Common and state law litigation against major greenhouse gas emitters

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Overview: Common law + state law climate change lawsuits.

- Public nuisance/product liability (tort) v. public trust/substantive due process v. consumer protection/fraud/greenwashing
- Focus on the public nuisance suits:
  - First v. second generation
  - Significant legal issues
  - Status update
- Why are these actions being pursued and what value might they have?

Public trust doctrine

"Aronow argues that his complaint alleges that respondents are "degrading the waterways of Minnesota to his detriment and those of future generations," and "these waterways are no longer usable to the same extent they were previously." But a reading of Aronow's complaint does not support this characterization. His complaint repeatedly alleges only that the atmosphere is included in the natural resources protected by the public-trust doctrine and that respondents' failure to protect the atmosphere is a violation of its obligation under the public-trust doctrine.

--Aronow v. State, No. A12-0585, 2012 WL 4476642, at *3 (Minn. Ct. App. Oct. 1, 2012)

Consumer protection/fraud/greenwashing

"Because the State seeks relief for harms allegedly caused by emissions associated with the use of fossil fuels by billions of consumers around the world, the district court had jurisdiction over this lawsuit…."

--Brief of Appellants, Minnesota v. American Petroleum Inst. (8th Cir.)

--Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020)

Exercising my “reasoned judgment,”…I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.

Just as marriage is the "foundation of the family," a stable climate system is quite literally the foundation "of society, without which there would be neither civilization nor progress." ….

Plaintiffs do not object to the government's role in producing any pollution or in causing any climate change; rather, they assert the government has caused pollution and climate change on a catastrophic level, and that if the government's actions continue unchecked, they will permanently and irreversibly damage plaintiffs' property, their economic livelihood, their recreational opportunities, their health, and ultimately their (and their children's) ability to live long, healthy lives. Echoing *Obergefell’s* reasoning, plaintiffs allege a stable climate system is a necessary condition to exercising other rights to life, liberty, and property.

Juliana v. United States, 947 F.3d 1159, 1171–72 (9th Cir. 2020) (citations omitted)

We are therefore skeptical that the first redressability prong is satisfied. But even assuming that it is, the plaintiffs do not surmount the remaining hurdle—establishing that the specific relief they seek is within the power of an Article III court. There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of "competing social, political, and economic forces," which must be made by the People's "elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country."

First generation climate nuisance suits (federal court, federal common law public nuisance):

AEP v. CT (large direct emitters):

- Not justiciable under political question doctrine (district court)
- Justiciable and presents a claim (2d Cir.)
- Displaced by the Clean Air Act (S.Ct.)

Kivalina v. Exxon (direct emitters and fossil fuel companies):

- Not justiciable under political question doctrine, no standing district court)
- Displaced under AEP v. CT (9th Cir.)

California v. General Motors (fuel efficiency of motor vehicle fleet):

- Not justiciable under the political question doctrine (district court)

Comer v. Murphy Oil (harms from Hurricane Katrina):

- Fraught procedural history
- Dismissed twice at district court level (standing, political question, and ultimately displacement)

Unpacking the 1GEN common law, climate change nuisance suits:

- Standing
- Political question doctrine
- Merits
- Displacement

Injury *Causation* Redressability

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'".

Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court."

Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61(1992) (citations omitted)

Counting noses on the Supreme Court re: standing for common law climate change plaintiffs….

The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under Massachusetts, which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions . . . and, further, that no other threshold obstacle bars review. Four members of the Court, adhering to [Justice Roberts'] dissenting opinion in Massachusetts [v. EPA] . . . , or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits.

Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011) (citations omitted)

Massachusetts v. E.P.A., 549 U.S. 497, 544–45 (2007) (Roberts, C.J., dissenting)

Petitioners are never able to trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards. In light of the bit-part domestic new motor vehicle greenhouse gas emissions have played in what petitioners describe as a 150–year global phenomenon, and the myriad additional factors bearing on petitioners' alleged injury—the loss of Massachusetts coastal land—the connection is far too speculative to establish causation.

Political question doctrine (hands off courts!)

Courts refrain from answering questions deemed to be reserved, under our system of separated powers, for the political branches. This deference is known as the political question doctrine. To determine whether a case presents a non-justiciable political question, courts apply factors set out in *Baker v. Carr* and dismiss an action under the political question doctrine where one of the identified factors is "inextricable from the case."

The *Baker v. Carr* factors most relevant in climate change suits:

- **"lack of judicially discoverable and manageable standards for resolving it"**
- **"impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"**

--Baker v. Carr, 369 U.S. 186, 217 (1962)

Climate change nuisance: the merits.

