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Making Democracy Great Again: An Exploration of Democratic Values in Climate Change Litigation

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Abstract

Until the 20th of January 2017, democracy was assumed to be secure within the United States but for the first time in recent history, America is now being presented as a ‘flawed democracy’¹ with the actions of President Donald Trump raising several red flags. His predilection towards authoritarian leadership, lack of respect for his executive powers, and insistence on “alternative facts”, challenge many facets of democracy – and, of particular relevance to this study, frustrate efforts to mitigate climate change through policy and government. With an administration so clearly intent on shutting down climate change action, civil society is turning to the only avenue it has left – the law – and is taking climate change issues to court in a last-ditch attempt to push for action. By investigating twelve concluded climate change cases initiated after Donald Trump entered office, the ways in which the courts can continue to defend democratic values can be explored. This research therefore seeks to draw new connections between the separa-

tion of powers, transparency, and accountability in climate change litigation as ways of safeguarding democracy in a period of crisis. While Donald Trump presents a real and imminent threat, the courts may be well placed as the necessary instrument for protecting democracy when we need it most.

1. Introduction

1.1. Democratic Crisis in the United States

Democracy, which will be examined in more detail in the next section, is a defining feature of American governance and yet ‘Donald Trump’s election raised a question that few Americans ever imagined asking... is our democracy in danger?’²

Until the 20th of January 2017, democracy was assumed to be secure within the United States (US)³ and without imminent war, threat of economic collapse, or significant civil unrest, it seemed destined to remain that way. ‘Yet stability is no guarantee of democracy’s future survival’⁴ – and nothing has proved that more clearly than the election of Donald Trump. While America’s economy and security remains stable, the actions of their leader are far from predictable. Even in the early days of the election campaign, some had already identified Trump as a ‘unique and present danger’⁵ to democracy. Aside from there being no evidence that Trump has ever spoken publicly in support of democracy,⁶ there have been consistent red flags which signal a move away from democracy under Donald Trump’s America. For the first time, the United States has been knocked out of the

¹ The Economist Intelligence Unit, ‘Declining Trust in Government Is Denting Democracy’ (*The Economist*, 2017) <<https://www.economist.com/graphic-detail/2017/01/25/declining-trust-in-government-is-denting-democracy>> accessed 9 July 2018.

² S Levitsky & D Ziblatt, ‘Is Donald Trump a Threat to Democracy?’ (*The New York Times*, 2016) <<https://www.nytimes.com/2016/12/16/opinion/sunday/is-donald-trump-a-threat-to-democracy.html>> accessed 9 June 2018.

³ S Mettler, ‘Democracy on the Brink’ [2017] *Foreign Affairs* <<https://www.foreignaffairs.com/reviews/review-essay/2017-04-17/democracy-brink>>.

⁴ Levitsky & Ziblatt (n 2).

⁵ Editorial Board, ‘Donald Trump Is a Unique Threat to American Democracy’ (*The Washington Post*, 2016) <https://www.washingtonpost.com/opinions/donald-trump-is-a-unique-threat-to-american-democracy/2016/07/22/a6d823cc-4f4f-11e6-aa14-e0c1087f7583_story.html?utm_term=.e62dd2df9ca4> accessed 9 May 2018.

⁶ M Liasson, ‘Donald Trump: Strong Leader or Dangerous Authoritarian?’ (*NPR Politics*, 2016) <<https://www.npr.org/2016/12/12/505205197/is-donald-trump-a-threat-to-democracy>> accessed 9 May 2018.

“full democracy” category – being downgraded to a “flawed democracy” by the Economic Intelligence Unit⁷ – a significant change which might signal the extent to which Trump is disrupting voter faith in government.

Donald Trump’s willingness to ignore facts or offer up “alternative facts” could be pushing us into a post-truth world, diminishing confidence in institutions, leaders and scientists alike. After launching his campaign for the presidency, Trump made a series of unfounded and distinctly damning accusations including: accusing Ted Cruz’s father of involvement in John F Kennedy’s assassination;⁸ alluding to Hilary Clinton being guilty of murder;⁹ reporting that Muslims in New Jersey celebrated after 9/11;¹⁰ accusing Mexico of sending rapists into America;¹¹ questioning Barack Obama’s citizenship;¹² ‘openly challeng[ing] the legitimacy of the electoral process’;¹³ and perhaps most significantly, after winning the election, claiming that he lost the popular vote majority because ‘millions of noncitizens voted illegally.’¹⁴ Although it would be easy to dismiss these actions and accusations as nonsense, they have potentially very serious implications. They indicate that Trump feels himself removed from the normal societal expectations of evidence, fact, and accuracy. So much so that it clearly ‘does not matter whether or not he contradicts himself,’¹⁵ or whether his all-out war on the mainstream media for publishing “fake news”¹⁶ presents itself as highly ironic. Trump’s promotion of “alternative facts” to discredit accepted authority – ranging from subtle attempts to influence opinion, to obvious attacks on the foundation of the voting system in the US – contributes towards destabilising democracy.

Further, Donald Trump has revealed that he knows almost nothing about the limits to his executive powers – laying bare his ignorance when it comes to his grasp of the separation of powers principle that drives American democracy. Trump turned some of his allegations into threats, promising to: ‘alter libel laws so journalists could be “sued like they’ve never been sued before”’;¹⁷ throw Hilary Clinton in jail while portraying her as an illegitimate opponent;¹⁸ punish those who criticized him;¹⁹ and limit the freedom of the independent press.²⁰ Not only do most of these threats lie far beyond the extent of his executive powers, but they lie outside the boundaries of democracy. Furthermore, Trump seems to think he ‘lives above the law,’²¹ pushing American democracy closer towards authoritarian dictatorship – and this is a slippery slope. Authoritarianism starts with ‘the president making decisions about particular companies, rather than working within the system... in the context of the rule of law’²² – and while this may initially appear harmless, this can move quickly towards fascism as the president starts to ‘act as if he has the sole power to decide.’²³

However, challenges to democracy did not start under the presidency of Donald Trump. His predecessors have combatted other democratic threats and useful tools have emerged that ensure resilience in their system of government.²⁴ Former White House aide to George W. Bush, Bill Galston, argued that checks and balances under the separation of powers principle are deliberately designed to combat these kinds of threats²⁵ – and he is not alone, many Americans reported faith in their systems as the reason for their lack of concern.²⁶ Yet, the warning signs remain and the ‘institutional safeguards protecting

⁷ I Oh, ‘A New Report Finds America Is No Longer a “Full Democracy”’ (*Mother Jones*, 2017) <<https://www.motherjones.com/politics/2017/01/new-report-finds-america-no-longer-full-democracy/>> accessed 9 April 2018.

⁸ Editorial Board (n 5).

⁹ Editorial Board (n 5).

¹⁰ Editorial Board (n 5).

¹¹ Editorial Board (n 5).

¹² Liasson (n 6).

¹³ Levitsky & Ziblatt (n 2).

¹⁴ Liasson (n 6).

¹⁵ J Butler, ‘Reflections on Trump’ (*Cultural Anthropology*, 2017) <<https://culanth.org/fieldsights/1032-reflections-on-trump>> accessed 9 May 2018.

¹⁶ Mettler (n 3).

¹⁷ Liasson (n 6).

¹⁸ Levitsky & Ziblatt (n 2).

¹⁹ Editorial Board (n 5).

²⁰ Editorial Board (n 5).

²¹ Butler (n 15).

²² Liasson (n 6).

²³ Butler (n 15).

²⁴ Mettler (n 3).

²⁵ Liasson (n 6).

²⁶ Levitsky & Ziblatt (n 2).

[US] democracy may be less effective than we think,²⁷ especially with the rise of the far-right across Western Europe.²⁸ Under Donald Trump ‘the next few years will be a kind of stress test for the liberal, democratic constitutional institutions’²⁹ that have been built – and nowhere is that stress better demonstrated than through Trump’s approach to tackling climate change, or more accurately his failure to tackle climate change.

1.2. Climate Change in Context

Scientific consensus on human induced climate change has reached 97%,³⁰ and while research results have been varied (as they often are in science), the latest International Panel on Climate Change report announced that they were ‘95% certain that humans are the main cause of current global warming’³¹ – a probability level which in the scientific field is tantamount to a certainty.

With policy makers recognising the increased threat of climate change, debate has shifted from the plausibility of climate change to how best to mitigate and adapt to changing climates. Policy makers have been forced to not only update national laws, but to engage in complex international debate to create continent-spanning legislation that better reflects the urgency of the situation. As such, the Paris Agreement was signed in December 2015 and applied at one time to every country in the world, pushing for a commitment from parties to keep global temperature increase to ‘well below 2°C above pre-industrial levels.’³² This universal commitment to reducing greenhouse gases was monumental as it placed pressure on governments to integrate

climate change into political decision making whilst highlighting the urgent need for policy to reflect this pressing issue. Unfortunately, despite the evidence and international support, climate change deniers across the world have not been silenced; and most problematically, they may have just found themselves a figurehead in President Donald Trump.

The US retains prominence as one of the world’s most influential economies, making it a major political force when it comes to international decision making and trend setting. Furthermore, ‘US policy shifts have implications far beyond its borders’³³ making the US an important catalyst in the movement towards mitigating climate change. Yet, the election of Trump has led to undeniable consequences for future progress in fighting climate change, shifting the rhetoric from scientific fact to “fake news” and “alternative facts” that bolster harmful economic agendas and close the door to efforts to mitigate climate change. Although the ‘scientific evidence does not change when an administration changes’³⁴ the combination of political priority, scientific credibility, and presidential aims certainly has the power to shift debate and crucially, redirect funding. Since the election of Donald Trump, there appears to be no limit to the extent of upheaval his administration is willing to endure in order to cast doubt on the science of climate change, and critically the need to mitigate against it.

Under Trump, the administration’s priorities have been made abundantly clear: removing climate change from a list of global threats;³⁵ eliminating the page dedicated to it on the White House website;³⁶ and opening up a narrative

²⁷ Levitsky & Ziblatt (n 2).

²⁸ P Foster, ‘The Rise of the Far-Right in Europe Is Not a False Alarm’ (*The Telegraph*, 2016) <<https://www.telegraph.co.uk/news/2016/05/19/the-rise-of-the-far-right-in-europe-is-not-a-false-alarm/>> accessed 9 November 2018.

²⁹ Liasson (n 6).

³⁰ Skeptical Science, ‘The Consensus Project’ (*The Consensus Project*, 2018) <<http://theconsensusproject.com/#sharePage>>.

³¹ IPCC, ‘Climate Change 2014: Synthesis Report’ (Intergovernmental Panel on Climate Change 2014) v.

³² Paris Agreement, UN/1/CP.21 (entered into force 4th Nov 2016) Article 2, 3.

³³ T Rinberg et.al. ‘Changing the Digital Climate’ (Environmental Data & Governance Initiative 2018) 6.

