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# Dodging Public Nuisance

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*Public nuisance claims against fossil fuel companies, drug companies, lead paint manufacturers, and other industries have raised the specter of onerous abatement orders and damage awards. While courts sometimes have rejected these industry-oriented public nuisance claims on their substantive merits, in climate change cases federal district courts have turned to doctrines of avoidance—including jurisdictional defenses and justiciability doctrines—to dismiss cases and avoid reaching the substantive merits. This dodging of public nuisance, often supported by questionable legal analysis, not only undermines the functions of tort law, but also cuts short important discussions between the judiciary, the political branches, and the broader public. Although plaintiffs ultimately may not succeed, courts should fulfill their responsibility to address public nuisance claims on their substantive merits, rather than reflexively relying on avoidance doctrines to dodge such claims.*

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## INTRODUCTION

Public nuisance claims against fossil fuel companies, drug companies, lead paint manufacturers, and other industries have raised the specter of onerous abatement orders and damage awards. Such potential liability, for conduct sometimes dating back decades, has prompted some to call for curbs on public nuisance actions. Perhaps in response to these calls, courts in some instances have rejected public nuisance claims on their substantive merits. In other instances, courts have turned to doctrines of avoidance—including jurisdictional defenses and justiciability doctrines—to dismiss cases and avoid reaching the substantive merits of public nuisance claims. Such avoidance by federal district courts has been especially common—and questionable—in climate change cases.<sup>1</sup> This Article takes a closer look at the legal reasoning in this subset of cases and concludes that it would often be appropriate for courts to address public nuisance claims on the merits, rather than warping the doctrines underlying these preliminary defenses. The failure to engage the substance of these claims not only undermines the functions of tort law, but also cuts short important discussions between the judiciary, the political branches, and the broader public.

Public interest public nuisance litigation, referring to public nuisance actions aimed at broad social problems, has been the subject of substantial academic commentary.<sup>2</sup> Some literature focuses on claims aimed at specific problems such as climate change,<sup>3</sup> whereas other literature considers public interest public nuisance more generally.<sup>4</sup> Against this background, this Article first catalogues trial courts' systematic avoidance of the substantive merits of public nuisance in climate change cases. As Part I demonstrates, courts' treatment of these cases stands in sharp contrast to courts' treatment of public interest litigation not involving climate change, where courts have frequently engaged with the substantive merits of public nuisance claims. Part II closely examines district courts' use of avoidance doctrines and finds that their analyses are often problematic. In many instances, the courts have stretched avoidance doctrines, disregarding existing precedent and the

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1. While this Article focuses on courts' dodging of the merits of public nuisance claims, trial courts have similarly dodged the merits of public trust claims involving climate change. *See* Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 *ECOLOGY L.Q.* 731, 734–44 (2020); *cf.* *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020) (dismissing public trust claims against federal government for lack of standing).

2. *See, e.g.*, Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 62 *S.C. L. REV.* 201 (2010) [hereinafter Gifford, *Climate Change*]; Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 *U. CIN. L. REV.* 741 (2003) [hereinafter Gifford, *Public Nuisance*]; DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION* (2010); Kuh, *supra* note 1; Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 *ENV'T L.* 1 (2011); Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 *WASHBURN L.J.* 541 (2006); Sarah L. Swan, *Plaintiff Cities*, 71 *VAND. L. REV.* 1227 (2018).

3. *See, e.g.*, Gifford, *Climate Change*, *supra* note 2; Kysar, *supra* note 2.

4. *See, e.g.*, Gifford, *Public Nuisance*, *supra* note 2.

rationales underlying the doctrines. Finally, Part III explores the broader ramifications of these developments for the avoidance doctrines, the rule of law, and society's response to climate change. Courts should not reflexively rely on avoidance doctrines to dodge climate change public nuisance claims.

## I. PUBLIC INTEREST PUBLIC NUISANCE LITIGATION

After presenting a brief explanation of public interest public nuisance litigation, this Part examines district courts' disposition of public interest public nuisance cases in different subject areas. In the climate change cases, in contrast to other cases, district courts have consistently avoided engaging with the substance of public nuisance claims.

### A. Definitions

#### 1. Public Nuisance

Public nuisance is often defined as a substantial and unreasonable interference with a public right where the defendant has control of the instrumentality causing the interference.<sup>5</sup> At common law, public rights subject to public nuisance included rights to unobstructed highways and waterways, as well as rights to unpolluted air and water.<sup>6</sup> While courts have found public nuisances under a wide range of circumstances, environmental problems—such as dust, smoke, chemical exposure, and odors—are among the most recognizable public nuisances.<sup>7</sup> In perhaps the most prominent public nuisance case, *Georgia v. Tennessee Copper Co.*, the Supreme Court found a public nuisance where sulfur dioxide emissions from Tennessee smelters caused significant damage to crops and vegetation in the neighboring state of Georgia.<sup>8</sup> Public nuisance plaintiffs are typically public authorities, but private parties who have suffered a special injury—an injury different in kind from the public's general injury—can assert public nuisance claims as well.<sup>9</sup>

The precise elements of public nuisance vary by jurisdiction. Offering a broad approach, California statutorily defines a nuisance as

[a]nything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs

5. See DAN B. DOBBS, *THE LAW OF TORTS* 1334 (1st ed. 2000).

6. See *State v. Lead Indus. Ass'n*, 951 A.2d 428, 453 (R.I. 2008) (describing public right); see also DOBBS, *supra* note 5, at 1335; Gifford, *Public Nuisance*, *supra* note 2, at 815 (describing fact patterns constituting public nuisance under common law).

7. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. L. INST. 1979); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 90, at 643–44 (W. Page Keeton ed., 5th ed. 1984); Denise E. Antolini & Clifford L. Rechtschaffen, *Common Law Remedies: A Refresher*, 38 ENV'T L. REP. 10114, 10120–21 (2008).

8. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238–39 (1907).

9. See Albert C. Lin, *Deciphering the Chemical Soup: Using Public Nuisance to Compel Chemical Testing*, 85 NOTRE DAME L. REV. 955, 975 (2010).

the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway . . . .<sup>10</sup>

California law goes on to define a public nuisance as a nuisance that “affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.”<sup>11</sup> Unlike in some other jurisdictions, “liability for nuisance [in California] does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance.”<sup>12</sup> While production of a defective product alone does not constitute a nuisance,<sup>13</sup> a product manufacturer’s more egregious conduct—such as promotion of a product “with knowledge of the hazard that such use would create”—may suffice.<sup>14</sup>

The wide range of circumstances in which courts have found a public nuisance has prompted the criticism that public nuisance lacks “meaningful definition and discernable boundaries.”<sup>15</sup> Indeed, a leading treatise once declared, “There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’”<sup>16</sup> Whatever the scope of the doctrine, public nuisance nonetheless remains an important mechanism for protecting public rights.

## 2. Public Interest Public Nuisance

Public nuisance claims inherently have a public aspect to them, as public nuisance requires interference with a public right or harm to large numbers of people.<sup>17</sup> Nonetheless, one can distinguish between relatively simple factual situations, where a defendant’s conduct directly interferes with the rights of a community—as in *Georgia v. Tennessee Copper*—from more complex situations

10. CAL. CIV. CODE § 3479 (2020), [http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=3479.&lawCode=CIV](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=3479.&lawCode=CIV) [<https://perma.cc/2VHC-TY6R>].

11. *Id.* § 3480.

12. *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Ct. App. 2006) (quoting *City of Modesto Redevelopment Agency v. Superior Ct.*, 13 Cal. Rptr. 3d 865, 872 (Ct. App. 2004)).

13. *See id.* at 328.

14. *Id.*; *see also id.* (“A public nuisance cause of action is not premised on a defect in a product or a failure to warn but on affirmative conduct that assisted in the creation of a hazardous condition.”).

15. Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873, 926 (2005); *see also* Schwartz & Goldberg, *supra* note 2 (arguing that products liability law, and not public nuisance doctrine, should govern liability relating to the manufacturing of products).

16. KEETON ET AL., *supra* note 7, § 90, at 643.

17. *See* ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 80 (8th ed. 2018). In those jurisdictions requiring interference with a public right, and not merely interference with the individual rights of a large number of persons, the public right refers to a collective right that is common to all members of the general public. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. L. INST. 1979).

where the interference is more indirect and mediated by the actions of additional parties. Often, these more complex cases—such as climate change—involve especially widespread harms affecting thousands or millions of people.<sup>18</sup> Donald Gifford uses the term “public interest tort litigation” to describe these collective common law actions that “seek[] to tackle large social problems instead of seeking to resolve disputes between individual parties.”<sup>19</sup>

Noting that such litigation is often filed in response to a perceived failure of the political branches, Gifford offers tobacco, handgun, lead pigment, and climate change litigation as examples of this public law model of tort litigation.<sup>20</sup> This model, Gifford contends, is “the wrong tool for the job of addressing climate change” and other social problems.<sup>21</sup> Instead, he urges judges to “use the traditional doctrines of judicial restraint to reject the invitation to engage in faux legislation.”<sup>22</sup> But while judicial solutions to these problems are less than ideal, judicial restraint has its own costs, as significant social harms are swept under the rug and persons harmed are left without avenues for seeking redress. Moreover, contrary to concerns regarding counter-majoritarian decisions by the courts, judicial review can play a critical role in upholding democratic values.<sup>23</sup>

#### *B. Public Interest Public Nuisance Cases Other than Climate Change*

As Gifford observes, courts have dismissed public interest public nuisance cases

because of plaintiffs’ inability to satisfy the substantive requirements of . . . public nuisance; the conflict between the common law actions and legislative enactments already in place; or the fact that any harm sustained by the states or municipalities was too “remote” from the manufacturers’ conduct or too “derivative” to justify liability.<sup>24</sup>

Indeed, in cases not involving climate change, courts have often engaged directly in the substantive application of public nuisance law. Although plaintiffs sometimes failed to achieve their litigation objectives, the courts have not shied away from deciding, based on the pleadings or evidence, whether plaintiffs had alleged or proven public nuisance. Courts’ engagement with the substantive merits of public nuisance in these cases suggests that courts are capable of evaluating public nuisance claims in climate change cases as well, notwithstanding their factual complexity.

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18. Gifford, *Climate Change*, *supra* note 2, at 219.

19. *Id.*

20. *Id.* at 219–20.

21. *Id.* at 204; *see also* Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L., no. 2, 2011, at 5–6 (proposing a requirement, based on public nuisance’s historical roots as a public action rather than a tort, that “the legislature . . . speak before courts use public nuisance law to adjudicate lawsuits targeting controversial social harm[ ]”).

22. Gifford, *Climate Change*, *supra* note 2, at 204.

23. *See infra* Section III.C.

24. Gifford, *Climate Change*, *supra* note 2, at 206.

What follows is a brief survey of public interest public nuisance cases involving harms other than climate change. Many of these cases involve environmental hazards: school districts and municipalities sued asbestos product manufacturers in the 1980s to recover the costs of asbestos removal; state and local governments subsequently sued lead paint manufacturers to pay for lead paint abatement; and local governments are now suing the sole manufacturer of PCBs to address widespread PCB contamination in the environment. In nonenvironmental contexts, public nuisance suits have been brought against tobacco companies to recover the costs of treating tobacco-related diseases, gun manufacturers to impose responsibility for gun violence, and opioid manufacturers to seek abatement and other relief from the ongoing opioid epidemic.

### 1. Asbestos Litigation

Lawsuits against asbestos product manufacturers represent some of the first efforts to apply nuisance doctrine to mass-manufactured products.<sup>25</sup> These efforts were unsuccessful, as courts repeatedly expressed the concern that plaintiffs were seeking to bring a products liability action disguised as a nuisance claim.<sup>26</sup> Most courts rejected plaintiffs' public nuisance claims on the specific ground that defendants lacked control of the instrumentality alleged to constitute a nuisance.<sup>27</sup> For example, in *City of Manchester v. National Gypsum Co.*, the court explained that "a basic element of the tort of nuisance is absent," as "[t]he instrumentality which created the nuisance . . . has been in the possession and control of the plaintiff . . . since the time it purchased the products containing asbestos materials."<sup>28</sup> Similarly, the court of appeals in *Detroit Board of Education v. Celotex* explained that because "Defendants gave up ownership and control of their products when the products were sold to plaintiffs[,] Defendants now lack the legal right to abate whatever hazards their products may pose."<sup>29</sup> It is worth noting that although courts dismissed asbestos plaintiffs' nuisance claims, they rejected those claims on the merits.<sup>30</sup>

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25. In many of these cases, plaintiffs asserted public and private nuisance claims or a general nuisance claim without distinguishing the two. *See, e.g.,* *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986) (pleading both public and private nuisance); *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) (pleading nuisance). Gifford, *Public Nuisance*, *supra* note 2, at 751.

26. *See* Gifford, *Public Nuisance*, *supra* note 2, at 751–52; *e.g.,* *City of San Diego v. U.S. Gypsum Co.*, 35 Cal. Rptr. 2d 876, 883–84 (Ct. App. 1994); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992).

27. *Tioga*, 984 F.2d at 920 (discussing cases).

28. 637 F. Supp. at 656.

29. 493 N.W.2d at 522.

30. *Nat'l Gypsum Co.*, 637 F. Supp. at 656; *Detroit Bd. of Educ.*, 493 N.W.2d at 522.



## 2. *Lead Paint Litigation*

During the early 2000s, various local governments and the state of Rhode Island brought public nuisance actions to require lead paint manufacturers to abate hazards caused by deteriorating lead paint in homes and other buildings. With the exception of litigation filed in California, these efforts ultimately failed. Even where plaintiffs were unsuccessful, however, the courts generally addressed the substance of their claims rather than dismissing the cases for procedural reasons or on grounds of judicial restraint.

The Rhode Island litigation produced the first U.S. trial verdict to impose public nuisance liability on lead paint manufacturers.<sup>31</sup> However, the verdict was overturned by the state supreme court, which held that the state had not and could not allege any set of facts to support its public nuisance claim.<sup>32</sup> Specifically, the state could not establish that the lead paint manufacturers interfered with a public right or that they were in control of the nuisance-causing instrumentality.<sup>33</sup> “Public right,” the court explained, traditionally refers to “those indivisible resources shared by the public at large, such as air, water, or public rights of way” and does not include “[t]he right of an individual child not to be poisoned by lead paint.”<sup>34</sup> In addition, the state had failed to allege that the defendants had control over the lead pigment at the time that it harmed the children of Rhode Island.<sup>35</sup>

Lead paint litigation in New Jersey failed on similar grounds. The City of Newark and twenty-five other local jurisdictions had sued paint manufacturers to recover the costs of abating lead paint in homes and buildings and providing associated medical care.<sup>36</sup> The cases were consolidated, and the New Jersey Supreme Court eventually held that the plaintiffs could not state a cognizable claim within the traditional parameters of common law public nuisance.<sup>37</sup> Poor maintenance by the property owners—and not the defendants’ conduct—had caused the harm, the court explained.<sup>38</sup> In support of this conclusion, the court noted that a state statute directed local boards of health to abate lead paint and imposed liability on property owners for abatement costs.<sup>39</sup> Additionally, the court found that the damages sought by the plaintiffs were unavailable as a remedy to public entities filing public nuisance actions.<sup>40</sup>

Claims in several other states were also rejected for failing to establish one or more elements of public nuisance. For example, St. Louis’s efforts to recover the costs of its lead abatement program failed because the city could not causally link

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31. *State v. Lead Indus. Ass’n*, 951 A.2d 428, 434 (R.I. 2008).

32. *Id.* at 435.

33. *Id.*

34. *Id.* at 453–54.

35. *Id.* at 455.

36. *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007).

37. *Id.* at 501.

