Legal Backgrounder

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Does the Constitution Provide a Substantive Due-Process Right to a Stable Climate System?

by Andrew R. Varcoe

Americans have many views on the causes and severity of climate change—and on the pros and cons of conceivable policy responses. But most Americans would likely react with some measure of surprise to one suggested solution—the notion that individual citizens have a constitutional right, enforceable by judicial diktat, to a stable climate system.

Surprising or no, this suggestion has landed in the lap of the U.S. Court of Appeals for the Ninth Circuit. In June, the Department of Justice (DOJ) filed a mandamus petition in that court in *Juliana v. United States*, a lawsuit pending in federal district court in Oregon. The *Juliana* plaintiffs claim a substantive due-process right—a fundamental, unenumerated right—to a stable climate. They also argue that the federal government has an enforceable public-trust duty to protect the atmosphere and other resources from climate change.

DOJ's mandamus petition asks the Ninth Circuit to direct the district court to dismiss the *Juliana* case. Although the Trump Administration filed the mandamus petition, the Obama Administration had asserted the same basic jurisdictional and merits arguments before the district court. The Ninth Circuit may rule on the petition soon.

While this litigation presents several important questions, this Legal Backgrounder focuses only on the core merits question whether there is a fundamental, unenumerated right to a stable climate system protected by the Due Process Clause of the Fifth Amendment.[1]

Background

The *Juliana* case was filed in August 2015. The plaintiffs are children and young people; a nonprofit group; and "Future Generations," represented by "their Guardian," the prominent climate scientist James Hansen. The defendants are the President of the United States and various federal officials and agencies.

The amended complaint alleges that the defendants and their predecessors in office violated the plaintiffs' rights by allowing cumulative carbon dioxide (CO_2) emissions to increase in several ways—by enabling and permitting fossil-fuel production and combustion, by subsidizing the fossil-fuel industry, and by allowing

[1] This Legal Backgrounder does not discuss the merits of the public-trust claim or the jurisdictional arguments. *Cf. Alec L. v. McCarthy*, 561 Fed. Appx. 7 (D.C. Cir. 2014) (per curiam) (affirming dismissal of similar suit, raising solitary public-trust claim, for lack of federal-question jurisdiction; concluding that public trust doctrine is a matter only of state law, not federal law). For two views on the potential applicability of the political question doctrine, *see* Andrew R. Varcoe, *Will the Ninth Circuit Rein in What Might Be "The Most Important Lawsuit on the Planet"?*, The Recorder (Jun. 20, 2017), and Douglas A. Kysar, *In "the Most Important Lawsuit on the Planet," Who Exactly Should the Ninth Circuit Rein In?*, The Recorder (Jun. 23, 2017).

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interstate and international transport of fossil fuels. The plaintiffs argue that these aggregate actions have caused climate instability that injures their prospects for long and healthy lives. Aside from the due-process and public-trust claims noted above, the plaintiffs assert equal protection and unenumerated Ninth Amendment claims, which appear to be secondary to their due-process claim.

As relief, the plaintiffs seek, *inter alia*, an order that would require the defendants to prepare and implement a national remedial plan to stabilize the climate system, which entails phasing out fossil-fuel emissions and drawing down excess atmospheric CO_2. The trial court would retain jurisdiction "to monitor and enforce" compliance with this plan.

In November 2015, the defendants and industry intervenors moved to dismiss the case. In November 2016, just two days after Election Day, U.S. District Judge Ann Aiken issued an order denying the motions. She concluded that there is an "unenumerated fundamental right" to "a climate system capable of sustaining human life." Judge Aiken further opined that the plaintiffs had adequately alleged that the federal government has violated its public-trust duties as to "the atmosphere, water, seas, seashores, and wildlife."

