Change the System, Not the Climate: Advocacy for a Unified Circuit Court of Appeals for Environmental Litigation

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ABSTRACT

Over the last 150 years, the United States' view of the environment has experienced significant changes. The beginning of the 20th century saw the first uses of the common law to protect the environment. The 1970s brought an increasing awareness of human effects on the environment and brought about sweeping legislation intended to protect the environment. In more recent years, however, progress has stalled. Environmental law in the United States has become a quagmire, with all three branches of government seemingly unable to find a path forward. Interweaving threads of common law and statutory law have transformed environmental law into a modern-day Gordian Knot, seemingly impossible to unravel. Attempts to pass comprehensive environmental legislation have had no success.

While Congress is deadlocked, the environment continues to suffer. Environmental plaintiffs have continued to battle a reluctant judiciary, crafting increasingly nuanced methods designed to overcome precedential hurdles. The federal courts, the intended forum for national issues, are seemingly unable to adjudicate. As a result, plaintiffs have brought massive environmental suits in state courts. This wave of litigation has created a new problem: a patchwork of state judiciaries across the United States unable to agree on consistent solutions to environmental problems.

Congress should acknowledge the improbability of comprehensive environmental legislation and look to history for a solution. Congress solved remarkably similar problems in the field of patent law by creating the Federal Circuit, collapsing competing jurisdictions into a single court and unifying patent law across the country. This Comment suggests Congress should create a Unified Circuit Court of Appeals for Environmental Litigation to cut through the Gordian Knot and unify environmental law across the United States.

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Table of Contents

I. INTRODUCTION

Climate change,[1] specifically the sensation known as global warming,[2] is a global issue. In the United States, the majority of adults believe the federal government is not taking enough action to combat climate change.[3] Congress cannot agree on environmental legislation—comprehensive or otherwise—that would slow or stop climate change's effects.[4] Exacerbating this problem, administrative guidance changes with

1. *See What is Climate Change?*, UNITED NATIONS, https://bit.ly/3K7ogLg (last visited Feb. 28, 2022) (defining climate change as "long-term shifts in temperatures and weather patterns").

2. *See Global Warming*, BRITANNICA, https://bit.ly/3psdmb0 (last visited Feb. 28, 2022) (defining global warming as the "phenomenon of increasing average air temperatures near the surface of Earth over the past one to two centuries").

3. *See generally* Cary Funk & Meg Hefferon, *U.S. Public Views on Climate and Energy*, PEW RSCH. CTR. (Nov. 25, 2019), https://pewrsr.ch/3uODe3N (showing 67% of U.S. adults think "the federal government is doing too little to reduce the effects of global climate change").

4. *See infra* Section II.A.3.

each president's political leanings.[5] While Congress treads water, the judiciary scrambles, and the executive branch flip-flops, the effects of the United States' current piecemeal approach to environmental policy are becoming harder to ignore.[6] For California's citizens, which recently experienced five of the State's ten largest wildfires in history, the world is quite literally burning around them.[7] With no clear answers or solutions, the time has come for the United States to take action.

Part II of this Comment briefly explores environmental law's history, beginning with its common law roots.[8] Part II examines the common law's history in the United States and the conflicts arising from the United States federal system,[9] and briefly summarizes selected developments in statutory environmental law.[10] Part II then transitions to a discussion of environmental litigation, beginning with an abbreviated history of the Supreme Court's environmental precedents.[11] Part II continues by surveying current environmental litigation occurring across the United States to assess the current state of environmental law throughout the nation.[12] Finally, Part II utilizes the patent law appellate court system to illustrate a transition from a fragmented system to a single, specified system,[13] comparing the complexities present in patent law, and the benefits gained by containing litigation in a single circuit.[14]

Part III of this Comment analyzes the problems facing environmental law in the United States and demonstrates the need for the creation of a single appellate circuit to handle environmental litigation by comparing issues facing environmental law to those previously faced by the patent law system.[15] Part III recommends that Congress create a specialized Court of Appeals for Environmental Litigation, and specifically grant the Court of Appeals jurisdiction over state common-law based environmental

5. *See* Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES (Jan. 20, 2021), https://nyti.ms/3eF9c8U.

6. *See generally The Effects of Climate Change*, NASA, https://go.nasa.gov/3bpTsW8 (last visited Feb. 21, 2021) (describing effects of climate change on the United States).

7. *See* Michael McGough, *5 of the 10 Largest Wildfires in California History Now Currently Burning*, SACRAMENTO BEE (Sept. 18, 2020, 2:38 PM), https://bit.ly/35PimgI.

8. *See infra* Section II.A.1.

9. *See infra* Section II.A.2.

10. *See infra* Section II.A.3.

11. *See infra* Section II.B.1.

12. *See infra* Section II.B.2.

13. *See infra* Sections II.C.1, II.C.2.

14. *See infra* Sections II.C.1, II.C.2.

15. *See infra* Section III.A.

claims.[16] Finally, Part IV offers concluding statements on issues raised in this Comment.[17]

II. BACKGROUND

Current environmental law in the United States is a tangled web of interweaving threads of common law, statutes, regulations, and litigation.[18] The daunting task of understanding modern environmental law is best navigated by breaking environmental law into its basic components: common law and statutory law.[19] This Part will first describe environmental law's history, beginning with its common law roots[20] and moving to subsequent foundational environmental legislation.[21] Critical judicial decisions and environmental litigation will then be explored to better understand the problems facing modern environmental litigants.[22] Finally, the historical problems faced by patent law and their resolution via the creation of the Court of Appeals for the Federal Circuit will provide perspective for problems currently facing environmental law.[23]

A. A Brief History of Environmental Law

Modern environmental law in the United States is complex, fluid, and sometimes inconsistent. The United States government's unique structure has resulted in a jumble of jurisdictions, statutes, and regulations that make understanding environmental law frustratingly difficult.[24] As with many difficult tasks, it is helpful to start at the beginning. Indeed, the beginnings of environmental law are found in the history of the common law, specifically in the tort of nuisance.[25]

1. The Common Law

The common law is "law derived from judicial decisions instead of from statutes."[26] American common law originates in the Nation's early days as a British colony and was largely inherited from the more mature

16. *See infra* Section III.B.
17. *See infra* Part IV.
18. *See infra* Sections II.A.1, II.A.2, II.A.3.
19. *See infra* Sections II.A.1, II.A.3.
20. *See infra* Section II.A.1.
21. *See infra* Section II.A.3.
22. *See infra* Sections II.B.1, II.B.2.
23. *See infra* Sections II.C.1, II.C.2.
24. *See infra* Sections II.A.3, II.B.
25. *See* State v. Schweda, 736 N.W.2d 49, 56 (Wis. 2007) ("There is no question that modern environmental law finds its roots in common law nuisance.").
26. *Common Law*, CORNELL L. SCH. LEGAL INFO. INST., https://bit.ly/3iQWKVR (last visited Mar. 22, 2022).

English common law.[27] As a result, much of American common law can trace its roots to decisions of English courts dating to before the United States' founding.[28] The tort of nuisance is one portion of American common law that can be tracked back to British common law, with the tort first originating hundreds of years ago.[29]

An early and foundational application of the doctrine of nuisance is found in *Aldred's Case*, in which a British court considered the case of a man whose neighbor had built a hog stye on the border of his property.[30] The plaintiff asserted that the odors from the neighbor's stye "corrupted" the air around the plaintiff's home.[31] The court held that the plaintiff could recover for the harm to the "use and profit of his house" due to the nuisance created by his neighbor,[32] allowing the plaintiff to protect the use of his land and the quality of the air around it.[33]

In the modern formulation of nuisance, a nuisance generally occurs when "a person . . . is engaged in an activity or is creating a condition that is harmful or annoying to others and for which he is legally liable . . . ."[34] In the 400 plus years since the tort of nuisance's recognition, nuisance has been split into two distinct causes of actions: "private nuisance"[35] and "public nuisance."[36]

Private nuisance is largely an evolution of the first nuisance doctrine recognized by the British courts.[37] Modern jurisprudence defines a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[38] American courts accepted private nuisance as early as 1828, when a Kentucky court allowed a man to recover damages for a neighbors' placement of a pig carcass in a natural spring, polluting the water leading through the plaintiff's property.[39] This case, and others from the time period, show that early nuisance jurisprudence

27. *See* Mary Ann Glendon et al., *Common Law*, BRITANNICA (Oct. 30, 2020), https://bit.ly/3cf9XpZ.

28. *See id.*

29. *See* Keiswetter v. City of Petoskey, 335 N.W.2d 94, 97 (Mich. Ct. App. 1983).

30. *See* Aldred's Case (1610) 77 Eng. Rep. 816, 816.

31. *See id.*

32. *See id.* at 821–22.

33. *See id.*

34. *Keiswetter*, 335 N.W.2d at 97 (quoting RESTATEMENT (SECOND) OF TORTS § 821A cmt. b(3) (AM. L. INST. 1979)).

35. *See infra* Section II.A.1.

36. *See infra* Section II.A.1.

37. *Compare* Aldred's Case (1610) 77 Eng. Rep. at 821–22 (finding nuisance when "[D]efendant maliciously . . . deprive[d] the plaintiff of the use and profit of his house"), *with* Phila. Elec. Co. v. Hercules, Inc., 762 F.2d 303, 313 (3d Cir. 1985) (discussing and applying the modern formulation of private nuisance).

