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Jason J. Czarnezki

Elisabeth Haub School of Law at Pace University

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ADVANCING THE REBIRTH OF ENVIRONMENTAL COMMON LAW

JASON J. CZARNEZKI*
MARK L. THOMSEN**

Abstract: Federal law often fails to mitigate environmental harm. An alternative litigation response when federal avenues prove ineffective is reliance on state common law doctrines, especially public and private nuisance. A rebirth of the common law is occurring. This Article provides examples of the rebirth of environmental common law and suggests how common law claims and remedies in the environmental context can mitigate environmental harm.

INTRODUCTION

Federal law strives to mitigate environmental harm such as air pollution and hazardous waste contamination, but with mixed results. The Clean Air Act (CAA) requires that air quality standards be established for pollutants that endanger the public health and welfare.¹ Standards already exist for carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide.² Yet, carbon dioxide is the major force behind global climate change, and no carbon dioxide standards exist despite efforts to make it a “criteria pollutant” under the CAA.³ In cases of hazardous waste contamination, some polluters agree to perform remedial work that may be unsuccessful or inadequate and does not provide complete property restoration for adjacent landowners.⁴ Federal environmental law fails to deter polluters

* Assistant Professor of Law, Marquette University Law School; A.B., J.D., University of Chicago.

** Partner, Cannon & Dunphy, S.C.; J.D., Marquette University Law School.

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¹ Clean Air Act § 108(a)(1), 42 U.S.C. § 7408(a)(1) (2000).

² 40 C.F.R. § 50.4-.12 (2005).

³ See *infra* Part III.A; Kirk Johnson, *3 States Sue E.P.A. to Regulate Emissions of Carbon Dioxide*, N.Y. TIMES, June 5, 2003, at B2; see also *infra* note 84 and accompanying text.

⁴ See *infra* Part III.B.

and protect the environment for a variety of reasons.⁵ For example, national standards may not be suitable for greenhouse gases,⁶ and federal agencies sometimes lack the resources to effectively perform restoration activities⁷ or federal standards are inadequate to restore affected resources to a state's more stringent standard. An alternative litigation response when federal avenues prove ineffective is reliance on state common law doctrines, especially public and private nuisance.

A rebirth of the common law is already occurring.⁸ Under a common law public nuisance theory, states have filed suit against energy companies to reduce carbon dioxide emissions.⁹ Additionally, private landowners affected by hazardous waste contamination have begun to utilize common law private nuisance claims.¹⁰ A traditional advantage of common law claims is that their remedies allow for compensation to the individual pollution victims.¹¹ Moreover, with remedies fashioned by the state courts, or federal courts applying state law,

⁵ See, e.g., Jason J. Czarnezki, *Shifting Science, Considered Costs, and Static Statutes: The Interpretation of Expansive Environmental Legislation*, 25 VA. ENVTL. L.J. 431, 434 (2006) (discussing narrow interpretation of the federal environmental regulatory regime).

⁶ See Véronique Bugnion & David M. Reiner, *A Game of Climate Chicken: Can EPA Regulate Greenhouse Gases Before the U.S. Senate Ratifies the Kyoto Protocol?*, 30 ENVTL. L. 491, 507 (2000) ("Moreover, the concept of a standard expressed in terms of a parts per million concentration is especially problematic for greenhouse gases because the United States is 'only' responsible for perhaps one-quarter of the global concentration of the gases. Thus, setting a national standard in the United States for greenhouse gas emissions would only accomplish a fraction of the emissions reductions needed to meet a global concentration target."); Nicholle Winters, *Carbon Dioxide: A Pollutant in the Air, but Is the EPA Correct That It Is Not an "Air Pollutant"?*, 104 COLUM. L. REV. 1996, 2001-02 (2004) (citing Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, EPA Acting Administrator (Aug. 28, 2003), available at http://www.epa.gov/airlinks/co2_general_counsel_opinion.pdf (concluding that carbon dioxide cannot be regulated under the Clean Air Act (CAA) because "the nature of the global pool would mean that . . . the entire world would either be in or out of compliance. Such a situation would be inconsistent with a basic underlying premise of the CAA regime . . ."). While national standards for greenhouse gases may be "unworkable," according to EPA, "regulating CO₂ emissions from automobiles is perfectly feasible." *Massachusetts v. EPA*, 415 F.3d 50, 69-70 (D.C. Cir. 2005) (Tatel, J., dissenting).

⁷ See *infra* Part III.B.

⁸ See BRUCE YANDLE, *COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT: CREATING WEALTH IN HUMMINGBIRD ECONOMIES* 114 (1997); Tom Kuhnle, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 STAN. ENVTL. L. J. 187, 214 (1996).

⁹ See *infra* Part III.A; see also Editorial, *A Novel Tactic on Warming*, N.Y. TIMES, July 28, 2004, at A14; N.C. *Sues TVA, Saying Emissions from Plants Make Residents Sick, Hurt Economy*, PLATTS, Feb. 6, 2006 (on file with authors), available at http://construction.ecnext.com/coms2/summary_0249-109630_ITM_platts.

¹⁰ See Kuhnle, *supra* note 8, at 191; see also Part III.B (discussing *Dyer v. Waste Mgmt. of Wisconsin, Inc.*, No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County argued Dec. 6, 2004)).

¹¹ Kuhnle, *supra* note 8, at 222.

common law claims can also promote timely restoration of damaged natural resources and polluted lands—goals of the major federal environmental statutes.¹² As administrative agencies can have difficulty in implementing cleanup of polluted sites and deterring pollution, perhaps common law courts should shoulder a greater share of this responsibility.

This Article, from a descriptive standpoint, provides examples of the rebirth of the environmental common law, and, for normative purposes, suggests how common law claims and remedies in the environmental context can continue to flourish. Part I of this Article discusses the common law origins of environmental law, as well as the public policy and environmental costs and benefits of invoking common law remedies in environmental torts. Part II considers whether state common law remedies are preempted by federal environmental statutes. Part III describes two pending cases as examples of the rebirth of the environmental common law, where common law remedies were invoked to abate air and hazardous waste pollution. Part III also counsels on the difficulties of showing causation and determining remedies. Part IV offers up a valuable tool to promote the rebirth of the environmental common law and environmental restoration, arguing that judges should apply a common law damage remedy in cases arising under state law, entitled the common law fund.

I. THE COMMON LAW ORIGINS OF ENVIRONMENTAL LAW

Environmental law and regulation “has evolved . . . from reliance on tort law to an emphasis on end-of-pipe controls through direct regulation and finally to an emphasis on pollution prevention.”¹³ Despite the fact that common law tort claims have been used to abate pollution since the seventeenth century,¹⁴ the bulk of common law cases and lawsuits came during the late nineteenth and twentieth centuries, creating what is now known as environmental law.¹⁵

At common law, landowners have the right to enjoy the benefits of their land free from “unwanted and unreasonable invasions by

¹² See, e.g., YANDLE, *supra* note 8, at 110; Kuhnle, *supra* note 8, at 223.

¹³ NANCY KUBASEK & GARY S. SILVERMAN, ENVIRONMENTAL LAW 127 (2005).

¹⁴ YANDLE, *supra* note 8, at 88–90 (citing *William Aldred's Case*, 77 Eng. Rep. 816 (1611)).

¹⁵ Roger E. Meiners, Stacie Thomas & Bruce Yandle, *Burning Rivers, Common Law, and Institutional Choice for Water Quality*, in THE COMMON LAW AND THE ENVIRONMENT 68 (Roger E. Meiners & Andrew P. Morriss eds., 2000).

people or pollution"¹⁶—*sic utere tuo, ut alienum non laedas*.¹⁷ Prior to modern-day command and control statutes, the nuisance cause of action was the main tool for environmental protection.¹⁸ Actions can be either public or private, and the nuisances themselves can be both.¹⁹ A public nuisance claim can be brought against an action that interferes with public health and rights.²⁰ However, public nuisance actions are generally brought by a public official or a member of the public meeting the "special injury" requirement.²¹

A private nuisance affects a limited number of land owners,²² and creates "a substantial and unreasonable interference with the use and enjoyment of an interest in land."²³ The interference may be intentional and unreasonable, or unintentional if negligent, reckless or abnormally dangerous.²⁴ The *Restatement (Second) of Torts* balances the gravity of the harm against the utility of the conduct to determine whether actions give rise to such a claim.²⁵ Courts have taken various approaches to the balancing test.²⁶ Some courts, rather than adopting the *Restatement* balancing approach, instead look for a level of interference that crosses some liability threshold.²⁷ Despite the prevalence

¹⁶ YANDLE, *supra* note 8, at 91.

¹⁷ The Latin phrase means that one should use his or her own property in such a manner as not to injure that of another. *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 689 (N.C. 1953).

¹⁸ YANDLE, *supra* note 8, at 91. The line between trespass, a direct physical invasion, and nuisance, an indirect invasion, has blurred over time, and there may be benefits to suing in trespass as opposed to nuisance. For further discussion of common law environmentalism, specifically nuisance and trespass, see Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 926–38 (1999).

¹⁹ YANDLE, *supra* note 8, at 91.

²⁰ *Id.*; see also Meiners, Thomas, & Yandle, *supra* note 15, at 68. For a brief discussion of the law of public nuisance as it applies to environmental cases, see generally James A. Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes*, 5 NAT. RESOURCES & ENV'T 29 (1990).

²¹ YANDLE, *supra* note 8, at 91–92.

²² *Id.* at 92.

²³ *Id.* (citing *Ryan v. City of Emmetsburg*, 4 N.W.2d 435 (Iowa 1942) and *Lederman v. Cunningham*, 283 S.W.2d 108 (Tex. Civ. App. 1955)); see also *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 689 (N.C. 1953); RESTATEMENT (SECOND) OF TORTS §§ 821F, 822 (1979).

²⁴ RESTATEMENT (SECOND) OF TORTS § 822.

²⁵ *Id.* § 826. Factors to determine the gravity of harm include the extent and character of harm, social value of plaintiff's use, suitability to location, and burden on plaintiff to avoid harm. *Id.* § 827. Factors to determine the utility of the actor's conduct include social value of actor's conduct, suitability to location, and impracticality of preventing harm. *Id.* § 828.

²⁶ See Meiners, Thomas & Yandle, *supra* note 15, at 69–70.

²⁷ See, e.g., *Jost v. Dairyland Power Coop.*, 172 N.W.2d 647, 653 (Wis. 1969).

of environmental tort claims, the difficulty of fashioning appropriate remedies may create problems when using tort law to control pollution and other environmental harms.²⁸

Courts can abate the activity by granting the plaintiff injunctive relief²⁹ or requiring the victims to pay damages.³⁰ The courts can allow the activity to continue if the defendant pays damages,³¹ or they can simply deny relief. However, an award of permanent damages may fail to abate the pollution because it leaves injured parties without a remedy for future harms and provides no motivation for the polluter to stop polluting if payment of damages is cost-effective.³² Common law damage remedies put courts in the difficult informational position of deciding what amount of damages is appropriate to compensate the victims, or whether to limit pollution to a certain level.³³

Courts are also reluctant to grant an injunction for fear that its scope may be too broad or narrow and that, if the injunction is ineffective, bargaining will not take place between the parties.³⁴ Courts often balance the economic harm caused by the pollution against the costs of the injunction, and, if the harm from the injunction is greater, courts will only award damages.³⁵ In addition, tort law plaintiffs face the burden of having to show causation, which can be especially difficult if there are multiple polluters, and often plaintiffs must expend substantial financial resources to bring common law tort actions against entities having potentially far greater resources.³⁶

The difficulties in adjudicating common law tort claims progressively caused a shift from tort actions to more direct regulation of environmental harm.³⁷ Both state governments and the federal government became more involved in the creation of command-and-control statutes and other legislation designed to set standards and mandate

²⁸ See KUBASEK & SILVERMAN, *supra* note 13, at 132.

