Climate Change and Statutory Construction: Administrative Law Expertise and 'New' Emergencies

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Edinburgh Law Review, in press

Abstract: Responding to climate change requires multi-faceted and long-term public action, particularly in the administrative sphere. The centrality of statutory construction in climate change administrative law adjudication reflects this fact. This article is a study of how statutory construction arguments are figuring in these cases in common law jurisdictions. Arguments relate to direct and indirect climate change legislative provisions and legislative obligations concerning environmental assessment. A study of these different arguments underscores how climate change is giving rise to complex legal questions – a legal reality often overlooked in discourses about these cases as forms of strategic litigation., That legal reality points to the need to foster administrative law expertise in relation to both statutes and climate change. Such fostering requires the evolution of legal imagination.

Keywords: climate change, administrative law, statutes, climate change litigation, legal imagination, statutory interpretation.

A. Introduction

It is a legal truth grudgingly acknowledged that many administrative law cases in common law jurisdictions concerning climate change are cases dominated by legal arguments to do with statutory construction.[1] I say 'grudgingly' for two reasons. First, statutory construction figures in most administrative law adjudication,[2] but it does not

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[1] J Peel and H Osofsky, 'Climate Change Litigation' (2020) 16 Annual Review of Law and Social Science 28 at 30. See Section C.

[2] J Bell and E Fisher, 'Exploring a Year of Administrative Law Adjudication in the Administrative Court' [2021] PL 505, 519; P Sales, 'Modern Statutory Interpretation' (2016) 38 Statute Law Rev 125; M Aronson, 'Judicial Review of Administrative Action: Between Grand Theory and Muddling Through'

get the hearts of legal scholars racing. Statutory interpretation is viewed as too basic, and statutes are viewed as too legally second rate to raise juristic pulses.[3] Second, anthropocentric climate change creates serious risks for human societies – now and more significantly in the future.[4] Cases concerning climate change are often understood as strategic interventions on the part of litigants to force significant action in the face of an emergency.[5] Recognising that these cases are statute specific does not easily fit into that narrative. Overall, responding to climate risks by interpreting legislative provisions, seems an underwhelming legalistic response to an overwhelming problem.

In this article I argue that the existence of statutory construction in climate change administrative law adjudication underscores the importance of thinking about administrative law in developing responses to climate change. Despite the rhetoric of a 'climate emergency', responding to climate change requires multi-faceted and long-term public action, particularly in the administrative sphere (Section B). The centrality of statutory construction in climate change administrative law adjudication reflects this fact (Sections C and D). In so doing, it draws attention to the need to foster administrative law expertise in relation to climate change which includes the evolution of administrative law imagination (Section E).

Three points to make before starting. This article focuses on legislation and case law from different common law countries, but it is not a comprehensive survey of climate change case law in the administrative law context.[6] Footnotes are illustrative not exhaustive. While legal culture is always important to think about, this article engages in a relatively 'thin' form of legal analysis.[7] Second, this article provides an internal

(2021) 28 Australian Journal Administrative Law 6; D Williams, 'The Case-Law of Administrative Law' (1982) 6 Trent Law Journal 1.

[3] A Burrows, *Thinking About Statutes: Interpretation, Interaction, and Improvement* (2018) at 1-2; Cf. Burrows, J Waldron, *The Dignity of Legislation* (1999) and N Duxbury, *Elements of Legislation* (2013).

[4] Intergovernmental Panel on Climate Change (IPCC), *AR6 Synthesis Report - Climate Change 2023: Summary for Policy Makers* (2023).

[5] M Wood, '"On the Eve of Destruction": Courts Confronting the Climate Emergency' (2022) 97 Indiana LJ 239; B Batros and T Khan, 'Thinking Strategically about Climate Litigation' in C Rodríguez-Garavito (ed) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (2022) at 104; K Bouwer and J Setzer, *Climate Litigation as Climate Activism: What Works?* (2020); and J Peel and H Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (2015).

[6] A number of excellent resources exist for getting an overview of cases, eg Sabin Center's Climate Change Litigation Database, http://climatecasechart.com, accessed 5 May 2023. For an account of some of the doctrinal developments see for example E Fisher et al, 'The Legally Disruptive Nature of Climate Change' (2017) 80 MLR 173.

[7] E Fisher, 'Through "Thick" and "Thin": Comparison in Administrative Law and Regulation Scholarship' in Peter Cane and others (eds) *Oxford Handbook of Comparative Administrative Law* (2020) 624-9.

account of doctrinal reasoning in administrative law decisions concerning climate change.[8] For this reason, I use 'adjudication' not 'litigation' to describe these judgments.[9] I am not interested in the success of any particular legal argument. The purpose of my analysis is to draw attention to how statute dominates these cases and the implications of that for understanding the role of law in relation to climate change. Third, my focus on administrative law is not an argument to say adjudication in other contexts such as private law and constitutional law is not important.

B. A New Emergency? The Administrative Law Landscape of Climate Change

As of 5 May 2023, 2,327 jurisdictions in 40 countries have declared a 'climate emergency'.[10] The phrase 'climate emergency' is a way of communicating the seriousness of the risks that climate change poses for humans and the environment. Those risks are serious indeed. The Intergovernmental Panel on Climate Change's latest synthesis report is more than sobering reading.[11] The adverse impacts of climate change are already occurring. They will continue and increase in the future. As the Panel states:

> Risks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (very high confidence). Climatic and non-climatic risks will increasingly interact, creating compound and cascading risks that are more complex and difficult to manage (high confidence).[12]

Mitigating and adapting to those risks requires 'wide-ranging, large-scale, rapid and systemic transformation'. [13]

The need for that systemic transformation is the reason for climate emergency declarations – they are devices for catalysing action. But they are not what is often thought of as a legally 'conventional' emergency declarations – that is devices that result in the 'suspension of the juridical order'.[14] These declarations are usually made by

[8] E Fisher 'Imagining Method in Administrative Law Scholarship' in C Harlow (ed) *A Research Agenda for Administrative Law* (2023) 1 at 7.
[9] Fisher et al, 'The Legally Disruptive Nature of Climate Change' at 175-6.
[10] https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/ accessed 5 May 2023.
[11] IPCC, *AR6 Synthesis Report*.
[12] Ibid at B.2.
[13] United Nations Environmental Programme *Emissions Gap Report 2022: the Closing Window* (2022) at xxii.
[14] G Agamben, *States of Exception* (2005) at 4.

'political' bodies, do not result in greater concentration of unaccountable executive power, and may not result in legal change.[15] Climate change is not creating a 'clean separation of normal law from abnormal legality'[16] that can lead to a state of exception -- 'an anomic space in which what is at stake is a force of law without law'.[17] The opposite in many ways is true. Climate change is mobilising a complex public law architecture.

