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CLIMATE CHANGE AND MODERN STATE COMMON LAW NUISANCE AND TRESPASS TORT CLAIMS

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This Comment examines the use of state common law tort claims to address climate change. The aim of this work is not to provide an in-depth examination of these issues, but rather to provide a contextualized and comprehensive overview of some of the most important issues in this field using modern cases actively being litigated. This Comment comes to the conclusion that the future of common law nuisance and trespass claims in the context of climate change is, for now, unclear. Given the national and global implications of climate change, courts may find that isolated states cannot set binding precedents and abate climate change alone. Yet this outcome is hardly assured, and would be a mistake, because state common law claims may potentially help states prepare for climate change in useful ways.

This Comment is divided into four Parts. Part I seeks to explain nuisance and trespass tort claims more generally before explaining their use in the context of air pollution. Part II discusses how the courts have treated state common law pollution tort claims in light of the federal environmental regulatory scheme. Part III discusses how court cases featuring common law claims against fossil fuel producers in the last few years have made their way through the courts and the current status and outcomes of these efforts. Finally, Part IV seeks to collect the lessons gleaned from the preceding Parts

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to discuss the utility of these actions, their downsides, their benefits, and their potential futures.

INTRODUCTION

Climate change is, without a doubt, one of the most pressing issues human civilization faces today.[1] Sea levels are rising, and droughts and extreme weather events are becoming more common.[2] Yet governments around the world are struggling to adapt to these threats and the stress they will put on political

1. *See* Press Release, Security Council, Climate Change 'Biggest Threat Modern Humans Have Ever Faced', World-Renowned Naturalist Tells Security Council, Calls for Greater Global Cooperation, U.N. Press Release, SC/14445 (Feb. 23, 2021).

2. *See id.*

institutions.[3] The United States is not immune to these risks and has already begun to suffer more frequent heatwaves, rising sea levels that risk flooding coastal cities, and an increased risk of wildfires as greenhouse gas emissions change the planet's climate.[4]

In the face of these risks, many states and municipalities that are dissatisfied with the current system of federal administrative environmental regulation have increasingly turned to common law in order to pursue claims against fossil fuel companies.[5] A recent surge of suits has used state common law torts claims of public or private nuisance and trespass to compel the abatement of greenhouse gas emissions and to help prepare for the significant costs local governments will incur to protect themselves from climate change.[6]

Yet the eventual outcomes of these efforts are far from clear. For the most part, these cases are currently debating procedural questions, like removal issues, and few courts have had the chance to address the merits of these claims.[7] To the degree that the merits of these claims have been addressed, if a court finds that the claims are necessarily based on federal common law as opposed to state common law, then the Clean Air Act (CAA) will preempt them.[8] It's possible that, while common law claims for nuisance and trespass have a long history in the environmental

3. *See id.*

4. 1 U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT 12–34 (2017).

5. Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENV'T L. REV. 49, 54–55 (2018).

6. *See* BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532 (2021); Shell Oil Products Co. v. Rhode Island, 141 S. Ct. 2666 (2021); Chevron Corp. v. San Mateo Cnty., 141 S. Ct. 2666 (2021); Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty., 141 S. Ct. 2667 (2021).

7. *Compare BP P.L.C.*, 141 S. Ct. at 1532, *and Shell Oil*, 141 S. Ct. at 2666 (judgement vacated and reversed on removal question to federal court, remanded to First Circuit for consideration in accordance with *BP P.L.C.* after initially remanding back to state court), *and San Mateo Cnty.*, 141 S. Ct. at 2666 (remanded to Ninth Circuit for consideration in accordance with *BP P.L.C.*), *and Suncor Energy*, 141 S. Ct. at 2667 (remanded to Tenth Circuit for consideration in accordance with *BP P.L.C.* after initially remanding back to state court), *with* City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (only *New York v. Chevron* has addressed the merits of state common law climate change claims directly thus far).

8. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 429 (2011); *New York v. Chevron*, 993 F.3d at 95–96.

law context[9] and could stand to be valuable tools for states and municipalities to address the impacts of climate change,[10] courts will be hesitant to accept them as viable means to address climate change harms. Such hesitation may stem from the courts' reluctance to make wide-ranging policy changes without the involvement of the legislature or concerns that state-specific remedies may not be appropriate for addressing a widespread issue like climate change.[11]

However, state common law tort claims have the potential to be impactful tools for states and municipalities to prepare for climate change, and courts should not dismiss these claims offhand. State common law tort claims are supported by precedent when such lawsuits apply the common law of the source state where pollution is emanating from.[12] State common law tort claims may also allow for meaningful remedies and could help prepare tort law as a whole to address the complicated but inevitable harms of climate change.[13] As a result, the courts have the opportunity to allow states and municipalities to employ a meaningful tool to prepare for and mitigate climate change, and though the courts may be reluctant to do so, they should allow these claims to proceed.

To explore these issues, this Comment is organized into four Parts. Part I discusses the general principles behind common law claims for private and public nuisance and trespass claims. Part II discusses how common law claims have interacted with the modern federal environmental regulatory framework in order to understand how these doctrines have evolved in tandem. These considerations are important for understanding the modern cases in context because issues like preemption are crucial for courts to consider when analyzing common law claims for environmental harms. Part III discusses two key cases that focus on state common law tort claims attempting to abate climate change, *BP P.L.C. v. Mayor & City Council of*

9. William Aldred's Case (1611) 77 Eng. Rep. 816, 9 Co. Rep. 57a (private nuisance); Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) (public nuisance); Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959) (trespass).

10. Lin & Burger, *supra* note 5, at 91–92.

11. *New York v. Chevron*, 993 F.3d at 92–94; Lin & Burger, *supra* note 5, at 91–92.

12. *See infra* Section II.B.

13. *See infra* Section III.B.

Baltimore[14] and *City of New York v. Chevron Corp.*,[15] and discusses the implications these cases have for future lawsuits. Finally, Part IV discusses what the future of these kinds of claims might be, given the background established in the previous Parts.

I. GENERAL PRINCIPLES OF NUISANCE AND TRESPASS AIR POLLUTION CLAIMS

Common law claims of public and private nuisance and trespass are key parts of state common law climate change lawsuits today.[16] Such claims vary from state to state in their specifics, so the primary means to analyze the nuances of these different claims is through the Second Restatement of Torts. This Section addresses how these common law claims interact with air pollution issues to illustrate the history of these claims and to contextualize them in the modern day.

A. Nuisance Claims

1. Private Nuisance

Private nuisance has long been employed for environmental harms in English common law.[17] It has been in use since at least 1611 when William Aldred brought suit against Thomas Bentam because the smell of Bentam's hog farm interfered with the use and enjoyment of Aldred's property.[18] The English court accepted the interference as an actionable nuisance.[19] Since these origins, private nuisance has evolved and remains viable in American common law. Private nuisance is currently outlined in the Second Restatement of Torts:

14. 141 S. Ct. 1532 (2021).

15. 993 F.3d 81.

16. *See BP P.L.C.*, 141 S. Ct.; Shell Oil Products Co. v. Rhode Island, 141 S. Ct. 2666 (2021); Chevron Corp. v. San Mateo Cnty., 141 S. Ct. 2666 (2021); Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty., 141 S. Ct. 2667 (2021). These cases all employ state common law claims of nuisance or trespass in varying ways in an attempt to address climate change harms.

17. William Aldred's Case (1611) 77 Eng. Rep. 816, 821–22, 9 Co. Rep. 57a.

18. *Id.*

19. *Id.*

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either:
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.[20]

The Restatement requires that the "invasion" be non-trespassory,[21] that the plaintiff have a property interest in the land,[22] and that the intrusion cause "significant" harm—namely harm that is nontrivial according to ordinary-minded individuals.[23]

As a result of these criteria, particularly the requirement that a plaintiff have a property interest in the land being invaded, "the law of private nuisance has tended to give greater protection to property interests than to interests based on personal comfort or well-being."[24] Private nuisance law has historically been utilized to help landowners litigate disputes with their neighbors, particularly when their neighbors choose to exercise their property rights in ways that infringe on other landowners' property rights or create dangerous conditions.[25] Over time, private nuisance suits have come to allow landowners to recover for the loss of health and comforts associated with land use.[26] Yet the ambiguities of private nuisance law principles, and their shifting focus, has led to courts across the

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20. RESTATEMENT (SECOND) OF TORTS § 822 (AM. L. INST. 1979). The Third Restatement of Torts did not change the Second Restatement's nuisance provisions. Kenneth W. Simons, *The Restatement of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines*, 44 WAKE FOREST L. REV. 1355, 1355 n.1 (2009).

21. RESTATEMENT (SECOND) OF TORTS § 821D (AM. L. INST. 1979).

22. *Id.* § 821E.

23. *Id.* §§ 821F, 821F cmts. c, d.

24. Benedict A. Schuck III, *Air Pollution as a Private Nuisance*, 3 NAT. RES. L. 475, 476 (1970).

25. *See* Roberts v. C.F. Adams & Son, 184 P.2d 634, 637 (Okla. 1947) ("Basically, the law with reference to private nuisances is a definition of the dividing line between the right of any owner to use his property as he so desires and the recognition of that right in another.").

26. Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 928–29 (1999).

country treating private nuisance claims differently over time, resulting in an unusually murky field of law.[27]

Currently, private nuisance suits usually see the courts follow the Second Restatement's approach of employing an objective balancing test between the "gravity of the harm" and the "utility of the actor's conduct."[28] The Second Restatement lays out a variety of factors for each side of the balancing test. On the "gravity of the harm" side, the Restatement weighs:

> (a) [t]he extent of the harm involved;
>
> (b) the character of the harm involved;
>
> (c) the social value that the law attaches to the type of use or enjoyment invaded;
>
> (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
>
> (e) the burden on the person harmed of avoiding the harm.[29]

On the "utility of [the actor's] conduct" side, the Restatement weighs: "(a) the social value that the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; and (c) the impracticability of preventing or avoiding the invasion."[30]

This is a simplified summary of the balancing tests a court might apply in a nuisance dispute,[31] but it illustrates how courts generally approach nuisance cases.[32] The remedies available to

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27. Schuck, *supra* note 24, at 476 (noting that this statement was made before the Second Restatement was published, but the First Restatement's elements for private nuisance in § 822 merely combined the various factors found in the Second Restatement's § 822, and §§ 821D–F, which had been divided into separate sections); *see also* Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1120 (7th Cir. 1975) ("Nuisance has always been a difficult area for the courts; the conflict of precedents and the confusing theoretical foundations of nuisance, led Prosser to tag the area a 'legal garbage can.'") (quoting William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942)).

28. RESTATEMENT (SECOND) OF TORTS § 826A (AM. L. INST. 1979); *see also* Meiners & Yandle, *supra* note 26, at 929.

29. RESTATEMENT (SECOND) OF TORTS § 827 (AM. L. INST. 1979).

30. *Id.* § 828.

31. *See id.* §§ 829–31 (laying out additional factors relevant for specific parts of private nuisance issues).

32. *See id.*; Meiners & Yandle, *supra* note 26, at 929–34.

plaintiffs can include injunctions, which are often temporary (though courts can impose permanent injunctions in extreme situations), damages, or a mixture of damages and injunctions.[33] In the air pollution context specifically, courts have landed on both sides of the balancing test and have come to mixed results.

For example, in *Boomer v. Atlantic Cement Co.*, the Court of Appeals of New York found that, though there was a nuisance, the utility of a cement facility that employed over three hundred people outweighed the harm caused by vibration and dust pollution entering the plaintiff's properties.[34] The *Boomer* court therefore reversed the district court's permanent injunction and granted a temporary injunction until permanent damages for past and future harm could be paid by Atlantic Cement.[35]

The *Boomer* court also announced its reluctance to endorse courts making wide-reaching decisions in the context of air pollution without the legislature, stating: "This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley."[36] The *Boomer* court also rejected the idea that the court should impose technological controls onto Atlantic Cement.[37] The court reasoned that it would be inequitable and that imposing a demand on a single cement facility to invent new technology to solve the dust problem, under threat of injunction, would carry no guarantee of success.[38]

Contrary to the logic of the *Boomer* court, in *Renken v. Harvey Aluminum*, the District Court of Oregon found a private nuisance where an aluminum plant released fluorine onto nearby fruit farms.[39] Because the pollution could be addressed by the installation of available technology, despite the aluminum factory representing a more economically profitable venture than the fruit farms, the *Renken* court went so far as to refuse to balance the fruit farmer's harms against the factory's

33. Meiners & Yandle, *supra* note 26, at 934–35.
34. 257 N.E.2d 870, 871–72, 875 (N.Y. 1970).
35. *Id.* at 875.
36. *Id.* at 871–72.
37. *Id.* at 873.
38. *Id.*
39. 226 F. Supp. 169, 175–76 (D. Or. 1963) (finding that the pollution was a continuing trespass, which constituted a nuisance).

costs of remedying these harms.[40] As a result, the *Renken* court mandated that the factory install pollution-capturing hoods to control the majority of the excess emissions within a year, or face an injunction.[41] This use of the court's powers to mandate something akin to a "best available technology" standard helped inform the later development of the modern federal environmental regulatory regime.[42]

The *Renken* and *Boomer* cases represent differing views of the judiciary's role in private nuisance claims, despite both featuring recognized air pollution nuisances, and highlight how differently courts treat such claims.[43] In *Renken*, despite the high economic costs imposed by mandating new technology and a potential injunction, the high costs of such actions did not justify forcing the plaintiffs to suffer harms—regardless of the policy implications of a court wading into air pollution issues that concerned the *Boomer* court.[44] Despite the varied outcomes of private nuisance suits in the environmental context, however, private nuisance claims have a long history in the field of air pollution and are a key part of the common law's tools to address these issues.[45] But the fields of private and public nuisance are deeply intertwined in this area—so much so that certain harms can be a private *and* public nuisance.[46] As a result, it is also crucial to understand public nuisance principles in order to understand modern common law tort suits over climate change and pollution.

2. Public Nuisance

Public nuisance is a similar doctrine to private nuisance, but public nuisance claims are for intrusions that interfere with a plaintiff's ability to access public rights and services, rather than interferences with private property rights in private nuisance

40. *Id.* at 176.

41. *Id.*

42. Douglas A. Kysar, *The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism*, 15, 17–18 (Yale L. Sch. Pub. L. Rsch. Paper No. 607, 2017).

43. *See id.* at 18.

44. *Renken*, 226 F. Supp. at 172; Kysar, *supra* note 42, at 18.

45. *See* cases cited *supra* note 16; William Aldred's Case (1611) 77 Eng. Rep. 816 9 Co. Rep. 57a.; Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y. 1970); *Renken*, 226 F. Supp. 169.

46. Meiners & Yandle, *supra* note 26, at 926.

claims.[47] Public nuisance claims in U.S. common law also have their roots in English jurisprudence.[48] Public nuisance was a strictly criminal offense enforceable by the English monarchy before it evolved to allow for lawsuits by individuals in the 1500s.[49] Public nuisance claims have been made for a broad variety of public harms, including issues of public safety like dangerous fireworks, public morals like houses of prostitution, and public health issues like the keeping of diseased animals, to name just a few examples.[50]

A key point made in the Second Restatement of Torts is that a public nuisance is not defined by the number of people affected by a harm.[51] Instead, it is defined by a group's deprivation of a common right, such as the right to fish, though some states have tied their public nuisance laws to the size of affected individual groups.[52] As a result, an entire community does not have to suffer a deprivation of public rights for a harm to constitute a public nuisance.[53] "[S]o long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large," the harm can constitute a public nuisance.[54] As outlined by the Second Restatement:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.

47. RESTATEMENT (SECOND) OF TORTS §§ 821B, 821B cmt. h (AM. L. INST. 1979).

48. *Id.* § 821B cmt. a.

49. *Id.*

50. *Id.* § 821B cmt. b ("At common law[,] public nuisance came to cover a large, miscellaneous and diversified group of minor criminal offenses, all of which involved some interference with the interests of the community at large—interests that were recognized as rights of the general public entitled to protection. Thus public nuisances included interference with the public health, as in the case of keeping diseased animals or the maintenance of a pond breeding malarial mosquitoes; with the public safety, as in the case of the storage of explosives in the midst of a city or the shooting of fireworks in the public streets; with the public morals, as in the case of houses of prostitution or indecent exhibitions; with the public peace, as by loud and disturbing noises; with the public comfort, as in the case of widely disseminated bad odors, dust and smoke; with the public convenience, as by the obstruction of a public highway or a navigable stream; and with a wide variety of other miscellaneous public rights of a similar kind.").

51. *Id.* § 821B cmt. g.

52. *Id.*

53. *Id.*

54. *Id.*

> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[55]

What constitutes an "unreasonable interference" is decided using the same kind of balancing test that the courts apply in private nuisance claims, namely by balancing the harms and utility of the actions in question.[56]

In contrast to private nuisance, which typically only requires a potential claimant to have a property interest in the affected land,[57] public nuisance doctrines have stricter requirements for determining who may bring claims. "Public official[s]," "public agencies," "political subdivision[s]," and their representatives may bring claims to address public nuisances.[58] Individuals may bring suits for injunctive relief from public nuisances if they have "standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action," but they cannot sue for damages.[59]

The only means an individual can use to sue for damages in a public nuisance suit, or for injunctive relief regardless of whether they are a "representative of the general public," is if they have suffered a "special injury" that is different in kind, rather than degree, to the harms suffered by the general

55. *Id.* § 821B.
56. *Id.* §§ 821B, 821B cmt. e, 827, 828.
57. *Id.* § 821E.
58. *Id.* § 821C(2)(b).
59. *Id.* § 821C(2)(c).

public.[60] Physical harm to an individual in addition to their deprivation of a public right can meet the special injury standard.[61] Pecuniary losses can also meet the special injury standard if an individual's pecuniary losses are different in kind, and not just degree, compared to the community.[62]

Public and private nuisance claims can often result from the same alleged harms.[63] For example, if a nuisance interferes with the use and enjoyment of one's land in the private nuisance sense *and* deprives them of a public right, then they may sue for both claims.[64] This is precisely why we see claims for private and public nuisance in environmental common law cases.

For municipalities and states in the environmental law context, there is a long history of public bodies using public nuisance to abate pollution. In 1907, in *Georgia v. Tennessee Copper Co.*, the U.S. Supreme Court granted an injunction in favor of the state of Georgia to prohibit the public nuisance of an out-of-state copper ore company that was releasing sulfur dioxide.[65] The sulfur dioxide became sulfuric acid as it traveled through the air before falling and damaging Georgia's forests, orchards, and crops.[66] The injunction was to take effect after allowing the company sufficient time to develop pollution control structures.[67] *Tennessee Copper* also held that a state can still bring an environmental public nuisance suit regardless of the damage it has done to its own environment.[68]

In the modern context, courts have treated public nuisance claims for air pollution in different ways, though it remains a viable doctrine. For example, in *Bell v. Cheswick Generating Station*, the Third Circuit in 2013 allowed a class action of over fifteen hundred private plaintiffs using Pennsylvania state law

60. Michael C. Blumm, *A Dozen Landmark Nuisance Cases and Their Environmental Significance*, 62 ARIZ. L. REV. 403, 409 (2020); RESTATEMENT (SECOND) OF TORTS §§ 821C(1), 821C(2)(a), 821C cmts. b, j (AM. L. INST. 1979).

