STATE COURTS DECIDE STATE TORTS: JUDICIAL FEDERALISM & THE COSTS OF CLIMATE CHANGE A COMMENT ON *CITY OF OAKLAND V. BP PLC* (9TH CIR. 2020)

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Introduction

In mid-2020, a socially distant Ninth Circuit panel decided *City of Oakland v. BP PLC*,[1] holding that state common law tort suits belong in state, not federal, court.[2] The plaintiffs in *City of Oakland* pleaded state law tort claims alleging that the defendants' conduct exacerbated climate change and amounted to a public nuisance.[3] Specifically, the plaintiffs argued that the oil and gas companies' strategy of deception—marketing and producing greenhouse gas-emitting products while hiding their internal research showing evidence of climate change and its disastrous effects—caused a public nuisance under Califor-

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1. 960 F.3d 570 (9th Cir.), *modified*, *reh'g denied*, 969 F.3d 895 (9th Cir. 2020).
2. *Id.* at 575, 585.
3. The Restatement of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (Am. Law Inst. 1979).

nia tort law.[4] The City of Oakland sought compensation for their climate change-based injuries as a remedy.[5] In other words, the complaint asked a familiar tort question: as climate change wreaks myriad injuries on society—more voluminous flooding, severe droughts, increased wildfires, greater water demand but lower water supply, reduced agricultural yields[6]—who compensates society for the cost of that damage wrought?[7] Despite the fact that the *City of Oakland* plaintiffs pleaded *state common law* claims, the oil and gas defendants successfully removed the case to *federal* court. Once there, what initially seemed like a familiar question became a political question, as the plaintiffs sought liability for a global problem, one that was implicitly "too big to abate" according to the district court.[8] Other cities and states have raised the same claims as the *City of Oakland* plaintiffs in their respective state courts and also faced removal to federal court.

The notion that the oil and gas defendants' tortious conduct may be "too big to abate" should seem foreign to state common law courts.[9] In *State v. Schenectady Chemicals, Inc.*,[10] one New York state court observed "[t]he common law is not static," as it considered whether the "modern chemical industry," which was "to a large extent, a creature of the twentieth century," could be held liable for "the problems engendered through the disposal of its byproducts."[11] At the time of this decision, New York was reeling from a hazardous waste problem. Most famously, environmental lawyers, students, and historians recall how atop the "Love Canal" landfill sat homes, streets, sewers, and a school, as hazardous substances leached below ground.[12] The state court allowed the plaintiff's tort claim arising from this "threat to all life forms" to proceed to the

4. *See* Complaint for Public Nuisance at 2, People v. BP PLC, No. RG17875889 (Cal. Super. Ct. Sept. 19, 2017).

5. *Id.* at 34.

6. *The Effects of Climate Change*, NASA, https://perma.cc/89ZJ-JK9G.

7. Announcing a similar lawsuit brought by the State of Delaware, Delaware Attorney General Kathleen Jennings used this rhetoric to describe the impetus for her action: "We alleged that these companies cause significant damage in Delaware, that they're responsible for it, and they ought to pay for it." Morgan Conley, *Delaware Demands Big Oil Foot Bill for Climate Change*, LAW360, https://perma.cc/4EXF-Y395.

8. City of Oakland v. BP PLC, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018), *vacated and remanded*, 960 F.3d 570 (9th Cir. 2020), *modified*, *reh'g denied*, 969 F.3d 895 (9th Cir. 2020). In general, the annals of federal court opinions often treat these climate tort claims as far beyond the pale for the federal judiciary. *See, e.g.*, Clean Air Council v. United States, 362 F. Supp. 3d 237, 254 (E.D. Pa. 2019).

9. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1888 (2001).

10. 459 N.Y.S.2d 971 (Sup. Ct. 1983).

11. *Id.* at 977.

12. United States v. Hooker Chems. & Plastics Corp., 722 F. Supp. 960, 962 (W.D.N.Y. 1989). President Jimmy Carter even declared the toxic state of affairs "the site [of] a federal emergency." *Id.*

merits and denied the chemical industry defendants' motion to dismiss.[13] *Schenectady Chemicals* readily acknowledged that disposal of the waste from "hundreds of previously unknown chemicals" developed since World War II was "essentially a political question," but held "[n]onetheless" that the court had jurisdiction to resolve the case.[14] Instead of retreating to the safe harbor of finding the plaintiff's claims against the chemical industry too vast for the court's competency, the state court, like others before it, "reacted by expanding the common law to meet the challenge."[15] The chemical industry could be held liable in tort,[16] and *Schenectady Chemicals* offers a takeaway principle for all courts: no industry nor innovation that imposes dangers on society is "too big to abate."[17]

The parallels between *Schenectady Chemicals* and *City of Oakland* illustrate the foundation of this comment's argument: state courts should decide state torts. The plaintiffs' claims in *City of Oakland* are not an unprecedented assertion of the common law, but instead follow in kind from other state common law tort suits like *Schenectady Chemicals*.[18] This comment contends that *City of Oakland* follows from the principle of judicial federalism and offers additional historical, legal, and policy rationales in support of the panel's decision.

Part I begins with a summary of the City of Oakland's pleadings, as well as similar claims from other jurisdictions.[19] Part I.A shows how the pleadings pose state law tort claims. Part I.B explains how the district court viewed these pleadings to present a federal question that warranted removal, and then, once in federal court, dismissed the plaintiffs' claims for presenting a nonjusticiable

13. *Schenectady Chems.*, 459 N.Y.S.2d at 977.

14. *Id.*

15. *Id.*

16. *See id.*

17. This expansion of the common law follows from the state court's own observation of state courts' role in tort. Its reasoning employs striking rhetoric, noting that "[s]ociety has repeatedly been confronted with new inventions and products that . . . have imposed dangers." *Id.* In addition, a note on parlance. The quip, "too big to abate" riffs off the phrase "too big to fail," describing government relief and protection of Wall Street institutions deemed essential to the financial system. *See* William Safire, Opinion, *Too Big to Fail or to Bail Out?*, N.Y. TIMES (Apr. 6, 2008), https://perma.cc/7FEG-89DD.

18. Brief of Professor Catherine M. Sharkey as Amicus Curiae in Support of Plaintiff-Appellant at 6, City of New York v. Chevron Corp., No. 18-2188 (2d Cir. Nov. 15, 2018) [hereinafter Sharkey Brief].

19. Other cities and states have raised the same claims as the *City of Oakland* plaintiffs in their respective state courts and also faced removal to federal court. *See, e.g.*, Mayor of Balt. v. BP PLC, 952 F.3d 452 (4th Cir.), *cert. granted*, No. 19-1189, 2020 WL 5847132 (Oct. 2, 2020); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142 (D.R.I. 2019), *aff'd sub nom.* Rhode Island v. Shell Oil Prods. Co., No. 19-1818, 2020 WL 6336000 (1st Cir. Oct. 29, 2020); Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947 (D. Colo. 2019), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020); King County v. BP PLC, No. 2:18-cv-00758, (W.D. Wash. May 25, 2018).

federal question because climate change is "too big" a problem for federal common law. The district court's reasoning helpfully frames the Ninth Circuit's course correction, summarized in Part I.C, confirming that state courts decide state common law torts, regardless of the size of the tortious conduct and injury.

Split into two Sections, Part II offers historical, legal, and policy rationales in favor of the Ninth Circuit's holding that state claims for liability for climate change-related injuries can and should proceed in state courts.