38. *Phila. Elec. Co*., 762 F.2d at 313 (quoting RESTATEMENT (SECOND) OF TORTS § 821D (AM. L. INST. 1979)).

39. *See* Tate v. Parrish, 23 Ky. 325, 326 (1828).

predominantly dealt with pollution of a water supply,[40] foreshadowing the later use of nuisance claims in environmental litigation.

A related tort now known as public nuisance was first recognized by an English court following the introduction of private nuisance into English common law in the early 1600s.[41] Today, courts define a public nuisance as "a substantial and unreasonable interference with a right common to the general public . . . ."[42] Courts soon recognized that public nuisance was an avenue to protect the rights of the public at large without a statutory cause of action.[43]

Early environmental law cases in the United States illustrate the historical use of public nuisance by states to protect the health and welfare of citizens against pollution.[44] The doctrine of public nuisance also quickly became a powerful tool for states to protect the natural environment.[45] The states' successes in asserting nuisance claims to abate pollution in the early 1900s cemented common law's role in environmental litigation.[46]

However, the federal system in the United States means that two systems of law exist in tandem: state law and federal law.[47] This tandem system has resulted in the existence of bodies of common law at both the state and federal levels, making uniform application of common law principles difficult.[48]

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40. *See generally* Chipman v. Palmer, 77 N.Y. 51 (1879) (allowing damages against the owner of a boarding house for dumping sewage into a creek upstream from the plaintiff's property).

41. *See generally* James v. Hayward (1630) 79 Eng. Rep. 761 (holding that a gate placed across a public highway constituted "a common nuisance" and may be destroyed).

42. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 771 (7th Cir. 2011) (quoting RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979)).

43. *See id.* at 770 (noting ability of courts to use common law to "fill in 'statutory interstices'").

44. *See infra* Section II.B.1.

45. *See infra* Section II.B.1.

46. *See* Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91, 94 (1972) (holding that there was federal common law in the realm of interstate pollution and citing to landmark decisions of the early 1900's, including *Missouri v. Illinois*); *see also* Missouri v. Illinois, 180 U.S. 208, 241 (1901).

47. *See* U.S. CONST. amend. X.

48. The separation of the judicial system of the United States into federal and state branches has resulted in uneven applications of the common law. *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co. (*Black & White Taxicab*), 276 U.S. 518, 529–30 (1928) (discussing the ability of federal courts to "exercise their own independent judgement" and not follow decisions of state courts). *But see* Lehman Brothers v. Schein, 416 U.S. 386, 390–91 (1974) (overturning a decision by a federal Court of Appeals and requiring that the federal court certify a question of law to the Florida Supreme Court in the interest of promoting "judicial federalism").

2. The Fractured History of Federal and State Common Law in the United States

The federal system created by the United States Constitution is carefully crafted to ensure that the federal government's power does not overwhelm the independent power held by each state in its own territory.[49] The Constitution explicitly enumerates certain powers to the federal government, and leaves all other powers to the individual states.[50] Though most often associated with the legislative branches of state and federal governments, the judicial system is equally important to the balance of state and federal power.[51] The Constitution grants each state in the union the ability to create and maintain their own system of courts, independent from the federal judiciary.[52] The Constitution largely left the structure and function of the courts up to Congress and the legislatures of the states.[53] Indeed, the United States Constitution explicitly created only a Supreme Court, leaving the creation of other federal courts up to the discretion of Congress.[54] While the wisdom of this hands-off approach has been proven over time, the approach also meant that many questions revolving around issues not addressed in the Constitution arose after the country was founded.[55] One such question was how the separation of governance in the United States would affect the now dueling bodies of common law.[56]

In the early 1800s, the Supreme Court had its first opportunity to answer this question, ruling in *Swift v. Tyson* that state courts interpreting the common law could not bind the federal judiciary, including the Supreme Court itself.[57] This decision de facto created two separate bodies of common law in the United States: federal common law and state

49. *See* Bond v. United States, 564 U.S. 211, 221 (2011) ("The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.").

50. *See* U.S. CONST. amend. X.

51. *See generally Bond*, 564 U.S. at 221–24 (discussing in part role of judiciary in maintaining balance of powers).

52. *See* Pub. Serv. Co. v. Corboy, 250 U.S. 153, 162 (1919) (noting Constitution does not limit the power of states to create courts).

53. *See generally* U.S. CONST. art. III (granting Congress power to create courts as it sees fit); *see also Pub. Serv. Co.*, 250 U.S. at 162.

54. U.S. CONST. art. III, § 1, cl. 1.

55. *See generally* Swift v. Tyson, 41 U.S. 1 (1842) (examining the nature of the common law in the United States); *see also* Marbury v. Madison, 5 U.S. 137, 166 (1803) (deciding question of Supreme Court authority).

56. *See generally Swift*, 41 U.S. 1 (examining nature of the common law in the United States).

57. *See id.* at 18–19.

common law.[58] This separation duplicated causes of action under the common law, resulting in each respective body of common law having its own causes of action.[59]

The Supreme Court reaffirmed the separation of federal and state common law in the infamous case *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[60] In this case, the Supreme Court rejected an opportunity to overturn *Swift v. Tyson*'s precedent.[61] The case involved a company seeking to enforce a contract which was illegal under Kentucky common law, but permissible under the federal common law.[62] The Court refused to apply Kentucky's common law and instead utilized a federal common law standard.[63] The decision generated controversy for maintaining an inequitable system of "forum shopping," allowing savvy plaintiffs to game the judiciary and choose the most favorable common law system.[64] This decision received immediate and heavy criticism.[65]

Ten years after the Court's decision in *Black & White Taxicab*, the Court reversed course in *Erie Railroad Co. v. Tompkins*.[66] In *Erie*, *the* Supreme Court stated, "[t]here is no federal general common law,"[67] seemingly rejecting its decision in *Swift*. This decision largely resulted in a requirement that the federal courts follow their respective state's courts' interpretations of the common law.[68]

Notwithstanding this rejection, the federal common law soon reappeared, albeit in a much more limited role.[69] The Supreme Court, in the 1972 decision *Illinois v. Milwaukee* (*Milwaukee I*), brought nuisance claims back into the convoluted world of the federal common law.[70] The

58. *See Black & White Taxicab*, 276 U.S. 518, 529–30 (1928) (discussing the ability of federal courts to "exercise their own independent judgement" and not follow decisions of state courts).

59. *See* H. Parker Sharp & Joseph B. Brennan, *The Application of the Doctrine of Swift v. Tyson Since 1900*, 4 IND. L.J. 367, 384 (1929) (describing that federal courts would not apply the common law of the state wherein the cause of action originated but would instead apply "principles of general jurisprudence," thereby creating a duplicate cause of action under federal common law).

60. *See Black & White Taxicab*, 276 U.S. at 518.

61. *See id.*

62. *See id.* at 528–29.

63. *See id.*

64. *See* Gregory Gelfand & Howard B. Abrams, *Putting Erie on the Right Track*, 49 U. PITT. L. REV. 937, 953 (1988).

65. *See Black & White Taxicab*, 276 U.S. at 532–34 (Holmes, J., dissenting) (criticizing the existence of federal common law separate from state common law).

66. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77 (1938).

67. *Id.* at 78.

68. *See id.*

69. *See, e.g.*, Clearfield Tr. Co. v. United States, 318 U.S. 363, 366–68 (1943); United States v. Standard Oil Co., 332 U.S. 301, 305–06 (1947) (applying federal common law).

70. *See Milwaukee I*, 406 U.S. 91, 95 (1972).

Court, adjudicating a dispute involving pollution between the states of Illinois and Wisconsin, stated that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law . . . ."[71]

Thus, the Supreme Court's decisions have created two separate bodies of common law: federal and state.[72] As a result, causes of action under the common law exist on both a federal and state level, and it is possible to pursue a claim of tort nuisance using either state or federal common law.[73] The Constitution's Supremacy Clause generally requires that, when federal and state laws conflict, federal law supersedes state law.[74] As a result, the presence of a federal common law tort of nuisance theoretically should eliminate any conflicting standards of state common law.[75] However, the answer of whether federal law supersedes a state law is not always easy to ascertain.[76] No bright line test exists for when federal common law will displace[77] state common law.[78] Congress added to this complex system of environmental law, with the passage of environmental legislation in the 1900s.[79]

3. Statutory Law

Though environmental law originated in the common law and the judicial system, in more recent years it has been largely dominated by statutory and administrative law.[80] Following the almost continuous upheaval of common law in the United States in the early 1900s, Congress took the initiative and began to legislate.[81]

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71. *Id.* at 103.

72. *See supra* notes 46–48 and accompanying text.

73. The Supreme Court's decision in *Milwaukee I*, which re-opened the door to federal common law claims, created the possibility of conflict with pre-existing state common law claims for nuisance. *See Milwaukee I*, 406 U.S. at 100.

74. *See* U.S. CONST. art. VI, cl. 2.

75. *See* Helfrich v. Blue Cross & Blue Shield Ass'n, 804 F.3d 1090, 1096–97 (10th Cir. 2015) (noting preemption requires that federal law replace state law when conflict arises).

76. *See infra* notes 99–102 and accompanying text; *see also* discussion *infra* Sections II.B.1., II.B.2.

