

The Flint River as it passes through Flint, Michigan. (Credit: Michael Barera, 2018)

The past few weeks have been eventful for environmental issues and constitutional law. On January 17th, a panel for the Ninth Circuit Court of Appeals threw out *Juliana v. United States* climate litigation for lack of standing. A few days later, the U.S. Supreme Court denied certiorari on a ruling from the Sixth Circuit, *Guertin v. Michigan*, allowing lawsuits arising from the Flint Water Crisis to proceed. Plaintiffs in *Juliana* and *Guertin* try to break new ground under Due Process Clause, asserting some level of substantive constitutional protection against environmental injury.

Guertin will likely proceed to the merits. *Juliana* will not. This post explores why, arguing that *Juliana* was correctly decided, no matter the political composition of the Supreme Court, and that *Guertin* could be a model for other environmental injury cases via § 1983. (The Sixth Circuit says *Guertin* is not an environmental case, but they protest too much—more on that below.)

Environmentalism and the U.S. Constitution

Environmentalism as we know it is a 20th-century invention. Relatively recent constitutions, like South Africa's, set forth an individual right to a clean and healthy environment. The U.S. Constitution, however, is significantly older and lacks any

such provision. That is not to say the Founders did not appreciate fresh air, wild creatures, or scenic beauty. Benjamin Franklin, notably, waged a media campaign against Philadelphia tanneries for polluting the Delaware River, theorizing that "miasmas" from decaying material in the river was making people sick. But before the rise of modern environmentalism, lawsuits against pollution proceeded under common law nuisance theories. Pollution was conceived of as an injury to property rights, public or private, rather than a violation of environmental interests in clean air, clean water, or the conservation of wild beings.[1]

It's 2020, and originalism is all the rage in the Supreme Court's constitutional lawmaking. The historical backdrop of environmentalism—an absence, really—has made environmental protection an area of constitutional contention for the last fifty years. It's still somewhat unsettled how far Congress may go under the Commerce Clause in protecting ecosystems and species; how much authority Congress can delegate to administrative agencies to create new environmental rules; and who may bring what types of environmental injury into federal court. *Juliana* and *Guertin* fall into this last category. What does the Constitution say about environmental injury, if anything? And how much power do federal courts have to protect individuals from such injury?

Substantive Due Process

Plaintiffs in both *Juliana* and *Guertin* allege injury under the Fourteenth Amendment's Due Process Clause which reads, "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[2] Erwin Chemerinsky's scholarship on Substantive Due Process is helpful to understand what's going on here. There are two kinds of due process: substantive and procedural. "Substantive due process," Chemerinsky writes, "asks . . . whether the government's deprivation of a person's life, liberty or property is justified by sufficient purpose. Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life liberty or property."

Over the years substantive due process has given rise to a set of "unenumerated" fundamental rights, such as the right to privacy, the right to marry, and the right to refuse medical treatment. It also encompasses a right to bodily integrity, which is typically used in police brutality cases. When the government violates one of these rights, it has intruded into an area receiving the highest level of constitutional protection, and must provide a compelling reason for doing so. This is a very

difficult standard to meet.

The ambit of fundamental rights under substantive due process is unclear (and thus subject to heavy criticism). The Supreme Court has said that such unenumerated rights "are, objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations removed). Fundamental rights, furthermore, are those "long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 339 (1923). Establishing a fundamental right is thus an inquiry informed by the historical, analogical reasoning of common law. This is where *Juliana* unfolds.

Bodily integrity cases follow a somewhat different analysis, in that plaintiffs must show that the official action has intruded on a person's body in such a way that it "shocks the conscience": that the action was arbitrary and thus oppressive. The inquiry is less about *what* has been violated—it is obvious to the courts that individuals have a fundamental interest in their bodies—and more about *how and why* the government intruded upon that interest. It is heavily informed by a subjective sense of moral disgust. This is the path *Guertin* takes.

