Private Nuisance as a Litigation Strategy for Climate Change

By

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Executive Summary

Climate change litigation is an action to address global climate change by bringing suits through the judicial system. One avenue for remedy is to build the cases around greenhouse gas emissions, either by asking for compensation or injunctive relief from major emitters, or asking the government to take action, or suing the EPA for its inaction to regulate the dangerous gases. In the relatively short history of this type of litigation, many of the cases have run up against the same barriers, including an inability to show the connection between one defendant’s emissions and the damages caused to the plaintiff by climate change, the perpetual volleying of blame between governmental branches, and many conflicts of power with the Clean Air Act.

There have always been environmental disputes between neighbors. Before the dawn of large environmental laws like the Clean Air Act, courts mostly resolved these issues with simple nuisance claims. A nuisance is an interference with another’s use or enjoyment of his real property. More recently, potential litigants have revived the use of nuisance claims to address nuisances associated with climate change. However, many courts interpreted the Clean Air Act in a way that made the nuisance claims invalid.

In 2013, the 3d Circuit Court of Appeals held that state level private nuisance claims survive federal preemption under the Clean Air Act in Bell v. Cheswick Generating Station. This research guides the reader through the legal lessons and terminology necessary to understand climate change litigation and a potential nuisance claim. Then the paper provides a background of the Clean Air Act and the applicable case history leading up to Bell. Finally, the author discusses criticisms of Bell and the use of private nuisance claims in climate change litigation.

The questions “If my property is damaged by a stationary emitter of air pollution, do I have any source of relief?” and “If I am a concerned citizen, how can I get involved in halting the impacts of climate change?” seem unrelated at first glance, but these questions are the thread that run through many of the climate change cases tried so far. By using the lessons learned from Bell and pursuing private nuisance claims in similar circumstances could be instrumental in battling climate change.
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Introduction

In 2013, a curious decision came down from the Third Circuit Court of Appeals and landed at the intersection of two seemingly disparate questions. The first question was, if my property is damaged by a stationary emitter of air pollution, do I have any source of relief? The second was, if I am a concerned citizen, how can I get involved in halting the impacts of climate change?

In Bell v. Cheswick Generating Station, a group of Pennsylvania residents sued their local power plant for compensation for damage to their properties from the dust and other particulate matter emitted by the generation station. The power plant’s operators, GenOn Corporation, argued that because the emissions were regulated under the Clean Air Act, GenOn was not responsible for the alleged injury to the plaintiffs. The court disagreed, holding that state level private nuisance claims are not preempted under the Clean Air Act. Why this decision is idiosyncratic and how it relates to the two questions posed above will be the subject of this research.

This paper will act as a guide to and through an indirect climate change case based on a state-based private nuisance claim that survives federal preemption under the Clean Air Act. This research will be presented in a way that is understandable to anyone interested in potential solutions to climate change, and will strive to be accessible to all, independent of any background in law, policy, or environmental issues.

Setting the Stage: Climate Change

The effects of climate change are here. Globally, humans have agreed as a species and a community of nations that we need to take drastic measures to halt its progression. Domestically, the issue remains contentious. It is no longer an option to allow America’s elected officials to deny climate change. Congressional inaction on climate change has led states, cities, companies, and private citizens to pursue climate change measures off Capitol Hill,¹ including through the courts.

Engendering a sense of urgency sufficient to effectively derail the current course of climate change has proven elusive, even where there is the will to act. This is true in many countries worldwide, but climate change action has had trouble building steam in America in particular. The issue is complex: climate change stems from different causes, and the relationships between greenhouse gas emissions and climate change are not always apparent. The U.S. is responsible for about 16% of all greenhouse gas emissions globally, despite holding only about 4% of the global population. Opinions on whether climate change should be a top priority for the current administration and Congress have shifted over time, but remain politically divided. In 2019, 67% of democrats (and democratic-leaning voters) believed that climate change should be a top priority, while 21% of republicans and republican-leaning voters agreed.

So, although there is no one reason why the tragedy of the commons looms so large in the U.S., the three reasons listed above paint a fairly clear picture: first, the causes and effects of climate change are scientifically difficult concepts, and the connection between the two is not always clear. Second, the U.S. is a major international contributor to climate change and changing that statistic will probably require Americans – who rely heavily on private transportation and other carbon-heavy goods and services – to undergo an unwanted lifestyle change. Third, although neither party has taken major action to address climate change, the issue is highly politicized.

In addition, as the cooperation necessary to halt climate change poses collective action problems at the national and global scale, and in all arenas of federal, state, and local government. While the shared responsibility is clear, the challenge remains to build the necessary political will to act.

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3 Id.
benefits and individual benefactors of climate change mitigation are innumerable and diffusive, the cost of climate change mitigation is often exorbitantly high, many times prohibitively so.\textsuperscript{10} Although the potential consequences of inaction are vast and unknowable,\textsuperscript{11} even when cleaner practices are implemented, the actions taken by one individual or firm to reduce environmental damage are unlikely to have a significant impact, and the cost of abatement may outweigh any marginal gains.

\textit{A Collective Action Problem}

While many individuals and firms do undertake measures to reduce environmental impacts, much of the time, environmental externalities – both positive and negative – are overlooked while decision makers focus on price tags.\textsuperscript{12} For example, Cindy understands that buying organic produce lessens her environmental footprint. However, if Cindy is not directly affected by the use of pesticides, it is likely that the only cost she will consider is the higher price of organic products. This is the basis of the collective action problem: individuals are incentivized to act in their own self-interest to the detriment of the group even though cooperation would improve the welfare of all.\textsuperscript{13}

Ideally, this is where a representative government would invest in the collective interests of all its citizens.\textsuperscript{14} Unfortunately, today, even issues as fundamental to the American experiment as human welfare,\textsuperscript{15} equality,\textsuperscript{16} property rights,\textsuperscript{17} and preservation of natural capital\textsuperscript{18} are couched in partisan

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\textsuperscript{14} “Introduction to Climate Action | UNFCCC.” https:// unfccc.int/climate-action/introduction-climate-action.
\textsuperscript{15} See e.g. “Flint Water Crisis | NRDC.” https://www.nrdc.org/flint.
\end{flushleft}
politics. Environmental advocates who knock at the doors of the legislature, seek remedy in the halls of the judiciary, and call to the executive agencies for answers are met with silence, as many citizens digest only the frothy emotional appeals of pundits and await the marginal changes sure to accompany the next change of administration.

