



GETTING HOTTER

Climate change in the courts

CLIMATE CHANGE HAS TAKEN CENTER STAGE POLITICALLY AND SOCIALLY. As fires raged in Australia, glaciers continued a steady melt, and the winter of 2020 tracked to become the hottest on record, Swedish teenager Greta Thunberg leveraged her “school climate strike” to build awareness among youth worldwide. Here in the United States, another, less-visible young woman sought to address the issue — not in the halls of the UN, but in the U.S. court system.

Kelsey Juliana, a 23-year-old from Eugene, Ore., is the lead plaintiff in *Juliana v. United States* (Case No. 6:15-cv-01517), a central focus of the climate change movement since its 2015 filing. Juliana, alongside other children, sued the government, claiming that their rights under the public trust doctrine and the due process clause were infringed by the federal government’s failure to combat climate change. In a

2016 decision roundly praised by environmental groups, U.S. District Judge Ann Aiken denied the government’s motion to dismiss, finding that “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.” But on appeal in January, the Ninth Circuit dismissed for lack of standing, explaining that the court lacked the power to effectuate a remedial plan, which would “require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches.” At press time, the plaintiffs had filed a petition for rehearing en banc.

What is the role of the judiciary in addressing climate change and similar challenges? We asked two experts to give us their perspectives: **JAMES HUFFMAN**, emeritus dean and professor at Lewis & Clark School of Law, who has served on the boards of the

Property and Environment Research Center and the Morris and Stewart Udall Foundation, and **GERALD TORRES**, a professor at Yale Law School and the Yale School of Forestry and Environmental Studies, and the former deputy assistant attorney general for the Environmental and Natural Resources Division of the U.S. Department of Justice and counsel to then-U.S. attorney general Janet Reno. Both have published and taught widely on the public trust doctrine, constitutional law, and environmental preservation issues. ►



JAMES HUFFMAN AND GERALD TORRES

ARE COURTS INSTITUTIONALLY WELL SITUATED TO ADDRESS THE PROBLEMS OF CLIMATE CHANGE? WHAT IS THE LEGAL AUTHORITY FOR THE COURTS TO BECOME (OR NOT BECOME) INVOLVED IN THIS AREA?

HUFFMAN: Courts are designed to resolve questions of fact and settle questions of law. If plaintiffs have legal standing founded on injury resulting from an illegal action or from failure to perform a required action, a court has the institutional authority and competence to address both the fact and law questions. In theory, both the fact questions — whether the alleged injury has been suffered and whether it was caused by the defendant's action or failure to act — and the law question — whether the defendant has a legal duty to refrain from acting or an affirmative duty to act — can be resolved by a court.

On the question of fact, the problem in the context of much climate litigation is twofold: (1) a plaintiff's alleged injuries are largely prospective and highly theoretical, and (2) any causal link between a plaintiff's alleged injury and the defendant's actions or inactions is indeterminate and, at most, a tiny fraction of the global contributions to those alleged injuries. Because plaintiffs bear the burden of proof on questions of fact, and because both injury and causation are highly speculative and uncertain, plaintiffs' claims should be summarily dismissed, and would be in other contexts.

On the question of law, many of the plaintiffs' claims are founded on imaginative legal theories. In *Juliana v. United States*, for instance, there is nothing in existing public trust or due process law to support the plaintiffs' claims. Indeed, Judge Aiken acknowledged that some imagination is required to

IN THE ABSENCE OF EXISTING LAW TO SUPPORT THE PLAINTIFFS' CLAIMS, JUDICIAL CREATIVITY CONSTITUTES LAWMAKING, IN DIRECT VIOLATION OF THE CONSTITUTIONAL SEPARATION OF POWERS.

THE PLAINTIFFS DID NOT ASK THE COURT TO LEGISLATE. THEY MERELY ASKED IT TO FIND THAT THE LEGISLATURE BOTH MUST ACT AND THAT IT HAS FAILED TO DO SO. SUCH A FINDING WOULD RESULT IN THE LEGISLATURE HAVING TO TAKE UP THE QUESTION.

find for the plaintiffs, and she defended her own creativity by referencing the extremity of the problem and the need for somebody to take action. Because the legislative and executive branches of government have failed to act, she explained, it falls to the courts to intervene. But in the absence of existing law to support the plaintiffs' claims, judicial creativity constitutes lawmaking, in direct violation of the constitutional separation of powers. The suggestion that such lawmaking is consistent with the historic role of the common law judge reflects a misunderstanding of the common law process. And even if colonial-era common law judges were understood to have lawmaking authority, that could not remain the case once both state and federal courts became subject to the constitutional separation of powers.

