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Extraterritoriality in Common Law Climate Actions: Judicial Restraint or Judicial Error?

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NOTE

Extraterritoriality in Common Law Climate Actions: Judicial Restraint or Judicial Error?

AARON B. RUDYAN*

TABLE OF CONTENTS

<i>I. Introduction</i>	179
<i>II. Background of the Common Law Climate Actions</i>	182
<i>III. Extraterritorial Application of the Common Law</i>	185
<i>A. The Hesitation to Establish a New Field of Federal Common Law</i>	185
<i>B. The Presumption Against Extraterritoriality Does Not Apply to Common Law Nuisance Suits</i>	189
1. <i>The Common Law as “Common,” “Constrained” and the Law of the “Commoner”</i>	191
2. <i>Climate Nuisance Suits as “Common,” “Constrained,” and the Law of the “Commoner”</i>	194
<i>IV. Choice-of-Law Principles Dictate the Use of U.S. Law in Climate Nuisance Suits</i>	198
<i>A. Federal Common Law</i>	198
1. <i>Maintaining the International System</i>	200
2. <i>Relevant Policies and Interests of Each Sovereign Nation</i>	201
3. <i>Ease in Applying U.S. Law</i>	202
<i>B. State Common Law</i>	203
1. <i>California</i>	203
2. <i>New York</i>	206
<i>C. The Choice-of-Law Analyses Further Support the Extraterritorial Application of the Common Law in Climate Actions.</i>	207

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178	<i>PACE ENVIRONMENTAL LAW REVIEW</i>	[Vol. 37
V. <i>Conclusion</i>		208

I. INTRODUCTION

In 1992, the United States (“U.S.”) signed and ratified the United Nations Framework Convention on Climate Change (“UNFCCC”).¹ Under the UNFCCC, the U.S. is required, among other obligations, to (1) implement measures to mitigate climate change by addressing anthropogenic sources of emissions;² (2) promote practices and processes that reduce or prevent emissions from all sectors;³ (3) promote sustainable management of sinks and reservoirs;⁴ (4) include climate change considerations in relevant social, economic, and environmental policies;⁵ (5) adopt policies to mitigate climate change by limiting emissions of greenhouse gases and by protecting sinks and reservoirs, with the aim of returning to 1990 emissions levels by 2000;⁶ and (6) identify and review domestic policies which encourage increased emissions of greenhouse gases.⁷ In 2016, the U.S. furthered its intent to mitigate climate change by signing the Paris Climate Agreement, whereby the U.S. pledged to decrease greenhouse gas emissions by 26-28% below the 2005 level before 2025.⁸

Despite the growing understanding of the near- and long-term effects of climate change,⁹ the U.S. has struggled to meet its goals under the Paris Agreement because, at the federal level, the political branches of government have neglected to adopt adequate

1. U.N. Framework Convention on Climate Change art. 26, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter Climate Change Framework].

2. *Id.* at art. 4(1)(b).

3. *Id.* at art. 4(1)(c).

4. *Id.* at art. 4(1)(d).

5. *Id.* at art. 4(1)(f).

6. *Id.* at art. 4(2)(a)–(b).

7. *Id.* at art. 4(2)(e)(ii).

8. U.S., U.S.A. FIRST N.D.C. SUBMISSION 1 (Mar. 9, 2016), <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf> [https://perma.cc/FLB7-9G2Q].

9. See *Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C*, IPCC (Oct. 8, 2018), <https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/> [https://perma.cc/A6HQ-FG4T] (determining that the severe impacts of climate change are already occurring and will exponentially increase if no action is taken).

climate laws.¹⁰ The U.S. Congress, for example, has failed to adopt any law to specifically control greenhouse gas emissions.¹¹ Likewise, the Executive Branch has demonstrated shortcomings in adopting climate-related initiatives. Although President Obama attempted to achieve greenhouse gas emission reduction through the Clean Power Plan, the courts have stayed this initiative,¹² and after the current administration took office in 2016, President Trump has effectively withdrawn support for the Plan,¹³ implemented policies to support continued reliance on fossil-fuel sources of energy,¹⁴ and officially started the proceedings to withdraw from the Paris Agreement.¹⁵ Due to the difficulties of implementing global climate policies and inaction at the federal level, an overarching legal regime to limit greenhouse gas emissions appears unachievable. And, despite the growing trend toward abating climate change at the state and local levels,¹⁶

10. *See generally Congress Climate History*, CTR. FOR CLIMATE AND ENERGY SOLUTIONS, <https://www.c2es.org/content/congress-climate-history/> [<https://perma.cc/7NK9-AX2H>]; *see also* Rep. of U.N. Env't Programme, Emissions Gap Report 2018, at 9, 15, U.N. Doc. DEW/2210/NA (2018).

11. *See Congress Climate History*, *supra* note 10.

12. *See, e.g.*, *West Virginia v. EPA*, 136 S. Ct. 1000 (Feb. 9, 2016) (mem.). Five separate but identical orders were issued in response to five separate applications to stay and many scholars have questioned the Court's authority to stay the case due to the stay's unprecedented nature. *See, e.g.*, Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 GEO. ENVTL. L. REV. 425, 426 (2016); Joshua Linn et. al., *The Supreme Court's Stay of the Clean Power Plan: Economic Assessment and Implications for the Future*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10859, 10860 (2016).

13. *See generally* Exec. Order No. 13,783, 82 Fed. Reg. 16,093–97 (Mar. 31, 2017) (replacing the Clean Power Plan with a fossil-fuel friendly initiative); *see also* Brad Plumer, *What to Expect as U.S. Leaves Paris Climate Accord*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/us-paris-accord-what-happens-next.html> [<https://perma.cc/5CNS-G5AW>] (explaining the national and international repercussions of Trump's withdrawal from the Paris Agreement).

14. *See Proposal: Affordable Clean Energy (ACE) Rule*, EPA, <https://www.epa.gov/stationary-sources-air-pollution/proposal-affordable-clean-energy-ace-rule> [<https://perma.cc/ZXZ9-AAKU>] (last updated June 19, 2019) (describing the fossil-fuel friendly regulation which has been promulgated under President Trump's first term).

15. Drew Kann, *US Begins Formal Withdrawal from Paris Climate Accord*, CNN (Nov. 4, 2019), <https://www.cnn.com/2019/11/04/politics/trump-formal-withdrawal-paris-climate-agreement/index.html> [<https://perma.cc/E9ZG-ECTM>].

16. *See generally* ALLIANCE FOR A SUSTAINABLE FUTURE, MAYORS LEADING THE WAY ON CLIMATE: HOW CITIES LARGE AND SMALL ARE TAKING ACTION 9–20 (2018), <http://www.usmayors.org/wp-content/uploads/2018/09/uscm-2018-alliance->

climate initiatives foresee stabilization of global surface temperatures in the distant future, if at all. As a result, many jurisdictions, including cities, are currently experiencing the negative effects of climate change with no reasonable prospect for political redress.¹⁷

Cities, therefore, have turned to judicial tribunals to obtain relief. Numerous cities within the U.S. have brought actions in federal courts across the nation seeking damages caused by climate change through the legal lens of common law torts.¹⁸ Originally, cities sought to bring actions against the major greenhouse gas emitters under the legal regime of the federal common law.¹⁹ In 2011, however, the Supreme Court determined that these claims, with respect to defendants deemed domestic corporations, were displaced under the Clean Air Act.²⁰ Consequently, cities have begun litigating climate actions against the oil companies who provide the fossil fuels used to produce greenhouse gases under state common law.²¹ Despite the high volume of climate actions entering the judicial system, almost all are being dismissed on jurisdictional grounds, without any discussion of the merits of their claims.²²

This Note delves into two of these common law nuisance actions in which district courts dismissed the City of Oakland's and the City of New York's claims that foreign and domestic oil companies caused city-wide damages by exacerbating the changing

building-report-baldwin-small-7.pdf [https://perma.cc/H4QW-N8AQ]; see also John R. Nolon, *Low Carbon Land Use: Paris, Pittsburgh, and the IPCC*, 40 U. ARK. LITTLE ROCK L. REV. 661, 678–91 (2018).

