

A New Front Blowing In: State Law and the Future of Climate Change Public Nuisance Litigation

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I. INTRODUCTION.....	102
II. A BROADER VIEW: STANDING AND POLITICAL QUESTION DOCTRINES UNDER STATE LAW.....	107
A. Limits on Federal Judicial Power to Review and Resolve Climate Change Public Nuisance Claims.....	109
1. American Electric Power v. Connecticut	111
2. Comer v. Murphy Oil Company.....	112
3. Kivalina v. Exxon-Mobil	114
B. Expansive State Law Jurisdiction Over Environmental Claims.....	115
C. Federal Limits on State Law Judicial Review of Environmental Claims.....	119
D. Implications for State Law Climate Nuisance Actions....	124
1. In State Court.....	125
2. In Federal Court.....	128
III. THE REMAINING WINDBREAK: PREEMPTION BY FEDERAL LAW ...	131
A. The Federal Clean Air Act	131
B. The Dormant Commerce Clause.....	137
IV. CONCLUSION	139

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I. INTRODUCTION

Climate change litigation, so far, has been an overwhelmingly federal affair. Federal climate change litigation has grown into an active field of law,¹ and one federal tort in particular—common law public nuisance—has emerged as a central tool for parties seeking limits on greenhouse gas emissions and damages for harms caused by past and current emissions.² Climate change claims under state tort law brought in state courts, by contrast, have remained comparatively rare.³

1. The most recent tally of active federal climate change litigation cases now exceeds 200 cases, and that tally excludes over 100 other cases that might qualify. David L. Markel & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 5 (Fla. State Univ. Coll. of Law, Pub. Law Research Paper No. 483, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762886. These cases include a broad array of claims, including challenges to federal agency actions regulating greenhouse gas emissions, actions to force agency action to regulate such emissions, disputes over the U.S. Environmental Protection Agency's authority to permit emissions, and claims for damages or injunctive relief under common law tort theories or under federal or state environmental statutes. Columbia University School of Law's Center for Climate Change Law maintains a tracking chart for significant U.S. climate change litigation, including state cases. *Climate Change Litigation in the United States*, CLIMATECASECHART.COM (Sept. 7, 2011), <http://www.climatecasechart.com>.

2. See discussion *infra* Part II.A.1 – A.3, on *Connecticut v. American Electric Power*, *Comer v. Murphy Oil Co.*, and *Village of Kivalina v. ExxonMobil*. This list does not include a fourth public nuisance climate change case that the parties resolved through settlement before the Ninth Circuit completed its review of the claim. *California v. Gen. Motors Corp.*, No. C06-05755-MJJ, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal., Sept. 17, 2007) (unpublished decision) (dismissing claim on political question grounds) (dismissing appeal per stipulation) (2009). In an unreported opinion, the Southern District of New York also dismissed a public nuisance tort action brought by an individual who claimed that greenhouse gas emissions from numerous entities had caused him mental distress. *Korsinsky v. EPA*, No. 05 Civ. 859(NRB), 2005 U.S. Dist. LEXIS 21778 (S.D.N.Y. Sept. 29, 2005), *aff'd*, 2006 U.S. App. LEXIS 21024 (2d Cir. Aug. 10, 2006) (unpublished opinion) (dismissed for lack of standing).

3. Markel and Ruhl's empirical survey of climate change litigation to date does not identify any reported tort claims seeking recovery or injunctive relief for climate change damages in state courts. See Markel & Ruhl, *supra* note 1. The total number of cases does not reflect federal court diversity actions based on state tort law or federal actions that include state law claims under the court's supplemental jurisdiction. See, e.g., *Comer v. Murphy Oil USA*, 585 F.3d 208 (5th Cir. Oct. 16, 2009), *revised* Oct. 22, 2009, *vacated by order granting en banc review*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed due to lack of quorum*, 607 F.3d 1049 (5th Cir. 2010) (including state tort law public nuisance claims under the court's supplemental jurisdiction). The tally of state tort law cases also excludes actions under state statutes that provide non-tort actions to address climate change effects, including actions to compel environmental impact assessments or to enforce greenhouse gas emission permitting requirements under state law. This categorization of cases does not include a recent swath of state court complaints and petitions that rely on public trust doctrines to seek injunctions that would force regulation of greenhouse gas emissions. See, e.g., *Bonser-Lain et al. v. Tex. Comm'n on Envtl. Quality*, Case No. 04-GN-11-002194 (201st

In each of these federal court battles, the parties have heatedly contested the appropriate role for the federal courts. Because of the federal courts' inherently limited jurisdiction under Article III of the U.S. Constitution, several high-profile decisions have wrestled over the institutional competence of federal courts to hear sprawling climate change disputes over activities that literally span the globe.⁴ In particular, three federal appellate courts reached different conclusions on whether federal courts can (or should) hear climate change public nuisance lawsuits under federal common law.⁵

The federal controversy recently culminated in the U.S. Supreme Court's ruling in *American Electric Power Co. v. Connecticut* (*AEP v. Connecticut*).⁶ Eight attorneys general, three non-profit land trusts, and the City of New York had sought to have the current levels of greenhouse gas emissions from coal-fired power plants owned by four privately owned utilities and the Tennessee Valley Authority declared a public nuisance under federal common law. After the Second Circuit allowed the lawsuits to proceed, the Supreme Court reversed and dismissed the case outright. In a unanimous opinion by Justice Ginsberg, the Court held that Congress displaced federal common law nuisance actions for climate change claims when it delegated authority to the U.S. Environmental Protection Agency to regulate greenhouse gas emissions under the federal Clean Air Act.⁷

Tellingly, the Court did not disturb the Second Circuit's conclusions that some of the plaintiffs had standing to pursue the claim and that the complaints did not pose a non-justiciable political question.⁸ Although the Court only reached a 4-4 split decision on these issues because of Justice Sotomayor's recusal,⁹

Dist. Ct., Travis Cnty., Tex.) (filed July 22, 2011) (petitioning state court to review TCEQ ruling that Texas law did not permit regulation of greenhouse gas emissions under the public trust doctrine); see also Felicity Barringer, *Suit Accuses U.S. Government of Failing to Protect Earth for Generations Unborn*, N.Y. TIMES, May 4, 2011, at A22, available at www.nytimes.com/2011/05/05/science/earth/05climate.html (discussing numerous public trust doctrine petitions and lawsuits being filed throughout the United States by a coalition of groups named Our Children's Trust).

4. See discussion *infra* Part II.A.1 – A.3..

5. *Id.*

6. *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011).

7. *Id.* at 12, 14.

8. *Id.* at 6.

9. Justice Sotomayor recused herself from deliberations, and pursuant to Court practice she did not provide any reason for withdrawing from the case. *Id.* at 4, 16. Her

her participation in the Second Circuit's panel decision reflects a likely narrow majority in the current Court that would both find standing for climate change claims brought by states and reject political question challenges to such lawsuits.¹⁰

AEP v. Connecticut, however, overtly left a central issue undecided. The Court pointedly noted that it did not review whether the federal Clean Air Act would preempt claims under state public nuisance law (as opposed to displacing federal common law).¹¹ The issue resurfaced during oral arguments when three different justices raised the prospect that the claimants might pursue their actions under state law or in state courts.¹² The

recusal likely arose because Justice Sotomayor sat on the Second Circuit panel that issued the lower court's opinion prior to her elevation to the U.S. Supreme Court. She expressly did not participate in the Second Circuit panel's opinion, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, at note * (2d Cir. 2009), but then-Judge Sotomayor actively joined in the oral arguments before the panel. Alex Kaplun, *Enviro Groups Like What They See in Obama's Justice Pick*, N.Y. TIMES, May 27, 2009, available at <http://www.nytimes.com/gwire/2009/05/27/27greenwire-enviro-groups-like-what-they-see-in-obamas-justice-6076.html> ("Sotomayor—who was the lone Democratic nominee on the three-judge panel—did much of the questioning of both sides and indicated in her comments that she believes there may be a need for regulation of greenhouse gas emissions. 'I have absolutely no idea about the science of global warming,' she said at one point during the hearing. 'But if the science is right, we have relegated ourselves to killing the world in the foreseeable future. Not in centuries to come but in the very near future.'").

10. The split among the Justices paralleled the 5-4 vote among the Justices in the *Massachusetts v. EPA* decision. 549 U.S. 497 (2007). For example, some of the objecting justices in *AEP v. Connecticut* repeated their objections on standing and political question grounds from *Massachusetts v. EPA*. 131 S. Ct. at 2535 ("Four members of the Court, adhering to a dissenting opinion in *Massachusetts*, 549 U.S., at 535, 127 S.Ct. 1438, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits."). While Justice Sotomayor did not join the Second Circuit's panel decision, commentators have speculated that she would likely share former Justice Stevens' opinions on standing for states to bring legal actions premised on damages from climate change effects. See *supra* note 9 (discussing then-Judge Sotomayor's questioning at oral argument before the Second Circuit on viability of climate change nuisance claims).

11. *Am. Elec. Power Co. v. Connecticut*, 131 S.Ct. 2527 (2011).

12. Justice Scalia, for example, raised the issue of potential state court climate nuisance suits early in the oral argument:

JUSTICE SCALIA: Mr. Keisler, what — what good does it do you to have this Court say that there is no Article III standing? The suit will just be brought in State court —

MR. KEISLER: Well —

JUSTICE SCALIA: — under State common law and — and the States' rules of standing are not ours.

MR. KEISLER: Well, many States, Your Honor, have similar doctrines of

Court left the issue unresolved because none of the parties had briefed or argued the issue.¹³

This article takes up the Court's suggestion and delves into the availability of state laws and courts to hear public nuisance claims against persons or corporations who allegedly contributed to harm caused by climate change. The answer to this question is complex, but illuminating: states have the sovereign power to grant their courts a broader capacity than federal courts to hear claims, including climate change public nuisance lawsuits.¹⁴ In fact, several states expressly provide a broader right of access to courts under their state constitutions or state environmental rights acts,¹⁵ and this expanded scope of competence may arguably extend to public nuisance climate change lawsuits.

The conversion of this broader mandate into an enforceable judgment, however, must navigate several complex steps. At the least, these hurdles include state law analogs of federal standing and political question doctrines.¹⁶ Even after a state court has decided that it can hear such a claim, it would likely face difficult questions over its ability to exercise *in personam* jurisdiction over (i) nonresident defendants based solely on climate change effects,¹⁷

standing, similar doctrines of political questions.

JUSTICE SCALIA: They only need one.

MR. KEISLER: Well, in any event, Your Honor, we believe we would have a very strong motion to dismiss in State court on a variety of grounds, including—

JUSTICE SCALIA: We're not sure about that, are we? So we — we — we — may be just spinning our wheels here.

MR. KEISLER: Well, I don't —

JUSTICE SCALIA: Indeed, you know, tapping the case to State judges instead of Federal judges, I would frankly rather have Federal judges do it, probably.

Transcript of Oral Argument at 5-6, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. — (2011) (No.10-174), 2011 WL 1480855. Justices Kennedy and Alito asked similar questions about the potential availability of climate change public nuisance actions in state courts or under state laws. *Id.* at 6, 29.

13. The Court noted that “[n]one of the parties have briefed preemption or otherwise addressed the availability of a nuisance claim under state law. We therefore leave the matter open to reconsideration on remand.” *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, at 2531.

14. See discussion *infra* Part II.B.

15. See discussion *infra* Part II.B.

16. See discussion *infra* Part II.B, note 62 (discussing state courts that impose state law standing requirements similar to federal standing thresholds).

