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From the Selected Works of James R. May

April, 2011

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RECENT DEVELOPMENTS AT THE JUNCTURE OF THE POLITICAL QUESTION DOCTRINE AND CLIMATE LITIGATION LAW

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Without near-term federal legislative action on climate change—the prospects of which seem as likely as the Kansas City Royals emerging as 2011 World Series champs, but hey, hope springs eternal—climate regulation as it were remains an untidy amalgam of actions and programs by states, individuals, the U.S. Environmental Protection Agency (EPA), and other federal, regional, and state agencies.

The fate of precursors to climate change is also in the hands of the courts, mostly federal. As has been reported in previous issues of this newsletter, international and federal tribunals and federal and state courts are awash in climate adjudication. And if and when federal climate legislation emerges, there will be much more. During 2009–2010, climate litigation shook the rust off the political question doctrine and public nuisance law, resurfaced standing, and challenged or precipitated sometimes bracing federal and state action in ways that might make even the more dilettante climate law observers stop and announce, “Wow.”

Perhaps the most interesting recent injection of constitutional law into environmental policy involves the use of the political question doctrine to thwart climate litigation by states and individuals. For a half decade, states and individuals have turned to common law causes of action for redress in climate litigation. See James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 958 (2008). Federal common-law causes of action, including those for public nuisance, provide potential—although imperfect and problematic—means for judicial cognizance of and

redress for these effects. See *id.* Nonetheless, some federal courts have determined that the seldom used “political question doctrine” bars them from “entering the climate change thicket,” reasoning that the matter is consigned to the coordinate branches of government. *Id.* at 957–59.

This is an astonishing legal development, because until recently the political question doctrine had touched only about a half dozen matters. The Supreme Court has decided that there are certain “political questions”—including matters that are demonstrably committed to a coordinate branch of government, require an initial policy determination, lack ascertainable standards, or could otherwise result in judicial embarrassment—that are nonjusticiable. *Baker v. Carr*, 369 U.S. 186, 217 (1962). For example, the Court has recognized executive power over foreign affairs, impeachment, and treaty abrogation as political questions into which courts ought to decline jurisdiction, finding them to be consigned to the elected federal branches of government under the “political question doctrine.” James R. May, *Constitutional Law and the Future of Natural Resource Protection*, in *THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY* 124, 146 (Lawrence J. MacDonnell & Sarah F. Bates eds., 2009). Climate change litigation has now entered this mix.

This short essay does three things. First, it provides a primer on the most recent case developments at the juncture of the climate litigation and the political question doctrine. Second, it hazards some discussion about how the Supreme Court might engage the political question issue in *Connecticut v. American Electric Power Co.*, Civ. Action No. 10-174, which is set for oral argument on April 19, 2011. It ends with some concluding thoughts about the impact that litigation has on climate policy.

1. *Connecticut v. American Electric Power*

In 2009–2010, federal circuit courts reversed earlier federal district court opinions that had dismissed tort-based climate cases under the political question

doctrine. Both cases are currently before the U.S. Supreme Court. In *Connecticut v. American Electric Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated & remanded*, 582 F.3d 309 (2d Cir. 2009), a collection of states representing 77 million citizens and private conservation organizations sued the nation's five largest emitters of carbon dioxide in the United States under federal common and state public nuisance law, asking the court for injunctive relief to "cap" defendants' emissions, develop a schedule for reducing defendants' emissions on a percentage basis over time, assess and measure available alternative energy resources, and reconcile its relief with U.S. foreign and domestic policy. The defendants, on the other hand, contended that federal courts should exercise judicial restraint in "resolving questions of high policy, which are for the political branches." *Id.* at 271.

The district court agreed with the defendants and dismissed the case as a nonjusticiable political question. The court concluded that it was impossible for it to make the "initial policy determination" "that must be made by the elected branches before a non-elected court can properly adjudicate a global warming nuisance claim." *Id.* at 273. It concluded that plaintiffs' allegations were "extraordinary," *id.* at 271 n.6, "patently political," *id.*, and "transcendently legislative." *Id.* at 272. It reasoned that the case's soup of environmental, economic, foreign policy, and national security ingredients "present non-justiciable political questions that are consigned to the political branches, not the Judiciary." *Id.* at 274.

