

2008

Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California

Randall S. Abate

Florida A & M University College of Law, randall.abate@famuedu

Follow this and additional works at: <http://commons.law.famuedu/faculty-research>

 Part of the [Administrative Law Commons](#), [Civil Procedure Commons](#), [Environmental Law Commons](#), [Law and Politics Commons](#), and the [Torts Commons](#)

Recommended Citation

Randall S. Abate, Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California, 40 Conn. L. Rev. 591 (2007-2008)

This Article is brought to you for free and open access by the Faculty Works at Scholarly Commons @ FAMU Law. It has been accepted for inclusion in Journal Publications by an authorized administrator of Scholarly Commons @ FAMU Law. For more information, please contact linda.barrette@famuedu.

CONNECTICUT LAW REVIEW

VOLUME 40

FEBRUARY 2008

NUMBER 3

Article

Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a “Global Warming Solution” in California

RANDALL S. ABATE

The battle against climate change and its impacts in the United States must be waged on many fronts and requires many weapons. Until the federal government provides a comprehensive and mandatory legislative response to the climate change problem, gap-filling efforts such as regional, state, and local legislative initiatives and climate change litigation will be essential to achieve some progress in the ongoing challenge to combat the causes and effects of climate change. This Article focuses on one of those gap-filling efforts: public nuisance suits against power companies and automobile manufacturers for the climate change impacts caused by emissions from those entities. Part II of this Article discusses the origins of public nuisance doctrine and the evolution of public nuisance claims as a vehicle for environmental litigation. Part III examines climate change as a new context for public nuisance litigation. It considers the political question doctrine as a possible obstacle to public nuisance claims for climate change impacts through an exploration of recent case law, culminating with the district court decision in California v. General Motors. Part IV analyzes preemption arguments and state law public nuisance arguments raised in California v. General Motors. Part V evaluates legal and policy arguments that maintain that public nuisance claims for climate change impacts may be an improper expansion of public nuisance doctrine. The Article concludes, contrary to the district court's conclusion in California v. General Motors, that California's strategy in seeking damages rather than injunctive relief in this case avoids possible political question and preemption pitfalls and is an appropriate and viable avenue for future public nuisance claims seeking recovery for climate change impacts.

ARTICLE CONTENTS

I. INTRODUCTION.....	593
II. PUBLIC NUISANCE: ORIGINS AND EVOLUTION	599
A. PUBLIC NUISANCE DEFINED.....	599
B. PUBLIC NUISANCE AS A VEHICLE FOR ENVIRONMENTAL LITIGATION.....	602
III. CLIMATE CHANGE IMPACTS AS PUBLIC NUISANCE: THE POLITICAL QUESTION HURDLE	607
A. <i>CONNECTICUT V. AMERICAN ELECTRIC POWER</i> : POLITICAL QUESTION DOCTRINE AND INJUNCTIVE RELIEF	608
B. <i>BARASICH V. COLUMBIA GULF TRANSMISSION CO.</i> : POLITICAL QUESTION DOCTRINE AND DAMAGES	612
C. <i>CALIFORNIA V. GENERAL MOTORS</i> : POLITICAL QUESTION DOCTRINE AND DAMAGES REVISITED	613
IV. CLIMATE CHANGE IMPACTS AS PUBLIC NUISANCE: PREEMPTION AND STATE LAW ISSUES.....	616
A. FEDERAL COMMON LAW AND PREEMPTION.....	617
B. CONFLICT PREEMPTION: THE CLEAN AIR ACT	620
C. FIELD PREEMPTION: THE ENERGY POLICY AND CONSERVATION ACT.....	622
D. STATE LAW ARGUMENTS.....	622
V. CLIMATE CHANGE IMPACTS AS PUBLIC NUISANCE: AN UNREASONABLE EXPANSION OF PUBLIC NUISANCE THEORY?.....	624
VI. CONCLUSION	629



Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a “Global Warming Solution” in California

RANDALL S. ABATE*

I. INTRODUCTION

Global atmospheric concentrations of greenhouse gases “have increased markedly as a result of human activities since 1750.”¹ According to a report released on February 5, 2007 by the Intergovernmental Panel on Climate Change (IPCC), “[w]arming of the climate system is unequivocal,”² and is very likely³ attributable to anthropogenic influences, namely, the release of greenhouse gases (GHGs) into the atmosphere.⁴ These gases trap solar heat in the atmosphere that would otherwise radiate away.⁵ Consequently, the global average surface temperature has risen 0.76 degrees Celsius since the beginning of the Industrial Revolution.⁶

The U.S. Environmental Protection Agency “does not dispute the existence of a causal connection between man-made greenhouse gas

* Assistant Professor of Law, Florida Coastal School of Law. The author gratefully acknowledges the assistance of Kelley Jancaitis, Masahiro Takeda, Aneta Mincheva, and H. French Brown, IV in preparing this Article.

¹ WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, SUMMARY FOR POLICYMAKERS 2 (S. Solomon et al. eds., Cambridge University Press 2007), available at http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_SPM.pdf [hereinafter IPCC FAR WGI]. Although some climate variability is normal, natural forces alone cannot explain the global warming experienced in the second half of the 20th century. *Id.* at 10. Between 1970 and 2004 alone, emissions of carbon dioxide increased 80%. WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: MITIGATION, SUMMARY FOR POLICYMAKERS 3 (B. Metz et al. eds., Cambridge University Press 2007), available at <http://www.ipcc.ch/SPM040507.pdf> [hereinafter IPCC FAR WGIII].

² IPCC FAR WGI, *supra* note 1, at 5.

³ Working Group I of the IPCC uses the following terms to indicate the likelihood of a particular outcome or result: “Virtually certain > 99% probability of occurrence, Extremely likely > 95%, Very likely > 90%, Likely > 66%, More likely than not > 50%, Unlikely < 33%, Very unlikely < 10%, Extremely unlikely < 5%.” *Id.* at 3 n.6.

⁴ *Id.* at 10 (“The observed widespread warming of the atmosphere and ocean, together with ice mass loss, support the conclusion that it is *extremely unlikely* that global climate change of the past [fifty] years can be explained without external forcing, and *very likely* that it is not due to known natural causes alone.”).

⁵ See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1446 (2007) (“[W]hen carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of the reflected heat.”).

⁶ IPCC FAR WGI, *supra* note 1, at 5.

emissions and global warming.”⁷ The harms associated with global climate change are both “serious” and “well-recognized,” and result in loss of glaciers, increased flooding risks, and accelerated sea level rise.⁸ Moreover, the U.S. Supreme Court recently recognized that the continued release of unregulated greenhouse gas emissions creates a risk of harm that is both “actual” and “imminent.”⁹

Unlike virtually all major industrialized nations, the United States is not a party to the Kyoto Protocol,¹⁰ and has not enacted mandatory federal GHG emissions reduction legislation to regulate the causes of climate change.¹¹ In the absence of such mandatory federal regulation, voluntary measures¹² have been introduced at the federal level and several regional, state, and local initiatives have been implemented to combat these types of emissions.¹³ These piecemeal measures are a step in the right direction but are not nearly enough to address the problems posed by climate change in the United States.¹⁴

⁷ *Massachusetts*, 1275 S. Ct. at 1457.

⁸ *Id.* at 1455.

⁹ *Id.*

¹⁰ The United States’ position on climate change is unique among major industrialized nations. As of this writing, Australia is the only other major industrialized nation that is not a party to the Kyoto Protocol. Kyoto Protocol: Status of Ratification, Oct. 23, 2007, http://unfccc.int/files/essential_background/kyoto_protocol/status_of_ratification/application/pdf/kpstats.pdf.

¹¹ The McCain/Lieberman Climate Stewardship Act sought to reduce greenhouse gas emissions to 2000 levels by 2010. S. 139, 108th Cong. § 316 (2003). The Act was defeated in the Senate by a vote of 55-43 in October 2003. 149 CONG. REC. S13598 (daily ed. Oct. 30, 2003). The U.S. government currently supports voluntary measures to address climate change. See Press Release, White House, Office of the Press Secretary, Climate Change Fact Sheet (May 18, 2005), available at <http://www.state.gov/g/oes/rls/fs/46741.htm> (detailing the Bush Administration’s climate change policy). At least four bills addressing climate change have been introduced in Congress in 2007 as of this writing. *E.g.*, Climate Stewardship Act of 2007, H.R. 620, 110th Cong. (2007) (“To accelerate the reduction of greenhouse gas emissions in the United States by establishing a market-driven system of greenhouse gas tradeable allowances that will limit greenhouse gas emissions in the United States, reduce dependence upon foreign oil, and ensure benefits to consumers from the trading in such allowances”); Global Warming Pollution Reduction Act, S. 309, 110th Cong. (2007) (“To amend the Clean Air Act to reduce emissions of carbon dioxide”); Global Warming Reduction Act of 2007, S. 485, 110th Cong. (2007) (“To amend the Clean Air Act to establish an economy-wide global warming pollution emission cap-and-trade program to assist the economy in transitioning to new clean energy technologies, to protect employees and affected communities, to protect companies and consumers from significant increases in energy costs”); Safe Climate Act of 2007, H.R. 1590, 110th Cong. (2007) (“To reduce greenhouse gas emissions and protect the climate.”).

¹² The Supreme Court recently described President George W. Bush’s “comprehensive approach” to climate change as involving “additional support for technological innovation, the creation of nonregulatory programs to encourage voluntary private-sector reductions in greenhouse gas emissions, and further research on climate change—not actual regulation.” *Massachusetts*, 127 S. Ct. at 1451 (emphasis added). Current U.S. climate change policy can be found in U.S. DEP’T OF STATE ET AL., USA ENERGY NEEDS, CLEAN DEVELOPMENT AND CLIMATE CHANGE, available at <http://www.state.gov/documents/organization/75455.pdf>.

¹³ See Randall S. Abate, *Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States*, 15 CORNELL J.L. & PUB. POL’Y 369, 373–85 (2006) (detailing the federal, state, regional, and local initiatives that have been enacted in the United States to combat climate change).

¹⁴ *Id.* at 373.

California was not the first state to enact GHG emissions reduction legislation;¹⁵ however, its Global Warming Solutions Act¹⁶ is the most ambitious and highly publicized state initiative in the nation. The Act seeks to reduce emissions to 1990 levels by 2020.¹⁷ It is the first enforceable state law aimed at reducing major industry GHG emissions that applies penalties for noncompliance.¹⁸ The Act creates a framework¹⁹ for the soon-to-be developed regulatory system by establishing a timeline for completing the necessary components of the system.²⁰

Even though the Global Warming Solutions Act is much broader and more proactive than most other states' legislative responses to climate change, it is not a panacea for the multi-faceted challenge that climate change presents in California. There are still gaps that need to be filled in California's response to climate change because the battle against climate change and its impacts must be waged on many fronts and requires many weapons. Until the federal government provides a comprehensive and mandatory legislative response to the climate change problem, gap-filling efforts will be essential to achieve some progress in the ongoing challenge to combat the causes and effects of climate change.

Consequently, in the month before the ambitious and comprehensive Global Warming Solutions Act was signed into law, the California Attorney General's Office filed a public nuisance suit, *California v. General Motors Corp.*, against the six largest automobile manufacturers in the nation.²¹ The suit sought damages for the impacts²² caused by the

¹⁵ In May 2003, Maine became the first state to enact GHG emission reduction legislation. ME. REV. STAT. ANN. tit. 38, § 576 (West Supp. 2006).

¹⁶ On October 17, 2006, Governor Schwarzenegger signed Assembly Bill 32, better known as the California Global Warming Solutions Act of 2006. CAL. HEALTH & SAFETY CODE DIV. 25.5 (West Supp. 2007).

¹⁷ *Id.* § 38550. The Act shall remain in effect beyond 2020, unless repealed or amended and allows for the creation of a Climate Action Team to be established by the governor. *Id.* § 38551.

¹⁸ *Id.* § 38580. The Act also provides for injunctive relief and penalties for "[a]ny violation of any rule, regulation, order, emission limitation, emissions reduction measure, or other measure adopted by the state board," and violations of such "shall be deemed to result in an emission of an air contaminant for the purposes of the penalty provisions." *Id.* § 38580(b)(2).

¹⁹ Although the Act lays the foundation for an operative market-based regulatory program, the language of the Act itself only sets forth the objectives and various deadlines for the development of the program. However, one mechanism that the Act affirmatively creates is a transferable credit "reward" system for early compliance. *Id.* § 38562(b)(3).

