Returning the Common Law to Its Rightful Place

by Tom Mounteer

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Many years ago, I had the pleasure of having Prof. J.B. Ruhl as my guest at the annual Environmental Law Institute awards dinner in Washington, D.C. (For those of you who have not had the opportunity to attend, the dinner is a testament to the environmental bar's collegiality.) At the time, J.B., now the Matthews & Hawkins Professor of Property at Florida State Law School, was teaching at George Washington University Law School and in the midst of publishing a series of intriguing law review articles applying "complexity theory" to environmental law.[1]

I thought of J.B. recently when a pair of circuit court decisions (*Connecticut v. American Electric Power Co. (AEP)*[2] and *Comer v. Murphy Oil USA*[3]), issued within a month of one another, reopened the possibility of addressing the challenge of climate change through common-law actions under the public nuisance doctrine.

J.B.'s articles offered many suggestions for "[r]eversing th[e] reductionist influence" on environmental law, including "a complete overhaul of our approach to legislation, administration, and jurisprudence" so as to "produce a system that de-emphasizes the regulations attractor by de-emphasizing the place of codified rules within the system."[4] Among his suggestions, J.B. called for greater reliance on the common law.

Indeed, the first of his three recommended steps for reversing the "regulatory spaghetti in which we find ourselves today" was "the return of common law to its rightful place as our first choice law-based method of establishing and managing the balance between freedom and rights." For J.B., the common law's adaptability, "chaotic qualities," and mirroring of "social phenomenon" made it superior to the "culture of regulatory micromanagement in legislation, administration, and jurisprudence."

I think the two circuit court decisions would please J.B.

Until these decisions, conventional wisdom had held that the political question doctrine barred common-law public climate change claims. Conventional wisdom rested on no less authority than the U.S. federal district courts that decided the cases that the circuit courts reversed.[5] (At this writing, it remains to be seen if the U.S. Court of Appeals for the Ninth Circuit will follow suit by reversing the District Court for the Northern District of California, which held, at the end of September 2009, that the political question doctrine barred a climate change case brought on a public nuisance theory.[6])

The U.S. Supreme Court has articulated numerous formulations of the political question doctrine, as summarized in the Court's 1962 "one man, one vote" decision.[7] The formulation that is most germane to climate change claims is "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."

Public nuisance claims are primarily claims for the government to assert. The plaintiffs in *Connecticut* were governments (specifically, eight state attorneys general and the city of New York) who sued five electric utilities alleging a public nuisance arising from the utilities' contribution to global warming. They sought injunctive relief requiring the utilities to reduce carbon dioxide emissions. The district court, however, found it lacked jurisdiction over the claims because the plaintiffs presented a nonjusticiable political question that required a policy decision by either the legislative or executive branch.

While it took the *Connecticut* court three years to hand down a decision, when it finally spoke, it did so unequivocally. Until Congress or federal regulators "pre-empt the field of federal common law of nuisance" as it applies to climate change, "federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by greenhouse gases." The U.S. Court of Appeals for the Second Circuit found no congressional preemption either in "Congress's mere refusal to legislate" or in the current Administration's endangerment finding.[8] The latter has yet to result in actual regulation.

In *Comer*, the plaintiffs were private parties, residents of Mississippi, who sued energy, oil, refining, and chemical companies claiming that their activities contributed to climate change and exacerbated the damage done by Hurricane

Katrina. The case was brought under federal diversity jurisdiction, to which state common-law claims (including public nuisance) were appended.

The district court dismissed on the basis of the political question doctrine. The U.S. Court of Appeals for the Fifth Circuit found the doctrine inapplicable. As long as the question before the court was justiciable and the complaining "party . . . is unable to identify a constitutional provision or federal law that arguably commits a material issue in the case exclusively to a political branch," the court ruled, the challenge is well within the court's competence. Whether this decision will stand is uncertain given the full court of appeals having recently granted rehearing of the case.

What is interesting in both decisions is the gusto with which the courts ruled. Despite the fact that federal policymakers seem to be tied in knots when it comes to tackling climate change, both these courts intimated that courts applying public nuisance theories would not be so stymied.

The Second Circuit focused on the relief the plaintiffs sought and found that the complaint fell within a well-established body of "nuisance cases where federal courts employed familiar public nuisance precepts, grappled with complex scientific evidence, and resolved the issues presented based on a fully developed record." Similarly, the Fifth Circuit found "common law tort rules provide long-established rules for adjudicating the nuisance claims at issue."

Some have a deep distrust for public nuisance claims altogether, calling them "a zombie—a mindless creature perhaps not particularly dangerous at first glance but incredibly difficult to kill once and for all."[9] Those in that camp were cheered in 2008, when the Rhode Island Supreme Court rejected the state's public nuisance suit against three former legal pigment makers, holding "[t]he State has not and cannot allege facts that would fall within the parameters of what would constitute public nuisance under Rhode Island law."[10]

Claimants in these revived climate change cases face equally stiff challenges in pursuing their claims. Establishing causation is certainly one of them. Indeed, in his concurrence in the *Comer* decision, Judge W. Eugene Davis indicated he would have dismissed on a proximate cause theory.

Even recognizing the hurdles that lie ahead, I think J.B. would be pleased by these decisions that seemingly return the common law to its rightful place.

(Endnotes)

1. J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 Vand. L. Rev. 1407 (1996); J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 Duke L.J. 849 (1996) [hereinafter Ruhl, *Complexity*]; J.B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System—How to Clean Up the Environment by Making a Mess of Environmental Law*, 34 Hou. L. Rev. 933 (1997).
2. 582 F.3d 309, 39 ELR 20215 (2d Cir. 2009).
3. 585 F.3d 855, 39 ELR 20237 (5h Cir. 2009), *reh'g granted*, No. 07-60756 (5th Cir. Feb. 26, 2010).
4. Ruhl, *Complexity*, *supra* note 1, at 861.
5. Connecticut v. American Electric Power Co., 406 F. Supp. 2d 265, 35 ELR 20186 (S.D.N.Y 2005); Comer v. Murphy Oil USA, No. 05-CV-436LG (S.D. Miss. Aug. 30, 2007).
6. Native Village of Kivalina v. ExxonMobil, 2009 WL 3326113, No. 08-1138, 39 ELR 20236 (N.D. Cal. Sept. 30, 2009).
7. Baker v. Carr, 369 U.S. 186, 217 (1962).
8. 74 Fed. Reg. 66496 (Dec. 15, 2009).
9. Steven Williams et al., *The Tort That Refuses to Die,* Nat'l L.J., Apr. 6, 2009, *at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429614761&slreturn=1&hbxlogin=1#.
10. State v. Lead Industries Assoc., 951 A.2d 428, 443 (R.I. 2008) ("the state has not and cannot allege that defendants' conduct interfered with a public right or that defendants were in control of lead pigment at the time it caused harm to children in Rhode Island").