TORRES: The justiciability doctrine asks whether there are appropriate plaintiffs to meet standing requirements and whether a dispute is one that a court can resolve, including whether there is a remedy within the

ordinary tools of the judiciary. The cases that have been filed in California and other states using state tort law, for the most part, have been found to satisfy normal standing requirements. Because they present issues, however complex, that are within the normal tort jurisprudence of the state, the courts have the tools to resolve them. Efforts to remove the cases to federal court have largely failed.

The *Juliana* case presented more difficult issues; the district court found that the children satisfied the standing requirements, but the Ninth Circuit disagreed. Since the case poses an issue that the court characterized as constitutional, the only question was whether the court has the authority to issue the kind of relief the plaintiffs are seeking. The Ninth Circuit said no. But the plaintiffs did not ask the court to legislate. They merely asked it to find that the legislature both must act and that it has failed to do so. Such a finding would result in the legislature having to take up the question. This is not uncommon; think of the landmark desegregation cases, for example. At

least initially, the courts found that the legislatures were best suited to remedy the constitutional infirmity the court identified. It was only after repeated failures to respond constitutionally did the courts step in.

After the ordinary question of justiciability is resolved, the political question doctrine is an ultimate limit to justiciability. The doctrine merely asks whether the court is the proper forum to decide an issue or whether it should be left to the legislature. In *Juliana*, the plaintiffs argued that when a court determines that a trust obligation has been violated, it is merely holding the legislature and executive branches to their respective constitutional duties. In other words, the case fully supports the values underlying the political question doctrine.

ARE THERE OTHER LEGAL CONTEXTS THE COURTS HAVE INVOLVED THEMSELVES IN — OR REFRAINED FROM INVOLVING THEMSELVES IN — THAT SERVE AS HELPFUL GUIDES OR ILLUMINATE THE QUESTION OF WHETHER TO TAKE ON CLIMATE CHANGE?

HUFFMAN: In *Juliana*, the district judge suggested the due process clause applies to the plaintiffs' claims in a way analogous to its application to laws prohibiting abortion and same-sex marriage. But the Supreme Court cases affirming rights to abortion and same-sex marriage are of a fundamentally different character. They involve what are often labeled negative rights claims — protections *from* government. The *Juliana* plaintiffs asserted positive rights claims — guarantees of government action. The difference is both substantive and practical.

The substantive difficulty is that in a government founded on popu-

lar sovereignty, government action and inaction must be governed by the elected representatives of the people. Recognition and enforcement of positive rights claims require courts to prioritize among popular demands for public action — in other words, to commandeer the legislative and executive functions of government.

The practical difficulty is that positive rights claims cannot be guaranteed because they require the expenditure of finite public resources. In principle, negative rights can be guaranteed: They require only that government *not* take actions that infringe individual rights. Of course, governments infringe upon negative rights with regularity, and it is the central role of the courts to enforce that guarantee. But if courts undertake to enforce positive rights claims by mandating government action, there can be no guarantee of enforcement because the government's resources are limited.

Another context in which courts have been asked to create new law involves the assertion of rights claims on behalf of nature. Christopher Stone was an early advocate of the concept in his 1972 book *Should Trees Have Standing: Toward Legal Rights for Natural Objects*. Although Stone's idea never gained traction with courts, there have been renewed efforts to advance the concept. The claim of rights in nature failed, and is likely to continue to fail, because implementation requires courts to answer questions they are neither authorized nor competent to address. Who represents nature? What constitutes injury to nature? What are judicially manageable and enforceable remedies?

TORRES: Before the advent of the modern environmental statutes, early interstate tort cases involving popu-

lation put the courts in difficult but ultimately manageable positions. Some of these cases were resolved under federal common law. In the area of federal Indian Law, courts commonly invoked the political question doctrine to avoid hard decisions (or to just defer to the legislature), but they also relied on pre-constitutional and federal common law to resolve questions that the legislature left undecided or that were (according to the various courts) squarely within their jurisdiction even if there was no treaty or statute or constitutional provision granting them power. Courts have found the power to act when a failure to do so would permit a constitutional infirmity to endure.