38. *Id.*

39. *Id.*

40. *Id.* at 502.

any specific defendant to any specific abatement project.<sup>41</sup> Milwaukee's lawsuit against a single paint manufacturer failed for lack of credible evidence that the defendant intentionally or knowingly created a nuisance.<sup>42</sup> And Chicago's public nuisance suit against lead paint manufacturers faltered on the issue of proximate cause, as the city had not identified any specific defendant as the source of lead paint at any particular location and the state legislature had chosen to hold landowners responsible for remediating lead paint.<sup>43</sup>

Public nuisance claims for lead paint contamination have succeeded only in California, where, as noted above, public nuisance does not require that a defendant control the instrumentality creating the nuisance at the time the harm occurs. "The critical question," courts have held, "is whether the defendant created or assisted in the creation of the nuisance."<sup>44</sup> In a crucial pretrial ruling, the court of appeal in *County of Santa Clara v. Atlantic Richfield Co.* distinguished public nuisance from a product liability claim.<sup>45</sup> "Liability is premised on defendants' promotion of lead paint for interior use with knowledge of the hazard that such use would create," the court emphasized, not on the mere production of a hazardous product.<sup>46</sup> After a bench trial, the trial court found that the defendants promoted lead paint with constructive, if not actual, knowledge that using lead paint would create a hazard and held the defendants jointly and severally liable for creating a public nuisance.<sup>47</sup> The \$1.15 billion judgment was largely upheld on appeal.<sup>48</sup>

### 3. PCBs

In the last five years, local governments have filed nearly twenty public nuisance lawsuits aimed at environmental contamination involving polychlorinated biphenyls (PCBs), a family of chemicals once widely used in electrical transformers, paints, and other products.<sup>49</sup> The defendant in these cases, Monsanto, was the sole manufacturer of PCBs, which were banned in the 1970s but continue to escape into the environment.<sup>50</sup> Monsanto has raised a number of arguments for dismissal,

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41. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 115–16 (Mo. 2007).

42. *City of Milwaukee v. NL Indus.*, 762 N.W.2d 757, 768–70 (Wis. Ct. App. 2008), *review denied*, 765 N.W.2d 579 (Wis. 2009).

43. *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 134, 139–40 (Ill. App. Ct.), *appeal denied*, 833 N.E.2d 1 (Ill. 2005); *see also* *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869, 878 (Ill. App. Ct. 2003) (rejecting public nuisance claim because plaintiffs had failed to identify defendant that supplied the lead paint in question).

44. *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Ct. App. 2006).

45. *Id.* at 328.

46. *Id.*

47. *People v. Atl. Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at \*8–10, \*52 (Cal. Super. Ct. Mar. 26, 2014), *rev'd sub nom.* *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499 (Ct. App. 2017).

48. *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. at 551–52.

49. *See* Jef Feeley & Tim Loh, *Roundup Not Only Monsanto Legal Woe for Bayer; PCB Claims Still Coming*, INS. J. (July 24, 2019), <https://www.insurancejournal.com/news/national/2019/07/24/533721.htm> [https://perma.cc/C9UP-YAQE].

50. *See id.*

including standing, statute of limitations, failure to state a claim, failure to exhaust administrative remedies, and overlap with product liability law.<sup>51</sup> So far, trial courts largely have rejected these arguments and declined Monsanto's invitation to dodge the substance of the public nuisance claims.<sup>52</sup> With several of the cases scheduled for trial, Monsanto recently submitted for court approval a \$650 million proposed settlement to resolve PCB pollution claims by a class of local governments.<sup>53</sup>

#### 4. Tobacco

Some of the best-known public nuisance claims against product manufacturers center on harms other than environmental contamination. Public nuisance was among the primary legal theories that states asserted in litigation against manufacturers of tobacco products in the 1990s.<sup>54</sup> The exact role of public nuisance in bringing about the resulting \$246 billion settlements is unclear, however, as the courts never issued a ruling on the merits of the public nuisance claims.<sup>55</sup>

Subsequent cases brought by individuals, health insurers, or other parties against tobacco companies sometimes asserted public nuisance claims.<sup>56</sup> However, many of these later cases were dismissed for failing to state a cause of action. Often, courts held that hospitals' or insurers' allegations that they bore additional costs as a result of smokers' injuries were insufficient to establish proximate causation.<sup>57</sup> In

51. *City of San Diego v. Monsanto Co.*, 310 F. Supp. 3d 1057, 1060 n.2, 1063–64 (S.D. Cal. 2018); *City of Spokane v. Monsanto Co.*, No. 2:15-CV-00201-SMJ, 2016 WL 6275164, at \*3, \*7 (E.D. Wash. Oct. 26, 2016); *City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096, 1104–06 (W.D. Wash. 2017); *Port of Portland v. Monsanto Co.*, No. 3:17-CV-15-PK, 2017 WL 9098079, at \*14–17 (D. Or. Apr. 18, 2017).

52. *Monsanto Co.*, 310 F. Supp. 3d at 1060 n.2, 1063–64 (rejecting defendant's arguments with respect to standing, statute of limitations, failure to state a claim, and failure to exhaust administrative remedies); *San Diego Unified Port Dist. v. Monsanto Co.*, No. 15-cv-578-WQH-AGS, 2020 WL 1479071, at \*11–12, \*14–16 (S.D. Cal. Mar. 26, 2020) (rejecting standing, displacement, and ripeness arguments); *Monsanto Co.*, 2016 WL 6275164, at \*3, \*7 (rejecting statute of limitations and standing arguments); *Monsanto Co.*, 237 F. Supp. 3d at 1104–06 (rejecting statute of limitations and standing arguments); *Monsanto Co.*, 2017 WL 9098079, at \*14–17 (rejecting standing, statute of limitations, and overlap with product liability law arguments); *City of Chula Vista v. Monsanto Co.*, No. 18cv1942-WQH-AGS, 2019 WL 1317330, at \*6 (S.D. Cal. Mar. 21, 2019) (rejecting exhaustion argument); *City of Long Beach v. Monsanto Co.*, No. CV 16-3493 FMO (ASx), 2018 WL 4846657, at \*4–5 (C.D. Cal. Aug. 21, 2018) (rejecting exhaustion argument); *City of Portland v. Monsanto Co.*, No. 3:16-cv-01418-PK, 2017 WL 4236583, at \*2 (D. Or. Sept. 22, 2017) (rejecting standing argument); *San Diego Unified Port Dist. v. Monsanto Co.*, No. 15-cv-578-WQH-JLB, 2016 WL 5464551, at \*6 (S.D. Cal. Sept. 28, 2016) (rejecting standing argument). *But cf.* *City of San Jose v. Monsanto Co.*, No. 5:15-cv-03178-EJD, 2017 WL 3335735, at \*3 (N.D. Cal. Aug. 4, 2017) (granting motion to stay pending exhaustion of administrative remedies).

53. See Feeley & Loh, *supra* note 49; Gene Johnson, *Monsanto to Pay \$95M over PCB Pollution in Washington State*, AP (June 24, 2020), <https://apnews.com/651ded32cc6bf210e78695ac7892d473> [<https://perma.cc/R22W-UKXE>] (noting also the separate \$170 million proposed settlement to resolve PCB pollution claims by Washington state, New Mexico, and Washington, D.C.).

54. See Gifford, *Public Nuisance*, *supra* note 2, at 753.

55. See *id.* at 754, 761–64.

56. See *id.* at 763 n.113.

57. See, e.g., *E. States Health & Welfare Fund v. Philip Morris, Inc.*, 729 N.Y.S.2d 240, 247–50 (Sup. Ct. 2000) (finding “no direct link between the alleged misconduct of Defendants and the alleged

other cases, courts held that plaintiffs had failed to allege special injury<sup>58</sup> or other elements of public nuisance.<sup>59</sup> Although the results of these cases were unfavorable to the plaintiffs, the courts—as in other public interest public nuisance cases—applied the substantive requirements of public nuisance law rather than ducking the issue altogether.

### 5. *Guns*

Drawing inspiration from the tobacco litigation, various states and municipalities filed public nuisance actions to hold gun manufacturers liable for gun violence during the early 2000s.<sup>60</sup> A few of these cases were dismissed for lack of standing,<sup>61</sup> but most were dismissed on the pleadings or upon summary judgment for failure to state an actionable public nuisance claim.<sup>62</sup> Courts rejected plaintiffs' claims for various reasons—insufficient allegations or proof of proximate

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damage to the Funds” because plaintiffs’ economic harm rested on injury to smokers); *Ass’n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 79 F. Supp. 2d 1219, 1229 (W.D. Wash. 1999), *aff’d*, 241 F.3d 696, 707 (9th Cir. 2001) (holding that plaintiffs’ allegations that the defendants’ actions caused public hospitals to bear unreimbursed costs were insufficient to demonstrate proximate cause).

58. *Allegheny Gen. Hosp. v. Philip Morris*, 228 F.3d 429, 446 (3d Cir. 2000) (affirming district court finding that “[h]ospitals did not sufficiently allege that they suffered a harm different from and of greater magnitude than the harm suffered by the general public”).

59. *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 972–73 (E.D. Tex. 1997) (dismissing case because state failed to plead elements required to establish a public nuisance—i.e., that defendants improperly used their own property or that state was injured in use and employment of its property).

60. See Gifford, *Public Nuisance*, *supra* note 2, at 764–65.

61. See, e.g., *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 132 (Conn. 2001) (holding that alleged harms were “too remote . . . to confer standing” even though plaintiffs’ allegations fell within definition of public nuisance).

62. See Gifford, *Public Nuisance*, *supra* note 2, at 766–69 (discussing cases).

causation,<sup>63</sup> control of the instrumentality,<sup>64</sup> or interference with a public right.<sup>65</sup> In many of these decisions, courts found public nuisance inapplicable after extensively analyzing whether the elements of public nuisance were satisfied by the specific factual context of handgun violence.<sup>66</sup> Moreover, one court, after a six-week trial, penned a hundred-page opinion finding that “defendants are responsible for the creation of a public nuisance and could . . . substantially reduce the harm occasioned by the diversion of guns to the illegal market and by the criminal possession and use of those guns.”<sup>67</sup> The court individually considered the elements of public nuisance and concluded that “a public nuisance exists . . . in the form of widespread access to illegal firearms that causes harm to the population at large in that it endangers and injures the property, health, safety or comfort of a considerable number of persons” and that “the nuisance was caused, contributed to and maintained by defendants.”<sup>68</sup> Although the court ultimately dismissed the case on account of the plaintiff’s failure to establish a special injury, the opinion further illustrates how courts have not hesitated to grapple with the substance of public interest public nuisance claims.<sup>69</sup>

### 6. Opioids

Ongoing public nuisance lawsuits against opioid manufacturers and distributors bear some resemblance to earlier tobacco litigation. In contrast to the tobacco cases, however, the courts in the opioid cases have begun to rule on the merits of plaintiffs’ public nuisance claims. Most of the federal cases filed by local

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63. See, e.g., *In re Firearm Cases*, 24 Cal. Rptr. 3d 659, 682 (Ct. App. 2005) (affirming grant of summary judgment to defendants “for lack of any evidence of causation”); *Young v. Bryco Arms*, 821 N.E.2d 1078, 1091 (Ill. 2004) (holding that “the defendants’ conduct is not a legal cause of the alleged nuisance because the claimed harm is the aggregate result of numerous unforeseeable intervening criminal acts by third parties”); *District of Columbia v. Beretta U.S.A. Corp.*, 872 A.2d 633, 650 (D.C.) (declining to “relax the common-law limitations of duty, foreseeability, and direct causation so as to recognize the broad claim of public nuisance”), *cert. denied*, 546 U.S. 928 (2005); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1138 (Ill. 2004) (holding that pleadings were insufficient to establish proximate causation); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 201–02 (App. Div.) (holding that harm alleged “is far too remote” and that defendants’ lawful activity was not a proximate cause), *appeal denied*, 801 N.E.2d 421 (2003).

64. See, e.g., *Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001) (holding that “the County has failed to allege that the manufacturers exercise sufficient control over the source of the interference with the public right”); *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 422 (3d Cir. 2002) (holding that “defendants lack the requisite control over the interference with a public right”). *But cf.* *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143 (Ohio 2002) (holding that the allegation that “appellees control the creation and supply of this illegal, secondary market for firearms, not the actual use of the firearms that cause injury,” is sufficient to establish control of alleged nuisance).

65. See, e.g., *Beretta U.S.A. Corp.*, 821 N.E.2d at 1114–16 (finding lack of authority to expand public right to encompass right to be free from unreasonable threats of danger caused by presence of illegal weapons).

66. See, e.g., *id.* at 1113–38; *Beretta U.S.A. Corp.*, 872 A.2d at 646–51.

67. *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 446 (E.D.N.Y. 2003).

68. *Id.* at 519.

69. *Id.* at 446.

governments to recover costs of responding to the opioid crisis have been consolidated in the Northern District of Ohio for purposes of resolving pretrial matters.<sup>70</sup> The plaintiffs in these cases have asserted public nuisance as well as other claims, and notwithstanding the complexity of the issues and the potentially enormous damages at stake, the trial court has engaged with the substance of the nuisance claims.<sup>71</sup> Defendants and plaintiff counties have reached settlements (pending approval) in the first of these cases, although the vast majority of cases remain pending.<sup>72</sup>

In addition to the consolidated federal litigation, almost all states have filed separate lawsuits in state court, alleging public nuisance and other claims.<sup>73</sup> In the first ruling to hold a drug company liable for the opioid epidemic, an Oklahoma judge ruled in August 2019 that Johnson & Johnson's misleading promotion of opioids created a public nuisance.<sup>74</sup> While the ruling is now on appeal, the trial court directly addressed the substance of the public nuisance claim, holding that the defendants' false and misleading marketing of opioids injured the health and safety of a considerable number of state residents.<sup>75</sup>

### C. Climate Change Public Nuisance Decisions

In contrast to the public interest public nuisance cases just described, the climate change public nuisance cases have proceeded without rulings on whether the plaintiffs actually proved the elements of public nuisance. In the first wave of cases, which centered on federal public nuisance law, district courts dodged applying public nuisance law to climate change by relying on justiciability doctrines of standing and political question as well as the doctrine of displacement. The second wave of cases, which are still working their way through the courts, have raised primarily state public nuisance claims. In two of those cases, *Oakland v. BP* and *New York City v. BP*, district courts dismissed public nuisance claims originally based on state law by recharacterizing them as federal claims and then deeming them displaced by federal statute or beyond the adjudicatory power of federal courts.

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70. See Colin Dwyer, *Your Guide to the Massive (and Massively Complex) Opioid Litigation*, NPR (Oct. 24, 2019, 3:30 PM), <https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation> [<https://perma.cc/BC47-K6F3>].

71. *In re Nat'l Prescription Opiate Litig.*, 406 F. Supp. 3d 672, 672–77 (N.D. Ohio 2019) (denying defendants' motion for summary judgment on public nuisance claims); *In re Nat'l Prescription Opiate Litig.*, 440 F. Supp. 3d 773, 813–15 (N.D. Ohio 2020) (rejecting argument that economic loss doctrine bars recovery for common law absolute public nuisance claim).

72. See Dwyer, *supra* note 70; Suggestions of Remand, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (J.P.M.L. Nov. 19, 2019), <https://www.ohnd.uscourts.gov/sites/ohnd/files/2941.pdf> [<https://perma.cc/M5Y8-XEXF>] (proposing to Judicial Panel on Multidistrict Litigation strategic remands of a select number of cases to facilitate resolution of different issues and types of cases).

73. See Suggestions of Remand, *supra* note 72, at 3 & n.2 (noting that forty-eight states plus the District of Columbia and Puerto Rico have filed eighty-nine opioid-related cases in state courts).

74. *State v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 4019929 (Okla. Dist. Ct. Aug. 26, 2019).

75. *Id.* at \*10–14.

