

# Mark Nevitt Climate and the Law

Wed, Apr 26, 2023 1:24PM 57:29

## SUMMARY KEYWORDS

climate, coastal zone, climate adaptation, climate change, law, adaptation, paper, legal, podcast, homeowners, thinking, lawyers, regulation, doug, doctrine, people, local government, question, mark, home

## SPEAKERS

Mark Nevitt, Doug Parsons



Doug Parsons 00:00

Hi everyone this is America adapts the climate change podcast Hey adapters welcome back to a very exciting episode. Joining me is Mark Nevitt, a law professor at Emory University. Mark and I discussed the legal challenges posed by climate change and the uncertainties that policymakers and property owners face in deciding whether to invest in climate adaptation as climate change destabilizes the physical environment legal doctrine is ripe for destabilization to US laws were created during a much more stable climate, which makes it difficult to address the unpredictable nature of climate impacts. Mark and I also dig into the role of the judiciary in climate decisions and if climate skepticism should be a disqualifying factor for a judge weighing in on these issues. We'll also hear a bit more about marks experiences as a fighter pilot with the US Navy of firsts for this podcast. Okay. upcoming episodes, I traveled to Trinidad and Tobago to record a podcast for the keeping history above water conference. It was a fantastic experience discovering how that island and other islands in the region will adapt to a changing climate also went to Columbus, Ohio to interview speakers and attendees at Patel's innovations and climate resilience conference. What a great time I got to meet quite a few listeners and previous guests on the show. Stay tuned for those episodes. But before we get started, I wanted to share legendary Academy Award winning director Oliver Stone is back with nuclear now his first film in seven years coming exclusively to theaters across the USA and Canada beginning April 28. Based on the book a bright future written by award winning scholar of international relations, Professor Joshua s. Goldstein, who also co wrote the film nuclear now explores the possibility for the global community to overcome the challenges of climate change and energy poverty to reach a more optimistic future through the power of nuclear energy, an option that may become increasingly important in the critical years ahead. With unprecedented access to the nuclear industry in France, Russia and the United States director Oliver Stone delivers a revolutionary documentary that Friday is called an intensely compelling must see film, The movie opens in New York and Los Angeles on April 28. With special one day screening events across North America on nuclear now day may 1 That you won't want to miss visit nuclear now. film.com to learn more. Okay, let's join Mark Nevitt and learn how the legal system will adapt to climate change. Hey, adapters, welcome back to a very exciting episode. Joining me is Mark Nevitt. Mark is an associate professor of law at Emory University School of Law in Atlanta, Georgia. Hi, Mark, welcome to the show. Hi, Doug, great to be on your show.

Looking forward to this, this was very frustrating episode, in the sense of preparing for this episode, you gave me a lot of homework, and I wanted to there could have been 10 episodes around the different topics that you're covering. And so it was the challenge for me to distill this down to hopefully we're gonna have this great conversation. And I just want to throw that out there and also want to throw out I'm not a lawyer, I think I'm a relatively smart guy. But of course, you know, a lot of my listeners, just the idea of technical terms, or the notion of really understanding the law, just pretend like you're talking to a somewhat informed person. But I don't really know the laws, maybe as well as I think I do. And so just keep that in mind in your answers. I'm just prepping that. But let's just get started with what kind of law do you teach? Sure.

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Mark Nevitt 03:18

So I just thought, first of all, thanks for having me the show, Doug, I've been a longtime admirer of America adapts. And it's been very generative to my work here at Emory law school in Atlanta. And you should know that some of the America adapts podcasts have made it into my syllabi. So I teach environmental law. I just taught environmental law class today, as well as climate change law and policy class, which is an interdisciplinary course here at Emory, looking at science law policy, I also teach constitutional law. My background is from the US Navy, which is where I get interested in the issue of climate change and climate security. So I stay involved in the national security space as well.

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Doug Parsons 03:55

All right, you've jumped the gun a little bit there. But you do have a fascinating background. Let's elaborate on that a bit more, because there you are at Emory. But it's been sort of a long journey. I mean, that military background walk us through that a little bit. I mean, just somewhat briefly, but just walk us a bit more how you got to where you're at. Sure. Well,

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Mark Nevitt 04:10

so I'm a proud third generation veteran of the US military. And so I was a naval officer for for 20 years following my commission from the University of Pennsylvania and within the Navy, I sort of had a few careers within the Navy. The first part was I flew Navy jets off aircraft carriers for the first six, seven years of my time in the Navy. That was a lot of fun, especially when in your 20s and you're invincible and then became a lawyer, let's call it military jag lawyer in the US Navy did a whole host of issues or legal practice in the Navy JAG corps, focusing most recently towards the end and environmental law issues and climate change issues. From there. I left the Navy, very difficult decision to leave the Navy 20 years of service and then I went down into the academic world and I've been teaching here at Emory actually since the summer of 22. But I've taught at University of Pennsylvania Law School series us in the US Naval Academy, following my naval service.

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Doug Parsons 05:03

Alright, this is total side question, but it just occurred to me there was that TV show called Jag, did they ever cover climate change in any of their episodes? Do you know?

did they ever cover climate change in any of their episodes? Do you know?

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Mark Nevitt 05:10

They didn't, Doug, but I will say when I left my squadron to go to law school, all my aviator and pilot friends just shook their head of me and say, why would you want to be a lawyer when you have the greatest job in the world flying with us, and it was a lot of fun, but I wanted to do something a little bit different than navy.

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Doug Parsons 05:28

Okay, now let's get into the weeds here. You've written a paper, and this is why we got started with this conversation in the first place. And correct me if I get it wrong, and maybe just tell where it's at. But yeah, the legal crisis within the climate crisis, that's a new paper out where's that?

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Mark Nevitt 05:40

So this paper is forthcoming in a Law Review, the Stanford Law Review, and it'll be coming out in the next year or so. But it is available. It's on draft right now, on an academic website, which I'm sure you'll put in the show notes. So a 75 page paper that I'm working on edits right now, but it's forthcoming the Stanford Law Review in the next year or so.

