

# Tort Law and Climate Change

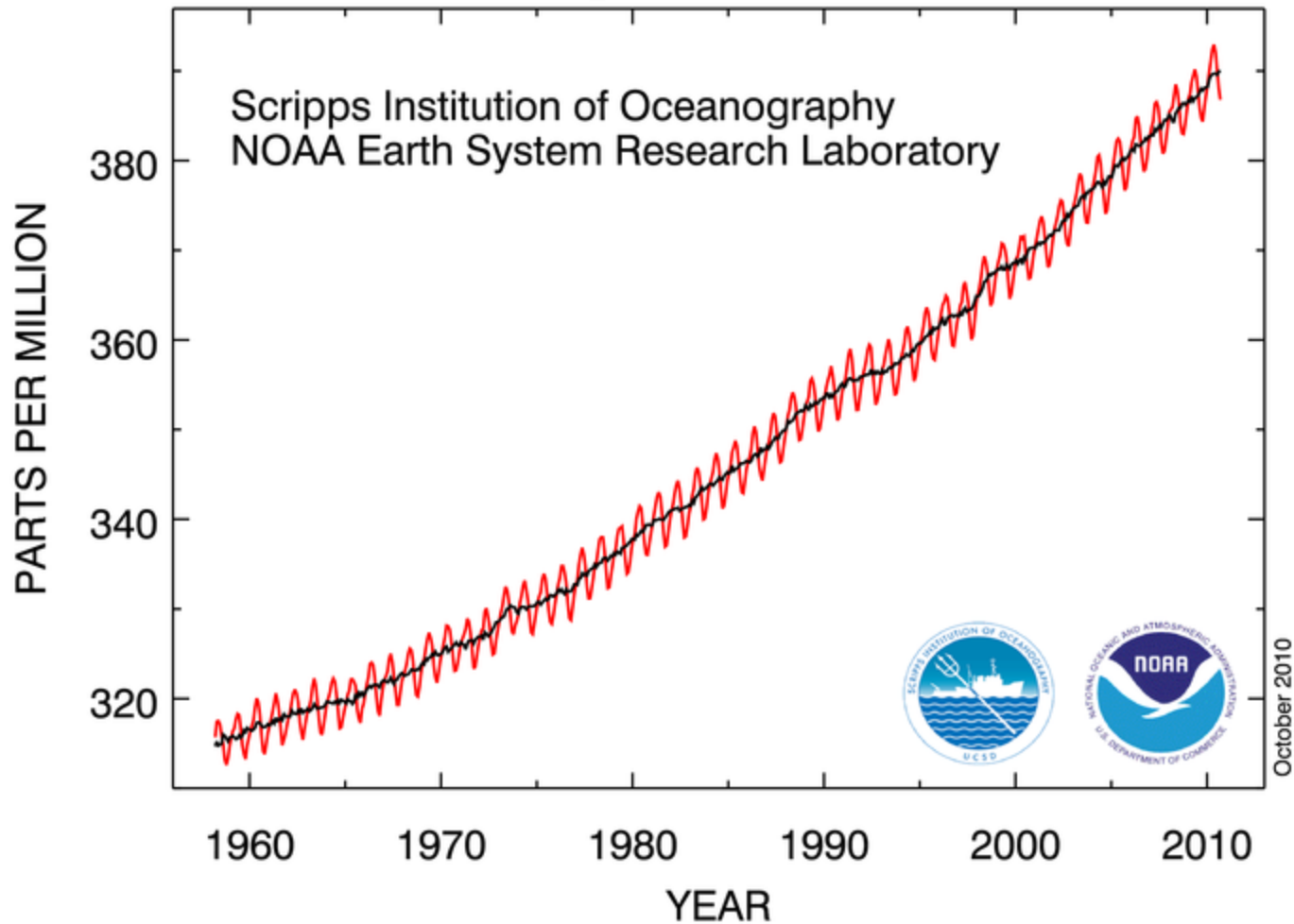
Prof. Tracy Hester

Environmental Law  
Fall 2015