²⁰ The Global Warming Solutions Act requires that the California Air Resource Board (CARB) determine California's 1990 GHG emission level and adopt a GHG reporting and verification system by January 1, 2008. *Id.* §§ 38550, 38570(c). By January 1, 2010, CARB must adopt regulations to implement the measures published by June 30, 2007. *Id.* § 38560.5. By January 1, 2011, CARB must adopt greenhouse gas emission limits and emission reduction measures that can become operable by January 1, 2012. *Id.* § 38562(a).

²¹ Complaint for Damages and Equitable Relief at 15, *California v. Gen. Motors Corp.*, No. C06-05755 MJJ (N.D. Cal. filed Sept. 20, 2006); *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, slip op. at 1 (N.D. Cal. Sept. 17, 2007).

automobile industry's carbon dioxide emissions that contribute to the climate change problem in California.²³ The automakers produce vehicles that annually emit over 289 million metric tons of carbon dioxide in the United States.²⁴ This amount constitutes approximately nine percent of human-generated carbon dioxide emissions in the United States and over thirty percent in California.²⁵ These vehicle emissions have contributed to climate change, which has greatly harmed California.²⁶

California's complaint asserted that the state had already taken action to remedy problems resulting from global warming and was spending millions of dollars to study, plan for, monitor, and respond to impacts that had already occurred because of climate change and other impacts that are likely or certain to occur.²⁷ California has also been harmed as the winter average temperatures in the Sierra Nevada region have risen by almost four degrees Fahrenheit during the second half of the twentieth century, which has reduced the snow pack.²⁸ A vital water storage and supply system for the state, this snow pack holds approximately thirty-five percent of the state's water.²⁹ The increased temperatures cause the snow pack to melt earlier, which results in an increased risk of floods.³⁰ California has already spent and continues to spend millions of dollars to plan for and monitor changes as well as make changes to the infrastructure in order to address such anticipated occurrences as coastal and beach erosion, increasing ozone pollution, and water supply issues created by the intrusion of seawater into the Sacramento Bay-Delta drinking water supplies.³¹ The State also alleged that significant expenditures had already

²² Global warming impacts affect California in a variety of ways. The California Global Warming Solutions Act of 2006 identifies global warming as a serious threat to the state economy, its natural resources, and the public health. CAL. HEALTH & SAFETY CODE § 38501(a) (West Supp. 2007). Specifically, it recognizes that global warming has the potential to affect air quality, water quality and supply, raise sea level, damage commercial and residential interests, damage marine ecosystems and the natural environment, and cause an increase in the incidence of infectious diseases. *Id.* These impacts in turn will be detrimental to the state's agricultural, wine, tourist, skiing, and recreation/commercial fishing industries. *Id.* § 38501(b).

²³ The transportation sector is the fastest growing area of carbon dioxide emissions, and half of all greenhouse gas output within the transportation sector comes from cars. ALEXANDER GILLESPIE, CLIMATE CHANGE, OZONE DEPLETION AND AIR POLLUTION: LEGAL COMMENTARIES WITH POLICY AND SCIENCE CONSIDERATIONS 42–43 (2006). Globally the transportation sector alone consumes 27% of the nation's commercial energy. *Id.* at 43. Furthermore, the United States produces 6% of worldwide carbon dioxide emissions. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1457 (2007) ("Considering just emissions from the transportation sector . . . the United States would still rank as the third-largest emitter of carbon dioxide in the world.").

²⁴ Complaint, *supra* note 21, at 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 2–3.

²⁸ *Id.* at 10.

²⁹ *Id.*

³⁰ *Id.* at 10–11.

³¹ *Id.* at 10.

been made responding to impacts to endangered or threatened wildlife, as well as monitoring for future problems that will arise from the effects of global warming.³²

Climate change also accelerates sea level rise, which increases erosion along California's approximately 1075 miles of coastline.³³ Sea level rise also increases the risk of salt infiltration to the fresh water of the Sacramento Bay-Delta.³⁴ The state has suffered damage from storm surges, beach closures, and natural resource degradation.³⁵ Climate change has also had severe health impacts on the people of California as extreme heat events increase in frequency, duration, and intensity.³⁶

In seeking public nuisance damages under either federal common law³⁷ or the state's public nuisance law, California asserted that it was not asking the court to find a comprehensive solution to climate change.³⁸ Rather, California maintained that it was merely asking the court to apply the facts of this case to determine if the state should recover for the unreasonable harm caused by the automakers' vehicle emissions.³⁹

The defendant automakers asserted that the federal court lacked subject matter jurisdiction and that the state's action failed to state a claim.⁴⁰ The automakers contended that the case is non-justiciable under the political question doctrine.⁴¹ The automakers further contended that there is no federal common law for the "nuisance of global warming" and that the claim is precluded under California law.⁴² Finally, the automakers alleged that the Clean Air Act (CAA)⁴³ and the Energy Policy Conservation Act (EPCA)⁴⁴ preempt any claim for harm resulting from global warming.⁴⁵

In response, California asserted that the federal common law of nuisance has existed since *Georgia v. Tennessee Copper Co.*,⁴⁶ and that courts are well suited to decide interstate nuisance cases. The complaint

³² *Id.* at 2–3.

³³ *Id.* at 11.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 12.

³⁷ Federal common law is grounded in the Constitution's grant of original jurisdiction to the Supreme Court for controversies between two or more states, and between a state and the citizens of another state, and has been invoked to resolve conflicts over interstate pollution. Benjamin P. Harper, Note, *Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns*, 40 GA. L. REV. 661, 663–65 (2006).

³⁸ Complaint, *supra* note 21, at 14.

³⁹ *Id.* at 12, 14.

⁴⁰ Defendant's Supplemental Brief Re: *Massachusetts v. EPA* at 3 n.2, *California v. Gen. Motors Corp.*, No. C06-05755MJJ (N.D. Cal. filed Apr. 3, 2007).

⁴¹ *Id.* at 1–3.

⁴² *Id.* at 3.

⁴³ Clean Air Act, 42 U.S.C. §§ 7401–7671g (Westlaw 2007).

⁴⁴ Energy Policy and Conservation Act, 42 U.S.C. §§ 6201–6422 (Westlaw 2007).

⁴⁵ Defendant's Supplemental Brief, *supra* note 40, at 1, 3–4.

⁴⁶ *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237–39 (1907).

asserted two causes of action, the first of which alleged a violation of the federal common law of public nuisance.⁴⁷ The state alleged that the defendants have knowingly created and contributed to global warming, a public nuisance, by substantially and unreasonably interfering with the public rights of the citizens of California in emitting carbon dioxide and other GHGs.⁴⁸ The state stressed that although the emission of carbon dioxide is interstate in nature, there have been “specific identifiable impacts in California.”⁴⁹ The second cause of action relied on state public nuisance law, and asserted that the defendants are liable under California Civil Code § 3479 *et seq.* and California Code Civil Procedure § 731.⁵⁰

Rather than seek injunctive relief, the plaintiffs in *California v. General Motors* sought damages as a way to avoid dismissal on political question grounds—a fate that befell the plaintiff in *Connecticut v. American Electric Power Co.*, a similar public nuisance case against power plants filed just one year prior to *California v. General Motors*.⁵¹ On September 17, 2007, the U.S. District Court for the Northern District of California disregarded this potentially viable distinction and dismissed California’s public nuisance claims on political question grounds.⁵²

Part II of this Article discusses the origins of public nuisance doctrine and the evolution of public nuisance claims as a vehicle for environmental litigation. Part III examines climate change as a new context for public nuisance litigation. It considers the parameters of the political question doctrine as a possible obstacle to public nuisance claims for climate change impacts through an exploration of *Connecticut v. American Electric Power Co.*, *Barasich v. Columbia Gulf Transmission Co.*,⁵³ and *California v. General Motors*. Part IV analyzes preemption arguments and state law public nuisance arguments that the court in *California v. General Motors* did not reach because it dismissed the case on political question grounds. Part V evaluates legal and policy arguments that maintain that public nuisance claims for climate change impacts may be an improper expansion of public nuisance doctrine. The Article concludes, contrary to the district court’s conclusion in *California v. General Motors*, that California’s

⁴⁷ Complaint, *supra* note 21, at 12–13.

⁴⁸ *Id.* at 12.

⁴⁹ *Id.* at 12–13.

⁵⁰ *Id.* at 13–14. The California Civil Code defines a nuisance as “anything which is injurious to health . . . or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . .” *Id.* at 14. California law further defines public nuisance as “one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.” *Id.*

⁵¹ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

⁵² *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, slip op. at 5–6, 15–16 (N.D. Cal. 2007). For a full discussion of this decision, see *infra* Part III.C.

⁵³ *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 680–81, 688–89 (E.D. La. 2006).

strategy in seeking damages rather than injunctive relief in *California v. General Motors* avoids possible political question and preemption pitfalls and is an appropriate and viable avenue for future public nuisance claims for climate change impacts.

II. PUBLIC NUISANCE: ORIGINS AND EVOLUTION

A. Public Nuisance Defined

Originating in the twelfth century, nuisance principles form the basis of modern environmental statutes.⁵⁴ At first only private nuisance was recognized; then, in the sixteenth century, courts also recognized public nuisance.⁵⁵ In *California v. General Motors*, California relies on a public nuisance theory which provides a remedy for “an unreasonable interference with a right common to the general public.”⁵⁶ Unreasonable interferences include significant interference with the public’s health,⁵⁷ safety,⁵⁸ peace,⁵⁹ comfort,⁶⁰ and morals.⁶¹

In determining the unreasonableness of the interference, courts consider: (1) the duration and effect of the conduct, (2) the actor’s state of mind, and (3) whether a statute or other law makes the conduct unlawful.⁶²

⁵⁴ See *Cox v. Dallas*, 256 F.3d 281, 289 (5th Cir. 2001) (“The nuisance action originated in the twelfth century.”).

⁵⁵ *Id.*

⁵⁶ RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979). Some states define it even more narrowly—as “an interference with either a public or a private interest in land.” 3 ENVIRONMENTAL LAW PRACTICE GUIDE § 16.02 (Michael B. Gerrard ed., 2007). Other states define it more broadly as any annoyance to the community. See, e.g., *Flo-Sun, Inc. v. Kirk*, 783 So.2d 1029, 1036 (Fla. 2001) (explaining “a public nuisance may be classified as something that causes ‘any annoyance to the community or harm to public health’”) (citation omitted).

⁵⁷ See, e.g., *Donley v. Boettcher*, 255 N.W.2d 574, 579 (Wis. 1977) (finding a city can appropriately take action against a building declared to be a public nuisance because of its unfitness for human habitation, occupancy, or use).

⁵⁸ See, e.g., *Pucci v. Algiere*, 261 A.2d 1, 10 (R.I. 1970) (affirming the lower court’s finding that a building whose floors, foundation, roof, and other parts were unsafe constituted a common-law nuisance).

⁵⁹ See, e.g., *State v. Turner*, 18 S.E.2d 372, 375 (S.C. 1942) (holding that a person is liable for public nuisance when the person knowingly allows the noise and profanity of drunken crowds to violate public peace).

⁶⁰ See, e.g., *Karpisek v. Cather & Sons Constr., Inc.*, 117 N.W.2d 322, 327 (Neb. 1962) (holding that an asphalt plant constitutes a public nuisance by generating dust carried onto private property when the private property owners suffered harm different from that suffered by the general public).

⁶¹ See, e.g., *Chicago v. Festival Theatre Corp.*, 438 N.E.2d 159, 168 (Ill. 1982) (holding that “a common law nuisance action may be maintained against a theater operator presenting live exhibitions that are obscene under our criminal law of obscenity”); *Chicago v. Cecola*, 389 N.E.2d 526, 528 (Ill. 1979) (holding that a massage parlor offering services constituting prostitution is a public nuisance).

⁶² RESTATEMENT (SECOND) OF TORTS § 821B(2) (1979); see also *Flo-Sun, Inc. v. Kirk*, 783 So.2d 1029, 1036 (Fla. 2001) (stating public nuisances may exist even if the actor complies with pollution laws); *New York v. Waterloo Stock Car Raceway, Inc.*, 409 N.Y.S.2d 40, 44–45 (Sup. Ct. 1978) (finding unreasonable interference existed where the actor’s conduct lasted for decades and recurred on a weekly basis, and dismissing the conduct’s compliance with zoning ordinances as well as its priority of occupation as immaterial).

