SHIFTING TIDES: MOVING CLIMATE CHANGE LITIGATION BEYOND BUSINESS AS USUAL

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In *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual*,[1] Dave Markell and J.B. Ruhl fill a fundamental gap in our understanding of the quickly evolving field of climate change litigation. Seemingly rejecting (or at least debunking) the myth that courts serve as the drivers of climate change policy, they conclude that courts have displayed restraint and avoided charting new jurisprudential paths.[2] In fact, they call this "business as usual."[3] As their title indicates, there are other conceivable outcomes of climate litigation. This Response accepts the empirical findings of their study, which includes all climate related cases through 2010, but suggests developments in the intervening years reveal new patterns. While some subsequent litigation, specifically in the federal courts, has reinforced the "business as usual" theme, post-2010 climate change litigation has shifted into a new phase that emphasizes discrete changes and promotes a "prodding and pleading" function through state court litigation.

THE THREE PHASES OF CLIMATE CHANGE LITIGATION

Climate change litigation covers an immense legal terrain.[4] Increasingly, litigation has provided an attractive vehicle for transforming climate policy while "legislative and executive attention lags."[5] A primary function of environmental litigation is to prod and plead[6] policy change. Climate litigation has transformed the substantive landscape in significant ways in a fairly short period of time. This has occurred during three discrete phases. Markell and Ruhl's study comprehensively reviews all cases through the second phase, since that

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1. Dave Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual*, 64 FLA. L. REV. 15 (2012).

2. *Id.* at 15.

3. *Id.*

4. WILLIAM C.G. BURNS & HARI M. OSOFSKY, ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 1 (William C.G. Burns & Hari M. Osofsky eds., 2009).

5. CINNAMON PIÑON CARLARNE, CLIMATE CHANGE LAW AND POLICY: EU AND US APPROACHES 99 (Oxford University Press 2010).

6. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 355 (2011) (Using "climate change nuisance suits to consider the potential for common law tort adjudication to serve a prodding and pleading function.").

time; however, there have been significant advancements in the climate litigation arena.

Phase I: Anything Goes Approach

The initial phase of climate change litigation included a flurry of various causes of action and petitions meant to influence political change. As Markell and Ruhl note, plaintiffs claims ran the gamut—statutory challenges, administrate proceedings, and tort actions[7]—seeking to address the inadequacy of political responses to climate change. While much of this litigation continues to sit on the dockets of federal and state courts, major developments did occur.[8] The apex was *Massachusetts v. EPA*—with the Court pushing the EPA to regulate greenhouse gases.[9] The decision was heralded as a victory for climate advocates. It also shaped the path of future litigation.

This occurred in two ways. First, the Court's standing analysis—focused extensively on the harm to Massachusetts as a state—narrowed the scope of potential plaintiffs. Importantly, federal courts have relied upon standing as a barrier to litigation post-*Massachusetts*."[10] This makes it harder for individual plaintiffs to sustain climate causes of action. Second, the EPA was tasked with determining whether to regulate greenhouse gases. This judicial prod produced a flurry of agency-driven changes to address climate change.[11] Recently, the D.C.

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7. Markell & Ruhl, *supra* note 1, at 30–32.

8. Justin R. Pidot, *Global Warming in the Courts: A Litigation Update*, GEO. ENVTL. L. & POL'Y INST. (March 5, 2007), http://www.gelpi.org/gelpi/current_research/documents/GWL_Update_3.13.07.pdf.

9. 549 U.S. 497 (2007).

10. *See* Melissa Waver, *Where Standing Closes a Door, May Intervention Open a Window? Article III, Rule 24(A), and Climate Change Solutions*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10946 (2012).

11. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I) (endangerment finding); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed.Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600, and 49 C.F.R. pts. 531, 533, 536, 537, 538) (tailpipe Rule); Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 40, 51, 70, 71) (timing or triggering Rule); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) (tailoring Rule); 2017–2025 Model Year Light-Duty Vehicle GHG Emissions and CAFE Standards: Supplemental Notice of Intent, 76 Fed.Reg. 48,758 (Aug. 9, 2011) (to be codified at 40 C.F.R. pts. 85, 86, 600 and 49 C.F.R. 531, 533) (emission standards); Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011) (to be codified at scattered sections of 40 C.F.R. and 49 C.F.R. pts. 523, 534, 535) (heavy truck rule).

