PRIVATE CLAIMS FOR A GLOBAL CLIMATE: U.S. AND INDIAN LITIGATION APPROACHES TO CLIMATE CHANGE AND ENVIRONMENTAL HARM

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Climate change is global, but legal responses to it are often intensely local. Even nations in similar circumstances may choose different legal strategies to deal with climate change because of their varying national and local laws and traditions. India and the United States offer an opportunity to compare two nations who both emit large amounts of greenhouse gases, rely on strong democratic governments based on principles of federalism and separation of powers, and have independent judiciaries that draw on long-standing British common law and statutory principles. Despite these similarities, the Indian and U.S. courts have so far taken different roles on applying their domestic laws to climate change claims. The United States has seen an active campaign to use public nuisance actions under federal law to either compel mitigation by carbon emitters or to recover compensation for damages allegedly caused by past emissions. India, notably, has a strong tradition of judicial action and public interest litigation when faced with injuries to the public at large that might fail to satisfy traditional notions of standing or justiciability. That tradition, however, has not led to major legal actions to force climate change mitigation by government agencies and private parties or to recover damages for personal injury and property damage caused by climate change.

This article will summarize the recent culmination of climate change public nuisance actions under federal common law in the United States, which reached their climax in the U.S. Supreme Court's recent decision in *Connecticut v. American Electric Power*.[1] It then offers some thoughts on likely directions for future climate change nuisance litigation in the United States and how those actions might affect future U.S. policy on climate change legislation and regulation. It then briefly overviews how Indian public interest litigation offers some parallels to U.S. climate change litigation. Last, the article offers some suggestions on the future course of climate change litigation in both countries.

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[1] *Connecticut v. American Electric Power Co.*, 564 U.S. --- (slip op., June 20, 2011) (No. 10-174) ("*Connecticut v. AEP*").

U.S. Climate Change Public Nuisance Litigation

U.S. courts have seen a boom in climate change litigation. At last count, the federal courts now have received over 200 lawsuits seeking legal relief over climate change claims. The complaints arise from a welter of different disputes, including efforts to compel the U.S. government or states to regulate greenhouse gas emissions, an equally large number of petitions and complaints seeking to halt government regulation of greenhouse gases, challenges to administrative agency regulations that impose specific limits on particular industry sectors, and contests over the inclusion of climate change effects in environmental impact assessments or rulemaking records.[2]

One of the most important legal devices for climate change challenges has been public nuisance tort actions. These claims allege that emissions by defendants cause a public nuisance because their emissions contribute to climate change effects such as flooding, drought, shore erosion and storm damages. While the exact scope of public nuisance doctrine remains ill-defined and controversial, many U.S. courts have turned to the Restatement of Torts (Second) for one broadly accepted formulation: a public nuisance is "an unreasonable interference with a right general to the common public."[3] Courts have clarified this definition to require an unreasonable interference with a right common to the general public by a person or people who caused the public nuisance. Some courts have emphasized that the defendant must retain control over the instrumentality that created the public nuisance. For example, companies that manufactured lead paint over 50 years ago may not bear responsibility for a public nuisance created by the paint because they no longer have control over the instrumentality (i.e., the paint) that caused the nuisance.[4]

Public nuisance actions historically played an important role in the development of U.S. environmental law. Early public nuisance actions led the U.S. Supreme Court to resolve key disputes between states and local governments over discharges of water pollution that crossed state lines as well as air emissions that damaged resources in adjoining states.[5] The prominence of public nuisance

[2] D. Markel and J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, (February 16, 2011), FSU College of Law, Public Law Research Paper No. 483, at pp. 5 n.8. Available at SSRN: http://ssrn.com/abstract=1762886. Markel and Ruhl studied 201 cases filed on climate change claims, and their study excluded another 100 cases that potentially could have also qualified as climate change litigation. *Id.* at pp. 58-59. The Columbia University School of Law's Center for Climate Change Law maintains a tracking chart for significant U.S. climate change litigation at www.climatecasechart.com .

[3] RESTATEMENT (SECOND) TORTS § 821B (1979).