Liability rests on a showing of unreasonable interference or injury, not unreasonable conduct. Therefore, recovery for public nuisance is possible even if the conduct is otherwise non-tortious.⁶³ Although the actor's state of mind is one factor in the unreasonableness analysis,⁶⁴ a plaintiff is not required to prove that the actor was negligent,⁶⁵ instead, he must establish proof of unreasonable interference with a public right.⁶⁶ Unreasonable interferences must cause "material" injuries, and do not include "mere trifles and slight indecencies."⁶⁷

Public nuisance must affect the public's common rights, as opposed to merely inflicting an injury to a large number of people's private rights.⁶⁸ One such common right is the enjoyment of the environment.⁶⁹ In the environmental context, public nuisance claims have been used to abate air pollution,⁷⁰ water pollution,⁷¹ hazardous waste disposal,⁷² and excessive noise.⁷³

⁶³ See, e.g., *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982) (holding that defendant can recover for public nuisance even when the conduct alleged does not qualify as a tort).

⁶⁴ See RESTATEMENT (SECOND) OF TORTS § 821B(2)(c) (1979) (stating that whether the actor knows, or has reason to know, that his or her conduct has a significant effect on a public right, is a factor in determining whether the interference is unreasonable).

⁶⁵ *Wood*, 443 A.2d at 1249 (holding that "negligence is not a necessary element of a nuisance case involving contamination of public or private waters by pollutants percolating through the soil and traveling underground routes").

⁶⁶ See *County of Westchester v. Town of Greenwich*, 76 F.3d 42, 45–47 (2d Cir. 1996) (focusing on the presumed reasonableness of growing trees by landowners in dismissing a county's public nuisance suit alleging the trees interfered with the county's airport operations); see also *Waterloo Stock Car Raceway, Inc.*, 409 N.Y.S.2d at 43 (stating that to determine unreasonableness, courts look at the facts of each case under a totality of the circumstances approach that includes factors like "location, surroundings, nature of the use, extent and frequency of the injury, and the effect on the enjoyment of life, health and property").

⁶⁷ See *Waterloo Stock Car Raceway, Inc.*, 409 N.Y.S.2d at 44 ("This is not a case where the populous is grumbling about mere trifles and slight indecencies. . . . Instead this is a completely unreasonable use of Defendant's premises to the material injury of his neighbor's premises and his person, and need not be suffered any longer.").

⁶⁸ *Id.* at 43–44.

⁶⁹ See David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 53 (2003) ("If, however, pollution prevents the use of a public beach or kills the fish in a navigable stream and thus potentially affects all members of the community, it impinges on a public right and can be characterized as a public nuisance. The enjoyment of the natural environment would seem to constitute such a public right.").

⁷⁰ See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238–39 (1907) (enjoining the discharge of sulphur dioxide that constituted a nuisance as it threatened harm to forests and plants and even public health).

⁷¹ See *Illinois v. Milwaukee*, 406 U.S. 91, 106 (1972) (explaining how water pollution claims have been brought under a public nuisance theory).

⁷² See *Wood v. Picillo*, 443 A.2d 1244, 1248 (R.I. 1982) (finding private and public nuisance existed where chemical dump site caused substantial injury to neighbors and threatened "to cause incalculable damage to the general public").

⁷³ See *New York v. Waterloo Stock Car Raceway, Inc.*, 409 N.Y.S.2d 40, 43–45 (Sup. Ct. 1978) (holding that the operation of a stock car raceway constitutes a public nuisance because of the cumulative effect of danger, noise, and dust that it produces).

Public nuisance actions may be brought by the government⁷⁴ or by private persons.⁷⁵ The number of affected persons does not need to be very high as long as the unreasonable interference as a whole constitutes a wrong to the public at large.⁷⁶ One way to satisfy this requirement is by showing that the location and manner of operation affect many different people who are continuously or temporarily in the area.⁷⁷ Private persons generally must have suffered harm different in kind from the harm suffered by the general public to be able to bring a suit for public nuisance;⁷⁸ however, in some jurisdictions a harm different in kind may not be required as long as the public nuisance is substantial.⁷⁹

Plaintiffs in nuisance actions may seek as a remedy damages, injunctions, or both.⁸⁰ Damages are awarded when the harm caused is significant and unreasonable despite the utility of the actor's conduct.⁸¹ Damages are available in both temporary and permanent nuisance cases.⁸² Where the nuisance is temporary, the damages recoverable are the reduction in value of the property in addition to any special damages.⁸³ Where the nuisance is permanent, the damages recoverable are the permanent reduction in value of the property in addition to any special damages.⁸⁴ Where the government sues for damages, it must show it suffered a pecuniary loss as a property owner.⁸⁵

Injunctions are available when there is no adequate remedy at law.⁸⁶

⁷⁴ See *Copart Indus., Inc. v. Consol. Edison Co.*, 362 N.E.2d 968, 971 (N.Y. 1977) ("A public, or as sometimes termed a common, nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency."); see also *County of Westchester v. Town of Greenwich*, 76 F.3d 42, 47 (2d Cir. 1996) (dismissing a county's public nuisance suit against landowners whose trees allegedly interfered with the county's airport operations).

⁷⁵ See *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 315 n.13 (3d Cir. 1985) (stating that a private person may bring a public nuisance claim if the harm suffered was of a different kind than the one suffered by the general public); *Copart Indus., Inc.*, 362 N.E.2d at 971 (stating private persons may bring public nuisance actions if the injury suffered is "special").

⁷⁶ *Waterloo Stock Car Raceway, Inc.*, 409 N.Y.S.2d at 44.

⁷⁷ *Id.*

⁷⁸ *Philadelphia Elec. Co.*, 762 F.2d at 315 n.13; see also *Leo v. Gen. Elec. Co.*, 538 N.Y.S.2d 844, 845-47 (App. Div. 1989) (holding commercial fishermen have standing on a public nuisance claim seeking monetary and injunctive relief against a manufacturer whose discharge of pollutants into public waters affected fishermen's ability to earn a livelihood because they have suffered "peculiar" harm due to the fact that "diminution or loss or livelihood is not suffered by every person who fishes" there).

⁷⁹ See *United States v. Hooker Chems. & Plastics Corp.*, 722 F. Supp. 960, 966-67 (W.D.N.Y. 1989) (ruling in favor of plaintiffs, public and private persons, the court found a public nuisance exists when an actor engages in "an abnormally dangerous activity" by disposing hazardous waste).

⁸⁰ *Cox v. Dallas*, 256 F.3d 281, 291 (5th Cir. 2001).

⁸¹ RESTATEMENT (SECOND) OF TORTS § 821B cmt. i (1979).

⁸² 3 ENVIRONMENTAL LAW PRACTICE GUIDE, *supra* note 56, § 16.02[4][a].

⁸³ *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1125 (7th Cir. 1976).

⁸⁴ *Rebel v. Big Tarkio Drainage Dist.*, 602 S.W.2d 787, 792 (Mo. Ct. App. 1980), *overruled on other grounds by Frank v. Env'tl. Sanitation Mgmt., Inc.*, 687 S.W.2d 876 (Mo. 1985).

⁸⁵ 3 ENVIRONMENTAL LAW PRACTICE GUIDE, *supra* note 56, § 16.02[4][a].

⁸⁶ *Stockdale v. Agrico Chem. Co.*, 340 F. Supp. 244, 260 (N.D. Iowa 1972); *Pate v. Martin*, 614 S.W.2d 46, 48-49 (Tenn. 1981).

They are granted when the actor's conduct is so unreasonable that it must cease.⁸⁷ Generally, in deciding whether to enjoin a nuisance, courts consider the plaintiff's injury, the defendant's expense in abating the nuisance and mitigation efforts, and the utility of the activity.⁸⁸ However, where the nuisance is permanent, injunctive relief becomes impracticable.⁸⁹

Defenses in nuisance actions include transfer of ownership, coming to the nuisance, and statute of limitations.⁹⁰ In general, defendants are liable for maintaining or creating a nuisance even after selling the property to another.⁹¹ When the current owner knew or should have known of the nuisance when buying the property, he or she may be liable for maintaining it.⁹² Some defendants would also argue the plaintiff came to the nuisance; however, in most cases this is just one factor the courts consider rather than a total defense.⁹³ The statute of limitations can be used as a defense because nuisance is a tort.⁹⁴ In continuing nuisance jurisdictions, each separate action is deemed to trigger the statute.⁹⁵

B. *Public Nuisance as a Vehicle for Environmental Litigation*

Although “[t]he deepest doctrinal roots of modern environmental law are found in principles of nuisance,”⁹⁶ the Supreme Court has consistently rejected public nuisance cases involving interstate water pollution, both before and after the enactment of the Clean Water Act (CWA). Public nuisance claims in the air pollution context are potentially more viable than

⁸⁷ Grossman, *supra* note 69, at 58.

⁸⁸ 3 ENVIRONMENTAL LAW PRACTICE GUIDE, *supra* note 56, § 16.02[4][a].

⁸⁹ *Id.*

⁹⁰ Other potential defenses include laches, a prescriptive right to maintain a nuisance, and non-liability for discretionary actions of the government. See *Shea Homes Ltd. P'ship v. United States*, 397 F. Supp. 2d 1194, 1199–1201 (N.D. Cal. 2005) (dismissing nuisance and trespass claims against the U.S. government for damages from methane gas because the government's efforts to control methane gas emissions from landfill were discretionary); *Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871, 883–84 (Pa. 1974) (holding that an action against stream polluters was not barred by laches, nor did the polluters obtain a prescriptive right to pollute as against the Commonwealth).

⁹¹ *State v. Ole Olsen, Ltd.*, 324 N.E.2d 886, 886 (N.Y. 1975).

⁹² See *State v. Shore Realty Corp.*, 759 F.2d 1032, 1051 (2d Cir. 1985) (determining a landowner responsible because he “purchased [the land] with knowledge of its condition—indeed of the approximate cost of cleaning it up—and with an opportunity to clean up the site”); see also *Starr v. Comm'r of Env'tl. Prot.*, 627 A.2d 1296, 1314 (Conn. 1993) (determining landowners liable for nuisances on their properties, even those who, “without fault of their own, find themselves the owners of polluted real estate without their having created or caused the contamination”), *superseded by statute*, An Act Establishing an Innocent Landowner Defense in Pollution Cases, 1993 Conn. Acts 1420 (Reg. Sess.), as recognized in 675 A.2d 430, 434–35 (Conn. 1996).

⁹³ *McQuade v. Tucson Tiller Apts., Ltd.*, 543 P.2d 150, 153 (Ariz. Ct. App. 1975); see also *Patrick v. Sharon Steel Corp.*, 549 F. Supp. 1259, 1267–68 (N.D. W. Va. 1982) (holding that West Virginia, like many other jurisdictions, has “rejected the doctrine of coming to the nuisance as a defense” because it is out of place in modern society and it goes against public policy).

⁹⁴ *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755, 758 (Ky. Ct. App. 1965).

⁹⁵ *Carpenter v. Texaco*, 646 N.E.2d 398, 399–400 (Mass. 1995).

⁹⁶ *Cox v. Dallas*, 256 F.3d 281, 291 (5th Cir. 2001) (quoting WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW § 2.1 (1977)).

in the water pollution context, even following the enactment of the CAA. This is due to the favorable precedent in *Georgia v. Tennessee Copper Co.*, and also because the CAA's regulatory scheme is not as comprehensive as the CWA's regulatory framework.

1. *Interstate Water Pollution*

Since the beginning of the twentieth century, the U.S. Supreme Court has repeatedly denied public nuisance claims involving interstate water pollution. This trend started with *Missouri v. Illinois*,⁹⁷ where the court refused to enjoin the discharge of Chicago's sewage, deemed a nuisance, into the Mississippi River through an artificial channel.⁹⁸ Missouri had alleged that Chicago's sewage discharge increased the number of deaths from typhoid fever in Missouri.⁹⁹ The court observed that the plaintiff's case depended on the inferences that typhoid fever has significantly increased since the discharge and that the bacillus survived the journey to St. Louis.¹⁰⁰ Concluding that the deaths from typhoid fever in St. Louis could have been caused by another source and not necessarily by the typhoid bacillus, the court dismissed the suit because the evidence was conflicting as to whether the bacillus survived the journey to St. Louis.¹⁰¹

In the early interstate water pollution cases, the Supreme Court relied on the inadequacy of the judiciary as a forum to resolve such disputes. For example, in 1921, the Supreme Court dismissed a common law public nuisance claim based on water pollution in a New York suit seeking a permanent injunction against New Jersey for its sewage discharge.¹⁰² The court considered the evidence "much too meager and indefinite to be seriously considered as ground for an injunction," especially given that a proposal was in place to treat the new sewage before it was discharged.¹⁰³ The court concluded that the sewage would not constitute a public nuisance because the evidence was not convincing that it would cause deposits on the water's surface, offensive odors, or serious pollution.¹⁰⁴ The court emphasized that "the grave problem of sewage disposal . . . is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States . . . than by proceedings in any court."¹⁰⁵

Similarly, the Supreme Court had also noted that the problem of

⁹⁷ *Missouri v. Illinois*, 200 U.S. 496 (1906).