77. *See infra* notes 98–99 and accompanying text.

78. The Supreme Court has established a two-part inquiry to determine if federal or state law controls. *See* Empire HealthChoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 692 (2006) ("[T]he Court recognized that prior cases had treated discretely (1) the competence of federal courts to formulate a federal rule of decision, and (2) the appropriateness of declaring a federal rule rather than borrowing, incorporating, or adopting state law in point." (citing Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988))).

79. *See infra* Section II.A.3.

80. *See* Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 76–77 (2001).

81. *See id.* at 77.

The most significant period of environmental legislation began in 1970 with the creation of the Environmental Protection Agency (EPA) by President Richard Nixon.[82] The first major legislation passed by Congress in 1970 was the National Environmental Protection Act ("NEPA"), which requires federal agencies to assess environmental impacts of prospective agency actions.[83] Also passed by Congress in 1970, the Clean Air Act instructs the EPA "to set standards for . . . toxic air pollutants."[84] After the Clean Air Act's passage, Congress passed the Clean Water Act in 1972, allowing the EPA "to set standards for what pollutants can be released into lakes, streams, and rivers, and . . . force polluters to get permits to do so."[85] Throughout the rest of the 1970s and into 1980, Congress continued to promulgate environmental legislation, passing the Endangered Species Act in 1973;[86] the Toxic Substances Control Act[87] and the Resource Conservation and Recovery Act in 1976;[88] and the Comprehensive Environmental Response, Compensation, and Liability Act in 1980.[89] Taken together, these laws appeared to be a strong backbone for environmental protection in the United States. Unfortunately, in the following decades, the laws have proven inadequate to combat arising environmental issues.[90] Despite this need, Congress seems unlikely to pass comprehensive environmental legislation any time soon, especially following the Green New Deal's sound rejection.[91]

The Green New Deal is a resolution that "lays out a grand plan for tackling climate change."[92] Specifically, the Green New Deal suggests a global goal of net-zero carbon emissions by 2050, reductions in greenhouse gas emissions in the United States, digitization of the power grid, and improvements to the Nation's transportation system.[93] The resolution, described as both a way to "avoid planetary destruction" and

82. *See The Origins of EPA*, U.S. ENV'T PROT. AGENCY, https://bit.ly/2McYYTx (last visited Jan. 13, 2021).

83. *See* Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, THE ATL. (Mar. 29, 2017), https://bit.ly/3a8Zc5V.

84. *Id.*

85. *Id.*

86. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544.

87. *See* Toxic Substances Control Act, 15 U.S.C. §§ 2601–2629.

88. *See* Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6987.

89. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675.

90. *See Majorities See Government Efforts to Protect the Environment as Insufficient*, PEW RSCH. CTR. (May 14, 2018), https://pewrsr.ch/3sfnPoZ (finding broadening agreement that U.S. environmental policy is insufficient).

91. *See* H.R.J. Res. 109, 116th Cong. (2019).

92. Lisa Friedman, *What is the Green New Deal? A Climate Proposal, Explained*, N.Y. TIMES (Feb. 21, 2019), https://nyti.ms/3kU9smT.

93. *See id.*

"a socialist plot,"[94] was first introduced in the House of Representatives in February 2019.[95] The divisive nature of the resolution was put on full display when Representative Virginia Foxx from North Carolina called for debate on the resolution, referring to the Green New Deal as "frankly, Anti-American . . . ."[96] Because the Green New Deal remains a resolution and is not yet a statute, its contents are not binding and would not become law if passed by Congress.[97] Though certainly not the only suggested environmental legislation in recent history, the controversy surrounding the Green New Deal illustrates the difficulty of enacting environmental legislation.[98] While political difficulties continue to impede the passage of new environmental statutes, the tangled relationship between state and federal law adds an additional layer of complexity in the application of current environmental law.[99]

Due to the unique relationship between the federal and state governments in the United States, the United States Constitution includes the Supremacy Clause, which dictates that courts must determine whether federal law may displace or preempt state law in a given conflict.[100]

Two interrelated concepts, displacement and preemption, typically determine whether federal law prevails over state law if the two conflict.[101] "Displacement will occur only where . . . a significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation."[102] Preemption occurs when state law conflicts with and is "replaced, where necessary, by federal law . . . ."[103] Federal statutory law may also displace or preempt existing causes of action under federal common law.[104] Utilizing these concepts, the Supreme Court has provided a clear answer to how federal environmental legislation affects federal common law nuisance claims.[105] However, the question remains whether federal statutes regulating the environment also displace or

94. *Id.*

95. *See* 165 CONG. REC. H1457-03 (daily ed. Feb. 7, 2019); *see also* CONG. REC. H1957 (daily ed. Apr. 20, 2021) (reintroducing the Green New Deal).

96. 165 CONG. REC. H2799-05 (daily ed. Mar. 26, 2019) (statement of Rep. Foxx).

97. *See* Friedman, *supra* note 92.

98. *See id.*

99. *See supra* Sections II.B.1, II.B.2; *see also infra* Section II.C.

100. *See* U.S. CONST. art. VI, cl. 2.

101. *See* Helfrich v. Blue Cross & Blue Shield Ass'n, 804 F.3d 1090, 1096–97 (10th Cir. 2015) (noting the difference between preemption and displacement).

102. *Id.* at 1096 (internal quotations and citation omitted) (citing Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988)).

103. *Id.*

104. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 422–25 (2011).

105. *See id.*

preempt nuisance claims brought under state common law.[106] The Supreme Court provided the clearest answer thus far in *International Paper Co. v. Oullette*[107] when it ruled that a claim brought under state common law was displaced; however, the Court did not find that federal law completely preempted state common law.[108] Instead, the Court found that "a state law . . . is pre-empted if it interferes with the methods by which the federal statute was designed to reach [its] goal."[109] This answer left open considerable room for states to maneuver a potential claim under state common law. Furthermore, in *American Electric Power Co.* (*AEP*) *v. Massachusetts*, the Supreme Court avoided the question of displacement as it related to state common law, further opening the door for claims to be made under state common law.[110] As a result, the newest round of common law environmental litigation focused on state common law claims to avoid the issues of displacement and preemption in the federal courts.[111]

B. Environmental Litigation

The global environment seems to be moving ever closer to disaster, and frustrations have reached a boiling point.[112] States and municipalities across the country have filed lawsuits using carefully constructed claims designed to avoid the federal courts.[113] In brief, environmental litigation in the United States began largely as both public and private nuisance suits

106. *See* Comer v. Murphy Oil USA (*Comer II*), 585 F.3d 855, 879 (5th Cir. 2009) (holding "[t]he plaintiffs have pleaded sufficient facts to demonstrate standing for their public and private nuisance, trespass, and negligence claims"), *vacated and reh'g granted en banc*, 598 F.3d 208 (5th Cir. 2010); *see also* Int'l Paper Co. v. Oullette, 479 U.S. 481, 483 (1987).

107. *See Int'l Paper Co.*, 479 U.S. at 483.

108. *See id.* at 492.

109. *Id.* at 494.

110. *See Am. Elec. Power Co.,* 564 U.S. at 428–29.

111. *See, e.g.*, Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021), *aff'd* 2022 U.S. App. LEXIS 9409, at *112–13 (4th Cir. Apr. 7, 2022); City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020), *modified en banc*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021); Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792 (10th Cir. 2020), *vacated*, 141 S. Ct. 2667 (2021).

112. *See generally* Maeve Reston, *The Growing Power and Anger of Climate Change Voters*, CNN POL. (Sept. 4, 2019, 3:20 PM), https://cnn.it/2NH7F8Z (discussing the increasing importance of the environment and rising frustrations among voters).

113. *See, e.g.*, City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *aff'd sub nom.* City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021); City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020); County of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021); Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019); Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31 (D. Mass. 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., 979 F.3d 50 (1st Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021); *Bd. of Cnty. Comm'rs*, 965 F.3d 792.

brought under the common law.[114] Though the common law began as a unitary body of law, in the 1800s the common law in the United States was split into federal common law and state common law.[115] During this time, environmental suits involving interstate disputes were often brought in federal court under federal common law nuisance causes of action.[116] However, in the 1900s, the Supreme Court did away with the idea of federal common law as a distinct body of law before reintroducing the idea in a more limited capacity later.[117]

During this time of upheaval in the common law, Congress began to heavily legislate on the environment, creating federal statutes designed to regulate perceived environmental problems.[118] Following the introduction of statutes into environmental law, the Supreme Court began to scale back plaintiffs' ability to pursue environmental litigation under the federal common law, declaring that Congress displaced this area of federal common law when it passed statutes regulating the activities in question.[119] As a result, plaintiffs are left with an uncertain path forward as they attempt to find a way to bring environmental litigation that does not rely on—and is not precluded by—federal law.[120]

1. Supreme Court Precedent

The Supreme Court's decisions have played a significant role in environmental law's development.[121] One of the first landmark Supreme Court decisions is the 1901 case *Missouri v. Illinois*.[122] The issue in the case was Missouri's ability to sue on behalf of its citizens to prevent harm to a public water source.[123] The Court held that a state may pursue a public nuisance suit on behalf of its citizens "if the health and comfort of the inhabitants of a state are threatened . . . ."[124] The decision was a watershed