(In case we ever get there….)

When conduct is unreasonable for purposes of establishing a public nuisance:

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

(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.

Restatement (Second) of Torts § 821B (1979)

Commentary in the Restatement suggests that private nuisance approaches re: what is "unreasonable" may also apply to public nuisance:

Restatement (Second) of Torts § 826, cmt. a:

Public nuisance. The rule stated in this Section applies to conduct that results in a private nuisance, as defined in § 821D. A similar rule may, and commonly does, apply to conduct that results in a public nuisance, as defined in § 821B.

Restatement (Second) of Torts § 829A, cmt. a:

Public nuisance. The rule stated in this Section applies to conduct that results in a private nuisance, as defined in § 821D. A similar rule may also be, and commonly is, applied to conduct that results in a public nuisance, as defined in § 821B.

When conduct is “unreasonable” for purposes of establishing a private nuisance:

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

(a) the gravity of the harm outweighs the utility of the actor's conduct, or

(b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

--Restatement (Second) of Torts § 826 (1979)

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation.

--Restatement (Second) of Torts § 829A (1979)

When federal statutes meet federal common law: potential displacement.

[I]t is an academic question whether, in the absence of the Clean Air Act and the EPA actions the Act authorizes, the plaintiffs could state a federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming. Any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions....

We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants. *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. And we think it equally plain that the Act “speaks directly” to emissions of carbon dioxide from the defendants' plants.

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None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand.

Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423-24, 429 (2011)

Doctrinally-prompted evolution in common law climate change suits:

First generation

- Federal common law of public nuisance
- Defendants mostly large direct emitters of GHGs (coal-fired plants)

Second generation

- State common law public nuisance, sometimes product liability and fraud
- Defendants mostly fossil-fuel producers (indirect emitters)

Threshold questions in 2GEN climate change nuisance suits

Removal and federal v. state court (*BP P.L.C. v. Baltimore*)

- Supreme Court: On appeal from federal district court denial of removal, appellate courts must examine all grounds for removal, not just federal officer jurisdiction.
- KANNON K. SHANMUGAM ON BEHALF OF THE PETITIONERS: “This Court's precedents dictate the commonsense conclusion that federal law governs claims alleging injury caused by worldwide greenhouse gas emissions. The court of appeals should have reached that ground for removal, and it should have held that the case was removable on that basis.”

Are these <u>necessarily</u> claims grounded in the federal common law (and, if so, are they displaced by the CAA, *see New York v. BP*)?

If the claims do sound in state law, are they preempted by the CAA?

From Appellants’ Supplemental Opening Brief in Baltimore v. BP P.L.C.:

“As a matter of federal constitutional law and structure, Plaintiff’s claims necessarily arise under federal, not state, law. Plaintiff seeks to hold Defendants liable for the consequences of emissions-producing conduct occurring in other states and around the world. Under long established Supreme Court precedent, such claims are necessarily and exclusively governed by federal common law. The artful-pleading doctrine precludes Plaintiff’s attempt to mischaracterize its inherently federal claims as based on state law, because the structure of the Constitution dictates that only federal law can apply to such interstate pollution claims. Accordingly, Plaintiff’s claims arise under federal law, and removal was proper.”

About NY v. BP …

Two defendants in the case were foreign companies and all of the defendants were alleged to be responsible for emissions occurring outside of the United States.

Are claims based on emissions outside of the United States displaced by the Clean Air Act?

City of New York v. Chevron Corp., 993 F.3d 81, 101 (2d Cir. 2021)

“[T]he Clean Air Act cannot displace the City's federal common law claims to the extent that they seek recovery for harms caused by foreign emissions. But that does not mean that those claims may proceed as a matter of federal common law. Like the district court, we conclude that foreign policy concerns foreclose New York's proposal here to recognize a federal common law cause of action targeting emissions emanating from beyond our national borders.”

Important merits questions (if we ever get there!)

CAN A PRODUCT MANUFACTURER BE HELD LIABLE IN PUBLIC NUISANCE?

IS BALANCING REQUIRED?

Exxon strikes back

Exxon filed a Rule 202 petition in Texas state court seeking to conduct pre-suit discovery (take depositions and obtain documents) from attorneys and governments that filed climate nuisance suits against Exxon in California. Exxon sought discovery relating to potential claims of abuse of process, civil conspiracy, and violations of Exxon's constitutional rights in connection with "abusive law enforcement tactics and litigation in California" that were "attempting to stifle ExxonMobil's exercise, in Texas, of its First Amendment right to participate in the national dialogue about climate change and climate policy." Exxon v. Pawa et al.