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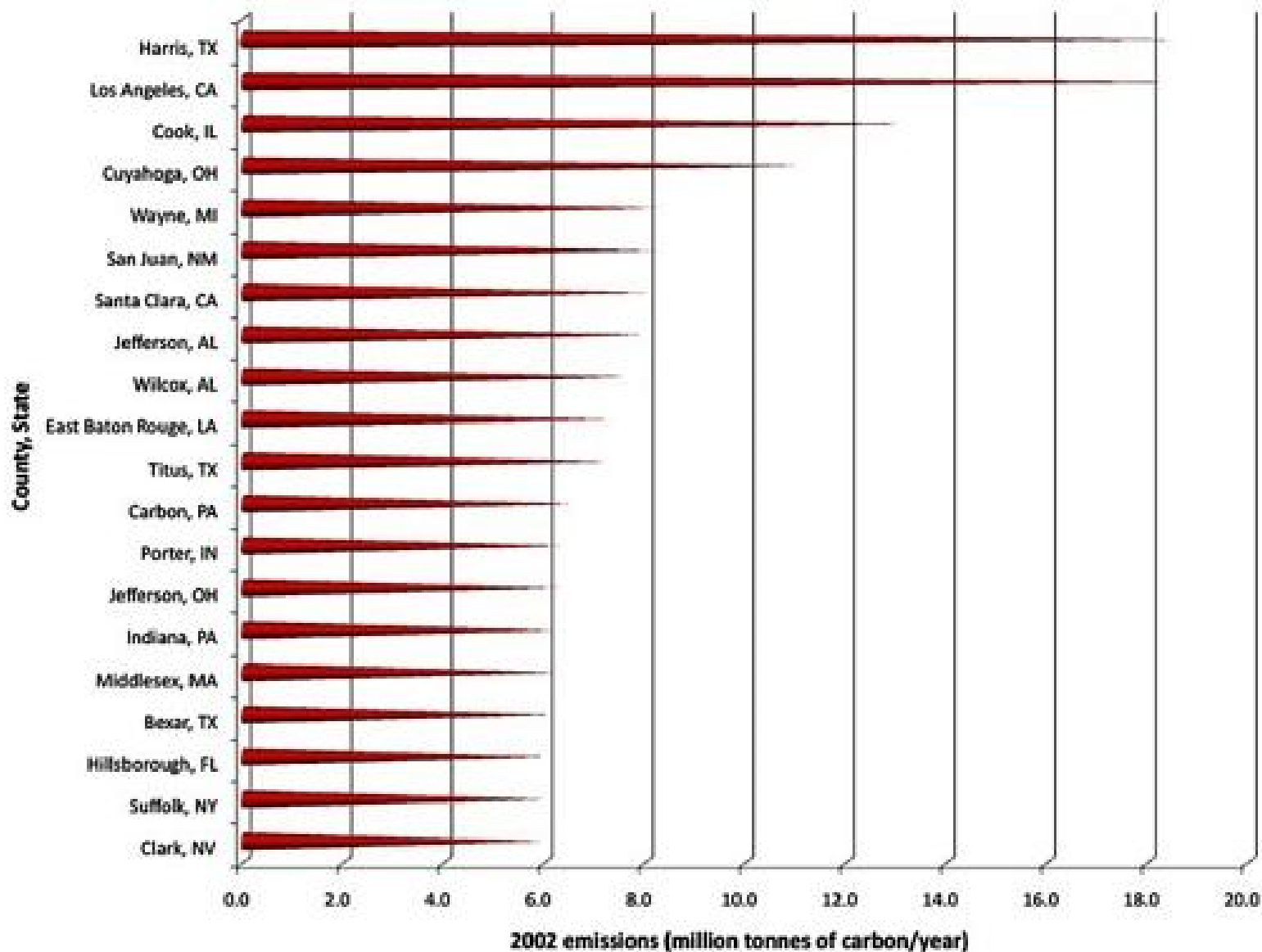
Houston, Texas  
September 8, 2015

