

ENVIRONMENTAL RIGHTS, PUBLIC TRUST, AND PUBLIC NUISANCE: ADDRESSING CLIMATE INJUSTICES THROUGH STATE CLIMATE LIABILITY LITIGATION

by Barry E. Hill

Barry E. Hill is a Visiting Scholar at the Environmental Law Institute and Adjunct Professor at Vermont Law School. He served as Director of the U.S. Environmental Protection Agency's Office of Environmental Justice from 1998-2007.

SUMMARY

This Article focuses on an area of rapidly evolving jurisprudence—climate liability litigation. It examines in depth the state attorney general's complaint filed in *Rhode Island v. Chevron Corp.* in 2018, alleging various state-law tort claims. It explores the intensely sustained legal battles taking place between states and fossil fuel companies over whether federal courts or state courts should have jurisdiction, which in many respects is the "ballgame issue" for both plaintiffs and defendants. Rhode Island's carefully crafted complaint arguably provides a roadmap for other states, as it comprehensively weaves together the state's public trust and public nuisance laws as well as the state's environmental rights amendment. The U.S. Court of Appeals for the First Circuit recently ruled that the state was "alleging [under state law that] the oil companies produced and sold oil and gas products that were damaging the environment in Rhode Island and engaged in a misinformation campaign about the harmful effects on the earth's climate," and remanded the case back to state court for trial.

In state and federal courts throughout this country, state attorneys general, representing the states, and private attorneys, representing Big Oil and gas companies, are waging fierce legal battles over the issue of jurisdiction in climate liability litigation. For example, on August 17, the attorney general of the District of Columbia argued in federal district court that his case, brought solely pursuant to the D.C. consumer protection law against Exxon Mobil, Chevron, and BP, should be heard in D.C. Superior Court.¹ In the motion to remand, he argued that "removal was improper because the District's complaint does not raise any federal claims, and the Superior Court is the appropriate forum for adjudicating the exclusively District law claims."² As in other state climate liability cases, industry legal counsel argued that the District's case nevertheless

raised questions of federal common law and, consequently, is preempted by federal law.

This Article examines in depth Rhode Island's current climate liability litigation, which also involves this jurisdictional argument. On July 2, 2018, Rhode Island sued 21 oil and gas fossil fuel companies,³ alleging various state-law tort claims.⁴ After removal, the U.S. district court chief

1. Motion to Remand to State Court, *District of Columbia v. Exxon Mobil Corp.*, No. 1:20-cv-01932 (D.D.C. filed Aug. 17, 2020), https://www.eenews.net/assets/2020/08/20/document_cw_01.pdf.

2. *Id.*

3. Complaint, *State v. Chevron Corp.*, No. PC-2018-4716 (R.I. Super. Ct. filed July 2, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180702_docket-PC-2018-4716_complaint.pdf. The 21 companies are Chevron Corp.; Chevron U.S.A. Inc.; ExxonMobil Corp.; BP p.l.c.; BP America, Inc.; BP Products North America, Inc.; Royal Dutch Shell, p.l.c.; Motiva Enterprises, LLC; Shell Oil Products Co. LLC; Citgo Petroleum Corp.; Conocophillips; Conocophillips Co.; Phillips 66; Marathon Oil Co.; Marathon Oil Corp.; Marathon Petroleum Corp.; Marathon Petroleum Co. L.P.; Speedway LLC; Hess Corp.; Lukoil Pan Americas, LLC; and Getty Petroleum Marketing, Inc.

4. Rhode Island filed a comprehensive 145-page complaint in state Superior Court seeking to hold the 21 fossil fuel companies liable for causing climate change impacts that adversely affected the state's natural resources, as well as the rights of its inhabitants' access to and use of those natural resources in violation of the state's Environmental Rights Amendment (ERA) and state

judge for the District of Rhode Island remanded the case back to state court.⁵ On July 22, 2019, the court found that the defendants had not carried their burden of showing that the case belonged in federal court.⁶

First, the court rejected the defendants' argument that Rhode Island's complaint artfully pleaded its claims to avoid federal jurisdiction. The court determined: "Defendants, in essence, want the court to peek beneath the purported state-law façade of the state's public nuisance claim, see the claim for what it would need to be to have a chance at viability, and convert it to that." The court added that there is nothing in the artful pleading doctrine, which the defendants rely on, to support such an argument. Second, the court determined that federal common law—which the defendants said necessarily governed the state's claims—could not completely preempt Rhode Island's public nuisance claim "absent congressional say-so."

Third, the court also was not persuaded that the federal Clean Air Act (CAA)⁷ or the foreign affairs doctrine completely preempted the state-law claims. The court rejected the defendants' argument that the case was preempted by the CAA and stated that, "[a]s far as the court can tell,

environmental laws. The complaint asserts claims of public nuisance; strict liability for failure to warn; strict liability for design defects; negligent design defects; negligent failure to warn; trespass; impairment of public trust resources; and violations of the state's ERA. The alleged harms include substantial sea-level rise; more frequent and severe flooding; extreme precipitation events and drought; and a warmer and more acidic ocean. The state asserts that the fossil fuel company defendants marketed and promoted their fossil fuel products, while simultaneously concealing the known hazards of those products and aggressively championing anti-science campaigns.

The state is seeking money damages for the defendants' acts and omissions for causing climate change impacts that adversely affect Rhode Island and jeopardize state-owned or -operated facilities, real property, and other assets. The state asserts that the defendants' acts and omissions are indivisible causes of Rhode Island's injuries and damages because, inter alia, (1) it is not possible to determine the source of any particular individual molecule of carbon dioxide (CO₂) in the atmosphere attributable to anthropogenic sources; (2) such greenhouse gas (GHG) molecules do not bear markers that permit tracing them to their source; and (3) GHGs quickly diffuse and comele in the atmosphere. The state goes on to assert that the defendants' wrongful conduct was willful and reckless with conscious disregard for the probable dangerous consequences of that conduct and its foreseeable impacts upon the rights of others, including the state of Rhode Island.

5. As anticipated, the fossil fuel companies sought to have the case removed to federal court just as they had done, at the time of the filing, in 14 other state climate change cases. The companies in those other lawsuits have maintained that climate change-related public nuisance claims are governed by federal common law and should, therefore, be heard in federal court.

On October 2, 2020, the U.S. Supreme Court, in another climate liability case (*BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189), granted certiorari on a narrow legal issue: whether district court remand orders can be appealed to the courts of appeal if defendant oil and gas companies premised removal on the Federal Officer Removal Statute. The argument is that the companies sold or extracted fossil fuels under federal guidance and control, and therefore they operated as federal officers, which gives federal courts jurisdiction over civil actions directed at the federal government or any of its federal officers. This is a federal appellate issue in that it centers on whether the oil and gas companies are allowed to appeal an entire remand order if federal officers are involved. This issue was raised and rejected by the Rhode Island District Court chief judge, since the allegations in the complaint pertained to the alleged misinformation and cover-up campaigns by the oil and gas industry defendants. However, if the Supreme Court rules in favor of the defendant oil and gas companies, they must still convince the appellate court(s) that their other arguments have validity and, therefore, the case must be heard in federal court. As of this writing, no hearing date has been set.

6. *Rhode Island v. Chevron Corp.*, No. 18-395 WES, 49 ELR 20126 (D.R.I. July 22, 2019).

7. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

the CAA authorizes nothing like the state's claims, much less to the exclusion of those sounding in state law. In fact, the CAA itself says that controlling air pollution 'is the primary responsibility of states and local governments.'" Fourth, the court found that the issues of foreign affairs, federal regulations, and navigable waters raised by the defendants were not disputed and substantial federal issues that the state court could entertain "without disturbing any congressionally approved balance of federal and state judicial responsibilities."

Fifth, the court determined that the federal issues were issues that the defendants "may press in the course of this litigation, but that are not perforce presented by the State's claims." Sixth, the court also rejected the defendants' arguments for removal under "bespoke jurisdictional law" (i.e., the Outer Continental Shelf Lands Act, federal enclave jurisdiction, the Federal Officer Removal Statute, the bankruptcy removal statute, and admiralty jurisdiction). In sum, the court stated that "[t]here is no federal jurisdiction under the various statutes and doctrines adverted to by defendants," adding that Rhode Island's claims are "thoroughly state-law claims." The court stated, "The rights, duties, and rules of decision implicated by the complaint are all supplied by state law, without reference to anything federal."

The defendants filed a notice of appeal to the U.S. Court of Appeals for the First Circuit. The First Circuit denied the defendants' motion for a stay pending appeal, and the defendants petitioned the U.S. Supreme Court for a stay of the proceedings.⁸ On October 22, 2019, the Supreme Court denied the defendants' application.⁹ The First Circuit held oral argument on September 11, 2020, on the defendants' appeal of the district court's remand order. On October 29, 2020, the First Circuit affirmed the district court order remanding the case back to state court for trial.¹⁰

In addition to the jurisdictional issue, the Rhode Island climate liability litigation raises a number of interesting

8. The First Circuit was asked by the defendants in a letter, dated October 7, 2019, to grant a pending stay motion because the Supreme Court was considering a stay application in a climate change case (*BP p.l.c. v. Mayor & City Council of Baltimore*) virtually identical to the Rhode Island climate change case that was pending in the U.S. Court of Appeals for the Fourth Circuit.

9. Associate Supreme Court Justice Stephen G. Breyer, who oversees the First Circuit, denied the defendants' application for a stay pending appeal of the remand order. Chief Judge William E. Smith, consequently, issued an order granting the motion to remand two days after Justice Breyer denied the stay. The defendants appealed the remand order to the First Circuit on November 20, 2019, arguing, among other things, in their brief that federal jurisdiction is proper because the state's claims necessarily invoked federal common law, notwithstanding the state-law labels used in the complaint. On November 27, 2019, the U.S. Chamber of Commerce filed an amicus brief supporting the defendants' argument that federal common law provided a basis for federal jurisdiction, and requested that the First Circuit review the entire remand order. On December 26, 2019, Rhode Island filed its brief and argued that the First Circuit only had jurisdiction to review whether federal officer removal jurisdiction existed and further argued that, in any event, other grounds for removal had no merit. Numerous amicus curiae briefs were filed in support of Rhode Island by entities such as Massachusetts and 12 other states, the National League of Cities, the Natural Resources Defense Council, Public Citizen, and so on.

10. *Rhode Island v. Shell Oil Products Co., L.L.C.*, No. 19-1818, 50 ELR 20245 (1st Cir. Oct. 29, 2020).

legal questions. First, what environmental rights, if any, do current and potential “climate refugees”¹¹ (e.g., children, pregnant women, the elderly, low-income communities, impoverished people with chronic health conditions, those with mobility or cognitive limitations, the underserved, and some minority communities)¹² have for a state government to protect them from the adverse effects of climate change on their environment and public health caused by fossil fuel companies? What environmental rights, if any, do these individuals and communities have for a state government to prosecute instances of climate injustice caused by fossil fuel companies? Is there a human right to clean

air, clean land, and clean water for all individuals and communities that is enforceable by a state government?

Second, are there legal doctrines that a state government could utilize against fossil fuel companies to address the adverse effects of climate change while, at the same time, addressing instances of climate injustice that these current and potential climate refugees face on a daily basis, and in the foreseeable future? The answer may be “yes.”

Part I of this Article examines the doctrine of environmental rights amendments (ERAs) and discusses Rhode Island’s ERA. Part II proceeds to review the venerable public trust doctrine and the important role that states have in protecting their natural resources, as well as protecting the rights of their inhabitants, including minority and/or low-income communities, to have access to and use of those natural resources. It discusses Rhode Island’s public trust law. Part III examines the doctrine of public nuisance and how this heretofore forgotten legal doctrine has recently played a significant role in a major opioid state litigation, and now Rhode Island’s climate liability litigation. Finally, Part IV offers some observations regarding state climate liability litigation.

The discussion here of these three distinct but nonetheless interrelated legal doctrines will be connected entirely to *State v. Chevron Corp.*¹³ That climate liability litigation, in my view, arguably provides a model framework for other states’ potential climate liability litigation against fossil fuel companies.

My purpose in examining Rhode Island’s skillfully crafted complaint is to demonstrate how an ERA argument, together with arguments regarding the public trust and public nuisance legal doctrines, could potentially be successfully used by a state attorney general’s office to prosecute a climate liability case in state court. The melding of these three legal doctrines in a single case creates a credible argument for addressing climate change while, at the same time, addressing instances of climate injustice within the state in state court.

But first, we will examine which communities throughout the United States are current and potential climate change refugees.

Prelude: Climate Injustice in the United States

It is generally accepted by the international scientific community that the climate is changing, that human activities are contributing to this major environmental and public health problem, and that the adverse impacts are already being felt by people, plants, and animals across the globe.¹⁴ The term “climate justice” is used to frame climate change/global warming as an ethical and political issue, rather than just a purely environmental issue. Climate justice advocates from around the world have related the adverse effects of climate change to concepts of justice,

11. According to the United Kingdom’s Climate and Migration Coalition, there is no single definition of the term “climate refugee.” Alex Randall, *Climate Refugees Definition: Can We Define a Climate Refugee?*, CLIMATE & MIGRATION COALITION, <http://climatemigration.org.uk/climate-refugees-definition/> (last visited Oct. 20, 2020).

For some, climate refugees are migrants who are forced to flee due to sudden or gradual alterations in the natural environment related to at least one of three impacts of climate change, such as sea-level rise, extreme weather events, and drought or water scarcity. Arguably, Puerto Ricans who fled the island for Florida or New York or for other cities on the mainland United States after September 2017 because of Hurricane Maria would qualify as climate refugees. Whereas the United Nations’ Refugee Agency (UNHCR) refers to climate refugees as “persons displaced in the context of disasters and climate change.” These climate refugees, however, must cross an international border. This would suggest that the Puerto Ricans who moved to the United States would not be considered climate refugees, per se, since they did not cross an international border.

