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A Political Question: Public Nuisance, Climate Change and the Courts

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Far from an “ordinary tort suit,” climate change public nuisance cases frame wholly new claims in which plaintiffs arbitrarily choose a comparatively tiny group of defendants, exceeding the legitimate scope of the judiciary in resolving disputes. The Supreme Court will take up this issue in the American Electric Power case this spring.

Robert Browning eloquently characterized the irresistible human impulse to reach beyond defined boundaries to achieve ambitious goals: “Ah, but a man’s reach should exceed his grasp, or what’s a heaven for,” the poet wrote. As a philosophical aspiration, Browning’s idealism may be admirable — but as a jurisprudential principle, it has serious limitations. For example, the role of civil courts in our society is to decide specific controversies framed by private disputes using existing standards, not to develop ad hoc rules to reconcile policy differences. If courts reach outside their defined boundaries they risk not only exceeding their grasp, but also losing their constitutional foothold. Addressing such “political questions” has historically been beyond the reach of courts, at the insistence of the judiciary itself, although the law has evolved over the centuries and remains fluid.

When it comes to climate change regulation, one of the great discussions of our day is whether the political branches of government or the judiciary should lead the way. Is it appropriate or wise to use the crucible of the courtroom to forge standards regarding what emission levels are, and are not, acceptable? In other words, is the use of tort litigation in this context a legitimate jurisprudential exercise, or does the judiciary overstep its bounds by reaching impermissibly into the political sphere?

Although the common law originated within the judiciary, society has increasingly imposed legislative and regulatory policies to guide and regulate both the citizenry and the businesses they create. Yet, over the last few decades, private citizens, cities, counties, states, and other public authorities have increasingly asked courts (as opposed to the legislature or executive) to solve large societal problems by characterizing problems as “public nuisances.”

The tort of public nuisance is the claim du jour because it is based on vague terms that allow it to be molded and shaped by the lawyers wielding it as a sword. In “Nuisance Without Fault,” the reporter for the Restatement (Second) of Torts, William Prosser, described the common law of nuisance as an “impenetrable jungle”; a “legal garbage can” full of “vagueness, uncertainty, and confusion.” And in 1992’s Supreme Court decision in Lucas v. South Carolina Coastal Council, Justice Harry Blackmun stated that in that case, “One searches in vain . . . for anything resembling a principle.” Yet, public nuisance does have a history of use in resolving pollution disputes, including cross-border pollution controversies.

The public nuisance cases of yesterday, however, are factually different from the climate change cases being brought today. Historically, pollution-based public nuisance cases were always contained within well-defined geographic borders. The alleged wrongful conduct and harm was localized...
and the full range of defendants and plaintiffs were either known or could be identified. Global climate change, by contrast, is seemingly boundless; it is caused by a universal and unlimited range of actors and events numbering in the billions, and starting more than 150 years ago.

To determine whether the defendants are liable for creating a public nuisance, a court has to determine both that a defendant has “unreasonably interfered” with a “public right” in a material way and that the defendant’s interference was “substantial,” objectionable to the reasonable man or woman. Ordinarily, courts could look to federal, state, or local legislation, regulations, and ordinances to determine what society has defined as unreasonable activities. But that is not true with respect to climate change because the political branches are still debating what is, and is not, an acceptable level of greenhouse gas emissions.

In 1962’s Baker v. Carr and again in 2004’s Vieth v. Jubelirer, the Supreme Court held that the judiciary should not entertain a dispute that lacks, according to the latter, “judicially discoverable and manageable standards for resolving it” because “judicial action must be governed by standard, by rule,” and the courts’ pronouncements “must be principled, rational, and based upon reasoned distinctions.” This language requires courts to have the technical and scientific expertise necessary to create standards and rules. At this time, however, courts lack the resources and tools to investigate, assess, and promulgate universal standards for resolving climate change cases — there are no existing standards latent in the common law or promulgated by the legislature or executive.

Have the political branches already displaced federal common law? When no standards presently exist to assess or measure responsibility, respect for the political spheres is critical and should not be overlooked or intentionally ignored. This is especially true where Congress, through the Clean Air Act, specifically delegated authority to the Environmental Protection Agency to regulate air pollution.

In the landmark 2007 case Massachusetts v. EPA, the Supreme Court found that greenhouse gases may be “air pollutants” under the broad language of the CAA. Following that decision, the agency found that greenhouse gas emissions “en-danger public health and welfare,” the standard in the act, and should be regulated. EPA has since turned to actively promulgating rules necessary to establish a program to regulate greenhouse gases.