17. ALLIANCE FOR A SUSTAINABLE FUTURE, *supra* note 16, at 8.

18. See, e.g., Amended Complaint at 7, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No: 2:18-CV-182-JFK) [hereinafter *New York Am. Compl.*]; First Amended Complaint at 2, *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No: 3:17-CV-06011-WHA) [hereinafter *Oakland Am. Compl.*].

19. See, e.g., *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011).

20. *Id.* at 424.

21. *New York Am. Compl.*, *supra* note 18, at 7; *Oakland Am. Compl.*, *supra* note 18, at 2.

22. See R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 322 (2017) (illustrating the judiciary's "subterfuge and self-limitation" with respect to adjudicating the substantive claims of climate change plaintiffs).

climate system through their continuous sale of fossil fuels.²³ Instead of targeting the dismissal of domestic oil companies, where the current legal debate revolves around Clean Air Act preemption and displacement,²⁴ this Note focuses on the dismissal of the claims with respect to foreign oil companies. Part II introduces the two climate nuisance suits and the district courts' reasoning in dismissing the common law complaints against the domestic and foreign defendants. Part III then illustrates that the courts erroneously relied on statutory canons to analyze and dismiss the cities' common law claims as they pertain to foreign defendants. Specifically, this section discusses the district courts' misuse of the presumption against extraterritoriality to dismiss the common law claims against the foreign oil companies. The final jurisdictional hurdle that the courts must overcome before reviewing the allegations on their merits is determining which law applies, domestic law or foreign law. Therefore, Part IV explores the novel choice-of-law analysis in the context of climate nuisance actions and concludes that both federal and state choice-of-law principles dictate the use of U.S. law – whether state or federal – in the context of common law climate actions. This section concludes with the exploration of how the choice-of-law analyses further support the extraterritorial application of the common law.

II. BACKGROUND OF THE COMMON LAW CLIMATE ACTIONS

In 2018, two novel common law climate actions were brought in the District Court for the Northern District of California and the District Court for the Southern District of New York.²⁵ In both cases, the cities of Oakland and New York brought public nuisance actions against domestic and foreign oil companies for causing city-

23. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1028–29 (N.D. Cal. 2018).

24. *See, e.g.*, Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENVTL. L. REV. 49, 69 (2018).

25. *New York Am. Compl.*, *supra* note 18, at 1 (naming BP, Chevron, ConocoPhillips, ExxonMobil, and Royal Dutch Shell as defendants); *Oakland Am. Compl.*, *supra* note 18, at 1 (naming BP, Chevron, ConocoPhillips, ExxonMobil, and Royal Dutch Shell as defendants).

wide damages as a result of their contributions to climate change.²⁶ Through their lawsuits, the cities attempted to expand upon the jurisprudence of transboundary harm²⁷ by arguing for the extraterritorial application of recognized common law principles to hold foreign and domestic oil companies liable for localized damages caused by climate change.²⁸ In both cases, the cities originally sought relief under the state common law.²⁹ Both district courts, however, determined that the suits must be governed by federal common law because the climate nuisance claims are entrenched in transboundary emissions.³⁰ State common law cannot apply, the courts reasoned, because controlling interstate pollution is a matter of federal law.³¹ Thus, “our federal system does not permit the controversy to be resolved under state law . . . because the interstate or international nature of the controversy makes it inappropriate for state law to control.”³²

Subsequently, the district courts easily dismissed the public nuisance claims against the domestic oil companies based on the Clean Air Act’s displacement of federal common law nuisance suits

26. Three of these oil companies – Chevron, ConocoPhillips, and ExxonMobil – are domestic oil companies, while the other two – BP and Royal Dutch Shell – are foreign-based. *See* New York Am. Compl., *supra* note 17 at 8–9.

27. *See, e.g., Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907) (applying common law principles to interstate pollution emitted from a finite copper refinery); *see also Missouri v. Illinois*, 200 U.S. 496, 517 (1906) (applying common law principles to interstate pollution discharged from a discrete sewage channel).

28. New York Am. Compl., *supra* note 18, at 1–2; Oakland Am. Compl., *supra* note 18, at 4–5.

29. New York Am. Compl., *supra* note 18, at 1; Oakland Am. Compl., *supra* note 18, at 2.

30. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018); Order Denying Motions to Remand at 3, *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. 3:17-CV-06011-WHA). Currently, both cities have appealed this determination to the Second Circuit and Ninth Circuit, respectively. *See, e.g.,* Appellant Brief at 29–42, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (2d Cir. 2018) (No. 18-2188) [hereinafter Appellant Brief]. Instead of taking a position on this complex, article-worthy topic, this Note argues that in either situation the governing common law can apply extraterritorially. While other sources discuss the implications of preemption jurisprudence, this Note will not. *See, e.g.,* Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP*, 117 MICH. L. REV. ONLINE 25, 26 (2018).

31. *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (“When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . .”).

32. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

involving emissions of greenhouse gas.³³ Because the Clean Air Act only grants the EPA jurisdiction over regulating domestic greenhouse gas emissions,³⁴ the district courts were unable to use the same displacement principles to dismiss the action against the foreign oil companies.³⁵ Instead, the courts turned to separation of powers principles as a legal justification for the dismissal of the actions.³⁶

Climate change is global, and fossil fuels contribute to climate change and its resulting harms regardless of where they are extracted and ultimately combusted; thus, the Plaintiffs in the climate actions are seeking to hold multinational companies liable under their state common law or – if the state common law claims have been deemed federal common law claims – under U.S. federal common law for fossil fuel extraction and combustion activities that took place outside of the U.S.³⁷ The courts seem to rely on the foreign aspect when invoking separation of powers to dismiss the cities' claims against foreign corporations.³⁸ Purporting to follow a string of recent Supreme Court cases,³⁹ the courts reasoned that the judiciary should not “extend or create private causes of action even in the realm of domestic law,” for the “decision to create a private right of action is one better left to legislative judgment”⁴⁰ Thus, the judiciary should be “wary of impinging

33. *City of New York*, 325 F. Supp. 3d at 472; *City of Oakland*, 325 F. Supp. 3d at 1024; see also *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (“We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants.”).

34. *Am. Elec. Power Co.*, 564 U.S. at 425 (holding that the CAA “thus provides a means to seek limits on emissions of carbon dioxide from domestic powerplants”).

35. *City of New York*, 325 F. Supp. 3d at 475 (determining that “the Clean Air Act regulates only domestic emissions”); *City of Oakland*, 325 F. Supp. 3d at 1024 (also determining that “foreign emissions are out of the EPA and Clean Air Act’s reach”).

36. *City of New York*, 325 F. Supp. 3d at 475–76; *City of Oakland*, 325 F. Supp. 3d at 1025.

37. *City of New York*, 325 F. Supp. 3d at 475; *City of Oakland*, 325 F. Supp. 3d at 1026.

38. *City of New York*, 325 F. Supp. 3d at 475; *City of Oakland*, 325 F. Supp. 3d at 1026.

39. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386 (2018).

40. *City of New York*, 325 F. Supp. 3d at 475 (quoting *Jesner*, 138 S. Ct. at 1402).

on the discretion of the Legislative and Executive Branches,”⁴¹ and, as a result, “federal courts should exercise great caution before fashioning federal common law in areas touching on foreign affairs.”⁴² Thus, the courts, in less than a page of discussion, use the extraterritorial effect of the cities’ claims as a means to dismiss the cases on separation of powers grounds.⁴³ The issue of the extraterritorial application of the common law in the context of climate nuisance suits, however, is quite difficult and nuanced, warranting a more in-depth analysis. By analyzing the jurisprudence surrounding extraterritoriality in conjunction with the foundational principles of the common law, this Note argues that the courts erred in determining that the extraterritorial application of the common law in the context of climate nuisance suits violates separation of powers principles.

III. EXTRATERRITORIAL APPLICATION OF THE COMMON LAW

A. The Hesitation to Establish a New Field of Federal Common Law

The district courts, when dismissing the climate nuisance actions, relied on the principle that the judiciary must exercise great caution before expanding the reach of the federal common law.⁴⁴ The trio of cases which give life to this principle, however, involve interpretation of the Alien Tort Statute (“ATS”).⁴⁵ The ATS has been described as a “legal Lohengrin,” in that its existence is hard to trace.⁴⁶ The creation of the ATS dates back to the enactment of the Judiciary Act of 1789, whereby Congress included a provision that bestowed upon the federal courts jurisdiction over certain subject matters; thus, the ATS is merely a jurisdictional

41. *Id.* (citing *Jesner*, 138 S. Ct. at 1402 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727)).

