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Using the Courts to Control Greenhouse Gas Emissions:
Frivolous or Fundamental?

Citizen groups who are concerned about the inactivity at the federal and state levels in controlling greenhouse gas emissions have been trying to use the courts to force some government action. They have had some success, but recently the courts have stepped back from this politically charged issue.

Back in 2007, the U.S. Supreme Court ruled that the U.S. Environmental Protection Agency *did* have the authority to regulate greenhouse gas emissions if EPA found that those emissions endangered public health and safety by contributing to global warming. EPA has since made that endangerment finding and is preparing, much to the displeasure of many in Congress, to regulate greenhouse gas emissions.

More recently, however, efforts to get the courts to order state and federal governments to act to reduce the threat of disruptive and dangerous climate change have found less support in the courts. Much to the relief of political conservatives and climate change deniers, the U.S. Supreme Court unanimously rejected the idea that the courts could or should order states to control greenhouse gases under the English Common Law prohibition against "public nuisances." The Montana Supreme Court also recently rejected allowing a case dealing with greenhouse gas emissions to come directly to the state's highest court on the basis of a claim that greenhouse gas emissions violate a "public trust" that the Montana government has to its citizens. That, too, is a Common Law concept.

Some have argued that that these were frivolous suits brought on the basis of quirky interpretations of the law that would upset the separation of powers in the United States by having the courts dictate environmental policy to the executive and legislative branches of government. But things are more complicated than that. Both of these English Common Law concepts, public nuisance and public trust, are well established elements of our law. In fact, they are what justifies and supports much of our environmental law and regulation.

The legal concept of a public trust goes back at least to Roman times where the law recognized that there were things that naturally belong to everybody because everybody's survival depended on them, in particular, air, flowing water, the sea, and the seashore. English Common Law that got folded into American legal precedence also recognized that "there are some...things which …must still unavoidably remain in common…Such as the elements of light, air, and water…" These resources were held by the government in trust for all citizens, to be managed in the pursuit of the public interest.

Legal limits on public nuisances have a similar ancient history. Despite frequent contemporary claims that private property is sacred and cannot be violated by other individuals or the government, the use of private property has always been limited to those uses that do not damage other people's property or their rights. You do not have a right to burn old tires in your back yard because you like the color and texture of the dense black smoke it produces. Nor can you make whatever noise you want or flood your yard with human sewage. To do so prevents others from the "quiet enjoyment of

their property" *and* damages a shared common resource held in trust for all citizens, the atmosphere and water supply.

Many libertarians who emphasize property rights often insist that we do not need pollution laws or regulations. Instead, people whose property or lives are being seriously harmed by pollutants should simply bring suit against the polluters as public nuisances that damage citizens and their property.

If fact, some of the earliest environmental law suits against business firms polluting rivers and streams were brought on exactly these terms in the first half of the nineteenth century. Unfortunately, as the industrialization of the nation proceeded, the courts increasingly ruled against the harmed citizens and in favor of the polluters on the grounds that economic development was the higher public interest that justified the damage to public trust resources and other private property. At the time these were seen as conservative court rulings that sought to support business expansion and wealth creation. To those suffering from the pollution, however, these court rulings must have appeared to be the worst sort of judicial activism: long held property and other legal rights were being taken from common citizens and given to powerful business interests.

It was the failure of the courts to uphold Common Law rights and protect the public trust that led legislatures and congress to begin writing very explicit environmental laws. The legal justification for those laws remained the public trust and public nuisance traditions that stretch back millennia: The air and the water are common or public resources whose private use is limited to those uses that do not degrade them in ways that threatens the health, safety, and wellbeing of citizens.

In that sense, citizens concerned about serious pollution problems whose correction powerful interests have successful blocked can be expected to continue to turn to the courts to try to get their ancient *and* contemporary rights to a clean and healthful environment protected. This is not the last time we will see such suits that attempt to force the legislative and executive branches of government to act to fulfill their public trust obligations.