In March 2017, DOJ requested an interlocutory appeal under 28 U.S.C. § 1292(b). In early June, Judge Aiken denied the request. DOJ immediately filed its mandamus petition.[2] At DOJ's request, the Ninth Circuit temporarily stayed the district court case. The Ninth Circuit ordered the plaintiffs to answer the petition. The petition is now fully briefed and awaits a decision from the court. Notably, a broad array of environmental and other non-governmental organizations, plus a group of 60-odd law professors, have submitted eight proposed *amicus* briefs supporting the plaintiffs.

The Ninth Circuit Is Unlikely to Recognize a New Constitutional Right to Be Secure Against Climate Change

A mandamus petition is a request for extraordinary relief. The Ninth Circuit has various options for ruling on the government's petition without reaching the merits. That said, if the court were to reach the merits now, it seems likely that the court would hold that there is no fundamental right to be protected against climate change.

As a general matter, federal courts are rightly reluctant to create or recognize new fundamental rights protected by substantive due process. As the Supreme Court has said, judges must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed" into judges' "policy preferences," and place great public questions "outside the arena of public debate and legislative action."[3]

The interest in a stable climate system is unlike any of the personal interests that the Supreme Court has held are fundamental rights protected by substantive due process. Most notably, the Court's 5-4 decision in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015), holding that couples of the same sex may exercise the fundamental right to marry, emphasizes that due-process rights protect "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *See id.* at 2599 ("[C]hoices concerning contraception, family relationships, procreation, and childrearing … are protected by the Constitution."). There has been no noticeable flowering of substantive due-process doctrine outside this domain since *Obergefell*.

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[2] Meanwhile, the intervenors had moved to withdraw from the case. In late June, a magistrate judge granted their motions.

[3] *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (rejecting claim to due-process right to assistance in committing suicide) (citation and quotes omitted); *see also Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (Stevens, J.) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended."); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1087-88 (9th Cir. 2015) (declining to recognize fundamental right "to own, operate, or work at a licensed professional business free from regulations requiring the business to engage in activities that one sincerely believes lead to the taking of human life").

Older lower court decisions are consistent with the view that interests related to pollution and climate change are not protected by substantive due process. *See Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1238 (3d Cir. 1980) (Constitution protects no "right to a pollution-free environment"), *vacated in part on other grounds sub nom. Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

Prudential factors militate against crafting a new constitutional right in the air pollution context. Congress has already enacted a comprehensive statute to regulate air pollution—the Clean Air Act (CAA)—and has amended it over several decades. After the Supreme Court held that the Act authorizes federal regulation of greenhouse gas (GHG) emissions, *see Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), the Environmental Protection Agency (EPA) began regulating such emissions. Despite recent political changes, EPA has not proposed to stop regulating GHG emissions.

In *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (*AEP*), the Supreme Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." This holding was about federal common-law claims. But much of the Court's reasoning applies equally—or more strongly—to potential constitutional claims.

The *AEP* plaintiffs proposed "that individual federal judges determine, in the first instance, what amount of carbon-dioxide emissions is 'unreasonable,' and then decide what level of reduction is 'practical, feasible and economically viable.'" 564 U.S. at 428 (citations omitted). Justice Ginsburg, writing for the Court, rejected this proposal. It could not "be reconciled with the decisionmaking scheme Congress enacted" in the CAA. *Id.* at 429. Under that scheme, EPA takes the lead in regulating greenhouse gases, subject to judicial review. *See id.* at 426-27.

As Justice Ginsburg explained, judges are not equipped to "prescribe[]" "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector ... in a vacuum." 564 U.S. at 427. EPA is better at making an "informed assessment of competing interests" ("as with other questions of national or international policy"), including "our Nation's energy needs and the possibility of economic disruption." *Ibid*; *cf. Collins*, 503 U.S. at 128-29.

Just as important, EPA is "an *expert* agency." 564 U.S. at 428 (emphasis added). Such an agency "is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions," who "are confined by a record comprising the evidence the parties present." *Ibid*. The Court added:

> Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located.