61. RESTATEMENT (SECOND) OF TORTS § 821C cmt. d (AM. L. INST. 1979).

62. *Id.* § 821C cmt. h.

63. *Id.* § 821C cmt. e.

64. *Id.* § 821C cmt. e; Schuck, *supra* note 24, at 479.

65. 206 U.S. 230, 236–37 (1907). It is not clear from the case whether Georgia pursued their claims under state or federal common law. *Id.* But the proposition that a state can sue a private polluter outside of their jurisdiction has been limited by *American Electric v. Connecticut*, which held that the CAA would preempt such federal common law claims today. Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 423 (2011).

66. *Tenn. Copper Co.*, 206 U.S. at 236–37.

67. *Id.* at 239.

68. *Id.* at 238.

to pursue private and public nuisance claims.[69] The plaintiffs sued to abate ash and airborne contaminant pollution that had settled onto their property due to the operation of nearby coal power plants.[70] This case is discussed in greater detail in Part II. Currently, public nuisance still plays an important role in environmental common law claims and is frequently invoked by municipalities hoping to abate environmental harms given the doctrine's broad applicability and demonstrated viability.[71] Finally, the last doctrine that must be discussed to understand modern environmental state common law suits is trespass.

B. Trespass

Trespass has long been used in tandem with environmental nuisance suits and carries several advantages that may encourage a plaintiff to bring trespass claims along with nuisance claims.[72] In many instances, trespass claims have longer statutes of limitations than private nuisance claims, and trespass claims can be made without a required showing of substantial harm or interference with the enjoyment of one's property.[73] Trespass claims are also not subject to the balancing test that weighs the utility of the action against the gravity of the harm that courts employ in nuisance cases.[74] In the environmental context there is often significant overlap between trespass and nuisance claims generally[75] because harms often both constitute an invasion of property and an interference with the use and enjoyment of the property.[76]

The Second Restatement outlines the elements for trespass as follows:

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69. 734 F.3d 188, at 189, 198 (3d Cir. 2013) (holding that the CAA did not preempt state law tort claims of nuisance, negligence, recklessness, and trespass).

70. *Id.*

71. *See* cases cited *supra* note 16.

72. Julian Conrad Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126, 1138; Meiners & Yandle, *supra* note 26, at 935–36.

73. Juergensmeyer, *supra* note 72, at 1138; Meiners & Yandle, *supra* note 26, at 935–36.

74. Anthony Z. Roisman & Alexander Wolff, *Trespass by Pollution: Remedy by Mandatory Injunction*, 21 FORDHAM ENV'T L. REV. 157, 160 (2010).

75. *See* Martin v. Reynolds Metals Co., 342 P.2d 790, 795 (Or. 1959) ("Here it is apparent that the law of trespass and the law of nuisance come very close to merging.").

76. Meiners & Yandle, *supra* note 26, at 936.

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) remains on the land, or
>
> (c) fails to remove from the land a thing which he is under a duty to remove.[77]

It is subsection (a) that implicates pollution harms as courts have accepted that air pollution and chemicals do constitute "things" that can give rise to trespass claims and polluters can meet the mens rea requirement of intent.[78]

An important part of how courts discuss trespass claims is also whether the trespass is "continuous," a finding that carries weight for nuisance claims as well, as this distinction is crucial for determining the statute of limitations.[79] As the Colorado Supreme Court detailed in *Hoery v. United States* in 2003:

> The typical trespass or nuisance is complete when it is committed; the cause of action accrues, and the statute of limitations [begins] to run at that time. . . . [T]he defendant's invasion continues if he fails to stop the invasion and to remove the harmful condition. In such a case, there is a continuing tort so long as the offending object remains and continues to cause the plaintiff harm.[80]

77. RESTATEMENT (SECOND) OF TORTS § 158 (AM. L. INST. 1979).

78. *Martin*, 342 P.2d at 794 (finding that the invasion of fluoride particulates was an actionable trespass); Bradley v. Am. Smelting & Refin. Co., 709 P.2d 782, 786 (Wash. 1985) (finding that pollutant emissions from a copper smelter were emitted with intent to trespass given the reasonable certainty they would invade the lands of others, and that such actions constituted valid trespass and nuisance claims); RESTATEMENT (SECOND) OF TORTS § 158 cmt. i (AM. L. INST. 1979).

79. Hoery v. United States, 64 P.3d 214, 218 (Colo. 2003) (finding that groundwater contamination from an army base constituted continuing trespass and nuisance under Colorado law), *aff'd* 324 F.3d 1220 (10th Cir. 2003).

80. *Id.*

Finally, trespass claims can merit both damages[81] and injunctive relief.[82] Trespass also may allow for unique injunctive remedies. Most notably, trespass claimants in some instances can request that injunctive relief include a total removal of the trespass, while nuisance claims only allow for an abatement of the harm until it no longer constitutes a nuisance.[83] In practice, this means that a court may be able to force a polluter to remove their pollution and engage in cleanup operations—expensive endeavors that may potentially grant plaintiffs greater awards.[84]

These are highly simplified overviews of the nuisance and trespass doctrines, and courts naturally will apply these principles in different ways. Yet these doctrines serve as viable and proven means to address intrastate environmental law claims. These general principles are also crucial for understanding interstate pollution and climate change lawsuits that feature state common law claims, and why these claims are often all present instead of a single type. But state common law claims operate alongside the federal environmental regulatory regime, and while the U.S. Supreme Court has seemingly allowed some state common law claims to proceed thus far,[85] whether they may prove viable in climate change litigation remains to be seen.

II. FEDERAL ENVIRONMENTAL LAWS AND COMMON LAW AIR POLLUTION CLAIMS

A. Preemption, Displacement, and Common Law Distinctions

Common law efforts to abate air pollution have inevitably run into conflicts with the modern federal regulatory system for pollution control. In the context of air pollution in particular, the main issue is the impact of the CAA and whether it preempts

81. *See Martin*, 342 P.2d at 795 (upholding damages granted by the district court for pollution trespass).

82. Roisman & Wolff, *supra* note 74, at 159.

83. *Id.* at 161, 166 (recognizing such injunctive cleanup orders might be denied by the court, or preempted by EPA mandated cleanup orders, but are a valid form of injunctive relief). Not all states have accepted this form of injunctive relief. *See id.* at 167–89.

84. *Id.* at 167.

85. *See infra* Section II.A.

state common law claims.[86] There are a number of threshold concepts worth illustrating before exploring these issues, however.

Briefly stated, preemption refers to instances when federal legislation "preempts" state legislation on an issue, making state law inapplicable. Preemption can occur when the federal government expressly states in federal legislation that state law is preempted, or it can be implied when the federal legislative scheme is comprehensive enough to infer that states have no room to enact rules in the area, or if it conflicts, frustrates, or interferes with federal law.[87]

Preemption is different than another doctrine often raised when discussing state common law environmental claims: displacement. Though courts have used the terms interchangeably in error,[88] displacement refers to a situation where Congress has spoken on a matter of federal common law via statute, thus "displacing" the federal common law on the issue.[89] Preemption, by contrast, is when state law conflicts with federal statutes so federal law "preempts" the state law.[90] The bar for the displacement of the federal common law by federal legislation is lower than the bar for preemption of state law by federal law.[91] Federal common law will be displaced by federal legislation if Congress has passed a statute that "speaks directly to the question" at issue.[92]

Finally, it is important to detail what the federal common law is, and how it differs from state common law, to clarify the exact distinction between the state and federal common law claims discussed in this Part. The "new" federal common law in the wake of the *Erie*[93] doctrine allows for federal courts to employ federal common law on issues of "national concern" where appropriate in the face of a statutory gap or necessity, or if Congress has given federal courts discretion to enact federal

86. 42 U.S.C. §§ 7401–621. *See generally* Sam Kalen, *Policing Federal Supremacy: Preemption and Common Law Damage Claims as a Ceiling to the Clean Air Act Regulatory Floor*, 68 FLA. L. REV. 1597 (2016).

87. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 491–92 (1987).

88. Eric M. Whitehead, *Displacement ≠ Preemption: The Opa 90 Damages Conundrum*, 18 LOY. MAR. L.J. 329, 332 (2019).

89. *Id.* at 332–34.

90. *Id.*

91. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423 (2011) (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981)).

92. *Id.* (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

93. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

common law in a particular field.[94] Historically, environmental issues of a national scope, like states suing for interstate environmental nuisance harms, were considered a field that utilized federal common law.[95]

Much like with federal statutes, the federal common law can preempt state law in certain unique conditions, though the two-step test to meet these conditions is stricter than with federal statutes and state law.[96] First, the issue must involve "uniquely federal interests," such as "obligations to and rights of the United States under its contracts" or "civil liability of federal officials for actions taken in the course of their duty."[97] Next, if one of these unique interests is at issue, then state law will still only be displaced if a "significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation."[98] Such a situation might exist when the nature of the issue demands a nationwide rule.[99] If these two conditions are met, then only the portions of the state law that directly produce the conflict or frustration will be preempted, though this can range from the entire body of state law or just pieces of state laws.[100]

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94. *Am. Elec. Power Co.*, 564 U.S. at 421 (quoting Henry J. Friendly, *In Praise of Erie – and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964)); *see also* City of New York v. Chevron Corp., 993 F.3d 81, 90 (2d Cir. 2021).