In 2009, the U.S. Court of Appeals for the Second Circuit reversed, finding climate claims in tort law to be justiciable. In *American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), the court held that no aspect of the political question doctrine applied to enjoin judicial review. In particular, the circuit court found that climate change is neither constitutionally consigned to the elected branches, nor prudentially left to them. In particular, it rejected the lower court's determination that there is in fact national climate change policy deserving deference under the political question doctrine: "Lurking behind Defendants' arguments is this salient question: What exactly is U.S. 'policy' on greenhouse gas emissions?" *Id.* at 331. Dismissing defendants' position that it is either to reduce emissions

or promote research, the court said: "These variegated pronouncements underscore the point that there really is no unified policy on greenhouse gas emissions." *Id.* at 331–32. Left open is the extent to which federal courts may calculate monetary damages attributable to carbon dioxide emissions in a public nuisance action. On August 2, 2010, American Electric Power and the other utility defendants filed a petition for certiorari to reverse the Second Circuit's ruling, arguing that (1) the states and other plaintiffs lack standing, (2) federal law preempts plaintiffs' claims, and (3) the case raises nonjusticiable political questions. *Connecticut v. American Electric Power Co.*, Petition for Certiorari, Civ. Action No. 10-174; AEP Cert. Petition at i, 13, 20, and 26. In late August 2010, the Obama Administration filed a brief in support of the utility defendants' petition, arguing that plaintiffs lack prudential standing, and that federal law displaces the need for common law causes of action for climate change. Brief for Tenn. Valley Auth. in Supp. of Pet'rs, *Connecticut v. American Electric Power Co.*, No. 10-174. In its brief, the U.S. Solicitor General's Office argues first that plaintiffs lack prudential standing under the standard articulated in the First Amendment *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) decision—and largely for the same non-justiciability reasons defendants argue in favor of applying the political question doctrine. Second, it argues that EPA activities during the last 12 months, including the final reporting rule, the proposed tailoring, cement kiln, and light duty truck emission rules, and other activities displace the need for common law causes of action under the standards set in the Court's *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) and *Milwaukee v. Ill.*, 451 U.S. 304 (1981) decisions.

On December 6, 2010, the U.S. Supreme Court agreed to hear the case, with Justice Sotomayor recusing herself, which seems to increase the prospects of a 4-4 split. Oral argument in the case is set for April 19, 2011.

2. *Comer v. Murphy Oil*

Another case before the Court—this time on a petition for writ of mandamus—is *Comer v. Murphy Oil*, 585 F.3d 855, 39 ELR 20237 (5th Cir. 2009), in which

plaintiff property owners filed a class action against several oil, coal, power, and chemical companies, and two industry trade associations, alleging that they were liable for property and other damage inflicted by Hurricane Katrina. Under the plaintiffs' theory, the companies caused or exacerbated climate change by going about their business without "currently available mitigation technologies," despite warnings from scientists and government agencies. This business methodology purportedly caused or exacerbated Hurricane Katrina, which then caused plaintiffs' injuries. As in *American Electric Power Co.*, the federal district court dismissed the claims in 2007 on political question and standing grounds from the bench, without a written opinion.

In 2009, a panel of the U.S. Court of Appeals for the Fifth Circuit reversed, finding—as the Second Circuit did in *American Electric Power Co.*—that plaintiffs' claims were not committed to a coordinate branch of the government. Specifically, according to the Fifth Circuit, "There is no federal constitutional or statutory provision making such a commitment, and the defendants do not point to any provision that has such effect." *Id.* at 870. The panel held that state common-law claims for harm attributed to climate change are legally cognizable:

Until Congress, the president, or a federal agency so acts, however, the Mississippi common law tort rules questions posed by the present case are justiciable, not political, because there is no commitment of those issues exclusively to the political branches of the federal government by the Constitution itself or by federal statutes or regulations.