[4] *See, e.g., State of Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 446-47 (R.I. 2008) (dismissing public nuisance claim against lead paint manufacturers because they no longer controlled the instrumentality that created the public nuisance).

[5] *See, e.g., Missouri v. Illinois*, 200 U.S. 496 (1906) (interstate discharge of sewage); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (interstate air emissions).

litigation, however, began to wane when the U.S. Congress passed federal legislation that instituted a statutory framework to regulate discharges into the environment. The implementation of these statutes displaced the federal common law underlying earlier public nuisance claims.[6] As a result, common law public nuisance actions became a device to fill gaps where federal law had not yet extended, and those gaps frequently arose when federal and statute environmental laws lagged behind emerging environmental threats or scientific discoveries. Even in this relatively limited role, public nuisance litigation remained an important tool for both interstitial federal litigation and public nuisance lawsuits under state laws that federal statutes could not displace.[7]

In this respect, the coalescing concerns about climate change in the late 1990s offered advocates an attractive opportunity to use common law public nuisance actions to answer a perceived vacuum of federal legislative and regulatory action. In the face of a consensus between the George W. Bush presidential administration and a Republican-controlled Congress that the federal government should not directly regulate greenhouse gas emissions,[8] environmental proponents and plaintiffs felt that public nuisance actions offered a possible route both to compel the federal government to take affirmative action and to force emitters of greenhouse gases to reduce their emissions so as to reduce potential tort liability risks.[9] Given the lack of federal action to directly regulate greenhouse gas emissions, the risk of displacement or preemption of these suits appeared low. The availability of injunctive relief also offered the prospect of direct action to limit emissions without the complexity or delay of drafting and implementing a broad-ranging set of laws or regulations.

On the other hand, the broad-ranging nature of climate change public nuisance actions posed significant risks. As a threshold matter, the federal courts would require plaintiffs alleging harms from climate change to demonstrate that they

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[6] *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (passage of the Federal Water Pollution Control Act displaced federal common law public nuisance actions for discharges into interstate waters).

[7] While federal statutes cannot displace state statutory or common law claims, it can provide a basis to preempt inconsistent state laws or state regulations in a field occupied by comprehensive federal legislation. *See* discussion *infra* at n.41.

[8] The U.S. Congress refused to ratify the Kyoto Protocol or other international instruments to regulate greenhouse gas emissions unless they included substantive limits on emissions from developing economies in China, Brazil and India. S. Fletcher, *Global Climate Change: the Kyoto Protocol*, Congressional Research Service Report at 9-10 (updated June 10, 2004). The Bush Administration also resisted efforts to compel the U.S. Environmental Protection Agency to regulate greenhouse gas emissions under the existing federal Clean Air Act. *See, e.g.,* Memorandum from Robert Fabricant, U.S. EPA General Counsel, to Marianne Horinko, Acting EPA Administrator (August 28, 2003) (reversing prior EPA legal opinion that EPA had authority under the Clean Air Act to regulate greenhouse gas emissions).

[9] Even if the litigation failed, the public nuisance lawsuits would also draw valuable public attention to the federal government's policy decision not to regulate greenhouse gas emissions under existing environmental statutes.

presented a "case or controversy" under Article III of the U.S. Constitution.[10] Most often, this standard required plaintiffs to show that they had standing to assert their claims. While standing doctrines in the federal courts have defied concise formulation, the U.S. Supreme Court has typically required plaintiffs to prove standing by showing they had suffered injury to a concrete and particularized legal interest caused by an action fairly traceable to actions of the defendant. In addition, a favorable decision by the court must be able to redress the injury.[11] These constitutional requirements meant that plaintiffs bringing climate change public nuisance claims faced the daunting challenge of showing their injuries from global climate change were "fairly traceable" to emissions of a particular defendant. In addition, the plaintiffs had to show that a decision by the court would redress their injury – even though that injury might result from the combined actions of global greenhouse gas emissions from sources far outside the courts' jurisdiction.