# Atmospheric CO<sub>2</sub> at Mauna Loa Observatory





## Top Twenty CO2 emitting counties



# EPA Greenhouse Gas Inventory

<http://ghgdata.epa.gov/ghgp/main.do>

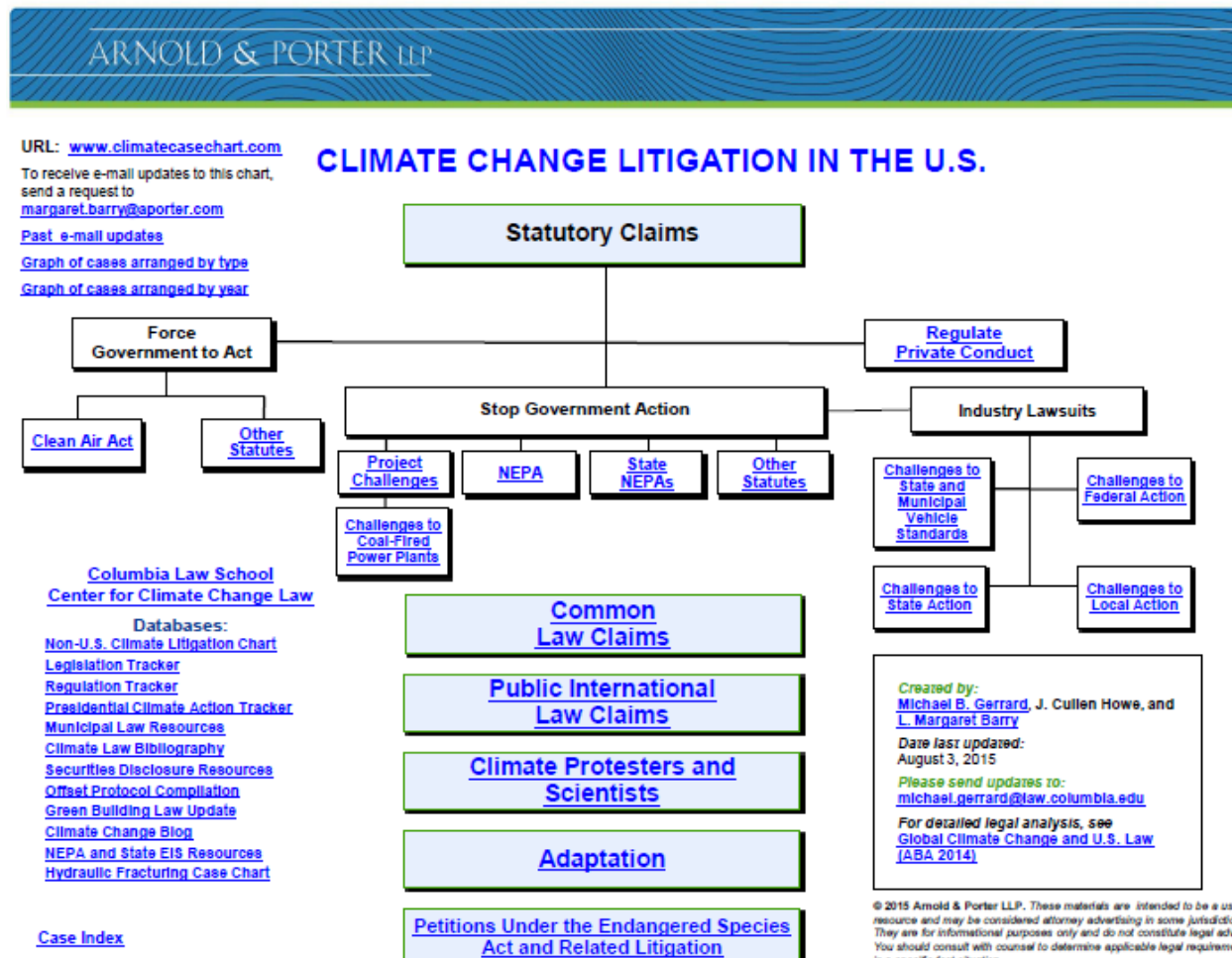


# Climate Change Litigation: It's already here

- Already active trial docket nationally
  - Over 200 active matters and prior decisions
  - Types: broader, more various than expected
    - NEPA, Endangered Species
    - Insurance coverage disputes
- Most notable actions: federal common law nuisance actions

# Climate Change Litigation Tracking Tools

- Sabin Center for Climate Change Law – [climate litigation chart](#)