While Congress may not have entirely preempted the field of emissions regulation, given EPA’s regulatory efforts, climate change public nuisance suits may be “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” according to 1987’s International Paper Co. v. Ouellette. In such situations, the Court has admonished against tolerating “suits that have the potential to undermine this regulatory structure.” The Obama administration recently agreed. Taking the official position that courts are inappropriate forums to address the complex issues raised by global warming, the Tennessee Valley Authority filed a brief in support of petitioners in the Second Circuit’s 2010 case American Electric Power Co. v. Connecticut, which is now the first climate change public nuisance suit to reach the Supreme Court; it will be heard later this spring.

As noted in Turner Broadcasting System Inc. v. Federal Communications Commission, decided in 1994, because the political branches can consider all pertinent issues in their entirety, “as an institution, . . . Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon [complex and dynamic issues],” resulting in policy choices that strike fair and effective balances. Indeed, according to Helvering v. Davis (1937), when Congress is confronted with a national problem, it does not just “improvise a judgment”; instead it holds hearings to gather “a great mass of evidence,” considers the problem from many perspectives, and ultimately supports “the policy which finds expression in the act.”

Moreover, in contrast to courts, which lose jurisdiction upon rendition of final judgment, political branches have continuing authority to revisit statutes and rules to modify or tailor their provisions. When the judiciary acts, however, it needs to “identify a public source of policy outside the court itself, if the decision is to be judicial rather than legislative,” explains author Hans A. Linde in a 1994 law review article titled “Courts and Torts: Public Policy Without Public Politics?” Linde further states that when courts bypass the political branches of government to implement their own common law solutions, the judiciary declares policy unilaterally and acts as the “will of the people.”
Courts and juries play an enormously important role in our system of government, but they are not a substitute for decisions by democratically elected representatives. As the Fourth Circuit recently observed in *North Carolina v. TVA*, “We doubt seriously that Congress thought that a judge holding a 12-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider.” For these reasons, it is crucial that courts respect the strengths of the rulemaking processes in which Congress placed its imprimatur.

In the public nuisance context, these considerations call for judicial deference, not common law policymaking. Given the planetary scope of the climate change problem, the depth of the inquiries needed to develop fair standards for its resolution, the comparative resources available to the judiciary and the political branches, and the extreme difficulty, if not impossibility, of fair adjudication, the primacy of political solutions is apparent. Indeed, as Professor Laurence H. Tribe and two co-authors recently wrote in “Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine,” published by the Washington Legal Foundation, “Whatever one’s position in the . . . debate over the extent or . . . reality of anthropogenic climate change, one thing is clear: legislators, armed with the best economic and scientific analysis, and with the capability of binding or at least strongly incentivizing, all involved parties, are the only ones constitutionally entitled to fight that battle.”

The Second Circuit’s *Connecticut v. American Electric Power Co.* decision trivializes the significance and scope of climate change by proclaiming it to be an “ordinary tort suit” — no more complex than the localized discharge of raw sewage into a river. Historically, public nuisance cases (including those involving interstate issues) have been contained within well-defined geographic borders and each precedent the *AEP* court cited relied upon that tradition. This is evidenced recently in 2009’s *Native Village of Kivalina v. ExxonMobil Corp.*, in which the district court stated, “The common thread running through each of those cases is that they involved a discrete number of ‘polluters’ that were identified as causing a specific injury to a specific area.” Far from an “ordinary tort suit,” climate change public nuisance cases frame wholly new claims in which plaintiffs arbitrarily train their magnifying glass on a comparatively tiny group of defendants.

Climate change allegations are plainly extraordinary — and labeling them otherwise is not a helpful exercise. The judiciary has no experience in dealing with a global phenomenon resulting from billions of potential plaintiffs, very few of which are subject to the jurisdiction of American courts. The courts’ past experience provides no guidance for determining what standards and rules should be applied, and given climate change’s extraordinary causal chain, it is difficult to see how ad hoc common law decisions will lead to “judicially discoverable and manageable standards” that will guide courts to decisions that are “principled, rational, and based upon reasoned distinctions.”

Simply stated, the immeasurable scope of the controversy matters. Using public nuisance to redress global climate change far exceeds the tort’s common law boundaries, and while venturing beyond those fences may be intellectually adventurous, there are no standards or rules that guarantee that such explorations will result in justice. As Antonin Scalia stated in *Vieth v. Jubelirer*, the judicial power created by the Constitution “is not whatever judges choose to do.” Indeed, the Supreme Court has already warned in *Massachusetts* that it has “neither the expertise nor the authority” to evaluate the many policy judgments involved in climate change issues. Such a standardless exercise is not jurisprudential. As stated in *In re Fibreboard Corp.*, the proceeding requested by plaintiffs may be “called a trial, but it is not.”

