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CLIMATE CHANGE AND PUBLIC NUISANCE LAW: *AEP v. CONNECTICUT* AND ITS IMPLICATIONS FOR STATE COMMON LAW ACTIONS

JEFFREY N. STEDMAN*

INTRODUCTION

In the summer of 2010, the Democratic leadership in Congress gave up on its attempt to pass legislation aimed at curbing carbon emissions associated with climate change.¹ This failure was a major disappointment to conservation groups and activists who had spent months negotiating and promoting the proposed legislation.² It was even seen “as a setback by some utility executives who had hoped that Congress would set predictable rules governing” greenhouse gas emissions.³

In recent years, some plaintiffs have begun to appeal to common law public nuisance doctrine in an attempt to address problems associated with climate change, with an assortment of government entities and private landowners suing energy companies and automakers for certain

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¹ Carl Hulse & David M. Herszenhorn, *Democrats Call Off Climate Bill Effort*, N.Y. TIMES, July 22, 2010, <http://www.nytimes.com/2010/07/23/us/politics/23cong.html>.

² *Id.*; see also Press Release, Nat'l Audubon Soc'y, Audubon Leader Comments on Senate Failure to Address Climate Change (July 22, 2010), available at <http://www.audubon.org/newsroom/press-releases/2010/audubon-leader-comments-senate-failure-address-climate-change-0>; Joe Romm, *The Failed Presidency of Barack Obama, Part I*, THINK PROGRESS (July 22, 2010), <http://thinkprogress.org/romm/2010/07/22/206465/the-failed-presidency-of-barack-obama/>; Gus Speth & Andrea Cone, *Congressional Failure to Enact Climate Change Legislation*, VT. L. TOP 10 ENVTL. WATCH LIST, <http://watchlist.vermontlaw.edu/congressional-failure-to-enact-climate-change-legislation/> (last visited Apr. 2, 2012) (listing the “Congressional failure to enact climate change legislation” as the top environmental issue of 2010).

³ Hulse & Herszenhorn, *supra* note 1; see Tina Casey, *Big Utilities Weigh In on New Climate Change Bill, the American Power Act*, CLEAN TECHNICA (May 12, 2010), <http://cleantechnica.com/2010/05/12/big-utilities-weigh-in-on-new-climate-change-bill-the-american-power-act/>.

effects of climate change.⁴ This trend has been welcomed by conservation groups and resisted by utility and other energy companies.⁵ Indeed, a primary complaint made by defendant utility companies in such cases is that the application of public nuisance doctrine to the issue of climate change would require courts to address these questions through the application of “vague and indeterminate nuisance concepts,” thereby making it difficult for potential defendants to reliably predict what sorts of activities will give rise to liability.⁶

A number of commentators have warned of the dire consequences of allowing greenhouse gas emissions policy to be governed by the application of common law public nuisance doctrine. For example, one free market-oriented blogger warned of a “tsunami of global warming litigation hitting with hurricane force.”⁷ Swiss Re, a major international reinsurance company, identified climate change litigation in the United States as a serious, emerging threat to insurance companies, suggesting that it could be the “new asbestos.”⁸

⁴ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g en banc granted*, 598 F.3d 208, *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir.); *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

⁵ Indeed, conservation groups have been directly involved in suing major power companies for their greenhouse emissions under public nuisance doctrine. For example, in *Connecticut v. AEP* the plaintiffs included the Audubon Society of New Hampshire, the Open Space Institute, and the Open Space Conservancy, while the defendants were all major power companies. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 266–67 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

⁶ See, e.g., Brief for Petitioner for a Writ of Certiorari at 2, 20, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 813 (2010) (No. 10-174), 2010 WL 3054374 at *20 [hereinafter Brief for Petitioner] (quoting *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 317 (1981)).

⁷ Don C. Brunell, *Tsunami of Global Warming Litigation Hitting With Hurricane Force*, OLYMPIA BUS. WATCH (Nov. 18, 2009), <http://www.olympiabusinesswatch.com/2009/11/tsunami-of-global-warming-litigation-hitting-with-hurricane-force.html>; see *Global Warming: Here Come the Lawyers*, BUS. WEEK (Oct. 30, 2006), http://www.businessweek.com/magazine/content/06_44/b4007044.htm; Peter Lattman, *Global Warming & the Law*, WALL ST. J. L. BLOG (Oct. 24, 2006, 8:15 AM), <http://blogs.wsj.com/law/2006/10/24/global-warming-the-law/>.

⁸ Daniel Hays, *Climate Claims Are the 'New Asbestos,' Swiss Re Suggests*, PROP. CASUALTY 360 (May 29, 2009), <http://www.propertycasualty360.com/2009/05/29/climate-claims-are-the-new-asbestos-swiss-re-suggests>.

Reaction from the legal academy has been more favorable, with one scholar suggesting that the application of public nuisance doctrine could offer the functional equivalent of a carbon tax, which is regarded by many economists as the most economically rational response to climate change.⁹ On this view, public nuisance litigation offers an alternative path to what some consider the most rational policy choice, when powerful political interests make it impossible to achieve this policy through the legislative process.¹⁰

Two recent decisions by United States Courts of Appeals served to fuel the hopes and fears surrounding climate change litigation. Both the Fifth Circuit and the Second Circuit issued decisions allowing public nuisance climate change cases to go forward, in both cases reversing district court decisions which had dismissed the plaintiffs' claims as non-justiciable political questions.¹¹ In *Comer v. Murphy Oil*, the Fifth Circuit would eventually reinstate the district court's dismissal of the plaintiffs' complaint on purely procedural grounds,¹² but, to the extent that the Fifth Circuit ruled on the merits of the case, it sided with the plaintiffs, at least on the issue of whether plaintiffs had a legitimate cause of action.¹³

Proponents of public nuisance climate change litigation won a more substantial victory, however, when the Second Circuit, in *Connecticut v. AEP*, reversed the district court's dismissal of a public nuisance climate change case, holding that the case did not present the court with a non-justiciable political question.¹⁴ The plaintiffs petitioned the United States Supreme Court for certiorari, as did the Obama Administration's Solicitor General, representing the co-defendant Tennessee Valley

⁹ Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827, 1829 (2008). Interestingly, Michigan Congressman Fred Upton sees proposed Environmental Protection Agency ("EPA") regulations in the wake of recent climate change litigation as a "backdoor attempt" to implement a cap-and-trade system. Matthew L. Wald, *E.P.A. Says It Will Press On With Greenhouse Gas Regulation*, N.Y. TIMES, Dec. 23, 2010, <http://www.nytimes.com/2010/12/24/science/earth/24epa.html?hpw>.

¹⁰ See Martha Judy & Jonathan Gerard, *Climate Change in the Courts*, VT. L. TOP 10 ENVTL. WATCHLIST, <http://watchlist.vermontlaw.edu/climate-change-in-the-courts/> (last visited Apr. 2, 2012) ("Judicial review may be the best option to address global warming in light of legislative and executive inaction to curb human-induced climate change.").

¹¹ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 319 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011); *Comer v. Murphy Oil USA*, 585 F.3d 855, 860 (5th Cir. 2009), *opinion vacated pending reh'gen banc*, 589 F.3d 208, *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

¹² See *infra* notes 51–53 and accompanying text.

¹³ *Comer*, 585 F.3d at 879–80.

¹⁴ *Connecticut*, 582 F.3d at 392.