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Doug Parsons 06:00

All right, 75 pages, and I'll be honest, I've gone through a lot of it. Boy, that's just it's dense material. And that's where I would go down these rabbit holes, I will have the that paper in my show notes so people can look at it. And there's it's broken down really nicely into different sections, if you just have curiosities about these different areas. And I want to talk a little bit some of the details, we're not going to go kind of section by section first off just what's been the response to it. So it has been accessible to people. And I think you'd mentioned earlier that well, before that it's been pretty popular response,

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Mark Nevitt 06:28

the response is been pretty popular. And I've gotten some feedback already since I posted it, and I tweeted it out a few weeks ago. And I think it's forcing people to look at the climate adaptation challenge, which a lot of your listeners are exposed to from a policy standpoint. And this paper sort of looks at, okay, where the rubber meets the road that were the legal sticking points, where are the legal questions? Where are the constitutional questions? Where are the legal challenges, because we look to adapt, we may have a lot of really good ideas, but we can't do it in a legal way, or a way that can be operationalized. In accordance with the law, it's going to be challenging. So the work of this paper, essentially saying, we have a whole set of

doctrines, laws, statutes, they're designed for a much more stable time, but climate change is going to be massively destabilizing as we look to adapt legal doctrine, legal statutes have to adapt with

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Doug Parsons 07:19

it. Okay. And so again, we're not gonna cover everything. But I think what's really important is that you make a point that there are four adaptation tools that policymakers are considering in response to climate change. So what are they

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Mark Nevitt 07:30

sure, and this is you can slice or dice it any way you want to talk, but I highlight four in the paper resistance accommodation retreat, which can come in either a managed retreat format or an unmanaged retreat format, we've defaulted to the latter, which is I call unmanaged retreat. So resistance is just the traditional building sea walls armoring, it can even be eminent domain steps in the coastal zones. That runs into a challenge with the Fifth Amendment. Accommodation is a regulation, it could be a no build zone or just coastal zone adaptation regulations in the coastal zone. But that too, has some challenges based upon how the Fifth Amendment is applied in the coastal zone. And then retreat, I think that we need to start thinking about managed retreat and have it in a voluntary manner. But we sort of defaulted to this fourth adaptation strategy, which I which I use in air quotes, if you're seeing me talk, which is essentially unmanaged retreat, which is sort of ad hoc, disjointed, which is often what happens following a natural disaster. So those are my four typologies. I walk through in the paper, and frankly, each one has really significant legal or policy challenges associated with implementing them.

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Doug Parsons 08:45

Again, this is related to the paper, how can policymakers balance the legal uncertainties and complexities with the urgent need to address the impacts of climate change on property owners and communities?

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Mark Nevitt 08:55

First and foremost, I think that legal legislators policymakers have to be upfront, and just the risks or associated with issues in the climate zone. Oftentimes, it's actually relatively opaque to know what we're buying into for a homeowner or even a renter in a climate coastal zone. I just signed the paper I use coastal zone as a touch point. But some of these adaptation issues are also relevant to the wildfire urban interface. I think that policymakers need to be upfront in disclosing the risks. And they also need to start integrating and start taking forward looking adaptation measures and regulations to start preparing for the what I view as a climate destabilize future.

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Doug Parsons 09:39

Doug Parsons 08:55

This is really interesting to me, because I think we all have a different definition of being property owners in the United States. This is just so sacrosanct and to my chagrin, I have a home and then I do appreciate all the rights that are associated with it. But I kind of look at property ownership as a sort of more sophisticated renter you know, you still have responsibilities, digital the current legal system, prioritize interest of property owners over the public interest when you think about climate change?

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Mark Nevitt 10:03

I think that the short answer to your question is yes, and particularly in the United States, and that's due to the Fifth Amendment and your your listeners may be familiar with the fifth amendment's takings clause, which is just 12 words, which have huge, huge, huge implications for climate change and climate adaptation. The Fifth Amendment takings clause says nor shall private property be taken for public use without just compensation. And so there are three aspects of that clause, which I think are really, really important for climate change and climate adaptation measures. The first is that that includes physical takings. So if you were to place an armoring or seawall on a private property, you have to provide just compensation to that private homeowner. The second piece of it is that this takings clause applies to regulations as well, that surprises people, there's a whole doctrine of regulatory taking. So if a coastal zone, a piece of legislation has a law that goes too far and impacts a property owners investment back expectations, then that can also trigger a taking requiring just compensation. So that's the second piece of takings clause, which has been expanded and recent in the last 100 years or so. And the final point, I'll say is that this is not just federal action, this applies to state local city action. And so that's known as the incorporation doctrine within us constitutional law. So we have the takings clause, it's been around since 1789. But because of this sort of doctrinal expansion of the last 100 years or so, also applies to regulations, also applies to all forms of government. And the upshot is that that's something that each and every municipality and locality needs to be aware of, before they pass regulation, or before they have some sort of physical invasion of another person's property. All right, there are all

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Doug Parsons 11:56

these great nuggets within the paper in there was a section where you, I don't know if you're actually suggesting or encouraging, but the need for a federal climate adaptation plan. And I've actually done an episode with the author of a bill hasn't passed and hasn't happened. But there's obviously a lot of interest. And you'd mentioned that this idea of critical climate zones that could help some of these legal discussions. Could you explain a little bit of that?

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Mark Nevitt 12:17

Sure. So the other sort of key constitutional provisions that I would highlight beyond the Fifth Amendment that is your listeners should just be aware of is the 10th Amendment, which says essentially, that the powers not delegated to the United States by the Constitution being the federal government, nor prohibited by it to the states are reserved to the States or to the people. So state, local governments really are at the front lines of climate adaptation on there, just a 10th amendment because we don't have some plenary, federal land use law applied to all adaptation. But I do think that there could be some sort of national climate adaptation plan,

discussion of a discusses critical climate zones, which provide some information to prospective buyers to to existing homeowners that really showcases the climate risks that are there right now we're seeing a lot of that being done by sort of third parties like real estate and other firms like that, trying to get at that. But I think the federal government does have a role in helping showcase and shining light on climate risk.

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Doug Parsons 13:18

And again, in the paper, there's so many of the examples, case studies and previous guest decisions that were made. I mean, it's all comes down to these local government decisions. Can you talk about some of the potential conflicts that exist between and you sort of, I think you just identified some of that there, but between federal and state law, but and then there's even local government policies, I mean, that's must be constantly butting up against each other.