17. See discussion *infra* Part II.C, notes 79-81.

(ii) the willingness of courts in other states to enforce a judgment that might conflict with public policy under their own laws,¹⁸ or (iii) the state court's power to issue and oversee injunctive relief against a governmental defendant.¹⁹

These initial hurdles only reflect the first prerequisites posed by each state's laws. Even if state courts conclude that they can hear these claims under their own laws, federal environmental permitting regimes may still preclude their ability to grant relief. For example, one federal court of appeals has ruled that the federal government's extensive regulation of emissions under the Clean Air Act has preempted public nuisance remedies under state tort laws that would impose liability for permitted emissions.²⁰ Even this broad decision, however, arguably does not foreclose climate change public nuisance claims if unique aspects of global climate change processes and effects offer a basis to distinguish them from the more common air quality concerns typically regulated under the Clean Air Act.²¹

The stakes, of course, stretch far outside concerns of legal theory and proper jurisdictional doctrines. If state courts provide a more hospitable forum for climate change public nuisance litigation under state laws, the pitched battle over climate change

18. See discussion *infra* Part II.C, note 83.

19. See, e.g., *New York v. New Jersey*, 256 U.S. 296, 309 (1921) (denying injunction request by New York to halt New Jersey sewage discharges, stating that before it would act "to control the conduct of one state at the suit of another, the threatened invasion must be of serious magnitude and it must be established by clear and convincing evidence" (citing *Missouri v. Illinois & The Sanitary Dist. of Chicago*, 200 U.S. 496, 521 (1906)), (finding suits by private parties to enjoin actions by state sovereigns that allegedly created public nuisances would likely face even more daunting barriers, including sovereign immunity.))

20. *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 302-4 (4th Cir. 2010); see discussion *infra* Part III.A. The U.S. Supreme Court dismissed the certiorari petitions to review the Fourth Circuit's opinion on July 22, 2011 per the stipulations of the parties. The parties announced a settlement in principle that will require the Tennessee Valley Authority to install pollution control equipment and substantially reduce emissions from the contested facilities. Press Release, EPA, EPA Landmark Clean Air Act Settlement with TVA to Modernize Coal-Fired Power Plants and Promote Clean Energy Investments (April 14, 2011), <http://www.epa.gov/compliance/resources/cases/civil/caa/tvacoal-fired.html> (follow "Press Release" hyperlink on the right side, under "Tennessee Valley Authority Clean Air Act Settlement Resources").

21. See discussion *infra* Part III.A, notes 127-128. *AEP v. Connecticut*'s conclusion that Congress displaced federal common law on GHG emissions by passing the Clean Air Act does not automatically mean that Congress's passage of the statute also preempted state common law and local statutes affecting GHG emissions. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. —, 131 S. Ct. 2527 (2011).

liability could simply shift from a federal forum into a bevy of state court actions that could yield conflicting and overlapping judgments with stacked damage awards and inconsistent injunctive relief. An available forum in state courts for climate change plaintiffs who lack federal standing will also pose difficult questions for those federal courts asked to review state court judgments or to hear diversity claims. These abstract jurisdictional questions could ultimately dictate the fate of multi-billion dollar claims and affect the allocation of power and responsibilities between the federal and state courts in a quintessentially global issue.

II. A BROADER VIEW: STANDING AND POLITICAL QUESTION DOCTRINES UNDER STATE LAW

As sovereigns with their own constitutions and statutory authorities, states generally have the freedom to set their own standing and justiciability doctrines. Many states have taken this opportunity to either judicially declare a broader standard for standing determinations than permitted in federal courts, or to pass legislation that guarantees broader access to state courts for both general and environmental claims.

This analysis focuses on standing and justiciability questions raised by claimants who pursue claims rooted in damages to their property or personal injury. While state courts (like federal courts) have explored whether to relax standing or justiciability requirements for claimants who allege procedural injuries, these issues do not play a central role in assessing the justiciability of climate change public nuisance claims. An analysis focused on the unique tort underpinnings of these claims and their intimate link to compensatory and injunctive remedies will allow us to parse out the large, complex and ill-defined case law that distinguishes “procedural” from “traditional” injuries for standing purposes under state or federal law.

These questions play out against a familiar background. Public nuisance tort actions have served as an important vehicle for legal challenges to pollution that threatened interests or rights held in common by the public.²² While the precise contours of public

22. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 86, at 616 (W. Page Keeton ed., 5th ed. 1984); Victor E. Schwartz et al., *Why Trial Courts Have Been Quick to Cool “Global Warming” Suits*, 77 TENN. L. REV. 803, 817-22 (2010) (recounting historical roots of public nuisance tort doctrine and growing use of public nuisance torts for environmental claims).

nuisance doctrine remain ill-defined and controversial, the most generally accepted definition holds that a public nuisance is “an unreasonable interference with a right general to the common public.”²³ Evolving from roots as a common law crime against interests held by the Crown,²⁴ public nuisance tort actions have challenged environmental threats ranging from municipal sewage into public waterways,²⁵ air pollution that crossed state borders to damage public lands held in another state,²⁶ and controversially, the distribution of toxins in commercial products such as lead-based house paint.²⁷ In their current incarnation, public nuisance actions can be brought both by governmental plaintiffs acting to protect rights held by the general public or by private parties who have suffered an injury different in kind than the injury inflicted on the general public.²⁸

With this backdrop, public nuisance common law tort doctrine offers an attractive vehicle to litigants who wish to claim that emissions of greenhouse gases by a group of defendants have injured public rights. These injured rights could include access to

23. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

24. See *id.* at § 821B cmt. a (1979); Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 767 (2001) (public nuisance actions originally “police-power based remedy for interference with rights of the sovereign”); see also Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 *WASHBURN L.J.* 541, 562–71 (2006) (“Public nuisance law has its foundation in twelfth-century English common law as a tort-based crime for infringing on the rights of the Crown.”).

25. See, e.g., *Missouri v. Illinois*, 200 U.S. 496 (1906) (regarding interstate discharge of sewage).

26. See, e.g., *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (regarding the emission of noxious gases from copper industry that caused damage in neighboring states).

27. See, e.g., *Rhode Island v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 435 (R.I. 2008) (dismissing public nuisance claims against manufacturers of lead additive for paints who lacked any control over the paints once they were distributed into commerce).

28. RESTATEMENT (SECOND) OF TORTS § 821C(1) (1977). This requirement that private plaintiffs must demonstrate an injury different in kind from the general public’s injury—known as the Special Injury Rule—has provoked great scholarly criticism and significant efforts for reform. For example, an American Law Institute conference in 1972 led to a proposal to modify the Special Injury Rule so that private plaintiffs could bring public nuisance actions if they either satisfied the Special Injury Rule or had “standing to sue as a representative of the general public, as a citizen in a citizen’s action or as a member of a class in a class action.” While the Restatement (Second) of Torts included this language, *id.* at § 821C(2)(c), every state jurisdiction except Hawaii has declined to adopt the modified rule. Antolini, *supra* note 24, at 855; James R. Drabick, *Note “Private” Public Nuisance and Climate Change: Working Within, and Around, the Special Injury Rule*, 16 *FORDHAM ENVTL. L. REV.* 503, 529–30 (2005).

publicly held coastal lands, damage to natural resources held in public trust, or direct threats to the public's health and safety within a state's interests as *parens patriae*.²⁹

A. Limits on Federal Judicial Power to Review and Resolve Climate Change Public Nuisance Claims

Federal doctrines of standing and political question justiciability arise from deep-rooted precepts in the U.S. Constitution. Standing requirements, as elaborated by the U.S. Supreme Court, reflect the inherent nature of the federal judicial process and Article III's empowerment of the federal judiciary to hear "Cases" or "Controversies." Without a party who has suffered the type of harm that gives rise to standing, a "case" may lack an adverse party or a kind of injury that the court can appropriately address.³⁰ The constitutional separation of powers also reinforces the need for the judiciary to wield its powers only in cases where the parties possess a genuine controversy, and standing requirements help limit and focus the judiciary's actions to those cases.

The federal doctrine of political question justiciability arises from similar concerns over the appropriate role of the federal judiciary. As elaborated by the U.S. Supreme Court, the political question doctrine allows the federal courts to decline cases that pose controversies that lie outside the courts' competence or that

29. For example, several state attorneys general raised similar damage claims before the U.S. Supreme Court when they sought to compel EPA to regulate greenhouse gas emissions from mobile sources until the federal Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497 (2007) (citing *Tennessee Copper* to note that states acting in their *parens patriae* capacity can only seek injunctive (equitable) relief on behalf of their citizens rather than monetary damages (pay)) (*Id.* at 537-38).

30. The well-known minimum Article III requirements for standing include (i) a concrete and distinguishable injury-in-fact (ii) whose causation is fairly traceable to the defendant's actions (iii) for which the court can craft a remedy. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This capsule summary obviously glosses over a deep body of scholarship and case law that attempts to rationalize standing doctrine in the federal courts, particularly for environmental claims. *See Robin K. Craig, Standing and Environmental Law*, in *PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW* at 195-217 (James R. May ed., 2011). In addition, concerns about separation of powers based on Article II may further limit standing for citizen suit actions that arguably impinge on the Executive Branch's constitutional prerogative to enforce the laws of the United States. U.S. CONST. art. II, § 3 ([The President] "shall take care that the laws be faithfully executed."); *see also, Lujan*, 504 U.S. at 577 ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'").

interfere with powers of the other two branches of the federal government. The doctrine has avoided a tidy formulation, but the Court has listed six independent tests that federal courts should use to identify the existence of a political question:

- (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- (2) a lack of judicially discoverable and manageable standards for resolving it; or
- (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
- (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
- (5) an unusual need for unquestioning adherence to a political decision already made; or
- (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³¹

A case becomes nonjusticiable if it cannot survive any one of these tests.³²

The Court's formulations of both standing doctrine and political question limitations reflect the inherently limited nature of federal judicial power. Non-prudential standing principles lie ultimately in Article III's formulation of the federal judicial branch's powers and limits.³³ Political question doctrine also reflects deep-rooted structural restrictions on federal courts arising from concerns about the separation of powers, the Article III formulation of judicial power through case-and-controversy requirements, and the lack of original jurisdiction for subordinate federal courts.³⁴

These issues played pivotal roles in the three leading climate change public nuisance actions brought in the federal courts. The analysis of standing and justiciability offered by this trio of cases remains relevant: while the U.S. Supreme Court ruled broadly that

31. *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

32. *Id.*

33. *Lujan*, 504 U.S. at 560. As noted above, some decisions and legal commentators have also pointed to Article II for additional conceptual support for federal standing principles. See discussion *supra* Part II.A, note 30.

34. *Vieth*, 541 U.S. at 277-78.

the federal Clean Air Act displaced federal common law public nuisance actions for climate change damages, the Court did not reject the lower court's finding that some of the plaintiffs had standing, or that their claims did not pose a non-justiciable political question.

1. *American Electric Power v. Connecticut*

This decision—the U.S. Supreme Court's first ruling in a climate change public nuisance case—has special importance for what it did *not* decide. Although the U.S. Supreme Court disposed of this lawsuit on the grounds that Congress displaced any federal common law of public nuisance for interstate air emissions when it passed the Clean Air Act, it did not disturb earlier lower court decisions in the case that upheld the standing of the attorneys general (and other private parties) to bring their nuisance action. The district court, like every other federal district court that has addressed public nuisance climate change claims, dismissed the action because the plaintiffs asserted nonjusticiable political questions.³⁵ The Second Circuit reversed the dismissal, and it ruled that the states and the private land trusts had standing to pursue their claims.³⁶ After a lengthy analysis of each of the six *Baker* factors, the Second Circuit concluded that the complaints did not raise a claim that fell within the confines of the political question doctrine.³⁷ In addition, the Second Circuit found that the states had incurred a sufficiently concrete and direct injury-in-fact to their sovereign interests in state-owned lands and the health of their citizens to support standing.³⁸ As discussed earlier, the U.S. Supreme Court expressly did not overturn this portion of the Second Circuit's opinion—largely because the Court's 4-4 split left it unable to directly overturn the Second Circuit's conclusions.³⁹

35. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2nd Cir. 2009), *rev'd*, 564 U.S. — (2011). Because it concluded that the complaint raised non-justiciable political questions, the district court expressly declined to rule whether the states or private land owners had standing to pursue their claims. *Id.* at 271 n.6. The Second Circuit therefore took up the issue of standing *sua sponte*. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 333 (2nd Cir. 2009).

36. *Id.* at 339-49.

37. *Id.* at 323-32.

38. *Id.* at 339-49.

39. See discussion *supra* notes 8-10. The U.S. Supreme Court's inability to overturn the Second Circuit's standing and political question ruling means that the Second Circuit's decision on those issues remains as binding precedent for future cases in the Second Circuit.