Thus, as used in this Article, it should be understood that a resident of Miami could be considered a climate refugee if she moved further inland to the state of Georgia because of sea-level rise in that a significant number of homes are just a yard or two above high tide—and that tide levels are rising rapidly. According to an August 2016 report by the real estate data firm Zillow, 32,986 homes (nearly one-third of the Miami housing stock), worth a combined total of \$16 billion, would be underwater if sea levels rose six feet by 2100, as predicted by the melting of the Antarctic ice sheet alone. In Miami Beach, there are plans to spend a half-billion dollars to install pumps and raise roads and seawalls. So called king tides are already causing more damage in Miami than they used to. Melissa Allison, *The Effect of Rising Sea Levels on Coastal Homes*, ZILLOW, Aug. 2, 2016, <https://www.zillow.com/blog/rising-sea-levels-coastal-homes-202268/>.

According to a 2012 World Resources Institute fact sheet, Florida is the state most vulnerable to sea-level rise, and metropolitan Miami has the largest amount of exposed assets and the fourth largest population vulnerable to sea-level rise in the world. Moreover, Miami-Dade County alone has more people living less than four feet above sea level than any state except Louisiana. CHRISTINA DECONCINI & FORBES TOMPKINS, WORLD RESOURCES INSTITUTE, SEA-LEVEL RISE AND ITS IMPACT ON FLORIDA (2012), https://pdf.wri.org/sea_level_rise_in_florida.pdf.

A 2015 *New Yorker* article described how the daily high-water mark has been rising in the Miami area almost one inch per year, which is nearly 10 times the rate of average global sea-level rise, and the adverse impact it is already having on the city and the metropolitan area. The author examined why the region has been called “ground zero when it comes to sea-level rise”; as “the poster child for the impacts of climate change”; as “the epicenter for studying the effects of sea-level rise”; as a “disaster scenario”; and as “the New Atlantis.” Moreover, when talking about climate change in the Florida Everglades on Earth Day 2015, President Barack Obama proclaimed, “Nowhere is it going to have a bigger impact than here in South Florida.” The article concluded: “Eventually, the Everglades, along with Shorecrest and Miami Beach and much of the rest of South Florida, will be inundated.” Elizabeth Kolbert, *The Siege of Miami: As Temperatures Climb, So, Too, Will Sea Levels*, NEW YORKER, Dec. 14, 2015, <https://www.newyorker.com/magazine/2015/12/21/the-siege-of-miami>.

12. AMERICAN PUBLIC HEALTH ASSOCIATION (APHA), ADAPTATION IN ACTION PART II, at 5-6 (2018), https://www.apha.org/-/media/files/pdf/topics/climate/adaptation_in_action_part_2.ashx?la=en&hash=87A791182153A590EE7C5C97AE94EEC2691EFD6E. In discussing climate justice, the APHA stated how climate change is predicted to increase health disparities, and that the health impacts of climate change affect those sub-populations differently.

13. See *supra* note 4.

14. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007 (2007), <https://archive.ipcc.ch/report/ar4/>.

particularly environmental justice¹⁵ and social justice.¹⁶ Climate justice advocates, consequently, have examined issues such as equality and the human right to a clean, safe, and healthy environment.¹⁷

One of the universally recognized climate justice advocate organizations is the Mary Robinson Foundation—Climate Justice, which “is a centre for thought leadership, education and advocacy on the struggle to secure global justice for those people vulnerable to the impacts of climate change who are usually forgotten—the poor, the disempowered and the marginalized across the world.”¹⁸ According to the Foundation:

Climate justice links human rights and development to achieve a human-centered approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts. Climate justice is informed by science, responds to science and acknowledges the need for equitable stewardship of the world’s resources.¹⁹

A fundamental principle of climate justice is that those who are least responsible for climate change suffer its greatest environmental and public health consequences. According to the University of Colorado Boulder Environmental Center:

Climate change is fundamentally an issue of human rights and environmental justice that connects the local to the global. With rising temperatures, human lives—particularly in people of color, low-income, and indigenous communities—are affected by compromised health, financial burdens, and social and cultural disruptions. Those who are most affected and have the fewest resources to adapt to climate change are also the least responsible for the greenhouse gas emissions—both globally and within the United States.²⁰

The fact that people who live, learn, work, and play in America’s most polluted environments are commonly people of color and the poor, and who are already disproportionately exposed to environmental harms and risks, is not new information. They are, consequently, victims of environmental injustice. And because of climate change, they are currently and in the foreseeable future disproportionately impacted by the negative effects of climate change throughout the United States. They are, consequently, victims of climate injustice.

Recent climate liability lawsuits have indicated that climate change does not impact all communities equally. For example, in the state of Minnesota’s climate liability complaint filed on June 24, 2020 (*State v. American Petroleum Institute*),²¹ the attorney general wrote:

Minnesota is in the midst of a climate-change crisis. The world has already warmed approximately two degrees Fahrenheit (F) due to human-caused climate change; Minnesota has warmed even more. *Warming will continue with devastating economic and public-health consequences across the state and, in particular, disproportionately impact people living in poverty and people of color.*

...

*Vulnerable populations such as the disabled, the elderly, children, people who live alone, people of color, and less-resourced communities are more likely to suffer health effects from higher air temperatures, flooding, and air pollution.*²²

Likewise, in the District of Columbia’s complaint filed on June 25, 2020 (*District of Columbia v. Exxon Mobil Corp.*),²³ the attorney general wrote:

15. The U.S. Environmental Protection Agency (EPA) defines “environmental justice” as follows:

Environmental justice is the *fair treatment* and *meaningful involvement* of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies. *Fair treatment* means that no group of people, including racial, ethnic, or socioeconomic groups should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state and local and tribal environmental programs and policies. *Meaningful involvement* means that: (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or their health; (2) the public’s contribution can influence the regulatory agency’s decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision-makers seek out and facilitate the involvement of those potentially affected.

U.S. EPA, TOOLKIT FOR ASSESSING POTENTIAL ALLEGATIONS OF ENVIRONMENTAL INJUSTICE (2004) (EPA 300-R-04-002) (emphasis added), available at <https://www.epa.gov/sites/production/files/2015-04/documents/toolkit.pdf>.

16. See CLIMATE ETHICS: ESSENTIAL READINGS (Stephen M. Gardiner et al. eds., 2010), <https://global.oup.com/academic/product/climate-ethics-9780195399622?cc=us&lang=en&>.

17. See SAMVEL VARVASTIAN, THE HUMAN RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT IN CLIMATE CHANGE LITIGATION (Max Planck Inst., MPIL Research Paper Series No. 2019-09, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369481.

18. Mary Robinson Foundation—Climate Justice, *Mission and Vision*, <https://www.mrfcj.org/about/mission-and-vision/> (last visited Oct. 20, 2020).

19. Mary Robinson Foundation—Climate Justice, *Principles of Climate Justice*, <https://www.mrfcj.org/principles-of-climate-justice/> (last visited Oct. 20, 2020). See also MARY ROBINSON FOUNDATION—CLIMATE JUSTICE, THE GEOGRAPHY OF CLIMATE JUSTICE: AN INTRODUCTORY RESOURCE (2011), <https://www.ria.ie/sites/default/files/the-geography-of-climate-justice.pdf>; BARBARA ADAMS & GRETCHEN LUCHSINGER, UNITED NATIONS, CLIMATE JUSTICE FOR A CHANGING PLANET: A PRIMER FOR POLICY MAKERS AND NGOS (2009).

20. University of Colorado Boulder Environmental Center, *Climate Justice*, <https://www.colorado.edu/center/energyclimate-justice/general-energy-climate-info/climate-change/climate-justice> (last visited Oct. 20, 2020).

21. Complaint, *State v. American Petroleum Institute*, No. 62-CV-20-3837 (Minn. Dist. Ct. filed June 24, 2020), https://www.ag.state.mn.us/Office/Communications/2020/docs/ExxonKochAPI_Complaint.pdf. On July 27, 2020, the fossil fuel defendants removed the case to federal court. Notice of Removal, *Minnesota v. American Petroleum Institute*, No. 20-CV-1636 (D. Minn. July 27, 2020), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200727_docket-020-cv-01636_notice-of-removal.pdf.

22. Complaint, *State v. American Petroleum Institute*, *supra* note 21, paras. 1, 161 (emphasis added).

23. Complaint, *District of Columbia v. Exxon Mobil Corp.*, No. 2020 CA.0002892B (D.C. Super. Ct. filed June 25, 2020), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200625_docket-2020-CA-002892-B_complaint.pdf.

Located at the confluence of the Anacostia and the Potomac, two tidally influenced rivers, the District is vulnerable to inland drainage and riverine and coastal flooding. Because of global warming, the District is experiencing more frequent and extreme precipitation events and associated flooding. *The District will continue to experience flooding, extreme weather, and heat waves exacerbated by climate change, with particularly severe impacts in low-income and communities of color.*²⁴

Rhode Island officials similarly believe that instances of climate injustice also exist in the state, and that these instances need to be addressed through the state's climate liability litigation. Their complaint recognized, in the "Factual Background" section, the disproportionate impacts on public health that climate change has had and will have on "vulnerable populations" in Rhode Island, who are current and potential climate refugees. Instead of using the term "climate refugees" per se, the complaint refers to the notion of "population displacement" and "sheltering services":

The State has incurred and will continue to incur expenses in planning, preparing for, and treating the public health impacts associated with anthropogenic global warming. Rhode Islanders are more likely to seek emergency on hotter days. On days when the temperatures reach 90°F, hospitalizations in the State for heat and dehydration increase 60% amongst those aged between 18 and 64, compared to the hospitalization rate on 80°F days. Climate models predict that ambient surface temperatures will increase by an average of 1.6°F by 2022, resulting in 378 more emergency department visits due to extreme heat in the months of April through October. *Vulnerable populations such as the disabled, elderly, children, communities of color, and low income are more likely to suffer health effects from high temperatures. Increased prevalence of vector-borne diseases, increased pollution, and increased allergens caused by increased surface temperatures will further contribute to increased hospitalizations in the State.*

Rhode Island will shoulder a portion of the costs for increased hospitalizations to treat recipients of State-funded medical insurance.²⁵

Still further, Rhode Island asserts:

Increased incidents of extreme weather have still more public health consequences, including danger to personal safety, economic disruption, and *population displacement*. As climate change impacts and severe weather events increase, they will place greater demands on emergency

response and *sheltering services*. The Rhode Island Emergency Management Agency ("RIEMA") has already incurred costs to improve resiliency to future disaster through planning and preparedness activities, trainings, and adaptation programs.²⁶

Moreover, the state asserts the substantial costs of educating its inhabitants, including "vulnerable populations," about the adverse impacts to public health of extreme heat waves:

The State has incurred significant expenses educating and engaging the public to better understand climate change, and promoting community involvement in actions to reduce climate change risks. *These efforts include by educating vulnerable populations about the public health impacts of extreme heat waves (such as heat stroke), drought (diminished water supply), and other climate change-related impacts.* Implementation of these planning and public outreach processes represent substantial cost to the State.²⁷

In essence, the state describes in its complaint "vulnerable populations" as the victims of climate injustice.

Finally, Rhode Island describes the disproportionate public health impacts of anthropogenic global warming on "vulnerable populations" as follows:

Sea level rise, increased air temperatures to the hydrologic cycle associated with anthropogenic climate change have resulted and will result in public health impacts for the state of Rhode Island.

Extreme weather events, such as hurricanes and inland flooding, have immediate health consequences, including danger to personal safety and longer-term consequences, including social and economic disruption, *population displacement*, and mental trauma.

Extreme heat-induced public health impacts in the State will result in increased risk of heat-related illnesses such as heat exhaustion and dehydration, increased hospitalizations, and death.

...

*Public health impacts of these climatological changes are likely to be disproportionately borne by communities made vulnerable by geographic, racial, or income disparities.*²⁸

The description of the instances of climate injustice to "vulnerable populations" in Rhode Island is consistent with the extensive research regarding addressing the disproportionate effects of air pollution and consequently climate change

On July 17, 2020, the fossil fuel defendants removed the case to federal court. Notice of Removal, *District of Columbia v. Exxon Mobil Corp.*, No. 1:20-cv-01932 (D.D.C. July 17, 2020), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200717_docket-120-cv-01932_notice-of-removal-1.pdf.

24. Complaint, *District of Columbia v. Exxon Mobil Corp.*, *supra* note 23, para. 97 (emphasis added).

25. Complaint, *State v. Chevron Corp.*, *supra* note 3, paras. 213-214 (emphasis added).

26. *Id.* para. 216 (emphasis added).

27. *Id.* para. 218 (emphasis added).

28. *Id.* paras. 88-90, 93 (emphasis added).

on Latinx and African-American communities, as well as low-income communities, throughout the United States.²⁹

Against this factual background, the next parts of this Article discuss Rhode Island's ERA, its public trust laws, and its public nuisance laws in the context of the climate liability litigation, as well as how those legal doctrines could be used to address instances of climate injustice in the state.