³⁴ J Samet, T Burke & B Goldstein, ‘The Trump Administration and the Environment — Heed the Science’ (2017) 376 *New England Journal of Medicine* 1182, 1187.

³⁵ J Borger, ‘Trump Drops Climate Change from US National Security Strategy’ (*The Guardian*, 2017) <<https://www.theguardian.com/us-news/2017/dec/18/trump-drop-climate-change-national-security-strategy>> accessed 7 October 2018.

³⁶ A Wilts, ‘Trump Officially Removes Climate Change from List of Global Threats’ (*Independent*, 2017)

questioning scientific confidence in climate change by inspiring ‘scandals over climate change science.’³⁷ Trump has led efforts to dismantle the Barack Obama administration’s climate change policies; delete the Clean Power Plan and reverse moratoriums on coal and gas.³⁸ With no attempt to hide his opinions on climate change, declaring during the elections that climate change was ‘a “hoax”, and as president proving his actions to be consistent with that view,’³⁹ Trump has created a detrimental atmosphere of doubt and uncertainty around climate change science. The administration has cut funding for the Environmental Protection Agency (EPA);⁴⁰ entered an all-out war with National Parks;⁴¹ reignited discussions around the survival of the coal industry; changed national monument laws to allow for fossil fuel extraction; withdrawn from the Paris Agreement; and has taken one huge step towards ‘Making Atmospheric Carbon Levels Great Again’⁴² – and not in a good way. With an administration so clearly intent on shutting down climate change action, civil society is turning to the courtroom for solutions, pushing for action on climate change through the only avenue left.

1.3. Climate Change in the Courtroom

Under the separation of powers principle – the division of power between the executive, the legislature and the judiciary – the most effective pathways for achieving action on climate change are through the executive or the legislature. Yet, with a government headed up by an active climate change denier,⁴³ the courts are increasingly being used as a way to challenge legislative and executive decision making (or lack of decision making) on climate change. While the courts are widely considered a less effective mechanism for policy-making, ‘there is nothing new about regulation by litigation’⁴⁴ and increasingly, ‘states and non-profit groups are turning to the courts for solutions to the challenges presented by climate change.’⁴⁵ In recent years the US has become a ‘staging ground for 654 climate-related cases’⁴⁶ making it a global leader on climate change litigation. Yet tackling climate change in the courtroom is controversial, and not always successful.

Taking science to court is challenging enough,⁴⁷ but the spatial, temporal, and political challenges that climate change brings, makes the issue even more complex to address.⁴⁸ Legal requirements such as standing, ripeness, jurisdiction and the political question doctrine all create bar-

<<https://www.independent.co.uk/news/world/americas/us-politics/trump-climate-change-threats-remove-list-global-dangers-national-security-latest-a8117486.html>> accessed 18 August 2018.

³⁷ H Osofsky, ‘Litigation’s Role in the Path of U.S. Federal Climate Change Regulation: Implications of AEP v. Connecticut’ (2012) 46 Valparaiso University Law Review 13, 449.

³⁸ E Bomberg, ‘Environmental Politics in the Trump Era: An Early Assessment’ (2017) 26 Environmental Politics 956.

³⁹ Rinberg et.al. (n 33) 6.

⁴⁰ G Thrush & C Davenport, ‘Donald Trump Budget Slashes Funds for EPA and State Department’ (*The New York Times*, 2017) <<https://www.nytimes.com/2017/03/15/us/politics/budget-epa-state-department-cuts.html>> accessed 17 August 2018.

⁴¹ F Robinson, ‘Trump Administration’s Feud with the National Park Service Is Absurd’ (*The Guardian*, 2017) <<https://www.theguardian.com/commentis-free/2017/jan/25/national-park-service-trump-twitter-campaign-spreads>> accessed 17 August 2018.

⁴² K Aronoff, ‘Does Donald Trump Represent a Step Forward for Climate Change Action?’ (*The Guardian*,

2016) <<https://www.theguardian.com/commentis-free/2016/may/16/donald-trump-energy-policy-climate-change>> accessed 20 June 2018.

⁴³ D Carrington, ‘Can Climate Litigation Save the World?’ (*The Guardian*, 2018) <<https://www.theguardian.com/environment/2018/mar/20/can-climate-litigation-save-the-world>> accessed 7 August 2018.

⁴⁴ B Ewing & D Kysar, ‘Prods and Pleas: Limited Government in an Era of Unlimited Harm’ (2011) 121 *The Yale Law Journal* 350, 386.

⁴⁵ A Kaswan, ‘The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives’ (2007) 42 *University of San Francisco Law Review* 39, 85.

⁴⁶ O Milman, ‘More People Heading to Court to Spur Action on Climate Change’ (*The Guardian*, 2017) <<https://www.theguardian.com/environment/2017/may/23/climate-change-government-court-cases-study>>.

⁴⁷ K Sali, ‘Scientific Evidence in Environmental Litigation’ (2016) 30 *Natural Resources & Environment* 27.

⁴⁸ H Osofsky, ‘The Continuing Importance of Climate Change Litigation’ (2010) 1 *Climate Law* 3.

riers to tackling climate change through litigation. Not only have the courts been heavily criticised for lacking in expertise when it comes to making decisions on climate change,⁴⁹ but their legitimacy to make decisions on political matters is also up for debate. 'The appropriate role of the courts in what [is] perceived to be [a] highly political issue'⁵⁰ is a continuous struggle for lawyers as they try to claim the space of the courts in climate change litigation. Climate change in the courts has to overcome the challenges of legitimacy, the separation of powers, and fundamental difficulties of scale. The breadth of a case matters, the narrower it is the more likely it is to be successful, but the less able it is to address the full extent of the climate change problem.

However, litigation as a form of resistance is significant for many reasons and often 'cases need not even get that far to have an impact.'⁵¹ Litigation can act as a driver for research – as the number of climate change lawsuits increase, the need for scientific information on the effects and responses to climate change increases.⁵² Litigation can also help to influence public opinion on the urgency of climate change,⁵³ instigating a shift in thinking that places increasing pressure on governments to act. Tackling climate change in the courtroom ultimately contributes to decision making by acting as a 'vehicle for protest and political discourse.'⁵⁴ Supported by past evidence in the 1950s when the civil rights movement proved the ability of the courts to act. 'Washington's failure to tackle the problem of racial inequality in education led ultimately to *Brown v Board of Education*'⁵⁵ which eventually prompted the creation of the Civil Rights Act of 1964: the same could happen for climate change. Acting as a means to apply pressure on government, whether the cases are successful

or not,⁵⁶ litigation plays an invaluable role in decision making:

In the absence of strong government action to address climate change, rulings in climate change litigation may serve as a de facto source of national climate policy with very real impacts on the regulatory landscape.⁵⁷

Judges are influenced by society and as climate change continues to be a public concern, it is looking 'increasingly likely [that judges will] look favourably on climate change litigation in coming years.'⁵⁸ Thus, ironically, some have argued that Trump's anti-climate change actions have legitimised the role of the courts in climate change and made judges more 'sympathetic to arguments that might have seemed far-fetched a while ago... help[ing] to save the planet after all.'⁵⁹ Fundamentally however, the courts are bound by the law, and their actions have to reflect that; any attempts to use litigation to force decision making on climate change thus have to focus on whether unlawful action has taken place, or will take place. Tackling climate change in court thus connects to wider values of democracy which guide American governance and are enshrined across its legal system. It is this symbiotic relationship which this research seeks to explore; addressing the role that the courts can play in reinforcing democratic values through climate change litigation, crucially, when the government will not.

Looking closely at concluded climate change litigation in the first year of Donald Trump's presidency offers an opportunity to consider how democratic principles are addressed in the courtroom – pointing to the future role of the

⁴⁹ J Peel & H Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015) 34.

⁵⁰ J Lin, 'Climate Change and the Courts' (2012) 32 *Legal Studies* 35, 57.

⁵¹ J Schwartz, 'Courts as Battlefields in Climate Fights' (*The New York Times*, 2010) <<https://www.nytimes.com/2010/01/27/business/energy-environment/27lawsuits.html>> accessed 7 February 2018.

⁵² S Tai, 'Science Policy through the Lens of U.S Domestic Climate Litigation' (2010) 27 *Science Policy in U.S Climate Litigation* 462.

⁵³ Osofsky (n 48); Lin (n 50); Peel & Osofsky (n 49).

⁵⁴ Osofsky (n 48) 6.

⁵⁵ D Bookbinder, 'How Trump's Reckless Climate Policy Invites a Judicial Backlash' (*Vox*, 2017)

<<https://www.vox.com/the-big-idea/2017/12/11/16759208/trump-climate-policy-courts-juliana-public-nuisance-lawsuits>> accessed 16 July 2018.

⁵⁶ J Peel & H Osofsky, 'Climate Change Litigation: Lessons and Pathways' (2017) 29 *Judicial Officers' Bulletin* 99; Osofsky (n 48).

⁵⁷ J Peel, 'Issues in Climate Change Litigation' (2011) 1 *Climate Change Law Review* 15, 23.

⁵⁸ Carrington (n 43).

⁵⁹ Bookbinder (n 55).

courts in both issues of climate change and political turbulence. The courts may have a unique opportunity to re-balance power, promote transparency, and hold decision-makers accountable – this is undoubtedly important, and is where this research will strive to make a contribution. Investigating the role of the courts in challenging the current US administration's efforts to depart from democracy, may identify a potential pathway for reinstating democratic values and priorities, while simultaneously revealing the challenges that litigation faces when tackling politics in the courtroom.

1.4. Research Aim & Methodology

After investigating recent climate change cases it became apparent that three themes were emerging as common features in the legal arguments. These themes not only seemed to reflect legal issues but were also heavily connected to democracy, providing an opportunity to investigate the relationship between the courts and democracy in Trump's America. While much has been written about the use of litigation to mitigate climate change, little has been done to map the connections between the courts and democratic values as a positive catalyst for maintaining order. This research therefore builds on the work that comes before it and strives to delve deeper into those climate change cases which have reached conclusion since Donald Trump's inauguration on the 20th of January 2017, specifically highlighting how the wider democratic values of the separation of powers, transparency, and accountability can be maintained through litigation. The overall research aim for this study therefore, is:

To investigate how democracy can be maintained through the courts: looking specifically at the separation of powers, transparency, and accountability in the context of climate change litigation.

To address this research aim, I will first offer some background on theories of democracy, the

separation of powers, transparency, and accountability and while, within the limits of this study, this background cannot be extensive it provides context for the cases being investigated. I will then seek to consider whether democracy can be maintained through the courts. Providing more detailed evidence using climate change litigation as a case study, looking at both opportunities and limitations for the courts. Ultimately, the relationship between power, transparency, and accountability as three key facets of democracy will be addressed, and conclusions will be drawn about the ways in which democracy can, or cannot, be maintained through the courts.