42. *City of Oakland*, 325 F. Supp. 3d at 1028.

43. *See, e.g., City of New York*, 325 F. Supp. 3d at 475–76.

44. *See Sosa*, 542 U.S. at 712; *see Kiobel*, 569 U.S. at 124; *see Jesner*, 138 S. Ct. at 1403.

45. Alien Tort Statute, 28 U.S.C. § 1350 (2018) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

46. *Sosa*, 542 U.S. at 712 (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)).

statute.⁴⁷ In fact, during the first 170 years after the enactment of the ATS, plaintiffs invoked its jurisdiction only once.⁴⁸

The trilogy of Supreme Court cases relied upon by the district courts all involve whether a cause of action is allowed under the ATS.⁴⁹ The first case, *Sosa*, produced a unanimous decision in which the Court determined that the ATS does not create a private right of action; rather, the statute merely provides a forum in which foreign plaintiffs may seek redress.⁵⁰ Because the ATS had only been invoked once previously,⁵¹ the Supreme Court proceeded to conduct an in-depth historical analysis of the statute to identify which causes of action could be brought under the ATS's jurisdiction.⁵² The Court ultimately found that the ATS "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."⁵³ Thus, the majority, echoed by Justice Scalia in concurrence, determined that for a claim resting on a tort in violation of international law to be valid under the ATS, the claim must (1) rest on a violation of customary international law; and (2) be defined with specificity comparable to violations of international law existing at the time of the ATS's enactment.⁵⁴ Consequently, the Court interpreted the ATS to limit the judiciary's power in expanding the statute's jurisdictional scope.⁵⁵

Nearly a decade later, the Supreme Court reiterated its hesitance to allow judicial expansion of the ATS.⁵⁶ In *Kiobel*, the plaintiffs, a group of Nigerian nationals residing in the U.S., brought an action under the ATS against Dutch, British, and Nigerian corporations for alleged violations of the law of nations.⁵⁷ Unlike *Sosa*, where the Court grappled with whether the claim was

47. *Id.* at 712–13 (citing 28 U.S.C. § 1350).

48. *Id.*

49. *See id.* at 712; *Kiobel*, 569 U.S. at 114; *Jesner*, 138 S. Ct. at 1394.

50. *Sosa*, 542 U.S. at 724.

51. *Id.* at 712.

52. *See id.* at 712–38.

53. *Id.* at 712.

54. *Id.* at 725. This is commonly known as the *Sosa* test.

55. The door to litigation under the ATS has not been closed; rather, "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Id.* at 729.

56. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117–16 (2013).

57. *Id.* at 111–12.

valid under the ATS, in *Kiobel*, the question before the Court was whether the ATS geographically reaches conduct that occurred in another sovereign state.⁵⁸ Simply put, the Court granted certiorari to decide whether the ATS allowed federal courts to adjudicate foreign conduct that occurred between aliens.⁵⁹ Recognizing that courts ultimately determine the geographic and jurisdictional reach of the ATS, the Supreme Court utilized the presumption against extraterritoriality – a canon of statutory interpretation stating that a statute that fails to clearly indicate an extraterritorial application has none⁶⁰ – to conclude that the ATS’s jurisdiction failed to encompass defendants’ violation of a law of nations occurring in a sovereign outside the U.S.⁶¹ Because “the danger of unwarranted judicial interference in the conduct of foreign policy is magnified . . . [where] the question is not what Congress has done but instead what courts may do,” the Supreme Court refused to expand the ATS’s jurisdiction in such a manner.⁶² In other words, in the context of the ATS, courts have the power to interpret Congress’s delegation of jurisdiction to the judiciary, specifically the geographic reach of ATS jurisdiction.⁶³

Six years after the Supreme Court issued its *Kiobel* opinion, the Court, in *Jesner*, again invoked judicial restraint, this time to limit the availability of ATS causes of action that may implicate foreign policy considerations.⁶⁴ The petitioners invoked the jurisdiction of the ATS, claiming that officials of a Jordanian bank had allowed transfers of funds to terrorist groups, who then used those funds to cause the deaths and injuries for which the plaintiffs

58. *Id.* at 115.

59. Michael L. Jones, Note, *Domesticating the Alien Tort Statute*, 84 GEO. WASH. L. REV. ARGUENDO 95, 106 (2016).

60. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010); *see also* *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007) (explaining that the presumption assures that the “United States law governs domestically but does not rule the world”).

61. *See Kiobel*, 569 U.S. at 116 (“[w]e think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.”); *see also* Jordan Clark, Note, *Kiobel’s Unintended Consequences: The Emergence of Transnational Litigation in State Court*, 41 ECOLOGY L.Q. 243, 255 (2014).

62. *Kiobel*, 569 U.S. at 109.

63. *See id.* at 116.

64. *Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386, 1407–08 (2018).

sought compensation.⁶⁵ The key issue in this case, left unanswered in the *Kiobel* opinion, was whether the ATS's jurisdiction encompasses actions against foreign corporations.⁶⁶ Utilizing historical analyses, canons of statutory interpretation, and rationales for judicial restraint employed in *Sosa* and *Kiobel*, the Supreme Court, with a slim five-to-four advantage, concluded that the ATS's jurisdiction does not include claims brought against foreign corporations.⁶⁷

The trio of cases caution the judiciary against broadening the jurisdictional scope of the ATS when interpreting the statute.⁶⁸ The district courts in the recent climate nuisance cases, however, saw more than mere interpretations of the ATS. Instead, the district courts determined that the trio illustrates a broader cautionary tale against judicial action "in the face of 'serious foreign policy consequences.'"⁶⁹ Specifically, the district courts latched onto the language of and theory behind the *Sosa*, *Kiobel*, and *Jesner* cases concerning extraterritorial application of U.S. law to dismiss the common law climate actions.⁷⁰ The courts opined that because the essence of the nuisance claims derives from the global emission of greenhouse gases and because this type of claim implicates numerous sources of foreign authority, the extraterritorial application of the common law would cause "significant foreign relations implications," which conflict with the unequivocal warning expressed by *Sosa*, *Kiobel*, and *Jesner*.⁷¹ The district courts, however, failed to elaborate on one paramount difference between the trilogy of cases and the climate nuisance suits. Although the claims in *Sosa*, *Kiobel*, and *Jesner* were

65. *Id.* at 1393.

66. *Id.* at 1395.

67. *See generally id.* Although the *Jesner* opinion was a plurality opinion, a majority of Justices concluded that ATS jurisdiction does not reach to foreign corporations.

68. It is important to note that the Supreme Court, in the trio of cases, was not limiting the territoriality of the common law claims; rather, the Court merely determined whether specific claims fall within the ATS's jurisdictional boundaries. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004); *see Kiobel*, 569 U.S. at 124; *Jesner*, 138 S. Ct. at 1407-08.

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

70. *See e.g.*, *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1025 (N.D. Cal. 2018) (quoting *Kiobel*, 569 U.S. at 117).

71. *City of New York*, 325 F. Supp. 3d at 475.

common law claims, these claims arose under the specific jurisdiction of the ATS, which is based on Congressional delegation of jurisdiction to the judiciary.⁷² The climate nuisance suits, in contrast, solely offer common law claims without any connection to a statutory legal regime.⁷³ Therefore, the courts ignored the stark contrast between claims arising purely under the common law and claims arising under statutory law.⁷⁴

By failing to recognize that common law claims differ greatly from their statutory counterparts, the courts incorrectly concluded that the adjudication of climate nuisance suits would cause serious foreign policy conflicts. The common law differs fundamentally from statutory law and its extraterritorial application will not produce the same foreign policy concerns.⁷⁵ Long-standing, foundational principles of the common law allow for the extraterritorial application of the common law claims in the context of climate nuisance suits without encroaching on the powers of the political branches of government.