Asking a court to spell out a detailed remedial order may be beyond the capacity of most courts, but the complexity of the issue before the court is, at best, a *prudential* reason to not act — not a constitutional or practical one. Courts have historically handled complex and socially disruptive issues when those issues were properly before them. Again, returning to civil rights litigation, whether in schools, prisons, or medical systems, courts have had to confront constitutional or statutory violations that presented immense complexity. The tool of the special master is always available, as are other remedial tools. Complexity may trigger prudence, but it doesn't vindicate nonaction.

IN JULIANA, THE DISTRICT OF OREGON FOUND THAT THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE PUBLIC TRUST DOCTRINE PROTECT A RIGHT TO "A CLIMATE SYSTEM CAPABLE OF SUSTAINING HUMAN LIFE." BUT THE NINTH CIRCUIT DISMISSED FOR LACK OF STANDING, EXPLAIN- ►

ING THAT THE COURT LACKED THE POWER TO EFFECTUATE A REMEDIAL PLAN, WHICH WOULD “REQUIRE A HOST OF COMPLEX POLICY DECISIONS ENTRUSTED TO THE WISDOM AND DISCRETION OF THE EXECUTIVE AND LEGISLATIVE BRANCHES.” WHAT IMPACT WILL THIS HAVE ON CLIMATE LITIGATION?

HUFFMAN: The Ninth Circuit ruling should weaken claims seeking judicial mandates for legislative and executive action, but will have no effect on lawsuits alleging violations of established common law or constitutional rights. There is no precedent for the district court’s ruling that the due process clause or the public trust doctrine guarantee a right to “a climate system capable of sustaining human life.” The public trust doctrine guarantees public rights of use in navigable waters. Until very recently, and only in a few cases, has the doctrine been applied to non-water-related resources. The atmospheric trust theory of the *Juliana* plaintiffs is even more distant from the historic common law doctrine.

On the due process claim, the district judge in *Juliana* cited the rights of privacy and same-sex marriage as precedent for a further extension of the scope of substantive due process. As already noted, those claims of right are entirely different from a claimed right to “a climate system capable of sustaining human life.” A right of privacy is implicit in the Third (quartering soldiers), Fourth (search and seizure), Fifth (takings), and Ninth Amendments to the Constitution.

A right to a climate system capable of sustaining life is affirmative in nature and thus without precedent in the Constitution. The sustaining of life depends on many things in addition to a habitable climate. Much more immi-

nent threats to life include inadequate nutrition, absence of shelter, and lack of health care. To be sure these, too, have been proposed for judicial recognition as constitutional rights, but, like the claimed right to a life-supporting climate, they take the form of positive rights claims that suffer from the shortcomings noted above.

Where life is threatened by the negligence of government employees, there is a remedy that courts have the authority and competence to provide. Where life is threatened in the criminal process from arrest to trial to sentence, the constitutional mandate of due process calls for judicial intervention. But where life is threatened by mother nature, whether under the influence of human civilization or not, due process offers no judicially manageable remedies.

TORRES: The objections to the use of the public trust doctrine are plentiful and easy to find. Criticisms typically pivot on issues of institutional competence or deference to the policymaking branches of government. After resolving questions of justiciability — and by constitutionalizing the public trust doctrine, as the district judge did in this case — the arguments about statutory displacement and the applicability of the political question doctrine are rendered beside the point.

The defendants in *Juliana* argued that the plaintiffs’ due process claim would require the court to trench on political prerogatives because the claim could not be resolved according to any manageable standard. But a manageable standard already exists — internationally agreed-upon standards, like the Montreal Protocol or the standards found by the Dutch Court in binding international obligations (discussed further below). The

plaintiffs argued that the greenhouse gas control regime, taken as a whole, was insufficient to protect the plaintiffs from the constitutional harm they were alleging. On one level, the defendants agreed with the plaintiffs. They conceded that the country needed to move toward internationally agreed-upon standards, but they argued that the court could not order it. To the contrary, the plaintiffs here were merely asking the court to do something that it was uniquely capable and empowered to do. As the court itself noted, “[e]very day, federal courts apply the legal standards governing due process claims to new sets of facts. The facts in this case, though novel, are amenable to those well-established standards.”

