State Common Law of Public Nuisance in the Modern Administrative State

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In recent years, the ancient writ of "public nuisance" has experienced a renaissance in the area of environmental law. Plaintiffs' attorneys, public-interest groups, and state attorneys general have brought public nuisance actions seeking injunctive relief or damages for air pollution and climate change, among other environmental concerns. These actions have targeted in-state and out-of-state sources and addressed local as well as interstate and even global environmental issues.

The variety and breadth of recent environmental public nuisance actions are not surprising, given the ill-defined nature of this tort. The common law of public nuisance arose in twelfth-century England as a criminal writ, brought by a sovereign to protect the exercise of rights common to his subjects. Over the centuries, the criminal writ evolved into a civil cause of action aimed at protecting from "unreasonable interference" rights common to the public.

From its inception, this cause of action was grounded in the sovereign's police powers, for "[t]o regulate and abate nuisances is one of" a state's "ordinary functions" under its police powers. *Nw. Fertilizing Co. v. Village of Hyde Park*, 97 U.S. 659, 667 (1878). Our constitutional system left intact, to the extent not otherwise delegated or prohibited to the states, state police power to enjoin conduct that unreasonably interferes with rights common to the state's citizens. *See Rhode Island v. Massachusetts*, 37 U.S. 657, 720 (1938) (States are "sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes."); U.S. Const. Amend. X ("The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

As a manifestation of a state's preserved police powers, the tort of public nuisance historically provided a cause of action for the state as sovereign to protect public rights of its own citizens, and within its own territory. *Mayor, Alderman and Commonality of NY v. Miln*, 36 U.S. 102, 139 (1837) ("operation of police powers" is "within the territorial limits of the state, and upon persons and things within its jurisdiction."). This was reinforced by the criminal law antecedents of the public nuisance writ, for it is axiomatic that "[t]he Courts of no country execute the penal laws of another." *The Antelope*, 23 U.S. 66, 123 (1825). Reflecting these principles, state statutes have often explicitly provided that a public nuisance must be abated by a process instituted in the name of the state.

Starting in the sixteenth century, the common law recognized a private cause of action for activity that impacts a "public right" (e.g., pollution of a river) but also for activity that causes a harm in which the public does not participate and that is distinct and peculiar to an individual (e.g., damage to a fish hatchery operated on that river). *See* R. Faulk and J. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 952. A public nuisance action brought by a private party who experienced "special damage," however, was concerned with compensating for harm, not enjoining conduct. Even with this evolution in the law of public nuisance, only *the sovereign* can seek to enjoin conduct subject to the sovereign's police powers. *See Bigelow v. Virginia*, 421 U.S. 809, 824 (1975).

What is unreasonable interference with a public right involves a quintessential policy judgment, exercised historically by courts of equity. Even in the modern common law state, as Justice Harlan observed, "the power . . . exists in courts of equity to protect the public against injury." *Mugler v. Kansas*, 123 U.S. 623, 673 (1887). And there lies the modern dilemma.

Before the era of social legislation, courts of equity filled an important void in the social compact with broad authority (albeit exercised with restraint) to protect the public against injury. As the tort of public nuisance evolved over the centuries, the sovereign (i.e., the state) exercised discretion to identify rights to be protected (e.g., unrestricted access to public roads or waterways), and the judiciary sitting in equity balanced competing interests to determine whether the targeted activity "unreasonably interfered" with the public right. In the modern administrative state, those social policy decisions are the province of the political branches of government. As a competing method for making social policy, the tort of public nuisance has evolved into what Justice Blackmun called an "impenetrable jungle" where "one searches in vain . . . for anything resembling a principle." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting). Given the current superstructure of federal and state legislation and regulation, what is the role of "public nuisance" in the modern administrative state?