B. The Presumption Against Extraterritoriality Does Not Apply to Common Law Nuisance Suits

The presumption against extraterritoriality has existed in American jurisprudence “for nearly as long as there have been federal statutes.”⁷⁶ Nevertheless, despite the waxing and waning of this principle’s application and the changes in its definition, the presumption has only been applied to the construction of statutes.⁷⁷ Instead of allowing judges to guess whether Congress would allow for extraterritoriality in a certain context, the presumption prevents “judicial-speculation-made-law” by only allowing extraterritorial application when Congress unequivocally

72. See Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 GEO. L.J. 1825, 1833 (2018).

73. See, e.g., New York Am. Compl., *supra* note 18, at 68–73.

74. See *City of New York*, 325 F. Supp. 3d at 475–76; *City of Oakland*, 325 F. Supp. 3d at 1024–28.

75. See discussion *infra* Section III.B, IV.C.

76. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 85 (1998).

77. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (“This principle represents a canon of construction, or a presumption about a statute’s meaning, rather than a limit upon Congress’s power to legislate.”)).

expresses an affirmative intention to give the statute extraterritorial effect.⁷⁸ Thus, the presumption prevents the judiciary from expanding the reach of statutory law beyond the legislative intent.

It has been suggested that the presumption against extraterritoriality derives from a policy of preventing judicial interference with foreign affairs through court-made geographic extensions of U.S. law.⁷⁹ In fact, it is this argument that the district courts relied on in applying the presumption to common law nuisance claims.⁸⁰ In the *City of Oakland*, the court applied a heightened level of caution which paralleled that of *Kiobel*.⁸¹ The Supreme Court in *Kiobel* determined that judicial interference is more dangerous when the courts are deciding what they may do.⁸² This danger, however, relates to the judiciary's role under the ATS to determine the jurisdictional reach of the statute. In *Sosa*, *Kiobel*, and *Jesner*, the Supreme Court was tasked with determining whether the substantive claims at issue were subject to ATS jurisdiction.⁸³ With jurisdictional statutes such as the ATS, the court retains the ability to significantly expand or limit the substantive reach of the statute. Thus, the courts reason that caution is warranted to prevent judicial overreach.

Some scholars, although agreeing that the extraterritorial application of statutes will cause judicial interference in the realm of foreign policy, disagree that the common law must be similarly restricted.⁸⁴ Specifically, because the common law represents a fundamentally unique form of law, one which has key distinctions from its statutory counterpart, its extraterritorial application will not cause similar concerns.⁸⁵

78. *Id.* at 261.

79. Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1351 (2014).

80. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1025 (N.D. Cal. 2018).

81. *City of Oakland*, 325 F. Supp. 3d at 1025.

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

83. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004); *Kiobel*, 569 U.S. at 112–13; *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1394 (2018).

84. Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301, 335 (2014).

85. *Id.*

1. The Common Law as “Common,” “Constrained” and the Law of the “Commoner”

When rejecting application of the presumption against extraterritoriality to judge-made common law, then-professor Jeffrey Meyer illustrated three key distinctions between the common law and its statutory counterpart.⁸⁶ Namely, the common law is “common,” “constrained,” and the law of the “commoner.”⁸⁷ In other words, the common law applies principles which transcend geographic boundaries, is derived from the “customs and relations of the common people, rather than being legislatively ordained,” and, is “subject to long-established practices” that systemically restrain its change more than statutes.⁸⁸ Already, multiple courts have rejected attempts to limit the geographic reach of common law principles abroad.⁸⁹

Tort law has long been applied in the extraterritorial context due to its “common” nature. Justice Holmes acknowledged this possibility by stating that “[g]enerally speaking, as between two common-law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state,” while “a statute of one would not be presumed to correspond to a statute in the other”⁹⁰ Even for non-common law countries, “[t]here is every reason why [other countries] should be presumed to recognize fundamental principles of right and wrong which lie at the foundation of human society,”

86. In 2014, Professor Meyer was appointed to the U.S. District Court of Connecticut. Ana Radelat, *Senate Confirms Meyer for District Court*, CT MIRROR (Feb. 24, 2014), <https://ctmirror.org/2014/02/24/senate-confirms-meyer-for-district-court/> [<https://perma.cc/M3JY-GHZ7>].

87. Meyer, *supra* note 84, at 307.

88. *Id.*

89. *See, e.g., Jovic v. L-3 Servs., Inc.*, 69 F. Supp. 3d 750, 762–64 (N.D. Ill. 2014) (determining that the common law can be applied even if the conduct occurred outside of the state that accepts such common law principles); *see also Norex Petroleum Ltd. v. Blavatnik*, No. 650591/11, 2015 WL 5057693, at *23 (N.Y. Sup. Ct. Aug. 25, 2015) (“New York courts have historically found that there is no territorial limit to New York common law causes of action, as there is with federal and state statutes.”). Additionally, two recent courts declined to apply the presumption to common law claims because the Defendants failed to cite authority supporting the application. *See Armada (Singapore) Pte Ltd. v. Amcol Int’l Corp.*, 244 F. Supp. 3d 750, 758 (N.D. Ill. 2017); *Leibman v. Prupes*, No. 2:14-CV-09003, 2015 WL 3823954, at *6 (C.D. Cal. June 18, 2015).

90. *Cuba R.R. Co. v. Crosby*, 222 U.S. 473, 479 (1912).

so that “if one should sue for damages suffered from an assault and battery, or from a larceny committed” in a foreign country, then “[t]here ought to be a presumption from common knowledge that a liability exists everywhere in such cases.”⁹¹ Thus, when “common” principles lay the foundation for the common law, courts need not hesitate to apply it extraterritorially.⁹²

Additionally, unlike statutory law, common law is “constrained” by the past.⁹³ Although many legal realists see the common law as judge-made law which parallels the legislative process, common law judges operate quite differently.⁹⁴ Instead of enacting broad policy like legislators, common law judges are constrained to specific dispute resolution.⁹⁵ The common law depends upon “conformity with the past” and what is “transmitted through time as a received body of knowledge and learning.”⁹⁶

91. *Parrot v. Mex. Cent. Ry. Co.*, 93 N.E. 590, 593 (Mass. 1911); *see also* *Bank of Augusta v. Earle*, 38 U.S. 519, 535–36 (1839) (“The common law is said to be ‘common right’ . . . In all civilized nations, this law is substantially the same. Even in nations not admitted to be within that description, there is a strong resemblance; for example, in the laws of the Hindoos. The reason is obvious. Whether expounded in codes, or disclosed by judicial investigation and decision, the great principles of justice are identical; and it is the aim of all law to cultivate, extend, and enforce them. Statutes are but few in comparison. They are exceptions; the common law is the great body. The legislator acts chiefly upon matters which are indifferent.”).

92. *See* Meyer, *supra* note 84, at 340. In response to Professor Meyer’s article, some critics have pointed to numerous examples wherein conflicts of similar common law principles still arise. *See* Zachary D. Clopton & P. Bartholomew Quintans, *Extraterritoriality and Comparative Institutional Analysis: A Response to Professor Meyer*, 102 GEO. L.J. ONLINE 28, 29–30 (2013) (citing BRAINERD CURRIE, *SELECTED ESSAY ON THE CONFLICT OF LAW* 107–10 (1963)). Obviously, these situations may occur, but, in the vast majority, the multiple common laws do not conflict and are thus “common.”

93. Meyer, *supra* note 84, at 307.

94. *Id.* at 342–43.

95. *Id.* at 343; *see also* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 593 (2006) (“Common law judges of earlier eras themselves reinterpreted received precedents with an eye toward their own situations . . .”).

96. Brian Simpson, *The Common Law and Legal Theory*, in *LEGAL THEORY AND COMMON LAW* 8, 20 (William Twining ed., 1986). Instead of the top-down approach of legislators, the common law derives bottom-up from long-established customs and principles. *See* *COMMON LAW THEORY* 173 (Douglas E. Edlin ed., 2007) (citing 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 68–70 (Oxford Uni. Press, 1765)) (“[T]he root of common law . . . was ancient custom, custom so long established that ‘the memory of man runneth not to the contrary.’”).