*Litigation: A Promising Tactic*

Environmental advocacy groups are reminiscent of a detective on the tail of a fugitive. When he does not find the fugitive at home or at work, the detective tries other tactics. He digs for clues. He researches. Likewise, environmental advocates have not opted to sit on their hands when met with opposition. They look for other avenues to accomplish their goals.

One potential tactic that has shown promise is through climate change litigation: an attempt to hash out big environmental issues through the judiciary.\(^{19}\) Litigants have faced many hurdles and tried many strategies to get their day in court. Like the detective, the attorneys involved in these cases undertake comprehensive research and use their resources carefully. They have come up short and tried again. They throw away unhelpful theories and hone strategies that appear able to clear all the hurdles upon which they have stumbled so far.

Although we think of environmental harms and disputes as being something that courts and legislatures have started to care about in the last half-century, these harms and disputes have been around forever, and we have been resolving them for a long time. Before the development of environment-specific statutes in the United States, federal and state courts employed tort law, particularly nuisance, which enables them to abate and compensate damages between a party whose land has been adversely affected and the party causing the damage.\(^{20}\)

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In the past 50 years, Congress has passed large federal bills that control things like air pollution. The positive side, of course, is that there are now national standards on air quality and environmental health has improved overall.\(^\text{21}\) This law works through permitting. If a plant or facility is operating in excess of its allowed emissions or otherwise outside of its permit, the Clean Air Act gives any person recourse to hold the facility liable to the relevant standards.\(^\text{22}\) A complicating factor is that if the facility is operating within the limits of the permit, but causes harm anyway, either because the permit is too lax or does not cover the harmful emission, there is little to no recourse for the victims.\(^\text{23}\)

In the past few decades, neighbors and lawyers and lawmakers have tried to poke holes in these processes, and fairly recently, they have found that the fabric of these mechanisms gives in an interesting place: as mentioned above, courts now recognize that state-based private nuisance claims survive federal preemption under the Clean Air Act.\(^\text{24}\) They have come to the fugitive’s hiding place to find the screen door flapping and a dewy glass of water on the table. The water is still cold. The fugitive was just here.

\textit{Solutions: Mapping a New Path}

One major setback climate change litigation has faced is that there is no worn path to victory. Unlike some other types of cases, there is no straight-forward formula in which to plug the facts. Although state-based private nuisance claims have been able to survive federal preemption and provide relief in several different cases and courts, all those who seek remedy for climate change in this way must currently dig through several decades of case law to learn why, and even then must understand the complex legal doctrines applied to result in the desired outcome.\(^\text{25}\)

\(^\text{24}\) Nuisance claims set in federal courts are not preempted due to the interplay of state and federal law as well as federal common law and federal statutory law. See the discussion of preemption and displacement below.
Of course, there is no one detective on the trail, and without a clear understanding of the path the “fugitive” has taken so far, each detective must start at the beginning. They go knocking at doors previously left unanswered. Likewise, promising claims have failed prematurely because the path through the complex underlying concepts is largely unmarked.

This paper intends to provide a roadmap through a hypothetical state nuisance case of this sort that is accessible to legal minds, environmental types, and lay people alike. It will explain what a potential litigant would need to know about legal doctrine to assemble a winning case and attempt to chart around likely pitfalls.

This research has been conducted primarily using qualitative literature review and case study methods, including internet database research, caselaw research, and library research. This research is presented in four parts: first, the paper provides a thorough background of the major legal concepts useful to understanding how similar cases have met failure and success thus far. Second, there will be an overview of the Clean Air Act, including relevant history, congressional intent, and the provisions applicable to bringing suit against polluters. Third, the research takes a deep dive into the major climate change litigation cases with thorough analysis of all hurdles, both surpassed and stumbled upon. Finally, the paper will end with a synthesis of the previous sections and a concluding discussion of major criticisms of the *Bell* decision and its realized and potential implications.
Background

Major Legal Concepts

Climate change litigation seeks to make one or more parties responsible (i.e., have to pay) for damages caused by their emission of greenhouse gases. This burgeoning field has faced many challenges over its relatively short history, encouraging potential petitioners to pursue creative litigation strategies. These have included constitutional challenges, state and federal claims, and cases brought to enforce or challenge federal statutes and the agency rules they invoke. Generally, climate change cases are divided into two categories: strategic and incidental.\(^{26}\)

Strategic, or direct, climate litigation brings issues directly related to climate change to the forefront. Such topics might include the regulation of greenhouse gases or whether there is a Constitutional right to a clean environment.\(^{27}\) Or, as in the *Kivalina* case, discussed below, an Alaskan town sued top greenhouse gas emitters for public nuisance because global climate change had caused sea level rise and the town had suffered major floods. These cases are “initiated to exert bottom-up pressure on governments (‘strategic public climate litigation’) or corporations (‘strategic private climate litigation’) to mitigate, adapt or compensate for losses resulting from climate change.”\(^{28}\)

In comparison, incidental climate change cases favor an indirect plan of attack by focusing on justiciable issues correlated with climate change, such as malodourous emissions or particulate pollution from a power plant that interfere with a homeowner’s use and enjoyment of their land.\(^{29}\) In this way, potential litigants hope to side-step politically loaded topics and keep the issues in the comfort zone of the court’s purview with more familiar claims, like the kinds of nuisance claims mentioned above, with which courts are intimately familiar. Courts may be hesitant to stick their necks out by ruling on injuries


\(^{28}\) Id.

as divisive and contentious as those alleged to be suffered from climate change, for which there may be little or no precedence, a weak link between harms and their sources, and misgivings about redressability. Nuisance claims, on the other hand, are rooted in rights central to the American experiment: private property rights.

Restraining these claims to damages easily tied to activities incidental to climate change (such as a power plant that deposits coal dust on nearby land, and through the same practice of burning coal also contributes to global climate change) allows potential litigants to avoid tying climate change in general to specific, localized outcomes. This is why nuisance is so frequently pursued through these incidental cases, which contain a long and complex history and are comprised of a (sometimes tangled) framework of legal components, stumbling blocks, and implications.