### 1. California v. GM

In *California v. GM*, one of the first climate change public nuisance cases, California alleged that greenhouse gas (GHG) emissions from automobiles manufactured by defendants constituted a public nuisance under federal common law.<sup>76</sup> Dismissing the case because it presented nonjusticiable political questions, the district court emphasized “the complexity of the initial global warming policy determinations that must be made by the elected branches prior to the proper adjudication of Plaintiff’s federal common law nuisance claim.”<sup>77</sup> The court also noted a “textual commitment of interstate commerce and foreign policy to the political branches,” and “a lack of judicially discoverable or manageable standards.”<sup>78</sup> California appealed, but voluntarily dismissed its appeal before the Ninth Circuit could review the trial court’s decision.<sup>79</sup>

### 2. Comer v. Murphy Oil

Another early case, *Comer v. Murphy Oil*, reflects perhaps the most convoluted avoidance of the merits of public nuisance in a climate change case. The plaintiff property owners in *Comer* asserted public nuisance and other common law claims against electric, fossil fuel, and chemical companies for allegedly exacerbating Hurricane Katrina’s harmful effects through their GHG emissions.<sup>80</sup> The district court dismissed under the political question doctrine and for lack of standing.<sup>81</sup> A Fifth Circuit panel reversed, explaining that plaintiffs’ nuisance claim did not present a political question exclusively committed to the legislative or executive branch, and that the defendants’ alleged contribution to the harm was sufficient to meet the causation element of standing.<sup>82</sup> However, the panel’s opinion was vacated after the Fifth Circuit granted en banc review.<sup>83</sup> Then, due to the loss of a quorum, the Fifth Circuit dismissed the en banc review, resulting in reinstatement of the district court’s opinion.<sup>84</sup> Noting that no surviving appellate court opinion had ever addressed the substance of the district court’s ruling, the plaintiffs refiled the case.<sup>85</sup>

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76. *People v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

77. *Id.* at \*6.

78. *Id.* at \*13–16.

79. *See* Unopposed Motion to Dismiss Appeal, California *ex rel.* Brown v. Gen. Motors Corp., No. 07-16908 (9th Cir. June 19, 2009), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2009/20090619\\_docket-07-16908\\_motion.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2009/20090619_docket-07-16908_motion.pdf) [<https://perma.cc/7MB9-HHQJ>].

80. *Comer v. Murphy Oil USA (Comer I)*, 585 F.3d 855, 859–60 (5th Cir. 2009), *vacated and reb’g granted*, 598 F.3d 208 (5th Cir. 2010).

81. *Comer v. Murphy Oil USA (Comer II)*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev’d*, 585 F.3d 855, *vacated and reb’g granted*, 598 F.3d 208.

82. *Comer I*, 585 F.3d at 866, 869.

83. *Comer v. Murphy Oil USA (Comer III)*, 607 F.3d 1049, 1055 (5th Cir. 2010), *mandamus denied*, *In re Comer (Comer IV)*, 562 U.S. 1133 (2011).

84. *Id.* at 1053–55.

85. *Comer v. Murphy Oil USA (Comer V)*, 839 F. Supp. 2d 849, 854 (S.D. Miss. 2012).

The district court dismissed the refiled claims on *res judicata* grounds, thereby depriving the plaintiffs of a ruling on the substantive merits of their claims.<sup>86</sup>

### 3. *AEP v. Connecticut*

The most influential of the first wave of climate change public nuisance cases, *American Electric Power Co. v. Connecticut* (*AEP*), likewise began with a district court ruling that dodged the merits.<sup>87</sup> Seeking injunctive relief, the plaintiffs in *AEP* alleged that GHG emissions from defendants' power plants constituted a public nuisance under federal common law.<sup>88</sup> Deeming the claims nonjusticiable under the political question doctrine, the district court explained that resolving the plaintiffs' claims "require[d] identification and balancing of economic, environmental, foreign policy, and national security interests, 'an initial policy determination of a kind clearly for non-judicial discretion.'"<sup>89</sup> The Second Circuit reversed, holding that the political question doctrine was inapplicable and that the plaintiffs had standing.<sup>90</sup> The Supreme Court granted certiorari and ordered dismissal of the case.<sup>91</sup> Essentially sidestepping defendants' arguments contesting justiciability, the Supreme Court held that the claims were displaced by "the [federal] Clean Air Act and the EPA actions it authorizes."<sup>92</sup> Technically, this holding constituted an adjudication of the case on the merits, not a dismissal for lack of jurisdiction.<sup>93</sup> However, as a result of applying the displacement doctrine, no court in the litigation ever faced the question of whether climate change constitutes a public nuisance. Thus, through the political question and displacement doctrines, both the district court and Supreme Court avoided engaging with the substance of public nuisance law.

### 4. *Kivalina v. ExxonMobil Corp.*

*AEP* left open the question of whether a federal public nuisance action for damages, as opposed to injunctive relief, remained viable. *Native Village of Kivalina v. ExxonMobil Corp.*, an action for damages resulting from climate change–related sea level rise, squarely presented the issue. Prior to the Supreme Court ruling in *AEP*, the district court in *Kivalina* dismissed the case on the grounds of political

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86. *Comer v. Murphy Oil USA (Comer VI)*, 718 F.3d 460, 467–69 (5th Cir. 2013), *aff'g* 839 F. Supp. 2d at 855–57.

87. *Connecticut v. Am. Elec. Power Co. (AEP I)*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

88. Plaintiffs also alleged public nuisance claims based on state law, but these claims ultimately were never adjudicated. *See Am. Elec. Power Co. v. Connecticut (AEP II)*, 564 U.S. 410, 429 (2011).

89. *AEP I*, 406 F. Supp. 2d at 274 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)).

90. *Connecticut v. Am. Elec. Power Co. (AEP III)*, 582 F.3d 309, 321–49 (2d Cir. 2009).

91. *AEP II*, 564 U.S. 410.

92. *Id.* at 420 n.6, 424 (noting that four members of the Court found that no threshold obstacle barred review of the public nuisance claim on the merits).

93. *Id.* at 420 (affirming Second Circuit's exercise of jurisdiction and proceeding to the merits).



question and standing.<sup>94</sup> The district court held that the case presented a political question because there were no judicially manageable standards for balancing the harms and benefits of fossil fuel consumption, and because deciding the merits would require policy determinations limiting GHG emissions and allocating climate change's costs.<sup>95</sup> In addition, the court deemed the plaintiffs' alleged injuries too remote to establish standing: the plaintiffs had demonstrated "no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time."<sup>96</sup> On appeal, the Ninth Circuit applied the Supreme Court's displacement analysis from *AEP* and ordered the case dismissed. The fact that the *Kivalina* plaintiffs were seeking damages rather than an injunction, the court held, did not meaningfully distinguish *AEP*: although "the lack of a federal remedy may be a factor to be considered in determining whether Congress has displaced federal common law[,] . . . displacement of a federal common law right of action means displacement of remedies."<sup>97</sup>

### 5. Oakland v. BP

As a result of *AEP*'s holding on displacement, plaintiffs in more recent climate change cases have turned to public nuisance claims based on state law. Dodging of the substance of these claims nevertheless has continued in some of these cases.

The plaintiffs in *Oakland v. BP* alleged that five of the world's largest oil companies had promoted fossil fuel use even as they knew that their products would contribute to dangerous global warming and associated sea level rise.<sup>98</sup> Seeking abatement orders requiring the defendants to fund various adaptation measures, the plaintiffs filed their lawsuits in state court and initially asserted only state public nuisance claims.<sup>99</sup> However, the defendants removed the cases to federal court, and the federal district court subsequently rejected the plaintiffs' motion to remand the cases to state court on the ground that the claims—"which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law."<sup>100</sup>

The plaintiffs amended their complaints to add federal public nuisance claims, and the defendants moved to dismiss. The court reaffirmed its earlier determination

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94. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 569 U.S. 1000 (2013).

95. 663 F. Supp. 2d at 874–78.

96. *Id.* at 880.

97. *Kivalina*, 696 F.3d at 857. The Ninth Circuit did not address the political question and standing issues.

98. *City of Oakland v. BP PLC (BP I)*, 325 F. Supp. 3d 1017, 1021 (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *modified*, 969 F.3d 895 (9th Cir. 2020).

99. *City of Oakland v. BP PLC (BP II)*, 969 F.3d 895, 901–02 (9th Cir. 2020).

100. *People v. BP P.L.C. (BP III)*, No. C 17-06011 WHA, 2018 WL 1064293, at \*2 (N.D. Cal. Feb. 27, 2018), *vacated sub nom. BP II*, 969 F.3d 895 (9th Cir. 2020).

that state common law was inapplicable and dismissed the federal claims.<sup>101</sup> Citing *AEP*, the court held that the Clean Air Act (CAA) displaced the plaintiffs' claims to the extent that they involved conduct and emissions arising within the United States.<sup>102</sup> To the extent that the claims were premised on conduct and emissions outside the country, the court held that they were not displaced by statute. Nonetheless, the court dismissed these claims as well on the ground that adjudication of public nuisance in this context would "interfere[] with separation of powers and foreign policy."<sup>103</sup>

#### 6. NYC v. BP

*New York City v. BP* was dismissed on similar grounds. The complaint, filed in federal court, asserted public nuisance, private nuisance, and trespass claims and requested compensatory damages and abatement.<sup>104</sup> Noting the denial of the motion to remand to state court in the *Oakland* litigation, the *New York City* court held that the plaintiffs' claims, "based on the 'transboundary' emission of greenhouse gases," necessarily "arise under federal common law and require a uniform standard of decision."<sup>105</sup> To the extent the claims were based on domestic emissions, the court held, they were displaced by the CAA.<sup>106</sup> And to the extent the claims were based on foreign emissions, the court deemed the claims "barred by the presumption against extraterritoriality and the need for judicial caution in the face of 'serious foreign policy consequences.'"<sup>107</sup> Hinting that the case also presented political questions inappropriate for judicial determination, the court concluded that "[t]o litigate such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches."<sup>108</sup>

Other district courts, declining to follow the *New York City* and *Oakland* courts' approaches, have instead remanded climate change public nuisance claims to state courts.<sup>109</sup> Even in these cases, however, federal district courts have not had

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101. *BP I*, 325 F. Supp. 3d at 1028.

102. *Id.* at 1024.

103. *Id.* at 1024–26. The Ninth Circuit reversed the lower court's ruling that federal question jurisdiction provided a basis for removal and remanded the cases to the district court to consider whether there was an alternative basis for subject matter jurisdiction. *City of Oakland v. BP PLC (BP IV)*, 960 F.3d 570, 575 (9th Cir. 2020).

104. The complaint does not specify whether the claims are grounded in federal or state law, but the pleading of diversity jurisdiction (but not subject matter jurisdiction) suggests an intent to rely at least in part on state law. Complaint at 13–14, 58–63, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No.1:18-cv-00182-JFK), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180109\\_docket-118-cv-00182\\_complaint-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180109_docket-118-cv-00182_complaint-1.pdf) [<https://perma.cc/W9BU-CGFV>].

105. *BP P.L.C.*, 325 F. Supp. 3d at 472.

106. *Id.* at 472–75.

107. *Id.* at 475.

108. *Id.* at 476.

109. *See infra* text accompanying notes 284–87.

to decide public nuisance claims on the merits. The overall trend remains that district courts avoid engaging with the substance of public nuisance claims in climate change cases, whether through disavowals of jurisdiction, assertions of nonjusticiability, or other means. Unsurprisingly, the courts have presented no explicit justification for consistently dodging the substance of public nuisance in these cases. Their opinions nonetheless suggest a discomfort with the scale of the problem: though the courts are not being asked to adjudicate climate change in its entirety, they often speak as if plaintiffs are requesting precisely that. In addition, the courts seem to dread the political implications of a substantive judgment for either side—hence, their characterization of plaintiffs’ claims as raising political questions or meriting judicial caution.

## II. DOCTRINES OF AVOIDANCE

In case after case, district courts have sidestepped the question of whether GHG emissions and their resultant harms constitute a public nuisance. In doing so, these courts have relied on a variety of avoidance doctrines rooted primarily in separation of powers and federalism rationales. The separation-of-powers-based doctrines at issue include political question, standing, the presumption against extraterritoriality, and the notion of judicial caution. The federalism-based doctrines courts have invoked include foreign policy preemption and other doctrines calling for the application of federal law to the exclusion of state law. Some district court opinions reflect straightforward application of governing precedent. But in many instances, district courts have stretched or expanded the avoidance doctrines well beyond existing precedent. This Part examines in detail the district courts’ use and misuse of avoidance doctrines in the climate change cases.

### *A. Political Question*

#### *1. Political Question in the Climate Change Cases*

Several early climate change public nuisance cases turned on the political question doctrine, which focuses on “the relationship between the judiciary and the coordinate branches of the Federal Government.”<sup>110</sup> The “dominant considerations” underlying the doctrine are “the appropriateness . . . of attributing finality to the action of the political departments and . . . the lack of satisfactory criteria for a judicial determination.”<sup>111</sup> In *Baker v. Carr*, the Supreme Court set out six factors for determining the existence of a nonjusticiable political question.<sup>112</sup> The climate change public nuisance opinions have concentrated on three of those factors: “[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and

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110. *Baker v. Carr*, 369 U.S. 186, 210 (1962).

111. *Id.* at 210.

112. *Id.* at 217.

manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>113</sup>

On its face, the first factor appears inapplicable to the climate change public nuisance cases. There is no “textually demonstrable constitutional commitment of the issue to a coordinate political department,” as the Constitution makes no mention of climate change or even the environment. Nonetheless, the district court in *California v. GM* asserted that “the textual commitment of interstate commerce and foreign policy to the political branches of government” weighed in favor of finding a political question.<sup>114</sup> Specifically, the court reasoned that imposing damages on defendant automakers through public nuisance might infringe on Congress’s power to regulate national and foreign commerce.<sup>115</sup> It might also infringe on foreign policy decisions by Congress or the president not to commit unilaterally to emissions reductions.<sup>116</sup>

Neither of these rationales is persuasive. Supreme Court precedents applying public nuisance to interstate pollution make clear that Congress’s authority to regulate interstate commerce is not exclusive.<sup>117</sup> As a general matter, the Constitution contemplates that courts will decide common law claims, and courts regularly impose damages on participants in commerce in the course of adjudicating such claims.<sup>118</sup> Furthermore, while climate change has global implications, the adjudication of public nuisance claims poses little risk of interfering with foreign policy. A judgment against climate change defendants would impact those defendants, of course, but would hardly establish a national or international emissions policy, nor would it preclude Congress from doing so.<sup>119</sup> Additionally, as the Supreme Court indicated in *Massachusetts v. EPA*, the possibility that a court ruling might reduce executive branch leverage in treaty negotiations does not establish courts’ lack of authority to issue such a ruling.<sup>120</sup>

The second *Baker v. Carr* factor, “a lack of judicially discoverable and manageable standards for resolving it,” was pivotal to the *Kivalina* district court’s characterization of climate change public nuisance as a political question.<sup>121</sup> The court found it difficult to balance the benefits derived from fossil fuel combustion, the availability and impacts of alternative energy sources, and the risks of increased

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113. *Id.* at 217. The other three factors assume action by the political branches and, given the federal government’s relatively modest actions on the issue, are minimally relevant to the climate change cases.

114. *People v. Gen. Motors Corp.*, No. C06-05755-MJJ, 2007 WL 2726871, at \*13 (N.D. Cal. Sept. 17, 2007).

115. *Id.* at \*14.

116. *Id.*

117. *See Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237–38 (1907); *Missouri v. Illinois*, 200 U.S. 496, 526 (1906).

118. *See AEP III*, 582 F.3d 309, 325 (2d Cir. 2009), *rev’d*, 564 U.S. 410 (2011).

119. *See id.*

120. 549 U.S. 497, 533–34 (2007).

121. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 874–76 (N.D. Cal. 2009), *aff’d*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 569 U.S. 1000 (2013).

flooding and other climate harms, and thus concluded that it could not make a principled and reasoned decision.<sup>122</sup> Distinguishing precedents applying public nuisance in other environmental contexts, the court noted that the climate change plaintiffs “seek to impose liability and damages on a scale unlike any prior environmental pollution case.”<sup>123</sup>

Admittedly, extensive liability and sizeable damages could result from climate change public nuisance litigation. This possibility does not render such cases judicially unmanageable, however. As the Second Circuit observed in *AEP*, “federal courts have successfully adjudicated complex common law public nuisance cases for over a century,” relying on common law principles and the Restatement (Second) of Torts.<sup>124</sup> Courts have developed various tools—including market share liability, substantial factor causation, and proximate causation—to address complex tort situations,<sup>125</sup> have applied such tools in public interest public nuisance litigation involving lead paint, for example,<sup>126</sup> and can apply these tools in climate change cases as well. Thus, the fact “that Plaintiffs’ injuries are part of a worldwide problem,” the Second Circuit explained, “does not mean Defendants’ contribution to that problem cannot be addressed through principled adjudication.”<sup>127</sup>

Ultimately, whether courts can manage public nuisance in the climate change context may depend on how they conceptualize climate change and public nuisance. If one considers climate change in its entirety, the innumerable sources of GHG emissions, and the complex tradeoffs involved in managing the activities that generate those emissions, courts might reasonably throw up their hands and pronounce the matter judicially unmanageable. In contrast, if one focuses on the conduct of fossil fuel companies or other critical players and the harms suffered by specific plaintiffs, adjudication of these claims resembles adjudication of more typical environmental public nuisances.