I. Environmental Rights Amendments

A. Background

Should everyone, including minority and/or low-income communities, be able to breathe fresh clean air; have access to clean water and sanitation; live in a clean, safe, and healthy environment; and eat safe food? Today, more than three-quarters of the world's national constitutions (149 out of 193) include explicit references to environmental rights and/or the central government's environmental responsibilities.³⁰ Ninety-six of those 149 national constitutions recognize that citizens have a substantive human right to live in a clean, safe, and healthy environment.³¹

According to Prof. Jonathan Z. Cannon, however, the U.S. Constitution is "pre-ecological."³² There is no mention of the environment in the federal Constitution. Nor is there a Supreme Court decision declaring that the right to a clean, safe, and healthy environment for all falls within a *penumbral right*—a right that could be derived from other rights explicitly protected in the Bill of Rights—as the Supreme Court has declared in *Griswold v. Connecticut*³³ for the right to privacy (the right to have access to contraceptives) or in *Obergefell v. Hodges*³⁴ regarding the right for same-sex couples to marry.³⁵ Consequently, the late Prof. Jack R. Tuholske has stated:

In our federal system, state constitutions often transcend the U.S. Constitution, embracing the Bill of Rights and more, and establishing and protecting rights and duties in areas of governance reserved to the states. Unlike the

federal Constitution, which has no provision for environmental protection, nearly one half of our state constitutions have textual rights or policy statements protecting natural resources and/or the environment. Many of the clearest statements of environmental rights were enacted in the last 40 years, as our nation began to recognize environmental protection as a legal and political norm. Protecting the environment was important to civil society, just like the other protections we elevate to constitutional right status.³⁶

In many respects, "environmental constitutionalism"³⁷ in the United States is a fairly new legal doctrine. In a 2004 law review article, my colleagues and I pointed out that every state constitution amended after 1959 explicitly addresses "modern concerns" regarding pollution control and preservation.³⁸ Indeed, fully one-third of all state constitutions include (1) policy statements regarding the importance of environmental quality; (2) environmental enabling language³⁹; and/or (3) language creating an individual right to a clean and healthy environment. Six states, as will be discussed in this section, have adopted the last and strongest type of provision.⁴⁰ The environmental constitutionalism movement, beginning in the 1970s, to add ERAs to the bill of rights sections of state constitutions is a further manifestation of the evolution and continued growth of this nation's modern environmental movement. Briefly stated, the modern environmental movement developed, generally speaking, through three stages over more than 100 years.⁴¹

The first stage occurred early in the 20th century and was led by such notable individuals as the Scottish immigrant John Muir, founder of the Sierra Club and the "father of national parks,"⁴² and the forester Aldo Leopold, the

29. See Jeremy S. Hoffman et al., *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 U.S. Urban Areas*, 8 CLIMATE 12 (2020), available at <https://www.mdpi.com/2225-1154/8/1/12/htm>; Christopher W. Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 PNAS 6001 (2019), available at <https://www.pnas.org/content/116/13/6001>; Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480 (2018), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5844406/>.

30. DAVID R. BOYD, DAVID SUZUKI FOUNDATION, PAPER #4: THE STATUS OF CONSTITUTIONAL PROTECTION FOR THE ENVIRONMENT IN OTHER NATIONS (2013), <https://davidsuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations.pdf>. See also Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized*, 35 DENV. J. INT'L L. & POL'Y 129 (2008).

31. BOYD, *supra* note 30, at 12.

32. JONATHAN Z. CANNON, ENVIRONMENT IN THE BALANCE: THE GREEN MOVEMENT AND THE SUPREME COURT 29 (2015).

33. 381 U.S. 479 (1965).

34. 574 U.S. 1118 (2015).

35. Barry E. Hill, *Bending the Arc Toward Justice*, ENVTL. F., July/Aug. 2020, at 53.

36. Jack R. Tuholske, *U.S. State Constitutions and Environmental Protection: Diamonds in the Rough*, 21 WIDENER L. REV. 239 (2015), available at <http://widenerlawreview.org/files/2008/10/13-Tuholske.pdf>. Professor Tuholske, who recently passed on, was a colleague for many years at Vermont Law School (VLS), where he served on the faculty for 20 years. He co-founded and directed VLS's Water and Justice Program, and pioneered the school's online master's degree program. To further his legacy, VLS will create the Tuholske Institute of Environmental Field Studies to advance his work in deep field-based experiential education. He also served as a technical advisor to VLS's U.S.-Asia Partnership in Environmental Law, and made many trips to China to teach judges and lawyers about the emerging field of environmental law in China.

37. See MAYA K. VAN ROSSUM, THE GREEN AMENDMENT: SECURING OUR RIGHT TO A HEALTHY ENVIRONMENT 50-54 (2017).

38. Barry E. Hill et al., *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT'L ENVTL. L. REV. 359 (2004).

39. Sixteen states (Oregon, California, Idaho, Utah, Colorado, New Mexico, Minnesota, Louisiana, Mississippi, Michigan, Ohio, Alabama, Florida, New York, Virginia, and North Carolina) have environmental policy statements or enabling language in their constitutions.

40. Three states (Illinois, Massachusetts, and Hawaii) have substantive environmental rights expressed outside of their constitutions' bill of rights sections. Three states (Montana, Pennsylvania, and Rhode Island) have substantive rights expressed in their constitutions' bill of rights sections.

41. See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Lawyers*, 19 ECOLOGY L.Q. 619, 634-39 (1992).

42. Wikipedia, *John Muir*, https://en.wikipedia.org/wiki/John_Muir (last edited Sept. 24, 2020).

“father of wildlife ecology,”⁴³ who advocated an appreciation and conservation of “things natural, wild, and free.”⁴⁴ The primary focus of these early environmentalists was conservation of natural resources and protection of a pristine environment. Their efforts led to the establishment of the system of national parks,⁴⁵ the preservation of forests,⁴⁶ and the designation of wildlife refuges and recreation areas for the American people to enjoy for generations to come.

For example, in 1903, President Theodore Roosevelt, an ardent conservationist,⁴⁷ while looking over the expanse of the Grand Canyon, said:

The Grand Canyon fills me with awe. It is beyond comparison—beyond description; absolutely unparalleled throughout the wide world . . . Let this great wonder of nature remain as it now is. Do nothing to mar its grandeur, sublimity and loveliness. You cannot improve on it. But what you can do is to keep it for your children, your children’s children, and all who come after you, as the one great sight which every American should see.⁴⁸

On February 26, 1919, President Woodrow Wilson designated the Grand Canyon as a national park.⁴⁹

The second stage began in the 1960s, during which environmental activism took place largely on the legal front, and lawyers played the leading role. “[I]n response to rising public consciousness during the 1950s and 1960s of the perils of pollution and of the waste of natural resources,” most of the modern environmental laws were enacted during the 1970s.⁵⁰ Environmental lawyers working in the U.S. Congress drafted a plethora of major environmental laws, and, in the executive branch, envi-

ronmental lawyers enforced the new laws and developed implementing regulations.⁵¹

Lawyers affiliated with newly established legal advocacy groups, such as the Natural Resources Defense Council, the Sierra Club Legal Defense Fund, and the Environmental Defense Fund, lobbied for the enactment of the major environmental laws and filed lawsuits to see that they were implemented. Think-tanks such as the Environmental Law Institute studied environmental laws and regulations, and approached environmental problems from a public policy perspective. During this period of heightened awareness of environmental issues, Presidents Richard M. Nixon, Gerald R. Ford, and Jimmy Carter—two Republicans and one Democrat—issued numerous Executive Orders that addressed a myriad of environment-related situations.⁵²

On September 27, 1962, moreover, Rachel Carson’s pioneering environmental science book *Silent Spring* was published. As a student of nature, her thought-provoking and inspiring book warned of the dangers to humans and non-human natural systems from the misuse of chemical pesticides such as dichlorodiphenyltrichloroethane (DDT). She basically asked the questions as to whether and why humans had the right (1) to control nature; (2) to decide who lives or dies; and (3) to poison or to destroy nonhuman life. In short, she questioned, in many respects, the scope and direction of contemporary science.

Furthermore, on December 2, 1970, the U.S. Environmental Protection Agency (EPA) was established to consolidate at the federal level the variety of research, monitoring, standard-setting, and enforcement activities to ensure the protection of human health and the environment. On

43. Aldo Leopold Foundation, *Aldo Leopold*, <https://www.aldoleopold.org/about/aldo-leopold/> (last visited Oct. 20, 2020).

44. MARYBETH LORBIECKI, *THINGS NATURAL, WILD, AND FREE: THE LIFE OF ALDO LEOPOLD* (Fulcrum Publishing, 2011).

45. The National Park Service Organic Act of 1916, 39 Stat. 535 (codified at 6 U.S.C. §§1-4), established the National Park System, which is managed by the U.S. Department of the Interior in order “to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” H.R. 15522, 64th Cong. ch. 408 (1916).

46. See Surveying the Public Lands Act of June 4, 1897 (commonly known as the “Organic Administration Act of 1897”) (30 Stat. 11, 35, ch. 2; 16 U.S.C. §551) (providing that the purpose of forest reservations is “to improve and protect the forest within the reservation,” or for “securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States”).

47. President Theodore Roosevelt is often called “the conservation president” since he doubled the number of sites in the National Park System. See National Park Service, *Theodore Roosevelt and the National Park System*, <https://www.nps.gov/thrb/learn/historyculture/trandthenpsystem.htm> (last updated Apr. 5, 2019).

48. History, *Roosevelt Dedicates the Grand Canyon as a National Monument*, available at, <https://www.history.com/this-day-in-history/theodore-roosevelt-makes-grand-canyon-a-national-monument>.

49. Andrew Glass, *Wilson Establishes Grand Canyon as a National Park*, Feb. 26, 1919, POLITICO, Feb. 25, 2017, <https://www.politico.com/story/2017/02/wilson-establishes-grand-canyon-as-a-national-park-feb-26-1919-235306>.

50. 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 (2003).

51. See 1970 CAA Amendments, 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618; 1972 Coastal Zone Management Act, 16 U.S.C. §§1451-1466, ELR STAT. CZMA §§302-319; 1972 Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§136-136y, ELR STAT. FIFRA §§2-35; 1972 Marine Mammal Protection Act, 16 U.S.C. §§1361-1421h, ELR STAT. MMPA §§2-410; 1972 Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607; 1973 Endangered Species Act, 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18; 1974 Forest and Rangeland Renewable Resources Planning Act, which was the precursor to the National Forest Management Act, 16 U.S.C. §§1600-1687, ELR STAT. NFMA §§2-16; 1976 Resource Conservation and Recovery Act, 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011; 1976 Federal Land Policy and Management Act, 43 U.S.C. §§1701-1785, ELR STAT. FLPMA §§102-603; 1976 Toxic Substances Control Act, 15 U.S.C. §§2601-2692, ELR STAT. TSCA §§2-412; 1977 Surface Mining Control and Reclamation Act, 30 U.S.C. §§1201-1328, ELR STAT. SMCRA §§101-908; 1977 Safe Drinking Water Act Amendments, 42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA §§1401-1465.

52. See Protection and Enhancement of Environmental Quality, Exec. Order No. 11514, *as amended*, 3 C.F.R. 920 (1966-1970); Protection and Enhancement of the Cultural Environment, Exec. Order No. 11593, 3 C.F.R. 559 (1971-1975); Use of Off-Road Vehicles on the Public Lands, Exec. Order No. 11644, *as amended*, 3 C.F.R. 666 (1971-1975); Assignment of Function Under Section 311 of the Federal Water Pollution Control Act, Exec. Order No. 11735, *as amended*, 3 C.F.R. 791 (1971-1975); Providing for Administration of the Clean Air Act and the Federal Water Pollution Control Act With Respect to Federal Contracts, Grants, or Loans, Exec. Order No. 11738, 3 C.F.R. 799 (1971-1975); Animal Damage Control of Federal Lands, Exec. Order No. 11870, 3 C.F.R. 177 (1975); Delegation of Authorities Relating to Energy Policy and Conservation, Exec. Order No. 11912, 3 C.F.R. 114 (1976); Exotic Organisms, Exec. Order No. 11987, 3 C.F.R. 116 (1977); Floodplain Management, Exec. Order No. 11988, *as amended*, 3 C.F.R. 117 (1977); Protection of Wetlands, With Accompanying Statement, Exec. Order No. 11990, 3 C.F.R. 121 (1977); Federal Compliance With Pollution Control Standards, Exec. Order No. 12088, *as amended*, 3 C.F.R. 243 (1978).

April 22, 1970, the first Earth Day was celebrated, where more than 20 million people across the nation attended festivities, and expressed their deep appreciation of Mother Earth.⁵³ This period has been characterized as the decade of “legislative environmentalism”⁵⁴ at its zenith since most of the major environmental laws were either enacted or significantly amended between 1970 and 1980, with subsequent amendments enacted in the decades since.

At the same time, however, in the 1970s, there was a concerted movement to add ERAs to the bill of rights sections of state constitutions to grant their inhabitants the constitutional right to clean air and pure water. Thus, in 1970, Illinois amended its state constitution by adding Article XI; in 1971, Pennsylvania amended its bill of rights section by adding Article I, §27; in 1972, Montana amended its bill of rights section by adding Article II, §3; in 1972, Massachusetts amended its state constitution by adding Article 97; and in 1978, Hawaii amended its state constitution by adding Article XI, §9.⁵⁵ And, finally, in 1987, Rhode Island amended its constitution by adding Article I, §27 to its bill of rights section.