Authority (“TVA”).¹⁵ The Supreme Court granted the defendants’ petition for certiorari in December 2010.¹⁶ In June 2011, the Court issued its decision, holding that any claim against the defendants based on federal common law was displaced by the Clean Air Act (“CAA”).¹⁷

The Court’s reversal of the Second Circuit’s *Connecticut v. AEP* decision will likely be a source of dismay among conservation groups and rejoicing among large-scale greenhouse gas emitters. However, such responses would be premature. Although the Court made it clear that any claim against the defendants based on federal common law would be displaced by the CAA and pending Environmental Protection Agency (“EPA”) regulations, the Court also explicitly left open the question of whether plaintiffs such as those in *AEP v. Connecticut* might have a claim against greenhouse gas emitters under state common law.¹⁸ In short, while the Court settled the issue of *displacement* of federal common law by federal statutory and regulatory law, it did not resolve the issue of *preemption* of state statutory and common law.¹⁹

Although the Court’s holding in *AEP v. Connecticut* was clear, the Court’s opinion was relatively short²⁰ and did not offer as complete a description of the Court’s reasoning as one might expect. For instance, while the Supreme Court drew the same conclusion as the district court in *AEP v. Connecticut*, it eschewed the district court’s analysis in terms of the political question doctrine, instead relying on a displacement argument.²¹ But the Court did not give any clear indication as to why it rejected the district court’s approach. This is somewhat surprising given that *all* of the district courts to hear climate change public nuisance cases dismissed the complaints by relying on the political question doctrine, holding that such cases presented the courts with non-justiciable political questions.²²

¹⁵ Brief for the Tenn. Valley Auth. in Support of Petitioners at 8–9, 25–30, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 813 (2010) (No.10-174), 2010 WL 3337661 (Aug. 24, 2010) [hereinafter Solicitor General’s Brief].

¹⁶ *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 813 (2010) (noting the grant of certiorari).

¹⁷ *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

¹⁸ *Id.* at 2540 (highlighting that the parties briefed the Court on state law nuisance claims).

¹⁹ See *supra* notes 17–18 and accompanying text.

²⁰ While the Second Circuit’s decision in *AEP* ran almost ninety pages, the Supreme Court’s opinion is approximately fourteen pages. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

²¹ *Am. Elec. Power Co.*, 131 S. Ct. at 2537.

²² See *infra* notes 31–59 and accompanying text.

This Note has two primary objectives: (1) to explain why the Supreme Court in *AEP* ruled the way it did, specifically, why it relied on a displacement analysis instead of the political question doctrine favored by the lower courts; and (2) to consider the extent to which the Court's decision in *AEP* leaves open the possibility of public nuisance claims against *AEP*-type defendants under state common law.

This Note argues that the Court's preferring a displacement analysis over reliance on the political question doctrine is not, in the end, terribly surprising, given the harsh criticism²³ that doctrine has attracted in recent years, in both its classical formulation and in the "prudential" form proposed by the Solicitor General.²⁴ If anything is surprising, it is the district courts' reliance on the political question doctrine, given its controversial status.

This Note also argues that, while there is explicit language in the CAA that seems to preserve to the states the right to impose more stringent emission standards on large-scale greenhouse gas emitters, there are reasons to doubt that such an approach would be successful, either as a legal strategy or as a means of mitigating the effects of climate change.²⁵ Although the Court withheld judgment on the preemption issue due to its not being sufficiently briefed,²⁶ there is language in the Court's *AEP* opinion suggesting that the Court would find preemption of state law by the CAA.²⁷ Moreover, even if the Court did not find preemption of state common law, any plaintiff in a state law action would be severely restricted by the state court's inability to regulate out-of-state greenhouse gas emitters.²⁸

Thus, although the Supreme Court's decision in *AEP* gives some hope to those who would address the problem of climate change through state common law public nuisance litigation, it would be a mistake to expect such an approach to play a significant role in addressing the various problems associated with climate change. Similarly, it would be a mistake to see the decision as a harbinger for a "tsunami of global warming litigation" or as an alternative path to the carbon tax promised land.

²³ See *infra* notes 267–70 and accompanying text.

²⁴ See Solicitor General's Brief, *supra* note 15, at 11–22 (arguing that plaintiffs' objections to defendants' standing are best understood as grounded in prudential considerations, instead of the standing requirements of Article III of the Constitution).

²⁵ See *infra* Part III.F.

²⁶ *Am. Elec. Power Co.*, 131 S. Ct. at 2540.

²⁷ See *infra* notes 236–42 and accompanying text.

²⁸ See *infra* notes 230–33 and accompanying text.

This Note is organized as follows. Part I describes the effects of climate change pointed to by plaintiffs in these cases and the treatment of these claims by various federal courts. Part II describes the concept of federal common law and explains how a public nuisance climate change case could arise under it. Part III explains why the Supreme Court in *AEP v. Connecticut* held federal common law public nuisance claims to be preempted by the CAA and considers the extent to which the Court's analysis leaves open the possibility of a public nuisance claim under state common law. Part IV considers the political question doctrine, explaining why the Supreme Court chose not to rely on this doctrine, in spite of its popularity with federal district courts faced with climate change public nuisance cases.

I. THE EFFECTS OF CLIMATE CHANGE AND THE RESPONSE OF THE FEDERAL COURTS

In order to appreciate what is at stake in the climate change debate, one must have some idea of the possible effects of climate change. Although there are pockets of skepticism about climate change, or the role of human activity in bringing it about,²⁹ there nevertheless seems to be a broad, substantial scientific consensus that carbon dioxide emission from human activity is a significant cause of climate change.³⁰ This section describes the types of damages plaintiffs have claimed in climate

²⁹ See John M. Broder, *Bashing E.P.A. Is New Theme in G.O.P. Race*, N.Y. TIMES, Aug. 17, 2011, <http://www.nytimes.com/2011/08/18/us/politics/18epa.html> (describing skepticism about climate change as part of current Republican Party orthodoxy).

³⁰ For a helpful discussion of the science behind climate change, see Daniel Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 2–3 nn.1–4, 9–11 nn.28–38 (2003). On the issue of the scientific consensus regarding climate change, see Zasloff, *supra* note 9, at 1858–59 nn. 160–62. See also INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, RENEWABLE ENERGY SOURCES AND CLIMATE CHANGE MITIGATION: SUMMARY FOR POLICYMAKERS AND TECHNICAL SUMMARY 7, available at http://srren.ipcc-wg3.de/report/IPCC_SRREN_SPM.pdf (finding that “greenhouse gas (“GHG”) emissions resulting from the provision of energy services has contributed significantly” to a dramatic increase in atmospheric greenhouse gas concentrations since 1850, and that “[m]ost of the observed increase in global average temperature since the mid-20th Century is very likely due to the observed increase in anthropogenic greenhouse gas concentrations”). For an authoritative discussion of the role of climate change in increasing the incidence of extreme weather events, see U.S. CLIMATE CHANGE SCIENCE PROGRAM, WEATHER AND CLIMATE EXTREMES IN A CHANGING CLIMATE: REGIONS OF FOCUS: NORTH AMERICA, HAWAII, CARIBBEAN, AND U.S. PACIFIC ISLANDS *passim* (2008), available at <http://downloads.climate-science.gov/sap/sap3-3/sap3-3-final-all.pdf> (describing the effect of greenhouse gases on extreme weather events).

change nuisance suits and briefly describes how various federal courts have responded.