Second, the sweeping breadth of climate change concerns made it difficult for a federal or state court to act without potentially setting a precedent that might affect emitters of greenhouse gases in thousands of other industry sectors or impact the interests of potentially millions (if not billions) of possible plaintiffs. As a result, federal courts understandably initially reached for doctrines of justiciability – in particular, the political question doctrine – to limit climate change public nuisance actions under federal common law.

Under the political question doctrine, federal courts could decline to hear cases that posed questions uniquely suited for the political branches rather than judicial branch. The U.S. Supreme Court explained that the federal courts should use six independent tests 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.[12]

[10] U.S. CONST. Art. III, Section 2.

[11] R. Craig, *Standing and Environmental Law: An Overview*, FSU COLLEGE OF LAW PUBLIC LAW RESEARCH PAPER No. 425 at pp. 2-13 (Jan. 2009).

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

A case becomes nonjusticiable if it cannot meet any one of these tests. Within this rubric, public nuisance climate change cases could face challenges based on (i) the difficulty of formulating a standard to resolve climate change nuisance claims arising from broad swaths of industrial activity around the globe that affected sweeping classes of clients, (ii) the deep policy implications of any decision by the court, and (iii) the risk of conflicting decisions and directives from multiple courts and government agencies.

These dynamics drove the three major climate change public nuisance cases that the federal courts have addressed so far.[13] Each of these cases posed differing circumstances which highlighted different strengths and weaknesses of federal common law public nuisance actions for climate change damages.

Connecticut v. AEP. This case centered on claims against five electric power companies by twelve states, a municipal government and three environmental advocacy groups, and the complaint alleged that emissions from the defendants' coal-fired power plants had contributed to climate change in a way that damaged each state. For example, the states alleged that climate change would cause increased health costs from medical conditions worsened by heat waves, loss of coastal property owned by the state due to rising ocean levels, and exacerbated damages from weather worsened by climate change. The states did not seek monetary compensation for the damages, and they instead asked the court to issue an injunction that would force the defendants to begin reducing their greenhouse gas emissions annually over a ten-year period.

The district court, after extensive briefing and oral argument, ultimately dismissed the complaint because it posed a political question.[14] The Second Circuit Court of Appeals, however, reversed the district court and held that the states had standing to pursue their claims.[15] The Second Circuit also ruled that the claims did not pose a political question, and that the difficulty of establishing a causal connection between the defendants' emissions and global climate change effects on the states could be resolved at trial.[16]

The U.S. Supreme Court granted certiorari to review the Second Circuit decision, and it issued a ruling on June 20, 2011.[17] That decision is discussed below.

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[13] This list excludes a fourth public nuisance climate change case that the parties resolved through settlement before the Ninth Circuit completed its review of the claim. *State of California v. General Motors Corp.*, No. C06-05755-MJJ (N.D. Calif. Sept. 17, 2007) (trial court dismissal of claim on political question grounds); *appeal voluntarily dismissed* (June 2009).

[14] 406 F.Supp.2d 265 (S.D.N.Y. 2005).

[15] 582 F.2d 309 (2d Cir. 2009).

[16] *Id.*

[17] *See* discussion *supra* at n.1.

Comer v. Murphy Oil Co. Ned Comer and other individual residents of the coastal state of Mississippi brought a class action lawsuit against numerous defendants in the oil and gas, coal, refining and chemical industries. Comer alleged, among several other claims, that the defendants' greenhouse gas emissions had contributed to climate change effects and thereby worsened the damage wreaked by Hurricane Katrina.[18] Rather than injunctive relief, the plaintiffs sought a monetary award to compensate them for their damages.[19]

Like the *Connecticut v. AEP* trial court, the *Comer* district court initially dismissed the complaint because it posed a political question. The court ruled from the bench that the plaintiffs' claims would require an initial determination on the appropriate levels of greenhouse gas emissions which could constitute a policy determination uniquely suited for the political branch.[20] The court also pointed out that conflicting determinations by federal courts on greenhouse gas emissions could undermine the executive branch's attempts to craft a coherent position when negotiating with other states on potential climate change treaties or international agreements.[21]

