

Will Climate Change the Courts?

David A. Murray

Disillusioned by politics, and especially by democracy, a large group of well-funded climate activists has decided that the courts offer the best hope for achieving what they call “climate justice.” To date, these groups have launched, funded, or staffed scores of coordinated lawsuits around the world. Following a well-established strategy for using the court system as a vehicle for political action, many include carefully chosen individual plaintiffs who claim various climate harms.

In the U.S., the cynosure of climate litigators’ hopes is *Juliana v. United States*, which its supporters call the “trial of the century.” Part of a broader campaign popularly known as the “children’s climate crusade,” *Juliana* is brought by twenty-one “youth plaintiffs”—children and teenagers, who ranged in age from 10 to 19 when the lawsuit was filed in 2015. The plaintiffs’ claim is sweeping: By failing to stabilize atmospheric carbon levels, the federal government has failed to protect their constitutional rights. Whereas many climate suits seek financial compensation for past damages, *Juliana* seeks massive policy changes.

Mary Christina Wood, a University of Oregon law professor and climate change activist, has been a key influence on many of these lawsuits through her proposal of a legal approach called “atmospheric trust litigation.” This strategy “calls upon the judicial branches of governments worldwide to force carbon reduction on the basis of their fiduciary responsibility to protect the public trust,” as she wrote in a 2012 book. Wood is fond of breathless and colorful catalogs of climate horrors:

Should business as usual continue even for a few more years, future humanity for untold generations will be pummeled by floods, hurricanes, heat waves, fires, disease, crop losses, food shortages, and droughts as part of a hellish struggle to survive in deadly greenhouse conditions.

Because “there has been little action at either the international or national level” to address this crisis, Wood argues that “exclusive reliance on the political branches for climate response now seems ill-advised.”

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As proponents freely allow, the aim of these lawsuits is more than a legal victory; it's publicity for the cause, shaping public opinion and turning the court system into a sustained front in the war over climate change. The strategy is a sort of asymmetrical warfare. It attacks the tort system on a number of its core doctrines, including traditional concepts of individual actors, liability, and clear lines of causation, all of which climate activists consider outmoded in the face of a planetary crisis. And while the defendants must win nearly every battle to maintain the status quo, the climate litigants can lose many, perhaps needing only a single major victory—especially in the U.S. Supreme Court or in the top court of another country—to achieve their aims.

The “Trial of the Century”

The year 2018 saw a wave of lawsuits filed on climate-related claims—more than eighty as of this writing, according to a database run by Columbia University's Sabin Center for Climate Change Law. Some are brought directly by advocacy organizations, others by city and state governments. Some target oil companies, while others target governments or their agencies. One lawsuit, filed in October by the state of New York, alleges that ExxonMobil misled its investors into believing it had accounted in its financial projections for the risks posed by potential future climate change regulation.

None of these suits, however, has enjoyed more public attention than *Juliana v. United States*. Its “youth plaintiffs”—with the minors represented by their parents or guardians—are led by Kelsey Juliana, now 22, from Eugene, Oregon. Joining them are the nonprofit group Earth Guardians and a complainant listed only as “future generations,” represented by “their Guardian Dr. James Hansen,” an erstwhile climate scientist turned full-time anti-carbon activist.

Hansen, the man who has led the call to reduce global atmospheric levels of carbon dioxide to 350 parts per million, is also the guiding spirit of the current spate of lawsuits. His granddaughter is among the *Juliana* plaintiffs, and he serves as her guardian in the suit. Hansen has spoken often about using the court system to secure “climate justice.” In November 2017, he told the *Guardian* that “the judiciary is the branch of government in the U.S. and other countries that is relatively free of bribery. And bribery is exactly what is going on.” That is, Hansen believes that elected politicians, unlike judges, have a high chance of being subject to the interests of the oil and coal industries, and so he urges what he calls a “litigate-to-mitigate” strategy.

The lead attorney representing the plaintiffs is Julia Olson, the founder, executive director, and chief legal counsel of Our Children's Trust, an organization that "elevates the voice of youth to secure the legal right to a stable climate and healthy atmosphere for the benefit of all present and future generations." Olson, who is also the chief counsel in several other climate suits, has told the story of how she conceived of *Juliana* while watching *An Inconvenient Truth* when she was pregnant with her son.