Part II.A offers historical and precedential rationales to support the structural argument that state courts decide state torts. The brief historical account describes how state courts developed tort liability at common law over time.[20] State courts, during the Industrial Revolution, developed tort liability to shift the distribution of the costs of industrial accidents from the public to industry and vice versa.[21] This history shows that when decided in state court, no tortious conduct is "too big to abate," as the district court in *City of Oakland* otherwise suggested. The precedential account offers two categories of Supreme Court decisions that safeguard state courts' authority over state torts. The first category of constitutional law cases restricted the reach of substantive due process rights under the Fourteenth Amendment. The second category of proce-

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20. *See, e.g.*, State v. Lead Indus., Ass'n, 951 A.2d 428, 445–46 (R.I. 2008). Faced with a public nuisance suit for the effects of lead paint in buildings and housing around the state, the Rhode Island Supreme Court offered an illustrative description of how state common–lawmaking adapts over time:

> Over centuries, this Court has taken careful steps to refine the common law definition of public nuisance to reflect societal changes. We are cognizant of the fact that the common law is a knowable judicial corpus and, as such, serves the important social value of stability; although the common law does evolve, that evolution takes place gradually and incrementally and usually in a direction that can be predicted.

Id. As a proof point that this notion of state common–lawmaking is neither novel nor jurisdictionally specific, the Washington Supreme Court explained how state common law evolved with innovations in society and industry:

> "What is reasonable under one set of circumstances is unreasonable under another. . . . Noises which in the preindustrial era would have been considered intolerably unreasonable are now tolerated as reasonable. The noise and smoke of railroad trains frequently passing human habitations is not now considered unreasonable, although an equal amount of noise and smoke would doubtless at an earlier time have been considered unreasonable . . . . Every form of industrial activity has its disagreeable factors. . . . The burdens of prosperity must be taken with its benefits."

Powell v. Superior Portland Cement, 15 Wash. 2d 14, 19–20 (1942) (quoting Ebur v. Alloy Metal Wire Co., 304 Pa. 177, 181 (1931)).

21. *See* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 74–78 (explaining how the American notion of public nuisance, in fact, first emerged as a barrier to private suits for nuisance in order to protect private industry, such as wharfs and railroads, from liability from injury caused to others' land).

dural cases set the rule for when state law claims necessarily raise a federal question, in part based on judicial federalism. This comment contends that both sets of precedent evince support for the structural argument that state courts decide state torts.[22]

Part II.B makes a policy argument in support of state court adjudication of climate change tort claims. In large part, this policy argument borrows from the constitutional theory of Judge Jeffrey S. Sutton: that fifty-state solutions to a question of constitutional law are better than one federal solution.[23] The same holds in this tort context: proceeding in state court gives courts fifty shots at the tort question of who bears the cost of climate change. Win or lose, the existence of these suits in state court may pressure future congressional action as more jurisdictions file these climate tort suits, as a similar strategy worked with Big Tobacco.[24] And if states do impose liability on the merits, then those decisions offer a roadmap for allocating liability that may guide court decisions in other lawsuits.[25] This common law accretion functions like a "trial and error"[26] approach to help courts decide complex factual and legal questions.

In conclusion, this comment argues that *City of Oakland* stands for a particular principle of judicial federalism: state courts decide state torts. The possibility that federal courts may waver in this current moment from that structural commitment is real and significant. The Supreme Court has granted certiorari to oil and gas industries' appeal in a similar case, in which the industry seeks federal court review of lower federal court decisions to remand state tort claims to state court where they belong.[27] Yet the pace of climate change hastens.[28] Greater damages incur as time passes—from wildfire season to hurricane and

22. *See also* Henry Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 397 (1964) ("Establishing a body of substantive law for federal courts in matters not otherwise of federal concern is not a legitimate end within the scope of the Constitution; thus to frustrate the ability of the states to make their laws fully effective in areas generally reserved to them would be inconsistent with the constitutional plan.").

23. *See generally* Jeffery S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018).

24. *See* Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 Temp. L. Rev. 825, 835–37 (2004) (explaining the history of public nuisance suits against tobacco manufacturers and Congress's attempt at settlement); *see also* Lindsey F. Wiley, *Rethinking the New Public Health*, 69 Wash. & Lee L. Rev. 207, 242 (2012) (describing how most public nuisance suits failed, and that the few that succeeded were ultimately cut off by Congress); *cf.* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 758–64 (2003) (discussing the history of similar public nuisance litigation and focusing on litigation against the tobacco industry).

25. *See generally* Sutton, *supra* note 23.

26. David F. Levi, *51 Imperfect Solutions: State and Federal Judges Consider the Role of State Constitutions in Rights Innovation*, 103 Judicature 37 (2019) (interviewing Jeffrey Sutton).

27. Jennifer Hijazi, *Justices Pick up Major Climate Liability Case*, E&E News (Oct. 2, 2020), https://perma.cc/9MBQ-27N4; Mayor of Balt. v. BP PLC, 952 F.3d 452 (4th Cir. 2020), *cert. granted*, No. 19-1189, 2020 WL 5847132 (Oct. 2, 2020).

flooding season.[29] Society finds itself in a crucial transition moment.[30] *City of Oakland* recognizes that state common law tort claims may have a role to play, and that only state courts have the power to decide them.

I. *City of Oakland v. BP PLC*

City of Oakland's boomerang journey between state and federal court illustrates the federal judiciary's divergent views on the proper jurisdiction for climate change–related torts. Based on their pleadings alone, the plaintiffs' tort claims centered on the public nuisance arising from oil and gas companies' production and deceptive marketing practices. But the district court issued two opinions, one denying remand and the other granting a motion to dismiss, that reached beyond the plaintiffs' complaint to characterize their claims as arising under federal law yet raising a nonjusticiable federal question. On arrival to the Ninth Circuit, the panel reversed and held that the plaintiffs' claims should have remained in state court.

A. The Plaintiffs' Pleadings

On September 17, 2019, the Oakland City Attorney filed suit against BP, Chevron, ConocoPhillips, ExxonMobil, and Royal Dutch Shell[31] in Alameda County Superior Court.[32] The complaint alleged that those defendants produced and promoted the use of fossil fuels even while knowing the disastrous effects the resulting greenhouse gas emissions would have on the Earth's climate.[33] The City of Oakland contended that the "defendants' campaign of deception and denial supports liability for contributing to a public nuisance."[34] For relief, the City of Oakland sought an order of abatement that would require the oil and gas defendants to fund the "infrastructure in Oakland necessary for the People to adapt to global warming impacts such as sea level rise."[35]

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28. *See* Ann Carlson, *Hurricanes, Wildfires, Climate Change and the Republican 'Platform' and Convention*, Legal Planet (Aug. 26, 2020), https://perma.cc/TDW3-47WA ("More intense hurricanes and more frequent, larger, and hotter wildfires are exactly what scientists predict as a result of rising temperatures caused by climate change.").
29. *See* Umair Irfan, *Why We're More Confident than Ever that Climate Change Is Driving Disasters*, Vox (Sept. 30, 2020), https://perma.cc/3H4F-6NY9.
30. *See The New Energy Order—Is It the End of the Oil Age*, Economist (Sept. 17, 2020), https://perma.cc/M2QS-WYCN.
31. Hereinafter referred to as the "oil and gas defendants."
32. *See generally* Complaint for Public Nuisance, *supra* note 4.
33. *See id.* at 15–16, 21.
34. Vic Sher, *Forum Versus Substance: Should Climate Damages Cases Be Heard in State or Federal Court?*, 73 Stan. L. Rev. Online 134, 136 (2020).
35. Complaint for Public Nuisance, *supra* note 4, at 34.