In a panel decision, the Fifth Circuit Court of Appeals initially reversed the trial court and held that the plaintiffs could proceed with their claims.[22] Unlike the Second Circuit, however, the full Fifth Circuit then decided to review the panel decision *en banc*. The decision to grant *en banc* review automatically vacated the panel decision.[23] When the Fifth Circuit subsequently lost its quorum due to late recusals by several judges, it could not proceed with the *en banc* review – but the court's vacatur of the panel decision remained in effect.[24] As a result, the Fifth Circuit essentially deprived itself of any ability to review the trial court's decision. The trial court's initial dismissal of the complaint therefore remained in effect.[25]

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[18] Original class action complaint, *Comer v. Murphy Oil, U.S.A., Inc.*, No. 1:05-CV-00436-LTS-RHW

[19] *Id.*

[20] Order Granting Defendants' Motion to Dismiss, *Comer v. Murphy Oil U.S.A., Inc.*, Civ. No. 1:05-CV-436-LG-RHW (S.D. Miss. Aug. 30, 2007).

[21] *Id.*

[22] *Comer v. Murphy Oil USA*, No. 07-60756, slip op. (5th Cir. Oct. 16, 2009), *revised* Oct. 22, 2009.

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

[24] *Id.*

[25] On Jan. 11, 2011, the U.S. Supreme Court declined to review the case and dismissed the plaintiffs' petition for mandamus to force the Fifth Circuit to take action on the appeal. *In re Comer et al.*, No. 10-294 (2011).

The *Comer* story is still not yet finished. After the Fifth Circuit failed to review the trial court's decision, the plaintiffs filed a renewed complaint in the district court to reassert their claims.[26] The trial court has not yet taken action on the new complaint, and the recent U.S. Supreme Court decision in *Connecticut v. AEP* will undoubtedly lead the trial court to reexamine its original decision to dismiss the case.

Village of Kivalina v. ExxonMobil. The Village of Kivalina sits on the western coast of Alaska by the Arctic Ocean, and its residents (mostly Inupiat natives) rely on permafrost and winter pack ice to protect their shoreline and to mitigate the effects of winter storms. Rising temperatures allegedly due to climate change had exposed their village to increased erosion and infrastructure damage. This erosion threatens to render the village uninhabitable in as little as ten years, according to an estimate from the U.S. Army Corps of Engineers.[27]

The tribal government sued nine oil companies, 14 power companies and a coal company, and its complaint alleged that their emissions had contributed to climate change which had reduced the village's protective ice pack and permafrost. Rather than request an injunction to reduce future emissions, the Village of Kivalina sought a monetary award for general damages and to recover the costs they would incur in moving the village to a safer location.[28] The cost of relocating the village may reach $400 million.[29]

As in *Connecticut v. AEP* and *Comer*, the trial court dismissed the complaint because it raised a political question that fell outside the court's jurisdiction and the plaintiffs lacked standing.[30] The Ninth Circuit has the case on appeal, but it postponed briefing and arguments pending the U.S. Supreme Court's ruling in *Connecticut v. AEP*. The Ninth Circuit has now set a deadline in early July 2011 for the parties to complete their initial briefing submissions, and the plaintiffs recently moved for permission to file extended supplemental briefs.[31]

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[26] Class action complaint, *Comer v. Murphy Oil USA, Inc.*, No. 1-11-CV-220-HSO-JMR (S.D. Miss.) (filed May 27, 2011).

[27] *Alaska Native Villages: Most are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance*, U.S. General Accounting Office, GAO-04-142 (Dec. 2003) at p. 1 ("GAO Report").

[28] Complaint for Damages and Jury Trial, *Village of Kivalina v. ExxonMobil Co.*, No. CV-08-1138 (N.D. Cal. Feb. 2008).

[29] *See* GAO Report, *supra* n.27, at 29.

[30] *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009).

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

The Supreme Court Speaks: Connecticut v. American Electric Power

In response to the growing split between the circuits and the high profile of these decisions, the U.S. Supreme Court stepped in to review the Second Circuit's ruling in *Connecticut v. AEP*. The Court's unanimous ruling will substantially alter the framework for future climate change litigation.

