Timely Judicial Recognition and Protection of Climate Rights

By Associate Justice Michael Wilson (Ret.)

A judge is meant to be an instrument of justice. Equally apparent is the principle that the rule of law is the force by which judges are meant to achieve justice. Yet, it is beyond cavil that historically injustice arising from privilege has proven to be an intractable impediment to the just application of the rule of law by judges. Men and women vying to be judges once selected may be ill-equipped to exercise the independence necessary to apply the rule of law to end systemic injustice caused by powerful special interests. Evidently, time is often needed for the rule of law to catch up to injustice.

The current climate emergency upends the historically gradual evolution of the rule of law to address injustice. Faced with the climate emergency, judges have little time—perhaps seven years—to apply the rule of law to protect the rights of citizens to a life-sustaining climate. Absent unprecedented judicial independence, climate injustice will persist, worsen, and cause the erosion of the rule of law as a cascading environmental catastrophe ensues. The greatest intergenerational injustice in history, the knowing destruction of a life-sustaining climate, is now before the world judiciary.

Historical Delay of Justice by Courts

Historically, courts have delayed justice during pivotal periods in our nation's history. During the agricultural era, the buying and selling of human beings so central to the agricultural economy was found to be constitutional. During the industrial era—when child labor were deemed essential to manufacturing—regulation of working conditions of children was found to be unconstitutional. The refusal of male judges to initially recognize the right of women to vote is well-known. Eventually, the failure of judges to apply the rule of law justly gave way to a more authentic application of principles of equal

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protection, due process, and social justice requiring a diminution of the unjust privilege of those interests who benefited from slavery, child labor, and disenfranchisement of women.

The most difficult contemporary issue now faced by the world judiciary is the greatest intergenerational injustice in human history: the knowing violation of the right of future generations to a life-sustaining climate.

Threat to Survival from Violation of the Environmental Rule of Law

The uncontested clarion call of impending environmental disaster issued by all but two of the countries of the world at the 2015 Paris Agreement has gone unheeded. The declaration of 193 states plus the European Union that the environmental collapse constituting an existential threat to the survival of humanity will likely occur if global warming since preindustrial times reaches 1.5 degrees Celsius has proven prophetic. Global warming to the present already dangerous level of about 1.2 degrees Celsius evinces a failure to heed the dire warning of the United Nations' Intergovernmental Panel on Climate Change in 2015. Now the emergency is upon us with the highest level of atmospheric carbon dioxide (CO2) levels in at least the last two million years and likely the last three million years. At present, about 420 parts per million (ppm) of CO2 is in the atmosphere, 70 ppm more than the global planetary safe boundary of 350 ppm, which is the CO2 target to prevent global warming above 1 degree Celsius. Global CO2 emissions from fossil fuels were 63 percent higher in 2021 than they were when international climate negotiations began in 1990. At present levels of greenhouse gas (GHG) emissions, global warming will reach 1.5 degrees Celsius in approximately 10 years. As the secretary general of the United Nations warned in December 2021, the devastation to human culture wrought by global warming to 1.5 degrees Celsius will far exceed the human suffering and economic disaster caused by the COVID-19 pandemic. Secretary-General António Guterres identified climate change as the single greatest threat to the natural environment and human societies "the world has ever experienced."[1] At the most recent United Nations climate convention in November 2022, Secretary-General Guterres warned the gathering of more than 100 princes, presidents, and prime ministers that "we are on a highway to climate hell with our foot on the accelerator."[2]

The hell posed by 1.5 degrees Celsius global warming will soon be worsened. Based on current policies in place, the planet is projected to warm to 2.6 to 2.9 degrees Celsius this century (most likely 2.7 degrees Celsius); if pledged emission reductions are considered, this warming reduces to about 2.4 degrees Celsius. By the end of the century, at present rates of greenhouse gas emissions, the atmosphere of Earth will heat to 4.8 degrees Celsius.[3] The effect of 4.8 degrees Celsius warming will be the collapse of the rule of law, the end of the global economy, and significant depopulation.

> Climate change is the single most important issue facing the judges of the world.