Circuit affirmed the legality of many of these programs.[12] While these changes represent the success of litigation, encouraging agency action, they also delimit future federal litigation.[13]

Phase II: Curtailing Federal Common Law Claims

The second phase of climate change litigation was replete with lessons for future litigants—unfortunately, most of them were cautionary. While, litigation prompted the EPA to undertake significant measures to address climate change, the courthouse doors did not swing open. Rather, as Markell and Ruhl observed, the expected wave of litigation already landed.[14]

As an example of the ebbing tide of litigation, tort-based claims have been curtailed.[15] First, the Supreme Court expressly held that states are unique litigants[16] and next that Congress delegated the authority to determine permissible carbon emissions from power plants to EPA, displacing federal common law claims.[17] Two recent cases aptly illustrate this development.

First, in *American Electric Power Co. v. Connecticut* (*AEP*),[18] the Supreme Court held that the Clean Air Act (CAA) displaced any federal common law claims against carbon-dioxide emissions.[19] As Professor Hari Osofsky has remarked, "[i]n *AEP*, the Court shape[d] the path of climate change litigation by reinforcing the appropriateness of regulatory actions while limiting federal common law public nuisance ones."[20] Second, in *Native Village of Kivalina v. ExxonMobil Corp.*,[21]

12. *Coal. for Responsible Reg., Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012); (challenging the endangerment finding, tailpipe rule, timing/triggering rule, and tailoring rule); *reh'g en banc denied*, No. 09-1322, 2012 WL 6621785 (D.C. Cir. Dec. 20, 2012).

13. *See infra* note 18.

14. Markell & Ruhl, *supra* note 1, at 71 ("One of the ironies of legal commentary on climate change litigation is that the predicted 'wave' of litigation, if one can call it that, has already hit.").

15. Federal tort-based claims were seen as a viable, in fact essential, means of addressing climate change. *See* David Grossman, *Tort-Based Climate Litigation*, *in* ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 195 (William C.G. Burns & Hari M. Osofsky eds., 2009).

16. Mass. v. EPA, 549 U.S. 497, 518 (2007) ("The cases are not as radical as some may think, and they are part of the new realty of climate change in the courts").

17. *See* Jonathan H. Adler, *A Tale of Two Climate Cases*, 121 YALE L.J. ONLINE 109 (2011), http://yalelawjournal.org/2011/09/13/adler.html.

18. 131 S. Ct. 2527 (2011).

19. *Id.* at 2237 ("[T]he Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.").

20. Hari M. Osofsky, AEP v. Connecticut*'s Implications for the Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101, 102 (2011), http://yalelawjournal.org/2011/09/13/ osofsky.html.

the Ninth Circuit held that the CAA displaced public nuisance claims.[22] Collectively, *AEP* and *Kivalina* "might spell the end of climate change tort litigation in the federal courts."[23]

Phase III: *New Directions—Atmospheric Trust Litigation*

This is not the end of the story. Responding to federal court setbacks, plaintiffs began advancing various claims in state courts. Recent claims have focused on atmospheric trust litigation.[24] The basic premise is that "all governments hold natural resources in trust for their citizens and bear the fiduciary obligation to protect such resources for future generations."[25] While this litigation has stalled in federal court,[26] there is reason to believe it will be successful in state court.[27] States emerged as early leaders in the climate change context.[28] Moreover, "[m]ost state constitutions contain provisions expressly addressing natural resources and the environment."[29]

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21. 696 F.3d 849 (9th Cir. 2012), *petition for cert. filed*, (U.S. Feb. 25, 2013) (No. 12-1072).

22. *Id.* at 858 (extending the rule established in *AEP*).

23. Quin M. Sorenson, *Native Village of Kivalina v. Exxonmobil Corp.: The End of "Climate Change" Tort Litigation?*, ABA TRENDS, 2013, at 1.