In effect, the Court issued two decisions. First, the Court split evenly in a 4-4 vote[32] that the states had standing to bring their claims and that the claims did not pose nonjusticiable political questions. Justice Ginsberg noted in a brief section of the opinion that the plurality believed that the states had standing under the precedent set by the Court's prior opinion in *Massachusetts v. EPA*, and the lack of a five-vote majority meant that the Court could not issue an opinion to reverse the Second Circuit's panel ruling.[33] The Court did not explain why it felt that the states' claims did not pose a political question.

The Court spoke with a resoundingly unanimous voice, however, to dismiss the states' complaint because their common law public nuisance claims had been displaced by the federal Clean Air Act.[34] According to Justice Ginsberg, the Court had previously ruled that the Clean Air Act[35] gave EPA the authority (and, in some respects, the obligation) to take regulatory actions on greenhouse gas emissions. Because Congress had expressly granted EPA the authority to regulate greenhouse gas regulations in the Clean Air Act, that legislative action displaced any prior federal common law public nuisance claims that might have applied to interstate greenhouse gas emissions.[36] Notably, Justice Ginsberg pointed out that the displacement occurred when Congress passed the Clean Air Act, and EPA's subsequent decisions to regulate (or not) greenhouse gas under the Act did not affect the original displacement.[37]

Last, the Court expressly did not rule on whether Congress' passage of the Clean Air Act also preempted public nuisance common law claims under state law.[38]

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[32] Justice Sotomayor recused herself because she participated in the Second Circuit panel that heard the original *Connecticut v. AEP* appeal prior to her elevation to the U.S. Supreme Court. *Connecticut v. AEP*, *supra* n.1 at 6, 16.

[33] *Id.* at 6.

[34] *Id.* at 10.

[35] 42 U.S.C. § 7401 *et seq.* (2011).

[36] *Connecticut v. AEP*, *supra* n.1 at 9-10.

[37] *Id.* at 12.

[38] *Id.* at 15. Displacement removes subjects from the reach of federal common law after Congress has taken action, and the federal courts readily find displacement because of concerns rooted in separation of powers. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938 ("[t]here is no federal general common law"). By

Justice Ginsberg simply observed that the Court did not address the issue because the parties had neither briefed nor argued the question before the Court.

The *Connecticut v. AEP* decision decisively forecloses the federal courts to public nuisance climate change claims under federal common law. That outcome, however, does not necessarily foreclose all climate change public nuisance cases in the future. First, the Court's rationale that the Clean Air Act reflects a legislative determination to displace federal common law nuisance means that Congress can also undo its decision. Bills introduced in the last two sessions of Congress would strip EPA of its authority to regulate greenhouse gas emissions under the Clean Air Act.[39] If Congress narrows the scope of the Clean Air Act to exclude greenhouse gases, then the Act arguably would no longer displace federal common law. This conclusion assumes, of course, that Congress does not expressly bar climate change nuisance litigation in the same act.[40]

Second, the Court's express caveat for state law climate change nuisance actions may foreshadow significant action in the state courts. If plaintiffs cannot base their claims on federal common law, they may instead turn to state tort law for similar claims. These claims may even proceed in federal courts if the plaintiffs base their claims on the federal court's diversity jurisdiction. This path assumes, of course, that the plaintiffs can still meet federal standards for standing and political question justiciability if they seek relief in the federal courts. Even if they cannot meet federal thresholds, state courts are not bound by the U.S. Supreme Court's decisions on standing or justiciability. As a result, state courts frequently use less stringent standing tests and exercise jurisdiction over claims that might trigger political question objections in a federal court.[41]

Even if federal law cannot displace state tort claims, it can still preempt conflicting state laws. While the standard for demonstrating preemption is more demanding that showing displacement, at least one federal court of appeals has concluded that the federal Clean Air Act's comprehensive grant of authority to EPA to regulate air pollutants preempts any state tort actions for interstate air pollution. In *North Carolina v. Tennessee Valley Authority*,[42] North Carolina

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contrast, a finding of preemption requires a negation of state law and infringement on a state's sovereignty, so the federal courts must satisfy a more stringent standard.