²⁹ See, e.g., *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 708 (Ariz. 1972).

³⁰ See, e.g., *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 690 (N.C. 1953).

³¹ See, e.g., *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 877 (N.Y. App. Ct. 1970).

³² KUBASEK & SILVERMAN, *supra* note 13, at 132.

³³ See *id.*

³⁴ Cf. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8–15 (1960).

³⁵ KUBASEK & SILVERMAN, *supra* note 13, at 132.

³⁶ *Id.*; see also David Doerge, *A Pile of Legal Issues*, MILWAUKEE J. SENTINEL, June 26, 2004, available at <http://www.jsonline.com/news/wauk/jun04/238996.asp> (last visited Jan. 4, 2007) (Marquette Professor Michael O'Hear stated, "These cases can be tremendously complicated. They can go on for years and they can cost millions just to litigate.").

³⁷ For a brief summary of the transition from nuisance law to environmental regulation, see JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 777–79 (5th ed. 2002).

compliance through threat of fines for violation.³⁸ Beginning in the late 1960s and early 1970s, state and federal statutes created regulations to attempt to control pollution,³⁹ and since that time there has been a proliferation of federal and state environmental statutes and administrative regulations.⁴⁰

Modern environmental law grew out of the common law tort system, and modern regulation of pollution arose in an effort to deal with the inadequacies of the common law.⁴¹ However, in many instances, in light of the complexities and bureaucracies of modern environmental regulation, the common law still provides an effective mechanism for determining appropriate pollution levels.⁴² Thus, while neither common or statutory law is wholly sufficient, the legal pendulum is swinging back ever so slightly towards common law tort actions.⁴³

State common law can be an effective means to prevent and remedy environmental pollution,⁴⁴ as well as provide full compensation for harmed victims. In many circumstances, the federal environmental law regime has proven ineffective. Faced with ever-tightening budgets⁴⁵ and the inconsistency of environmental enforcement from administration to administration—continuing through George W. Bush's presidency⁴⁶—it is no surprise that the Environmental Protection Agency (EPA) has found it difficult to restrain polluters and restore already polluted ecosystems; as a result, cleanup of Superfund sites has been slow,⁴⁷ and federal agencies often fail to regulate certain pollutants,

³⁸ See KUBASEK & SILVERMAN, *supra* note 13, at 135; YANDLE, *supra* note 8, at 108.

³⁹ YANDLE, *supra* note 8, at 108.

⁴⁰ For a historical discussion of modern environmental law, see generally RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004).

⁴¹ YANDLE, *supra* note 8, at 108.

⁴² *Id.* at 159.

⁴³ Cf. Meiners & Yandle, *supra* note 18, at 923–24 (“[P]rotection of environmental assets seems to be headed back to its origins, to states, local governments, and local citizens”); Kuhnle, *supra* note 8, at 214; Eric E. Nelson & Curt R. Fransen, *Playing with a Full Deck: State Use of Common Law Theories to Complement Relief Available Through CERCLA*, 25 IDAHO L. REV. 493, 493 (1988–89).

⁴⁴ After all, the primary goals of CERCLA are deterrence and restoration. See Jason J. Czarnezki & Adrienne K. Zahner, *The Utility of Non-Use Values in Natural Resource Damage Assessments*, 32 B.C. ENVTL. AFF. L. REV. 509, 525 (2005).

⁴⁵ Felicity Barringer, *The President's Budget: Environment, Clean Water Fund Facing Major Cuts*, N.Y. TIMES, Feb. 5, 2005, at A11.

⁴⁶ See, e.g., Bruce Barcott, *Changing All the Rules*, N.Y. TIMES MAG., Apr. 4, 2004, at 39.

⁴⁷ See CONGRESSIONAL BUDGET OFFICE, *ANALYZING THE DURATION OF CLEANUP AT SITES ON SUPERFUND'S NATIONAL PRIORITIES LIST 8* (March 1994), available at <http://www.cbo.gov> (follow “Publications by Subject Area” hyperlink; then follow “Environment” hyperlink; then scroll down to “1994” section).

such as carbon dioxide under the CAA. In addition, the cost recovery tools of federal law have themselves become burdensome, while the common law traditionally “allows for damaged parties to recover losses.”⁴⁸

In general, it seems the differences between federal environmental statutes and state common law causes of action “mirror the advantages and disadvantages of federal and state law generally.”⁴⁹ However, the advantages of the common law, at least in some circumstances, are substantial. Rigorous enforcement of state nuisance and trespass law may promote a preference for prevention if the proper signals are sent to potential polluters.⁵⁰ Under the common law, plaintiffs can recover damages to be used for cleanup and restoration, obtain injunctions more easily, and enjoy broader liability parameters.⁵¹ The common law allows for a “broad array of damages,”⁵² yet defendants also can assert caveat emptor.⁵³

This is not to say that there are not disadvantages with the common law. Courts may not be able to easily design and monitor cleanups, and predictable outcomes and national standards may not exist without federal agency oversight.⁵⁴ Courts may also lack the necessary information to fully assess and determine proper damage calculations, and injunctions may result in inefficient results.⁵⁵

The pros and cons of state common law actions are not limited to legal consequences, but also to the practical logistics of plaintiff litigation. Plaintiffs, or in most instances their attorneys (in light of contingency fees), must hire expensive scientific experts and perform costly and invasive scientific analyses of polluted sites.⁵⁶ Plaintiffs must also be prepared to combat opposing expert witnesses.⁵⁷ Then again, with

⁴⁸ Meiners & Yandle, *supra* note 18, at 959–61 (citing Randall G. Vickery & Robert M. Baratta, Jr., *Back to the Legal Future: Environmental Claims Come Full Circle as Plaintiffs Return to the Common Law for Relief*, NAT'L L.J., June 10, 1996, at C1).

⁴⁹ Kuhnle, *supra* note 8, at 221.

⁵⁰ See Roger E. Meiners & Bruce Yandle, *The Common Law: How it Protects the Environment*, PERC POLICY SERIES, ISSUE No. PS-13 (May 1998), available at <http://www.perc.org> (follow “Publication Library” hyperlink; then follow “Policy Series” hyperlink).

⁵¹ Kuhnle, *supra* note 8, at 222–23. Consequential damages (for example, falling land values) are available when using common law remedies. *Id.*; see also Meiners & Yandle, *supra* note 18, at 960.

⁵² Kuhnle, *supra* note 8, at 198; e.g., Meiners & Yandle, *supra* note 50.

⁵³ Kuhnle, *supra* note 8, at 224.

⁵⁴ *Id.* at 225–26.

⁵⁵ *Id.*

⁵⁶ *Id.* at 226; Meiners & Yandle, *supra* note 50.

⁵⁷ See Michael C. Anibogu, *The Future of Electromagnetic Field Litigation*, 15 PAGE ENVTL. L. REV. 527, 573 (1998).

financial risks can come high returns. If a plaintiff is successful, polluting defendants will think twice and proceed cautiously before appealing or continuing to pollute. The potential damages are high (making settlement a worthwhile choice if defendants are found liable in the trial court), and it is in the interests of polluting defendants to avoid published appellate decisions stating that certain toxic emissions or leaks are nuisances under state law, despite existing agreements with federal actors.⁵⁸

II. PREEMPTION? THE RELATIONSHIP BETWEEN FEDERAL STATUTES AND STATE COMMON LAW

In order to utilize the common law, these traditional state causes of action must not be preempted by federal statutes.⁵⁹ Specifically, does the Clean Water Act (CWA), Clean Air Act (CAA), or Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) preempt state common law doctrines, or is the state free to provide its own common law remedies? The CWA and CAA do not preempt state common law claims,⁶⁰ and CERCLA preemption law still permits substantial state common law claims.⁶¹

A. Nuisance Preemption and the Clean Water Act

Much discussion has focused on the preemptive effect of the CWA, with many analyses concluding that the CWA should be seen as preserving preexisting remedies available under state law.⁶² The Supreme Court held, in *International Paper Co. v. Ouellette*, that the CWA did preempt a Vermont nuisance law to the extent that the law imposed liability on a New York point source, but the CWA did not bar individuals from bringing the nuisance claim pursuant to the law of the source state (here, New York).⁶³ Thus, while the CWA preempted

⁵⁸ See Kuhnle, *supra* note 8, at 222–24; Nelson & Fransen, *supra* note 43, at 514–17.

⁵⁹ We note that state statutes and federal common law are additional sources of authority, and state statutes may preempt state common law claims.

⁶⁰ See *infra* Part II.A–B.

⁶¹ See *infra* Part II.C.

⁶² WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 287 (1994) (citing Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 172 (1985); Randolph L. Hill, *Preemption of State Common Law Remedies by Federal Environmental Statutes: International Paper Co. v. Ouellette*, 14 ECOLOGY L.Q. 541, 545 (1987); Calvin R. Dexter & Teresa J. Schwarzenbart, Note, *City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution*, 1982 WIS. L. REV. 627, 664 (1982)).

⁶³ *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) ("The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals

one state's nuisance law from being applied in another state, the CWA did not preempt a nuisance claim of the state where the pollution originated.⁶⁴ "The Court is less likely . . . to find federal preemption of state common law because it begins 'with the assumption that the historic police powers of the states were not to be superseded by [federal legislation] unless that was the clear and manifest purpose of Congress.'"⁶⁵ The CWA does not expressly preempt state common law remedies.⁶⁶ To the contrary, it preserves such remedies within the savings clause of the citizen suit provision of the Act.⁶⁷ Legislative history of the citizen suit provision also indicates "an affirmative recognition that state common-law rights and remedies were meant to survive enactment of the federal statute."⁶⁸ Thus, pursuant to existing case law, the plain language of the Act, and the legislative history behind the Act, the CWA does not preempt state common law environmental claims.

B. Nuisance Preemption and the Clean Air Act

Like the CWA, the CAA does not preempt state common law nuisance claims.⁶⁹ In another suit stemming from the facts of *Ouellette*, the court held that the CAA did not preempt state law nuisance claims by property owners for alleged air pollution damage arising from a paper mill.⁷⁰ The court reasoned that "state law nuisance claims have always been available to *private parties* suing for damages for pollution that travels between state boundaries."⁷¹ Additional case law supports the finding that the CAA does not preempt state common

from bringing a nuisance claim pursuant to the law of the *source* State."). For a critique of current preemption jurisprudence and advocating allowing the nuisance laws of the affected state, see generally Ann M. Lininger, *Narrowing the Preemptive Scope of the Clean Water Act as a Means of Enhancing Environmental Protection*, 20 HARV. ENVTL. L. REV. 165 (1996).

⁶⁴ *Ouellette*, 479 U.S. at 497.

⁶⁵ See Glicksman, *supra* note 62, at 183 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981)).

⁶⁶ See *id.*

⁶⁷ *Id.* at 186 & n.366. The clause provides that "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." 33 U.S.C. § 1365(e) (2000).

⁶⁸ Glicksman, *supra* note 62, at 187; see also Thomas C. Buchele, *State Common Law Actions and Federal Pollution Control Statutes: Can They Work Together?*, 1986 U. ILL. L. REV. 609, 641-42 (1986).

⁶⁹ See RODGERS, *supra* note 62, at 125.

⁷⁰ *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58, 62 (D. Vt. 1987).