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Mark Nevitt 13:40

Sure. So we see the federal law really come in through the three different statutes that your listeners are familiar with. And that comes down to sort of information sharing and funding and how we fund some of our development and oftentimes critical climate zones. The first is the Stafford Act, which is how we, which is the federal Stafford Act, which is essentially how we respond to emergencies or major disasters and climate change will will have an increase in that over the time period. But what that what that does, I think too often, Doug, is we have this pattern of destroy, rebuild, repeat. And there's some examples in the paper I talked about. There's homes, and they've been destroyed numerous times that have been federally bailed out based upon provisions in the Stafford Act and how FEMA allocates lawyer money following this natural disaster. So that's the first sort of federal law that has a role. Again, it's not a adaptation plan, but it has a key role. The second of course, is the National Flood Insurance Policy, which I think subsidizes building in the coastal zone through the provision of subsidized flood insurance. And the third is the Privacy Act, which doesn't get enough attention as it probably should. But that protects certain laws or certain records for past flooding from being provided to prospective homeowners as a protective record under the Privacy Act, interpretation. And so that's sort of where the federal government is involved is a sort of three key roles. Absent that state and local governments, they control the show, right? For adaptation, you have this really interesting federalism system, where you have these statutes, which are oftentimes not disclosing climate risks, were even incentivizing risk in the critical zone. And then you have state and local governments, which are trying to sort of manage our adaptation future,

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Doug Parsons 15:29

you sort of answered it, but I want to keep digging in Are there any particular legal doctrines or statutes that you believe need to be updated or amended to deal with climate change? And I just, I mean, they kind of go to things like NEPA. And I don't know if that's even necessarily relevant. But it's that big environmental law. It's this assessment, and it forces a lot of local governments to start thinking about the environmental impact. But I mean, just where can we start? Sure. So

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Mark Nevitt 15:51

I think that we could maybe start with the Stafford Act that has some pre Hazard Mitigation provisions that are there. And there's been some updates to the Stafford Act that we should build upon. So it's not just reactive, it's more and more proactive. You mentioned the National Environmental Policy Act are really key key law, I don't know if there that really is something that for climate adaptation, it needs to be looked at again, but when he's certainly looking at climate mitigation, and these massive renewable energy projects, or things along those lines, there has to be an environmental impact statement for massive solar farms or wind farms, something along those lines. So NEPA in a in an odd way, could actually be undermining some of those climate climate efforts. So I think the Stafford Act should be looked at and the Privacy Act should be looked at the National Flood Insurance Policy program should be looked at as well. I also think that just the doctrine that we have sort of interpreting the Fifth Amendment, which is really a lot of the focus of the paper needs to be looked at with fresh eyes. Because what I'm concerned about is that it could have a chilling effect, just the fear of litigation, or the fear that the state or local government could be running a check to homeowners based upon a regulation, which is based upon the climate science in a coastal zone, that could actually put taxpayers on the hook for compensating private homeowners and say, right now, I think that the law has not kept up with sort of our climate moment. And that's one of the key takeaways from the papers that we have these doctrines that have worked relatively well for a stable physical environment. I don't think they're ready for our climate destabilize future.

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Doug Parsons 17:35

All right, much of the paper focuses on coastal zones, but you do touch upon like wildfire zones. And I even think of riverine flood zones, which you know, that gets I don't think that gets enough attention. When you think about maybe these reforms to the legal system. Are you going to have to just develop all new ones for each climate impact? I mean, how does that because you because let's say there would be some precedent set, like when you're thinking of ruling on like a sea level rise decision, it's about dealing gets with that particular land, and we're gonna have to just come up with a new system for each of these impacts,

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Mark Nevitt 18:07

I think that we will have to think about the relationship between private property rights and regulation writ large. And I think that applies, whether it be a coastal zone, or a wildfire zone or something that we want to adapt to. And I think that one of the issues that comes out of the paper, I think, is this notion of regulatory takings. So we've expanded this physical takings to include not just the physical taking of private property, but also the regulation of private property. So if you have these sort of critical climate zones that you really don't want to build there anymore, it could be in the aftermath of a wildfire, or it could be a coastal barrier island, if you were to pass a regulation, which would prohibit building, you know, existing homeowners and landlords are going to sue and under the doctrine, there's a case I talked about in there called Lucas, where if there's no ability to achieve economic beneficial use of that of that property, following the regulation, the state and local government is going to be on the hook for compensating that landowner. And so these doctrines, in particular, the regulatory takings doctrine, I think are germane to or they apply to whatever the climate impact may be. But when you just sort of look, start looking at that with fresh eyes,

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Doug Parsons 19:29

it's distinctly possible when I was reading the paper, I just misinterpreted some of the things that you're saying there, especially with some of the I guess, the rulings that come down but it got me think I like talking hypotheticals here. You talked about homeowners willing to live with risks, let's say in the coastal zone, and somehow in some ways that absolves local government if it there's this everyone sort of aware of what's going on and it's like, okay, they're gonna live in this coastal zone. They were made aware of the risks that and so the local government is not responsible for a whole bunch of things that they're generally responsible for, and it just got me thinking like, let's say in Florida It's like, okay, well, you know, they're on their own. But it's never like that. And I especially think like the insurance market in Florida. So even though all right, these insurance companies are not going to insure these coastal homes, then it's even the inland homeowners are subsidizing it indirectly or through the citizens insurance. And so they're not really just taking responsibility on their own if they're living in this really dangerous area. Now, did I interpret that right in the first place?

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Mark Nevitt 20:26

I think that's fear. I think that this gets to this notion of notice, which oftentimes, we don't have complete information about climate risk. And one of the points of the paper I'm arguing is that at a minimum, we need to have a baseline understanding of the climate risks that homeowners are facing. And I think that could impact this investment back expectations, which is a very critical legal term, which govern whether or not a regulatory taking has occurred. But there's a lot in your question to your point about just all the good information that can flow from providing notice requirements, and not just potentially helping out in a legal challenge. It also sort of highlights sort of this real challenge that we have, because so many of the interested homeowners in real estate or municipalities, they don't want people to leave their, their the coastal zone, they're incentivized to not highlight necessarily all the climate risk associated with the coastal zone. So I think we need to embrace what I call adaptation realism in the paper, were needed to sort of get me to get real about adaptation, the challenges before us and start thinking big picture rather than sort of short term fiscal fears or fears that leaving the coastal zone will start draining the municipal coffers.