Perhaps the legal concept most frustrating to the average person is that the determination of which party ultimately wins or loses is just one piece of a much larger puzzle. The remedy for the victor may be incremental, piecemeal, and localized. Moreover, many cases do not survive to this stage of adjudication. Before any argument can be made about the issue at hand, the court must first determine if the plaintiffs have a case at all, if the issue can be appropriately decided in a court, if the issue should be decided in that specific court, and so on. That is to say, the court must determine if all of the logistical obligations have been satisfied before undertaking the facts of the case. In the introduction, words like “hurdles” and “stumbling blocks” refer to these types of requirements.

It is also important to note that while this section will provide a brief outline of the tort of private nuisance and the elements of a nuisance claim, the specific facts of any given nuisance claim are not of particular significance. This research is not on tort theory, for which many great resources are available.

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The key here is the analysis of how and why private nuisance claims are permissible in state court, alongside the rather comprehensive permitting scheme of the federal Clean Air Act.

This section will open with an overview of the major legal distinctions useful to anyone unfamiliar with law in general: the differences between common and statutory law as well as between public and private law. Next, after introducing state and federal laws and jurisdiction, there will be a discussion of removal, or the circumstances under which a case may be taken out of state court and tried in federal court instead. Finally, this section turns to a general overview of nuisance, followed by an explanation of the procedural and substantive issues that plaintiffs must clear in order to have their day in court.

Broad Legal Principles

Common and Statutory Law

The first major legal distinction is the difference between statutory and common law. Statutory law is the written law enacted by the legislature or government at all levels of representation, whether that be federal, state, or local.34 Conversely, common law (or case law), is comprised of the rules decided upon as part of the judicial process; when the court creates a new rule where no statutory law exists.35

Statutory law often supersedes common law, but both are given equal standing in America.36 The interplay between statutory and case law will be discussed throughout this paper, but it is important to note that each is necessary to maintain a vibrant and continuously evolving legal system. The judiciary is often viewed as a counterbalance to statutory law, interpreting the language of written laws and redressing any wrongs done by the legislature. However, the judiciary plays an important role that moves beyond balancing the system: using common law to push the legislature under a specific set of circumstances.37

If the legislature is being silent or inactive, the courts cannot abdicate the duty to create common law when problems arise. Sometimes a problem exists ahead of action by the political branches, and the courts can and should start making norms and provide relief.\textsuperscript{38} The courts are also tasked with interpreting the law. The judiciary typically holds the attitude that when the legislature enacts laws, they say what they mean and mean what they say. However, if the intended interpretation is questionable or otherwise controversial, the courts should provide a judgment.\textsuperscript{39} If the courts’ interpretation differs from the legislature’s intention, it is the legislature’s duty to fix the disputed language.

\textit{Public and Private Law}

A public law deals with issues that affect the general public, i.e., society at large. Public laws include constitutional laws, criminal laws, municipal laws, international laws, and administrative laws.\textsuperscript{40} Administrative laws are the rules and regulations created by agencies at all levels of government in order to enforce the laws passed by administrative bodies.\textsuperscript{41} Public laws are also those that deal with the regulation of the legal system or institutions rather than of individuals. An example of a public law in the environmental context would be a carbon emissions cap for fossil-fuel fired power plants to ensure compliance with the Clean Air Act. An action brought by a government party against such a power plant for exceeding those limitations would also fall under this category.

Private law, in contrast, governs issues between two or more people or organizations. Private laws include torts, contracts, and property.\textsuperscript{42} In reference to climate change nuisance suits, the potential complaint would allege that a specific polluter infringed on one or more persons’ enjoyment of their respective properties. However, the harm would necessarily be limited to those parties named in the suit.

\textsuperscript{38} Koppel, Glenn S. “When Push Comes to Shove Between Court Rule and Statute: The Role of Judicial Interpretation in Court Administration.” Santa Clara Law Review 40 (n.d.): 85.
\textsuperscript{39} Id.
and would not aim to benefit the general population (although reducing pollution would likely have positive side effects for everyone).

**State and Federal Law, State and Federal Jurisdiction**

Perhaps the defining characteristic of the American experiment is the division of power, not only between the branches of government, but also between the federal government and its component states. Very generally, federal law governs all 50 states while state law is particular to that state, and largely, state laws may be more stringent than federal laws, but not less. In the same vein, federal courts adjudicate a specific set of disputes while state courts handle another set. Unfortunately, the interplay between these court systems is far more complex and convoluted than the relationships of state and federal laws.

Questions about federal and state jurisdiction answer the question “which court should here this case?” The hypothetical nuisance case proposed in this research necessarily be filed in and proceed at the state level. However, many climate defendants have sought, and were granted, removal to federal court. In order to examine the case history and ultimately to understand why these private nuisance cases survive federal preemption, it is necessary to follow prior cases as they are passed between courts. Thus, it is helpful to go over some of the circumstances of why cases are removed to federal court here.

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44 While federal laws are often interpreted as providing minimum standards (i.e., a floor), some states have enacted laws preventing state environmental standards from being any more stringent than federal laws. See “State Laws Restricting State Rules More Stringent than Federal Requirements.” https://www.csgmidwest.org/policyresearch/qom-0317.aspx.

For a case to be removed, the federal court must have subject matter jurisdiction over the case. The first cause for removal to federal court is diversity jurisdiction.\textsuperscript{46} Diversity jurisdiction is a type of subject-matter jurisdiction that allows federal courts to hear civil cases where the amount in controversy exceeds $75,000 and in which the parties are of diverse in citizenship (i.e., the parties legally reside in different states) or state of incorporation (for corporations as legal persons). Usually, complete diversity is required in order for diversity jurisdiction to apply, meaning that none of the plaintiffs may be from the same state as any of the defendants.\textsuperscript{47} As it relates to climate change litigation, it is important to understand diversity jurisdiction in order to contrast some of its attributes with another type of federal subject-matter jurisdiction.