To conduct this investigation, I have taken a socio-legal approach using doctrinal methodologies as the latter allows me to 'make coherent or justify a segment of the law as part of a larger system.'⁶⁰ However, this method cannot be removed from wider social constructions⁶¹ and will therefore be used in tandem with a socio-legal outlook which will arguably allow me to 'examine law's social character far more extensively and broadly'⁶² than would be possible without external perspective. Similarly, the nature of law makes it 'highly susceptible to invasion by other disciplines'⁶³ and thus my background in climate change science will compliment this research, while undoubtedly contributing to my interpretation. It should also be noted that I am a passionate advocate for action on climate change and democracy, and thus this research will also be influenced by my attitude towards climate change deniers and those that threaten democratic principles.

Selecting relevant climate change litigation to investigate as part of this study meant determining two key factors: first, how to define climate change litigation; and second, how to decide which specific cases to look at. To address these factors, I relied heavily on work by the Sabin Center for Climate Change Law at Columbia University, who created a database of climate change litigation filed in 2017 and most crucially,

⁶⁰ T Hutchinson & N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 84.

⁶¹ C Mccrudden, 'Legal Research and the Social Sciences' [2006] *The Law Quarterly Review* 632.

⁶² R Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25 *Journal of Law & Society* 171, 191.

⁶³ *Ibid.* 178.

a report on 'Litigation in the Age of Trump: Year One.'⁶⁴ According to their studies, climate change litigation can be defined as any litigation that 'directly and expressly raise[s] an issue of fact or law regarding the substance or policy of climate change causes and impacts.'⁶⁵ Although this definition of climate change litigation may exclude cases which address climate change indirectly, it was important for the purpose of this research to place a limit on the cases that I could investigate, due to the sheer number of applicable cases. Similarly, I had to be selective when choosing specific cases to investigate within this definition. The report by the Sabin Center included 82 cases filed in 2017, with the majority of cases (73%) as pro-environmental cases.⁶⁶ To narrow down my investigation, I chose to only address pro-environmental cases which had reached a decision in court. The decisions ranged from: court dismissal; self-dismissal; an order in favour of the environmental plaintiffs; or an order in favour of the non-environmental defendants. In the end, this resulted in a total of thirteen cases, twelve of which are addressed fully in chapter three (the remaining one dealt with issues that arose pre-2017) and are up to date as of the 19th of July 2018. Their analysis will be used to help support discussion of democracy in the courtroom – specifically through reference to balancing power, transparency, and accountability.

2. Components of Democracy

2.1. Democracy

There is arguably no straightforward definition of democracy – democracies vary across the world and underscore different cultural norms, values

and beliefs. For some, democracy is plainly understood to mean 'rule by the people,'⁶⁷ whereas a legal perspective describes democracy as being about 'the plurality of ideas, the freedom of speech, tolerance, broad mindedness, and political representation through elections.'⁶⁸ Across this spectrum of understanding, there are some generic characteristics that help to shape how a democracy might operate. Generally, democracy is seen to include a free electoral system and resulting government; each enshrined by equitable values and practices.

As a system of government, democracy works hard to promote fair and equal representation; honest and open relationships with its people; and a sense of security in a system that will endure. Certainly, the values of the separation of powers, transparency, and accountability contribute to creating a system of government that is responsible for its actions, considerate in its decision making, and open about its mistakes. However, 'American democracy has always been a work in progress'⁶⁹ and, while democracy may strive to uphold certain values, this does not always equate to democracy being the best system of government. Winston Churchill famously noted this tension, stating that: 'democracy is the worst possible system – except for all the rest,'⁷⁰ an understanding that succinctly captures the complexity of democracy and recognises its imperfections.

Though flawed, democratic rule ensures the creation of strong informal norms; 'democracies work best when unwritten rules of the game, known and respected by all players, ensure a minimum of civility and cooperation.'⁷¹ The expectations and values that surround democracy help to hold it in shape and ensure longevity even when its foundations start to crack. It is these intuitive democratic values which underpin

⁶⁴ D Adler, 'U.S. Climate Change Litigation in the Age of Trump: Year One' (Columbia Law School 2018).

⁶⁵ Peel & Osofsky (n 56) 100.

⁶⁶ Adler (n 64).

⁶⁷ D Gregory, *The Dictionary of Human Geography* (5th ed., Blackwell Publishers 2009) <<https://search.credoreference.com/content/entry/bkhumgeo/democracy/0?institutionId=2454>>.

⁶⁸ G Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford Scholarship Online 2013) <<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199671199.001.0001/acprof-9780199671199>>.

⁶⁹ Mettler (n 3).

⁷⁰ R Dallek, 'American Democracy Has Gone through Dark Times Before' (*The Guardian*, 2017) <<https://www.theguardian.com/commentis-free/2017/nov/01/american-democracy-dark-times-rob-ert-dallek>> accessed 9 May 2018.

⁷¹ Levitsky & Ziblatt (n 2).

most of a nation's population, that serve as the 'soft guardrails of democracy'⁷² protecting it from corruption, chaos, and ultimate catastrophe.

2.2. Separation of Powers & The Political Question Doctrine

2.2.1. Separation of Powers: A Definition

The separation of powers is a defining feature of democracy⁷³ and rests on the principle of balanced power, the notion that the judiciary, executive and legislative branches of government should remain independent from one another to ensure a system of checks and balances that 'safeguard against the abuse of political power.'⁷⁴ This tripartite system of government is particularly prominent under the American presidential system, and generally remains uncontested as a valuable asset to democracy. In practice, the balance of powers tends to vary; most distinctly between the executive and legislative branches of government,⁷⁵ and can differ not only across borders, but from president to president. Maintaining the balance of power is an ongoing process, achieved through balancing conflicting interests between the executive and the legislature, 'in this way, the two discipline each other to the voters' advantage.'⁷⁶ The judiciary then acts as the 'umpire of the structure of separation of powers'⁷⁷ managing the conflicts between the executive and the legislature, while simultaneously acting on the concerns of civil society and nudging government into action.

⁷² Levitsky & Ziblatt (n 2).

⁷³ T Persson, G Roland & G Tabellini, 'Separation of Powers and Political Accountability' (1997) 112 *The Quarterly Journal of Economics* 1163.

⁷⁴ K Kirwan, 'The Use and Abuse of Power: The Supreme Court and Separation of Powers' (1995) 537 *ANNALS* 76, 77.

⁷⁵ Persson, Roland & Tabellini (n 73).

⁷⁶ Persson, Roland & Tabellini (n 73) 1163.

⁷⁷ Kirwan (n 74) 76.

⁷⁸ T Moe & M Caldwell, 'The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems' (1994) 150 *Journal of Institutional and Theoretical Economics* 171.

⁷⁹ Kirwan (n 74) 77.

⁸⁰ Kirwan (n 74) 77.

2.2.2. Separation of Powers: US Context

In the American presidential system of government, the major players tend to be the president and the legislators.⁷⁸ Particularly under a Republican government, 'the legislative authority necessarily predominates,'⁷⁹ except for the president who holds the power to 'recommend and veto legislation.'⁸⁰ While in practice, the president's power is 'strictly limited'⁸¹ and could be blocked, reversed or mitigated against – there remains a constitutional ambiguity when it comes to executive authority, which can 'tempt presidents to try and push those limits'⁸² – marking their influence within the separation of powers system. Specifically, regarding the impact of the president, literature supports the notion that Trump would have significant power. In the context of climate change:

Though the administration cannot immediately change our bedrock environmental legislation, it can, through appointments, executive actions, and reduction or elimination of funding, affect research, policy, and implementation and enforcement.⁸³

Specifically, Trump has managed to exert a significant breadth of influence across all three components of the separation of powers. His influence within the executive branch of government, as head of state, is explicit and his access to the legislative branch through his role in congress may also appear clear. Yet, his influence has proven to go beyond congress, extending to his appointment of certain key stakeholders at the federal level; as heads of independent agencies such as Scott Pruitt's⁸⁴ placement at the

⁸¹ Bomberg (n 38) 958.

⁸² Levitsky & Ziblatt (n 2).

⁸³ Samet, Burke & Goldstein (n 34) 1186.

⁸⁴ J Lee & A Pearce, 'How Trump Can Influence Climate Change' (*The New York Times*, 2016) <<https://www.nytimes.com/interactive/2016/12/08/us/trump-climate-change.html>> accessed 7 October 2018. The placement of Scott Pruitt at the head of the Environmental Protection Agency is significant because of his history; he is widely considered a close ally of the fossil fuel industry and has spoken out publicly as a climate change denier. This choice of appointment is therefore not insignificant.

head of the Environmental Protection Agency. And within the judiciary, he appointed two new Supreme Court Judges at the beginning of his presidency, providing him opportunity to assert his influence through two out of nine of the Supreme Court Judges. Thus, Trump's appointment of Supreme Court judges Neil Gorsuch and Brett Kavanaugh⁸⁵ is not insignificant, as it evidences his expanding control over the tripartite system of government. Across history, American leaders have 'resisted the temptation to use their temporary control of institutions to maximum partisan advantage,'⁸⁶ but that is not to say it will remain that way. Trump's influence, having extended to all corners of the separation of powers system, directly challenges the balance of power on which democracy has been built – an influence which is played out particularly acutely in the context of climate change.

2.2.3. Separation of Powers: Litigation Opportunities and Limitations

The separation of powers principle is not without flaws and is frequently criticised for its impracticability⁸⁷ and inefficiency.⁸⁸ Yet, what is most significant about the separation of powers in the context of litigation is the complicated dichotomy between (1) its ability to balance power, and (2) the limitations the separation of powers places on the courts. Thus, the separation of powers plays an inherently conflicted role in litigation: on the one hand acting to further democracy, while on the other, actively restricting the courts' ability to do so.

The judiciary might appear the least powerful of the three branches of government; 'it cannot execute its own decisions... [or] take over the government in the way that congress can'⁸⁹ and arguably only has the power to cast judgement or enforce already existing law. However, the courts can also be seen as the most appropriate

space for interpreting the constitution as their limited power makes them 'the safest repository [to] enforce the supreme law of the land.'⁹⁰ The courts' role in applying the separation of powers, and ensuring that power in general is not abused, demonstrates the courts' value as an avenue for protecting democracy.

Yet, as mentioned, the courts' role in rebalancing power through litigation is inherently complex, most significantly as a result of the political question doctrine which stems from the separation of powers. The political question doctrine provides that the separation of powers would be breached if certain political issues were to be addressed in court.⁹¹ It therefore ensures that political matters are reserved for the executive and legislature – as they are considered the most able to decide on these issues. As such, in cases where the political question doctrine applies, the courts tend to dismiss the case on the grounds that it is 'nonjusticiable'⁹² – presenting a significant hurdle for those seeking to utilise the courts as guardians of democracy, specifically on the topic of climate change. This obstacle can result in both plaintiffs and defendants arguing over whether policy determination on climate change has been made,⁹³ proving the limit of the courts' ability to enforce certain actions under law.

