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# FROM CLIMATE CHANGE AND HURRICANES TO ECOLOGICAL NUISANCES: COMMON LAW REMEDIES FOR PUBLIC LAW FAILURES?

**Stephen M. Johnson**\*

## INTRODUCTION

Over the past few years, there has been a minor renaissance in the use of common law actions, especially public and private nuisance, to address environmental problems not being adequately addressed by public law, such as climate change and natural disasters like Hurricane Katrina.<sup>1</sup> Ever since the explosion of public law in response to environmental problems in the 1970s, the common law has provided remedies for personal injury and property damage that are not available under public law,<sup>2</sup> and avenues of relief for problems that were ignored by public law. The common law and public law should not, however, be viewed as alternatives for addressing environmental problems, but as complements. There is an Escheresque quality to the relationship between public law and common law, in that public law continues to evolve in light of developments in the common law, while the common law is

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1. See, e.g., *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated, reh'g granted en banc*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009); *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644 (E.D. La. 2009); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009); *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007); *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006).

2. The federal environmental statutes, such as the Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act, provide for civil and criminal penalties, as well as injunctive relief, but do not authorize courts to award money damages. See, e.g., Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1319, 1365 (2006); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6928, 6972 (2006); Clean Air Act, 42 U.S.C. §§ 7413, 7604 (2006). The Superfund law authorizes courts to award "response costs" to plaintiffs but not money damages. See 42 U.S.C. § 9607 (2006).

influenced, in turn, by developments in public law.<sup>3</sup> Vibrant common law remedies are an essential complement to public law for effective programs to minimize harms to the environment and human health.

Several recent federal court decisions involving nuisance or negligence claims for damages related to climate change and Hurricane Katrina appear, at first blush, to provide strong incentives for an even greater focus on common law to address environmental problems. Private nuisance actions could potentially be used more widely to address destruction or degradation of waters or wetlands that are no longer protected by the Clean Water Act or habitats that are not protected by the Endangered Species Act, or problems created by non-point source pollution, non-hazardous waste management, or locally unwanted land use siting.<sup>4</sup> Similarly, public nuisance lawsuits could potentially target other actions that contribute to global climate change or address problems that may be caused in the future by nanotechnology, new toxic chemicals, or new uses of existing toxic chemicals.<sup>5</sup>

However, the recent federal court decisions should not be viewed as fundamentally altering the role that common law actions play in protecting the environment and human health. It will still be difficult to rely on the common law to solve these broader environmental problems. The recent decisions removed some jurisdictional and standing barriers to common law actions, but many impediments remain. The primary impediment, which was not significantly affected by the recent decisions, is the difficulty of proving causation in the common law actions.<sup>6</sup> The recent decisions may have made it easier to bring common law actions but not necessarily to win them. Furthermore, the decisions leave several standing and preemption questions unresolved, so it may not even be easier than before to bring common law actions in some circumstances.

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3. See Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 547–49 (2007).

4. See *infra* notes 162–72 and accompanying text.

5. See *infra* note 173 and accompanying text.

6. See *infra* Part V.A.

To the extent that the recent decisions spark an increase in common law litigation to address some of the problems not addressed by public law, though, the litigation could spur legislative changes to the public law. Consequently, the decisions may ultimately have a greater impact on public law than on common law.

Part I of this article explores the role that the common law played in addressing environmental problems prior to the development of a robust public law regime in the 1970s and the changing role of common law as the new regime was implemented. Part II of the article examines the reasons why there has been a renaissance in common law actions and why the trend could continue. Part III of the article discusses the recent federal appellate court decisions that could accelerate the common law renaissance, as well as some other recent federal court decisions that could slow the renaissance. All of these decisions involved harm caused by global climate change, Hurricane Katrina, or both. Part IV of the article identifies environmental problems not adequately addressed under public law that might be the subject of more aggressive common law enforcement if the renaissance continues and discusses the advantages of addressing those problems through common law actions. Finally, Part V explores the continuing limitations of common law that have not been remedied by the recent decisions.

#### I. THE 1970S: THE ASCENDANCY OF PUBLIC LAW

From the dawn of the age of industrialization, the common law developed as a powerful tool to address pollution problems.<sup>7</sup> Private parties and governments sought to combat environmental problems through public and private nuisance, trespass, negligence, and strict liability lawsuits.<sup>8</sup> State and federal courts frequently awarded damages to neighbors of paper mills, refineries, chemical factories, and other industries that were harmed by pollution from those

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7. See J.B. RUHL, JOHN COPELAND NAGLE & JAMES SALZMAN, *THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW* 930–31 (1st ed. 2008).

8. See Klass, *supra* note 3, at 567.

activities, or the activities themselves were enjoined.<sup>9</sup> Although many of the lawsuits were based on state common law, some of the lawsuits involving interstate pollution were brought under federal common law.<sup>10</sup>

Over time, however, federal, state and local governments adopted laws and regulations to address environmental problems. Although the trend began with state and local efforts early in the twentieth century,<sup>11</sup> public environmental law became ubiquitous with the flood of federal environmental legislation in the 1970s.<sup>12</sup> As public environmental law grew, the number of common law environmental claims declined sharply.<sup>13</sup>

While common law claims declined, neither Congress nor the states sought to fully displace common law remedies by adopting environmental protection statutes and regulations. Indeed, most of the federal environmental statutes include provisions that explicitly preserve more stringent state and local remedies.<sup>14</sup> In some cases, the adoption of federal statutes will eliminate *federal* common law remedies. For instance, in *City of Milwaukee v. Illinois*, the Supreme Court held that the Clean Water Act displaced federal common law

9. See, e.g., *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334 (1933); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *McCleery v. Highland Boy Gold Mining Co.*, 140 F. 951, 952–53 (C.C.D. Utah 1904); *Steifer v. City of Kansas City*, 267 P.2d 474 (Kan. 1954); *Susquehanna Fertilizer Co. v. Malone*, 20 A. 900, 902 (Md. 1890); *Whalen v. Union Bag & Paper Co.*, 101 N.E. 805 (N.Y. 1913); *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 690 (N.C. 1953); *Martin v. Reynolds Metals Co.*, 342 P.2d 790, 794 (Or. 1959); *Costas v. City of Fond du Lac*, 129 N.W.2d 217 (Wis. 1964).

10. See, e.g., *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981) (dealing with interstate water pollution); *Tenn. Copper*, 206 U.S. 230 (addressing interstate air pollution).

11. See *Klass*, *supra* note 3, at 567; Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 578–79 (2001).

12. See *Klass*, *supra* note 3, at 567; ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE & POLICY 88 (6th ed. 2009).

13. See H. Marlow Green, *Can the Common Law Survive in the Modern Statutory Environment?*, 8 CORNELL J.L. & PUB. POL'Y 89, 109 (1998) (finding a sharp decline in the number of common law actions brought after 1975); see also J.B. Ruhl, *Making Nuisance Ecological*, 58 CASE W. RES. L. REV. 753, 754 (2008). Professor J.B. Ruhl suggests that the explosion of public law diminished the use of nuisance law to address species and habitat protection just as it diminished the use of nuisance law to address pollution control problems. *Id.* at 755–56.

14. See, e.g., 33 U.S.C. §§ 1365(e), 1370 (2006); 42 U.S.C. §§ 6929, 6972(f) (2006); 42 U.S.C. § 9614 (2006).

nuisance claims involving discharges of water pollution that were regulated by the Act's permitting program.<sup>15</sup>

The reach of *City of Milwaukee v. Illinois*, however, is limited. First, the Court did not find that federal common law was displaced merely because Congress had enacted federal water pollution legislation. Instead, the Court analyzed the structure of the statute and concluded that Congress implicitly displaced federal common law with respect to the plaintiff's claim because Congress established a comprehensive regulatory program to address the pollution discharges that were at issue in the case.<sup>16</sup> It is possible, therefore, that the Court may find that other federal environmental statutes that do not establish a comprehensive permitting program to address environmental problems do not displace federal common law.<sup>17</sup>

More importantly, though the Supreme Court, in *City of Milwaukee v. Illinois*, held that the Clean Water Act displaced federal common law regarding the discharges involved in the case, the Court did not foreclose state common law actions.<sup>18</sup> Significantly, several years later, in *International Paper Co. v. Ouellette*, the Supreme Court concluded that although the Clean Water Act displaced federal common law actions regarding water pollution discharges that are regulated under the Act's comprehensive permitting program, the Act

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15. *Milwaukee II*, 451 U.S. at 317.

16. *Id.* ("We conclude that, at least so far as concerns the claims of respondents, Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.").

17. For instance, Professor Randall Abate argues that the Clean Air Act should not be interpreted as displacing federal common law regarding greenhouse gas pollution from automobiles because the statute does not establish a comprehensive regulatory system to address such pollution in the way that the amended Clean Water Act regulated point source discharges of water pollution. See Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 CONN. L. REV. 591, 605–07 (2008). Professor Jonathan Zasloff disagrees, arguing that the statute should be read to displace federal common law regarding harm caused by greenhouse gases. See Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827, 1848–49 (2008). Professor Zasloff relies, in part, on the suggestion by Justice Rehnquist, in *City of Milwaukee v. Illinois*, that the Court "start[s] with the assumption" that statutes displace federal common law, due to separation of powers principles. *Milwaukee II*, 451 U.S. at 317. Part III of this Article examines some of the recent federal court decisions that explore the Clean Air Act, greenhouse gases, and displacement of federal common law.

18. *Milwaukee II*, 451 U.S. at 327–29.

does not preempt *state* common law actions for harm caused by those discharges, as long as the actions are based on the common law of the *discharging state*.<sup>19</sup>

After the Court's decision in *Ouellette*, it was clear that while the common law's role in addressing environmental problems was diminished by the development of federal, state, and local public law, common law was still an important tool for addressing environmental problems. When exploring the importance of common law in the age of environmental statutes, commentators often stress that the common law provides remedies that are not available under most statutes.<sup>20</sup> While federal and state environmental statutes generally provide for declaratory and injunctive relief to prevent future violations, they do not generally provide any relief for property damage or personal injury.<sup>21</sup> Common law nuisance, trespass, negligence and strict liability actions often remain the only option for recovering those damages.

In the same way that the common law provides remedies that are not available under public law, it can be used to address problems that are either not addressed under public law or not addressed adequately.<sup>22</sup>

While the common law plays those important roles in the modern age of statutes, critics frequently assert that public law is a much more efficient and effective tool to address environmental problems and that it developed because of the failure of the common law to address those problems. Specifically, critics often assert that because judges in common law actions focus on narrow, specific issues involving litigants within their jurisdiction, rather than on the potential impact of those decisions on groups that are not involved in

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19. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987). Unlike the analysis regarding displacement of federal common law, courts begin with a presumption that federal law does not preempt the "historic police powers of the States . . . unless that was the clear and manifest purpose of Congress." *Id.* at 492 n.11 (quoting *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230 (1947)).

20. See *PERCIVAL ET AL.*, *supra* note 12, at 101; *Klass*, *supra* note 3, at 569.

21. See *Klass*, *supra* note 3, at 583. Professor Alexandra Klass also notes that while the Clean Water Act and Clean Air Act might not authorize lawsuits to challenge pollution caused by activities that are authorized by a permit, persons harmed by those activities can generally still seek remedies for their injuries under common law. *Id.*

22. See *infra* notes 161–73 and accompanying text.

the litigation, the common law can effectively address small-scale local issues but cannot address broader national or international problems.<sup>23</sup> Common law judges are also criticized as generalists, lacking the expertise to resolve the broader technical questions that arise in environmental disputes.<sup>24</sup> An agency administering a statute, on the other hand, can collect data from a wide range of sources and employ experts to set pollution limits on a national or international basis after considering the broader impacts of limiting pollution to specific levels.<sup>25</sup>

Critics also argue that public law is preferable to common law because the common law develops slowly, does not develop uniformly, and is retrospective in nature.<sup>26</sup>

Common law and public law should not, however, be viewed as alternative regimes for addressing environmental problems, but as complementary regimes. Environmental statutes are frequently interpreted in light of common law principles and enacted or amended in response to developments in the common law.<sup>27</sup> Similarly, the common law has evolved and developed in response to the development and interpretation of public law.<sup>28</sup> The following section of this article explores those interconnections more fully in the context of the recent mini-renaissance in common law actions.