Federal vs. State Sovereignty

There is a long history of state common law public nuisance actions brought by states in state courts to protect their citizens. The role of federal courts in our constitutional system

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is different from that of state courts. As courts of limited jurisdiction, federal courts do not create or expand causes of action. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778, 783 (4th Cir. 1995) (Federal courts "rule upon state law *as it exists* and do not surmise or suggest its expansion."). Rather, when a state common law cause of action is brought in federal court, the federal court must apply the law of the state that would have applied had the action been filed in state court. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). If the federal court has difficulty discerning the legal principles the state court would apply, it may certify the question to the highest court of the state to ensure that it is correctly applying the state's law. *See, e.g., Lehman Brothers v. Schein*, 416 U.S. 386, 390–91 (1974).

Given that the common law of public nuisance is founded in state police powers, an action in federal court by citizens of one state to address a nuisance activity undertaken in a foreign state by the residents of that other state raises additional questions. Because state common law of public nuisance provides no cause of action to address *interstate* pollution, the Supreme Court in the last century discovered a limited "federal" common law of public nuisance to address interstate pollution at a time when there were no federal laws addressing such interstate concerns. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). As the Court later observed, "[i]f state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 n.7 (1981) (*Milwaukee II*).

Given that the federal common law of interstate pollution was a gap-filling exercise, intended only to provide a remedy for those limited matters not addressed by state common law or by the federal political branches of government, the federal public nuisance cause of action—if it even continues to exist in the modern administrative state—was always narrow. Thus, once Congress speaks to a matter, no gap in the regulatory compact exists, and there is no room for federal common law, i.e., any federal common law that might otherwise exist is "displaced." Given the separation of powers concerns implicated by this regime, there is a presumption *in favor* of displacement. *Matter of Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981). As the Supreme Court observed, "[t]he question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee II*, 451 U.S. at 325–27. As a result, it matters not the detail with which Congress has spoken, nor the state of executive branch implementation, nor the nature of the remedy Congress has provided; once the political branches have spoken on a matter, courts may not use federal common law to make a competing assessment or to provide a supplemental remedy. *Milwaukee II*, 451 U.S. at 315 (A statute need "not address every issue of [an area of law] . . . but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer."; *but see Connecticut v. American Electric Power Co. Inc.*, Nos. 05-5104-CV, et al. (decided Sept. 21, 2009) (even though Congress provided authority in the Clean Air Act (CAA) to regulate greenhouse gases, until that authority is used to the satisfaction of the court, federal common law is not displaced).

This narrow role for federal common law is compelled not only by separation of powers principles, but also by the nature of the public nuisance cause of action itself. As an instrument for making social policy, public nuisance actions should be treated with restraint by the judiciary. As Justice Harlan observed, even before the advent of the modern administrative state, the authority of a federal court sitting in equity to protect the public from injury was one "not frequently exercised." *See Mugler*, 123 U.S. at 673.

Limits Arising from Federal Statutory Law

As a limited, gap-filling exercise, federal common law (to the extent it exists) is readily displaced through action by the federal political branches. Because the Constitution preserves to the states their preexisting police powers, however, state common law is subject to a different analysis.

The federal government regulates extensively in the field of environmental pollution, having enacted comprehensive programs addressing air pollution, water pollution, and solid and hazardous waste management, among others. The decisions of the federal political branches in these enactments should not be subject to second-guessing under the guise of state common law. As the Supreme Court explained in *International Paper v. Ouellette*, the state common law of public nuisance is preempted by a comprehensive federal statutory program (in that case, the Clean Water Act), *unless* specifically preserved by the federal statute. 479 U.S. 481, 499 n. 20 (1987).

In environmental legislation, Congress has been sensitive to the role of states on issues that have traditionally fallen within the scope of state police power. For this reason, federal environmental statutes typically preserve the right of states to regulate sources within their jurisdiction more stringently than provided by federal law. *See, e.g.*, 42 U.S.C. § 7416 (CAA). For these reasons, the preemption issue in environmental law is often one of statutory construction, i.e., whether and to what extent did Congress provide that state common law of public nuisance remains available as a means of making environmental policy?