Despite this limited power, scope for litigation as a 'direct pathway for climate change regulation'⁹⁴ is increasing, offering an important vehicle for holding governments accountable when civil society becomes restless. Although the political question doctrine and the separation of powers can both be barriers for litigating on political matters, once plaintiffs overcome these hurdles, these principles can also provide an accessible route for checking power imbalances and reinstating democratic values. Focusing on climate change litigation as an arena for addressing power imbalance is particularly helpful as it:

⁸⁵ L Hurley & S Holland, 'Trump Picks Conservative Judge Kavanaugh for Supreme Court' (*Reuters*, 2018) <<https://www.reuters.com/article/us-usa-court-trump/trump-set-to-announce-hotly-anticipated-u-s-supreme-court-pick-idUSKBN1JZ25A>> accessed 13 September 2018.

⁸⁶ Levitsky & Ziblatt (n 2).

⁸⁷ Ewing & Kysar (n 44).

⁸⁸ Moe & Caldwell (n 78).

⁸⁹ Kirwan (n 74) 77.

⁹⁰ Kirwan (n 74) 77.

⁹¹ J Michaels, 'An Enduring, Evolving Separation of Powers' 115 *Columbia Law Review* 84.

⁹² Osofsky (n 37) 451.

⁹³ Ewing & Kysar (n 44).

⁹⁴ Peel & Osofsky (n 49) 38.

Provides a window into the power dynamics that influence the current regulatory process. Examining the whirling dervish of interested entities highlights the complexity of addressing these externalities... but it also provides a path for making progress.⁹⁵

A better understanding of the complex dynamic between the separation of powers and litigation will help to unveil the contribution that litigation can make towards furthering democracy.

2.3. Transparency

2.3.1. Transparency: A Definition

Transparency also has a complicated relationship with democracy, and the extent to which transparency is valued tends to depend on the political context. Scholarly interpretations of transparency vary across disciplines, with interpretations emerging from non-profit activist roots, to finance, international relations, and global governance. In general, however, interpretations of transparency tend to include reference to openness,⁹⁶ greater flows of information,⁹⁷ accountability,⁹⁸ and an understanding that promoting transparency implies the existence of secrecy and corruption⁹⁹ – creating a somewhat eclectic but workable definition of transparency which essentially encourages honest communication between stakeholders. Even so, the meaning of transparency is constantly evolving and some argue that ‘offering a general definition of transparency as a starting point for

inquiry is highly problematic¹⁰⁰ – as its vague nature is often part of its value. Most significantly, it is recognised that transparency is fundamentally ‘hard to measure’¹⁰¹ with no tangible unit of transparency, and many factors which intertwine to support transparent activity. This can make transparency difficult to pin down in litigation, with its varied definition contributing to its potentially varied application in the courts.

Transparency in government is generally considered to be heavily connected to other principles such as the ‘right-to-know’¹⁰² and information disclosure¹⁰³: two normative principles which work together to help instil democratic government.¹⁰⁴ These principles combine to ensure public access to information and the ability to contribute to politics through, for example, comment and notice periods. Although these complimentary principles facilitate transparency, academic and practiced understanding of disclosure is incomplete, and the ability to predict its accomplishments and threats remains largely unclear.¹⁰⁵ Thus, the role and value of transparency within democracy is still not fully understood which makes it a difficult democratic value to work with. In government, transparency is regarded as an effective political strategy as it ‘sells well [and] everyone seems to favour it.’¹⁰⁶ It ‘improves administrative effectiveness,’¹⁰⁷ helps respond to tensions in modern society,¹⁰⁸ improves engagement across industries and stakeholder groups,¹⁰⁹ improves public perceptions of politics,¹¹⁰ and helps to prevent abuses or mistakes by leaders.¹¹¹ Transparency can

⁹⁵ H Osofsky, ‘The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance’ (2005) 83 Washington University Law Quarterly 1789, 1855.

⁹⁶ C Ball, ‘What Is Transparency?’ (2009) 11 Public Integrity 293.

⁹⁷ A Gupta, ‘Transparency in Global Environmental Governance: A Coming of Age’ (2010) 10 Global Environmental Politics 1.

⁹⁸ M Mason, ‘Transparency for Whom? Information Disclosure and Power in Global Environmental Governance’ 7; Ball (n 96); Gupta (n 97).

⁹⁹ Ball (n 96).

¹⁰⁰ P Langley, ‘Transparency in the Making of Global Environmental Governance’ (2001) 15 Global Society 73, 75.

¹⁰¹ C Coglianese, ‘The Transparency President? The Obama Administration and Open Government’ (2009) 273 Faculty Scholarship 1, 16.

¹⁰² T Beierle, ‘The Benefits and Costs of Disclosing Information about Risks: What Do We Know about Right-to-Know?’ (2004) 24 Risk Analysis 335, 336.

¹⁰³ Gupta (n 97).

¹⁰⁴ P Jaeger & J Bertot, ‘Transparency and Technological Change: Ensuring Equal and Sustained Public Access to Government Information’ (2010) 27 Government Information Quarterly 371.

¹⁰⁵ Beierle (n 102).

¹⁰⁶ Coglianese (n 101) 18.

¹⁰⁷ Ball (n 96) 301.

¹⁰⁸ A Gouldson, ‘Risk, Regulation and the Right to Know: Exploring the Impacts of Access to Information on the Governance of Environmental Risk’ (2004) 12 Sustainable Development 136.

¹⁰⁹ Ibid.

¹¹⁰ Coglianese (n 101).

¹¹¹ Coglianese (n 101).

therefore be seen as a constructive aspect of democracy with the potential to reinstate confidence in our political leaders.

Despite this, transparency is considered a double-edged sword;¹¹² as it does not always evoke the desired result and requires careful application to be effective. Significantly, how government should go about designing transparent policies 'is less than clear'¹¹³ and while most scholars agree that transparency is necessary, there are significant criticisms and objections to having too much transparency. Total transparency, for example, is argued to produce negative results by limiting the government's ability to gain important information from private actors, generating internal dissent, and removing the opportunity to speak freely in order to tackle controversial subjects. Thus, 'reasoned transparency'¹¹⁴ is argued to be more effective than total transparency as it encourages visibility of explanations for decision making, rather than full disclosure. The real choice for government then, is 'how much transparency, and what type to offer over different processes'¹¹⁵ – this involves complicated trade-offs and compromises which do not often play out as intended while intertwining with notions of power and accountability in complicated ways.

2.3.2. Transparency: US Context

The last decade highlights a complicated relationship between the US government and transparency. During George W. Bush's administration, government 'worked to keep as much information as possible... away from public view.'¹¹⁶

With limited access to information, denied Freedom of Information Act¹¹⁷ requests, and refusals to testify before congressional committees¹¹⁸ George W. Bush went down in history as the 'The Secrecy President.'¹¹⁹ Following this, it is unsurprising that Barack Obama launched a campaign focused on expanding public access to information, criticising special interests, and promoting participation in decision making.¹²⁰ His presidency emphasised the need for transparency in government, marked by two executive orders pushing for government agencies to prioritise openness when dealing with Freedom of Information Act requests¹²¹ and before the end of his first year Obama had issued a report on open government and generated an extensive list of future projects for transparency.¹²²

Present day America promulgates a very different relationship with transparency, both across congress and the executive. Donald Trump ran an election campaign which generated much controversy around the issue of transparency: he constructed a damaging narrative against Hillary Clinton on the basis of withheld information about email security;¹²³ he is suspected of engaging in dubious Russian relationships;¹²⁴ and he refused to reveal his tax returns.¹²⁵ Continued evidence of the Trump administration's rocky relationship with transparency therefore comes as no surprise. Yet, Trump supporters might tell a different story: one of a president who is not afraid to speak the truth and is therefore more transparent than those that came before.¹²⁶ Whichever way you look at it, Trump clearly provokes interesting debate around the value of transparency in American democracy.

¹¹² Coglianese (n 101).

¹¹³ Ball (n 96) 2.

¹¹⁴ Coglianese (n 101) 15.

¹¹⁵ Coglianese (n 101) 2.

¹¹⁶ Jaeger & Bertot (n 104) 372.

¹¹⁷ The Freedom of Information Act (FOIA) provides the public with a right to request access to records from federal agencies, and similarly requires agencies to disclose information under any request (unless it falls under one of the nine exemptions).

¹¹⁸ Jaeger & Bertot (n 104).

¹¹⁹ Coglianese (n 101) 5.

¹²⁰ Coglianese (n 101).

¹²¹ Jaeger & Bertot (n 104).

¹²² Jaeger & Bertot (n 104).

¹²³ Editorial Board (n 5).

¹²⁴ B York, 'Time to End the Crazy Secrecy of the Trump-Russia Investigation' (*Washington Examiner*, 2018) <<https://www.washingtonexaminer.com/opinion/columnists/byron-york-time-to-end-the-crazy-secrecy-of-the-trump-russia-investigation>> accessed 21 August 2018.

¹²⁵ Z Thomas, 'What's in Donald Trump's Tax Returns?' (*BBC News*, 2016) <<https://www.bbc.co.uk/news/election-us-2016-36382410>> accessed 9 December 2018.

¹²⁶ M Kinsley, 'Trump the Transparent' (*The New York Times*, 2017) <<https://www.nytimes.com/2017/06/17/opinion/sunday/trump-the-transparent.html>> accessed 9 December 2018.

Trump's actions on transparency in respect of climate change, seem less open to interpretation. Following a trend of manipulating information – evidenced most significantly by the removal of climate change information across the Environmental Protection Agency's platforms and beyond – the reduction in transparency is clear. Risk management plans, climate change concerns, and climate change priorities have been removed from official websites,¹²⁷ manipulating information to mislead and try to influence public opinion and 'contribute to broader denialist efforts that obscure and cast doubt on scientific consensus on climate change.'¹²⁸ These actions make it harder for the public to access high-quality research and for policymakers to understand climate change action, they diminish democratic practices such as notice-and-comment periods, and ultimately contribute to a 'wider practice of censoring science that is seen to be at odds with short-term economic gains.'¹²⁹ Opinions about Donald Trump on this matter remain divided however it can clearly be seen that the administration's approach to tackling climate change has been one of increased secrecy; damaging for climate change science, litigation, and fact.

2.3.3. Transparency: Litigation Opportunities and Challenges

Exploring themes of transparency in a courtroom setting offers a unique opportunity to tackle political issues without actually being explicitly political. The 'moral and political imperative... closely associated with the idea of accountability and inclusive governance'¹³⁰ allows litigation on transparency to uniquely address political issues without asking the courts to directly decide on the outcome of a political argument.

¹²⁷ Beierle (n 102).

¹²⁸ Rinberg et.al. (n 33) 4.