⁷¹ *Id.* at 61.

law claims arising out of various instances of air pollution.⁷² Scholars have concluded that the CAA does not preempt state common law tort claims, using the same rationale as when discussing the CWA.⁷³

*C. Nuisance Preemption and the Comprehensive Environmental Response,
Compensation and Liability Act*

Sources diverge as to the extent CERCLA preempts state common law claims. CERCLA contains a savings clause, stating that "nothing . . . shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."⁷⁴ Thus, it seems that Congress sought to have CERCLA "work in conjunction with other federal and state hazardous waste laws."⁷⁵ However, "CERCLA does preempt the application of state or local law to hazardous waste contamination where the state or local law is in actual conflict with CERCLA."⁷⁶ Courts have found preemption of state law where there is sufficient conflict between the state law and CERCLA's contribution scheme, or where state law remedies would impair an effective cleanup.⁷⁷

Absent these limited scenarios, CERCLA does not preempt state law claims,⁷⁸ including common law claims dealing with harm caused

⁷² See *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1284 (W.D. Tex. 1992) (holding that the CAA does not preempt source state common law claims against a stationary source and reasoning that preemption of state common law actions would entirely preclude compensatory relief that plaintiffs may show is justified); see also *Abundiz v. Explorer Pipeline Co.*, 2002 WL 1592604, at *4-5 (N.D. Tex. Jul. 17, 2002) (finding that the CAA did not preempt plaintiffs' state tort law claims, derived from a spill of MTBE-treated gasoline).

⁷³ See Buchele, *supra* note 68, at 638-44; see also Andrew Mcfee Thompson, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia and Inconsistency*, 45 EMORY L.J. 1329, 1344-46 (1996); Kuhnle, *supra* note 8, at 210-14.

⁷⁴ 42 U.S.C. § 9614(a) (2000).

⁷⁵ See *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1225 (D.N.M. 2004) (citing *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993)).

⁷⁶ *Gen. Elec. Co.*, 335 F. Supp. 2d at 1225 (illustrating actual conflict means that it is impossible to comply with both the federal and state law).

⁷⁷ See, e.g., *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002); *XDP, Inc. v. Watumull Prop.*, 2004 U.S. Dist. LEXIS 12057 (D. Ore. May 14, 2004); see also Gregory M. Romano, Note, "Shovels First and Lawyers Later": A Collision Course for CERCLA Cleanups and Environmental Tort Claims, 21 WM. & MARY ENVTL. L. & POL'Y REV. 421, 441-45 (1997); Steven H. Goldberg & Amilia Sanders, *CERCLA: Cutting a Wider Path by Preemption of State Law Claims*, ENVTL. LITIG. COMM. NEWSL., Dec. 14, 2004.

⁷⁸ The U.S. Court of Appeals for the Ninth Circuit, for example, found an industrial company liable for creating a public nuisance and violating state environmental laws for dumping hazardous chemicals in the ground near its manufacturing site. *California v. Campbell*, 138 F.3d 772, 782 (9th Cir. 1998). Even though the court lacked jurisdiction to

by hazardous waste.⁷⁹ When CERCLA remedies are inadequate, a plaintiff can turn to common law causes of action for relief, and there is a modern trend toward the expansion of the common law so these causes of action can coexist with a CERCLA action.⁸⁰

III. TWO CASE STUDIES: INVOKING THE COMMON LAW

This section describes two cases attempting to use state common law doctrines to abate environmental harm.⁸¹ In the first, we focus on the difficulty of stating a claim and proving causation, while in the second, we focus on the evaluation of damage remedies. In *Connecticut v. American Electric Power Co.*, state and local governments have filed suit against power companies under state public nuisance law in order to mitigate greenhouse gas emissions.⁸² In *Dyer v. Waste Management of Wisconsin*, despite the existence of agreements pursuant to CERCLA between polluters and the federal government, landowners have filed suit under state private nuisance doctrine in an effort to cleanup adjacent lands polluted with hazardous waste.⁸³ Can, and should, these lawsuits relying on state doctrines of public and private nuisance prove successful?

allow an interlocutory appeal on the CERCLA issue, the court had the authority to hear both the nuisance claim and the state environmental claims, thus indicating that CERCLA may not preempt state law actions. *Id.* at 775–77. However, it is not at all clear that preemption was argued, and *California v. Campbell* was decided earlier than *Fireman's Fund Insurance Co. v. City of Lodi*.

⁷⁹ See, e.g., *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1416–17 (4th Cir. 1994) (where the Fourth Circuit concluded that state law claims for injunctive relief were preempted by federal statute (although the federal statute here was the Resource Conservation and Recovery Act (RCRA), rather than CERCLA), but that state law claims for damages were not preempted by the federal statute); *Wilsonville v. SCA Servs., Inc.*, 426 N.E.2d 824, 826–31 (Ill. 1981); *State Dep't of Env'tl. Prot. v. Ventron Corp.*, 468 A.2d 150, 154, 160, 166 (N.J. 1983) (finding a corporation liable under theories of nuisance, strict liability, and a New Jersey state environmental law); *Wood v. Picillo*, 443 A.2d 1244, 1245 (R.I. 1982); see also Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 942–61 (2004) (discussing case law where state common law claims have been used to deal with hazardous wastes).

⁸⁰ See Joseph F. Falcone, III & Daniel Utain, *You Can Teach an Old Dog New Tricks: The Application of Common Law in Present-Day Environmental Disputes*, 11 VILL. ENVTL. L.J. 59, 63 (2000); see also Kuhnle, *supra* note 8, at 218–22; Nelson & Fransen, *supra* note 43, at 499–508 (explaining that state common law remedies complement CERCLA and help obtain full and timely relief).

⁸¹ For another case study, see generally John Harleston & Kathleen M. Harleston, *The Suffolk Syndrome: A Case Study in Public Nuisance Law*, 40 S.C. L. REV. 379 (1999).

⁸² *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

⁸³ *Dyer v. Waste Mgmt. of Wis., Inc.*, No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County argued Dec. 6, 2004).

A. *In Lieu of the Clean Air Act*

1. Regulating Greenhouse Gas Emissions

An effective tool is needed to help abate overwhelming greenhouse gas emissions. Federal law has shown not to be the best instrument to mitigate greenhouse gas production since carbon dioxide is not defined as a CAA criteria air pollutant requiring National Ambient Air Quality Standards,⁸⁴ nor as an air pollutant requiring emission standards for new motor vehicles.⁸⁵ The federal government has failed to mitigate carbon dioxide emissions⁸⁶ under the CAA despite the plain language of the Act.⁸⁷

Dissenting in *Massachusetts v. EPA*—the case which upheld EPA's decision that the agency cannot and should not regulate greenhouse gas emissions from motor vehicles under the CAA—D.C. Circuit Judge Tatel argued that greenhouse gases “plainly fall within the meaning” of air pollutants to be regulated under the CAA.⁸⁸ Tatel went on to argue that if the EPA administrator finds the gases contribute to air pollution that puts the public's health in danger, “then EPA has authority—indeed, the obligation—to regulate their emis-

⁸⁴ See also *supra* notes 3 & 6 and accompanying text. The Attorneys General of three states—Massachusetts, Connecticut and Maine—intended to force EPA to list carbon dioxide as a criteria pollutant under section 108 of the CAA, but voluntarily dismissed the suit in order to focus on litigation that carbon dioxide must be regulated in mobile sources under section 202 of the Act. For further discussion, see Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN ST. ENVTL. L. REV. 15, 75–82 (2006); Richard W. Thackeray, Jr., *Struggling For Air: The Kyoto Protocol, Citizens' Suits Under the Clean Air Act, and the United States' Options for Addressing Global Climate Change*, 14 IND. INT'L & COMP. L. REV. 855, 888–94 (2004). However, the key question, regardless of whether you seek to regulate pollution under section 108 or 202 of the CAA, is whether any greenhouse gases can be considered an “air pollutant” under section 302(g) of the Act. See 42 U.S.C. § 7602(g) (2000) (defining “air pollutant” as “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.”).

⁸⁵ See *Massachusetts v. EPA*, 415 F.3d 50, 53 (D.C. Cir. 2005) (upholding “EPA's denial of a petition asking it to regulate carbon dioxide . . . and other greenhouse gas emissions from new motor vehicles under § 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1)” in a 2–1 decision, with all judges on different grounds); see also Anthony DePalma, *Court Says E.P.A. Can Limit Its Regulation of Emissions*, N.Y. TIMES, July 16, 2005 at A11.

⁸⁶ Other greenhouse gases include methane, nitrous oxide, and hydrofluorocarbons.

⁸⁷ See Czarnezki, *supra* note 5, at 441.

⁸⁸ *Massachusetts v. EPA*, 415 F.3d at 73 (Tatel, J., dissenting).

sions from motor vehicles.”⁸⁹ Currently, however, Congress has not explicitly mandated regulating greenhouse gases, and EPA has not voluntarily done so. Other than international initiatives, two other options remain available to mitigate greenhouse gas production: first, state and local responses such as state legislation, municipal programs and initiatives,⁹⁰ and second, state common law remedies such as public and private nuisance.

A number of state and local governments have begun to consider programs and policies to limit the production of greenhouse gases.⁹¹ While some of these programs are voluntary,⁹² there has been a movement by state officials to recommend greenhouse gas emissions limits. For example, in 2003, Maine passed a law setting a statewide target for reducing greenhouse gas emissions.⁹³ More recently, the Governor of California outlined a non-binding proposal to reduce the state’s greenhouse gas emissions to year 2000 levels in less than five years, and eighty percent less than 1990 levels in forty-five years.⁹⁴

⁸⁹ *Id.* A parallel argument was successfully made by plaintiffs in *Lead Indus. Ass’n, Inc. v. EPA*, 647 F.2d 1130, 1148–56 (D.C. Cir. 1980), where the D.C. Circuit held that if EPA found lead emissions to endanger health and welfare, a nondiscretionary duty to list it as a criteria air pollutant arose. Thus, this argument might prove persuasive in both section 202 and 108 suits. See McKinstry, *supra* note 84, at 76–77. But EPA, relying on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), concluded that “in light of the enormous economic and political consequences of regulating greenhouse gas emissions, Congress would have been far more specific if it had intended to authorize EPA to regulate the subject under § 202(a) (1) of the Clean Air Act.” *Massachusetts v. EPA*, 415 F.3d at 56 n.1 (citing 58 Fed. Reg. at 52,928).

⁹⁰ However, states and municipalities are reluctant to pass such laws. See Jonathan H. Adler, *Heated Nuisance Suits*, TCSDaily, July 27, 2004, available at <http://www.tcsdaily.com/Article.aspx?id=072704C> (stating that it imposes costs on a home state to call for state legislation requiring significant emission cuts).

⁹¹ See U.S. Environmental Protection Agency, State and Local Greenhouse Gas Mitigation Case Studies, <http://yosemite.epa.gov/OAR/globalwarming.nsf/content/ActionsStateCaseStudies.html> (last visited Jan. 4, 2007). For a detailed discussion of a variety of state and local responses to greenhouse gases and global climate change, see McKinstry, *supra* note 84, at 26–58. Regional responses to greenhouse gases are also being considered. See Anthony DePalma, *9 States in Plan to Cut Emissions by Power Plants*, N.Y. TIMES, Aug. 24, 2005 at A1; Regional Greenhouse Gas Initiative, <http://www.rggi.org/about.htm> (last visited Jan. 4, 2007); see generally Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54 (2005).