This active period of environmental constitution-making in the states has been characterized as the “environmental constitutionalism” era.⁵⁶ According to the August 2016 report of the New York State Bar Association:

Environmental constitutionalism began in New York, and was expanded in 1969, influenced in part by Dr. Rachel Carson’s seminal book, *Silent Spring*. Dr. Carson wrote that “[i]f the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem.” Rachel Carson, *Silent Spring* 12-13 (1962).⁵⁷

The third stage of the modern environmental movement took root in the 1980s and continues to the present time. It has been led in large part by a different set of actors—community activists whose primary focus is the protection of human health from the adverse effects of pollution in the air from gases and smoke, pollution in the water from chemicals and other substances produced by industry, and pollution in the soil from fertilizers and pesticides. Their efforts led, for example, to the enactment in 1980 of the

Comprehensive Environmental Response, Compensation, and Liability Act⁵⁸—commonly known as CERCLA or Superfund—which established a federal response program following the hazardous waste disaster at Love Canal, New York. CERCLA gives EPA the statutory authority to seek out the parties responsible for the release of specific substances at severely polluted sites, and to assure their financial cooperation in their cleanup.

According to the Delaware Riverkeeper, Maya K. van Rossum, however, our legislative-based environmental protection infrastructure has failed to protect human health and the environment in this country, and therefore we must radically rethink our approach. She argues that existing environmental laws do not ban pollution or development since permits are, in effect, licenses to pollute. In her 2017 book, she wrote that “[i]ndustries are perfectly able to pollute the air and water not in spite of, but because of the Clean Air Act and the Clean Water Act—they simply need the right permits to do so.”⁵⁹ She went on to state that “[l]egislative environmentalism has had its day, and the environment is still on the brink of catastrophe—we need a new way forward.”⁶⁰

In short, the “legislative environmentalism” of the second stage of the modern environmental movement has failed many communities, particularly minority and/or low-income communities, because environmental laws, among other things, emphasize jumping through procedural hoops, and are process-oriented. For example, the preparation of an environmental impact statement (EIS) is part of the permitting process under the National Environmental Policy Act of 1969 (NEPA).⁶¹ If an EIS is determined to be inadequate after the federal government’s “assessment” of the potential environmental effects of the proposed project, the developer can always revise and resubmit the document to the regulators.⁶² The siting of the pollution-generating facility may only be delayed, and not stopped, which is the primary goal of affected communities.⁶³

Ms. van Rossum has categorically stated:

Constitutional provisions to ensure a healthy environment comprise the linchpin of a new environmentalism. Unlike its alternatives, this brand of environmentalism doesn’t rely on government, environmental organizations, or wealthy green benefactors to affect change. It draws on an authority more powerful than corporations, laws, and

53. See Jack Lewis, *The Spirit of the First Earth Day*, EPA J., Jan./Feb. 1990, available at <https://archive.epa.gov/epa/aboutepa/spirit-first-earth-day.html>.

54. VAN ROSSUM, *supra* note 37, at 10, 41-44.

55. See Art English & John J. Carroll, *State Constitutions and Environmental Bills of Rights*, in *THE BOOK OF THE STATES 2015*, at 18 (Council of State Governments 2015), available at <http://knowledgecenter.csg.org/kc/system/files/English%20Carroll%202015.pdf>.

56. VAN ROSSUM, *supra* note 37. See also Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day 1970 to the Present*, 9 FORDHAM ENVTL. L. REV. 107-54 (2017).

57. NEW YORK STATE BAR ASSOCIATION, REPORT AND RECOMMENDATIONS CONCERNING THE CONSERVATION ARTICLE IN THE STATE CONSTITUTION (ARTICLE XIV) ADOPTED BY THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION 30 n.129 (2016), <https://staging.nysba.cliquedomains.com/app/uploads/2020/02/Report-on-NYS-Constitution-Article-XIV-final.pdf>.

58. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

59. VAN ROSSUM, *supra* note 37, at 42.

60. *Id.* at 15.

61. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.

62. According to EPA’s website, NEPA was one of the first laws ever written that established the broad national framework for protecting our environment. NEPA’s basic policy is to assure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment. NEPA requirements are invoked when airports, buildings, military complexes, highways, parkland purchases, and other federal activities are proposed. Environmental assessments and EISs, which are assessments of the likelihood of impacts from alternative courses of action, are required from all federal agencies and are the most visible NEPA requirements. U.S. EPA, *Summary of the National Environmental Policy Act*, <https://www.epa.gov/laws-regulations/summary-national-environmental-policy-act> (last updated Aug. 15, 2019).

63. Hill, *supra* note 35, at 51.

governments. *This authority is the inalienable, indefeasible, inherent rights we all possess as residents of the earth.* Constitutional environmental amendments are our greatest hope for protecting the people of Manchester, the sturgeon, the people who are here today, and their future descendants. As I've experienced firsthand, constitutional environmental rights and protections afford all of us concerned about our environment, our health, our safety, our children, the quality of our lives, our economy, and our jobs newfound leverage against ineffectual or corrupt lawmakers and inadequate laws. Let's turn our attention now to constitutional rights—what this new weapon is and how it has evolved over time.⁶⁴

Currently, as shown earlier, states with ERAs in their constitutions are Hawaii, Illinois, Massachusetts, Montana, Pennsylvania, and Rhode Island.⁶⁵ The environmental right set forth in those ERAs is arguably an enforceable human right to a clean, safe, and healthy environment for all of the states' inhabitants in state courts. New York⁶⁶ and New Jersey⁶⁷ are in the process of amending their constitutions.

Former Associate Supreme Court Justice Louis D. Brandeis once famously stated in an opinion that the states can serve as 50 "laboratories of democracy."⁶⁸ Following is

64. VAN ROSSUM, *supra* note 37, at 43-44.

65. HAW. CONST. art. XI, §9; ILL. CONST. art. XI, §§1, 2; MASS. CONST. amend. art. XLIX; MONT. CONST. art. II, §3 (in the bill of rights section); PA. CONST. art. I, §27 (in the bill of rights section); R.I. CONST. art. I, §17 (in the bill of rights section).

66. On April 30, 2019, both chambers of the New York State Legislature approved the constitutional amendment, which reads: "Each person shall have a right to clean air and water, and a healthful environment." Article 1, §19 will appear on the ballot in a statewide referendum on November 2, 2021, since a constitutional amendment requires a simple majority vote in each chamber of the state legislature in two successive legislative sessions with an election for state legislators in between, and then must pass a statewide referendum. Ballotpedia, *New York Environmental Rights Amendment (2021)*, [https://ballotpedia.org/New_York_Environmental_Rights_Amendment_\(2021\)](https://ballotpedia.org/New_York_Environmental_Rights_Amendment_(2021)) (last visited Oct. 20, 2020).

67. In the 2018 legislative session, concurrent resolutions (A.C.R. 85 and S.C.R. 134) were introduced in the General Assembly and the Senate. The concurrent resolutions read: "Every person has a right to a clean and healthy environment, including pure water, clean air, and ecologically healthy habitats, and to the preservation of the natural, scenic, historic, and esthetic qualities of the environment. The State shall not infringe upon these rights, by action or inaction." To become a law, Article 1, paragraph 24 needs either approval by three-fifths of the Senate and the Assembly or majorities in both chambers in two consecutive sessions, followed by a citizen referendum in which New Jersey residents must approve the amendment by a majority vote. A.C.R. 85, 218th Leg., 2018 Sess. (N.J.), *available at* https://www.njleg.state.nj.us/2018/Bills/ACR/85_11.HTM.

68. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). Justice Brandeis wrote:

There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

a discussion of how Rhode Island's ERA is reflected in the state's climate liability complaint, and how it addresses the environmental and public health issues related to disproportionately affected communities.

B. Rhode Island's ERA and the Complaint

As a laboratory of democracy, Rhode Island's approach to its ERA is somewhat different from the paths taken by the other states. To begin with, Rhode Island's ERA is quite detailed in that it encompasses an access right for swimmers and gatherers of seaweed. Its ERA is rooted in hundreds of years of fishing, swimming, and shore rights for its people. Rhode Island, whose official nickname is the "Ocean State," only has 1,045 square miles of land but has more than 400 miles of shoreline with its direct access to the Atlantic Ocean.⁶⁹

On January 20, 1987, the Rhode Island Constitution was amended to include a green amendment in the Declaration of Certain Rights and Principles section, together with the freedom of religion, the right to bail, the right to a trial by jury, and so on. Article I, §17 provides for broad protection of the state's natural resources, and guarantees that its people

shall be secure in their rights to the use and enjoyment of the natural resources of the state with regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral, and other natural resources, and to adopt all means necessary and proper by law to protect the natural environment of the people . . .⁷⁰

According to the constitution's "Notes to Decisions" section, "[t]he term 'people' as used in the Constitution is broad and comprehensive, and comprises in most instances all of the inhabitants of the state."⁷¹

The term "people," most assuredly, includes Rhode Island's minority and/or low-income communities and individuals who seek "climate justice."⁷² According to the U.S. Census Bureau, as of July 1, 2018, Rhode Island has a total population of 1,057,315 inhabitants (83.9% white; 8.4% Black; 1.1% American Indian and Alaska Native; 3.6% Asian; 15.9% Hispanic; 0.2% Native Hawaiian and other Pacific Islanders; and 2.8% two or more races). As far as persons in poverty are concerned, those individuals represent 12.9% of the total population.

Rhode Island's ERA is not self-executing in that the General Assembly is required to protect the environmen-

69. Rhode Island is the smallest state and is just 37 miles wide and 48 miles long. *See* State Symbols USA, *The Ocean State*, <https://statesymbolsusa.org/symbol-official-item/rhode-island/state-nickname-state-quarter/ocean-state> (last visited Oct. 20, 2020).

70. Annotated Constitution of the State of Rhode Island and Providence Plantations (1988), *available at* <https://helindigitalcommons.org/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1026&context=lawarchive>.

71. *Id.*

72. U.S. Census Bureau, *QuickFacts: Rhode Island*, <https://www.census.gov/quickfacts/RI> (last visited Oct. 20, 2020).

tal rights of the people. The General Assembly has plenary power to protect the environmental rights of the state's inhabitants. Accordingly, the General Assembly has declared in General Laws of Rhode Island §10-20-1 that "each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state."⁷³

The state, as trustee, has the responsibility to protect the natural resources located within the state for the people, as well as, among other things, to protect their access to the "rights of fishery and the privileges of the shore." The state's trustee responsibilities were examined by the Rhode Island Supreme Court in the 2004 case *Cherenzia v. Lynch*⁷⁴ where the state, through its attorney general, appealed from a summary judgment of the Superior Court, in favor of plaintiff commercial fishermen in their challenge to the constitutionality of General Laws of Rhode Island §20-6-30. The statute prohibited the use of self-contained underwater breathing apparatus (SCUBA) methods to gather shellfish from four named, coastal salt water ponds. Section 20-6-30 was enacted after private citizens complained that commercial SCUBA fishing in the ponds was depleting the shellfish supply and interfering with boating activities.

The fishermen argued that the statute violated Rhode Island Constitution Article I, §17's guarantee of fishery rights to all citizens as well as their substantive due process and equal protection rights. The Rhode Island Supreme Court held that the trial court had misinterpreted §17 in that it actually obligated the legislature to act to protect the rights of all Rhode Islanders, not just commercial fishermen. Since the legislation did not infringe upon any right entitled to heightened protection, the Rhode Island Supreme Court applied a minimal level of scrutiny test, and found that the challenged restrictions, which applied to recreational as well as commercial fishermen, reasonably related to the proper legislative goal of preserving fisheries for the use of all. The Rhode Island Supreme Court vacated the trial court's grant of summary judgment and remanded the matter with directions to enter judgment in favor of the state.

In reaching its decision, the Rhode Island Supreme Court stated:

Here, the provisions of §20-6-30 neither infringe on a fundamental constitutional right, nor do they create a suspect classification. The scope of the fundamental right protected in art. 1, sec. 17, is that all the inhabitants of the state "shall continue to enjoy and freely exercise" equal access to the state's fishery resources. . . .

If a statute or regulation contained restrictions that infringed upon the fundamental right of the inhabitants of the state to have equal access to the "rights of fishery," then such a regulation or law would be subject to strict-scrutiny analysis. . . . Here, however, the provisions of

§20-6-30 do not infringe on the fishermen's fundamental right of equal access to the state's resources because no fundamental constitutional right exists for inhabitants of this state to harvest shellfish from specific bodies of water by using a specific method of fishing. On the contrary, we have interpreted art. 1, sec. 17 to mean that "fishing must be carried on for the ultimate benefit of the people of the state and not merely for the profit and emolument of the fishermen engaged in the business." . . . Because the provisions of §20-6-30 do not deny the fishermen equal access to the shellfish populations in the designated salt ponds, the provisions of §20-6-30 do not infringe on this fundamental constitutional right.⁷⁵

Thus, consistent with the Rhode Island Supreme Court's *Cherenzia* decision regarding the ERA, the state has a major responsibility, as trustee, to protect the natural environment, and to protect the rights of all the people, including minority and/or low-income inhabitants, to enjoy those natural resources, which includes the fishery resources in the water as well as presumably the air.

This is unequivocally reflected in the state's ERA cause of action in the climate liability litigation:

**State Environmental Rights Act,
Equitable Relief Action
(Against All Defendants)**

. . .

The General Assembly has further found and declared that "each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state," and that "it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction." R.I. Gen. Laws §10-20-1.

The General Assembly has defined "pollution, impairment, or destruction" to include "any conduct which materially adversely affects or is likely to materially adversely affect the environment." R.I. Gen. Laws §10-20-2(6).

The Attorney General "may maintain an action in any court of competent jurisdiction for declaratory and equitable relief against any other person for the protection of the environment, or the interest of the public therein, from pollution, impairment, or destruction," and may "take all possible action, including . . . formal legal action, to secure and insure compliance with the provisions of this chapter." R.I. Gen. Laws §10-20-3(b), (d)(1), (d)(5).⁷⁶

The state's well-crafted complaint regarding its ERA and the important role of the state as trustee is consistent with the Rhode Island Supreme Court's *Cherenzia* decision.