95. *Am. Elec. Power Co.,* 564 U.S. at 421–22; *see also* Nikhil V. Gore & Jennifer E. Tarr, Connecticut v. American Electric Power Co., 34 HARV. ENV'T L. REV. 577, 580 (2010).

96. Courts have used preemption and displacement interchangeably when it comes to federal common law overriding state law. *Compare* Helfrich v. Blue Cross & Blue Shield Ass'n, 804 F.3d 1090, 1096 (10th Cir. 2015) ("*Displacement* of state law, however, requires more than just the presence of a uniquely federal interest.") (emphasis added), *with* Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1263 (10th Cir. 2022) ("Having determined that the federal common law does not completely *preempt* the state-law claims, we now consider whether the federal act that displaced the federal common law—the CAA—completely preempts them.") (emphasis added). Confusingly, the U.S. Supreme Court has even used both terms within the same opinion. *E.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 507–08 (1988). Given this confusion, this Comment uses "preemption" to describe the override of state law by federal common law due to the similarity in the interplay between levels of government at issue compared to traditional preemption, and because it seems to be the more commonly utilized term in the caselaw.

97. *Boyle*, 487 U.S. at 504–05.

98. *Id.* at 507 (internal quotations omitted).

99. *Id.* at 508.

100. *Id.*

As it relates to air pollution, the Supreme Court has recognized that interstate pollution issues historically justified the creation of federal common law.[101] But whether interstate pollution issues meet the standards to displace state law has not been definitively settled and, especially in the context of climate change, there is a great deal of nuance to this situation.

B. American Electric *and* International Paper

The foundation for the dynamic between preemption and state common law claims in the air pollution and climate change context is found in two Supreme Court cases: *International Paper Co. v. Ouellette*, decided in 1987,[102] and *American Electric v. Connecticut*, decided in 2011.[103] *American Electric* involved New York City and several states and land trusts filing suit against four private power companies and the Tennessee Valley Authority.[104] The plaintiffs filed claims under federal interstate nuisance common law, with the aim of mandating a cap on carbon-dioxide emissions which would have gotten stricter each year.[105]

The Supreme Court held that the CAA displaced *federal* common law claims, such as interstate environmental nuisance suits,[106] to abate carbon dioxide emissions from power plants,[107] defeating the plaintiffs' claim. But the Supreme Court left open the question of whether *state* common law claims would be viable to mitigate carbon dioxide emissions.[108] *American Electric* did not reach the question of whether federal common law claims for air pollution could exist in the absence of the CAA, for its existence made the question moot as it clearly displaced such claims for this very reason.[109]

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101. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 421–22 (2011).
102. 479 U.S. 481 (1987).
103. 564 U.S. at 415.
104. *Id.*
105. *Id.*
106. *Id.* at 423.
107. *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853, 858 (9th Cir. 2012) (highlighting an example of an environmental federal common law claim, which reinforced the holding in *American Electric* by holding that a public nuisance claim brought under federal common law for greenhouse gas emissions by Kivalina was displaced by the CAA).
108. *Am. Elec. Power Co.*, 564 U.S. at 429.
109. *Id.* at 423.

American Electric's prohibition on federal common law claims to mitigate carbon dioxide, while leaving open the possibility of using state common law claims, built on *International Paper*'s limitation on potential state common law claims. In *International Paper*, the Supreme Court saw a class action where Vermont landowners brought nuisance claims under Vermont state common law.[110] The plaintiffs filed suit in response to a New York–based paper mill releasing effluent into a river, which fed into a lake on the border of New York and Vermont.[111] The Supreme Court held that the Clean Water Act (CWA) prohibited the Vermont plaintiffs from bringing state common law claims against out-of-state polluters using the *affected* state's, Vermont's, common law.[112]

Importantly, however, the Supreme Court held that the CWA did not preempt state common law claims for interstate water pollution using the *source* state's, New York's, common law.[113] Relying heavily on the CWA's savings clause,[114] which preserved the viability of state common law claims to address water pollution, the Court held that interstate claims using source state common law were valid as they would not implicate conflicting legal standards that might undermine the CWA.[115] The case was then remanded so the lower court could consider the case under New York state common law.[116] As a result, *International Paper* laid a strong foundation for interstate environmental state common law claims generally—so long as they use the source state's laws and not the affected state's laws.

110. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 483–84 (1987).

111. *Id.*

112. *Id.* at 497–500.

113. *Id.*

114. The U.S. Supreme Court in *International Paper* highlighted the relevant parts of the CWA's savings clause using the analysis employed by the Seventh Circuit in *Illinois v. Milwaukee*: "First, § 510 of the Act provides: 'Except as expressly provided . . . nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.' 33 U.S.C. § 1370. In addition, § 505(e) states: 'Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . .' 33 U.S.C. § 1365(e)." *Int'l Paper*, 479 U.S. at 485 (quoting Illinois v. Milwaukee, 731 F.2d 403, 413–14 (1984)).

115. *Id.* at 492–500.

116. *Id.* at 500.

C. State Common Law Claims and Air Pollution

With the prohibition on federal common law claims against interstate air pollution established by *American Electric* and the prohibition on affected state common law claims established by *International Paper*, the courts began to hold that some source state common law claims in the interstate context were viable.[117] The Supreme Court's analysis of state common law with respect to the CWA and its savings clause in *International Paper* has heavily informed analysis of the CAA in the preemption context. The CAA has very similar language informing its own savings clause,[118] which reads, in the pertinent portions:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency) . . . .[119]

> Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.[120]

The CAA's savings clause and the logic of *International Paper* provided the foundation for courts to uphold interstate air

117. Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685, 686–87 (6th Cir. 2015); Bell v. Cheswick Generating Station, 734 F.3d 188, 190 (3d Cir. 2013); Freeman v. Grain Processing Corp., 848 N.W.2d 58, 63 (Iowa 2014); North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 296 (4th Cir. 2010); *Int'l Paper Co.*, 479 U.S. at 483–84 (1987).

118. *See Bell*, 734 F.3d at 195 (finding that there is "no meaningful difference" between the saving clauses in the CAA and the CWA).

119. 42 U.S.C. § 7604(e).

120. 42 U.S.C. § 7416.

pollution claims using source state common law. In the 2013 case *Bell v. Cheswick Generating Station*, the Third Circuit analyzed the CAA's savings clause in light of its similarity to the CWA's saving clause as discussed in *International Paper*.[121] The plaintiffs, a group of fifteen hundred individual property owners within a mile of the Cheswick Generating Station, brought suit in response to fly ash and coal combustion byproducts which collected as black and white dust on their properties.[122] The Third Circuit held that the CAA did not bar source state common law claims against the Pennsylvania-based coal power plants.[123] As the Third Circuit wrote in regards to the plaintiffs' "nuisance, negligence and recklessness, and trespass" suits, "We see nothing in the Clean Air Act to indicate that Congress intended to preempt source state common law tort claims."[124]

In 2015, the Sixth Circuit in *Merrick v. Diageo Americas Supply, Inc.* found that state common law rules constituted a "requirement" under the CAA savings clause's mention of state's rights to enact "any requirement respecting control or abatement of air pollution."[125] In *Merrick*, the plaintiffs filed a nuisance claim in response to the ethanol vapor emissions from the defendant's whiskey distilleries, which had caused the growth of whiskey fungus on the plaintiffs' properties.[126] The Sixth Circuit employed the same logic as the *Bell* court and allowed the state common law claims to proceed without being preempted by the CAA, writing: "[The CAA] expressly preserves the state common law standards on which plaintiffs sue."[127] At the state court level, the Supreme Court of Iowa in *Freeman v. Grain Processing Corp.* held in 2014 that Iowa's state version of the CAA[128] did not preempt state common law nuisance and trespass claims against a local wet corn milling facility's pollution, nor did the CAA.[129]

But the evolution of these cases is particularly interesting given that they came about after the Fourth Circuit's 2010

121. *Bell*, 734 F.3d at 194–95.
122. *Id.* at 189, 192.
123. *Id.* at 198.
124. *Id.* at 188, 198.
125. 42 U.S.C. § 7416(2); Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685, 690 (6th Cir. 2015).
126. *Merrick*, 805 F.3d at 686–87.
127. *Id.* at 690–95.
128. IOWA CODE §455B (2022).
129. 848 N.W.2d 58, 63, 94 (Iowa 2014).

ruling in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, which revived the *Boomer* court's concern with courts litigating interstate air pollution issues.[130] The Fourth Circuit held that the district court in North Carolina had applied North Carolina law in error when it upheld an injunction against out-of-state Tennessee Valley Authority power plants, contrary to the holding in *International Paper*, as North Carolina was the *affected* state.[131] Instead, the district court should have applied *source* state law from Alabama and Tennessee—neither of which recognized nuisance claims for polluting activities sanctioned by law.[132] While this ruling supported the logic in *International Paper* allowing for interstate common law claims if plaintiffs sue under source state law, and indeed the Fourth Circuit was careful to say that *International Paper* did not rule out all potential common law environmental torts,[133] the Fourth Circuit was highly skeptical of the use of common law for interstate pollution suits.[134]

Much like the court in the *Boomer* case, which argued that air pollution was an issue for the legislature,[135] the Fourth Circuit was primarily concerned that state common law tort actions would lead to a "patchwork" of standards.[136] The Fourth Circuit feared that a case-by-case system of standards would be unpredictable and difficult to comply with, and might even harm the environment further.[137] The Fourth Circuit instead endorsed lawsuits via the existing mechanisms in the CAA available to individuals or to the state to sue for violations, or compel the EPA to act.[138] The Fourth Circuit did not invalidate source state common law, but this hesitancy indicates that the *Boomer* court's reluctance to endorse common law pollution regulation via the courts was as relevant in 2010 as it was in 1970.[139]

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130. 615 F.3d 291, 306–12 (4th Cir. 2010).