Using public nuisance as an aggregative tort creates “standardless” liability that should be barred by the political question doctrine. Although, the *AEP* court claimed its holding was consistent with the *Restatement (Second) of Torts*, it failed to heed author Dean Prosser’s stern warning: “If a defendant’s conduct . . . does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard.” Prosser’s concerns were recently reinforced by Cornell law school professor James A. Henderson, one of the reporters for the *Third Restatement*. According to Professor Henderson, these new tort theories are not lawless simply because they are non-traditional, or court-made, or because the financial stakes are high. Instead, “the lawlessness of these aggregative torts inheres in the extent to which they combine sweeping, social-en-
gineering perspectives with vague, open-ended legal standards for determining liability and measuring recovery.” If the Court allows this controversy to proceed, it will be “empower[ing] judges and juries to exercise regulatory power at the macro-economic level that even the most aggressive administrative agencies could never hope to possess. In exercising these extraordinary regulatory powers via tort litigation, courts (including juries) exceed the legitimate limits of both their authority and their competence.”

In addition, the lack of action by the political branches does not empower common law creativity. Contrary to the Second Circuit’s claims, legislative and regulatory silence are not dispositive of whether courts are competent to decide climate change controversies. Indeed, there has been “a longstanding resistance, as a matter of law, to the idea that legislative inaction or silence, filtered through a judicial stethoscope, can be made to sound out changes in the law’s lyrics — altering the prevailing patterns of rights, powers, or privileges that collectively constitute the message of our laws,” wrote Laurence H. Tribe in his law review article “Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence.” More pointed — and remarkably similar to the concerns of Dean Prosser and Professor Henderson — is Justice Felix Frankfurter’s warning in 1940’s Helvering v. Hallock that “we walk on quicksand when we try to find in the absence of . . . legislation a controlling legal principle.” The absence of action by the political branches does not empower common law adventures.

Indeed, the Second Circuit’s standing analysis conflicts with the substantive law of public nuisance and equitable maxims. In deciding that the plaintiffs in the AEP case had standing, the appeals court held that a plaintiff need only claim that its nuisance-related injuries amount to at least an “identifiable trifle” involving “recreational” or “esthetic interests.” In so holding, the court apparently grafted the standing requirements for statutory citizen suits and regulatory challenges to agency actions onto the common law tort of public nuisance. Common law public nuisance, however, has never justified the abatement of “trifling” or insignificant conditions that do not, standing alone, substantially disrupt, interfere, impede, or impair rights held collectively by citizens. Surely standing to pursue a claim cannot be justified by allegations that fail to conform to the elements of the underlying tort.

Under the Second Circuit’s reasoning, it is difficult to imagine anyone who lacks standing to file nuisance claims regarding greenhouse gas emissions.

To show standing in public nuisance cases, at a minimum, courts should also require claimants to allege that the substantial interference can be meaningfully abated, not just nominally “reduced.” In the absence of such a showing, any “redress” ordered by the court will be a hollow remedy where the ultimate “relief” is merely symbolic, not efficacious. As Justice Thurgood Marshall stated in 1971’s New York Times Co. v. United States: “It is a traditional axiom of equity that a court of equity will not do a useless thing.” Given the global scope of the alleged climate change public nuisance, any injunctive relief ultimately granted in AEP will amount to no more than an idle symbolic gesture.

f, as Justice Oliver Wendell Holmes counseled in 1917’s Southern Pacific Co. v. Jensen, the development of the common law should be “molar and molecular,” the transmutation of “public nuisance” concepts to address global climate change requires more rumination and digestion than the judiciary alone can prudently provide. Justice Benjamin Cardozo echoed Holmes’s analogy when he stated that courts make law only within the “gaps” and “open spaces of the law” in his 1921 book of lectures The Nature of the Judicial Process.

Advocates who tout public nuisance litigation as a universal panacea should pay careful attention to the “rumination” analogy. Despite the tort’s ravenous reputation as a potential “monster” capable of devouring time-honored legal precedents in a single gulp, that appetite is constrained by the common law’s tendencies to move in a “molar and molecular” fashion — to chew thoroughly — and then to swallow, if at all, only small bits at a time. Under such circumstances, the limits of judicial competency suggest that prudence and forbearance, rather than adventure, is the most principled response.

Although the poet’s imagination may dream of leaping to seize an otherwise inaccessible prize, wise jurists know that the common law progresses in a measured series of carefully considered steps — each firmly grounded on traditional principles. Departing from that path, as climate plaintiffs suggest, to blaze a trail through uncharted and unpredictable territory is an adventure best entrusted to politicians. •