24. The Atmospheric trust is simply a specific application of the Public trust doctrine—a legal mechanism to require the government to protect natural resources essential for the public—that views our shared atmosphere as vital to human health and well-being. *See* Mary Christina Wood, *Atmospheric Trust Litigation*, *in* ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 100–01 (William C.G. Burns & Hari M. Osofsky eds., 2009).

25. *Id.* at 99.

26. Alec L. v. Jackson, 863 F.Supp.2d 11, (D.D.C. 2012) (holding that even if public trust doctrine was a federal common law claim, it would have been displaced by the CAA as the Court held in *AEP*).

27. The public trust doctrine is a matter of state, not federal concern. *See* PPL Montana, LLC v. Montana, 565 U.S. ___, 132 S.Ct. 1215, 1234 (2012). Additionally, the Court in *AEP* left open whether the CAA displaced other state common law claims. *See Am. Elec. Power Co.*, 131 S. Ct. at 2540.

28. *See* Cinnamon Carlarne, *Notes from A Climate Change Pressure-Cooker: Sub-Federal Attempts at Transformation Meet National Resistance in the USA*, 40 CONN. L. REV. 1351, 1367 (2008) ("[S]tates are beginning to take independent and collaborative action to address climate change" which includes regional climate change initiatives and encouraging the development renewable energy sources); Patrick Parenteau, *Lead, Follow, or Get Out of the Way: The States Tackle Climate Change with Little Help from Washington*, 40 CONN. L. REV. 1453, 1453 (2008) ("Lacking leadership at the national level, the states have stepped into the breach on climate change.").

29. Bret Adams, et al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73, 74 (2002). *See also* RANDY J, HOLLAND, STEPHEN R. MCALLISTER, JEFFREY M. SHAMAN & JEFFREY S. SUTTON, STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 731 (2010); Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157 (2003).

To date, litigation has prompted regulatory change but the Court has limited federal court redressability of climate injuries, making the availability of state constitutional claims all the more important.[30] The recent swath of state court complaints relying on the atmospheric trust doctrine to regulate greenhouse gas emissions are one of the most promising of this new variety of claims.[31] Recent cases give hope to climate advocates. In *Bonser-Lain et al. v. Texas Commission on Environmental Quality*,[32] the court spoke broadly about the atmospheric trust doctrine's scope. Relying upon the Texas Constitution, the court found that the Texas Constitution protected *all* natural resources.[33] Other state courts have permitted similar suits to move beyond the motion to dismiss stage,[34] and claims have been filed across the country.[35] A new variety of climate claims is emerging.

Now, into the third phrase of litigation, common law based-state constitutional claims present an opportunity to keep climate change alive in the courts,[36] while also refocusing on discrete regulatory changes. Thus, as we progress through the third phase of climate litigation, new possibilities are emerging and a renewed focus on state-based claims will prove critical to the success of this next wave of litigation. The tides are shifting.

30. Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 176 (2009) ("In some cases . . . the only way a lawyer can win is through the state constitution.").

31. This is not to say other avenues of litigation are not available. Indeed, the third phase of litigation has refocused on pursuing various claims—a similar strategy as in phase I—with an increased emphasis on state-based claims.

32. Bonser-Lain v. Tex. Comm'n on Envtl. Quality, Cause No. D-1-GN-11-002194 (201st Judicial Dist. Ct. Travis County, Texas, Aug. 2, 2012).

33. *Id.* (including the air and atmosphere). *See* Tex. Const. art. xvi, § 59(a) ("The conservation and development of all of the natural resources of this State . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.").

34. *See, e.g.*, Sanders-Reed v. Martinez, No. D-101-CV-2011-01514 (N.M. Dist. Ct. July 14, 2012).

35. *See* Michael B. Gerrard & J. Cullen Howe, *Climate Change Litigation in the U.S.*, CLIMATE CASE CHARTS, http://www.climatecasechart.com (last updated Mar. 14, 2013) (including Alaska, Arizona, Kansas, Massachusetts, Montana, Oregon, and Washington).

36. *See* Tracy D. Hester, *A New Front Blowing in: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STAN. ENVTL. L.J. 49, 57 (2012) ("These injured rights could include . . . damage to natural resources held in public trust.").