Climate Change: Juliana v. United States

Plaintiffs in *Juliana* assert a substantive due process right to a "climate system capable of sustaining human life." The right's "breadth . . . is striking," no doubt, but it is an eminently reasonable one. The stability of the climate system is integral to the happiness and security of U.S. citizens. American legal culture, following Roman and English law, has long recognized an inalienable public interest in the air, water, seas and seashores, bolstered by a sense that the bounty of Nature was a God-given entitlement. The Founders furthermore understood the natural world's resources must be wisely managed for the prosperity of present and future generations. So far, so good.

The practical reality of a substantive right, however, is inseparable from the question of whether a court has the power to provide a remedy for its violation. The Ninth Circuit answered that second question in the negative. Assuming, but not deciding, that a fundamental climate right existed, the panel balked at the relief plaintiffs requested: "an injunction requiring the government . . . to cease permitting, authorizing, and subsidizing fossil fuel use . . . [and] to prepare a plan

subject to judicial approval to draw down harmful emissions." Such an order would be "beyond the power of an Article III court," as it would involve complex, technical decisionmaking with enormous societal and financial impacts, and thus better left to the democratic branches of government.

I'm inclined to agree with the Ninth Circuit. Elsewhere on this blog, Professor Ann Carlson has persuasively critiqued the court's reasoning, arguing that "just enjoining the government from subsidizing fossil fuels . . . would at least begin to redress the plaintiffs' harm without necessarily raising . . . separation of power concerns." Professor Carlson is correct, in that enjoining fossil fuel subsidies is within the judiciary's technical competence, and that it would provide meaningful relief to plaintiffs' injuries. The climate right would therefore be redressable, if it were *justiciable*. But it's not: an injunction like that is not within the judiciary's power to grant. Climate change is too vast a problem, and fossil fuels are too tightly intertwined with every aspect of economic life, for the courts to demand wide-scale decarbonization in the absence of federal climate policy. To bring such policy about, climate advocates need to win elections.

Not every issue should be constitutionalized by judges. No judicial order, or series of orders, can resolve the climate crisis without full, enthusiastic participation by the Legislative and Executive branches. Responding to climate change is a multi-generational project, one that needs to be vigorously pursued and sustained over many, many decades, if not centuries. An undertaking like that requires electoral power built through national coalitions. The courts are an excellent venue (for now, at least) for enforcing environmental policy codified in statutes and regulations, but they are an inappropriate place to will such policy into existence. And, as an environmental advocate, I'm reluctant to support expansive views of judicial power given the current ideological composition of the Supreme Court.

The Flint Water Crisis: Guertin v. Michigan

This all makes for an interesting contrast in *Guertin.* The events of the Flint Water Crisis are well known: it was the most widely covered environmental justice disaster in recent memory (with the exception of climate change). Plaintiffs, using various legal theories, filed suit in federal district court for personal injuries resulting from drinking and bathing in water tainted with lead and iron. The district court dismissed all claims but a § 1983 action for violation of their fundamental right to bodily integrity guaranteed by substantive due process. The Sixth Circuit Court of Appeals affirmed this part of the ruling.

Section 1983 provides individuals with a federal cause of action against those who, "acting pursuant to state government authority, violate federal law," including constitutional rights. Unlike in *Juliana*, the Flint plaintiffs did not assert a new fundamental right to environmental integrity. They would not have prevailed had they done so: "There is, of course, no fundamental right to water service," observed the Sixth Circuit in *Guertin*, nor does "the Constitution . . . guarantee a right to live in a contaminant-free, healthy environment." Instead, the environmental injury was rearticulated as a violation of bodily integrity: by introducing tainted drinking water into the homes of Flint residents, state and city officials violated the basic well-being and wholeness of their bodies.

The court analogized the Flint Water Crisis to informed consent cases arising in the medical context, particularly *In re Cincinnati Radiation Litigation*, 874 F. Supp. 796 (S.D. Ohio 1995). In *Cincinnati Radiation*, government officials subjected unwitting cancer patients to human radiation experiments, exposing them to nuclear war–levels of radiation under the guise of providing treatment for their illnesses. The experiment and its risks were concealed from the victims, and it inflicted "burns, vomiting, diarrhea and bone marrow failure" resulting in death and shortened lifespans. The *Guertin* court developed the analogy, reasoning:

"In both instances, individuals engaged in voluntary actions that they believed would sustain life, and instead received substances detrimental to their health. In both instances, government officials engaged in conduct designed to deceive the scope of the bodily invasion. And in both instances, grievous harm occurred."