¹²⁹ Rinberg et.al. (n 33) 11.

¹³⁰ Mason (n 98) 9.

¹³¹ A Florini, 'Making Transparency Work' (2008) 8 *Global Environmental Politics* 14.

¹³² The Administrative Procedure Act (APA) is the United States federal statute that dictates how administrative agencies of the federal government may propose and establish regulations. Significantly, it grants judiciary oversight over all agency actions – making it one of the most important parts of US administrative law.

The courts actively embody the values of transparency – and in fact, the credibility and functionality of the courts rely on it.¹³¹ Proper interpretation of the law, and objective rule making, demands transparency to achieve justice. Utilising transparency to achieve action on climate change or matters political, is regarded favourably by the courts who value a system of information disclosure and transparency, as a key feature of justice.

The most common way to address transparency in court is to utilise the Administrative Procedures Act (APA),¹³² which applies to administrative bodies, limiting the power of plaintiffs to target wider audiences on transparency, and in turn climate change. By avoiding the political question doctrine in this way, transparency can only contribute by insisting that actors follow rules appropriately – it cannot, for example, go as far as to create a rule, or enforce one that is not already there. This means that the scope of litigation is restricted to administrative errors and breaches of existing rules – making the ability of litigators to stop actions, or enforce new ones limited.

2.4. Accountability

2.4.1. Accountability: A Definition

Accountability is considered a modern day 'buzzword',¹³³ which between the years 2001 and 2006 appeared in around 70 proposed bills in US congress in each two-year cycle.¹³⁴ This rise in the use of the term went hand in hand with an increased need to address citizen satisfaction rates; a key tool for political persuasion.¹³⁵ Although there has been increasing discussion about accountability in recent years – definitions of accountability remain 'highly fragmented and

¹³³ M Bovens, R Goodin & T Schillemans (eds), *The Oxford Handbook of Public Accountability* (First Edition, Oxford University Press 2014) 1.

¹³⁴ *Ibid.*

¹³⁵ G Bouckaert & S Van de Walle, 'Comparing Measures of Citizen Trust and User Satisfaction as Indicators of "Good Governance": Difficulties in Linking Trust and Satisfaction Indicators' (2003) 69 *International Review of Administrative Sciences* 329.

non-cumulative... virtually every different author sets out to produce his or her own definition.¹³⁶ Accountability then, tends to be interpreted differently across disciplines, but can generally be accepted to mean: ‘the expectation that one may be asked, often by an authority or one’s superior, to justify one’s thoughts, beliefs, or actions.’¹³⁷ It is this definition that aligns closely with litigation – as the law strives to hold people directly accountable for their actions. In general, the various definitions of accountability tend to be connected to responsibility, transparency, equity and power¹³⁸ and contribute to attempts to ensure good-practice, and well-intentioned behaviour in politics – constructing a notion of accountability as a positive value within democracy.

Accountability’s connection to power is central. Notably, the separation of powers principle is essentially based on the notion that accountability through a tripartite system of government will ensure effective government.¹³⁹ Each pillar of government is meant to ensure that the others are being held accountable. The idea is to employ ‘counter-weights to promote good governance, political accountability, and compliance with the rule of law.’¹⁴⁰ Similarly, when considering the role that accountability plays in balancing power, it is important to consider who is being held accountable, and by whom; a concept which seems to have been challenged recently under the presidency of Donald Trump. Given the role of accountability in connecting ideas of balanced power and transparency under democracy, it is often hard to distinguish it as a separate value. Accountability’s broad definition tends to explain why it applies widely across litigation – acting alongside other democratic values. However,

that does not make it any less impactful or valuable to democracy.

2.4.2. Accountability: US Context

Since Trump entered office, he has taken a very different approach to leadership compared to those who came before him. He shares his unfiltered opinions on Twitter;¹⁴¹ goes off-script during public appearances;¹⁴² fires staff members who have held long-standing positions of responsibility;¹⁴³ and, on countless occasions, has accused the press of publishing “fake news” and “alternative facts.”¹⁴⁴ His behaviour has been likened to that of a spoilt toddler,¹⁴⁵ and yet it does not appear that the tripartite system of government – certainly in respect of the executive or legislature – offers an effective means of holding him to account. Despite Trump being officially accountable to congress, that does not seem to impact on his actions as president – leaving the judiciary as the last line of defence of democracy through accountability.

2.4.3. Accountability: Litigation Opportunities and Challenges

At first glance, the relationship between accountability and litigation appears to be simple. The very nature of litigation is to hold citizens accountable when they disobey the law. It would therefore not be unreasonable to assume that accountability and litigation go hand in hand to help protect democracy. However, two main factors threaten the ability of accountability within litigation to safeguard democracy: (1) time, and (2) specificity.

¹³⁶ Bovens, Goodin & Schillemans (n 133) 2.

¹³⁷ Bovens, Goodin & Schillemans (n 133) 4.

¹³⁸ T Weiss, ‘Governance, Good Governance and Global Governance: Conceptual and Actual Challenges’ (2000) 21 *Third World Quarterly* 795.

¹³⁹ Ewing & Kysar (n 44).

¹⁴⁰ Michaels (n 91) 520.

¹⁴¹ J Lee & K Quealy, ‘The 487 People, Places and Things Donald Trump Has Insulted on Twitter: A Complete List’ (*The New York Times*, 2018) <<https://www.nytimes.com/interactive/2016/01/28/up-shot/donald-trump-twitter-insults.html>> accessed 9 December 2018.

¹⁴² R Harrington, ‘Trump Goes Off-Script in Wild Rally in Michigan’ (*Business Insider UK*, 2018)

<<http://uk.businessinsider.com/trump-rally-white-house-correspondents-dinner-2018-4/?r=US&IR=T>> accessed 9 December 2018.

¹⁴³ C Graham, “‘You’re Fired!’: Who Donald Trump Has Sacked and Who Has Resigned During His Time as President” (*The Telegraph*, 2018) <<https://www.telegraph.co.uk/news/0/fired-donald-trump-has-sacked-has-resigned-time-president/>>.

¹⁴⁴ Mettler (n 3).

¹⁴⁵ Radio Scotland, ‘Donald Trump “like a Spoilt Child” Says You’ve Been Trumped Film-Maker’ (*BBC News*, 2012) <<https://www.bbc.com/news/uk-scotland-17995908>> accessed 9 August 2018.

Litigation is an inherently slow process¹⁴⁶ and, as already mentioned, not necessarily the best vehicle for decision making.¹⁴⁷ So, although accountability fits neatly into the context of the courtroom, it is limited by the courts' inability to reach decisions quickly, interrogate evidence, or investigate claims at speed. This challenge becomes particularly evident when a case attempts to hold institutions accountable for slowing down action on climate change; often by the time the challenge has made it through the court, the proposed stay or delay has reached its conclusion anyway – making it hard to prove that the case is still ripe. Given how urgent action on climate change needs to be, this is a significant limitation to tackling climate change through the courts on the grounds of accountability. Similarly, too, this poses challenges for democracy – as issues can be time sensitive, require fast action, or demand prompt decisions – a role which the courts cannot fulfil.

Secondly, the courts face another limitation in respect of accountability, in that they demand a heavy amount of specificity when progressing cases through the courtroom. For a case to be successful it has to prove that it is justiciable, the plaintiff has standing, and that the case is ripe. These factors alone dictate that the case needs to be narrow in nature. Although this may not always place limits on accountability, it can restrict the courts from making judgements that reflect the full extent of the accountability challenge, therefore limiting their ability to contribute fully towards a democratic outcome.

2.5. The Interplay Between the Separation of Powers, Transparency & Accountability

We have seen how each of these democratic values has its own specific significance in the context of litigation, the US, and Donald Trump, and I chose to present these values individually so as to make those connections clear. However, in reality, these values tend to overlap in litigation, and lie below the surface of climate

change cases, often making them hard to identify. President Obama perfectly noted the relationship between these values, stating that 'a democracy requires accountability, and accountability requires transparency'¹⁴⁸ – noting the ways in which transparency and accountability go hand in hand¹⁴⁹ in the context of democracy. The separation of powers which fundamentally guides democracy is similarly caught up in this relationship, contributing to, and at times challenging, the values of transparency and accountability in litigation.

Each of these three values are important elements of democracy within their own right, but when presented together, they arguably contribute to strengthening the courts' ability to protect democratic values. In combination, these values are able to contribute most effectively towards sustained democracy, and significantly provide both an avenue for the courts to influence government as well as protection from government threats to democracy.

As the next section will demonstrate, the courts' examination of the separation of powers, transparency, and accountability contribute to democracy both individually and collectively – to varying degrees of success. This investigation allows for the evaluation of the courts' increased scope for protecting democratic values, specifically in the context of climate change litigation.

3. Case Law & Discussion

To substantiate the premise that democracy can be safeguarded in the courtroom by tackling the separation of powers, transparency, and accountability, this chapter considers contemporary evidence of these values being addressed in the courts in the context of climate change. Acknowledging that it is not the role of the courts to directly address issues of democracy – their role being to determine unlawful behaviour – plaintiffs therefore have to base their argument

¹⁴⁶ Peel (n 57).

¹⁴⁷ D Grossman, 'Warming up to a Not-so-Radical Idea: Tort-Based Climate Change Litigation' (2003) 28 *Columbia Journal of Environmental Law* 1.

¹⁴⁸ B Obama, 'Office of the Press Secretary' (2009) 39 *Presidential Studies Quarterly* 429.

¹⁴⁹ Ball (n 96).

not on whether the defendants' action was iniquitous, but on whether or not it was legal. However, as already established, there are recurring themes that present themselves within litigation, with both legal and democratic significance. This chapter will first examine evidence from cases that demonstrate positive opportunities for litigation to further democratic values and will then address cases that appear to highlight the limitations to litigation's role in fostering democracy.

3.1. Courtroom Opportunities: Upholding Democratic Values

3.1.1. *Sierra Club v Federal Energy Regulatory Commission (FERC)*

The case of *Sierra Club v FERC*¹⁵⁰ demonstrates how power can be addressed in court. Here, the petitioners requested an emergency stay on the construction of the NEXUS pipeline stretching from Ohio to Michigan, arguing that the defendants' actions were an abuse of power. Petitioners laid out their argument following Circuit Rule 18(a)(1) which states that 'an emergency stay of an agency's proceedings is warranted where a movant establishes that it is (1) likely to prevail on merits, (2) likely to suffer irreparable harm absent a stay, (3) other parties will be unlikely to suffer substantial harm if the stay is granted; and (4) the public interest lies in granting the stay.'¹⁵¹ Petitioners utilised a number of legal arguments to make their case, however it is their claim in respect of FERC's misuse of power that underpins a significant thread of their overall argument. Petitioners argued that FERC did 'not have the statutory authority to issue tolling orders';¹⁵² that the tolling order itself [was] insufficient as 'congress did not authorise FERC to delegate its authority to act on such requests';¹⁵³ and noting that 'FERC's lengthy tolling periods encroach on the court's rightful jurisdiction granted to it by congress, effectively ceding the judicial branch's sole power to define

congress' conferral of jurisdiction.'¹⁵⁴ These arguments conjoin to build a case against FERC as having acted unlawfully with respect to their delegated powers. Had unforeseen circumstances not resulted in the self-dismissal of this case by the petitioners, after discovering that one of their defendants had sold pipeline land to NEXUS making it a conflict of interest, it might be reasonable to assume that the petitioners' case would have been successful. The courts would have had clear legal basis to support issuing an emergency stay – on the grounds that FERC's actions breached their delegated powers – underlining the separation of powers principle and providing an explicit example of the potential role of the courts in re-balancing power and upholding democratic principles through the lens of climate change.