Climate change is a collective action problem with many causes and many impacts.[18] As with all tragedies of the commons, the power and authority of states necessary figures in effective responses to it.[19] Public international law, particularly the Paris Agreement 2015, has framed climate change as a problem, coordinated sovereign state action in relation to it, and encouraged types of action such as emission trading schemes.[20] But as the law of consenting states, public international law has limited authority. It has been nation states acting within their jurisdictions where public law has played the most significant role in responding to climate change. Some national action can be understood as directly flowing from international regimes,[21] but by no means all. Responding to climate change involves top-down and bottom-up processes of change and integration of actions across governments. [22]

In many national jurisdictions, legislation has been passed that creates frameworks for adapting and responding to climate change.[23] These often include relatively novel legal provisions, such as long term emission reduction targets,[24] which

[15] J Stacey, 'The Public Law Paradoxes of Climate Emergency Declarations' (2022) 11 TEL 291 at 295-6. Although they can see Severe Weather Emergency Legislation Act 2023 (NZ).
[16] T Poole, 'The Law of Emergency and Reason of State' in E Criddle (ed) *Human Rights in Emergencies* (2016) 148 at 151. Note, as Poole argues depiction may 'overdramatise' the problem (at 149).
[17] Agamben, *States of Exception* at 39.
[18] E Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change' (2010) 20 Global Environmental Change 550.
[19] G Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.
[20] L Rajamani, *Innovation and Experimentation in the International Climate Change Regime* (2020). On these different roles for public international law see E Fisher bet al, *Environmental Law: Text, Cases and Materials* 2nd ed (2019) at Ch 12.
[21] Eg nationally determined contributions, For the UK's formal submission to the UNFCC see https://www.gov.uk/government/publications/the-uks-nationally-determined-contribution-communication-to-the-unfccc accessed 5 May 2023.
[22] Eg M Finck, 'Above and Below the Surface: The Status of Sub-National Authorities in EU Climate Change Regulation' (2014) 3 JEL 443.
[23] Eg Climate Change Act (2008) (UK) and Climate Change Act 2017 (Victoria). For more examples of different types of legislative provisions see Grantham Research Institute on Climate Change and the Environment, Climate Change Laws of the World, https://climate-laws.org accessed 5 May 2023. See also T Muinzer (ed) *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (2020).
[24] C Hilson, 'Hitting the Target? Analysing the Use of Targets in Climate Law' (2020) 32 JEL 195.

raise questions about their legal nature and enforceability.[25] Legislative provisions that require explicit consideration of climate change have also been included in statutes governing a range of activities.[26] These are all examples of what Scotford and Minas call 'direct' climate change legislative provisions.[27] There are also many examples of what they call 'indirect' provisions[28] – that is legislative provisions that protect the environment and in so doing encompass climate change.[29]

Most direct and indirect provisions are not self-executing. A common feature of these provisions is that they delegate decision-making power to administrative bodies and/or govern administrative practices.[30] Given the multiple causes and impacts of climate change, public administration at all levels of government is engaged. In some cases, new administrative institutions have been created,[31] but existing administrative bodies have also taken on new tasks.[32] Legislation has created new administrative regimes for managing climate change - processes for setting of carbon budgets for example.[33] Other provisions require, or empower, administrative decision-makers to consider climate change as part of their decision-making processes. That might include decisions concerning mitigation schemes[34] or decisions in relation to specific projects or activities.[35] Consideration of climate change may or may not be alongside the consideration of other environmental issues.[36] Climate change can also figure in executive and administrative policy documentation, both as a supplement and as a substitute for legislation.[37]

For some public lawyers, the delegation of power to administrative decision-makers raises anxieties – administrative power is thought to be freewheeling and thus

[25] D Feldman, 'Legislation Which Bears No Law' (2016) 37 Statute L Rev 212 at 222.
[26] Eg s 5(8) Planning Act 2008 (UK).
[27] E Scotford and S Minas, 'Probing the Hidden Depths of Climate Law: Analysing National Climate Change Legislation' (2019) 28 RECIEL 67 at 74.
[28] Ibid at 74.
[29] Eg s 9 Protection of the Environment Administration Act 1991 (NSW).
[30] See E Fisher, *Risk Regulation and Administrative Constitutionalism* (2007) at 19-22 for why problems like climate change involve a role for public administration.
[31] Eg Climate Change Committee, s 32 Climate Change Act 2008 (UK).
[32] D. Spence, 'Naive Administrative Law: Complexity, Delegation and Climate Policy' (2022) 39 Yale J on Reg 964 at 975-987.
[33] Eg, s 13 and s 14 of the Climate Change Act 2008 (UK).
[34] Eg Pt 2, Energy Act 2008 (UK).
[35] Eg s 10(2) Planning Act 2008 (UK).
[36] Eg see the range of considerations in Eg *Gloucester Resources Limited v Minister for Planning* (2019) 234 LGERA 257, [2019] NSWLEC 7 – a merits review decision concerning a coal mine.
[37] See B. Preston, 'The Interaction of Policy and Law in Environmental Governance' (2022) 29 Australian Journal of Administrative Law 230.

constantly needing to be constrained.[38] In the climate change context, that perception is largely incorrect – legislation is delegating to administrative institutions that operate with complex institutional and knowledge practices and are often being held to account in a range of different ways.[39] This is not an automatic reason to 'defer' to decisions by these institutions. Rather the point is that these administrative spaces are not 'anomic' spaces.[40]

But while public administration is not untrammelled in making decisions concerning climate change, it is also not a 'transmission belt' delivering on pre-ordained goals.[41] A significant reason for this is that 'climate change' is multivalent. That is 'it is so open to multiple meanings and interpretations. It provides us with none of the defining qualities that would give it a clear identity– no deadlines, no geographical location, no single cause, solution, or enemy'.[42] That multivalence manifests itself in the administrative context in at least three different ways. First, decision-making about climate change is often requiring consideration across different sectors of government – both horizontally and vertically. [43] Vertical integration not only accommodates the relationship between national and international law but also the national and local levels.[44] Second, consideration of climate change requires decision-makers to work with longer time horizons than administrative decision-makers normally have in mind. Statutory net zero targets set at 2050 are an obvious example of this.[45] Third, it is not always clear what exactly should and should not be considered by administrative decision-makers when they are taking into account climate change. Are foreign lives relevant to an assessment of the social cost of carbon?[46] Does consideration of climate change require consideration of a particular temperature target?[47] In assessing the environmental impact of a mining project, do the carbon emissions from the end use of the mined product need to be considered?[48]

[38] E Fisher and S Shapiro, *Administrative Competence: Reimagining Administrative Law* (2020) at 9-11.
[39] Ibid at Chapter Two and Chapter Three.
[40] Agamben, *States of Exception* at 39.
[41] R Stewart, 'The Reformation of American Administrative Law' (1984) 88 Harvard L Rev at 1675-8.
[42] G Marshall, *Don't Even Think About It: Why Our Brains Are Wired to Ignore Climate Change* (Bloomsbury 2014) at 94.
[43] J Bell and E Fisher, 'The Heathrow Case in the Supreme Court: Climate Change Legislation and Administrative Adjudication' (2022) 85 MLR 226 at 230.
[44] Ibid, 230 and Department of Transport, *Gear Change: A Bold Vision for Cycling and Walking* (2020) providing funding to local authorities for low traffic neighbourhoods.
[45] Section 1, Climate Change Act 2008.
[46] C Sunstein, 'Climate Change Cosmopolitanism' (2022) 39 Yale J on Reg 1012.
[47] *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* 250 LGERA 1, [2021] NSWLEC 92 at [2].
[48] *Gloucester Resources* at [486]-[513].