131. *Id.* at 296, 306–10.

132. *Id.* at 306–10 (holding that while the district court had mentioned Alabama and Tennessee law, it had essentially applied North Carolina law when it crafted its remedies, which effectively violated *International Paper*).

133. *Id.* at 302–04, 311.

134. *Id.* at 301–02.

135. *See* Boomer v. Atl. Cement Co., 257 N.E.2d 870, 871 (N.Y. 1970).

136. *North Carolina ex rel. Cooper*, 615 F.3d at 296.

137. *Id.* at 306, 312.

138. *Id.* at 310–11.

139. *Boomer*, 257 N.E.2d at 871.

Examining the cases following *International Paper*, it is clear that *International Paper* definitively held that interstate pollution could be addressed by source state common law claims.[140] Indeed *Bell*, *Freeman*, and *North Carolina v. Tennessee Valley Authority* upheld the rule from *International Paper* and found that the CAA did not preempt source state common law environmental claims.[141] This is a crucial threshold issue now that the federal common law, which used to be considered viable for interstate air pollution harms,[142] has now been definitively ruled out in the wake of *American Electric*.[143]

When it comes to greenhouse gas emissions, however, which the Supreme Court has already stated the EPA has authority to regulate under the CAA,[144] it is difficult to predict how these decisions might impact the recent wave of common law actions in response to climate change. Intrastate and interstate state common law claims to abate greenhouse gas emissions present particularly imposing challenges given the broad impacts of climate change and do not have clear support from current precedent—though a number of new cases on these issues may provide some guidance.

III. CURRENT STATE OF COMMON LAW CLAIMS TARGETING FOSSIL FUEL PRODUCERS

Today there are a number of active lawsuits by cities, counties, and states against major greenhouse gas emitters, like fossil fuel companies, which are pursuing state common law tort claims such as trespass, public and private nuisance, and negligence.[145] The plaintiffs' aims are to abate further emissions of greenhouse gases and receive compensation for the harms they have already suffered—and will continue to suffer—as a result of climate change.[146] Many of these suits make claims along consumer protection lines as well, such as fraud and civil

140. *Int'l Paper Co.*, 479 U.S. at 492–500.

141. *See* cases cited *supra* note 117.

142. Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 423 (2011).

143. *Id.* at 424.

144. Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

145. *See U.S. Climate Change Litigation: Common Law Claims*, SABIN CTR. FOR CLIMATE CHANGE L., http://climatecasechart.com/case-category/common-law-claims [https://perma.cc/3PMC-NMS7] (cataloging thirty-one cases that employ state common law claims).

146. *See id.*

conspiracy, in response to allegations that fossil fuel companies misled the public about the harms of climate change despite knowing the risks.[147] While analysis of all of these cases is outside the scope of this Comment, two of these state common law-based climate change lawsuits merit further scrutiny in order to gauge the potential future of these kinds of claims.

A. BP P.L.C. v. Mayor & City Council of Baltimore

1. Background and Issues

The plaintiffs' complaint in *BP P.L.C. v. Mayor & City Council of Baltimore*, filed in 2018, is predicated primarily on extensive allegations that the defendants, consisting of numerous fossil fuel producers, profited off the sale and manufacture of fossil fuels and promoted their use while they knew or should have known the significant risks associated with the unabated use of fossil fuels.[148] For example, the plaintiffs cited public facing statements by Chevron, ConocoPhilips, and Shell that highlighted their commitment to renewable energy despite allegedly never actually pursuing such efforts.[149] Instead, plaintiffs cited efforts by the defendants to harden their operational infrastructure, at great cost, to prepare for the impacts of climate change.[150] Such efforts included raising the height of offshore oil platforms to account for higher sea levels and designing platforms capable of drilling in areas with greater risk of ice flow movement.[151] The plaintiffs' claims were essentially that the defendants' actions demonstrated that the defendants were aware of the risks of climate change yet hid their knowledge of these dangers and even actively campaigned against making necessary changes, all of which caused harm to the plaintiffs.[152] Such harms included increased risk of repeated flooding as a result of already increasing sea levels, which posed threats to city infrastructure, increased risks of severe droughts and winter storms, and imposed significant costs associated with

147. *See id.*

148. Plaintiff's Complaint at 50–97, Mayor of Balt. v. BP P.L.C. 388 F.Supp. 3d 538 (D. Md. 2019) (No. ELH-18-2357).

149. *Id.* at 94–95.

150. *Id.* at 87–89.

151. *Id.*

152. *Id.* at 97–99.

having to upgrade city infrastructure to prepare for such harms.[153]

The plaintiffs brought several claims as a result, namely public nuisance,[154] private nuisance,[155] strict liability for failure to warn,[156] strict liability for design defect,[157] negligent design defect,[158] negligent failure to warn,[159] trespass,[160] and violations of the Maryland Consumer Protection Act for unfair or deceptive trade practices.[161] As relief, the plaintiffs requested compensatory damages, equitable relief via abatement of the nuisance, civil penalties for the consumer protection violations, attorney's fees, punitive damages, disgorgement of profits, costs of the suit, and other costs deemed proper.[162] Save for the state common law nuisance and trespass claims, discussing all of these claims is beyond the scope of this Comment.

In terms of public nuisance, the plaintiffs' main argument was that the defendants were in the best position to abate the harms their activities were causing and yet still promoted their use and campaigned against efforts to find alternatives, contributing to substantial risks to public health, safety, peace, comfort, and convenience.[163] The plaintiffs argued that these harms and risks included interference with the use and enjoyment of property as a result of severe weather events and environmental changes, which would ultimately destroy the properties in question.[164] The city and its residents would suffer these costs, while the defendants could have taken steps with their allegedly superior knowledge to abate this problem.[165] The private nuisance claim was laid out along very similar lines but with the addition that the acts of the defendants were indivisible as it is not possible to trace greenhouse gas molecules to a specific source.[166] The plaintiffs also alleged nuisance per se

153. *Id.* at 99–106.
154. *Id.* at 107–11.
155. *Id.* at 112–14.
156. *Id.* at 115–17.
157. *Id.* at 117–20.
158. *Id.* at 121–23.
159. *Id.* at 124–26.
160. *Id.* at 126–28.
161. *Id.* at 128–30.
162. *Id.* at 130.
163. *Id.* at 107–10.
164. *Id.* at 109–10.
165. *Id.* at 110.
166. *Id.* at 114.

because of violations of the Maryland Consumer Protection Act.[167]

The plaintiffs sought traditional damages, an abatement of the nuisances, for the defendants to be enjoined from causing future nuisances, and punitive damages because the defendants acted with malice.[168] Regarding the balancing test that courts utilize when considering nuisance claims, the plaintiffs argued that the gravity of the harms they had and would continue to suffer outweighed the utility of the defendants' actions.[169]

For the trespass claim, the plaintiffs argued that the defendants were allowing invasions onto their property, such as "flood waters, extreme precipitation, saltwater and other materials," that threatened to make the property unusable.[170] With the same disclosure that it is impossible to trace specific greenhouse gas molecules to a specific source, meaning that the defendants' harms were indivisible, the plaintiffs alleged that the defendants' "introduction of fossil fuels into the stream of commerce was a substantial factor" behind the harms to the plaintiffs' property.[171]

Alleging that these actions were taken with malice, as the defendants knew of the risks associated with their products, the plaintiff requested punitive damages "for the good of society and [to] deter defendants from ever committing the same or similar acts."[172] However, the plaintiffs did not request any injunctive relief, such as cleanup or mitigation efforts, for the trespass claim.[173]

2. The Importance of Removal Disputes

The merits of these claims have, unfortunately, not yet been adjudicated. The courts have thus far focused on removal questions, which have delayed the case, while the parties have debated whether the case should be heard in state or federal court.[174] However, the removal questions at issue stand to greatly impact the outcomes of climate change–related common

167. *Id.* at 111.
168. *Id.*
169. *Id.* at 107, 109–10.
170. *Id.* at 127.
171. *Id.*
172. *Id.* at 128.
173. *Id.* at 127–28.
174. *See generally* BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532 (2021).

law tort cases. For one thing, removal motions have been the first step taken by many defendants in state common law cases with claims similar to *BP P.L.C. v. Baltimore*;[175] so from a procedural standpoint, it is crucial to understand this process as it is a key part of this emerging litigation. Particularly as *BP P.L.C. v. Baltimore* validated the removal approach taken by many fossil fuel defendants,[176] this will be a near-guaranteed first step for these lawsuits in the future.