114. *See supra* Section II.A.1.
115. *See supra* Section II.A.2; *infra* Section II.B.1.
116. *See supra* Section II.B.1.
117. *See supra* Section II.A.2; *infra* Section II.B.1.
118. *See supra* Section II.A.3.
119. *See supra* Section II.A.3; *infra* Section II.B.1.
120. *See supra* Section II.B.1.
121. *See, e.g.*, Missouri v. Illinois, 180 U.S. 208, 241 (1901); New York v. New Jersey, 256 U.S. 296, 312–14 (1921); Georgia v. Tenn. Copper Co., 206 U.S. 230, 327–29 (1907); *Milwaukee I*, 406 U.S. 91, 95 (1972); Int'l Paper Co. v. Oullette, 479 U.S. 481, 496–97 (1987).
122. *See* Missouri v. Illinois, 180 U.S. 208, 241 (1901).
123. *See id.* at 218–19.
124. *Id.* at 241.

moment,[125] and states began to increasingly utilize public nuisance claims as a method to abate harms to their citizens.[126]

Exemplifying this trend of public nuisance claims is the case of *Georgia v. Tennessee Copper Co*.[127] The State of Georgia claimed the Tennessee Copper Company created a public nuisance through toxic gas emissions and sought an injunction to halt the emissions.[128] The Court sided with Georgia, remarking that "[i]t is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale . . . ."[129] Taken together, *Missouri v. Illinois* and *Georgia v. Tennessee Copper Co.* underscore the Supreme Court's prominent role in the earliest stages of United States' environmental law.[130]

Following these landmark federal common law environmental cases in the 1900s, the Supreme Court wavered on the federal common law's applicability in the cases of *Erie* and *Illinois v. Milwaukee*.[131] However, as federal legislation targeting the environment increased, the Supreme Court again decreased the role of federal common law.[132] In 1987, the Court faced a difficult question in the case of *International Paper Co. v. Oullette*.[133] In *International Paper Co.*, the petitioners asked the court to determine whether the Clean Water Act (CWA)[134] preempted a Vermont state common law nuisance claim for interstate pollution arising outside of Vermont.[135] Given the interstate nature of the pollution and Congress' intent behind the CWA, the Court held that federal law preempted nuisance claims under Vermont state common law.[136] The Court noted that the plaintiffs may still seek a remedy under the law of the state in which the pollution originated.[137]

125. *See Watershed*, MERRIAM-WEBSTER, https://bit.ly/3pyNsiL (last visited Feb. 4, 2021) (defining watershed as "a crucial dividing point, line, or factor").

126. *See, e.g.*, Missouri v. Illinois, 180 U.S. 208, 241 (1901); New York v. New Jersey, 256 U.S. 296, 312–14 (1921); *Tenn. Copper Co.*, 206 U.S. at 237–39.

127. *See Tenn. Copper Co.*, 206 U.S. at 236.

128. *See id.*

129. *Id.* at 238.

130. *See* Missouri v. Illinois, 180 U.S. 208, 208 (1901); *see also Tenn. Copper Co.*, 206 U.S. at 236.

131. *See infra* Section II.B.2.

132. *See* Int'l Paper Co. v. Oullette, 479 U.S. 481, 496–97 (1987).

133. *See id.*

134. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387); *see also* Clean Water Act of 1977, 33 U.S.C. §§ 1251–1387.

135. *See Int'l Paper Co.*, 479 U.S. 481 at 483.

136. *See id.* at 496–97.

137. *See id.* at 497–500. The essence of the Court's suggestion revolved around a belief that it was inappropriate to apply Vermont state common law to an entity which was creating pollution from across a state line. *See id.* at 500. A complaint alleging a cause of

In 2011, the decision in *American Electric Power Co.* (*AEP*) *v. Massachusetts* continued to scale back environmental common law claims.[138] *AEP* included a federal common law public nuisance claim brought by several states against several large power companies.[139] The states asked the courts to cap carbon dioxide emission levels.[140] The Court held that the Clean Air Act (CAA)[141] displaced states' ability to pursue a nuisance claim under the federal common law for greenhouse gas emissions.[142] The Court stated that the CAA displaced federal common law claims of nuisance regarding any air pollutants that fall within the scope of the EPA's authority to regulate.[143] Thus, following *AEP* and *International Paper*, Plaintiffs' ability to pursue both federal and state public nuisance common law claims is severely limited.

2. Current Litigation

The displacement of federal common law public nuisance claims has rendered plaintiffs dissatisfied with statutory and regulatory remedies and resulted in an uncertain path forward.[144] Whether state common law claims have also been displaced is a question that has not been conclusively answered.[145] Another hurdle standing in the way of judicial resolution of

action under New York common law in the immediate case would likely have been acceptable. *See id.*

138. *See Am. Elec. Power Co.*, 564 U.S. 410, 423 (2011).

139. *See id.* at 418 n.3–5 (naming plaintiffs as California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin; and naming defendants as American Electric Power Company, Inc. (and a wholly owned subsidiary), Southern Company, Xcel Energy Inc., Cinergy Corporation, and the Tennessee Valley Authority).

140. *See id.* at 415.

141. *See generally* Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676 (codified as amended at §§ 7401–7616).

142. *See Am. Elec. Power Co.*, 564 U.S. at 423.

143. The Supreme Court stated the CAA and "the EPA actions it authorizes" spoke "directly to [the] question" of carbon dioxide emissions in the case. *Id.* at 424. *See also supra* Section II.B.1.

144. *See supra* Section II.A.; *see also infra* Section II.B.2.c.

145. *See* Comer v. Murphy Oil USA, Inc. (*Comer I*), 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) (internal citations omitted) ("In the present case, although the plaintiffs do not request injunctive relief, they are asking this Court to make similar determinations regarding the reasonableness of the defendants' emissions. As explained previously, the state law causes of actions asserted by the plaintiffs hinge on a determination that the defendants' emissions are unreasonable, and the plaintiffs' Amended Complaint specifically alleges that the defendants' emissions are unreasonable. Therefore, the Court finds that the plaintiffs' entire lawsuit is displaced by the Clean Air Act."). *But see Comer II*, 585 F.3d 855, 879 (5th Cir. 2009) (holding "[t]he plaintiffs have pleaded sufficient facts to demonstrate standing for their public and private nuisance, trespass, and negligence claims"), *vacated and reh'g granted en banc*, 598 F.3d 208 (5th Cir. 2010).

environmental nuisance claims is the political question doctrine.[146] The political question doctrine, created by the Supreme Court in the case of *Marbury v. Madison*, prevents the judiciary from reviewing decisions by the Executive and Legislative branches that are purely political in nature.[147] Several courts have relied on the doctrine as a basis for dismissing environmental suits.[148] These claims have been heavily influenced by yet another restriction on environmental litigation: preclusion by federal statute.[149] The uncertainty caused by the political question doctrine and possible preclusion of state common law claims, however, has not stopped a litany of cases from being brought across the United States.[150]

Current litigation has taken a variety of related approaches and has been met with differing results.[151] Various entities brought the initial round of new climate litigation in the state of California and utilized novel combinations of state common law claims designed to avoid the federal courts.[152] Around the same time as the California cases, the City of New York also relied on state common claims but brought a more conventional suit in federal court.[153] Later cases sprouted in Maryland, Colorado, Rhode Island, and Massachusetts attempting to utilize methods similar to those

146. *See* Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 516 (2007) ("It is therefore familiar learning that no justiciable 'controversy' exists when parties seek adjudication of a political question . . . ."); *see also* discussion *infra* Section II.B.2.a.

147. *See* Marbury v. Madison, 5 U.S. 137, 166 (1803) (describing decisions which are exclusively within the discretion of the Executive branch as political in nature).

148. *See, e.g.*, *Comer I*, 839 F. Supp. 2d at 862; Native Vill. of Kivalina v. Exxon Mobil Corp., 663 F. Supp. 2d 863, 871–73 (N.D. Cal. 2009); City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018), *aff'd sub nom.* City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021).

149. Environmental litigation may be precluded if the claim is preempted or displaced by federal law. *See Preclusion*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining preclusion as "[t]he foreclosure of some eventuality before it can happen"); *see also supra* notes 101–05 and accompanying text.

150. *See, e.g.*, City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018); 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., 979 F.3d 50 (1st Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021); Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021), *aff'd* 2022 U.S. App. LEXIS 9409, at *112–13 (4th Cir. Apr. 7, 2022); Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31 (D. Mass. 2020).

151. *See* Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 39–40 (D. Mass. 2020). *But see* City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018), *aff'd sub nom.* City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021).

152. *See, e.g.*, California v. BP P.L.C., No. C 17-06011, 2018 U.S. Dist. LEXIS 32990, at *3–5 (N.D. Cal. Feb. 27, 2018); County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937–39 (N.D. Cal. 2018), *aff'd*, 960 F.3d 586 (9th Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021).

