

LAW OF CLIMATE CHANGE: DOMESTIC & TRANSNATIONAL SPRING 2020

RPAD 399-0007 (10110)
RPOS 399-0011 (10012)
January 23 – April 30, 2020
Tuesday and Thursday 1:15-2:35
Social Sciences 255
Professor Eleanor Stein
Office hours: by appointment
E-mail: estein@albanylaw.edu
Preferred pronouns: she, her

SYLLABUS

Course Overview

The objectives of this course are (1) to develop your awareness of the severity, causes, and responses to the climate change crisis, (2) to enable you to understand and use the law as a tool to effect climate change policy and actions on the part of government and corporations, and (3) to develop your skills in reading and understanding climate change-related news and information.

As you will see, this is a living topic: climate change law is in a state of constant change – there are new laws proposed in Congress and in the New York State legislature, court challenges and decisions, presidential or governor actions and announcements every week. Some of the cases we will be studying may be decided during the course: our first study will be a court decision on Friday January 17. Accordingly, the syllabus will be modified to reflect this ongoing process.

My Expectations

LATENESS: I do not accept late submissions. This is how it works in the legal profession: there just is no such thing as filing late. The only exception is that you can request a brief extension from me in writing, in advance, just as lawyers have to do with judges. If I decide the reason for the extension is acceptable, and that your late filing does not hurt the work of other students, I will grant it.

PLAGIARISM: I am looking for your original work. In legal thinking there is really no wrong answer – what I look for is you applying your own thinking and

judgment to the problem before you. Copying and pasting an analysis of a case we are working on is not the work of this course and I will certainly spot it. You are encouraged to quote from the decisions we are reading, and from your opponent's arguments – as long as this material is inside quotation marks, with a citation to the source. I am not looking for formal legal citation form – the name of the document and the page or URL is sufficient (for example, if you are quoting from a decision, *Massachusetts v. EPA*, p. 6). Plagiarizing public sources or others' work is also a violation of the attorney code of ethics, as well as UAlbany's rules. In addition, I do not accept Wikipedia as an authoritative source – you may consult it to get started on an issue.

STUDYING LAW: This course consists of a series of discussions and assignments in which you will do legal work. If you have not studied law this will be confusing at first, but you will get the idea quickly. I will ensure that all students, regardless of their field of study, will be able to develop legal tools, and that using this approach will make the assignments more realistic and interesting. Law students may have additional assignments.

Course Materials

This course consists of four modules, each centered around one important aspect of climate change law. We will take time in the first few classes to develop a basic understanding of the current state of climate change science: everything in this field depends upon the science. In addition to the required readings listed below, we will have the great advantage of a visiting lecturer: Professor Mathias Vuille, a working climatologist in the UAlbany Department of Earth and Atmosphere Sciences, who will help us navigate the scientific issues and to recognize the scale of the crisis.

The modules are: I. Climate change and human rights; II. International law of climate change; III. Federal law of climate change; and IV. Climate change law in the states and cities. In each of the modules, there are videos, power points and readings posted on Blackboard. In the category Getting Started, there is also a Library Folder, which contains some of the major sites for research and going deeper into the cases we are reading and discussing, as well as new analysis, for example, the status of the Trump Administration's initiatives to roll back laws governing greenhouse gas emissions or other climate change rules. The modules begin We will introduce international environmental law, including the background of climate treaty law up through the historic December 2015 Paris Agreement. We will be assessing the future of that Agreement, including the statement of withdrawal from the Paris Agreement by the Trump administration in June 2017. We will be holding negotiations of our own in preparation for the next international round of climate change meetings, to be held in Katowice, Poland in November. Our negotiation will follow the actual international meetings. As the parties to the Paris Agreement engage in meetings and refine their positions, we will be doing the same in class. You will be part of a team representing a country or a group of countries.

Turning to domestic (US) law, we begin with federal law. We will examine roles of the legislative, executive, and judicial branch, and the areas of law that govern two principal sources of greenhouse gases: transportation and the generation and use of energy. In examining these areas we will first be studying the United States Supreme Court decisions interpreting relevant sections of the Clean Air Act. We will have guest speakers who are practicing litigators in this field. Following study of the Clean Air Act decisions we will review the Supreme Court and other decisions on common law challenges directly major power companies. We will follow the Trump Administration's campaign to overturn these decisions in particular and the regulation of fossil fuels in general.