Furthermore, defendants in these cases have an interest in seeing their defenses heard in federal court.[177] In a 1992 survey, defense attorneys representing businesses expressed a preference for federal courts largely due to their fear of antibusiness bias in state courts, a perceived greater competency in federal courts, a perceived greater chance of more favorable rulings, and a greater availability for summary judgments.[178] As a result, defendants make a number of removal arguments to justify removing cases to federal courts.[179]

The hope for the defendants is that a federal court will be a more favorable venue and will be more likely to find that interstate greenhouse gas emissions and their resulting harms are necessarily matters of federal law.[180] Though such a finding is hardly guaranteed, should a court find that the harms of greenhouse gas emissions from fossil fuel production are a matter that can only be addressed by federal common law, instead of state common law, then the case will be moot per

175. Rhode Island v. Shell Oil Prods. Co., 979 F.3d 50, 54–55, 60 (1st Cir. 2020) (affirming remand order on grounds that removal was not justified under federal-officer removal), *vacated*, 141 S. Ct. 2666 (2021) (vacated and remanded to be decided in accordance with *BP P.L.C.*); *see also* Cnty. of San Mateo v. Chevron Corp., 960 F.3d 586, 593–95, 603 (9th Cir. 2020) (affirming remand order and dismissing appeal for lack of jurisdiction to review the remand order), *vacated sub nom.* Chevron Corp. v. San Mateo Cnty., 141 S. Ct. 2666 (2021) (vacated and remanded to be decided in accordance with *BP P.L.C.*).

176. *BP P.L.C.*, 141 S. Ct. at 1543.

177. Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, at 375, 408–10, 412–13, 417, 424–26 (1992) (detailing an empirical survey of plaintiff and defense attorneys regarding their reasoning for choosing state or federal court); *see also* John Schwartz, *Supreme Court Gives Big Oil a Win in Climate Fight With Cities*, N.Y. TIMES (May 17, 2021), https://www.nytimes.com/2021/05/17/climate/supreme-court-baltimore-fossil-fuels.html [https://perma.cc/57HX-ARED].

178. Miller, *supra* note 177, at 369, 375, 408–10, 412–13, 417, 424–26.

179. *BP P.L.C.*, 141 S. Ct. at 1536.

180. Such an outcome was precisely what happened in *New York v. Chevron*. City of New York v. Chevron Corp., 993 F.3d 81, 90–95 (2d Cir. 2021).

American Electric's prohibition on federal common law pollution claims in light of the CAA.[181]

Not all federal courts may come to the same conclusion of course, and some federal courts may find that state courts and state common law claims are an appropriate means to address these claims.[182] For now, however, only the jurisdictional removal questions have been adjudicated, save for *City of New York v. Chevron*'s outcome on the merits.[183] Regardless, the outcome of removing a case regarding a state common law claim for air pollution to federal court can be quite impactful, and the removal holding of *BP P.L.C. v. Baltimore*, which resolved a split between the Fourth and Seventh Circuits,[184] is worth discussing in greater detail.

3. Removal Outcome

After the initial filings in Maryland state court, the defendants' first move in *BP P.L.C. v. Baltimore* was to remove the case to federal court.[185] They made several arguments to justify this, citing "the federal-question statute, 28 U.S.C. § 1331; the Outer Continental Shelf Lands Act, 92 Stat. 657, 43 U.S.C. § 1349(b); the admiralty jurisdiction statute, 28 U.S.C. § 1333; and the bankruptcy removal statute, 28 U.S.C. § 1452."[186] Most importantly, however, the defendants argued that 28 U.S.C. § 1442(a)(1), the federal officer removal statute, authorized removal as some of their fossil fuel operations were allegedly conducted at the federal government's request.[187] The plaintiffs then filed a motion to have the case remanded back to

181. Am. Elec. Power Co., v. Connecticut, 564 U.S. 410, 429 (2011); *New York v. Chevron*, 993 F.3d at 90–95.

182. For example, the Tenth Circuit in *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy* recently rejected the defendant's six separate claims appealing the federal district court's remand of the common law environmental claims back to state court. Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1275 (10th Cir. 2022).

183. *Compare New York v. Chevron*, 993 F.3d at 90–95 (discussing the necessity of the federal common law for the claim and the differences in its holding and other cases discussing the removal issue), *with Suncor Energy*, 25 F.4th at 1250–75 (denying removal and sending to state court despite the impact of *BP P.L.C.* because the defendants had failed to raise valid arguments for removal on numerous grounds).

184. *BP P.L.C.*, 141 S. Ct. at 1536, 1543.

185. *Id.* at 1543.

186. *Id.* at 1536.

187. *Id.*

state court, which the federal district court granted, and the defendants appealed to the Fourth Circuit.[188]

Typically, a federal appeals court cannot review a federal district court's remand decision, but 28 U.S.C. § 1447(d) contains an express exception in the case of remands in response to removal claims made under 28 U.S.C. § 1442 and § 1443.[189] The Fourth Circuit interpreted this to mean that they could only review the federal officer removal statute claim that led to remand, not the entire order, and the court thus refused to review the other arguments.[190] But this led to a split with the Seventh Circuit, which had found that the federal appellate court could review the entire remand decision on appeal under 28 U.S.C. § 1447(d).[191] The U.S. Supreme Court granted certiorari in 2020 to hear the issue.[192]

The U.S. Supreme Court's opinion, written by Justice Gorsuch, with a dissent from Justice Sotomayor,[193] sided with the Seventh Circuit holding that 28 U.S.C. § 1447(d) granted federal appellate courts the authority to review an entire remand order, and the Supreme Court remanded the case back to the Fourth Circuit.[194] Justice Gorsuch, writing for the majority, focused on the plain language of the statute's reference to the appellate court's ability to review an "order" without qualifications.[195] Justice Sotomayor, in dissent, argued that this would, in effect, allow defendants to avoid the general prohibition on federal appellate review of remand orders, subject to only narrow exceptions, by "shoehorning a § 1442 or § 1443 argument into their case for removal."[196] The dissent reasoned that this would likely lead to frivolous removal arguments and gamesmanship and would delay adjudication, despite the

188. *Id.* at 1536–37.

189. 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.").

190. *BP P.L.C.*, 141 S. Ct. at 1537.

191. *Id.*

192. *Id.*

193. *Id.* at 1534, 1543. Justice Alito did not take part in the decision. *Id.* at 1543.

194. *Id.* at 1543.

195. *Id.* at 1537–40.

196. *Id.* at 1543.

majority's belief that sanctions for frivolous actions would sufficiently discourage such behavior.[197]

As discussed previously, *BP P.L.C. v. Baltimore*'s answer to the removal question has significant implications for other cases throughout the country. Already the same removal issue is being litigated in other similar climate change cases throughout the country,[198] and the Supreme Court's holding effectively ensured that defendants have a far greater chance of successfully removing cases to federal court as appellate courts can now examine more grounds in a remand order to reverse such a decision if they see fit.[199]

However, the efforts of fossil fuel defendants to see these cases removed to federal court may not always bear fruit, even with the new advantages created by *BP P.L.C. v. Baltimore*. On April 7, 2022, after *BP P.L.C. v. Baltimore* was remanded to the Fourth Circuit to examine the entirety of the removal motion, the Fourth Circuit determined that none of the removal arguments raised by the defendants merited the claims being heard in federal court.[200] The Fourth Circuit reasoned that, despite the widespread impacts of climate change, state courts were perfectly capable of resolving matters of state law even on this imposing subject, though they made no comment on the potential merit of the claims.[201] In the words of the Fourth Circuit:

> The impacts of climate change undoubtably have local, national, and international ramifications. But those consequences do not necessarily confer jurisdiction upon federal courts carte blanche. In this case, a municipality has decided to exclusively rely upon state-law claims to remedy its own climate-change injuries, which it perceives were caused, at least in part, by Defendants' fossil-fuel products and strategic misinformation campaign. These claims do not belong in federal court.[202]

197. *Id.* at 1542–43, 1546–47.

198. *See* cases cited *supra* note 175.

199. *See BP P.L.C.*, 141 S. Ct. at 1543.

200. Mayor of Balt. v. BP P.L.C., 31 F.4th 178, 238 (4th Cir. 2022) (internal citations omitted).

201. *Id.*

202. *Id.*

Now the case is finally heading back to the state district court, which can, at long last, address the merits of the case and the state common law claims—though the defendants submitted a petition to the Supreme Court for certiorari to review the Fourth Circuit's affirmation of the remand order.[203]

This was the outcome in a Tenth Circuit state common law case as well, *Board of County Commissioners of Boulder County v. Suncor Energy*.[204] After being remanded to the Tenth Circuit to review the defendant's entire removal motion in the wake of *BP P.L.C. v. Baltimore*, the Tenth Circuit decided that none of the defendants' claims merited the case being heard in federal court.[205] The Tenth Circuit thus affirmed the federal district court's original remand order attempting to send the case back to state court.[206] As a result, a state court may soon hear the claims on their merits. But the fossil fuel defendants in *Suncor* have been working hard to avoid this outcome here as well, and have also petitioned the U.S. Supreme Court for certiorari to review the Tenth Circuit's decision to affirm the district court's remand order.[207]

It is unclear how state courts, or federal courts, might eventually rule on the merits of these state common law climate change claims. As of the writing of this Comment, no state common law claim aimed at abating climate change has been heard on the merits beyond the *City of New York v. Chevron* case. Regardless of this uncertainty, however, *BP P.L.C. v. Baltimore* is crucial for understanding the current state of climate change–related state common law tort cases. Its procedural impacts are a key part of how these cases have been litigated, and whether these cases are decided in federal or state court may have significant impacts. Though, at this stage, it seems possible that fossil fuel defendants' hopes of having these claims heard in federal court may not be so easily realized.

