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Law Review Article Critiques Local Government Public Nuisance Suits: Reed Smith

Perhaps you recall how President Trump campaigned on behalf of "Big Luther" Strange in Alabama. Strange had been appointed by Alabama's Governor to fill the Alabama United States Senate seat vacated by Jeff Sessions when Sessions became U.S Attorney General. Trump supported Strange's effort to win election to the seat in his own right for the term to commence after the interim appointment expired. Big Luther is, indeed, big. At six feet, nine inches, he is the tallest U.S. Senator ever. But Strange lost the Republican primary to Judge Roy Moore, and then Moore went on to lose to Doug Jones.

Sometimes we forget that state attorneys general also – at least usually – had careers as working attorneys who handled the same sorts of discovery and motion issues that fill up the days of most of us. Strange was a lawyer for an important energy company (full disclosure: we represented that same company many years ago), and was once a partner at one of Alabama's preeminent law firms.

And it turns out that Strange is also an impressive legal scholar. He is the author of "A Prescription for Disaster: How Local Governments' Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into a Policy-making Role and Subverts the Equitable Administration of Justice," 70 South Carolina L. Rev. 517 (Spring 2019). It is a useful and good read, and it is not our aim to steal Strange's thunder. Consider our little summary an invitation to go to the article, study its citations, and follow its argument.

Strange makes the point that nuisance actions originated in criminal law, with the prosecution of such claims reserved for state or government officials seeking injunctive relief or criminal conviction for harms to the public. Strange then traces the evolution and expansion of the theory, with specific allusion to municipal suits against the gun industry for violent crimes, against the oil industry for climate change, and against banks and lenders for subprime lending practices. The last episode outlined in the historical section of the article is the opioids litigation. Strange distinguishes a state AG's parens patriae authority from local governments, which have authority to recover only for injuries suffered by the municipality/county/whatever itself. It is the latter species of action that troubles Strange.

Strange's fundamental criticism of local government actions against alleged public nuisance is that they inject litigants and courts into democratic policy-making decisions. He does not favor regulation by litigation, and warns that it implicates separation of powers concerns. Regulatory lawsuits invade legislative powers, and courts are not particularly good at such regulation. Moreover, the subject of the proposed judicial regulation will often be a nonjusticiable political question, which was committed to a coordinate government branch, eludes judicial standards, reeks of policy determinations, and creates the possibility of multifarious pronouncements by different organs of government. Legislatures and regulators possess technical expertise that courts (and juries) lack, and are also peculiarly capable of balancing cross-cutting policy interests.

There are, of course, legal doctrines that should step in and halt lawsuits that infringe upon

regulatory regimes. Any reader of this blog will have bumped into dozens of posts about preemption and primary jurisdiction. Strange takes those doctrines seriously – certainly more seriously than the many rogue courts that seem to view them as inconveniences. Wyeth v. Levine is appropriately cabinned by the article. Primary jurisdiction gets the respect it deserves in this article, as does the dormant commerce clause. Strange also sets out how public nuisance suits allege damages that are not traceable to and proximately caused by the defendants' conduct – with such conduct usually being lawful under the applicable regulatory regime.

The article also makes the point that local government actions disrupt the ability of state attorneys general to bring and manage litigation arising from the same alleged conduct. The actions might be beyond the scope of local governmental authority. Even if within scope, the local government actions raise the specter of double recovery.

Aside from doctrinal barriers and practical dangers, local government suits adversely affect the administration of justice in other ways. Strange describes how the various layers of redundant suits can multiply discovery requests, enable outlier verdicts to distort the overall litigation process, and penalize defendants for conduct occurring outside the relevant jurisdiction.

Anyone who has played a role in local government nuisance litigation will recognize the force of Strange's insights. The system is messy and sometimes yields unfair results. As is always the case, there are winners and losers. Predatory plaintiff lawyers and policy-making judges seem to think the system is just fine. But Strange makes a compelling case that judicial administration is a loser, as is the regulatory function that weighs costs and benefits for society as a whole.

by Stephen J. McConnell

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