features

Climate Displacement, Managed Retreat, and Constitutional Revolution

Ira Feldman and James R. May

Where will everybody go to survive the inevitable climate disruption? This article considers how U.S. constitutional law informs and influences potential governmental programs and policies affecting millions of citizens who will be displaced from their homes and livelihoods by climate change. The study of what is known as "managed retreat" and "receiving communities"—and, in the popular press, "climate havens"—is in its infancy.

Our inquiry is to be distinguished from issues that focus primarily on the government's responsibility for climate "mitigation." *See, e.g.*, *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd for lack of standing*, 947 F.3d 1159 (9th Cir. 2020), *aff'd*, slip op. (9th Cir. May 2, 2024). Much less attention has been paid to the extent to which U.S. constitutional law shapes the "adaptation" side of climate change, including congressional and state authority, due process, equal protection, privileges and immunities, compensable takings, and federalism. We conclude that the U.S. Constitution is neither designed nor equipped to handle the oncoming climate displacement wave and wonder whether a "constitutional revolution" is warranted.

The Great Displacement

The climate crisis is rapidly intensifying. Every hour, humans pump more carbon into the atmosphere than in the preceding hour, contributing to a one-way climate crisis ratchet: every year is warmer than the one it follows. The 18 warmest years in human experience have occurred over the last 19 years, with almost every succeeding year warmer than the one before. The year 2023 was the warmest year on record, with an average global temperature exceeding the pre-industrial average by 2.43 degrees F (1.35 degrees C). *See* Nat'l Oceanic & Atmospheric Admin., *2023 Was World's Warmest Year on Record by Far* (May 5, 2024). The year 2023 also set a record for the highest monthly sea surface temperature of any month in human history, with 2024 and succeeding years sure to set even more unwelcome records.

There is no relent. It is clear we have entered the Anthropocene. *See* Anthony Barnosky & Mary Ellen Hannibal, *Despite Official Vote, the Evidence of the Anthropocene Is Clear*, Yale Env't 360 (Apr. 2, 2024). Emissions of greenhouse gases (GHGs) have increased by nearly 100% in the last half-century alone. Over this time, mean global temperatures have increased to 15 degrees C from 13.7, a rate of warming far exceeding anything seen in the geological record, and carbon pollution only increases around the globe. The effects are worsening everywhere all at once: fire, floods, sea rise, drought, and what used to be known as "extreme weather." *See* U.S. Global Change Rsch. Program, *Extreme Weather*, Third Nat'l Climate Assessment (2014). Everyone will experience the impacts of climate change and resultant human suffering now and from now on.

The geomorphological inputs are easy to explain. The most livable latitudes of the planet are moving north and south. Coastal areas will be inundated and unlivable. The sea will consume presently populated archipelagos. Millions of people have

Published in *Natural Resources & Environment* Volume 39, Number 1, Summer 2024.

already migrated toward the Middle East, Europe, and North America from Southeast Asia and Africa due to increasingly unpredictable weather patterns that have made farming impossible. An estimated 200 million others will relocate to more hospitable climes within their own countries. This "Great Displacement" will amount to a vast remapping of the world's population. *See* Jake Bittle, *The Great Displacement: Climate Change and the Next American Migration* (2023).

Climate Displacement in America

This is not strictly an international issue. We must focus on climate displacement on the home front because America will be wildly different, even unrecognizable, decades from now. Pinched by loss of land and less livable land, Americans will need to move. By 2050, an estimated 13 million people will be displaced by sea rise, 28 million by megafires, and 100 million by heat. *See* M. Hauer et al., *Millions Projected to Be at Risk from Sea-Level Rise in the Continental United States*, 6 Nature Climate Change 691–95 (2016). Given its continental expanse, the most likely governmental response in the United States is to condemn land for relocation and relinquishment. Yet despite acknowledging the challenge, there is no plan and no resources yet for appropriate action. *See* Exec. Order No. 14,013, 86 Fed. Reg. 8835 (Feb. 4, 2021).

At present, there is no strategy to coordinate the likely displacement of tens of thousands of U.S. residents from communities impacted by climate change. What might a national strategy contemplate to adapt? Will restrictions and limitations raise constitutional questions relating to several traditionally accepted rights? Legal scholarship has looked at the question of a constitutional right to a stable climate and other questions related to GHG reduction (mitigation). *See* James R. May & Erin Daly, *Can the U.S. Constitution Encompass a Right to a Stable Climate? (Yes, It Can.)*, 41 UCLA J. Env't L. & Pol'y 105 (2021). However, few if any have explored the constitutional legal implications of climate change adaptation.

The hypothetical before us is whether a federal strategy for coordinating managed retreat and receiving communities will require greater constitutional flexibility and/or novel interpretations, amounting to what one scholar has called a "Constitutional Revolution."