# Climate Change Nuisance Lawsuits: Many Causes, Many Claims

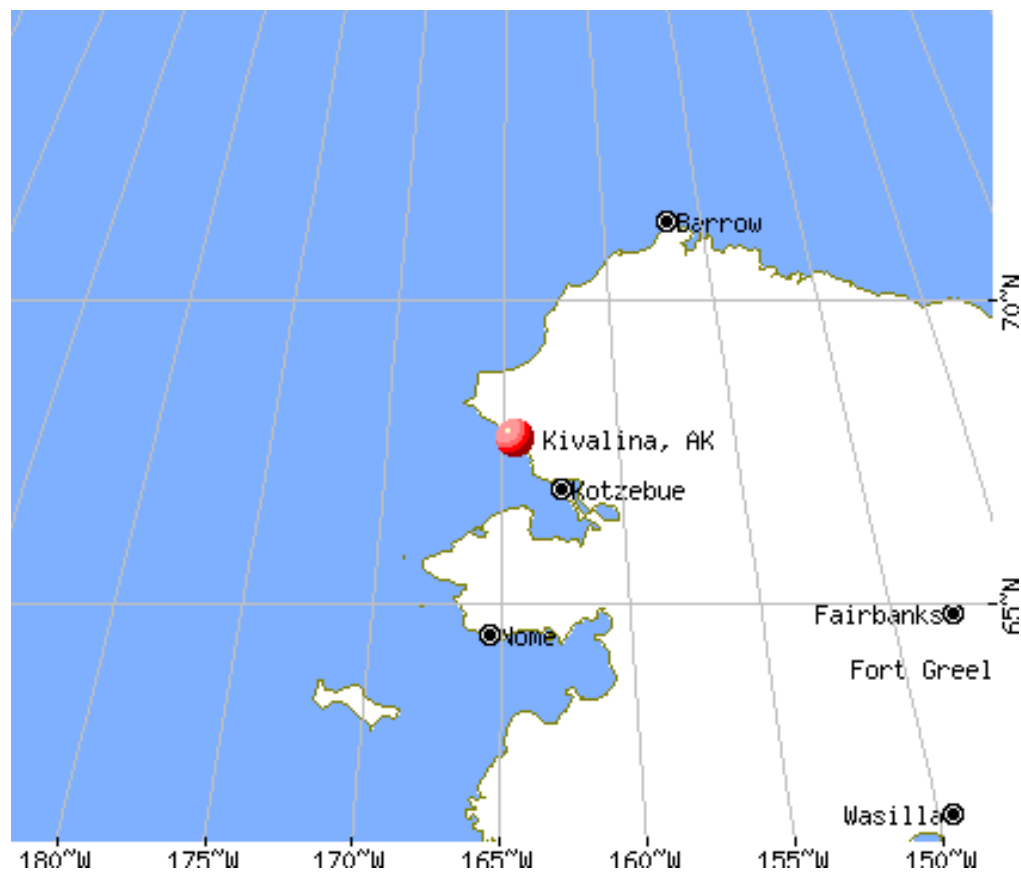
## Courts as Battlefields in Climate Fights



Erosion of the shoreline in Kivalina, Alaska, has led to a closely watched climate-change lawsuit.

By [JOHN SCHWARTZ](#)

Published: January 26, 2010





# The Big Three



- **Connecticut v. AEP (2d Cir.)**
  - Eight AGs sued five power companies
  - U.S. Supreme Court ruled that federal common law nuisance claims were displaced by Clean Air Act
- **Comer v. Murphy Oil Co. (5<sup>th</sup> Cir.)**
  - Class action suit for Katrina property damages
  - Targets oil, coal, chemical and insurance companies
  - Fifth Circuit has dismissed in very odd fashion; district court just dismissed re-filed complaint and dismissed again
- **Native Village of Kivalina v. Exxon Mobil (9<sup>th</sup> Cir.)**
  - District court in California dismissed as political question
  - Ninth Circuit dismissed on displacement grounds as well



# Climate Change Liability -- Key Thoughts and Themes

- Climate change tort lawsuits aren't going away anytime soon
- Should fate of nuisance suits differ?
  - Relief sought (injunctions vs. damages)?
  - Claims and harms alleged?
  - Types of plaintiffs bringing claims?
- The battle to get into court is different than the battle within the court
  - Causation
  - Effectiveness of remedy