Overall, then administrative choices need to be made about what is meant by 'climate change' and what mitigation and adaption mean in relation to it. Those choices are not unbounded. The starting point for determining those boundaries are the statutes that govern a decision.[49] Such choices will also be in situations where recognising and responding to climate change is giving rise to all types of socio-political conflicts. Many argue that action is not being taken fast enough or is not comprehensive enough.[50] At the same time there is pushback from industries[51] and sectors of communities.[52] New 'greener' technologies beget new controversies.[53] Government action has also attracted the ire of populist movements.[54]

C Statutory Construction Arguments in Administrative Law Adjudication Concerning Climate Change

Given the above, it is not surprising that climate change has given rise to disagreements about the legitimacy and legality of administrative action. Not all these disputes have resulted in legal actions, but some have. These cases take a variety of forms – common law judicial review actions,[55] legal challenges under specific legislative provisions,[56] and forms of merits review.[57] The motivations of parties bringing action varies. Some are advocating for administrative decision-makers to consider climate change and/or take more assertive action in relation to climate change.[58] Other parties are challenging decisions where climate change has been a reason or motivation for a decision.[59] In

[49] Sunstein, 'Climate Change Cosmopolitanism' at 1021.
[50] N Stern, *Why Are We Waiting?: The Logic, Urgency, and Promise of Tackling Climate Change* (2016).
[51] N Oreskes and E Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (2011).
[52] Eg M Stott, '15-Minute Neighbourhoods and the Rise of Climate Denialism' (21 March 2023, LSE Blog), https://blogs.lse.ac.uk/progressingplanning/2023/03/21/15-minute-neighbourhoods-and-the-rise-of-climate-denialism/ accessed 8 May 2023.
[53] S Bogojević, 'The Race for Lithium and the Rule of Law' (Climate Change and the Rule of Law Blog, UCL, 22 March 2022), https://www.ucl.ac.uk/law-environment/blog-climate-change-and-rule-law/race-lithium-and-rule-law accessed 8 May 2023.
[54] L Fisher, 'Unearthing the Relationship Between Environmental Law and Populism' (2019) 31 JEL 383.
[55] Eg *Massachusetts v EPA* 549 US 497 (2007).
[56] Eg *Spurrier, R (On the Application Of) v The Secretary of State for Transport* [2019] JPL 1163, [2020] PTSR 240, [2019] EWHC 1070 (Admin).
[57] *Gloucester Resources* and *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2022] QLC 21.
[58] *Spurrier*; *Massachusetts v EPA*; *Friends of the Earth Ltd, R (On the Application Of) v Secretary of State for International Trade/UK Export Finance (UKEF) & Anor* [2023] WLR(D) 22, [2023] EWCA Civ 14 (the UKEF case); and see the cases cited below.
[59] Eg *Sheakh, R (On the Application Of) v London Borough of Lambeth Council* [2022] WLR(D) 170, [2022] PTSR 1315, [2022] EWCA Civ 457; *Swiss International Airlines AG, R (on the application of) v Secretary of State for Climate Change and Energy & Anor* [2015] EWCA Civ 331; and *West Virginia v. EPA* 142 S Ct 2587 (2022).

many cases there are, besides administrative decision-makers, parties both supporting and defending the administrative decision being challenged.[60] Parties are also not always motivated by a concern for climate change, but in protecting their position in light of changes in the law.[61] Many legal arguments in these cases are not successful. This is even at the initial stage of permission to apply for judicial review in the UK context.[62]

The legal arguments in these cases do vary considerably. Alongside arguments that relate to conventional grounds of judicial review are arguments about rights,[63] international law,[64] and arguments grounded in tort.[65] But with all that said, a common feature of these cases is the dominance of questions concerning statutory construction. For example, the Sabin Center's Climate Change case chart for the United States (a country with a written constitution) as of 2 May 2023 shows 1088 cases which are to do with Federal statutes compared to 112 constitutional law cases and 60 common law/public trust cases.[66] In other common law jurisdictions, while there are a handful of tort actions,[67] there are few constitutional law actions.

Most of this case law is thus a form of administrative law adjudication and in those cases statutory construction features significantly. As noted in the introduction, from an administrative law perspective, this is not unusual. Statutes are the main means of empowering public administration. Statutory construction figures significantly in all administrative law adjudication,[68] particularly in relation to environmental law.[69] While the legal arguments concerning statutory construction will be statute specific, three broad categories of cases can be identified.

[60] Eg *Spurrier* and *Massachusetts v EPA*.
[61] Eg *Solar Century Holdings Ltd & Ors v Secretary of State for Energy & Climate Change* [2014] EWHC 3677 (Admin) and *Tate and Lyle Sugars Ltd v Secretary of State for Energy and Climate Change & Anor* [2011] EWCA Civ 664.
[62] *Global Feedback Ltd, R (On the Application Of) v Secretary of State for Environment, Food And Rural Affairs* [2022] EWHC 3269 (Admin).
[63] Eg *Plan B Earth & Ors, R (On the Application Of) v The Prime Minister & Ors* [2021] EWHC 3469 (Admin) (permission refused);
[64] Eg *UKEF* at [21]-[22].
[65] Eg *Smith v Attorney-General* [2022] NZHC 1693 and *Minister for the Environment v Sharma* [2022] FCAFC 35; 291 FCR 311; 400 ALR 203; 15 ARLR 390.
[66] http://climatecasechart.com/us-climate-change-litigation/ accessed 2 May 2023.
[67] Eg *Smith v Attorney-General*.
[68] Bell & Fisher, 'Exploring a Year of Administrative Law Adjudication in the Administrative Court' at 520.
[69] E Scotford, 'Legislation and the Stress of Environmental Problems' (2021) 74 CLP 229.

(1) Statutory Construction and Direct Climate Change Legislative Provisions

In jurisdictions where there are direct climate change provisions there are cases in which legal arguments have been raised about how those provisions should be interpreted and how they govern decision-making. These arguments relate both to framework legislation and to direct provisions inserted into other pieces of legislation.

Framework climate change legislation, such as the Climate Change Act 2008 (UK) is often novel in legal terms. That novelty is in three different ways. First, given the nature of climate change as a polycentric problem such legislation does not have the 'narrow clarity' of legislation that applies to a specific problem.[70] There are thus legal arguments concerning the reach of such legislation,[71] and how framework legislation interacts with other pieces of legislation.[72]

Second, framework legislation is also novel due to the type of obligations included in it. The most obvious example is the long-term temperature targets included in many framework acts.[73] Legal arguments have not so much directly focused on the enforceability of such targets, but on the processes that relate to them. For example, the processes by which such targets are revised,[74] and the processes by which proposals and polices are set so as to meet carbon budgets.[75] In many cases, legal disagreement concerns whether the action taken is consistent with the statutory obligation.[76] These