The United States has had limited success in addressing climate change at the federal level. Despite the infusion of funds from the Bipartisan Infrastructure Law and the Inflation Reduction Act, we have not come close to achieving comprehensive climate change regulation. Addressing GHG reductions through the Clean Air Act is recognized as an imperfect solution, but that is the current legal authority for mitigation. As for adaptation and resilience considerations, a recent "Resilience Framework" represents the cutting edge. *See* White House, *National Climate Resilience Framework* (Sept. 2023).

So, is it folly at this point to speculate about how U.S. constitutional law will adjust to the "new normal" as we adapt? There are major uncertainties the climate crisis presents not limited only to the timeline under consideration. We cannot predict how further exacerbation of extreme weather will modify behavior absent regulation. We cannot predict how political parties will approach the challenge of internal displacement of populations within the United States. We cannot predict how successful mitigation efforts will be, nor can we predict if technological change will alter the climate change trajectory anytime soon. However, the science presents a rather bleak picture. Hauer's estimate of the displacement of more than 13 million people on the East Coast due to sea level rise by the end of the century should serve as a wake-up call—not just a call to action to redouble mitigation efforts, but an advance warning regarding the need to prepare to adapt while there is still time to plan and implement an effective strategy. We argue that all options should be on the table—including constitutional reinterpretation—as the government and all stakeholders develop a viable game plan.

Creating a Game Plan for Climate Change Displacement

Given the complexity and enormity of the challenge, a serious effort to plan for climate change displacement impacts in the United States is needed. *See* Ira Feldman, *Receiving Communities: When Climate Change Forces an Exodus from Affected Regions, Where Will the Displaced Go?*, Env't F., Sept./Oct. 2023, at 32–39; I. Feldman, *Policy and Governance Approaches for Receiving Communities*, Presentation at Columbia University "Managed Retreat" Conference (June 2023). Currently, there is no existing strategy or game plan, and only a handful of incipient organized initiatives consider the big picture. Other climate migration issues have captured media and popular attention, most notably the immigration situation at the U.S. southern border. Humanitarian and legal concerns have been recognized relating to international refugees from Africa, Asia, and Europe, where, in some cases, climate change is a driver, if not the sole motivation.

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The situation is starkly different for internal displacement in the United States. There is no doubt that some degree of climate migration is occurring already, but there is no government agency or organization tracking such movement. In these early stages of climate-induced migration, decisions to relocate are made largely at the individual or family level. Such ad hoc relocation of individuals and households is distinguished from situations where entire communities and populations will need to contemplate relocation. *See* Hannah M. Teicher & Patrick

Marchman, *Integration as Adaptation: Advancing Research and Practice for Inclusive Climate Receiving Communities*, 90 J. Am. Plan. Ass'n 30 (2023).

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Some localities have expressed a willingness to be considered "climate havens," citing relative safety and abundant resources. But there is no evidence that any of these communities will afford greater protection from climate impacts, nor have they engaged in a sophisticated planning process contemplating in-migration. *See* Marcello Rossi, *Some Northern Cities Could Be Reborn as "Climate Havens,"* Yale Climate Connections (Aug. 27, 2019); Raleigh Tacy et al., *Climate Migration in Vermont: Receiving Areas, Key Demographics, Potential Impacts on Natural and Social Resources*, Antioch Univ. New Eng. (2020). News reports allude to a simplistic "good for our local economy" rationale for receiving communities. However, in many of the same communities, there has been pushback in response to fears of gentrification and concerns about accommodating outsiders. While the near-term future is uncertain, it is already clear that only a national strategy with state, local, and tribal partners will suffice.

Identifying Constitutional Concerns in the "New Normal"

There are numerous reasons why only a federal strategy will suffice. First, climate change is a global issue, and the federal government has the lead role in international negotiations and research funding. Second, individual communities will be ill-prepared to fend for themselves in planning for and accommodating any significant degree of in-migration, even with state-level assistance. Third, the scope of internal displacement is likely to extend to multiple geographic regions in response to variegated climate impacts already recognized. The national strategy must contemplate a coherent system of multilevel governance, allowing flexibility for localized climate adaptation solutions. But what does the Constitution say about the coordinated management of these displaced populations on the continuum of managed retreat to receiving communities? And where it is insufficient to meet the climate crisis, is it time for a "constitutional revolution?" In broad strokes, we can imagine several areas of concern that might raise constitutional issues under future conditions.