We will then turn our attention to the actions regions and states have taken to reduce fossil fuel use, including current conflicts between state and federal policy. This study will focus on the role of regions and states in reducing emissions from fossil fuel use to generate electricity. We will also have expert speakers visiting us in this area. We will then study efforts to adapt to the effects of climate change, focusing on New York City's approach to adaptation to the catastrophic effects of climate change in the aftermath of 2012 Superstorm Sandy. We will examine the consequences of climate denial in an ongoing study of Hurricanes Harvey and Maria.

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2012 Superstorm Sandy. We will examine the consequences of climate denial in an ongoing study of Hurricanes Harvey and Maria.

Here are the modules and the class schedule. Additional materials are available on Blackboard, organized by module.

INTRODUCTION: Overview of the science of climate change

January 23 – 28, February 4, 2020

Readings: Bill McKibben, EAARTH, chapters 1 and 2.

Decision of the U.S. Circuit Court of Appeals for the 9th Circuit (January 17, 2020) in *Juliana v. U.S.*, and the decision can be found

at <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5e22101b7a850a06acdff1bc/1579290663460/2020.01.17+JULIANA+OPINION.pdf>.

Greta Thunberg, *Speech at Madrid climate talks*, at

https://www.democracynow.org/2019/12/12/greta_thunberg_speech_cop_time_magazine?utm_source=Democracy+Now%21&utm_campaign=54ec110929-

[Daily Digest COPY 01&utm_medium=email&utm_term=0_fa2346a853-54ec110929-192216053](https://www.democracynow.org/2019/12/12/greta_thunberg_speech_cop_time_magazine?utm_source=Democracy+Now%21&utm_campaign=54ec110929-Daily+Digest+COPY+01&utm_medium=email&utm_term=0_fa2346a853-54ec110929-192216053).

MODULE I – CLIMATE CHANGE AND HUMAN RIGHTS

February 6-14, 2020

Reading: *Juliana v. United States, Opinion*, (U.S. Circuit Court of Appeals for the 9th Circuit, January 17, 2020),

<https://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/17/18-36082.pdf>

[suggested material: recording of oral argument held before the Ninth Circuit Court of Appeals on June 4, 2019; See www.ourchildrenstrust.org for commentary].

Urgenda v. State of the Netherlands, Decision of the Supreme Court of the Netherlands

The Inuit Petition before the Arctic Circumpolar Conference

THE OSLO PRINCIPLES

MODULE II – INTERNATIONAL LAW OF CLIMATE CHANGE

February 18-March 4, 2020

Reading: We will introduce international environmental law, including the background of climate treaty law up through the historic December 2015 Paris Agreement. We will be assessing the future of that Agreement, including the statement of withdrawal from the Paris Agreement by the Trump administration in June 2017. We will be holding negotiations of our own in preparation for the next international round of climate change meetings, to be held in Katowice, Poland in

November. Our negotiation will follow the actual international meetings. As the parties to the Paris Agreement engage in meetings and refine their positions, we will be doing the same in class. You will be part of a team representing a country or a group of countries.

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We will then turn our attention to the actions regions and states have taken to reduce fossil fuel use, including current conflicts between state and federal policy. This study will focus on the role of regions and states in reducing emissions from fossil fuel use to generate electricity. We will also have expert speakers visiting us in this area. We will then study efforts to adapt to the effects of climate change, focusing on New York City's approach to adaptation to the catastrophic effects of climate change in the aftermath of 2012 Superstorm Sandy. We will examine the consequences of climate denial in an ongoing study of Hurricanes Harvey and Maria.

Finally, we will explore the application of human rights law and mechanisms to climate change, as well as the concept of climate justice, in the context of the human costs of fossil fuel, the international human right to a clean environment, and the various attempts to locate and enforce those rights in national and international law, as well as the intervention in climate-related human rights litigation by the Trump Administration.