There is a parallel to this in a Netherlands case, *Urgenda Foundation v. State of the Netherlands*, in which the court was faced with the question of whether the Netherlands were doing enough to combat climate change. The court ordered the government to reduce emissions consistent with the obligations the state had already pledged to undertake. It did not have to construct a climate change policy from scratch.

The decision in the Ninth Circuit will dampen the use of the public trust doctrine in litigation — although, as I have discussed, the decision also illustrates the subtle vices of the passive virtues — but the case put into broader conversation a fundamental question: What is government for? That conversation will not go away, and the arguments raised by the plaintiffs in *Juliana* will continue to animate an important political discussion.

IN JANUARY, MAJOR CORPORATIONS — INCLUDING NESTLE, MICROSOFT, AND BLACKROCK — ALL MADE COMMITMENTS TO ADDRESS CLIMATE

THERE IS NO PRECEDENT FOR THE DISTRICT COURT'S RULING THAT THE DUE PROCESS CLAUSE OR THE PUBLIC TRUST DOCTRINE GUARANTEE A RIGHT TO "A CLIMATE SYSTEM CAPABLE OF SUSTAINING HUMAN LIFE."

THE CASE PUT INTO BROADER CONVERSATION A FUNDAMENTAL QUESTION: WHAT IS GOVERNMENT FOR? THAT CONVERSATION WILL NOT GO AWAY.

CHANGE THROUGH THEIR BUSINESS PRACTICES. IS THIS A BETTER ROUTE TO CHANGE?

HUFFMAN: Voluntary remedies to social and environmental challenges, whether through market exchange or mutually agreed association, are always better than government mandates. Which is not to say that government mandates are not sometimes required. But mandates lack the unanimity and flexibility of mutually agreed-to actions and will always be subject to creative evasion by those in disagreement with the mandated policies. In *Democracy in America*, Alexis de Tocqueville marveled at the American reliance on voluntary associations to achieve public purposes. Nearly two centuries later, he would be saddened to learn of America's now heavy reliance on litigation and governmental mandates.

TORRES: I am not sure that it is a better way, but what it reflects is that actors, private or public, can take notice of the risks posed by unchecked greenhouse gas production. In the private sphere the accountability to owners is clear. The duty of the managers is to reduce risk and put the shareholders and other stakeholders in the best possible posi-

tion to recognize gains and minimize losses. One of the interesting things in the debate over the responsibilities of private actors has been the push-back on the idea that corporations exist only to maximize shareholder value. Thoughtful corporate commentators both in industry and in the academy have recurred to older and still vital conceptions of what and to whom corporations owe a duty. My former colleague Lynn Stout captured this in her book *The Shareholder Value Myth*.

GIVEN THAT THE DEGREE OF THE THREAT POSED BY CLIMATE CHANGE VARIES ACCORDING TO LOCATION, COULD JUDGES IN DIFFERENT DISTRICTS SUPPORTABLY COME OUT DIFFERENTLY ON THIS QUESTION? IS THIS A QUESTION OF PRAGMATICS OR PRINCIPLE?

HUFFMAN: The role of the judiciary should be a matter of principle. Article I vests "[a]ll legislative Powers herein granted . . . in . . . Congress." In addition to express authority relating to the military, foreign affairs, appointment of executive officers and judges, and the granting of pardons, Article II makes the president responsible to "take Care that the Laws be faith-

fully executed." So the judicial role encompasses neither legislation nor execution of the laws.

The suggestion that the courts' authority might vary with the degree of threat posed in different jurisdictions implies a type of discretion that courts cannot exercise consistent with the rule of law. Of course, different jurisdictions might have different laws, but it is not for a court to exercise the powers of the legislative or executive branches in response to perceived threats that those branches have not addressed to the court's satisfaction. Proponents of an atmospheric trust theory have explicitly argued that legislative and executive failure to address climate change (to those proponents' satisfaction) requires that courts intervene. The district judge in *Juliana* effectively embraced that view in observing that "[a] deep resistance to change runs through defendants' and intervenors' arguments" and in opining that "[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it."