There are four prominent climate change public nuisance cases that have made their way into the federal courts.³¹ In *California v. General Motors*³² the State of California sued six large automobile manufacturers, claiming that emissions from automobiles they manufactured contributed to climate change, which in turn has caused the snow pack in California's mountains to melt earlier in the season and more rapidly than it did in years past.³³ Southern California in particular, with its arid climate, historically has depended heavily on the mountainous snow pack for its water supply,³⁴ and earlier melting of the snow puts this water supply in jeopardy.³⁵ Moreover, the higher temperatures cause the snow pack to melt more quickly, which increases the likelihood of flooding.³⁶ The State of California sued the automakers for creating a nuisance through their contribution to global warming, seeking monetary damages as compensation for the millions of dollars the state spent to study, plan for, monitor, and respond to current and potential effects of global warming.³⁷

California put forth both federal and state common law nuisance claims.³⁸ The district court dismissed the federal public nuisance claim on non-justiciability grounds, holding that deciding the case would require that the court make inappropriate policy determinations where there was a "lack of judicially discoverable or manageable standards" available to resolve the question before it.³⁹ In essence, the court held that public nuisance doctrine provided it with no legal standard by which it could rationally determine whether the activities of the defendants

³¹ See Brief for Petitioner, *supra* note 6, at 8–10 (noting three of the four cases, with the fourth being the case at issue in the brief).

³² *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009).

³³ *Id.* at *1–2.

³⁴ See CITY OF L.A. DEP'T OF WATER & POWER, SECURING L.A.'S WATER SUPPLY, 1, 6 (2008), available at <http://www.ladwp.com/ladwp/cms/ladwp010587.pdf>.

³⁵ The *California v. General Motors* court noted that the Sierra Nevada snow pack accounts for thirty-five percent of the state's entire water supply. *California*, 2007 WL 2726871, at *1.

³⁶ *Id.*; see USGS Multi-Hazards Demonstration Project, *Arkstorm: West Coast Storm Scenario*, U.S. GEOLOGICAL SURV., <http://urbanearth.gps.caltech.edu/winter-storm-2/> (last visited Apr. 2, 2012) (warning of the possibility of catastrophic "mega-storms," intensified by climate change, causing massive urban and agricultural flooding and other losses in California).

³⁷ *California*, 2007 WL 2726871, at *1–2.

³⁸ *Id.* at *2.

³⁹ *Id.* at *5–16.

were so unreasonable as to constitute a public nuisance.⁴⁰ The court refrained from passing judgment on the state common law nuisance claim, on the grounds that the dismissal of the federal diversity claim left it without supplemental jurisdiction over the state claim.⁴¹

In *Native Village of Kivalina v. ExxonMobil*⁴² the governing body of an Inupiat tribal village along the western coast of Alaska sued twenty-four oil, energy, and utility companies, seeking compensatory damages for costs associated with relocation of their village.⁴³ The village, with a population of about 400, claimed that rising temperatures had caused the melting of sea ice along the coast, which had protected the village from the effect of winter storms, and that the resulting erosion was so severe that the village would have to be moved.⁴⁴ Like California in its case against the automakers, the village claimed that global warming was a public nuisance and sought damages against the defendants for their contribution to this nuisance.⁴⁵ Like the court in *California v. General Motors*, the court in *Kivalina* dismissed the suit, holding that the claims presented non-justiciable political questions.⁴⁶ The *Kivalina* court additionally held that the plaintiffs lacked standing because they could not trace their injuries to any of the named defendants' emissions.⁴⁷

In *Comer v. Murphy Oil* a group of Mississippi residents and property owners sued a number of oil, coal, chemical, and utility companies in a class action for damages associated with Hurricane Katrina.⁴⁸ The plaintiffs claimed that the rising temperatures associated with climate change had "fueled and intensified" the hurricane, and that since the defendants had contributed to climate change, they should be held responsible for the effects of Katrina, including plaintiffs' damages.⁴⁹ The district court in *Comer* dismissed the plaintiffs' claim as presenting non-justiciable political questions and for lack of standing.⁵⁰

⁴⁰ *Id.* at *15–16.

⁴¹ *Id.* at *16.

⁴² *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

⁴³ *Id.* at 868.

⁴⁴ *Id.* at 868–69.

⁴⁵ *Id.* at 868.

⁴⁶ *Id.* at 883.

⁴⁷ *Id.* at 880–81. In *AEP v. Connecticut*, the Court reported a four-to-four split on the question of Article III standing, with Justice Sotomayor taking no part in the decision, thus leaving undisturbed the Second Circuit's finding of standing. 131 S. Ct. 2527, 2535, 2540 (2011).

⁴⁸ *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009).

⁴⁹ *Id.* at 859.

⁵⁰ *Id.* at 860.

However, on appeal the plaintiffs in *Comer* won an initial major victory when a three-judge panel of the Fifth Circuit Court of Appeals reversed the district court, holding that the case did not present a non-justiciable political question and that the plaintiffs did have standing, so that the plaintiffs' case could go forward.⁵¹ But the victory was short-lived. The Fifth Circuit granted an en banc rehearing,⁵² but after a recusal left the court without a quorum, it dismissed the appeal, vacating the decision of the three-judge panel and leaving in place the district court's dismissal of the plaintiffs' case.⁵³

It was in *Connecticut v. AEP* where those favoring the use of the public nuisance doctrine to address the problem of climate change won their first substantial victory.⁵⁴ The plaintiffs consisted of the States of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin and the City of New York, along with the Open Space Institute, Inc., the Open Space Conservancy, Inc., and the Audubon Society of New Hampshire.⁵⁵ The defendants were a number of major power companies, including the American Electric Power Company, the Southern Company, and the Tennessee Valley Authority.⁵⁶ The plaintiffs identified the defendants as the five biggest carbon dioxide emitters in the United States, claiming that their emissions "constitute approximately one quarter of the U.S. electric power sector's carbon dioxide emissions" and that "U.S. electric power plants [were] responsible for ten percent of worldwide carbon dioxide emissions from human activities."⁵⁷

The plaintiffs in the *AEP* case followed the by-now familiar pattern of claiming that the defendants, in contributing to climate change, had given rise to a public nuisance. But whereas the plaintiffs in the other public nuisance cases had sought compensatory damages, here the plaintiffs sought an injunction against the defendants, asking the court to impose a cap on the defendants' carbon emissions.⁵⁸ The district court dismissed the plaintiffs' claims, holding that the case presented the court with non-justiciable political questions.⁵⁹ However, in a very lengthy and wide-ranging opinion, the Second Circuit Court of Appeals reversed the

⁵¹ *Id.* at 879–80.

⁵² *Comer v. Murphy Oil USA*, 598 F.3d 208, 210 (5th Cir. 2010).

⁵³ *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1055 (5th Cir. 2010).

⁵⁴ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

⁵⁵ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 265, 266 (S.D.N.Y. 2005).

⁵⁶ *Id.*

⁵⁷ *Id.* at 268 (citations omitted).

⁵⁸ *Id.* at 272.

⁵⁹ *Id.* at 274.

district court, holding that the case did not present non-justiciable political questions, that the federal common law nuisance action claimed by the plaintiff had not been displaced⁶⁰ by the CAA, and that the plaintiffs had standing to sue under the public nuisance claim.⁶¹

II. FEDERAL COMMON LAW

In *Erie v. Tompkins* the Supreme Court made it clear that “[t]here is no federal general common law.”⁶² But this just means that, in exercising its diversity jurisdiction in a typical common law cause of action such as breach of contract or negligence, a federal court is not at liberty to draw its own conclusions about what the governing substantive law ought to be.⁶³ Instead, the court must apply the relevant state common law.⁶⁴ However, on the same day⁶⁵ that Justice Brandeis’s opinion in *Erie* was announced, the Court also announced another Brandeis-authored opinion explicitly affirming the authority and power of the federal courts to create federal common law, at least in certain circumstances.⁶⁶ The circumstances at issue in this latter case involved interstate water rights, an area which has played a prominent role in the development of federal common law since the Court’s *Erie* decision.⁶⁷

Although federal common law is alive and well (in spite of Justice Brandeis’s statement in *Erie*) and is perhaps even expanding,⁶⁸ the Supreme Court has never offered a clear definition or theory of federal

⁶⁰ The courts have been somewhat inconsistent in their usage of terminology, with some courts describing federal statutory law as “displacing” federal common law. *See, e.g.*, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 392 (2d Cir. 2009). Other courts describe federal statutory law as “preempting” federal common law. *See, e.g.*, *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 312 (1981). The Supreme Court, in its *AEP v. Connecticut* decision, used “displacement” in relation to federal common law and “preemption” in relation to state law, 131 S. Ct. 2527, 2530, 2534 (2011), and this Note follows that usage.