Although it analyzed federal political question issues extensively, the Second Circuit did not address whether state law might provide a separate basis for standing or political question jurisdiction. The initial complaint by the attorneys general alleged that their public nuisance claim sounded in federal common law “and, in the alternative, state law.”⁴⁰ This initial complaint also alleged that jurisdiction for plaintiff’s state law claims rested solely within the federal district court’s supplemental jurisdiction authority.⁴¹ Since the Second Circuit upheld the plaintiff’s standing for federal common law claims, it did not need to explore whether state law public nuisance actions provided an expanded basis for standing or an alternative vehicle for review of claims that might fall within political question justiciability restrictions.

2. *Comer v. Murphy Oil Company*

In this class action lawsuit, numerous residents of coastal Mississippi brought a public nuisance action against several oil and gas production, refining, coal and chemical production companies.⁴² The lawsuit contended that emissions from the defendants’ operations had contributed to climate change effects which in turn aggravated the damages caused by Hurricane Katrina in 2005.⁴³ The complaint requested that the court award monetary damages to the plaintiff class instead of an injunction to restrict future greenhouse gas emissions.⁴⁴

After the district court dismissed the complaint because it raised a political question that both required a policy determination on the appropriate levels of greenhouse gas emissions, and risked undermining Executive Branch efforts to set forth a unified position for the United States in international

40. Complaint at ¶¶ 1, 6, 36, 165-86, *Conn. v. Am. Electric Power Co.*, 582 F.3d (S.D.N.Y. filed July 24, 2004) (No. 104CV05669) (alleging state law public nuisances), available at www.pawalaw.com/assets/docs/Complaint%20Global%20Warming%20AGs%20Final%20with%20Exhibits.pdf (last verified on Oct. 22, 2011).

41. *Id.* at ¶ 36 (alleging that jurisdiction for the state law claims “is proper pursuant to 28 U.S.C. § 1367”—i.e., supplemental jurisdiction—and not raising federal question or diversity jurisdiction for the state law claims and contending that jurisdiction against the Tennessee Valley Authority was proper under 28 U.S.C. §§ 1331, 1337).

42. Third Amended Class Action Complaint, *Comer v. Murphy Oil USA, Inc.*, (S.D. Miss. Apr. 19, 2006) (No. 1:05-CV-00436-LTS-RHW), 2006 WL 1474089 [hereinafter “*Comer* complaint”].

43. *Id.* at ¶¶ 13-15.

44. *Id.* at ¶¶ 19, 47.

climate change convention negotiations.⁴⁵ The Fifth Circuit initially reversed the trial court's dismissal.⁴⁶ According to the panel's opinion, the landowners both had standing to pursue their public nuisance claims and did not present a claim that the political question doctrine would categorize as non-justiciable.⁴⁷

The panel's decision met a quick end: the full Fifth Circuit granted the defendant's request for a rehearing *en banc*, and it consequently vacated the panel's opinion.⁴⁸ After late recusals resulted in the loss of a quorum, the Fifth Circuit concluded that it could not carry through with a full *en banc* review of the case.⁴⁹ Because the court had already vacated the panel decision, however, the Fifth Circuit ultimately found itself in an unprecedented situation: it could neither reissue the panel decision nor come to an opinion by the full bench. In effect, the Fifth Circuit muted itself. The trial court's earlier dismissal of the complaint therefore retained its effect.⁵⁰

In contrast to the Second Circuit, the Fifth Circuit's initial panel decision held that plaintiffs' claims satisfied standing requirements under state law. The panel specifically noted that federal diversity jurisdiction requirements mandated it to assess the plaintiff's standing under both federal and state law.⁵¹ After briefly noting that Mississippi state law provided a broader basis for standing than federal law, the court concluded that Mississippi law readily provided standing for the plaintiffs' state law claims. The Fifth Circuit panel explained that:

Plaintiffs' claims easily satisfy Mississippi's "liberal standing requirements." The Mississippi Constitution provides that "[a]ll

45. *Comer v. Murphy Oil USA*, No. 06-60757, WL 6942285 at *1 (Dist. Miss. Aug. 30, 2007).

46. *Comer v. Murphy Oil USA*, No. 06-60756 (5th Cir. Oct. 16, 2009) slip. op., revised Oct. 22, 2009; *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009).

47. *Comer*, 585 F.3d at 861-69 (standing discussion), 872-76 (political question). While the panel decision found that the plaintiffs had standing to bring public nuisance claims, it ruled that the plaintiffs lacked standing on prudential grounds for their civil conspiracy, unjust enrichment and fraudulent misrepresentation claims. *Id.* at 867-69..

48. *Comer v. Murphy Oil USA*, No. 07-60756, WL 2136658 at *4 (5th Cir. May 28, 2010).

49. *Id.*

50. The U.S. Supreme Court declined to review the Fifth Circuit's decision not to proceed with an *en banc* rehearing and dismissed the plaintiffs' request for mandamus that would compel the Fifth Circuit to consider the appeal. *In re Comer*, 131 U.S. 902 (2011).

51. *Comer*, 585 F.3d at 855.

courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay,” Miss. Const. art. III § 24. Because Mississippi’s Constitution does not limit the judicial power to cases or controversies, its courts have been more permissive than federal courts in granting standing to parties. “In Mississippi, parties have standing to sue ‘when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law.’” . . . The plaintiffs clearly allege that their interests in their lands and property have been damaged by the adverse effects of defendants’ greenhouse gas emissions. Accordingly, they have standing to assert all of their claims under Mississippi law.

The Fifth Circuit did not address the role, if any, of Mississippi law in the application of the political question doctrine in a diversity jurisdiction case.⁵²

After the Supreme Court declined plaintiffs’ mandamus request to compel the Fifth Circuit to hear their appeal, the plaintiffs filed a new complaint to reassert their claims (including public nuisance allegations rooted in state law).⁵³ The *AEP v. Connecticut* ruling will likely lead the trial court to re-examine its original decision to dismiss the case.⁵⁴

3. *Kivalina v. Exxon-Mobil*

This lawsuit sought to recover the costs that the village of Kivalina will incur to move inland from its current location on the west coast of Alaska near the Arctic Ocean. According to the complaint, greenhouse gas emissions from nine oil companies, 14 power companies and a coal producer had contributed to climate change effects that spurred stronger winter storms, reduced winter pack ice and increased coastal erosion and permafrost loss.⁵⁵ The cost of relocating the village could climb to as high as \$400 million.⁵⁶

52. *Id.* at 862 (internal citations omitted).

53. *In re Comer*, 131 U.S. at 902.

54. *Comer v. Murphy Oil USA, Inc.*, No. 1-11-CV-220-HSO-JMR (S.D. Miss., May 27, 2011).

55. Complaint, *Kivalina v. ExxonMobil Co.*, No. CV-08-1138 (N.D. Cal. filed Feb. 26, 2008).

56. *Id.* at 2; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-142, ALASKA NATIVE

The trial court dismissed the complaint on grounds similar to the dismissals in *Comer* and *AEP v. Connecticut*.⁵⁷ The Northern District of California district court concluded that the complaint raised claims that constituted political questions, and as a result the trial court declined to hear the lawsuit.⁵⁸ The parties have appealed the trial court's ruling to the Ninth Circuit, which temporarily postponed briefing until the U.S. Supreme Court handed down its decision in *AEP v. Connecticut*. The parties have now resumed briefing.⁵⁹ The Ninth Circuit has revived the briefing schedule, and the parties have already requested permission to file extended supplemental briefs.⁶⁰

All three of these cases highlight the key issue that has dominated climate change nuisance cases before the federal courts so far: a preoccupation with surmounting the courts' threshold for jurisdiction in the first place. While the Court's *AEP v. Connecticut* decision will likely foreclose further debate on those jurisdictional issues for federal common law claims, the battle will now likely simply shift to new fronts: state law claims and state courts.

B. Expansive State Law Jurisdiction Over Environmental Claims

State courts can operate under broader mandates than the federal judiciary. While the powers of state courts vary according to the dictates of their individual constitutions or statutory authorizations, state courts typically function as courts of general jurisdiction.⁶¹ As a result, state courts often have the freedom to

VILLAGES: MOST ARE AFFECTED BY FLOODING AND EROSION, BUT FEW QUALIFY FOR FEDERAL ASSISTANCE, U.S. General Accounting Office, at 1 (Dec. 2003).

57. *Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). While the *Kivalina* decision concluded that foreign policy concerns did not raise a political question bar to the plaintiffs' claims, it nonetheless dismissed the complaint because the court lacked judicially discoverable and manageable standards to reach a decision, *id.* at 873-76, and a decision would require the judiciary to reach an initial policy determination clearly dedicated to the political branches' discretion. *Id.* at 876-77. Similar political question concerns shaped the trial courts' rulings in both *Comer*, 585 F.3d at 860 n.2, and *AEP v. Connecticut*, 406 F. Supp. 2d at 272-74.

58. *Kivalina*, 663 F. Supp. 2d at 871-83.

59. See, e.g., Appellant's Supplemental Brief on *AEP v. Connecticut*, *Kivalina v. ExxonMobil Corp.*, No. 09-17490 at pp. 3-8 (Nov. 4, 2011) (addressing whether the *AEP v. Connecticut* decision's rationale supports displacement or preemption of nuisance claims).

60. Appellants' Motion to Lift Stay of Proceedings and Allow Supplemental Briefing, *Kivalina v. ExxonMobil Corp.*, No. 09-17490 (9th Cir. June 24, 2011).

61. See, e.g., K. MANASTER & D. SELMI, *STATE ENVIRONMENTAL LAW* § 14.2 (2010) ("Unlike the federal law of standing, which is rooted in the Constitution's 'case or controversy' requirement, standing in the state courts is not normally viewed as a

adopt more flexible doctrines under their state's own constitutional precepts, and state standing law frequently allows claims by plaintiffs who would not satisfy federal constitutional standing requirements.⁶² Some state legislatures also grant their courts additional competence to hear matters outside traditional Article III constraints. As a result, several state courts benefit from particular state statutes that expand the ambit of justiciable state claims. Numerous states even provide a statutory right of access to their courts that can allow them to hear normally non-justiciable claims or render advisory opinions.⁶³

Thirteen states have specifically expanded their courts' ability to review environmental claims.⁶⁴ These assurances of broad

constitutional doctrine.”).

62. *Id.* Several state appellate courts have ruled outside the environmental context that their constitutions allow state legislatures to confer standing on private citizens for judicial actions that pursue the public interest. *See, e.g.*, *National Paint & Coatings Ass'n v. California*, 68 Cal. Rptr. 2d 360, 365 (Cal. Ct. App. 1997); *Nichols v. Kan. Gov't Ethics Comm'n*, 18 P.3d 270, 276-77 (Kan. Ct. App. 2001); *Minnesota Pub. Interest Research Grp. v. Minn. Dep't of Labor*, 249 N.W.2d 437, 441 (Minn. 1976); *City of Picayune v. S. Reg'l Corp.*, 916 So. 2d 510, 525 (Miss. 2005); *Animal Legal Def. Fund v. Woodley*, 640 S.E.2d 777, 778 (N.C. App. 2007); *Kellas v. Dep't of Corrections*, 145 P.3d 139, 141-42 (Or. 2006); *Housing Auth. of Chester v. Pa. State Civil Service Comm'n*, 692 A.2d 1122, 1125 (Pa. 1997). For example, “[e]very state except New Mexico recognizes taxpayer standing” under state constitutional doctrines. By contrast, federal courts have allowed only narrow grounds to support standing in federal taxpayer claims. *See* Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1007-11 (2001).

Other states, however, have interpreted their state constitutional conferrals of judicial authority to include limitations similar to federal standing restrictions (in particular, injury-in-fact requirements). *See, e.g.*, *Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 550 S.E.2d 287, 291-92 (S.C. 2001); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *Parker v. Town of Milton*, 726 A.2d 477, 480 (Vt. 1998); *Coleman v. Sopher*, 459 S.E.2d 367, 372 note 6 (W.Va. 1995); *see also* *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 436-37 (Colo. 2000) (allowing a more flexible approach to injury-in-fact requirements for standing under state law); *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 967 (Utah 2006) (requiring traditional federal test, but court allows use of “alternative test” when “issues of significant public importance” are involved).

63. Elmendorf, *supra* note 62, at 1006-08; *see also* James W. Doggett, Note “Trickle Down” Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing be Imported into State Constitutional Law?, 108 COLUM. L. REV. 839, 840 (2008).