[39] *See, e.g.*, H.R. 6561 (111th Cong. 2d Sess.) (introduced by Rep. Ted Poe) (barring EPA from using any funds to implement greenhouse gas regulations under the federal Clean Air Act).

[40] Several bills include precisely that language. A statutory attempt to foreclose climate change nuisance actions, however, may raise federal constitutional concerns if it shuts down such suits already underway in the federal court system. *See* Complaint in *Comer v. Murphy Oil Co.*, *supra* at n.26 (new complaint by *Comer* plaintiffs to allege federal and state common law claims for climate change damages).

[41] T. Hester, *A New Front Blowing In? Using State Law for Public Nuisance Climate Change Actions* (in publication) (2011) at __.

[42] *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010) ("*North Carolina v. TVA").*

brought a diversity action in federal district court because emissions from eleven coal-fired power plants operated by TVA in Tennessee had allegedly caused a public nuisance across state lines in North Carolina. When the federal district court ruled that the power plants created a public nuisance under Tennessee law, it relied on North Carolina tort law to guide its interpretation of Tennessee's tort law and to rule in favor of North Carolina.[43] The Fourth Circuit reversed the district court's verdict and declared in sweeping language that the Clean Air Act effectively preempts any state law tort action which sought to impose interstate liability for emissions authorized by a program under the federal Clean Air Act.[44]

North Carolina has petitioned the U.S. Supreme Court to review the Fourth Circuit's decision, and the Court has extended the deadline for responses to North Carolina's petition until July 2011.[45] If the Supreme Court grants certiorari and subsequently adopts the Fourth Circuit's interpretation of the Clean Air Act's preclusive effect, the future for any type of public nuisance tort action under state or federal law will look bleak indeed.

U.S. Public Nuisance Climate Change Litigation and Public Interest Litigation in India

At first glance, U.S. climate change public nuisance litigation offers intriguing parallels to environmental legal innovations in Indian environmental law. Upon closer examination, however, the two legal devices diverge in important ways that highlight how attempts to litigate climate change damages in the Indian courts might differ from U.S. public nuisance litigation. Given the complexity and rich history of public interest litigation in India, this article can only briefly scratch the surface of some potential areas of potential difference and similarity for comparison.

The Indian judiciary has garnered international attention and praise for its expansion of judicial remedies to aid the poor and disenfranchised.[46] The creation of public interest litigation is one of its most visible achievements. This unique

[43] *North Carolina v. Tennessee Valley Authority*, 593 F. Supp.2d 812 (W.D.N.C. 2009).

[44] *North Carolina v. TVA*, *supra* n. 42, at 306-07 ("[t]he 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").

[45] Order Further Extending Time to File Response to and Including July 6, 2011 For All Respondents, *North Carolina v. Tennessee Valley Authority*, No. 10-997 (U.S. June 1, 2011) *available at:* *http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-997.htm* .

[46] The Indian courts have developed a rich body of environmental law, including confirmation of a right to a clean environment within the fundamental constitutional right to life contained in Article 21, reducing ripeness barriers for environmental challenges, and the expansion of mandamus powers to include discretionary acts and to institute "continuing mandamus" D. Badrinarayana, *The Emerging Constitutional Challenge of Climate Change: India in Perspective*, Chapman University School of Law Legal Studies Research Paper Series No. 09-26 at pp. 30-31, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463556 (last checked June 26, 2011).

type of litigation allows private plaintiffs to seek judicial redress for violations of fundamental constitutional rights, including violations of the fundamental constitutional right to a healthy environment. Public interest litigation typically targets government institutions who fail to protect such fundamental rights, but the litigation clearly also directly involves and affects private defendants who engage in actions that the government allegedly failed to control or promote. The key facets of public interest litigation include:

- a relaxation of standing requirements so that plaintiffs need not satisfy typical burdens of proving injury, causation or redressability;

- a willingness of the Indian courts to order the executive branch to undertake discretionary functions that normally fall outside the scope of judicial review;

- an allowance of representation by proxy, where a person with "sufficient interest" can seek judicial review on behalf of poor and vulnerable segments of the general population.