Flint residents' right to bodily integrity was thus violated by state officials "knowingly and intentionally introducing life-threatening substances into [them] without their consent, especially [because] such substances" confer no conceivable public benefit. Those actions "shock the conscience" because defendants engaged in lengthy deliberations before changing the city's source of drinking water, were aware of the health risks involved, misled residents about contamination levels months, and were motivated solely to save money.

Now, the Sixth Circuit says that *Guertin* is a bodily integrity case, not an environmental rights case. It isn't hard, however, to imagine an analogous fact pattern involving other vectors of environmental contamination. Imagine state officials, somewhere, (not your state, surely) authorize installation of a cheap but untrustworthy piece of air-scrubbing equipment at a publicly owned power plant. The device fails, leading to acute air pollution in a nearby town, aggravating

respiratory conditions and leading to an uptick in emergency room visits. State officials do nothing, citing cost, and assert for months that air quality is fine, knowing that it is not. It sounds, unfortunately, like a plausible scenario, and a lot like *Guertin*.

One could perhaps try to distinguish the facts on the basis that pumping poisoned water into homes is somehow a deeper and more intimate violation than pumping harmful matter into the air, but I don't find that persuasive. On a most basic level, humans need water and air to survive, and bring both into their bodies in order to make use of them. Alternatively, one could argue that the City of Flint was providing the water directly, whereas a power company provides electricity, not clean air. But this is a silly distinction, given its functional equivalence to the Flint Water Crisis and the gravity of the misconduct: the hypothetical managers of the power plant demonstrated a reckless disregard for the health and well-being of the people they served.

This is why I think *Guertin* could be a model for other § 1983 cases where official decisionmaking results in acute environmental poisoning threatening the bodies of local human residents—so long as "shock the conscience" factors are present (likely foreseeability and demonstrable indifference to human harm, tantamount to a recklessness standard in tort law), and the government lacks a compelling justification. Formally, this isn't *quite* the same as asserting a fundamental "environmental" right—but it does suggest that the Constitution provides basic level of protection against sufficiently heinous environmental injury caused by state actors.

Final thought

On January 21, 2020, the Supreme Court denied certiorari on the Sixth Circuit's ruling—the plaintiffs' constitutional claims in *Guertin* have survived judicial scrutiny, at least at the motion to dismiss stage. (Qualified immunity will be a bigger problem for plaintiffs at summary judgment.) It makes an interesting comparison with *Juliana*, which many suspect the Ninth Circuit dismissed to protect against an even worse environmental ruling by the Supreme Court.[3] Both *Juliana* and *Guertin* involve reckless disregard by government actors for public health and environmental integrity, and both concern fundamental necessities for sustaining human life. But *Guertin* resembles past litigation arising from industrial disasters; tracks the reasoning of medical battery actions; and is brought by plaintiffs from a specific, limited geographic area. In short, it seems manageable, discrete, and

justiciable in a way that *Juliana* does not. If there is a path forward for substantive environmental protection under the present Constitution, it follows *Guertin*, not *Juliana*.

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(*Many thanks to Andrew Hellman for teaching me Federal Courts. All mistakes are my own.*)

Footnote:

[1] Whether we can separate “intrinsic” environmental interests from “instrumental” human interests in the environment is a lively philosophical debate, to be picked up another time.

[2] The Fourteenth Amendment’s Due Process Clause is applied against the federal government via the Fifth Amendment’s Due Process Clause, through something called “reverse incorporation,” a factoid loved by law professors and few others.

[3] Personally, I have trouble imagining a Chief Justice Kagan enjoining all federal subsidies for fossil fuels, but it’s always hard to picture the counterfactual.