73. R.I. GEN. LAWS §10-20-1 (2015), available at <https://law.justia.com/codes/rhode-island/2015/title-10/chapter-10-20/section-10-20-1/>.

74. 847 A.2d 818 (R.I. 2004).

75. *Id.* at 824.

76. Complaint, *State v. Chevron Corp.*, *supra* note 3, paras. 307-309.

II. The Public Trust Doctrine

A. Background

Basically, the public trust principle is that the sovereign holds in trust for public use some natural resources, regardless of private-property ownership. As the New Jersey Supreme Court so aptly stated in *Matthews v. Bay Head Improvement Ass'n*: “The genesis of this principle is found in Roman jurisprudence, which held that ‘[b]y the law of nature’ ‘the air, running water, the sea, and consequently the shores of the sea’ were ‘common to mankind.’”⁷⁷ Understanding Rhode Island’s public trust assertions in this climate liability litigation requires a brief primer on the public trust doctrine.

In the *Institutes of Justinian*, the sixth-century effort to codify Roman law and to reform legal education, Byzantine Emperor Caesar Flavius Justinian articulated the basic concept of the public trust:

1. Thus, the following things are by natural law common [to] all—the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations. 2. On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein. 3. The sea-shore extends to the limit of the highest tide in time of storm or winter. 4. Again, the public use of the banks of a river, as of the river itself, is part of the law of nations; consequently everyone is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting-place for the cargo, as freely as he may navigate the river itself. But the ownership of the bank is in the owner of the adjoining land, and consequently so too is the ownership of the trees which grow upon it. 5. Again, the public use of the sea-shore, as of the sea itself, is part of the law of nations; consequently[,] everyone is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it.⁷⁸

In its early form, the public trust doctrine sought to protect the public’s right to access certain resources, particularly navigable bodies of water. As emphasized in Roman law, the land exposed between high tide and low tide is open to everyone, and no individual can own this land, or prevent others from walking along it.⁷⁹

The English later incorporated the doctrine into their legal system, and, in 1215, the doctrine emerged as part of the Magna Carta, which, among other things, specifically condemned interference with citizens’ access to navigable waters, and prevented the king from giving favored noblemen exclusive rights to hunt or fish in certain areas. Although the monarch was understood to own the land, he had an obligation to protect it for use by the public.

Still later, the public trust doctrine became a part of American common law.⁸⁰ The public trust doctrine has been incorporated into American jurisprudence from this nation’s beginnings. For example, the Northwest Ordinance of 1787 states:

The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefore.⁸¹

In 1842, in *Martin v. Lessee of Waddell*,⁸² the Supreme Court first accepted the public trust doctrine, where the Court ruled that the lessee was not entitled to exclusive fishery rights in land under navigable waters because those lands were originally transferred from a king to a duke as one of the royalties incident to the powers of government and not as private property. And in 1892, the Court reversed the granting of shoreline on Lake Michigan to a railroad company in *Illinois Central R.R. Co. v. Illinois*⁸³ based on the public trust doctrine. In 1911, moreover, in *Light v. United States*,⁸⁴ the Supreme Court again recognized the public trust doctrine, which requires the government to act as a trustee to maintain some level of quality, and to protect those resources from being depleted by private interests or expended to the detriment of future generations.⁸⁵

Essentially, the public access and use provisions in state constitutions emphasize the public trust doctrine that common resources are held in trust by the state for its people, and that it is possible to call upon the state government to protect core values inherent in the natural resources that collectively belong to the people.

In 1983, in the seminal case *National Audubon Society v. Department of Water & Power of the City of Los Angeles*,⁸⁶ the California Supreme Court ruled:

REV. 123, 136 (2012).

80. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 558, 566 (1990), for a comprehensive discussion of the public trust doctrine.

81. Northwest Ordinance of 1787, art. IV, 1 Stat. 50 (1789), <https://www.ourdocuments.gov/doc.php?flash=false&doc=8#>.

82. 41 U.S. 367 (1842).

83. 146 U.S. 387 (1892).

84. 220 U.S. 523 (1911).

85. Munro, *supra* note 79.

86. 33 Cal. 3d 419 (1983).

77. 471 A.2d 355, 360 (N.J. 1984) (quoting JUSTINIAN, *THE INSTITUTES* 2.1.1 (Thomas Sandars trans., Callaghan & Co. 1st Am. ed. 1876) (sixth century)).

78. JUSTINIAN, *INSTITUTES*, bk. II, tit. I, at 18 (J.B. Moyle trans., Oxford 1911) (sixth century), available at <http://amesfoundation.law.harvard.edu/digital/CJCiv/JInst.pdf>.

79. See Gregory S. Munro, *The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana*, 73 MONT. L.

Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.⁸⁷

In that case, the California Supreme Court held that the public trust doctrine protected non-navigable tributaries of Mono Lake, a navigable water body, from diversions by the city of Los Angeles. The court grounded its expansion of the public trust doctrine in the doctrine's elastic nature when it stated that "[t]he objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways."⁸⁸ Other state courts, such as the supreme courts of Pennsylvania and Montana, and a Rhode Island trial court (which will be discussed shortly), have made similar findings on the practical applications of the public trust doctrine.⁸⁹

B. Rhode Island's Public Trust Laws and the Complaint

As a practical matter, the Rhode Island Coastal Resources Management Council (CRMC) holds title to resources in trust for the benefit of the public. The CRMC's jurisdiction is determined by a 200-foot buffer from the actual public resource or coastal feature. The state has an interest in public trust resources and management of such public resources, which is based on (1) need, uses, and water quality standards (covered in management plans); or (2) a holistic approach. The state relies on its coastal resources management plan (CRMP) for guidance in balancing public versus private rights.⁹⁰

In *Miller v. Coastal Resources Management Council*,⁹¹ plaintiff landowner challenged the decision of the CRMC, which denied the landowner permission to build a residence on coastal property located on a peninsula. An engineer and biologist on the CRMC's staff assessed the landowner's project. On appeal to the trial court, the landowner argued that he should have been granted an exception under the CRMP. The Superior Court trial judge denied and dismissed the appeal. The court held that the requirements of the CRMP could not have been satisfied by any modification of the landowner's project because of the configuration of the land itself. The CRMC was entitled to rely on its biologists' conclusions showing that no

development of the land was possible under the goals and policies of the CRMP.

In reaching its decision, the trial court stated:

In this case the agency was called upon to decide the future impact of proposed activities. It was not, as is the Court in many instances, trying to decide the future impact of accomplished activities, or of already established situations, with demonstrated historic impact. The agency had to weigh both the impact, if any, of the proposed activity, and the likelihood that the proposed activity would be carried out as planned if restrictions were imposed. Given a choice between the pessimistic predictions of its staff and the optimistic ones of the plaintiff's experts the agency cannot be faulted for declining to subject the public to the risk of expert error.⁹²

The court went on to state:

This Court is . . . satisfied that the council had a statutory authority to reject any "design, location, construction, alteration and operation" of any land uses "when these are related to a water area" under the council's jurisdiction where there is "a reasonable probability of conflict with a plan or program for resources management or damage to the coastal environment." . . . The council is also authorized to "issue, modify or deny permits (which it calls 'assents') for any work in, above, or beneath the areas under its jurisdiction . . ." The defendant clearly did not violate any statutory provision.

Article I, Section 16 of the *Constitution of the State of Rhode Island* was adopted by the people of the State, has provided since 1986:

"The powers of the State and of its municipalities to regulate and control the use of land and waters in the furtherance of the preservation, regeneration and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in Section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property."

Since this Court has found that there was a factual basis for the regulatory activity of the council "in the furtherance of the preservation, regeneration and restoration of the natural environment," the council's exercise of that power may not be deemed a public use of private property requiring "just compensation" under *Article I, Section 16*, even if confiscatory.⁹³

87. *Id.* at 441.

88. *Id.* at 434.

89. See Pennsylvania's, *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017), and Montana's, *Montana Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38 (1984).

90. See a comprehensive discussion of the role of the council at CRMC, *About the CRMC*, <http://www.crmc.ri.gov/aboutcrm.html> (last visited Oct. 20, 2020).

91. No. PC 89-2726, 1991 WL 7899, 1991 R.I. Super. LEXIS 215 (Super. Ct. Dec. 13, 1991).

92. *Id.* at *26.

93. *Id.* at *31.

Thus, it is Article I, §16 that spells out the state’s public trust responsibilities. This provision specifically provides that the public, including minority and/or low-income inhabitants, shall have access to the “rights of fishery and the privileges of the shore.”⁹⁴

This reference in the Rhode Island Constitution serves as the basis for the state’s assertions in its present complaint that the defendants’ actions impaired the public trust resources, which includes the atmosphere, based upon state law and the state constitution:

**Impairment of Public Trust Resources
(Against All Defendants)**

...

The Rhode Island Constitution has enshrined common law to provide for broad protection of the State’s natural resources, and guarantees that its citizens “shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state. . . .

The Rhode Island Constitution provides that the “powers of the state” to “regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural environment. . . . as those rights and duties are set forth in Section 17, shall be an exercise of the police powers of the state, [and] shall be liberally construed.” R.I. Const. art. I, §16.

The General Assembly has repeatedly declared that coastal resources of the State, plant and animal life within the State, and the State’s watershed are critical natural resources inuring to the benefit of the public. . . .

...

As alleged above, Defendants, through their affirmative acts and omissions have interfered with the use and enjoyment of public trust resources within Rhode Island. . . .

*As a direct and proximate result of the defects previously described, fossil fuel products, the public trust resources over which the State serves as trustee have been injured, and the use and enjoyment of those resources by Rhode Island and its citizens has been impaired. As a result, the State of Rhode Island has incurred and will continue to incur substantial expenses and damages set forth in this Complaint within the jurisdictional limits of this Court to investigate, remediate, prevent, and restore injuries to public trust resources, for which Defendants are jointly and severally liable.*⁹⁵

Rhode Island made every effort in the complaint to anchor its public trust arguments based upon state law and the state constitution only. Indeed, there was ample state law on which to rely. In essence, Rhode Island, through its actions, invoked the reserved powers doctrine of the Tenth Amendment of the Constitution, which states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”⁹⁶ In sum, there is nothing in the complaint that would suggest that Rhode Island has usurped the powers of the federal government regarding its public trust responsibilities nor the basic principles of federalism.⁹⁷

Rhode Island deftly sets forth in the complaint various aspects of its public trust responsibilities and how the defendants’ acts and omissions adversely affected the state’s efforts to carry out those trust responsibilities as follows:

Sea level rise, changes to the hydrologic cycle, and increased air and ocean temperatures resulting from anthropogenic climate change have and will result in injury to public, industrial, commercial, and residential assets within the State either directly, or through secondary and tertiary impacts that cause the State to expend resources in resiliency planning, responding to these impacts, and repairing infrastructure damage; lost revenue due to decreased economic activity in the State; *injury to natural resources which the State holds in trust for the use and enjoyment of the people of the State; and cause the State to suffer other injuries.* Among the properties and natural resources in the State that have and/or will be injured as a result of anthropogenic climate change are:

- a. Roads and Bridges . . .
- b. Other Transportation Infrastructure . . .
- c. Energy Infrastructure . . .
- d. Dams . . .
- e. Ports . . .
- f. Beaches . . .
- g. Water Supply . . .
- h. Wastewater Management . . .
- i. Stormwater/Flood Management Infrastructure. . .
- j. Residential and Commercial Property . . .
- k. Aquatic Resources . . .
- l. Marshes and Coastal Wetlands . . .
- m. Terrestrial Natural Resources . . .⁹⁸

Rhode Island’s ERA stresses the responsibilities of the state in protecting the natural resources and environment through comprehensive regulations. Moreover, the state is a trustee and steward of the environment for the people, including its minority and/or low-income inhabitants. The enforcement of the ERA is clearly legislative. Accord-

94. Public access to the “rights of fishery and the privileges of the shore” relies on the entitlements of the King Charles Charter that preceded the Rhode Island Constitution of 1842. Again, this protection is rooted in hundreds of years of fishing and shore rights for the people of the state of Rhode Island.
 95. Complaint, State v. Chevron Corp., *supra* note 3, paras. 295-297, 301-302 (emphasis added).

96. See U.S. CONST. amend. X, available at https://www.law.cornell.edu/constitution/tenth_amendment.
 97. See Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENVTL. L. 399, 400 (2015).
 98. Complaint, State v. Chevron Corp., *supra* note 3, para. 212 (emphasis added).

ingly, the General Assembly has declared in General Laws of Rhode Island §10-20-1 that “each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state.”⁹⁹ This duty is unambiguously reflected in the complaint.