1. Other Jurisdictions' Similar Pleadings

The City of Oakland did not act alone, as other jurisdictions have sued oil and gas defendants under state tort law for climate change–related injuries.[36] All over the country, localities and states argue that oil and gas defendants are liable for the climate change injuries that resulted from their production and deceptive marketing of fossil fuel products.[37] The total count, as of July 2020, includes at least seventeen different plaintiffs who have brought state law actions in state court seeking compensation for the costs of climate change specific to their jurisdiction.[38]

King County, Washington, for example, alleged that the oil and gas defendants knowingly promoted fossil fuel products even as the companies' internal science warned of the severe effects of climate change.[39] The localized effects of climate change on the coastal-lying King County amount to decreased snowpack and changes in streamflow, increased demand for water, increased risk of forest fires, increased flooding and storm surges, and decreased hydropower yields.[40] These environmental changes are adversely impacting county salmon recovery efforts, and "county assets and infrastructure," among other injuries.[41] Altogether, King County asserted that these harms amount to a "substantial and unreasonable interference with and obstruction of public rights and property, including . . . the public rights to health, safety, and welfare of King County residents."[42] Like the City of Oakland, King County asked oil and gas defendants to fund an abatement program that will aid the county's "resiliency measures to protect against global warming-induced injuries."[43]

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36. *See supra*, note 19. *See also* Morgan Conley, *Minn. Fights to Move Climate Fraud Suit Back to State Court*, LAW360, https://perma.cc/X24H-E7M4 ("The state told the court the relief it's seeking through their state-law claims for product defect and consumer protection is compensation for the damages its population suffered due to the oil industry players' alleged coordinated, multidecade campaign to mislead the public and conceal the climate change risks posed by the production and use of fossil fuels.").
37. Sher, *supra* note 34, at 135–36; *see, e.g.*, Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 146–47 (D.R.I. 2019), *aff'd sub nom.* Rhode Island v. Shell Oil Prods. Co., L.L.C., No. 19-1818, 2020 WL 6336000 (1st Cir. Oct. 29, 2020).
38. *See* Sher, *supra* note 34, at 134 (noting thirteen cases as of May 2020); *see also* Emily Davies, *D.C. Attorney General Sues Oil and Gas Companies, Alleging Industry Misled Public About Climate Change*, WASH. POST (June 25, 2020), https://perma.cc/8HQ9-RY8D (noting the addition of the District of Columbia's case); Ellen M. Gilmer, *Exxon Pushes Minnesota Climate Case from State to Federal Court*, BLOOMBERG NEWS (July 27, 2020), https://perma.cc/L6L6-2WRL.
39. First Amended Complaint at 3, King County v. BP PLC, No. 2:18-cv-00758 (W.D. Wash. Aug. 17, 2018).
40. *Id.* at 79–82.
41. *Id.* at 83.
42. *Id.* at 92.
43. *Id.* at 97.

Rhode Island presents another example as one of the early states to bring a state tort suit against oil and gas defendants. Confronting the reality that "[c]limate change is expensive," Rhode Island "want[ed] help paying for it."[44] The State projected that climate change will damage the State's "manmade infrastructure, its roads, bridges, railroads, dams, homes, businesses, and electric grid; the location and integrity of the State's expansive coastline, along with the wildlife who call it home; [and] the mild summers and the winters that are already barely tolerable."[45] Adapting to these changes, the State alleged, will require "vast sums . . . to fortify before and rebuild after the increasing and increasingly severe weather events; and Rhode Islanders themselves, who will be injured or worse by these events."[46] Because "many of the State's municipalities lie below the floodplain," Rhode Island claimed "it will have more to bear than most."[47] The defendants attempted to remove the suit to federal court, but the First Circuit affirmed the district court's remand order.[48]

Most recently, Minnesota joined the liability fray. In state court, Minnesota alleged that the oil and gas defendants knowingly concealed their products' contribution to climate change.[49] The State's complaint demonstrates that the defendants' conduct accelerated particular climate harms in Minnesota[50] by encouraging further fossil fuel consumption and delaying collective climate action.[51] Diverging from its earlier state and local government counterparts, Minnesota sought more than abatement compensation, requesting that defendants publicly disclose all the research and information in their possession relating to climate change and provide for a corrective education campaign, civil penalties, equitable restitution, and disgorgement of profits, as well as any other relief the court deems proper.[52]

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44. Rhode Island v. Chevron Corp., 393. F. Supp. 3d. 142, 146 (D.R.I. 2019), *aff'd sub nom.* Rhode Island v. Shell Oil Prods. Co., No. 19-1818, 2020 WL 6336000 (1st Cir. Oct. 29, 2020).
45. *Id.*
46. *Id.*
47. *Id.* at 146–47.
48. Rhode Island v. Shell Oil Prods. Co., 2020 WL 6336000, at *6; *see also* Keith Goldberg, *1st Circ. Debates If RI Climate Suit Belongs in Federal Court*, LAW360 (Sept. 11, 2020), https://perma.cc/RZ8G-S5V7.
49. Complaint at 31–38, 53–55, Minnesota v. Am. Petroleum Inst., No. 0:20-cv-01636 (D. Minn. July 27, 2020).
50. *Id.* at 57–70 (alleging that the oil and gas defendants conduct has caused and will cause particular harms to the State, such as annual temperature increases, increased precipitation and flooding with specific instances when the State expended more money to respond to flood disasters, greater strain on the state electric grid, increased public health effects like asthma rates or vector-borne illnesses, harm to state public lands, and planning costs as the State adapts to climate change).
51. *Id.* at 70–72.
52. *Id.* at 82–83.

As the above examples reveal, none of these plaintiffs asserted claims of federal law, or sought to impose liability for emissions themselves.[53] Still, in each of the described actions, the oil and gas defendants sought removal to federal court.[54] In cases where plaintiffs plead only state law claims, removal to federal court should occur only under rare circumstances.[55] The Northern District of California, however, took the removal bait.

B. The District Court: Climate Change Requires a Federal Solution

The district court proceeded in two steps to deny the City of Oakland's claim for liability under state tort law. Initially, the court determined that the federal common law "necessarily governed" the plaintiffs' state claims for liability.[56] After the district court denied remand to state court because federal common law offered a more suitable decision rule, the district court found that the plaintiffs had, in fact, not presented a justiciable claim and granted the oil and gas defendants' motion to dismiss.[57]

The district court denied remand to state court, reasoning that tort liability for the effects of climate change is "necessarily governed" by federal common law.[58] Though the City of Oakland pleaded state law "nuisance claims," the district court held that federal common law governs "the general subject of environmental law" and "includes ambient or interstate air and water pollution," such as greenhouse gas emissions.[59] Federal common law has reached environmental harms even after *Erie Railroad Co. v. Tompkins*,[60] which famously declared "there is no federal general common law."[61] Since the defendants' conduct involved "the worldwide predicament" that is climate change, the court had to employ the "most comprehensive view available."[62] According to the district court, state common law adjudication would be "unworkable" because it

53. *See* Sher, *supra* note 34, at 134–36.

54. *Id.*; *see* 28 U.S.C. § 1441.

55. Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 149–51 (D.R.I. 2019), *aff'd sub nom.* Rhode Island v. Shell Oil Prods. Co., L.L.C., No. 19-1818, 2020 WL 6336000 (1st Cir. Oct. 29, 2020).