THE WORK OF THE COURSE:

The course will be posted on Canvas. Some assignments may be given and handed in electronically: hard copy will be required for most written assignments. There will also be some discussion postings and some group work on Canvas. We will take advantage of the availability of experts in the field to come to class and share their experience with us. We will rely heavily on primary materials in your packet, now available at the bookstore. Other materials will be provided on Canvas.

The work of this course will be carried out in several forms:

- Class meetings
- Negotiation of implementation of the Paris climate agreement since the withdrawal of the US (preparation + in class exercise)
- Litigation of a state case concerning electric power (preparation + in class argument)
- A final paper or presentation. There will be a list of possible topics and students are also free to propose their own topic, subject to consultation with and approval by Professor Stein.

Much of the work in this course challenges you to negotiate and litigate in the context of actual cases or disputes. I expect professional-level work from you, including meeting all deadlines, filing final work products that you have proof-read and can stand by, collegial work with your team members, and preparedness to present and respond to judge's questions.

Your final grade will be based upon the following factors and will consider these indices of professionalism:

Class participation (preparedness and active presence in class. This includes presentations to the class by each student of specific assigned cases) – 20%

Negotiation, state case, other assignments – 30%

Final paper or presentation – 50%

Cell Phones: While in class, your phones must be turned off. A ringing or vibrating phone is distracting. If you are expecting a time sensitive or health-related phone call during the time that the class is meeting, inform me in advance and we will decide together if an exception is warranted for that class time.

Computer Use: You can use iPads and laptops only for note taking or looking up information needed during the class. All other uses are strictly prohibited during class.

Required Materials:

Nathaniel Rich, *Losing Earth: The Decade We Almost Stopped Climate Change*, The New York Times Magazine, August 5, 2018, and Michael Gerrard and Jody Freeman, Eds, GLOBAL CLIMATE CHANGE AND U.S. LAW, 2D EDITION (ABA Publishing)(Gerrard)

Materials packets – available at the bookstore + materials to be provided on Canvas

Bill McKibben, *EARTH : MAKING A LIFE ON A TOUGH NEW PLANET* (St. Martins, Griffin 2010) (McKibben) (chapters one and two).

Supplemental Materials:

Web links and recent materials to be provided.

News articles and blogs, such as the New York Times, at site for Climate Change News that follows the UN climate negotiations closely,

<http://www.climatechangenews.com> and that maintained by the Columbia Law School Sabin Center on Climate Change law, at <http://columbiaclimatelaw.com/> .

MODULE II

– FEDERAL LAW OF CLIMATE CHANGE: Who MAKEs the RULES ABOUT GREENHOUSE GAS EMISSIONS?

February 18-27, 2020

The Clean Air Act approach:

Reading: *Massachusetts v. U.S. Environmental Protection Agency*, decided by the US Supreme Court in 2007. This case established the foundation of American climate change law.

The Common Law approach:

Required Materials:

Nathaniel Rich, *Losing Earth: The Decade We Almost Stopped Climate Change*, The New York Times Magazine, August 5, 2018, and

Michael Gerrard and Jody Freeman, Eds, GLOBAL CLIMATE CHANGE AND U.S. LAW, 2D EDITION (ABA Publishing)(Gerrard)

Materials packets – available at the bookstore + materials to be provided on Canvas

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Supplemental Materials:

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<http://www.climatechangenews.com> and that maintained by the Columbia Law School Sabin Center on Climate Change law, at <http://columbiaclimatelaw.com/> .

INTRODUCTION TO THE COURSE and OVERVIEW OF CLIMATE CHANGE LAW, POLICY and SCIENCE

Objectives: learning the basics of climate change science and the policy and legal tools to address climate change and its impacts; internalizing the vocabulary of climate change principles and issues; seeing your relationship to this global crisis and your own life.

Monday August 20, 2018 ~ Via CANVAS Conference

Reading: Nathaniel Rich, *Losing Earth: The Decade We Almost Stopped Climate Change*, The New York Times Magazine, August 5, 2018

Suggested reading: either of the brief commentaries on this piece by climate expert Joe Romm (<https://thinkprogress.org/scientists-slam-new-york-times-climate-story-for-whitewashing-role-of-big-oil-and-gop-63fbc3a85b09/>) or by advocate Naomi Klein (<https://theintercept.com/2018/08/03/climate-change-new-york-times-magazine/>).