⁶¹ *Connecticut*, 582 F.3d at 315, 319.

⁶² *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

⁶³ *See id.* at 71–73. The *Erie* decision overturned *Swift v. Tyson*, 41 U.S. 1 (1842), in accord with which many federal courts pursued the project of establishing a common, national commercial law.

⁶⁴ *Erie*, 304 U.S. at 73.

⁶⁵ Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 597 (2006).

⁶⁶ *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

⁶⁷ Tidmarsh & Murray, *supra* note 65, at 596–97.

⁶⁸ *Id.* at 586.

common law.⁶⁹ However, in the early 1980s the Court offered some helpful guidance in determining its nature and scope. In *Texas Industries v. Radcliff* the Court, after citing *Erie's* statement that there is no federal general common law, identified two instances under which federal common law is available: (1) “those in which a federal rule of decision is ‘necessary to protect uniquely federal interests’”; and (2) “those in which Congress has given the courts the power to develop substantive law.”⁷⁰ Since it is clear that Congress has not expressly given the federal courts the power to develop substantive law in the area of greenhouse gas emissions, the development and application of federal common law for public nuisance climate change cases would have to be grounded in the protection of uniquely federal interests. The *Texas Industries* Court emphasized that these instances will be “few and restricted” and it described the areas in which federal common law is appropriate as “limited.”⁷¹ As the Court put it,

absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.⁷²

A second case in which the Supreme Court offered valuable guidance in the development and application of federal common law, particularly in the context of climate change litigation, is *City of Milwaukee v. Illinois*,⁷³ commonly known as *Milwaukee II*.⁷⁴ The Court decided this case nine years after its decision in *Illinois v. City of Milwaukee*,⁷⁵ commonly known as *Milwaukee I*.⁷⁶ In *Milwaukee I* the State of Illinois asked the Supreme Court to exercise its original jurisdiction and abate an alleged nuisance created by the City of Milwaukee when it discharged large amounts

⁶⁹ *Id.* at 589.

⁷⁰ *Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398, 426 (1964)).

⁷¹ *Id.* (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).

⁷² *Id.* at 641; *see also* *Tidmarsh & Murray*, *supra* note 65, at 594–609 (discussing four enclaves of federal common law: cases affecting rights and obligations of the United States; interstate controversies; international relations; and admiralty).

⁷³ *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981).

⁷⁴ *See, e.g.*, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 326 (2d Cir. 2009).

⁷⁵ *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91 (1972).

⁷⁶ *See, e.g.*, *Connecticut*, 582 F.3d at 327.

of raw and inadequately treated sewage into Lake Michigan, an interstate waterway that borders Illinois.⁷⁷

The Court identified a number of federal laws “touching interstate waters,”⁷⁸ but found that none of them provided a remedy to Illinois.⁷⁹ The Court held that, in this case, it was only federal common law that offered a remedy to Illinois, stating that “[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law.”⁸⁰ Thus, the Court in *Milwaukee I* held that the State of Illinois did have a federal common law nuisance claim against the City of Milwaukee, and exercised its discretion in remitting the parties to the appropriate district court for further proceedings.⁸¹

After the Court’s decision in *Milwaukee I*, the plaintiff filed suit in federal district court, which found that Illinois had established the existence of a nuisance under federal common law, and ordered the defendant City of Milwaukee to eliminate overflows of raw sewage and achieve specific limitations on the discharge of treated sewage.⁸² The City of Milwaukee appealed, and in what has come to be known as *Milwaukee II*, the Supreme Court held that because of Congress’s passage of the Clean Water Act in the years subsequent to its decision in *Milwaukee I*, the plaintiff State of Illinois no longer had a claim under federal common law.⁸³ While affirming the *Milwaukee I* Court’s holding that a remedy for public nuisance is sometimes available under federal common law, the Court held that the State of Illinois’s public nuisance claim had been displaced⁸⁴ by the subsequent passage of the Clean Water Act.⁸⁵

The Court’s holding in *Milwaukee II* with respect to displacement is an important one, and will be considered in more detail in Part III. The focus here, however, is on what the Court’s opinion reveals about the nature and scope of federal common law. Citing *Erie*, the Court declared that, unlike state courts, federal courts are not general common law courts and lack the power and authority to develop their own “rules of decision.”⁸⁶

⁷⁷ *Milwaukee I*, 406 U.S. at 93.

⁷⁸ *Id.* at 101–03.

⁷⁹ *Id.* at 103.

⁸⁰ *Id.*

⁸¹ *Id.* at 108.

⁸² *Illinois v. City of Milwaukee (Milwaukee II)*, 451 U.S. 304, 311 (1981).

⁸³ *Id.* at 307, 317–23, 332.

⁸⁴ The *Milwaukee II* court uses the term “preempted.” *See supra* note 60.

⁸⁵ *Milwaukee II*, 451 U.S. at 316–17.

⁸⁶ *Id.* at 312.

The language used in Justice Rehnquist's opinion suggests that there is a presumption against federal common law, and that courts should resort to it only in very limited circumstances: "When Congress has not spoken to a particular issue . . . and when there exists a 'significant conflict between some federal policy or interest and the use of state law' the Court has found it necessary, in a 'few and restricted instances' to develop federal common law."⁸⁷ The Court described federal common law as a "necessary expedient" and as something that "is resorted to '[in] absence of an applicable Act of Congress."⁸⁸ The *Milwaukee II* opinion also emphasized the gap-filling role of federal common law, rejecting its application when existing federal statutory and regulatory law leave no "interstice" to be filled by federal common law.⁸⁹

Another limitation of federal common law has to do with its relation to state common law claims. In many of the climate change public nuisance cases, the plaintiffs have made their claims under both federal and state common law.⁹⁰ So long as this is just a case of lawyers keeping their options open by arguing in the alternative, this is not problematic. However, the Supreme Court has made it clear that the two claims are, in principle, incompatible. In *Milwaukee II* the Court noted,

the inconsistency in Illinois' argument and the decision of the District Court that both federal and state nuisance law apply to this case. If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used.⁹¹

Similarly, the Second Circuit's opinion in *Connecticut v. AEP*, citing *Milwaukee II*, refused to consider the plaintiffs' alternative state law

⁸⁷ *Id.* at 313 (citations omitted).

⁸⁸ *Id.* at 314 (citations omitted).

⁸⁹ *Id.* at 323–24; see *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 330 (2d Cir. 2009); *Coop. Benefit Adm'rs, Inc. v. Ogden*, 367 F.3d 323, 329–30 (5th Cir. 2004) (noting that federal common law may be used as a minor gap filler).

⁹⁰ See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871, at *2 (N.D. Cal. Sept. 17, 2007); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005). In *Comer v. Murphy Oil*, the plaintiffs asserted claims under Mississippi common law, and made their way into federal court via diversity jurisdiction. 585 F.3d 855, 860 (5th Cir. 2009).