Unlike many climate lawsuits grounded in statutes of the Clean Air Act, *Juliana* puts forward a sweeping argument that the U.S. government's "failure to prevent the present and looming climate crisis constitutes a breach in the government's basic duty of care to protect Plaintiffs' fundamental constitutional rights." The rights allegedly violated are those to "life, liberty, and property" and to "equal protection," as well as the plaintiffs' "unenumerated inherent and inalienable natural rights" and their "rights as beneficiaries of the federal public trust."

The relief sought for *Juliana's* plaintiffs consists of massive, unspecified policy changes aimed at stabilizing global carbon-dioxide levels at 350 ppm by the year 2100, a longstanding goal for climate activists. (Current levels are over 400 ppm.) The suit explains:

Absent immediate, meaningful action by Defendants [that is, the U.S. government] to cease their permitting, authorizing, subsidizing, and supporting fossil fuel exploitation, production, and consumption, and otherwise to act to phase-out CO₂ emissions, Plaintiffs would suffer increasingly severe consequences. By 2100, these Youth Plaintiffs (many of whom should still be alive), and future generations, would live with a climate system that is no longer conducive to their survival.

But *Juliana* and the other suits are following as much a media as a legal strategy. A few of its young plaintiffs have become stars in sympathetic media outlets, especially Xiuhtezcatl (pronounced "shoo-TEZ-kaht") Martinez, a telegenic figure who raps about the environment and the son of an environmental activist. He has earned breathless profiles in media outlets and received an award for youth activism from President Obama at the White House.

Some of the major climate suits brought by city governments have been dismissed in federal court. And *Juliana* has already undergone some significant modifications, including the dismissal of the president himself as a defendant (originally Obama, now Trump), so ordered by a federal judge in an attempt to preserve the separation of powers. But since the suit was first filed against the Obama administration in the U.S. district

court for the District of Oregon, it has survived multiple appeals by the federal government to have it dismissed or stayed—that is, to halt the proceeding. As of this writing, the case had for several months been bouncing between the federal district court for the District of Oregon, the federal appeals court for the Ninth Circuit, and the U.S. Supreme Court, with an ongoing series of petitions and appeals by both sides leaving it yet undecided whether or not the case will proceed to trial.

But even if *Juliana* is ultimately lost or dismissed, organizers may well claim that their loss was really a victory, as they will have changed the national conversation in their favor. Indeed, advocates are already laying the groundwork for this approach. At Climate Liability News, a website that offers friendly coverage for litigation brought by climate activists, one article claims that the dismissal efforts show the government is “frantic to avoid the trial.” Another notes that the government’s likely strategy would require conceding the scientific findings on climate change, thus inducing President Trump’s Department of Justice to contradict the general stance of his administration. But these publicity tactics are aimed at people unfamiliar with the legal stakes of *Juliana*.

The New Right to a “Stable Climate”

The arguments the *Juliana* plaintiffs make are striking. As Ann Aiken, a federal judge for the District of Oregon, noted in a November 2016 ruling denying an earlier request for dismissal,

This is no ordinary lawsuit. Plaintiffs challenge the policies, acts, and omissions of the President of the United States, the Council on Environmental Quality, the Office of Management and Budget, the Office of Science and Technology Policy, the Department of Energy, the Department of the Interior, the Department of Transportation (“DOT”), the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of State, and the Environmental Protection Agency (“EPA”).

Judge Aiken rhetorically supported the plaintiffs’ assertion of a new fundamental constitutional right to a “stable climate,” or a “climate system capable of sustaining human life.” Put simply, the argument for the new right goes like this: The U.S. government has caused or allowed “pollution and climate change on a catastrophic level”; without a stable climate, people will be deprived of life, liberty, and property; a stable climate is therefore a “necessary condition” of these constitutional protections.