Aside from the removal questions, *BP P.L.C. v. Baltimore* is also crucial since it is emblematic of how plaintiffs are framing their allegations against fossil fuel companies, their harms, and their state common law claims—though naturally these harms

203. Petition for Writ of Certiorari, *BP P.L.C.*, 31 F.4th 178 (No. 22-361).

204. F.4th 1238, 1275 (10th Cir. 2022).

205. *Id.*

206. *Id.*

207. Petition for Writ of Certiorari, *Suncor Energy*, 25 F.4th 1238 (No. 21-1550).

and claims will vary as a result of location, strategy, and applicable state laws.[208] The potential outcome of these kinds of cases on the merits is even harder to ascertain now, however, thanks to *City of New York v. Chevron*.[209]

B. City of New York v. Chevron

1. Background and Issues

In 2021, the Second Circuit in *City of New York v. Chevron* affirmed the federal district court and dismissed New York City's state common law claims against fossil fuel producers.[210] New York City brought claims of public and private nuisance and trespass, alleging that the defendant fossil fuel companies continued to sell and promote fossil fuels despite being aware of the risks of climate change, much like in *BP P.L.C. v.*

208. *Compare* Plaintiff's Complaint, *supra* note 148, at 50–97, 99–130 (discussing common law claims and including general allegations of fossil fuel companies continuing to sell products despite knowing the risks), *with* Amended Complaint and Jury Demand at 46–123, Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp 3d 947 (D. Colo. 2019) (No. 18-cv-01672-WJM-SKC), *vacated*, 141 S. Ct. 2667 (2021) (plaintiff's general allegations of defendants selling fossil fuels despite the risks are substantially similar to the allegations in *BP P.L.C.*). The harms in the *Suncor* amended complaint focused largely on risks to water supply, increased risk of wildfires, public health hazards, and increased costs to protect open space, forest, and agricultural property. The claims included public nuisance, private nuisance, trespass, unjust enrichment, violations of Colorado Consumer Protection Act, and civil conspiracy. The plaintiffs requested past and future damages to abate climate change related costs, remediation and abatement of harm, and damages and attorney's fees for violations of Colorado Consumer Protection Act. Interestingly, this amended complaint made a point of clarifying that the plaintiffs are not seeking to restrict the defendant's speaking rights, and that they are not seeking to enjoin oil and gas operations or sales or enforce emission controls. Compare this *Suncor* amended complaint also with Plaintiff's Complaint at 50–97, Rhode Island v. Shell Oil Prods. Co., 979 F.3d 50 (1st Cir. 2020) (PC-2018-4716), *vacated*, 141 S. Ct. 2666 (2021), whereby the plaintiff's claims were substantially similar to *BP P.L.C.* and alleged continued sales by fossil fuel companies despite knowledge of the risks, causing harm to Rhode Island primarily through damage to their coastline, ports, transportation energy and water processing infrastructure, and natural resources. The plaintiff's claims included public nuisance, strict liability for failure to warn, strict liability for design defect, negligent design defect, negligent failure to warn, trespass, impairment of public trust resources, and violations of the State Environmental Rights Act. The plaintiffs sought compensatory damages, abatement of the nuisance, attorney's fees and costs, punitive damages, and disgorgement of profits.

209. 993 F.3d 81 (2d Cir. 2021).

210. *Id.* at 86.

Baltimore,[211] and sought past and future damages as well as an injunction to abate the nuisance and trespass.[212]

The Second Circuit first held that federal common law would necessarily govern claims that effectively attempted to regulate national and international greenhouse gas emissions, and that even claims raised under solely New York state law could not proceed as they would conflict with federal interests.[213] According to the Second Circuit, suits to mitigate greenhouse gas emissions could have effects far outside a single state if allowed to proceed and would impact the defendants throughout different states and even in different countries.[214] Even if New York City only wished to pursue damages, and not injunctions or reductions in emissions, the Second Circuit reasoned that this would lead to an unacceptable and unpredictable de facto system of state regulations that could undermine federal policy goals and implicate federalism concerns.[215]

The Second Circuit distinguished this direct outcome from cases that have focused on removal issues, like *BP P.L.C. v. Baltimore*,[216] by clarifying that these cases had only thus far determined whether the state claims *needed* to be heard in federal court.[217] None had addressed the merits of the claims and whether they were preempted by federal law as of yet.[218] In *Chevron*, however, since the claims had originally been brought in federal court, the Second Circuit was free to rule on the preemption issue without discussing questions of removal or remand.[219]

Having established that the claims had to proceed under federal common law, the Second Circuit went on to hold that "the Clean Air Act displaces federal common law claims concerned with domestic greenhouse gas emissions," regardless of whether

211. *See* Plaintiff's Complaint, *supra* note 148, at 97–99.
212. *New York v. Chevron*, 993 F.3d at 88.
213. *Id.* at 90–91.
214. *Id.* at 92–94.
215. *Id.* at 92–94, 96.
216. *See generally* BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532 (2021); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022).
217. *New York v. Chevron*, 993 F.3d at 93–94.
218. *Id.*
219. *Id.* at 94–95.

they seek relief in the form of damages or injunctive relief.[220] Finally, the Second Circuit held that the CAA's savings clause did not authorize state common law claims against domestic greenhouse gas emitters, as it only permitted narrower suits against out-of-state emitters using source state law that would not upset federal interests.[221] The Second Circuit also held that claims against defendants for emissions arising in foreign nations could not be addressed by federal common law claims, as such actions would frustrate national foreign policy and would be an overreach into realms governed by the executive and legislative branches.[222]

2. Implications of *City of New York v. Chevron*

If various courts across the country agree with the Second Circuit and determine that common law claims to abate greenhouse gas emissions are necessarily governed by federal common law, then common law claims will no longer be viable—regardless of whether a state or federal court hears the merits of the case or if the claim is based in state or federal common law. Under the logic of *Chevron*, state common law claims to recover damages for the harms of greenhouse gas emissions from intrastate or interstate defendants are essentially claims to abate widespread greenhouse gas emissions,[223] which are quite different from the comparatively localized and discrete pollution harms at issue in cases like *International Paper*.[224]

For the Second Circuit such claims are necessarily governed by federal common law instead of state law due to their wide-ranging effects and because the effects of such claims would conflict with federal interests.[225] This effectively results in sidestepping *International Paper*'s allowance for source state pollution claims against out-of-state polluters by forcing the federal common law to apply when a case focuses on greenhouse

220. *Id.* at 95–96 ("[W]hether styled as an action for injunctive relief against the Producers to stop them from producing fossil fuels, or an action for damages that would have the same practical effect, the City's claims are clearly barred by the Clean Air Act.").

221. *Id.* at 98–100.

222. *Id.* at 101–03.

223. *Id.* at 92–93, 95–96.

224. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 483–84 (1987).

225. *New York v. Chevron*, 993 F.3d at 90–95.

gas emissions.[226] And with the federal common law displaced by the CAA, this simultaneously does not allow for state common law litigation against greenhouse gas emitters, according to the Second Circuit.

This raises several questions for the future of state common law climate change lawsuits and may severely restrict a state's options to use common law claims like nuisance or trespass to abate climate change. Of course, it is not guaranteed that all courts will adhere to this logic, but it could be a major roadblock in the future of such cases and raises doubts about their viability.

IV. FUTURE POSSIBILITIES, AND THE PROS AND CONS, OF STATE COMMON LAW CLIMATE CHANGE LAWSUITS

Given the aforementioned general principles for common law torts of nuisance and trespass, their history in the environmental context, and the impacts of the discussed current cases, what might the future hold for these lawsuits?

On one hand, it is clear that if courts find that state common law claims for nuisance or trespass in relation to greenhouse gas emissions are necessarily issues of federal common law, then the CAA will almost certainly displace them and render such claims ineffective. And indeed greenhouse gas emissions are arguably different in kind, and degree, than the harms that the courts have addressed under state common law tort claims due to their extraterritorial nature and widespread impact.

Compared to cases like *International Paper*, *Merrick*, *Freeman*, *North Carolina v. Tennessee Valley Authority*, and *Bell*, which upheld common law claims against specific and limited in-state pollution issues using source state law,[227] suits seeking to abate greenhouse gases are pursuing claims against actors whose harms affect the entire country, and the world, in varying ways. The Second Circuit aptly stated the clear issue with using a single state's common law to address such issues in *Chevron*:

> To state the obvious, the City does not seek to hold the Producers liable for the effects of emissions released in New York, or even in New York's neighboring states. Instead, the

226. *Id.*
227. *See* cases cited *supra* note 117.

> City intends to hold the Producers liable, under New York law, for the effects of emissions made around the globe over the past several hundred years. In other words, the City requests damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet.[228]

Additionally, tort law is not intended to create broad regulatory schemes, and court decisions would lack the expertise of specialized agency decision-making.[229] Asking the judiciary to enact these changes would also effectively separate policymaking from the democratic process.[230] Judicially created environmental policies via common law suits could have enormous impacts for companies, municipalities, and individuals throughout the country but would be made without input from voters and their representatives in Congress. Such sweeping changes would likely benefit from the involvement of the legislative and executive branches.

These inherent issues and the outcome in *Chevron* seriously undermine state common law climate change suits. If other circuit courts across the country find that such claims are necessarily issues of federal common law, and are therefore inherently likely to be displaced by the CAA as the Second Circuit held in *New York v. Chevron*,[231] then such state common law actions to abate climate change would be wholly ineffective.

Even if other circuit courts disagree with the Second Circuit, such a split would almost certainly be decided by the Supreme Court. The outcome of such a case is hard to predict with certainty of course, but given the precedent established in *American Electric*, the Supreme Court would likely hold that state common law claims that attempt to abate greenhouse gas emissions would be displaced by the CAA if such claims are necessarily issues of federal law.[232]

On the other hand, the outcome in *Chevron* is hardly guaranteed. Common law nuisance suits clearly have a place in environmental law given their longstanding history in the field

228. *New York v. Chevron*, 993 F.3d at 92.