153. *See* City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 470 (S.D.N.Y. 2018).

seen in the California cases.[154] After an initial round of decisions in federal district courts across the country, several circuit courts of appeals reached the conclusion that the cases could not currently be heard in federal court.[155]

a. The District Court Cases

The new wave of climate litigation began in 2018, when several entities in California brought suit in state court.[156] The county of San Mateo and the cities of Oakland and San Francisco brought independent suits against many of the world's largest oil and gas companies.[157] Illustrating the complexity of climate litigation, the cases were met with differing outcomes at the district court level.[158]

The courts first decided the case filed by the Cities of Oakland and San Francisco.[159] Following removal[160] to federal court by the fossil fuel company defendants, a federal judge denied the plaintiffs' motion to remand to state court.[161] The court concluded that, despite the fact that each city pleaded only a single cause of action under California state public nuisance law, the claims were "necessarily governed by federal common law."[162] The court pointed to the need for a "uniform standard of decision" that could only be provided by a federal standard.[163] The court further remarked that the plaintiffs' claims depended on a "global

154. *See, e.g.*, Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021), *aff'd*, 2022 U.S. App. LEXIS 9409, at *112–13 (4th Cir. Apr. 7, 2022); Bd. Of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 423 F. Supp. 3d 1066 (D. Colo. 2019), *motion for stay denied*, 405 F. Supp. 3d 947 (D. Colo. 2019), *aff'd in part*, 965 F.3d 792 (10th Cir. 2020), *vacated*, 141 S. Ct. 2667 (2021); 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., 979 F.3d 50 (1st Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021); Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31 (D. Mass. 2020).

155. *See, e.g.*, Mayor of Balt. v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020); Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792 (10th Cir. 2020), *vacated*, 141 S. Ct. 2667 (2021); City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020), *modified en banc*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021); Rhode Island v. Shell Oil Prods. Co., 979 F.3d 50 (1st Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021).

156. *See* California v. BP P.L.C., No. C 17-06011, 2018 U.S. Dist. LEXIS 32990, at *3 (N.D. Cal. Feb. 27, 2018).

157. *See id.* at *3.

158. *See id.* at *3–5; *see also* County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018), *aff'd*, 960 F.3d 586 (9th Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021).

159. *See* California v. BP P.L.C., No. C 17-06011, 2018 U.S. Dist. LEXIS 32990, at *3–15 (N.D. Cal. Feb. 27, 2018).

160. *See Removal*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The transfer of an action from state to federal court.").

161. *See* California v. BP P.L.C., No. C 17-06011, 2018 U.S. Dist. LEXIS 32990, at *15 (N.D. Cal. Feb. 27, 2018).

162. *Id.* at *5–6.

163. *Id.* at *9.

complex" of emissions, leading the court to believe that federal common law was the basis for the claims.[164]

The court deciding the San Mateo County case concluded differently.[165] Though the case was brought against largely the same defendants under the same theory and removed to the same federal district, a different judge found that removal was improper.[166] The court first concluded that federal common law could not control, due to the Supreme Court's precedent in *AEP*: that federal statutory law displaced any relevant federal common law claims.[167] The court next concluded that removal was not "warranted under the doctrine of complete preemption."[168] Ultimately, the court dismissed the possibility that removal was proper under other theories and held that the case should be remanded to state court.[169] However the judge granted a stay on the order to remand pending an appeal for the case brought by Oakland and San Francisco.[170]

Because of these conflicting decisions, the California cases remained in federal court, and the corporate defendants moved to dismiss in the cases brought by the Cities of Oakland and San Francisco.[171] The court ruled in the defendants' favor[172] and dismissed the Cities' complaint.[173] However, the plaintiffs appealed the district court's decision to the Ninth Circuit Court of Appeals.[174]

Contemporaneous with the California cases' litigation, which used state common law claims, the City of New York ("New York") brought a more traditional case in federal court, though anchored in state common law.[175] New York sued five major oil and gas companies in federal court in 2018,[176] alleging that the "[d]efendants' ongoing conduct continues to

164. *See id.* at *14–15.

165. *See* County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 938–39 (N.D. Cal. 2018), *aff'd*, 960 F.3d 586 (9th Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021).

166. *See id.* at 939.

167. *See id.* at 937.

168. *Id.*

169. *See id.* at 939.

170. *See id.*

171. *See* City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1019 (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *modified en banc*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021).

172. *See infra* notes 175–87 and accompanying text. The court in this case relied on grounds like to those found in *City of New York*. *See infra* notes 175–87 and accompanying text.

173. *See* City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1024–26 (N.D. Cal. 2018); *see also* City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 470–76 (S.D.N.Y. 2018), *aff'd sub nom.* City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021).

174. *See infra* Section II.B.2.b.

175. *See* City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 469–70 (S.D.N.Y. 2018).

176. *See id.* at 468 (naming defendants as BP P.L.C., Chevron, ConocoPhilips, Exxon, and Royal Dutch Shell).

exacerbate global warming and cause recurring injuries to New York City."[177] In response to the Complaint, the defendants moved to dismiss, arguing in part that dismissal was warranted because New York's state law claims were controlled by federal common law.[178]

The court held in the defendants' favor, concluding that: (1) federal common law governed New York's claims; (2) the Clean Air Act ("CAA") displaced New York's claims; and (3) the political question doctrine barred the court from considering New York's claims.[179] The court supported its first conclusion on the basis that New York's claims were based on the defendants' "worldwide fossil fuel production," and as a result of the "transboundary" nature of the pollution, federal common law should control.[180] The court relied on the Supreme Court's reasoning in *AEP* to justify its second conclusion[181]: that the CAA displaced federal common law claims for greenhouse gas emissions.[182] Finally, the court reasoned that the "immense and complicated problem" presented by global warming and greenhouse gas emissions inherently involved foreign policy and implicated the political question doctrine, making it a nonjusticiable issue.[183] As a result, the court dismissed New York's complaint.[184]

Though New York failed in holding the fossil fuel companies responsible for global warming, the lawsuit made clear that common law nuisance claims brought in federal court were no longer a viable course of action for environmental lawsuits.[185] This decision, in combination with the California cases, sent a message to other potential climate change plaintiffs: future claims brought by environmental plaintiffs would need to be fought in state courts, and would have to rely on state common law.[186]

Following the decisions in California and New York, cases were brought in several locations, including Washington, Maryland, Colorado, and Rhode Island, that attempted to utilize state common law to pursue fossil fuel companies in state courts.[187] These cases were removed by the

177. *Id.* at 469.
178. *See id.* at 470.
179. *See id.* at 470–76.
180. *See id.* at 471–72.
181. *See id.* at 472–73; *see also supra* Section II.B.1.
182. *See* City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2018).
183. *Id.* at 475–76.
184. *See id.* at 476.
185. *See id.* at 475–76.
186. *See, e.g.*, County of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021); County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018), *aff'd*, 960 F.3d 586 (9th Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021).
187. *See, e.g.*, King County v. BP P.L.C., No. C18-758-RSL, 2018 U.S. Dist. LEXIS 178873 (W.D. Wash. Oct. 17, 2018); Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021), *aff'd*, 2022 U.S. App. LEXIS 9409, at *112–13 (4th Cir. Apr. 7, 2022); Bd. Of Cnty. Comm'rs v.

defendants to federal courts in an attempt to utilize the precedent holding that federal common law was preempted.[188] These cases turned into bitter jurisdictional battles as fossil fuel defendants attempted to have the cases adjudicated by the federal court system.[189] The Maryland case, brought by the Mayor and City Council of Baltimore, became the first case to be decided at the Federal Circuit Court level.[190]

b. The Circuit Courts of Appeals Cases

In late 2019, the Fourth Circuit Court of Appeals became the first federal appellate court to weigh in on the issue of removing state common law claims against major fossil fuel companies.[191] The Mayor and City Council of Baltimore had brought state common law claims, including public and private nuisance claims, against the defendants.[192] The Court of Appeals opened its decision by noting that although the case necessarily involved complex issues of jurisdiction over environmental lawsuits, the question before the court was a narrow jurisdictional one.[193] After an extensive explanation of its reasoning, the court affirmed the district court's ruling remanding the case to state court.[194]

Shortly after the decision of the Fourth Circuit, the Ninth Circuit Court of Appeals concluded that removal to federal court in the case brought by Oakland and San Francisco was improper.[195] The court first reasoned that the Cities' claim did not raise a "substantial federal issue," which would have provided a basis for federal jurisdiction under the *Grable* test.[196] Further, the court stated that under the well-pleaded

Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947 (D. Colo. 2019), *aff'd in part*, 965 F.3d 792 (10th Cir. 2020), *vacated*, 141 S. Ct. 2667 (2021); 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., 979 F.3d 50 (1st Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021).

188. *See supra* Section II.B.1; *see also* discussion *supra* Section II.B.2.a.

189. *See generally* Mayor of Balt. v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020) (investigating the appropriateness of jurisdiction based on federal officer removal).

190. *See id.* at 471.

191. *See id.*

192. *See id.* at 457.

193. *See id.* at 456–57 ("This appeal is about whether a climate-change lawsuit against oil and gas companies belongs in federal court. But this decision is only about whether one path to federal court lies open.").

194. *See id.* at 471. The Fourth Circuit's decision as to the breadth of jurisdictional inquiries that it could consider on appeal were brought before the Supreme Court in 2021. *See* BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1542 (2021). The Supreme Court vacated the decision of the Fourth Circuit and remanded the case for the Fourth Circuit to hear the defendant's other jurisdictional arguments. *See id.* at 1542–43.

195. *See* City of Oakland v. BP PLC, 960 F.3d 570, 582 (9th Cir. 2020).

