regul. Grp.*, 573 U.S. 302, 324 (2014) (using the Major Questions Doctrine to hold that the EPA could not apply restrictions on greenhouse gas emission to sources that were not being regulated under the Clean Air Act); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (holding that the FDA could not regulate tobacco without explicit congressional authorization).

108. 142 S. Ct. 2587, 2616 (2022)

109. Dana Neacsu, *Applying Bentham’s Theory of Fallacies to Chief Justice Roberts’ Reasoning in West Virginia v. EPA*, 61 DUQ. L. REV. 95, 110 (2023).

110. 42 U.S.C. § 7602(g). The Act defines air pollutant as “any air pollution agent or combination of such agents . . . which is emitted into or otherwise enters the ambient air.” *Id.*

111. 42 U.S. §7408(a)(2).

112. See Gerrard, *supra* note 97 at 3.



already established and stronger emissions standards can be implemented. The incorporation of Purdy’s “environmental ethic”—which can be accomplished through administrative agency action that reflects our commitment to values of preserving the environment—will ensure that our climate goals materialize into action.¹¹³

The United States has been complacent in its efforts to combat climate change. But to relive the past faux pas does not fit with American pragmatism. It is possible that past legislative failures are due to a lack of ecological values being incorporated into social and personal life normativity.¹¹⁴ It may be that the clearer way for the United States to properly address the existential threat that climate change poses is to follow the steps of the European Union, promoting collective action and ensuring that everyone plays their part. Without it, we are destined to continue along the path we are presently on, failing to accomplish our goals and remaining idle as the climate crisis worsens. The objectives of the European Union approach are particularly helpful: “ensur[ing] that all . . . policies contribute to this goal and that all sectors of the economy and society play their part.”¹¹⁵

Even more, the vast difference in jurisprudential approaches between the United States and the European Union is concerning. With exception to *Massachusetts v. EPA*,¹¹⁶ the Supreme Court typically clings to dated legal doctrines and forms an impediment to our climate progress. On the other hand, the novel approach of the European Union provides that adherence to caselaw is important, except when diverging is necessary to keep with the needs and progress of society. The United States and its courts would be wise to adopt such an admirable and novel approach, for without it, we will continue to be a barrier to our own progress.

While the United States has many paths at its disposal to better address the climate crisis, it must be sure to be clear and intentional. Specifically, the United States needs to ensure that it provides easy access to the available funds under the IRA. Additionally, our government must tighten emissions standards where administrative agency authority already exists, for this would provide a means for avoiding the impediment that the Supreme Court poses, while simultaneously ensuring constitutional authority and taking the necessary action to preserve our world. Without such action, the citizenry of the United States will continue to lose

113. PURDY, *supra* note 29 at 232-33.

114. *Id.* at 233.

115. EUROPEAN CLIMATE LAW, *supra* note 35.

116. 549 U.S. 497 (2007)



faith in our leaders and institutions, contributing to a society overwhelmed with uncertainty.

VI. CONCLUSION

The United States' continued failure to accomplish significant progress in the fight against climate change can contribute to social death. Our failure to prioritize and implement pragmatic approaches in addressing a truly global issue is concerning. The European Union, in its efforts to combat climate change, has fostered a collective approach to address existential threats while ensuring that goals are not just goals, but rather legally binding targets. While the European Union approach is admirable, it is not the only path available to the United States. An emphasis on pragmatism and the incremental implementation of industry-specific objectives will allow for the preservation of society's faith in our governmental and social institutions. It is important to acknowledge that "[t]here is no evil more direct and injurious than the injury we choose to let happen against our planet, our lives, and especially our youth."¹¹⁷ Without significant progress, we will continue to fall short of remedying the evil that we have idly permitted to worsen.

117. See Neacsu, *supra* note 109 at 113.