Indeed, the doctrine of public nuisance is open to varying interpretations that could prove pivotal in the climate change context. Doug Kysar has observed that the Restatement (Second) of Torts’ articulation of public nuisance “focus[es] on the severity of the alleged harm, rather than on a welfarist assessment of whether the defendant’s activity is socially desirable on net.”<sup>128</sup> Assessing the severity of harms caused by climate change is something that courts can manage; determining whether the sale and use of fossil fuels was reasonable in light of their social benefits and

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122. *Id.* at 874–75.

123. *Id.* at 876.

124. 582 F.3d at 326–28.

125. *See* Kysar, *supra* note 2, at 35–39.

126. *See* *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 546, 548–49 (Ct. App. 2017) (applying substantial factor analysis and joint and several liability); *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 134–36 (Ill. App. Ct.) (finding proximate cause requirement unmet and declining to apply market share liability theory), *appeal denied*, 833 N.E.2d 1 (Ill. 2005).

127. *AEP III*, 582 F.3d at 329.

128. Kysar, *supra* note 2, at 25.

harms seems less so.<sup>129</sup> Even under an approach focused on cost-benefit balancing, however, climate change public nuisance claims still may prove manageable. Under California law, for example, courts' analysis of the reasonableness of defendants' conduct might well focus on defendants' promotion of fossil fuels with knowledge of its hazards, rather than the sale of such fuels.<sup>130</sup> On this narrower issue, plaintiffs may face challenges of proof, but the matter seems amenable to judicial management.

The third *Baker v. Carr* factor, "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion," raises questions similar to the second factor. The district court in *AEP* found this factor "particularly pertinent," observing that "[t]he scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation."<sup>131</sup> In the court's view, the plaintiffs' request for a cap on defendants' carbon dioxide emissions would "require[] identification and balancing of economic, environmental, foreign policy, and national security interests."<sup>132</sup> The Second Circuit rejected this analysis, however, and explained that applying common law nuisance to climate change would require no initial policy determination.<sup>133</sup> Where plaintiffs seek only damages or abatement, as opposed to injunctive relief, courts can focus on the harms suffered by the plaintiff and defendant's responsibility for those harms, rather than engaging in a policy determination better suited to the political branches.<sup>134</sup>

## 2. Political Question Doctrine in the Supreme Court

District courts' readiness to apply the political question doctrine in climate change cases stands in sharp contrast with the Supreme Court's general reluctance to find political questions. In *Baker v. Carr* itself, the Court held that allegations that a state apportionment statute violated the Equal Protection Clause did *not* present a political question.<sup>135</sup> Moreover, since *Baker* was decided in 1962, the Supreme Court has rarely denied jurisdiction on political question grounds.<sup>136</sup> Until the

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129. *See id.* at 21 (suggesting that under a balancing approach, "plaintiffs will face the difficult prospect of demonstrating that the defendant's activities fail a social welfare cost-benefit test"); Gifford, *Climate Change*, *supra* note 2, at 255 ("Courts are inherently institutionally incapable of establishing rational, principled criteria for determining which emissions are 'unreasonable' in the context of specific litigation affecting only a handful of named defendants.").

130. *See* Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENV'T L. REV. 49, 89–90 (2018) (discussing *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 529–30).

131. *AEP I*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

132. 406 F. Supp. 2d at 272, 274.

133. *AEP III*, 582 F.3d at 331.

134. The failure of the political branches to regulate GHG emissions, the court of appeals further noted, only underscored the existence of regulatory gaps to be filled via the common law. 582 F.3d at 330.

135. 369 U.S. 186, 226–27 (1962).

136. *See* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1966 (2015).

Court's 2019 decision in *Rucho v. Common Cause*, “a majority of the Court ha[d] found only two [cases] to present political questions, and both involved strong textual anchors for finding that the constitutional decision rested with the political branches.”<sup>137</sup> In the first of these cases, *Gilligan v. Morgan*, the Court dismissed a suit by Kent State students alleging negligent training of the National Guard and demanding judicial supervision of the Guard's training and operations.<sup>138</sup> The Constitution explicitly vests in Congress the responsibility “for organizing, arming, and disciplining . . . the Militia,” the Court explained, making the matter a political question.<sup>139</sup> In the second case, *Nixon v. United States*, the Court dismissed a challenge to a Senate committee's taking of evidence in the impeachment proceedings of a former federal judge.<sup>140</sup> The case presented a political question, the Court emphasized, in light of the Constitution's “textual commitment” to the Senate of the “sole Power to try all impeachments.”<sup>141</sup>

Cases regarding the 2000 presidential election further suggest the limited reach of the political question doctrine.<sup>142</sup> One of the central issues in the litigation—“whether the state court had erroneously interpreted state law such that electors would be appointed contrary to the manner selected by the state legislature”—seemingly presented a political question governed by the Constitution's text.<sup>143</sup> As Rachel Barkow has contended, the Constitution (as amended by the Twelfth Amendment) expressly vests Congress with the authority to open states' certifications of their electoral votes and to count those votes, an authority that presumably extends to determining whether proper procedures for selecting electors had been followed.<sup>144</sup> The momentous nature of the litigation—which essentially would determine the outcome of the 2000 presidential election—further pointed in favor of dismissal.<sup>145</sup> The Court nevertheless decided the cases without even mentioning the political question doctrine.<sup>146</sup>

The Court explicitly rejected a political question argument a decade later in *Zivotofsky ex rel. Zivotofsky v. Clinton*.<sup>147</sup> The plaintiff in *Zivotofsky*, who was born in Jerusalem, sought to have Israel listed as his birthplace on his passport.<sup>148</sup> Although Congress had enacted a law directing the State Department to honor such requests, the State Department declined to do so based on its longstanding policy of not

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137. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 268 (2002).

138. 413 U.S. 1, 5–6 (1973).

139. *Id.* at 6–7 (quoting U.S. CONST. art. I, § 8, cl. 16).

140. 506 U.S. 224, 251 (1993).

141. *Id.* at 228–29 (quoting U.S. CONST. art. I, § 3, cl. 6).

142. *See* Barkow, *supra* note 137, at 273.

143. *Id.* at 277.

144. *See id.* at 277–78.

145. *See id.* at 295–96.

146. *See* *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000); *see also* Barkow, *supra* note 137, at 275, 300.

147. 566 U.S. 189, 191 (2012).

148. *Id.* at 193.

taking a position on Jerusalem’s political status.<sup>149</sup> The lower courts held that the case presented a political question because the executive branch possessed exclusive authority over the matter.<sup>150</sup> Notwithstanding the foreign policy interests at stake and the potential political implications of a court decision, the Supreme Court deemed the matter justiciable.<sup>151</sup> The plaintiffs sought only to enforce a specific statutory right, the Court explained, and the courts could resolve the plaintiffs’ claim by undertaking a “familiar judicial exercise” of deciding whether the plaintiffs’ interpretation of the statute was correct and whether the statute was constitutional.<sup>152</sup>

Finally, the Supreme Court held in *Rucho v. Common Cause* that political gerrymandering presents a nonjusticiable political question.<sup>153</sup> *Rucho* settled an issue with which the Court had struggled for decades. In 1986, a splintered Court had deemed partisan gerrymandering claims to be justiciable in *Davis v. Bandemer*.<sup>154</sup> Eighteen years later, in *Vieth v. Jubelirer*, Justice Scalia authored a plurality opinion contending that such claims were not justiciable and declaring that courts had failed to develop a workable standard for evaluating them.<sup>155</sup> However, Justice Kennedy, whose concurrence provided the critical fifth vote for dismissal, declined to find that the case presented a political question on the grounds that suitable standards for identifying an unconstitutional gerrymander might still emerge.<sup>156</sup> Returning to the issue in *Rucho*, the Court concluded that it was “not equipped to apportion political power as a matter of fairness.”<sup>157</sup> Focusing on the second *Baker v. Carr* factor, the Court declared, “There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral.”<sup>158</sup>

Viewed against these Supreme Court precedents, the climate change public nuisance cases present an improbable setting for applying the political question doctrine.<sup>159</sup> In contrast to the first two post-*Baker* instances where the Court found a political question—military operations and impeachment—the climate change cases present no textual constitutional commitment of the issues to the political branches. And in contrast to *Rucho*, public nuisance does not involve the

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149. *Id.*

150. *Id.* at 195.

151. *Id.* at 202.

152. *Id.* at 196.

153. 139 S. Ct. 2484, 2487 (2019).

154. 478 U.S. 109, 143 (1986), *abrogated by Rucho*, 139 S. Ct. 2484.

155. 541 U.S. 267, 278–81 (2004).

156. *Vieth*, 541 U.S. at 311–13 (Kennedy, J., concurring).

157. 139 S. Ct. at 2499.

158. *Id.* at 2500.

159. Indeed, the Supreme Court opinion in *AEP II*, with Justice Sotomayor recused, noted that “[f]our [m]embers of the Court would hold . . . that no . . . threshold obstacle [including political question doctrine] bars review.” 564 U.S. 410, 420, 420 n.6 (2011); *see also* Gifford, *Climate Change*, *supra* note 2, at 256 (conceding that “employing the political question doctrine to deny jurisdiction in climate change litigation would extend the doctrine beyond its traditional boundaries.”).



apportionment of political power, a matter that is inherently political. While courts may be called to balance costs and benefits in analyzing public nuisance, such balancing presents no greater adjudicative difficulties and involves no more of a policy determination than other decisions courts routinely issue.

Ultimately, when a court concludes that public nuisance presents a political question, the political branches are left to decide whether climate change (or some other alleged problem) constitutes a public nuisance. Such a stance is nonsensical in the vast majority of jurisdictions where public nuisance is a common law claim because courts—not legislatures or agencies—decide common law claims.<sup>160</sup>

### B. Standing

Several district court opinions from the first wave of climate change litigation, including *Kivalina* and *Comer*, dismissed plaintiffs' claims for lack of standing.<sup>161</sup> Although standing has not played a significant role in more recent climate change public nuisance decisions, the defendants in the *Oakland* and *New York City* cases have raised similar arguments involving causation.<sup>162</sup>

The *Kivalina* district court held that the plaintiffs lacked standing because they could not trace their harms to the defendants or any other specific entity.<sup>163</sup> Addressing plaintiffs' arguments regarding the causation element of standing, the court deemed it "entirely irrelevant whether any defendant 'contributed' to the harm" in the absence of a legal limit on GHG emissions.<sup>164</sup> The district court in *Comer* also dismissed the public nuisance and other common law claims before it for lack of standing.<sup>165</sup> Although the court's written opinion did not elaborate on the standing issue, it can be inferred from the Fifth Circuit panel's opinion reversing

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160. See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 413 (2011); see also Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 112–13 (2007) (suggesting that courts, rather than misapply political question doctrine, should simply dismiss for failure to state a claim upon which relief can be granted).

161. Native Vill. of *Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 569 U.S. 1000 (2013); *Comer II*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285, at \*1 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *vacated and reh'g granted*, 598 F.3d 208 (5th Cir. 2010).

162. See Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss First Amendment Complaint at 19–22, 20 n.13, *BP I*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. 3:17-cv-06011-WHA), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180419\\_docket-317-cv-06011\\_motion-to-dismiss-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180419_docket-317-cv-06011_motion-to-dismiss-1.pdf) [<https://perma.cc/XM99-M2L6>] (setting out causation arguments and citing district court opinion in *Kivalina*); Memorandum of Law of Chevron Corp., ConocoPhillips, and Exxon Mobil Corp. Addressing Common Grounds in Support of Their Motions to Dismiss Plaintiff's Amended Complaint at 34–35, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 1:18-cv-00182-JFK), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180330\\_docket-118-cv-00182\\_memorandum-of-law-3.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180330_docket-118-cv-00182_memorandum-of-law-3.pdf) [<https://perma.cc/24HM-DA6Q>] (contesting various elements of standing, including causation).

163. *Kivalina*, 663 F. Supp. 2d at 880–81.

164. 663 F. Supp. 2d at 880.

165. *Comer II*, 2007 WL 6942285, at \*1.

the trial court that the *Comer* plaintiffs' claims likewise had foundered on causation.<sup>166</sup>

Application of standing doctrine to common law tort claims essentially requires courts to take a preliminary peek at the merits: standing's requirements of injury, traceability, and redressability overlap with proof of plaintiffs' harm, whether defendants caused that harm, and the relief to which plaintiffs may be entitled.<sup>167</sup> This overlap raises serious doubts as to whether standing is even applicable to common law claims.<sup>168</sup> Common law claims inherently belong before Article III courts, and a plaintiff's failure to demonstrate harm or causation should lead to dismissal on the substantive merits, not dismissal for lack of standing.<sup>169</sup> Even if a standing inquiry were appropriate, the climate change public nuisance plaintiffs would likely be able to satisfy its requirements in most instances.<sup>170</sup> The plaintiffs—often state and local governments—can point to concrete injuries from rising sea levels and increased risks of catastrophic fire, heat waves, and other consequences of climate change.<sup>171</sup> Moreover, suits for damages or abatement would redress such injuries.<sup>172</sup>

Causation might pose a more difficult question, and it has been the most contested element of standing in the district court climate change public nuisance opinions. Yet in most instances, the causal link between climate change plaintiffs' injury and defendants' conduct seems sufficient to demonstrate standing. The requirement that a plaintiff's injury be "fairly traceable" to defendant's conduct, which the Supreme Court has described as "relatively modest," is less stringent than

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166. The Fifth Circuit, after noting that the plaintiffs had sufficiently alleged injury in fact and redressability—which had not been contested by the defendants—focused its analysis on causation. *Comer I*, 585 F.3d 855, 863–64 (5th Cir. 2009), *vacated and reh'g granted*, 598 F.3d 208 (5th Cir. 2010). The court rejected the defendants' contentions that causation was too attenuated and that their alleged contributions to plaintiffs' injuries were too minimal. *Id.* at 864–67.

167. See Lin & Burger, *supra* note 130, at 71–72.

168. See Ewing & Kysar, *supra* note 160, at 388–89.

169. See Ewing & Kysar, *supra* note 160, at 413; Gifford, *Climate Change*, *supra* note 2, at 247 (noting that standing typically is applied to statutory or constitutional claims and that "courts usually hold that the proper ground for dismissal of a tort claim is on substantive grounds, not the standing issue").

170. Furthermore, there is little doubt that the plaintiffs will litigate these cases vigorously, thus satisfying standing's underlying purpose of ensuring judicial decision making in the context of an adversarial process. *Flast v. Cohen*, 392 U.S. 83, 106 (1968); see Siegel, *supra* note 160, at 88–89 (acknowledging importance of adversarial presentation of issues to sound decision making, but questioning the ability of standing doctrine to advance that purpose).

171. See Swan, *supra* note 2, at 1259–60 (noting that in "public nuisance cases, the common law has traditionally offered a kind of plenary public nuisance standing to municipalities").

172. See Gifford, *Climate Change*, *supra* note 2, at 244 (observing that in *Kivalina*, "where the requested remedy was damages, there was obviously no problem with the court's ability to redress the plaintiffs' harm through damage awards if the court traced the plaintiff's harm to the defendant's conduct").

the requirement of tort causation.<sup>173</sup> In *AEP*, the Second Circuit recognized the modest nature of this requirement when it held that plaintiffs needed only to show that a “pollutant causes or contributes to the kind of injuries alleged by the plaintiffs.”<sup>174</sup> Allegations that a defendant’s contribution to the problem is too small, the Second Circuit added, are “best left to the rigors of evidentiary proof at a future state of the proceedings, rather than dispensed with as a threshold question of constitutional standing.”<sup>175</sup>

Evidence linking GHG emissions and climate change impacts has become stronger with time.<sup>176</sup> As a result, demonstrating that a plaintiff’s harm is fairly traceable to a defendant’s conduct is likely to be easier than at the time of the district court rulings in *Comer* and *Kivalina*. Proximate causation—which incorporates societal judgments regarding whether defendants should be held legally responsible for fairly traceable harms—presents a more challenging issue for plaintiffs.<sup>177</sup> However, analysis of that issue should occur when a court considers the substantive merits of a public nuisance claim, not as a threshold matter.