Simply put, statutory law reflects a majoritarian model whereby a simple majority of legislators is required to define the law,⁹⁷ while common law reaches beyond the majoritarian outlook to include the traditions of the minority when determining the law.⁹⁸

Also, the common law is not an expression of legislative intent.⁹⁹ Rather, it arose independent of geographic considerations and political figures to reflect people's relationships with one another.¹⁰⁰ As such, the common law system evolved into:

[A] customary system of law in this sense, that it consists of a body of practices observed and ideas received over time by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts.¹⁰¹

It was Chief Justice John Marshall who stated that “[w]hen our ancestors migrated to America, they brought with them the common law of their native country,” and “[i]n breaking our political connection with the parent state, we did not break our connection with each other.”¹⁰² And so the common law can be

97. See A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 419–420 (1999).

98. See *id.* at 440.

99. “[T]he ‘commonsense notion [is] that Congress generally legislates with domestic concerns in mind.” *Small v. United States*, 544 U.S. 385, 388 (2005) (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).

100. See ALAN BRUDNER, *THE UNITY OF THE COMMON LAW* 1–2 (U.C. Press, 1995) (explaining the origins of the common law as a framework of interactions designed to meet common goals without political discourse); Meyer, *supra* note 84, at 342.

101. Simpson, *supra* note 96, at 20.

102. *Livingston v. Jefferson*, 15 F. Cas. 660, 665 (C.C.D. Va. 1811). In further support of this notion, carved onto the external walls of the Department of Justice in Washington, D.C. is the quote “[t]he common law derives from the will of mankind, issuing from the life of the people, framed by mutual confidence, and sanctioned by the light of reason.” See Robert Farley, *Chain E-mail Claims a Quote at the Top of the Redesigned Department of Justice Website Comes from a Socialist Who Wanted to Impose Global Common Law*, POLITIFACT (July 14, 2011), <https://www.politifact.com/truth-o-meter/statements/2011/jul/14/chain-email/chain-e-mail-claims-quote-top-redesigned-departmen/> [<https://perma.cc/G5XJ-LAZB?type=image>] (explaining the location and the history of the quotation).

deemed the law of the “commoner” because it is derived from the relationships amongst the people sans geographic limitations.¹⁰³

2. Climate Nuisance Suits as “Common,” “Constrained,” and the Law of the “Commoner”

The district courts in *City of Oakland* and *City of New York* were correct when stating that courts should be wary of extending the common law beyond its intended reach. This restraint, however, should not derive from a fear of foreign affairs implications caused by extraterritoriality; rather, the caution should arise only where there is a deviation from longstanding foundations of the common law. Because nuisance suits relating to climate change embody the three unique characteristics of the common law, such suits are distinguishable from statutory claims made under the ATS, and therefore the courts should be permitted to adjudicate these suits in the extraterritorial context. The tort of nuisance is “common” because in relevant international jurisdictions, it has been recognized as a valid claim. In both climate nuisance suits, the cities brought actions against Royal Dutch Shell and BP, companies headquartered in the Netherlands and the United Kingdom, respectively.¹⁰⁴ In the United Kingdom, nuisance law has been used for hundreds of years as a means for the protection of property rights, including in the transnational context.¹⁰⁵ In the Netherlands, nuisance law has been utilized for the same purpose.¹⁰⁶ Thus, the potential for foreign affairs implications in these climate nuisance suits as voiced by the district courts¹⁰⁷ is misguided due to the commonality of nuisance suits between these sovereign states.

103. Meyer, *supra* note 84, at 307.

104. See New York Am. Compl., *supra* note 18, at 8–9.

105. See Elena Merino Blanco & Ben Pontin, *Litigating Extraterritorial Nuisances Under English Common Law and UK Statute*, 6 TRANSNAT'L ENVTL. L. 285, 285 (2016).

106. See Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) [hereinafter *Urgenda Decision*].

107. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018) (“To litigate such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government.”); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1029 (N.D. Cal 2018) (“The

The locality of harm alleged by the cities illustrates the “constrained” aspect of climate nuisance suits. The cities are trying neither to regulate the world’s greenhouse gas emissions nor to chastise the burning of fossil fuels to harness necessary forms of energy and electricity. Instead, the cities are attempting to obtain monetary relief for the damages caused to their municipal regions because of the activities of the oil companies.¹⁰⁸ Thus, the courts must not view these adjudications as ones which will send shockwaves throughout U.S. foreign policy; rather, the courts must view the claims as what they are – claims for relief for the damages caused by interference of rights common to the general public of those municipalities.¹⁰⁹ The district courts reasoned that because climate nuisance suits will involve the balancing of competing interests – namely, the balance between environmental protection and the continued use of fossil fuels as a source of energy – this balancing should be left to Congress.¹¹⁰ Even though most nuisance suits involve the balancing of interests,¹¹¹ which is a form of policymaking, in the context of climate nuisance suits, completion of a nuisance analysis may not require such balancing.¹¹² Therefore, the fact that climate nuisance suits

problem [of climate change] deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case.”).

108. New York Am. Compl., *supra* note 18, at 73–74; Oakland Am. Compl., *supra* note 18, at 55.

109. Weaver & Kysar, *supra* note 22, at 354 (explaining how the “nihilistic judge” abdicates their duty in the face of a grand and complex nature of the problem). The relevant inquiry is whether the statute should apply domestically, which requires the determination of the statute’s focus. *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136–37 (2018) (alterations omitted) (quoting *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016), and *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010)).

110. *City of New York*, 325 F. Supp. 3d at 475–76; *City of Oakland*, 325 F. Supp. 3d at 1027.

111. See generally RESTATEMENT (SECOND) OF TORTS §§ 821A–F (AM. LAW INST. 1979).

112. See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 369–71 (2d Cir. 2011), *rev’d on other grounds*, 564 U.S. 410 (2011) (determining that the City of New York pleaded a valid public nuisance claim for damages caused by climate change). In addition, the Restatement has included a non-balancing test, referred to as the “moral outrage” test, whereby an invasion is unreasonable if the harm it causes is “severe and greater than the other should be required to bear without compensation.” ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 78 (8th ed. 2018) (quoting RESTATEMENT (SECOND) OF TORTS § 829A).

present the possibility for a larger, more impactful decision should not suppress a court's ability to hear the matter. Even so, adjudication in this context does not necessarily involve the balancing of environmental protection and fossil fuel energy; rather, it presents the fossil fuel industry's crippling effects on coastal cities.¹¹³ The cities are not seeking to end the use of fossil fuels or promote worldwide environmental protection with these suits. Instead, these suits seek reimbursement for the millions of dollars spent repairing the damages caused by climate change.¹¹⁴ Therefore, despite the assumption that these suits involve the immense policy decision of balancing environmental protection with continued fossil fuel use, these suits actually represent a constrained action to recover localized damages. Additionally, these claims do not present novel arguments for which there is no precedent. Nuisance claims have long been used as a means to address localized harm to the enjoyment of private or public property.¹¹⁵ Therefore, the use of judicial restraint to bar valid and justifiable climate nuisance claims stands without merit.¹¹⁶ Instead, it reflects the current trend of the judiciary to dismiss valid claims associated with climate change without reviewing the merits.¹¹⁷

Climate nuisance suits represent the law of the "commoner" despite the relatively new nature of climate change. Nuisance claims purport to protect an individual's right to use and enjoy her property or to protect rights common to the general public.¹¹⁸ In the context of climate nuisance suits, the property of municipalities

113. See New York Am. Compl., *supra* note 18, at 32–34; Oakland Am. Compl., *supra* note 18, at 45–50.

Additionally, the claims are intertwined with the fact that the energy companies misrepresented the causes and impacts of climate change to the public. See James Weinstein, *Climate Change Disinformation, Citizen Competence, and the First Amendment*, 89 U. COLO. L. REV. 342, 342–45 (2018).

114. New York Am. Compl., *supra* note 18, at 73–74; Oakland Am. Compl., *supra* note 18, at 55.

115. See, e.g., *Missouri v. Illinois*, 180 U.S. 208, 244–45 (1901) (public nuisance); *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 666 (Tenn. 1904) (private nuisance).

116. See *Am. Elec. Power Co.*, 582 F.3d at 321–32 (determining that although common law climate actions present difficult and complex questions, the court must not yield because of this difficulty).