196. *See id.* at 578–79 (internal citations omitted) ("[F]ederal jurisdiction over a state-law claim will lie if a federal issue is '(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-

complaint rule,[197] the Cities' original state common law claims were not subject to federal jurisdiction.[198] Finally, the court noted that although the Cities' had amended their complaints with a federal common law cause of action after the district court's original ruling, no subject matter jurisdiction existed at the time of removal, so removal was improper.[199]

Accordingly, the Ninth Circuit remanded the case to the District Court for consideration of the defendants' other proposed justifications for removal.[200] However, in a related proceeding in 2018, a California district court rejected several other potential grounds for removal.[201] The cumulative effect of the above cases appeared to indicate general approval of state common law nuisance claims, providing a potential avenue forward for other plaintiffs.[202] The First and Tenth Circuits, following the lead of the Fourth and Ninth Circuits, ruled that similar cases belonged in state courts under similar jurisdictional reasoning.[203] The Second Circuit, however, affirmed the holding reached by the district court in *City of New York*, marking it as the lone Circuit Court of Appeals to rule that state common law nuisance claims did not belong in state courts.[204]

c. The Supreme Court Ruling and the Aftermath

In 2021, the Supreme Court vacated the ruling of the Fourth Circuit in *Mayor of Baltimore* and held that the Circuit Courts must consider every jurisdictional challenge brought by the defendants.[205] In separately reported decisions, the Court also vacated the rulings of the Second, Ninth,

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state balance approved by Congress.' All four requirements must be met . . . ." (citing Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005))).

197. *See Complaint*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a well-pleaded complaint as "[a]n original or initial pleading that sufficiently sets forth a claim for relief—by including the grounds for the court's jurisdiction, the basis for the relief claimed, and a demand for judgment—so that a defendant may draft an answer that is responsive to the issues presented").

198. *See* City of Oakland v. BP PLC, 960 F.3d 570, 582 (9th Cir. 2020).

199. *See id.* at 585.

200. *See id.* at 585–86.

201. *See* County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937–38 (N.D. Cal. 2018), *aff'd*, 960 F.3d 586 (9th Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021).

202. *See, e.g.*, County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018), *aff'd*, 960 F.3d 586 (9th Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021); City of Oakland v. BP PLC, 960 F.3d 570, 575 (9th Cir. 2020).

203. *See* Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 981 (D. Colo. 2019), *aff'd in part*, 965 F.3d 792 (10th Cir. 2020), *vacated*, 141 S. Ct. 2667 (2021); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 151–52 (D.R.I. 2019), *aff'd sub nom.* Rhode Island v. Shell Oil Prods. Co., 979 F.3d 50 (1st Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021).

204. *See generally* City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (affirming the ruling of the lower court).

205. *See* BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1542 (2021).

and Tenth Circuits.[206] However, climate activists and observers were quick to note that the Court did not rule on the merits of the various plaintiffs' claims.[207]

While many cases across the country wait to hear the Fourth Circuit's decision on remand, cities and municipalities have not stopped their efforts to have their claims heard in state court.[208] Most recently, the City of Hoboken succeeded in convincing a federal district court that their state common law claims belong in state court.[209] The court in *City of Hoboken* echoed the sentiment expressed by climate activists, stating that, "[t]he Supreme Court, however, did not consider the underlying merits of the removal or remand. Instead, it focused solely on the narrow issue of a court's scope of review . . . ."[210] The Court held that "none of the Defendants' bases for federal jurisdiction are sound. Accordingly, this matter will be remanded to state court."[211] The case is currently awaiting appeal at the Third Circuit.[212] A federal court in the state of Delaware reached a similar conclusion to the court in *City of Hoboken*, remanding several state common law claims to state court.[213]

In April of 2022, the Fourth Circuit reached its decision on remand from the Supreme Court in *Mayor of Baltimore*.[214] After "evaluat[ing] eight distinct grounds for removal . . . [,]"[215] the court affirmed its original ruling, concluding that "[t]hese claims do not belong in federal court."[216]

The long history of environmental litigation and the lengths to which plaintiffs are forced to go to bring their cases in front of the judiciary indicate that the current regulatory scheme is not working.[217] The results in these cases have strengthened the possibility that a new wave of

206. *See, e.g.*, Chevron Corp. v. San Mateo County, 141 S. Ct. 2666 (2021); Shell Oil Prods. Co. v. Rhode Island, 141 S. Ct. 2666 (2021); Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs, 141 S. Ct. 2667 (2021).

207. *See* Adam Klasfeld, *Supreme Court Gives Big Oil Another Shot to Move Baltimore Climate Change Suit to Different Court; Sotomayor Pens Lonely Dissent*, L. & CRIME (May 17, 2021, 11:44 AM), https://bit.ly/3p04JnO.

208. *See* City of Hoboken v. Exxon Mobil Corp., No. 20-cv-14243, 2021 U.S. Dist. LEXIS 169925, at *2 (D.N.J. Sept. 8, 2021).

209. *See id.* at *36–37.

210. *Id.* at *9.

211. *Id.* at *35.

212. *See* Margaret Barry & Maria Antonia Tigre, *February 2022 Updates to the Climate Case Charts*, COLUM. L. SCH. (Feb. 4, 2022), https://bit.ly/3JGDWEM.

213. See Del. *ex rel.* Jennings v. BP Am., Inc., No. 20-1429, 2022 U.S. Dist. LEXIS 2378, at *43 (D. Del. Jan. 5, 2022).

214. *See* Mayor of Balt. v. BP P.L.C., No. 19-1644, 2022 U.S. App. LEXIS 9409, at *112–13 (4th Cir. Apr. 7, 2022).

215. *Id.* at *9.

216. *Id.* at *113.

217. *See supra* Sections II.B.1, II.B.2.

environmental lawsuits may soon be litigated on a state-by-state basis.[218] Accordingly, the current state of environmental law in the United States has opened the door to the possibility of different states reaching any number of conclusions under state common law causes of action.[219] As the district court in *City of Oakland* recognized, climate change litigation should be resolved with a "uniform standard of decision."[220] Here, environmental law may benefit from a similar path as was utilized for patent law when Congress created a unified appellate court, the Federal Circuit.[221]

C. The Federal Circuit and Patent Law

The practice of patent law, replete with novel technological and legal issues, has long been regarded as a particularly difficult and complicated area of the law.[222] In part, this reputation arises from the nature of patent law as applying to novel inventions.[223] But as complex as patent law is in practice today, at one time patent law was equally complex in its application.[224] Before the United States Court of Appeals for the Federal Circuit (the "Federal Circuit") was created in 1982,[225] patent law shared a key similarity with environmental law: a lack of uniformity.[226]

1. Background of the Federal Circuit

Prior to the creation of the Federal Circuit, patent law operated within the confines of the standard federal judiciary, utilizing the typical circuits and administrative judges within the United States Court of Custom and Patent Appeals.[227] Problems arose frequently, and the various circuit

218. *See* Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792, 827 (10th Cir. 2020) (affirming order remanding case to state court); *see also* Mayor of Balt. v. BP P.L.C., 952 F.3d 452, 471 (4th Cir. 2020) (affirming order remanding case to state court), *vacated*, 141 S. Ct. 1532 (2021), *aff'd*, 2022 U.S. App. LEXIS 9409, at *112–13 (4th Cir. Apr. 7, 2022).

219. *See* discussion *supra* Section II.B.2.

220. *See* California v. BP P.L.C., No. C 17-06011, 2018 U.S. Dist. LEXIS 32990, at *9 (N.D. Cal. Feb. 27, 2018).

221. *See infra* Section II.C.1.

222. *See* Jennifer K. Bush et al., *Six Patent Law Puzzlers*, 13 TEX. INTELL. PROP. L.J. 1, 2 (2004) ("To call patent law complex is to call the sky blue or the ocean vast and deep.").

223. *See id.* ("The complexity of patent law is also a function of the frequently complex technology to which it applies.").

224. *See* ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS 12 (7th ed. 2017).

225. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

226. *See* MERGES & DUFFY, *supra* note 224, at 13 ("[T]he Federal Circuit was ostensibly formed to unify patent [law] . . . .").

227. *See About the U.S. Courts of Appeals*, U.S. CTS., https://bit.ly/3kebTkz (last visited Feb. 21, 2021) (describing the makeup of the appellate court system as 12 Circuit Courts of Appeals and one Federal Circuit).

courts struggled to maintain a uniform front for patent law.[228] The United States Constitution gives Congress the power to "from time to time ordain and establish" federal courts inferior to the United States Supreme Court.[229] Acting in accordance with this power, Congress created the Federal Circuit to improve consistency and uniformity in the complex field of patent law.[230] To accomplish this goal, Congress granted the Federal Circuit the unique ability among Circuit Courts of Appeals to exercise nationwide jurisdiction over specific subject matter.[231] Though the Federal Circuit can hear cases arising from many sources of appeals, about two-thirds of Federal Circuit cases relate to intellectual property.[232] The Federal Circuit is typically the court of last resort for patent disputes because the court is the exclusive Court of Appeals for patent cases.[233] However, the Supreme Court maintains the ability to "establish basic legal principles" in patent law by granting certiorari[234] to cases the Court deems important.[235]

2. Effects of the Federal Circuit on Patent Law

The Federal Circuit has certainly experienced success in unifying patent law,[236] although criticisms of the court remain.[237] From 2016 to 2017, the Supreme Court overturned every one of the Federal Circuit's patent decisions.[238] However, this trend can be attributed to recent factors

228. *See* MERGES & DUFFY, *supra* note 224, at 12 ("It was difficult to get a patent upheld in many federal courts, and the circuits diverged widely both as to doctrine and basic attitudes toward patents.").