In our first class, we will begin with introductions and a general discussion of the course. The substantive heart of the class will be our discussion of the NY Times piece, the commentaries, and our own views.

We will also discuss your assignment for the August 22 class, which will consist of your first team meetings in preliminary preparation for our own global climate summit negotiation.

MODULE I: INTERNATIONAL LAW OF CLIMATE CHANGE

Objectives: Learning fundamentals of multi-party negotiations, in theory and in practice; familiarity with the climate change treaties and the global negotiations process; understanding the US's current position on the Paris Agreement and its implications.

Wednesday, August 22, 2018 ~ Negotiation Team Meetings

Reading: Gerrard, Chapter 2, *The International Regime*; **your country's Paris pledges**

In this class you will meet in the teams detailed below, to begin preliminary preparation for your negotiation of the next global climate change meeting of the Conference of the Parties to the Paris Agreement. Your teams may meet in our class room or otherwise as you decide as a team.. Each team will represent a country (or group of countries) that is about to enter into negotiations at the annual meeting of nations that are parties to the climate treaties, in particular to the recent Paris Agreement (2015). You will receive team-specific instructions about your country shortly. These instructions are based on the actual historic and current positions of your respective countries in the ongoing climate summit meetings. The next meeting will take place in Katowice, Poland, in November 2018. Your teams are just beginning to meet to discuss your positions at that meeting. Your meeting on August 22 is preliminary – you will discuss your team instructions and begin considering strategy. Your resources will be: the reading in Gerrard; your team instructions; and the World Resources Institute comprehensive collection of the pledges of each country as to what level of

carbon emissions they may attain by the years 2020-2030, at <http://cait.wri.org/indc/>. Most helpful at this stage is the WRI blog post that accompanies the pledge of each country. In addition, a quick read of the Paris Agreement included in the supplemental materials packet will be helpful, although we will shortly be studying it and its antecedent treaties.

Your teams for the negotiation are as follows:

CHINA

Andrew Clark
Alexandria Decatur
David Dickinson
Nicolas Favreau

EUROPE

Theodore Fina
Isabela Goncalves
Jason Lettieri
Martha Mahoney

SMALL ISLAND STATES (refer to Marshall Islands submissions, specifically)

Omar Nimri
Spencer Patterson
Joseph Power

UNITED STATES

Morgan Weber
Kristopher Wilson
Jennifer Wlodarzck.

Monday, August 27, 2018

Reading: *United Nations Framework Convention on Climate Change (1992)*(All of the climate change treaties are in the Supplemental Materials Packet)

We will begin the study of the international negotiations on climate change, starting with the Framework Convention, the basis for all subsequent treaties. We will also discuss our in-class negotiation project in detail.

~No class on Monday, September 3, Labor Day~

Wednesday, September 5, 2018

Reading:

Gerrard, *Introduction and Overview*
McKibben, *EAARTH*, Chapters 1 and 2
Bill McKibben, *Global Warming's Terrifying New Math*, Rolling Stone magazine, <https://www.rollingstone.com/politics/politics-news/global-warmings-terrifying-new-math-188550/>.

We are privileged to welcome guest speaker on current developments in climate change science: Professor Mathias Vuille, Department of Environmental and Atmospheric Science, UAlbany. Come to class prepared to ask questions based on your reading, his presentation, and other information and knowledge you bring on climate change.

~ No class on Monday September 10, Rosh Hashanah ~

Wednesday, September 12, 2018

Reading: *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (1998)

Analysis of the Treaty and discussion of class negotiation

Monday, September 17, 2018 – Wednesday September 19

Reading: *Copenhagen Accord* (December 2009)

Paris Agreement (December 2015)

Analysis of the Treaty and discussion of class negotiation

Monday, September 24, 2018 – Wednesday September 26, 2018 -

Team meetings and final preparations for negotiation.

Monday, October 1, 2018

NEGOTIATION. Following the negotiation, students will hand in their preparation notes in hard copy. Reflections on the negotiation process will be posted on Canvas by Monday, October 8 by 11:00 PM. Reflections should include consideration of the analysis in *Losing Earth*, of the relationship between the Montreal Protocol (reducing ozone depleting substances) and the climate treaty regime. Also consider, *United Nations Ozone Secretariat, A Success in the Making: The Montreal Protocol on Substances That Deplete the Ozone Layer* (2007), at https://unep.ch/ozone/Publications/MP_A_Success_in_the_making-E.pdf.