Secondly, a case may be removed to federal court under federal question jurisdiction.\textsuperscript{48} Arising under Article III of the US Constitution, federal question jurisdiction is another type of subject-matter jurisdiction that allows federal courts to hear civil cases in which the complainant claims a violation of the Constitution, a federal law, or a treaty to which the United States is a party.\textsuperscript{49} Unlike diversity jurisdiction, federal question jurisdiction has no citizenship requirements or minimum amount in controversy.\textsuperscript{50}

A third type of subject-matter jurisdiction exists, and while it has not commonly been employed to remove climate change cases to federal court, it is still worthwhile to mention. Supplemental jurisdiction arises when a case would best be decided if its component parts were not divided between the


federal and state courts. That is to say, if a case contains multiple complaints, with some appropriate for federal jurisdiction, and others belonging to state jurisdiction, the federal court may exercise its power to decide all of the issues at the same time. Again, this type of jurisdiction is not a common way to remove climate change cases to federal court, and indeed, even if it applies, the court is not required to exercise supplemental jurisdiction.

Procedural and Substantive Issues

This section will explore the procedural hurdles that must be cleared in order for a case to be heard. These conditions fall under the broad umbrella question “will the court hear my argument?” which must be satisfied before any facts are considered. Some of these hurdles are procedural requirements, which typically ensure that litigants have correctly followed civil procedure, or the rules at the foundation of our legal system. The remaining hurdles tend to be classified as substantive issues, which often pertain to the specific facts of a case and whether they should result in a affirmative or negative ruling.

On one level, it is easy enough to point to the rules of civil procedure as procedural, and to point to civil rights and responsibilities as substantive. However, many times the line between them is not as bright or easily ascertained. For example, the National Environmental Policy Act relies solely on procedural requirements and has been interpreted to have no substantive requirements. One procedural requirement a federal agency must fulfill before beginning a substantial project includes an environmental assessment. However, the judiciary has intervened in such a way that courts no longer accept a finished EA as sufficient to meet the procedural requirement; courts now have the power to tell the agency

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56 Id.
whether the EA is done correctly.\textsuperscript{57} When courts have the power to dictate the proper elements of a cost-benefit analysis – or even to influence whether a project takes place at all – the procedural issue begins to look quite substantive.

A non-legal mind trying to interpret the difference between procedural and substantive requirements is reminiscent of a non-native Spanish speaker learning the differences between \textit{por} y \textit{para}. A lawyer or a native speaker easily navigates between the two. Yet, a simple internet search of the terms indicates that there may be deeper philosophical questions at play.

\textbf{Broad Issues, Specific Application}

The following issues neither encompass enough cases to be considered major legal concepts, nor are they specific to nuisance claims. The “intermediate” issues of preemption, displacement, and the political question do not fit nicely in any one place. While neither procedural nor substantive issues, these questions of federal power and judicial reach apply to many federal court cases but arise under only specific circumstances, including cases where the facts may implicate or relate to major federal environmental laws, such as the Clean Air Act. Thus, a discussion of these issues ensues below, rather than under the heading of major legal concepts, because these doctrines have a specific history of invocation under federal environmental statutes.

Though potentially obscure and sometimes difficult to parse out, these three concepts are incredibly important to the argument for employing state-based private nuisance claims in the arena of climate change litigation and form the basis upon which the cases discussed below have been decided.

\textit{Displacement}

\footnotesize{\textsuperscript{57} See Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980). “[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences…”}
While there is no general federal common law in the United States,\(^58\) “in certain areas of national concern, such as environmental protection, federal courts have the power to fill in ‘statutory interstices’ and if necessary, even ‘fashion federal law,’ thus creating federal common law in those specific areas.”\(^59\) If federal common law exists in some area, and a federal statute also speaks directly to the issue at hand, the federal statutory law may displace the federal common law.\(^60\) This preserves the power of Congress to “prescribe national policy in areas of special federal interest” by barring the court from holding federal common law above federal statutory law.\(^61\)

In *American Electric Power Co, Inc. v. Connecticut,*\(^62\) several states and land conservation groups sued electric power companies, alleging that the utility companies were a public nuisance because their emissions of greenhouse gasses contribute to climate change. The states sought a federal common law remedy: they wanted the courts to rule that the utility companies had to reduce emissions. AEP, along with the other appellants, argues that only the EPA could set emissions standards. The Court agreed. In the decision, Justice Ginsberg wrote, "The Clean Air Act and the EPA action the Act authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."\(^63\)

**Political Question Doctrine**

The political question addresses the question, “can any court hear this case?” The basic premise of the political question is to ensure the separation of powers\(^64\) by limiting the courts’ authority to

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adjudicate on issues that are best left to the other branches of government. A common, although mind-bogglingly self-referencing, definition may be summed up as follows: courts may only adjudicate on questions of law that are deemed justiciable, and generally must refrain from adjudicating questions that are inherently political.

In a basic sense, the political question doctrine is meant to prevent courts from having too wide an arc of power. If a question is political, the doctrine says, it belongs to the legislature. Likewise, it prevents citizens from asking courts simply to opine on the meaning of laws and how they are enforced. If a law has been improperly implemented, that might be justiciable in the court. If, on the other hand, a citizen believes that a law itself is unfair, or that there should be a law where none currently exists, that typically falls within the purview of the legislature. This strives to ensure separation of powers by limiting the purview of the court.

The Political Question Doctrine builds upon a concept called “case or controversy.” Derived from Article III of the Constitution, this provision limits the Court’s purview to deciding actual disputes, and not simply offering advice or interpretations of laws without a cases or controversy. The elements of what constitutes a case or controversy is called standing, which will be explained further below.

In recent climate change claims, courts have been fond of effectively volleying the problem back to the other branches, and in particular, pointing to the very broad range of laws and responsibilities overseen by the Environmental Protection Agency (EPA). In a very simple sense, Congress has granted power over most things environmental to the EPA, and so in many cases the courts have refused to adjudicate some issues surrounding laws like the Clean Air Act. The Act will be discussed in more detail

69 The Case or Controversy limitation on judicial power is specific to the Supreme Court. Many state supreme courts do issue advisory opinions.
below, but in brief, one way it allows for redress is by allowing “any person” to bring action against a party for violations of air quality standards or other provisions.\textsuperscript{71} If, however, the problematic behavior is not governed by the Act or its implementing regulations, there is arguably no source of relief.