⁹² See New Hampshire’s Voluntary Greenhouse Gas Emissions Reductions Registry, N.H. REV. STAT. ANN. § 125-L:3 (2005); see also NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES, NEW HAMPSHIRE GREENHOUSE GAS REGISTRY, <http://www.des.state.nh.us/ard/climatechange/ghgr.htm> (last visited Jan. 4, 2007).

⁹³ 38 ME. REV. S. §§ 574–578 (2004) (calling for creation of a “climate change action plan” to reduce in-state carbon dioxide emissions to 1990 levels by 2010, to ten percent below 1990 levels by 2020, and eventually by as much as eighty percent).

⁹⁴ Katherine Ellison, *Turned Off by Global Warming*, N.Y. TIMES, May 20, 2006 at A13.

2. Common Law Claims and *Connecticut v. American Electric Power Co.*

In the absence of strong federal or state initiatives, the common law provides another option for mitigation of greenhouse gas emissions. As a primary example, in July 2004, eight states⁹⁵ and New York City filed suit in *Connecticut v. American Electric Power Co.* against five of the country's largest power companies in an effort to force a reduction in carbon dioxide emissions.⁹⁶ Plaintiffs assert claims of federal common law public nuisance, and assert public nuisance under the state common laws where the power plants are located.⁹⁷ While the companies do not dispute that carbon dioxide contributes to global warming, they do challenge the plaintiffs' assertion that carbon dioxide emissions constitute a public nuisance.⁹⁸ As the plaintiffs assert, "The action calls on the companies to reduce their pollution, and does not seek monetary damages."⁹⁹

Specifically, the complaint alleges that the defendant companies have available to them "practical, feasible and economically viable options for reducing carbon dioxide emissions without significantly increasing the cost of electricity to their customers."¹⁰⁰ Plaintiffs seek an order holding the defendants jointly and severally liable for a public nuisance, and an injunction against each of the defendants to reduce emissions by "a specified percentage" each year for at least a decade.¹⁰¹ According to the complaint, global warming is a public nuisance because it adversely affects public health (for example, heat deaths due to prolonged heat waves and asthma), coastal, water, and agricultural resources, the water levels of the Great Lakes, and flora and fauna.¹⁰²

⁹⁵ The eight states are California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin.

⁹⁶ See Editorial, *A Novel Tactic on Warming*, *supra* note 9.

⁹⁷ Complaint ¶ 1, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (04-CV-05669, 04-CV-05670). The power plants are located in Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kentucky, Louisiana, Michigan, Minnesota, New Mexico, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Virginia, West Virginia and Wisconsin.

⁹⁸ *Id.* ¶ 23.

⁹⁹ Press Release, Office of New York State Attorney General Eliot Spitzer, *Eight States & NYC Sue Top Five U.S. Global Warming Polluters* (July 21, 2004), available at http://www.oag.state.ny.us/press/2004/jul/jul21a_04.html.

¹⁰⁰ Complaint ¶ 5, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d at 265.

¹⁰¹ *Id.* ¶ 6.

¹⁰² *Id.* ¶¶ 3, 108–40.

Since greenhouse gases are not regulated under federal law, the states may have viable nuisance claims under state laws.¹⁰³ If global climate change can be found to be a public nuisance and the defendant utilities responsible, the release of carbon dioxide can be abated. However, some have questioned whether the three percent per year emission reduction sought is sufficient to effect global climate change, and, in turn, why the state attorneys general have filed such a claim.¹⁰⁴ While these concerns are certainly legitimate (and exemplify the difficulty in fashioning proper tort remedies), they question the remedy sought and do not raise concerns about using state common law as the underlying cause of action. That said, it is interesting to note that the state attorneys general, except Wisconsin, did not target facilities in their own states.¹⁰⁵

3. Proving Causation

Two major issues have arisen in determining the validity of state common law public nuisance claims to abate greenhouse gases: (1) whether plaintiffs can properly state a claim that the power companies intentionally and unreasonably contributed to global warming;¹⁰⁶ and (2) whether these claims are in conflict with U.S. foreign policy or congressional regulation of global warming.¹⁰⁷

¹⁰³ As stated, the complaint also asserts federal common law nuisance claims. *Id.* ¶ 1. Professor Adler has argued that these claims would not likely survive on the merits in light of existing federal statutes. Adler, *supra* note 90 (“Despite their claims, a federal common law cause of action for a public nuisance by carbon dioxide emissions is speculative, at best.”). While the CAA now has a comprehensive permit program like that of the Clean Water Act, which has preempted federal common law (*see City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981)), the CAA has not been utilized to regulate carbon dioxide emissions. Therefore, since EPA has taken the position that the agency does not have the authority to regulate carbon dioxide emissions under the Act (*see Massachusetts v. EPA*, 415 F.3d 50, 53 (D.C. Cir. 2005); 68 Fed. Reg. 52,922 (Sept. 8, 2003)), perhaps “[t]his makes it less likely that courts would find preemption of federal common law.” Updates to Environmental Regulation Casebook, <http://www.law.umaryland.edu/faculty/bpercival/casebook/chap2.asp> (last visited Jan. 4, 2007); *see also New England Legal Found. v. Costle*, 666 F.2d 30, 32 n.2 (2d Cir. 1981) (reserving judgment of the preemption question while noting that the CAA, unlike the CWA, did not regulate pollution from all sources).

¹⁰⁴ *See* Adler, *supra* note 90; Robert J. Samuelson, *Attorney Generals' Hot Air*, WASH. POST, Aug. 11, 2004, at A21.

¹⁰⁵ Adler, *supra* note 90 (“The state AGs could have targeted facilities in their own states, bringing a series of state-law-based common law nuisance claims, but that would have meant imposing costs at home.”).

¹⁰⁶ *See Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 270 (S.D.N.Y. 2005).

¹⁰⁷ *See id.* at 274.

Plaintiffs could successfully state a claim for public nuisance under various state laws. As an example, under Wisconsin law, greenhouse gas emissions could constitute a public nuisance because these gases interfere with public health and public comfort.¹⁰⁸ In order to effectively find liability for a public nuisance, a plaintiff must show the “existence of a public nuisance” and that defendants had “actual or constructive notice” of the nuisance.¹⁰⁹ Producers of greenhouse gases cannot successfully disclaim these elements. They are certainly aware that their power plants and facilities emit greenhouse gases such as carbon dioxide.

Plaintiffs must also show that the defendants’ “failure to abate the public nuisance is a *cause* of plaintiff’s injuries.”¹¹⁰ On its face, proving causation might seem like a major challenge for plaintiffs. The defendants argue that plaintiffs cannot prove causation because their emissions represent less than two percent of global greenhouse gas emissions,¹¹¹ and, while defendants know that their actions contribute to global climate change, they do not agree that they could have known that such emissions might cause the specific injuries asserted by plaintiffs.¹¹² In other words, defendants may contribute to global warming, but they do not admit that global warming caused detrimental effects to the plaintiffs.¹¹³ Thus, courts may have to entertain a number of scientific experts to discuss to what extent our health and natural resources are adversely affected by increases in global temperature. While EPA describes many of these concerns as “uncertainties,”¹¹⁴ the Intergovernmental Panel on Climate Change and U.S. Department of

¹⁰⁸ Wisconsin courts have adopted the *Restatement* definition of public nuisance. *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 691 N.W.2d 659, 669 (Wis. 2005); see also *RESTATEMENT (SECOND) OF TORTS* § 821B (2006). The *Restatement* requirements for determining a public nuisance are not the same as those found in the CAA. See, e.g., Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2000), (“the emission of any air pollutant . . . which in his [or her] judgment . . . may reasonably be anticipated to endanger public health or welfare.”).

¹⁰⁹ *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 646 N.W.2d 777, 793-94 (Wis. 2002).

¹¹⁰ *Id.* at 794 (emphasis added).

¹¹¹ Def.’s Mot. to Dismiss, at 47, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (Nos. 04 Civ. 5669(LAP), 04 Civ. 5670(LAP)) (filed Sept. 30, 2004).

¹¹² Def.’s Reply, at 24, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (Nos. 04 Civ. 5669(LAP), 04 Civ. 5670(LAP)) (filed Nov. 19, 2004).

¹¹³ See *id.*

¹¹⁴ U.S. EPA, *Global Warming—Climate, Uncertainties*, <http://yosemite.epa.gov/oar/globalwarming.nsf/content/climateuncertainties.html> (last visited Jan. 4, 2007).

State have documented the adverse effects of global warming,¹¹⁵ including detrimental effects in many areas of the United States.¹¹⁶ Therefore, while gases that emit foul odors have long been considered public nuisances,¹¹⁷ greenhouse gases simply create a different, and more scientifically complex, harmful effect.

However, under Wisconsin's interpretation of the *Restatement*, specific causal identification is not required since "public nuisance is focused primarily on harm to the community or general public, as opposed to individuals who may have suffered specific personal injury or specific property damage."¹¹⁸ Plaintiffs need not prove that the defendants' emitted gases are present in the states suing and that these gases became a hazard to the public.¹¹⁹ As the court stated in *City of Milwaukee v. NL Industries, Inc.*, "Were it otherwise, the concept of public nuisance would have no distinction from the theories underlying class action litigation, which serves to provide individual remedies for similar harms to large numbers of identifiable individuals."¹²⁰ Evidence that power companies each produced carbon dioxide emissions does create a genuine issue of material fact for a court to deter-

¹¹⁵ Intergovernmental Panel on Climate Change, *A Report of Working Group II of the Intergovernmental Panel on Climate Change, Summary for Policymakers*, http://www.grida.no/climate/ipcc_tar/wg2/005.htm (last visited Jan. 4, 2007).

¹¹⁶ *Id.*; Intergovernmental Panel on Climate Change, *Summary for Policymakers*, tbl.SPM-2, http://www.grida.no/climate/ipcc_tar/wg2/017.htm# (last visited Jan. 4, 2007); U.S. Dep't of State, *U.S. Climate Action Report—2002*, at 110, [http://yosemite.epa.gov/oar/global_warming.nsf/UniqueKeyLookup/SHSU5BNQ7Z/\\$File/ch6.pdf](http://yosemite.epa.gov/oar/global_warming.nsf/UniqueKeyLookup/SHSU5BNQ7Z/$File/ch6.pdf) (last visited Jan. 4, 2007).

¹¹⁷ See *City of Milwaukee v. Milbrew, Inc.*, 3 N.W.2d 386, 390 (Wis. 1942) (citing 2 WOOD, LAW OF NUISANCES 819, § 609 (3d ed. 1893)); see also *Breese v. Wagner*, 203 N.W. 764, 765–66 (Wis. 1925) (affirming trial court's conclusion that a constructed roadway was a public nuisance for emitting offensive odors).

¹¹⁸ *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888, 893 (Wis. Ct. App., 2004).

¹¹⁹ *Accord* *Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2005 R.I. Super. LEXIS 95, at *5–6 (R.I. Super. Ct. 2005); *Thomas v. Mallett*, 701 N.W.2d 523, 549 (Wis. 2005); cf. *NL Indus., Inc.*, 691 N.W.2d at 893 (rejecting defendants' claim that "the City must prove, at a minimum, that NL Industries' pigment or lead paint or Mautz's lead paint is present on windows in Target Area properties and that their conduct somehow caused the paint to become a hazard to children."). For further discussion of the individual causation requirement, see Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873, 877 (2005) (citing William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 131 (1983)) (noting that Landes and Posner have "mocked" the individual causation requirement). See generally Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825 (2004); Thomas C. Galligan, Jr., *The Risks of and Reactions to Underdeterrence in Torts*, 70 MO. L. REV. 691 (2005); Donald G. Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting from Mass Products*, 64 MD. L. REV. 613 (2005).