229. Lin & Burger, *supra* note 5, at 91–92.

230. *Id.*

231. *New York v. Chevron*, 993 F.3d at 92–96.

232. Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, at 423, 429 (2011); *see also* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, at 853, 858 (9th Cir. 2012).

of air pollution[233] and their express preservation in the CAA.[234] And their recent rise in popularity is arguably a reaction to the perceived failures of the federal environmental regulatory regime's response to climate change and the desire for quicker alternatives.[235] Additionally, the field of tort law might benefit and evolve from confronting the complicated nature of climate change litigation.[236]

Judges may not feel comfortable with addressing the complicated nature of causation and attributing harm in the era of climate change litigation,[237] but in the past tort law has evolved with science and societal understanding, and it can continue to develop as the scientific certainty surrounding climate change improves.[238] After all, climate change harms will only continue to grow, and the legal system will need to evolve in one way or another to address these problems. Tort law has an opportunity to evolve in ways that can help meaningfully address societal, economic, and legal concerns in the face of the crisis that climate change poses.[239]

Furthermore, there may be valuable benefits for municipalities pursuing these kinds of claims given the history and applicability of common law nuisance and trespass claims in the pollution context. States and municipalities may particularly benefit from injunctive relief such as imposing emissions abatement technology requirements on defendants[240] or forcing defendants to clean up the effects of trespassing pollution.[241]

Regarding the Second Circuit's concern with state-by-state common law suits creating inconsistent standards, this may not

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233. *See generally* William Aldred's Case (1611) 77 Eng. Rep. 816, 9 Co. Rep. 57a; Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907); Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959); Renken v. Harvey Aluminum Inc., 226 F. Supp. 169 (D. Or. 1963); Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y. 1970); Bell v. Cheswick Generating Station, 734 F.3d 188 (3d Cir. 2013); Freeman v. Grain Processing Corp., 848 N.W.2d 58 (Iowa 2014); Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685 (6th Cir. 2015).

234. 42 U.S.C. §§ 7604(e), 7416.

235. Lin & Burger, *supra* note 5, at 54–55.

236. Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENV'T L. 1, 44–48 (2011).

237. *Id.* at 44.

238. *Id.* at 44–48.

239. *Id.*

240. *See* Renken v. Harvey Aluminum Inc., 226 F. Supp. 169, 176 (D. Or. 1963).

241. Roisman & Wolff, *supra* note 74, at 161, 166.

be as problematic as the Second Circuit fears because climate change will affect each state differently.[242] The common law, while not as comprehensive as a federal regulation like the CAA, may serve as a valuable tool to create situation-specific remedies tailored to the exact harms that a plaintiff might suffer as a result of climate change. For example, a U.S. city on a coastline that stands to suffer repeated flooding might sue for the costs of repairing damaged infrastructure and constructing seawalls. These costs would likely differ dramatically from a city that sees very different harms, like a ski-town that loses revenue as a result of reduced snowfalls and a shorter tourist season. A national policy may not take these differences into account, but the common law gives plaintiffs the opportunity to prove exactly how they have been harmed by climate change and win adequate compensation.

Finally, in reading the allegations in complaints like *BP P.L.C. v. Baltimore*,[243] it is hard to argue that it would be acceptable to force cities, states, and the public to bear the enormous costs of climate change while those who profited most from leading society down this path would suffer no additional costs, despite allegedly being aware of the risks. This is especially true when considering the alleged coordinated efforts by fossil fuel industries to impede the preventative actions to mitigate climate change.[244] Lawsuits that focus on deceptive business practices, fraudulent concealment and misrepresentation, and civil conspiracy will likely be powerful tools in future climate change claims as a result[245] and are already being included in a number of lawsuits.[246] These deceptive business claims may also be particularly useful no matter how state common law nuisance and trespass torts

242. *Climate Change Impacts by State*, EPA, https://19january2017snapshot.epa.gov/climate-impacts/climate-change-impacts-state_.html [https://perma.cc/Q28F-LA8Y] (providing an archived EPA government website providing fact sheets for every state's anticipated impacts from climate change, as understood in 2017).

243. Plaintiff's Complaint, *supra* note 148, at 50–97; *see also* Amended Complaint and Jury Demand, *supra* note 208, at 46–123.

244. Plaintiff's Complaint, *supra* note 148, at 50–97.

245. Joseph Manning, *Climate Torts: It's a Conspiracy!*, 62 B.C. L. REV. 941, 963–71 (2021) (detailing the potential benefits of business conspiracy focused climate change lawsuits and how to approach building such claims).

246. *See* case filings cited *supra* note 208.

evolve, as such claims do not have to fear preemption conflicts with the CAA.[247]

Regardless, to allow defendants who both caused enormous harm and prevented mediative actions for profit to completely escape liability will undeniably be perceived as unfair. State common law could play a key role in compensating plaintiffs given its proven viability and would demonstrate for society that such actions cannot go unpunished.

CONCLUSION

Collectively, common law nuisance and trespass claims may not be the best means to pursue climate change abatement,[248] and the evolution of future cases will be crucial for understanding how the U.S. court system may treat such disputes, but state common law claims are necessary tools for states and municipalities to address the threat of climate change. State common law nuisance and trespass suits may be an effective means for spurring action to mitigate climate change[249] and could encourage new legislative policy efforts while helping provide local governments with some of the necessary capital to prepare for climate change.[250] And the aforementioned cases and principles demonstrate that common law tort claims of nuisance and trespass are alive and well in the context of air pollution and are gaining steam in the realm of climate change.

Yet, without knowing how the numerous cases that have been remanded back on removal issues will be resolved or how the courts may treat common law claims issues when they reach the actual merits, it is difficult to say for sure how these issues will evolve in the future. Some courts may follow the logic of the Second Circuit in *Chevron* given the wide-ranging global impacts of greenhouse gases and rule against allowing state lawsuits to take action on a case-by-case basis.[251]

If another circuit court does rule differently than the Second Circuit, such a split would almost certainly lead to the Supreme Court's review given the high stakes involved in these cases and

247. Manning, *supra* note 245, at 970–71.
248. Lin & Burger, *supra* note 5, at 91–92.
249. *Id.* at 92–93.
250. *Id.*
251. City of New York v. Chevron Corp., 993 F.3d 81, 86 (2d Cir. 2021).

because the Supreme Court has already weighed in on the issue to varying degrees through *BP P.L.C. v. Baltimore*, *American Electric*, and *International Paper*. Given the opportunity, it seems reasonable to hypothesize that the Supreme Court would side with the logic of the Second Circuit and preempt state common law claims akin to how they precluded federal common law claims in *American Electric*.

Though this is only an assumption, such a ruling would be a fatal blow for plaintiffs aiming to use state common law claims to mitigate climate change. While the common law could still be used to address limited intrastate nuisance issues, and perhaps interstate pollution under source state common law (depending on the Supreme Court's approach), a particularly adverse ruling could entirely preclude states and municipalities from utilizing the common law to mitigate interstate environmental harms or greenhouse gases.

Given the severity of climate change, however, which stands to impact states and municipalities all over the country in different ways,[252] and the common law's long history of addressing air pollution harms,[253] state common law should be accepted by the courts as a valid means to compensate states and municipalities. Ruling to prohibit it entirely would be a mistake. Climate change will prove to be an enormous challenge for common law tort doctrines such as nuisance and trespass,[254] but common law torts are a well-equipped set of legal doctrines that may allow for municipalities and the public to recoup mitigation costs[255] and could show the public that those who profited the most from climate change can be held accountable. Furthermore, while it is still an open question whether state common law claims to abate climate change can operate alongside the CAA, precedent and the plain text of the CAA

252. EPA, *supra* note 242.

253. William Aldred's Case (1611) 77 Eng. Rep. 816, 9 Co. Rep. 57a (private nuisance); Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) (public nuisance); Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959) (trespass).

254. Kysar, *supra* note 236, at 44–48.

255. Renken v. Harvey Aluminum Inc., 226 F. Supp. 169, 176 (D. Or. 1963) (regarding imposition of emissions abatement technology); Meiners & Yandle, *supra* note 26, at 934–35 (noting private nuisance remedies can include damages, injunctive relief including pollution abatement, or even permanent injunctions); Roisman & Wolff, *supra* note 74, at 159, 161, 166 (noting trespass remedies can include damages, and wide-ranging injunctive relief including cleanups).

support the notion that states and municipalities should be able to sue for state common law claims using source state law.[256]

It is true that state common law tort regimes such as nuisance and trespass would face difficulties rising to the massive challenges of climate change. But simply because such a task would be difficult is not an acceptable excuse for the court system to throw up its hands in defeat and effectively deny states and municipalities a viable means to prepare for the impacts of climate change. Environmental litigators should continue bringing common law claims to mitigate climate change and take advantage of the unique remedies common law torts can offer, though litigators should proceed cautiously to ensure that judges are not presented with an easy opportunity to preempt them. But courts should accept that, even if imperfect, these claims have merit and strong support in U.S. law, and judges should assist the evolution of common law torts to confront the complexities climate change will pose to the legal system. The stakes are too high to do otherwise.

256. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 483–84 (1987); Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685, 686–87 (6th Cir. 2015); Freeman v. Grain Processing Corp., 848 N.W.2d 58, 63 (Iowa 2014); Bell v. Cheswick Generating Station, 734 F.3d 188, 189–90 (3d Cir. 2013); 42 U.S.C. §§ 7416, 7604(e).