The courts have interpreted this dilemma with the CAA to invoke the political question, because the absence or unfairness of the law is not justiciable by the court, and the issue itself (whether or not greenhouse gases should be regulated) is too contentious for the court to decide.\textsuperscript{72} However, in general, it is not always the case that a lack of law means that the courts cannot intervene. Many times, the job of the courts is to create new common law where there is none, and “[t]he value of a common law system is that the law can be adapted to situations that were not contemplated by the legislature.”\textsuperscript{73}

In addition, the Act is silent on greenhouse gas emissions, which has limited plaintiffs’ ability to curb these emissions. The Supreme Court did interpret greenhouse gases as “pollutants” under the Clean Air Act as a matter of textual interpretation in \textit{Massachusetts v. EPA}.\textsuperscript{74} This will be discussed in the relevant case history. However, the Court has not instructed the EPA to regulate the harmful emissions, calling upon the political question doctrine to look sideways at the legislature’s lack of action.\textsuperscript{75} Of course, if the courts turn away these claims and the legislature and agencies refuse to act, injured plaintiffs have exhausted their avenues for seeking relief. This perpetual volleying of the issue from courts to the legislature to the executive agencies has left plaintiffs with nowhere to turn.

\textit{Preemption}


\textsuperscript{73} “The Importance of Precedent.” https://biotech.law.lsu.edu/map/TheImportanceofPrecedent.html.


Preemption is similar to displacement, but where displacement refers to the difference between federal common law and federal statutory law, preemption is the idea that if state and federal laws conflict on a particular issue, the ultimate authority rests in the federal law. “Preemption applies regardless of whether the conflicting laws come from legislatures, courts, administrative agencies, or constitutions.”

The best way for congress to address confusion on whether state or federal law applies is simply to say so. Writing into legislation the intent for federal law to supersede state law is called express preemption, and it has the potential to circumvent disagreements and confusion. The counterpoint to express intent is implied intent: reading into the law that congress surely meant for the federal law to take precedence. Implied intent can be further broken down into subtypes, but the distinction between express and implied intention will suffice to understand the cases examined in this paper.

Preemption is particularly important in climate change cases because of the way that some environmental laws (including the Clean Air Act) provide avenues for injured plaintiffs to seek relief. As referenced above, “any person” may bring action against a party for violations of air quality standards or other provisions of the Act or its implementing regulations. The argument made in Bell, explored further below, is that even if there is no Clean Air Act violation, the Act does not preempt plaintiffs from seeking state common law sources of relief.

**Standing Doctrine**

The standing doctrine describes the set of requirements a person must meet in order to be within the jurisdiction of the federal courts. Derived from article III of the Constitution, the standing doctrine was articulated in a test by the Supreme Court in the early 1990s that states that it is the responsibility of the person bringing the suit to prove his “standing to sue.” It “stipulates that the jurisdiction of federal courts is limited to cases where: (i) the plaintiff has suffered an injury in fact; (ii) that is fairly traceable to

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the defendant’s misconduct (causation); and (iii) is capable of being redressed by the court” (internal citations omitted).\textsuperscript{80}

The first prong of the standing test is to show injury.\textsuperscript{81} Generally, in these climate change suits or similar disputes of environmental harm, courts have not taken issue with the injuries alleged by plaintiffs; they have found the links between purported damages such as declining ocean front property value and sea level rise, or increased temperatures and poor harvest yields, intuitive enough to pass muster.\textsuperscript{82} However, convincing courts that these damages are a direct result of anthropogenic climate change has been more difficult.\textsuperscript{83}

The next prong is to show that the alleged injury is “fairly traceable” to the defendant.\textsuperscript{84} This procedural standing issue of cause-in-fact is different from the substantive issue of causation, which will be discussed below.\textsuperscript{85} It will suffice to say that here we split hairs in this way: judges typically have not taken issue with plaintiff’s allegations of injury. Monetary damages from loss of property value or decreased harvests are plain enough. The problem lies in attributing those losses to climate change.\textsuperscript{86} This differs from “proximate” or “legal” cause, which is the responsibility of the plaintiff to then show that the defendant holds substantial responsibility for causing or furthering climate change.\textsuperscript{87} The

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\textsuperscript{82} Id.
\textsuperscript{87} Id.
substantive issue (causation) will be argued as part of the case, while the procedural hurdle (standing) must be cleared in order for the case to be heard at all.

The redressability requirement concerns the court’s ability to set the situation right: in order for a case to succeed in meeting standing requirements, the plaintiff’s injury must be able to be corrected by the action of the court. The plaintiff must be able to be “made whole.” Environmental litigation in general has had difficulty clearing this requirement for two reasons. The first has to do with procedural injuries.

Procedural injuries occur when a federal agency has not followed the proper procedure in taking some environmental action. However, many times, there is no injury in fact, only the increased risk of a future harm to some party. This is derived from the notion that some outcome would have differed had the agency followed proper procedure. In Lujan v Defenders of Wildlife, the Court “maintained that redressability is part of the ‘irreducible constitutional minimum’ of standing.” Therefore, a hypothetical injury to an unnamed future party does not satisfy the redressability requirement.

The second issue courts have taken with redressability has to do with the global scale of climate change. Whatever relief might be provided to the plaintiff will not affect climate change in any measurable way, will not slow its effects in any noticeable way, and most importantly, will not prevent the plaintiff from being injured by climate change in the future. This is another reason it is convenient to litigate climate change indirectly through private nuisance claims in which the injury is clear and redressable.

Being derived from the Constitution, standing applies to federal courts, which, by their very nature, have limited jurisdiction. Although state courts are not governed by this principle, and maintain general, rather than limited, jurisdiction, many states have opted to limit their power to adjudicate cases.

by adopting standing principles. A 2017 “Survey of Constitutional Standing in State Courts” revealed that the majority of states apply Constitutional standing, and so while many states have individually carved-out exceptions to this rule, a basic knowledge of standing doctrine is useful, even for cases that remain at the state level.