¹²⁰ 691 N.W.2d at 893.

mine whether defendants knowingly participated in the creation of the public nuisance of global warming.¹²¹

4. Preemption

As discussed in Part II.B *supra*, the CAA does not preempt common law nuisance claims. However, an alternative theory is that these state claims are preempted due to other congressional action and the goals of U.S. foreign policy.¹²² In this respect, common law claims in the greenhouse gas and global warming context are unique because trans-boundary greenhouse gas emissions have a global impact and are subject to the foreign policy concerns of the political branches of government.¹²³

According to Judge Preska of the Southern District of New York in *Connecticut v. American Electric Power Co.*, in fashioning a remedy, the court would be required to consider the impact of the relief granted on “the United States’ ongoing negotiations with other nations concerning global climate change” and “the United States’ energy sufficiency and thus its national security.”¹²⁴ Thus, she concluded that the plaintiffs’ complaints “present non-justiciable political questions that are consigned to the political branches, not the Judiciary.”¹²⁵ This holding has already been appealed to the U.S. Court of Appeals for

¹²¹ *Accord id.* at 894 (“Evidence that Mautz and NL Industries each promoted the use of lead paint directly to the public and through sales staffs creates a genuine issue of material fact for the jury on the question of whether defendants participated in the creation of a public nuisance of childhood lead poisoning in the City of Milwaukee.”). While the nuisance may affect the suing states, the plaintiffs likely must rely on the law of the source states. Only Wisconsin is home to a plaintiff and a defendant power plant. As Professor William H. Rodgers, Jr. stated:

One is tempted to predict that state courts are not likely to be overenthusiastic about proposals to mulct local business for the benefit of strangers residing across the border. . . .

Actually, predictions of outcome are likely to be sensitive not so much to the content of the law but to who is applying it. Nuisance law is pretty much the same from state to state, and a federal judge sitting in Vermont might be disposed to apply New York law for the benefit of Vermont residents.

RODGERS, *supra* note 62, § 4.3, at 287 & n.13.

¹²² Def.’s Mot. to Dismiss, at 47, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (Nos. 04 Civ. 5669(LAP), 04 Civ. 5670(LAP)).

¹²³ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 268–70 (S.D.N.Y. 2005) (discussing the congressional and presidential actions relating to global climate change).

¹²⁴ *Id.* at 272.

¹²⁵ *Id.* at 274.

the Second Circuit, and while there are strong reasons to be skeptical of an affirmance,¹²⁶ such a ruling, if upheld, is likely limited to the global warming context, and the political question doctrine would not stop similar nuisance claims against air, land, or water pollutants as they are generally not preempted by federal law.¹²⁷

B. *In Lieu of CERCLA*

1. Restoring Hazardous Waste Sites

While success stories exist,¹²⁸ EPA has faced difficulties in implementing the goals of CERCLA, and, in turn, cleaning up sites on the National Priorities List (NPL).¹²⁹ This has occurred for a number of reasons including politics and bureaucratic red tape, but the traditional criticism against CERCLA is that cleanup of Superfund sites is too slow and too expensive.¹³⁰ On the other hand, there may be good

¹²⁶ One may be skeptical that the Second Circuit will hold that this nuisance case is non-justiciable as a political question as this is not the type of case dealing with the internal workings of the other branches of government, *see* *Nixon v. U.S.*, 506 U.S. 224, 228 (1993). In addition, the presence of political issues does not necessarily indicate a non-justiciable political question. *See* *Kadic v. Karadžić*, 70 F.3d 232, 249 (2d Cir. 1995). Is the question of whether global warming equals a public nuisance best left to the political branches? Perhaps this is a question of institutional competence. *See, e.g.*, Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003).

¹²⁷ *See supra* Part II.

¹²⁸ U.S. EPA, *Archived News Articles and Superfund Success Stories*, <http://www.epa.gov/superfund/accomp/success/index.htm> (last visited Jan. 4, 2007).

¹²⁹ For a brief evaluation of Superfund, *see* Katherine N. Probst & Diane Sherman, *Success for Superfund: A New Approach for Keeping Score* (Apr. 2004), <http://www.rff.org/documents/RFF-RPT-SuperfundSuccess.pdf> (last visited Jan. 4, 2007).

¹³⁰ Part of this failure by EPA to enforce aggressively hazardous waste cleanup is merely a result of bureaucratic red tape. In order for EPA to issue administrative orders to another federal agency, it must first get acceptance from the Department of Justice. This requirement leads to prolonged negotiations, which in turn result in enormously slow responses to CERCLA by polluters, including federal facilities. Shane Justin Harvey, *Environmental Law Survey*, 71 DENV. U. L. REV. 961, 967 (1994).

Despite Congress's directives, however, EPA implementation of the federal hazardous waste statutes has had a tortured history. Cleanup of hazardous waste sites has proceeded slowly. The EPA has failed to meet its statutory deadlines, and Congress has severely criticized EPA regulations and policy under both RCRA and CERCLA. Several causes account for these problems, including the intrusion of partisan politics into Agency operations, the inadequacy of Agency resources, and the magnitude of the Agency's task. These recurring difficulties have raised doubts about the viability of agency-forcing as an approach to environmental legislation, leading some to call for increased administrative discretion.

reason for slow cleanups; it takes significant time and money to produce scientific analysis that will lead to development and implementation of a site-specific remediation plan, especially if risk-tolerance must be low.

Are CERCLA's perceived failures due to administrative failure or responsible science? The empirical data is insufficient to answer this question. Finding evidence of systematic agency capture is difficult when cleanups are performed by state agencies and EPA regional offices that may vary greatly in their institutional cultures, effectiveness, and reliance on traditional enforcement mechanisms.¹³¹ Discussed *infra*, the case of *Dyer v. Waste Management of Wisconsin* is arguably an example of administrative failure or foot-dragging by a potentially responsible party (PRP).¹³² Despite multiple time-consuming studies and engineering actions, pollution may have continued to migrate from a Superfund site into the property of adjacent landowners.

In addition, there may be reasons to be concerned about administrative failure when dealing with a single or dominant-PRP site. The single or dominant PRP may strategically subvert agency control and cleanup, something much more difficult to do in the dynamic environment of a multiple-PRP site where corporate influences will cancel out, reducing the possibility of agency capture. Though even in the latter cases, a single PRP may control and dominate the multiple-PRP litigation and cleanup process, attempting to maximize future profits while negotiating with trustees (for example, it is better to pay little and delay now, and instead pay later).

At minimum, the sheer number of parties involved in the cleanup of hazardous waste sites may result in jumbled and inconsistent enforcement. Evidence exists, however, that EPA embraces policies which may foreclose expedient cleanup and restoration of damaged property and resources.¹³³ EPA permits "reliance on natural

Developments in the Law—Toxic Waste Litigation, 99 HARV. L. REV. 1458, 1474 (1986); see also CONGRESSIONAL BUDGET OFFICE, *supra* note 47.

¹³¹ Federal and state agencies serve as trustees to oversee the cleanup and the natural resource damage assessment process. See, e.g., 43 C.F.R. § 11.14(rr) (2005) (allowing any agency listed in the national contingency plan to be a trustee).

¹³² *Dyer v. Waste Mgmt. of Wis., Inc.*, No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County, argued Dec. 6, 2004).

¹³³ OFFICE OF SOLID WASTE, EMERGENCY RESPONSE DIR. 9200.4-17P, USE OF MONITORED NATURAL ATTENUATION AT SUPERFUND, RCRA CORRECTIVE ACTION, AND UNDERGROUND STORAGE TANK SITE 1-2 (Apr. 21, 1999) [hereinafter OSWER DIR. 9200.4-17P]; see also *Changes in Utility Infrastructure Raise NEPA Consideration*, ARMY LAW., Jul. 1998, at 84, 85-86.

attenuation processes (within the context of a carefully controlled and monitored site cleanup approach) to achieve site-specific remediation objectives within a time frame that is reasonable compared to that offered by other more active methods."¹³⁴ Natural attenuation is a restoration approach "without human intervention."¹³⁵ In other words, it is a policy of "no action,"¹³⁶ allowing for natural processes to clean the environment over time. Natural Attenuation is unlike most common law jurisprudence where the goal is to restore the polluted area in the immediate future.¹³⁷

Natural attenuation certainly is an attractive solution for PRPs in light of the costly nature of site cleanup.¹³⁸ Yet it does not encourage cleanup in the foreseeable future and instead endorses long-term, natural remediation. As other scholars have pointed out, "EPA endorses the use of natural attenuation as long as the proper evaluation and monitoring are performed to demonstrate that human health and the environment are sufficiently protected."¹³⁹ Natural attenuation is permissible so long as the contaminant will decrease over time, there is continual monitoring, and the time-frame is reasonable.¹⁴⁰ However, combined with EPA approval of cost-benefit analysis in evaluation for site cleanup options,¹⁴¹ seventy-five years can be con-

¹³⁴ See OSWER Dir. 9200.4-17P, *supra* note 133.

¹³⁵ The "natural attenuation processes" that are at work in such a remediation approach include a variety of physical, chemical, or biological processes that, under favorable conditions, act without human intervention to reduce the mass, toxicity, mobility, volume, or concentration of contaminants in soil or groundwater. These in-situ processes include: biodegradation; dispersion; dilution; sorption; volatilization; radioactive decay; and chemical or biological stabilization, transformation, or destruction of contaminants. *Changes in Utility*, *supra* note 133 at 84, 85–86.

¹³⁶ Robert G. Knowlton & Jeffrie Minier, *Recent Trend for Environmental Compliance Provides New Opportunities for Land and Water Use at Brownfields and Other Contaminated Sites*, 41 NAT. RESOURCES J. 919, 928 (2001); see also James W. Hayman, *Regulating Point-Source Discharges to Groundwater Hydrologically Connected to Navigable Waters: An Unresolved Question of Environmental Protection Agency Authority Under the Clean Water Act*, 5 BARRY L. REV. 95, 123–24 (2005) ("The mantra of EPA is that 'dilution is not a solution to pollution' . . .").

¹³⁷ See *infra* Part IV.

¹³⁸ See Erik Claudio, Comment, *How the EPA May Be Selling General Electric Down the River: A Law and Economics Analysis of the \$460 Million Hudson River Cleanup Plan*, 13 FORDHAM ENVTL. L. REV. 409, 426–32 (2002); Knowlton & Minier, *supra* note 136, at 928 ("The potential cost savings in remediation through the application of the natural attenuation strategy . . .").

¹³⁹ Knowlton & Minier, *supra* note 136, at 928 (citing OSWER Dir. 9200.4-17P, *supra* note 133).

¹⁴⁰ *Id.* at 929; see also *Changes in Utility*, *supra* note 133, at 85–86.

¹⁴¹ Knowlton & Minier, *supra* note 136, at 931–32.

sidered a reasonable time period.¹⁴² Despite such long time periods, EPA allows natural attenuation, although “very cautiously,” to be the exclusive remedy at contaminated sites.¹⁴³

EPA expects that sites that have a low potential for plume generation and migration are the best candidates for monitored natural attenuation.¹⁴⁴ But concern exists as to whether these strategies are consistently applied across EPA’s regions, or even from one site to another within regions.¹⁴⁵ It is an open question as to whether regulators are “only accept[ing] natural attenuation as a remedy when it meets all applicable, relevant, and appropriate health requirements.”¹⁴⁶ There is a very real concern that natural attenuation will be used just to get contaminated sites “off-list” without good data and predictions as to whether contaminants will actually be removed, and contaminated groundwater will not be polluted downgradient in the future.¹⁴⁷

With the possibility of administrative failure in a given case, a foot-dragging PRP, and the (over) use of natural attenuation and cost-benefit analysis in site cleanup, sites containing a migrating or existing pollutant affecting a third party may not be remedied within a reasonable timeframe. However, under state common law the same pollutant would be considered a nuisance and promptly abated. An advantage of the common law is that it serves as a tool for more immediate cleanup, in conjunction with CERCLA, to decrease response time in dealing with an existing plume and ensure proper remediation.¹⁴⁸ Although, if CERCLA works properly in restoring the polluted site and adjacent land, any common law claims may be minimal.