64. CONN. GEN. STAT. §§ 22a-14-20 (2011); FLA. STAT. ANN. § 402.412 (West 2011); IND. CODE §§ 13-30-1-1 to 13-30-1-12 (2011); IOWA CODE § 455B.111 (2011); LA. REV. STAT. ANN. § 30:2026 (West 2011); MD. CODE ANN., NAT. RES. §§ 1-501 to -508 (West 2011); MASS. GEN. LAWS ch. 214, § 7A (2011); MINN. STAT. §§ 116B.01-13 (2011); NEV. REV. STAT. ANN. §§ 41.540-570 (West 2011); N.J. STAT. ANN. §§ 2A:35A-1 to :35A-14 (West 2011); N.D. CENT. CODE §§ 32-40-01 to 32-40-11 (2011); S.D. CODIFIED LAWS §§ 34A-10-1 to 34A-10-17 (2011). Michigan has a similar statute to provide expanded judicial access for environmental claims, MICH. COMP. LAWS §§ 324.1701-1706 (2011), but the Michigan

citizen standing to challenge environmentally damaging actions also include some state constitutional provisions.⁶⁵ In some contexts, these state constitutional and statutory environmental rights have supported environmental damage claims or actions for injunctive relief. Cases under these provisions usually focus on whether the constitutional or statutory provisions provide a self-executing right of action, and therefore they typically involve parties with concrete and individualized harms that would support standing.⁶⁶ An expanded state constitutional environmental right could buttress claims rooted in environmental injuries that a federal court might reject.⁶⁷

States also enjoy some degree of freedom from federal

Court of Appeals struck it down as an unconstitutional legislative attempt to expand standing beyond the judiciary's constitutional powers. *Michigan Educ. Ass'n v. Superintendent of Pub. Instruction*, 724 N.W.2d 478 (Mich. Ct. App. 2008). The Michigan Legislature has not yet revised or withdrawn the statute.

65. HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; MONT. CONST. art. IX, § 1. Nearly half of the states have constitutional provisions that address environmental conditions in general terms, including Alabama, art. XI, § 219.07(1); California, art. X, § 2 (water); Colorado, art. XVIII, § 6 (forests); Florida, art. II, § 7 (natural resources and scenic beauty); Idaho, art. XV, § 1 (water rights); Louisiana, art. IX, § 1; Massachusetts, art. XCVII; Michigan, art. IV, § 52 (natural resources); Minnesota, art. XIII, § 12 (preservation of hunting and fishing); Missouri, art. III, § 37 (water pollution control); New Mexico, art. XX, § 21; New York, art. XIV, §§ 3-4; North Carolina, art. XIV, § 5; Ohio, art. VIII, § 2; Oregon, art. XI, § 2 (art. XI-F: reforestation; art. XI-H: pollution control; art. XI-(1) water development projects); Pennsylvania, art. I, § 27; Puerto Rico, art. VI, § 19; Rhode Island, art. I, § 17 (fisheries, shore privileges, natural resources); Utah art. XVIII, § 1 (forestry); and Virginia art. XI, § 2. The scope and enforceability of these constitutional provisions remain unclear and, to some extent, untapped. *See* James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, in *PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW* at 306-13 (James R. May ed., 2011).

66. *See, e.g.,* *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1092 (D. Mont. 2006) (declining to rule on whether Montana's constitutional right to a clean environment was self-executing and could support a jury verdict holding a refinery liable for environmental restoration costs).

67. For example, the Hawaii Supreme Court allowed a native rights advocacy group to challenge a land exchange on state constitutional grounds by adopting a broad interpretation of standing requirements under Hawaii's constitution. *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1257 (Haw. 1992). The court noted that its expansive view of standing would apply "in cases in which the rights of the public might otherwise be denied hearing in a judicial forum." *Id.* at 1257; *see also* *Pele Def. Fund v. Puna Geothermal Venture*, 881 P.2d 1210, 1213 (Haw. 1994); *Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Haw.*, 979 P.2d 1120, 1127 (Haw. 1999) (stating that in cases involving environmental concerns, the court would not be inclined "to foreclose challenges to administrative determinations through restrictive applications of standing requirements"). While these cases dealt with standing to pursue administrative procedural injury claims, their reliance on Hawaii's constitutional provisions for broadening standing would presumably apply to common law or statutory public nuisance actions as well.

constitutional constraints on nonjusticiability and political questions.⁶⁸ While the U.S. Supreme Court has rooted its political question jurisprudence in the structural precepts of the U.S. Constitution, the doctrine has remained an exercise in judicial self-restraint. The Court has never intimated that its political question doctrine binds state judiciaries under the Supremacy Clause or other constitutional provisions. To the extent that state constitutions or statutes parallel similar separation of powers as the federal constitution, state courts and legislatures may choose to adopt a similar approach for their independent reasons. Federal decisional law, however, does not compel them to follow that path.

Finally, the state courts' ability to allow broader standing tests and adopt differing standards for political questions acquires special weight when a state becomes a plaintiff in its own courts. For example, when a state brings a public nuisance action on behalf of its citizens, that state's courts may be less inclined to question the state's ability to bring such actions in its *parens patriae* capacity. The courts may also defer to the state when balancing equities on decisions to grant equitable relief to protect the state's sovereign interests.⁶⁹ On the other hand, lawsuits by state sovereigns against entities outside of the state's boundaries may

68. Jay M. Zitter, *Construction and Application of Political Question Doctrine by State Courts*, 9 A.L.R. 6th 177 (orig. published 2005, updated 2011) (illustrating varied application of political question doctrine by state courts premised on language of respective state constitutions); *see, e.g.*, *Neely v. W. Orange-Cove Consol. Ind. Sch. Dist.*, 176 S.W.3d 746, 779-80 (Tex. 2005) (declining to decide whether federal political question doctrine applies in Texas courts and observing that "[t]his Court has never held an issue to be a nonjusticiable political question, and we have referred to the doctrine only in passing. The courts of appeals have applied the doctrine only rarely") (citations omitted).

69. *See, e.g.*, *Georgia v. Tenn. Copper Co.*, 206 U.S. at 237-39 ("If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. . . . This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power"); *supra* note 26; *Env'tl. Def. Fund v. Lamphier*, 714 F.2d 331, 337-38 (4th Cir. 1983) (When Virginia sought to enjoin waste landfill's operation as a common law public nuisance, the court noted "[w]here the plaintiff is a sovereign and where the activity may endanger the public health, 'injunctive relief is proper, without resort to balancing'") (internal citations omitted); *State of Missouri ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 793 (Mo. 1980) ("Injunctions or abatements have been the traditional remedies when the state brings suit for a public nuisance . . ."). *But see*, *Natural Res. Def. Council v. Winters*, 555 U.S. 7, 24 (2008) (In a citizen suit seeking to halt sonar tests by U.S. Navy, "[a] preliminary injunction is an extraordinary remedy never awarded as of right. . . . In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'") (internal citations omitted).

raise federalism and preemption concerns.⁷⁰

In sum, while courts undoubtedly look to federal court decisions for guidance on how to implement state judicial doctrines on standing and political questions, state court decisions have frequently adopted broader stances that allow claimants access to state courts when they could not present a federal claim.⁷¹ This expanded access to state court remedies is particularly pronounced with claims brought under state environmental constitutional provisions or state environmental rights statutes.

C. Federal Limits on State Law Judicial Review of Environmental Claims

States, of course, do not have unlimited power to expand the ability of their courts to hear claims; the U.S. Constitution can trammel the enforceability in other states of judgments rendered in a state court that relies on excessively broad concepts of standing or that flouts political question requirements in ways rejected by the host state. The inherently parochial nature of a state court's jurisdictional reach and equitable powers may also immensely complicate the ability of plaintiffs to serve process on multiple nonresident defendants or to seek broad relief. Finally, the effects of state law on public nuisance climate change claims can cut both ways. For example, if a state's constitution permits a broader range of action, a state legislature may enact legislation to hobble the ability of a state court to hear expansive tort claims under state law. Numerous states have enacted tort reform legislation that may impede broad public nuisance climate change litigation under state tort laws.⁷² At least one state has passed legislation that expressly revokes the ability of its courts to hear climate change nuisance cases under state law.⁷³

Importantly, some of these potential limits on state jurisdiction over climate claims would not apply to the core set of cases that will likely offer the most attractive initial claims. For example, a plaintiff might choose to pursue a climate change public nuisance

70. See, e.g., *North Carolina ex rel. Cooper v. TVA*, 206 U.S. 291 (4th Cir. 2010); see also discussion *infra* notes 27-28.

71. See K. MANASTER & D. SELMI, *supra* note 61 ("In the final analysis, the broadened standing concepts endorsed by the state courts have greatly expanded the ability of plaintiffs to challenge governmental decisions.").

72. See discussion *infra* notes 95-97.

73. See discussion *infra* note 98 (discussing Texas statute to prohibit public nuisance claims for emission of greenhouse gases from facilities that possess permits for emissions of air pollutants).

action initially against a set of defendants located within the same state whose facilities emit greenhouse gases within the state's borders. The plaintiff might also allege damages that arose solely within the state.⁷⁴ While these suits would still face daunting challenges of proving causation, impleading arguably indispensable defendants, and assessing potential limits to the imposition of joint and several liability under state law, they would not immediately raise the foundational questions about the jurisdictional limits of the state court's powers against nonresident defendants because the plaintiffs' action would target solely domestic interests and parties.⁷⁵

Federal constraints on the ability of state laws and courts to address climate change public nuisance claims would likely arise initially in three contexts. First, the federal Constitution would place substantive limits on the ability of a state court to exercise jurisdiction over a nonresident defendant in a fashion that violates the Due Process or Equal Protection clauses. Second, federal law (including statutes) can set limits on the ability of state law to regulate, or for state courts to exercise subject matter jurisdiction over, climate change liabilities. Last, even if one state's laws and courts allow the imposition of liability on a defendant for public nuisance climate change damages, federal law may constrain the ability of plaintiffs to enforce that judgment in another state's courts.

As a fundamental constraint, the federal Constitution would still limit the ability of state courts to render judgments that disregard concepts of standing or political question justiciability. For example, the Full Faith and Credit Clause may constrain the ability to enforce one state court's decision in another state if the original state used inappropriately broad standing or political question doctrines. While federal and state courts have long used these principles to circumscribe the breadth of foreign court judgments on legal claims or remedies that the host state

74. For example, Steve Susman, a prominent plaintiff's attorney in Houston, Texas, has speculated that a ski lodge operator might bring a claim specifically for damages to the lodge's operations caused by reduced snowfall. Eric Torbensen, *Don't Like the Heat? Try Suing: Lawyers Anticipate a Rising Sea of Work Tied to Climate Change*, DALLAS MORNING NEWS, June 25, 2007, at A1. If such plaintiffs brought their claims solely against defendants whose in-state operations allegedly caused the damage, their claims might avoid many of the jurisdictional and procedural pitfalls described above.

75. These issues could quickly emerge, of course, if the defendants implead or bring third-party actions against nonresident defendants.

prohibits, these doctrines have not yet surfaced in an attempt to enforce a judgment on a state law or foreign law tort claim alleging climate damages. No theoretical or practical barrier, however, should bar their application.

In a similar fashion, the Supremacy Clause allows the imposition of substantive limits on the ability of state courts to use especially broad formulations of standing or political question doctrine. Congress can undoubtedly use legislation to limit the enforceability of certain state laws or court judgments that rely on concepts which Congress refuses to endorse.⁷⁶ This power, however, must still satisfy the fundamental mandates of the Full Faith and Credit Clause and other constitutional guarantees, and Congress has not yet attempted to limit the enforceability of any state court tort judgments to award climate change damages.⁷⁷ If Congress does pass such legislation, it will need to craft careful language to avoid other federal constitutional pitfalls.⁷⁸

These bars to federal or foreign state enforcement of a state law climate change nuisance judgment assume, of course, that the

76. For example, Congress has expressly barred the enforcement of state court judgments that attempt to implement state statutes or laws allowing same-sex marriage. *See* 1 U.S.C. § 7; 28 U.S.C. § 1738(C) (1996) (“Defense of Marriage Act” or “DOMA”). While Congress indisputably has the power to limit the enforcement of state court judgments within the confines of the Full Faith and Credit and Due Process Clauses, some litigants have already challenged the constitutionality of DOMA as a violation of federal constitutional assurances of due process and equal protection. The Obama Administration has concluded that section 3 of DOMA, as applied to legally married same-sex couples, fails to meet heightened standards of constitutional scrutiny and has therefore instructed the U.S. Department of Justice not to defend the law in litigation before the First Circuit. Marc Ambiner, *Obama Won’t Go To Court Over Defense of Marriage Act*, NAT’L J., (Feb 23, 2011), <http://nationaljournal.com/obama-won-t-go-to-court-over-defense-of-marriage-act-20110223>.