[70] T Muinzer , 'What Do We Mean When We Talk about National 'Climate Change Acts' and How Important are They in the Context of International Climate Law?' in T Muinzer (ed) *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (2020) at 12.
[71] Eg *Stephenson v Secretary of State for Housing And Communities And Local Government* [2019] EWHC 519 (Admin) (06 March 2019) at [70-[73] and *Packham, R (on the application of) v High Speed Two (Hs2) Ltd* [2020] EWCA Civ 1004 at [103].
[72] Eg *Global Feedback Ltd* at [16], [23]-[24]; *Environment Victoria v AGL Loy Yang* [2022] VSC 814 at [70] and *Students for Climate Solutions Incorporated v Minister of Energy and Resources* [2022] NZHC 2116 at [5].
[73] Hilson, 'Hitting the Target?'.
[74] Eg *Thomson v Minister for Climate Change Issues* [2017] NZHC 733; [2018] 2 NZLR 160 at [73]-[98] and *Plan B Earth & Ors, R. (on the application of) v Secretary of State for Business, Energy And Industrial Strategy* [2019] Env LR 13, [2018] EWHC 1892 (Admin).
[75] *Plan B Earth & Ors, R (On the Application Of) v The Prime Minister & Ors* [2021] EWHC 3469 (Admin).
[76] *Friends of the Earth Ltd & Ors, R (On the Application Of) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225, [2022] ACD 107, [2022] WLR(D) 321, [2022] HRLR 18, [2022] EWHC 1841 (Admin) (The Net Zero Strategy case) at [155]-[222] and *Elliott-Smith v Secretary of State for Business, Energy And Industrial Strategy & Ors* [2021] EWHC 1633 at [61-[74].

include questions include what type of 'decision' is reviewable,[77] and what type of assessment a statutory provision requires.[78]

Third, and related to this, arguments about statutory construction also relate to legal questions concerning the exercise of discretion. For example, a legal argument may concern what features of climate change are a 'material consideration'.[79] The determination of what is 'material' is an exercise in statutory construction. Likewise, legal arguments concerning the rationality of assessment and modelling exercises to do with climate change also require interpretation of statute.[80] This is particularly when legislative frameworks are often setting out the requirements for what an assessment, and thus what a rational assessment, must look like.[81] A similar state of affairs can be seen in relation to other environmental legislation.[82]

Statutory construction is not only relevant to framework climate change legislation. There have also been legal arguments concerning construction of 'direct' statutory provisions in other legislation that refer to climate change. A high-profile example of this is the *Heathrow* case in the UK Supreme Court that concerned the proper construction of s 5(8) and s 10(2) of the Planning Act 2008.[83] Both these provisions concern how mitigating and adapting to climate change should figure in the process of formulating a National Policy Statement. Legal questions in that case concerned not only how a particular statutory term should be constructed, but also what is a 'material consideration' in relation a statutory requirement to consider climate change. Furthermore, in this and other cases, the surrounding statutory context is relevant to the legal analysis.[84]

(2) Statutory Construction and Indirect Climate Change Legislative Provisions

Legal questions concerning climate change are not only arising in relation to direct climate change legislative provisions. There are also a set of legal arguments concerning

[77] *Lawyers for Climate Action NZ Incorporated v Climate Change Commission* [2022] NZHC 3064 at [56]-[68] (reviewability of advice from the climate change commission).
[78] *Lawyers for Climate Action NZ Incorporated* at [129]-[274] and *Net Zero Strategy* at [157]-[193].
[79] *Elliott-Smith* at [48]-[60] and *Friends of the Earth Ltd & Ors, R (on the application of) v Heathrow Airport Ltd* [2021] 2 All ER 967, [2020] UKSC 52 (The *Heathrow* case) at [151]-[166].
[80] *Lawyers for Climate Action NZ Incorporated* at [81-[128] and *Net Zero Strategy* (n 63) [184]-[193].
[81] Eg s 13 Climate Change Act 2008 (UK).
[82] E Fisher et al, 'Rethinking Judicial Review of Expert Agencies' (2015) 92 Texas LR 1681 and J Bell, 'ClientEarth (No 2): A Case of Three Legal Dimensions' (2017) 29 JEL 343.
[83] *Heathrow*. Discussed in Bell and Fisher, 'The Heathrow Case in the Supreme Court'.
[84] *West Coast ENT Inc v Buller Coal Ltd* [2014] 1 NZLR 32, [2013] NZSC 87 at [168]-[176].

whether statutory provisions in legislation govern climate change even where climate change is not mentioned ('indirect' legislative provisions). These types of arguments have often been raised in jurisdictions in which there has been no significant climate change legislation such as the US. These cases fall into three overlapping categories.

The first category are those cases in which a legal argument is being made that a provision covers climate change but no and/or minimal action has been taken.[85] These cases are novel in terms of being effectively challenges to inaction.[86] But they are not novel in the sense they are often raising 'vanilla' statutory interpretation questions.[87] For example, does 'pollutant' in the US Clean Air Act include greenhouse gas emissions? Yes.[88] Does an obligation on a decision-maker to '(a) develop 'environmental quality objectives, guidelines and policies to ensure environment protection, and (b) monitor the state of the environment for the purpose of assessing trends and the achievement of environmental quality objectives, guidelines, policies and standards' encompass consideration of climate change? Yes as well.[89] These cases are effectively cases about whether an administrative institution has jurisdiction over climate change.

The second category of cases to do with 'indirect' climate change provisions raise legal questions about whether any particular action is legally permissible or required under an indirect provision. This argument may often appear alongside an argument about jurisdiction,[90] but not always.[91] A high profile recent example of this type of argument was whether section 111(d) of the US Clean Air Act gave power to the US EPA to require power companies to shift to renewable energy production.[92] But there are also more mundane examples –does a fact sheet about methane fall into the statutory classification of 'environmental quality objectives, guidelines and policies to ensure environment protection'?[93]

The final category of cases concerning indirect provisions to note are cases concerning whether there was a legal error made in how climate change was or wasn't

[85] Eg *Massachusetts v EPA* and *Bushfire Survivors*.
[86] On the problems of challenging inaction see S Shapiro, 'Rulemaking Inaction and the Failure of Administrative Law' (2019) 68 Duke LJ 1805.
[87] D Markell and JB Ruhl. 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2012) 64 Florida Law Review 15 at 69.
[88] *Massachusetts v EPA* at 529.
[89] *Bushfire Survivors* at [16].
[90] *Bushfire Survivors* at [77]-[79] and *Utility Air Regulatory Group v EPA* 573 US 302 (2014).
[91] Eg *In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation--MDL No. 1993* 709 F.3d 1 (DC Cir 2013).
[92] *West Virginia v. Environmental Protection Agency* 142 S Ct 2587 (2022).
[93] *Bushfire Survivors* at [123]-[125].

considered in making a decision or a policy. The statutory framework in these cases allows for the exercise of discretion – often in the form of requiring a range of factors to be taken into account, for example factors that can be considered in relation to a planning application.[94] These cases are distinct from those above because the power of the decision-maker is more open textured, albeit as noted above not unbounded.[95] For example, in the UK planning context, decisions are often described as examples of 'planning judgement'.[96] There is thus an expectation in making a decision, that a decision-maker will draw on their administrative intelligence.[97] As with above, in many of these cases climate change has been taken into account in decision-making - the issue is whether there has been legal error in doing so.[98] These cases can also concern circumstances where, while legislation does not mention climate change, relevant policy does.[99] As above, legal analysis starts with the statutory context as it is that context that determines what is a legally relevant consideration.