To the audience reading this article, you should know that the heating of the Earth from growing anthropogenic release of GHG emissions is already causing environmental catastrophe—catastrophic fires in the western United States, Canada, Europe, the high Arctic, and Australia; catastrophic heating of the ocean to over 100 degrees Fahrenheit in Florida; coral reefs undergoing unprecedented bleaching this past summer from Florida to Colombia; atmospheric and oceanic heatwaves occurring more frequently at intensities that would be impossible without human-caused global heating, with attendant human deaths and marine die-offs; catastrophic rain constituting "water bombs" with enormous destructive force, for example, requiring one year of rebuilding of the north side of the island of Kaua'i; catastrophic flooding of New York City during Hurricane Sandy; unprecedented lethal heat in Phoenix to above 115 degrees Fahrenheit; catastrophic flooding of a third of Pakistan; impending catastrophic displacement of virtually the entire population of the countries of Tuvalu and Kiribati from sea-level rise; catastrophic disappearance of glaciers and the loss of water resources in mountains around the world; catastrophic death to exponentially increasing numbers of poor children who are unable to escape the heating of the atmosphere to sustained lethal temperatures over 100 degrees Fahrenheit and the flooding of their homes. Most recently, global warming contributed to the complete elimination by fire of one of my community's major cities, Lahaina, when wildfires raged into the city. Nearly 100 people were killed, and thousands of buildings were destroyed. The role that human GHG emissions played in this disaster is still being assessed.

As Justice Antonio Benjamin of the National Judicial Tribunal of Brazil has stated, climate change is the single most important issue facing the judges of the world. The failure of traditional international, national, and subnational governance systems and the private sector to protect future generations from climate destruction is reminiscent of past failures to prevent systemic widespread injustice. Young people today and the future generations they represent are treading the path worn before them by slaves, children exploited in factories, oppressed women, and so many others who have sought to apply the rule of law to systemic widespread injustice. It is a path fraught with

opposition from formidable private economic entities—the fossil fuel energy industry, its lobbyists, and its array of extraordinarily well-compensated lawyers. International Energy Agency (IEA) Executive Director Fatih Birol says the energy industry as a whole made $4 trillion in profits in 2022, more than double its recent annual average of $1.5 trillion.[4]

With billions in profits, hundreds of millions of dollars in government subsidies, and a cadre of helpful scientists, the energy industry and its partners in the financial management industry constitute a mighty opposition to the community of young people and municipalities in the United States that seek application of the rule of law to protect themselves from the knowing destruction of the environment upon which their future depends.

The resort of future generations and Indigenous people to the federal courts of the United States for redress from entities that violate their right to a life-sustaining climate has been largely rejected. Unlike jurisdictions in other countries where courts apply the rule of law to claims seeking protection from knowing environmental damage to a life-sustaining environment,[5] the federal courts of the United States have thus far abdicated responsibility to apply the rule of law to claims that alleged knowing contamination of the atmosphere with deleterious levels of GHG emissions in violation of the constitutional right to a life-sustaining climate.

One of the most prominent examples of a federal court abdicating its responsibility to leave future generations a habitable planet is the Ninth Circuit's reversal of the district court of Oregon's decision recognizing that youth plaintiffs have a substantive due process right to a stable climate capable of supporting human life.[6] In a decision consistent with the application of the environmental rule of law to climate claims in other countries, the district court in *Juliana* aptly explained how "[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it."[7] The concern of the district court proved prescient when a two-member majority of a three-judge panel in the Ninth Circuit Court of Appeals reversed it.[8] The majority dismissed the youth plaintiffs' due process and public trust claims against the federal government based on the proposition that the plaintiffs lacked standing because the application of certain remedies to the climate crisis would be too complex for judicial decision-making. According to the majority, "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan," which would require a "comprehensive scheme to decrease fossil fuel emissions and combat climate change."[9] In a cavalier aside, before rejecting the claims of the youth plaintiffs, the majority acknowledged the existential threat they face caused by the U.S. government:

> In the mid-1960s, a popular song warned that we were "on the eve of destruction." The plaintiffs in this case have presented compelling evidence that climate change has brought that eve nearer. A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.[10]

Judge Josephine Staton, in a formidable dissenting opinion in *Juliana*, took to task the majority's supposition that youth plaintiffs are barred from bringing claims against the United States for knowingly threatening their substantive due process right to a stable climate capable of supporting human life.[11] As Judge Staton explained, claims vindicating the right to a life-sustaining climate system are redressable by courts. A remedial plan requiring the government to reduce GHG emissions in an amount necessary to ensure a stable climate system is not a remedy that defies judicial decision-making so as to render it nonjusticiable. Judge Staton refuted the majority's proposition that the Constitution of the United States provides no remedy for the plaintiffs' injuries:

> Our history is no stranger to widespread, programmatic changes in government functions ushered in by the judiciary's commitment to requiring adherence to the Constitution. Upholding the Constitution's prohibition on cruel and unusual punishment, for example, the Court ordered the overhaul of prisons in the Nation's most populous state. *See Brown v. Plata*, 563 U.S. 493, 511, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."). And in its finest hour, the Court mandated the racial integration of every public school—state and federal—in the Nation, vindicating the Constitution's guarantee of equal protection under the law. *See Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954). In the school desegregation cases, the Supreme Court was explicitly unconcerned with the fact that crafting relief would require individualized review of thousands of state and local policies that facilitated segregation. Rather, a unanimous Court held that the judiciary could work to dissemble segregation over time while remaining cognizant of the many public interests at stake. . . :
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> Plaintiffs' request for a "plan" [in the instant case] is neither novel nor judicially incognizable. Rather, consistent with our historical practices, their request is a recognition that remedying decades of institutionalized violations may take some time. Here, too, decelerating

> from our path toward cataclysm will undoubtedly require "elimination of a variety of obstacles." Those obstacles may be great in number, novelty, and magnitude, but there is no indication that they are devoid of discernable standards.[12]

The remedy for violation of the right to a stable climate capable of supporting human life is discreet: to reduce GHG emissions. In comparison, desegregating the schools of the United States is a significantly more complex remedial undertaking.

A request by the Juliana youth plaintiffs for a full en banc review of the two-judge majority provides a further example of the hostile reception of the federal courts to climate claims. The plaintiffs' request to the largest federal circuit in the United States for an en banc hearing was denied.[13] Notwithstanding its status as the signature climate case in the United States,[14] and the compelling dissent of Judge Staton, the Ninth Circuit Court of Appeals provided no opinion as to why an issue recognized by all three members of the *Juliana* panel as an existential "problem approaching 'the point of no return'"[15] lacked the importance necessary to gain the consideration of an en banc panel of Ninth Circuit appellate judges.[16]

The Ninth Circuit sent a clear message to young people and future generations who seek protection from knowing environmental damage to a life-sustaining environment: They have no standing to seek redress in the federal courts of the United States. A review of the oral arguments in *Juliana* was mandatory for all my law clerks and legal externs. It is a dire, disturbing message to all men and women who seek the application of the rule of law in federal court to protect future generations from the wanton destruction of a life-sustaining environment by the federal government.

Another recent example of federal courts refusing the application of statutorily based environmental rule of law to climate claims is the majority opinion of the U.S. Supreme Court in *West Virginia v. EPA*.[17] The majority deprived the federal Environmental Protection Agency (EPA) of "the power needed—and the power granted—to curb greenhouse gases" from power plants. As the dissent explained: "The Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions . . . I cannot think of many things more frightening."[18] No doubt, the future posture of the U.S. Supreme Court majority on claims for redress of constitutional and statutory climate rights violations is frightening to those who seek protection in federal court.

Thus, it is apparent that "the modern [federal] judiciary has enfeebled itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court."[19] The stark failure of the federal judiciary to grant redress to present and future generations alleging knowing destruction of a life-sustaining climate system relegates implementation of the climate rule of law to state judiciaries.[20]

Unlike the *Juliana* majority, the Hawaii State Supreme Court does not, in the words of Judge Staton, choose to "throw up [our] hands."[21] In contrast to the federal judiciary, the Hawaii Supreme Court has recognized the constitutional right to a life-sustaining climate,[22] on the strength of Article 9 of the Hawaii Constitution, empowering the state to protect a healthy environment.