229. U.S. CONST. art. III, § 1.

230. *See United States Court of Appeals for the Federal Circuit*, U.S. CTS. 4 (June 2019), https://bit.ly/3JUmAUT; *see also* MERGES & DUFFY, *supra* note 224, at 13.

231. *See United States Court of Appeals for the Federal Circuit*, *supra* note 230, at 4.

232. *See id.* (noting that in Fiscal Year 2018, 67% of cases before the Federal Circuit related to intellectual property, and sources of appeals include the Board of Patent Appeals and Inferences, Board of Contract Appeals, United States District Courts, and United States Court of International trade, among others).

233. *See* MERGES & DUFFY, *supra* note 224, at 57 (noting that the Supreme Court hears a "tiny fraction" of patent proceedings, indicating almost all appeals end at the Federal Circuit).

234. *See Certiorari*, BLACK'S LAW DICTIONARY (11th Ed. 2019) (defining certiorari as "[a]n extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review . . . . The U.S. Supreme Court uses certiorari to review most of the cases that it decides to hear").

235. MERGES & DUFFY, *supra* note 224, at 57 (noting that the Supreme Court hears a "tiny fraction" of patent proceedings, indicating almost all appeals end at the Federal Circuit).

236. *See id.* at 13 ("Since the creation of the Federal Circuit, patents have been held valid more frequently . . . .").

237. *See* Steven Seidenberg, *US Perspectives: Troubled Federal Circuit Hobbles US Patent System*, INTELL. PROP. WATCH (July 31, 2017), https://bit.ly/3NukIF7.

238. *See id.*

that created upheaval in the patent system, including the continually increasing value of patents.[239] In addition to financial considerations, the America Invents Act (AIA) of 2011 also contributed to the upheaval.[240] The AIA dramatically changed key portions of the United States patent law system.[241] The founding of the Federal Circuit also did not create a separate system of trial courts to replace the federal district courts, leaving open the possibility of forum shopping for savvy plaintiffs.[242]

Despite this occasionally rocky record, the Federal Circuit has successfully unified the patent system through its power to exercise exclusive jurisdiction over the patent system in the United States.[243] As drastic as issues in patent law seem today, data from before the Federal Circuit's creation showed substantial differences in patent law's application from circuit to circuit.[244] Further, though the continually increasing value of patents has contributed to issues currently facing the Federal Circuit and patent law at large, it should be noted that uncertainty involved in patent adjudication acted as one of the primary reasons for patents' depressed value prior to the Federal Circuit's creation.[245]

The Federal Circuit's formation collapsed the large number of appellate courts capable of hearing patent law disputes into a single court.[246] This alone decreased the possibility for potential patent litigants to attempt to game the system by forum shopping to obtain the best possible common law and therefore results.[247] An additional effect of creating a single court to handle complex patent cases was a substantial reduction in the pool of judges that could adjudicate patent disputes.[248]

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239. *See* MERGES & DUFFY, *supra* note 224, at 14.

240. *See id.* at 18; *see also* Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 35 U.S.C.).

241. *See* MERGES & DUFFY, *supra* note 224, at 18 (describing the AIA as "the single most important piece of legislation in patent law since the 1952 Patent Act"); *see also* Leahy-Smith America Invents Act §§ 1–37.

242. *See* Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1802 (2013).

243. *See United States Court of Appeals for the Federal Circuit*, *supra* note 230, at 4.

244. *See* Robert D. Swanson, *Implementing the E.U. Unified Patent Court: Lessons from the Federal Circuit*, 9 BYU INT'L L. & MGMT. REV. 169, 171 (2013) (citing Thomas Cooch, *The Standard of Invention in the Courts*, *in* DYNAMICS OF THE PATENT SYSTEM 34, 56–59 (W. Ball ed. 1960)).

245. *See id.* (citing Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 6 (1989)).

246. *See United States Court of Appeals for the Federal Circuit*, *supra* note 230, at 4.

247. *See* Christopher A. Cotropia, *"Arising Under" Jurisdiction and Uniformity in Patent Law*, 9 MICH. TELECOMM. & TECH. L. REV. 253, 260–61 (2003).

248. *See generally U.S. Courts of Appeals Additional Authorized Judgeships*, U.S. CTS., https://bit.ly/3qFKmuW (last visited Feb. 20, 2021) (showing a total of 179 appellate

This smaller number of judges allowed for increased consistency in results.[249] Thus, despite criticisms of the Federal Circuit, it has largely succeeded in Congress's primary goal of unifying patent law.[250] Given the current condition of environmental law in the United States,[251] the lack of a definitive venue to dispute environmental claims, and the slim likelihood of a legislative solution from Congress in the near future,[252] Congress should look to the Federal Circuit's successes[253] and create a unified court of appeals for environmental law.[254]

III. ANALYSIS

The 19th and 20th centuries saw the establishment of the first national parks and a realization that the environment was a resource which the entire Nation could—and should—benefit from.[255] The passage of time and the increasing interconnectedness of the world made clear that actions affecting the environment do not remain localized in one area; sewage dumped into the Mississippi River in Minnesota flows downstream to Louisiana, and a coal burning power plant in New York may create acid rain in Pennsylvania.[256] The environment does not stop at state or national borders, and the degree to which the environment is protected should not change depending on the jurisdiction.[257]

The federal system in the United States is ill suited to solve borderless environmental problems. State-by-state regulation has created an inconsistent patchwork of environmental laws across the United States,[258] and increasingly antiquated federal laws intended to solve the problem suffer from erratic enforcement.[259] Attempts to resolve environmental disputes in the judiciary have resulted in a further fracturing of environmental policy across the United States as courts in different

judges across all federal Circuit Courts of Appeal with 12 judges appointed to the Federal Circuit and 167 across the other circuits).

249. *See* Swanson, *supra* note 244, at 192 (noting improvements in consistency of opinions in part due to smaller number of judges within Federal Circuit).

250. *See* Cotropia, *supra* note 247, at 305.

251. *See supra* Sections II.A., II.B.

252. *See supra* Section II.A.3.

253. *See supra* Sections II.C.1, II.C.2.

254. *See infra* Part III.

255. *See Brief History of the National Parks*, LIBR. OF CONG., https://bit.ly/38tyaqr (last visited Jan. 9, 2021).

256. *See* Ned Potter, *Mississippi River Flooding: Pollution, Fertilizers, Sewage in the Flood Waters; ABC News Does its Own Testing*, ABC NEWS (May 10, 2011, 1:42 PM), https://abcn.ws/2YlwnOd.

257. *See* 1 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 1A.04 (2021).

258. *See id.*

259. *See* David M. Konisky & Neal D. Woods, *Environmental Federalism and the Trump Presidency: A Preliminary Assessment*, 48 PUBLIUS: THE J. OF FEDERALISM 345, 345–46 (2018).

jurisdictions reach inconsistent conclusions on crucial environmental issues.[260] The United States' history illustrates the difficulty in establishing an ideal balance of power between national and state governments.[261] The current system of environmental laws is an unfortunate relic of these power struggles. A solution that creates uniformity in application of environmental law across the country is necessary. The most intuitive solution, comprehensive federal environmental legislation, has become a political football and is increasingly unlikely to be enacted.[262] A specialized federal court of appeals for environmental law, one like the specialized patent law court, poses as a possible solution to the patchwork of environmental law.[263]

A. The Need for a Unified Circuit Court of Appeals for Environmental Litigation

The creation of a Unified Circuit Court of Appeals for Environmental Litigation by Congress, in conjunction with a grant of exclusive jurisdiction over environmental law disputes—mirroring the creation of the Court of Appeals for the Federal Circuit[264]—would help transform the tangled web of jurisdictions and interpretations of environmental law into a single, consistent thread. By creating a Unified Circuit Court of Appeals for Environmental Litigation, Congress would be able to avoid the political quagmire of environmental issues, create a unified application of environmental laws and regulations across the entire United States, and signal to the judiciary, along with the world at large that the environment should no longer be considered a political weapon.[265] In essence, with relatively little policy implementation, Congress could completely overhaul the United States' environmental legal landscape to maximize uniformity and minimize costs.[266]

The creation of the Court of Appeals for the Federal Circuit in 1982 provides precedent for the establishment of a similar court to handle environmental litigation.[267] When creating the Federal Circuit, Congress

260. *See supra* Sections II.B.1, II.B.2; *see also* Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 51 (D. Mass. 2020). *But see* City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 470–76 (S.D.N.Y. 2018), *aff'd sub nom.* City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021).

261. *See Constitutional Convention and Ratification, 1787–1789*, U.S. DEP'T OF STATE OFF. OF THE HISTORIAN, https://bit.ly/3blxwNA (last visited Jan. 9, 2021) (discussing creation of the U.S. Constitution and the failings of the Articles of Confederation).

262. *See supra* Section II.A.3.

263. *See infra* Section III.A.

264. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

265. *See supra* Section II.A.

266. *See supra* Section II.C.