(3) Climate Change and Legal Obligations of Environmental Assessment

A major feature of modern environmental legislation is that it often creates a legal framework for the environmental impacts of a project to be assessed.[100] Legislative frameworks set out requirements for the activities that assessment applies to, what assessment requires, who is to be consulted, and how assessment should be figured into a final decision.[101] These frameworks can apply to specific projects (what is known as

[94] *Minister for Planning v Walker* (2008) 161 LGERA 423, [2008] NSWCA 224; *Barbone & Anor (On Behalf of Stop Stansted Expansion) v Secretary of State for Transport & Anor* [2009] EWHC 463 (Admin) at [68]-[87]; *Royal Forest & Bird Protection Society of New Zealand Inc v Southland District Council* [2023] NZHC 399 at [54]-[80].
[95] *Transport Action Network Ltd, R (On the Application Of) v Secretary of State for Transport* [2022] PTSR 31, [2021] EWHC 2095 (s 3 of the Infrastructure Act); and *UKEF*.
[96] *Barbone* at [9]; *Bristol Airport Action Network Co-Ordinating Committee v Secretary of State for Levelling Up, Housing and Communities* [2023] WLR(D) 55, [2023] EWHC 171 (Admin) at [209]; and *ClientEarth, R (on the application of) v Secretary of State for Business, Energy and Industrial Strategy & Anor* [2021] PTSR 1400, [2021] WLR(D) 44, [2021] EWCA Civ 43 (*EN1/EN2* case) at [66]
[97] S Ruiz Tagle, 'The Urban Constitution: Handling Complexity and Disagreement Through Intelligent Decision-making' (DPhil, Faculty of Law, University of Oxford, 2022).
[98] *Transport Action Network Ltd, R (On the Application Of)* at [118].
[99] *EN1/EN2* at [98]-[110] and *Griffin, R (on the application of) v London City Airport Ltd* [2011] EWHC 53 (Admin) at [38]-[45]and *Bristol Airport Action Network Co-Ordinating Committee*.
[100] E Fisher, 'Environmental Impact Assessment: 'Setting the Law Ablaze'' in D Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (2nd ed (2022).
[101] Fisher et al, *Environmental Law* at Ch 20.

environmental impact assessment – EIA)[102] as well as to 'upstream' forms of decision-making plans and programmes (strategic environmental assessment – SEA).[103]

When the first environmental impact assessment regime was introduced in the United States in 1969,[104] Judge Leventhal of the DC Circuit of the Federal Court of Appeals described it as 'setting the law ablaze'.[105] In early US case law, it was argued that assessment gave considerable discretion to decision-makers and contained no significant legal obligations. It was ruled otherwise. The duty of a court 'is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy'.[106] Courts across the world have developed a rich body of administrative law doctrine concerning assessment.[107] In that case law, the governing legislation is always the starting point.

Given that contributions to anthropocentric climate change are a significant environmental impact, it is not surprising that courts have been asked to adjudicate upon legal questions concerning the interrelationship between environmental assessment and climate change. Most environmental assessment regimes, albeit not all,[108] make no explicit mention of climate change. The legal arguments put forward in these cases thus relate to the legal arguments in relation to indirect climate change provisions. They are considered separately however, because of the legally distinct nature of assessment regimes.[109]

A common legal question in environmental assessment case law is what activity it applies to (commonly known as screening),[110] and that question has been raised in relation to climate change.[111] This question is important because if environmental

[102] The Town and Country Planning (Environmental Impact Assessment) Regulations 2017.
[103] The Environmental Assessment of Plans and Programmes Regulations 2004.
[104] National Environmental Policy Act 1969.
[105] H Leventhal, 'Environmental Decision Making and the Role of the Courts', (1974) 122 University of Pennsylvania Law Review 509 at 510.
[106] *Calvert Cliffs' Coordinating Committee, Inc. v. U. S. Atomic Energy Commission* 449 F 2d 1109 (DC Cir 1971) at 1111.
[107] *Champion, R (on the application of) v North Norfolk District Council & Anor* [2015] 4 All ER 169, [2016] Env LR 5, [2015] 1 WLR 3710, [2015] BLGR 593, [2015] UKSC 52, and *Palm Beach Protection Group Incorporated v Northern Beaches Council* (2020) 250 LGERA 212, [2020] NSWLEC 156.
[108] See for example Clause 14(2) of the Mining State Environmental Planning Policy in *Gloucester Resources* at [491].
[109] On this note the discussion at *Appeal By Greenpeace Ltd Against The Advocate General And Another And Bp Exploration Operating Company Ltd And And Another* 2021 GWD 33-434, [2021] CSIH 53, [2021] ScotCS CSIH_53 at [66] about why material consideration case law does not apply.
[110] Fisher, 'Environmental Impact Assessment' at 342.
[111] *Rights: Community: Action, R (On the Application Of) v Secretary of State for Housing, Communities and Local Government* [2022] WLR(D) 12, [2022] JPL 843, [2022] PTSR 907, [2023] 1 P & CR 12, [2022] Env LR 21, [2021] EWCA Civ 1954.

assessment obligations apply, then it opens the way for formal consideration of climate change in the decision-making process. Whether such obligations do apply, turns on a construction of the statutory language.

If an assessment regime does apply, the question is what should be in the *scope* of assessment. Legal questions thus arise about whether regimes cover climate change impacts and if so what type of impacts. In the main, there has been agreement that any direct impacts to climate change from a project or activity are covered, although questions can arise about what exactly are the impacts that should be assessed. [112]

One of the most significant issues in the case law has been whether environmental assessment for a natural resource development (where there is nearly always a requirement for EIA) should encompass scope 3 emissions – that is greenhouse emissions that arise not from a development but from the end use of the resources produced.[113] Scope 3 emissions are often significantly greater than the emissions directly related to the project. For example, in relation to a proposed coal mine in Australia, an assessment determined 'Scope 1 and Scope 2 emissions to be about 1.8Mt CO2-e over the life of the mine and Scope 3 emissions to be at least 36Mt CO2-e'.[114] Whether Scope 3 emissions should be included turns on an interpretation of the governing statutory framework, which can include policy and previous cases interpreting those and other provisions.[115] The question of whether scope 3 emissions can be included has also been understood as a question of evaluative judgment that is only reviewable on *Wednesbury* grounds.[116]

D. Statutory Construction and Current Discourses About Climate Change Cases

The discussion above is not exhaustive. It should also be noted that the categories are porous. For example, a legislative provision may make no explicit mention of climate change, but climate change may be part of the policy context that provision is operating

[112] This might include regard for the Paris Agreement, see *Heathrow* at [139].
[113] *Finch On Behalf of the Weald Action Group, R (On the Application Of) v Surrey County Council & Ors* [2022] PTSR 958, [2022] Env LR 27, [2022] JPL 970, [2022] EWCA Civ 187 and *Appeal By Greenpeace Ltd*.
[114] *Gloucester Resources* at [486].
[115] *Gloucester Resources* at [486]-[513]; *Gray v Minister for Planning* (2006) 152 LGERA 258, [2006] NSWLEC 720; at [69]-[100]; and *Finch.*
[116] *Heathrow* at [143]-[147] and *Finch* at [57]-[58].

in.[117] Likewise, one legal dispute may raise different legal questions concerning different types of legislative provisions.[118]

What the analysis in the last section does do is foreground the dominance of legislation in administrative law adjudication that relates to climate change. There are exceptions to this – for example where the decision being challenged has a non-statutory basis[119] or where what is being challenged is the interpretation of policy.[120] But overall, a major feature of administrative law adjudication in the climate change is that legal questions about statutory construction figure significantly.