¹⁴² *Id.* at 931 (citing Robert G. Knowlton, Jr., *Benefit-Cost Analysis of Groundwater Alternatives at the DOE UMTRA Site Near Riverton, WY* 18 (July, 1997) (unpublished report, on file with authors)).

¹⁴³ *Changes in Utility*, *supra* note 133, at 85 (citing OSWER DIR. 9200.4-17P, *supra* note 133); see also *Environmental Law Division Notes*, ARMY LAW., Mar 1995, at 35, 36 (stating that natural attenuation can be “even a stand-alone remedial alternative”); Nicholas J. Wallwork & Mark E. Freeze, *Managing Environmental Remediation Under Federal CERCLA*, SL080 ALI-ABA 401, 419 (2006) (stating that natural attenuation can “be selected as a sole-remedy”).

¹⁴⁴ *Changes in Utility*, *supra* note 133, at 85; see Stephanie Pullen et al., *Recent Developments in Environmental Law*, 30 URB. LAW. 945, 980 (1998) (discussing when the use of natural attenuation is appropriate).

¹⁴⁵ See Ann R. Klee & Ernie Rosenberg, *The Moribund State of CERCLA Reauthorization*, 13 NAT. RESOURCES & ENV’T 451, 453 (1999).

¹⁴⁶ *Environmental Law Division Notes*, *supra* note 143, at 36 (emphasis added).

¹⁴⁷ Joseph E. Odencrantz et al., *Natural Attenuation: Is Dilution the Solution?*, 40 LUSTLINE BULLETIN 8, 12 (Mar. 2002), available at <http://www.epa.gov/OUST/cat/LL40NatAtt.pdf>.

¹⁴⁸ Another advantage of the common law is clearly the availability of personal injury damages, unavailable under CERCLA. See generally *Developments in the Law—Toxic Waste Litigation*, *supra* note 130, at 1602.

2. The Common Law and *Dyer v. Waste Management of Wisconsin*

The now-closed Muskego Sanitary Landfill was permitted to operate in 1954 with consent from the City of Muskego, Wisconsin and in 1971 with permission from the Wisconsin Department of Natural Resources (WDNR).¹⁴⁹ Unfortunately, private wells near the landfill were found to have elevated contaminant levels, eventually resulting in the landfill site's addition to the National Priorities List (NPL) of hazardous waste sites eligible for long-term remedial action financed under the federal Superfund program.¹⁵⁰

In *Dyer v. Waste Management of Wisconsin*, landowners allege that defendant Waste Management allowed and accepted illegal liquid waste to be dumped at the landfill adjacent to their property.¹⁵¹ Plaintiffs allege that this waste included vinyl chlorinated solvents used in paints and degreasers that degrades into vinyl chloride, a known carcinogen, which later migrated from the landfill onto plaintiffs' properties.¹⁵² The plaintiffs allege that Waste Management did not have a license to dump this liquid waste at the Muskego landfill¹⁵³ and that the groundwater quality began to deteriorate around the landfill.¹⁵⁴ The complaint alleges that chlorinated solvents were found at dangerous concentrations in adjacent property owners' ground water, spring-fed ponds, and drinking water wells.¹⁵⁵

Plaintiffs assert a variety of state common law claims against Waste Management, including: (1) negligence (failure to exercise duty of reasonable care in operating the landfill); (2) private nuisance (substantial interference with use and enjoyment of land); and (3) trespass (intrusion of hazardous and toxic substances from the landfill onto plaintiffs' properties).¹⁵⁶

¹⁴⁹ U.S. EPA, *NPL Fact Sheets for Wisconsin: Muskego Sanitary Landfill*, <http://www.epa.gov/R5Super/npl/wisconsin/WID000713180.htm> (Sept. 2006) (last visited Jan. 4, 2007).

¹⁵⁰ *See id.*

¹⁵¹ Complaint at ¶ 4, *Dyer v. Waste Mgmt. of Wisconsin, Inc. (WMWI)*, No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County Apr. 13, 2004). Co-author Mark Thomsen is an attorney representing the plaintiffs in this case as well as the plaintiffs in the consolidated case of *Muskego Moose Family Center No. 1057 v. WMWI*, No. 04-CV-912 (Wis. Cir. Ct., Waukesha County Apr. 13, 2004). All materials relating to the *Dyer* case are available and on file with the authors.

¹⁵² *Id.* ¶¶ 1–2, 4.

¹⁵³ *Id.* ¶¶ 21–22.

¹⁵⁴ *Id.* ¶ 25.

¹⁵⁵ *Id.* ¶¶ 70–78.

¹⁵⁶ *See id.* ¶¶ 96–118.

Federal action has proven less than effective in this case. While the landfill site was added to the NPL in the mid-1980s, even after remedial action, hazardous substances remain above health-based minimum levels.¹⁵⁷ The remedial investigation and feasibility study began in 1987 and was completed in 1992, construction of the landfill cap and gas collection system were completed in 1994, and a limited groundwater pump-and-treat system was completed in 1997.¹⁵⁸ In 1998, owners of private residences located near the landfill were notified by the WDNR and the State of Wisconsin Department of Health and Family Services that vinyl chloride was present in their private water supply wells at concentrations that exceeded state and federal drinking water standards.¹⁵⁹ Thus, federal regulatory action did not restore the contaminated area or groundwater to the required regulatory standards.¹⁶⁰

3. Enforcing State Common Law

Statutory omissions, administrative problems, and enforcement inefficiencies should not limit common law causes of action that might provide additional remedies to landowners. In light of the inadequacies of the federal regime, common law principles have a role to play. The common law, first, should *not* be adversely affected by the federal role (for example, CERCLA compliance orders administered by EPA), and, second, should force polluters to be seen as violators of *state* law, serving as an important deterrent to environmental pollution.¹⁶¹

For example, at the preliminary stages of a hazardous waste common law action, expert witnesses should not be allowed to discuss compliance with a consent decree. An expert opinion about an EPA compliance order "simply has no appropriate role to play . . . in the common law causes of action which are being pursued."¹⁶² A defen-

¹⁵⁷ U.S. EPA, *NPL Fact Sheets for Wisconsin: Muskego Sanitary Landfill*, *supra* note 149.

¹⁵⁸ *Id.*

¹⁵⁹ Letter from State of Wis. Dep't of Natural Res. to Mr. Art Dyer (Apr. 28, 1998) (on file with authors); Letter from State of Wis. Dep't of Health and Family Servs. to Mr. and Mrs. Anthony Vitano (Feb. 17, 1998) (on file with authors).

¹⁶⁰ U.S. EPA, *NPL Fact Sheets for Wisconsin: Muskego Sanitary Landfill*, *supra* note 149 ("[T]he remedial action resulted in hazardous substances at the site above health-based levels . . .").

¹⁶¹ See Charlie Garlow, *Environmental Recompense*, 1 APPALACHIAN J.L. 1, 9, 17 (2002).

¹⁶² Transcript of Proceedings of Sept. 9, 2004 at 60, *Dyer v. Waste Mgmt. of Wis., Inc.*, No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County Sept. 9, 2004) (quoting Judge Skwierawski, and referring to CERCLA's savings clause, which "preserve[s] common law obligations or liabilities under state law").

dant's compliance with a federally dictated decree should not be relevant as to whether that defendant has violated state nuisance laws. Retired Wisconsin Circuit Court Judge Michael Skwierawski (acting as Special Master) stated in *Dyer*:

Plaintiffs' argument about private nuisance causes of action is absolutely correct. It is irrelevant whether Waste Management's conduct complied with CERCLA or complied with standards set forth in the National Contingency Plan or any other place if the Plaintiffs can establish that their conduct and the activities on the property caused the leaching of hazardous cancer-causing chemicals into adjacent wells. That's, I think, a fairly straightforward proposition. It doesn't make any difference what they did or didn't do if that's what happened.¹⁶³

In other words, it is irrelevant whether a defendant has complied with the federal rules—statutes, contracts, or otherwise—if there remains a failure to comply with state law. Where there is no federal preemption, states must be free to determine what constitutes environmental harm in their own jurisdictions.

State common law doctrines can therefore become effective deterrents of environmental harms. But, this deterrent effect can only occur if compliance (or lack thereof) with the federal regime does not automatically dictate a liability finding in state jurisdictions.¹⁶⁴ Again, Judge Skwierawski stated:

The bottom line remains that the—there are independent common law obligations as argued by the Plaintiffs on the—impressed upon the Defendants that are to be analyzed separately and free from and apart from the existence of CERCLA consent orders and the listing of actions to be taken pursuant to those.¹⁶⁵

Consent decrees or compliance orders do not dictate what is an allowable release under state nuisance and trespass laws.¹⁶⁶ State law

¹⁶³ *Id.* at 61–62.

¹⁶⁴ *See id.* at 64.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 63 (noting that compliance with a consent decree is not relevant in determining whether defendant's conduct was reasonable or constituted a nuisance); *see also* Garlow, *supra* note 161, at 9 (“[C]ompliance [with natural resource statutes] does not ensure that an activity will not be subject to a nuisance claim.”) (citing *Galaxy Carpet Mills v. Mas-*

liability should not be affected by the enforcement culture in the federal government.¹⁶⁷ We note that this conclusion cuts both ways. State common law may be less environmentally friendly than a federal agreement. Thus, a failure to comply with a federal arrangement does not necessarily mean there has been a violation of state common law.

However, while it is arguably easier for the cause of action to proceed in this more traditional pollution nuisance case than in the greenhouse gas context, discussed *supra*, the proper remedy may be more difficult to determine.¹⁶⁸ Yet, without appropriate (here, common law) remedies, there will be no deterrence under state law. As Judge Skwierawski stated:

The plaintiff makes a powerful argument, I think, about the fact that if alternative sources of water are supplied and the defendants are not required to clean up the mess that they have made in the plaintiffs' view, then there is no deterrent in the law. They can turn our underground water supplies into sewers and just truck in more water. The community has [sic] a whole just kind of sails onward. That's, depending on the jury, a potentially powerful argument that may influence a jury to agree with the plaintiffs' version of restoration damages being the most reasonable measure and the appropriate measure to be assessed. It may influence one way or the other the trial judge at the same time.¹⁶⁹

Thus, property owners or possessors may have a right to a clean underground water supply, and the remedy that will fully compensate such persons for the breach of this right must include cost of restoration damages.¹⁷⁰

sengill, 338 S.E.2d 428 (Ga. 1986); *Vill. of Wilsonville v. SCA Servs., Inc.*, 426 N.E.2d 824 (Ill. 1981); *Neal v. Darby*, 318 S.E.2d 18 (S.C. Ct. App. 1984)).

¹⁶⁷ Transcript of Proceedings of Sept. 9, 2004 at 62–63, *Dyer v. Waste Mgmt. of Wis., Inc.*, No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County Sept. 9, 2004) (“[S]tandards under the common law requiring a landowner not to create a nuisance, public or private, cannot be set by a process which is subject to the current whims in enforcement.”).

¹⁶⁸ See *Massachusetts v. EPA* 415 F.3d 50, 53 (D.C. Cir. 2005).

