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Response: Comment on *What Climate Change Can Do About Tort Law*

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Climate Change Tort Litigation to Date

- Four cases involve common law “nuisance” claims, asserting that emissions of greenhouse gases contribute to the “nuisance” of climate change and associated alleged effects.
 - *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (U.S. 2011) (*AEP*)
 - Federal common law claims by eight states, a municipality, and three private land trusts against electric utilities, demanding an injunction requiring defendants to reduce emissions over the next decade.
 - U.S. Supreme Court affirmed dismissal of the claims, holding they are displaced by provisions of the Clean Air Act authorizing EPA to address greenhouse gas regulation of power plant emissions.
 - *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009)
 - Federal common law claims by Native Tribe against two dozen oil, coal, and utility companies, demanding approximately \$400 million in damages to address alleged future risks from climate change.
 - District court dismissed case on grounds that plaintiffs lacked standing and claims presented non-justiciable political questions; appeal is pending before the Ninth Circuit (No. 09-17490).
 - *Comer v. Murphy Oil USA*, No. 1:11-cv-220, __ Fed. Supp. 2d __ (S.D. Miss. 2012)
 - State tort claims by Mississippi landowners against scores of oil, coal, and utility companies, demanding that defendants be held monetarily liable for damages caused by Hurricane Katrina.
 - District court dismissed case on grounds, among others, that plaintiffs lacked standing and claims presented political questions and were preempted by the Clean Air Act.
 - *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. 2007)
 - Federal common law claims by the State of California against several automobile manufacturers, demanding an injunction requiring the defendants to reduce emissions from automobiles.
 - District court dismissed claims as presenting non-justiciable political questions; no appeal.

Climate Change Tort Litigation to Date (continued)

- Other cases involve common law “public trust” claims, asserting that the government holds the atmosphere in “trust” for the public and has a fiduciary duty to, among others, promulgate specific regulations addressing greenhouse gas emissions and climate change.
 - *Alec L. v. Jackson*, No. 1:11-cv-2235 (D.D.C. 2012)
 - Claims by individuals and advocacy organizations against six federal agencies – including the Department of Agriculture, the Department of Defense, and EPA – demanding that the agencies take action to reduce emissions by at least 6% per year and operate under court supervision over the next century to limit CO₂ world-wide to 350 ppm.
 - Motions to dismiss are pending on standing, political question, displacement, and no such doctrine cognizable under federal law.
 - Numerous similar “public trust” actions are pending in state courts across the country, with state agencies and officials named as defendants.
 - In none of these cases has relief been granted, and motions to dismiss are pending in many (and have in some cases been granted).

What Climate Change Can Do About Tort Law

- Professor Kysar acknowledges that tort law, as it exists today, “seems fundamentally ill-equipped to address the causes and impacts of climate change,” and argues instead that climate change should serve as a catalyst to transform tort law.
 - Duty, breach, causation, and injury should be reconceived to change the tort system from a means of “compensating and deterring harm” into a broad “backdrop and partner to environmental, health, and safety regulation.”
 - The tort system would be changed into a shadow administrative regime, administered by the courts through *ad hoc* adjudication.
- While Professor Kysar’s proposal is certainly bold, we believe it rests on fundamental misconceptions regarding the basis and purpose of American tort law.

The Nature of Tort

- A “tort” is traditionally defined as a wrong committed by one against another that causes a legally cognizable injury, for which the law allows a remedy.
 - Liability is imposed because – and only because – the actor should have foreseen the possibility of harm and yet engaged in the conduct at issue.
- Through all historical developments, from “joint and several liability” and “respondeat superior” to “strict liability,” this critical link between the tortfeasor and the harm has been maintained.

The Nature of Tort (continued)

- The approach suggested by Professor Kysar would sever this critical link between the tortfeasor and the harm.
 - Liability could be premised on the defendant's conduct itself, in light of relevant societal interests.
- If particular conduct (for example, emission of greenhouse gases) is deemed contrary to the public welfare, any actor that engages in that form of conduct may be held liable for any and all ill-effects attributed thereto.
 - Problems that could be addressed under such a system include, according to Professor Kysar, “climate change, terrorism, infectious disease outbreaks, and financial market instability.”

Limitations on the Tort System

- In addition to exceeding the traditional limitations on tort liability, his approach faces at least three other fundamental problems:
 1. Separation of Powers
 2. Fundamental Fairness
 3. Judiciary Not Equipped to Manage the Level of Complexity the New System Would Pose

Limitations on the Tort System (continued)

- Separation of powers principles preclude the transfer of legislative authority to the judiciary that Professor Kysar's approach would entail.
 - Professor Kysar's approach requires judges and juries to weigh a nearly infinite array of societal interests against potential risks and assign responsibility among a multitude of global actors.
 - The Supreme Court has itself recognized that “judges lack the scientific, economic, and technological resources [to] cop[e] with issues of this order.” *AEP*, 131 S. Ct. at 2540.
- Vesting authority in one state court to craft a binding “solution” to a matter of national and international concern, like climate change, would also violate the rule that the law of one state cannot dictate conduct or bind actors in other states (*State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

Limitations on the Tort System (continued)

- Professor Kysar’s system would unmoor the tort system from fundamental principles of fairness.
 - Liability could be imposed arbitrarily on a very few (current) emitters for harms attributed to the actions of the collective, including emitters over the last centuries.
- No one person or entity is responsible for the harms associated with climate change, or other “collective action” problems.
 - In fact, there are billions of former and current sources of emissions, many of which are overseas (and not subject to U.S. jurisdiction) or no longer in existence.
- To hold a small group responsible for the harms caused by the collective whole is fundamentally unfair: in federal law there would be no right of contribution to effectively allocate the burden.

Limitations on the Tort System (continued)

- The judiciary is simply not equipped to manage the level of complexity that Professor Kysar's system would entail.
 - Cases could involve hundreds of thousands if not millions of litigants.
 - Scores of expert witnesses interpreting and advancing scientific data regarding the causes of climate change, its potential impact across the globe, and potential remedies to abate its effect.
 - Every element of Professor Kysar's new form of tort law would involve intractable factual issues, for which judges and juries lack the expertise, time, and resources to resolve (e.g., what share of liability and responsibility should individual actors bear?; how does one measure past and future economic, cultural, and social harms of large numbers of peoples and entities?).

What Law Can Do About Climate Change

- Massive collective action problems like climate change require legislative solutions.
 - While a comprehensive solution has not been adopted, Congress, federal agencies, and States have already taken some steps.
 - There may even be a place for tort liability within a legislative solution (e.g., National Childhood Vaccine Injury Act).
- Professor Kysar’s proposal is fundamentally a legislative one, and should be addressed to Congress, not the courts.
- The tort system was never envisioned as the cure for all of society’s ills, and it was certainly never intended to serve as a shadow version of the administrative state.