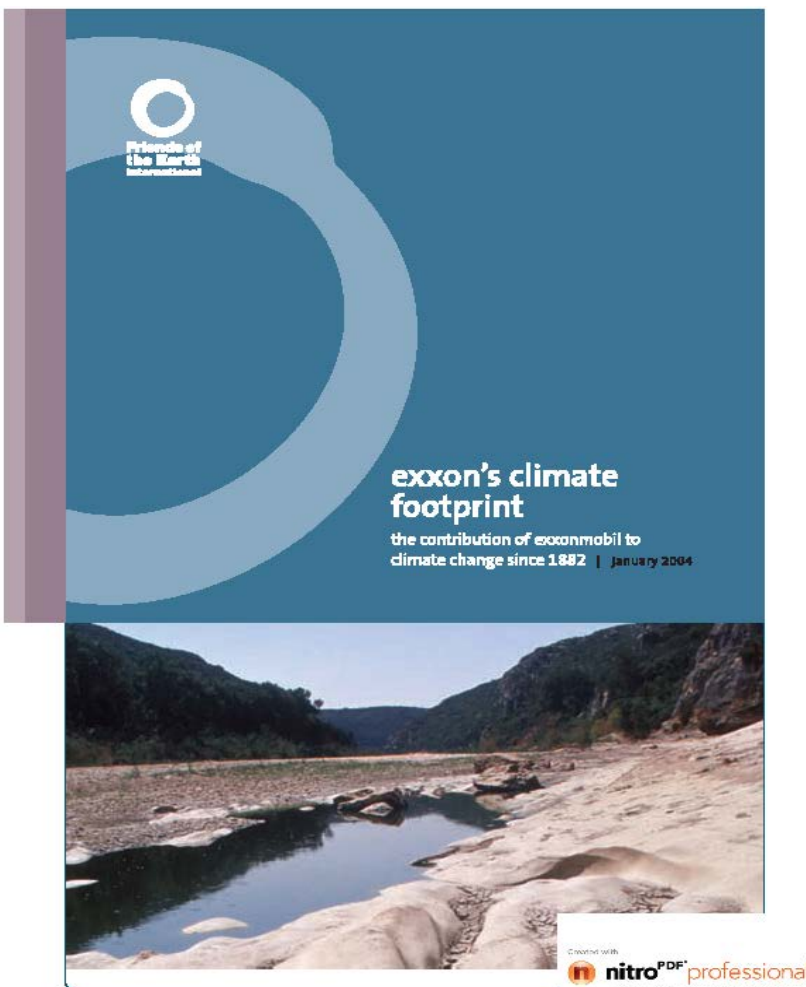
## Future Directions in Climate Change Litigation

- State law claims and lawsuits
- Adaptation of tactics and strategy from tobacco and asbestos litigation
  - Collateral effects of certain claims (conspiracy)
- Transnational climate litigation claims