### C. Other Separation-of-Powers Rationales

In recent climate change public nuisance decisions, separation-of-powers rationales have appeared in the form of doctrines aimed at limiting courts’ role in foreign affairs. Both the *Oakland* and *New York City* courts, when confronted with public nuisance claims involving foreign GHG emissions, expressed separation-of-powers concerns analogous to those underlying the political question doctrine. The *New York City* court held, “[T]o the extent that the City seeks to hold Defendants liable for damages stemming from foreign greenhouse gas emissions, the City’s claims are barred by the presumption against extraterritoriality and the need for judicial caution in the face of ‘serious foreign policy consequences.’”<sup>178</sup> Similarly, the *Oakland* court declared that “the principles underlying the presumption against extraterritoriality” warrant “great caution before fashioning

173. *Bennett v. Spear*, 520 U.S. 154, 171 (1997); *Comer I*, 585 F.3d 855, 864 (5th Cir. 2009) (citing cases), *vacated and reh’g granted*, 598 F.3d 208 (5th Cir. 2010); *AEP III*, 582 F.3d 309, 345–47 (discussing cases), *rev’d*, 564 U.S. 410 (2011).

174. 582 F.3d at 346.

175. *Id.* at 347.

176. See Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 CLIMATIC CHANGE 229 (2014) (finding that nearly two-thirds of industrial carbon dioxide and methane emissions can be traced to ninety industrial carbon producers); Brenda Ekwurzel, James Boneham, M.W. Dalton, Richard Heede, Roberto J. Mera, Myles R. Allen & Peter C. Frumhoff, *The Rise in Global Atmospheric CO<sub>2</sub>, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers*, 144 CLIMATIC CHANGE 579 (2017) (using the climate model to quantify contribution of leading carbon producers’ emissions to specific climate impacts, including temperature increase and sea level rise); PAUL GRIFFIN, THE CARBON MAJORS DATABASE: CDP CARBON MAJORS REPORT 2017 (2017).

177. Kysar, *supra* note 2, at 29–41.

178. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018) (quoting *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1407 (2018)).

federal common law in areas touching on foreign affairs.<sup>179</sup> In the context of the climate change public nuisance claims, however, the applicability of judicial caution and the presumption against extraterritoriality is highly questionable. Reliance on these rationales underscores trial courts' continuing reluctance to adjudicate the substance of public nuisance.

### 1. *Presumption Against Extraterritoriality*

The presumption against extraterritoriality is a canon of statutory interpretation that “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters.”<sup>180</sup> In analyzing whether a statute applies extraterritorially, a court first asks whether a clear affirmative indication in the statute rebuts the presumption against extraterritoriality.<sup>181</sup> If the statute contains no clear indication of extraterritorial application, a court must then “look to the statute’s focus” to “determine whether the case involves a domestic application of the statute.”<sup>182</sup>

The public nuisance climate change opinions have extensively cited two Supreme Court decisions involving the presumption, *Kiobel v. Royal Dutch Petroleum Co.* and *Jesner v. Arab Bank*. In *Kiobel*, the Supreme Court applied the presumption to the Alien Tort Statute (ATS).<sup>183</sup> *Kiobel* acknowledged that courts “typically apply the presumption [against extraterritoriality] to discern whether an Act of Congress regulating conduct applies abroad.”<sup>184</sup> The ATS “does not regulate conduct,” as the Court observed, but is a “strictly jurisdictional” statute “that allow[s] federal courts to recognize certain causes of action based on sufficiently definite norms of international law.”<sup>185</sup> The Court nonetheless applied the presumption to the ATS because “the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.”<sup>186</sup> In *Jesner*, the Court addressed an issue *Kiobel* left unresolved: whether foreign corporations may be sued under the ATS.<sup>187</sup> Answering that question in the negative, the Court concluded that separation-of-powers and foreign policy concerns underlying the presumption counseled against allowing ATS actions against foreign corporations.<sup>188</sup>

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179. *BP I*, 325 F. Supp. 3d 1017, 1025, 1028 (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *modified*, 969 F.3d 895 (9th Cir. 2020).

180. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010), *superseded by statute*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

181. *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2101 (2016).

182. *Id.* at 2101.

183. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116–17 (2013).

184. *Id.* at 116.

185. *Id.* at 116.

186. *Id.* at 116.

187. *Jesner v. Arab Bank PLC*, 138 S. Ct. 1386, 1398 (2018).

188. *Id.* at 1403, 1407.

Relying heavily on *Jesner*, the *New York City* court applied the presumption against extraterritoriality to the plaintiffs' common law claims.<sup>189</sup> *Jesner*, the court reasoned, was not limited to the ATS, but more broadly counseled against recognizing causes of actions that may implicate the laws and policies of foreign governments.<sup>190</sup> Similarly, the *Oakland* court found the plaintiffs' efforts to apply public nuisance to foreign emissions "counter to . . . the presumption against extraterritoriality."<sup>191</sup> Quoting *Kiobel*, the *Oakland* court stated that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified' where 'the question is not what Congress has done but instead what courts may do.'"<sup>192</sup>

Although this reluctance to adjudicate claims involving foreign emissions may be understandable, the *Oakland* and *New York City* courts erred in applying the federal presumption against extraterritoriality. First, the presumption is a canon of statutory interpretation; it is irrelevant to common law claims such as those asserted by the *New York City* plaintiffs.<sup>193</sup> Choice-of-law rules, not principles of statutory interpretation, govern the applicability of common law to conduct occurring outside the United States.<sup>194</sup> Second, where a public nuisance claim is based on statute—as in California<sup>195</sup>—state law rather than federal law governs the existence and scope of any presumption against extraterritoriality.<sup>196</sup> Third, any presumption against extraterritoriality (whether federal or state) is arguably irrelevant because the climate change public nuisance cases may not even involve the extraterritorial application of law. Under federal law, whether a claim involves extraterritorial application of

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189. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018).

190. *Id.* (quoting *Jesner*, 138 S. Ct. at 1399, for the proposition "that where an action may have significant foreign relations implications, 'recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.'").

191. *BP I*, 325 F. Supp. 3d 1017, 1025 (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *modified*, 969 F.3d 895 (9th Cir. 2020).

192. *Id.* (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013)).

193. See William S. Dodge, *Misusing the Presumption Against Extraterritoriality in Climate Change Litigation*, 1 CTS. & JUST. L.J. 118, 121 (2019); *E.E.O.C v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (describing presumption as a canon of construction for ascertaining congressional intent).

194. See Dodge, *supra* note 193, at 123; Brief of Conflict of Laws and Foreign Relations Law Scholars as Amici Curiae in Support of Plaintiff-Appellant and Reversal of the District Court's Decision at 7, *City of New York v. BP P.L.C.*, No. 18-2188 (2d Cir. Nov. 15, 2018) [hereinafter *Conflict of Laws Brief*], [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20181115\\_docket-18-2188\\_amicus-brief.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20181115_docket-18-2188_amicus-brief.pdf) [https://perma.cc/3L7Z-6QPK]. Under New York choice-of-law rules, the law of the jurisdiction having the greatest interest—normally the locus of the plaintiffs' injuries or property—would apply. See Dodge, *supra* note 193, at 123.

195. See First Amended Complaint at 58, *BP I*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. 3:17-cv-06011-WHA), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180404\\_docket-317-cv-06011\\_complaint-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180404_docket-317-cv-06011_complaint-1.pdf) [https://perma.cc/2GRF-GH5M].

196. See Dodge, *supra* note 193, at 122–23 (noting that California's presumption against extraterritoriality generally turns on the location of the conduct, but has not been applied when conduct outside the state causes injury within the state). For cases recognizing California's presumption against extraterritoriality, see *Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 (Cal. 2011); *Diamond Multimedia Sys., Inc. v. Superior Ct.*, 968 P.2d 539, 553 (Cal. 1999), *cert. denied*, 527 U.S. 1003.

law is determined by the focus of the statute (in the case of a legislative enactment) or the claim.<sup>197</sup> The focus of a public nuisance claim is the place where the interference with a public right or public property occurs—which in the climate change public nuisance cases involves a domestic application of law.<sup>198</sup> Under California law, adjudicating public nuisance actions involving foreign GHG emissions may not involve the extraterritorial application of state law either; the critical issues are whether the crucial element(s) of a claim occurred in California and the comparative impairment to the law of the respective states involved.<sup>199</sup> Neither the *New York City* nor *Oakland* courts addressed these issues.

## 2. Judicial Caution

The “judicial caution” invoked in the *Oakland* and *New York City* opinions likewise originates in ATS jurisprudence. The notion of judicial caution first appeared in the Supreme Court’s decision in *Sosa v. Alvarez-Machain*, which held that a private right of action could be brought under the ATS for certain torts in violation of the law of nations.<sup>200</sup> In 1789, when the ATS was enacted, three specific torts were actionable: violation of safe conducts, infringement of the rights of ambassadors, and piracy.<sup>201</sup> Beyond these three, *Sosa* explained, “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [three] 18th-century paradigms.”<sup>202</sup> It was in this

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197. See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010), *superseded by statute*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2101, 2108, 2111 (2016) (holding that focus of RICO’s private right of action was domestic injury to business and property and dismissing plaintiffs’ claims for foreign injury even though defendants engaged in conduct in the United States); Dodge, *supra* note 193, at 121.

198. See Conflict of Laws Brief, *supra* note 194, at 7 n.3.

199. *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 927–37 (Cal. 2006) (applying a California law prohibiting the unauthorized recording of telephone conversations to a Georgia defendant that recorded its calls with California residents and applying “comparative impairment analysis” of laws of respective jurisdictions). In cases when out-of-state conduct causes in-state injury, California has looked to conflict-of-law principles, rather than any presumption against extraterritoriality, to determine the applicable law. See Brief of Conflict of Laws and Foreign Relations Law Scholars as Amici Curiae in Support of Plaintiff-Appellants and Reversal of the District Court’s Decision, *BP IV*, 960 F.3d 570 (9th Cir. 2020) (No. 17-cv-06011) [hereinafter *Oakland Amicus Brief*]. The “comparative impairment” analysis that California applies to resolve conflicts of law requires a court to “evaluate[] and compare[] the nature and strength of the interest of each jurisdiction in the application of its own law ‘to determine which state’s interest would be more impaired if its policy were subordinated to the policy of the other state’ and then ultimately appl[y] . . . ‘the law of the state whose interest would be the more impaired if its law were not applied.’” *Kearney*, 137 P.3d at 922 (citations omitted); see *Oakland Amicus Brief*, *supra*, at 7 (“When conduct and injury occur in different jurisdictions, the California Supreme Court regularly applies the law of the place of injury, recognizing that ‘a state may act to protect the interests of its own residents while in their home state.’” (citation omitted)).

200. 542 U.S. 692, 724 (2004).

201. *Id.*

202. *Id.* at 725.

context—determining the specific claims that may be brought under the ATS—that the Supreme Court has urged “judicial caution.”<sup>203</sup> An important reason behind this caution is the “adverse foreign policy consequences” that might follow from holding that “a foreign government or its agent has transgressed” international law,<sup>204</sup> a concern echoed by the Court in *Jesner*.<sup>205</sup>

Judicial caution, a concept grounded in ATS jurisprudence, has no history of application to the common law or to state claims.<sup>206</sup> Granted, public nuisance cases like *Oakland* and *New York City* do raise some of the concerns expressed in *Sosa* and *Jesner*—including the potential ramifications of applying domestic law to foreign corporations and the preference that the political branches make policy decisions. However, there is no legal precedent for transplanting the notion of judicial caution from the ATS context to public nuisance. Indeed, the two contexts are distinguishable. In the ATS cases, the courts were asked to decide whether to create or expand an implied federal cause of action, and the Supreme Court expressed serious concern that such litigation had caused “significant diplomatic tensions”<sup>207</sup> or might result in holding “a foreign government or its agent” liable for violating international norms.<sup>208</sup> In the climate change cases, on the other hand, courts are being asked to apply a well-established cause of action—state public nuisance—to private foreign actors.

Moreover, the fact that climate change is the subject of the Paris Agreement and other international agreements does not, as the *Oakland* and *New York City* courts reasoned, require the courts to decline to intervene.<sup>209</sup> A public nuisance judgment against multinational fossil fuel companies would not conflict with any obligation under these agreements, nor would it impose any obligation on foreign governments. The fact that international climate agreements and these public nuisance cases address the same global problem—climate change—does not require courts to exercise judicial caution under existing law. Many domestic cases, such as product liability actions, involve foreign entities and affect international treaty negotiations, yet pose no justiciability problem.<sup>210</sup> Indeed, the *Oakland* court conceded that it was applying judicial caution expansively when it stated that the

203. *Id.*

204. *Id.* at 727–28. The Court did note the limited role of federal courts in making common law and recognizing private rights of action as further grounds for caution. *Id.* at 726–27.

205. *Jesner v. Arab Bank PLC*, 138 S. Ct. 1386, 1403 (2018).

206. *See* Dodge, *supra* note 193, at 124 (“[T]he climate change cases involve the application of existing state laws not the creation of an implied cause of action under a federal statute.”).

207. *Jesner*, 138 S. Ct. at 1406.

208. *Sosa*, 542 U.S. at 727; Dodge, *supra* note 193, at 126.

209. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018) (observing that plaintiffs’ claims “implicate countless foreign governments and their laws and policies”); *BP I*, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018) (noting that “[g]lobal warming is already the subject of international agreements” and worrying that the imposition of liability “would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil”), *vacated*, 960 F.3d 570 (9th Cir. 2020), *modified*, 969 F.3d 895 (9th Cir. 2020).

210. *See* Gifford, *Climate Change*, *supra* note 2, at 252.

ATS precedents stood for a “broader point . . . that federal courts should exercise great caution before fashioning federal common law in areas touching on foreign affairs.”<sup>211</sup>

#### D. Federalism Rationales

The recent wave of climate change public nuisance cases generally asserts public nuisance claims founded on state law.<sup>212</sup> Not surprisingly, the *Oakland* and *New York City* district courts have relied on federalism-based rationales, in addition to separation-of-powers rationales, to dismiss plaintiffs’ claims.

##### 1. Uniquely Federal Interests

In denying the plaintiffs’ motion to remand the case to state court, the *Oakland* court held that federal common law “necessarily governed” the plaintiffs’ public nuisance claims.<sup>213</sup> To support this holding, the court cited legal doctrine authorizing federal courts to fashion federal common law if “necessary to protect uniquely federal interests.”<sup>214</sup> Uniquely federal interests, the Supreme Court has explained, involve those

narrow areas [that are] . . . concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.<sup>215</sup>

As discussed more extensively elsewhere, the areas involving “uniquely federal interests” are far narrower than the *Oakland* court understood them to be.<sup>216</sup> The Supreme Court has explained that the “rights and obligations of the United States” are implicated when the United States’ contractual rights and obligations are at issue or when federal officials may be held liable for actions taken in the course of their duties.<sup>217</sup> Similarly, “interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations” refer specifically to disputes involving questions of international law, the act of state doctrine, or competing interests of states in their sovereign capacity.<sup>218</sup>

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211. 325 F. Supp. 3d at 1028.

212. See *supra* Section I.C.5, I.C.6.

213. *BP III*, No. C 17-06011 WHA, 2018 WL 1064293, at \*2 (N.D. Cal. Feb. 27, 2018), *vacated sub nom. BP II*, 969 F.3d 895 (9th Cir. 2020).

214. *Id.* at \*2 (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

215. *Tex. Indus., Inc.*, 451 U.S. at 641.

216. See Lin & Burger, *supra* note 130, at 64–66.

217. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–05 (1988).

218. See Diane P. Wood, *Back to the Basics of Erie*, 18 LEWIS & CLARK L. REV. 673, 692–95 (2014) (quoting *Tex. Indus., Inc.*, 451 U.S. at 641).