MODULE II: U.S. FEDERAL LAW OF CLIMATE CHANGE

Objectives: Differentiating the legal strategic approaches to climate change litigation and legislation; familiarizing with the role of federal regulation, and the relationship between statutory and common law litigation. Recognizing the current US administration's attempts to roll back federal climate change law.

Clean Air Act litigation:

Wednesday, October 3, 2018 - The Clean Air Act and its climate litigation

Reading: Gerrard, Chapter 2, *U.S. Policy*, and Chapter 5, *Clean Air Act Regulation*

Massachusetts v. EPA, 549 U.S. 497 (2007)(in Supplemental Materials packet)

Overview of federal climate law issues – US greenhouse gas emissions, Clean Air Act regulation, and attempted roll back

Monday, October 8, 2018 – Monday October 15, 2018

Reading: *EPA Determination Denying Reconsideration of the Endangerment Finding (2010)*

United Air Regulatory Group v Environmental Protection Agency, 573 US ___ (2014)

The Clean Power Plan stay orders (Supplemental Materials)

The Trump Administration America First Energy Plan (Supplemental Materials)

Common Law litigation:

Wednesday October 10 - Monday, October 22 - The public nuisance and public trust litigation – overview

Reading: *American Electric Power v. Connecticut*, 564 U.S. 410 (Materials Packet)

Village of Kivalina v Native Village of Kivalina v ExxonMobil, 696 F3d 849 (9th Circuit 2012), cert den'd 569 US 1000 (2013)(Materials Packet); and *Juliana v. U.S.*, __F Supp. 3d (D.C. Oregon 2016)(in Files on Canvas); Gerrard, Chapter 6, *Civil Remedies*

Wednesday, October 24 – The public nuisance and public trust litigation –

American Electric Power v. Connecticut, 564 U.S. 410 (Materials Packet)

Village of Kivalina v Native Village of Kivalina v ExxonMobil, 696 F3d 849 (9th Circuit 2012), cert den'd 569 US 1000 (2013)(Materials Packet).

~Proposals for final paper or final presentation due Wednesday, October 24~

Monday, October 29, The atmospheric trust litigation-

Reading: *Juliana v. U.S.*, __ F. Supp. 3d __ (D.C. Oregon 2016); in Files on Canvas, under title “Aiken” ruling; Supreme Court Order, in Files on Canvas.

MODULE III: STATE INITIATIVES

Objectives: Appreciating the federalism dimension: preemption and cooperation; appreciating the diversity and critical importance of state and local legal action on climate change; developing civil litigation and team work skills.

Wednesday, October 31, 2018 - State Initiatives: Mitigation through Energy Regulation ~ overview

Reading: Gerrard, Chapter 10 – *State Initiatives*; Chapter 13 - Energy

~Distribution of role instructions for Quixote Wind litigation~

Monday, November 5, 2018 - Law Firm Discussion of *Quixote Wind*

Reading: The library, general instructions and your law firm instructions

Wednesday, November 7, 2018 – Guest speaker Rudy Stegemoeller: The once and future electric grid!

Monday November 12, 2018 ~ NO CLASS VETERANS DAY~

Wednesday, November 14 – Discussion of NY Public Service Law Article 10, and siting renewable resources; and Discussion of the California statute and the NYS regulatory program, Reforming the Energy Vision – diverse approaches to the same problems?

Reading: California Global Warming Solutions Act and NYPIRG summary of NY Public Service Commission Reforming the Energy Vision (Materials Packet II) and pages 1-30 of NY PSC REV Framework Order (Canvas Files) and Gerrard on NY PSL Article 10, Materials Packet II. Presentation: Patterson (CA), Moore (NY REV), and Power (Article 10)

Monday, November 19 – Matter of Quixote Wind: in camera conference/oral argument with Administrative Law Judge on petitions for reconsideration.