But it is not for courts to change the law, no matter the extremity of perceived risks. Judge Aiken quotes Chief Justice Marshall's famous statement in *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is." If Judge Aiken understands Marshall to mean that judges have authority to make new law when circumstances call for it, she is sorely mistaken. Marshall's statement has always been understood to summarize both the extent and limit of the judicial power — to say what the law is as it exists in the Constitution, as it has been enacted by the legislature, and as it has been executed by the executive. If a judge concludes that action ►

or inaction by the political branches of government are not adequate to meet the challenges faced, the judge's remedy is the same as for every other citizen — to seek change through the political process.

TORRES: Under the theory advanced by the plaintiffs in *Juliana*, the answer to that question is no. The due process clause does not differ with location, although the remedy it triggers may have different expressions. The whole point of the litigation is that climate change is a global problem that will have various manifestations. The state tort lawsuits are requesting a specific remedy because of the harms that climate change has already caused, which have led local governments and the states to address the hazards the defendants knew they were creating. Coastal tribes that depend on the shellfish resource, for example, might have a different remedy, but the underlying cause is the same. This may be one of those cases where principles and pragmatics intersect.

OTHER COUNTRIES, LIKE THE PHILIPPINES AND INDIA, HAVE RECOGNIZED TO VARYING DEGREES A RIGHT TO A HEALTHY ENVIRONMENT OR, LIKE CHINA, HAVE ESTABLISHED EXTENSIVE SPECIALIZED COURTS TO ADDRESS CLIMATE CHANGE. GIVEN THE CROSS-BORDER NATURE OF CLIMATE CHANGE, SHOULD U.S. JUDGES TAKE NOTE OF THIS?

HUFFMAN: What other countries are doing with respect to climate change can and probably should be of interest to American legislators and other policymakers. Although differences in culture, economy, and geography make replication of foreign laws unlikely

CLAIMS BASED ON IMAGINATIVE LEGAL THEORIES OR ON A SIMPLE APPEAL TO AN IMPENDING CRISIS SHOULD BE SUMMARILY DISMISSED BY THE COURTS. WE LIVE IN A DEMOCRATIC REPUBLIC IN WHICH, FOR BETTER OR WORSE, WE MUST RELY ON OUR ELECTED OFFICIALS TO ESTABLISH CLIMATE CHANGE POLICIES.

THE CONSTITUTIONALIZING OF THE PUBLIC TRUST DOCTRINE WILL BE IN FOR A BUMPIER RIDE, BUT THE TRADITIONAL RESISTANCE TO CLIMATE CHANGE LITIGATION — BASED ON JUSTICIABILITY AND DISPLACEMENT — MAY BECOME HARDER TO MAINTAIN.

to yield identical results, lessons can be learned from comparative analysis. Courts also can learn lessons from the structure and processes of foreign courts. But American judges, whether federal or state, cannot look to foreign laws as guidance in their interpretation and enforcement of U.S. laws.

A core feature of the rule of law is that all affected parties must be able to know what the law is. Because judges are in the business of applying the law to past and current disputes, having reference to foreign laws is not consistent with their core responsibility to uphold the rule of law.

The United States Supreme Court has on occasion, though not without controversy, had reference to “the opinion of the world community,” but found it relevant only where it provides “confirmation of our own conclusions.” *Roper v. Simmons*, 543 U.S. 551, 578 (2005). That other nations have recognized a right to a healthy environment is thus irrelevant to decisions by U.S.

courts absent an independent basis in American law for such a right to exist.

In the constitutional context, reference to foreign law can be particularly misleading given the proliferation of unenforced and unenforceable positive rights in the constitutions of many other countries. For reasons discussed above, judicial pronouncements of a right to a healthy environment cannot be guaranteed. Illustrative is the much-celebrated Dutch Supreme Court's ruling in *Urgenda Foundation v. Kingdom of the Netherlands*. Although the Dutch government had undertaken significant carbon reduction measures, the court concluded that those measures were insufficient, resulting in the violation of Dutch citizens' “right to life and the right to a private and family life” under the European Convention of Human Rights. It is a symbolic victory for the plaintiffs, but not one instructive to American courts. Even in the Netherlands, it will remain for the government, not the

courts, to devise a remedy — and that will be done in the face of the multitude of other demands, some in the nature of positive rights claims, made on the government.