Indian public interest litigation has served a particularly important role with environmental challenges, including successful lawsuits to protect the Taj Mahal from emissions from coal and coke plants,[47] to control tannery discharges into the Ganges River,[48] to impose tighter controls and location standards on Delhi's hazardous industries,[49] to restrict pollution from mass transit vehicles,[50] and to halt destruction diversions of rivers.[51]

Despite this history, the Indian courts apparently have not yet received a significant tort claim nor issued a judgment on a climate change damage claim.[52] Given the aggressive litigation efforts by environmental advocates in the United

[47] *M.C. Mehta v. Union of India*, 2 S.C.C. 353 (1997).

[48] *M.C. Mehta v. Union of India*, 6 S.C.C. 63 (1998).

[49] *M.C. Mehta v. Union of India*, 5 S.C.C. 281 (1996).

[50] *M.C. Mehta v. Union of India*, 4 S.C.C. 359 (2002); *M.C. Mehta v. Union of India*, 6 S.C.C. 12 (1999).

[51] *M.C. Mehta v. Union of India*, 6 S.C.C. 213 (2000).

[52] Hon. Justice B. Preston, Chief Judge of Land and Environment Court, New South Wales, *Climate Change Litigation*, PRESENTATIONS TO JUDICIAL CONFERENCE OF AUSTRALIA COLLOQUIUM at 19 (Oct. 2008) ("[w]hilst there have been a number of actions [in India], based on constitutional rights to life, addressing the effects of air pollution, there has not yet been litigation focused on [greenhouse gas] emissions or climate change, although there is the potential") (internal citations omitted). *See also* M. Gerrard and J. Chen, *Non-U.S. Climate Change Litigation Chart* at 14 ("Cases by Country"), available at http://www.law.columbia.edu/centers/climatechange (last checked June 26, 2011).

States and other nations to force governmental action or recover damages for climate change effects, the lack of activity in one of the world's most noted and active courts for environmental jurisprudence is notable.

U.S. climate change public nuisance litigation adopts some procedural and jurisdictional tactics that echo important facets of Indian public interest litigation. For example, the U.S. Supreme Court has declared states may possess a special status that grants them standing to pursue claims for climate change damages to their natural resources and citizens. In *Connecticut v. AEP*, the plurality briefly noted that the Court's prior decision in *Massachusetts v. EPA* supported the standing of states to bring climate change claims in federal courts.[53] While *Massachusetts v. EPA* focused on a challenge to EPA's failure to undertake regulation of greenhouse gases under the Clean Air Act, the *Connecticut v. AEP* court's ready adoption of the case for a public nuisance claim might reflect a broader willingness of the Court to examine the standing of states with a more deferential eye.

While this flexibility appears to parallel the Indian courts' expansive view of standing in public interest litigation, fundamental differences nonetheless divide their approaches. Indian public interest litigation loosens standing requirements so that private claimants – namely, the poor and vulnerable segments of Indian society – can more readily bring their claims against government entities for violating their fundamental constitutional rights.[54] By contrast, the *Connecticut v. AEP* decision upholds a standing rule that appears to apply primarily to states rather than individuals injured by climate change. While the U.S. Supreme Court expressly did not rule on whether private individuals can satisfy standing requirements to bring climate change nuisance claims,[55] the *Connecticut v. AEP* decision's emphasis on the governmental nature of the plaintiffs likely signals the Court's unwillingness to venture past this narrow exception in standing doctrine until the Court squarely faces the issue in a future case.

Second, Indian public interest litigation may provide a broader set of remedies than U.S. public nuisance litigation, and those remedies would serve a different goal. While the state plaintiffs in *Connecticut v. AEP* sought an injunction to limit future greenhouse gas emissions by the defendants, U.S. common law public nuisance actions typically seek monetary awards from private defendants who

[53] *Connecticut v. AEP*, *supra* n.1, at 6 ("[f]our members of the Court would hold that *at least some* plaintiffs have Article III standing under *Massachusetts*, which permitted a *State* to challenge EPA's refusal to regulate greenhouse gas emissions. . . ") (emphasis added).

