

Common Law Judges Must Act On Global Warming

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We all know that we have to take action now on global warming. As private individuals, we are beginning to do things like installing photovoltaic panels at our homes and businesses, switching to Priuses and bicycles, and buying local. Our governments are edging forward with steps including a revised Kyoto Protocol, California's Global Warming Solutions Act of 2006 and the America's Climate Security Act just introduced into the U.S. Senate by Senators Lieberman and Warner.

But, one might ask, what has become of that other great engine of American social transformation, the common law? Unfortunately, as the recent case of *California v. General Motors et al.* proves yet again, when it comes to the environment, our common law judges are missing in action and can best be seen running for the hills. The disengagement by these judges not only forsakes their historical role in American system of law but, when combined with the Supreme Court's takings jurisprudence, is leading American environmental law into a profound and corrosive gridlock.

In *California v. General Motors et al.*, California's Attorney General sued six automakers for money damages, alleging that the carbon emissions from their cars, which constitute 20% of U.S. greenhouse gas emissions and 30% of California emissions, have created a common law nuisance. The case was brought in federal court because it implicates pollution emanating from other states, and therefore raises an issue of federal rather than state common law. It squarely charges automakers with substantial liability for the impacts of global warming on California; there could hardly be a more important social issue today.

On September 17, 2007, District Judge Martin Jenkins took his first major step in handling this important common law matter: he dismissed it. He accepted the automakers' unlikely argument that the court should not get involved in global warming because it raises "political questions" that the Constitution assigns exclusively to the political branches of government. He wrote that adjudication of California's claim would require him to balance environmental destruction with the interest in advancing industrial development, and that such balancing of competing interests is the job of the political branches of government, not courts. This decision duplicated the 2005 dismissal by the Southern District of New York of another global warming case, *Connecticut v. American Electric Power Co.*, a federal common law nuisance action in which six states sued electric utilities seeking a phased abatement of their ongoing carbon emissions. These cases, both now on appeal, hearken back to the famous 1970 decision *Boomer v. Atlantic*

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Cement Co., in which the high court of the State of New York asserted that controlling air pollution is the responsibility of legislatures and not courts at common law.

There was a time when the common law judiciary embraced the ongoing duty to resolve conflicts between environment and economy. Throughout most of our history the common law has been the nation's major source of laws affecting property, steadily evolving through resolution of private disputes. Legal historians have shown that property rights have never been fixed. Instead, they have been continuously modified through the centuries as our circumstances and social objectives have changed.

Our current structure of property rights arose during the nineteenth century when judges invented it to enable the industrialization of the United States. The judges explicitly concluded that the public welfare was no longer best served by the ancient rule that landowners must "use their own so as not to harm another." They came to view the net public benefit as best served by economic growth even if it caused some collateral damage. Thus, they sought to encourage economic growth by shielding industry from the liability imposed by the old rules, and began instead to impose liability only where defendants were somehow "at fault." As they overthrew the old law and invented the modern fault-based liability doctrines of negligence and nuisance, the most important step they took was to switch the burden of proof onto plaintiffs, who now must demonstrate that defendants' acts are "unreasonable" to make them liable for the damage they cause. This modern test requires plaintiffs to prove that defendants' could have taken steps to prevent the damage that were "cost-effective" (meaning steps whose benefits outweigh their costs), otherwise the damage is deemed "not unreasonable" and is allowed to lie where it falls, an acceptable by-product of the social benefits of economic activity.

This profound redefinition of property rights, rooted in social policy, effectively unleashed the Industrial Revolution as the judges intended. It also permitted the ecological destruction we now face. The common law forces courts to evaluate the fault-based "unreasonableness" of each increment of damage on a case-by-case basis, determining whether each increment taken alone is cost-benefit justified. It implicitly assumes not only that the economy can grow forever but also that the total scale of the accompanying cost-benefit-justified damage to the Earth can grow forever as well. The modern common law, focusing on the fault of individual actions, contains no means of constraining the total scale of the ecological damage we do. It was invented when the world was viewed as an "empty world" with boundless pollution sinks and resources, when the atmosphere seemed infinite and there always was another forest, another river, another fishery to exploit.