⁹⁸ *Id.* at 525–26.

⁹⁹ *Id.* at 522–23.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 525–26.

¹⁰² *New York v. New Jersey*, 256 U.S. 296, 312–13 (1921).

¹⁰³ *Id.* at 309–10.

¹⁰⁴ *Id.* at 312–13.

¹⁰⁵ *Id.* at 313.

interstate pollution, no matter how simple the case may be, presents “an extremely awkward vehicle [for the court] to manage.”¹⁰⁶ In *Ohio v. Wyandotte Chemical Corp.*, the court declined to exercise original jurisdiction in a suit brought by Ohio against out-of-state corporations that allegedly created a nuisance by dumping mercury in Lake Erie.¹⁰⁷ The court concluded that it would exercise its original jurisdiction on issues of federal law, particularly those requiring appellate review, but not for “noisome, vexatious, or unfamiliar tasks.”¹⁰⁸ The court reasoned that because mercury was not the only pollutant in the Lake, the case raised novel scientific factual issues, and there were many governmental agencies already dealing with those issues.¹⁰⁹

In the modern era of interstate water pollution cases, the Supreme Court has relied on preemption under the CWA as a basis for denying public nuisance claims. For example, in 1981, the court in *Middlesex County Sewerage Authority v. National Sea Clammers Association*¹¹⁰ dismissed the respondents’ federal common law nuisance claims against various government entities of Middlesex.¹¹¹ The respondents alleged that the petitioners had discharged sewage and other waste into the Hudson River and New York Harbor, polluting the Atlantic Ocean and thereby, “causing the ‘collapse of the fishing, clamming and lobster industries.’”¹¹² The court held that “the federal common law of nuisance has been fully pre-empted in the area of ocean pollution”¹¹³ by statute.¹¹⁴

2. Interstate Air Pollution

There are several public nuisance cases involving air pollution that provide a significant portion of the foundation for evaluating the viability of public nuisance claims for climate change impacts. The first and perhaps most significant of these cases is *Georgia v. Tennessee Copper Co.*, where in 1907 the Supreme Court ruled in favor of a public nuisance

¹⁰⁶ *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 504 (1972).

¹⁰⁷ *Id.* at 494.

¹⁰⁸ *Id.* at 498–99.

¹⁰⁹ *Id.* at 503–05.

¹¹⁰ *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981).

¹¹¹ *Id.* at 22.

¹¹² *Id.* at 4–5 (quoting Complaint at ¶ 39, App. 26a, *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981)).

¹¹³ *Id.* at 11.

¹¹⁴ The Court referred to the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251–1387 (Westlaw 2007) and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401–45 (Westlaw 2007). *Middlesex County Sewerage Auth.*, 453 U.S. at 22. The Court explained “there is no reason to suppose that the pre-emptive effect of the FWPCA is any less when pollution of coastal waters is at issue.” *Id.* Six years later, the Supreme Court similarly concluded that the CWA preempted Vermont nuisance law from applying to a New York point source. *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 501 (1987). For further discussion, see *infra* Part III.A.

plaintiff in an interstate air pollution case.¹¹⁵ Seeking injunctive relief, the State of Georgia commenced an action in its quasi-sovereign capacity against Tennessee's copper companies that allegedly discharged sulfur dioxide in the air, harming Georgia's forests, crops, and orchards.¹¹⁶ The court noted:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.¹¹⁷

In granting the injunction, the court noted the magnitude of the pollution was not in dispute as it considerably threatened harm "to the forests and vegetable life, if not to health, within the plaintiff State."¹¹⁸ Nevertheless, the court allowed the companies a reasonable amount of time to abate the pollution before issuing the injunction.¹¹⁹ California relies heavily on this landmark case in framing its theory of the case in *California v. General Motors*.¹²⁰

In contrast, in 1972, the Supreme Court in *Washington v. General Motors Corp.* refused to exercise its original jurisdiction,¹²¹ noting that federal district courts are better equipped to handle the air pollution claims.¹²² In this case, eighteen states sued the nation's four major automobile manufacturers alleging conspiracy "to restrain the development of motor vehicle air pollution control equipment."¹²³ The states sought an injunction

requiring the defendants to undertake an accelerated program of spending, research and development designed to produce a fully effective pollution control device or devices and/or pollution free engine at the earliest feasible date and also ordering defendants to install effective pollution control devices in all motor vehicles they manufactured during the conspiracy and as standard equipment in all future motor

¹¹⁵ *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 239 (1907).

¹¹⁶ *Id.* at 236–38.

¹¹⁷ *Id.* at 238.

¹¹⁸ *Id.* at 238–39.

¹¹⁹ *Id.* at 239.

¹²⁰ See *infra* Parts III, IV.

¹²¹ *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 114 (1972).

¹²² *Id.* at 116.

¹²³ *Id.* at 111.

vehicles which they manufacture.¹²⁴

Although recognizing that the case presented "important questions of vital national importance" and that the court's power to hear the case could not be disputed, it still refused to exercise jurisdiction.¹²⁵ Noting that air pollution was "one of the most notorious types of public nuisance,"¹²⁶ the court concluded that air pollution remedies "necessarily must be considered in the context of localized situations" as geographical characteristics are important in abating air pollution.¹²⁷

Public nuisance air pollution claims have not been as successful since Congress's enactment of the Clean Air Act (CAA). In 1981, in *New England Legal Foundation v. Costle*, the Second Circuit affirmed dismissal of a federal common law claim of nuisance seeking declaratory and injunctive relief against the Long Island Lighting Company.¹²⁸ The company allegedly maintained a public nuisance by burning high sulfur fuel.¹²⁹ Without deciding whether the CAA always preempts federal common law nuisance claims alleging air pollution, the Second Circuit based its decision on two factors.¹³⁰ First, the Second Circuit considered the Environmental Protection Agency's (EPA) express approval of the conduct, especially since "the conduct sought to be enjoined implicates the technically complex area of environmental law and where Congress has vested administrative authority in a federal agency presumably having significant technical expertise."¹³¹ The court noted that Congress had decided that better regulation would result from a comprehensive statutory program than "through ad hoc common law remedies."¹³² Second, the court contemplated the availability of an adequate and more appropriate remedy at law, namely a petition to the EPA for review of the interstate effects of the alleged sulfate emission and further appeals, if necessary.¹³³ Because the alternative remedy existed, the court concluded that "a federal common law remedy would be contrary to congressional intent."¹³⁴

Four years later, in *National Audubon Society v. Department of Water & Power of Los Angeles*,¹³⁵ the Ninth Circuit refused to recognize a federal

¹²⁴ *Id.* at 112 (internal quotation marks omitted).

¹²⁵ *Id.*

¹²⁶ *Id.* at 114.

¹²⁷ *Id.* at 114-16.

¹²⁸ *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981).

¹²⁹ *Id.* at 31.

¹³⁰ *Id.* at 32-33.

¹³¹ *Id.* at 33.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* Similarly, the following year, in *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982), the United States District Court for the District of New Jersey granted defendants' motion for summary judgment dismissing the United States' federal common law nuisance claim seeking damages for air pollution. *Kin-Buc, Inc.*, 532 F. Supp. at 700. For further discussion, see *infra* Part III.A.

¹³⁵ *Nat'l Audubon Soc'y v. Dep't of Water & Power of L.A.*, 869 F.2d 1196 (9th Cir. 1988).

common law nuisance claim based on air pollution, noting that the case did not involve “either the rights and obligations of the United States as sovereign, or an interstate dispute making application of state law inappropriate.”¹³⁶ The National Audubon Society sought an injunction to restrain the defendant’s diversion of four freshwater streams that flowed naturally to Mono Lake, alleging that the diversion to Los Angeles increased the salinity and ion concentration of Mono Lake.¹³⁷ The court held that the federal common law nuisance claims for air and water pollution were preempted by federal air and water quality statutes.¹³⁸ The court further noted that the CAA authorized the EPA and the states to remedy air pollution.¹³⁹ It concluded that there was not “a uniquely federal interest,” but rather that it was the states’ responsibility to protect the nation’s air quality.¹⁴⁰ The court did not reach the issue of preemption by the CAA because it concluded that no federal common law nuisance claim for air pollution could be asserted based on the facts of the case.¹⁴¹

Although public nuisance cases regarding interstate air pollution were not significantly more successful than those involving interstate water pollution, these air pollution cases asserting federal common law as the basis for relief have left the door ajar to assert a successful public nuisance claim for the interstate pollution involved in climate change. The applicable cases limited their holdings to narrow factual contexts and acknowledged that the CAA is not as comprehensive as the CWA in its preemptive effect on the federal common law of interstate pollution.¹⁴²

III. CLIMATE CHANGE IMPACTS AS PUBLIC NUISANCE: THE POLITICAL QUESTION HURDLE

While public nuisance cases in the air pollution context form a foundation for the climate change impact cases that will be discussed in the remaining parts of the Article, there is no federal common law for climate change. This reality makes it even more challenging for plaintiffs to bring successful public nuisance claims for climate change impacts. In addition,

¹³⁶ *Id.* at 1206.

¹³⁷ *Id.* at 1198.

¹³⁸ *Id.* at 1200, 1202.

¹³⁹ *Id.* at 1202.

¹⁴⁰ *Id.* at 1203.

¹⁴¹ *Id.* at 1205.

¹⁴² See *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 114 (1972) (stating that while air pollution is a nationally felt public nuisance, abatement measures should be state fostered to accommodate the disparate needs of various cities); *Nat’l Audubon Soc’y v. Dep’t of Water & Power of L.A.*, 869 F.2d 1196, 1212–13 (9th Cir. 1988) (Reinhardt, J., dissenting) (stating that the Clean Air Act not an all-encompassing program of pollution regulation comparable to the Clean Water Act); *New England Legal Found. v. Costle*, 666 F.2d 30, 32 (2d Cir. 1981) (stating that the court would not “reach the broad question of whether the Clean Air Act totally preempts federal common law nuisance actions based on the emission of chemical pollutants into the air”).

the CAA and the Supreme Court's recent decision in *Massachusetts v. EPA*¹⁴³ present potential additional obstacles to the potentially viable theory of public nuisance claims for climate change impacts.

Like other air pollution, defendants' GHG emissions that contribute to global warming threaten the public's health, safety, comfort, and convenience, and thus, can be deemed unreasonable.¹⁴⁴ In addition, global warming has long-lasting effects that are foreseeable to the actors.¹⁴⁵ The injuries asserted in global warming suits also implicate public rights.¹⁴⁶ For instance, the thawing of the permafrost in Alaska implicates public rights by leading to forest damage, erosion, sinking of ground surface, and more.¹⁴⁷ Although harm need not have occurred for recovery in a claim for injunctive relief,¹⁴⁸ global warming plaintiffs often have already suffered the harmful impacts of climate change.¹⁴⁹

The fundamental questions are (1) whether compensation for climate change impacts should be handled by the judicial branch, as opposed to the legislative or executive branches, and (2) whether climate change causes and impacts should be addressed at the international level rather than under a purely domestic regime and forum. These challenging questions trigger the political question doctrine's potential applicability to this context. The first public nuisance case filed to recover for climate change impacts, *Connecticut v. American Electric Power Co.*, was dismissed on political question grounds.¹⁵⁰ The second public nuisance case for climate change impacts, *California v. General Motors*, sought damages instead of injunctive relief in an attempt to avoid political question doctrine concerns, but suffered a similar fate at the hands of the political question doctrine.

A. *Connecticut v. American Electric Power: Political Question Doctrine and Injunctive Relief*

In *Connecticut v. American Electric Power Co.*, eight states¹⁵¹ sued five major power production companies in the District Court for the Southern District of New York.¹⁵² The states claimed that they represented

¹⁴³ *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

¹⁴⁴ *See id.* at 1455–56 (“The harms associated with climate change are serious and well recognized.”); Grossman, *supra* note 69, at 54 (“The second critical element of a public nuisance claim is that the defendants’ interference with the public right is unreasonable.”).

¹⁴⁵ Grossman, *supra* note 69, at 54.

¹⁴⁶ *See id.* at 53 (“The first critical element of the definition of public nuisance is ‘a right common to the general public.’”).

¹⁴⁷ *Id.* at 53–54.

¹⁴⁸ RESTATEMENT (SECOND) OF TORTS § 821B cmt. i (1979).

¹⁴⁹ Grossman, *supra* note 69, at 58.