Id. (citation omitted). Thus it was "altogether fitting" that Congress had designated EPA, not judges, "as best suited to serve as primary regulator" of GHG emissions. *Ibid.*[4]

Justice Ginsburg's reasoning in *AEP* applies equally, or even more forcefully, to substantive due-process claims for climate-change prevention or mitigation. If a court errs in applying constitutional law to climate change, the consequences are far more severe than if the court errs in applying federal common law.

Congress is free to override federal common law, but not a constitutional precedent. For example, the plaintiffs want the district court to determine "the minimum safe level of atmospheric CO_2 concentrations" and the "timeframe" for achieving that level. Answer of Real Parties in Interest to Petition for Writ of Mandamus 32

[4] In addition, federal district judges lack the power to enter precedential decisions, and thus lack the power to bind any other judges.

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(Aug. 28, 2017). But what if the court misses the mark in doing so? Congress and the President would have no power to override such an error.

For these reasons, it seems unlikely that a Ninth Circuit panel would recognize a constitutional right to a stable climate system.

The Ninth Circuit Is Unlikely to Hold that the State-Created Danger Doctrine Effectively Creates a New Constitutional Right to Be Secure Against Climate Change

The *Juliana* plaintiffs invoke a different strand of substantive due process when they rely on the state-created danger doctrine. Under that doctrine, a governmental entity takes on a constitutional duty to an individual whom it places in peril in deliberate indifference to his or her safety.[5] The *Juliana* plaintiffs argue that the defendants or their predecessors assumed such a duty when they "authorized, permitted, and promoted the extraction, transportation, and combustion of fossil fuels for decades with full knowledge that such activities would manifest unique and personalized injuries to individuals." This argument could be seen as an extrapolation from the constitutional rights to life, liberty, and property. Nonetheless, as applied to climate change, the argument is fundamentally problematic for several reasons.

First, the state-created danger doctrine covers dangers attributable to government *actions*, not to government *omissions*. *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195, 197-203 (1989). The doctrine provides no remedy for failures to regulate private activity.

Second, even when limited to government *actions*, the plaintiffs' argument would expand the state-created danger doctrine so radically as to make it unrecognizable and unworkable. The argument proves too much. Courts have applied the doctrine to government actions that cause direct physical harm to individuals—typically, actions by law enforcement officers or other government agents. But climate change is immeasurably more complex than such incidents. Climate change is a kind of global mass tort, with diffuse and innumerable causes and impacts, involving a very large number of potential wrongdoers and victims.

If global climate change is a state-created danger, then the same goes for a host of other complex, interconnected phenomena with many apparent causes and impacts. Consider, for instance, more conventional forms of pollution, which have well-documented health and mortality effects. Or consider disease outbreaks. Taken seriously, the plaintiffs' argument implies the constitutionalization of much of our entire government system, under which the federal courts would routinely be required to make far-reaching risk-management and resource-allocation decisions that could not be overturned by the political branches of government.

It therefore seems unlikely that the Ninth Circuit would extend the state-created danger doctrine to climate change.

Conclusion

The Ninth Circuit would likely not recognize a due-process right to be protected against climate change. A decision upholding such a right would represent a major departure from current precedent and would shift immense power from our elected officials, and the expert agencies that they oversee, to unelected judges and litigants. Such a decision would likely be an instant candidate for U.S. Supreme Court review.

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[5] *See Penilla v. City of Huntington Park*, 115 F.3d 707, 709-11 (9th Cir. 1997) (per curiam) (holding plaintiffs stated constitutional claim by alleging that police officers increased risk to decedent by canceling 911 call, dragging him from public view into empty house, locking door, and leaving him there alone "after they had determined that he was in dire need of care"); *see also Pauluk v. Savage*, 836 F.3d 1117, 1125-26 (9th Cir. 2016) (doctrine applies when government employee is exposed to known and obvious danger of toxic mold in workplace); *but cf. Collins*, 503 U.S. at 126-27, 129 (rejecting notion that due process guarantees government employees "a safe working environment," "certain minimal levels of safety and security," or "a workplace that is free of unreasonable risks of harm").

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