⁹¹ *Milwaukee II*, 451 U.S. at 313 n.7.

claims on the grounds that they were incompatible with the court's finding that plaintiffs had a valid cause of action under federal common law.⁹²

Given the rather limited role played by federal common law in our legal system,⁹³ it is not surprising that federal courts would refuse to apply federal common law if there is an adequate remedy available under state common law. Part III argues that there is strong support for the Supreme Court's recent holding that existing, or soon-to-be existing, legislative and regulatory law displaces the type of common law public nuisance claims exemplified by *Connecticut v. AEP*. However, this does not necessarily mean the end of such claims, because the absence of federal common law in this area, even through displacement by Congressional and EPA action, could still leave room for state common law to operate.

III. PREEMPTION OF FEDERAL COMMON LAW

A. *Early 20th-Century Federal Common Law and the Public Nuisance of Water Pollution*

Although federal common law has been applied in a fairly wide range of cases,⁹⁴ it has been especially prominent in cases involving interstate water pollution.⁹⁵ In a 1906 case, *Missouri v. Illinois*,⁹⁶ it was Illinois (specifically, the City of Chicago) that was dumping raw sewage into Lake Michigan, and this sewage was allegedly making its way down the Mississippi River toward St. Louis.⁹⁷ After several hundred people in St. Louis died of diseases such as typhoid,⁹⁸ the State of Missouri sued Illinois, seeking an abatement of a public nuisance.⁹⁹

At the beginning of the twentieth century, there was virtually no federal legislation regarding water pollution.¹⁰⁰ Thus, there were no

⁹² *Connecticut*, 582 F.3d at 392.

⁹³ See *supra* notes 70–72, 82–89 and accompanying text.

⁹⁴ See Tidmarsh & Murray, *supra* note 65, at 594 (noting six different areas of federal common law).

⁹⁵ *Id.* at 596–99.

⁹⁶ *Missouri v. Illinois (Missouri II)*, 200 U.S. 496 (1906).

⁹⁷ *Id.*

⁹⁸ *Id.* at 523.

⁹⁹ *Missouri v. Illinois (Missouri I)*, 180 U.S. 208, 216 (1901). This earlier decision establishing a federal cause of action is often distinguished from the Court's 1906 decision by referring to the 1901 decision as *Missouri I* and the 1906 case as *Missouri II*. See, e.g., *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 326 (2d Cir. 2009).

¹⁰⁰ *Milwaukee I* points to some very limited legislation passed in 1899, under which Congress established "some surveillance by the Army Corps of Engineers over industrial

legislative interstices for the federal courts to fill. However, there was a federal interest at stake, and the Supreme Court held that the State of Missouri could sue Illinois under federal common law.¹⁰¹ Although the injunction was eventually denied on the factual finding that the bacteria from Chicago could not survive the trip down the river to St. Louis,¹⁰² the case nevertheless established a federal common law cause of action for one state against another state whose activities constituted a public nuisance.¹⁰³

The next year, in *Georgia v. Tennessee Copper*, the Court held that the State of Georgia had a federal common law cause of action against two copper smelters in Tennessee, whose facilities were emitting sulphur dioxide which made its way across the state border into Georgia, causing damage to the (mainly agricultural) property of certain citizens of Georgia.¹⁰⁴ In this case, the causation of damages was established to the satisfaction of the Court, and the injunction was granted.¹⁰⁵

B. The Renewal of Federal Common Law Public Nuisance Claims in the 1970s

By the time that *Milwaukee I* made its way to the Supreme Court in 1972, Congress had passed a significant amount of legislation regarding water pollution, including the Federal Water Pollution Control Act, originally passed in 1948, and the National Environmental Policy Act of 1969.¹⁰⁶ Nevertheless, the Court found that existing legislation did not offer the plaintiff the needed remedy, and appealed to federal common law in fashioning a remedy for Illinois.¹⁰⁷

The Court emphasized, however, that the federal common law of nuisance could eventually be displaced by new federal legislation or regulations: “But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.”¹⁰⁸ Enforcement of the environmental rights of a state against impairment from a source outside its borders, at least at the time

pollution, not including sewage.” *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 101 (1972).

¹⁰¹ *Missouri I*, 180 U.S. at 208–09, 248.

¹⁰² *Missouri II*, 200 U.S. at 525–26.

¹⁰³ *Id.* at 517–18; *Missouri I*, 180 U.S. at 208.

¹⁰⁴ *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238–39 (1907).

¹⁰⁵ *Id.*

¹⁰⁶ *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 101–02 (1972).

¹⁰⁷ *Id.* at 103.

¹⁰⁸ *Id.* at 107.

of *Milwaukee I*, required the application of federal common law: "Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with" Illinois's claim.¹⁰⁹

When the Illinois-Milwaukee dispute finally made its way back to the Supreme Court in 1980, the *Milwaukee II* Court held that subsequent federal legislation regarding water pollution—specifically, what has come to be known as the Clean Water Act¹¹⁰—was sufficiently comprehensive to displace any appeal to federal common law. Justice Rehnquist's opinion saw this legislation as a product of Congress's recognition that the previous federal water pollution control program was "inadequate in every vital aspect."¹¹¹ The new amendments to the Act established a new regulation regime which made it illegal for anyone to discharge pollutants into interstate waters unless they had a permit.¹¹² Once a suitably comprehensive statutory and regulatory system governing water pollution was in place, the question simply became whether the actions of the City of Milwaukee were in accord with or in violation of the new statutory and regulatory regime.¹¹³ At this point, the common law nuisance cause of action had dissolved.

The Court in *Milwaukee II* justified its position on displacement of federal common law by appeal to separation of powers, saying that once Congress has addressed a problem, federal courts cannot continue to appeal to their own judgment about what is most in accord with common sense and the public interest.¹¹⁴ The question of whether the legislation at issue had displaced federal common law required "an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law."¹¹⁵ Once Congress had spoken directly on an issue, the federal courts were no longer free to substitute their own substantive judgment under the guise of "supplementing" Congress's answer or filling legislative and regulatory interstices.¹¹⁶

¹⁰⁹ *Id.* at 107 n.9.

¹¹⁰ The Court referred explicitly to the "Federal Water Pollution Control Act Amendments of 1972." *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 307 (1981).

¹¹¹ *Id.* at 310 (quoting S. REP. NO. 92-414, at 7 (1971)).

¹¹² *Id.* at 310–11.

¹¹³ *See id.* at 311.

¹¹⁴ *Id.* at 315.

¹¹⁵ *Id.* at 315 n.8.

¹¹⁶ *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 315 (1981); *see id.* at 324 n.18 (distinguishing cases where the district court, in imposing stricter limitations, was

For the *Milwaukee II* Court, the question of whether the amended water pollution control legislation spoke directly to the case at issue depended on whether the legislation was sufficiently comprehensive—whether Congress had “occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.”¹¹⁷ Justice Rehnquist’s opinion delved into the legislative history and found that the purpose of the amendments was not just to add another bit of legislation about water pollution, but was instead a complete rewriting and total restructuring of existing water pollution law.¹¹⁸ The opinion also relied on frequent usage of the word “comprehensive” in the legislative history, finding that “[n]o Congressman’s remarks on the legislation were complete without reference to the ‘comprehensive’ nature of the Amendments.”¹¹⁹

C. *Application of Federal Common Law Public Nuisance Doctrine to Air Quality*

The Second Circuit’s decision in *Connecticut v. AEP* closely followed the analysis laid out in the *Milwaukee* cases. The court examined the relevant statutory and regulatory law for the climate change context—in this case, the CAA—and found that it was not sufficiently comprehensive to displace the plaintiffs’ public nuisance action.¹²⁰ Although the Supreme Court has recently defined carbon dioxide as a pollutant for purposes of the CAA, and made clear that the EPA has the authority to regulate its emission with respect to its impact on climate change,¹²¹ the EPA had, at the time of the Second Circuit’s decision, not yet issued any regulations on carbon emissions from stationary sources such as coal-fired power plants.¹²² Therefore, the *AEP* case was distinguishable from *Milwaukee II*, and it is not surprising that the Second Circuit refused to find displacement by Congressional action in this case.