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Doug Parsons 21:44

What I thought was really interesting in you talked about, there's just the flip side to legal liability for local governments, if they're not doing enough, they could be liable if they're not, if they're doing things they could be liable and talk about, I think about \$500 million had been invested in Miami. They're trying to be proactive, they're trying to do the responsible thing. But you make the point that they actually might be putting themselves in sort of legal jeopardy by assuming those responsibilities. Did I read that? Right?

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Mark Nevitt 22:09

Right. And this is sort of an open question. And sort of you did that right. Read that right dog, essentially, the government under some case law doesn't have an affirmative duty to protect



private property, unless they have taken on a obligation to do so. And if you were to take on an adaptation, and Miami I believe, is 500 million of adaptation. There are some some case law that suggests that the the private property owners are going to expect the city of Miami to maintain those adaptation measures for some period of time. And the case law on this is a bit mixed, to be fair. But there's some laws out there or some case law out there that suggests that failure to reasonably maintain roads or infrastructure could actually impose some sort of legal obligation or legal duty to the local locality or city. So in the city of Miami, I think what they're doing is really important. But I also think that they could change the relationship between the private property owners and the government in the sense that, generally speaking, there's no legal obligation for the city of Miami to safeguard its citizens through infrastructure. But once the infrastructure is put in place, that relationship changes. And so it's just something that we need to think through. And I have a little bit of discussion of that in the paper. That's something I want to build out in the future.

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Doug Parsons 23:34

I just had an episode talking about climate equity, and there's been uneven results. But there's been a lot of attention to do more environmental justice, climate justice, and you think about climate adaptation measures and how they could disproportionately impact low income communities and minority communities to talk about that a bit. How do we help with the legal system? And as we're trying to think of reform, that they're not necessarily going to be impacted negatively? Again, and again, I think

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Mark Nevitt 24:00

on a general matter, I listen to the climate equity podcast and I agree with the professor, a lot of his themes I think from my standpoint, it's a lot about how do you actualize? How do you operationalize your legal rights, oftentimes, the people who have access to lawyers access to fight for the legal rights are going to be the wealthiest people, right? Who have the resources have the baseline of knowledge, who have the wealthiest amount of property to protect. And so there's four core aspects of aspects of access to justice, Doug, which I think is sort of in the background of this of this conversation, which is to say that we have these laws that protect private property rights. And if you're a poor owner, a community of color, and you're less likely to operationalize that with access to legal services, then you're not going to be able to fight for your rights. And so the wealthier homeowners, many of them on very affluent Island in affluent parts of the country are more likely to do that. So as a as a core access to justice question, I think that that is here. And one of the cases I used was the old a one a wishes the access road, and Florida where litigant sued and these homes are worth millions and millions of dollars, once the county decided not to maintain an upgrade this particular road, the homeowners relatively affluent access to lawyers, and they fought for the rights and they were able to make some progress in that stance. But But I wonder about other communities that may not fully understand their rights or have access to lawyers in the same way,

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Doug Parsons 25:39

the Washington Post has been doing some great climate coverage. And just today, they had a story about another home on the Outer Banks of North Carolina that just fell into the ocean and all the struggles there. And I'm glad they're focusing on sea level rise. And I'm sure it's

fascinating for you to hear those struggles that are going on with his communities, but it was like it was the fourth home. And it's only for that and think about low income communities that are being impacted in really terrible ways and all this attention on these really expensive homes right there on the coast. And it really is not some high volume thing. Not that's not a tragedy for that particular family. But just the attention that these people get, it's there, there it is, you know, it's come shows up in the media to

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Mark Nevitt 26:16

your executor. I've been following the story very closely. And I use the Outer Banks of North Carolina throughout the paper as an example of this as well, Doug, so but there's a lot of communities who are not on the front page of the Washington Post that are facing similar problems, even worse problems.

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Doug Parsons 26:31

You do a lot of speculating the paper, which I love, and I just having hypotheticals when it comes to climate change, and I was thinking like you're in a coastal community, and they're doing the responsible thing and doing an adaptation plan. And you talk about climate models and the modeling, and it is getting more sophisticated. And they're really getting down to some really regional level data and remains to be seen how accurate it is when it comes to planning. But it seems to be getting more accurate. And I wonder if a legal situation where there's an adaptation plan, and they use some very sophisticated climate model to make decisions about where developments going to occur or developments not going to occur. Is that going to leave them liable, especially if these I just had this discussion with Eric Roston from Bloomberg News about climate models, because he's covered it quite a bit. That Okay, well, they were wrong with these projections, and that impacted people making money building homes couldn't build a home or they were actually building a home in an area that the local government said wasn't going to be impacted. And it was I mean, it's just it's ripe for just lawsuits. Right. Sure.

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Mark Nevitt 27:33

I mean, the is this is a full litigation opportunity, regardless of what side you're on. So I think I come down to paper that it's important that states and localities start integrating the best available climate science into their adaptation plan. And based on a couple reasons. One is it's the right thing to do from just a common sense, perspective plan for the future and take into account the best available climate science. I also think it could help thwart some of these litigation challenges. And I say that because if a regulation is based upon the the best available climate science, there's some legal basis to argue that that is a sound regulation that is designed to protect the citizenry, protect the health and safety of that local community. And on there, this test that I talked about in the paper called The Penn Central test that gets at the nature and character of the particular regulation and the purpose of the underlying regulation, which courts are more likely to defer to the legislature defer to the policymakers, if they're regulating the coastal zone, for good faith reasons that are based on protecting the health, welfare and safety of the community. And that's not absolute Doug, but I think you have to sort

of make your wins where you're can based upon this antiquated doctrine. So I think that be upfront about why you're regulating about what's the basis for this particular regulation and that can only help that local community.