3.1.2. *Colorado River Ecosystem v State of Colorado*

The case of the *Colorado River Ecosystem v State of Colorado*¹⁵⁵ is an interesting example of a case which did not enter the courts to try and rectify a wrong-doing. Instead, the strength of this case lay in its ability to set precedent and pave the way for future cases to follow. The plaintiffs' complaint asked for the court to designate the Colorado River Ecosystem as 'a person capable of possessing rights... to exist, flourish, regenerate, be restored, and naturally evolve'¹⁵⁶ noting that there had been 'no related or similar cases before any courts'¹⁵⁷ making it a matter of first impression. The plaintiffs drew upon previous examples to support the legal basis for their claim: citing the opinion of US Supreme Court Justice Douglas who argued in *Sierra Club v Morton*¹⁵⁸ that 'contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects';¹⁵⁹ the designation of Te Urewera, a 821-square mile area of New Zealand as a legal entity with 'all the rights, powers, duties, and liabilities of a legal person'¹⁶⁰ under the Te

¹⁵⁰ *Sierra Club v Federal Energy Regulatory Commission* [2017] 17-1236, D.C Cir.

¹⁵¹ *Ibid.* 3.

¹⁵² *Sierra Club* (n 150) 4.

¹⁵³ *Sierra Club* (n 150) 6.

¹⁵⁴ *Sierra Club* (n 150) 9.

¹⁵⁵ *Colorado River Ecosystem et.al. v State of Colorado et.al.* [2017] 1:17-cv-02316, D. Colo, Document 19.

¹⁵⁶ *Ibid.* 32.

¹⁵⁷ *Colorado River Ecosystem* (n 155) 32.

¹⁵⁸ *Sierra Club v Morton et.al.* [1972] 405 US 727.

¹⁵⁹ *Colorado River Ecosystem* (n 155) 18.

¹⁶⁰ *Colorado River Ecosystem* (n 155) 14.

Urewera Act of 2014; the 2016 decision under Colombia's Constitutional Court to designate At-rato River as 'an entity subject to rights and protection, conservation, maintenance and restoration',¹⁶¹ and the 2017 High Court of Uttarakhand's decision to rule that the Ganga and Yamuna Rivers are 'legal persons/living persons'¹⁶² in the north of India. The plaintiffs constructed a further argument that 'the recognition of the Colorado River Ecosystem as a "person" is far less of a stretch than bestowing upon inanimate corporations the status of personhood,'¹⁶³ as has been done under US constitutional law – even without mention of corporations in the constitution. The case was eventually granted self-dismissal with prejudice by plaintiffs, who noted that 'the complaint represented a good faith attempt to introduce the Rights of Nature doctrine into our jurisprudence.'¹⁶⁴ This case represents an attempt to shift judicial thinking, investigate the jurisdiction of the courts, and influence public opinion by utilising the courts as a pathway for better environmental protection. It challenges the role of the courts in balancing power, by presenting it with a judicial challenge with clear political consequences. Significantly, this case bypasses traditional non-judicial methods for pursuing a climate change agenda, instead using the courts as a site for action. Without a court decision, this case is unable to set legal precedent, but instead paves the way for future cases by allowing the issues to be explored, highlighting the potential role of the courts in promoting democracy by responding to public pressure.

3.1.3. *California v United States Bureau of Land Management – Two Cases*

The following two cases show how multiple democratic values can be addressed, using both power and transparency, in an attempt to further democracy. The Bureau of Land Management (BLM)'s proposed Waste Prevention, Production

Subject to Royalties, and Resources Convention Rule (the Rule) sought to 'reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities.'¹⁶⁵ However, after the Rule came into effect in January 2017, Donald Trump passed an Executive Order asking agencies to review actions, identifying those that:

Potentially burden the development of use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.¹⁶⁶

As a direct result of this executive order, on the 15th of June 2017, BLM put notice in the Federal Register that they would be postponing the compliance dates of their Waste Prevention Rule to the 17th of January 2018 – delaying the rule by a year. This formed the basis of the *State of California v Bureau of Land Management*¹⁶⁷ case on the 5th of July 2017, with plaintiffs 'alleging that the decision by defendants to postpone certain compliance dates of the Rule violated the APA.'¹⁶⁸ Particular attention was given to the interpretation of Section 705 which outlines appropriate action regarding the postponement of a rule. Plaintiffs pointed to the decision in *Safety-Kleen Corp v Environmental Protection Agency*¹⁶⁹ which held that 'Section 705 does not permit an agency to suspend a promulgated rule without notice and comment.'¹⁷⁰ The plaintiffs further referenced sections 553(b) and (c) of the APA which outline notice-and-comment requirements, inferring that the defendants had violated these procedural requirements – actively abandoning transparency in their actions. In the end, the courts agreed, on the basis of these failures in transparency, and granted the plaintiffs motion for summary judgement and thus vacated the Postponement Notice.

¹⁶¹ Colorado River Ecosystem (n 155) 21.

¹⁶² Colorado River Ecosystem (n 155) 21.

¹⁶³ Colorado River Ecosystem (n 155) 19.

¹⁶⁴ *Colorado River Ecosystem et.al. v State of Colorado et.al.* [2017] 1:17-cv-02316, D. Colo, Document 24, 2.

¹⁶⁵ *State of California et.al. v United States Bureau of Land Management et.al.* [2017] 3:17-cv-03804, N.D Cal, 2.

¹⁶⁶ Executive Order No. 13,783 [March 28th, 2017] 82 Fed Reg. 16,093.

¹⁶⁷ *State of California* (n 165).

¹⁶⁸ *State of California* (n 165) 4.

¹⁶⁹ *Safety-Kleen Corp. v Environmental Protection Agency* [1996] U.S. App. LEXIS, *2 D.C. Cir.

¹⁷⁰ *State of California* (n 165) 12.

However, the legal challenge did not finish there, and on the 8th of October 2017 BLM introduced a Suspension Rule, which provoked the emergence of the *State of California v Bureau of Land Management*¹⁷¹ case on the 19th of December 2017. Plaintiffs now moved to ‘challenge the Suspension Rule... moving for a preliminary injunction’¹⁷² – which could be obtained by demonstrating four factors: ‘(1) that [they were] likely to succeed on the merits, (2) that [they are] likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in [their] favour, and (4) that an injunction is in the public interest.’¹⁷³ The plaintiffs again mentioned the defendant’s failure to provide an appropriate notice and comment period, arguing that ‘the notice and comment in this case was not meaningful because Secretary Zinke had already determined the outcome of the rulemaking before receiving comment and had limited the scope of the rulemaking comments so as not to consider those addressing the substance of the Rule or Suspension Rule.’¹⁷⁴ While the court disagreed on the plaintiffs’ suggestion that the defendants engaged in predetermination, they pointed out that the plaintiffs’ argument regarding the Secretary’s limitation of the scope of the comments.. [had] more merit.’¹⁷⁵ The court found that Secretary Zinke failed to consider certain comments, claiming them to lie outside the scope of the Prevention Rule – which the court deemed as ‘arbitrary and capricious within the meaning of the APA.’¹⁷⁶ Thus, the plaintiffs were successful in arguing that the defendants actions were unlawful on the basis of poor transparency – eventually leading to their success in being granted a preliminary injunction on the Suspension Rule, which reinstated the Rule.

The result of both cases demonstrates how multiple legal issues that are also important democratic values can be successfully addressed within litigation. In these cases, the interconnected nature of these democratic values is also

apparent, and significant. Donald Trump’s Executive Order provoked both actions, and by ruling in favour of the plaintiffs, the courts were able to adhere to the separation of powers principle within democracy. These cases therefore, demonstrate how the courts can, by directly challenging breaches of transparency and abuses of power which contradict the law and the opinions of civil society, also indirectly contribute towards maintaining democratic values.

3.1.4. Natural Resources Defense Council v National Highway Traffic Safety Administration

The case of *Natural Resources Defense Council v National Highway Traffic Safety Administration (NHTSA)*¹⁷⁷ was set in the context of the 2015 Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 (Improvements Act) and also highlights power and transparency issues. The Improvements Act, passed by congress, ‘requir[ed] federal agencies to adjust their civil penalties to account for inflation.’¹⁷⁸ Plaintiffs claimed however that the defendants ‘exceeded [their] statutory authority in indefinitely delaying a rule implemented pursuant to the clear congressional directive in the Improvements Act’ and simultaneously violated the APA¹⁷⁹ alluding to failures to align with the separation of powers and transparency. Here, the court investigated the plain and core interpretations of the Improvements Act and found the intentions of the act to be clear and mandatory,¹⁸⁰ concluding that the statute ‘does not authorise NHTSA to indefinitely delay implementation of these penalty increases’¹⁸¹ – noting that the ‘purpose of the Act is simply incompatible with the notion of indefinite delay.’¹⁸² In this example the court therefore found it relatively easy to support the accusation that the NHTSA was acting outside its delegated power, finding also that the defendants had breached the APA in their failure to

¹⁷¹ *State of California et.al. v United States Bureau of Land Management et.al.* [2017] 3:17-cv-07187, N.D Cal.

¹⁷² *Ibid.* 4.

¹⁷³ *State of California* (n 171) 5.

¹⁷⁴ *State of California* (n 171) 22.

¹⁷⁵ *State of California* (n 171) 23.

¹⁷⁶ *State of California* (n 171) 24.

¹⁷⁷ *Natural Resources Defense Council et.al. v National Highway Traffic Safety Administration et.al.* [2017] 17-2780 (L), 2nd Cir.

¹⁷⁸ *Ibid.* 4.

¹⁷⁹ *Natural Resources Defense Council* (n 177) 5.

¹⁸⁰ *Natural Resources Defense Council* (n 177) 26.

¹⁸¹ *Natural Resources Defense Council* (n 177) 27.

¹⁸² *Natural Resources Defense Council* (n 177) 28.

adhere to the notice-and-comment provision.¹⁸³ The court ordered the defendants to ‘vacate the Suspension Rule’¹⁸⁴ – thus evidencing the court’s ability to reinstate values of transparency and balanced power in the context of climate change litigation. This case demonstrates how multiple democratic values can be found playing key roles in litigation, and thus shows the significant connections between the courts and democracy.