Constitutional Authority for Managed Retreat

It is likely that Congress has the authority to develop regulatory processes and programs to manage internal climate displacement in the United States under the Commerce, Treaty, Welfare, and Property clauses of the U.S. Constitution. First, the Commerce clause provides that "Congress shall have the power . . . to regulate Commerce . . . among the several states." Courts have held that the Commerce clause permits Congress to regulate in three areas: channels of interstate commerce (such as navigable waters), instrumentalities of interstate commerce, and activities that "substantially affect" interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995). The Court then described the "substantially affects" test as a function of whether (1) the underlying activity is "inherently economic," (2) Congress has made specific findings as to effect, (3) the law contains a jurisdictional element, and (4) the overall effects of the activity are substantial. *Morrison v. Olson*, 529 U.S. 598 (2000). Seldom in applying this vigorous analysis have courts found Congress lacks constitutional authority to protect fish, flies, spiders, "hapless toads," waters, or wolves that exist solely within a single state. Moreover, the Court has upheld congressional authority when Congress could have a "rational basis" for concluding that "activities, taken in the aggregate, substantially affect interstate commerce," such as regulating homegrown marijuana. *Gonzales v. Raich*, 545 U.S. 1 (2005). Thus, it would seem that federal programs regulating retreat from climate change effects would easily pass constitutional muster under the Commerce clause.

Second, the Treaty clause provides that the executive branch "shall have power, by and with the advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." After a treaty is approved, Congress has the power under the Necessary and Proper clause "to make all laws which shall be necessary and proper for carrying into execution . . . all . . . powers vested by this Constitution in the Government of the United States," laws that effectively preempt any conflicting laws enacted by states. *Missouri v. Holland*, 252 U.S. 416 (1920). Thus, presuming ratification, Congress would likely have the authority to regulate managed retreat under the Treaty clause.

Third, the Spending and General Welfare clauses permit Congress to tax and spend to "provide for the common defense and General Welfare of the United States" by attaching conditions to the receipt of federal funds, provided the conditions are not coercive, authority that has been used to implement various federal environmental laws. *South Dakota v. Dole*, 483 U.S. 203 (1987). Such "cooperative federalism" is the bulwark of most of the nation's health and welfare legislation, including environmental protection. Thus, Congress likely has the authority to raise and spend taxes in support of managed retreat.

Fourth, the Property clause authorizes Congress to make all "needful" rules concerning federal land, which constitutes about 28% of the country. Courts have interpreted the scope of this authority to be "virtually without limitation." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)). With this authority,

Congress has enacted numerous laws allowing for the development, use, and exploitation of natural resources on federal lands. Other provisions of the Constitution have allowed Congress to exercise relatively unquestioned authority to manage natural resources on federal enclaves under the Enclave clause. *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525 (1885). Congress also has the authority to "acquiesce" to presidential power to "reserve" natural resources on federal land. *Midwest Oil Co. v. United States*, 236 U.S. 459 (1915). Thus, Congress likely has the authority to establish displacement zones under the auspices of the Property clause.

Last, under existing interpretations of law, there would seem to be little states can do to prevent migration into their state from those affected by climate change in another state. Freedom of movement is governed by the Privileges and Immunities clauses, which state, "The Citizens of each State shall be *entitled* to all Privileges and Immunities of Citizens in the several States" and that "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens." The right to travel includes the "right of free ingress into other States, and egress from them." *Paul v. Virginia*, 75 U.S. 168 (1869). Moreover, the Court has upheld a federal right to (1) enter one state and leave another, (2) be treated as a welcome visitor rather than a hostile stranger, and (3) be treated equally to native-born citizens. *Saenz v. Roe*, 526 U.S. 489 (1999). Thus, it would seem that states could do little to stanch the managed retreat of citizens from another state into their own. The flip side of this clause is that it is unlikely to provide protection for those who *resist* relocation. The U.S. Supreme Court has held that the clause does not provide an actionable claim for anyone but freed slaves, thus leaving it beyond litigants subject to managed retreat. *Slaughter-House Cases*, 83 U.S. 36 (1873).

Constitutional Limitations on Managed Retreat

There are a series of counterbalancing constitutional limitations, however. The Constitution has mechanisms that could limit managed retreat and constrain receiving communities, including constitutional takings, and the Due Process, Equal Protection, and Privileges and Immunities clauses.

First, relocating people could implicate due process rights, particularly when condemning uninhabitable property or establishing relocation zones on private land. The Fifth Amendment forbids the government from "taking private property for public use without just compensation." "Taking" includes so-called regulatory takings that arise when regulation goes "too far." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). This involves a balancing approach that turns on how closely the impact of the challenged regulation resembles a physical occupation of the regulated property. In so doing, courts weigh three factors to determine whether a government regulation triggers the obligation to compensate the property owners: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) the "character of the governmental action," that is, whether it amounts to a physical invasion or merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

It is likely that managed retreat would implicate the Takings clause, requiring just compensation both for the displaced and for private property owners in receiving communities, in any number of ways. For example, the U.S. Supreme Court has held depriving a landowner of all economically viable use of property, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), or requiring them to maintain a public pathway to the beach, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), or to set aside land for a greenway, *Dolan v. City of Tigard*, 512 U.S. 374 (1994), are compensable takings. One can easily imagine how nearly any managed retreat involving private property will trigger the Fifth Amendment. Even preexisting state laws can constitute a compensable taking. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). The prospects of extensive compensation would likely make federal, state, and local authorities think twice about managed retreat. Climate migrants and existing residents have property rights that could be affected during the adaptation process. Therefore, just compensation must be ensured for property taken or affected by adaptation, adhering to the principles of eminent domain and due process.