77. Several bills have proposed to limit EPA’s authority under the Clean Air Act to regulate greenhouse gas emissions, and some of those bills expressly foreclose state tort public nuisance claims for climate change damages. *See, e.g.*, Leslie Kaufman, *House Republicans Try to Curb Environmental Rules*, N.Y. TIMES, July 27, 2011, at A16; *see also* Robin Bravender, *Senator Voinovich Throws Curveball at Senators’ Plan to Limit GHG Regs in Climate Bill*, N.Y. TIMES, (Apr. 22, 2010) <http://www.nytimes.com/cwire/2010/04/22/22climate-wire-sen-voinovich-throws-curveball-at-senators-p-32487.html> (describing proposed bill to expressly preempt state law public nuisance claims for damages from greenhouse gas emissions).

78. Some constitutional pitfalls include potential violations of the Takings and Due Process Clauses for legislation that retroactively terminates litigation that the plaintiffs have already initiated in state or federal court. In addition, such federal legislation might also trigger bill of attainder concerns (depending on whether the bill’s language targeted any specific lawsuit), concerns about limitations on *ex post facto* legislation, and structural federalism objections.

judgment relies on broader concepts of standing or political question doctrine that the host state or federal court do not share. Even absent these special factors, other federal constitutional limits would bracket the extraterritorial application of one state's public nuisance law to emissions occurring in another state.⁷⁹ These constitutional limits would apply to any tort action that seeks to reach a party who lacks sufficient contacts with that state,⁸⁰ but those limits might carry special force in climate change public nuisance actions that would pose questions of attenuated causation or involve actions by parties wholly outside of state.⁸¹

Enforcement of foreign judgments may also pose special constitutional challenges under the Full Faith and Credit Clause for state court public nuisance climate change claims.⁸² For example, if a successful litigant seeks to enforce a state court judgment against a defendant in another state's court system, the defendant's state may have a public policy against imposition of public nuisance liability for greenhouse gas emissions. Texas, for example, has passed legislation to specifically prohibit such lawsuits in its own courts.⁸³ It remains unclear whether this legislative ban might affect the ability of Texas courts to use conflicts of law principles to hear claims that require application of

79. For example, federal constitutional protections would prevent the imposition of state court jurisdiction over a defendant who lacked minimum contacts with the state forum. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 285, 291 (1980).

80. In a diversity case, the federal district courts must rely on the long-arm jurisdiction statute of the state where the court sits. FED. R. CIV. P. 4(k)(1)(A). State long-arm statutes frequently seek to extend the jurisdiction of their courts to the maximum extent permitted by federal constitutional due process requirements. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-78 (1985) (upholding application of Florida long-arm jurisdiction statute to Michigan franchisee because extension of jurisdiction did not offend "traditional notion[s] of fair play and substantial justice" embodied in the Due Process Clause of the U.S. Constitution's Fourteenth Amendment).

81. These issues also drove some of the Fourth Circuit's analysis of whether the federal Clean Air Act preempted state law public nuisance actions to abate interstate emissions from power plants in *North Carolina v. Tennessee Valley Authority*. *See* *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 301-03 (4th Cir. 2010) (discussing concerns about "patchwork quilt" of inconsistent obligations arising from multiple state nuisance actions over cross-border emissions).

82. Many of the policy and constitutional issues evoked by choice-of-law debates over which state's law to apply will also surface in fights over attempts to use one state's courts to enforce a climate change public nuisance judgment issued by another state.

83. *See* discussion *infra* note 97 (describing Texas statute to provide affirmative defense against public nuisance actions for emissions of greenhouse gases from facilities holding air permits).

another state's laws, or their ability to enforce out-of-state court judgments that impose liability under climate change public nuisance theories.

Beyond these core concerns, a host of corollary issues will also affect efforts by state courts to extend their jurisdiction under state law to out-of-state actions in a climate change public nuisance action. For example, some state plaintiffs may contend that the state's tort laws appropriately apply to a defendant whose actions outside the state nonetheless led to environmental harm within the state that support a tortious claim.⁸⁴ For example, while federal courts typically seek to avoid extraterritorial application of environmental statutes absent express Congressional direction, they have found that actions by a foreign defendant can lead to liability under environmental statutes if they create environmental damages within the United States.⁸⁵ While this analysis has supported the extraterritorial application of federal environmental statutes, it arguably could also allow extension of state tort liability to actions outside the state. Such an action, however, would likely face vigorous procedural attacks such as *forum non conveniens* challenges.⁸⁶

84. *See, e.g.,* *New Jersey v. City of New York*, 283 U.S. 473, 482 (1931) (finding that the dumping of trash in international waters remained subject to public nuisance action in federal district court because

"the defendant is before the Court and the property of plaintiff and its citizens that is alleged to have been injured by such dumping is within the Court's territorial jurisdiction. The situs of the acts creating the nuisance, whether within or without the United States, is of no importance. Plaintiff seeks a decree in personam to prevent them in the future. The Court has jurisdiction");

City of New York v. A-1 Jewelry & Pawn, Inc., 247 F.R.D. 296, (E.D.N.Y. 2007) (allowing exercise of personam jurisdiction over nonresident defendant under New York long-arm statute for actions outside of state that allegedly created public nuisance within the state).

85. *See, e.g.,* *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006) (holding Canadian mining company potentially responsible for release of hazardous substances outside the United States that caused downstream contamination necessitating a response action under CERCLA within the United States).

86. *Forum non conveniens* allows a federal court to dismiss an action when another forum can provide a more convenient hearing with easier and more effective access to evidence. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248-49, 256 (1981) (explaining that the "central purpose of any *forum non conveniens* inquiry" is simply "to ensure that the trial is convenient"). This inquiry requires the court to determine "(1) that an adequate alternative forum is available and (2) that . . . private and public interest factors weigh in favor of dismissal." *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 951 (11th Cir. 1997); *see also Piper*, 454 U.S. at 257. The court can consider public factors such as "the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the

In addition to substantive questions about the competence and jurisdiction of state courts to hear broad climate change public nuisance claims under state law, prosaic procedural questions may pose more practical barriers to state court strategies. For example, state court lawsuits for climate change public nuisances will likely include defendants who reside outside the jurisdiction of the state.⁸⁷ If so, a state court will likely have to wrestle with its ability to identify defendants subject to its *personam* jurisdiction.⁸⁸ Plaintiffs in state court may also have to navigate local conflicts of law principles that could affect which state's nuisance laws will apply to out-of-state emissions,⁸⁹ and the host state's laws may also affect the scope of relief available to the litigants.⁹⁰

D. *Implications for State Law Climate Nuisance Actions*

The framework underlying potential climate change nuisance lawsuits under tort law yields surprising implications when those actions proceed under state law rather than federal common law.

avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." *Id.* at 241 n.6 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)). Private factors can include the "ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; . . . and all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Id.* (quoting *Gilbert*, 330 U.S. at 508 (1947)).

87. Even if the plaintiffs did not include nonresident defendants at the outset of such litigation, the original defendants would likely seek to add those nonresident defendants either as necessary parties or alternatively attempt to add them through third-party claims for contribution or indemnification.

88. While some federal environmental statutes allow for nationwide service of process and relative ease of jurisdictional reach over defendants, *see e.g.* 42 U.S.C. § 9613(e) (authorizing nationwide service of process under the Comprehensive Environmental Response, Compensation and Liability Act), state law plaintiffs may find themselves struggling to show the requisite minimum contacts and basis for *personam* jurisdiction for exercise of state court jurisdiction over a nonresident defendant. *See* discussion *supra* Part II.C, at note 79 of the constitutional requirements for minimum contacts.

89. *See* discussion *supra* note 20, and *infra* notes 125-132. The *North Carolina v. Tennessee Valley Authority* district court used North Carolina law choice of law principles to apply Tennessee nuisance law to emissions from coal-fired power plants located in Tennessee. 615 F.3d 291 (4th Cir. 2010). The Fourth Circuit's analysis centered on preemption concerns, its conclusion that the district erroneously applied North Carolina law in the guise of Tennessee tort law, and its belief that emissions cannot constitute a public nuisance if they comply with federal Clean Air Act permit emission limits. *Id.*

90. For example, some states impose bond requirements during the appeals process for parties seeking injunctive relief or relief from injunction. *See, e.g.*, TEX. R. CIV. P. 571 (requiring bond "in double the amount of judgment" for appeals).

In short, state law public nuisance actions pursued in federal court may still face significant standing and political question barriers (although these hurdles may be lower if a state government brings those claims). But these same state law claims may sidestep such barriers if the plaintiffs file their claims in state courts. This tactic, however, may create other impediments, including limited jurisdictional reach, tangled choice of law issues, potential class action limitations and express constraints imposed by the host state's laws on tort actions.

1. *In state court*

In contrast to federal courts, state courts entertaining public nuisance actions under state laws have greater latitude to hear claims that might not meet traditional federal standing and justiciability standards.⁹¹ State tort laws may also offer more favorable substantive standards for private parties to bring public nuisance actions.⁹² If so, the more immediate challenges to state court climate change nuisance actions will likely arise from the inherently limited jurisdictional reach of state courts⁹³ as well as other subject matter jurisdictional limits imposed by each state's laws.⁹⁴

91. Of course, *AEP v. Connecticut's* conclusion that the federal Clean Air Act has displaced federal common law public nuisance claims would bar plaintiffs from pursuing federal common law public nuisance claims in state court as well. 564 U.S. —, 131 S. Ct. 2527 (2011). This outcome forecloses the need to evaluate whether reverse-*Erie* doctrine might apply to public nuisance climate change actions brought in state court under federal common law. Some commentators had previously suggested that state courts should apply a reverse-*Erie* analysis to require the use of federal standing law when Congress implicitly intended for a federal statute's remedial scheme to stay within the constraints of federal standing doctrine. See, e.g., Paul J. Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315, 1317 (2005).

92. For example, Hawaii has adopted a modified standard for private plaintiffs to satisfy the requirement that they suffered an injury different in kind from the general public's injury. See discussion *supra* note 67.

93. See discussion *supra* note 76-82 (regarding federal constitutional constraints on extension of state judicial *personam* jurisdiction).

94. For example, Nevada imposes a geographic limitation on suits by citizens under its statute to authorize legal actions against environmental violations. NEV. REV. STAT. ANN. §§ 41.540(1) (West 2011) (authorizing that "[a]ny person who is a resident of this state may commence an action in any district court of this state *where any violation is alleged to have occurred*, to enforce compliance with any statute, regulation or ordinance for the protection of the air, water and other natural resources from pollution, impairment or destruction, if such person has first given 30 days' written notice of the person's intention to file suit") (emphasis added).

Climate change public nuisance lawsuits under state law may find themselves generally hobbled by broader initiatives to limit state tort litigation. Tort reform initiatives have led several state legislatures to substantially limit the rights of recovery for litigants claiming personal injury or property damage. For example, some of these acts impose damage caps that limit the rights of recovery for plaintiffs who seek sizable individual recoveries from corporate defendants in the power, mining or transportation sectors. Other tort reform steps may collaterally limit the ability of plaintiffs to prove their claims or to impose joint and several liability on a large group of defendants.⁹⁵

Beyond general initiatives to reform state tort laws, some efforts have targeted public nuisance litigation in particular. For example, several states have limited public nuisance lawsuits that seek recovery for non-traditional tortious activity such as lead paint sales or application, handgun possession or sales, or gang activity.⁹⁶ More tellingly, some states may begin to pass legislation that specifically forecloses the ability to bring public nuisance tort lawsuits for climate change damages. For example, Texas adopted a statute in 2011 that expressly forbids nuisance or trespass lawsuits for damages allegedly due to greenhouse gas emissions from facilities that have permits under authorized federal programs for the activities that released the gases.⁹⁷ This act effectively prevents the filing of future climate change tort litigation in Texas courts

95. Mississippi, for example, has statutorily abolished joint and several liability. As a result, even defendants who contributed to a joint injury with a legally exempt party will face liability only for their share of fault. MISS. CODE ANN. § 85-5-7(5) (West 2011). Texas prohibits the imposition of joint and several liability on a defendant unless the plaintiff can show that the defendant contributed to more than fifty percent of the collective harm. TEX. CIV. PRAC. & REM. CODE § 33.013(b)(1) (2011) (allowing defendant to be held responsible only for its percentage of fault unless defendant is 50% or more responsible, and can designate—as opposed to join—other responsible parties whose fault contributed to plaintiff's harm; toxic tort cases now use the same 50% threshold for joint and several liability). For further information on respective state limitations on tort recoveries, see generally TORT LAW DESK REFERENCE: A FIFTY-STATE COMPENDIUM (M. Daller ed., Wolters Kluwer 2010) (summarizing each state's tort laws and recovery limitations).