## II. WHY NOW?: REASONS FOR THE COMMON LAW RENAISSANCE

While common law actions to address environmental problems declined with the explosion of public law, a wave of high-profile private and public nuisance actions over the past few years may

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23. See Ruhl, *supra* note 13, at 777–79; Klass, *supra* note 3, at 598; see also Jason J. Czarnecki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 7 (2007).

24. See Ruhl, *supra* note 13, at 779.

25. See Klass, *supra* note 3, at 569.

26. See Ruhl, *supra* note 13, at 779; Klass, *supra* note 3, at 569, 583.

27. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1881 (2009) (relying on the Restatement of Torts to interpret the liability provisions of Superfund); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1382 (8th Cir. 1989) (incorporating common law principles regarding liability for acts of independent contractors).

28. See Klass, *supra* note 3, at 584–99.



signal the beginning of a mini-renaissance in common law environmental protection actions. Professor Alexandra Klass suggests that the trend toward using public nuisance law and other common law tools to address broader environmental problems is consistent with an “instrumentalist” vision for the common law, where nuisance and other tort actions serve as a separate branch of public regulatory law that is intended to deter undesirable conduct, spread societal losses, and compensate victims of wrongdoing.<sup>29</sup> She suggests that the instrumentalist vision has taken precedence over the alternative vision for tort law, that of corrective justice, which views the common law as merely a means to obtain redress for private wrongs.<sup>30</sup>

Many other factors have influenced the reinvigoration of the common law. First, enforcement of federal and state environmental statutes and regulations has been weak in many areas and non-existent in others.<sup>31</sup> Without an effective public law option, common law is the only tool to address some environmental problems.

In the past decade, the Supreme Court has also played an important role in reinvigorating common law actions by issuing several rulings based on principles of federalism and the Commerce Clause that limit federal authority to address environmental problems and expand state authority.<sup>32</sup> The Court’s recent decisions have narrowed federal authority to regulate under the Commerce Clause and have spurred courts and agencies to interpret federal regulatory authority under environmental statutes more narrowly.<sup>33</sup> Thousands of acres of wetlands and hundreds of miles of waters that were protected under

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29. See Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1505–06, 1508 n.19 (2009).

30. *Id.* Professor Klass notes, however, that while the recent public nuisance actions to address climate change are examples of tort law as a form of public law, common law actions to address harm caused by hazardous waste disposal often resemble the private law model of tort law. *Id.* at 1529–36.

31. See Czarnetzki & Thomsen, *supra* note 23, at 6–7; Klass, *supra* note 3, at 581.

32. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

33. See *Rapanos v. United States*, 547 U.S. 715, 738 (2006); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 173–74 (2001). In both cases, the Court interpreted the Clean Water Act narrowly to avoid a question regarding whether regulation of particular intrastate waters under the Act violated the Commerce Clause.

the Federal Clean Water Act are no longer accorded the same protection in light of those decisions.<sup>34</sup> The Court's expansion of state power at the expense of federal power extends beyond the Commerce Clause, though. In fact, during the 2009 Supreme Court term, in every environmental case where federalism concerns were implicated, the Court ruled in favor of state or local governments.<sup>35</sup> The Court also may have increased opportunities for citizens to bring common law actions for harm caused by environmental problems by issuing a ruling in *Massachusetts v. EPA* that establishes a rather generous standing standard for environmental plaintiffs.<sup>36</sup> Depending on how the case is interpreted and applied, this ruling could make it easier for plaintiffs to establish standing to sue even though the harm they suffer from pollution is caused by a variety of sources and the relief sought in the lawsuit does not fully redress their harm.<sup>37</sup>

Other factors could also play a role in fostering a more significant increase in common law actions to protect the environment. Professor J.B. Ruhl argues that a growing awareness of the economic value of ecosystems and the development of the field of ecological economics could spur a wave of lawsuits to address "ecological nuisances."<sup>38</sup> He suggests that the ability to quantify the economic value of natural

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34. See James Murphy & Stephen M. Johnson, *Significant Flaws: Why the Rapanos Guidance Misinterprets the Law, Fails to Protect Waters, and Provides Little Certainty*, 15 SE. ENVTL. L.J. 431, 455–56 (2007).

35. See Stephen M. Johnson, *The Roberts Court and the Environment*, 37 B.C. ENVTL. AFF. L. REV. 317, 333 (2009).

36. *Massachusetts v. EPA*, 549 U.S. 497 (2006). Although the case did not involve a challenge under common law, the standing analysis used by the Court should apply to plaintiffs in common law actions as well.

37. The Court concluded that the EPA's actions caused the plaintiffs' harm because they "contributed" to the harm, even though there were many other causes of their harm, and that the plaintiffs satisfied the "redressability" requirement for standing because the relief they sought would reduce their harm "to some extent." *Id.* at 523–26. The Court stressed that the plaintiffs need not prove that the relief they sought would relieve their "every injury." *Id.* at 525 (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)). However, it is not clear how broadly the decision will be applied. As the Court noted in its standing analysis, it was significant that the plaintiffs in the case were states and that they were suing to enforce a procedural right. *Id.* at 517–21.

38. See Ruhl, *supra* note 13, at 756–57. Although it might still be difficult to put a precise dollar figure on the total value of ecosystem services, Professor Ruhl argues that there is growing recognition that ecosystems provide many economic values, including flood mitigation and groundwater recharge from wetlands, water filtration and sediment capture from forests, and nutrient cycling, gas regulation, thermal regulation and carbon sequestration from other ecosystems. *Id.*

resources has made it easier for plaintiffs to prove that a defendant's action causes specific and measurable harms to those resources that have specific and measurable impacts on the plaintiffs.<sup>39</sup>

Professor Alexandra Klass agrees that advances in science make it easier for plaintiffs to prevail in nuisance actions, and she argues that public law contributes to that dynamic by requiring the collection and reporting of data that can be used by litigants to prove that a defendant's action is a nuisance and causes the plaintiff's harm.<sup>40</sup> She also notes that courts frequently look to the broad environmentally protective purposes of public laws in determining how to interpret and apply the common law and the appropriateness of different types of damages under the common law.<sup>41</sup> She argues that public law has influenced the development of common law in the past and continues to influence the development of common law today.<sup>42</sup> Finally, advocates of an expansion of common law tools to address environmental problems suggest that many of the traditional criticisms of the use of the common law are misguided. Specifically, they argue that the local nature of decision making in common law courts is often an advantage for dealing with environmental problems, rather than a disadvantage, because the judges, due to their proximity to the problem, are in a better position to determine the effect of an activity on a community and to balance equities to

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39. *Id.* He points out that ecological economics and the development of ecosystem services valuation have already caused an expansion of the common law by prompting an expansion of public trust principles. *Id.*

40. *See* Klass, *supra* note 3, at 591–94.

41. *Id.* at 587–89. For instance, she points out that in light of the enactment of the federal Superfund law, which imposes strict liability on a wide variety of persons for releases of hazardous substances, many state courts have held persons strictly liable under common law for environmental contamination caused by such releases. *Id.* at 587. She also notes that state courts have frequently allowed common law plaintiffs to recover permanent “environmental stigma damages” in addition to cleanup costs for contamination of their property, in light of the stigma imposed on their property by the federal regulatory regime for hazardous waste cleanups. *Id.* at 588–89.

42. *Id.* at 548–55. She notes that scholars and legal authorities including Dean Roscoe Pound, Justice Benjamin Cardozo, and Judge Henry Friendly have emphasized the importance of the evolution of common law in response to statutes. *Id.* All of those authorities emphasized the important role that common law judges play in “balancing policies with a goal of achieving a pragmatic . . . solution,” as opposed to simply declaring “what the law is.” *Id.* at 547, 549. She asserts, however, that courts have thus far underutilized the public law as a tool to model common law regarding environmental protection. *Id.* at 547, 557, 565.

determine an appropriate solution to the problem.<sup>43</sup> Professor Ruhl suggests that common law courts would be particularly adept at addressing “ecological nuisances,” since most claims for such nuisances would focus on a primarily local harm.<sup>44</sup> Many commentators agree that common law judges will be free from the political pressure that might otherwise be asserted against government agencies.<sup>45</sup>

In response to claims that judges cannot weigh and balance broad issues with national and international impacts, advocates of common law actions to protect the environment argue that courts can resolve the environmental disputes before them without making those broader policy decisions.<sup>46</sup>

### III. THE COMMON LAW RESPONSE TO CLIMATE CHANGE AND DISASTER

While it is not yet clear that there has been a renaissance in common law actions to protect the environment, it is clear that there have been some high profile common law actions brought in the past few years to address the environmental problems that are being caused by global climate change and natural disasters like Hurricane Katrina. Both the Second and Fifth Circuit Courts of Appeal issued opinions allowing plaintiffs to proceed with nuisance actions for damages related to global warming, despite challenges by the defendants that the plaintiffs lacked standing and that the claims were

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43. See Klass, *supra* note 3, at 573, 582.

44. See Ruhl, *supra* note 13, at 778.

45. See Klass, *supra* note 3, at 581.

46. Jonathan Zasloff argues, for instance, that courts can award money damages rather than injunctions for harm caused by public nuisances, in order to avoid the criticism that courts lack the competence to manage broad injunctions against public nuisances. See Zasloff, *supra* note 17, at 1838. One of the benefits of damages, Zasloff notes, is that the defendant can decide whether it is more economical to pay damages and continue to pollute, or to stop polluting. *Id.* Even in cases where courts are called upon to issue injunctions, Alexandra Klass argues that courts can decide whether to issue the injunction in a case like *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970), by balancing the harms to the parties before the court rather than by examining the complex interstate air pollution issues that extended beyond the dispute in the case. See Klass, *supra* note 3, at 572.

non-justiciable political questions.<sup>47</sup> The Fifth Circuit subsequently vacated its decision, though, when it agreed to rehear the case en banc.<sup>48</sup> The Ninth Circuit Court of Appeals is likely to address similar standing and justiciability questions shortly in a nuisance case brought by residents of Kivalina, Alaska, a small village that is disappearing due to global climate change.<sup>49</sup> In addition to those developments in climate change litigation, the federal courts in Louisiana have issued some significant rulings recently in common law actions related to damage caused by hurricanes.<sup>50</sup>

#### A. Connecticut v. American Electric Power Co.

In September 2009, the United States Court of Appeals for the Second Circuit held that a coalition of states and land trusts could proceed with litigation against several electric power companies for injuries that the plaintiffs suffered due to global climate change caused, in part, by defendants' emission of greenhouse gases.<sup>51</sup> The plaintiffs in that case, *Connecticut v. American Electric Power Co.*, brought federal and state common law public nuisance claims and sought declaratory and injunctive relief, rather than money damages.<sup>52</sup> The court held that the plaintiffs had standing to sue, the claims were justiciable and governed by federal common law, which was not displaced, and the plaintiffs stated claims for nuisance under federal common law.<sup>53</sup>

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47. See *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated, reh'g granted en banc*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

48. See *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

49. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). An earlier case in the Ninth Circuit brought by the State of California against auto manufacturers addressed similar issues. See *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at \*5-8 (N.D. Cal. Sept. 17, 2007).

50. See *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644 (E.D. La. 2007); *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006).

51. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 315 (2d Cir. 2009). New York City was also a plaintiff in the case. *Id.* at 316.