56. California v. BP PLC, No. C 17-06011, 2018 WL 1064293, at *2 (N.D. Cal. Feb. 27, 2018), *vacated and remanded sub nom.* City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020), *modified, reh'g denied*, 969 F.3d 895 (9th Cir. 2020).

57. City of Oakland v. BP PLC, 325 F. Supp. 3d 1017, 1028–29 (N.D. Cal. 2018), *vacated and remanded,* 960 F.3d 570 (9th Cir. 2020), *modified, reh'g denied*, 969 F.3d 895 (9th Cir. 2020).

58. California v. BP PLC, 2018 WL 1064293, at *3.

59. *Id.*

60. 304 U.S. 64 (1938).

61. *Id.* at 78.

62. California v. BP PLC, 2018 WL 1064293, at *5.

would leave "a patchwork of fifty different answers to the same fundamental global issue."[63]

It follows, then, that the district court claimed to possess subject matter jurisdiction over the plaintiffs' state law claims because climate change is a national problem. Normally, in assessing subject matter jurisdiction, the "well-pleaded complaint rule" controls, which asks whether the plaintiffs' complaint poses a question of federal law.[64] But here, since the state law claims "depend[ed] on a global complex of geophysical cause and effect involving all nations of the planet (and the oceans and the atmosphere),"[65] the state law claim "demand[ed] . . . as universal a rule of apportioning responsibility as is available."[66] Federal common law provides that universal rule and gives the district court subject matter jurisdiction.[67] Removal was then appropriate.

Possessing jurisdiction, the district court dismissed the plaintiffs' claims as a political question beyond the judiciary's power to decide.[68] In granting the defendant's motion to dismiss, the court framed the dispute as "not over science" but instead "a legal one" that asked "whether these producers of fossil fuels should pay for anticipated harm that will eventually flow from a rise in sea level."[69] The "breathtaking" scope of the plaintiffs' theory of liability "rests on the sweeping proposition that otherwise lawful and everyday sales of fossil fuels, combined with an awareness that [emissions cause climate change] constitute a public nuisance."[70] The plaintiffs' claim for public nuisance under federal common law required "proof that a defendant's activity unreasonably interferes with the use or enjoyment of a public right and thereby causes . . . widespread harm."[71] The district court determined that such a sweeping theory of liability demanded an analysis of climate change's negative effects and also the benefits of greenhouse gas emitting industries.[72] In the district court's view, the latter

63. *Id.*

64. *See* Caterpillar Inc., v. Williams, 482 U.S. 386, 392 (1987).

65. California v. BP PLC, 2018 WL 1064293, at *5.

66. *Id.* (citing Wayne v. DHL Worldwide Express, 294 F.3d 1179, 1184 (9th Cir. 2002)). Judge Alsup also seemed to offer a secondary rationale that since flooding causes the public nuisance injury, and flooding originates from the navigable waters of the United States, the federal courts have proper subject matter jurisdiction as a matter of federal common law. *Id.* When the Ninth Circuit amended the original panel opinion as part of its denial for a rehearing en banc, it rejected this ground for jurisdiction. *See* City of Oakland v. BP PLC, 969 F.3d 895, 900 (9th Cir. 2020).

67. California v. BP PLC, 2018 WL 1064293, at *5.

68. *See* City of Oakland v. BP PLC, 325 F. Supp. 3d 1017, 1028–29 (N.D. Cal. 2018), *vacated and remanded*, 960 F.3d 570 (9th Cir. 2020), *modified, reh'g denied*, 969 F.3d 895 (9th Cir. 2020).

69. *Id.* at 1022.

70. *Id.*

71. *Id.*

72. *Id.* at 1023.

muddles the liability question because "all of us have benefitted" from fossil fuel production.[73] Oil and gas fuels "power plants, vehicles, planes, trains, ships, equipment, homes and factories."[74] The vastness, then, of climate change,[75] placed the legal question of liability for sea level rise outside the judiciary's competency.[76] The extent to which those firms actually responsible for the effects of climate change should be liable is better left to "the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate."[77]

This argument treated oil and gas defendants' conduct as a hazard "too big to abate"[78] through tort.[79] Certainly, the oil and gas defendants have good reason to argue that their conduct is too big to abate, and they endorsed such an argument in their notice of removal here.[80] The move to cast the City of Oakland's theory as beyond the role of the courts, and instead as a political question would not have been possible without the initial denial of remand. On appeal, the Ninth Circuit corrected the legal record. Though its decision was fundamentally grounded in civil procedure, its reasoning followed from the principle that state courts, not federal courts, decide torts.[81]

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73. *Id.* The court's rhetoric is particularly striking and is included in full below:

> With respect to balancing the social utility against the gravity of the anticipated harm, it is true that carbon dioxide released from fossil fuels has caused (and will continue to cause) global warming. But against that negative, we must weigh this positive: our industrial revolution and the development of our modern world has literally been fueled by oil and coal. Without those fuels, virtually all of our monumental progress would have been impossible. All of us have benefitted. Having reaped the benefit of that historic progress, would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded? Is it really fair, in light of those benefits, to say that the sale of fossil fuels was unreasonable?

Id. at 1023–24.

74. *Id.* at 1025.

75. *Id.* ("Our industrial revolution and our modern nation, to repeat, have been fueled by fossil fuels.").

76. *Id.* at 1025–26.

77. *Id.* at 1026.

78. *See supra* note 17, which explains the choice behind using the phrase "too big to abate."

79. City of Oakland v. BP PLC, 325 F. Supp. 3d 1017, 1028–29 (N.D. Cal. 2018) ("It remains proper for the scope of plaintiffs' claims to be decided under federal law, given the international reach of the alleged wrong and given that the instrumentality of the alleged harm is the navigable waters of the United States. Although the scope of plaintiffs' claims is determined by federal law, there are sound reasons why regulation of the worldwide problem of global warming should be determined by our political branches, not by our judiciary."), *vacated and remanded*, 960 F.3d 570 (9th Cir. 2020), *modified, reh'g denied*, 969 F.3d 895 (9th Cir. 2020).

80. *See* Notice of Removal at 10, California v. BP PLC, No. 3:17-cv-06011 (9th Cir. Oct. 20, 2017).

81. *See infra* Part II.

C. The Ninth Circuit: Remanding to State Court

The Ninth Circuit decision in *City of Oakland* held that state courts are the proper home for state law tort claims arising from climate change.[82] The question presented on appeal was whether the district court possessed subject matter jurisdiction when it denied remand.[83] The brief answer: the district court lacked subject matter jurisdiction because neither exception to the "well-pleaded complaint"[84] rule applied. The first exception, often called the *Grable* exception,[85] applies if federal law is an unstated but "necessary element" of the complaint.[86] The second exception, the artful pleading doctrine, applies if federal law completely preempts a state cause of action.[87]

The *Grable* exception uses four factors to determine the presence of a federal question in a state law pleading. The factors are whether the federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."[88] Only a few cases fall under this exception. The eponymous case, *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,[89] is one of those few. Though the action in *Grable* arose under state property law, the case presented the "rare state title case that raises a contested matter of federal law . . . genuine disagreement over federal tax title provisions," and yet had "only a microscopic effect on the federal-state division of labor."[90] In contrast, allowing a state tort claim in federal court would have "attracted a horde of original filings and removal cases raising other state claims with embedded federal issues,"[91] which would have "heralded a potentially enormous shift of traditionally state cases into federal courts."[92]

According to the Ninth Circuit, the City of Oakland's public nuisance claim did not raise a qualifying federal issue. For one, the public nuisance caused by the effects of climate change failed to raise a substantial federal issue.[93] A substantial federal issue involves pure issues of law, like a challenge to a federal statute or the Constitution, where the issue's disposition may control in

82. City of Oakland v. BP PLC, 969 F.3d 895, 901 (9th Cir. 2020).

83. *See id.* at 903.