TORRES: Of course, courts in the United States should take note of the actions of other states and other courts. The policy choices or the legal rationales of those courts are not binding on courts in the United States, but they are instructive. The Declaration of Independence itself requires “a decent respect to the opinions of mankind,” and we have never been a jurisdiction that is blind or deaf to international changes even as we resist them. Besides, we have already undertaken to act responsibly in the family of nations, recognizing the interdependence of ecological systems. That each country will find its own way was the genius of the Paris Accord, even if scientists are now suggesting that the Accord set too modest a goal.

Importantly, the interdependence of our economic systems will do as much as the courts or legislatures to move the needle on climate. For example, BlackRock, the investment management firm, has a value that would make it the third-largest global economy (after the U.S. and China); its recent promise to shift its energy portfolio away from fossil fuels could do as much as anything to reduce the dependence on fossil energy that is driving climate disruption. I suspect that the change in the underlying social conditions, such as the increasing impact of climate change on business and tourism, and growing awareness and activism among younger generations, will have an impact on the courts as well as legislatures. Perhaps it will be the children who will not only drive the necessary social change but also drive financiers

to make changes that are audible even to climate change deniers, whether in robes or in business suits.

WHERE DOES — AND SHOULD — CLIMATE CHANGE JURISPRUDENCE GO FROM HERE?

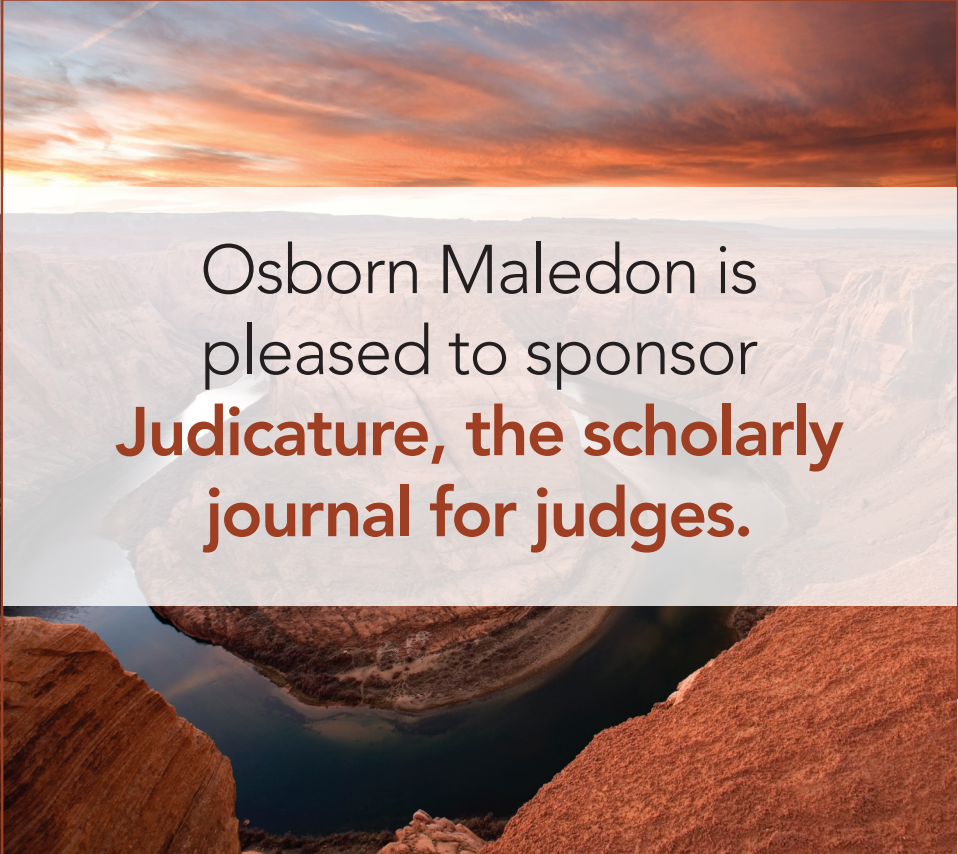
HUFFMAN: The future of climate change jurisprudence depends on whether judges assume a problem-solving, quasi-legislative role or adhere to their historic and constitutional role as enforcers of the rule of law. To date, most judges in the United States have followed the latter course. But a few judges, like the district judge in *Juliana*, have taken it upon themselves to create new laws designed to trump legislative and executive policy choices. These few judges are the target of much climate litigation. By filing a barrage of lawsuits on various theories in all of the states and in the federal courts, those orchestrating the litigation anticipate only occasional success, but that is all they need. A favorable decision anywhere can be cited as precedent everywhere.

