Opinion

States Protecting the Public Interest in the Era of Trump

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AS WE WATCH THE TRUMP ADMINISTRATION DISMANTLE environmental and occupational regulations, as well as the Affordable Care Act (ACA), it may be naïve to inject a bit of hope and optimism. But some bright spots are certainly emerging, even in the reddest of states. Of course, we know the ironies: the success of the Kynect website in Kentucky, home of the 2 senators most opposed to the ACA, and Susan Collins's and some governors' support of Medicaid expansion despite the fact that they're Republicans. Less surprisingly, California has been leading the way in environmental regulatory efforts to limit CO₂ emissions and to promote stringent air quality standards.

California has also pioneered actions in the use of civil courts to protect future generations from a number of industrial pollutants. Perhaps the most far-reaching was the 2013 decision by Superior Court judge James Kleinberg to address the age-old epidemic of childhood lead poisoning in the state's case against Sherwin Williams, NL Industries, and ConAgra, 3 companies that marketed lead paint before the 1950s. He ordered them to pay for lead removal from the walls of San Francisco, Los Angeles, San Diego, Oakland, and a number of other cities and counties in the state.¹ This has now been reinforced by California's Sixth District Court of Appeal, which unanimously upheld the lower court's decision. Pending a final appeal to the state Supreme Court, the companies are to pay for removing lead paint from the walls of tens of thousands of California homes. The court held, based on the historical evidence presented, that the companies responsible for marketing and promoting lead paint should pay to detoxify at-risk homes.² This case was groundbreaking because it was the result of nearly 2 decades of legal wrangling over the responsibility for preventing childhood lead poisoning, arguably the longest childhood epidemic in American history. Until this decision, suits for lead poisoning or other industrial pollutants were brought under liability law statutes—for harms that were done in the past. Now,

under the principles in the California decision, communities can sue to prevent future damage.

The origins of this case are complex: Prior to the 1990s, children who went into convulsions after ingesting lead were brought to hospitals where they underwent days of chelation treatments to “remove” lead from their bodies. If anyone was held accountable, it was the landlord, who might be sued under liability law for not maintaining the property.³

This post-hoc remedy was frustrating to public health advocates around the country. The most obvious failure of this system was that the legal “solutions” were antithetical to every principle of prevention that was the basis of their profession. Rather than remove lead paint before children were harmed, we waited for poisoned children, veritable “canaries in the mines,” to identify poisoned homes with their health.

The California decision was the result of over 20 years of legal wrangling that occupied a generation of once-young lawyers and scholars who first developed the case in Rhode Island and then, after some heartbreak, continued to fight for the principle of prevention in California. In Rhode Island, Sheldon Whitehouse, the attorney general at the end of the last century (and now a US senator), began the suit. (Full disclosure: I have been involved as a consultant, researcher, and witness in both of these efforts since the beginning.) Whitehouse used and the court accepted the innovative argument of “nuisance law,” which historically has been used by public health departments⁴ to stop people from polluting public water supplies or from dumping garbage in their own or a neighbor’s backyard. Like polluting the water supply, lead paint on the walls of Rhode Island homes also presented a foreseeable hazard. The principle was simple: the companies made the mess, so they should clean it up.

In March 2006, after the longest trial in Rhode Island civil court history, the jury ordered the companies to pay up to an estimated \$4 billion for the removal of lead paint from the state’s windowsills, doorframes, and other obvious sources of lead paint dust and chips.⁵ This was immediately attacked by the business press and appealed by the companies. Two years after the trial, in a heartbreaking decision, the state Supreme Court reversed the verdict, arguing that the case had been brought to court under the wrong law: the state could not sue companies for damages that had not yet occurred.

Despite this disheartening reversal, California, which had begun a similar suit in the early 2000s, brought its case in 2012. As a precaution against years of useless legal efforts, the state's lawyers and staff, including veterans of the Rhode Island effort, Fidelma Fitzpatrick, Laura Holcomb, and Bob McConnell of Motley Rice, approached the California Supreme Court to get a preliminary ruling as to the applicability of nuisance law. Would the court reverse a possible verdict in favor of the state using the same justification as did the Rhode Island court? No. The court instead said the case could go forward. After all, all public health law and regulations were meant to prevent disease and if the state couldn't act until the damage had occurred, no public health statute would be enforceable. Again, after a lengthy trial that made headlines, the state won. Judge Kleinberg ordered the companies to pay \$1.15 billion to the cities and counties to remove lead. The companies appealed and this past November, after 4 years, the court denied the defense's appeal. Now the paint companies are appealing to the California Supreme Court and we will once again hold our breath.

This victory at the appeals level is significant in and of itself. Yet the principles laid out in the superior and appellate courts' decision can have a much wider application to all sorts of historical environmental injustices. The federal government may have dropped the ball on environmental pollution, so now let us look to the states to take up the slack.

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