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October 3, 2015: Is Litigation the Way to Stop Global Warming?

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Title: Is Litigation the Way to Stop Global Warming?

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10/3/2015—Mary Wood, Oregon Law Professor, gave a terrific presentation at the Duquesne University Climate and Creation Conference. Her message was an endorsement of pending atmospheric trust litigation that attempts to hold governments accountable for change in the climate. The litigation enforces what she calls nature's trust—a kind of expansion of the public trust doctrine. The necessity of such litigation is simply the emergency of climate change and the harm it is already doing. What she calls the statutory regime of environmental law is not adequate and a Congress bought by the fossil fuel industry is not up to the task. The citizenry has been intentionally confused by big money lies about the climate and cannot demand change. Wood denies that such litigation turns judges into dictators, but she is being disingenuous about that. Such litigation, if successful, results in a court order to reduce carbon emissions. How is that to be done without legislation, except by direct executive action? The fact that the President takes the ultimate actions does not change the undemocratic nature of the undertaking. Yes, courts enforce rights against the democratic branches. But this kind of action is certainly controversial and, compared to moving to a carbon free economy, is very limited in range and impact. In contrast, the President would have to impose a carbon tax or cap and trade etc. What Wood was showing, although she would presumably deny it, is that democracy is just a luxury in the face of this emergency. The example she used—economic mobilization in WWII—just proves the point. Democracy in wartime generally takes a back seat. But only temporarily. I may be overreacting. The litigation may be meant really to spur action—like the use of the necessity defense in civil disobedience cases is meant to allow the protestor to make her case before the public—not to win acquittal. If so, I wish she had said so. The irony of this is that, back in 1998, I wrote an article laying out the same strategy that is now being used—Establishing a Federal Constitutional Right to a Healthy Environment, 68 Miss. L.J. 605. But I later repudiated this approach as ceding much too much power to the courts and lawyers. Once it is concluded that democracy has failed, it doesn't matter that much what happens to the environment. If the only way to save the planet is to enslave its people then I have to ask, what is the point of saving the planet? Just get rid of the people. Martin Heidegger warned us about this years ago. He was quoted as saying that he did not know what form of political life was appropriate for a technological age, but he doubted it was democracy. Maybe he was right.