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Second, managed relocation, including the creation of receiving communities, could implicate substantive due process. The Due Process clause of the Fifth and Fourteenth Amendments prevents the government from "depriv[ing] any person of life, liberty, or property, without due process of law." These are viewed as having two prongs: substantive and procedural. Substantive due process addresses the "what," that is, the extent to which the government may regulate "fundamental rights," such as family, marriage, sexual relations, living arrangements, and death. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (fundamental right to marriage); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (fundamental right to childrearing). Government actions depriving an individual of a fundamental right are subject to strict scrutiny, meaning the government must

use the least disruptive means to achieve a compelling state end. If no fundamental right is involved, however, then rational basis review applies, meaning that all the government needs to show is that it chose a reasonable means to achieve some rational governmental objective. Managed retreat would invariably implicate several fundamental rights, including family and living arrangements, subjecting governmental displacement policies to strict scrutiny.

Third, managed retreat could implicate the Equal Protection clause, which provides "nor shall any state deny to any person within its jurisdiction the equal protection of the laws." The U.S. Supreme Court has held that the clause is triggered by evidence of "invidious" express or intentional racial discrimination. *Washington v. Davis*, 426 U.S. 229 (1976). While thus far no court has held that climate policies contravene equal protection, given so many displaced communities are likely to be those of color, managed retreat could invite heightened scrutiny under the clause.

Last, a coordinated federal program linking managed retreat and receiving communities could run afoul of the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Court has held unconstitutional a federal law that required states to "take title" to low-level radioactive wastes, finding it "would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." *New York v. United States*, 505 U.S. 144 (1992). Likewise, it seems as though requiring states to accept an influx of citizens from other states could constitute a "commandeering" of state governmental resources.

Does the Climate Crisis Warrant Constitutional Revolution?

The climate emergency could constitute an inflection point warranting constitutional revolution. Scholar Robert Lipkin posited that constitutional legal theory evolves and adapts with what anthropologist and humanist J. Robert Gould might have called "punctuated equilibrium," that is, long periods of stasis upset by abrupt, transformative change. *See generally* Robert Justin Lipkin, *Constitutional Revolutions: Pragmatism and the Role of the Judicial Review in American Constitutionalism* (2000). Professor Lipkin referred to such changes in constitutional legal theory as "constitutional revolutions" (as in "revolt," not "revolve"), wherein legal change inconsonant with existing constitutional theory is impelled by compelling extrinsic factors. "Constitutional Revolution," he wrote, is marked by "legal change not clearly authorized by the constitution." Robert Justin Lipkin, *The Anatomy of Constitutional Revolutions*, 68 Neb. L. Rev. 701 (1989).

Constitutional Reconsideration or Revolution?

Although the Constitution is silent about the environment, the Framers were no strangers to migration and something akin to managed retreat, but from perceived tyranny instead of environmental catastrophe. While the Constitution likely provides some authority for Congress to regulate managed retreat and convert federal land to support receiving communities, it contains several potential limitations, thus warranting constitutional reconsideration if not revolution. In the background, there are already signals that the U.S. Supreme Court is reluctant to expand statutory authority based on a "future state" induced by climate change. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 364–65 (2018) (rejecting the expansion of critical habitat). Looking ahead, several questions could test the Constitution's flexibility and influence the choice between reconsideration and revolution. Will the right to freely travel across state borders within the United States always be protected? Will states' priority in land use decisions be questioned in matters of human habitability, environmental sensitivity, industrial relocation, and reestablishing livelihoods? Can public lands, including federal lands like military bases, parks, forests, and other protected areas, be taken, swapped, or repurposed for establishing receiving communities?

In considering whether these questions lead to constitutional reconsideration or revolution, let's remember that Lipkin believed that there is nothing revolting about constitutional revolutions because they are necessary means for adapting legal theory to managed retreat in a changing world. Perhaps it is time to apply Lipkin's theories to our climate moment.

Ira Feldman is the founder and chairman of the not-for-profit Adaptation Leader. James R. May is the Richard S. Righter Distinguished Professor of Law at Washburn University School of Law in Topeka, Kansas. They may be reached at ira@adaptationleader.org and james.may@washburn.edu, respectively.