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Doug Parsons 29:07

Hey, adapters, we'll be right back with Mark but want to share again, legendary Academy Award winning director Oliver Stone is back with nuclear now his first film in seven years, coming exclusively to theaters across the USA and Canada beginning April 28. Based on the book a bright future written by award winning scholar of international relations, Professor Joshua s. Goldstein, who also co wrote the film nuclear now explores the possibility for the global community to overcome the challenges of climate change and energy poverty to reach a more optimistic future through the power of nuclear energy, an option that may become increasingly important in the critical years ahead. With unprecedented access to the nuclear industry in France, Russia and the United States director Oliver Stone delivers a revolutionary documentary that variety has called an intensely compelling let's see film, The movie opens in New York and Los Angeles on April 28. With special one day screening events across North America on nuclear now day may 1 That you won't want to miss. Visit nuclear Now Phil boom.com To learn more, okay, let's get back to Mark. We are going to do a major pivot here. But it's very important to as let's say, they start passing some really useful laws and you're like, okay, they're starting to get this policymakers and such. That's not where the law ends. It's how these laws are interpreted. And we have to think about the judiciary. And it immediately just comes to my mind, you hear all the different, there's judge, local judges, there's federal judges, there's the Supreme Court, and I want to talk a bit about that. And I guess I'll just start off with a simple question. You look at the judge landscape out there making these decisions, are they equipped to handle these climate change questions?

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Mark Nevitt 30:33

That's a good question. I don't know, I think that the climate change is not something that is really front and center of a lot of this adaptation litigation that judges turn to. But that's changing a little bit to dog, we're still sort of see a little bit of that and some judicial interpretations, not necessarily at the Supreme Court level, the Supreme Court has been really focused more on on climate mitigation in West Virginia versus EPA, and of course, Massachusetts versus EPA, which gets the authority of the Clean Air Act. But we're starting to see, I think more judges that trendline is starting to wrestle with climate impacts and climate change writ large. But there I think there is a little bit of a disconnect, because the doctrine hasn't again, it hasn't kept up with, I think the threat before us.

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Doug Parsons 31:26

I'm gonna get some Supreme Court questions. But there's this notion of even recusing yourself from a decision because we just make a lot of assumptions. Like you can't expect a judge to be an expert about all the science that comes before them. They just can't do it. That's not when you initially go to school for to be a judge and be your lawyer. I guess I'm starting off, but let's just say because there's different levels of judgeships that, you know, a particular judge is not only skeptical, but just doesn't really necessarily think climate change is real. I mean, is that a

situation where that judge should recuse themselves from making a decision? Because if you're just everything that your interpretation, your reading of the law, in relation to climate change, if your fundamental beliefs is that it doesn't even exist, that's a problem.

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Mark Nevitt 32:09

That certainly is a problem. I don't know about the judicial ethics associated with that I'd be it seems unlikely that a federal judge would recuse himself or herself. I don't know of any open climate deniers on the federal judiciary. I know some more climate skeptics. And we saw that in very famous cases that I talked about in the paper, Justice Scalia was a little bit more skeptical of climate change. And you see that a little bit in his reasoning and the Lucas decision, which is an important coastal zone adaptation case, in South Carolina, as well as Massachusetts versus EPA, where he grills the council about some of the climate science so I but I can't see judicially ethically a federal judge recusing himself or herself. In that situation. I'm not aware of any open climate deniers and the federal judiciary, but I may be missing something. Well, I

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Doug Parsons 33:00

bet in the last 1020 years, they make sure that point is not well, no, but it could be true. And it just, I guess my point, though, I think of all the points that you make, in your paper, there's a lot of complex things that your future projection, you're gonna have to start thinking about the law in different ways. And if they fundamentally believe that this thing is not happening, and they're not kind of, it's not shared, and they're the notion of like, ethically needing I'm not putting you on the spot, should they, but it's just they're making very consequential decisions based on something that they don't even think is happening. It's just it would be insanity, that they would be able to make a ruling on that.

M

Mark Nevitt 33:34

Right. I think that you have to we have expert agencies, of course, the Environmental Protection Agency, which is afforded some level of deference in their agency decision making, there's open question about how much deference they should be afforded, even amongst his current Supreme Court. But I do think the impact is going to be so great, that is going to be very, very difficult not to wrestle with these with these issues. That's sort of one of the key things I'm trying to point out in the paper is just the future is already here. It's just not evenly distributed. And we're seeing that in these legal doctrines. And so I think judges, homeowners, lawmakers, podcasters, all the above are going to have to start thinking about these really thorny questions sooner rather than later.

D

Doug Parsons 34:16

Okay. And speaking the Supreme Court that, you know, obviously, it's an ideologically conservative court at the moment, and I think you talk about some issues that could go really need to be decided on in the future. And I can't think of them right now. But just like some big adaptation decision that the Supreme Court's weighing in on that is going to just be really important. And they weigh in a way that makes it impossible for local government, state

governments to take adaptation actions that are just for everyone. You know, it's it's even related to manage retreat, which are super empowering eminent domain, they make it impossible and it just everyone just sort of shrugging, putting your hands up. We can't do all the things we do for the public safety here. I mean, I guess that could happen, though, right?

M

Mark Nevitt 34:55

I guess it could happen. So the Supreme Court the current jurisprudence is a bit of a mixed bag. I guess it applies to climate adaptation. On one hand, I mentioned the Fifth Amendment takings clause. And it says nor shall private property be taken for public use without just compensation. But the Supreme Court has interpreted the term public use to be relatively large, very, very broad. That includes most environmental protection was climate adaptation measures that's following a string of Supreme Court cases that ended in *Kelo* in 2005. But the Supreme Court has also found indirect takings, which could be something where a flood on one piece of property floods, another piece of property if the Supreme Court has held that temporary takings could be required just compensation. And so we haven't had sort of this seminal private property moment for climate adaptation yet, but your point is well taken dug about how would the court wrestle this within all these different competing interests in a very complex science?

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Doug Parsons 35:58

All right, and well, one of the questions I came up very early, even before I finished reading, the paper was just like, if you could just amend the Constitution, what would it look like? And it just might, there might not be a need to amend the Constitution. You've talked about a lot of precedents. But you do mentioned in your paper, you have this the idea of an amendment that could enshrine a substantive constitutional right to a stable and healthy environment. And I think that was the basis of it. Could you elaborate?