117. Weaver & Kysar, *supra* note 22, at 322–23.

118. RESTATEMENT (SECOND) OF TORTS §§ 821B, 822 (AM. LAW INST. 1977).

have been destroyed or significantly damaged because of human-created climate change.¹¹⁹ Although climate change may appear massive in scale, the root of the cities' claims derive from localized harms allegedly caused by private parties. Nuisance suits are notorious for varying in scale, from claims as small as a neighbor damaging a homeowner's trees¹²⁰ to more sizeable claims such as the contamination of large cities' drinking water supply.¹²¹ What remains constant throughout every suit, however, is the localized relationship between the individual and the harm.¹²² People and communities have utilized the foundations of nuisance law to protect their property interest for hundreds of years. Thus, nuisance suits, even when applied on the grand scale of climate change, must be viewed as the law of the "commoner." And although climate nuisance suits are grand in scale, the courts must not shy away from adjudicating valid claims on cautionary grounds.

The "common," "constrained," and "commoner" characteristics of climate nuisance suits illustrate why the district courts' application of the judicial caution laid out in *Sosa*, *Kiobel*, and *Jesner* cannot apply. Rather, the courts should have understood that the U.S. common law can be extended extraterritorially.¹²³

119. New York Am. Compl., *supra* note 18, at 23; Oakland Am. Compl., *supra* note 18, at 45–51.

120. *Stevens v. Moon*, 202 P. 961, 962 (Cal. Dist. Ct. App. 1921).

121. *Missouri v. Illinois*, 180 U.S. 208, 219 (1901).

122. The distinction between ATS litigation and common law climate nuisance suits is further supported by the fact that suits arising under the ATS often involve foreign parties, conduct in foreign jurisdictions, and harms experienced outside of the US. *See generally* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 123 (2013); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1388 (2018). In contrast, the common law climate actions here involve local harm and local plaintiffs.

123. Another key factor to consider when analyzing whether the common law can apply abroad is Due Process constraints. In *All State Ins., Co. v. Hague*, the Supreme Court determined, with respect to the extraterritoriality of state law, the Due Process Clause prevents state courts from applying common law claims in the absence of any "significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." 449 U.S. 302, 308 (1981). In the common law climate actions, however, this requirement is easily satisfied because both foreign oil companies regularly do business within California and New York. New York Am. Compl., *supra* note 18, at 10–16; Oakland Am. Compl., *supra* note 18, at 11–25. The District courts, in lieu of analyzing these clearly satisfied Due Process requirements, apply the arguably more appropriate limits on extraterritoriality. *City of New York v. BP*

Instead of invoking the presumption against extraterritoriality and prematurely dismissing these claims, the district courts should have proceeded to perform a choice-of-law analysis to determine the applicability of U.S. law. Although the choice-of-law analysis appears separate and disconnected from the viability of applying the common law extraterritorially, performing the choice-of-law analysis highlights certain aspects of the climate nuisance actions which further support the extraterritorial application of the common law in such suits.

IV. CHOICE-OF-LAW PRINCIPLES DICTATE THE USE OF U.S. LAW IN CLIMATE NUISANCE SUITS

Instead of invoking extraterritoriality to dismiss the climate nuisance suits, state and federal district courts should proceed to employ choice-of-law rules and traditional common law principles to determine the source and content of the legal rights and obligations implicated by overseas conduct that causes domestic harm to U.S. residents.¹²⁴ Because the district courts' determination to apply federal common law is currently pending on appeal and may be reversed,¹²⁵ the following section discusses how choice-of-law principles dictate the utilization of U.S. law in the context of both federal and state common law.

A. Federal Common Law

When claims arising under the federal common law conflict with another body of law, federal courts in general apply the law of the jurisdiction with the greatest interest in the litigation.¹²⁶

P.L.C., 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1025 (N.D. Cal 2018).

124. See, e.g., *Ajuba Int'l, LLC v. Saharia*, 871 F. Supp. 2d 671, 681 (E.D. Mich. 2012) (tortious conduct committed in foreign country caused harm in Michigan and was actionable under Michigan tort law); *In re Agent Orange Product Liability Litigation*, 635 F.2d 987, 994–95 (2d Cir. 1980) (state tort law applies to claims brought by Vietnam War veterans injured by wartime use of chemical herbicides).

125. Appellate Brief, *supra* note 30; see also Appellant Brief, *City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir. Mar. 13, 2019).

126. *Eli Lilly do Brasil, Ltda. v. Fed. Express Corp.*, 502 F.3d 78, 81 (2d Cir. 2007) (quoting *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 350 (2d Cir. 1992)) [hereinafter "*Eli Lilly*"].

This regularly involves the employment of the Restatement (Second) of Conflict of Laws.¹²⁷ Under the Restatement, where actions involve injury to property, “the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship”¹²⁸ The Restatement outlines seven factors to analyze when determining if a forum has a “more significant relationship” than the forum where the injury occurred:

- (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.¹²⁹

Factors (d), (e), and (f), however, are of lesser importance in the field of torts, because “persons who cause injury on nonprivileged occasions, particularly when the injury is unintentionally caused, usually act without giving thought to the law that may be applied to determine the legal consequences of this conduct.”¹³⁰ These parties retain low justified expectations with respect to choice-of-law principles, so the protection of these expectations play only a minute role in a choice-of-law analysis.¹³¹ Consequently, the remaining factors – (a), (b), (c), and (g) – become more significant in the analysis.¹³² Special weight, however, is given to subsection (a) – the needs of the interstate and international systems – where the issue would be resolved differently under laws of each interested state.¹³³

127. See *e.g.*, *id.* at 81; *In re Sterba*, 852 F.3d 1175, 1179 (9th Cir. 2017).

128. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 147 (AM. LAW INST. 1971); see also *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003–04 (9th Cir. 1987) (noting that the Restatement “creates a presumption that the law of the place where the injury occurred applies”).

129. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2).

130. *Id.* at § 145 cmt. b.

131. *Id.*

132. *Id.*

133. *Id.* at § 145 cmt. d.

1. Maintaining the International System

One concern with allowing U.S. law to govern is the possibility that “[h]uge United States tort judgments could trigger similar adverse foreign reactions because the judgment could bankrupt or financially cripple the foreign defendant and, in some cases, undercut employment and the economy of the foreign country.”¹³⁴ But when a foreign entity engages in commercial activity with the purpose of deriving substantial profits from the U.S. market, it arguably assumes the risk of having U.S. law applied to tortious conduct that caused injury to the country.¹³⁵ In the current climate proceedings, both Royal Dutch Shell and BP perform substantial business within both California and New York, including the production, marketing, and sale of fossil fuels.¹³⁶ Therefore, even though these oil companies are headquartered abroad, the presence of numerous contacts within California and New York suggest that the international systems will remain intact with the application of U.S. law over that of the foreign nations.

The maintenance of the international system is further supported by the European Union’s (“E.U.”) Rome II Regulation.¹³⁷ An important consideration for the first factor explores whether the foreign forum’s choice-of-law analysis differs from that of the local forum because the needs of the interstate system may become imbalanced through the utilization of the local forum’s laws.¹³⁸ For E.U. member states, including the United Kingdom (“U.K.”) and the Netherlands,¹³⁹ the Rome II Regulation provides that “the law

134. Luther L. McDougal III, *Toward the Increased Use of Interstate and International Policies in Choice-of-Law Analysis in Tort Cases Under the Second Restatement and Leflar’s Choice-Influencing Considerations*, 70 TUL. L. REV. 2465, 2480 (1996).

135. *Id.* at 2482.

136. New York Am. Compl., *supra* note 18, at 10–13, 19–22; Oakland Am. Compl., *supra* note 18, at 11–12, 21–23.

137. See Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40, 44 (EC) [hereinafter Rome II Regulation].

138. See e.g., *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1004 (9th Cir. 1987) (“Choosing Poland’s damages law facilitates the working of the international system because Poland would apply the same law under its choice-of-law rule, *lex loci delicti*.”).

139. *Countries in the EU and EEA*, GOV.UK, <https://www.gov.uk/eu-eea> [<https://perma.cc/5R58-L45J>]. Although the U.K. has attempted unsuccessfully to leave the E.U. numerous times, because its withdrawal appears nonexistent in

applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred”¹⁴⁰ Although not applicable to the U.S., the Rome II regulation is some evidence that the E.U. accepts the traditional application of an injured forum’s law, suggesting that the E.U. does not have a strong interest in applying a contrary rule. Accordingly, the first factor weighs in favor of utilizing U.S. law in the context of climate nuisance actions.