But this is not the only basis for recognizing such a right under the Hawaii Constitution. The right to a life-sustaining climate system is also guaranteed by the due process clause of Article I, Section 5 of the Hawaii Constitution, which guarantees that the state will not deprive a person of "life, liberty or property without due process of law[.]" Article I, Section 5 of the Hawaii Constitution protects both procedural and substantive due process rights.[23] Substantive due process safeguards fundamental rights that are "implicit in the concept of ordered liberty."[24]

The identification and protection of fundamental due process rights is inherent in the judicial duty of all judges of the State of Hawaii.[25] Fundamental rights that are implicit in the concept of ordered liberty can be enumerated or unenumerated in the constitution.[26] In other words, "[t]he genius of the [c]onstitution is that its text allows future generations [to] protect . . . the right of all persons to enjoy liberty as we learn its meaning."[27]

Determination of whether a right is protected by substantive due process requires inquiry into whether the right "is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate fundamental principles of liberty and justice that lie at the base of all our civil and political institutions."[28] It is fundamental that a life-sustaining climate system is implicit in the concept of ordered liberty and lies "at the base of all our civil and political institutions."[29] Indeed, a stable climate is the foundation upon which society and civilization exist in Hawaii and throughout the globe.[30]

Recently, the Montana First Judicial District Court affirmed Montana's commitment to safeguard and ensure youth plaintiffs' fundamental constitutional right to a clean and healthful environment—which includes climate as part of the environmental life-support system—and therefore their dignity, health and safety, equal protection of the law, and their very liberty.[31] The court held unconstitutional state laws precluding state consideration of the effects of fossil fuel emissions from proposed fossil fuel projects. It found that the statutes failed to provide "adequate remedies for the protection of the environmental life support system from degradation." As with the Hawaii Constitution, the Montana Constitution guarantees the right to a life-sustaining climate system, and the courts are tasked with animating that guarantee. The *Held* court noted the judiciary's vital role in enforcing constitutional rights: "This judgment will influence the State's conduct by invalidating statutes prohibiting analysis and remedies based on GHG emissions and climate impacts, alleviating Youth Plaintiffs' injuries and

preventing further injury."[32] Moreover, any "reduction in Montana's GHG emissions that results from a declaration . . . would provide partial redress of Plaintiffs' injuries because the amount of additional GHG emissions emitted into the climate system today . . . will impact the long-term severity of the heating and the severity of Plaintiffs' injuries."[33] "It is possible to affect future degradation to Montana's environment and natural resources and injuries to these Plaintiffs."[34] The court found that "every ton of carbon dioxide matters" and every ton avoided will help alleviate the climate crisis. The U.S. EPA, a defendant in the *Juliana* litigation, responded with approval to the *Held v. Montana* ruling: "[It] sets a precedent for intergenerational accountability and environmental justice, ensuring that the decisions made today positively impact the well-being of tomorrow's generations."[35]

Without an "effective response to climate change" that prevents catastrophic climate change impacts, "the integrity of the rule of law" itself is subject to collapse.[36] The effects of failing to reduce atmospheric CO2 concentrations to below 350 ppm will lead to "social, political and economic chaos, and in that chaos[,] the rule of law cannot survive."[37]

Thus, the due process clause of Article I, Section 5, which protects against the deprivation of life, liberty, and property, requires the State of Hawaii to act to ensure that there is a life-sustaining climate system capable of supporting the health and survival of Hawaii's people and the rule of law itself.

The conclusion that the due process right to "life, liberty [and] property" under Article I, Section 5 subsumes the right to a life-sustaining climate is supported by the fact that a life-sustaining climate system underlies all other constitutional guarantees.[38] In other words, the right to a life-sustaining climate system is deserving of fundamental status as essential to our scheme of ordered liberty because it is "preservative of all rights."[39]

For example, the Hawaii Supreme Court has recognized "that parents have a substantive liberty interest in the care, custody, and control of their children protected by the due process clause of article 1, section 5 of the Hawaii Constitution."[40] If there is no guarantee of a stable climate system capable of supporting human life, our present children and future generations stand to inherit "nothing but parched earth[.]"[41] Thus, the right to "care, custody, and control" of one's child becomes meaningless without an environment enabling parents to safely raise their families.[42] A stable climate system is fundamental to Hawaii's constitutional guarantees, including "the right to personal security"[43] and the right to bodily integrity.[44]

Conclusion

A signature fact distinguishing the climate emergency as the greatest environmental threat ever faced by humanity is that a brief period of time remains for courts to protect climate rights upon which the lives and well-being of future generations depend. The failure of the federal judiciary to achieve climate justice renders paramount the duty of state courts to apply normal principles of due process, equal protection, and public trust to recognize the right to a life-sustaining environment. The future of our planet and the survival of future generations depend on judges doing their jobs with courage to achieve the just application of the climate rule of law.