52. *Id.* at 315. Specifically, the plaintiffs asked the court to cap the carbon dioxide emissions by the defendants and then to reduce the emissions by a specified percentage each year for ten years. *Id.* at 314.

53. *Id.* at 315.

The Second Circuit heard the case when the plaintiffs appealed the district court's decision to dismiss the case on the grounds that it raised non-justiciable political questions.<sup>54</sup> The Second Circuit stressed that “[t]he political question doctrine must be cautiously invoked,” and simply because an issue may have political implications does not make it non-justiciable.<sup>55</sup> Applying the six factors articulated by the Supreme Court in *Baker v. Carr*,<sup>56</sup> the court reversed the district court's finding that the plaintiffs' claims were non-justiciable.<sup>57</sup> With regard to the first factor, the court held that the issue in the case was not textually committed to Congress or the Executive branch.<sup>58</sup> Importantly, the court recognized that the plaintiffs were not asking the court to fashion a comprehensive solution to global climate change but were merely seeking to limit emissions from six domestic coal-fired power plants that were allegedly causing a public nuisance.<sup>59</sup> The court concluded that in the common law nuisance case at bar, “[t]he department to whom this issue has been ‘constitutionally committed’ is none other than our own—the Judiciary.”<sup>60</sup> With regard to the second *Baker* factor, the court concluded that there were judicially manageable standards

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54. *Id.* at 314. The district court determined that the case was non-justiciable based on the third *Baker* factor, finding that the plaintiffs' claims were “impossib[le] [to] decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion.” *Id.* at 319 (alteration in original) (quoting *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005)).

55. *Id.* at 323 (citation omitted) (quoting *Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994)).

56. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“Prominent on the surface of any case held to involve a political question is found [(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.”).

57. *Am. Elec. Power Co.*, 582 F.3d at 324–32.

58. *Id.* at 325.

59. *Id.* The defendants had argued, to the contrary, that resolution of the case would impermissibly interfere with the President's authority to manage foreign relations. *Id.* at 324. The court noted that its decision would not bind parties not before the court and would not set across the board domestic emissions standards. *Id.* at 325.

60. *Id.* at 325 (alteration in original) (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991)).

available for the court to use to resolve the claims.<sup>61</sup> Although global climate change creates broader problems, the court counseled that it was merely being asked to resolve a public nuisance action against six defendants and “that federal courts have successfully adjudicated complex common law public nuisance cases for over a century.”<sup>62</sup> With regard to the third *Baker* factor, the court held that it was not necessary to await an initial policy determination to resolve the plaintiffs’ claims.<sup>63</sup> The court noted that while Congress has not agreed on a comprehensive plan to address global climate change, the actions that Congress and the Executive Branch have taken suggest that they favor reducing greenhouse gas emissions.<sup>64</sup> After determining that the issue was not a non-justiciable political question based on the other three *Baker* factors, the court suggested that Congress or the EPA could ultimately overrule any decision that the court made in this common law nuisance action if they disagreed with the approach taken by the court.<sup>65</sup>

After rejecting the defendants’ non-justiciability argument, the court addressed the question of the plaintiffs’ standing, which the district court had declined to address.<sup>66</sup> The court was reviewing the standing question in the context of the defendants’ motion to dismiss

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61. *Id.* at 329. The defendants argued that resolution of the claims would require the court to resolve issues for which there are no standards, including how far domestic and global emissions should be reduced, whether power plants or automobiles should be required to reduce their emissions, and what impacts the reductions would have on jobs, the economy and security. *Id.* at 326.

62. *Id.* at 326, 329. As the court stressed, “The question presented here is discrete, focusing on Defendants’ alleged public nuisance and Plaintiffs’ alleged injuries. As the States eloquently put it, ‘[t]hat Plaintiffs’ injuries are part of a worldwide problem does not mean Defendants’ contribution to that problem cannot be addressed through principled adjudication.’” *Id.* at 329 (alteration in original).

63. *Am. Elec. Power Co.*, 582 F.3d at 331.

64. *Id.* The court held that Congress’s failure to adopt comprehensive greenhouse gas legislation did not demonstrate Congress’s intent to supplant common law. *Id.* In fact, although Congress and the Executive Branch have not yet adopted a comprehensive strategy to address climate change, the court pointed out the following:

It is . . . fair to say that the Executive [B]ranch and Congress have not indicated they favor *increasing* greenhouse gases. On the contrary, the political branches are at the very least concerned about global warming, and Congress has passed laws that call for study of climate change and research into technologies that will reduce emissions.

*Id.*

65. *Id.* at 332.

66. *Id.* at 332–33. The court noted “that when a lower court dismisses a case without deciding whether standing exists and the basis for the dismissal [is overturned],” the reviewing court has an obligation to address the standing issue sua sponte. *Id.*

at the pleading stage, so the court applied a less rigorous standard of review than it would have applied at a later stage of litigation.<sup>67</sup> Since the group of plaintiffs included states, as well as land trusts, the court began its standing analysis by focusing on the standing rules that apply to states when they are suing in their *parens patriae* capacity.<sup>68</sup> The court suggested that it was unclear whether a lower standard that previously applied when states sued in their *parens patriae* capacity<sup>69</sup> was still applicable after the Supreme Court's decision in *Massachusetts v. EPA*.<sup>70</sup> However, the court concluded that it was not necessary to determine whether the lower standard applied because the states met the traditional standing test set forth in *Lujan v. Defenders of Wildlife*.<sup>71</sup> The court also concluded that the land trusts met the requirements of the *Lujan* test.<sup>72</sup>

Applying the *Lujan* test, the court concluded that the states alleged *present* injuries, including declining water supplies caused by the reduced size of snowpack, which were similar to the coastal erosion that the Supreme Court held to be a sufficient injury for Massachusetts in *Massachusetts v. EPA*.<sup>73</sup> The states also alleged a variety of *future* injuries, including increased illness and death,

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67. *Id.* at 333. The court stressed that, at the pleading stage, the court “presume[s] the general factual allegations embrace those facts necessary to support the [plaintiffs’] claim” and the court construes all reasonable inferences to be drawn from the plaintiffs’ allegations in their favor. *Id.* Consequently, the court noted that the plaintiffs in the case, at the pleading stage, did not need to present scientific evidence to prove their injury-in-fact, causation, or redressability. *Id.* The court stressed that a more stringent standard would apply at the summary judgment stage or at trial. *Id.*

68. *Id.* at 334. “[T]he States [we]re suing in both their proprietary and *parens patriae* capacit[y] . . .” *Id.* “*Parens patriae* is an ancient common law prerogative which ‘is inherent in the supreme power of every state . . . [and is] often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.’” *Id.* (quoting *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890)). The states in the case were suing to protect their natural resources and the health of their citizens. *Id.* at 338.

69. *Am. Elec. Power Co.*, 582 F.3d at 338. The court indicated that, based on the Supreme Court’s decision in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1992), a state suing based on *parens patriae* “(1) ‘must articulate an interest apart from the interests of particular private parties . . .’; (2) ‘must express a quasi-sovereign interest’; and (3) must have ‘alleged injury to a sufficiently substantial segment of its population.’” *Id.* at 335–36 (footnote omitted).

70. *Am. Elec. Power Co.*, 582 F.3d at 335–36 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

71. *Id.* at 338. Under *Lujan*, the plaintiff must demonstrate that he has suffered an injury-in fact that is caused by the defendant’s action and that the relief that the plaintiff seeks will redress his injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

72. *Am. Elec. Power Co.*, 582 F.3d at 349.

73. *Id.* at 341.



increased smog, beach erosion, accelerated sea level rise, salinization of marshes and water supplies, more droughts and floods, and increased wildfires.<sup>74</sup> Although the land trusts did not allege present injuries, they did allege future harm to the ecological and aesthetic values of the lands they held in trust, which would interfere with their efforts to preserve ecologically significant and sensitive lands for scientific and educational purposes and for human use and enjoyment.<sup>75</sup> Although many of the future harms that plaintiffs asserted would not occur in the short term, the court concluded that they were imminent because they were certain to occur.<sup>76</sup>

Regarding causation, the defendants argued that global climate change is caused by many factors other than their emission of greenhouse gases, so plaintiffs could not prove that any specific harm was caused by their activities.<sup>77</sup> The court rejected that argument, however, holding that (1) the causation analysis for purposes of standing, particularly at the pleading stage, is not the same as the proximate cause standard that applies to the merits of a tort action,<sup>78</sup> and (2) the plaintiffs satisfied the requirement that their injury be fairly traceable to the defendants' conduct by alleging that the defendants' activities contributed to their injuries.<sup>79</sup>

Finally, regarding redressability, the court rejected the defendants' argument that the plaintiffs lacked standing because the greenhouse

74. *Id.* at 342.

75. *Id.*

76. *Id.* at 344 (quoting Brief for Plaintiffs-Appellants at 42–43, *Am. Elec. Power Co.*, 582 F.3d 309 (No. 05-5104cv)). The court wrote, “In describing imminence, the [Supreme] Court was not imposing a strict temporal requirement that a future injury occur within a particular time period . . . . Instead, the Court focused on the *certainty* of that injury occurring in the future, seeking to ensure that the injury was not speculative.” *Id.* at 343. With regard to the future injuries of the states and land trusts, the court wrote, “[T]hey are certain to occur because of the consequences, based on the laws of physics and chemistry, of the documented increased carbon dioxide in the atmosphere.” *Id.* at 344. Although the plaintiffs also alleged standing because the defendants' actions caused an increased risk of harm, the court did not find it necessary to determine whether that constituted an “injury-in-fact” because it concluded that the plaintiffs had sufficiently alleged other injuries. *Id.* at 344 n.21.

77. *Id.* at 345. The defendants alleged that the plaintiffs were required to prove that the defendants' activities *alone* caused the plaintiffs' harm. *Id.*

78. *Am. Elec. Power Co.*, 582 F.3d at 346. The court also pointed out that even on the merits, defendants who concurrently cause a plaintiffs' indivisible injury can be held jointly and severally liable. *Id.*

79. *Id.* at 346–47.

gas emissions that the plaintiffs sought to limit through an injunction would not prevent the plaintiffs' injuries, because global climate change is caused by the emissions of many other entities that were not parties to the lawsuit.<sup>80</sup> Citing *Massachusetts v. EPA*, the court ruled that a demonstration that the courts could provide *some* measure of relief is sufficient to show redressability, and the proposed remedy does not need to address or prevent all of the plaintiffs' harm.<sup>81</sup> Accordingly, the court determined that the plaintiffs satisfied the redressability requirement for standing because even though the relief that the plaintiffs sought would not itself reverse global warming, it would slow the pace of emissions increases.<sup>82</sup>

After the court concluded that the plaintiffs had standing to sue, the court addressed another issue that was not resolved by the district court and held that the plaintiffs made sufficient allegations to state a claim for relief under the federal common law of nuisance.<sup>83</sup> Applying the Restatement formulation for a claim for public nuisance, the court concluded that the plaintiffs' complaints adequately alleged "an unreasonable interference" with a right common to the general public.<sup>84</sup> The court had little trouble concluding that the states were suing to prevent harm to public rights in their jurisdictions, including "the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world."<sup>85</sup> Although private parties

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80. *Id.* at 348.

81. *Id.* at 348–49.

82. *Id.*

83. *Id.* at 349–71. Like the standing issue, on appeal, the parties fully briefed the issue regarding the plaintiffs' failure to state a claim. *Id.* at 349. Once again, since the court was considering a motion to dismiss based on the pleadings, it stressed that it would "constru[e] the complaint[s] liberally, accepting all factual allegations in the complaint[s] as true and drawing all reasonable inferences in the plaintiff[s]' favor." *Id.* (alteration in original). The court wrote that "[c]ourts apply a 'permissive' standard in assessing public nuisance pleadings." *Id.* at 370.