2. Relevant Policies and Interests of Each Sovereign Nation

In determining the extent of each parties’ interest in tort actions, courts have employed a three-step analysis: (1) identify the particular rule of law in each state, (2) identify the purposes or policies underlying each rule, and (3) assess the extent to which application of each rule in the current context will further such policy.¹⁴¹ The U.S. and U.K. nuisance laws are nearly identical in language and structure, essentially both revolve around the protection of a state’s people from localized property interference.¹⁴² And because the U.S. nuisance law developed from its U.K. counterpart,¹⁴³ the purposes of each can be fairly equated. This is further supported by the main consideration of reviewing each parties’ interests, which allows courts to scrutinize conflicting laws when one law absolves an individual of liability while the

the near future, it is quite likely that the adjudications of the climate nuisance actions will be completed beforehand.

140. Rome II Regulation, *supra* note 137, at 44–45 (“The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.”).

141. *See, e.g.,* Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1299 (11th Cir. 1999).

142. *See The Law Commission, Simplification of Criminal Law: Public Nuisance and Outraging Public Decency*, at 5, COM (2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/471111/https://perma.cc/6DBK-UECN [hereinafter *The Law Commission*].

143. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L. Q.* 755, 767 (2001).

other imposes liability.¹⁴⁴ In the current climate nuisance actions, with respect to the conflict between U.S. and U.K. law, there is no such dichotomy; rather, each jurisdiction employs a multi-factored analysis to determine whether the alleged nuisance is actionable.¹⁴⁵

The conflict between U.S. and Dutch law is not as clear-cut. Because the Netherlands does not possess a comprehensive nuisance law framework that parallels that of the U.S.,¹⁴⁶ a quick comparative analysis appears unattainable. However, the Netherlands, through its judiciary, has recently mandated a policy-shift towards fewer greenhouse gas emissions because climate change is currently, and will continue to negatively impact, numerous local interests of the Dutch people.¹⁴⁷ Therefore, applying the U.S. law in the current climate actions will not cause conflicts with the Dutch policy because the nature of the climate nuisance suits is to allow recovery for localized harms caused by the production, marketing, and sale of the fossil fuels which produce greenhouse gases. Consequently, this factor does not weigh in favor of applying U.K. or Dutch law when adjudicating the current climate actions.

3. Ease in Applying U.S. Law

It has long been accepted that there is a risk of courts misapplying unfamiliar law.¹⁴⁸ Even though U.K. nuisance law has a similar framework to U.S. nuisance law, U.S. courts will still be required to comprehend and correctly apply foreign law, which still imposes some risk of misapplication. With respect to Dutch law, the risk is significantly magnified because the Netherlands

144. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. f (AM. LAW INST. 1971).

145. See RESTATEMENT (SECOND) OF TORTS § 821F (AM. LAW INST. 1977); see *The Law Commission*, *supra* note 142, at 6–7.

146. See generally Art. 6:178 para. f BW. (Neth.), translated in *Dutch Civil Code: Book 6 The Law of Obligations*, DUTCHCIVILLAW.COM, <http://www.dutchcivillaw.com/legislation/dcctitle6633.htm> [<https://perma.cc/8KPY-VXWP>] [hereinafter *Dutch Civil Code*].

147. *Urgenda* Decision, *supra* note 106, at 50 ¶4.89 (upholding the lower court's reasoning expressly grounded in the Dutch law of hazardous negligence).

148. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 745–49 (1988) (O'Connor, J., dissenting) (determining that a Kansas court incorrectly applied the laws of another state).

does not have a public nuisance framework. Consequently, even though California and New York brought their claims under the public nuisance doctrines, applying Dutch law would require the courts to divert from the familiar common law framework to one of civil law. The potential for misapplication illustrates the difficulty of applying foreign law and highlights the ease of applying U.S. law. With all relevant factors overwhelmingly weighing in favor of applying U.S. law, the federal common law, as opposed to U.K. and Dutch law, must govern.

B. State Common Law

When federal courts sit in diversity, however, they must conform to the conflict of law principles prevailing in the state.¹⁴⁹ Because there are currently two climate nuisance suits attempting to apply state law – in California and New York – and because each state utilizes a unique choice-of-law framework, this section analyzes both states.

1. California

“California courts employ a ‘governmental interest analysis’ to assess whether California law or non-forum law should apply. . . .”¹⁵⁰ The governmental interest analysis comprises three general steps: (1) determine whether the laws of the conflicting forums actually differ from one another; (2) if there is a difference, examine each jurisdiction’s interest in applying its law to determine if a conflict truly exists; and, (3) if there is a true conflict, “carefully evaluate[] the nature and strength” of each jurisdiction’s interest in the application of its own law “to determine which state’s interest would be more impaired if its policy were subordinated to the policy of the other state’ and then ultimately

149. *Rogers v. Grimaldi*, 875 F.2d 994, 1002 (2d Cir. 1989) (“A federal court sitting in diversity or adjudicating state law claims that are pendent to a federal claim must apply the choice of law rules of the forum state.”); *Moore v. Greene*, 431 F.2d 584, 589–90 (9th Cir. 1970) (same).

150. *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1080 (9th Cir. 2009); *Reich v. Purcell*, 432 P.2d 727, 729 (Cal. 1967) (“[W]hen application of the law of the place of the wrong would defeat the interests of the litigants and of the states concerned, we have not applied that law.”).

appl[y] ‘the law of the state whose interest would be more impaired if its law were not applied.’”¹⁵¹

In California, the state essentially follows the Restatement (Second) of Torts with respect to public nuisance.¹⁵² Public nuisance is described as a substantial and unreasonable interference to collective social interests, including “the public health, the public safety, the public peace, the public comfort or the public convenience.”¹⁵³ The requirements of a substantial and unreasonable interference can be further explained. First, a “substantial” interference is one that causes “significant harm,” defined as “harm of importance . . . a real and appreciable invasion of the plaintiff’s interests . . . and an invasion that is definitely offensive, seriously annoying or intolerable.”¹⁵⁴ This element is governed by an objective standard, following what “persons of normal health and sensibilities living in the same community” would believe.¹⁵⁵ Second, to determine if an interference is “unreasonable,” the reviewing court examines “whether the gravity of the harm outweighs the social utility of the defendant’s conduct, [by] taking a number of factors into account.”¹⁵⁶ This determination is likewise an objective one, which is typically decided by the factfinders in a specific case.¹⁵⁷

In the U.K., public nuisance is nearly identical in nature. Similar to its U.S. counterpart, U.K. law characterizes public nuisance as “suffering of common injury by members of the public by interference with rights enjoyed by them as such.”¹⁵⁸ Although the language of the U.K. public nuisance doctrine does not perfectly mirror that of California’s public nuisance doctrine, it can still be considered “the same” with respect to the choice-of-law

151. *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 527 (Cal. 2010) (quoting *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006)).

152. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 604–05 (Cal. 1997).

153. *Id.* at 604.

154. *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 696 (Cal. 1996) (internal quotation marks omitted) (citing RESTATEMENT (SECOND) OF TORTS § 821F (AM. LAW INST. 1977)).

155. *Id.* (citing PROSSER & KEETON, TORTS § 88 (5th ed. 1984)).

156. *Id.* at 697 (citing RESTATEMENT (SECOND) OF TORTS §§ 826–831 (AM. LAW INST. 1977)).

157. *Id.*

158. *The Law Commission, supra* note 142, at 5.

analysis.¹⁵⁹ Therefore, because the U.K. law and California both define public nuisance as an interference with a right common to the general public, there is no conflict and California law governs.¹⁶⁰

In the Netherlands, there is no specific public nuisance doctrine which parallels that in California.¹⁶¹ Consequently, the laws of the U.S. cannot be identical to those of the Netherlands, forcing a reviewing court to move to the second criterion: examine each jurisdiction's interest in applying its law to determine if a conflict truly exists. First and foremost, although Royal Dutch Shell is headquartered in the Netherlands, it performs vast activities within U.S. boundaries, including selling, producing, and marketing fossil fuels as well as pouring millions of dollars into lobbying campaigns.¹⁶² In California, more interactions with a certain forum translates to that forum having a larger interest in the matter.¹⁶³ Not only was California the location of the harm, but California was also home to numerous Royal Dutch Shell operations.