As an initial matter, an environmental savings clause that preserves state authority to implement or to enforce more stringent state laws cannot create authority that did not otherwise exist. It cannot, therefore, authorize an affected state to impose its common law on sources in a foreign state. After all, "[a] State does not acquire power or supervision over the internal affairs of another state merely because the welfare and health of its own citizens may be affected." *Bigelow*, 421 U.S. at 809, 824. As a result, a statutory provision that preserves the authority of a state to regulate its sources more stringently does nothing to authorize application of a *foreign* state's common law. At most, such a savings clause preserves the police power of the *source* state to regulate sources within its jurisdiction. *Id.* at 492, 497.

Moreover, an environmental savings clause could *not* "preserve" a state common law cause of action for interstate pol-

lution because such an action does not exist. After all, federal common law for interstate pollution arose because there was no state common law cause of action for such pollution: it is a "basic principle of federalism . . . that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

And an environmental savings clause could *not* create a cause of action for one sovereign to enforce a foreign sovereign's public nuisance law. As discussed above, a public nuisance cause of action derives from a state's police power to protect that state's citizens. One sovereign has no authority in our federalist system to exercise another sovereign's police powers. *See Bigelow* at 492, 497.

If federal common law of public nuisance is displaced by modern environmental legislation, and state common law does not provide a public nuisance cause of action for interstate pollution, what then of the Supreme Court's decision in *International Paper?* In that case, landowners in Vermont filed suit against a pulp and paper mill in New York under Vermont common law of nuisance. Consistent with the principles discussed above, the Court in the end disallowed the suit under Vermont common law and merely allowed the source state's (i.e., New York's) more stringent law to apply to its own citizens. *Id.* at 492–97.

An environmental savings provision that allows a state to regulate its own sources more stringently merely preserves that state's common law with respect to sources in that state, to the extent consistent with the federal legislation. Nevertheless, proper application of the savings clause requires close attention to the policies and objectives of the federal legislation. Thus as the Supreme Court observed in *International Paper,* despite a "savings provision" in the Clean Water Act that preserves more stringent state law of the "source State," the Clean Water Act nonetheless preempts a source state's "choice of law" rule to the extent it would lead to application of the affected state's common law. 479 U.S. 481, 494–99 (1987).

For this reason, where Congress has provided a statutory regime for addressing interstate pollution, source state common law (as well as state statutory law) that conflicts with the policies and objectives of that regime is preempted. For example, in the CAA, Congress established national standards (including "national ambient air quality standards" and "prevention of significant deterioration increments") to protect public health and welfare and then required states to adopt requirements for their own sources, eliminating any significant impact in foreign states that would contribute to exceedances of these standards in those other states. 42 U.S.C. § 7410(a)(2). Congress told the Environmental Protection Agency to require revision of these state programs if they proved inadequate, *id.* § 7410(k)(5), and authorized states to enforce these noninterference requirements against foreign states through a specific statutory mechanism. *Id.* § 7426. Imposing a public nuisance policymaking regime on top of this statutory regime for interstate air pollution would interfere with the CAA's policies and objectives.

Limits Arising from State Law

Like the federal political branches, state legislative and executive branches have important policymaking roles. Just as federal common law is readily displaced by action of the federal political branches, state common law should defer to the policymaking role of the state political branches.

State constitutions may address the allocation of policymaking authority among branches of state government. Depending on the state constitution, a state common law cause of action for public nuisance could implicate separation of powers concerns similar to those that exist at the federal level. Such separation of powers concerns should, at the very least, counsel restraint in application of state common law where it threatens to encroach on the powers of the political branches.

Apart from constitutional separation of powers concerns, state statutes often impose limitations on public nuisance actions that reflect the common law antecedents of this tort. For example, state statutes typically limit the parties who can bring such actions to the state and individuals who experience "special damage." State statutes may explicitly preempt public nuisance actions in certain circumstances (e.g., where the cause of action arose after statutory protections were enacted).