Causation

As noted above, the type of causation that constitutes a substantive issue is the court’s ability to see the causal relationship that connects the plaintiff’s injury with the defendant’s actions, i.e., the plaintiff needs to show that the defendant significantly contributed to the climate change that caused the injury they are alleging in the complaint. Courts have historically struggled with linking specific, often localized actions with the trans-national issue of climate change. Although recent scientific advances have parsed out specific climatic outcomes among major polluters, courts have struggled to make a definitive finding that but for the actions of the defendant, the injury to the plaintiff would not have occurred.

Next, courts have grappled with understanding how the relief requested would bar further injury to other potential litigants. That is to say, even if the court provided relief from the actions of one particular party, climate change would likely continue uninterrupted. This second major piece of the causation finding begins to butt up another substantive issue: redressability, or the ability of the court to make the plaintiff whole. Here again the courts have struggled to find an appropriate response to the claim. Would injunctive relief be appropriate; would it be enough to stop the defendant’s climate-causing

actions? Can monetary compensation to one party or set of litigants rectify climate change, a damage that is inherently a global harm?

These two substantive problems are like opposite sides of the same coin. In redressability we ask, “is there any kind of action that the court could take that would adequately compensate the plaintiff’s injury?” The similar questions in causation ask, “can this situation be made right?” “if so, how?” and, “even if this situation is made right, will the problem be stopped?”

Nuisance Litigation

A nuisance is (i) unreasonable conduct (ii) which substantially interferes with (iii) use and enjoyment (iv) of land. All four parts of this definition are necessary and will be fleshed out below. First, however, it will be helpful to distinguish between nuisance and trespass. They are both torts that involve interference with a person’s land, and in modern times, the line between these two related issues has become increasingly blurred. On a basic level, trespass protects the exclusive possession of land while nuisance pertains to interference with the use and enjoyment of land. Trespass requires a physical intrusion on the property of another, while nuisance does not require a physical entry.

Nuisance claims come in two flavors: public and private. The bulk of this research focuses on private nuisance, which will be explained in detail in this section. Private nuisance typically involves disputes between neighbors or parties in the same general area. It involves an injury, as described above, inflicted by one person or entity onto one or several property owners.

Public nuisance doctrine, in contrast, “protects the public against unreasonable and substantial interference with a public right” or with public property. Public nuisance is “[a]n activity or thing that

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affects the health, safety, or morals of a community.”

Public nuisance claims are usually leveraged by a government official or someone otherwise capable of acting on behalf of the public. An individual may only seek redress in a situation of public nuisance if they experience a particularized harm; they must be able to show that the injury they experienced was somehow worse or different than the harm experienced by everyone else who was affected. In this way, federal environmental statutes are one strategy to define and limit public nuisances.

The importance of distinguishing between public and private nuisance will become clearer in the analysis section to follow. Here, it will suffice to say that in environmental law, categorizing a harm as a public versus a private nuisance can have several consequences. It can reflect an understanding of the environment as a personal property right, or as a shared common right; likewise, it can frame pollution as an injury to owners of tangible property, or as a generalized harm to all. It can pose larger philosophical questions, including whether we have a fundamental or Constitutional right to a clean environment, and whether pieces of the environment, such as the airshed, should be protected as a public resource.

Although the hypothetical complaint in question is a state-level private nuisance claim, nearly all the legal battles with climate change as a core issue have been fought at the federal level, and so a brief description of the applicable procedural requirements will aid in understanding the case history discussed below.

**Parts of a Nuisance Claim**

**Possessory Interest:** the potential plaintiff must occupy and/or exercise control over the land on which the nuisance claim originates. In the case of nuisance, a plaintiff is not required to have

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ownership interest; i.e., a person who rents or leases land has possessory interest without having
ownership interest.

**Substantial Interference:** the defendant’s alleged interference must be offensive, inconvenient, or
annoying to a reasonable person.¹⁰³ A substantial interference could include financial loss, a physical
change in the property, or a harm that is continuous and ongoing. Courts are generally willing to
recognize four categories of interferences that may result in a nuisance: noise, odor, physical invasion
(like dust settling from a factory), and other environmental or safety hazards.¹⁰⁴

**Unreasonable Interference:** the classic test for reasonableness in a private nuisance claim is the
neighborliness standard, in which the court determines whether the disturbance was unreasonable based
on the character of the community where the action takes place and the suitability of the activity to the
neighborhood.¹⁰⁵

A more modern approach to the reasonableness requirement uses a usefulness standard in place
of neighborliness. The usefulness standard is a balancing test that considers the “suitability of the conduct
to the local character of the community,” and weighs social value of the activity in question and the
practicality of avoiding the harms which the activity causes.¹⁰⁶ If the “gravity of the harm outweighs the
utility of the conduct,” then the behavior is unreasonable.¹⁰⁷

However, even when the usefulness of the harmful activity to the society at large outweighs the
potential injury to the plaintiff, the plaintiff may still be entitled to compensation. Although the
defendant’s conduct is considered socially valuable rather than wrong or unlawful, the plaintiff should not
have to bear the burden of costs that may arise.¹⁰⁸ If the financial burden of compensation would not

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¹⁰³ Dodson, Robert D. “Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New
¹⁰⁴ Id.
¹⁰⁵ Woodbury, Stephen E. “Aesthetic Nuisance: The Time Has Come to Recognize It.” Natural Resources Journal
nuisance.
nuisance.
prevent the socially useful activity from continuing, the courts may hold the creator of the nuisance liable for compensatory damages.\textsuperscript{109}

\textbf{The Clean Air Act}

“\textit{[T]he Clean Air Act of 1970 is complex and demanding enough to keep lawyers, engineers, and environmentalists busy for all of their lifetimes. It seems to me that we have created a maze into which only the foolhardy attempt to enter and from which only the exhausted, depleted, and defeated emerge.}”

- Barry Goldwater, 1976

According to the Environmental Protection Agency (EPA), “[t]he Clean Air Act (CAA) is a comprehensive federal law that regulates air emissions from stationary and mobile sources.”\textsuperscript{110} The CAA is founded on the principle of cooperative federalism, or an interplay between the powers of federal, state, and local governments. The implementing agency for this Act is the EPA. The primary enforcement mechanism for stationary emitters is a permitting scheme, in which firms are essentially given an allowance of certain pollutants they may emit to remain in compliance with air quality standards.\textsuperscript{111}