For many of those arguing and adjudicating these cases that dominance will not be surprising. But for others it will be, or at least it is a legal reality not dwelt on. In a recent case there is a telling typo. The Climate Change Act 2008 was referred to as the 'Claimant Change Act 2008'.[121] Telling, because by and large, administrative law cases concerning climate change have been viewed through the scholarly lens of 'strategic litigation'. This has been an 'external' approach to the study of law where law is understood as an instrument for specific ends.[122] The scholarly focus has primarily been on how climate change litigation is a strategy to achieve outcomes where outcomes are defined broadly.[123] Bouwer and Setzer have noted that the 'evaluation of the effectiveness and impacts of climate litigation cannot simply focus on the result in the courts, but the implications of publicity (even of a loss) and the litigation campaign as a whole need to be taken into account'.[124] They thus provide a categorisation of climate change cases (not just in public law) into three categories – those that directly contribute to climate action, those that indirectly contribute, and those fail due to 'procedural and/or substantive doctrinal hurdles, but can help changing narratives'.[125] There are valid reasons for this external account of these cases.[126] But it is not the only way to

[117] Eg See the context of Section 26A of the Coal Industry Act 1994 which requires the Welsh Ministers to approve coal mining licences in *Coal Action Network, R (On the Application Of) v Welsh Ministers & Anor* [2023] EWHC 1194 (Admin) at [15]-[19].
[118] *Heathrow*.
[119] *London Borough of Hillingdon & Ors, R (on the application of) v Secretary of State for Transport & Anor* [2010] JPL 976, [2010] ACD 64, [2010] EWHC 626 (Admin) at [47].
[120] Eg *EN1/EN2* at [77]-[97] although note the importance of the wider statutory context to the reasoning.
[121] *Transport Action Network Ltd, R (On the Application Of)* at [68].
[122] Fisher, ''Through "Thick" and "Thin"' at 617-8.
[123] Batros & Khan, 'Thinking Strategically about Climate Litigation' at 104. Peel & Osofsky, *Climate Change Litigation*.
[124] Bouwer & Setzer, *Climate Litigation as Climate Activism* at 10.
[125] ibid 13.
[126] L Vanhala, 'The Social and Political Life of Climate Change Litigation: Mobilizing the Law to Address the Climate Crisis' in C Rodríguez-Garavito (ed) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (2022)

study these judgments and provide an account of them.[127] But when it comes to climate change, while there are many insightful articles on climate change 'litigation', there are relatively few articles studying this case law as part of administrative law 'adjudication'.[128]

Much could be said about the limitations of strategic litigation discourses and instrumental understandings of law in the climate change context.[129] Here I want to draw attention to one problem – the dangers of eliding the purposes of litigation with the substance of adjudication. Nearly all litigants are strategic in all areas of law, not least commercial practice, but it would never be thought that the *only* way to study contract law doctrine is from the perspective of the parties bringing the cases. That elision between motivations for litigation and the substance of legal argument can also mean that climate change is framed as a 'political topic'. Litigants are thus seen as political agents demanding courts to step outside their legitimate constitutional role.[130]

Decision-making about climate change, like nearly all administrative decisions, has 'political' dimensions – recognising that the word 'political' is a reference to a quality not thought to be within the province of law and adjudication. But the way in which climate change raises questions about statutory interpretation also underscores that decision-making about climate change has legal dimensions. The Court of Appeal has noted in a judicial review concerning climate change that:

> The task of the court in a claim such as this is only to decide the issues of law. Those issues cannot extend into the realm of political judgment – which is the responsibility of the executive, not the courts – or into the domain of policy-making, or into the substantive merits of the decision under challenge. They can embrace matters of law. But they cannot call into question the decision-maker's exercise of evaluative judgment, except where the principles of public law allow.[131]

[127] Fisher 'Imagining Method' at 5-12 providing examples of different ways to study cases.
[128] Cf. B Preston, 'The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)' (2021) 33 JEL 1 and Bell and Fisher, 'The Heathrow Case in the Supreme Court'.
[129] E Fisher, 'Climate Change, Narrative, and Public Law Imagination' (The Separation of Powers in the Global Arena: Promises and Betrayals' Symposium, IRPA, Luiss University, Rome, 16th December 2022).
[130] D Campbell, 'Temperature Tantrum' (2021) 137 LQR 380.
[131] *Finch* at [3].

That is correct. But questions about statutory construction are quintessentially legal questions. They are not political questions. They are not questions about merits. They are questions about what a legally valid construction of a statute is.

In being so, they are examples of how climate change as an 'emergency' is not creating an 'anomic space'[132] As charted in Section B, climate change has resulted in a complex administrative law architecture. The range and diversity of statutory construction arguments in these cases reflects that. Statutory construction may not be exciting, but it underscores the importance of law in responding to climate change.

E. Fostering Expertise and Imagination

Recognising the significance of statutory construction in administrative law adjudication concerning climate change is not the end of my argument, however. While statutory construction may be thought of as boring, it is also an exercise that requires legal skill. Recognising the significance of statutory construction in administrative law adjudication concerning climate change thus not only underscores how climate change gives rise to legal questions but also how administrative law expertise is required in answering those questions. By 'expertise' I mean a set of practices that embed knowledge, skills, and experience.[133] That expertise has two overlapping dimensions – administrative law expertise and climate change expertise. [134] That expertise can be seen in evidence in many cases, but it also needs fostering.

As already noted, statutory construction is a feature of all administrative law adjudication. It is about the 'derivation' of meaning within a particular context.[135] It is also not done in isolation. As Sales LJ, as he then was, has stated:

> Statutes are legal instructions transmitted into an existing, highly developed framework of legal values and expectations. The existing law, modes of reasoning, and established localized value systems provide the interpretive

[132] Agamben, *State of Exception* at 39.
[133] Fisher and Shapiro, *Administrative Competence* at Ch 2.
[134] This could be thought of as a difference between contributory and interactional expertise. On that see E Fisher, 'The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers' (2012) 1 TEL 48 and B Preston, 'The Many Facets of a Cutting-Edge Court: A Study of the Land and Environment Court of New South Wales in B Preston and E Fisher (eds) *An Environmental Court in Action: Function, Doctrine, and Process* (2022) at 11.
[135] Duxbury, *Elements of Legislation* at 124. See also Burrows (n 3) 5 and *O (a minor), R (on the application of v Secretary of State for the Home Department* [2022] INLR 189, [2022] 4 All ER 95, [2022] 2 WLR 343, [2023] AC 255, [2022] HRLR 9, [2022] UKSC 3 at [28]-[31].