84. *See* Caterpillar, Inc., v. Williams, 482 U.S. 386, 392 (1987).

85. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).

86. City of Oakland v. BP PLC, 969 F.3d at 901.

87. City of Oakland v. BP PLC, 960 F.3d 570, 579 (9th Cir. 2020).

88. *Id.* at 578 (quoting Gunn v. Minton, 568 U.S. 251, 258 (2013)).

89. 545 U.S. 308 (2005).

90. *Id.* at 315.

91. *Id.* at 318.

92. *Id.* at 319.

93. City of Oakland v. BP PLC, 960 F.3d at 580.

other cases.[94] The plaintiff's public nuisance claim "is no doubt an important policy question, but it does not raise a substantial question of federal law for the purposes of [federal jurisdiction]."[95] Under *American Electric Power Co. v. Connecticut*,[96] it is not clear if any federal common law exists to govern this public nuisance claim for the production of fossil fuels.[97] Additionally, in an oblique reference to the fourth *Grable* factor, the Ninth Circuit added that public nuisance, as the district court admitted as well, involves a fact-intensive cost-benefit analysis better suited to state court.[98]

The second exception, called the "artful pleading doctrine," "allows removal where federal law completely preempts a plaintiff's state-law claim."[99] Complete preemption—when a federal statute provides an exclusive cause of action for a plaintiff seeking state law remedies— is also a rare occurrence.[100] A federal statute must i) evince congressional intent to displace a state law cause of action, and ii) provide a substitute cause of action.[101]

This exception did not apply because the Clean Air Act ("CAA") neither intended to displace state tort law claims,[102] nor provided a substitute federal cause of action.[103] The CAA included Congress's declaration that "air pollution control at its source is primarily the responsibility of States and local governments"[104] and a saving clause, meaning that Congress did not intend for federal regulation to foreclose state common law remedies.[105] Again, the panel also pointed out the relevance of *American Electric Power Co. v. Connecticut*, which displaced federal common law claims to abate greenhouse gas emissions,[106] but left unanswered whether the CAA preempted state common law suits.[107] Similarly, the CAA displaced federal common law nuisance claims, but does not

94. *See id.* at 579.
95. *Id.* at 581.
96. 564 U.S. 410 (2011).
97. In *American Electric Power Co. v. Connecticut*, the Supreme Court held that the Clean Air Act displaced federal common law claims brought to abate interstate greenhouse gas emissions. A group of states, a city, and land trusts sued a collection of electric power corporations under a federal common law theory of nuisance. 564 U.S. at 415. But the Clean Air Act's comprehensive regulatory regime displayed Congress's intent to make "an expert agency, here, EPA," the "primary regulator of greenhouse gas emissions," rather than "[f]ederal judges." *Id.* at 428.
98. *See* City of Oakland v. BP PLC, 960 F.3d at 580–81.
99. Rivet v. Regions Bank of La., 522 U.S. 470, 475 (1998).
100. City of Oakland v. BP PLC, 960 F.3d at 579 ("The Supreme Court has identified only three statutes that meet this criteria . . . .").
101. *See id.* at 580 (citing Hansen v. Grp. Health Coop., 902 F.3d 1051, 1057 (9th Cir. 2018)).
102. *See Am. Elec. Power Co.*, 564 U.S. at 429.
103. *See* City of Oakland v. BP PLC, 960 F.3d at 581–82.
104. *Id.* at 582.
105. *Id.* at 581–82.
106. *Id.*
107. *Am. Elec. Power Co.*, 564 U.S. at 429.

offer any remedy to cities to pursue compensation for fossil fuel production and its resulting emissions.[108]

The Ninth Circuit returned the *City of Oakland* complaint to state court where it belongs. As the panel reasoned under *Grable* and complete preemption, whether the district court's removal was valid concerns the division of labor between state and federal courts. Subject matter jurisdiction is a stopgap to assure a proper division of labor—judicial federalism. Though the oil and gas defendants tried again, the circuit denied their en banc petition,[109] closing the door on the view that the plaintiff's claims necessarily arise under federal common law. Across other circuits, there is a growing consensus that only state courts possess jurisdiction to reach the merits of climate change tort claims for fossil fuel production and deceptive marketing practices.[110] Leaving the state courts to determine the merits of common law liability for the effects of climate change aligns with the Constitution's structure. The second Part of this comment embraces the judicial federalism that underpins *City of Oakland* and explains its significance for pending and future suits in climate change tort cases.

II. Judicial Federalism & the Costs of Climate Change

The discussion of jurisdiction in *City of Oakland* acknowledges that removal to federal court of state law claims would undermine the state-federal court balance. Assigning common law tort liability falls to the states.[111] The liability rule for the effects of climate change, hereafter referred to as "climate tort cases," is no different.[112] When only state law claims are pleaded, climate tort cases "ought to be left to"[113] the state courts to decide on the merits.

Left in state court, no tortious conduct is "too big to abate." State courts should not treat a public nuisance theory of liability as beyond the court's competency, as the federal courts tend to do.[114] Oil and gas defendants see federal court as an attractive venue because those courts take a shallow view of their own competency to apportion liability. In contrast, when these climate tort

108. City of Oakland v. BP PLC, 960 F.3d at 582.

109. *See* City of Oakland v. BP PLC, 969 F.3d 895, 901 (9th Cir. 2020).

110. *See supra* note 19.

111. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

112. *See* Sharkey Brief, *supra* note 18, at 3–4.

113. Friendly, *supra* note 22, at 405.

114. *See* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012). *Juliana* also rejected citizen plaintiff constitutional claims on standing grounds because the requested relief fell beyond the court's Article III power. 947 F.3d at 1175.

cases instead remain in state court, said courts can embrace a familiar role[115] and assess who should bear the costs of climate change.[116]

Whether or not plaintiffs ultimately prevail on the merits, as more jurisdictions engage with the facts and law behind public nuisance and like claims, pressure builds for future federal action to address climate change.[117] If plaintiffs do prevail on the merits, too, a fifty-state roadmap for apportioning liability may also guide either the federal courts or Congress to take affirmative climate action.[118]

A. State Courts Decide State Torts

The plaintiffs in *City of Oakland* and their nationwide counterparts face unspeakable costs from localized climate change effects. Asking who should bear these costs—the public or private industry—is a core principle of tort.[119] Historically, state courts seized the role of evolving common law to industrial innovation and resulting injuries.[120] As illustrated in *Schenectady Chemicals*, state courts have a long history of using common law jurisprudence[121] to react to new injurious conduct by industry.[122] In addition to that history, federal courts themselves have recognized in other contexts the important power of states and their courts to deal with injuries in tort, and particularly environmental torts.[123]

Who bears the cost of activity that injures others in society is central to common law tort cases.[124] In *The Cost of Accidents*, Judge Guido Calabresi clas-

115. *See* Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1557 (1997) ("Instead of emphasizing separate judicial and legislative magistracies, we were using our authority over the common law to find an accommodation between the two branches. There is no readily discernible parallel in the federal courts to the capacity of state courts to craft a legal landscape that encompasses and harmonizes statutory and common law principles."); *see also* Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601, 1607 (2001) (noting state courts perform a "lawmaking function . . . vis-à-vis common law rules").