M

Mark Nevitt 36:21

Sure. And let me just be clear that this is the b2b and academic talking about constitutional amendments, which is we have a little bit of gridlock and the Congress and of course in this country to make to understate it. But I think that there could be a climate moment or climate, I call it a climate constitutional moment at some point, and it could come and that can come in two forms. Doug, one would be looking at existing laws or existing constitutional provisions, such as the due process clause or Equal Protection Clause, and finding a constitutional right to a stable and healthy environment. That was an argument that was made in the children's case, *Juliana versus the United States*, which ultimately failed it in federal court. But they were saying, Look, we have a substantive right to a clean, healthy environment that's enshrined in the Constitution. And the government has a duty to operationalize and protect that, right. So using basically the existing text of the Constitution and finding a new, right. Alternatively, there could be some sort of Amendment to the Constitution. And I talk a little bit about this in the paper. And that would love to see something done maybe in the regulatory taking space that take into account climate conditions, or the notion that rebalancing the private public property rights in a way that gives local governments state governments a little bit more space to take innovative climate adaptation measures, because right now, I think that could be a chilling effect, for fear of litigation. I also think you can see state constitutions, a lot of state

constitutions discuss protection of Environment Protection of healthy, clean environment, I also see some some state constitutional work that can be done, that's much more likely to happen, just it's easier to get a state constitutional amendment through. But there's some work to be done, I think, at the constitutional level, that could help with some of these adaptation efforts.

D

Doug Parsons 38:14

Yeah, it'd be very difficult to get a new amendment, but it all you know, that's this moment. And just you think of what climate change might ultimately mean, in the jeopardy that we face, it might change everyone's mind. But we're certainly not in that mindset yet, with enough people thinking like that. So related to this, I want to pivot and you've have done a ton of writing you lawyers in your writing the volume of work that you've put out, I'm just like, oh, my gosh, yeah. But I want to talk about national emergencies instead of the executive orders and the ability of President to do something and it's related to the Supreme Court of the Supreme Court gets makes decisions that makes it impossible to do things. Where does the President kind of step in? And does he even have the legal right? And so there's the national emergencies act, and it could address climate change. You talk about this in a paper? And could you elaborate a bit on that? Here's another potential tool in the toolkit, right?

M

Mark Nevitt 39:01

Sure. So I wrote a paper is climate change, a national emergency? There's about a year and a half old in the UC Davis Law Review, and essentially asked that question, it was a bit of a bit of a thought exercise, Doug, where if the President were to declare climate change national emergency, what will be the legal authority to do that, and what could he or she actually do, and it's interesting, the national emergencies Act, as you referenced, is authority that Congress has delegated to the president to declare an emergency, which is very, very broadly defined. In fact, it's not defined in the statute. And so right now, we're in Psalm 35, emergencies national emergencies, that that the President actuates specific powers and so the National Emergency act is by declaring emergency sort of serves as a skeleton key which unlocks certain doors that could be used to address a whole host of issues if he was to declare climate change. And now Should emergency, I highlight a few possible things that the President could do just also cognizant this would be enormously controversial, right? Do this. But I also wanted to have a little bit of a thought exercise to look at what were those powers be and what could possibly be done.

D

Doug Parsons 40:16

And let's just on the flip side of that, it'd be very controversial if a president is not acting based on what a clear and present danger to the American people to I just, you know, have to kind of look at it that way. So it's one of those things you just don't want the President to exploit in a situation that doesn't seem obvious. So

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Mark Nevitt 40:32

yeah, and we'll see up so drop your drug, I think that this potentially was an issue this summer, prior to the inflation Reduction Act it was a few weeks there were a lot they weren't gonna

prior to the Inflation Reduction Act, it was a few weeks, there were a lot, they weren't gonna have much climate legislation. So there was, I think, an open discussion or some somewhat open discussion about using the national emergencies act to declare climate change an emergency. And then actually, let's just say there are some work that could be done that don't implicate civil rights or liberties. And I talked about that in the paper, which I'm sure you'll put in the show notes, which could facilitate some unpack some more federal funding for green energy using certain laws to, frankly, punish sort of climate rogue states or states that are really engaging in egregious climate activities, I use the case of Brazil, in the paper itself for the destruction of the rainforest. So there is some work that could be done that doesn't necessarily implicate, you know, civil liberties concerns, whether or not that should be done. I'll leave that to the policymakers. But there's certainly authorities that are there. And if you believe climate change is, in fact, an existential crisis, you're gonna want to start thinking about all the different legal tools that are in your toolkit. You know, I guess

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Doug Parsons 41:36

what's scary about that my knee jerk reaction is like, well, yes, I want the President to kind of step up and work on this. But then you have a new president that could use the same powers and make an argument that let's build a border wall as part of this climate emergency and all sorts of ways of interpreting to your own political agenda. So it's a Pandora's box. If you're not done. Right, you would just think we wouldn't pass legislation based on rational actors. But that's not how, I guess democracies work. All right. There's a little commentary.

M

Mark Nevitt 42:04

Exactly, right. Of the of the border wall emergency in that context, Doc. So I appreciate you saying that.

D

Doug Parsons 42:10

Are any countries doing this? Well, when it comes to legal system reform and such,

M

Mark Nevitt 42:16

this paper doesn't necessarily address that? I think that that's something I'm looking at doing and further projects, I think one of the things that struck me is just how protective our constitutional system is of private property rights. And it really took me to, and I've been writing this paper for several years to do a deep dive into the law doctrine and statutes to look at this. And so I don't know of any other nation that has private property protections like the US does, I think when I look to our neighbors that in North Canada is doing some interesting work, I managed retreat that is worth looking into potentially looking at doing a comparative study down the line. But right now, I think that the US is really uniquely situated in the sense that we're the largest greenhouse gas emitter historically in the world. But we also have these private property protections that are encapsulated by the Fifth Amendment that make it challenging for a lot of adaptation that needs to take place.

D

Doug Parsons 43:15

Yeah, our properties. I mean, it's obviously very important for a lot of reasons. But it keeps us from making a lot of really good decision in the public interest. But that's another episode. And we've got to finish this out this section out your experience with the military. I'm curious, how has that helped you in a lot of the work that you're doing now?