Finally, an activity that has been specifically permitted or approved by an elected state official could not logically constitute unreasonable interference with a public right. Reflecting this, state courts and legislatures have repeatedly found that once permitted or approved, an activity cannot be enjoined as a public nuisance. *See, e.g., Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 574 S.E. 2d 48, 53 (N.C. App. 2002) ("Courts will not enjoin as a nuisance an action authorized by valid legislative authority.").

Limits of Public Nuisance in the Modern Administrative State

As can be seen from the foregoing discussion, an overlapping public nuisance regime in the administrative state creates potential for conflict and confusion. In recent cases, the concept of public nuisance has provided a basis for argument over a variety of environmental issues, including how to regulate climate change, *Connecticut v. AEP*; interstate air pollution, *North Carolina v. TVA*, 593 F. Supp. 2d 812 (W.D.N.C. 2009), environmental cleanups, *NJDEP v. ExxonMobil,* 2008 WL 4177038 (N.J. Super. Ct. Aug. 29, 2008); and exposure to airborne contaminants, *Gates v. Rohm and Haas Co.,* 2008 WL 2977867 (E.D. Pa. July 30, 2008).

In these cases, sovereigns have been brought into conflict as they address impacts that extend beyond state boundaries. *See, e.g., North Carolina v. TVA*, 593 F. Supp. 2d 812. Private attorneys general with agendas different from the sovereigns have sought inconsistent regulation, *see, e.g., Comer v. Murphy Oil Co.,* CV 05-0436, (S.D. Miss. Aug. 30, 2007), and have sought to push regulation into a judicial forum that lacks technical expertise for such decisions. All of this makes it harder for regulated entities to understand what the law is.

Because our Constitution preserves state police powers,

state common law will continue to play a role in our federalist system. But where a common law cause of action implicates the policymaking roles and responsibilities of other branches of government, it must be approached with restraint. In this regard, several principles emerge from the common law evolution of public nuisance and our Constitution that help delimit the role of public nuisance in the modern administrative state.

First, actions to enjoin activities as a public nuisance are the prerogative of the state sovereign. While a private party may be entitled to bring a suit to recover damages created by an activity that constitutes a public nuisance *if* that party suffers special injury, it is the sovereign who exercises discretion on behalf of its citizens to pursue activities that unreasonably interfere with the rights of its citizenry in general.

Second, for the reasons discussed above, there is no state common law public nuisance cause of action for interstate air pollution. Federal common law for interstate pollution arose early in the 1900s because state common law did not reach interstate pollution and there was no federal environmental regulation. State common law creates standards of conduct for sources located in the state, not for sources in foreign states.

Third, as an exercise of the sovereign's police power to protect the public health and welfare of its citizens, a public nuisance action exists only for the sovereign whose police powers are at issue and only within that sovereign's jurisdiction. The common law of public nuisance is not a roving mandate for a sovereign to enforce the police powers of any other sovereign or to impose its authority on other sovereigns or their citizens.

Fourth, because states can be anticipated to take their common law into account when fashioning state legislation, careful attention must be afforded to the statutory and regulatory law of the source state in determining the existence and scope of any state public nuisance cause of action.

Fifth, because federal courts have no authority to create or expand causes of actions, federal courts presented with state public nuisance actions should refrain from making policy under the guise of public nuisance. If any doubt exists as to the availability of a public nuisance action under state law, federal courts should abstain, *see, e.g., Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496, 498 (194), or certify to the highest court of the state the question of how to address the interplay of the state's statutory and common law.

Within these bounds, there remains a role for state common law. A sovereign can still seek to enjoin activity in that state that unreasonably interferes with public rights. A sovereign can still invoke the common law of a foreign sovereign, when it suffers special injury due to unreasonable activity (as defined by the foreign sovereign) within the jurisdiction of the other state. And a sovereign can still invoke federal statutory remedies.

Adherence to these principles will maintain state common law of public nuisance within appropriately manageable, reasonably predictable bounds and avoid placing the judiciary in the untenable position of making social policy. If respected, these principles may make the journey through the "impenetrable jungle" of state common law of public nuisance a bit less treacherous.