The climate change cases do not fall within any of the categories of cases that the Court has identified as involving “uniquely federal interests.” The cases are not admiralty cases, they do not concern the rights or obligations of the United States or of federal officials, and they do not implicate the conflicting rights of states or relations with foreign nations. The *Oakland* court nevertheless concluded that the “plaintiffs’ claims, if any, are governed by federal common law” because the problem of climate change “crie[s] out for a uniform and comprehensive solution,” “governed by as universal a rule of apportioning responsibility as is available.”<sup>219</sup> While the court correctly described climate change as a global threat, its analysis did not establish the existence of “interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations”<sup>220</sup> that would warrant the application of federal common law.

## 2. Foreign Policy Preemption

The concerns raised by the *Oakland* and *New York City* district courts under the rubric of judicial caution<sup>221</sup> might be more suitably addressed through the doctrine of foreign policy preemption. Foreign policy preemption of state law, which may involve either field preemption or conflict preemption, allows “concern for uniformity in this country’s dealings with foreign nations” to override “an exercise of state power that touches on foreign relations.”<sup>222</sup> Field preemption applies where “the Constitution entrusts foreign policy exclusively to the National Government,” regardless of whether the federal government has acted.<sup>223</sup> In these areas of “exclusive[] federal competence,” states may not intrude, even if state law does not conflict with federal policy.<sup>224</sup> However, if a state is addressing a traditional state responsibility, courts consider conflict preemption, which—in the case of conflict between state law and federal obligations—balances “the strength or the traditional importance of the state concern asserted” against “the strength of the federal foreign policy.”<sup>225</sup>

Field preemption is inapplicable to climate change public nuisance claims seeking abatement or damages because such claims do not involve foreign policy matters entrusted by the Constitution to the federal government. Only under an extremely expansive definition of foreign affairs—one that encompasses state laws having an impact on foreign corporations—might field preemption arguably apply. Such a definition would represent a dramatic departure from precedent<sup>226</sup> and

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219. 2018 WL 1064293, at \*3, \*5.

220. *Tex. Indus., Inc.*, 451 U.S. at 641.

221. *See supra* Section II.C.2.

222. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)).

223. *Id.* at 419 n.11.

224. *Zschernig v. Miller*, 389 U.S. 429, 442 (1968) (Stewart, J., concurring).

225. *Garamendi*, 539 U.S. at 419 n.11.

226. Under those precedents, courts are to focus on the “real purpose” of the state law to determine whether it concerns an area of traditional state responsibility. *Movsesian v. Victoria*

preempt wide swaths of state regulation.<sup>227</sup> Indeed, because public nuisance claims, whether based on statute or common law, reflect the exercise of a state's traditional police powers,<sup>228</sup> conflict preemption is the appropriate lens for analysis. Yet the conditions for finding conflict preemption are not met either, as the doctrine requires an affirmative federal act “fit to preempt” state law, such as a treaty or executive agreement with which the state law would interfere.<sup>229</sup> No such act exists in the area of climate change, where U.S. pledges under the Paris Agreement merely commit to achieving minimum standards but do not bar further action by states.

### 3. A “Multiplicity of Standards” Argument?

Notwithstanding the inapplicability of “uniquely federal interests” doctrine and foreign policy preemption, a more plausible argument can be made against applying state public nuisance standards to foreign GHG emissions. In *International Paper Co. v. Ouellette*, the Supreme Court held that the Clean Water Act precludes a source of water pollution from being subjected to pollution standards other than those derived from federal law or the law of the state in which the source is located.<sup>230</sup> Subjecting a polluter to multiple standards, the Court explained, “would lead to chaotic confrontation between sovereign states” and make it difficult, if not impossible, for a polluter to comply with those standards.<sup>231</sup> Interests of efficiency and fairness might similarly counsel against subjecting a foreign GHG emitter to the standards of multiple nations, let alone the standards of multiple states and other subnational entities. The *Oakland* court essentially adopted this line of reasoning in denying the plaintiffs’ motion to remand the case to state court:

Taking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law. A patchwork of fifty different answers to the same fundamental global issue would be unworkable. This is not to say that the ultimate answer under our federal common law will favor judicial relief. But it is to say that the extent of any judicial relief should be uniform across our nation.<sup>232</sup>

*Ouellette*’s relevance, however, is limited by the fact that it was a statutory interpretation case. As the Court expressly noted, the imposition of multiple

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Versicherung AG, 670 F.3d 1067 (9th Cir. 2012). Thus, a state’s efforts “to vindicate the claims of Holocaust survivors,” *Garamendi*, 539 U.S. at 426, to provide redress to Armenian genocide victims, *Morsesian*, 670 F.3d at 1076, or to “withhold[] remittances to legatees residing in Communist countries,” *Zschernig*, 389 U.S. at 440, have been preempted.

227. Cf. Conflict of Laws Brief, *supra* note 194, at 21 (suggesting extreme examples of preemption where foreign policy consequences are sufficient to invalidate state law).

228. See Lin, *supra* note 9, at 973.

229. *Garamendi*, 539 U.S. at 416–19.

230. 479 U.S. 481, 494–99 (1987).

231. *Id.* at 496–97 (quoting *Illinois v. City of Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984)).

232. *BP III*, No. C 17-06011 WHA, 2018 WL 1064293, at \*3 (N.D. Cal. Feb. 27, 2018), *vacated sub nom. BP II*, 969 F.3d 895 (9th Cir. 2020).

standards would “serious[ly] interfere[] with the achievement of the full purposes and objectives of Congress,” which had sought to establish an efficient and predictable permit system through the Clean Water Act.<sup>233</sup> In the climate change public nuisance cases, by contrast, no permitting system governs the foreign GHG emissions of the defendants. More importantly, if a foreign defendant’s GHG emissions have negatively impacted a plaintiff, efficiency and fairness concerns—as well as the international law obligation not to cause transboundary environmental harm<sup>234</sup>—argue in favor of internalizing the costs of those emissions by requiring the defendant to abate or compensate for those impacts. Rather than dismissing state law–based claims because of the global nature of climate change, courts at least should address whether the defendants’ conduct has created a public nuisance.

### *E. Displacement*

Having recast the state public nuisance claims as federal claims, the *Oakland* court concluded that the portion of those claims pertaining to domestic conduct was displaced by statute.<sup>235</sup> The *Oakland* court relied on the Supreme Court’s holding in *AEP* that the Clean Air Act displaced federal nuisance claims against fossil fuel–fired power plants.<sup>236</sup> Although the *Oakland* court initially suggested that the claims before it might be distinguishable because they focused on the production and sale of fossil fuels rather than their combustion,<sup>237</sup> it later dismissed the case based on its conclusion that “Congress has vested in the EPA the problem of greenhouse gases.”<sup>238</sup>

The Supreme Court’s displacement analysis in *AEP*, however, did not extend so broadly. The CAA, the Court noted, focuses on regulating emission sources, directing the EPA to list categories of stationary sources of air pollution and to establish emission standards for those sources.<sup>239</sup> Nowhere in the opinion does the Court suggest that the statute’s delegation of authority over emission sources—and the accompanying displacement of common law—extends beyond the polluting activity itself.

## III. CONSEQUENCES OF DISTRICT COURTS’ DODGING

District courts have resorted to a range of avoidance doctrines to dodge the substance of climate change public nuisance claims.<sup>240</sup> Perhaps as a result of a

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233. 479 U.S. at 493.

234. See DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 472 (5th ed. 2015).

235. *BP III*, 2018 WL 1064293 at \*4.

236. *AEP II*, 564 U.S. 410, 424 (2011); *BP III*, 2018 WL 1064293, at \*4.

237. 2018 WL 1064293, at \*4.

238. *BP I*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *modified*, 969 F.3d 895 (9th Cir. 2020).

239. 564 U.S. at 424.

240. See *supra* Part II.

divided Supreme Court's affirmance of jurisdiction in *AEP*, the political question and standing doctrines cited frequently in the early cases have given way to the use of other avoidance doctrines. Admittedly, courts' reluctance to adjudicate the substance of climate change public nuisance claims is not unexpected.<sup>241</sup> Climate change cases present complex circumstances for applying public nuisance doctrine, precedents for doing so are nonexistent, and the economic and political implications of a nuisance finding could be severe.<sup>242</sup> Yet as this Part explores, the dodging of public nuisance has ramifications beyond individual case outcomes for the avoidance doctrines, the rule of law, and society's overall response to climate change.

*A. The District Courts Have Overextended Avoidance Doctrines*

Outside of the climate change context, commentators have roundly criticized the courts for their "messy and unprincipled" application of political question, standing, and other avoidance doctrines.<sup>243</sup> The following discussion will not rehash these critiques, which often allege the manipulation of these doctrines to avoid difficult questions or achieve politically and ideologically motivated results.<sup>244</sup> Consistent with these critiques, the district courts' use of these doctrines in climate change cases has had the effect of avoiding the substance of public nuisance law. Yet as the discussion here will explain, the district court rulings in the climate change

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241. See Ewing & Kysar, *supra* note 160, at 355 (opining that courts are "[u]nderstandably resistant to the claim that global climate change is an ordinary pollution nuisance of the kind adjudicated for centuries").

242. See Kysar, *supra* note 2, at 9 ("[T]rying to force climate change into traditional common law categories calls into question basic features of tort law itself."); Gifford, *Climate Change*, *supra* note 2, at 204 (contending that "the public law model of tort litigation is the wrong tool for the job of addressing climate change and that wise judges should use the traditional doctrines of judicial restraint to reject the invitation to engage in faux legislation?").

243. See, e.g., Ewing & Kysar, *supra* note 160, at 415; RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 169 (5th ed. 2009) (criticizing Supreme Court justices' manipulation of standing doctrine to reach desired outcomes); Siegel, *supra* note 160, at 89 (contending that the "standing doctrine does not bear any necessary relationship to vigorous advocacy[,] [n]or does it even serve as a suitable, if rough, proxy for the practical likelihood that a plaintiff will do a good job of illuminating issues for the courts"); William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221, 223 (1988) (noting the "apparent lawlessness of many standing cases"); Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 *ARIZ. ST. L.J.* 1, 17–18 (2017) (recounting criticisms of lower courts' application of political question doctrine); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 *HARV. L. REV.* 1275, 1277 (2006) (criticizing Supreme Court's demand for judicially manageable standards, found most explicitly in political question doctrine, as "more often the products or outputs of constitutional adjudication than inherent elements of the Constitution's meaning"); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 *YALE L.J.* 597, 600–01 (1976) (contending that courts in political question cases essentially affirm the constitutionality of action by the political branches rather than abstain from judicial review); John Harrison, *The Political Question Doctrines*, 67 *AM. U. L. REV.* 457, 457 (2017) (contending that "lower court decisions have seriously misunderstood the [political question] doctrine by treating it as a limit on subject matter jurisdiction" and refusing to reach the merits of claims).

244. See *supra* note 243, for detailed criticisms.

public nuisance cases have been especially unmoored and have strayed far from prior decisions.

First, consider the political question doctrine. *Baker v. Carr* sets out a malleable, multifactor inquiry that can hardly be expected to generate consistent results. Nonetheless, the doctrine rests on a fairly straightforward premise: “[T]hat the Constitution vests authority to decide some constitutional questions in the political branches because of their unique institutional characteristics and strengths.”<sup>245</sup> Indeed, the three post-*Baker v. Carr* cases where the Supreme Court found a political question all alleged constitutional violations.<sup>246</sup> The plaintiffs in *Rucho* asserted violations of the First Amendment, Equal Protection Clause, and Elections Clause.<sup>247</sup> The plaintiff in *Nixon v. United States* alleged a violation of the Impeachment Trial Clause.<sup>248</sup> And the plaintiffs in *Gilligan v. Morgan* claimed deprivations of life and liberty without due process of law.<sup>249</sup> For the political question doctrine to apply, it was not enough for defendants to show that the political branches were more capable than the courts of addressing the matter in question. Rather, these cases raised political questions because their determination was “entrusted to one of the political branches or involve[d] no judicially enforceable rights.”<sup>250</sup>

Viewed against these precedents, the district courts’ invocations of the political question doctrine in *AEP* and *Kivalina* are striking. The plaintiffs in the climate change cases asserted *common law* public nuisance claims, not constitutional claims. By their very nature, common law claims are within the province of the courts, not the political branches, to decide.<sup>251</sup> As the Supreme Court underscored in rejecting a political question claim in *Zivotofsky*, “the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid.”<sup>252</sup> Use of the political

245. Barkow, *supra* note 137, at 242; *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (“The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”); see Grove, *supra* note 136, at 1909 (“[T]he political question doctrine instructs that the courts may not decide certain issues—most prominently, federal constitutional claims—at all.”); Henkin, *supra* note 243, at 599. The doctrine is also applied with some frequency to claims involving foreign affairs. See CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3534.2 (3d ed. 2008); see also Gifford, *Climate Change*, *supra* note 2, at 251 n.398 (citing tort actions in which federal courts of appeals applied political question doctrine).

246. Pre-*Baker* Supreme Court decisions applying the doctrine also involved constitutional claims. See Barkow, *supra* note 137, at 253–63 (discussing pre-*Baker* cases).

247. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

248. *Nixon v. United States*, 506 U.S. 224, 226 (1993).

249. *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973).

250. *Rucho*, 139 S. Ct. at 2494 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004)).

251. The Supreme Court held in *Oneida County v. Oneida Indian Nation* that a federal common law claim to enforce aboriginal land rights did not present a political question. 470 U.S. 226, 249–50 (1985). In doing so, the Court rejected arguments that the claim was nonjusticiable in light of Congress’s plenary power over Indian affairs and the need to adhere to a political decision already made. See *id.*

252. *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012).

question doctrine—a doctrine aimed at safeguarding the separation of powers—to preclude courts from adjudicating non-constitutional common law claims demonstrates a fundamental misunderstanding of the doctrine.

The district courts' invocation of standing in *Kivalina* and *Comer* likewise reflects a strained application of a doctrine aimed at upholding the separation of powers. Standing, which was developed as a mechanism for limiting challenges to government agency actions, is typically asserted by the political branches as a defense to statutory or constitutional claims.<sup>253</sup> Properly applied, the doctrine bars individual citizens from raising generalized grievances about government and courts from engaging in the general supervision of government action (or inaction).<sup>254</sup> The climate change public nuisance cases, however, involve challenges to private actions, not government actions. In this context, standing doctrine should be simply inapplicable.<sup>255</sup> Admittedly, if the climate change plaintiffs were allowed to litigate the substance of public nuisance, they might face formidable obstacles to demonstrating injury or causation. Nonetheless, the proper ground for resolving these matters would be on the substantive merits, and not through a standing inquiry.<sup>256</sup>

District courts' application of foreign policy-related doctrines—namely, the presumption against extraterritoriality and the notion of judicial caution—further exemplifies the misuse of separation-of-powers-based avoidance doctrines in climate change litigation. As explained above, the presumption against extraterritoriality is a canon of statutory interpretation that is simply irrelevant to common law claims.<sup>257</sup> Moreover, courts must determine whether public nuisance law is being applied extraterritorially in the first instance—an inquiry that involves far more than considering the locus of the underlying conduct.<sup>258</sup> Overlooking these fundamental points, the *New York City* and *Oakland* courts applied the presumption against extraterritoriality in the course of dismissing plaintiffs' common law claims. As far as judicial caution is concerned, courts apply the concept in the narrow context of determining specific claims cognizable under the Alien Tort Statute.<sup>259</sup> The *New York City* and *Oakland* courts' invocation of judicial caution outside the

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253. Gifford, *Climate Change*, *supra* note 2, at 247.

254. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–76 (1992); Ewing & Kysar, *supra* note 160, at 387–88.

255. *See supra* text accompanying nn. 168–169.

256. *See* Gifford, *Climate Change*, *supra* note 2, at 247; *see also* ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 71 (7th ed. 2016) (“Injury to rights recognized at common law—property, contracts, and torts—are sufficient for standing purposes.”); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1290–91 (1976) (“The standing issue could hardly arise at common law . . . . There the question of plaintiff’s standing merged with the legal merits: On the facts pleaded, does this particular plaintiff have a right to the particular relief sought from the particular defendant from whom he is seeking it?”).