Endnotes

1. U.N. Sec'y-Gen., Promotion and Protection of Human Rights in the Context of Climate Change, ¶ 1, U.N. Doc. A/77/226 (July 26, 2022).

2. António Guterres, Sec'y-Gen., United Nations, Remarks to High-Level Opening of COP27, Sharm El-Sheikh, Egypt (Nov. 7, 2022), https://www.un.org/sg/en/content/sg/speeches/2022-11-07/secretary-generals-remarks-high-level-opening-of-cop27.

3. R.S. Vose et al., *Temperature Changes in the United States*, *in* Climate Science Special Report: Fourth National Climate Assessment, vol. 1, ch. 6 (D.J. Wuebbles et al., eds., U.S. Global Change Rsch. Program, Climate Science Special Report: Fourth National Climate Assessment 2017).

4. Olivia Rosane, *Oil and Gas Sector Made $4 Trillion in Profits in 2022, IEA Chief Says*, EcoWatch (Feb. 16, 2023), https://www.ecowatch.com/oil-and-gas-profits-2022.html.

5. *See, e.g.*, Hof's-Hague, 9 October 2018, RvdW 2018, 13-1396 m.nt. DGJ (Urgenda Found./State of the Netherlands, Ministry of Infrastructure & the Env't) (Neth.) (ordering the Dutch government to limit greenhouse gas emissions to 25 percent below 1990 levels by 2020, finding that "[d]ue to the severity of the consequences of climate change and the great risk of hazardous climate change occurring—without mitigation measures—the court concludes that the State has a duty of care to take mitigation measures"); Ashgar Leghari v. Fed'n of Pakistan, (2015) W.P. No. 25501/2015, 10 (Pak.) (where a farmer sued the Pakistani national government for failure to reduce greenhouse gas emissions, the court determined that "the delay and lethargy of the State in implementing [its climate] Framework offend[ed] the fundamental rights of the citizens"); Gloucester Res. Ltd. v. Minister for Planning, [2019] NSWLEC 7 (Austl.) (upholding the denial of an application to construct a coal mine, noting that the climate change impacts of the project outweigh its economic benefits).

6. Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

7. *Id.* at 1262.

8. Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

9. *See id.* at 1171.

10. *Id.* at 1164.

11. Judge Staton described the climate emergency in detail:

> What sets this harm apart from all others is not just its magnitude, but its irreversibility. The devastation might look and feel somewhat different if future generations could simply pick up the pieces and restore the Nation. But plaintiffs' experts speak of a certain level of global warming as "locking in" this catastrophic damage. Put more starkly by plaintiffs' expert, Dr. Harold R. Wanless, "[a]tmospheric warming will continue for some 30 years after we stop putting more greenhouse gasses into the atmosphere. But that warmed atmosphere will continue warming the ocean for centuries, and the accumulating heat in the oceans will persist for millennia[.]"

Id. at 1176 (Staton, J., dissenting).

12. *Id.* at 1188–89.

13. Juliana v. United States, 986 F.3d 1295 (9th Cir. 2021) (order denying petition for rehearing *en banc*).

14. Robinson Meyer, *A Climate-Lawsuit Dissent That Changed My Mind*, The Atlantic (Jan. 22, 2020).

15. *Juliana*, 947 F.3d at 1166.

16. *Juliana*, 986 F.3d at 1296.

17. 142 S. Ct. 2587 (2022).

18. *Id.* at 2828 (Kagan, J., dissenting).

19. Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 Wis. L. Rev. 785, 785–86, 788 (2015) (citing Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (2014)).

20. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1262 (D. Or. 2016) ("The current state of affairs . . . reveals a wholesale failure of the legal system to protect humanity") (citations and quotations omitted), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

21. See Juliana v. United States, 947 F.3d 1159, 1174 (9th Cir. 2020) (Staton, J., dissenting); *see also* Aji P v. State of Washington, 497 P.3d 350, 353 (Wash. 2021) (Gonzalez, J., dissenting) ("The court should not avoid its constitutional obligations that protect not only the rights of these youths but all future generations who will suffer from the consequences of climate change.").

22. *In re* Maui Elec. Co., 150 Haw. 528, 538, n.15 (2022).

23. *See, e.g.*, KNG Corp. v. Kim, 107 Haw. 73, 82 (2005).