84. *Am. Elec. Power Co.*, 582 F.3d at 352–53. The Restatement definition of public nuisance is set forth in RESTATEMENT (SECOND) OF TORTS § 821B(1) (1965).

85. *Am. Elec. Power Co.*, 582 F.3d at 352–53. The court also concluded that New York City had sufficiently alleged interference with rights common to the public within the city, including increased heat related deaths and damage to the city's coastal infrastructure. *Id.* at 366.

must also demonstrate that they have suffered a harm that is different in kind to bring a public nuisance action,<sup>86</sup> the court concluded that the land trusts adequately alleged such harm.<sup>87</sup>

Finally, the court rejected the defendants' claim that other federal laws displaced the plaintiffs' federal common law public nuisance claims. The court stressed that federal common law is displaced when a federal statute speaks directly to the question otherwise addressed by federal common law.<sup>88</sup> The defendants argued that the Clean Air Act established a comprehensive regulatory program to address air pollution similar to the Clean Water Act program addressing water pollution, which the Supreme Court, in *City of Milwaukee v. Illinois*, determined displaced federal common law for interstate water pollution.<sup>89</sup> The Second Circuit disagreed, however, pointing out that while the Clean Air Act established a comprehensive program for regulating "criteria pollutants," the Act did not currently target emissions of greenhouse gases from stationary sources, like power plants.<sup>90</sup> The court also noted that while the Supreme Court, in *Massachusetts v. EPA*, recognized that the EPA could regulate carbon dioxide emissions from motor vehicles under the Clean Air Act, the agency is only beginning to focus on using that authority to regulate motor vehicle emissions and has not yet developed any *proposed* regulations to address greenhouse gas emissions from

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86. RESTATEMENT (SECOND) OF TORTS § 821C (1965).

87. *Am. Elec. Power Co.*, 582 F.3d at 363. The court wrote that "although the Trusts are private entities, they share similar features with public entities due to the fact that their lands are open to the public and they are private property owners 'whose charter, purpose and mission is to preserve land for public use, enjoyment, and benefit.'" *Id.* at 368–69. The court also suggested that "[t]he magnitude of the Trusts' land ownership also constitutes such a difference in degree as to become a difference in kind." *Id.* at 369.

88. *Id.* at 374. The court pointed out that "dueling preemptions" apply when analyzing statutes and their impact on the common law. *Id.* On the one hand, "separation of powers concerns create a presumption in favor of preemption of federal common law whenever it can be said that Congress has legislated on the subject." At the same time, "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Id.* at 374 (alterations in original) (citation omitted) (quoting *United States v. Oswego Barge Corp. (In re Oswego Barge Corp.)*, 664 F.2d 327, 335 (2d Cir. 1981); *United States v. Texas*, 507 U.S. 529, 534 (1993)).

89. *Id.* at 378.

90. *Am. Elec. Power Co.*, 582 F.3d at 376, 380–81.

stationary sources.<sup>91</sup> Consequently, the court determined that the Clean Air Act did not directly address the question otherwise addressed by the plaintiffs' public nuisance action.<sup>92</sup> Further, the court concluded that none of several other federal laws that required climate change studies or reports displaced the federal common law of public nuisance.<sup>93</sup>

### B. *Comer v. Murphy*

Only a month after the Second Circuit issued its opinion in *Connecticut v. American Electric Power Co.*, a panel of the United States Court of Appeals for the Fifth Circuit, in *Comer v. Murphy*, overturned a trial court's order that dismissed private and public nuisance actions brought by residents and land owners on the Mississippi Gulf Coast against energy, fossil fuel, and chemical companies.<sup>94</sup> In a diversity action, the plaintiffs sought money damages under state common law based on private and public nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy, but not an injunction.<sup>95</sup> Regarding the nuisance claims, the plaintiffs alleged that the defendants' actions emitted greenhouse gases that caused an increase in global air and water temperatures and subsequently caused a rise in

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91. *Id.* at 378–79. The *Massachusetts v. EPA* court held that the EPA could regulate carbon dioxide emissions from motor vehicles under the Clean Air Act if it made an “endangerment” finding under the Act and then issued regulations after making that finding. *Id.* at 379. The Second Circuit noted that, at the time of its decision, the EPA had only made a *proposed* endangerment finding, so it had not issued any regulations to address carbon dioxide emissions from motor vehicles. *Id.* The court also stressed that while the EPA might be able to regulate emissions of greenhouse gases from stationary sources under other provisions of the Clean Air Act if it made endangerment findings under those provisions and issued regulations, the agency has not done that. *Id.* The court held that the Clean Air Act scheme for regulating greenhouse gas emissions more closely regulated the program that was in place under the Clean Water Act at the time that the Supreme Court held that the Clean Water Act did *not* displace federal common law in *Illinois v. Milwaukee (Milwaukee I)* than the Clean Water Act program that was in place at the time that the Court decided *City of Milwaukee v. Illinois (Milwaukee II)*. *Id.* at 379–80.

92. *Id.* at 381.

93. *Id.* at 387. The court wrote, “Congress has prescribed research, reports, technology development, and monitoring, but . . . has not enacted any legislation that ‘addresses’ the problem that climate change presents to Plaintiffs. . . . The linchpin in the displacement analysis concerns whether the legislation *actually regulates* the nuisance at issue. Study is not enough.” *Id.* at 385–86.

94. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated, reh’g granted en banc*, 598 F.3d 208 (5th Cir. 2010); *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

95. *Id.* at 859–60.

sea levels that added to the strength of Hurricane Katrina, which destroyed the plaintiffs' private property, as well as public property.<sup>96</sup> The district court dismissed the plaintiffs' claims on the grounds that the plaintiffs lacked standing and the claims presented nonjusticiable political questions.<sup>97</sup>

On appeal, the Fifth Circuit panel held that the plaintiffs had standing to bring the public and private nuisance, trespass, and negligence claims, and none of those claims presented non-justiciable political questions.<sup>98</sup> Regarding standing, since the appellate court was reviewing the trial court's decision to dismiss the claim based on the pleadings, as was the case with *Connecticut v. American Electric Power Co.*, the court noted that general factual allegations of injury may be sufficient to withstand a motion to dismiss.<sup>99</sup> The court restated the traditional Article III test for standing: a plaintiff must demonstrate that (1) they have suffered an injury in fact, (2) the injury is fairly traceable to the defendant's action, and (3) the injury will likely be redressed by a favorable decision from the court.<sup>100</sup> The defendants did not contest that the plaintiffs met the first and third standing requirements, injury in fact and redressability, so the court focused its analysis primarily on the second factor, causation.<sup>101</sup>

While the defendants argued that the chain of causation between their emission of greenhouse gases and the plaintiffs' injuries from Hurricane Katrina was too attenuated, the court stressed that the connection for standing purposes "need not be as close as the proximate causation needed to succeed on the merits of a tort claim"

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96. *Id.* at 861.

97. *Id.* at 860.

98. *Id.* The court dismissed the unjust enrichment, fraudulent misrepresentation, and civil conspiracy claims for prudential standing reasons. *Id.* For those claims, the plaintiffs were not alleging that the defendants' greenhouse gas emissions caused their injuries, but were alleging that the defendants' public relations campaigns and pricing of petrochemicals caused their injuries. *Id.* at 860–61.

99. *Id.* at 862. As a preliminary matter, the court pointed out that the plaintiffs were required to meet both state and federal standing requirements, since the case was a federal diversity case involving state common law. *Id.* at 861. The court noted, however, that the plaintiffs easily satisfied the liberal standing requirements of Mississippi law, which mandate that plaintiffs must "assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant." *Id.* at 862.

100. *Comer v. Murphy Oil USA*, 585 F.3d 855, 862 (5th Cir. 2009).

101. *Id.* at 863–64.

and an *indirect* causal relationship is sufficient for standing as long as there is a *fairly traceable* connection between the defendant's conduct and the plaintiff's injury.<sup>102</sup> The court also counseled that the defendants' argument regarding attenuation was the same argument that the Supreme Court rejected in *Massachusetts v. EPA*.<sup>103</sup> In fact, the court suggested that the connection in *Massachusetts v. EPA* was even more attenuated than the connection in the case at bar, because the *Massachusetts* plaintiffs were challenging the EPA's decision to *not* regulate greenhouse gas emissions, which led to an increase in greenhouse gas emissions, whereas the *Comer* plaintiffs were challenging the increased greenhouse gas emissions by the defendants.<sup>104</sup>

The Fifth Circuit panel also rejected the defendants' argument that the plaintiffs lacked standing. The defendant's argued that they were not the sole or material cause of the plaintiffs' injury because their actions only contributed to the plaintiffs' injury and global climate change is caused by a wide variety of sources.<sup>105</sup> Once again, the court suggested that the defendants' claim was similar to a claim rejected by the Supreme Court in *Massachusetts v. EPA*.<sup>106</sup> The *Comer* court wrote that "to satisfy the 'fairly traceable' element of standing plaintiffs need not 'show to a scientific certainty that defendant's [pollutants], and defendant's [pollutants] alone, caused the precise harm suffered by the plaintiffs . . . but rather whether 'the

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102. *Id.* at 864 (quoting *Toll Bros. v. Twp. of Readington*, 555 F.3d 131, 142 (3d Cir. 2009)). In a concurring opinion, Judge Davis wrote that the plaintiffs' claim would probably not meet the proximate cause standard required on the merits, but he noted that the court was not required to reach that question on appeal. *Id.* at 880 (Davis, J., concurring). While the majority stressed that a different standard applies to causation for purposes of standing than the proximate cause standard that applies on the merits of the tort claim, the majority also stressed that it was applying a more lenient standard than it would at a later stage of the litigation because it was reviewing a motion to dismiss based on the pleadings. *Id.* at 864–65 (majority opinion).

103. *Id.* at 865. The court noted that the *Massachusetts v. EPA* court "accepted as plausible the link between man-made greenhouse gas emissions and global warming, as well as the nexus of warmer climate and rising ocean temperatures with the strength of hurricanes." *Id.* (citation omitted).

104. *Id.* The court recognized that the *Massachusetts v. EPA* court offered "special solicitude" to the plaintiffs in that case because they were states, but the *Comer* court noted that "the chain of causation at issue here is one step shorter than the one recognized in *Massachusetts*, so these plaintiffs need no special solicitude." *Id.* at 865–66 n.5.

105. *Id.* at 866–67.

106. *Comer*, 585 F.3d at 866.

pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.”<sup>107</sup> Since it concluded that the defendants’ actions contributed to the plaintiffs’ injuries, the court determined that the traceability requirement for standing was met.<sup>108</sup>

Regarding the defendants’ claim that the plaintiffs’ claims presented non-justiciable political questions, the Fifth Circuit panel noted that the political question doctrine does not preclude a court from reviewing disputes merely because they have political implications or ramifications.<sup>109</sup> Instead, the doctrine precludes review of such questions if they are “political” in the sense that they have been committed by the Constitution exclusively to the elected or political branches.<sup>110</sup> While the court recognized that the Supreme Court’s decision in *Baker v. Carr* normally provides the framework for analyzing whether a claim is a non-justiciable political question, it held that a challenger has the burden of identifying a constitutional provision or federal law that commits the issue in the case exclusively to a political branch.<sup>111</sup> Since the defendants in the case did not identify any constitutional provision or federal law that committed the issues in the case to the political branches, the court did not apply the *Baker* test.<sup>112</sup> The court also suggested that “[c]ommon-law tort claims are rarely thought to present nonjusticiable political questions . . . [because] ‘the common law of tort provides clear and well-settled rules on which the district court can easily rely.’”<sup>113</sup> The court also stressed that “claims for damages are . . . considerably less likely to present nonjusticiable political questions, compared with claims for injunctive relief.”<sup>114</sup>

The Fifth Circuit panel ultimately concluded that “the questions posed by this case, viz., whether defendants are liable to plaintiffs in damages under Mississippi’s common law torts of nuisance, trespass

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107. *Id.* (first and second alteration in original).