III. Public Nuisance Doctrine

A. Background

Generally speaking, a “public nuisance” is a harm to the community. According to Prof. Thomas W. Merrill:

The classic example of a public nuisance is what used to be called a *purpresture*—blocking or obstructing a public road or navigable waterway. The right to use a road or navigable stream has always been understood to be a public right, in the sense of a privilege enjoyed *by* all members of the community. The blockage is therefore an injury common to the general public. It does not matter whether the road or the waterway is actually used *by* everyone or indeed *by* anyone at all. The point is that it is available to all members of the community, and this open access feature provides a right common to all.¹⁰⁰

The public nuisance doctrine dates back to 12th-century England as a criminal writ to remedy actions that infringed upon royal property or blocked public roads or waterways. As described above, these “*purprestures*,” which invariably involved conduct affecting the use of land, were encroachments upon the royal domain or the public highway, and could be redressed by the king of England.¹⁰¹ The king alone, because of his police powers, had the power and the authority to bring public nuisance claims, which were criminal prosecutions.¹⁰² As a remedy, the king, based upon his authority as the monarch, sought an injunction or an abatement of the criminal conduct that amounted to a public nuisance.¹⁰³

In the 16th century, this ancient tort was broadened by an English court so that private individuals who suffered “special” injuries could sue for damages resulting from a

public nuisance and that those injuries were different in kind from the damages all other members of the public suffered. According to Professor Merrill:

This was the understanding that not only public officials, but also private persons who suffer “special injury”—an injury different in kind and not merely in degree from the public injury—are entitled to prosecute public nuisance actions. This exception is widely recognized, and is enshrined, once again, in the *Restatement of Torts*.¹⁰⁴

It is generally accepted by environmental law scholars, treatises, and even the *Second Restatement of Torts*¹⁰⁵ that a 16th century British King’s Bench decision, called *Anonymous*,¹⁰⁶ announced what has become known as the “special injury rule.” More than three centuries after the *Anonymous* case in Britain, America adopted English common law for its own use. The American tort of public nuisance mirrored British common law.

According to Prof. Denise Antolini,¹⁰⁷ during the work on the *Second Restatement of Torts* (1979)¹⁰⁸ administrative law and environmental law commentators forcefully argued that a public nuisance as a tort should be expanded to include any “unreasonable interference” with a public right. Those commentators also argued that individual plaintiffs should be able to seek to enjoin or abate a public nuisance if they sued as a representative of the general public; as a citizen in a citizen’s suit; or as a member of a class action. Professor Antolini stated: “Interest among environmental lawyers and law schools in using the courts for environmental protection was exploding.”¹⁰⁹

Arguably, in light of the emerging environmental jurisprudence, there were a number of reasons as to why there was such a heightened interest in using the courts to protect human health and the environment at that time. First, during the second stage of the modern environmental movement, on January 1, 1970, President Nixon signed NEPA (which has been known as “the mother of all modern environmental laws and regulations in the United States”¹¹⁰) into law, launching the 1970s as the environmental law and policy decade.¹¹¹ Later in that year, President Nixon created EPA, which consolidated environmental regulatory programs from other federal agencies into a single entity.

99. R.I. GEN. LAWS §10-20-1 (2015), available at <https://law.justia.com/codes/rhode-island/2015/title-10/chapter-10-20/section-10-20-1/>.

100. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4(2) J. TORT L. ii, 9-10 (2011).

101. Basically, under British common law, the king, through a sheriff, could bring suit to stop a criminal infringement and force the offending party to repair any damage to the king’s property. This was a criminal writ, which belonged only to the king. The king sought to punish these criminal infringements, known as “*purprestures*,” through criminal proceedings. See Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison With Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 361-62 (1990).

102. See John R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 80 (1989). See also Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941 (2008).

103. Victor E. Schwartz et al., *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 OKLA. L. REV. 629, 632 (2010).

104. Merrill, *supra* note 100, at 13.

105. RESTATEMENT (SECOND) OF TORTS §821B cmt. A (1979).

106. Y.B. Mich. 27 Hen. 8, fol. 27, pl. 10 (1535). The idea that a private individual (as compared to the Crown) could sue and recover damages came from a hypothetical in a judge’s dissenting opinion in this case.

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

108. The first *Restatement of Torts* (1939) did not mention public nuisance as a tort.

109. Antolini, *supra* note 107, at 831.

110. See PASE Corps, which also says that NEPA “was designed to engage stakeholders and to provide potential environmental effects to help inform leaders in their major federal decisions.” PASE Corps, *National Environmental Policy Act of 1969*, <http://pasecorps.org/casting/nepa-regulations-and-guidance> (last visited Oct. 20, 2020).

111. *Id.* Since NEPA was enacted, “[o]ver 100 countries worldwide have adopted the NEPA framework in creating their environmental impact assessment processes.”

Further, Congress enacted the majority of the nation's federal environmental laws during this period, which concerned primarily pollutants in the air, surface water, and groundwater, and solid waste disposal. As a result of public health and environmental issues concerning acid rain, visibility, and air quality, air pollutants such as particulates, sulfur dioxide, nitrogen dioxide, carbon monoxide, and ozone were also placed under regulation by EPA as a result of newly enacted environmental laws.¹¹² Nonetheless, there apparently was a firm belief among environmentalists and many environmental lawyers that EPA, the new administrative agency, was not up to the task of regulating pollution, including pollution that was state-sanctioned through permits or allowed by local regulatory regimes. In addition to the new EPA, they wanted citizens to be able to use public nuisance law to combat pollution.

Second, in its wisdom, Congress introduced citizen enforcement suits as part of every major environmental law. For example, during the 1970 debate surrounding the notion of citizen enforcement suits in the CAA, a U.S. Senate report stated: "The Committee bill would provide in the citizen suit provision that actions will lie against the Secretary [of EPA] for failure to exercise his duties under the Act, including his enforcement duties."¹¹³ Some members of Congress initially resisted granting such power to ordinary citizens. To illustrate, in reading from a memorandum prepared by his Senate staff listing the various objections to this grant of authority, then-Sen. Roman Hruska (R-Neb.) said:

The public interest is not served by subjecting officials of the Executive Branch to harassing litigation. How can they perform the complex administrative and enforcement functions required under the Clean Air Act while simultaneously participating as defendants and/or witnesses in litigation? Instead of forcing such officials to act more effectively the institution of citizens' suits will more likely lead to paralysis within the regulatory agency.¹¹⁴

The majority of members of Congress, however, determined that the fledgling EPA needed citizen enforcement suits to assist the Agency in protecting human health and the environment.

In sum, there was good reason as to why administrative law and environmental law commentators were significantly engaged in the public nuisance discussions surrounding the *Second Restatement of Torts*. Professor Antolini stated:

These developments prompted a new stream of scholarship by federal administrative and environmental law commentators, who were eager to address environmental

problems and were re-examining dusty legal tools, from the ancient remedy of *qui tam* to the common law of public nuisance. All of these profound social and legal developments converged to create the necessary conditions for a turbulent ALI [American Law Institute] meeting in 1970 and brought particular pressures to bear on the public nuisance section of the proposed Restatement (Second).¹¹⁵

In his first drafts as the original reporter for the *Second Restatement*, the noted tort scholar and dean of the Law School at the University of California, Berkeley, William L. Prosser, in defining "public nuisance" in §821B, limited public nuisance to "a criminal interference with a right common to all members of the public."¹¹⁶ And, regarding who may sue, Dean Prosser limited damage recovery only to individuals that satisfied the special injury rule in §821C.¹¹⁷ In other words, Dean Prosser's first drafts reflected, at that time, the American version of British common law.

The ALI, however, voted at the 1970 meeting to reopen the discussion of §§821B and 821C, and the dean of the Vanderbilt Law School, John W. Wade, replaced Dean Prosser as the reporter. As a direct result of the arguments of the administrative law and environmental law commentators, the definition of "public nuisance" in §821B was broadened beyond criminal conduct to encompass any "unreasonable interference with a right common to the general public," and added a list of factors to help determine whether the interference was "unreasonable."¹¹⁸ With respect to the recovery of damages in §821C, the special injury rule for individual plaintiffs was preserved. However, with respect to proceedings to enjoin or abate a public nuisance, §821C was broadened to provide that such proceedings could be brought not only by governmental officials, but also by individuals satisfying the special injury rule and by those that "have standing to sue as a representative of the general public, as a citizen in a citizen's enforcement suit or as a member of a class action."¹¹⁹

According to Professor Antolini:

Little did Prosser know that, at the 1970 Annual Meeting, an unprecedented "legal drama" would unfold that would significantly alter his carefully crafted special injury rule. The events would prove to be the final straw prompting his resignation. After an emotional debate, the ALI membership voted to override Prosser's draft statement of the special injury rule in order to infuse into public nuisance the principles of standing rapidly developing in new federal administrative law cases. The rebellion would mark a doctrinal watershed—the pinnacle of the attempt to harmonize private plaintiffs' access to public nuisance with emerging public law principles. The rebellion also repre-

112. See Stacy J. Silveira, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. ENVTL. AFF. L. REV. 497 (2004), available at <https://lawdigitalcommons.bc.edu/ealr/vol28/iss2/71>.

113. S. REP. NO. 91-1196, at 438-39 (1970), reprinted in 1970 U.S.C.C.A.N. 3277, 3281.

114. 116 CONG. REC. S. 16013, 16115 (daily ed. Sept. 21, 1970) (statement of Senator Hruska).

115. Antolini, *supra* note 107, at 834-35.

116. *Presentation of Restatement of the Law, Second, Torts, Tentative Draft No. 15*, 46 A.L.I. PROC. 267, 282 (1969).

117. *Id.* at 285-86.

118. *Presentation of Restatement of the Law, Second Torts, Tentative Draft No. 16*, 47 A.L.I. PROC. 287, 300 (1970).

119. *Id.*

sented an unprecedented grassroots challenge to Prosser's authority, reflecting the social upheaval of the times.

This “moment . . . so terribly burning in history” represented the convergence of dramatic social and legal events unfolding in the United States in the late 1960s: the social justice and environmental movements, and the parallel creation of modern federal standing law in administrative law cases. The major shift in the Restatement's position on public nuisance was greeted with great enthusiasm by observers, particularly the new Reporter John W. Wade and the new generation of environmental law scholars and practitioners.¹²⁰

As a direct result of the *Second Restatement's* changes to the law of public nuisance, there have been a number of lawsuits brought by public officials, with mixed results, pertaining to air pollution,¹²¹ asbestos,¹²² lead paint,¹²³ as well as tobacco.¹²⁴ Recently, a public nuisance claim against a major pharmaceutical company for opioids¹²⁵ was resolved in the state's favor after a non-jury trial.

On August 26, 2019, a state court judge issued a decision in *State ex rel. Hunter v. Purdue Pharma, L.P.*¹²⁶ District Judge Thad Balkman in the District Court of Cleveland County, Oklahoma, determined that Johnson & Johnson (J&J), the international pharmaceutical company, must pay \$572,102,028.00¹²⁷ (later reduced to \$465 million by the court because of the court's mathematical error) to compensate the state for expenses related to combatting the

opioid epidemic in Oklahoma.¹²⁸ The court's decision was based on Oklahoma's public nuisance law, which reads:

A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:
First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or
Second. Offends decency; or
Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or
Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.¹²⁹

Judge Balkman wrote that J&J had substantially interfered with public health, and embarked on “false, misleading, and dangerous marketing campaigns” that, consequently, had “caused exponentially increasing rates of addiction, overdose deaths,” and babies born exposed to opioids. Mike Walker, Oklahoma's attorney general, stated that “between 2015 and 2018, 18 million opioid prescriptions were written in a state with a population of 3.9 million. Since 2000 . . . about 6,000 Oklahomans have died from opioid overdoses, with thousands more struggling with addiction.”¹³⁰

On December 9, 2019, J&J appealed the now \$465 million verdict, and asserted that the trial judge wrongly applied the state's public nuisance law. The company believed, according to a J&J lawyer, that the ruling “created a public nuisance by launching a misleading marketing campaign [that] violates well-established constitutional principles including due process”¹³¹ since the court was applying public nuisance law to a highly regulated commercial activity.¹³² On appeal, the company argued that the judge's decision that the marketing and sale of a lawful product can constitute a public nuisance could have grave implications for all businesses that operate in the state.

120. Antolini, *supra* note 107, at 828. See also John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 *ECOLOGICAL L.Q.* 241 (1972).

121. See *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374, 2 ELR 20046 (Cal. Ct. App. 1971).

122. See *Tioga Public Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513 (Mich. Ct. App. 1992).

123. See *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d (N.J. 2007); *City of Milwaukee v. NL Indus.*, 762 N.W.2d 757 (Wis. Ct. App. 2008).

124. Many states invoked public nuisance law and sued the four largest cigarette-manufacturing tobacco companies to recoup their expenses attributable to their citizens' tobacco use. But those cases became part of the November 1998 master settlement agreement by which the companies agreed to pay 46 states and five U.S. territories more than \$200 billion by the year 2023 in order to avoid further legal proceedings for the companies' advertising, marketing, and promotion of cigarettes. Thus, the case was not tried. It should be noted that the only court to actually consider the public nuisance claim against tobacco companies dismissed the case because the court was “unwilling to accept the state's invitation to expand a claim for public nuisance beyond its ground in real property.” *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997).

125. Opioids are an addictive family of drugs that block pain signals between the body and brain. Opioids include prescription painkillers such as Vicodin and OxyContin, as well as illegal drugs such as heroin and illicit versions of fentanyl. Until recent decades, they were prescribed largely for pain for patients with cancer, at the end of their lives, or with acute pain, such as after surgery. Since the 1990s, there has been a push in the medical world, partly funded by drug companies, to do better at treating pain—and opioids came to be seen as part of the solution.

126. No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486 (Okla. Dist. Ct. Aug. 26, 2019).

127. The award was reduced to \$465 million because the judge made a mathematical error. The sum of \$572 million included \$107 million for treating babies born addicted to opioids, when, in fact, Judge Balkman said the figure should be \$107,000. The sum of \$465 million was reflected in the court's November 15, 2019, final order.

128. Oklahoma settled in 2019 with the maker of OxyContin, Purdue Pharma, for \$270 million, and Israeli-owned Teva Pharmaceuticals for \$85 million ahead of the J&J trial. Purdue Pharma agreed to establish a \$200 million trust to fund an addiction studies center at Oklahoma State University in Tulsa, Oklahoma.