¹⁵⁰ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267, 274 (S.D.N.Y. 2005).

¹⁵¹ *Connecticut*, *New York*, *Iowa*, *New Jersey*, *Vermont*, *Wisconsin*, *Rhode Island*, and *California*. *Id.* at 267.

¹⁵² *American Electric Power Company*, the *Southern Company*, *Tennessee Valley Authority*, *Xcel Energy Corporation*, and *Cinergy Corporation*. *Id.*

the interests of more than seventy-seven million people and their related environments.¹⁵³ The states brought suit on alternative grounds, alleging both federal and state common law theories for the public nuisance of global warming.¹⁵⁴

The states claimed that the defendant power companies were the five largest emitters of carbon dioxide in the United States, collectively emitting approximately 650 million tons of carbon dioxide annually, or one quarter of the U.S. electric power sector's carbon dioxide emissions.¹⁵⁵ They also asserted that U.S. electric power plants emit ten percent of the world's human activity carbon dioxide emissions.¹⁵⁶ The states claimed that carbon dioxide emissions that contribute to climate change were occurring.¹⁵⁷ The states sought an order (1) "holding each of the Defendants jointly and severally liable for contributing to an ongoing public nuisance, global warming," and (2) enjoining each of the defendants' contribution to the public nuisance "by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade."¹⁵⁸

The electric power companies contended that the states failed to state an action for which relief could be granted because: (1) "there is no recognized federal common law cause of action to abate [GHG] emissions"; (2) separation of powers principles preclude the court from adjudication; and (3) "Congress has displaced any federal common law cause of action to address the issue of global warming."¹⁵⁹

The defendants relied on the fact that Congress passed the Global Change Research Act in 1990, which authorized federally funded climate change research.¹⁶⁰ The defendants noted that while the United States is a party to the United Nations Framework Convention on Climate Change (UNFCCC),¹⁶¹ this treaty is non-binding.¹⁶² The defendants further relied on a series of congressional bills affirmatively barring the EPA from

¹⁵³ *Id.* at 268.

¹⁵⁴ *Id.* at 267. Federal and state common law are mutually exclusive; federal common law applies when important federal interests would be frustrated by the application of state law or to prevent injustice from forum shopping likely to result if the applicable law to a controversy varies according to the forum that decides it. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 310 (2005). See generally Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 FORDHAM ENVTL. L. REV. 407 (2005) (arguing that global warming is a public nuisance for which defendants could be held liable as contributors).

¹⁵⁵ *Am. Elec. Power Co.*, 406 F. Supp. 2d at 268.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 270.

¹⁵⁹ *Id.*

¹⁶⁰ Global Change Research Act, 15 U.S.C. §§ 2931–2938 (Westlaw 2007); *Am. Elec. Power Co.*, 406 F. Supp. 2d at 269.

¹⁶¹ United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

¹⁶² *Am. Elec. Power Co.*, 406 F. Supp. 2d at 269–70.

implementing the Kyoto Protocol.¹⁶³ Finally, the defendants relied on the Bush administration's executive actions stressing that any judicial action on the subject would have a negative impact on negotiations with developing countries.¹⁶⁴

In granting defendants' motion to dismiss, the *Connecticut* court relied on the political question doctrine as articulated in *Baker v. Carr*.¹⁶⁵ *Baker* set forth six independent circumstances that present non-justiciable political questions.¹⁶⁶ They are: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially discoverable and manageable standards for resolving it;" (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."¹⁶⁷

The court focused on the third *Baker* situation—the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion. The court concluded that without an initial policy decision from the elected branches of government—Congress and the Executive—the court would be required, at a minimum, to:

- (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants;
- (2) determine the appropriate percentage reduction to impose upon Defendants;
- (3) create a schedule to implement those reductions;
- (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change;
- (5) assess and measure available alternative energy resources; and
- (6) determine and balance the implications of such relief on the United States energy sufficiency and thus its national security.¹⁶⁸

¹⁶³ *Id.* at 269.

¹⁶⁴ *Id.* at 270.

¹⁶⁵ *Baker v. Carr*, 369 U.S. 186, 217 (1962). In *Baker*, the U.S. Supreme Court responded to the plaintiff's allegations of equal protection violations by articulating six independent instances in which a claim presents a non-justiciable political question. *Id.* The Court recently reaffirmed the landmark decision's contribution to the political question doctrine in *Vieth v. Jubliere*, 541 U.S. 267, 277–78 (2004). For a discussion of the history and ramifications of the decision, see generally Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretative Approach of Baker v. Carr*, 80 N.C. L. REV. 1103 (2002).

¹⁶⁶ *Baker*, 369 U.S. at 217.

¹⁶⁷ *Id.*

¹⁶⁸ *Am. Elec. Power Co.*, 406 F.Supp.2d at 272.

The court stated that without an initial policy determination, a balancing of these interests is impossible.¹⁶⁹

The Plaintiffs argued that their case was a “simple [public] nuisance claim of the kind courts have adjudicated in the past;”¹⁷⁰ however, the court disagreed, noting that in no prior pollution-as-public-nuisance cases had a court been asked to opine on areas that “[touch] on so many areas of national and international policy.”¹⁷¹ The court stated that “[t]he scope and magnitude of the relief the Plaintiffs seek reveals the transcendently legislative nature of this litigation. Plaintiffs ask this Court to cap carbon dioxide emissions and mandate annual reductions of an as-yet-unspecified percentage.”¹⁷² The court was concerned with the complexity of these initial policy determinations concerning climate change, including whether the costs be spread across the entire electricity-generating industry or other industries, and the implications for the economy, the nation’s energy independence, and national security.¹⁷³

The court also considered statements that had previously been issued by the EPA.¹⁷⁴ The EPA has been given administrative authority over the complex areas of environmental law and has issued several statements regarding the regulation of activities that possibly could be contributing to global climate change.¹⁷⁵ For instance, the EPA recognizes that “[i]t is hard to imagine any issue in the environmental area having greater ‘economic and political significance’ than regulation of activities that might lead to global climate change.”¹⁷⁶ The EPA further noted that “[t]he issue of global climate change . . . has been discussed extensively during the last three Presidential campaigns; it is the subject of debate and negotiation in several international bodies; and numerous bills have been introduced in Congress over the last 15 years to address the issue.”¹⁷⁷ The EPA has also indicated that efforts undertaken unilaterally by the United States to address carbon dioxide emissions could weaken efforts by the federal governments to influence developing nations to limit GHGs in their economies and changes in the global climate raise important foreign policy issues which are “the President’s prerogative to address.”¹⁷⁸

¹⁶⁹ *Id.* at 272–73.

¹⁷⁰ *Id.* at 272.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 273.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003)).

¹⁷⁷ *Id.* (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,928).

¹⁷⁸ *Id.* (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931).

Therefore, *Connecticut* initially appears to dim the prospects for California's ability to recover in *California v. General Motors*. Both cases seek relief in the politically charged area of climate change regulation, where no controlling precedent exists in federal common law and where the political question doctrine stands as a difficult obstacle to obtaining relief for climate change impacts. The opportunity to seek damages instead of injunctive relief, however, offers a potential opportunity to avoid these problems.

B. *Barasich v. Columbia Gulf Transmission Co.: Political Question Doctrine and Damages*

Since *Connecticut*, at least one environmental public nuisance case was not dismissed under the political question doctrine. In *Barasich v. Columbia Gulf Transmission Co.*,¹⁷⁹ the court engaged in a thorough discussion of the *Baker* test and held that tort actions, such as public nuisance, do not present non-justiciable political questions.¹⁸⁰

In *Barasich*, a class of Louisiana landowners sued oil and gas pipeline companies for eroding protective marshlands that inevitably led to greater destruction of the plaintiff's land once hit by Hurricane Katrina.¹⁸¹ The plaintiffs alleged that the oil and gas companies' destruction of protective marshes constituted a public nuisance that specifically harmed the plaintiff landowners.¹⁸² The companies moved to dismiss on the ground that the claim was a non-justiciable political question.¹⁸³

The court reviewed the *Baker* test and stated that cases that seek monetary relief are less likely to raise political questions because injunctions are susceptible to problems when they have the potential to force the judiciary to intrude into the decision-making domain of another branch.¹⁸⁴ The court then distinguished *Connecticut* on the basis of the relief sought. Because the plaintiffs in *Barasich* sought monetary relief, the court would not be forced to make the policy determinations that the injunction in the *Connecticut* case required.¹⁸⁵ The court dismissed the third *Baker* situation by stating that when there are judicially manageable

¹⁷⁹ *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006).

¹⁸⁰ *Id.* at 684–85.

¹⁸¹ *Id.* at 678.

¹⁸² *Id.* at 678–80.

¹⁸³ *Id.* at 680.

¹⁸⁴ *Id.* at 685–86. *But see* *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459–63 (2007) (requiring the EPA to classify carbon dioxide as an “air pollutant” within the meaning of the CAA, not through the Court’s independent policy determination on the nature and importance of regulating GHGs, but in accord with Congress’ intent in enacting the CAA).

¹⁸⁵ *But see* *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436-LG-RHW, slip op. at 1 (S.D. Miss. Aug. 30, 2007) (dismissing on political question grounds the Gulf Coast property owners’ suit for damages against companies whose emissions of greenhouse gases allegedly increased the strength of Hurricane Katrina).

standards to guide the court, such as in tort claims, an initial policy determination is unnecessary.¹⁸⁶ The court then grouped the last three *Baker* situations together, and concluded that they only apply when another branch of government has acted in an area in which judicial action could create a conflict.¹⁸⁷

The distinction noted in *Barasich* between public nuisance cases seeking damages as compared to cases seeking injunctive relief has potentially profound implications for the future of public nuisance suits for climate change impacts. Understanding why *Connecticut* failed provides the foundation for understanding why *California v. General Motors*' public nuisance suit should succeed.

C. *California v. General Motors: Political Question Doctrine and Damages Revisited*

The door that the *Barasich* case opened for potential recovery of damages in a public nuisance suit was, at least temporarily, slammed shut in the Northern District of California's decision in *California v. General Motors*.¹⁸⁸ In this case, California filed suit alleging public nuisance under both federal common law and California state statutes for the climate change impacts caused by emissions from the automobile industry.¹⁸⁹ The defendants' motion to dismiss asserted four separate grounds for dismissal.¹⁹⁰

First, the defendants contended that the issue was a political question best left to the legislative and executive branches.¹⁹¹ Climate change policy is a question of both public and foreign policy involving complex science with potential political, social, and economic consequences.¹⁹² California asserted that no policy determinations were needed; the court simply needed to apply the law of nuisance to the facts of the case.¹⁹³

The Northern District of California considered the six *Baker* factors,¹⁹⁴ focusing on the third factor regarding whether the court would be required to make an initial policy decision in order to resolve the case.¹⁹⁵ The defendants argued that meaningful reductions in GHGs would require a

¹⁸⁶ *Barasich*, 467 F. Supp. 2d at 686–87.

¹⁸⁷ *Id.* at 687; see also *Massachusetts*, 127 S. Ct. at 1459–63 (concluding that the Court could undermine prior acts of Congress and the Executive Branch by forcing the EPA to regulate carbon dioxide through new vehicle emissions standards when doing so as a matter of statutory interpretation).

¹⁸⁸ *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

¹⁸⁹ *Id.* at **1–2.

¹⁹⁰ *Id.* at *2.

¹⁹¹ *Id.* at *5.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See *supra* notes 166–68 and accompanying text.

¹⁹⁵ *Gen. Motors Corp.*, 2007 WL 2726871, at *6.

“broad array” of coordinated legislation.¹⁹⁶ California claimed that its damage had already been suffered and there was no need to wait for a comprehensive resolution of climate change impacts by the federal government.¹⁹⁷

Even though California sought only damages in its suit, the court held that this case presented a political question.¹⁹⁸ As in *Connecticut v. American Electric Power Co.*, the court held that resolution of the case would require an assessment of whether there was unreasonable interference with a public right.¹⁹⁹ The court determined that it would need to balance the benefits of emissions reductions against the public interest in advancing and preserving the economy, which would likely require the court to create a quotient or standard to quantify damages to California.²⁰⁰

The court further reasoned that the federal government’s hesitation and deliberate inaction with respect to climate change policy makes court intervention even more inappropriate.²⁰¹ Because the issue is “still under active consideration” by the legislative and executive branches,²⁰² interference by the judicial branch would undermine the political branch by weakening the United States’ efforts to persuade key developing countries to lower the GHG-intensity of their economies.²⁰³

After examining *Massachusetts v. EPA*, the court in *California v. General Motors* concluded that the authority to regulate GHGs lies with the federal government.²⁰⁴ By concluding that the plaintiffs had standing to challenge the EPA in that case, the Supreme Court implicitly recognized that states dissatisfied with national policy should advance their interest through administrative channels.²⁰⁵ Moreover, the court recognized that the Clean Air Act (CAA) covers all air pollutants, including carbon dioxide; therefore, the determination of reasonableness lies with the EPA under the auspices of the CAA.²⁰⁶

The court also found the first and second *Baker* factors persuasive in its determination of non-justiciability.²⁰⁷ The defendant automobile manufacturers argued that there is a textually demonstrable constitutional commitment to the other branches in the area of climate change policy.²⁰⁸ The defendants relied on (1) Congress’s authority over interstate

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at *8.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at *7.