Exxon's petition was denied for lack of personal jurisdiction over the defendants.

Texas H.B. No. 2144 (proposed)

Sec. 100F.001. PURPOSE; ABROGATION OF COMMON LAW; CONFLICTS. (a) The purpose of this chapter is to ensure that the tort of public nuisance is defined clearly and in a manner consistent with its traditional scope for purposes of its use as a cause of action in this state.

(b) This chapter abrogates the common law of public nuisance and supersedes any other statute to the extent of a conflict. This chapter provides the only remedies for the tort of public nuisance in this state.

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Sec. 100F.004. LIMITATIONS ON LIABILITY. (a) Conditions arising from the following conduct are not considered unlawful conditions for purposes of a public nuisance action in this state:

(1) an activity expressly authorized or encouraged by a statute, ordinance, rule, or other similar measure adopted by this state, a political subdivision of this state, the United States, or a regulatory agency of this state or the United States; and

(2) the lawful manufacturing, distributing, selling, advertising, or promoting of a lawful product.

In re Peabody Energy Corporation, 958 F.3d 717 (8th Cir.)

- U.S. Court of Appeals for the Eighth Circuit held that state statutory and common-law climate change tort claims are dischargeable in bankruptcy and were in fact discharged in this case.
- Peabody Energy Corporation emerged from Chapter 11 bankruptcy with a confirmed plan of reorganization effective April 3, 2017. Several months later, it was sued, along with nearly 40 other defendants in the fossil fuel industry, by three separate counties in California alleging the defendants were responsible for greenhouse gas emissions between 1965 and 2015, which have led to sea level rise and damage to property.

Political question doctrine.

--People of State of California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007)

[T]he adjudication of Plaintiff's claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development. . . . The balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court.

Standing + political question doctrine.

--Native Vil. of Kivalina v ExxonMobil Corp., 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009), aff'd, 696 F.3d 849 (9th Cir. 2012)

Plaintiffs ignore that the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance.

Displacement + dormant foreign affairs preemption.

--City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018), *vacated and remanded sub nom*. City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020), *opinion amended and superseded on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020)

While it remains true that our federal courts have authority to fashion common law remedies for claims based on global warming, courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches. The Court will stay its hand in favor of solutions by the legislative and executive branches.

Displacement + dormant foreign affairs preemption.

--City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 475–76 (S.D.N.Y. 2018, *aff'd* City of New York v. Chevron Corp., 993 F.3d 81, 103 (2d Cir. 2021)

[T]he immense and complicated problem of global warming requires a comprehensive solution that weighs the global benefits of fossil fuel use with the gravity of the impending harms. To litigate such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government. Accordingly, the Court will exercise appropriate caution and decline to recognize such a cause of action.

Displacement + dormant foreign affairs preemption.

--City of New York v. Chevron Corp., 993 F.3d 81, 103 (2d Cir. 2021)

To hold the Producers accountable for purely foreign activity (especially the Foreign Producers) would require them to internalize the costs of climate change and would presumably affect the price and production of fossil fuels abroad. It would also bypass the various diplomatic channels that the United States uses to address this issue, such as the U.N. Framework and the Paris Agreement. Such an outcome would obviously sow confusion and needlessly complicate the nation's foreign policy, while clearly infringing on the prerogatives of the political branches.

Displacement + failure to state a claim.

--Alec L. v. Jackson, 863 F. Supp. 2d 11, 17 (D.D.C. 2012), *aff'd sub nom*. Alec L. ex rel. Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014)

Ultimately, this case is about the fundamental nature of our government and our constitutional system, just as much—if not more so—than it is about emissions, the atmosphere or the climate. Throughout history, the federal courts have served a role both essential and consequential in our form of government by resolving disputes that individual citizens and their elected representatives could not resolve without intervention. And in doing so, federal courts have occasionally been called upon to craft remedies that were seen by some as drastic to redress those seemingly insoluble disputes. But that reality does not mean that every dispute is one for the federal courts to resolve, nor does it mean that a sweeping court-imposed remedy is the appropriate medicine for every intractable problem…. [T]he issues presented in this case are not ones that this Court can resolve by way of this lawsuit….

Standing.

--Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020)

[A]ny effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of "competing social, political, and economic forces," which must be made by the People's "elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country."

Thank you