On January 13, 2020, in the District Court of Oklahoma, Cleveland County, the state sued three large distributors (McKesson Corp., Cardinal Health, and AmerisourceBergen) who delivered more than 34 billion doses of narcotics to the state and the rest of the country between 2006-2012, and who failed to halt plainly suspicious drug orders because they were making such great sums of money. Oklahoma alleged in the complaint that these major distributors fueled the opioid crisis by supplying massive and patently unreasonable quantities of opioids throughout the United States, including Oklahoma. Oklahoma alleged that the companies ignored their duties and responsibilities against oversupply and diversion of opioids for illicit and non-medical uses for one reason only: “greed.”

129. OKLA. STAT. tit. 50, §§1 et seq. (2018).

130. Jan Hoffman, *Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial*, N.Y. TIMES, Aug. 30, 2019, <https://nyti.ms/2HpXF8>.

131. Janelle Stecklein, *Oklahoma's Public Nuisance Law Focus of \$572.1 Opioid Verdict Appeal*, MERIDIAN STAR, Aug. 27, 2019, https://www.meridianstar.com/cnhi_network/oklahoma-s-public-nuisance-law-focus-of-opioid-verdict-appeal/article_c5384ecd-25dd-50f0-9d22-b44bf0a74b39.html.

132. *Id.*

In sum, J&J argued that “the ruling was an unprecedented interpretation of Oklahoma public nuisance law.”¹³³ J&J stated in its appeal: “That novel ruling has immense public policy implications, undermining product-liability law rules, which have always governed disputes over the marketing and sales of goods, and threatening wide-ranging liability for companies that do business in Oklahoma.”¹³⁴ The appeal is pending in the Supreme Court of the state of Oklahoma.¹³⁵

Public nuisance in Rhode Island was examined by a Superior Court judge in his April 2, 2001, decision and order in the lead paint case, *State v. Lead Industries Ass’n, Inc.*¹³⁶ The court stated that Rhode Island case law defines a public nuisance as “an unreasonable interference with a right common to the general public: it is behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community.”¹³⁷

The court discussed the preeminent role of the Rhode Island attorney general in prosecuting public nuisance claims:

It is undisputed that the Attorney General may prosecute a public nuisance at common law and under General Laws 1956 §10-1-1 et seq., entitled “Abatement of Nuisances.” Section 10-1-1 provides:

Whenever a nuisance is alleged to exist, the attorney general or any citizen of the state may bring an action in the name of the state, upon the relation of the attorney general or of an individual citizen, to abate the nuisance and to perpetually enjoin the person or persons maintaining the nuisance and any or all persons owning any legal or equitable interest in the place from further maintaining or permitting the nuisance either directly or indirectly. The complaint shall be duly sworn to by the complaining party, unless brought by the attorney general, and shall set forth the names of the parties, the object of the action, a description of the place complained of, and a statement of the facts constituting the alleged nuisance.¹³⁸

Rhode Island’s law regarding the prosecution of a public nuisance case in state court makes it clear that it is entirely consistent with the *Second Restatement’s* §821C.

Finally, the court commented on the burden of proof and the issue of liability:

The burden of proving a nuisance is upon the party alleging it who must “demonstrate the existence of the nuisance, and that injury has been caused by the nuisance

complained of.” (citations omitted). However, “the law does not attempt to impose liability in every case in which one person’s conduct has some detrimental effect on another.” *Id.* “Liability is imposed only in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances.” *Id.* (citing 4 Restatement (Second) Torts §822, cmt. g at 112 (1979)). Nevertheless, “[o]ne is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on.” 4 Restatement (Second) Torts §834 at 149 (1979).¹³⁹

Along these lines, following is Rhode Island’s public nuisance claim in the climate liability litigation, which is also quite similar to the Oklahoma attorney general’s arguments in the opioid case. To begin with, paragraph 33 of the complaint states that, individually and collectively, the defendants are responsible to the state for its injuries in that:

At all times herein mentioned, each of the Defendants was the agent, servant, partner, aider and abettor, co-conspirator, and/or joint venture of each of the remaining Defendants herein and was at all times operating and acting within the purpose and scope of said agency, service, employment, partnership, conspiracy, and joint venture and rendered substantial assistance and encouragement to the other Defendants, knowing that their conduct was wrongful and/or constituted a breach of duty.¹⁴⁰

B. Rhode Island’s Public Nuisance Laws and the Complaint

Public Nuisance (Against All Defendants)

. . . In Rhode Island, the public is entitled by right to the protection, preservation, and enhancement of the air, water, land, and other natural resources located within the State, and it is the policy of the State to create and maintain within the State conditions under which man and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this State has been endowed.

Defendants, and each of them, by their affirmative acts and omissions, have created, contributed to, and assisted in creating, conditions in the State of Rhode Island that constitute a nuisance, and has permitted those conditions to persist, by, *inter alia*, increasing local sea level, and associated flooding, inundation, erosion, and other impacts within the State; increasing the frequency and intensity of drought in the State; increasing the frequency and intensity of

133. Sean Murphy, *Johnson & Johnson Appeals \$572M Ruling in Oklahoma Opioid Lawsuit*, Ins. J., Sept. 30, 2019, <https://www.insurancejournal.com/news/southcentral/2019/09/30/541584.htm>.

134. *Id.*

135. State ex rel. Hunter v. Purdue Pharma, L.P., No. 118474 (Okla. filed Dec. 9, 2019), available at <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=118474>.

136. No. 99-5226, 2001 R.I. Super. LEXIS 37 (R.I. Super. Ct. Apr. 2, 2001), available at <https://www.courts.ri.gov/Courts/DecisionsOrders/99-5226.pdf>.

137. *Id.* at **13-14.

138. *Id.* at *11.

139. *Id.* at *14.

140. Complaint, *State v. Chevron Corp.*, *supra* note 3, para. 33.

extreme heat days in the State; and increasing the frequency and intensity of extreme precipitation events in the State.

The nuisance created and contributed to by the Defendants unreasonably endangers and injures the property, health, peace, comfort, safety, and welfare of the general public and the natural resources of [the] State of Rhode Island, interfering with the comfort and convenience of communities statewide, as well as with the State’s parens patriae ability to protect, conserve, and manage the water, land, and wildlife of the State, which are by law precious and invaluable public resources.

...

Because of their superior knowledge of fossil fuel products, and their position controlling the extraction, refining, development, marketing, and sale of fossil fuel products, Defendants were in the best position to prevent the nuisance as the harm occurred and continues to occur, but failed to do so, including by failing to warn customers, retailers, regulators, public officials, or the State of the risks posed by their fossil fuel products, and failing to take any other precautionary measures to prevent or mitigate those known harms.

...

The seriousness of rising sea levels, higher sea level, more frequent and extreme drought, more frequent and extreme precipitation events, more frequent and extreme heat waves, and the associated consequences of those physical and environmental changes, is extremely grave and outweighs the social utility of Defendants’ conduct because, inter alia,

...

e. the social benefit of placing fossil fuels into the stream of commerce is outweighed by the availability of other sources of energy that could have been placed into the stream of commerce that would not have caused anthropogenic climate change and its physical and environmental consequences as described herein; Defendants, and each of them, knew of the external costs of placing their fossil fuel products into the stream of commerce, and rather than striving to mitigate those externalities, Defendants instead acted affirmatively to obscure them from public consciousness;

...

Defendants’ acts and omissions as alleged herein are an actual and legal cause of the public nuisance.

Defendants’ acts and omissions as alleged herein are indivisible causes of Plaintiff State of Rhode Island’s injuries and damages as alleged herein, because, inter alia, it is not possible to determine the source of any particular individual molecule of CO₂ [carbon dioxide] in the atmosphere

attributable to anthropogenic sources because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gases quickly diffuse and commingle in the atmosphere.

Defendants’ wrongful conduct was willful, reckless, or wicked, with conscious disregard for the probable dangerous consequences of that conduct and its foreseeable impact upon the rights of others, including the State of Rhode Island. Therefore, the State requests an award of punitive damages in an amount reasonable, appropriate, and sufficient to punish these Defendants for the good of society and deter Defendants from ever committing the same or similar acts.¹⁴¹

IV. Conclusion

It is much too early in the Rhode Island climate liability litigation to hazard a guess as to whether the case may eventually be heard by a jury of ordinary citizens on substantive grounds. Moreover, it is much too early to hazard a guess as to whether the Rhode Island attorney general will have the opportunity to question the Big Oil and gas companies’ executives in state court regarding (1) what they knew about climate change before and since the Intergovernmental Panel on Climate Change issued its first report in 1990¹⁴²; (2) when they knew about climate change; (3) what their companies did to prepare for the adverse effects of climate change; and (4) how they funded a nationwide campaign to persuade the public that climate change was not occurring.

The stakes are indeed high. In 2019, the fossil fuel industry waged a concerted legal battle in the Supreme Court to reverse at that time three district court orders in Rhode Island, Baltimore, Maryland, and Boulder, Colorado,¹⁴³ as well as three U.S. courts of appeal decisions that determined that these climate change cases should be heard in state court. The companies argued that the CAA preempted these legal disputes and, therefore, raised federal questions.

The fossil fuel companies essentially argued that this nation’s response to the domestic and international climate

141. *Id.* paras. 226-228, 230, 232, 234-236 (emphasis added; Latin words emphasized in original).

142. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FIRST ASSESSMENT REPORT (Cambridge Univ. Press 1990).

143. *Chevron Corp. v. Rhode Island* (On October 22, 2019, Justice Breyer, the circuit justice for the First Circuit, denied the application (No. 19A391) for a stay pending appeal of the remand order, available at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19a391.html>); *BP p.l.c. v. Mayor & City Council of Baltimore* (On October 22, 2019, Chief Justice John Roberts, the circuit justice for the Fourth Circuit, denied the application (No. 19A368) for a stay pending appeal of the remand order, available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20191022_docket-19A368_order.pdf) (As discussed in note 5, the Court granted certiorari regarding the Federal Officer Removal Statute issue.); and *Suncor Energy Inc. v. Boulder County* (On October 22, 2019, Justice Sonia Sotomayor, the circuit justice for the Tenth Circuit, denied the application (No. 19A428) for recall of the remand order, available at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19a428.html>).

change issue should be addressed by the executive and legislative branches of the federal government, not the federal judiciary. On the federal level, the more than two dozen multinational energy companies argued that this issue was already answered squarely by the Supreme Court. In 2011, the Court, in a decision written by Justice Ginsburg, had determined in *American Electric Power Co. v. Connecticut*¹⁴⁴ that those plaintiffs (eight states, one city, and three land trusts) needed to raise their grievances about greenhouse gas (GHG) emissions with EPA, not through federal nuisance actions against four individual private power companies and the Tennessee Valley Authority. The Court expressly stated:

Indeed, this prescribed order of decision making—the first decider under the [Clean Air] Act is the expert administrative agency, the second, federal judges—is yet another reason to resist setting emissions standards by judicial decree under federal tort law. The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum. As with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation’s energy needs and the possibility of economic disruption must weigh in the balance.

The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators . . . The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.¹⁴⁵

With this decision, the companies believed that the *American Electric Power Court* recognized the paramount role that EPA has played since 1970. The Court concluded that the climate change issue should be addressed by Congress and the executive branch, through EPA, not by individual federal judges. Importantly, however, the Court also stated in the decision that “[t]he Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators.” Moreover, the Court stated that “The Act envisions extensive cooperation between federal and state authorities, see §7401(a), (b), generally permitting each State to take the first cut at determining how best to achieve EPA emission standards within the domain, see §7411(c)(1), (d)(1)-(2).”¹⁴⁶

Thus, the Supreme Court recognized the important role that state regulators play as co-regulators of GHG emissions. And the district court chief judge, in his July 22, 2019, denial of the fossil fuel company defendants’ request to remove the Rhode Island case to federal court, stated: “In fact, the CAA itself says that controlling air pollution

‘is the primary responsibility of states and local governments. 42 U.S.C. §7401(a)(3)’¹⁴⁷ Moreover, the legislative and executive branches of Rhode Island government have enacted legislation and promulgated regulations to protect the atmosphere as a natural resource for the people of the state. Further, there is no Rhode Island case law that prohibits the state judiciary from handling a climate change case brought under state law and the state constitution.¹⁴⁸

On October 15, 2019, the district court chief judge rejected the companies’ request in a brief order to remove the climate liability case to federal court. And, as discussed earlier in this Article, Rhode Island prevailed on the jurisdictional issue when the First Circuit affirmed on October 29, 2020, the district court order remanding the case back to state court for trial.

Although I cannot make any predictions, I offer four observations that other states may want to consider as they contemplate filing a complaint against fossil fuel companies. Just as public trust law, for example, is a matter of state law, there are nonetheless significant variations across the 50 “laboratories of democracy” in terms of both substance and jurisprudential underpinning. Some states moreover, like Connecticut and Minnesota, as well as the District of Columbia, have filed cases based upon local consumer protection laws and argue that the oil and gas companies created a public nuisance by producing and marketing a dangerous product while violating state consumer fraud statutes. That is why “[s]ome experts say the newest iteration of climate liability lawsuits brought by states’ attorneys general using consumer protection laws could face an easier battle in the legal fight to remain in state court, since local consumer protections laws are so robust.”¹⁴⁹ Thus, I will use the state of New York as an example of a state moving in a positive direction if it decides to file such a climate liability lawsuit.

A. Observation One: The Importance of an ERA and Updated Public Trust Legislation

A state may want to consider having an ERA and an updated public trust law that spell out clearly the government’s environmental policy with respect to the atmosphere as a natural resource that needs to be protected by the state as trustee for all individuals and communities, including minority and/or low-income communities.