108. *Id.* at 866–68.

109. *Id.* at 870.

110. *Id.*

111. *Id.* at 872.

112. *Comer*, 585 F.3d at 875.

113. *Id.* at 873 (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991)).

114. *Id.* at 874.

or negligence, are justiciable because they plainly have not been committed by the Constitution or federal laws or regulations to Congress or the president.”<sup>115</sup>

Although the Fifth Circuit panel’s decision in *Comer* seemed to brighten prospects for an expansion of public nuisance actions to address broad environmental problems, the Fifth Circuit vacated the decision in March 2010, when it agreed to rehear the appeal en banc.<sup>116</sup>

### C. California v. General Motors Corp.

Just as plaintiffs in global warming nuisance actions initially were thwarted at the district court level in the Second and Fifth Circuits, they have met little success at the district court level in the Ninth Circuit. In *California v. General Motors Corp.*, the United States District Court for the Northern District of California dismissed a nuisance action brought by the State of California against General Motors, Toyota, Ford, Honda, Chrysler, and Nissan on the grounds that the case raised non-justiciable political questions.<sup>117</sup>

The State of California sued the automakers based on federal and state common law, alleging that the greenhouse gases emitted by the vehicles the defendants manufactured constituted a public nuisance.<sup>118</sup> The State sought money damages and a declaratory judgment for future money damages but did not seek an injunction.<sup>119</sup> In its complaint, the State alleged that the defendants produced vehicles that emitted more than 20% of the carbon dioxide emissions generated by human activity in the United States. Furthermore, the State claimed the emissions contribute to global warming that has caused increased average winter temperatures in California, reduced

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115. *Id.* at 870.

116. *Comer v. Murphy Oil USA*, 598 F.3d 208, 210 (5th Cir. 2010). The court subsequently dismissed the appeal when it lost a quorum. *See Comer v. Murphy Oil USA*, 607 F.3d 1049, 1054 (5th Cir. 2010).

117. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at \*10–11 (N.D. Sept. 17, Cal. 2007).

118. *Id.* at \*3–5.

119. *Id.* at \*4. Some commentators have suggested that a public nuisance action for damages may be more likely to withstand a non-justiciability challenge than a claim for injunctive relief. *See infra* note 210.



snow pack, increased flooding, increased erosion, increased frequency and duration of extreme heat events, and increased intensity and risk of wildfires.<sup>120</sup> The automakers filed a motion to dismiss the complaint based on non-justiciability, failure to state a claim under California common law or federal common law, and preemption.<sup>121</sup>

The court analyzed the plaintiff's complaint under the *Baker v. Carr* analysis for justiciability and indicated that, based on the third factor, the court could not decide the case "without making an initial policy determination of a kind clearly for non-judicial discretion."<sup>122</sup> Even though the State of California sought money damages rather than an injunction, the court concluded that it would still need to balance the harm caused by the emissions from the defendants' vehicles against the economic effects of limits on the emissions to determine whether the defendants' conduct was an "unreasonable" interference with a public right, as required for a public nuisance action.<sup>123</sup> The district court further concluded that the deliberate inaction of the political and executive branches indicated that the other branches are still actively considering the issue.<sup>124</sup> The court felt that an award of money damages could undermine the strategic choices of the other branches regarding appropriate action to address global climate change.<sup>125</sup>

After determining that the plaintiff's claim was non-justiciable, the court concluded that it was not necessary to determine whether the

120. *Gen. Motors Corp.*, 2007 U.S. Dist. LEXIS 68547, at \*3-4.

121. *Id.* at \*5.

122. *Id.* at \*19, 38.

123. *Id.* at \*22-24.

124. *Id.* at \*30.

125. *Id.* at \*29. The court wrote that "[b]ecause a comprehensive global warming solution must be achieved by a broad array of domestic and international measures that are yet undefined, it would be premature and inappropriate for this Court to wade into this type of policy-making determination before the elected branches have done so." *Id.* at \*30. The court also concluded that under the first *Baker* factor the issues in the case were textually committed to the political branches because the claims implicate the power of Congress and the Executive Branch over interstate commerce and foreign policy. *Id.* at \*43. Finally, under the second *Baker* factor, the court determined that there were no judicially discoverable or manageable standards to govern resolution of the plaintiffs' claims. *Id.* The court distinguished the case from other public nuisance cases because the other cases did not raise similar national and international policy issues. *Id.* at \*46.

plaintiff stated a claim under federal common law, whether federal statutes displaced common law, and whether the plaintiff stated a claim under state common law.<sup>126</sup>

Although the State of California initially appealed the court's decision to the United States Court of Appeals for the Ninth Circuit, the State subsequently moved to dismiss its appeal when the EPA took the first steps toward regulating greenhouse gas emissions from motor vehicles, the President directed the Department of Transportation to establish higher fuel efficiency standards, and Chrysler and General Motors filed for bankruptcy.<sup>127</sup>

#### D. *Kivalina v. ExxonMobil Corp.*

The United States District Court for the Northern District of California dismissed another nuisance action tied to global climate change in *Kivalina v. ExxonMobil Corp.*<sup>128</sup> In that case, the city of Kivalina, Alaska, and the governing body of an Inupiat village sued several dozen oil, energy, and utility companies. The plaintiffs alleged that the defendants' greenhouse gas emissions contributed to global climate change, which has diminished the Arctic ice, resulting in erosion and destruction that will require the city and village of Kivalina to relocate.<sup>129</sup> The plaintiffs based their claims on federal public nuisance law, state public and private nuisance law, and state claims for conspiracy and concert of action.<sup>130</sup> They sought money damages, rather than an injunction, alleging that the relocation of the city could cost as much as \$400 million.<sup>131</sup>

The defendants moved to dismiss the plaintiffs' claims on the grounds that they were non-justiciable and the plaintiffs lacked standing to sue.<sup>132</sup> Unlike the panel in the *General Motors Corp.*

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126. *Gen. Motors Corp.*, 2007 U.S. Dist. LEXIS 68547, at \*50.

127. See Kevin P. Holewinski & Kristin L. Parker, *California Attorney General Dismisses Appeal of Climate Change Suit Against Automakers*, MARTINDALE, July 14, 2009, [http://www.martindale.com/environmental-law/article\\_Jones-Day\\_750198.htm](http://www.martindale.com/environmental-law/article_Jones-Day_750198.htm).

128. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

129. *Id.* at 868–69.

130. *Id.* at 869.

131. *Id.*

132. *Id.* at 870.

case, the *Kivalina* panel determined that the plaintiffs' claims did not run afoul of the first *Baker* factor, in that the issue in the case was not textually committed to another branch.<sup>133</sup> However, the panel concluded, under the second and third *Baker* factors, that the court lacked judicially discoverable and manageable factors to decide the case and the issue required an initial policy determination by the legislative or executive branch.<sup>134</sup> Like the *California* panel, the *Kivalina* panel concluded that the court could not balance the gravity of the harm caused by the defendants' actions against the utility of the conduct to determine whether the conduct was "unreasonable" as required for a nuisance action without additional standards.<sup>135</sup>

After finding the plaintiffs' claims non-justiciable, the court also determined that the plaintiffs lacked standing to sue.<sup>136</sup> The court rejected the plaintiffs' claim that they only needed to demonstrate that the defendants contributed to their injury in order to establish standing at the early stages of litigation.<sup>137</sup> Contrary to the approach taken by the United States Courts of Appeals for the Second and Fifth

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133. *Id.* at 873. The panel stressed that "a mandate to regulate a certain area is not the equivalent of delegating the exclusive power to resolve that issue to another branch," and "the mere fact that foreign affairs have been affected by a judicial decision does not implicate abstention." *Id.* at 872–73 (quoting *Khouzam v. Attorney Gen. of United States*, 549 F.3d 235, 250 (3d Cir. 2008)).

134. *Kivalina*, 663 F. Supp. 2d at 873–77.

135. *Id.* at 874–75. The panel argued:

[T]he factfinder will have to weigh . . . the energy-producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of different alternatives on consumers and business at every level. The factfinder would then have to weigh the benefits derived from those choices against the risk that increasing greenhouse gases would in turn increase the risk of causing flooding along the coast of a remote Alaskan locale.

*Id.* (citations omitted). The court held that the precedent nuisance cases did not provide sufficient guidance to determine whether the defendants' actions were unreasonable. *Id.* Finally, the court held that the political branches should resolve the dispute because

virtually everyone on Earth is responsible on some level for contributing to such emissions. Yet [p]laintiffs are in effect asking this Court to make a political judgment that the two dozen defendants named in this action should be the only ones to bear the cost of contributing to global warming.

*Id.* at 877 (footnote omitted). The court, instead, felt that "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." *Id.*

136. *Id.* at 882.

137. *Id.* at 878–80. The court recognized, though, that the causation requirement for standing is less than "proximate causation." *Id.* at 878.

Circuits, the district court panel in *Kivalina* suggested that plaintiffs must allege that the defendants' conduct was the "seed of [their] injury" and the plaintiffs' claim must fail if the defendants can identify alternative sources of the plaintiffs' injury.<sup>138</sup> Since global climate change is caused by a variety of different sources, the panel concluded that the plaintiffs were not able to demonstrate that the defendants' actions caused their injuries.<sup>139</sup> Since the court dismissed the federal claims, they also dismissed the state common law claims.<sup>140</sup> The plaintiffs have appealed the decision to the Ninth Circuit.<sup>141</sup>

#### E. *Barasich v. Columbia Gulf Transmission Co.*

Although the federal district courts in the Ninth Circuit have not been receptive to plaintiffs' common law actions for harm caused by global climate change and related disasters, plaintiffs have had more luck in the district courts in the Fifth Circuit. In *Barasich v. Columbia Gulf Transmission Co.*, the United States District Court for the Eastern District of Louisiana rejected the defendants' motion to dismiss the lawsuit, which was brought by thousands of residents of Louisiana against oil and gas companies for the damages caused by Hurricanes Katrina and Rita, on the grounds that the suit raised non-justiciable political questions.<sup>142</sup>

The plaintiffs sued the defendants based on negligence, among other grounds, alleging that the construction of canals and destruction of wetlands by the defendants reduced the natural buffer that the

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138. *Id.* at 880–81 (alteration in original).

139. *Id.* The plaintiffs also claimed that they were entitled to special solicitude in the standing analysis under *Massachusetts v. EPA* because they were sovereign. *Id.* at 882. The court distinguished that case, however, on the grounds that they were not seeking to enforce a procedural right and were not states, like the plaintiffs in *Massachusetts v. EPA*. *Id.*

140. *Kivalina*, 663 F. Supp. 2d at 882. The court pointed out, "A district court may decline to exercise supplemental jurisdiction over a claim if it has dismissed all claims over which it had original jurisdiction." *Id.*

141. See Rachel D'Oro, *Kivalina, Alaska: Eroding Village Appeals Lawsuit's Dismissal, Blames Corporations for Climate Change*, THE HUFFINGTON POST, Jan. 21, 2010, [http://www.huffingtonpost.com/2010/01/29/kivalina-appeals-eroding-\\_n\\_441420.html](http://www.huffingtonpost.com/2010/01/29/kivalina-appeals-eroding-_n_441420.html).

142. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006). While the case began as two class action lawsuits brought by nine plaintiffs, the plaintiffs filed a joint amended complaint to sue on behalf of thousands of residents in seventeen different parishes. *Id.* at 678–79.

wetlands provided to the residents' property, thus increasing the damage caused to their property by the hurricanes.<sup>143</sup> The actions were based on state law, and the plaintiffs sought money damages rather than an injunction.<sup>144</sup> In response to the defendants' motion to dismiss, the court applied the *Baker* factors and held that the case was "nothing more than a tort suit under Louisiana law."<sup>145</sup> The court noted that the Fifth Circuit had previously suggested that cases seeking money damages, like *Barasich*, were less likely to be non-justiciable than cases seeking injunctive relief, which could require courts to dictate policy to federal agencies.<sup>146</sup> The court also held that federal water pollution laws did not preempt state common law actions like those at bar.<sup>147</sup>

However, the *Barasich* court's decision also demonstrates some of the remaining impediments to reliance on common law actions on a broader scale. Although the court concluded that the case did not raise non-justiciable political questions, the court ultimately granted the defendants' motion to dismiss the plaintiffs' claims for failure to state a claim upon which relief could be granted.<sup>148</sup> Even though the court applied a favorable standard of review to the plaintiffs' complaint on the motion to dismiss based on the pleadings,<sup>149</sup> the court concluded that the plaintiffs did not sufficiently allege that any particular defendant caused their injuries for their negligence

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143. *Id.* at 678–80. The plaintiffs alleged that over a million acres of wetlands were destroyed by the defendants' activities and millions more were degraded. *Id.* at 679. The defendants' activities caused salt-water intrusion into the wetlands, which destroys the wetlands vegetation, converting them to open water. *Id.* The plaintiffs sued for negligence, based on Article 2315 of the Louisiana Civil Code, as well as strict liability, based on Article 667 of the Code. *Id.* at 679–80.

144. *Id.*

145. *Id.* at 684. The defendants argued that the case required an initial policy determination by the political branches because it implicated energy policy, economic development, and environmental protection, and the balance between those interests. *Id.* at 686. However, the court concluded that an initial policy determination is unnecessary when there are judicially manageable standards to apply. *Id.* at 686–87.

146. *Id.* at 685–86.

147. *Id.* at 688.

148. *Barasich*, 467 F. Supp. 2d at 695.

149. The court accepted all facts in the pleadings as true and interpreted the facts in the light most favorable to the plaintiffs, the non-moving party. *Id.* at 680.

claim.<sup>150</sup> While a plaintiff could make out its prima facie case for negligence by demonstrating that a defendant's actions were a concurrent cause of the plaintiffs' harm and were also a substantial factor in contributing to that harm, the plaintiffs did not allege that their injuries were caused by any particular defendant.<sup>151</sup> The court counseled, "The plaintiffs cannot impose liability on a defendant absent a showing of individual causation. The Fifth Circuit has repeatedly rejected theories of group liability or market share liability."<sup>152</sup>

Although the court dismissed the plaintiffs' lawsuit, the court instructed the plaintiffs on a future course of action that might be more fruitful. The court wrote:

By all accounts, coastal erosion is a serious problem in south Louisiana. If plaintiffs are right about the defendants' contribution to this development, perhaps a more focused, less ambitious lawsuit between parties who are proximate in time and space, with a less attenuated connection between the defendant's conduct and the plaintiff's loss, would be the way to test their theory.<sup>153</sup>

#### F. *In Re Katrina Canal Breaches Consolidated Litigation*

The final significant district court decision involving common law claims relating to global climate change or natural disasters was *In re Katrina Canal Breaches Consolidated Litigation*.<sup>154</sup> In that case, several residents of New Orleans sued the United States for damages they suffered in light of the failure of levees during Hurricane

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150. *Id.* at 691. The court also determined that the defendants did not owe a duty to the plaintiffs to protect them from damages caused by hurricanes because the harm was too attenuated. *Id.* at 693. For the strict liability claim that was based on Article 667 of the Louisiana Civil Code, the court determined that the statute only imposed strict liability for ultra-hazardous activities on "neighbors" of the plaintiffs and that the defendants were not "neighbors" under the statute. *Id.* at 690.

151. *Id.* at 694–95.

152. *Id.* at 694.

153. *Id.* at 695.

154. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644 (E.D. La. 2007).

Katrina.<sup>155</sup> The plaintiffs brought an action for money damages under state law, alleging that the Army Corps of Engineers was negligent in constructing and maintaining the Mississippi River Gulf Outlet, a channel from New Orleans to the Gulf of Mexico, and that its negligence caused increased velocity of water in the channel during Hurricane Katrina, which led to the destruction of the levees that caused the harm to the plaintiffs' properties.<sup>156</sup> The plaintiffs alleged that the Corps was aware that "wave wash" caused when large vessels navigated the channel would widen the channel and erode the berms protecting the levees in the vicinity of the channel and that some of the levees would incrementally lower over time due to lateral displacement of soil.<sup>157</sup> The plaintiffs also alleged that the Corps' dredging in the channel caused salt-water intrusion that destroyed wetlands and increased wave force in the channel.<sup>158</sup>

Unlike many of the other cases described above, the defendant did not argue that the claims were non-justiciable, and they did not argue that the plaintiffs lacked standing. The case is significant, however, because the court concluded that the defendant's actions, over a course of several decades, caused the plaintiffs' injuries.<sup>159</sup> Even though the defendant's actions were combined with the much more destructive force of Hurricane Katrina, the court concluded that the defendant's actions were concurring causes of the plaintiffs' injuries, so the defendant could be held liable.<sup>160</sup>

#### IV. BEYOND CLIMATE CHANGE AND DISASTER: NEW AVENUES FOR THE COMMON LAW

Although the recent mini-renaissance in common law environmental protection lawsuits has focused on global climate

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155. *Id.* at 647–48.

156. *Id.*

157. *Id.* at 653–79.

158. *Id.* at 665–75.

159. *Id.* at 697–98.

160. *In re Katrina*, 647 F. Supp. 2d at 697–98. The Corps argued that the plaintiffs' injuries were caused by the "shear force of Hurricane Katrina and its resultant storm surge," rather than a combination of the two. *Id.* at 681.

change and disasters, it could reinvigorate the use of the common law to address several other problems that are not being adequately addressed by federal or state public law. While it may still be unclear in some cases whether the common law actions would be based on a federal common law or state common law, the federal environmental statutes will generally preserve common law remedies.<sup>161</sup>

Several of the global climate change lawsuits were public nuisance actions, but for many of the issues that are not being adequately addressed by federal or state regulators, private nuisance actions may be more appropriate. This is particularly true when the harms caused by individual defendants are localized and the plaintiff has already suffered harm. Advances in science, coupled with data collected under the public laws, can make it easier for plaintiffs to prove that the defendants' actions constitute a nuisance.

Private nuisance actions might be especially useful to target harms caused to isolated waters, non-navigable tributaries of navigable waters, and other waters that the federal government has ceased to regulate in light of recent Supreme Court decisions.<sup>162</sup> Such waters often provide valuable benefits to adjacent landowners, including flood prevention, pollution control, erosion prevention, and groundwater recharge.<sup>163</sup> As Professor J.B. Ruhl observes, since experts have begun to assign dollar figures to these "ecosystem services," it should be easier to demonstrate that the destruction of the ecosystems is an "ecological nuisance."<sup>164</sup> Professor Ruhl recognizes that it may be more difficult for a plaintiff to prevail in a nuisance action when the plaintiff's property is physically remote from the defendant, the plaintiff's harm occurs a considerable time after the defendant has acted, or there are many persons who are

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161. See, e.g., 33 U.S.C. §§ 1365(e), 1370 (2006); 42 U.S.C. §§ 6929, 6972(f) (2006); 42 U.S.C. § 9614 (2006).

162. See Murphy & Johnson, *supra* note 34, at 455–56 (discussing the narrowing of Clean Water Act jurisdiction in light of the Supreme Court's decision in *Rapanos*).

163. See Robin Kundis Craig, *Justice Kennedy and Ecosystem Services: A Functional Approach to Clean Water Act Jurisdiction After Rapanos*, 38 ENVTL. L. 635, 641–43 (2008).

164. See Ruhl, *supra* note 13, at 758–61, 784.



acting to harm the waters.<sup>165</sup> He also recognizes that it may be difficult for plaintiffs to prevail in such suits when they have not yet suffered any harm, but are suing based on anticipated harm.<sup>166</sup> Nevertheless, he observes that when plaintiffs can identify and quantify specific harms caused by destruction or degradation of ecosystems, such lawsuits appear “rather plain vanilla as far as nuisance doctrine is concerned.”<sup>167</sup>

Professor John Nagle cites *Cook v. Sullivan*,<sup>168</sup> a recent New Hampshire Supreme Court decision, as an example of the “ecological nuisance” actions envisioned by Professor Ruhl.<sup>169</sup> In *Cook*, the plaintiffs sued their neighbor when the neighbor built his house in wetlands, which altered the hydrology of the area and increased flooding on the plaintiffs’ property.<sup>170</sup> The supreme court agreed that the defendants’ activities constituted a nuisance and upheld the lower court’s order that required the defendant to move the house out of the wetlands.<sup>171</sup>

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165. *Id.* at 764–70. Professor Ruhl notes that it might be difficult, depending on the facts of the cases, to demonstrate in some of those cases that the defendants intentionally caused an interference with the plaintiff’s use and enjoyment of their property. *Id.* For purposes of nuisance law, a defendant acts intentionally when they either act for the purpose of causing the interference with the plaintiff’s property rights or when they know with substantial certainty that they will cause that interference. *Id.*

166. *Id.* at 763–64. Professor Ruhl indicates that the extent of the harm that the defendant’s actions will cause will often be unclear until the defendant acts. *Id.*

167. *Id.* at 773. In order to prove that a defendant’s action constitutes a nuisance, a plaintiff must prove that the defendant’s action constitutes an “unreasonable” invasion of the plaintiff’s property rights, which requires a balancing of the gravity of the harm against the utility of the defendant’s conduct. *Id.* at 772. Regarding the gravity of the harm, Professor Ruhl argues:

There is nothing about [that analysis] that puts ecosystem service nuisances in some qualitatively distinct category compared to other nuisances. [Because t]he injuries associated with loss of ecosystem services can be severe, they are often manifested in physical damage to tangible property, and they can pose risks to residences and socially valuable commercial and agricultural operations that are perfectly suited to their localities.

*Id.* He also notes that, regarding the “utility of [the] defendant’s conduct,” as the economic benefits of ecosystem services are quantified, it is less likely that destruction of ecosystems for development purposes will outweigh those benefits. *Id.* at 773. While “many acres of coastal dunes, wetlands, and forests have given way to development of one kind or another,” Ruhl points out that “[n]ow that we know how economically devastating the loss of natural capital can be locally and regionally, the fact that it was once seen as acceptable ought to play a significantly diminished role on defendants’ behalf.” *Id.*

168. *Cook v. Sullivan*, 829 A.2d 1059 (N.H. 2003).

169. See John Copeland Nagle, *From Swamp Drainage to Wetlands Regulation to Ecological Nuisances to Environmental Ethics*, 58 CASE W. RES. L. REV. 787, 797–99 (2008).

170. *Cook*, 829 A.2d at 1062.

171. *Id.* at 1067–68.

Similar “ecological nuisance” actions could be brought to address harms caused by non-point source pollution, destruction of ecosystems that provide habitat for endangered or threatened species, or harms related to practices involved in growing genetically modified crops. In each of these areas, either the federal laws do not provide for a comprehensive federal role or the federal government has not aggressively used authorities under the laws to address the issues.