The CAA is the first major environmental law to allow for citizen suits which provide an opportunity for “any person” to participate in holding firms and the implementing agency accountable to the provisions of the Act.\textsuperscript{112} The citizen suit provisions provided rights of action to concerned parties through three principle means of enforcement: (1) “citizens are entitled to file suit to force a party into compliance with national emissions standards if the EPA Administrator has failed to prosecute the violator”; (2) “citizen enforcement may compel the Administrator to perform a nondiscretionary duty”;

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and (3) “a related provision allows a right of review of final Agency action by petition to the United States Court of Appeals for the appropriate circuit.”\(^{113}\)

Jurisdiction over these suits is also written into the statute. District courts are vested with jurisdiction over three main types of actions: to bring a violator into compliance, to address a failure by the Administrator to perform a nondiscretionary action, and to enjoin the construction of a major emitting facility without a permit.\(^{114}\)

Section 304(e) provides a savings clause, or a provision that limits the scope of the statute. Section (e) states in part: "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement ... [of the Act] or to seek any other relief."\(^{115}\)

Looking at these sections of the Act alone, it seems plain that state-based private nuisance claims should be allowed under the Clean Air Act.\(^{116}\) However, as shown through the narrative of precedential cases below, this has not always been so apparent to courts.

**Narrative of Applicable Cases**

A relatively small number of cases pave the path to the *Bell* decision, but following the thread through these decisions, which involve narrow applications of the relevant laws, is confusing at best. As evidenced in the lengthy literature review of legal principles, many times there is a significant translation barrier between a word’s common usage and its legal meaning, and often a substantial knowledge base is


\(^{114}\) Id.


prerequisite to understanding only a few short lines. Thus, the applicable cases will be presented in a narrative format rather than interspersed in the background section.

Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007)\(^{117}\)

The state of Massachusetts (along with several other states) asked the EPA to regulate carbon dioxide and other greenhouse gas emissions from new motor vehicles, arguing that the CAA compelled the EPA to regulate “any air pollutant” that is “reasonably… anticipated to endanger public health or welfare.” The EPA refused on the grounds that the CAA did not authorize the Agency to regulate greenhouse gases, and regardless, the Agency has the discretion to defer a decision until they better understand "the causes, extent and significance of climate change and the potential options for addressing it." Massachusetts appealed the Agency action.

The Supreme Court ruled against the EPA, stating that the language of the Clean Air Act was purposefully “sweeping” and “capacious” as to allow the Agency a wide arc of action in the future and to prevent the Act from fading into obsolescence. Further, the Court ruled that if the EPA intends to continue inaction on the regulation of greenhouse gases, the Agency must first consider whether carbon and other harmful gasses contribute to climate change.

This case is important to understanding the landscape of climate change litigation overall, although the ties between this ruling and the Bell ruling might not be readily apparent. The holding that greenhouse gases can and should be regulated under the Clean Air Act unless the EPA officially considers whether carbon and other greenhouse gas emissions are positively correlated with climate change and then publicly confirms the Agency’s decision to continue inaction is monumental. This shows that for the Court, a connection between greenhouse gas emissions and climate change is the default, and for the EPA to be exempt from regulating them as pollutants under the CAA, they must exhibit a compelling reason to refrain.

\(^{117}\) Massachusetts v. EPA, 549 US 497 (Supreme Court 2006).
Although this research contemplates bringing a nuisance claim with a strong causal tie between an emitting facility and an injury typically associated with nuisance, damages directly resulting from climate change could be (and have been, such as in *Kivalina*) used as the basis for nuisance suits. This holding suggests that direct climate change litigation cases could fall under the purview of the Clean Air Act, and if such claims were brought at the state level, that they would be exempt from federal preemption.

The basic holding in *Bell* is that even if an emitting facility is compliant with its CAA permit, injured parties may still seek relief in state court. While direct climate litigation has faced difficulties proving that the defendant should be held responsible for the harms endured, from the holding in *Mass.* we can infer that claims seeking damages for the effects of climate change can fall under the CAA and thus state-based claims of this kind should survive federal preemption.


Eight states, the City of New York, and several private conservation groups brought suit against utility companies and the Tennessee Valley Authority, which the plaintiffs claimed were the five highest emitters of greenhouse gases. The plaintiffs claimed that the utility companies were a public nuisance because the emissions contributed to global climate change. AEP et. al argued that only the EPA may set emissions standards.

The Court agreed. This case nicely illustrates the important difference between preemption and displacement. This case, filed in federal court, sought redress under federal common law on the basis of public nuisance. Where there is federal statute addressing an issue, federal statutory law supersedes federal common law. There is no common law cause of action to seek a reduction in carbon emissions because those pollutants are governed by the Clean Air Act. This case does not involve the concept of

\(^{118}\) American Electric Power Company v. Connecticut, 564 U.S. 410 (Supreme Court 2011).
preemption, the legal principle that allows, in some cases, federal law to supersede state law (or state law to supersede local or municipal law).

Thus, this case explains the continued instance that claims against emitting facilities are brought in state court and remain at the state level. State based claims survive federal preemption under the Clean Air Act, but there is no way for federal claims to seek redress outside of the CAA.

Native Village of Kivalina v. ExxonMobil Corp. No. 4:08-cv-01138 (N.D. Cal.)\textsuperscript{119}

This suit, originally filed in a U.S. District court in 2008, is an example of strategic, or direct, climate change litigation. The Native Village of Kivalina, Alaska, along with the City of Kivalina, brought a common law nuisance case against ExxonMobil Corporation and other major emitters in the energy industry, seeking monetary damages for the destruction of the village by flooding caused by global climate change.

The case was dismissed by the district court for two reasons. First, on the assertion that the regulation of greenhouses gases is a political issue rather than a legal one, and thus should be resolved by Congress rather than the judiciary (i.e., under the political question doctrine). Secondly, the district court found that Kivalina lacked Article III standing for failure to show that there was a “substantial likelihood” that the defendants’ conduct caused the harms alleged. The appellate court upheld the decision under a different theory: that Kivalina’s nuisance claim was not justiciable because it had been preempted by the Clean Air Act.