²⁰⁴ *Id.* at **10–12.

²⁰⁵ *Id.* at *11.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at **13–16.

²⁰⁸ *Gen. Motors Corp.*, 2007 WL 2726871, at **13–14.

commerce, and (2) the power of the executive and legislative branches over foreign policy.²⁰⁹ The court agreed with the defendants, noting negative commerce implications where automakers, utility companies, and other businesses would be exposed to additional tort liability simply for operating lawfully within a given state.²¹⁰ Moreover, in the area of foreign policy, the court recognized the political branches' refusal to involve the United States in the international global warming debate without commitment from developing countries and the injustice in punishing defendant automobile manufacturers for selling their product lawfully in domestic and international markets.²¹¹

The defendants also claimed that there was a lack of judicially manageable standards to guide the court in reaching a decision.²¹² California, however, asserted that the legal framework for federal common law nuisance is well-established through transboundary pollution cases.²¹³ The court concluded that these transboundary cases were distinguishable from the present instance because: (1) the plaintiffs in those cases sought equitable remedies, not money damages, so they provide no guidance to the court in determining an appropriate amount for damage from pollution; (2) the cases provide no standards for allocating fault or damages between parties for damage from GHG emissions; (3) those cases do not implicate as many national and international policy issues; (4) transboundary pollution cases were focused on local problems emanating from a single, identifiable source; and (5) federal nuisance cases have been reserved for cases where one state sues a company for nuisance when operating in another state.²¹⁴ In the present case, the defendants operate both within and outside of the state of California, as well as in many foreign countries.²¹⁵ Based on these considerations, the court held that there was a lack of judicially manageable standards.²¹⁶

Having determined that a non-justiciable political question existed, the court declined to consider California's federal common law of interstate pollution arguments.²¹⁷ Moreover, the parties conceded that the court cannot exercise supplemental jurisdiction over California's state common

²⁰⁹ *Id.* at *13.

²¹⁰ *Id.* at *14.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at *15 (citing *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (discharge of raw sewage into Lake Michigan); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (diversion of water from rivers); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (actions causing flooding); *New York v. New Jersey*, 256 U.S. 296 (1921) (discharge of sewage into New York Bay); *Georgia v. Tennessee*, 206 U.S. 230 (1907) (discharge of noxious gases)).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at **15–16.

²¹⁷ *Id.* at *16

law claims when it does not have jurisdiction over the federal claim.²¹⁸ Thus, the Northern District of California dismissed the case, but allowed the state law nuisance claim to be re-filed in California state court.²¹⁹

IV. CLIMATE CHANGE IMPACTS AS PUBLIC NUISANCE: PREEMPTION AND STATE LAW ISSUES

The plaintiffs in both *Connecticut v. American Electric Power Co.* and *California v. General Motors* pled their cases in the alternative. In each case, the plaintiffs asserted that federal common law applied and should govern the outcome; however, if the court determined that federal common law did not apply, the plaintiffs asserted that they were entitled to relief under state common law.²²⁰ Equipped with the knowledge that seeking injunctive relief was what doomed *Connecticut's* public nuisance claim,²²¹ the State of California sued six major automakers seeking money damages for contributing to climate change.²²² The critical difference between the two cases was that the plaintiffs in *Connecticut v. American Electric Power Co.* sought injunctive relief, whereas the state in *California v. General Motors* sought damages. Although this distinction should have ensured that California could avoid the political question concern that plagued the plaintiffs in *Connecticut v. American Electric Power Co.*, the Northern District of California disagreed.²²³ Nevertheless, because the district court dismissed the case on political question grounds, there are still important issues that the district court did not reach regarding preemption issues under the CAA and EPCA that may be addressed in a possible appeal of the case to the Ninth Circuit. This Part of the Article will first review the context of federal and state common law public nuisance claims and how the preemption concern arises. It will then address the conflict preemption and field preemption concerns at issue in *California v. General Motors*, and conclude with a brief discussion of the state law arguments in the case.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Common law claims may be more advantageous than regulatory claims because they allow for compensation to individual victims and can promote timely restoration of damaged natural resources and polluted lands. Jason J. Czarnetzki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 7 (2007).

²²¹ Ken Alex, Supervising Deputy Attorney General for the State of California, participated in the filing of the *Connecticut v. American Electric Power Co.* case and in drafting the *California v. General Motors* complaint. In doing so, he relied on the opinion of the court in *Connecticut v. American Electric Power Co.* in making decisions on how to plead *California v. General Motors*.

²²² Complaint, *supra* note 21, at 3–5 (naming General Motors Corp., Toyota Motor North America, Inc., Ford Motor Co., Honda North America, Inc., Chrysler Motors Corp., and Nissan North America, Inc. as defendants).

²²³ For a full discussion of the court's discussion, see *supra* Part III.C.

A. Federal Common Law and Preemption

There are three ways in which federal law can preempt state law.²²⁴ First, express preemption exists when a federal law provides in express terms that a particular state law is preempted.²²⁵ Second, implied or “field” preemption exists where a federal law is so comprehensive that it creates a reasonable inference that Congress intended to make the federal law practically universal, leaving no room for the state regulation.²²⁶ Finally, a federal law may preempt a state law when the state law conflicts with the federal law by being “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”²²⁷ or by making compliance with both the federal law and the state law physically impossible.²²⁸

Preemption is a potential issue in public nuisance claims because federal courts, unlike state courts, are courts of limited jurisdiction.²²⁹ In 1938, the Supreme Court in *Erie Railroad Co. v. Tompkins* declared, “There is no federal general common law.”²³⁰ Therefore, because neither the federal Constitution nor Congress has the authority to dictate what common law rules the states should apply, the common law of each state applies except where congressional or federal constitutional authority governs.²³¹

A few areas of federal common law remain after *Erie*, however, such as the federal common law of interstate pollution. In 1972, in *Illinois v. Milwaukee*, the State of Illinois sued the City of Milwaukee and other defendants alleging pollution of Lake Michigan by sewage discharge.²³² The Supreme Court held that public nuisance claims of interstate water pollution presented federal questions and should be handled by federal district courts.²³³

The court determined that federal common law exists that governs “air and water in their ambient or interstate aspects.”²³⁴ It noted that the federal common law of public nuisance in interstate waters may be applied despite the existence of the Federal Water Pollution Control Act (FWPCA).²³⁵

²²⁴ See *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491–92 (1987) (identifying express preemption, implied preemption, and preemption by conflict).

²²⁵ *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983); see also *Ouellette*, 479 U.S. at 491 (identifying express preemption that is explicit in the language of the federal law, but noting preemption may also exist when there is no such explicit language).

²²⁶ *Pac. Gas & Elec. Co.*, 461 U.S. at 204; *Ouellette*, 479 U.S. at 491–92.

²²⁷ *Id.* (both quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

²²⁸ *Pac. Gas & Elec. Co.*, 461 U.S. at 204.

²²⁹ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972).

²³³ *Id.* at 107–08.

²³⁴ *Id.* at 103.

²³⁵ *Id.* at 104.

Therefore, federal common law applied, preempting state laws,²³⁶ however, the court cautioned, "The applicable federal common law depends on the facts peculiar to the particular case."²³⁷ The court did not foreclose the possibility of considering state standards, especially when such standards were stricter than the federal rules.²³⁸

Conversely, in 1981, the Supreme Court in *Milwaukee v. Illinois*²³⁹ held that a federal common law remedy was not available to the state of Illinois for the alleged discharge and inadequate treatment of sewage by Wisconsin municipal corporations, which was alleged to threaten the health of Illinois's citizens.²⁴⁰ The court concluded that "Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."²⁴¹ The court reasoned that the FWPCA Amendments of 1972 were intended to completely rewrite existing water pollution legislation,²⁴² and therefore, the courts were not free to try to improve this comprehensive scheme by applying federal common law that imposed more stringent limitations.²⁴³ It also noted that as between state and federal common law, one or the other should be used, but not both at the same time.²⁴⁴

Similarly, one year later in *United States v. Kin-Buc, Inc.*, the U.S. District Court for the District of New Jersey held that the CAA preempted a federal common law nuisance claim seeking damages for air pollution.²⁴⁵ The court reasoned that the CAA addressed the issue of air pollution because it "establishes a complete regulatory procedure whereby various pollutants are identified, air quality standards are set, and procedures for strict enforcement are created."²⁴⁶ Echoing the Supreme Court in *Milwaukee v. Illinois*, the district court emphasized that when there is a comprehensive regulatory program monitored by an expert administrative agency, federal common law is unnecessary and, therefore, preempted.²⁴⁷

²³⁶ *Id.* at 105.

²³⁷ *Id.* at 106.

²³⁸ *Id.* at 107.

²³⁹ *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

²⁴⁰ *Id.* at 309, 332.

²⁴¹ *Id.* at 317.

²⁴² *Id.*

²⁴³ *Id.* at 319-20.

²⁴⁴ *Id.* at 313 n.7; see also *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (explaining that federal law governs where state law cannot be applied, as in cases where the rights and obligations of the sovereign are implicated, where international and interstate disputes arise, or where there is an admiralty issue).

²⁴⁵ *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982).

²⁴⁶ *Id.* at 702.

²⁴⁷ *Id.* (citing *Milwaukee*, 451 U.S. at 317).

In deciding whether the CAA preempted the federal common law of nuisance in the air pollution context,²⁴⁸ the court compared the CAA with the FWPCA, but distinguished the CAA and concluded it “must be evaluated on its own terms.”²⁴⁹ The court reasoned that “[w]hile the FWPCA regulates every point source of water pollution, the CAA regulates only those stationary sources of air pollution that are found to threaten national ambient air quality standards.”²⁵⁰ Accordingly, the court articulated the governing test as “whether the scope of the legislative scheme established by Congress is such that it addresses the problem formerly governed by federal common law.”²⁵¹

In 1987, in *International Paper Co. v. Ouellette*,²⁵² the Supreme Court considered whether the CWA preempted a common law nuisance claim filed in Vermont under Vermont law when the source of alleged injury was in New York.²⁵³ The respondents, property owners, alleged that the petitioner’s mill constituted a nuisance by its discharge of effluents into Lake Champlain, which diminished the value of the respondents’ property.²⁵⁴ The court concluded that the CWA preempted the application of Vermont nuisance law to a New York point source. The court noted that an affected state has only “an advisory role in regulating pollution that originates beyond its borders”²⁵⁵ and “may not establish a separate permit system to regulate an out-of-state source.”²⁵⁶

The court explained that where an Act of Congress establishes a comprehensive regulation and the matter is generally controlled by federal law, as in the case of interstate pollution, “the only state suits that remain available are those specifically preserved by the Act.”²⁵⁷ It ruled that the CWA, and not various states’ standards, should be applied to a single point source, so that there would be no “serious interference with the achievement of the ‘full purposes and objectives of Congress.’”²⁵⁸ The court noted that “[a] state law also is preempted if it interferes with the methods by which the federal statute” would reach its goal.²⁵⁹ In this case,

²⁴⁸ *Id.* at 701.

²⁴⁹ *Id.*

²⁵⁰ *Id.* Prior to the 1990 Amendments, the CAA was not as comprehensive as the CWA. Harper, *supra* note 37, at 682–83. After adoption of the 1990 Amendments, however, the CAA has been considered sufficiently comprehensive to preempt federal common law nuisance claims, including those based on emissions from stationary sources. Merrill, *supra* note 154, at 319.

²⁵¹ *Kin-Buc, Inc.*, 532 F. Supp. at 702. (citing *Milwaukee*, 451 U.S. at 315 n.8).

²⁵² *Int’l Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

²⁵³ *Id.* at 483.

²⁵⁴ *Id.* at 484.

²⁵⁵ *Id.* at 490.

²⁵⁶ *Id.* at 491.

²⁵⁷ *Id.* at 492.

²⁵⁸ *Id.* at 493–94 (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)).