3.1.5. *Clean Air Council v Pruitt*

In the case of *Clean Air Council v Pruitt*,¹⁸⁵ all three themes of power, transparency and accountability are touched upon; making this a particularly strong example of litigation that demonstrates the courts’ role in upholding democratic values. This case was based on the EPA’s reconsideration of two provisions within the Methane Rule (81 Fed Ref 35,824 – June 3, 2016). First, on the 5th of June 2017 – two days after the deadline for parties to conduct emissions surveys under the Methane Rule – the EPA published ‘a notice of reconsideration and partial stay’¹⁸⁶ in the Federal Register, which claimed that the stay had gone into effect on the 2nd of June 2017 – three days before the notice was published. Next, on the 16th of June 2017, the EPA published ‘a notice of proposed rulemaking announcing its intention to extend the stay “for two years” and to “look broadly at the entire 2016 Rule.”’¹⁸⁷ This, the petitioners argued, was a violation of the Clean Air Act (CAA) section 307(d)(7)(B)¹⁸⁸ for the following reasons: (1) ‘all of the issues Administrator Pruitt identified could have been, and actually were, raised (and extensively deliberated) during the comment period’;¹⁸⁹ (2) ‘the stay—which EPA made retroactive to one day before the June 3 compliance deadline—eliminates [the threat of increased civil penalties for failures to comply]... and thus relieves regulated parties of liability they would

otherwise face’;¹⁹⁰ (3) the final rule ‘fails the logical outgrowth test... because the final rule was surprisingly distant from the proposed rule’.¹⁹¹ For these reasons, the court found the EPA’s decision to impose a stay ‘arbitrary, capricious and in excess of its statutory authority’¹⁹² – siding with the petitioners and granting their motion to vacate the stay. Although the scope of this case appears narrow, it manages to highlight poor transparency – in the form of the EPA’s announcement of the stay, after the fact; accountability – by providing opportunity for petitioners to challenge EPA’s attempts to remove liabilities for oil and gas companies; and, a rebalance of power – by holding EPA answerable to their claims of ‘inherent power’.¹⁹³ The combined use of these values in the courtroom appears to be impactful – demonstrating the scope that litigation has for defending democratic values.

Additionally, an interesting feature of this case was the dissenting opinion of Judge Brown who disagreed entirely with the court’s decision. He noted that it was wrong of the court to ‘conclude the EPA’s stay falls within [the court’s] jurisdictional reach’¹⁹⁴ noting that ‘section 7607(d)(7)(B) renders a stay a mere means to facilitate a decision we lack the authority to review’.¹⁹⁵ His response thus points to an interesting consideration: that perhaps the courts are becoming more willing to decide over political matters – attempting to achieve democracy even in controversial circumstances that ordinarily do not fall under their jurisdiction. However, by stepping outside their delegated powers – it could also be argued that the courts are failing to support democracy by abusing their delegated powers. Either way, this case presents an interesting insight into the role of the courts in safeguarding democracy through litigation.

¹⁸³ Natural Resources Defense Council (n 177) 44.

¹⁸⁴ Natural Resources Defense Council (n 177) 44.

¹⁸⁵ *Clean Air Council et.al. v Scott Pruitt & Environmental Protection Agency* [2017] 17-1145, D.C Cir.

¹⁸⁶ *Ibid.* 4.

¹⁸⁷ *Clean Air Council* (n 185) 5.

¹⁸⁸ See also: 42 U.S.C 7607(d)(7)(B), and 82 Fed Reg, 25,731 (June 5, 2017).

¹⁸⁹ *Clean Air Council* (n 185) 6.

¹⁹⁰ *Clean Air Council* (n 185) 8.

¹⁹¹ *Clean Air Council* (n 185) 14.

¹⁹² *Clean Air Council* (n 185) 23.

¹⁹³ *Clean Air Council* (n 185) 12.

¹⁹⁴ *Clean Air Council* (n 185) 31.

¹⁹⁵ *Clean Air Council* (n 185) 31.

3.1.6. *Natural Resources Defense Council v Pruitt*

The case of *Natural Resources Defense Council v Scott Pruitt*¹⁹⁶ directly builds on the result of the previous case. However here, petitioners ‘seek review of the final action of respondents published in the Federal Register at 82 Fed. Reg. 24,878 (May 31, 2017) and titled ‘Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills.’¹⁹⁷ The petitioners asked the court to vacate the stay on the basis that the case mirrored the arguments of *Clean Air Council v Pruitt* where the defendants had abused the values of power, transparency and accountability. Unlike the previous case, in this example, defendants here had manipulated the CAA requirements, fulfilling them but failing to offer ‘any explanation [as to] why the Administrator concluded that those issues qualified for reconsideration under section 307(d)(7)(B).’¹⁹⁸ In the end, this case was withdrawn by both parties as the EPA agreed to abandon plans to implement the stay, and the petitioners accepted that the stay would only have affected landfills for 90 days. However, in light of the precedent for this case, it could be argued that the case would have likely been successful – although the opinion of Judge Brown in the previous case might have forced the courts to act with caution on the basis of avoiding overstepping their statutory authority. The presence of a near identical case, however, suggests that successful litigation patterns are being established.

3.2. Courtroom Limitations: Potential Challenges for Protecting Democracy

3.2.1. *City of Oakland v BP plc.*

In the case of the *City of Oakland v BP plc.*¹⁹⁹ plaintiffs brought a claim against five fossil fuel companies, holding them liable for knowingly

contributing to climate change: citing this as a public nuisance under federal common law, and looking to call on the separation of powers principle. The case initially battled with jurisdiction, prompting a move from state to federal law which was deemed more applicable due to the extent of the legal challenges. However, the inherently international reach of the case left the court debating the appropriate jurisdiction, until eventually deciding to leave the question of jurisdiction open, noting that ‘there [was] a more direct resolution from the Supreme Court and [the] court of appeals’²⁰⁰ which would help decide the outcome of the case. The court thus turned to the separation of powers principle and, unlike other cases considered in this research, had to take account of the international dimension in making the decision. As in the case of *Kiobel v Royal Dutch Petroleum Co.*²⁰¹ it was recognised that ‘where a claim reaches conduct within the territory of another sovereign, concerns of unwarranted judicial interference in foreign policy are all the more pressing.’²⁰² Thus, the separation of powers principle was clearly considered more influential in this international context than it might have been in a purely national context. The irony of the case being moved to federal level, only to then be dismissed under the separation of powers, which would also have applied at state level was noted by the court, yet they concluded that ‘although the scope of plaintiffs’ claims is determined by federal law, there are sound reasons why regulation of the worldwide problem of global warming should be determined by our political branches, not by our judiciary.’²⁰³ Here, the courts utilise the separation of powers to justify their refusal to decide over this political matter, recognising their limitations and acknowledging the distinct role of the executive and legislature in addressing complex foreign policy issues. This judgement appears straightforward at first glance, however in the circumstances of diminishing democracy, the court’s refusal to decide on the matter creates wider problems, particularly for climate change. If neither government nor the

¹⁹⁶ *Natural Resources Defense Council et.al. v Scott Pruitt et.al.* [2017] 17-1157, D.C Cir.

¹⁹⁷ *Ibid.* 1.

¹⁹⁸ *Natural Resources Defense Council* (n 196) 5.

¹⁹⁹ *City of Oakland et.al. v BP plc et.al.* [2017] 3:17-cv-06011, N.D Cal.

²⁰⁰ *City of Oakland* (n 199) 8.

²⁰¹ *Kiobel et.al. v Royal Dutch Petroleum Co. et.al.* [2013] 569 US 108.

²⁰² *City of Oakland* (n 199) 11.

²⁰³ *City of Oakland* (n 199) 15.

courts are willing to decide on the matter, then this becomes a limitation for democracy and civil society at large.

3.2.2. *People of the State of California v United States*

The case of the People of the State of California v United States²⁰⁴ again confronts the separation of powers principle, and involves the consolidation of three similar cases which challenged Waiver Determinations that had been passed by the Secretaries of the Department of Homeland Security in August 2017. The Waiver Determinations concerned the construction of border walls, and waived the legal requirements of the National Environmental Policy Act, the Endangered Species Act, the Coastal Zone Management Act and over thirty additional laws that are not relevant to this specific case.²⁰⁵ The plaintiffs argued that: '(1) the Waivers are ultra vires acts that exceed the authority delegated by congress; and (2) the Waivers are unconstitutional acts under a variety of legal doctrines.'²⁰⁶ This case therefore looked to utilise the separation of powers principle to prove that the Department of Homeland Security had acted outside of its delegated authority. Plaintiffs claimed that by delegating power to the Secretary, the defendants were in breach of the separation of powers principle: arguing that 'section 102(c) has granted the Executive Branch a blanket waiver which is in violation of the non-delegation doctrine and separation of powers.'²⁰⁷ The non-delegation doctrine is the notion that 'congress cannot delegate or transfer the legislative functions with which it is vested.'²⁰⁸ The court disagreed however, and while acknowledging the value of these principles, made a distinction between delegation and offering support. The court cited Supreme Court advice, which recognised 'that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent congress from obtaining the assistance of its coordinate branches.'²⁰⁹ Here, the separation of powers principle failed to provide the plaintiffs with a

strong enough claim to persuade the courts to decide in their favour, instead benefitting the defendants who were able to prove that they had not acted outside their authority. In this example, invoking the separation of powers argument can be seen to have unintended consequences. While the court adheres to the separation of powers principle – by appropriately applying the non-delegation doctrine – it is simultaneously limited by the separation of powers, through an inability to judge over the matter at the heart of this case. The case centres on whether or not delegated powers can enforce the waivers rather than being able to decide on the appropriateness of the waivers in the first place (which would be a breach of the court's jurisdiction, but arguably would be a way to hold the executive and legislature accountable). This case then, demonstrates how the legal consideration of these democratic principles can work unhelpfully against each other. Difficulties like this could limit the ability of the courts to contribute towards upholding democracy.

3.2.3. *Lindsay v Republican National Committee*

The case of Lindsay v Republican National Committee²¹⁰ demonstrates the barrier that the separation of powers and the political question doctrine creates for pursuing action on political matters in the courtroom. In this case, the plaintiff launched a pro se complaint against over 120 defendants including 'President Donald Trump and most of his cabinet, several state and national elected officials, and several groups and individuals associated with conservative or Republican causes, among others.'²¹¹ The plaintiff listed a number of grievances, including 'failing to act on global warming.'²¹² Under the normal order of court proceedings, the court has to prove that the plaintiff has standing and that the claims are justiciable under the jurisdiction of the court. In this case, the court found that the plaintiff had failed to provide evidence of standing, or ripe justiciable disputes – on the basis that most

²⁰⁴ *People of State of California et.al. v United States of America et.al.* [2017] 3:17-cv-01215, S.D Cal.