96. Richard Faulk & John Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 4 MICH. ST. L. REV. 941, 978-1014 (2007).

97. TEX. WATER CODE § 7.257 (2011) ("Defense to Nuisance or Trespass"). The drafting of the new Texas statute, effective September 1, 2011, may have unexpected effects. For example, one interpretation of the statute would prohibit any public nuisance action related to the emission of a greenhouse gas even if the plaintiffs did not raise any claims related to climate change. As a result, the new law may bar a public nuisance action for emissions of methane (a greenhouse gas) from industrial operations.

under Texas law, even though (ironically enough) Texas still vigorously protests the federal government's ability to impose greenhouse gas emission limits in air permits issued to Texas facilities.⁹⁸

Other state statutes may unexpectedly affect climate change public nuisance actions. For example, historical attempts to modify local weather (e.g., rain making) have triggered tort actions that suggest troubling precedents for climate change public nuisance litigation.⁹⁹ Tellingly, not a single tort action claiming damages from weather modification activities has resulted in a judgment awarding money damages or injunctive relief.¹⁰⁰ The legal uncertainty created by the lawsuits also led some states to expressly shield weather modification activities from trespass and nuisance liability.¹⁰¹ Even if state statutory definitions have enough flexibility

98. The State of Texas has filed multiple lawsuits to challenge EPA's regulatory actions to compel permits for greenhouse gas emitters in Texas under the Clean Air Act's Prevention of Significant Deterioration and New Source Review programs. *See, e.g.*, Press Release, Texas Office of the Attorney General, Texas Files Legal Action to Block Imposition of EPA Regulations that Threaten Texas Jobs (Sept. 16, 2010) <https://www.oag.state.tx.us/oagnews/release.php?id=3484> (announcing that Texas Attorney General had filed four petitions to stay implementation of EPA finding that greenhouse gas emissions pose a substantial endangerment under the Clean Air Act as well as three related rules to control greenhouse gas emissions).

99. Some state courts have denied claims for damages allegedly arising from weather modification because the plaintiffs either failed to prove that the weather modification efforts actually caused their damages or that they had a protectable property interest in rainfall from historical weather patterns. *Saba v. Cnty. of Barnes, Benson, Burleigh, Eddy, Foster, Griggs, Kidder, and Nelson, and Wells & Weather Modification, Inc.*, 307 N.W.2d 590 (N.D. 1981) (refusing to certify class for plaintiffs allegedly damaged by weather modification on causation grounds); *Slutsky v. New York*, 97 N.Y.S.2d 238, 239 (Sup. Ct. 1950) (no vested property right to clouds or the moisture therein); *Penn. Natural Weather Ass'n v. Blue Ridge Weather Modification Ass'n*, 44 Pa. D. & C.2d 749 (Pa. Com. Pl. 1968) (finding qualified right to clouds and moisture over property, but expressing doubt about plaintiffs' ability to prove that hail suppression caused their specific property damage); *cf. Mont. Wilderness Ass'n v. Hodel*, 380 F. Supp 879 (D. Mont. 1975) (dismissing action to enjoin cloud seeding in drainage for river as moot because permit for weather modification had expired during lawsuit). *But see* *Sw. Weather Research, Inc. v. Rounsaville*, 320 S.W.2d 211, 216 (Civ. App. El Paso 1959), *aff'd sub nom. Southwest Weather Research, Inc. v. Jones*, 327 S.W. 2d 417 (Tex. Civ. 1959) (In limiting scope of temporary injunction to halt hail suppression effort that allegedly damaged adjoining ranching operations, Court of Appeals noted that "[u]nder our system of government the landowner is entitled to such precipitation as Nature deigns to bestow.... It follows, therefore, that this enjoyment of or entitlement to the benefits of Nature should be protected by the courts if interfered with improperly and unlawfully.").

100. Gregory Jones, Comment, *Weather Modification: The Continuing Search for Rights and Liabilities*, 1991 B.Y.U. L. Rev. 1163, 1167-70 (1991).

101. *See, e.g.*, COLO. REV. STAT. § 36-20-123 (2011); UTAH REV. CODE ANN. § 73-15-7 (West 2011). Other states provide similar statutory exemptions from trespass liability for

to include climate change effects, however, they likely will not protect greenhouse gas emitters because such statutes typically require the emitter to have a weather modification permit as a precondition for legal protection.¹⁰²

2. *In federal court*

Federal courts still potentially have a role to play in climate change public nuisance litigation, even after *Connecticut v. AEP*. For example, claimants can still bring state law climate change nuisance actions under the federal courts' diversity jurisdiction. The federal courts may also find themselves reviewing climate change tort claims that raise possible affirmative defenses under federal statutes that grant exclusive jurisdiction in the federal courts, or they may need to review state court judgments challenged on federal constitutional grounds. More prosaically, some state law climate nuisance claims may target federal governmental defendants or parties who enjoy the ability to remove actions to federal court.

As noted above, the federal district courts have uniformly found that they lacked jurisdiction over public nuisance climate change tort claims under federal common law either because the plaintiffs could not prove that they met standing requirements or the complaints posed non-justiciable political questions. The federal circuit courts of appeal have split on these issues, and the U.S. Supreme Court lacked a majority to reverse the Second Circuit's upholding of standing and jurisdiction in the narrow case where state governments brought the claims. All of these decisions

weather modification efforts. These protections only apply if the defendant holds a permit or authorization from the state to perform weather modification. COLO. REV. STAT. § 36-20-123(1), (2)(a)-(b) (2011) (while "mere dissemination of materials and substances into the atmosphere pursuant to an authorized project shall not give rise to the contention or concept that such use of the atmosphere constitutes trespass or involves an actionable or enjoined public or private nuisance," conducting such activities without a permit constitutes negligence per se and failure to halt such activities when ordered is a felony); *see also* COLO. REV. STAT. § 36-20-123(2)(a) (2011) ("Failure to obtain a permit before conducting [a weather modification] operation . . . shall constitute negligence per se."); N.D. CODE § 61-04.1-37(2) ("Dissemination of materials and substances into the atmosphere by a permittee acting within the conditions and limits of the permittee's permit shall not constitute trespass."); WISC. STAT. ANN. § 93.35(14)(b) (West 2011) ("Dissemination of materials and substances into the atmosphere by a permittee acting within the conditions and limits of his or her permit shall not give rise to the contention that the use of the atmosphere constitutes trespass.").

102. *Id.*

focused on claims that arose under federal common law rather than state tort laws.¹⁰³

If non-sovereign plaintiffs brought state claims in federal court, however, they would likely face continued challenges under Article III standing requirements. These federal jurisdictional standards would still apply even to state law tort claims brought under the district court's diversity jurisdiction. Long-standing precedent and federal statutes require that diversity claimants must satisfy both state and federal standing requirements.¹⁰⁴ For example, the vacated *Comer* panel opinion expressly ruled that the plaintiffs met standing requirements under both Mississippi state law and federal law.¹⁰⁵ While state claimants may benefit from some special solicitude from the federal courts for their claims under state law, the federal courts will nonetheless insist that diversity plaintiffs meet Article III standing and jurisdictional requirements even if they raise claims solely under state tort laws.¹⁰⁶

103. The federal public nuisance complaints raised state law claims as well. *See*; Class Action Complaint at ¶¶ 5-7, 22, 45-46, *Comer v. Murphy Oil USA, Inc.*, No. 1:11cs220HSO-JMR (S.D. Miss. May 27, 2011), 2011 WL 2947582 (including state law claims); Complaint at ¶ 8, *Native Vill. of Kivalina v. ExxonMobil Corp.*, Civ. Action No. C 08-01138 SBA (N.D. Cal. Feb. 26, 2008), 2008 WL 594713 (pleading supplemental jurisdiction over state law claims); ; Complaint at ¶¶ 1, 6, 36, 165-86, *Connecticut v. Am. Elec. Power* (S.D.N.Y. 2004), <http://www.pawalaw.com/assets/docs/Complaint%20Global%20Warming%20Ags%20Final%20with%20Exhibits.pdf> (last visited Oct. 17, 2011) (involving state law claims pled in the alternative under the court's supplemental jurisdiction) and at ¶ 263 (pleading in the alternative state statutory and/or common law of private and public nuisance). None of the trial court decisions, however, addressed the independent viability or justiciability of those state claims in federal court when they dismissed the actions on political question or standing grounds.

104. CHARLES ALLEN WRIGHT ET AL., 13B FEDERAL PRACTICE & PROCEDURE § 3531.14 n.28 (3d ed. 2009); *see also* *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 173 (2d Cir. 2005); *Metro. Exp. Services, Inc. v. City of Kan. City*, 23 F.3d 1367, 1369-70 (8th Cir. 1994); *City of Moore v. Atchison, Topeka & Santa Fe Railway Co.*, 699 F.2d 507, 511 (10th Cir. 1983); *Owen of Ga., Inc. v. Shelby Cnty*, 648 F.2d 1084, 1088-90 (6th Cir. 1981).

105. *See* the discussion of *Comer v. Murphy Oil USA*, in note 52.

106. Some commentators have suggested that the state courts should apply a reverse-*Erie* analysis to require the use of federal standing law when Congress implicitly intended for a federal statute's remedial scheme to stay within the constraints of federal standing doctrine. *See, e.g.*, Paul Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315, 1317 (2005). State law climate change public nuisance actions, however, should not pose reverse-*Erie* concerns because, by definition, they do not raise claims grounded in federal rights or statutes. Reverse-*Erie* doctrine might have played an important role if plaintiffs had sought to pursue federal common law claims in state courts, but that route vanished when *Am. Elec. Power v. Connecticut* found that the Clean Air Act displaced any federal common law claims for public nuisance climate change actions. 564 U.S. at —.

Plaintiffs who bring state law nuisance actions for interstate emissions under the diversity jurisdiction of the federal courts may also face challenges over which state's law will govern. First, at least one federal court of appeals has ruled that the Clean Air Act has expressly preempted such public nuisance tort claims for interstate emissions.¹⁰⁷ But even if the federal courts ultimately find no preemption, public nuisance plaintiffs with interstate claims may face further complex challenges. In analogous circumstances, the U.S. Supreme Court has ruled that claimants from one state who sue for damages caused by discharges in another state must rely on the law of the state where the discharge took place.¹⁰⁸ As a result, those plaintiffs may face a Hobson's choice: either sue in the courts of the state where the discharges occurred (and where a bias might favor the resident defendants), or sue in federal courts that may have more restrictive requirements for standing and justiciability.¹⁰⁹

Even if plaintiffs bring their claims initially in state courts, the federal courts may still receive appeals from disappointed state litigation parties who wish to invoke federal rights or defenses. In this situation, the U.S. Supreme Court has directly addressed the ability of federal courts to review state court judgments on federal claims or causes of action. In *ASARCO Inc. v. Kadish*,¹¹⁰ the Court had to address whether federal courts could review state court judgments on questions of federal law¹¹¹ in an action brought by plaintiffs who lacked Article III standing. The Court concluded that the defendants who had lost the underlying appeal had now suffered an injury-in-fact that supported Article III standing. This outcome, of course, leaves open the possibility of asymmetrical

107. See discussion of North Carolina *ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010) *infra* notes 27-28.

108. *Int'l Paper Co. v. Oulette*, 479 U.S. 481, 495-98 (1987) (holding that federal Clean Water Act did not preempt state law public nuisance actions for cross-state effluent discharges, but Court limited the choice of law for such actions to the law of the state where the discharge occurs).