[54] M. Faure and A.V. Raja, *Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables*, 21 FORDHAM ENVT'L L. REV. 239, 265 (2010) (expanded standing can include "representative standing" to represent the poor and underprivileged, or "citizen standing" where the government fails to act or acts abusively).

[55] *Connecticut v. AEP*, *supra* n.1, at 8 ("[w]e have not yet determined whether private citizens (here, the land trusts) or political subdivisions (New York City) of a State may invoke the federal common law of nuisance to abate out-of-state pollution").

contribute to the nuisance. For example, the *Comer* lawsuit sought a substantial monetary verdict from the power company defendants, and *Kivalina* included a request for monetary payment to cover the costs of relocating the village away from the Alaskan shoreline.[56] Attempts by a U.S. federal court to issue a broad injunction to constrain greenhouse gas emissions by large numbers of parties or by significant industrial facilities on a long-running basis would almost certainly spur legal challenges under the political question doctrine. By contrast, Indian public interest litigation frequently centers on the issuance of broad writs of mandamus or other equitable relief that require governmental agencies to take actions to halt or alleviate violations of fundamental constitutional rights.[57]

Last, recent pronouncements by the Indian Supreme Court may reflect a growing concern with the need to balance environmental rights with national priorities for economic development. For example, the Court has shown less willingness to assume that any violation of an environmental norm automatically results in environmental damage or requires a judicial response.[58] If the Indian judiciary displays a greater willingness to defer to State agency evaluations of possible environmental damage, it might parallel the U.S. courts' increasing deference to expert administrative agency judgments where Congress has delegated authority to the agency to make that judgment either through an express delegation or by legislative ambiguity and silence.[59] Such deference would raise additional barriers to broad-ranging lawsuits that challenge governmental climate change policies and actions.

Conclusion

The U.S. courts have become an active forum for climate change litigation. These lawsuits rely on existing statutory rights and traditional common law actions that plaintiffs have adapted to the new challenges of climate change. As a result, the federal courts have looked to long-standing precedents on standing, justiciability

[56] *See* discussion *supra* at nn.19, 28-29.

[57] Indian public interest litigation's focus on equitable relief should not obscure the courts' ability also to award damages to plaintiffs injured by environmental damages caused by private defendants. The Indian courts have awarded substantial punitive damages against private actors who infringe fundamental constitutional rights by causing environmental damage. *M.C. Mehta v. Kamal Nath*, WP182/1996 (2002) ("[t]he powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner").

[58] *Research Foundation for Science Technology and Natural Resource Policy v Union of India*, 2007 (11) SCALE 75 (2007) (favoring continuance of ship breaking industry subject to protections); *Deepak Nitrite Ltd. v State of Gujarat*, 6 S.C.C. 402, 407 (2004) (failure to comply with environmental requirements did not automatically demonstrate the environmental damages would results); *Essar Oil Ltd. v Halar Utkarsh Samiti*, 2 S.C.C. 392, 408 (2004) (Court deferred to State's determination of environmental damage caused by construction of pipeline).

[59] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

and displacement or preemption doctrine to help manage and guide the growing tide of litigation. The U.S. Supreme Court's recent decision in *Connecticut v. AEP* emphasizes the federal courts' reluctance to stray outside traditional norms when crafting responses to these claims except in narrow areas (such as standing and political question standards for state plaintiffs). While claimants under state tort laws or in state court systems may have greater flexibility and less daunting barriers, they nonetheless will have to do the hard work of adapting existing common law and statutory causes of action to support novel claims which raise broad-based damage claims and evoke difficult questions of effective judicial remedies.

By contrast, the Indian judiciary has already blazed that trail by creating innovative new procedural and substantive vehicles to protect the rights of broad classes of individuals who suffer broad and attenuated injuries to public rights caused by the actions of both governments and private defendants. Those procedural tools, however, have not yet fostered new litigation in the Indian court system to seek damages or injunctive relief based on climate change damages. If U.S. climate change public nuisance litigation ultimately yields significant verdicts in the future, the Indian judiciary may soon see requests for relief that adapt India's rich tradition of environmental judicial action to possible climate change damage claims.