In explaining how new rights can come to be recognized, Aiken mentioned the decisions in *Roe v. Wade* (the right to privacy) and *Obergefell v. Hodges* (the right to marry). A seeming irony arises here: Among the *Juliana* plaintiffs is a collective plaintiff listed as “future generations,” and one might wonder how not-yet-conceived generations could have judicial standing before a court system that does not recognize the most basic protections for babies already in the womb. (Aiken sidestepped this question by asserting that, since the youth plaintiffs have standing, the standing of “future generations” need not be determined.)

The new right to a stable climate, Aiken argued, derives primarily from the due process clause of the Fifth Amendment, which states that “no person shall be...deprived of life, liberty, or property, without due process of law.” And it is bolstered by the Ninth Amendment, which asserts that the people retain other rights not specifically enumerated in the Constitution. In a 2017 article in the *American University Law Review*, Mary Christina Wood and law professor Michael C. Blumm describe *Juliana*’s theory of due process this way:

Judge Ann Aiken’s decision broke new legal ground, deciding that the children have a fundamental right to a climate system capable of sustaining human life. Judge Aiken concluded that the right to a climate system capable of sustaining human life is protected against federal government interference by both the due process and equal protection clauses of the U.S. Constitution as well as the public trust doctrine, which she found implicit in the due process clause and, indeed, implicit in sovereignty.

If and when *Juliana* proceeds to a more substantive stage of argument, this claim of a new right will likely face skepticism. As Andrew R. Varcoe pointed out in a 2017 article for the Washington Legal Foundation, “As a general matter, federal courts are rightly reluctant to create or recognize new fundamental rights protected by substantive due process.”

To add to these troubles, the central idea of a “stable climate” has no generally recognized legal meaning or content. While the *Juliana* suit lists the 350-ppm target as a requirement for a stable climate, it does not define the term itself. What is a stable climate? What competent authority will declare when a stable climate has been achieved? What standards and measurements will be used? Has the climate, in fact, ever been stable—and if so, when? Who will choose a baseline period against which to measure when the climate becomes stable?

Furthermore, there is a question of standing. Legal precedent requires that in order to have standing to sue, plaintiffs’ harms must be “concrete

and particularized.” That is, plaintiffs must suffer actual rather than merely hypothetical injuries, and the injuries must affect the plaintiffs personally. Lack of concrete and particularized climate harms was a central basis for Chief Justice John Roberts’s dissent from the 2007 *Massachusetts v. EPA* ruling, which held that the EPA could regulate greenhouse gases as pollutants. The plaintiffs, Roberts argued, failed to demonstrate that Massachusetts had lost coastal land, relying instead on computer models of future loss that had a high degree of uncertainty. Thus the injury was not concrete or actual. And because particularization requires that individual plaintiffs suffer injuries personally and seek relief that would benefit them in a way that is distinct from the benefits to the public, “the very concept of global warming seems inconsistent with this particularization requirement.”

The Supreme Court’s 2016 *Spokeo, Inc. v. Robins* ruling, authored by Justice Samuel Alito, notably reinforced the notion that harms in tort law must be “concrete and particularized.” Despite this, Judge Aiken held that climate harms can still be concrete and particularized even if shared by all Americans or even all humans, citing other cases, such as *Pye v. United States* (2001), in which a federal appeals court ruled that “So long as the plaintiff... has a concrete and particularized injury, it does not matter that legions of other persons have the same injury.” Aiken thus concluded that the *Juliana* plaintiffs indeed had standing to allege “harm to their personal, economic, and aesthetic interest.”

Breaking the Judicial Mold

The *Juliana* case, with its sweeping claims and vague notion of a “stable climate,” may seem to be a long shot. But part of its strategy, and that of climate litigation broadly, is to put pressure on traditional tort law, and the court system more broadly, so as to gradually expand their power.

In 2011, shortly before Mary Christina Wood published her influential proposal for “atmospheric trust litigation,” Yale law professor Douglas Kysar surveyed dozens of recent law review articles that speculated about how tort law might be used to force changes in climate policy.