116. HORWITZ, *supra* note 21 and accompanying text.

117. *See* Jeffrey S. Sutton, *The Enduring Salience of State Constitutional Law*, 70 RUTGERS U. L. REV. 791, 796 (2018).

118. *Id.*; *see also* HORWITZ, *supra* note 21 and accompanying text.

119. Sharkey Brief, *supra* note 18, at 2–3.

120. HORWITZ, *supra* note 21.

121. *See* Hershkoff, *supra* note 9, at 1888.

122. HORWITZ, *supra* note 21.

123. *See, e.g.*, *In re* Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig., 488 F.3d 112, 133 (2d Cir. 2007).

124. *See* Frank I. Michelman, *Pollution as Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647, 653 (1971) ("Society through its legislative *or judicial organs* is of course the author of the very decision (through strict liability) to assign accident costs to manufacturers rather than victims; and society through its courts evaluates the costs of all accidents. . . ." (emphasis added)).

sified this kind of activity as "accidents."[125] Judge Calabresi argued that the decision rules for assigning liability for the cost of accidents involve choosing who bears the cost of injury.[126] He offered guidance that choosing who should bear the cost of accidents should turn on whichever party is the "cheapest cost avoider."[127] Industry is the "cheapest cost avoider" when it can "internalize" the cost of accidents and produce its product in such a way that lessens the likelihood of future injury.[128] Tort liability forces that internalization by holding industry liable for not taking proper measures when they bring their goods or services to market without reducing future injury.[129] This form of incentivizing behavioral changes functions like regulation, and as Judge Richard Posner once articulated "tort law is a form of regulation, and always has been."[130]

This understanding of tort liability grafts on to climate tort cases. In an amicus brief for a climate tort case brought by the City of New York,[131] Professor Catherine Sharkey explained how the City's claim for public nuisance against oil and gas defendants posed the question of cost internalization in the climate change context.[132] The City of New York, like the City of Oakland and other plaintiffs, sought "to force the fossil fuel defendants to pay for the damages caused by their production and sale of fossil fuels and thus to internalize the external cost associated with the consumption of fossil fuels through regular tort principles."[133] Sharkey supported the plaintiff's claims on the merits and argued that "tort liability would reasonably have [the defendants] internalize this cost,"[134] for the oil and gas defendants are likely the "cheapest cost avoiders."[135] Imposing damages is within the competency of a New York court, because "with damages, a court can therefore focus . . . on imposing liability . . . while leaving it to the fossil fuel companies to figure out how this is best done."[136] The oil and gas defendants, not the court, decide the ultimate plan for emissions reduction, for the cost of climate accidents shifts from burdening the citizens of New York to burdening fossil fuel production, which is "also better situated to induce . . . steps to reduce emissions."[137] The logic in Professor

125. *Id.* at 647.

126. *See id.* at 654.

127. *Id.* at 655.

128. *See id.* at 655–56.

129. *Id.*

130. Eric A. Posner, *Tobacco Regulation or Litigation?*, 70 U. Chi. L. Rev. 1141, 1155 (2003).

131. City of New York v. Chevron Corp., No. 18-2188 (2d Cir. Nov. 15, 2018).

132. *See* Sharkey Brief, *supra* note 18, at 2.

133. *Id.*

134. *Id.* at 2.

135. *Id.* at 10.

136. *Id.* at 15.

137. *Id.*

Sharkey's amicus applies equally to other climate tort cases, like *City of Oakland*.

The City of Oakland's efforts to redistribute the costs of climate change from the public to industry aligns with state courts' historic roles. State courts' "common law lawmaking has been from the beginning an accepted feature of state and local governance."[138] In the nineteenth century, state courts fashioned common law tort rules in a systematic way that favored economic growth.[139] As Morton Horwitz described in *The Transformation of American Law*:

> Under traditional legal doctrine, trespasses or nuisances to land could not be justified by the social utility of the actor's conduct nor could the absence of negligence serve as a limitation on legal liability for injury to person or property. And since many of the schemes of economic improvement had the inevitable effect of directly injuring or indirectly reducing the value of portions of neighboring land, common law doctrines appeared to present a major cost barrier to social change.[140]

But nuisance liability did not impede growth, as state courts denied claims, many of which shared the structure of the claims brought by the City of Oakland.[141] There is some debate about Horwitz's conclusion[142] that state courts acted with systematic intention in subsidizing economic growth and transportation networks.[143] Putting aside intentionality, it is clear as a historical matter that the change in common law had the effect of redistributing liability costs from industry to the public, and the individual.[144]

The City of Oakland's complaint seeks to shift the cost of climate injuries under a common law theory of public nuisance. If anything, its legal argument is less radical than the switch flipped by nineteenth-century state courts, when

138. Hershkoff, *supra* note 9, at 1889.

139. HORWITZ, *supra* note 21, at 68–69.

140. *Id.* at 70.

141. *Id.* at 75–76 ("If most judges did not follow the Kentucky court in openly reshaping the law of nuisance, they shared that court's partiality toward economic development. As a result, while the formal doctrine appeared to change very little, judges began to establish a variety of ingenious variations in its application that eventually transformed the substance doctrine itself. The effect of these changes was that individuals who sought damages due to injuries from great works of public improvement were frequently denied the benefits of a nuisance doctrine that, formally at least, seemed to provide the injured party with all the advantages.").

142. Eric Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 30 (1972).

143. HORWITZ, *supra* note 21, at 101.

144. *Id.* at 75–76; Gifford, *supra* note 24, at 804 ("It would appear that Horwitz is correct, however, in his core conclusion that the perceived need to protect railroads and emerging industries from ruinous damage judgments discouraged at least some courts from awarding private plaintiffs damages on either public nuisance or a private nuisance theory.").

"virtually all injuries were still conceived of as nuisances, thereby invoking a standard of strict liability," which tended to ignore the specific character of the defendant's act until "many types of injuries had been reclassified under a 'negligence' heading," to reduce industry's liability.[145] Instead, the City of Oakland leverages the existing common law of their jurisdiction to impose liability.[146] The California Civil Code codifies common law public nuisance as "anything which is injurious to health, including . . . an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property"[147] affecting an "entire community or neighborhood."[148] This definition of public nuisance is surely inclusive of environmental harms, such as increased flooding from sea level rise.[149] To impose liability on the fossil fuel industry instead of the public, especially in a moment of energy transition, is as timely now as the opposite move was during the Industrial Revolution.[150]

Additionally, the special role that tort liability plays in state courts has legal precedent. Recently, in *Juliana v. United States*,[151] plaintiffs sought vindication under the Constitution, including the Fourteenth Amendment, for the effects of climate change.[152] These claims arise from the so-called "state-created danger doctrine."[153] There are very few examples where plaintiffs have successfully invoked this doctrine.[154] Tragic facts, such as a state's failure to help a child in an abusive home[155] or a failure to enforce a restraining order[156] have failed to persuade the Supreme Court. The *Juliana* plaintiffs won on this ground at the district court, but their success was short-lived.[157] Overall, the Supreme Court has denied that the Fourteenth Amendment vindicates these kinds of injuries, in deference to state tort law's liability-assigning role.[158] Without a limit on the

145. HORWITZ, *supra* note 21, at 85.

146. *See* Complaint for Public Nuisance, *supra* note 4.