109. Kirsten Engel, *State Standing in Climate Change Lawsuits*, 26 J. LAND USE & ENVTL. L. 217, 226-27 (2011) (arguing that plaintiffs with public nuisance claims for interstate greenhouse gas emissions will likely sue in federal courts under diversity jurisdiction where "their claims would receive a more sympathetic hearing than they would in the state courts of the parties that they are suing").

110. 490 U.S. 605, 617 (1989).

111. See, e.g., 28 U.S.C. § 1257 (2011) (Court can review "[f]inal judgments . . . by the highest court of a State . . . where the validity of a treaty or statute of the United States is drawn in question.").

appellate review: the plaintiffs would not have possessed a similar injury if they had lost their action, and they therefore could not have sought federal appellate review.¹¹² For climate change state law nuisance litigants, *Kadish* raises the prospect that they can rely on state law standing doctrines to pursue their claims in state courts even if they invoke federal rights or laws—but at the peril of potentially skewed avenues of appeal to federal appellate review if they lose.¹¹³

III. THE REMAINING WINDBREAK: PREEMPTION BY FEDERAL LAW

Even if state courts use broader state law doctrines of standing and political question to hear statutory or common law public nuisance lawsuits for climate change damages, they may still find their ability to hear such cases barred by federal preemption. This preemption might arise from multiple sources, including statutory preemption under the Clean Air Act and preemption under larger constitutional doctrines such as the Dormant Commerce Clause.

A. *The Federal Clean Air Act*

The Fourth Circuit's recent decision in *North Carolina v. Tennessee Valley Authority* poses the starkest example of the preemption concern.¹¹⁴ In this case, the Tennessee Valley Authority (TVA) operated eleven coal-fired power plants in Tennessee, Kentucky and Alabama, and these plants emitted sulfur

112. William Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 281 (1990).

113. Even if a federal court concluded that plaintiffs had satisfied constitutional prerequisites for standing and justiciability, prudential doctrines of justiciability may still bar federal review of certain state law claims. For example, federal courts may extend *Burford* abstention doctrines to preclude review of state law public nuisance actions that seek injunctive or equitable relief. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Under *Burford*, a federal court can dismiss a case only if it presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or if its adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976). The *Burford* doctrine, however, would not allow federal courts to dismiss or remand state common law public nuisance actions that seek solely monetary damages. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 719-23 (1996) (holding that federal courts can dismiss cases based on *Burford* abstention doctrine only when the plaintiffs seek equitable relief or other discretionary actions and cannot dismiss or remand outright common law actions for damages).

114. *North Carolina ex rel. Cooper v. TVA*, 615 F.3d at 291, 296 (4th Cir. 2010).

dioxide, nitrous oxides and precursors for particulate matter.¹¹⁵ Although the plants already operated in full compliance with state permits issued under programs authorized under the federal Clean Air Act, the Attorney General of North Carolina brought a public nuisance action in a North Carolina federal district court to require TVA to install upgraded pollution control equipment in several coal-fired power plants in Alabama and Tennessee.¹¹⁶ The action alleged that the power plants' emissions constituted a public nuisance under the state laws of Tennessee and Alabama, but the district court ultimately selected an injunction that closely paralleled North Carolina state law legal requirements for emission controls.¹¹⁷ The injunction would have required TVA to install scrubbers and other pollution-reducing equipment on four plants located within 100 miles of the border with North Carolina by December 2013.¹¹⁸ The court also established a schedule for TVA to further reduce sulfur dioxide and nitrous oxide emissions.¹¹⁹

The Fourth Circuit reversed the district court's decision and dissolved the injunction.¹²⁰ In reversing the district court, the Fourth Circuit held broadly that the federal Clean Air Act's extensive permitting framework preempted any conflicting state public nuisance law that would otherwise create liability for emissions from a facility permitted under the federal Clean Air Act because of the "considerable potential mischief in those nuisance actions seeking to establish emissions standards different from federal and state regulatory law."¹²¹ The Fourth Circuit also held that the district court improperly relied on the substance of North Carolina law to determine the nuisance standards of the host states

115. *Id.* at 296-97.

116. *Id.* at 297.

117. *Id.* at 306-07 ("Unfortunately, while the district court acknowledged the proper standard, it for all practical purposes applied North Carolina's Clean Smokestacks Act extraterritorially in Alabama and Tennessee. The decision below does little more than mention the black letter nuisance law of Alabama and Tennessee on its way to crafting a remedy derived entirely from the North Carolina Act.").

118. *Id.* at 298.

119. *Id.* at 297-98, 306-09.

120. *Id.* at 310-12.

121. *Id.* at 302-06. Even though the Clean Air Act did not necessarily preempt "every conceivable suit under nuisance law," the Fourth Circuit emphasized that the U.S. Supreme Court had "created the strongest cautionary presumption against" nuisance lawsuits seeking to impose emissions standards different from federal and state permits. *Id.* at 303.

of Alabama and Tennessee.¹²² Last, the court found that a facility's emissions could not create a public nuisance under either Tennessee or Alabama law if they complied with permits issued by each state through programs authorized under the federal Clean Air Act.¹²³

After the parties announced a settlement that required TVA to install extensive emission control equipment and provided other injunctive relief, they dismissed the petition for certiorari on July 22, 2011 as part of the overall settlement agreement.¹²⁴ The Fourth Circuit's unchallenged holding will therefore pose a significant, if not insurmountable, barrier to state court climate change public nuisance actions against extraterritorial sources by states within the Fourth Circuit's jurisdiction.¹²⁵ It will also set the stage for conflicting standards of preemption for state law public nuisance claims against sources with federal permits. To date, however, the Second Circuit declined to rule on similar preemption claims in *Connecticut v. AEP* because it concluded that the plaintiffs could rely on federal common law nuisance actions.¹²⁶

Ultimately, the distinction between displacement of federal common law and the preemption of state laws may prove crucial. As noted in *AEP v. Connecticut*, the standard for displacement of federal common law is relatively low. For displacement, Congress

122. *Id.* at 306-09.

123. *Id.* at 309-10.

124. *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 291 (2011) (dismissing petition for certiorari based on Rule 46 (July 22, 2011), [http:// www.supremecourt.gov /Search.aspx?FileName=/docketfiles/10-997.htm](http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-997.htm)).

125. This conclusion assumes, of course, that EPA successfully implements its full regulatory program to permit greenhouse gas emissions under the federal Clean Air Act despite numerous judicial challenges.

126. 582 F.3d at 392 ("Accordingly, since we hold that the federal common law of nuisance applies in this case, we do not address the States' and Trusts' alternative claims based on state public nuisance law"). As noted above, the U.S. Supreme Court's decision in *AEP v. Connecticut* rested on displacement of federal common law rather than preemption of state laws. *See* discussion *supra* notes 11-13. The Fifth Circuit panel's vacated panel opinion in *Comer v. Murphy Oil* also did not reach a conclusion on whether regulatory activities under the Clean Air Act preempted state law public nuisance actions. Interestingly, the Fourth Circuit's decision arguably creates a conflict with its own prior rulings in the same case. In an earlier interlocutory ruling, the court held that North Carolina's common law tort claims against the Tennessee Valley Authority were not preempted by the Supremacy Clause of the U.S. Constitution or by provisions of the federal Clean Air Act. *See North Carolina ex rel. Cooper*, 515 F.3d 344, 350-53 (4th Cir. 2008) (relying on earlier U.S. Supreme Court rulings that statutory language to preserve state "requirements" from preemption, such as in the federal Clean Air Act's waiver of sovereign immunity, also protected state common law tort claims).

need only evidence its general intent to delegate discretionary authority to an agency within a statutory framework.¹²⁷ By contrast, preemption of state laws requires a clear statement of Congressional intent to preempt inconsistent state law or an evident Congressional desire to comprehensively occupy a field so that state regulation becomes insupportable.¹²⁸ As a result, a federal statute may displace prior federal common law without preempting existing state laws in the same area.

The Fourth Circuit expressly addressed whether North Carolina common law would support a public nuisance action at a facility whose emissions complied with Clean Air Act permitting requirements. While the court noted that section 7604(e) of the Clean Air Act expressly preserves state laws imposing more stringent requirements for emissions of pollutants or contaminants than state law,¹²⁹ it concluded that section 7604 did not allow common law public nuisance actions for damages caused by cross-border emissions.¹³⁰ According to the Fourth Circuit, the Clean Air Act's savings clause only preserves the ability of states to impose emission limits more demanding than federal requirements for sources within their jurisdiction, and only allows state law claims for relief from injuries caused by emissions from facilities operating within the state.¹³¹

127. *Am. Elec. Power v. Connecticut*, 564 U.S. at —, slip op. at 9-10 (“Legislative displacement of federal common law does not require the ‘same sort of evidence of a clear and manifest [congressional] purpose’ demanded for preemption of state law,” and therefore “[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute ‘speak[s] directly to [the] question’ at issue.”) (internal citations omitted).

128. *See, e.g., Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 (2009) (“In all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied. . . , we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”) (internal citations omitted) (internal quotation marks omitted); *see also Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 110 (2005) (Kennedy, J., concurring) (“[A] high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act. . . . [a]ny conflict must be irreconcilable . . . [t]he existence of a hypothetical or potential conflict is insufficient.”) (internal citations omitted).

129. 42 U.S.C. § 7604(e) (2011) (“Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).”).

130. *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291,303-04 (2011).

131. *Id.* at 302-04 (“We thus cannot allow non-source states to ascribe to a generic savings clause a meaning that the Supreme Court in *Ouellette* held Congress never

State climate change nuisance lawsuits may therefore lead to situations where a federal statute meets the standard required to displace federal common law claims, but lacks language with sufficient clarity to satisfy the more stringent standard for preemption of state laws. Proposed legislation to suspend federal regulatory initiatives to regulate greenhouse gas emissions under the Clean Air Act may actually remove delegations of regulatory authority to EPA that would otherwise support a preemption of state law public nuisance lawsuits for greenhouse gas emissions. Congress, however, can include express language in these bills to expressly bar future state greenhouse gas public nuisance lawsuits; in fact, several proposed bills already include this targeted language.¹³²

The touchstone to resolve these conflicting opinions over preemption will likely be the U.S. Supreme Court's seminal decision in *International Paper v. Oulette*. The case dealt with a situation closely analogous to cross-state emissions of air pollutants: a paper mill had discharged effluents into a lake in New York which then flowed across state boundaries to affect properties in Vermont.¹³³ The paper mill discharged the pollutants pursuant to a valid permit issued by New York under a delegated program authorized under the federal Clean Water Act.¹³⁴ When the Vermont residents brought numerous tort claims (including a public nuisance action) under Vermont law to force the New York paper mill to reduce its effluents,¹³⁵ the Court declared that the Clean Water Act did not preempt a state from imposing common law public nuisance liability on in-state sources even for effluent discharges under federally authorized permits.¹³⁶ The Clean Water Act, however, did preclude the application of one state's public nuisance laws to a facility operating in another state.¹³⁷ To bring such an action, the plaintiffs would have to rely on the law of the state where the emissions occurred, which meant the public nuisance tort law of New York controlled Oulette's claims.¹³⁸

intended.").

132. See discussion *supra* notes 76-78.

133. *Int'l Paper Co. v. Oulette*, 479 U.S. at 495-98.

134. *Oulette v. Int'l Paper Co.*, 602 F. Supp. 264, 266 (D. Vt. 1985), *aff'g order*, 776 F.2d 55 (2d Cir. 1985), *aff'g in part, rev'g in part*, 479 U.S. 481 (1987).

135. *Id.* at 266, 274.

136. *International Paper*, 479 U.S. at 498-500.

137. *Id.* at 493-94.

138. *Id.* at 496-99.

While the Fourth Circuit acknowledged the vitality of *Oulette* and its applicability to North Carolina's claims, the court brusquely asserted that the laws of Tennessee and Alabama (where the power plant emissions occurred) would not label as a public nuisance any emissions under permits authorized by the federal Clean Air Act.¹³⁹ Prior case law, however, makes a more subtle distinction as to the circumstances where a nuisance is or is not authorized. As the Fourth Circuit noted in passing, both states would still impose liability on permitted emissions if they occurred negligently.¹⁴⁰ This conclusion accords with the general precept that federal and state courts historically have held that safety standards and permitting compliance do not completely insulate a facility operator from tort liability even if the operator satisfied those regulatory standards.¹⁴¹ Congress can undoubtedly expressly preempt or limit state standards that set out more stringent requirements, but it must state its intention to preempt state law in clear and explicit fashion.