Kysar’s somewhat gloomy review concluded that “the pessimism of legal scholars is justified” and that tort law, as presently constituted, has little power as a climate remedy. So Kysar flipped the question, proposing that we ask not *What can tort law do about climate change?* but *What can climate change do about tort law?* He answered positively: “The tort system... must shift in order to serve its role as the administrative state’s traditional and necessary backdrop.”

The old tort law system, said Kysar, based as it is on classical liberal concepts of discrete actors and clearly delineated responsibilities, “seems fundamentally ill-equipped to address the causes and impacts of climate change.” “At each stage of the traditional tort analysis—duty, breach, causation, and harm—the climate change plaintiff finds herself bumping up against doctrines that are premised on a classical liberal worldview.” The ongoing planetary climate crisis, however, “will make certain trappings of classical liberalism—such as the presumed atomicity of private actors or the purely mechanistic depiction of causation—increasingly difficult to maintain.”

Kysar concluded that filing climate tort cases—even apparently doomed ones—can change tort law in (to him) positive ways. As judges get used to the claims being made by the anti-carbon plaintiffs, he wrote, the claims will come to seem less exotic. He concluded, “Even as climate change tort suits fail on the merits, they may yet change the air.”

In the face of imminent catastrophe, it’s time for Earth’s Platonic guardians to step up, in the form of select judges willing to accept the challenge. As Wood puts it, the atmospheric trust doctrine “appoints the court to police the legislature and agencies in their management of trust assets,” especially the planet’s atmosphere. Under this doctrine, the atmosphere is a “public trust,” imposing legally enforceable obligations on governments to provide future generations with a “stable climate.”

The public trust doctrine holds that certain natural resources belong to the public rather than to private actors, an ownership right that must be protected by the sovereign. The principle finds its roots in ancient Roman law—hence Wood’s claim that the right to a stable climate is an “inherent constitutional limit on sovereignty,” binding not just on the federal government, but on all governments, state and local too, and not just those of the United States. Thus the push in various international courts—what Wood calls a “worldwide campaign”—to gain actual recognition of this ostensibly-already-present obligation on sovereignty.

Needless to say, this atmospheric management will have to be long-standing, says Wood, since every country must participate. “Atmospheric trust litigation breaks the mould by inviting judicial innovation in defining and enforcing carbon emissions reduction at the domestic level, worldwide.” In a 2016 paper, Wood spelled out how that enforcement might work: by extracting massive damages from fossil fuel companies in legal systems worldwide, then establishing a “central United Nations mechanism” to collect the damages, maintain them in a trust fund, and distribute them to climate projects. “While such a global restoration effort

on this scale is unprecedented, the underlying legal principles are strikingly similar to those traditionally applied.”

The Political Question

Like Kysar, Wood admits that for a host of reasons current legal doctrine may bar the way for climate litigants. These reasons are being tested and measured by the current wave of lawsuits, most of which are still skirmishing on these doctrinal grounds. But Wood hopes that “courts recognizing the enormity of climate crisis and the crucial role of the judiciary may approach these barriers with a leniency that is not characteristic of past decisions.”

Finding the right judge will not be easy, says Wood:

Unfortunately...even many judges in common law systems are now so accustomed to issuing rulings within detailed confines of legislation or regulations that they may have lost an inclination to construct meaningful remedies using their powerful traditional prerogatives of equity.

This is a roundabout way of saying that visionary judges will have to ignore the “confines” of traditional legal doctrines in order to create whatever new rights are necessary to save the planet.

Wood understands that atmospheric trust litigation “will be criticized on the basis that it invites courts to overstep their function and intrude into a matter best left to the political branches.” But the temptation for some judges to cast themselves in the role of world savior will be great: “Handed the right complaint, there will no doubt be path-breaking judges who...recognize this epochal moment in the course of human civilization and will exert their judicial authority to protect the globe’s atmosphere.”

The doctrinal barrier causing the most trouble for climate litigants is indeed what tort lawyers call “justiciability” or “the political question.” This is simply the notion that political issues are best decided by the elected representatives of the executive and legislative branches rather than by unelected judges. It was one of the reasons for Justice Roberts’s dissent in *Massachusetts v. EPA*, where he wrote, “this Court’s standing jurisprudence simply recognizes that redress of grievances of the sort at issue here ‘is the function of Congress and the Chief Executive,’ not the federal courts.” Although the *Massachusetts* case was a clear victory for climate litigators, the political question is largely still open, and many activists feel that it is often not answered in their favor.