²⁰⁵ *Ibid.*

²⁰⁶ *People of State of California* (n 204) 2.

²⁰⁷ *People of State of California* (n 204) 66.

²⁰⁸ *People of State of California* (n 204) 66.

²⁰⁹ *People of State of California* (n 204) 66.

²¹⁰ *Lindsay v Republican National Committee et.al.* [2017] 3:17-cv-00123, W.D. Wis.

²¹¹ *Ibid.* 1.

²¹² *Lindsay* (n 210) 1.

grievances relied on predicted future actions, but most significantly the court dismissed the claim on the basis of justiciability. The court noted that under the political question doctrine, the separation of powers, and the policy of judicial self-restraint, the court ‘does not have the authority to resolve the types of broad policy objections raised by Lindsay,’²¹³ noting that these claims should be reserved for the legislative and executive branches of government; eventually dismissing the case as ‘nonjusticiable.’²¹⁴ This case, like the case above, demonstrates the limits that the separation of powers can place on the court’s jurisdiction. Although as before, the court appropriately applies the separation of powers principle to argue that a decision on this issue would be in breach of their delegated powers, it simultaneously limits the extent to which the courts can hold the executive and legislative accountable – another important aspect of their role as part of democratic checks and balances. Although, in this example, the case would likely have failed due to a lack of standing, it further demonstrates the potential conflict between some democratic principles.

3.2.4. *NY State Department of Environmental Conservation v FERC*

In the case of *NY State Department of Environmental Conservation v FERC*,²¹⁵ the petitioner requested the vacation of two orders from FERC which authorised Millennium Pipeline Company to build a pipeline in New York State – striving to hold FERC accountable. The petitioners questioned FERC’s finding that ‘the petitioners waived [their] authority to review [the Water Quality Certification]... under Section 401 of the Clean Water Act’²¹⁶ after failing to respond within the year’s deadline. Having later denied FERC the Water Quality Certification on the basis of having ‘failed to evaluate the downstream greenhouse gas emissions from the project,’²¹⁷ the petitioners claimed that FERC was acting unlawfully by having decided to go ahead with the

²¹³ Lindsay (n 210) 3.

²¹⁴ Lindsay (n 210) 3.

²¹⁵ *New York State Department of Environmental Conservation v Federal Energy Regulatory Commission* [2017] 17-3770-ag, 2nd Cir.

²¹⁶ *Ibid.* 3.

²¹⁷ *New York State Department of Environmental Conservation* (n 215) 7.

building regardless. This case is particularly interesting as the petitioner’s decision to deny the application on the basis of incomplete research would likely have been supported by the court – on the basis that compliance requires full information, and that the plaintiffs have a right to hold the defendants accountable for a failure to provide that. However, because of technical details laid out in the CAA which seek to achieve timely decision making, the court ruled in favour of the defendants, supporting the defendants’ view that the review process was waived. This case therefore identifies an interesting dichotomy – on the one hand it can be seen as a win for democracy, holding the petitioners accountable for untimely decision making, while on the other it can be seen as a loss, because it fails to hold the defendants accountable for poor environmental assessment. This case therefore again highlights the complicated relationship between the courts and democracy, with challenges to tackling accountability, as well as limits to litigation that prevent it from making considered decisions that take into account the social and political context.

3.2.5. *Natural Resources Defense Council v Perry*

The case of *Natural Resources Defence Council v Perry*²¹⁸ highlights a tricky legal characteristic, outlining a significant barrier to the law’s ability to uphold democracy when the government will not. The case tackled the Department of Energy’s failure to publish energy standards in the Federal Register – therefore preventing them from going into effect. Plaintiffs argued that this was ‘a violation of the Department’s duties under the Energy Policy and Conservation Act.’²¹⁹ The defendants put forward a range of counter arguments, suggesting first that ‘the citizen-suit provision of the Energy Policy and Conservation Act does not give citizens a means to sue the Department for failing to comply with a regulation adopted under the Act’²²⁰ and pointing out that citizens could only sue if the Department failed

²¹⁸ *Natural Resources Defense Council Inc. et.al. v Perry et.al.* [2017] 17-cv-03404-VC, N.D Cal.

²¹⁹ *Ibid.* 1.

²²⁰ *Natural Resources Defense Council* (n 218) 3.

to comply with the Act itself.²²¹ However, the court revealed that the provision actually supported suing the Department for any 'failure to perform any act or duty under this part which is not discretionary... a "duty" can be imposed by a regulation as well as a statute.'²²² The defendants then attempted to argue that the Error Correction Rule 'preserves the Department's "free-standing authority and discretion to continue to assess, modify, or withdraw draft rules that the agency has contemplated before those rules are published as final rules in the Federal Register"'²²³ – even though no language existed in the Rule or the history of its adoption to support this claim. Given these circumstances, the court sided with the plaintiffs, awarding them summary judgement and asking the Department to publish the standards within 28 days of the ruling.²²⁴ The result appears to clearly demonstrate how the courts can be used as an avenue for holding government accountable – utilising the Energy Policy and Conservation Act to ensure timely decision making on climate change. Accountability, in this way, can be used fruitfully in a litigation setting to maintain democratic values throughout decision making in government.

However, this case was re-opened by the defendants who decided to file an emergency motion to stay pending appeal in March 2018.²²⁵ The motion was granted by the court – effectively over-turning the previous court ruling. In this example, the Court of Appeals found a different interpretation of the Department's duty and agreed with the defendant's argument which met the conditions necessary for a stay. This reversal is noteworthy as it undermines the previous court decision and undoes the court's ruling which promoted accountability, and furthered democracy. It is a fundamental feature of the judiciary that most decisions can be challenged – leaving outcomes vulnerable to appeals and further debate. This clearly limits the ability of litigation to enforce democratic values in a concrete manner that ensures sustainable and durable application over time.

4. Conclusion

This investigation sought to explore the role of the courts in maintaining democracy during a period of crisis; focusing specifically on the ways the courts have dealt with the separation of powers, transparency, and accountability in the context of climate change litigation. While the findings of this research can only begin to point at certain connections, opportunities, and limitations – they will hopefully shed new light on the complex role of the courts in sustaining democracy.

My analysis of recent climate change cases revealed three recurring themes which directly reflected legal issues as well as being key democratic values. These three democratic values: the separation of powers, transparency, and accountability each create unique opportunities and challenges for litigation. Studying the cases helped to show how these values manifested themselves in the courtroom and revealed how they could be approached in ways that support democracy. Significantly, analysis of these cases helped to demonstrate the strength of these values when addressed together. Democracy, as already mentioned, is built on a variety of values which shift over time or according to circumstance – therefore, evidence of multiple values in litigation contributes to the courts' heightened ability to protect democracy. In general, this research has revealed that important democratic principles are being actively addressed in the courts, showing how democracy reaches beyond the executive and legislature. Many argue that there is an urgent need to counteract Donald Trump's move away from democracy – the findings here point to the valuable role of litigation for maintaining democracy.

Nonetheless, the courts unsurprisingly addressed each of these democratic values differently. As was indicated in chapter two, each value had a different relationship to democracy and litigation – explaining their varied application across climate change litigation. These findings

²²¹ Natural Resources Defense Council (n 218) 3.

²²² Natural Resources Defense Council. (n 218) 3.

²²³ Natural Resources Defense Council (n 218) 5.

²²⁴ Natural Resources Defense Council (n 218) 9.

²²⁵ *Natural Resources Defense Council et.al. v Perry et.al.* [2018] 18-15380, N.D Cal.

are significant as they contribute towards understandings of democracy as a whole, and the complex connection it has with litigation.

Analysis of the cases highlighted how the separation of powers could be seen as both an opportunity and a limitation for democracy. For example, if the separation of powers is considered an important feature of democracy, then the limits on the court (which stop it being able to rule over political matters, and in particular climate change) can be seen as furthering democracy. However, if holding the branches of government to account is viewed as an important feature of democracy, then the courts' inability to act outside their delegated powers is a limitation of their ability to uphold democracy. This dilemma presents a challenge for those trying to explore the role that the courts play in protecting democracy – but recognises an important aspect of the separation of powers principle, that might benefit from further research.

Transparency on the other hand, appeared to have a less complicated relationship with litigation, and presented less of a challenge in the context of the courts. The majority of cases which featured the value of transparency were successful, arguably due to the straightforward way that transparency is dealt with in litigation; the agent either acted according to certain guidelines related to transparency, or they did not. This points to the idea that transparency can be addressed more easily in the courtroom than other elements of democracy, making it a valuable example of the ability of the courts to protect democracy.

My investigations have revealed that accountability is heavily connected to the other democratic values of the separation of powers and transparency, and this makes it difficult to address. As shown in the analysis of the cases, accountability issues are often in conflict with other democratic values which present more accessible legal arguments in the context of litigation. My examination of accountability issues in the courtroom demonstrated how these three democratic values can work against one another,

sometimes acting as a limitation for the courts, in their ability to maintain democracy.

Clearly, these three values operate differently within both a legal and democratic context and suggest a very complex relationship between the courts and democracy – one that requires careful legal strategy to achieve favourable outcomes. In climate change litigation in particular, it is clear that whilst the courts are challenged by the political context of the subject matter, there have been successes from narrow legal approaches that address themes of power, transparency, and accountability. This is an important finding for trying to better understand the ability of the courts to protect democracy.

This research has also opened up avenues for further study. While this study reflects findings from climate change litigation: there is scope to establish whether these democratic values apply across all areas of law. Further research might endeavour to investigate the potential breadth of their application, and whether other democratic values emerge as significant contributors to democracy through the courts. Similarly, further research might look at the ways in which courts' opinions are shifting – marking their digression from the separation of powers and their perhaps increasing willingness to address politics in the courtroom, albeit that this is controversial. Though this research points to areas where democracy can be protected by the courts, the longevity of this impact is as yet unknown. As mentioned previously, the courts provide numerous opportunities for appeal. Positions may therefore be reversed, and this feature of the law could limit the long-term “stickiness”²²⁶ of litigation's contribution to democracy – the result of which can only be revealed over time.

In conclusion then, litigation clearly has a complicated relationship with democracy, and in the context of climate change this research reveals important and interesting findings that help gain a better understanding of an important source of resistance to Trump. What this research can conclude however, is that litigation can drive, and is driving, decision making, even when the executive and legislature are paying scant atten-

²²⁶ Adler (n 64) 84.

tion to upholding democratic principles. Ultimately this research offers hope that democracy is not doomed to depart under Trump. It also offers an increased understanding of the important role of the courts as a much-needed stronghold for maintaining democracy in the US. Litigation may not be the most direct or effective way of sustaining democracy, but it can contribute significantly when the executive and legislature are neglecting to do so.

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