This was a significant legal issue in a climate change case that was recently decided in the state of Oregon. In 2011, two teenagers who live in Oregon, Olivia Chernaik and Kelsey Cascadia Rose Juliana, and their mothers filed a climate change complaint in the Circuit Court of Oregon, Lane County, against then-Gov. John Kitzhaber and the state for failing to protect essential natural resources, including the atmosphere, as required under the pub-

147. See *supra* note 6, at 10.

148. See Mary E. Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173 (1993).

149. Jennifer Hijazi, *D.C. Says Climate Case Belongs in Local Court*, E&E NEWS, Aug. 20, 2020, <https://www.eenews.net/climatewire/stories/1063712079>.

144. 564 U.S. 410, 41 ELR 20210 (2011).

145. *Id.* at 427.

146. *Id.* at 428.

lic trust doctrine.¹⁵⁰ The plaintiffs sought to compel the state government to create a viable climate recovery plan for reducing CO₂ emissions in order to protect the state's natural resources, and to protect young people from the impacts of climate change.

In May 2015, the circuit court trial judge held that the state had no affirmative legal responsibility nor fiduciary obligation to preserve and protect the atmosphere from climate change for present and future generations because it is not a public trust resource. In sum, the trial court questioned “whether the atmosphere was a ‘natural resource’ at all.” There is no enacted law or constitutional provision on this issue, which provides that Oregon has a fiduciary responsibility as trustee to protect the atmosphere from impairment.

In July 2015, the plaintiffs filed a notice of appeal with the Oregon Court of Appeals, and in January 2019, the appellate court finally ruled against the youth plaintiffs by stating that the public trust doctrine imposed no affirmative duty on the state, and declined to state whether the atmosphere is a public trust resource.¹⁵¹ The plaintiffs asked the Oregon Supreme Court to review and overturn the appellate court's decision. On October 22, 2020, the Oregon Supreme Court affirmed the appellate court's decision that the public trust doctrine does not impose a fiduciary obligation upon the state to preserve and protect the atmosphere.¹⁵²

Imagine for a moment if Oregon had a robust and updated public trust law like Rhode Island's spelling out the state's public trust responsibilities regarding its natural resources, as well as a simple and straightforward ERA like New York's impending self-executing amendment that states, “Each person shall have a right to clean air and water, and a healthful environment.” The proposed ERA (Article I, §19) will be inserted in the state constitution's bill of rights section, together with, among others, the right to freedom of worship; the right to freedom of speech and press; as well as the right to equal protection of the laws. In New York, a constitutional amendment requires a simple majority vote of each chamber of the legislature in two successive legislative sessions with an election for state legislators in between. The proposed ERA will be put before the voters via a November 2, 2021, referendum.

Arguably, the Oregon trial court may have been able to issue a different ruling on the state's affirmative duty to protect its natural resources, which includes the atmosphere, if the state had in place public trust legislation, as well as an ERA similar to New York's.

B. *Observation Two: The Importance of Environmental Justice Legislation*

A state may want to consider enacting environmental justice legislation that spells out clearly state environmental policy with respect to protecting all individuals and communities, including disproportionately impacted communities, because of climate change.

This Article began with a discussion of climate justice and climate refugees in the United States who are, based upon extensive research over the past 35 years, minority and/or low-income communities who are disproportionately exposed to environmental harms and risks as compared to other communities. Consequently, I then surmised, based upon this research, that climate change currently and in the foreseeable future disproportionality impacts minority and/or low-income communities throughout the nation. Similar to Virginia¹⁵³ and New Jersey,¹⁵⁴ New York, as a laboratory of democracy, enacted environmental justice legislation this year in order to address the environmental and public health impacts of environmental/climate injustice.

On January 1, 2020, New York added a new Article 48 to the Environmental Conservation Law, which established a permanent environmental justice advisory group.¹⁵⁵ Importantly, the law¹⁵⁶ declared that it is now state policy that “all people, regardless of race, color, religion, national origin or income, have a right to fair treatment and meaningful involvement in the development, implementation and enforcement of laws, regulations and policies that affect the quality of the environment.” Moreover, it is now state policy that “no group of people, including a racial, ethnic or socioeconomic group of people, should be disproportionately exposed to pollution or bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal or commercial operations, or the execution of federal, state, local, and tribal programs and policies.” In sum, environmental justice as a public policy issue is embedded into the state's ERA.

This environmental justice law empowers New York officials to address the impacts of climate change now

150. *Chernaik v. Kitzhaber*, No. 16-1-09273 (Or. Cir. Ct. filed May 19, 2011).

151. On May 22, 2019, the Oregon Supreme Court granted the plaintiffs' request to review the Court of Appeals' January 2019 ruling. On November 13, 2019, the court heard oral arguments.

152. *Chernaik v. Brown*, 367 Or. 143, 50 ELR 20242 (2020).

153. S.B. 406 was signed into law on April 22, 2020. The law established the 27-member Virginia Council on Environmental Justice as a permanent advisory body to the executive branch, and according to Gov. Ralph Northam's statement: “This bill will help to ensure communities are directly involved in the decisions that affect them most, and will help prevent vulnerable Virginians from being disproportionately impacted by pollution, climate change and environmental hazards.”

154. S.B. 232 was signed into law on September 18, 2020. The law requires the New Jersey Department of Environmental Protection to evaluate the environmental and public health impacts of certain facilities on overburdened communities when reviewing certain permit applications. This law makes New Jersey the first state in the nation to require mandatory permit denials if an environmental justice analysis determines that a new facility will have a disproportionately negative impact on overburdened communities.

155. An act to amend the environmental conservation law, in relation to establishing a permanent environmental justice advisory group and an environmental justice interagency coordinating council, A1564/S2385, 2019-2020 Reg. Sess. (N.Y. 2019), available at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A01564&term=2019&Summary=Y&Text=Y.

156. Environmental Conservation Law §§48-0101 to 48-0113.

while, at the same time, to address climate injustice for all, including disproportionately affected communities.

C. *Observation Three: The Importance of State Climate Change Legislation*

A state may want to consider having comprehensive climate change policy enacted into law that spells out clearly specific requirements and some aspirational goals with respect to GHG emissions in the state in order to protect all individuals and communities, including disproportionately impacted communities.

On July 18, 2019, New York's Climate Leadership and Community Protection Act was enacted into law, which called for a dramatic decrease in GHG emissions to address the grave threats posed by climate change identified in the law.¹⁵⁷ The law, among other things, commits the state to reaching net-zero GHG emissions by 2050. It requires 40% emission reductions below 1990 levels by 2030, and 85% emission reductions below 1990 levels by 2050. Additionally, to reach the target of net-zero emissions, the law allows for any remaining emissions beyond 85% to either be directly reduced or offset through projects that remove GHG emissions from the atmosphere.

Of importance, the law includes several environmental justice policy provisions by (1) setting a target for disadvantaged communities to receive 40% of the overall benefits from the state's climate programs; and (2) declaring, at a minimum, those disadvantaged communities must receive no less than 35% of those benefits. Further, the law established the Climate Justice Working Group, which advises the Climate Action Council that has the responsibility of developing the final criteria for identifying disadvantaged communities based on considerations related to public health, environmental hazards, and socioeconomic factors.

Additionally, the law addressed the current problem of poor air quality through the creation of a community air monitoring program, whereby the state's Department of Environmental Conservation (DEC) would identify high-risk communities and monitor the air quality for exposure to air contaminants and pollutants. Subsequently, the DEC and the Climate Justice Working Group will create and implement a strategy to improve air quality in communities adversely affected by local air pollution. Finally, the law required that the state prioritize projects that not only reduce GHG emissions, but also eliminate criteria pollutants in historically disadvantaged communities when the state acts to meet its GHG emissions reduction goals.

157. An act to amend the environmental conservation law, the public service law, the public authorities law, the labor law and the community risk and resiliency act, in relation to establishing the New York state climate leadership and community protection act, S6599/A8429, 2019-2020 Leg. Sess. (N.Y. 2019), available at <https://www.nysenate.gov/legislation/bills/2019/s6599>.

D. *Observation Four: The Importance of Updated Public Nuisance Legislation*

A state may want to consider having comprehensive public nuisance legislation that specifically addresses the issue of climate change.

A New York Supreme Court trial judge was confronted with the fact that the state did not have appropriate legislation and implementing regulations in place to address a hazardous waste issue in *State v. Schenectady Chemicals, Inc.*¹⁵⁸ In that case, New York filed a lawsuit to compel a chemical company to pay the cleanup costs of a dumpsite to prevent the seepage of chemical wastes into the public water supply. New York alleged common-law public nuisance, and violations of New York Environmental Conservation Law §§17-0501 and 17-1701. Those laws and implementing regulations, however, dealt with new chemical "discharges" subject to fines for a lack of a permit.

The trial court held that it would be ludicrous for the chemical company to comply with those laws and regulations and apply now for a permit for chemicals that were dumped between 15-30 years ago, prior to the filing of the lawsuit. But the trial court determined that New York's public nuisance claim was viable:

The common law is not static. Society has repeatedly been confronted with new inventions and products that, through foreseen and unforeseen events, have imposed dangers upon society (explosives are an example). The courts have reacted by expanding the common law to meet the challenge, in some instances imposing absolute liability upon the party who, either through manufacture or use, has sought to profit from marketing a new invention or product (citation omitted). The modern chemical industry, and the problems engendered through the disposal of its by-products, is, to a large extent, a creature of the twentieth century. Since the Second World War hundreds of previously unknown chemicals have been created. The wastes produced have been dumped, sometimes openly and sometimes surreptitiously, at thousands of sites across the country. Belatedly it has been discovered that the waste products are polluting the air and water and pose a consequent threat to all life forms. *Someone must pay to correct the problem, and the determination of who, is essentially a political question to be decided in the legislative arena.* As Judge Bergan noted in *Boomer v Atlantic Cement Co.* (26 NY2d 219, 222, 223), resolution of the issues raised in society's attempt to ameliorate pollution are to a large extent beyond the ken of the judicial branch. Nonetheless, courts must resolve the issues raised by litigants and, in that vein, this court holds that the fourth through seventh causes of action of the amended complaint state viable causes of action sounding in nuisance.¹⁵⁹

The defendant chemical company filed a motion to dismiss the statutory claims, which the trial court granted.

158. 117 Misc. 2d 960, 13 ELR 20550 (N.Y. Sup. Ct. 1983).
159. *Id.* at 966-67 (emphasis added).

But the trial court denied the motion to dismiss the common-law public nuisance claims because water, like air, belongs to everyone. On February 18, 1983, the trial court found that the chemical manufacturer created a public nuisance and, therefore, was absolutely liable for the resulting damages since “[o]ne who creates a nuisance through an inherently dangerous activity or use of an unreasonably dangerous product is absolutely liable for resulting damages, regardless of fault, and despite adhering to the highest standard of care.”¹⁶⁰ The case was appealed. On July 26, 1984, the Appellate Division affirmed the trial court’s decision, finding that “the seepage of chemical wastes into a public water supply constitutes a public nuisance.”¹⁶¹

Likewise, the *Rhode Island Supreme Court in State v. Lead Industry Ass’n*¹⁶² reversed a judgment of abatement against three lead paint manufacturers and a national trade association of lead producers. The defendants challenged a judgment of the Superior Court, Providence County, which imposed liability on the manufacturers for creating a public nuisance, in an action brought by the attorney general. The Rhode Island Supreme Court, among other things, determined that the state had not and could not allege any set of facts to support its public nuisance claim that would establish that the manufacturers interfered with a public right or that they were in control of the lead pigment they, or their predecessors, manufactured at the time it caused harm to Rhode Island children. In short, the court determined that allowing the state’s public nuisance claim “would change the meaning of public right to encompass all behavior that causes a widespread interference with the private rights of numerous individuals.”¹⁶³

And that, in turn, “would be antithetical to common law and would lead to a widespread expansion of public nuisance law that never was intended.”¹⁶⁴

The Rhode Island Supreme Court ruled that the judgment of abatement with respect to the two manufacturers was reversed. The judgment with respect to a third manufacturer, however, was affirmed. The court determined that it is the legislature’s responsibility to address lead paint as a public policy issue as well as a public health issue, and the liability should be on the landlords since they were in control of the lead paint at the time that it became hazardous. Thus, the lesson learned is for legislatures to update their states’ public nuisance laws to specifically address the phenomenon of climate change.

In conclusion, at some point, the substantive issues surrounding climate change and climate liability will be addressed unless the Supreme Court blocks all state climate lawsuits on jurisdictional grounds and they are never considered. This, however, “could set environmental, social, political and economic precedents for generations.”¹⁶⁵ In the meantime, there is no magic formula that a state must follow in order to prosecute a climate liability case against fossil fuel companies.

But I offer these four observations that states may want to consider and act on before their lawsuit is even filed. It appears that there are legal arguments or legal doctrines that a state government could utilize against fossil fuel companies to address the adverse effects of climate change while, at the same time, addressing instances of climate injustice that current and potential climate refugees face on a daily basis, and in the reasonably foreseeable future.

160. *Id.* at 965.

161. *State v. Schenectady Chems*, 103 A.D.2d 33, 37 (N.Y. App. Div. 1984).

162. 951 A.2d 428 (R.I. 2008).

163. *Id.* at 452.

164. *Id.* at 454.

165. David Hasemyer, *Lawsuits Seeking Damages for Climate Change Face Critical Legal Challenges*, INSIDECLIMATE NEWS, Jan. 28, 2020, <https://insideclimatenews.org/news/27012020/supreme-court-climate-change-cases-fossil-fuel-accountability>.