257. *See supra* Section II.C.1.

258. *See id.*

259. *See supra* Section II.C.2.

ATS context, and in the absence of the foreign policy concerns raised in the ATS cases, was unprecedented and unwarranted.

Finally, the *Oakland* court's assertion that climate change public nuisance claims implicate "uniquely federal interests"—and thus cannot be governed by state law<sup>260</sup>—likewise represents a dramatic departure from precedents regarding what interests qualify as uniquely federal. Under those precedents, uniquely federal interests are at play when the United States' rights and obligations are at issue and in disputes involving international or admiralty law.<sup>261</sup> The climate change public nuisance cases implicate none of these interests. Rather than identifying such interests, the *Oakland* court held that the presumed advantages of federal legislation on climate change raised "uniquely federal interests" that precluded plaintiffs from asserting their state law claims.<sup>262</sup> Here again, the district court invoked a doctrine without even purporting to adhere to doctrinal requirements.

The application of political question, standing, and other avoidance doctrines to tort claims, even those involving transboundary pollution, is truly anomalous. This can be seen by contrasting the climate change cases with the Supreme Court's decision in *Ohio v. Wyandotte Chemicals Corp.*<sup>263</sup> In *Wyandotte*, the state of Ohio invoked the Court's original jurisdiction to abate an alleged nuisance resulting from pollution discharges originating in other states and Canada. Exercising its discretion not to hear the case, the Court noted the presence of complex and technical factual questions, as well as the involvement of other bodies in regulating the defendants' conduct.<sup>264</sup> The primary significance of the *Wyandotte* decision today is that it established the Court's discretionary authority to decline original jurisdiction cases.<sup>265</sup> Of particular relevance to the climate change public nuisance cases, however, is the Court's finding that it had jurisdiction over the dispute. Although some of the allegedly tortious conduct occurred outside the United States, the Court firmly recognized its ability to hear the case:

That we have jurisdiction seems clear enough. Beyond doubt, the complaint on its face reveals the existence of a genuine "case or controversy" between one State and citizens of another, as well as a foreign subject . . . . While we have refused to entertain, for example, original actions . . . that seek to embroil this tribunal in "political questions," this Court has often adjudicated controversies between States and between a

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260. *BP III*, No. C 17-06011 WHA, 2018 WL 1064293, at \*2 (N.D. Cal. Feb. 27, 2018) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)), *vacated sub nom. BP II*, 969 F.3d 895 (9th Cir. 2020).

261. *See supra* Section II.D.1.

262. *BP III*, 2018 WL 1064293, at \*2 (quoting *Tex. Indus., Inc.*, 451 U.S. at 640).

263. 401 U.S. 493 (1971).

264. *Id.* at 502–05.

265. *See, e.g.*, Rebecca E. Hatch, Annotation, *Construction and Application of 28 U.S.C.A. § 1251, Implementing Original Jurisdiction of Supreme Court—Supreme Court Cases*, 57 A.L.R. FED. 2d 199, § 2 (2011).

State and citizens of another State seeking to abate a nuisance that exists in one State yet produces noxious consequences in another.<sup>266</sup>

*Wyandotte* leaves no doubt that the federal courts can and should adjudicate public nuisance disputes involving transboundary pollution, and it casts grave doubt on district courts' various efforts to avoid the substance of the climate change plaintiffs' claims.

### B. No Harm, No Foul?

Although district courts repeatedly have gone out of their way to apply avoidance doctrines in the climate change public nuisance cases, one might reasonably wonder whether their opinions really matter. Some of the district court rulings were reversed, and more recent decisions might face a similar fate on appeal. Even those opinions that survive might have limited precedential force. After all, these are only district court opinions.

Moreover, the judiciary might view climate change litigation as *sui generis*. As Donald Gifford has observed, “Resolving issues such as which defendant contributed what ‘amount’ of global climate change, whether that contribution exceeded reasonable levels, and what should be done about it, is more polycentric, to an exponential degree than any set of issues a common law court has ever resolved.”<sup>267</sup> However, courts have grappled with the substance of complex public interest public nuisance claims involving handguns, lead paint, and opioids.<sup>268</sup> The contrast between courts' treatment of these cases and their handling of the climate change cases suggests that courts view climate change cases as distinct. Consistent with this view, relatively few courts in non-climate change cases have cited to the opinions holding that climate change public nuisance claims present a political question. For instance, the district court opinion in *AEP* has been cited in ten other cases; of the six citing cases unrelated to climate change, none found the *AEP* court's political question analysis applicable.<sup>269</sup> Indeed, those opinions that do discuss the *AEP* court's political question analysis tend to distinguish it.<sup>270</sup>

Nonetheless, there are good reasons to suspect that the district courts' pronouncements applying the avoidance doctrines in climate cases may influence other courts. Many of the climate change public nuisance opinions were published in the Federal Supplement reporter, and the cases have received much attention in legal circles and beyond.<sup>271</sup> Moreover, while some district court rulings have been

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266. 401 U.S. at 495–96.

267. Gifford, *Climate Change*, *supra* note 2, at 255.

268. *See supra* Section I.B.

269. The search was conducted on Westlaw on December 6, 2019.

270. *See, e.g.*, *Nw. Env't Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 970 (D. Or. 2006) (noting that plaintiffs merely asked court to enforce statute and regulations, “not . . . to make a free-wheeling policy choice and decide whether global warming is, or is not, a serious threat or what measures should be taken to remedy that problem,” in contrast to *AEP*).

271. *See, e.g.*, *Should Fossil-Fuel Companies Bear Responsibility for the Damage Their Products Do to the Environment?*, WALL. ST. J. (Nov. 19, 2019, 2:03 PM), <https://www.wsj.com/articles/should->



reversed on appeal, those reversals themselves are of equivocal significance. In *AEP*, for instance, the Supreme Court was evenly divided on the political question and standing issues that had served as grounds for the district court's dismissal. Thus, although the Supreme Court affirmed the Second Circuit's reversal of the district court on those issues, that affirmance carried no precedential weight.<sup>272</sup> In *Comer*, a Fifth Circuit panel reversed the district court's dismissal on political question and standing grounds, but the circuit's subsequent decision to conduct en banc review led to vacatur of the panel opinion.<sup>273</sup> And while the Ninth Circuit in *Kivalina* did not reverse the district court's determination that the case presented a political question and that the plaintiffs lacked standing, neither did the court of appeals affirm the lower court on either of those grounds.<sup>274</sup> Instead, the court of appeals dismissed the claims under displacement doctrine.<sup>275</sup>

Furthermore, although one might argue that the climate change public nuisance cases are *sui generis*, the district court analyses generally fail to identify principled bases for limiting their reasoning to those cases. As a result, their opinions sow seeds of mischief in applying the avoidance doctrines.

For example, several opinions—including *AEP*, *Oakland*, and *Kivalina*—have turned on courts' reluctance to balance climate change harms against the benefits of fossil fuel use.<sup>276</sup> However, courts frequently must—and do—undertake similarly difficult balancing analyses, whether in determining a defendant was negligent, an injunction is warranted, or a plaintiff's constitutional rights (with respect to due process or the First Amendment, for example) have been violated.<sup>277</sup> Notwithstanding the difficulty of balancing and the policy implications that might flow from the results of a balancing inquiry, courts have not deemed these questions as beyond their competence. The district court climate change opinions, however,

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fossil-fuel-companies-bear-responsibility-for-the-damage-their-products-do-to-the-environment-1157-4190219 [https://perma.cc/2949-SJNY].

272. *AEP II*, 564 U.S. 410, 420 (2011).

273. *Comer III*, 607 F.3d 1049, 1053 (5th Cir. 2010), *mandamus denied*, *Comer IV*, 562 U.S. 1133 (2011).

274. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 569 U.S. 1000 (2013).

275. *Id.* at 858.

276. *See AEP I*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011); *BP I*, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018) (“[Q]uestions of how to appropriately balance these worldwide negatives [of fossil fuel combustion] against the worldwide positives of the energy itself . . . demand the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate.”), *vacated*, 960 F.3d 570 (9th Cir. 2020), *modified*, 969 F.3d 895 (9th Cir. 2020); *Native Vill. of Kivalina v. ExxonMobil*, 663 F. Supp. 2d 863, 874–75 (N.D. Cal. 2009) (noting that factfinder would have to weigh various factors, including benefits derived from fossil fuel use, “against the risk that increasing greenhouse gases would in turn increase the risk of causing flooding along the coast of a remote Alaskan locale”), *aff'd*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 569 U.S. 1000 (2013).

277. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 947 (1987).

crack open the door for courts to throw their hands up and declare such balancing unmanageable under political question, standing, or some other doctrine.

Likewise, the *New York City* and *Oakland* courts' dismissals were based in part on the concern that a legal dispute rooted in the common law could have serious consequences for foreign entities. Although these opinions spoke in terms of judicial caution and the presumption against extraterritoriality,<sup>278</sup> this underlying concern could arise in numerous contexts. In today's global economy, various branches of public law—including antitrust, securities, and environmental law—have serious implications for entities beyond the United States' boundaries.<sup>279</sup> Private law actions as well—rooted in common law principles governing contract, tort, and property disputes—also often involve foreign entities.<sup>280</sup> As a matter of fact, an extensive set of doctrines—including personal jurisdiction, forum non conveniens, international comity, and sovereign immunity—already govern the allocation of adjudicative authority over transnational litigation.<sup>281</sup> If courts were to disregard these doctrines and instead follow the *New York City* and *Oakland* courts' reasoning that possible foreign consequences render disputes nonjusticiable, one can imagine questionable dismissals in countless cases.

Further abuses might follow from the expansive approach to the “uniquely federal interests” doctrine suggested by the *Oakland* opinion. The doctrine would no longer apply only when the United States' rights and obligations or international or admiralty law are at issue. Instead, courts might be inclined to dismiss any conflict that might benefit from a comprehensive federal approach rather than the piecemeal application of state common law. Various social problems—ranging from opioid abuse and illegal drug trafficking to gun violence—could fall within this category. Yet surely, these matters do not involve *uniquely* federal interests, and their significance should not—in the absence of federal legislation—lead to preemption of state law on these matters.

Finally, while this Article has focused on use of the avoidance doctrines by the federal courts, it is worth considering whether plaintiffs yet might be able to secure substantive rulings in state courts, particularly with respect to state law claims. State courts tend to apply the doctrines of standing and political question in a much less restrictive way than federal courts, if they apply those doctrines at all.<sup>282</sup> Thus, state courts might offer more favorable prospects for reaching the substance of plaintiffs' public nuisance claims. Worryingly, the course of the *Oakland* litigation before the district court suggested that plaintiffs might never get the opportunity to secure a

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278. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 475–76 (S.D.N.Y. 2018); *BP I*, 325 F. Supp. 3d at 1026 (reasoning that plaintiffs' claims “undoubtedly implicate the interests of countless governments, both foreign and domestic” because they seek to impose billions of dollars of liability “to abate the localized effects of an inherently global phenomenon”).

279. See Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 92–95 (2009).

280. See *id.*

281. See *id.* at 77–80.

282. See Gifford, *Climate Change*, *supra* note 2, at 250.

state court ruling: once the district court held that federal law necessarily governs the global problem of climate change, defendants' removal of the case appeared decisive, as it eventually resulted in dismissal of the public nuisance claim—transformed from a state law claim to one based on federal law—on displacement grounds.<sup>283</sup>

Recently, however, several federal district courts faced with similar claims have declined to follow the same course. For instance, in *County of San Mateo v. Chevron*, the district court remanded the plaintiffs' state public nuisance claims to state court, reasoning that federal common law, because it had been displaced, could not preclude the plaintiffs from asserting state common law claims.<sup>284</sup> Similarly, the district court in *Mayor and City Council of Baltimore v. BP P.L.C.* remanded the claims before it to state court even though it found the *Oakland* district court's removal ruling to be "well stated" and to "present[] an appealing logic."<sup>285</sup> Pointing to the well-pleaded complaint rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint, the *Baltimore* court concluded that it lacked federal question jurisdiction over the plaintiffs' state public nuisance claims.<sup>286</sup> Should these rulings survive on appeal,<sup>287</sup> state courts may well be forced to address the substance of plaintiffs' claims.

### C. Promoting the Rule of Law and Democratic Values

Aside from their potential impacts on the scope of the avoidance doctrines, the district courts' rulings have allowed courts to sidestep their fundamental duty to decide the specific cases brought before them. The failure to decide the substantive validity of plaintiffs' public nuisance claims undermines the basic functions of tort law and the democracy-enhancing role of the judiciary.

283. *BP I*, 325 F. Supp. 3d at 1024.

284. 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), *aff'd in part and dismissed in part*, 960 F.3d 586 (9th Cir. 2020). The court also declined to rule on defendants' contention that the state law claims were preempted by federal statute, holding that the issue could be properly addressed by state courts upon remand. *Id.* at 938.

285. *Mayor of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 556 (D. Md. 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *cert. granted*, No. 19-1189, 2020 WL 5847132 (2020).

286. *Id.* at 556–58. The district courts in *Board of County Commissioners v. Suncor Energy Inc.*, 405 F. Supp. 3d 947, 961–63 (D. Colo. 2019), *aff'd in part and dismissed in part*, 965 F.3d 792 (10th Cir. 2020), and *Rhode Island v. Chevron Corporation*, 393 F. Supp. 3d 142, 147–51 (D.R.I. 2019), followed similar lines of reasoning in remanding the respective plaintiffs' claims—all based on state law—to state court.

287. The Ninth Circuit affirmed the district court's ruling in *County of San Mateo* that removal was not proper under the federal-officer removal statute and held that it lacked jurisdiction over the rest of the district court's remand order. 960 F.3d 586. The Supreme Court granted certiorari to the Fourth Circuit's decision affirming the district court in the *Baltimore* litigation, *Mayor of Baltimore*, 952 F.3d 452 (4th Cir. 2020). See *Mayor of Baltimore*, 2020 WL 5847132 (Oct. 2, 2020).

### 1. *Advancing the Functions of Tort Law*

What are the functions of the common law in areas, such as environmental law, that are governed largely by statute?<sup>288</sup> Since 1970, statutes and regulations have come to dominate U.S. environmental law.<sup>289</sup> However, the common law played a central role in addressing environmental problems prior to that time, and it has continued to serve as a critical backstop since.<sup>290</sup> In particular, tort law serves a private law function of redressing private wrongs as well as public law functions of deterring unreasonable conduct, compensating victims, and spreading losses.<sup>291</sup> Statutory law has largely usurped tort law as to its public law functions, but even here, common law retains an important role. Political opposition, bureaucratic inertia, and increasingly rigorous demands for supporting data may prevent statutes and regulations from addressing serious problems wholly or in part.<sup>292</sup> In such circumstances, the common law can fill statutory gaps, offering flexible remedies to deal with unanticipated, neglected, or overlooked factual contexts.<sup>293</sup> Relatedly, judges and juries can tailor societal norms to specific situations.<sup>294</sup> Moreover, because environmental statutes generally do not provide for compensatory damages,<sup>295</sup> the common law serves as an essential mechanism for compensating victims of tortious conduct.

Climate change presents circumstances in which tort law can fulfill its gap-filling potential. The Clean Air Act, the primary federal statute for addressing air pollution, was enacted in 1970, long before widespread recognition of climate change as a serious threat. In 1990, and again in 2009, Congress considered but failed to adopt statutory amendments that would have directly governed GHG emissions.<sup>296</sup> And while the Obama administration attempted to regulate some emission sources through various components of the CAA,<sup>297</sup> these efforts were

288. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982) (noting transition from “a legal system dominated by the common law . . . to one in which statutes, enacted by legislatures, have become the primary source of law”).

289. See PERCIVAL ET AL., *supra* note 17, at 93.

290. See HOLLY DOREMUS, ALBERT C. LIN & RONALD H. ROSENBERG, *ENVIRONMENTAL POLICY LAW* 40 (6th ed. 2012).

291. See Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1508–09 (2009).

292. See Michael D. Axline, *The Limits of Statutory Law and the Wisdom of Common Law*, 38 ENV'T L. REP. 10268, 10268 (2008).