M

Mark Nevitt 43:34

Sure. So actually came to this the climate issue relatively organically and naturally, when I was in the military, I was serving as a Navy jag in Norfolk, Virginia. And we were looking at adaptation in Norfolk, Virginia, Hampton Roads, your listeners might be familiar with that part of the world. It's the largest Navy base in the world with probably the largest concentration, national security infrastructure in the whole entire world and norful, the seas are rising is in the soil is sinking. And so I can't do this climate change issue sort of organically when we're thinking about, well, how can we safeguard Norfolk Naval Station in the surrounding area, and that's when I frankly, this idea this germ of the paper came about 10 years ago, when I was looking at all the property laws in Hampton Roads, and on the federal facility, and just how difficult of a problem this will be to adapt. I think how it's helped me is that I think military planners and I think I still have this as an academic, very relatively apolitical, we are very much problem solvers. We have a planning culture, we're always trying to plan for the future very much a risk based decision making culture. And so climate change kind of fits snugly in a lot of the training that we have in the military as we start planning for sort of unknown adversaries or unknown risks and making decisions in the face of incomplete knowledge. But you know, you have to start planning for the future and making decisions. And so that's been very helpful. I think, as they start thinking about some of these legal challenges, like Maybe facing our country in the context of climate adaptation. We also think that there's a whole and you've had really wonderful guests on this, Doug on climate security that is gets people at people's attention, because it's not just an environmental issue or a green issue, but it's actually pretty much a security issue as well. All right, we're

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Doug Parsons 45:15

gonna get you on at some point, we're gonna talk national security, we just didn't have time for that in this episode. But it's a whole area for you. And I certainly want to have that conversation too. I have a lot of younger listeners in the sense of like university students, and people that really want to get into the adaptation space. And sometimes they reach out and they ask for advice on it. And they listen to the podcast, and they're getting ideas be an urban planner, landscape architect, and so you're there at a law program there at Emory. Is there a lot of interest from your law students in climate change? Or is it just more kind of environmental law? How does that work with your students?

M

Mark Nevitt 45:47

I think the interest is through the roof. I really do, Doug, and I taught climate change law and policy, universe, Pennsylvania Law School, and that was standing remotely class. And I also would invite not just law students, but other people who are just interested in climate change,



adaptation and climate change law and policy into the classroom. And so we would get a really interesting group of people who are students who are just law students, they were all over the university, same as Syracuse and I taught that class with environmental economists, political scientists, and ecologists, because it's very interdisciplinary. And so we also would have a whole host of students from across the university and the same here at Emory, I have public health people in my class, because it's very, very interdisciplinary and nature. And I should also say that Emory, I'll give a plug for Emory University, it has a new climate initiative, looking at research scholarship teaching in the climate space that was just announced a few months ago. And that's really going to bring in a lot of students and interests in this area. But the to your question is through the roof, I didn't have a climate change course, when I went to law school 15, some odd years ago, and the students are really, really engaged on this issue.

D

Doug Parsons 46:57

And you might disagree with me here. I, you know, I worked a conservation policy for the longest time and I worked with a lot of environmental lawyers, and there's a certain type of person that goes into environmental law. And I think you know, what I'm talking about, great that they're out there, right? Maybe they're not taking the big bucks with the corporate law firm, because they're doing environmental law. Do you feel like there's actual opportunities that were when you're thinking about climate adaptation? You don't necessarily have to equate it with environmental law, it could be adaptation law, and I was looking at the different sections of your emphasis at Emory law, and you know, there's health law, and there's corporate law and all that. Do you think there's this opportunity where people could actually get into the adaptation law space? And it doesn't necessarily mean you're an environmental lawyer?

M

Mark Nevitt 47:34

I think that's right, I think that the law helps in the adaptation space, because you sort of have the just a baseline of legal knowledge to work with the policy makers. And so you know, I think as environmental lawyers, I think the best environmental lawyers, when I was in practice, are just natural problem solvers. They're not saying no, and they're not saying yes, they're, they're sort of helping the client, wherever that may be sort of solving problems. And so I think that lawyers have an important role in doing that. Hopefully, that's responsive to your question, Doug,

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Doug Parsons 48:03

sorta, well, maybe this would help go further. And I'm not sure how much as you know, as an academic now, but you know, law firms are always I think they're, they're talking at the law schools, or is there interest from law firms when it comes to students or not? So I guess lawyers graduate to have some background in climate law.

M

Mark Nevitt 48:20

There is and there's climate practice growing at law firms, I had a classmate of mine speak to my class on climate change law and policy, who is has a climate practice at I'm at a major United States law firm. So that's a growing area. I think thinking inflation Reduction Act is sort

United States law firm. So that's a growing area. I think, thinking innovation reduction Act is sort of a game changer on how we implement that law going going forward. So there'd be a lot of work I think for lawyers, not just within federal agencies and state, local governments as they look to operationalize that, but also at law firms. And so traditional environmental law, that regulatory practice was always going to be there. But I think the climate practice is a growing area.

D

Doug Parsons 48:57

Cool. I hope that happens. All right. I like to give like concrete takeaways for my listeners out there. And you've covered a lot of ground here. But let's say you're a local government person or your state government, and what advice would you give them to get better education because they can read your paper, but part of it is just there needs to be awareness building with people out there making these decisions? What sort of advice would you give people out there to just start looking into the legal implications of all this?

M

Mark Nevitt 49:22

Sure. I think that number one would just sort of be familiar with the climate science as you look through your your land use planning your adaptation, planning for the future, and make clear as a policymaker, as a legislature, this is why you're making a respective change. I think that just be clear about the legal challenges that are in front of them. And if you want to resist here is going to be some of the challenges especially with physical takings. If you want to legislate here's some challenges associated with accommodation that you need to think through before you actually pass a law because the number of the dollar amount that is we're talking about here is in trillions of dollars dogs associated with just The Coastal Zone alone exposed to climate impacts. If you're looking at retreat, here are some issues associated with it. Just know that if it's involuntary retreat, it's going to be enormously politically controversial and also very, very expensive associated with paying those homeowners for leaving. But just know that right now, we don't really have a clear, coherent national climate adaptation strategy. So the default I argue, and I would say to the policymakers, we're defaulting to what I call unmanaged retreat, which is sort of ad hoc, disjointed, reactive, and that's not a good way to move forward, we need to start thinking forward looking prescriptively about dealing with climate risks as we understand them right now.

D

Doug Parsons 50:38

So this question, I'm sure my listeners, they've been waiting for this the whole episode, and probably the only thing they're really interested in is, what was it like landing a fighter plane on an aircraft carrier?