While these distinctions undermine the precedential value of *North Carolina v. TVA* for public nuisance cases generally, they apply even more strongly to climate change actions. While the

139. *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 309-310 (2011).

140. *Id.* (In Alabama, "an entity must behave *in a negligent manner* if its expressly permitted activities are to constitute a nuisance," in Tennessee, "[t]he only way that a permit-authorized activity can be enjoined under a nuisance theory is *if it is operating negligently*, a claim is not before us in this case.") (emphasis added).

141. Federal and state courts have historically held that compliance with safety standards, regulatory requirements, or permit limits do not invariably insulate a facility operator from tort liability. PROSSER ON TORTS, *supra* note 22, at § 36:

While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue. Such a standard is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions. . . . The same is of course true of administrative regulations. Where there is a normal situation, clearly identical with that contemplated by the statute or regulation, and no special circumstances or danger are involved, it may be found, and can be ruled as a matter of law, that the actor has done his full duty by complying with the statute, and nothing more is required. . . . But if there are unusual circumstances, or increased danger beyond the minimum which the statute was designed to meet, it may be found that there is negligence—and perhaps even recklessness—in not doing more.

Id. at 233. In its more modern formulation, this principle has preserved tort liability for nuisance or trespass when a facility operating under a state-issued permit either violates the terms of that permit or acts in a negligent fashion. R. Epstein, *Federal Preemption, and Federal Common Law, in Public Nuisance Cases*, 102 NW. L. REV. 551, 559 (2008) (citing *Vaughan v. Taff Vale Ry. Co.*, 157 Eng. Rep. 1351, 1354 (Exch.) (1860)).

Fourth Circuit focused heavily on the Clean Air Act's extensive regulatory framework for emissions of criteria air pollutants in areas that fail to meet National Ambient Air Quality Standards, EPA has yet to promulgate and fully implement many aspects of those rules for greenhouse gas emissions.¹⁴² Furthermore, because greenhouse gas emissions do not have significant localized effects on air quality, states may have difficulty meeting the requirements to petition for emissions restrictions from upwind sources that have affected downwind air quality under section 126 of the Clean Air Act. While the *AEP v. Connecticut* opinion admittedly laid out numerous factors in its displacement discussion that would also weigh in favor of preemption,¹⁴³ Justice Ginsberg's careful delineation and unwillingness to hem a future Court's analysis of preemption issues hints that the Court may not readily follow the Fourth Circuit's sweeping line of analysis in future climate change public nuisance actions rooted solely in state law.

B. *The Dormant Commerce Clause*

If state law climate change public nuisance suits survive preemption claims under the federal Clean Air Act, they still might face a serious preemption challenge from the Dormant Commerce Clause. Even if Congress has not expressly or implicitly preempted a state statute or common law through passing a specific federal statute, the Dormant Commerce Clause may still bar a state from regulating environmental activities in a way that either discriminates against interstate commerce or unduly burdens the flow of commerce across state lines.

Dormant commerce clause cases have used two tests to assess the constitutionality of state statutes or laws that arguably burden interstate commerce. First, if a state program or law discriminates against interstate commerce, the court will review it under a strict scrutiny standard.¹⁴⁴ State laws rarely survive such a review.¹⁴⁵ The

142. For example, EPA has not announced any plans to designate carbon dioxide and other greenhouse gases as criteria air pollutants under Title I of the Clean Air Act or to set a national ambient air quality standard for ambient greenhouse gas concentrations that states must satisfy.

143. J. Adler, *The U.S. Supreme Court Disposes of a Nuisance Suit: American Electric Power v. Conn.*, CATO SUP. CT. REV., 2010-11 at 295 (Sept. 2011) ("While *Am. Elec. Power* does not preclude state-law-based nuisance actions, Justice Ginsburg's opinion offered cautionary notes about the potential consequences of allowing such suits to proceed.").

144. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977).

145. Discriminatory state laws motivated by economic protectionism are "subject to a

courts may use this heightened level of review even with state laws that do not purposefully discriminate against interstate commerce if those laws nonetheless discriminate in practical effect.¹⁴⁶ If a state law does not discriminate, the court will instead review it under a deferential balancing test.¹⁴⁷ Under this standard, a state law will survive if the State's interest is legitimate and the burden placed on interstate commerce does not clearly exceed the law's local benefits.¹⁴⁸

State laws to regulate activities that arguably contribute to climate change have already drawn Dormant Commerce Clause challenges. In *Central Valley Chrysler-Jeep v. Witherspoon*, several parties argued that California's program to regulate greenhouse emissions from new automobiles impermissibly infringed interstate commerce under the Dormant Commerce Clause.¹⁴⁹ The court rejected the Dormant Commerce Clause challenge by observing that California's program did not discriminate against interstate commerce,¹⁵⁰ and it ultimately dismissed the case by finding that Congress had expressly authorized California under the federal Clean Air Act to burden interstate commerce.¹⁵¹

Central Valley Chrysler-Jeep presages the likely Dormant Commerce Clause challenges that will face state law tort actions to reduce greenhouse gas emissions through liability judgments or

'virtually per se rule of invalidity,' which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (internal citations omitted).

146. *Hunt*, 432 U.S. at 350-53. Although Washington's law restricting apple sales was facially neutral in its treatment of in-state and out-of-state activities, the statute was invalid because it had the "practical effect of not only burdening interstate sales. . . but also discriminating against them." *Id.* at 350.

147. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

148. *Id.* Neither strict scrutiny nor the *Pike* balancing test applies when the state law burdening commerce has resulted from the state entering the market as a participant. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). This exemption has no obvious relevance for reviewing state law public nuisance climate change claims under the Dormant Commerce Clause.

149. *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1183-86 (E.D. Cal. 2006). The plaintiffs also alleged that Congress had preempted California's ability to promulgate the rules when it passed the federal Energy Policy and Conservation Act and the federal Clean Air Act. *Id.* at 1167-75.

150. *Id.* at 1183-86.

151. *Id.* The plaintiffs ultimately dismissed their case after the automobile manufacturers reached an agreement with the Obama Administration and the federal government issued new federal Corporate Automotive Fleet Efficiency standards for automobiles.

injunctions. If a state court action targets a large array of greenhouse gas emitters, it will likely include sources located in states outside of the court's jurisdiction.¹⁵² Given the broad distribution of greenhouse gas emission sources and activities, the bulk of activities targeted by such a suit would likely occur outside of the state. If the action then seeks to impose liability or to enjoin those activities outside the state, it may arguably discriminate in intent or in effect against those interstate activities.¹⁵³ As noted above, a strict scrutiny review would almost certainly strike down the application of state tort laws to climate change claims. To the extent that such a state law lawsuit expressly affects or regulates activities outside the state, it may also run afoul of the Dormant Commerce Clause.¹⁵⁴

Even if such state law public nuisance lawsuits did not discriminate against interstate commerce, they would still need to satisfy the *Pike* balancing test. If the host state's interest in regulating greenhouse gas emissions is "legitimate" and the benefits of imposing liability on greenhouse gas emitters "clearly exceed" the burden on interstate activities, state law climate nuisance suits would not violate the Dormant Commerce Clause.¹⁵⁵ Even though this balancing test is typically deferential to the state, the potential significant costs of reducing greenhouse gas emissions and the sizable burden that an injunction or unquantified liabilities for legal damages might place on interstate commercial activities might not satisfy even the liberal *Pike* standard.

IV. CONCLUSION

The *AEP v. Connecticut* decision shut the federal courthouse doors to federal common law public nuisance litigation for climate

152. All three federal common law public nuisance actions included multiple defendants whose emissions of greenhouse gases took place at multiple locations, including facilities located outside of the federal district court's host state.

153. For similar analyses of potential Dormant Commerce Clause challenges to state legislation that regulates greenhouse gas emissions, see Peter C. Nordberg, *Excuse Me, Sir, But Your Climate's On Fire: California's S.B. 1368 and the Dormant Commerce Clause*, 82 NOTRE DAME L. REV. 2067, 2076-90 (2007) and David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53, 70-74 (2003).

154. *Brown-Foreman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 581-84 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 630 (1982); *Carolina Trucks & Equip. v. Volvo Trucks of N. Am.*, 492 F.3d 484, 486 (4th Cir. 2007).

155. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

change damages, but the purported grand denouement is likely just the end of the first act. The U.S. Supreme Court's refusal to decide whether the federal Clean Air Act preempts state common law public nuisance claims heralds another potential path ahead for litigants: recasting their claims as state law public nuisances, and then bringing those claims either in federal courts under diversity jurisdiction or directly in state courts. These approaches each have their own drawbacks, but they offer an opportunity to continue attempts to impose liability on sizable emitters of greenhouse gases for their historical and current conduct.

These jurisdictional and procedural intricacies reflect a deeper issue. Given the enormous stakes involved in climate change public nuisance litigation against innumerable parties in far-flung jurisdictions throughout the world, the courts will likely focus tightly on traditional jurisdictional and procedural prerequisites as safeguards of the proper allocation of powers under the U.S. Constitution and structural federalism concerns. For many of the same legal and policy reasons that underlie a reduced role for states in litigation over certain claims, the federal and state courts may find themselves motivated to strictly adhere to procedural and jurisdictional prerequisites for large multiparty complex tort actions over climate change.

Those constraints may also translate into the ultimate issue: are climate change public nuisance actions—even if not preempted and brought by parties with standing—focused on legal claims in a sphere unsuited for state regulation? The fundamental distinction between climate and weather¹⁵⁶ offers an insight on the ability of state law to resolve disputes over air quality versus climate. While air quality violations may cross state lines or affect large areas, it remains fundamentally a local or regional geographic phenomenon.¹⁵⁷ While state courts may wrestle with application of

156. "Weather" typically denotes the short-term state of the atmosphere, including such phenomena as seasonal rainfall or temperature variations, and it usually focuses on effects within a restricted geographic area. By contrast, "climate" refers to long-term averages of climate effects and weather conditions (usually over a 30-year period) and frequently focuses on larger geographic areas or even a global scale. J.T. Houghton et al. (eds.), Working Group I to the Intergovernmental Panel on Climate Change, *CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS* at Appendix 1 ("Glossary") (2001), available at http://www.grida.no/publications/other/ipcc_tar/.

157. Despite this general statement, international transport of air pollutants has emerged as a growing contributor to air quality concerns in the United States. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, *AIR QUALITY MANAGEMENT IN THE UNITED STATES*, 276-77 (2004) (noting challenges posed by "import of pollutants transported from

common law tort standards for actions that reach across jurisdictional boundaries, they do not question the suitability of local law to resolve questions about local air quality or injuries. By contrast, climate is inherently a large-scale and long-term system that by definition has global impacts.

When faced with environmental media in the past that resisted ready regulation under local laws, state courts have retreated and federal courts have looked to federal law as the lodestar for decision. These circumstances suggest that future state court litigation over climate change public nuisance claims may ultimately face a more daunting challenge from potential preemption under the dormant commerce clause. To date, the federal courts have not directly answered claims that the dormant commerce clause will preclude state regulatory actions or legal liability for climate change effects or greenhouse gas emissions.¹⁵⁸ If state law claimants survive the long gauntlet over standing, political question, jurisdictional reach, and choice of law issues, they may still have to survive the final hurdle on whether any local action to impose liability for climate change effects may—by definition—impermissibly require discriminatory regulation of activities located outside of the state in a way that unduly affects interstate commerce.

No matter how the state and federal courts ultimately resolve these questions, the immediate forecast is clear: more litigation over climate change public nuisance claims lies ahead. Those storms will move from federal common law claims in federal courts to a broader and more varied host of state law actions in both federal and state courts. These battles will shape important precedents for how local state laws and courts can—and will—wrestle with sweeping environmental claims that, by design, touch every corner of the globe.

the Eurasian continent across the Pacific Ocean into the western part of North America” and that “[t]he rapid industrialization of the Asian continent could conceivably exacerbate this phenomenon”).

158. See discussion *supra* Part III.B.