This case failed for several reasons. First, it was filed in federal court rather than state court. Here, the nuisance claims were dismissed without prejudice, and they may be pursued at a later time in a state court. However, it was the use of the federal venue that allowed the appellate court to hold that the nuisance claims were preempted under the CAA. If the case was solely state-based, this reasoning would not have applied. Second, this case shows why it is preferable to use an incidental approach to litigating

\textsuperscript{119} Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).
climate change by tying the alleged harms to those commonly recognized in nuisance claims, rather than leaving the connection between the defendants’ actions and something as vast as climate change to the judgment of the court, thereby opening the issue of standing to scrutiny when it need not be.

Reliance on a more-familiar nuisance claim would have also sidestepped the political question. Of course, climate change does not always cause standard-nuisance harms that can be clearly traced to the actions of the defendant, but in cases where the

*Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987)*\(^{120}\)

Although *Ouellette* is the first of these cases chronologically, it is best explained here because its facts are similar to the *Bell* case and it is heavily cited in *Bell*. In *Ouellette*, Vermont property owners filed a state level, common law nuisance suit (in Vermont) against New York based International Paper Co. for polluting Lake Champlain. The Court found that Vermont state law did not apply to regulating water pollution because state common law remedies are preempted by the Clean Water Act. However, the Court also found that the CWA did not preempt the state based private nuisance claim. The problem here was that the plaintiffs filed their complaint in Vermont, while the alleged pollution emanated from New York. The lesson from this case is that private nuisance actions must be brought in the state from which the alleged pollution originates.

The Court has found on multiple occasions that the Clean Water Act and the Clean Air Act are similar enough that many decisions applied under one will translate to the other. As discussed below, this was the reasoning applied in *Bell*: as long as the suit is brought in the state where the alleged polluter is situated, the Clean Air Act does not preclude private actions against emitting firms.

*Bell v. Cheswick Generating Station 734 F.3d 188 (2013)*\(^{121}\)

\(^{120}\) *International Paper Co. v. Ouellette, 479 US 481 (Supreme Court 1986).*

\(^{121}\) *Bell v. Cheswick Generating Station, 734 F. 3d 188 (Court of Appeals, 3rd Circuit 2013).*
A group of more than 1,500 Pennsylvania plaintiffs who owned or inhabited land within a one-mile radius of Cheswick Generating Station, a coal-fired power plant, brought suit against the plant’s operator GenOn, alleging damages from ash and other contaminants settling on their property. GenOn claimed that because they were required to comply with extensive (and comprehensive) under the CAA, they owed “no extra duty” to the plaintiffs. The District Court agreed with GenOn and dismissed the case. On appeal, the question before the Third Circuit was “whether the Clean Air Act preempts state law tort claims brought by private property owners against a source of pollution located within the state.”

The Circuit Court, relying heavily on the analysis in Ouellette, determined that “[b]ased on the plain language of the Clean Air Act and controlling Supreme Court precedent… such source state common law actions are not preempted.”

Analysis

In many ways, the impetus for this research was the reaction to the Bell decision, because many of those who publicly responded to the holding seemed to think that it materialized unexpectantly and left a gaping, highly problematic loophole. This section will explore these criticisms and examine whether opponents’ “slippery slope” worries are warranted.

Criticisms

The primary criticism of the Bell holding was the concern that facilities permitted under and regulated by the Clean Air Act would have no way of anticipating potential private claims brought against them in state court. Why have a permitting scheme, these critics ask, if compliance with the Act does not protect the emitting firms against litigation?

Using this same line of reasoning, one could ask, why have laws at all if following them does not guarantee protection against being sued? Of course, the answer lies at the heart of the need for both civil and criminal, public and private laws. In general, the types of defendant behavior that cause private nuisance claims are not criminal acts. If they were, there would be no use for the nuisance action; if your neighbor’s problematic behavior were criminal, you would simply call the police, not file a nuisance claim. Likewise, if there were no such thing as nuisance, and the only protection you had against your neighbor was if he was in violation of the law, there would be no relief for actions, that while not against the law, violate your positive rights to the use and enjoyment of your property.

The savings clause in the Clean Air Act is there precisely to protect citizens from harms encountered even when emitting facilities are complaint with the CAA. If the language of the act is intentionally “sweeping” and “capacious” as to allow the regulations of new or unknown pollutants so that it does not become obsolete, it would make sense that part of the intention and scope of the savings clause would be to protect against unforeseen harms.

*Philosophical Issues*

As discussed above, nuisance claims protect the use and enjoyment of property even if the defendant’s problematic behavior is regulated or otherwise justified. An important part of a typical nuisance claim is the balancing test that determines if the usefulness of the behavior outweighs the damage caused. Environmental statutes like the Clean Air Act squash the ability to bring a nuisance claim from both sides. These laws essentially remove the opportunity to perform any judicial analysis of the defendant’s behavior, should a case survive to a point where such analysis would be warranted. As discussed above, many times a litigant’s claim has not been so lucky, and the court interprets the statute as so to displace or preempt the common law remedy.

The major criticism of *Bell v. Cheswick Generating Station* is that allowing state level private nuisance claims to survive federal preemption is somehow a loophole that would blindside firms that were otherwise in compliance with their Clean Air Act permits. While this research has shown that the
court’s interpretation was legally sound, perhaps that criticism is true. Perhaps, looking forward, environmental “ambulance chasers” will be knocking on the doors of all who reside near coal-fired power plants, inspiring dreams of riches, and ready with white gloves to inspect for dust. The benefit of using private nuisance claims in that situation is to reinstate the balancing test. We need electricity and we need power plants, but that should not exempt polluters from paying for the damages they have caused, even if they are compliant with their Clean Air Act Permits.

If the Bell holding incites a mob of environmental lawyers, let them come. An influx of state-level private nuisance cases and the subsequent backlash from the utility companies might provide the catalyst necessary to make the EPA fix the Clean Air Act.

Conclusion

The questions “If my property is damaged by a stationary emitter of air pollution, do I have any source of relief?” and “If I am a concerned citizen, how can I get involved in halting the impacts of climate change?” seem unrelated at first glance, but these questions are the thread that run through many of the climate change cases litigated under the Clean Air Act so far. The court’s holding in Bell v. Cheswick Generating Station showed that there is relief for injured plaintiffs, and that pursuing a private nuisance claim in that circumstance could be instrumental in battling climate change.