¹⁶⁹ Transcript of Proceedings of Dec. 6, 2004 at 62–63, *Dyer v. Waste Mgmt. of Wis., Inc.*, No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County Dec. 6, 2004) (Skwierawski, J.); see also *infra* note 202 and accompanying text.

¹⁷⁰ See Transcript of Proceedings of Dec. 6, 2004 at 62–63, *Dyer v. Waste Mgmt. of Wis., Inc.*, No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County Dec. 6, 2004) (Skwierawski, J.); see also *infra* note 202 and accompanying text.

4. The Remedy and Damages

The common law has long recognized the importance of a clean environment for private property owners and the public at large,¹⁷¹ and “[t]hose who poison the land must pay for its cure.”¹⁷² The Wisconsin Court of Appeals observed “that access to, and use of, an undefiled underground water supply is a right of private occupancy,”¹⁷³ and therefore, it has been the law of Wisconsin and other states “that the cost of repairing and restoring damaged property and water to its original condition is a proper measure of compensatory damages.”¹⁷⁴

Restoration cost is an additional appropriate measure of damages even when the diminution in value to the plaintiffs’ properties is considered.¹⁷⁵ Courts have occasionally applied the rule that a plaintiff is entitled instead to the lesser of the “cost of repairs or diminution in value.”¹⁷⁶ However, this should not be a steadfast rule to be applied in every case.¹⁷⁷ For example, the court in *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Service Co.*,¹⁷⁸ recognized that the “diminished value land rule” is an archaic rule that does not truly compensate a land owner for the wrongful acts of a defendant:

¹⁷¹ WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 218 (Garland Pub., 1978) (1783) (noting that it is a nuisance “to corrupt or poi[s]on a water-cour[s]e”); see also *Hammack v. Mo. Clean Water Comm’n*, 659 S.W.2d 595, 600 (Mo. Ct. App. 1983) (“Clean water is the essence and lifeblood of our society. Without it we will perish.”).

¹⁷² *State Dep’t of Env’t. Prot. v. Ventron Corp.*, 468 A.2d 150, 160 (N.J. 1983).

¹⁷³ *City of Edgerton v. Gen. Cas. Co.*, 493 N.W.2d 768, 781 (Wis. Ct. App. 1992).

¹⁷⁴ *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 665 N.W.2d 257, ¶ 57 (Wis. 2003) (quoting *Gen. Cas. Co. of Wis. v. Hills*, 561 N.W.2d 718, 725 (Wis. 1997)); *Anstee v. Monroe Light & Fuel Co.*, 177 N.W. 26, 27 (Wis. 1920) (“Since no further recurrence of the nuisance is likely to take place, the court properly assessed damages for future as well as past injury to soil and well occasioned by the acts of the defendant complained of. In this way, and in this way only, could plaintiff be made whole in one action for the loss sustained by him by reason of the acts of nuisance already committed by the defendant.”); *Magnolia Petroleum Co. v. Smith*, 238 S.W. 56, 59 (Ark. 1922) (“[T]he measure of [plaintiff’s] damage was not as for a total destruction of his well and the cost of digging another one, as the learned trial judge found, but the expense which [plaintiff] would necessarily have to incur in order to restore his well to its former use.”). Under current law, individual plaintiffs are entitled to the restoration damages. Compare this outcome to the common fund discussed *infra* Part IV.

¹⁷⁵ *Laska v. Steinpreis*, 231 N.W.2d 196, 200 (Wis. 1975).

¹⁷⁶ See, e.g., *id.* For a discussion of doctrines to award restoration damages, see James R. Cox, *Reforming the Law Applicable to the Award of Restoration Damages as a Remedy for Environmental Torts*, 20 PACE ENVTL. L. REV. 777, 781–802 (2003).

¹⁷⁷ See *Sch. Dist. No. 15 of Town of Granville v. Kunz*, 24 N.W.2d 598, 599 (Wis. 1946) (“A reasonable argument could be made that in any case the cost of rectifying the damage is the proper measure even though it may exceed the diminution in value of the damaged property . . .”).

¹⁷⁸ 618 So.2d 874, 877 (La. 1993).

Recently, courts and commentators have criticized . . . simplistic tests which require the automatic application of limitations on an owner's recovery of the cost to restore or repair his damaged property. Such ceilings on recovery not only seem unduly mechanical but also seem wrong from the point of view of reasonable compensation. If the plaintiff wishes to use the damaged property, not sell it, repair or restoration at the expense of the defendant is the only remedy that affords full compensation. To limit repair costs to diminution in value is to either force a landowner to sell the property he wishes to keep or to make repairs partly out of his own pocket. Rules governing the proper measure of damages in a particular case are guides only and should not be applied in an arbitrary, formulaic, or inflexible manner, particularly where to do so would not do substantial justice. Limiting the costs of repairs to the diminution in value of the property appears to fly in the face of the rule requiring that the injured party be restored to his former position.¹⁷⁹

As one commentator stated, "Anachronistic limitations on recovery based on property value fail to take into account the public's interest in ensuring an effective cleanup."¹⁸⁰

IV. THE COMMON LAW FUND

Stated simply, the common law strives for immediate cleanup of pollution and condemns the destruction of the natural environment. Federal environmental law, such as the CAA and CERCLA, strive for

¹⁷⁹ *Id.* (citing *Myers v. Arnold*, 403 N.E.2d 316, 321 (Ill. App. Ct. 1980)) (awarding \$3.6 million to repair structural damage to an historic church building even though church had no present intention to restore) (internal quotations omitted); *see also* *St. Martin v. Mobil Exploration & Producing U.S. Inc.*, 224 F.3d 402, 410 (5th Cir. 2000) (affirming restoration damages award of \$10,000 per acre which exceeded the purchase price and market value of approximately \$245 per acre); *C.R.T., Inc. v. Brown*, 602 S.W.2d 409, 410 (Ark. 1980) ("The fact that it would be expensive to restore the land to its former condition [was] not reason alone to overrule [restoration damages]."); *Council of Unit Owners v. Carl M. Freeman Assocs., Inc.*, 564 A.2d 357, 361-62 (Del. Super. Ct. 1989) (in a case where plaintiffs alleged between \$13 and \$15 million in restoration damages and defendants alleged that the market value of the properties had increased, the court established the measure of damages as the "cost of repair").

¹⁸⁰ *Cox*, *supra* note 176, at 809. There are outer-limits to restoration value as the fact-finder should, in determining damages, take into account what can be remedied cost-effectively (in contrast to looking at the point of harmful exposure) and the underlying conduct of the defendant. *See id.* at 808.

similar outcomes, as the statutes' goals are deterrence, environmental protection, and reduction and elimination of pollution.¹⁸¹ However, CERCLA cleanups and consent decrees typically focus on federal standards, and not the often higher state standards.¹⁸² Determining nuisance under state common law, however, would look to state air quality or toxic release standards.¹⁸³

The argument against using state common law is that it will lead to increased litigation costs without the benefit of established federal norms, as well as buck the recent trend to engage in faster, voluntary cleanup with higher risk tolerance; hence the use of natural attenuation and cost benefit analysis.¹⁸⁴ However, under state common law, cleanup can occur under state mandated contaminant levels (which would determine what constitutes a nuisance under state law) and judicially mandated time frames, working with additional financial resources.

For example, the Wisconsin state standard for vinyl chloride in drinking water is 0.2 parts per billion (ppb),¹⁸⁵ while the federal standard is a much higher 2.0 ppb.¹⁸⁶ If landowners are to have full beneficial use of their property,¹⁸⁷ there must be immediate cleanup to achieve the federal standard instead of waiting many years for natural cleanup, and if landowners are to have full use and enjoyment, then any cleanup and restoration initiative must respond to state standards—a choice that would promote environmental federalism.¹⁸⁸

State common law, given the arguably ineffective existing federal regime, makes it possible to achieve pollution deterrence and cleanup in the foreseeable future under higher standards, and provides additional funds to reach an under-funded goal.¹⁸⁹ "From the standpoint of a plaintiff whose property has become contaminated by environmental pollutants, damage remedies that are designed to promote full

¹⁸¹ 42 U.S.C. § 7401 (2006); *Ohio v. DOI*, 880 F.2d 432, 446 (D.C. Cir. 1989).

¹⁸² Cox, *supra* note 176, at 779–80.

¹⁸³ See Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403, 460–61 (1997).

¹⁸⁴ See *id.* at 414–15.

¹⁸⁵ Wisconsin Department of Health and Family Services, *Vinyl Chloride* (2004), available at <http://www.dhfs.state.wi.us/eh/ChemFS/fs/VC.htm>.

¹⁸⁶ U.S. EPA, *Consumer Factsheet on: Vinyl Chloride*, http://www.epa.gov/OGWDW/contaminants/dw_contamfs/vinylchl.html (last visited Jan. 7, 2007).

¹⁸⁷ After all, the federal Maximum Contaminant Level Goal is zero. *Id.*

¹⁸⁸ See, e.g., Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 135–36 (2005); William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108 (2005).

¹⁸⁹ See Adler, *supra* note 188, at 135–36.

restoration of property have been slow to evolve.”¹⁹⁰ The following proposal for a common law fund doctrine, consistent with other equitable proposals to expand the scope of restoration remedies,¹⁹¹ will help by creating more available resources and moving pollution cleanup and deterrence efforts along.

A. Description

Judges have long invoked their equitable powers “to adopt appropriate remedies to meet the exigencies of a given case,”¹⁹² especially when the case requires creative, flexible, and imaginative remedies because traditional forms of monetary relief, such as loss of property value, are inadequate.¹⁹³ Implementation of a common law equitable remedy—the common law fund—would further promote the use of state common law doctrines to restore and repair our natural resources.

Fashioned by state court judges, the common law fund would allow—and possibly mandate in the interests of public policy—damages to be paid into a fund that could be used to restore plaintiffs’ property, often adjacent to hazardous waste disposal sites, damaged by pollutants. While money would go to pay for attorney contingency fees¹⁹⁴ and named plaintiffs may receive some remuneration, the substantial majority of the damages paid would go to restoration, an outcome that often takes too much time due to a shortage of federal resources. Attorneys would be willing to take cases subject to the common law fund because attorneys fees would be paid, and private plaintiffs—

¹⁹⁰ Cox, *supra* note 176, at 809.

¹⁹¹ See generally Cox, *supra* note 176, at 777, 805 (suggesting that courts should expand existing equitable trust doctrines and apply them to awards of environmental restoration damages, and noting that it has been suggested by at least one court).

¹⁹² State v. Seigel, 472 N.W. 584 (Wis. Ct. App. 1991).

¹⁹³ See Howard W. Brill, *Equitable Remedies for Common Law Torts*, 1999 ARK. L. NOTES 1, 13 (recognizing the need for “alternative creative remedies when a simple exchange of money as a form of substitutionary relief was inadequate[,]” and stating that “[e]quity has inherent and broad powers to fashion, shape and indeed create a remedy to prevent, or if time has passed, to correct a wrong. Those powers also exist, to be exercised creatively and imaginatively, when the wrong to an individual is defined by the rights flowing from the millennium-long growth of the common law.”).