M

Mark Nevitt 50:51

It was a lot of fun in the daytime. During the nighttime, I will say that it was stressful. So that's the best I can do. But it's a young man or woman's game. I'll say that now you can, if you were looking at me, you'd see my great years, I probably have at least 20 or 30 from each aircraft

carrier landing dog. But I it's a fun job. It was a it was a it was a great job. But I'm also really glad to be outside the cockpit in a safer environment.

**D** Doug Parsons 51:20

Alright, and you saw Top Gun Maverick, right? Of course.

**M** Mark Nevitt 51:23

I did. Yes. Twice.

**D** Doug Parsons 51:25

Alright, so that when he was breaking all those records at the very beginning, when he just eject, he would have been dead, right? You just don't kind of survive at that speed. Right?

**M** Mark Nevitt 51:33

That's true. That's a true statement.

**D** Doug Parsons 51:36

It's like, alright, I get it's a movie and said, and let's create a little controversy here now is are we going to have fighter pilots 20 years from now? Or is it all going to be drones?

**M** Mark Nevitt 51:45

I think there will be a ratio of drones to fighter pilots, which is very, very high, but will still have manned aircraft, I think taking off in launchy from aircraft carriers and still with the Air Force, but the ratio will be skewed more towards UAVs.

**D** Doug Parsons 52:01

All right, well, just curious. Okay, last question. I asked all my guests if you could recommend one person to come on the podcast and don't necessarily have to come on but it's just sort of your this kind of aspirational guests that would come on the podcast, who would it be?

**M** Mark Nevitt 52:13

Sure I'm a huge admirer. I'm a huge admirer of all your your podcast guests. And I say all the ones I really love, but I think that Robert and Craig would be really great to have on your podcast duck because she's a law professor at University of Southern California. She's gonna

think about climate adaptation for 30 some odd years. Her work is very, very interesting. She just wrote this really great paper called four degrees Celsius, which looks at what are the challenges and adaptation when if the world was to be at the four degrees Celsius level, according to just global aggregate temperatures, she would be a great guest. She's a lovely person. She's incredibly smart. And I cite her all the time in my work. So I think Robin Craig would be really great.

D

Doug Parsons 52:54

Well, maybe you can connect us at some point. That sounds fantastic. Really interesting. Happy to do that. Mark. This is fantastic. This up to the hex I love talking about the law. I haven't done it enough. And I think you're doing some really exciting work. And I think your students that come through your program are probably gonna go out and do some amazing things. Thanks for what you're doing. Thanks for coming on the podcast. Thanks, Doug. Okay, it actors that is a wrap. Thanks to mark for joining the podcast. I've only focused on the legal system a few times. And I love discussing it with people who actually know the law and are thinking about climate change I really enjoyed when we touched on the topic of climate skepticism in the legal system. It's concerning to think that judges who hold climate skepticism could be making decisions that have significant impacts on climate change policy. While it's important to respect the judicial system and its decision making processes, it's essential that we have judges who understand the science behind climate change and the severity of its impacts, or at least respect the voices of those experts that do when weighing in on these important cases. Additionally, it was encouraging to hear that many law students are interested in pursuing climate law as they will undoubtedly play a crucial part in shaping the future of climate policy. As Mark highlighted, the legal system will play a critical role in climate adaptation. And we need lawyers who are climate savvy to lead the charge. I've included links to Mark's essays in the show notes. He has a wealth of knowledge and expertise on how the legal system will respond to climate change, and I highly recommend giving this work read. And finally, I was glad to hear that scene where Tom Cruise went Mach 10 and Top Gun Maverick was nonsense. I wasn't buying it when I saw it and Mark confirmed my suspicions. Okay, I'm always hearing from listeners that they have started listening to the podcasts and the last few months or the last year and that means they have missed out on a bountiful archive if they haven't poked around at previous episodes. So I'm going to dig in the vault when I can and highlight to previous episodes in case you need some recommendations in Episode 156 affordable housing and climate change with Laurie Schulman of Enterprise Community Partners. So Laurie came on at the time she was the national director for climate risk reduction resilience at Enterprise Community Partners, but now she's working at the White House work tour. So we discussed affordable housing and climate change standardized resilience and Building Codes. What's problematic about the subject of managed retreat, resilience 21 and a new report and FEMA housing policy change, and in Episode 116, I hosted frequent guests Dr. Jesse Keenan of Tulane University, Jesse discussed his new research paper on how sea level rise will impact the viability of the 30 year home mortgage the foundation of much of the home ownership in the United States, we also discuss how local banks are being more aggressive and avoiding risky coastal loans and much more. So definitely take a look in the archive. Okay, does your organization have a powerful and inspiring story of climate change adaptation to share with the world imagine showcasing it on a widely acclaimed podcast with a large network of climate and adaptation professionals. America adapts offers you the perfect platform to tell your story and spread your message to a global audience by sponsoring an episode not only will you be sharing your story with the world, but you will also be incorporating a podcast episode as part of your organization's long

term communication strategy. Don't limit your communication toolkit to just webinars and white papers. They can be dry and forgettable. You'll get to work with me personally to identify the experts that represent the amazing work you're doing. Give your organization a dynamic and engaging way to communicate with members, board members and funders make a lasting impact by using the power of podcast storytelling to captivate your audience and bring your message to life. Some of my previous partners include Battelle Natural Resources Defense Council, University of Pennsylvania Wharton, World Wildlife Fund, UCLA, Harvard University to name just a few. So discover the enduring value podcast as you continue to promote your story long after its original release. Learn more by emailing me at [America.daps@gmail.com](mailto:America.daps@gmail.com). And are you looking for a speaker who can inspire your audience with real life stories of climate adaptation? Look no further, I offer keynote presentations that weave together engaging stories from the American apps podcast and my own experiences in this exciting field. My talks are sure to motivate and inspire your audience. Whether you're planning a public or corporate event, I'm available to speak and share my expertise. Don't miss out on this opportunity. Learn about climate adaptation in a fun and informative way. I like to think to book me as a speaker, visit [America.daps.org](http://America.daps.org) and get in touch. And as host of American apps, I'm always eager to connect with my listeners and hear feedback on the show. Whether you want to share your thoughts or suggest a guest you'd like to hear from I'm open to it all your input not only helps me improve the show, but it can also lead to exciting new opportunities. So don't hesitate get in touch with me, America. [daps@gmail.com](mailto:daps@gmail.com) I look forward to hearing from you. Okay, adapters Keep up the great work. I'll see you next time.