24. In the Interest of Doe, 99 Haw. 522, 533, n.14 (2002) (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

25. *See, e.g.*, State v. Quino, 74 Haw. 161, 177 (1992) (Levinson, J., concurring) ("[A]s the ultimate judicial tribunal in this state, this court has final, unreviewable authority to interpret and enforce the Hawaii Constitution.") (internal quotations and citations omitted).

26. *See, e.g.*, State v. Abellano, 50 Haw. 384, 391–93 (1968) (Levinson, J., concurring) (explaining that the constitution protects unenumerated rights because "[i]t is fundamental error to argue that the framers believed their subjective intentions were to control the construction of the Constitution in the centuries to come").

27. Juliana v. United States, 217 F. Supp. 3d 1224, 1249 (D. Or. 2016) (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015)), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

28. *KNG Corp.*, 107 Haw. at 82 (internal citations and quotations omitted); *see also* Baehr v. Lewin, 74 Haw. 530, 556 (1993) (internal citations and quotations omitted).

29. *KNG Corp.*, 107 Haw. at 82 (citations and quotations omitted).

30. *See* Minors Oposa v. Sec'y of the Dep't of Env't & Nat. Res., G.R. No. 10183, 33 I.L.M. 173, 187–88 (July 30, 1993) (Phil.) ("[U]nless the rights to a balanced and healthful ecology . . . are mandated as state policies . . . the day would not be too far when all else would be lost not only for the present generation, but also for those to come—generations which stand to inherit nothing but parched earth[.]").

31. Held v. Montana, No. CDV-2020-307, slip op. at 91, 97–98, 102–03 (Mont. First Jud. Dist. Ct. Aug. 14, 2023).

32. *Id.* at 102.

33. *Id.* at 89.

34. *Id.*

35. *See* Press Release, U.S. Env't Prot. Agency, EPA Regional Administrator Statement on Montana Court Ruling in Favor of Youth and Their Constitutional Right to a Healthful Environment (Aug. 14, 2023), https://www.epa.gov/newsreleases/epa-statement-montana-court-ruling-favor-youth-and-their-constitutional-right.

36. Cinnamon P. Carlarne, *U.S. Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 Am. U. L. Rev. 387, 477 (Dec. 2019).

37. Tom Burke, Webinar: *Rule of Law and Climate Change* (June 30, 2021), https://www.e3g.org/news/lcaw-rule-of-law-and-climate; Francois Kunc, *Climate Change May Pose Threat to Rule of Law, Says Supreme Court Judge Francois Kunc*, Australian Fin. Rev. (Oct. 11, 2018), https://www.afr.com/companies/professional-services/climate-change-poses-threat-to-rule-of-law-says-supreme-court-judge-francois-kunc-20181011-h16iov ("At its worst, inadequately mitigated climate change could undo our social order and the rule of law itself. . . . It is no longer either difficult or alarmist to imagine a day when, in extremis, the defen[s]e, external affairs and immigration powers of the Commonwealth [of Australia] are invoked to support measures not seen since World War II to deal with the social, political, economic and physical effects of climate change.").

38. Juliana v. United States, 217 F. Supp. 3d 1224, 1248–49 (D. Or. 2016) ("Often, an unenumerated fundamental right draws on more than one [c]onstitutional source. The idea is that certain rights may be necessary to enable the exercise of other rights, whether enumerated or unenumerated."), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

39. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

40. In the Interest of Doe, 99 Haw. 522, 533 (2002).

41. Minors Oposa v. Sec'y of the Dep't of Env't & Nat. Res., G.R. No. 10183, 33 I.L.M. 173, 187–88 (July 30, 1993) (Phil.).

42. *In the Interest of Doe*, 99 Haw. at 533.

43. *See, e.g.*, State v. Bonds, 59 Haw. 130, 134 (1978) (citations and quotations omitted).

44. *See, e.g.*, State v. Yong Shik Won, 137 Haw. 330 (2015) (explaining the right to bodily integrity in the context of unreasonable searches and seizures). Rights that this court has concluded are not "implicit in the concept of ordered liberty" are far from the right to a life-sustaining climate system. *See, e.g.*, State v. Mallan, 86 Haw. 440, 445 (1998) (the right to possess and use marijuana is not a fundamental right implicit in the concept of ordered liberty); *see also* State v. Mueller, 66 Haw. 616, 628 (1983) (the right to engage in sexual conduct for a fee is not a fundamental right implicit in the concept of ordered liberty).