Activists received another striking victory on the political question, however, in a recent case in the Netherlands. In June 2015, the District Court of The Hague issued an order requiring the Dutch government to reduce the country's greenhouse gas emissions by 2020 to 25 percent below 1990 levels. The case had been brought by the Urgenda Foundation, a Dutch climate activist group, along with nearly a thousand individual citizen plaintiffs who claimed they were being harmed by climate change. It was the first time any court anywhere had ordered a government to reduce greenhouse gas emissions.

The Dutch government made clear that it agreed with Urgenda's goals of dramatically reducing emissions, and it pledged to fulfill the order's terms. It has even gone further, promising to shut down its five coal plants by 2030 and to build more wind farms. But despite the government's amenability, last May it appealed the ruling on grounds of national sovereignty. Since no international law or treaty required the Dutch government to reduce emissions, it argued, a sovereign government should be free to adopt or change emission reduction targets as it sees fit instead of having them imposed by a court. In a landmark victory for climate litigators worldwide, in October the appeals court upheld the original ruling: "The Court of Appeal has based its ruling on the State's legal duty to ensure the protection of the life and family life of citizens" and "disagrees with the State that courts have no right to take decisions in this area."

In the United States, however, several lawsuits have run into the hurdle of sovereignty or justiciability. The sovereignty argument—that political authority lies with elected officials, not the courts—scuttled a climate suit brought by the cities of Oakland and San Francisco in September 2017 against BP, Chevron, ConocoPhillips, ExxonMobil, and Royal Dutch Shell. The following June, William Alsup, a federal district judge in California, granted the defendants' motion to dismiss on grounds of "failure to state a claim." But Alsup made clear that it was the issue of sovereignty that sunk the case for him: "The Court will stay its hand in favor of solutions by the legislative and executive branches."

Oakland and San Francisco had sued under a theory that sea level rise and other consequences of climate change are "public nuisances," which are governed by federal common law. But the precedent of two earlier cases called this theory into question. In a 2011 case, *American Electric Power Company v. Connecticut*, the Supreme Court ruled that because the Clean Air Act gives the EPA authority to regulate greenhouse gas emissions, nuisance claims under federal common law can no longer serve as a basis for emissions claims. In *Kivalina v. ExxonMobil*, the Alaskan

city of Kivalina had sought damages for rising sea levels caused by past emissions. In 2012, a federal appeals court ruled on the case that the same “displacement” applies also to past emissions: “The solution to Kivalina’s dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law.” This set of decisions ruled out federal common law as a tool for climate litigants, serving as the basis for Judge Alsup’s decision to dismiss the suit by Oakland and San Francisco.

But some climate litigators continue to see hope for climate nuisance suits in state law, owing to ambiguities about the respective jurisdictions of state and federal common law. For this reason, climate defendants like oil companies usually seek to have cases that include claims based on state common law removed to federal courts, figuring that they will be treated more favorably there. In March, Vince Chhabria, a federal district judge in California, sent back to state court a series of lawsuits, brought by Marin and San Mateo counties and the city of Imperial Beach against a group of major oil companies, seeking damages for a rise in sea levels. The jurisdiction of the cases is still being disputed in the courts.

The Problem of Climate Causation

In San Francisco’s suit against the oil companies, its city attorney Dennis Herrera said he “looks forward to providing the objective history of climate change science.” Judge Alsup, for his part, responded by ordering a climate science “tutorial,” a series of presentations from both sides on the history and current state of climate science. Chevron’s attorney relied exclusively on publications and presentations by the Intergovernmental Panel on Climate Change, and though he stressed the uncertainties in the panel’s reports, it did mark the first time Chevron had publicly stated that it accepts that humans cause climate change. In a much-noted admonition to the other four defendants, Alsup ordered them to reply to Chevron’s presentation by either agreeing with or refuting its points, telling them, “You can’t get away with sitting there in silence and then later saying, ‘Oh, he wasn’t speaking for us.’”