Moreover, even a weak legal case can be a strong public relations and political tool. As we have witnessed with the media frenzy over the supposedly carbon-free travels and the emotional testimony of 16-year-old Swedish environmental activist Greta Thunberg, facts and law often have little to do with climate change politics. The use of the courts to influence political ends is not unique to climate change.

Where climate jurisprudence *should* go is down a path consistent with the rule of law and the limited role of the judiciary. Some claims under public nuisance are appropriate grist for the judicial mill, though proof of causation will remain a big challenge for plain-

tiffs. Claims of right under existing and future legislation, as well as claims under federal and state administrative procedures acts, also fall well within the judiciary’s authority and capacity. But claims based on imaginative legal theories or on a simple appeal to an impending crisis should be summarily dismissed by the courts. We live in a democratic republic in which, for better or worse, we must rely on our elected officials to establish climate change policies.

TORRES: I think that the state lawsuits will move forward and highlight the costs of inaction, while also making concrete the preliminary costs of adaptation. The constitutionalizing of the public trust doctrine will be in for a bumpier ride, but the traditional resistance to climate change litigation — based on justiciability and displacement — may become harder to maintain. How courts accommodate those changes will differ, just as the specific injuries that underlie standing will differ. The empirical physical impacts of climate disruption will be harder to resist as a legal matter. As discussed above, action among private players will have an impact on the public understanding of the problems posed by climate change. If the federal government intervenes on the side of climate denial (by, for example, making a market for flood insurance where the private market has already abandoned it, or subsidizing coal and the risk associated with it now that the major insurers have backed out of that market), the question posed in *Juliana* very clearly remains: What is the government’s responsibility to the people in the face of looming disaster?

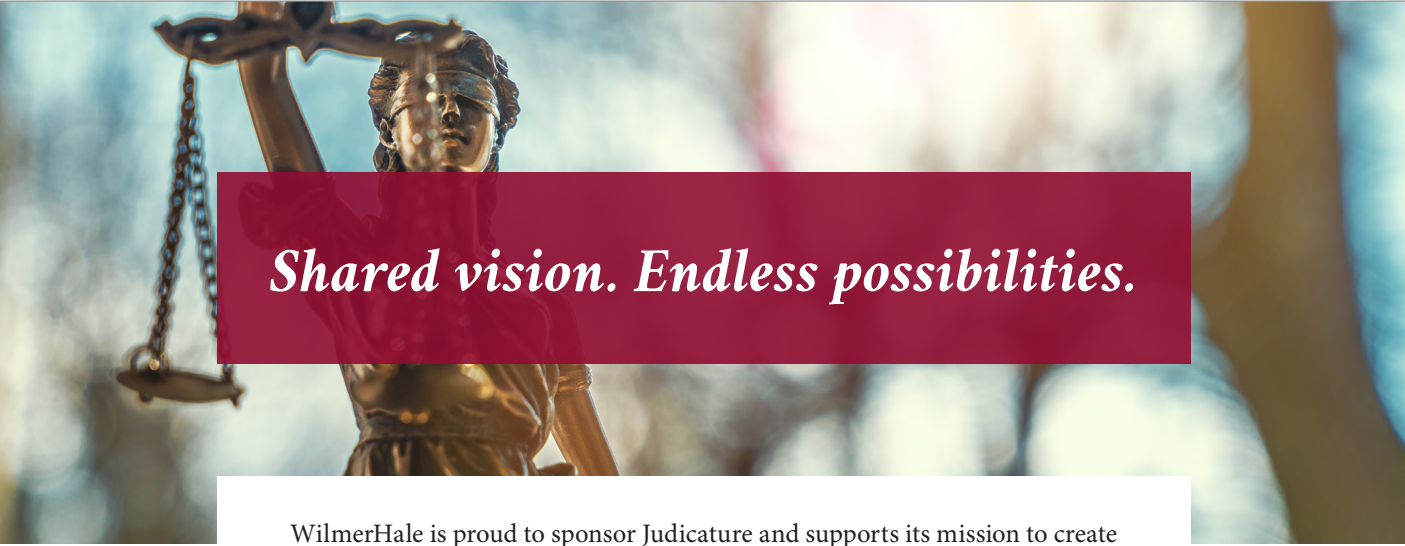


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