Id.

In a bizarre twist, the Fifth Circuit then vacated the panel's decision and reinstated the district court's dismissal of the case. *See Court Tosses Landmark Global Warming Ruling After Late Recusal*, <http://www.nytimes.com/gwire/2010/06/01/01greenwire-court-tosses-landmark-global-warming-ruling-af-26422.html>. On May 28, 2010, the Fifth Circuit announced that it had vacated on the ground that the court could not muster a quorum after it had granted a

motion for rehearing en banc. *See Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th. Cir. 2010). The necessary nine of the court's 16 members voted to hear the matter en banc. (The other seven had recused themselves.) After granting the motion for hearing en banc, one more judge recused herself, leaving the court one judge short of a quorum. Instead of reinstituting the panel decision, five of the remaining eight "eligible" judges applied local rules and voted to vacate the appeal altogether, without reaching the merits, and to reinstate the district court's dismissal. In dismissing the case, the reconstituted panel wrote:

In sum, a court without a quorum cannot conduct judicial business. This court has no quorum. This court declares that because it has no quorum it cannot conduct judicial business with respect to this appeal. This court, lacking a quorum, certainly has no authority to disregard or to rewrite the established rules of this court. There is no rule that gives this court authority to reinstate the panel opinion, which has been vacated. Consequently, there is no opinion or judgment in this case upon which any mandate may issue. Because neither this en banc court, nor the panel, can conduct further judicial business in this appeal, the Clerk is directed to dismiss the appeal.

Id. at 1055. Three judges strongly disagreed. Judge Dennis, for one, wrote in dissent:

I respectfully dissent from the decision by the majority of this en banc court to refuse to hear oral argument or to decide this appeal on its merits, but to take the shockingly unwarranted actions of ruling that the panel decision has been irrevocably vacated and dismissing the appeal without adjudicating its merits. The majority's decision to declare that we no longer have a quorum, and to take the drastic action of dismissing the appeal without hearing its merits, but with the intention of reinstating the district court's judgment, is manifestly contrary to law and Supreme Court precedents. The majority's action is deeply lamentable because it was forewarned of the reasons militating against its erroneous rush to judgment by the parties' letter briefs and by internal memoranda. If the five-judge en banc majority's

precipitous summary dismissal of the appeal is not corrected, it will cause the sixteen-active judge body of this United States Court of Appeals to default on its absolute duty to hear and decide an appeal of right properly taken from a final district court judgment.

Id. at 1056 (Dennis, J., dissenting).

In late August 2010, plaintiffs filed a writ of mandamus, asking the Supreme Court to direct the Fifth Circuit to reinstate the panel's unanimous decision that the case is justiciable. *In re Ned Comer*, Pet'rs' Writ of Mandamus, Civ. Action No. 10-294.

3. *Native Village of Kivalina v. ExxonMobil*

In 2008, the city of Kivalina and the Alaska Native Village of Kivalina—a federally recognized tribe (collectively, Kivalina)—brought a federal lawsuit against a dozen petroleum refining, energy producing, and coal extracting companies (companies). *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009). Kivalina claims that the companies' legacy and ongoing greenhouse gas emissions cause and contribute to climate change that is causing Kivalina to melt into the Arctic Ocean, and it seeks to recover the estimated \$400 million it will cost to relocate the community.

Adding to those that have found tort-based climate cases nonjusticiable under the doctrine, a federal district court in *Native Village of Kivalina v. ExxonMobil Corp.* held that “neither Plaintiffs nor AEP offers any guidance as to precisely what judicially discoverable and manageable standards are to be employed in resolving the claims at issue . . . [other] cases do not provide guidance that would enable the Court to reach a resolution of this case in any ‘reasoned’ manner.” *Id.* at 876. *Native Village of Kivalina* is currently before the U.S. Court of Appeals for the Ninth Circuit. Appellant's Opening Brief, *Native Vill. of Kivalina v. ExxonMobil Corp.*, No. 09-17490 (9th Cir. 2010).