(in the opinion of the *Milwaukee II* Court) actually providing a different regulatory scheme than that developed by Congress, as opposed to merely filling a gap in the regulatory scheme).

¹¹⁷ *Id.* at 317.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 318.

¹²⁰ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 375–88 (2d Cir. 2009) (discussing the court’s displacement analysis).

¹²¹ *Massachusetts v. EPA*, 549 U.S. 497, 528–30 (2007).

¹²² *Connecticut*, 582 F.3d at 379–81.

However, by the time the Supreme Court heard the defendants' appeal from the Second Circuit's decision in *AEP*, there had been significant changes in the EPA's treatment of greenhouse gases. Before the Second Circuit's decision, the most that Congress and the EPA had done was call for consideration and study of the problem of climate change and the role of greenhouse gases, and there had been no actual regulation of greenhouse gases aimed at preventing or mitigating the effects of climate change.¹²³ But as the Solicitor General's brief in support of the defendants' petition for certiorari explained, by the time *AEP* reached the Supreme Court, there had been significant movement by the EPA toward a more comprehensive regulation of greenhouse gases such as carbon dioxide.¹²⁴

The Solicitor General's brief pointed to several developments occurring since the Second Circuit's issuing of its *AEP* decision on September 21, 2009, that undermined the Second Circuit's conclusion regarding displacement.¹²⁵ Many of these developments were in response to the Supreme Court's decision in *Massachusetts v. EPA*.¹²⁶ The first development occurred on October 30, 2009, when the EPA issued a rule requiring certain sources (typically those that annually emit more than 25,000 tons of greenhouse gases per year) to report emissions of greenhouse gases to the EPA.¹²⁷ Second, on December 15, 2009 the EPA found that greenhouse gases "may reasonably be anticipated to endanger public health and welfare," and determined "that carbon-dioxide and other greenhouse-gas emissions from new motor vehicles contribute to total greenhouse-gas air pollution."¹²⁸

The third development pointed to by the Solicitor General is more complicated than the first two.¹²⁹ On May 7, 2010, the EPA, in conjunction with the National Highway Traffic Safety Administration, "published a joint final rule," aimed at "dramatically reduc[ing] greenhouse-gas

¹²³ See *id.* at 381, 386 ("We express no opinion at this time as to whether the actual regulation of greenhouse gas emissions under the CAA by EPA, if and when such regulation should come to pass, would displace Plaintiffs' cause of action under the federal common law.").

¹²⁴ Solicitor General's Brief, *supra* note 15, at 8–9, 25–30.

¹²⁵ *Id.* at 22–32.

¹²⁶ 549 U.S. 497; see *Connecticut*, 582 F.3d at 377–79.

¹²⁷ Solicitor General's Brief, *supra* note 15, at 25.

¹²⁸ *Id.*; see Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the CAA, 74 Fed. Reg. 66,497 (Dec. 15, 2009). The Second Circuit's *AEP* decision emphasized that the EPA had not, at the time of its decision, made any findings about the effect of greenhouse gases on public health and welfare. 582 F.3d at 379.

¹²⁹ Solicitor General's Brief, *supra* note 15, at 25–27.

emissions from light-duty vehicles.”¹³⁰ The new restrictions on emissions from these vehicles were scheduled to go into effect on January 2, 2011, and the Solicitor General argued that these new regulations would have significant implications for stationary emitters of greenhouse gases.¹³¹ For the first time, greenhouse gases such as carbon dioxide would be treated as “pollutants” under the CAA, and Sections 165 and 169(1)¹³² of the CAA would now apply to stationary sources of greenhouse gases.¹³³ The effect of this, argued the Solicitor General, would be that “any new or modified ‘major emitting facility’” would have to get a PSD (“prevention of significant deterioration”)¹³⁴ permit, which would require the facility to be “subject to the best available control technology for each pollutant subject to regulation under [the CAA.]”¹³⁵

The Solicitor General also argued that the adoption of the new light-duty vehicle rules subjected greenhouse gases to the permitting requirements of Title V of the CAA.¹³⁶ The Solicitor General’s brief¹³⁷ pointed to a 2005 decision of the D.C. Circuit Court, which stated that the CAA’s Title V permitting process “requires that certain air pollution sources, *including every major stationary source of air pollution*, each obtain a single, comprehensive operating permit to assure compliance with all emission limitations and other substantive CAA requirements that apply to the source.”¹³⁸ Thus, the classification of carbon dioxide as a pollutant under the CAA, which was required by the Supreme Court’s holding in *Massachusetts v. EPA*, seemed to require any major stationary source of carbon dioxide to obtain a Title V permit.¹³⁹ Accordingly, on June 3, 2010,

¹³⁰ *Id.* at 25.

¹³¹ *Id.* at 26.

¹³² 42 U.S.C. §§ 7475(a), 7479(1) (2006).

¹³³ Solicitor General’s Brief, *supra* note 15, at 27–29.

¹³⁴ “A PSD permit is a legal document that limits the amount of air pollution that may be released by a source (i.e., a plant or facility). A PSD permit is required before a ‘major’ new source is constructed, or before changes or modifications that are ‘major’ or ‘significant’ are made at an existing ‘major’ source of air pollution. The permit may be issued by EPA or the designated permitting authority. The permit specifies what construction is allowed, what emission limits must be met, and often how the equipment that is causing the air pollution must be operated.” *Air Permits*, ENVTL. PROT. AGENCY, <http://www.epa.gov/region9/air/permit/psd-public-part.html> (last visited Apr. 2, 2012).

¹³⁵ Solicitor General’s Brief, *supra* note 15, at 26–27 (alteration in original) (quoting 42 U.S.C. §7475(a)(4)).

¹³⁶ *Id.* at 27.

¹³⁷ *Id.*

¹³⁸ *Integrity Project v. EPA*, 425 F.3d 992, 993 (2005) (emphasis added).

¹³⁹ *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007).

the EPA issued a final rule that tailored application of the PSD and Title V permitting requirements to stationary emitters of carbon dioxide.¹⁴⁰

The Solicitor General's arguments for displacement were submitted to the Supreme Court in August 2010, and were subsequently bolstered by a December 2010 EPA press release outlining the agency's plan for implementing greenhouse gas standards for fossil-fuel power plants and petroleum refineries, which the EPA described as "two of the largest industrial sources [of greenhouse gases or GHG], representing nearly 40 percent of the GHG pollution in the United States."¹⁴¹ The EPA promised to issue regulations with regard to greenhouse emissions from stationary sources (presumably in addition to the PSD and Title V permitting requirements discussed by the Solicitor General) within the next two years.¹⁴²

The EPA's press release stated that it would propose standards for power plants in July 2011 and for refineries in December 2011, and that it would issue final standards for power plants in May 2012 and for refineries in November 2012.¹⁴³ In conjunction with the developments described by the Solicitor General, any new standards developed by the EPA for greenhouse gas-emitting power plants and refineries would have given the Supreme Court substantial grounds for finding the respondents' federal common law public nuisance claim displaced by federal statutory and regulatory law.