293. See Mark P. Nevitt & Robert V. Percival, *Could Official Climate Denial Revive the Common Law as a Regulatory Backstop?*, 96 WASH. U. L. REV. 441, 493–94 (2018); DOREMUS ET AL., *supra* note 290, at 40.

294. See Axline, *supra* note 292, at 10274–75.

295. See DOREMUS ET AL., *supra* note 290, at 40; Klass, *supra* note 291, at 1570–71.

296. See *Massachusetts v. EPA*, 549 U.S. 497, 511–12 (2007); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

297. See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 310–13 (2014) (recounting EPA initiatives on climate change); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (Clean Power Plan).

largely tied up in the courts or rolled back by the Trump administration.<sup>298</sup> Most sources of ongoing GHG emissions remain unregulated, and neither statutes nor regulations provide recourse for harms resulting from past GHG emissions.

Climate change falls into a regulatory gap and at the same time has much in common with the landmark public nuisance case, *Georgia v. Tennessee Copper*. Transboundary air pollution was at the heart of *Georgia v. Tennessee Copper*, and it lies at the heart of the climate change public nuisance cases as well. To be sure, climate change is consistent with lay and historical understandings of public nuisance—it is at least as much of a nuisance as the smoke-belching factory next door or the incessantly noisy neighbor.<sup>299</sup> Moreover, it readily satisfies many of the core elements of public nuisance: climate change substantially interferes with public health and various public rights. It is a pollution problem that affects the broader community—the very sort of situation that the public nuisance doctrine has historically addressed.<sup>300</sup> But to describe climate change in such an understated manner does not do justice to the catastrophic harms that climate change threatens (and already has caused) for numerous publics around the globe. Indeed, one might better describe climate change as a particularly extreme example of public nuisance.<sup>301</sup>

Yet while climate change constitutes an extraordinary interference with the rights of the global public, it hardly resembles an ordinary tort case. Unlike a straightforward scenario in which a single defendant's discrete action injures an individual plaintiff, climate change involves innumerable parties who collectively harm multiple plaintiffs—indeed, the entire planet—over an extended period of time.<sup>302</sup> Establishing the elements of public nuisance or any tort claim poses a formidable challenge for any plaintiff who reaches the merits phase of climate change tort litigation.<sup>303</sup> One legal commentator suggested nearly a decade ago, “At each stage of the traditional tort analysis—duty, breach, causation, and harm—the climate change plaintiff finds herself bumping up against doctrines that are premised on a classical liberal worldview in which threats such as global climate change simply do not register.”<sup>304</sup> Although climate change harms have become

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298. Repeal of Clean Power Plan, 84 Fed. Reg. 32,520 (July 8, 2019); Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 24–26 (2019) (discussing litigation stays and delays with respect to Clean Power Plan).

299. See Antolini & Rechtschaffen, *supra* note 7, at 10120–21 (listing various environmental harms that courts have found to be public nuisances); WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW § 2.1, at 100 (1977) (“The deepest doctrinal roots of modern environmental law are found in principles of nuisance.”).

300. See Kysar, *supra* note 2, at 24–25.

301. See Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 ENV'T L. REP. 10230 (2009).

302. See Ewing & Kysar, *supra* note 160, at 369.

303. See *id.* at 369–70.

304. Kysar, *supra* note 2, at 9–10.

much more prominent and attribution science has made tremendous advances since then,<sup>305</sup> formidable barriers of proof remain.

Deciding climate change nuisance claims on their substantive merits nonetheless would advance the tort system's objectives of clarifying legal obligations and reconciling potentially conflicting ideals of liberty and protection from harm.<sup>306</sup> Ultimately, it is uncertain whether climate change plaintiffs will be able to establish the elements necessary to prevail on their public nuisance claims. If plaintiffs succeed, they will obtain remedies for tortious wrongs. But even if plaintiffs fail, the adjudication of their claims on their substantive merits would fulfill important functions in contesting "visions of right, responsibility, and social order" and "articulat[ing] public understandings of morality."<sup>307</sup> Moreover, unsuccessful claims would underscore "gaps between the common law's basic ideal of protection from harm imposed by others' agency and the failure of other branches to step in when the complexity of such harm renders it unsuitable for judicial resolution."<sup>308</sup> In other words, by determining common law claims on their substantive merits, rather than dodging them, courts would make clear the common law's limits as a gap-filler and thereby may force or invite action by the political branches.<sup>309</sup>

Outside of the climate change context, courts have grappled with—and are continuing to grapple with—the substance of public interest public nuisance claims.<sup>310</sup> In doing so, courts not only demonstrate that adjudication of such claims is possible, but they also advance the functions of tort law. Thus, although the lead paint litigation was largely unsuccessful, decisions in those cases made clear that tort law could provide no relief, and in their wake a number of municipalities enacted local laws aimed at reducing lead hazards by boosting inspection and remediation requirements in rental housing.<sup>311</sup> A further example of tort law's ability to promote conversations between the judiciary and other branches of government is occurring in regards to opioid litigation. The comparison between opioid litigation and climate change litigation is especially apt, as the two have in common a multiplicity of potential defendants and the potential for plaintiffs to seek seemingly boundless relief. Though "extremely complex,"<sup>312</sup> opioid litigation is proceeding even as Congress enacted substantial legislation aimed at promoting prevention, treatment,

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305. See *supra* note 176 and accompanying text; Michael Burger, Jessica Wentz & Radley Horton, *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENV'T L. 57, 77–140 (2020).

306. Ewing & Kysar, *supra* note 160, at 378.

307. *Id.* at 356.

308. *Id.* at 356–57.

309. *Id.* at 356–57; see also *id.* at 375 ("By struggling to apply common law principles to the harms of an ever more complex and interconnected world—and often precisely in failing to do so satisfactorily—courts deliver dignified, public pronouncements that legislative and administrative inertia have left our basic ideals unprotected.").

310. See *supra* Section I.B.

311. See Katrina S. Korfmacher & Michael L. Hanley, *Are Local Laws the Key to Ending Childhood Lead Poisoning?*, 38 J. HEALTH POL. POL'Y & L. 757 (2013).

312. Suggestions of Remand, *supra* note 72, at 2.

and recovery with respect to opioid abuse.<sup>313</sup> Here and in other contexts, courts have found ways to deal with the multidimensionality and complexity of public interest public nuisance litigation, and they can do likewise in the climate change cases.

## 2. *Advancing Democratic Values Through the Courts*

Notwithstanding the well-established function of common law claims, decisions dodging the merits of public nuisance often suggest that judicial intervention would be undemocratic. Whether under the rubric of political question, standing, extraterritoriality, or judicial caution, trial courts have consistently broadcast the message that the political branches—and not the countermajoritarian institution of the judiciary—are the proper actors to address climate change. Climate change, these courts tell us, possesses features distinct from ordinary pollution problems that render it uniquely unsuitable for adjudication as a public nuisance.

This assertion of climate change exceptionalism warrants closer examination: Namely, what features of climate change, if any, might place it beyond the bounds of judicial authority? At its core, climate change is an environmental pollution problem—a paradigmatic public nuisance in its interference with public rights. Although several features of climate change litigation might make its adjudication as a public nuisance challenging, none of them should preclude courts from deciding the cases.

Perhaps the most obvious difficulty presented by climate change litigation is the magnitude of the underlying problem, an aspect several courts have cited in their analyses. In *Oakland v. BP*, the order denying the plaintiffs' motion to remand to state court stated: "If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints . . . [T]he scope of the worldwide predicament demands the most comprehensive view available . . ." <sup>314</sup> Similarly, the *New York City* court declared that "the immense and complicated problem of global warming requires a comprehensive solution . . ." <sup>315</sup> While the courts have not expressly stated it this way, the worry seems to be that state common law actions, and even federal common law actions, should be dismissed because of their limited purchase on the climate change problem.

Undoubtedly, a comprehensive solution to climate change would be preferable to a piecemeal approach. However, because GHGs are emitted globally by a myriad of sources, no single set of institutions—whether the courts, Congress, or the executive branch—is capable of generating anything close to a comprehensive

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313. See Nicolas Terry, *From Health Policy to Stigma and Back Again: The Feedback Loop Perpetuating the Opioids Crisis*, 2019 UTAH L. REV. 785, 805–08 (2019).

314. *BP III*, No. C 17-06011 WHA, 2018 WL 1064293, at \*3 (N.D. Cal. 2018), *vacated sub nom. BP II*, 969 F.3d 895 (9th Cir. 2020).

315. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018).

solution.<sup>316</sup> Granted, the political branches might produce a broader approach to climate change than the courts. Courts are necessarily constrained by the cases brought before them, whereas Congress and federal agencies can generate more comprehensive policies through legislation or rulemaking. Courts are at a comparative institutional disadvantage, but it does not necessarily follow that they should refrain from adjudicating climate change public nuisance cases. In the absence of a directive from Congress—in the form of displacement, preemption, or otherwise—courts have the authority and indeed, the duty, to decide these claims.

International institutions offer no more favorable prospects for a comprehensive solution to climate change. As a general matter, international environmental law is of limited effectiveness, a “thirty-percent solution” whose primary force is in encouraging and enabling international cooperation.<sup>317</sup> International law has proven especially limited in addressing climate change. Notwithstanding nearly three decades of international attention to the growing climate threat, GHG emissions continue to rise, and achieving the global community’s goal of avoiding dangerous anthropogenic interference with the climate system appears unlikely.<sup>318</sup>

Worries that adjudication cannot comprehensively solve climate change hint at plaintiffs’ potential difficulties in overcoming the problem of diluteness. Namely, the defendants in climate change public nuisance cases can assert that any emissions that might be attributed to them represent a small percentage of cumulative GHG emissions worldwide. They might further contend that their fair share is an even smaller percentage because their customers—a sizable share of the global population—directly engaged in or benefited from the activities that generated the emissions.<sup>319</sup> Such causation-related arguments may ultimately prevail, but they are arguments on the merits that courts should address as such. That plaintiffs might struggle to establish causation should not excuse courts from adjudicating the merits in the first instance.

Courts also might hesitate to decide the climate change public nuisance cases on the merits because doing so would require them to balance competing interests, a task better suited for policymakers. Relatedly, should plaintiffs prevail, crafting a remedy would involve courts in an exercise that courts may view as analogous to legislating. The *Oakland* court, for example, suggested that the “question of reasonableness . . . falls squarely within the type of balancing best left to Congress

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316. See Ewing & Kysar, *supra* note 160, at 353 (holding out climate change as an example of a “wickedly complex” problem that does not “yield to straightforward command-and-control regulation or other familiar lawmaking forms”).

317. DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 15–16 (2010).

318. See Noah M. Sachs, *The Paris Agreement in the 2020s: Breakdown or Breakup?*, 46 *ECOLOGICAL L.Q.* 865, 867–70, 888–89 (2019).

319. See Kysar, *supra* note 2, at 38–40.



(or diplomacy).”<sup>320</sup> Similarly, the *AEP* district court reasoned that adjudicating public nuisance would require a balancing of interests that “is impossible without an initial policy determination . . . by the elected branches.”<sup>321</sup>

Judicial anxiety that deciding the substance of climate change public nuisance claims would lead courts to overstep their proper constitutional role is unwarranted. Common law claims lie at the core of courts’ competence and authority. Their adjudication on the merits, regardless of their difficulty or outcomes, does not give rise to problems of democratic accountability.<sup>322</sup> As Kysar and Ewing have observed:

There is no obvious reason why preliminary filters are necessary or desirable as an additional gatekeeper against unmanageable, would-be common law claims, above and beyond the quite significant power of courts to dismiss for legal insufficiency within the common law framework itself. The widespread failure of public nuisance claims in the handgun, lead paint, and subprime mortgage industry contexts suggests that courts have means readily available to manage nuisance doctrine from within.<sup>323</sup>

Moreover, the legislative branch’s ability to override any judicial outcome it deems objectionable only underscores the absence of separation-of-powers concerns.

Contrary to such concerns, Katy Kuh has suggested that judicial engagement with climate change public nuisance cases “would strengthen democracy in accord with widely accepted justifications for counter-majoritarian judicial review.”<sup>324</sup> First, Kuh contends, courts’ fundamental duty to protect representation in the political process requires consideration of the interests of children and future generations, who, like politically disadvantaged minorities, are systematically disadvantaged in political processes.<sup>325</sup> While existing doctrine does not recognize children or future generations as suspect classifications meriting constitutionally heightened review,<sup>326</sup> courts’ substantive adjudication of climate change public nuisance claims—which are based on common law rather than the Constitution—would not require such recognition. Rather than overriding democratically determined policy, adjudication of these claims can reinforce democratic principles of participation and

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320. *BP I*, 325 F. Supp. 3d 1017, 1027 (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *modified*, 969 F.3d 895 (9th Cir. 2020); *see also City of New York*, 325 F. Supp. 3d at 473 (noting that “Congress has expressly delegated to the EPA the determination as to what constitutes a reasonable amount of greenhouse gas emission under the Clean Air Act”).

321. *AEP I*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005), *vacated*, 582 F.3d 302 (2d Cir. 2009), *rev’d*, 564 U.S. 410 (2011).

322. *See Siegel*, *supra* note 160, at 125 (“The critical constraint on judicial interference with democracy lies not in the procedural conditions for judicial action but in the substantive standard that courts apply on the merits.”).

323. Ewing & Kysar, *supra* note 160, at 418.

324. *See Kuh*, *supra* note 1, at 731.

325. *Id.* at 755–57.

326. *Id.* at 756–57.

representation.<sup>327</sup> Admittedly, the representation of future generations, though consistent with the principle of intergenerational equity, extends beyond conventional understandings of representative democracy. However, children are indeed poorly represented in the political process, especially in circumstances where the presumption that adults act in the best interest of their children may not hold true.<sup>328</sup>

Kuh further asserts that judicial review can advance democratic values by correcting pathologies in the political process.<sup>329</sup> This second argument for judicial review highlights the fact that misinformation can distort not only the economic marketplace but also the political marketplace. California public nuisance doctrine already recognizes that distortion of the economic marketplace—specifically, promotion of a product “with knowledge of the hazard that [its] use would create”—can give rise to a public nuisance.<sup>330</sup> For public nuisance purposes, it is likely too much of a stretch to analogize the harms to the democratic process caused by such conduct to the physical harms of climate change. But climate change public nuisance plaintiffs need not make such an argument in order to succeed. As courts consider the substance of plaintiffs’ claims, their attention to defendants’ efforts to distort public communication and the political process can weed out unscientific claims, help to set the record straight, and facilitate informed democratic debate on future climate policy.<sup>331</sup>

#### CONCLUSION

Shrinking from their obligation to decide the cases brought before them, district courts have dodged the substantive merits of the climate change public nuisance cases by stretching and misapplying avoidance doctrines. Courts’ treatment of the climate change cases stands in sharp contrast to public interest public nuisance cases involving other subjects, where courts have demonstrated the ability to engage with the substance of public nuisance in complex settings. The dodging of climate change public nuisance cases is poorly reasoned and unwarranted; simply put, courts can and should decide whether defendants’ production, promotion, and sale of fossil fuels constitutes a public nuisance.

If courts do reach the substantive merits, plaintiffs’ public nuisance claims against fossil fuel companies ultimately may not succeed. The existence of attenuated causal chains, countless GHG emitters, and protracted timeframes surrounding the emission of GHGs and the incurrence of harm all pose formidable

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327. *Id.* at 754–56.

328. See Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1506–08 (1998) (discussing current law’s presumption that parents act in the best interests of their children and characterizing that presumption as “troubling,” since “some parents act selfishly and neglect or abuse their children”).

329. Kuh, *supra* note 1, at 751, 758–59.

330. *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 328 (Ct. App. 2006).

331. Kuh, *supra* note 1, at 758–59.

barriers to plaintiffs. Furthermore, making climate change policy through litigation would be far from ideal. Climate change public nuisance plaintiffs nevertheless should have an opportunity to make their case. Successful actions could bring industry to the table and facilitate the crafting of legislated approaches. Even unsuccessful action can call attention to fossil fuel companies' responsibility for climate change—including any involvement in disinformation campaigns—and mobilize public support for concrete and effective responses.<sup>332</sup>

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332. See Lin & Burger, *supra* note 130, at 93.