Additionally, in the Netherlands, modern policy has trended towards the minimization of fossil fuels to abate the effects of climate change by reducing carbon emissions and to adapt to the already changing climate.¹⁶⁴ Consequently, allowing the localized

159. *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1081 (9th Cir. 2009) (holding that because the law of the foreign forum generally does not conflict with the current forum, there is no conflict under California's choice of law analysis).

160. This further supports the argument that extraterritoriality should not be an issue in the context of common law climate nuisance suits. See discussion *infra* Section IV.C.

161. See *Dutch Civil Code*, *supra* note 146.

162. Oakland Am. Compl., *supra* note 18, at 9, 21; Niall McCarthy, *Oil and Gas Giants Spend Millions Lobbying to Block Climate Change Policies [Infographic]*, FORBES (Mar. 25, 2019), https://www.forbes.com/sites/niallmccarthy/2019/03/25/oil-and-gas-giants-spend-millions-lobbying-to-block-climate-change-policies-infographic/?fbclid=IwAR31OeH2e6q6S-vCF_fglBQnZqMFbZVtowmq5MvOBSXbsI7sBEm2cbaM-gw#1a82fa987c4f [https://perma.cc/6X68-3Z4H].

163. See *Havlicek v. Coast-to-Coast Analytical Servs., Inc.*, 46 Cal. Rptr. 2d 696, 700 (Cal. Ct. App. 1995) ("Delaware's interest in regulating the activities of its domestic corporations is less substantial where, as here, its only contact with the corporation is in issuing a certificate of incorporation.").

164. See *Dutch Vision on Global Climate Action*, GOV'T.NL, <https://www.government.nl/topics/climate-change/dutch-vision-on-global-climate-action> [https://perma.cc/37PR-5CST].

recovery in the California climate nuisance action will not impair the climate-friendly policies of the Netherlands.¹⁶⁵ Thus, if state law governs in the context of the recent climate nuisance actions, California's choice-of-law framework dictates the utilization of California state law.

2. New York

New York has adopted a "greater interest" analysis whereby the law of the jurisdiction which has the "greatest concern with the specific issue raised in the litigation[]" applies.¹⁶⁶ To determine which law controls under this standard, the reviewing court must evaluate each jurisdiction's relationship or contact with the occurrence of events or the parties.¹⁶⁷

New York, like California, follows the Restatement of Torts and defines a public nuisance as "conduct . . . which offend[s], interfere[s] with or cause[s] damage to the public in the exercise of rights common to all."¹⁶⁸ Consequently, New York nuisance law is nearly identical to the nuisance law of the U.K..¹⁶⁹ With respect to the Netherlands, however, the nuisance laws do not match because the Netherlands does not have a specific nuisance doctrine.¹⁷⁰ This difference does not matter, though, because in cases involving the interference with property rights, the New York Court of Appeals has determined it "almost unthinkable" to apply the law of some other location than the law where the property is located.¹⁷¹

The logic is simple in the climate nuisance context: New York has experienced significant damages as a result of oil companies'

165. See *Havlicek*, 46 Cal. Rptr. 2d at 700 (referencing the consideration given to each state's interest in the application of its respective policies).

166. *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 280 (N.Y. 1993) (quoting *Babcock v. Jackson*, 191 N.E.2d 279, 283 (N.Y. 1963)).

167. *Id.*

168. *Copart Indus., Inc. v. Consol. Edison Co.*, 362 N.E.2d 968, 971 (N.Y. 1977).

169. See *supra* notes 142–143 and accompanying text.

170. See *generally Dutch Civil Code*, *supra* note 146. This is further supported by the analysis performed in the *Urgenda* Decision whereby the court did not invoke a nuisance doctrine but instead utilized other fields of law to protect public rights injured by greenhouse gas emissions. See *Urgenda* Decision, *supra* note 106.

171. *Heaney v. Purdy*, 272 N.E.2d 550, 551 (N.Y. 1971) (quoting *Babcock*, 191 N.E.2d at 284).

contribution to climate change. The houses, schools, hospitals, and livelihoods of the New York population have been put at serious risk because of the actions of the oil companies. Consequently, the city has expended mass amounts of funds to prevent any rapid deterioration. Therefore, New York must have a greater interest in the matter than the countries located thousands of miles away from the localized harms, and New York law must apply to the climate nuisance suit brought in the Southern District.

C. The Choice-of-Law Analyses Further Support the Extraterritorial Application of the Common Law in Climate Actions.

Even though the current procedural posture of the climate actions involves the determination of whether the federal common law or the respective state common law applies,¹⁷² in either situation, choice-of-law principles dictate the use of U.S. law.¹⁷³ This determination, although typically considered after justiciability analyses,¹⁷⁴ shines relevant light on whether allowing the extraterritoriality of the common law in climate actions violates separation of powers principles.

With respect to the British corporation BP, federal, California, and New York public nuisance law does not present a conflict with its U.K. counterpart.¹⁷⁵ Logically, the district courts' broad generalization that the extraterritorial application of the common law creates "serious foreign policy consequences" is unfounded.¹⁷⁶ Even with respect to the Royal Dutch Shell where a more traditional conflict of laws arises, the volume and depth of interests felt by the U.S. and its respective states overwhelm the minority of

172. Although this determination will affect the justiciability of the climate actions against foreign oil companies, the main purpose of appealing this issue is to prevent the Clean Air Act's preemption of the federal common law. See Appellant Brief, *supra* note 30, at 43–47; Brief for Appellants at 34–42, *City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir. Mar. 13, 2019).

173. See discussion *supra* Section IV.A–B.

174. See, e.g., *Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 174–80 (3d Cir. 1995) (performing a choice of law analysis after determining that the court had subject matter jurisdiction); *Floyd v. CIBC World Mkts., Inc.*, 426 B.R. 622, 633–641 (S.D. Tex. 2009) (performing a choice of law analysis after determining that the parties had proper standing).

175. See discussion *supra* Section IV.A–B.

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

interests of the Netherlands.¹⁷⁷ Coupled with the intense climate mitigation and adaptation efforts pursued by the Netherlands,¹⁷⁸ the presence of “serious foreign policy consequences” appears inapposite. In the context of climate nuisance actions, then, the district courts’ omission of a choice-of-law analysis caused the courts to overstate the relevant foreign policy concerns and to invoke inapt Supreme Court precedent. Therefore, in addition to determining that U.S. law governs in common law climate nuisance actions, the choice-of-law analysis further supports the extraterritorial application of the common law.

V. CONCLUSION

More and more, municipalities are turning to the common law in search of remedies for the damages caused by climate change. Judges are consistently dismissing these actions, often by offering less than convincing reasons as to why these actions cannot proceed on the merits. The district courts’ findings in the *City of New York* and the *City of Oakland* cases demonstrate the most recent attack on allowing the adjudication of climate actions on their merits. The utilization of the statutory presumption against extraterritoriality to bar the common law’s reach to foreign oil companies, however, stands on shaky grounds due to the common law’s significant variation from its statutory counterpart. As this Note has illustrated, the U.S. district courts’ reliance on Supreme Court precedent involving statutory law plays no role in the extraterritorial application of the common law.

This Note goes a step further in completing the final analysis before reaching the merits of the case – determining which law applies. By reviewing the choice-of-law principles in conjunction with U.S. law, U.K. law, and Dutch law, the mandate to apply U.S. law further supports the extraterritorial application of the common law because it demonstrates the lack of conflicting laws and policies between the three sovereign nations. Because issues of

177. See discussion *supra* Section IV.A–B.

178. See *Dutch Vision on Global Climate Action*, *supra* note 164.

standing¹⁷⁹ and political question¹⁸⁰ in the context of climate suits have already been resolved, the choice-of-law analysis represents the final jurisdictional hurdle the district courts must overcome before reviewing the cities' claims against the foreign oil companies on the merits. By understanding that in the context of common law climate actions U.S. law – whether federal or state – applies, there is a stronger likelihood of the judiciary overcoming jurisdictional hurdles to decide the merits of these cases. The judiciary's reticence to hear common law climate actions is concerning because the most significant effects of climate change have yet to come and the current global efforts to prevent such effects appear inadequate.

179. *See Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (determining that governmental entities have standing with respect to damages caused by climate change).

180. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 332 (2d Cir. 2011), *rev'd on other grounds*, 564 U.S. 410 (2011) (determining that although common law climate actions present difficult and complex questions, the suits do not present a nonjusticiable political question).