The EPA's December 2010 press release was somewhat vague, and it left open the possibility that its new greenhouse gas regulations would amount to nothing more than a permit system.¹⁴⁴ Although a permit

¹⁴⁰ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (referring more generally to permitting for greenhouse gas emissions). See Solicitor General's Brief, *supra* note 15, at 27 n.17 for a description of various steps of the tailoring rule for carbon dioxide emitters.

¹⁴¹ Press Release, ENVTL. PROT. AGENCY, EPA to Set Modest Pace for Greenhouse Gas Standards (Dec. 23, 2010) [hereinafter EPA Press Release], *available at* <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/d2f038e9daed78de8525780200568bec!OpenDocument>.

¹⁴² The EPA described plans to develop New Source Performance Standards ("NSPS"), which "set the level of pollution new facilities may emit and address air pollution from existing facilities." *Id.* The EPA's plans for regulation of *existing* stationary sources of greenhouse gases, as described in the December 2010 press release, were somewhat vague, which might have been expected to create trouble for those who wished to describe the regulatory scheme as "comprehensive." *Id.* But the Supreme Court made clear that it was the CAA, and not subsequent EPA regulations, that preempted federal common law. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011). See also *infra* note 311.

¹⁴³ EPA Press Release, *supra* note 141.

¹⁴⁴ See *id.* (noting a general discussion of "standards").

might not sound like a comprehensive regulation of the problem of climate change, it would offer strong support for the conclusion that Congress, through an administrative agency's (i.e., the EPA's) interpretation of the CAA and a gap-filling regulation, had spoken directly to the issue of the legality of the activities of the defendants in *AEP*, and that any federal common law public nuisance claim had therefore been displaced.¹⁴⁵

In both its PSD and Title V permitting scheme¹⁴⁶ and its promise to issue future regulations with respect to greenhouse gases,¹⁴⁷ the EPA has taken an incremental approach to climate change regulations. However, as the Solicitor General noted, the Supreme Court allows Congress and administrative agencies such as the EPA "significant latitude as to the manner, timing, content, and coordination of its regulations."¹⁴⁸ About an incremental approach, the Supreme Court has said the following: "Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. . . . They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed."¹⁴⁹ Climate change is a serious and complex issue, with respect to both science and public policy. It thus seems just the sort of issue on which the relevant administrative agencies would take a slow and incremental approach, and such an approach to the problem seems sufficiently comprehensive to justify the Supreme Court in finding displacement of federal common law in this area.¹⁵⁰

Thus, given the changes in the EPA's position regarding the regulation of greenhouse gases after the Second Circuit's *AEP* decision, one might have predicted that the Second Circuit would find itself in a position analogous to that of the Court in *Milwaukee I*, where the Court's upholding of a federal common law cause of action was later undermined

¹⁴⁵ See *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 310–11 (1981) (highlighting a comparable permitting system within the Clean Water Act).

¹⁴⁶ Solicitor General's Brief, *supra* note 15, at 27 n.17.

¹⁴⁷ The EPA press release emphasizes that it is setting a "modest pace" and taking a "common-sense approach" to the regulation of greenhouse gases. EPA Press Release, *supra* note 141.

¹⁴⁸ Solicitor General's Brief, *supra* note 15, at 28 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007)).

¹⁴⁹ *Massachusetts*, 549 U.S. at 524.

¹⁵⁰ See *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955) ("[Legislative] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.").

by the passage of the Clean Water Act.¹⁵¹ A reasonable view before the Supreme Court's decision in *AEP* might have been that, although the Second Circuit was correct about the displacement issue at the time of its decision, the movement of the EPA in the time between that decision and the appeal before the Supreme Court made it almost certain that the Supreme Court would find the plaintiffs' federal common law claim displaced by the CAA, combined with new EPA regulations.

D. The Supreme Court's Analysis in AEP v. Connecticut

The Supreme Court did find displacement of the plaintiffs' federal common law claim, but the Court made it clear that the EPA's regulatory initiatives after the Second Circuit's decision were not necessary to reach such a conclusion.¹⁵² The Court noted that, at the time of the Second Circuit's decision, the "EPA had not yet promulgated any rule regulating greenhouse gases."¹⁵³ The Court also noted several of the most important recent EPA regulatory actions with respect to greenhouse gases, including the phasing in of requirements that mandated new or modified major greenhouse gas emitting facilities use the "best available control technology," and the EPA's commencement of a rule-making action under Section 111 of the CAA "to set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired power plants."¹⁵⁴ The Court also noted the EPA's plan to introduce a proposed rule on greenhouse gas emissions from stationary sources by July 2011, and a final rule by May 2012.¹⁵⁵

The Second Circuit had accepted the plaintiffs' argument "that federal common law [was] not displaced until the EPA actually exercis[ed] its regulatory authority, *i.e.*, until it set[] standards governing emissions from the defendants' plants."¹⁵⁶ The Solicitor General's description of the EPA's regulatory actions after the Second Circuit's decision was designed to demonstrate that the EPA had in fact exercised its regulatory authority, and thus, that a finding of displacement was now

¹⁵¹ See generally *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 310–11 (1981) (finding displacement of federal common law in light of subsequent "comprehensive" legislation).

¹⁵² *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

¹⁵³ *Id.* at 2535.

¹⁵⁴ *Id.* at 2533 (citing 42 U.S.C. §7475(a)(4) (2006)).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2538.

appropriate.¹⁵⁷ But the Court made it clear that any appeal to EPA regulatory actions was unnecessary to find displacement:

The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; *the delegation is what displaces federal common law*. Indeed, were EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its ongoing § 7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency's expert determination.¹⁵⁸

Thus, while the Solicitor General's arguments for displacement on the basis of the actions of the EPA subsequent to the Second Circuit's decision may have been persuasive, they were, in the end, of mere academic interest. The CAA is sufficient, in and of itself, to displace any federal common law public nuisance claim the plaintiffs in *AEP* might have had.

A comparison of the Supreme Court's decision in *AEP* with its decision in *Milwaukee II* is instructive. In *Milwaukee II*, the Court emphasized that displacement of federal common law depended on whether Congress had spoken directly on the matter,¹⁵⁹ and "whether the field had been occupied, not whether it ha[d] been occupied in a particular manner."¹⁶⁰ In finding that the Clean Water Act had displaced the plaintiff's action under federal common law, the *Milwaukee II* Court focused on three things: (1) the repeated description in the legislative history of the Clean Water Act as "comprehensive";¹⁶¹ (2) the fact that the Clean Water Act regulated every point source discharge of pollution, only allowing discharge with a permit;¹⁶² and (3) the fact that the Clean Water Act provided the plaintiff with a forum in which it could plead its case.¹⁶³

Unlike the *Milwaukee II* opinion, with its lengthy inquiry into the legislative history of the Clean Water Act, the *AEP* Court made no apparent effort to search the legislative history of the CAA to determine

¹⁵⁷ Solicitor General's Brief, *supra* note 15, at 22–32.

¹⁵⁸ *Am. Elec. Power Co.*, 131 S. Ct. at 2538–39 (emphasis added).

¹⁵⁹ *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 313–15 (1981).

¹⁶⁰ *Id.* at 324.

¹⁶¹ *Id.* at 317–19.

¹⁶² *Id.* at 318.