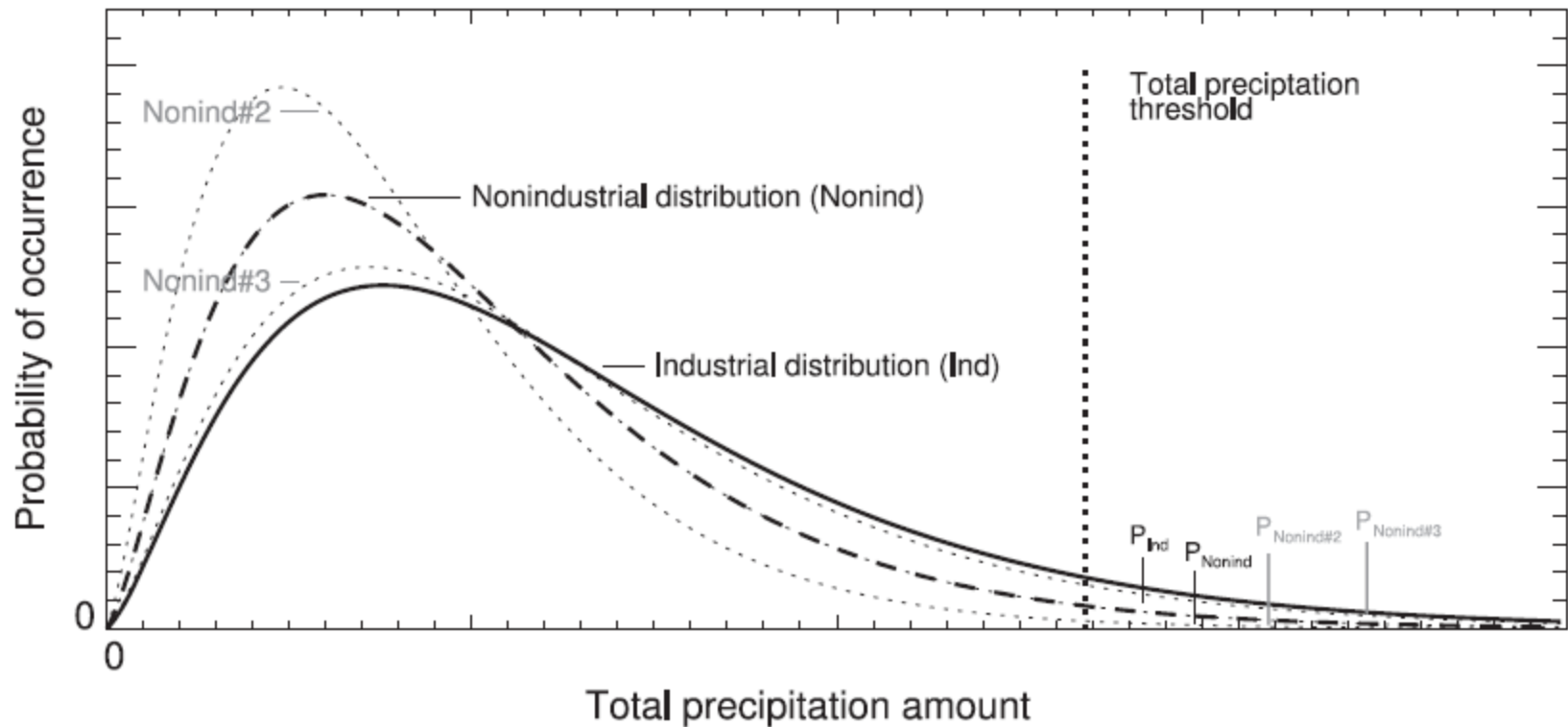
# Public Trust Litigation

- Public trust doctrine
  - Limits on state's ability to alienate resources
  - Analogous to fiduciary duty
  - Used in water, submerged property cases
- Is the atmosphere a public trust?
- *TCEQ v. Bonser-Lain* (Tx.Ct.Apps. (3d District) 2014)



- Tallies emissions back to 1882
- Claims about 5 percent of historical global carbon emissions from Exxon
- Alleges most releases occurred after climate concerns first raised

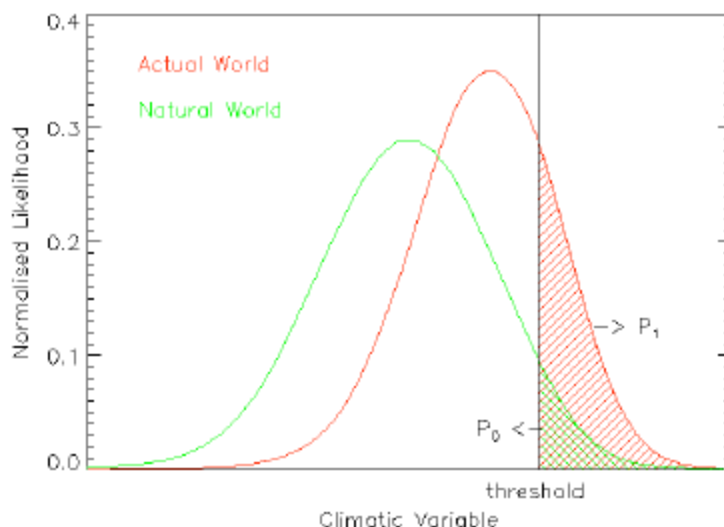
# Climate Attribution Science and Litigation?



# Fraction of Attributable Risk

Fractional change in the likelihood of exceeding a temperature threshold attributable to a particular causal factor

(Allen, Nature, 2003)



**$P_0$ :** Probability of exceeding a threshold in the “world that might have been” (without that causal factor).

**$P_1$ :** Probability of exceeding a threshold in the actual world.

$$\text{FAR} = 1 - (P_0 / P_1)$$

Extreme weather events that arose partially from anthropogenic climate change:

- European heat wave of 2003
- The cold US of 2008
- Moscow heatwave of 2010
- Cold European winter 2009/2010
- UK flooding in 2000

## A final question (or two)

- If tort law won't easily accommodate climate change damage claims, what's the next step?
  - Legislation? (Texas)
  - Reform tort law itself?
  - Create something entirely new? (constitutional, administrative, sovereign claim settlement process)





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