147. CAL. CIV. CODE § 3479.

148. *Id.* § 3480.

149. *See* Complaint for Public Nuisance, *supra* note 4, at 33. Plaintiffs in *City of Oakland* seek compensation for the public nuisance arising from "damage from global warming-induced sea level rise, greater storm surges, and flooding" among other injuries to the public welfare. *Id.*

150. Nafeez Ahmed, *The End of the Oil Age Is upon Us*, VICE (Aug. 26, 2020), https://perma.cc/46LZ-CYY7.

151. 217 F. Supp. 1224 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2019).

152. *Id.* at 1251 (citing Penilla v. Huntington Park, 115 F.3d 707, 709 (9th Cir. 1997)).

153. Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1 (2007).

154. *Id.*

155. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 203 (1989).

156. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 768–69 (2005).

157. *See Juliana*, 217 F. Supp. at 1251 (citing *Penilla*, 115 F.3d at 709).

158. *See DeShaney*, 489 U.S. at 203 (noting that states may fashion their own "system of liability which would place upon the State and its officials the responsibility for failure to act" in the face of danger); *Town of Castle Rock*, 545 U.S. at 768–69.

reach of the right to due process in the face of deprivation of life, liberty, or property, the Constitution risks treating "the Fourteenth Amendment as 'a font of tort law.'"[159]

Underpinning these constitutional decisions lies a recognition of state courts' unique common law–making tort role, and federal courts should take notice. Though state-created danger cases usually involve plaintiffs who want to expand the scope of the Fourteenth Amendment to increase liability, federal courts should be equally wary of defendants who want to expand the scope of Article III jurisdiction to evade liability.[160] *Erie* shut down federal general common law because up until the decision "federal courts [had] an inappropriate role within our federal system by providing a forum through which repeat-player tort defendants could seek, and often find, more favorable treatment, than they tended to receive under state law."[161] That fear predicts the oil and gas defendants' strategy in *City of Oakland* and its counterparts. Many state jurisdictions already recognize that state tort law should remedy and prevent "environmental damage."[162] But cases like *Juliana*, *Native Village of Kivalina v.*

159. *Town of Castle Rock*, 545 U.S. at 768–69.

160. *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 436 (2016).

161. *Id.* A reader may also ask: what about federal common law for interstate pollution, and other transboundary environmental harms? *See Georgia v. Tenn. Copper*, 206 U.S. 230 (1907); *see also Missouri v. Illinois*, 180 U.S. 208 (1901). It is worth clarifying the distinction between federal and state common law, in case any confusion remains for the reader. The takeaway principle from this comment should be that when plaintiffs plead state common law claims, there is no role for federal courts to dismiss the case as nonjusticiable or for the federal common law to supply the decision rule for the case. *Erie*'s pronouncement that "there is no federal general common law," is a statement denying the federal courts the power to supply their own common law decision rule when exercising jurisdiction to entertain a state law claim. It does not, however, deny that there might be a form of federal common law that is *specialized* to federal circumstances, as Judge Friendly described in his piece defending the *Erie* decision and its consequences. *See* Friendly, *supra* note 22, at 405. When state and local government plaintiffs sue for interstate pollution on behalf of their citizens, the question presented may be one of federal common law, not state common law. As the Supreme Court recognized in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), federal common law fills the gaps of federal positive law: "The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. . . . When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* at 103. *City of Milwaukee* neatly follows the paradigm that Judge Friendly suggests. *Erie* "[left] to the states what ought to be left to them," which led to the emergence of "a federal decisional law in areas of national concern. . . . The clarion yet careful pronouncement of *Erie*, 'There is no federal common law,' opened the way to what, for want of a better term, we may call specialized federal common law." Friendly, *supra* note 22, at 405 (citations omitted). In conclusion, state common law claims should be "left" in state court. Federal common law, therefore, does not present a decision rule relevant to the climate tort cases such as *City of Oakland*.

162. *In re* Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig., 488 F.3d 112, 133 (2d Cir. 2007)

ExxonMobil Corp.,[163] *Clean Air Council v. United States*,[164] and the district court in *City of Oakland* show that repeat player defendants know that removal to federal court is more likely to protect them from liability.[165]

The *City of Oakland* district court's view that tortious conduct can be so "comprehensive" as to evade state common law liability specifically is without legal precedent.[166] *Grable* considers the division of labor between state and federal courts before granting federal jurisdiction over state law pleadings in order to avoid opening the "floodgates" of state litigation.[167] The Supreme Court feared a situation like *Merrell Dow Pharmaceuticals Inc. v. Thompson*,[168] which asked whether a state law claim for misrepresentation necessarily raised a federal issue.[169] Removal, however, was improper because absent a federal statutory right of action for misrepresentation, "federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues."[170] If the bigness of tortious conduct alone raised a federal issue requiring federal jurisdiction, that quality, too would apply to a "tremendous number of cases," in tort and open the floodgates for tort suits in federal court.[171]

The Supreme Court has ultimately recognized that valuing federalism necessitates respect and deference for state common law authority in tort. The evidence lies in the fear that an expanded Fourteenth Amendment would "destroy the boundary between common law tort and the Constitution"[172] as well as the application of *Grable*'s fourth factor.[173] *City of Oakland* thus cautions fu-

163. 96 F.3d 849 (9th Cir. 2012).

164. 362 F. Supp. 3d 237 (E.D. Pa. 2019).

165. City of Oakland v. BP PLC, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018) ("Nuisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus."), *vacated and remanded*, 960 F.3d 570 (9th Cir. 2020), *modified*, *reh'g denied*, 969 F.3d 895 (9th Cir. 2020).

166. *See, e.g.*, Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984). Asked to determine whether state law remedies for nuclear accidents remained available (as in not-preempted) by national regulatory efforts surrounding nuclear safety, the Supreme Court concluded that it would not deny the availability of state law remedies for nuclear accidents without express evidence of congressional intent to do so. *Id.*

167. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 318 (2005).

168. 478 U.S. 804 (1986).

169. *Id.* at 806–07.

170. *Grable*, 545 U.S at 318 (summarizing the Court's reasoning in *Merrell Dow*).

171. *Id.*

172. Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 624 (1983).

173. *Grable*, 545 U.S at 318.

ture federal courts, perhaps even the Supreme Court itself,[174] that removing climate tort cases to federal court would upset this careful balance. This comment outlines *City of Oakland*'s implicit urging to its fellow federal courts: take notice, not of removal, but of the savvy oil and gas defendants acting to evade liability for their own profit.

B. The Consequences: A Congressional Settlement or Fifty Tort Solutions

The final section of this comment speculates on the possible consequences of leaving state courts to adjudicate the climate tort cases. Regardless of the ultimate result on the merits, plaintiffs like the City of Oakland should continue to bring claims against energy company defendants in state court, and seek remand if subject to federal removal. As Horwitz suggests,[175] and others confirm,[176] in the past, state courts have evolved their common law to shift liability to redistribute the costs of industry. The same outcome is possible for the costs of climate change. But win or lose, the aggregate of fifty states (plus the District of Columbia) may still offer a roadmap for "more comprehensive"[177] federal action.