In his order, Alsup acknowledged at elaborate and detailed length all the points of climate science raised by the litigants, deflating the popular talking point that this was “climate science on trial.” “The issue is not over science,” he wrote. “All parties agree that fossil fuels have led to global warming and ocean rise and will continue to do so, and that eventually the navigable waters of the United States will intrude upon Oakland and

San Francisco.” Rather, said Alsup, “the issue is a legal one—whether these producers of fossil fuels should pay for anticipated harm that will eventually flow from a rise in sea level.” As Alsup notes in his dismissal,

The dangers raised in the complaints are very real. But those dangers are worldwide. Their causes are worldwide. The benefits of fossil fuels are worldwide. The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case.

Another blow to climate litigants came in July from John Keenan, a federal district judge in New York, who dismissed with prejudice—meaning it cannot be refiled—a lawsuit brought by the city of New York against several oil companies. Like other suits brought by municipalities, this one sought compensation rather than mitigation. In his ruling, Keenan, like Alsup, echoed the prevailing scientific wisdom: “Climate science clearly demonstrates that the burning of fossil fuels is the primary cause of climate change,” which has led to “severe and irreversible harms.” But Keenan dismissed the case for some of the same reasons Alsup did. Because the city filed nuisance claims governed by federal common law, and the Clean Air Act displaced federal common law in nuisance claims, the case is not to be decided in court:

Climate change is a fact of life, as is not contested by Defendants. But the serious problems caused thereby are not for the judiciary to ameliorate. Global warming and solutions thereto must be addressed by the two other branches of government.

Even if the science is not on trial in these particular cases, there is another formidable hurdle for litigants that is both a matter of science and legal doctrine: causation. This is a critical aspect of tort law, as plaintiffs must demonstrate that the defendants caused the damage in order for them to be held liable. Because of the global nature and diverse sources of greenhouse gases, it is inherently difficult to determine the extent to which defendants—whether oil companies or the U.S. government—cause climate change and resulting damages such as sea level rise.

In his dissent from *Massachusetts v. EPA*, Justice Antonin Scalia referred to studies by the National Research Council that noted the many uncertainties in climate models regarding natural climate variability. Some aspects of climate change, for example, may not be caused by a rise in greenhouse gases. Judge Aiken, writing in her November 2016 ruling on *Juliana*, noted that in some other climate cases, courts have ruled that

the extent to which oil companies cause climate change is “scientifically indiscernible” because the sources of greenhouse gases are so diffuse. Nonetheless, she shrugged, “climate science is constantly evolving.” There may well be more clarity and certainty about causation in the near future.

A Moral Victory

No one yet knows what arguments the government will present if *Juliana* eventually makes it to trial. But some of the case’s supporters are already hedging their bets, arguing that, win or lose, there will be a broader public-relations benefit. As a 2018 law review article bearing the helpful title “Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories” puts it, “If used effectively, the medium of litigation offers a unique opportunity to reframe climate change and overcome some of the public’s cognitive hurdles to perceiving the true dangers of climate change.” Or, as Bill Watterson’s Calvin might put it, “They’re all *moral* victories.”

Notwithstanding Judge Aiken’s optimism, few legal observers give *Juliana* much of a chance of ultimate success. For example, in a recent *Atlantic* article, constitutional law professor Garrett Epps says the case “is a long shot. An entire raft of federal-court doctrines...has grown up to prevent federal courts from hearing what are called ‘generalized grievances’ against the government.” And the fact that *Juliana*’s plaintiffs are not seeking any specific agency actions, but rather are aiming at a particular *outcome* that will require massive, wrenching economic changes and hundreds of billions if not trillions of dollars to implement, will likely prove a problem for them at a more substantive stage of deliberation.

Like its predecessor, the Trump administration has so far failed in its many attempts to derail the case. The outcome of the case may yet further the cause of climate torts in U.S. courts, or be their graveyard. Given *Juliana*’s survival so far, the only safe prediction is that the case will receive intense, if glib, media attention—a distraction from the deeper political debates we ought to be having.