267. *See* Federal Courts Improvement Act of 1982 §§ 101–102.

acted "due to the special need for uniformity in patent cases, and . . . to reduce forum shopping."[268] These motivations echo the current problems faced in environmental law and suggest that a similar solution may be applicable.[269]

As much as disagreements between courts weakened patent law,[270] environmental law is approaching a point of no return. The patent system prior to the creation of the Federal Circuit had the benefit of being confined to the federal court system.[271] In contrast, environmental litigation is currently split between state and federal courts,[272] creating the potential for further inconsistency and instability and heightening the need for a unified court. Further similarities between patent and environmental litigation involve the relatively high costs associated with both types of litigation.[273] Moreover, though the patent system extends across the 50 states and every person within them, typically each patent dispute affects only the parties immediately involved in the case. Conversely, environmental lawsuits increasingly affect large swaths of individuals as cities, counties, and states bring suit on behalf of their citizens.[274] Accordingly, a lack of uniformity in environmental law has the potential to affect substantial portions of the United States population.[275] As the passage of a comprehensive federal environmental legislation is unlikely, Congress should look to the Federal Circuit and take a similar approach in environmental law by creating a designated Circuit Court of Appeals for Environmental Litigation. The creation of such a court would allow for consistency and uniformity of environmental law to develop, just as patent law did after the creation of the Federal Circuit.[276]

Additionally, with the creation of the Unified Circuit Court of Appeals for Environmental Litigation, Congress would have the unique opportunity to establish special parameters for environmental litigation. In patent law cases of willful infringement, a court may assess triple damages against a defendant.[277] Congress could take a similar path in environmental law, or instead, create a special cap for damages in certain types of

268. Elizabeth I. Rogers, *The Phoenix Precedents: The Unexpected Rebirth of Regional Circuit Jurisdiction Over Patent Appeals and the Need for a Considered Congressional Response*, 16 HARV. J.L. & TECH. 411, 428 (2003).

269. *See supra* Sections II.B.2, II.C.1, II.C.2.

270. *See* Rogers, *supra* note 268, at 428.

271. *See* Pratt v. Paris Gas Light & Coke Co., 168 U.S. 255, 257 (1897) (describing federal law restricting patent cases to the federal courts).

272. *See supra* Sections II.A.2, II.B.2.

273. *See supra* Section II.C; *see also* Daniel Stein, *Environmental Mediation: A Viable Alternative to Costly Litigation*, 16 ENVIRONS 69, 69–70 (1993).

274. *See supra* Section II.B.2.

275. *See supra* Sections II.A, II.B.

276. *See supra* Section II.C.

277. *See* 35 U.S.C. § 284.

environmental suits. Other standards could include requiring specific methods of discovery, unique requirements to meet the burden of proving a prima facie case, and other customizations focused on making environmental litigation less costly and time consuming to carry out.

Precedent from the last few decades has established that federal common law environmental nuisance suits are often displaced by federal statutory law.[278] More recently, a trend among federal circuits has emerged that indicates a willingness to allow state environmental nuisance claims to go forward in state courts.[279] Although individual plaintiffs may be pleased to have discovered a possible route to obtain environmental justice, this state–by–state approach will only serve to weaken the United States' ability to address the changing climate and regulate the environment.[280]

In *City of New York*, the Court of Appeals for the Second Circuit seemed to firmly close the door on climate litigation pursued through federal common law nuisance claims.[281] While the court largely echoed language of the Supreme Court in earlier decisions,[282] the decision exemplified the problem currently facing environmental law: the issue is national in scope but cannot be adequately addressed using federal law.[283] Federal common law, once the primary method for handling interstate environmental disputes, can no longer be used.[284]

Federal statutes are failing to stop or even slow the tide of climate change and have instead stood in the way of potential judicial remedies.[285] Desperate plaintiffs have been forced from federal courts to state courts to attempt to receive remedies for environmental problems they cannot reasonably resolve on their own.[286] Allowing state courts to determine critical environmental questions is untenable because of the possibility of further fracturing United States environmental policy. Federal courts are the jurisdiction in which environmental cases should be heard, as they can bind larger areas under a single rule.[287] But the number of circuits and lack of unity among them creates difficulty in obtaining a uniform application of laws.

B. Implementing a Successful Unified Circuit Court of Appeals for

278. *See supra* Sections II.B.1, II.B.2.
279. *See supra* Section II.B.2.
280. *See supra* Sections II.A.2, II.B.2.
281. City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 470–76 (S.D.N.Y. 2018), *aff'd sub nom.* City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021).
282. *See id.*; *see also supra* Section II.B.1.
283. *See supra* Sections II.A.3, II.B.2.
284. *See supra* Sections II.B.1, II.B.2.
285. *See supra* Section II.A.3.
286. *See supra* Section II.B.2.
287. *See supra* Sections II.B, II.C.

Environmental Litigation

Congress should utilize a framework similar to the Federal Circuit to create the Unified Circuit Court of Environmental Litigation, which should include a single panel of judges to preside over issues. Comparable to the Federal Circuit, the judges need not be experts on environmental law.[288]

As patent law is entirely federally regulated,[289] Congress created the Federal Circuit with relative simplicity. Alternatively, environmental law is complex in nature, due its composition of often interweaving federal and state law.[290] Thus, Congress must explicitly give the Unified Circuit Court of Environmental Litigation jurisdiction to preside over cases brought with causes of action based in state common law, and the ability to apply state law in restricted environmental cases. Fortunately, the common law of nuisance is relatively uniform and does not involve significant variations on a state-by-state basis.[291] The main issue the court is intended to resolve is the current inconsistencies found in environmental law. Given the recent litigation, major environmental law questions will likely be litigated and decided entirely in state courts if a unified circuit court is not created.[292] Such a path could be disastrous for the environmental policy of the United States.[293] By giving a single court the authority to answer questions of environmental law, whether those questions be rooted in state or federal common law, Congress would ensure a virtually borderless and uniform application of environmental law across the entire country.[294] Such an application is necessary for a borderless entity like the environment. Just as was seen when the Federal Circuit was created, environmental law would cease to be a cacophony of conflicting voices and instead a single

288. *See generally* Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1418–25 (2016) (noting expertise of judges of Federal Circuit comes from experience in the position).

289. *See* Gugliuzza, *supra* note 242, at 1814 (explaining that practically all patent cases are "subject to exclusive federal jurisdiction").

290. *See supra* Sections II.A.1, II.A.2, II.A.3.

291. *See* Keiswetter v. City of Petoskey, 335 N.W.2d 94, 97 (Mich. Ct. App. 1983) (internal quotations omitted) (defining a nuisance as when "a person . . . is engaged in an activity or is creating a condition that is harmful or annoying to others and for which he is legally liable . . . ." (quoting RESTATEMENT (SECOND) OF TORTS § 821A cmt. b(3) (AM. L. INST. 1979))). Nuisance actions brought under a state common law cause of action in other instances remain similar to this definition. *See, e.g.*, Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021), *aff'd*, 2022 U.S. App. LEXIS 9409, at *112–13 (4th Cir. Apr. 7, 2022); Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947 (D. Colo. 2019), *aff'd in part*, 965 F.3d 792 (10th Cir. 2020), *vacated*, 141 S. Ct. 2667 (2021).

292. *See supra* Section II.B.2.

293. *See* discussion *supra* Section II.B.

294. *See* discussion *supra* Section II.C.

voice would be heard.[295] Additionally, Congress could later reinstate a federal cause of action for environmental plaintiffs. However, given the similarity between federal and state common law nuisance,[296] doing so would largely be a symbolic gesture. Regardless of the method Congress uses, it should take action to create a Unified Circuit Court of Appeals for Environmental Litigation to create uniformity and consistency in the United States' environmental law.

IV. CONCLUSION

It is far past time for the United States to take action to alleviate the problems being caused by the condition of environmental law. The damage inflicted on the global environment on a daily basis is not being slowed or stopped by current environmental policy.[297] Comprehensive legislation addressing the shortcomings of the current system of environmental laws and regulations is not likely to come any time soon, largely due to the realities of the United States' political system.[298] States, municipalities, and counties across the United States have brought litigation against major oil and gas corporations, clearly signaling their dissatisfaction with the environmental status quo.[299] While these suits open the possibility that climate plaintiffs may be able to have their day in court, the suits also open the possibility to a state-by-state fracturing of the already broken system of United States environmental regulation.[300]

Luckily, Congress has a ready-made template by which they can avoid the political pitfalls of comprehensive climate legislation while still making strides towards improving consistency and uniformity in environmental law.[301] The extensive similarities present between the state of patent law pre-Federal Circuit and the current state of environmental law indicates that a similar solution will likely address many of the most pressing issues facing environmental policy in the United States today.[302] The creation of a Unified Circuit Court of Appeals for Environmental Litigation would prevent the further splintering of United States climate policy that appears to be imminent.[303] The United States should present a unified front in the battle to stop climate change by taking the first step

295. *See* discussion *supra* Section II.C.

296. *See supra* Sections II.B.1, II.B.2.a. (examining federal and state cases bringing suit using causes of action brought under federal common law and state common law).

297. *See The Effects of Climate Change*, *supra* note 6.

298. *See supra* Section II.A.3.

299. *See supra* Section II.B.2.

300. *See supra* Section II.B.2.

301. *See supra* Sections II.C.1, II.C.2.

302. *See* discussion *supra* Section II.C.

303. *See supra* Sections II.A, II.B.2.

and creating a single Circuit Court of Appeals for Environmental Litigation.