> context in which a statute is read. Upon receipt of a statutory text, lawyers and the judiciary seek to knit it into the fabric of the law.[136]

The courts are working with the 'text of the statute and the grain of the legislation' governing the analysis.[137] The interpretative context involves precedents concerning statutory construction.[138] Thus for example, in the US, doctrines such as the *Chevron* doctrine[139] have governed the interpretation of indirect climate change provisions.[140] In the Anglo-Commonwealth context, Warnock and Preston have pointed to the importance of the principle of legality in interpreting legislation in the climate change context.[141] Interpreting indirect and direct climate change provisions requires consideration of these doctrines and precedents.

There also needs to be consideration of a court's constitutional role. As Lord Carnwath noted in relation to an administrative law case concerning climate change, 'It is not for us [the judges] to substitute our own views on policy for those of the policy-makers, but rather to give their views full effect—in other words, it is for us to have the courage of their convictions'.[142] That constitutional role is not settled. In cases concerning direct or indirect legislative obligations, adjudication concerning climate change is contributing to the development of doctrines that have often been evolving over decades.[143].

Take for example, *West Virginia v EPA*. In that case the US Supreme Court ruled that s 111(d) of the Clean Air Act 1999 (CAA) did not empower the US Environmental Protection Agency (EPA) to introduce a scheme that required electrical utilities to shift to renewable energy production. Language in the CAA arguably authorised EPA to take this step, but the majority said it was not enough that there is a 'merely plausible textual basis for agency action' because such action raised matters of vast political and economic significance. In such circumstances, there must be 'clear

[136] Sales, 'Modern Statutory Interpretation' at 128
[137] ibid 130.
[138] Burrows, *Thinking About Statutes* at 27.
[139] *Chevron USA, Inc. v. NRDC*, 467 US 837 (1984).
[140] *Massachusetts v EPA* and *Utility Air Regulatory Group v EPA*.
[141] C Warnock and B Preston, 'Climate Change, Fundamental Rights, and Statutory Interpretation' (2023) 35 JEL 47.
[142] Lord Carnwath, 'Judges and the Common Laws of the Environment—At Home and Abroad' (2014) 26, 177, 186-7. The case was *London Borough of Hillingdon*.
[143] See for example doctrine concerning threatened and endangered species listing under the Endangered Species Act 1973 (US). See *Polar Bear Endangered Species Listing* and L Tsang, 'The Endangered Species Act and Climate Change: Selected Legal Issues' (CRS Briefing 2019).

congressional authorisation'.[144] The majority describe this requirement as the Major Questions doctrine – a doctrine that has evolved out of several US Supreme Court decisions of the last twenty years.[145] My own view is the Major Questions doctrine lacks legal rigour. It is not clear when it will apply, the majority's analysis doesn't have much to do the legal text of the CAA, and there is little engagement with the administrative law architecture that relates to the CAA.[146] I am not alone in that assessment.[147] The point is that to understand that case needs a wider and deeper understanding of the administrative law context.

There also needs to be a deeper understanding of direct climate change legislative provisions. As noted above, some of the legislation that is considered in these cases is new and there is genuine legal uncertainty about the meaning of provisions. New legislation always creates uncertainty and that inevitably begets a need for adjudication.[148] That uncertainty is heightened by the novelty of some of the direct climate change legislative provisions that have been passed.[149] The legal obligations in relation to carbon budgets and strategies are examples.[150] These processes, like EIA when it was first introduced, 'set the law ablaze'[151] by creating legal obligations that have few legislative precedents.

An example is section 5(8) of the Planning Act 2008 which refers to 'Government policy relating to the mitigation of, and adaptation to, climate change'. It is not only the reference to climate change that is novel but the undefined concept of 'Government policy' with a capital G.[152] These statutes are not being interpreted in isolation, but, as Sales points out, interpretation also involves 'knit[ting] it into the fabric of the law'.[153]

Fostering greater expertise with statutes, also requires considering how existing legislative obligations and the precedents that relate to them do, can, and should accommodate climate change as a consideration. In some cases that requires reconciling

[144] *West Virginia v EPA* at 2609.
[145] For an overview of that evolution see M Sohoni, 'The Major Questions Quartet' (2022) 136 Harvard Law Review 262.
[146] L Fisher, 'West Virginia v EPA: Thwarting Robust Legal Reasoning' (OHRH Blog July 11 2022).
[147] T Merrill, 'The Major Questions Doctrine: Right Diagnosis, Wrong Remedy' (2023) Available at SSRN: https://ssrn.com/abstract=4437332 provides an overview of arguments.
[148] Bell and Fisher, 'A Year of Administrative Law Adjudication' at 515.
[149] Eg s 13 and 14 Climate Change Act 2008. See the discussion in the *Net Zero Strategy* case.
[150] *Net Zero Strategy* and *Lawyers for Climate Action NZ*
[151] Leventhal, Environmental Decision Making and the Role of the Courts'.
[152] Bell and Fisher, 'The Heathrow Case in the Supreme Court' at 233.
[153] Sales, 'Modern Statutory Interpretation' at 128.

climate change with conventional administrative law doctrine.[154] In other cases that requires incorporating climate change into a body of doctrine that has developed in relation to a regime such as environmental impact assessment.[155]

Focusing on these statutes cannot be done in isolation, however. As the example in the last paragraph highlights, expertise is also needed in understanding climate change.[156] That is not only in relation to the science of it.[157] It is also about understanding that the interpretative disagreements in these cases often arise because of the multivalence of climate change and the role that statutes play in cabining that multivalence. As seen in section B, what 'climate change' denotes is not fixed. Does it require explicit consideration of how it is framed in relation to the Paris Agreement? What about emissions not currently covered by legislative regimes?[158] What impacts should be considered for funding an overseas project?[159] The answer to these questions will depend on the governing statute and the architecture that relates to it. That inevitably involves legal analysis.

That type of legal analysis, while starting with doctrine and precedent, also requires judges to be active in their legal analysis as climate change and/or the law are novel. This does not mean that courts are being activist.[160] Rather, judges are needing to sort through arguments and keenly and conscientiously apply and develop administrative law doctrine in a deliberate and responsive manner to administrative law questions that concern climate change.

Overall, arguments that climate change is not an issue for judges are meaningless.[161] Clearly there will be arguments that push the limits of what is justiciable – arguments about the detailed merits of assessment being an example of this. But the point is climate change gives rise to a set of legal questions that require legal resolution. These cases are not so much cases about a purposive or a literal interpretation. Rather

[154] *Heathrow* at [116]-[121].
[155] *Heathrow* at [142]-[143] and *Finch* at [15].
[156] See for example, S Jasanoff, 'Objectivity in Regulatory Science: Sites and Practices' in C Camic, N Gross, and M Lamont (eds) *Social Knowledge in the Making* (2011).
[157] Although that can be important see *Lawyers for Climate Action NZ*.
[158] *Heathrow*.
[159] Compare the two judgments in *Friends Of The Earth Ltd, R. (On the Application Of) v The Secretary of State for International Trade Export Credits Guarantee Department (UK Export Finance) ("UKEF") & Anor* [2022] EWHC 568 (Admin) and the UKEF case.
[160] On this distinction see E Fisher, 'The Administrative Law Expertise of the Land and Environment Court of New South Wales' in E Fisher and B Preston (ed) *An Environmental Court in Action: Function, Doctrine and Process* (2022) at 199-200.
[161] Some of these arguments are canvassed in L Burgers, 'Should Judges Make Climate Change Law?' (2020) 9 TEL 55.

they concern how to determine the 'best interpretation'[162] in relation to the complexity of climate change.