Private nuisance actions might also be used more aggressively to address the problems caused by non-hazardous solid waste management, another issue not addressed comprehensively by federal public law. Pollution data gathered under the Federal Emergency Planning and Community Right to Know Act, as well as data gathered by federal agencies under other environmental statutes regarding the harmful effects of various pollutants, should make it easier for plaintiffs to prevail in nuisance actions for harms caused by non-hazardous solid waste management.<sup>172</sup>

Public nuisance actions could also be brought to address many of these problems when the harm caused by the defendants’ actions is more widespread. In addition, public nuisance law might be used to address current problems other than those identified above and global climate change. For instance, as industries expand the use of nanotechnology or expand the use of new or existing toxic substances, public nuisance actions might become attractive if federal regulation in those areas remains lax or non-existent and scientific studies can demonstrate that the substances cause specified harms. Even more creative applications of public nuisance law may be on the horizon. Professor Christine Klein, for instance, recently explored

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172. 42 U.S.C. § 11023 (2006). The Emergency Planning and Community Right to Know Act requires thousands of businesses to file annual reports with the EPA that describe the volume of various chemicals and pollutants that they use or discharge into the air, water, or land each year. *Id.* That information is included in a “Toxic Release Inventory” that is available on the web. U.S. EPA, *TRI Data and Tools*, <http://www.epa.gov/tri/tridata/index.htm> (last visited Oct. 20, 2010). Information regarding the harmful effects of hazardous substances is available through the website of the Agency for Toxic Substances and Disease Registry (ATSDR), among other places. *See* ATSDR, *Toxic Substances Portal*, <http://www.atsdr.cdc.gov/substances/index.asp> (last visited Oct. 20, 2010).

the potential for using nuisance law to address urban sprawl, another issue that has been largely ignored by public law.<sup>173</sup>

The benefits of addressing the environmental problems identified above through common law actions are obvious and significant, if such suits can be successfully brought. Several of the features of common law that were criticized when compared to public law may actually be advantages of common law when compared to a non-existent public law or non-enforced public law. Although common law is often criticized as slow,<sup>174</sup> a slow process is preferable to inaction under public law. In addition, to the extent that plaintiffs can identify specific harms caused by activities that are unregulated or under-regulated under public law, a local decision-maker examining those concrete facts is probably in the best position to devise a remedy to address the environmental problem.<sup>175</sup> Further, when the claims are brought in federal court or in state courts where the judges are not elected, the decision-maker is less subject to political pressure.

The flexibility of remedies under common law is another advantage.<sup>176</sup> If public laws addressed the problems outlined above, plaintiffs would normally be able to pursue injunctive or declaratory relief and, perhaps, civil penalties.<sup>177</sup> The civil penalties, however, would be paid to the state or federal treasury, and the plaintiffs would

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173. See Christine A. Klein, *The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*, 48 B.C. L. REV. 1155, 1213–16 (2007). Professor Klein views sprawl as an important environmental justice issue, since the benefits of sprawl are felt by one group, while the costs of sprawl are imposed on a very different group. *Id.* at 1213. As she suggests, sprawl can “contribute to the abandonment of urban communities, undercut economic productivity, deny equal opportunity, destabilize older suburbs, undercut education investments, reduce public safety, and worsen traffic congestion.” *Id.* at 1215. While arguing for the application of nuisance law to the problems caused by sprawl, she recognizes that it may be difficult to demonstrate causation or to prove a sufficient injury for standing when bringing a nuisance action against a sprawling developer. *Id.* at 1219.

174. Klass, *supra* note 3, at 583.

175. See Ruhl, *supra* note 13, at 778.

176. For instance, Professor Jonathan Zasloff has suggested that the public nuisance lawsuits brought by the states against energy producers and auto manufacturers are, in essence, a judicially created tax on greenhouse gas emissions. See Zasloff, *supra* note 17. In a separate article, Professor Jason Czarnecki suggests that courts could use their equitable powers at common law to create a common law fund to address pollution problems as a remedy in common law actions. See Czarnecki & Thomsen, *supra* note 23, at 30–33.

177. See *supra* note 2.

not be able to recover money damages.<sup>178</sup> Through common law actions, on the other hand, the plaintiffs can recover money damages. Thus, there is some assurance that the money the defendants pay will be used to address the problems caused by the defendants' actions. Conversely, civil penalties under public law may have a deterrent effect but are not designed to compensate the plaintiffs.

Common law actions might also address environmental justice issues not adequately addressed under public law. For instance, under public law, a developer might be granted a permit to destroy wetlands that provide flood protection and pollution control for one community because it has agreed to buy "mitigation credits" for protecting wetlands that provide benefits to a different community.<sup>179</sup> While the public law would transfer those ecosystem service benefits from one community to another, a court, under nuisance law, could order the developer to compensate the adversely impacted community for those losses. Similarly, while federal and state pollution permitting laws and pollution trading laws may lead to "hot spots," geographic areas that are subjected to greater levels of pollution than other communities, common law actions could provide those communities with relief for those harms or a tool to prevent further harms.<sup>180</sup> Common law courts are generally in the best position to address those concerns because they are likely to be familiar with the local conditions that created the problems and have broad experience balancing equitable factors to design remedies.

On top of all the other benefits of common law actions, perhaps the greatest advantage of addressing global climate change, destruction or degradation of ecosystem services, and the other problems outlined above through the common law is that such actions can spur the federal and state governments to adopt stronger public laws to address those problems or to place greater emphasis on enforcing the

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178. *Id.*

179. See James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607, 648–67 (2000).

180. See Stephen M. Johnson, *Economics v. Equity II: The European Experience*, 58 WASH. & LEE L. REV. 417, 441–42 (2001); Stephen M. Johnson, *Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?*, 56 WASH. & LEE L. REV. 111, 129–30 (1999).

existing public laws.<sup>181</sup> While the mere fact that common law actions are being brought may put pressure on legislatures and governments to expand and strengthen public law, common law actions can also provide valuable information about the environmental problems addressed in those actions that can be used to shape the expanded and strengthened public law.<sup>182</sup> The *United States Code* is replete with legislative provisions that were motivated by litigation.<sup>183</sup> As noted above, while public law may shape the development of common law actions, developments in the common law can also shape the public law.

#### V. NOT SO FAST: LIMITATIONS ON THE COMMON LAW RESPONSE

Although the judicial opinions discussed above may spur renewed focus on the use of common law to address environmental problems, the importance of the decisions should not be exaggerated. Serious roadblocks remain on the path towards using common law actions to address broader environmental problems.

##### A. Causation

Most importantly, while the decisions may ease a plaintiff's burden of proving causation for standing, they do not ease the plaintiff's burden of proving causation on the merits of the common law claim, regardless of whether the claim is a claim for nuisance, negligence, or strict liability. Several of the opinions stressed that causation for purposes of standing is not the same as the proximate causation that

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181. See Klein, *supra* note 173, at 1233; Zasloff, *supra* note 17, at 1827. However, Professor Madeline Klass notes that robust pursuit of common law actions might also spur legislation that protects industries. See Klass, *supra* note 29, at 1504. She points out that Congress often provides a federal remedy when displacing state law, but has enacted several laws over the last two decades that displace state law without providing a federal remedy in their place. *Id.* at 1538–42. None of those laws addressed environmental problems, though.

182. See Ruhl, *supra* note 13, at 778–82.

183. See generally Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 TUL. L. REV. 2279 (1995); George Cameron Coggins & Doris K. Nagel, "Nothing Beside Remains": *The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473 (1990).

would need to be proved for the underlying claims.<sup>184</sup> Frequently, one of the biggest roadblocks for plaintiffs in nuisance and negligence actions is demonstrating that the defendant's actions proximately caused the plaintiff's injuries. In fact, while the *Barasich* court held that the plaintiffs' common law claims were justiciable, it dismissed their underlying claims and counseled the plaintiffs to test their theory in a "more focused, less ambitious lawsuit between parties who are proximate in time and space, with a less attenuated connection between the defendant's conduct and the plaintiff's loss."<sup>185</sup> Similarly, Judge Davis, concurring in the *Comer* case, would have concluded that the plaintiffs in that case failed to state a claim on the merits.<sup>186</sup> Thus, while the recent decisions might make it easier for the plaintiffs to proceed with their common law actions, they won't make it easier for them to prevail on the merits.

There are several reasons why causation may continue to be a stumbling block for plaintiffs that are trying to use common law actions to address broader environmental problems. First, although plaintiffs would prefer to use common law actions to prevent harm before it occurs, it will be much harder to prove that the defendant's actions will cause specific harms to the plaintiffs when the harms have not yet occurred.<sup>187</sup> Since it will be easier to prove causation when the harm has already occurred, it may be more appropriate to rely on those actions to redress ongoing harms than to prevent broader environmental problems.

Another problem that plaintiffs face regardless of whether their lawsuit is based on past or future harm is that they must demonstrate that the defendant's conduct was a "but for" cause of their harm, as well as the proximate cause.<sup>188</sup> While it may be sufficient for standing purposes for the plaintiff to prove that the defendant's actions "contribute to" the plaintiff's injury, more will be required on

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184. See *supra* notes 78, 102, 137 and accompanying text.

185. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 695 (E.D. La. 2006).

186. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated, reh'g granted en banc*, 598 F.3d 208 (5th Cir. 2010); *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

187. See *Zasloff*, *supra* note 17, at 1867–70.

188. RESTATEMENT (SECOND) OF TORTS §§ 430–39 (1965).

the merits. When several defendants concurrently cause a plaintiff's injury, the plaintiff must prove that the defendant's actions were a "substantial factor" in causing the plaintiff's harm in order to hold a defendant liable.<sup>189</sup> Traditionally, in tort, plaintiffs have been required to demonstrate that the particular defendant who they are suing caused them some specific injury.<sup>190</sup> This is sometimes referred to as an "individual causation" requirement.<sup>191</sup> In most cases, it is not sufficient for plaintiffs to prove that the defendant was the member of a group, all of whom were engaging in activities that combined to cause the plaintiff harm.<sup>192</sup> That could be a roadblock for tort claims like those in the *Comer* and *Connecticut* cases, where the plaintiffs sued several defendants who may have contributed to the problems that caused the plaintiffs' harm, but where the plaintiffs would be hard pressed to prove that any particular defendant caused a specific individual harm to them. It could be less problematic in private

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189. *Id.* §§ 431–33.

190. Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873, 874 (2005).

191. *Id.* As Professor Gifford notes, academics who adopt an "instrumentalist" theory of tort law are less likely to demand proof of "individual causation" than those who adopt a "corrective justice" theory of tort law. *Id.* at 877. Instrumental theorists believe that tort law pursues social policy objectives that are external to the legal system, such as wealth maximization, accident prevention, or distribution of losses over a widespread basis. *Id.* at 876. Corrective justice theorists believe that tort law is designed to require injuring parties to repair the losses caused by their wrongful conduct. *Id.* at 877. For corrective justice theorists, individual causation is essential for that goal. *Id.*

192. There is one traditional exception, set forth in the landmark case of *Summers v. Tice*, 199 P.2d 1 (Cal. 1948). In that case, when two hunters acted negligently towards the plaintiff, but the plaintiff was shot by only one bullet, the court shifted the burden to the defendants to prove that they were not the factual cause of the plaintiff's injury. *Id.* at 3–5. In many cases where plaintiffs may try to use common law to prevent broader environmental problems, though, it may be unlikely that a court would apply the rule from *Summers v. Tice* to ease the plaintiff's burden of proving individual causation. There are two important differences between that case and many of the potential environmental common law actions. First, in *Summers v. Tice*, at least one defendant, and in fact only one defendant, was the factual cause of the plaintiff's injury. In many of the environmental cases, especially the global warming cases, the harm may be caused by some combination of actions by many different defendants, rather than by one individual defendant. See Gifford, *supra* note 190, at 910. Since one of the reasons for shifting the burden is the belief that the defendants are in a better position to determine which one actually caused the plaintiff's injury, that rationale is undercut when none of the defendants likely individually caused the plaintiff's harm. *Id.* Second, in *Summers v. Tice*, the plaintiffs sued every person that could have been the factual cause of their injury. In many of the environmental cases, the plaintiff will not sue every person that might be the factual cause of the plaintiff's injury. *Id.* at 911–12. If there are other persons who could have caused the plaintiff's individual harm, it is not fair to put the burden on the defendants who have been sued to prove that they are not at fault. *Id.*

nuisance actions to address the “ecological nuisances” discussed above.