Discussion

These cases make for strange bedfellows. “Strict textualists,” for example, might question the basis for

the political question doctrine to stem judicial review under Article III, while “originalists” might call the Second Circuit's ruling “activist.” On the other hand, “activists” might describe a result to overturn the Second Circuit's ruling. States' rights advocates might be inclined to uphold the states' lawsuit, except that this is an environmental case involving what some might consider to be progressive state action that often falls when brought before the Supreme Court. And those on the bench who have been skeptical of federal authority in environmental issues might paradoxically find that EPA's recent activities to regulate greenhouse gas emissions displaces the common law.

Prognostication is a dangerous business, particularly given the amalgam of standing, political question doctrine, supremacy clause, separation of powers, congressional authority, and federalism issues that these cases present, not to mention the prominent role big business and the fact that climate change is the defining issue of our day. In addition, the Supreme Court has displayed a recent penchant for reversing controversial circuit court decisions in environmental cases, particularly out of the Second and Ninth Circuits. Yet once again, decisions in these cases, particularly regarding the applicability of the political question doctrine, could boil down to where Justice Kennedy stands.

One thing is certain: these cases fit none of the Justices' ideological templates to a “T.” With all of that in mind, *Connecticut v. AEP* could come out this way:

To uphold: Ginsberg, Breyer, Kagen

To reverse: Scalia, Thomas, Alito, Roberts

Wildcard: Kennedy

If Kennedy votes to uphold, that would mean a 4-4 deadlock, which effectively would uphold the Second Circuit's ruling. However, given Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715, 759–88 (2006), anything is possible, including that a concurring opinion by Kennedy could be paramount.

In contrast, a 5-3 vote would effectively put a lid on federal common law responses to climate change. On the other hand, the Court could decide the case on constitutional or prudential standing ground, or under

the displacement doctrine, thereby avoiding the political question doctrine issue in the case. There is some history to the Court avoiding the issue as applied to greenhouse gas emissions. In *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007), the Supreme Court declined to engage arguments seemingly steeped in the political question doctrine in holding that the federal Clean Air Act, 42 U.S.C. §§ 7401–7671q, gives the EPA authority to regulate greenhouse gas emissions from new motor vehicles, which might suggest a modulated outcome.

Conclusion

Domestic litigation developments regarding climate will resonate across the spectrum of a broad array of federal administrative efforts to regulate greenhouse gas emissions, at least ones that survive current congressional efforts at legislative intervention or defunding. For example, on Friday, December 10, in the consolidated case of *Coalition for Responsible Regulation, Inc., et al. v. EPA*, the U.S. Court of Appeals for the D.C. Circuit denied all the pending motions to stay EPA’s regulations of greenhouse gases, some of which were scheduled to take effect on January 2, 2011. The EPA’s rule requires new and modified sources already required to control emissions of other air pollutants under the federal Clean Air Act to control greenhouse gas emissions for six months. After the six-month period, new sources with emissions exceeding 100,000 tons a year and modified existing sources with emissions of more than 75,000 tons per year must control emissions. Some motions challenged EPA’s authority to regulate industrial greenhouse gas emissions. Others challenged EPA’s ability to exempt smaller greenhouse gas emitters under the Clean Air Act. Four conservation groups petitioned to intervene in the case to defend the EPA’s decision not to exempt emissions from biomass energy activities. The per curiam order by Judges Ginsburg, Tatel, and Brown declared that the petitioners (several industry groups and states opposed to climate regulation) “have not shown that the harms they allege are ‘certain,’ rather than speculative, or that the ‘alleged harm[s] will directly result from the action[s] which the movant[s] seeks to enjoin.’” *Coalition for Responsible Regulation, Inc. v. EPA*, 2010 U.S. App. LEXIS 26980, 8 (D.C. Cir. Dec. 10, 2010).

However, the incoming 112th Congress has made blocking EPA action on climate a priority, which informs the political question, preemption, and displacement issues discussed above.

Whatever the Court decides in *AEP v. Connecticut* is sure to rock the foundation of climate law and policy for many years—perhaps generations—to come.

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