To argue for greater engagement with legislation is not a startling thing to argue. Judges have long been making that argument.[163] There are also many examples of judges and lawyers who have this expertise. But while my argument above may appear straightforward it also requires the evolution of collective legal imagination. Legal imagination is what all lawyers use in reasoning about law.[164] It is the set of mental constructs that we deploy to make sense of law and in its place in the world.[165] It is what restrains legal reasoning and empowers it. It is what is taught in law schools, and it is what a barrister in making a legal argument is asking a judge to engage. Stressing the important of fostering administrative law expertise in relation to climate change and administrative law adjudication requires an evolution of imagination for at least three reasons.

The first and most obvious, is that environmental problems such as climate change did not originally feature in legal imagination, and thus there is a need to evolve our mental constructs.[166] One example of this is that legal arguments are often relating to an activity that was not seen as a problem before. Thus, for example, the legal question in *Massachusetts v EPA* concerned whether greenhouse gases are a 'pollutant' even though they do not pollute at ground level. That fact was the focus of legal argument before the Court.[167] The majority concluded such gases are pollutants but Justice Scalia dissented on this point arguing that 'regulating the build-up of CO2 and other greenhouse gases in the upper reaches of the atmosphere, which is alleged to be causing global climate change, is not akin to regulating the concentration of some substance that is polluting the air.'[168]

But this is not the only way that climate change is requiring an evolution of legal imagination. The multivalence of climate change is requiring judges to adjudicate on an issue that is capable of being framed in different ways. Thus for example, in the

[162] Burrows, *Thinking About Statutes* at 30-1.
[163] Sales, 'Modern Statutory Interpretation' and S Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) Monash ULR 1.
[164] E Fisher, 'Legal Imagination and European Union Environmental Law' in P Craig and G de Burca (eds) *The Evolution of European Union Law* (3rd ed, 2021) at 850-1.
[165] See also M Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (2020).
[166] Fisher, *Environmental Law: A Very Short Introduction* (2017) at Ch 5.
[167] A discussion of the transcript can be found at Jasanoff, 'Objectivity in Regulatory Science' at 327-330.
[168] *Massachusetts v EPA* at 559

Heathrow case most of the legal arguments concerned what should be taken into account in relation to the phrase 'climate change'. The legal questions before the Court asked it to think about vertical integration (the role of the Paris Agreement), horizontal integration (aviation), and into the future (post-2050 emissions).[169] Likewise, in the EIA cases discussed above, consideration of climate change is requiring courts to consider the legal implications of environmental impacts having different dimensions. It is not just a case of lawyers knowing something about climate change, it is about understanding the implications of climate change for legal reasoning.[170]

The second way that climate change requires an evolution of legal imagination is in relation to statute as a legal form. Judges and practitioners have long pointed to the importance of legislation, but as already noted there is an assumption in common law systems that they are not legally interesting or as legally complex as common law reasoning.[171] As Martin Krygier put it over thirty years ago, 'contemporary statutes' are believed to be examples of the '*differentia specifica* of modernity and anti-traditionality in law'.[172] To take the statutory construction arguments in these cases seriously there is thus a need to take the role of legislation as a form of law more seriously. It is striking to note that not only is there relatively little written on climate change adjudication, but there is also relatively little written on climate change legislation.[173] Thinking about legislation in the abstract is challenging.[174] But while challenging it is not impossible, particularly when what it applies to is a risky reality.

Related to this, the statutory construction arguments in these cases are not only requiring judges to consider the wider statutory context but also the institution making the decision. Thus, important in the legal analysis of a statutory term in these cases is how a judge understands what the law (statute and administrative law doctrine) expects of an administrative decision-maker who is making a decision pursuant to a statute.[175] In other words, embodied in the law are concepts of institutional competence.

[169] Bell and Fisher, 'The Heathrow Case in the Supreme Court'.
[170] Preston, 'The Influence of the Paris Agreement'.
[171] Burrows *Thinking About Statutes* at 2.
[172] M Krygier, 'The Traditionality of Statutes' (1988) 1 Ratio Juris 20 at 21. See also B Preston, 'The Art of Judging Environmental Law Disputes' (2008) 12 Southern Cross Law Review 103 at 104.
[173] Cf. Muinzer, *National Climate Change Legislation* and Scotford and Minas, 'Probing the Hidden Depths of Climate Law'.
[174] Burrows, *Thinking About Statutes* at 47.
[175] *Bushfire Survivors* at [51]-[53] and *West Virginia v EPA* (compare the institutional analysis of the majority (at 2613) with the dissent (at 2637-8).

Administrative law from this perspective is the law of public administration.[176] Statute is not just an instrument for particular ends but creating an institutional form.[177]

The third and final aspect of the evolution of legal imagination to note concerns legal scholarship. As noted above, viewing climate change case law through the lens of strategic litigation has its limits. As do instrumentalist accounts of public law as a tool for particular ends. As Loughlin has noted, these accounts: 'do not accord law the status of a concept: law is merely an instrument for achieving particular objectives; legal decisions are thus to be evaluated in terms of outcomes…'[178] A focus on statutory construction requires scholars to take the legal substance of these cases seriously. For those who think legal arguments are 'more smoke and style than shape and substance',[179] and thus merely masked ideology, that will be a big ask. But what is striking in these cases is just how much legal analysis climate change is begetting. The cases discussed in this article are not short on legal argument and the discussion of those arguments is lengthy. There is a need not only for climate change law scholars but also administrative law scholars to register and ponder that fact.[180] What these cases highlight is that climate change is disrupting administrative law doctrine in different ways.[181] Despite this, much of the writing about climate change case law has primarily been by those interested in climate change, not those interested in administrative law.

F. Conclusion

This article has explored a rather mundane legal reality – administrative law adjudication concerning climate change is dominated about arguments about statutory construction. But while mundane, it is a legal reality that is easily forgotten when confronted with the existential risk of climate change. In such circumstances it is tempting to search for immediate routes to effective action. The rather mundane reality I have mapped here points in the opposite direction. It points to the need for lawyers and legal scholars to up their legal game when it comes to legal work with statute. That in turn requires the evolution of legal imagination.

[176] E Fisher and S Shapiro, 'Disagreement About Chevron: Is Administrative Law The "Law of Public Administration"?' (2021) 70 DLJ Online 111.
[177] P Cane, 'Public Law in the Concept of Law' (2013) 33 OJLS 649.
[178] Loughlin, *Public Law and Political Theory* (1992) at 205-6.
[179] A Hutchinson, 'Why I Don't Teach Administrative Law (and Perhaps Why I Should?)' ([2015] Osgoode Hall LJ 1033 at 1044.
[180] Bell and Fisher, 'The Heathrow Case in the Supreme Court'.
[181] Fisher et al, 'The Legally Disruptive Nature of Climate Change'.