~No class Wednesday November 21 – Thanksgiving~

MODULE IV: CLIMATE CHANGE, HUMAN RIGHTS AND CLIMATE JUSTICE

Objectives: Learning the fundamentals of the human rights regime and the environmental justice antecedents of climate justice jurisprudence, domestic and international; appreciating the domestic law applications of human rights principles.

Monday, November 26, 2018– International Human Rights – Sheila Watt-Cloutier, *Petition to the Inter American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused by Acts and Omissions of the United States*, Executive Summary, Materials Packet II. Presented by Weber and Gonzalez

Wednesday, November 28, 2018 – Human Rights and Climate Change

Reading: *The Oslo Principles; Urgenda v State of Netherlands*

Reading: *Urgenda v State of the Netherlands* and *The Oslo Principles* in Materials Packet II, Presented by Wilson and Wlodarczyk (*Urgenda*) and Beatty and Buescher (*Oslo*)

MODULE II – NEW YORK CITY TAKES THE FOSSIL FUEL INDUSTRY TO COURT

July 1 – July 3, and July 5, 2019

CASE STUDY (required reading): *City of New York v. B.P., Chevron, et al* (US District Court 2018)

Required material: Video lecture, *American Electric Power v. Connecticut* (U.S. Supreme Court 2011); news articles on this case and a companion case from Oakland, California.

Suggested material: News articles on the progress of similar cases, and on the Chamber of Commerce initiative to prohibit cities from litigation against fossil fuel companies.

Module II (Week Two) centers on a case in progress, *New York City v. B.P., Chevron, et al.*, concerning New York City's claim that five of the largest greenhouse gas emitters in the world should pay for the damages to New York City during Superstorm Sandy and other climate impacts. The required materials consist of the July 2018 US District Court decision of Judge Keenan, the US Supreme Court decision in *American*

Electric Power v. Connecticut, and the video mini-lecture concerning the case. You are responsible to post a Climate News of the Week in the discussion Forum. The assignments for this module consist of two memos: your initial memo filed on Wednesday July 3, and your responsive memo filed on Friday July 5. All assignments and discussions are due at 9:00 P.M. on the due date. Again, you will see that there are two separate sets of questions – one for each law firm. Only answer the questions for your law firm. In this case, The Green Law Firm represents British Petroleum (BP) and the other oil companies, and The Blue Law Firm represents The City of New York.

**MODULE III –STATE Rules on climate change
CHARGES EXXON WITH LYING TO SHAREHOLDERS ABOUT THE
DANGERS OF CLIMATE CHANGE**

July 8-July 12, 2019

CASE STUDY (required reading): People of the State of New York [Attorney General] v. Exxon Mobil, Complaint, October 24, 2018.

Required Material: Video lecture; Sabin Center update on NYS v. Exxon Mobil.

Module III is about an action filed by the New York State Attorney General in October 2018, in New York State Supreme Court (the lowest court of general jurisdiction in the state system) alleging that the corporation fraudulently misled its shareholders by downplaying the dangers of climate change, caused in significant part by the actions taken by Exxon Mobil, although the company was fully aware of those dangers for decades. These dangers posed real risk to Exxon Mobil shareholders, as it is the world's largest oil and gas company, and as countries reduce their greenhouse gas emissions as a result of their domestic policies, in reaction to the climate change movement, or in recognition of the future impact of the Paris Agreement. Filing this complaint, the start of the lawsuit, following years of intensive investigation into Exxon Mobil's scientific research into climate change, publications advising its customers on risk, and the company's alleged misrepresentation. The Attorney General has the authority to conduct such an investigation, including access to the company's records, under a New York State Law known as the Martin Act, General Business Law § 352. Currently the judge is hearing disputes on discovery – that is, the obligation or parties to provide information to one another.

The schedule for Module III tracks Module II. On Tuesday, July 9, by 9:00 PM you will file your third Climate Change News of the Week discussion post. On Wednesday, July 10, you will file your answer to my questions on the Exxon Mobil complaint, in your role as counsel. There will be two sets of questions, one for each party. Make sure you only answer the set of questions for your law firm. In Module III, The Green Law Firm represents the Attorney General and the State of New York, and The Blue Law Firm represents Exxon Mobil.

Friday, July 19 is the last day of the class.