Over time, courts have eased the burden on plaintiffs in some “mass tort” cases to allow the plaintiffs to recover damages from a specific defendant even though they could not prove that the defendant individually caused a specific harm to the plaintiff.<sup>193</sup> For instance, in *Sindell v. Abbott Laboratories*, the California Supreme Court adopted a “market share liability” theory to allow a plaintiff to recover damages for birth defects caused by a type of drug manufactured by several defendants, even though the plaintiff could not prove which defendant manufactured the drug that caused harm to the plaintiff.<sup>194</sup> Under the court’s approach, each defendant was “held liable for the proportion of the judgment represented by its share of [the market for the drug] unless [the defendant] demonstrates that it could not have made the product which caused [the] plaintiff’s injury.”<sup>195</sup>

Similarly, in an earlier case, *Hall v. E.I. DuPont de Nemours & Co.*, a federal district court in New York adopted an “enterprise liability” theory, allowing a plaintiff to proceed with a products liability suit against several manufacturers of blasting caps, even though the plaintiff could not demonstrate which manufacturer produced the blasting caps that injured the plaintiff.<sup>196</sup>

However, those theories have only been used in very limited situations, usually involving medical malpractice.<sup>197</sup> In the context of nuisance law or addressing environmental problems, courts have

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193. See Gifford, *supra* note 190, at 878–80, 901–02.

194. *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980).

195. *Id.* at 937. Although the theory has been rejected in most contexts other than the DES context, the Wisconsin Supreme Court adopted a similar approach in 2005 in *Thomas v. Mallet*, 701 N.W.2d 523, 533 (Wis. 2005), to allow a childhood lead poisoning victim’s case against manufacturers of lead pigment to proceed even though the plaintiff could not identify which of the defendants manufactured the specific product that caused the plaintiff’s injuries. The “risk contribution” approach adopted by the Wisconsin Supreme Court is a little different from the market share approach, though, because the court instructs the jury, when assigning percentages of liability to the defendants, to consider the relative degree of egregiousness of each defendant’s conduct in addition to its market share. *Id.* at 551.

196. *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972)

197. See Gifford, *supra* note 190, at 904–15.



adopted none of those theories, and it is unlikely that those theories will be expanded to cover such areas in the future.<sup>198</sup>

Assuming courts will require plaintiffs to prove “individual causation,” additional roadblocks may arise in the broader public nuisance cases, like *Connecticut v. American Electric Power Co.*, regarding the type of evidence that the plaintiffs may rely upon to prove causation. In that case, as in *Massachusetts v. EPA*, the plaintiffs relied, in part, on findings and conclusions of state, federal, and international regulators, including findings of the Intergovernmental Panel on Climate Change and the National Academy of Sciences.<sup>199</sup> Some courts may rule that such evidence is inadmissible to prove that a defendant’s action caused harm to an individual plaintiff because (1) the threshold for the agency’s determination that an activity may cause a harm is lower than the threshold that would apply to proof of causation in tort; or (2) the agency’s determination focuses on whether an activity in general can cause a harm, rather than on whether the specific activity in question causes the plaintiff’s harm.<sup>200</sup> In each of those situations, a court may conclude that the prejudicial nature of the evidence outweighs its relevance.<sup>201</sup> Similar problems could arise for plaintiffs in private nuisance actions for “ecological nuisances” to the extent that they rely too heavily on regulatory findings and conclusions.

### *B. Standing and Justiciability*

Although the Second Circuit’s *Connecticut* decision and the recently vacated Fifth Circuit *Comer* decision provided public nuisance plaintiffs with reasons to be optimistic on standing, the cases did not remove all barriers to standing. Both cases involved challenges to standing at the pleading stage, so the courts adopted a

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198. *Id.* at 904–15, 933.

199. *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 317 (2d Cir. 2009); *Massachusetts v. EPA*, 549 U.S. 497, 507 (2007).

200. *See Gilbert S. Keteltas & Joanne Lichtman, Are Regulatory Findings Admissible Evidence?*, 34:3 LITIG., SPRING 2008, at 39, 40–41.

201. *Id.* at 43.

very lenient standard of review.<sup>202</sup> Even in those cases, it is not clear that the courts would find that the plaintiffs had standing if the challenges were raised on summary judgment or at trial, stages when the court would apply a more demanding standard.<sup>203</sup> Further, even though those decisions seem to be clearly consistent with the Supreme Court's analysis in *Massachusetts v. EPA*,<sup>204</sup> the district courts in the Ninth Circuit adopted a more demanding test for standing and it is unclear what standing analysis the Fifth Circuit will adopt in *Comer* when the court rehears the case en banc.<sup>205</sup>

Even if courts adopt the standing analysis that the Second Circuit adopted in *Connecticut v. American Electric Power Co.*, plaintiffs may find it difficult to establish standing in public nuisance cases where the defendants' actions increase their risk of harm, but they have not yet suffered the harm.<sup>206</sup> Finally, if private parties, rather than governments, sue for public nuisance, they may still encounter problems demonstrating that the injury they have suffered is different in kind from the injuries suffered by the public as a whole.<sup>207</sup>

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202. See *supra* notes 67, 99 and accompanying text.

203. However, the court's decisions in those cases were significant not simply because they found that the plaintiffs had standing, but because of the analysis that they used to make that determination. In both cases, the courts adopted the *Massachusetts v. EPA* approach to find (1) that the defendants' actions "caused" the plaintiffs' harm even though other actions combined with the defendants' actions to cause the harm, and (2) that the plaintiffs' harm could be redressed by the relief that they sought even though imposing sanctions on the defendants would not completely cure the plaintiffs' injuries. See *supra* notes 78–82, 100–08 and accompanying text. Even though courts may require more factual support for the plaintiffs' allegations at a later stage of the litigation, the analysis that courts use to determine whether the defendants' actions cause the plaintiffs harm should not change. Similarly, the analysis that courts use to determine whether the relief that the plaintiffs seek redresses their harm should not change.

204. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

205. Lower courts might conclude that the standing analysis in *Massachusetts v. EPA* should be limited to suits brought by states, in light of the Court's reference to the "special solicitude" accorded to states in the standing analysis. See *supra* note 37 and accompanying text.

206. The *American Electric* court did not determine whether an increased risk of harm constituted an "injury in fact" for purposes of standing. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 344 n.21 (2d Cir. 2009).

207. Courts have interpreted the "different-in-kind" requirement narrowly to limit the circumstances in which private parties can bring public nuisance actions. See Mandy Garrels, *Raising Environmental Justice Claims Through the Law of Public Nuisance*, 20 VILL. ENVTL. L.J. 163, 173 (2009). Mandy Garrels criticizes the narrow interpretation as frustrating the pursuit of public nuisance actions by environmental justice advocates, and she notes that the state of Hawaii has adopted a rule that allows any person who has suffered an injury in fact caused by the defendant's actions to pursue a public nuisance action against the defendant. *Id.* at 178–80.

Standing should be less problematic in the context of private nuisance actions brought to address “ecological nuisances.”

In addition to potential standing impediments, justiciability claims could still derail public nuisance actions to address broader environmental problems when the plaintiffs are turning to public nuisance because public law is nonexistent or not enforced. Just as there appears to be disagreement within the circuits regarding whether public nuisance claims to address global climate change are justiciable,<sup>208</sup> similar disagreements could arise if plaintiffs turn to public nuisance actions to address other environmental problems that are being intentionally ignored by the legislative and executive branches.<sup>209</sup> In those cases, academics suggest that courts are more likely to find that the claims are justiciable when the plaintiffs seek money damages than when the plaintiffs seek injunctive relief.<sup>210</sup> Once again, private nuisance actions to address “ecological nuisances” are less likely to be challenged as raising non-justiciable political questions.

### C. *Regulating the Manufacture of Products Through Nuisance Law*

Public nuisance lawsuits that challenge the manufacture of products, like the *California v. General Motors Corp.* case, as opposed to the use of products, could face roadblocks in addition to the standing, justiciability, and causation problems identified above.

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208. See *supra* notes 57, 98, 122, 134–35 and accompanying text.

209. See *supra* notes 172–73 and accompanying text.

210. See Zasloff, *supra* note 17, at 1838–39; Abate, *supra* note 17, at 612, 627. In discussing the benefits of seeking money damages as opposed to an emissions cap in public nuisance actions relating to global climate change, Professor Randall Abate writes:

The litigation strategy to pursue damages rather than injunctive relief is likely a successful approach to avoid the political question doctrine concerns . . . . Courts are empowered to decide tort cases, and only need to find unreasonable harm to award damages. The state is not seeking a comprehensive solution to climate change in seeking damages . . . .

*Id.* at 627. However, the district court in *California v. General Motors Corp.* found the claims non-justiciable even though the plaintiff was only seeking money damages, rather than an injunction. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at \*22–30 (N.D. Sept. 17, Cal. 2007).

Opponents argue that it is inappropriate to apply public nuisance law to the manufacture of products for several reasons.<sup>211</sup>

First, they argue that it is an unlawful attempt to avoid limits on lawsuits against manufacturers that are built into products liability law, including statutes of limitations, notice requirements, and defenses based on the plaintiff's conduct or exhaustion.<sup>212</sup> More significantly, it allows plaintiffs to avoid demonstrating that the defendant's product was defective, a fundamental requirement of products liability law.<sup>213</sup> Opponents fear that allowing plaintiffs to pursue public nuisance actions against companies based on the manufacture of products would blur the line between public nuisance and products liability, leading to ambiguous and unmanageable precedent.<sup>214</sup> They argue that public nuisance is an amorphous and poorly defined tort that gives judges too much discretion to find that the manufacture of products is unreasonable.<sup>215</sup>

#### CONCLUSION

While the impediments outlined in the preceding section may continue to limit the effectiveness of common law actions to achieve broad environmental protection goals in the long-term, they are not preventing plaintiffs from turning to the common law in the short-term to address problems not addressed by public law. Public nuisance actions to address climate change may ultimately fail in court but may spur changes in public law, which may be the primary benefit of this minor renaissance of the common law. It will probably

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211. See Abate, *supra* note 17, at 626; Gifford, *supra* note 190, at 925–29; see also Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006).

212. E.g., Schwartz & Goldberg, *supra* note 211, at 552, 578–79.

213. *Id.* at 578–79.

214. See Abate, *supra* note 17, at 626; Schwartz & Goldberg, *supra* note 211, at 541.

215. See Abate, *supra* note 17, at 626; Gifford, *supra* note 190, at 748, 786; Schwartz & Goldberg, *supra* note 211, at 541, 579. In contrast, Professor Abate believes that public nuisance should play a valuable role in regulating the manufacture of products. He argues that “like all common law principles, public nuisance doctrine needs to evolve and grow to respond to the changing needs of our society. . . . Traditional federal and state legislative responses are important, but those processes move very slowly and do not always offer meaningful recourse for the impacts in our backyards.” See Abate, *supra* note 17, at 626–27.

not be the only benefit, however. As described above, while plaintiffs may face significant impediments in public nuisance actions to address climate change, they may have greater success using private nuisance law to address narrower environmental problems not addressed adequately by public law. Litigants could have great success bringing “ecological nuisance” actions to address the very real local effects of national environmental problems caused by lax regulation of non-point source pollution and development of sensitive ecosystems, as well as the abdication of regulation of isolated wetlands and non-navigable streams. Those victories would be valuable in their own right, but might also lead to changes in public law to address those problems. It is not clear how successful plaintiffs will be in pursuing common law environmental claims over the next few years. It is clear, however, that the common law and public law will only become stronger because litigants can pursue claims under both.