But twenty-first century realities have outrun this nineteenth century view of the world. In *California v. General Motors et al.*, Judge Jenkins recognized that the allegations before him highlighted the limitations in the common law. He wrote that he had no guidance as to how to determine what was an unreasonable contribution to global warming or how to apportion costs among multiple sources of damage. But the answer is that the current rules of the common law are not inevitable or required by logic or somehow fixed for all time. It is the job of judges to adapt the law to current

circumstances seeking always to promote the public welfare. We need them to invent new rules that respond to the central fact of humanity's modern circumstances: the Earth has a finite and limited capacity to sustain ecological damage, and to exceed this ecologically sustainable limit is to diminish the public welfare. It seems plain that the law should adopt a new presumption: that we now must avoid environmental damage, including carbon emissions, whenever and wherever possible.

The federal government has stepped in with modern environmental statutes. Unfortunately, since these statutes were patterned after the common law, they harbor, for the most part, the common law's core structure. They implicitly adopt the presumption that favors economic activity and then, especially as administered under President Clinton's Executive Order No. 12866, require government to develop regulations that it can prove are "reasonable" (i.e., provide benefits that outweigh costs). Like the common law, these statutes force environmental problems to be addressed medium-by-medium and case-by-case and do not attempt to constrain cumulative ecological damage. We all know that the federal statutes are not going to preserve the Earth, and these are the fundamental reasons why.

To be sure, some federal laws adopt environmental or health objectives, including the wetland protection and water quality goals of the Clean Water Act, the health-based standards of the Clean Air Act and provisions of the Food Quality Protection Act and the Endangered Species Act. Some states and local communities are going further as well, attempting to ban development in ecologically sensitive areas and adopting new approaches such as the precautionary principle. These laws are important steps forward, and the bitter criticism that industry reserves for them reflects their divergence from the balance of interests struck long ago by the common law.

The divergence between the common law and more progressive steps by government is, however, corrosive for our system of government through the rule of law. It encourages property owners to view environmental laws as invasions of their common law rights, as efforts by government to take their property and give it to the public. It allows property rights conflicts to be cast as a struggle of private individuals for freedom from a repressive and authoritarian government rather than what they are -- a continuing democratic realignment of property rights to promote the public welfare. It fuels reactions like Oregon's Proposition 37 and calls by property owners for legislatures everywhere to adhere to the rights embodied in the common law or else provide compensation.

The Supreme Court stoked these fires with the landmark 1992 takings case of *Lucas v. South Carolina Coastal Council*. In that case, a landowner claimed that South Carolina worked a taking and owed him compensation when its law to preserve fragile beachfront barred him from building houses on his land. Justice Scalia's opinion for the 6-3 Court agreed, holding that when legislation denies an owner of "all economically beneficial or productive use of land," the Fifth Amendment requires compensation if the legislation creates more restrictions than "background principles of the State's law of property and nuisance already place upon land ownership."

So it came to be that the current version of the common law, developed to promote the Industrial Revolution, is enshrined as the source of legitimate "background principles" of property rights, the touchstone against which progressive environmental legislation must be measured (at least where it eliminates economic value). One might find dubious, as

did the *Lucas* minority, this disfavoring of legislative expressions of the democratic will. After all, the Constitution nowhere defines what is and is not property, and the ultimate source of power to define property rights, including the power to overrule the common law, resides in the people, the democratic polity. But *Lucas* is the law of the land, and those of us who urge legislatures to adopt more progressive, ecologically-based laws know just how deeply they fear working a takings that, like South Carolina, they cannot afford.

The Supreme Court's jurisprudence is impeding legislatures from creating a structure of property rights that diverges substantially from the common law. This makes it more important, not less, for our judges to confront ecological crises in the disputes that come before them at common law. The federal common law cases now on appeal in the Ninth Circuit and the Second Circuit represent profound efforts to prompt common law judges to step up and grapple with global warming both on its own merits and also as a paradigm for grappling with the problem of cumulative ecological impacts writ large. We all, including future generations, should salute the plaintiff States and environmental groups for their efforts and wish them well. For we need the common law to join with individuals and the other branches of government, and take action now.