Tort litigation can force federal or state legislators to settle the cases.[178] In a closely analogous litigation strategy, multiple states filed tort and consumer fraud claims, including public nuisance, against tobacco companies.[179] These lawsuits exerted market and financial pressure on tobacco companies, exposing them to liability risk in forty jurisdictions.[180] The tobacco defendants turned to settlement negotiations to release these pressures.[181] At first, the initial settlement agreement failed on the floor of Congress.[182] The second agreement, no longer requiring congressional approval, allocated damages to "forty-six states, the District of Columbia, and five U.S. territories" to "reimburse them for the cost of treating smoking-related illnesses under the Medicaid program," "additional payments to the states in perpetuity to reimburse them for smoking-

174. *See* Alison Frankel, *Big Oil Repeatedly Remanded to State Courts—Will SCOTUS Come to the Rescue?*, REUTERS (July 8, 2020), https://perma.cc/G52M-CATT (describing other litigation either beginning in state court, removed to district court or on appeal).

175. *See* HORWITZ, *supra* note 21, at 74–78.

176. *See* Gifford, *supra* note 24, at 803–04.

177. California v. BP PLC, No. C 17-06011, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018), *vacated and remanded sub nom*. City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020), *modified, reh'g denied*, 969 F.3d 895 (9th Cir. 2020).

178. *See* Ausness, *supra* note 24, at 835–37; Lindsey F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207, 245 (2012); *cf.* Gifford, *supra* note 24 at 758–64.

179. *See* Ausness, *supra* note 24, at 833.

180. *See id.* at 833–35.

181. *See* Gifford, *supra* note 24, at 747; *see also* Ausness, *supra* note 24, at 835–36.

182. *See* Ausness, *supra* note 24, at 836.

related Medicaid costs," as well as advertising and branding.[183] The relative success of this multistate tort litigation strategy inspired similar, but less successful, strategies "against the manufacturers of handguns and lead-pigment."[184] Plaintiffs bringing climate tort cases already gesture towards this history to justify their approach.[185] This possibility is especially true following the change in presidential administrations.[186]

Regardless of whether the City of Oakland is victorious on the merits, the spread of climate tort cases may also sketch a roadmap for other courts to decide those disputes. Judge Jeffrey S. Sutton sits on the federal Sixth Circuit but he expounds a theory of judicial federalism for constitutional law that closely mirrors this comment's view of judicial federalism in tort.[187] A core principle of Judge Sutton's theory is that state courts interpreting state constitutions "can play an important role in the process of doctrinal change."[188] As state courts accumulate results, that can "provide an indication of 'changing norms'" otherwise inaccessible to the Supreme Court and other federal courts.[189] Judge Sutton likens this process of state constitutional accretion to "build[ing] common law doctrines from the ground up, whether in torts, property, or contracts."[190] As he describes it, common law or constitutional accretion allows for "trial and error here, trial and error there,"[191] invoking Justice Brandeis's famous idea of state legislatures as policy laboratories.[192]

Applying Judge Sutton's theory to climate tort cases emphasizes the importance of leaving climate tort cases in state courts. The trial-and-error approach allows competing solutions to apportioning liability for the costs of climate change. As the *City of Oakland* district court stated, the disputed issue is "not over science" but the legal rule for liability.[193] Different state jurisdictions can respond to the localized effects of climate change pleaded before them and apportion liability as the evidence requires. Federal district courts may be ham-

183. *Id.* at 836–37.

184. Gifford, *supra* note 24, at 747.

185. Erik Larson, *Exxon's Climate Trial Is Over in New York. But the Legal War Is Just Beginning*, L.A. Times (Nov. 15, 2019), https://perma.cc/V5F6-98CU.

186. Ellen M. Gilmer & Stephen Lee, *Biden's Climate Support Could Spawn More Cases Against Big Oil*, Bloomberg L. News (July 22, 2020), https://perma.cc/Z5PG-4WFL.

187. *See generally* Sutton, *supra* note 23 (describing a theory of state constitutionalism that empowers state courts to independently assess the federal Constitution and their own state constitution).

188. Goodwin Liu, *State Courts and Constitutional Structure*, 128 Yale L.J. 1304, 1323 (2019).

189. *Id.*

190. Sutton, *supra* note 117, at 796.

191. Levi, *supra* note 26.

192. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

193. *See* City of Oakland v. BP PLC, 325 F. Supp. 3d 1017, 1022 (N.D. Cal. 2018), *vacated and remanded*, 960 F.3d 570 (9th Cir. 2020), *modified, reh'g denied*, 969 F.3d 895 (9th Cir. 2020).

strung by the fact that their decisions set a national rule,[194] whereas state courts can apportion liability and set the remedy in their jurisdiction.[195] Eventually, the trial-and-error approach may even convince judges and justices that climate change is nonjusticiable.[196]

On some level, the persuasiveness of judicial federalism for climate torts assumes that state courts will, at least sometimes, find for the plaintiffs on the merits. The cost of climate change seems too great. But the positive valence is not necessary for this argument's strength. If state courts decide that tort should not hold industry liable for the cost of accidents, perhaps as a matter of fairness given the ubiquity of fossil fuel use,[197] that outcome would still result from plaintiffs' taking up to fifty shots in state courts, rather than only one shot in federal court.[198]

Conclusion

"The common law is not static;" it evolves.[199] *City of Oakland* joins the chorus of appellate courts denying federal question jurisdiction for state court tort claims arising from the effects of climate change. The Ninth Circuit's deft deployment of civil procedure assures that the careful balance between federal and state courts remains struck. In effect, *City of Oakland* stands for the principle that state courts *do* and *should* decide state torts. As the effects of climate change spread,[200] society can only hope that state courts will find an answer to

194. *See* California v. BP PLC, No. C 17-06011, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018), *vacated and remanded sub nom.* City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020), *modified, reh'g denied*, 969 F.3d 895 (9th Cir. 2020).

195. Sutton, *supra* note 117, at 796; Liu, *supra* note 188, at 1313–14 ("Instead, Judge Sutton treats state constitutionalism as a structural mechanism for American constitutional law to develop in a manner that accounts for 'differences in culture, geography, and history,' fosters a diversity of approaches to difficult questions instead of 'winner-take-all solutions,' facilitates experimentation that is 'easier to correct' and allows 'the National Court [to] assess the States' experiences' before deciding a federal constitutional issue.").

196. Sutton, *supra* note 117, at 796. ("After the evidence is in, the pragmatic judge can decide whether to nationalize the issue, to allow more time, or to leave the issue to States."); *see also* Liu, *supra* note 188, at 1339 ("[I]nnovation by state courts can inform federal constitutional adjudication, allowing the U.S. Supreme Court to assess what has worked and what has not. The notion of states as laboratories suggests that 'whenever the Court confronts a federal constitutional problem with a state analogue, it might usefully learn from the experience of the state courts that got there first.").

197. City of Oakland v. BP PLC, 325 F. Supp. 3d at 1023–24 ("[W]ould it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded?").

198. *See* Sutton, *supra* note 117, at 793.

199. State v. Schenectady Chems., Inc., 459 N.Y.S.2d 971, 977 (Sup. Ct. 1983).

200. Bill McKibben, *The World Has Reached Decision Time on the Climate Crisis*, New Yorker (Aug. 12, 2020), https://perma.cc/AYS2-PP98.

the question posed in the City of Oakland's complaint: who compensates society for the cost of the damage wrought? As jurisdictions follow the City of Oakland and their counterparts, the fossil fuel industry may begin to finally feel the costs of their deception.[201]

201. *See generally* NAOMI ORESKES & ERIC M. CONWAY, MERCHANTS OF DOUBT (2010).