¹⁹⁴ See Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984) (“[U]nder the ‘common fund doctrine’ . . . a reasonable fee is based on a percentage of the fund bestowed on the class”); *In re Lupron Mktg. & Sales Practices Litig.*, 2005 U.S. Dist. LEXIS 17456, at *9–11 (D. Mass. Aug. 17, 2005) (citing Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)) (“Courts have long recognized that a lawyer who recovers a ‘common fund’ for the class she represents is entitled to be paid a reasonable attorneys’ fee and her expenses prior to the distribution of the balance to the class.”).

especially environmentally oriented ones or ones who think cleanup of their property is worth more than the lost market value of their property¹⁹⁵—would make use of the doctrine, as would non-profit environmental groups that now would have a mechanism to fund lawyers.¹⁹⁶ The amount of money to be paid into the fund would be projected reasonable restoration costs, and judges would not have to allocate damages among various plaintiffs. Thus, plaintiffs would have a remedy available that would allow for direct cleanup and full use of their property in the post-restoration future, rather than be paid only a likely smaller amount for their property value diminution.¹⁹⁷

In addition, the fund would promote efficiency and would protect all future individuals who might be harmed by pollution. Without the fund to clean up all adjacent lands, there is the potential for future, more costly lawsuits by landowners downgradient.¹⁹⁸ This potential will provide a strong incentive for PRPs to move early and cleanup now, creating more sustainable business practices, and the fund could resolve all liability for defendants as to potential future plaintiffs.

The common law fund (here, the actual monies) would require judicial oversight to see that the fund is used properly to support more aggressive, and possibly agency-supervised, cleanup and restoration.¹⁹⁹ A cleanup and restoration plan may be mandated by the court itself—or in conjunction with a court appointed trustee, such as a state environmental protection agency—or the fund could be used to support an existing cleanup plan.²⁰⁰ In other words, the court, as part of approving the settlement or as a judicial finding, would direct that cleanup would commence. CERCLA would not preempt such a remedy because the fund would further effective cleanup by providing

¹⁹⁵ The common law fund is useful where the resource is undervalued by the market. See *supra* Part III (discussing the inadequacy of measuring damages by diminution of value). See generally Czarnecki & Zahner, *supra* note 44 (discussing the undervaluation of non-use values, and discussing the importance of receiving full restoration costs).

¹⁹⁶ Accord Cox, *supra* note 176, at 802 (stating that a “‘constructive trust’ or ‘equitable trust’ . . . could be created for the benefit of future property owners, neighbors, and/or for interested members of the general public”).

¹⁹⁷ 1 DANIEL P. SELMI & KENNETH A. MANASTER, *STATE ENVIRONMENTAL LAW* § 3.23 (2005) (“A consistent theme in case law discussions of nuisance remedies is flexibility in the judicial approach to the problem. The court’s basic aim is to adjust the conflict in a pragmatic way and to settle on a remedy that will intrude least on the prerogatives of property owners.”).

¹⁹⁸ Cox, *supra* note 176, at 780 (discussing the interest in intergenerational equity).

¹⁹⁹ Accord Cox, *supra* note 176, at 807 (stating that the fund “should be administered for the benefit of future property owners and members of the public”).

²⁰⁰ See Cox, *supra* note 176, at 808–09.

direct resources to the trustees or plaintiffs in control of the cleanup process.²⁰¹

The common law fund addresses the view that restoration is the only appropriate remedy. For example, hazardous waste might pollute well-water. Damages as a measure of diminution of property value often may be less than the value to a landowner of having clean groundwater. What if diminution of value were accompanied by an alternative water source?²⁰² Polluters should not be able to destroy public resources, so long as they can provide injured parties with, for example, a lifetime and unlimited supply of bottled water or a connection to municipal water. Instead, nuisance law and the common law fund, like environmental statutes, are meant to both deter pollution and restore already polluted areas.²⁰³

Creation of the common law fund is not only within the equitable powers of the judiciary, but its development is supported by the rationales for other fund-like arrangements.²⁰⁴ For example, using their equitable powers, judges in the class action context may invoke the *cy pres* doctrine and allow for funds to be distributed, instead of individually, for a benefit other than direct cash compensation to the plaintiffs.²⁰⁵ Such distributions, like the use of the common law fund in environmental cases, can be used successfully because there is a close nexus between the injury (the plaintiff's property damaged by pollution) and the distribution (to the common fund), which would be used to rem-

²⁰¹ See *supra* note 77 and accompanying text. A recent decision of the U.S. Court of Appeals for the Tenth Circuit, *New Mexico v. General Elec. Co.*, 467 F.3d 1233, 2006 U.S. App. LEXIS 26993 (10th Cir. 2006), attempts to clarify what remedies are available under state common law when EPA maintains ongoing remediation efforts. On the one hand, New Mexico limits the preemptive effect of CERCLA, permits usage of common law claims, and supports common law damage remedies so long as the monies are used for restoration and remediation purposes. See *id.* at *53–54, *60–61, *64–68. On the other hand, the court explicitly questions whether common law claims can be brought before EPA remediation efforts are completed, or, possibly, unless EPA admits that there will be no remedial action on a certain piece of real property. *Id.* at *72–74.

²⁰² Under many circumstances the diminished market value is not sufficient to make the plaintiff whole. Does the furnishing of water or an alternative source of water make a plaintiff whole in this case together with whatever diminished market value may have occurred to these properties? See Transcript of Proceedings of Dec. 6, 2004 at 61, *Dyer v. Waste Mgmt. of Wis., Inc.*, No. 01-CV-1866 (Wis. Cir. Ct., Waukesha County Dec. 6, 2004).

²⁰³ See, e.g., *Czarnecki & Zahner*, *supra* note 44, at 525.

²⁰⁴ Like CERCLA's Superfund, fund arrangements are often found in statutory provisions. See *Offshore Oil Spill Pollution Fund*, 43 U.S.C. §§ 1811–1824 (2006); *Oil Spill Liability Trust Fund*, 26 U.S.C. § 9509 (2006).

²⁰⁵ See 4 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 11.20 (4th ed. 2002).

edy a much wider class of individuals (here, restore damaged property of many adjacent landowners).²⁰⁶ In fact, the common law fund would directly benefit the plaintiffs, unlike traditional uses of *cy pres* that provide for more indirect benefits (discounts, charitable donations).

In addition, companies may be more willing to make payments for an environmental fund rather than direct payments to injured plaintiffs,²⁰⁷ and the fund avoids the possible unjust enrichment if plaintiffs would not “expend the recovered sums on actual property restoration.”²⁰⁸ Finally, a common law fund may be the only way to truly compensate injured plaintiffs. Like a class action suit, the number of individuals whose property is damaged may be large and many potential plaintiffs are unlikely to file a claim,²⁰⁹ meaning the common law fund may be the only way to ensure adequate cleanup and restoration,²¹⁰ an outcome worth the potential windfall to non-plaintiffs whose land or water source may be restored.²¹¹

²⁰⁶ See, e.g., *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 209 (D. Me. 2003) (“[M]embers of the public (and thus potentially class members who did not file a claim, as well as those who did) will benefit either in using the CDs themselves or in the general public benefit from recurrent music CD availability.”); cf. Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 457 (1972) (“The goal of the cy pres remedy . . . is to effectuate the normal damage distribution to class members as closely as possible, and this should be the purpose of the courts whenever feasible.”).

²⁰⁷ Companies are often more willing to pay to charitable funds. See, e.g., *New York v. Reebok Int'l Ltd.*, 96 F.3d 44, 46 (2d Cir. 1996); *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1393 (N.D. Ga. 2001); *New York v. Dairylea Coop., Inc.*, 1985 WL 1825 (S.D.N.Y. 1985).

²⁰⁸ Cox, *supra* note 176, at 802.

²⁰⁹ See *Dolgow v. Anderson*, 43 F.R.D. 472, 484–85 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970) (“The class action is particularly appropriate where those who have allegedly been injured are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive.”) (internal quotations omitted).

²¹⁰ Cf. United States District Judge D. Brock Hornby, *Panel: The Use of “Coupon” Compensation and Other Non-Pecuniary Redress*, Federal Trade Commission Workshop, Sept. 13, 2004, available at http://www.ftc.gov/bcp/workshops/classaction/writ_materials/hornby.pdf.

²¹¹ See 3 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS*, § 10.22 (4th ed. 2002) (“To the extent that cy pres distribution actually benefits a sufficient number of injured class members, the monies paid to third parties are an incidental but necessary cost that must be accepted in order to confer the benefits in a feasible way to a large proportion of the injured class members. This result is fully consistent with and promotes the historic objectives of class actions, which were originally created as a court rule of convenience.”).

B. *Application*

The common law fund is more easily applied to a case involving hazardous waste releases where restoration costs may exceed diminution in property value.²¹² The fund can be used to cleanup waste from the property and begin immediate restoration efforts. However, in some cases, restoration in the traditional sense is not possible.²¹³ For example, while air pollution can cause damage that allows for retrospective correction in the greenhouse gas context—for example, cleaning off black soot or treating asthma in children—the air pollution is also trans-boundary, without “on the ground” effects as easily detectable or remedied; this allows for only prospective relief in public nuisance cases to reduce greenhouse gases that cause global warming.²¹⁴ In these cases, the common law fund could be used, as an alternative to percentage reduction goals, for mandated use of better technology and research to develop new technology to stop future emissions.²¹⁵ The fewer emissions in the future would then offset past production, and industry may be more willing to endow a fixed amount into a fund rather than deal with technology-forcing future reductions that might result in business losses of unknown magnitude.

The idea of the common law fund can be an effective remedy because it allows for both prospective and retrospective relief; thus appeasing both those who seek restoration—governments and environmentalists—and those who lost and expended resources as a result of the pollution, plaintiffs and the plaintiff's bar.²¹⁶ The common law fund mirrors the supposed restoration and deterrence goals of CERCLA and other federal environmental statutes, and administrative agencies will be willing to work with affected plaintiffs if they know they might have an additional restoration fund available, leading to less pollution in the future, and more efficient and faster cleanups.²¹⁷

²¹² See Cox, *supra* note 176, at 807 (discussing the similar case of Ewell v. Petro Processors, Inc., 364 So. 2d 604 (La. Ct. App. 1978)).

²¹³ See Garlow, *supra* note 161, at 10 (discussing the Exxon-Valdez disaster and limitations on retroactive cleanup).

²¹⁴ See *id.* at 16–17.

²¹⁵ Cf. Garlow, *supra* note 161, at 17 (“Only by requiring that the violator reduce air/water pollution in an amount equal to or greater than the illegal emissions will violators begin to restore the environment they have damaged.”).

²¹⁶ See Cox, *supra* note 176, at 779.

²¹⁷ See *id.* at 780.

CONCLUSION

Federal administrative agencies are designed to enforce federal law. In the environmental context, EPA, with the resources it has available, must look at polluters and victims on a case by case basis to determine the appropriate course of action, whether such action is a consent decree, litigation, a compliance letter, restoration, or nothing at all. In this manner, administrative agencies function as common law courts determining the rights and remedies of the players in the environmental game.²¹⁸ However, if federal administrative agencies are, in fact, at least in some cases, ineffective common law courts because they do not regulate environmental harms or cannot provide certain remedies, then potential plaintiffs should invest their efforts in the state common law.²¹⁹ State common law doctrines can effectively determine what is an unreasonable act using state promulgated environmental standards, and provide for alternative or additional remedies. Meanwhile, judicially crafted remedies like the common law fund—allowing portions of state court damages to be paid to a restoration fund—can effectively promote both restoration and deterrence where federal action has proven less than effective.

²¹⁸ See generally Cass R. Sunstein, *Is Tobacco A Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013 (1998); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 533 (1997) ("Justice Scalia's discussion neglects the possibility that administrative agencies can discharge some of the functions of common law courts without compromising democratic values.").

²¹⁹ Cf. Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2011 (1997) (arguing that judges are already in a good position to act as "temporary administrative agencies" to deal with complex cases).