²⁵⁹ *Id.* at 494 (citing *Michigan Canners & Freezers Ass’n, Inc., v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 477 (1984)).

Vermont law was preempted because it would allow the federal permit system to be circumvented, which would upset the balance of private and public interests reflected in the CWA.²⁶⁰

B. Conflict Preemption: The Clean Air Act

There are two possible types of preemption at issue in *California v. General Motors*: conflict preemption and field preemption. Conflict preemption potentially arises under the CAA and field preemption could exist under EPCA.²⁶¹

Conflict preemption is possible because the CAA's definition of air pollutant has been expanded by the Supreme Court's April 2007 decision in *Massachusetts v. EPA*.²⁶² The court determined that carbon dioxide is an "air pollutant" under the CAA.²⁶³ Therefore, the EPA is required to regulate carbon dioxide emissions under the CAA upon a finding that they create a risk of harm to public health or welfare.²⁶⁴ Although considered an environmental victory, the court's holding increases the difficulty of successfully pursuing a public nuisance action for air pollution by introducing the problem of conflict preemption. If there is conflict preemption and, consequently, no federal common law, state law would govern under the savings clause in § 104(e) of the CAA.²⁶⁵

The Supreme Court's conclusion that carbon dioxide is a pollutant under the CAA could now mean that the CAA preempts federal common law public nuisance claims. In *Connecticut*, the plaintiffs pled for relief under the federal common law of public nuisance or, alternatively, under state common law. Filing the claim in the alternative is an effective strategy to avoid the effect of possible federal preemption. If the court finds that the CAA does preempt the federal common law public nuisance claim, the claim can proceed under the state common law. However, if the court determines that *Massachusetts v. EPA* requires a finding of preemption because sources of carbon dioxide emissions are now regulated under the CAA, then the CAA savings clause will keep the source state's common law public nuisance viable.²⁶⁶

In *California v. General Motors*, on the issue of conflict preemption,

²⁶⁰ *Id.*

²⁶¹ Although the automakers asserted that the CAA preempts the field of emissions, the CAA is not as comprehensive as the CWA, as noted in *Milwaukee v. Illinois*, and therefore does not create a field preemption concern regarding possible public nuisance claims. The CWA regulates all point sources while the CAA relies on national standards that are implemented through state plans, rather than a source-specific comprehensive permit system.

²⁶² *Massachusetts v. EPA*, 127 S. Ct. 1438, 1460–61 (2007).

²⁶³ *Id.* at 1460.

²⁶⁴ *Id.* at 1462.

²⁶⁵ See *infra* Part IV.D. CAA § 209(a) has very narrow language, and only preempts state standards relating to control of emissions of new vehicles. 42 U.S.C. § 7543(a) (Westlaw 2007).

²⁶⁶ *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

GM argued that the Supreme Court's decision in *Massachusetts v. EPA* makes clear that the CAA completely preempts federal common law regarding carbon dioxide as an air pollutant.²⁶⁷ Under the court's ruling, GHGs are governed by the CAA, the EPA has authority to regulate GHGs from vehicle emissions, and states have an explicit right to challenge the EPA's decisions.²⁶⁸ Thus, GM argued, the CAA provides for both regulation of carbon dioxide linked to climate change and an effective remedy for insufficient regulation, and preempts the entire related field of federal common law.²⁶⁹

In contrast, California argued that complete displacement of an area of federal common law occurs only upon implementation of a comprehensive long-range regulatory regime directly addressing the particular issue; the fact that a statute covers the same general subject matter as a federal statute is not sufficient.²⁷⁰ *Massachusetts v. EPA* highlights that the CAA currently provides no comprehensive response, remedy, or regulation to the specific problem of global warming, and may not develop such a plan for several years.²⁷¹

Noting that conflict preemption occurred in *Milwaukee II* only after an "all-encompassing program of water pollution regulation," but not in *Milwaukee I* where numerous laws merely "touched" interstate waters, California argued that the "unexercised regulatory authority" granted to the EPA in *Massachusetts* is insufficient to preempt common law.²⁷² This proposition is supported by the recent history in application of the CAA regarding air pollution and ozone depletion that congressional intervention is required before effective regulatory action is taken against interstate air pollution.²⁷³ California concludes that "[w]hile the *Massachusetts* ruling may prod the EPA to address global warming in a manner that provides the State with a meaningful remedy for harms related to future greenhouse gas emissions, until that comes to pass, the court must apply the federal common law to California's claim."²⁷⁴

The automakers will likely argue that a piecemeal approach to regulation of new vehicle emissions should be avoided at all costs. They will likely rely on *Massachusetts v. EPA* to state that the Supreme Court has mandated that the EPA act with regard to new vehicle emissions of

²⁶⁷ Defendants' Supplemental Brief, *supra* note 40, at 3.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ California's Supplemental Brief Re: *Massachusetts v. Environmental Protection Agency* at 4, California v. Gen. Motors Corp., No. 3:06-cv-05755-MJJ (N.D. Cal. Apr. 13, 2007).

²⁷¹ *Id.*

²⁷² *Id.* (emphasis removed); California's Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 9, California v. Gen. Motors Corp., No. 3:06-cv-05755-MJJ (N.D. Cal. Feb. 1, 2007).

²⁷³ Merrill, *supra* note 154, at 318.

²⁷⁴ California's Supplemental Brief, *supra* note 270, at 5.

carbon dioxide and that any action by the California court would only hinder the process.

C. *Field Preemption: The Energy Policy and Conservation Act*

The automakers in *California v. General Motors* also asserted that this public nuisance claim is preempted by EPCA.²⁷⁵ The defendants contended that setting fuel economy standards is “functionally equivalent” to the regulation of GHG emissions.²⁷⁶

California rebutted this argument by asserting that increasing mileage standards are not the sole method to address global warming.²⁷⁷ Many alternative solutions are available that do not affect fuel economy such as alternative fuels, new technologies to capture or sequester emissions, reduction of emissions upstream in manufacturing process, and other strategies.²⁷⁸ The state further asserted that EPCA was never intended to be a comprehensive environmental or global warming statute.²⁷⁹ The purpose of EPCA is to increase the domestic supply of petroleum, conserve energy, and decrease the vulnerability to imports.²⁸⁰ EPCA also does not contain any civil remedy related in any way to global warming.²⁸¹ Accordingly, California claimed that while EPCA may preempt a state law claim, the state relies on the federal common law for its remedy.

D. *State Law Arguments*

If the court determines that the CAA preempts California’s common law claims, then the CAA savings clause will retain the state causes of action.²⁸² The automakers claimed that (1) California’s consent to vehicles is a defense to public nuisance²⁸³ and that (2) the mere sale of a legal product cannot be a public nuisance.²⁸⁴ The automakers further contended that California state nuisance law only allows the state to sue for abatement, not damages.²⁸⁵ These compelling arguments make California’s state law nuisance arguments weaker than its arguments based on the federal common law of interstate nuisance.

The automakers asserted that California has expressly consented to

²⁷⁵ Defendants’ Supplemental Brief, *supra* note 40, at 3–4.

²⁷⁶ California’s Memorandum of Law, *supra* note 272, at 13.

²⁷⁷ *Id.* at 13–14.

²⁷⁸ *Id.* at 14.

²⁷⁹ *Id.* at 13.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 14.

²⁸² The CAA savings clause, § 104(e), preserves causes of action under state law when the CAA preempts a state common law claim. 42 U.S.C. § 7604(e) (Westlaw 2007).

²⁸³ California’s Memorandum of Law, *supra* note 272, at 30.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 31.

have vehicles in its state and thus cannot obtain damages from any nuisance that they create.²⁸⁶ Therefore, California Civil Code § 3482 bars the action unless the action is expressly authorized by state or federal law.²⁸⁷ California's CARB program individually permits each new auto for use in the state.²⁸⁸ California state government employs 37,000 vehicles itself, the largest fleet of any group in the state.²⁸⁹ California also has a vast transportation infrastructure on which it invites and encourages vehicles to travel.²⁹⁰ The state enthusiastically consents to the sale of automobiles within its borders, and it receives vast revenue from both motor vehicle fees and fuel taxes.²⁹¹

California responded by asserting that no express authority is available under § 3482.²⁹² For express authority, there must be legislative contemplation of the doing of the very act that causes the injury.²⁹³ The state claimed that the law requires express consent to the particular activity and to the particular resulting nuisance or hazard.²⁹⁴ California contended that simply because a state supports a product in the marketplace does not preclude it from seeking recovery for any harm that may be ultimately caused.²⁹⁵

The automakers also asserted that California law bars the assertion of public nuisance based on the "mere manufacture and distribution of a product"²⁹⁶ and that for liability to attach the manufacture must be engaged in some "affirmative conduct that assisted in the creation of a hazardous condition."²⁹⁷ They further claimed that state law only allows recovery in three specific instances—where a defendant: (1) owned or controlled property where nuisance arose; (2) created nuisance on another's property; or (3) employed another to perform work that resulted in nuisance.²⁹⁸ California rebutted this assertion by contending that the critical question is whether the defendant created or assisted in the creation of the nuisance.²⁹⁹ Here, the automakers designed vehicles to discharge GHGs in a manner

²⁸⁶ See *id.* at 30.

²⁸⁷ *Id.* at 29.

²⁸⁸ Defendants' Notice of Motion and Motion to Dismiss Second Amended Complaint for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief May be Granted at 20, *California v. Gen. Motors, Corp.*, No. C06-05755 MJJ (N.D. Cal. Dec. 15, 2006) [hereinafter Defendants' Motion to Dismiss].

²⁸⁹ *Id.* at 19–20.

²⁹⁰ California's Memorandum of Law, *supra* note 272, at 30.

²⁹¹ *Id.*

²⁹² *Id.* at 29–30.

²⁹³ *Id.* at 29.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 30.

²⁹⁶ Defendants' Motion to Dismiss, *supra* note 288, at 25.

²⁹⁷ *Id.* (citing *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 328 (Cal. Ct. App. 2006)).

²⁹⁸ *Id.*

²⁹⁹ California's Memorandum of Law, *supra* note 272, at 30–31.

that creates a nuisance, and the automakers knew or should have known of the emissions and their impacts.³⁰⁰

V. CLIMATE CHANGE IMPACTS AS PUBLIC NUISANCE:
AN UNREASONABLE EXPANSION OF PUBLIC NUISANCE THEORY?

This part of the Article considers four arguments that oppose the theory underlying public nuisance claims in the climate change context. In response to each argument, it then presents a multi-faceted endorsement of the state's theory of the case in *California v. General Motors*. It explains how California's approach is a well-grounded legal theory that avoids political question and preemption obstacles while advancing the laudable objectives of promoting climate change regulation and authorizing recovery from its impacts. Part V also illustrates how the state's theory in *California v. General Motors* is a logical extension of the existing federal common law of interstate air pollution.

There are four categories of arguments that oppose the state's prospects for recovery in the *California v. General Motors* case: (1) judicial competence and efficiency; (2) interpretation of the CAA and federal common law; (3) fairness; and (4) improper expansion of public nuisance doctrine. The four opposing arguments will be presented first, followed by arguments supporting the state's position in *California v. General Motors*.

The judicial competence argument asserts that courts are not the appropriate body to make decisions on international policy issues like climate change. This theory lies at the heart of the political question hurdle for California in its case, as it did for the states in the *Connecticut* case.³⁰¹ Courts are empowered to interpret legislation and give effect to its purpose, which is arguably what occurred in the *Massachusetts v. EPA* case. In that case, the states sought to compel EPA to do the job that Congress arguably had assigned the agency to do. There was some ambiguity as to whether Congress intended EPA to have the non-discretionary duty to regulate carbon dioxide as an air pollutant. Therefore, the court was the appropriate forum to resolve that dispute. The opponents of California's theory would argue that *California v. General Motors* is distinguishable from *Massachusetts v. EPA* because the *California v. General Motors* case presents the potential for the judiciary to engage in a form of "legislating from the bench" if it rules on climate change impact cases.

At best, the judiciary's involvement in *California v. General Motors* is premature because an initial policy determination from Congress on climate change regulation has not yet occurred. Such an initial policy

³⁰⁰ *Id.* at 31.

³⁰¹ See *supra* Part III.A.

determination can and should take the form of domestic implementing legislation enacted pursuant to the mandates of an international accord like the Kyoto Protocol. In the alternative, at a minimum there would need to be mandatory domestic legislation in place, albeit not connected to an international law regime addressing climate change, that requires GHG emission reductions. Only then would courts have a proper role to play in giving effect to the congressional policy expressed in such legislation on a highly significant national and international regulatory matter.

The other side of the judicial competence argument is the efficiency argument, perhaps better known as the “floodgates problem.” This argument asserts that allowing a case like *California v. General Motors* to proceed, even though it only seeks damages for past harms, could cause an avalanche of subsequent unnecessary, expensive, time-consuming, and premature climate change litigation. The automakers would assert that meaningful help for victims of climate change impacts is on its way in light of the Supreme Court’s decision in April 2007 in *Massachusetts v. EPA*. Moreover, *California v. General Motors* represents a form of counterproductive impatience that interferes with this impending congressional response to climate change via EPA’s new mandate to consider regulating carbon dioxide as a criteria pollutant under the CAA. The *Massachusetts v. EPA* decision has set the wheels in motion to deliver what California ultimately wants to protect its environment and its citizens—a mandatory federal framework to regulate GHG emissions. Until that time, California’s efforts and resources would be more productively devoted to state regulation of climate change—through laudable initiatives such as California’s Global Warming Solutions Act—and by promoting technological innovation and striving to work cooperatively with industry to address a problem that affects all citizens of the state.

Even if the CAA and EPCA do not occupy and preempt the interstate air pollution context to the degree that the CWA preempts interstate water pollution cases, Congress is about to move one significant step closer to that preemption bar with the implementation phase of the *Massachusetts v. EPA* decision. The automakers would assert that it is most appropriate at this juncture to allow Congress and the EPA to undertake the task that is now before them—to regulate carbon dioxide as a pollutant under the CAA. When that task is complete, it is likely that the climate change area will be comprehensively regulated in much the same way that the CWA governs the water pollution context. Therefore, the need to rely on and extend the interstate air pollution dimension of public nuisance into the climate change area to attempt to fashion interim relief for climate change impacts is premature at best, if not entirely unnecessary.

Clogging the courts with unnecessary suits such as California’s public nuisance claim also raises fairness concerns. The environmental

movement rallied around meritorious suits in the 1970s and 1980s against egregious polluters whose conduct posed a grave threat to the health and welfare of citizens and to the integrity of natural resources. The *Connecticut* and *California v. General Motors* cases, however, are entirely different situations from these early environmental lawsuits. These public nuisance suits are making scapegoats out of the backbone of the American economy—the energy sector and the automobile industry—simply for conducting their business in a way that is entirely consistent with applicable law. Therefore, the fairness argument asserts that widespread problems such as climate change impacts that affect the nation as a whole must be addressed at the highest level of democracy—federal and state government—and should not scapegoat the pillars of the economy, which are simply a few of the many sources of the climate change problem to which we all contribute.

Related to the fairness and scapegoating concern is the problem of doctrinal distortion—the improper expansion of the public nuisance doctrine into areas it was not meant to reach. Public nuisance doctrine was not intended to become a made-to-order weapon to haul the latest “bad guy”³⁰² into court to collect damages for an alleged public harm. Conversely, public nuisance doctrine traditionally has “targeted how properties or products are used, not manufactured.”³⁰³ This shift away from improper use to improper manufacture is a problem for at least two reasons. First, it blurs the distinction between public nuisance and products liability doctrine, which will lead to inevitable confusion for the bench and bar, and will likely produce ambiguous and unmanageable precedent. Second, it is an improper extension of public nuisance doctrine because it creates an unworkable judicial standard that allows too much discretion for judges to identify what might be unreasonable interference in any possible context. Public nuisance doctrine is best used as a gap-filler in environmental litigation—to articulate novel ways for courts to find a way to provide redress for a tangible environmental harm that is not otherwise regulated under existing statutory regimes.

California has a variety of general policy responses to these challenges to its theory of the case in *California v. General Motors*. First, like all common law principles, public nuisance doctrine needs to evolve and grow to respond to the changing needs of our society. Desperate times call for desperate measures. In light of the climate change crisis that has just come to center stage in the international arena within the past ten to fifteen years,

³⁰² The “bad guys” in this modern expansion of public nuisance litigation have been manufacturers of unpopular products such as asbestos, guns, tobacco, lead paint, and MTBE (a gasoline additive). Richard O. Faulk & John S. Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation by Public Authorities and Private Counsel*, 21 TOXICS L. REP. 1172, 1176 (2006).

³⁰³ *Id.*

there is a need for heroic litigation to go beyond the bounds of traditional doctrine and try to promote public good through creative use of common law theories like public nuisance. Traditional federal and state legislative responses are important, but those processes move very slowly and do not always offer meaningful recourse for the impacts in our backyards. Second, regarding fairness, the doctrine of joint and several liability in tort law permits a plaintiff to sue any individual for part of a harm that the plaintiff suffered and recover from that responsible party some or all of the damages to which the plaintiff is entitled. Third, the downfall of the tobacco industry did not occur because affected Americans waited for federal regulatory action. Rather, it came from creative and ambitious plaintiffs' lawyers that crafted a viable legal theory to promote public welfare by seeking damages for harm to individual victims.³⁰⁴ It was an important step in the right direction that later contributed to meaningful legislative responses. The *California v. General Motors* case can offer a similar positive step in the fight against the causes and effects of climate change.

There are two significant obstacles that could prevent California from prevailing in an appeal of the *California v. General Motors* case: (1) the political question doctrine, and (2) preemption. The state's theory of the case overcomes both of these hurdles for the reasons that follow.

The litigation strategy to pursue damages rather than injunctive relief is likely a successful approach to avoid the political question doctrine concerns raised in the *Connecticut* case. Courts are empowered to decide tort cases, and only need to find unreasonable harm to award damages. The state is not seeking a comprehensive solution to climate change in seeking damages in this public nuisance claim. Even California's ambitious Global Warming Solutions Act does not purport to solve the world's—or even the nation's—climate change crisis.

Consistent with the court's reasoning in *Barasich*, recovery of damages does not constitute a policy determination; it is merely an application of public nuisance law to the facts. In *Connecticut*, seeking injunctive relief would have required the court to determine standards without an initial policy finding. Without guidance from Congress or the EPA, the court would be arbitrarily stopping future action. However, by awarding monetary damages for past harms, the court in *California v. General Motors* would be fulfilling one of its primary functions—to provide monetary awards to those who are harmed. The legal framework for adjudicating public nuisance claims is well established. Courts have been deciding cases applying the federal common law of public nuisance

³⁰⁴ Stephen Susman, Esq., Address at BNA Environment Health and Safety Audio Conference: Panacea or Placebo: Using Public Nuisance Principles to Redress Environmental Harms (Feb. 27, 2007) (on file with author).

since *Georgia v. Tennessee Copper Co.* Under the federal common law of public nuisance, the court must only decide whether there has been an unreasonable harm to the state of California. Once the court determines that the harm is unreasonable, it may award damages as courts routinely do on a day-to-day basis.

In addition, the relief sought in *California v. General Motors* is more narrowly tailored than the relief sought in *Connecticut*. *Connecticut* was brought on behalf of citizens of several different states scattered throughout the United States.³⁰⁵ Unlike the Defendants in *Connecticut*, all of the auto manufacturers in *California v. General Motors* do business or are registered entities in the State of California. This is a critical distinction because one of the issues that several of the defendants in the *Connecticut* case asserted was that they were not present in any of the plaintiff states and that the states were attempting to hold them liable for their contributions to the “public nuisance” of global climate change even though these contributions occurred outside of the states that were bringing suit.³⁰⁶

With respect to preemption in light of *Massachusetts v. EPA*, California has a viable response. *Massachusetts v. EPA* addresses new emission standards and arguably could preempt public nuisance suits for climate change impacts once those new emission standards are in place. California’s case, however, merely seeks to recover damages for *past* harms from climate change impacts. The court must only find unreasonable harm and apply the law to the facts. In addition, there is a difference between addressing the *causes* as distinguished from the *effects* of climate change. The CAA does not expressly preempt tort actions. Therefore, such tort actions to address recovery for the effects of climate change may be viable even after the *Massachusetts v. EPA* decision’s amended statutory framework for the CAA is implemented.

Although a legal issue like climate change regulation may be politically charged, it does not necessarily create a political question. The UNFCCC is the only climate change treaty to which the United States is a party; however, this framework treaty does not require any mandatory reductions in greenhouse gas emissions. The United States has expressly declined to become a party to the UNFCCC’s Kyoto Protocol, which imposes mandatory targets and timetables for GHG emissions reductions. All current acts of Congress dealing with climate change focus on research and voluntary compliance. There are currently no Executive agreements dealing with climate change.

The cases involving interstate air pollution discussed in Part I of this

³⁰⁵ Complaint at 3–5, *Connecticut v. Am. Elec. Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005) (No. 04-CV-05669).

³⁰⁶ *Id.* at 1.

Article also support the validity of California's position. First, federal common law should govern this case because climate change impacts experienced in California are the result of interstate air pollution from GHG emissions throughout the United States and beyond U.S. borders. Therefore, the concern addressed in *National Audubon Society v. Department of Water* (Mono Lake case) that an interstate dispute was not at issue is not a problem in *California v. General Motors*. The dispute in the Mono Lake was an exclusively intrastate matter, whereas climate change is a quintessential form of interstate pollution.

California v. General Motors is also distinguishable from two interstate air pollution cases under the CAA that concluded that the CAA preempted federal common law claims. Although the Supreme Court in *Washington v. General Motors* did not exercise its original jurisdiction to hear the interstate air pollution case, the court noted that air pollution was "one of the most notorious types of public nuisance"³⁰⁷ and that air pollution remedies "necessarily must be considered in the context of localized situations as geographical characteristics are important in abating air pollution."³⁰⁸ This language reinforces the state's theory in *California v. GM*. The impacts are localized in California and not dispersed throughout 18 states as in *Washington v. General Motors*. Moreover, unlike in *New England Legal Foundation v. Costle*, there is no express approval from EPA at issue in this case to assert that the CAA preempts the application of federal common law. Taken together, these two cases on their face appear to limit the viability of federal common law claims for interstate air pollution; however, the holdings are limited to the narrow factual contexts in both cases. Therefore, the window of opportunity for future public nuisance claims asserting federal common law recovery for interstate air pollution has been left at least partially open for such claims to avoid CAA preemption.

VI. CONCLUSION

The federal common law of interstate pollution has been a controversial and politically charged topic in the American legal system for more than a century. Dating back to the landmark case of *Georgia v. Tennessee Copper Co.*, states have a long history of suing neighboring states to recover for pollution originating beyond state borders. Early Supreme Court decisions reflected the Court's concern about plaintiffs asserting public nuisance claims to resolve interstate pollution cases in the judicial system. The concern was grounded in the Court's understanding that the judiciary was not the proper forum for interstate pollution disputes

³⁰⁷ *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 114 (1972).

³⁰⁸ *Id.* at 114-16.

and that such disputes were better resolved through interstate negotiation or federal statutory mandate. With the advent of federal environmental legislation like the CAA and the CWA in the 1970s, preemption concerns made the application of public nuisance claims even more problematic because, in most cases, the federal statutory scheme should govern the dispute.

However, California's public nuisance suit against the auto manufacturers should not be plagued by these concerns because (1) it involves intrastate impacts from climate change in California; (2) the claim triggers application of the federal common law through allegations of interstate pollution; (3) the CAA does not yet preempt public nuisance claims for climate change impacts because it lacks a climate change regulatory scheme and Congress is not likely to implement one in the immediate future; and (4) California seeks a judicially manageable remedy—damages for past harms—rather than injunctive relief to set future compliance standards.

If California succeeds on appeal in its public nuisance claim, it would provide a strong impetus for the federal government to implement a mandatory GHG emission reduction program as quickly as possible. Even if California's claim is unsuccessful, it would be yet another powerful tool, in addition to other types of climate change litigation and regional, state, and local climate change regulatory initiatives, to call attention to the need for aggressive climate regulation.³⁰⁹ Even with positive steps forward like the California Global Warming Solutions Act and the victory in *Massachusetts v. EPA*, harms from climate change impacts have occurred and will continue to occur as the United States moves closer to a comprehensive federal regulatory system for GHG emissions reductions.

³⁰⁹ See Harper, *supra* note 37, at 696–97 (noting that the response to such climate change litigation could goad members of the regulated community to self-regulate their GHG emissions in anticipation of future mandatory GHG regulation); see also Pawa & Krass, *supra* note 154, at 420–21 (noting that in the wake of the *Connecticut* case, one of the defendants announced support for regulation of carbon dioxide emissions, another announced it would build a clean coal plant that could capture and sequester carbon dioxide emissions, and a third joined the Plains Carbon Dioxide Reduction Partnership to further investigate various strategies to reduce carbon dioxide emissions in the atmosphere).