¹⁶³ *Id.* at 325–26.

whether Congress intended it to be “comprehensive.”¹⁶⁴ The *AEP* Court was also dismissive of any attempt to require of the regulation of greenhouse gases something analogous to the permit scheme in *Milwaukee II*:

As *Milwaukee II* made clear . . . the relevant question for purposes of displacement is “whether the field has been occupied, not whether it has been occupied in a particular manner.” Of necessity, Congress selects different regulatory regimes to address different problems. Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit. After all, we each emit carbon dioxide merely by breathing.¹⁶⁵

Thus, the Court made it clear that the key to displacement analysis would not be the scope and extent of the actual EPA regulations, but instead, the enabling legislation itself.¹⁶⁶

The Supreme Court in *AEP* also emphasized the opportunities the CAA provided the plaintiffs for a redress of their injuries. According to the Court, “when Congress addresses a question previously governed by a decision rested on federal common law . . . the need for such an unusual exercise of law-making by federal courts disappears.”¹⁶⁷ The Court noted that “it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest,” and stated that the test for displacement of federal common law was whether the legislation spoke directly to the question at issue.¹⁶⁸

In support of its holding that the CAA displaced any federal common law right to seek abatement of carbon dioxide emissions from

¹⁶⁴ See generally *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527. In this regard, the Court’s *AEP* opinion may be read as part of a trend away from reliance on legislative history. See, e.g., David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1659 (2010) (attributing the decline in the Supreme Court’s use of legislative history since the mid-1980s to a “rightward shift in the ideological composition of the Court”). But see Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1983, 1995, 2001 (2007) (arguing that the “death” of legislative history has been exaggerated by previous research, and suggesting that Justices tend to appeal to legislative history in close, difficult cases, when other interpreted “methods may be inconclusive”).

¹⁶⁵ *Am. Elec. Power Co.*, 131 S. Ct. at 2538 (quoting *Milwaukee II*, 451 U.S. at 324).

¹⁶⁶ *Id.* at 2538–39.

¹⁶⁷ *Id.* at 2537 (quoting *Milwaukee II*, 451 U.S. at 314).

¹⁶⁸ *Id.*

fossil-fuel fired power plants, the Court noted the following features of the Act:

Section 111 of the Act directs the EPA Administrator to list “categories of stationary sources” that “in [her] judgment . . . caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Once EPA lists a category, the agency must establish standards of performance for emission of pollutants from new or modified sources within that category. And, most relevant here, §7411(d) then requires regulation of existing sources within the same category. For existing sources, EPA issues emissions guidelines; in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction.¹⁶⁹

Thus, the text of the CAA, together with the Court’s holding in *Massachusetts v. EPA* that greenhouse gases such as carbon dioxide constitute pollutants, requires the EPA, and not the federal courts, to address the problem of greenhouse gases.

The Court also noted that “the Act provides multiple avenues for enforcement,” which is significant given the importance of the reach of remedial provisions in determining whether a “statute displaces federal common law.”¹⁷⁰ Perhaps most important is the right to petition for rule-making under the Act:

If EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA’s response will be reviewable in federal court . . . EPA is currently engaged in a § 7411 rulemaking to set standards for greenhouse gas emissions from fossil-fuel fired power plants. To settle litigation brought under §7607(b) by a group that included the majority of the plaintiffs in this very case, the agency agreed to complete that rulemaking by May 2012. The Act itself thus provides a means to seek

¹⁶⁹ *Id.* at 2537–38 (citations omitted).

¹⁷⁰ *Id.* at 2538.

limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.¹⁷¹

Thus, although the EPA has no obligation to regulate fossil-fuel burning emitters of greenhouse gases, whereas that would necessarily mean putting limitations on such emitters, the agency is obligated under the CAA to regulate such emitters in the sense of hearing and responding to rule-making petitions from those who have an interest in stopping or reducing the emission of greenhouse gases from such facilities.

Should the EPA fail to respond to such petitions for rule-making to the satisfaction of petitioners, the Act gives such petitioners the right to seek review of the EPA decision in the Court of Appeals, and ultimately to petition the Supreme Court for certiorari.¹⁷² However, the standard of review for such EPA decisions is demanding for a petitioner, who must show that the EPA's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."¹⁷³ Moreover, any such judicial review of an EPA decision would trigger "*Chevron* deference" from the Court, which requires the reviewing court to defer to an administrative agency in the interpretation of a piece of legislation that agency is charged with enforcing.¹⁷⁴ Thus, it is unlikely that the plaintiffs in *AEP* would prevail in a challenge to an adverse EPA rule-making decision regarding greenhouse gas emissions.

E. Preserving a Public Nuisance Action Under State Law

The plaintiffs in *AEP* originally sought relief under both federal and state common law.¹⁷⁵ The Second Circuit followed the *Milwaukee II* Court in holding that state and federal common law could not both apply in this case: "If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used."¹⁷⁶ Thus, somewhat ironically, the Supreme Court's finding of displacement of the federal common law cause of action makes it more likely

¹⁷¹ *Am. Elec. Power Co.*, 131 S. Ct. at 2538 (citations omitted).

¹⁷² *Id.* at 2539.

¹⁷³ *Id.* (quoting 42 U.S.C. § 7607(d)(9)(A) (2006)).

¹⁷⁴ *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

¹⁷⁵ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

¹⁷⁶ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 392 (2d Cir. 2009) (quoting *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 314 n.7 (1981)).

that the plaintiffs could successfully establish a public nuisance cause of action under state common law, against at least some *AEP*-type defendants.

The Second Circuit, because it found a federal common law cause of action, refused to consider the plaintiff's alternative state law claim.¹⁷⁷ The Supreme Court, upon finding displacement of the federal common law cause of action, remanded the state law claim for further consideration on remand.¹⁷⁸ This section considers the possible merits of such a state law claim, arguing that a state common law claim is probably not preempted by the CAA or EPA regulations. However, this section also notes the significant limitations in scope of such a state law claim, along with language in the Supreme Court's *AEP* decision that could support preemption.

Although the Supreme Court in *AEP* did not rely on subsequent EPA regulatory actions in reaching its conclusion, those actions nevertheless reinforce a finding of displacement.¹⁷⁹ However, the question of preemption of state law is a significantly different question. This is made clear by both the Supreme Court's decision in *Milwaukee II* and the text of the CAA. The key to understanding this is to keep in mind the different types of authority given to federal and state courts. The Supreme Court has long "recognized that federal common law is 'subject to the paramount authority of Congress'"¹⁸⁰ and is resorted to only in absence of a relevant act of Congress.¹⁸¹

After the passage of the 1972 Amendments to the Clean Water Act, Illinois argued that, even though the City of Milwaukee had obtained a permit for its activities under the new regulatory regime, it still had a federal common law cause of action under which a federal court could impose restrictions more demanding than the new federal requirements.¹⁸² The *Milwaukee II* Court rejected this position, saying that "[f]ederal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme."¹⁸³ The federal courts are purposefully insulated from the democratic process, and it would be a violation of separation-of-powers principles to allow the federal courts

¹⁷⁷ *Id.*

¹⁷⁸ *Am. Elec. Power Co.*, 131 S. Ct. at 2540.

¹⁷⁹ See generally *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981) (holding that "comprehensiveness" of subsequent legislation, including coverage of all point sources of pollution, gave rise to displacement of federal common law).

¹⁸⁰ *Id.* at 313 (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)).

¹⁸¹ *Id.* at 314.

¹⁸² *Id.* at 323.

¹⁸³ *Id.* at 320.

to substitute their own policy judgments for those expressed through Congressional legislation and administrative agency regulations.¹⁸⁴

The preemption of *state* common law, however, is a very different matter. Whereas the powers of the federal courts are limited in accord with their non-democratic nature, our system of federalism starts from the presumption that “the historic police powers of the States were not to be superseded by Federal [legislation] unless that was the clear and manifest purpose of Congress.”¹⁸⁵ Thus, unless Congress makes it very clear that it intended to preclude the various states from enacting their own, more stringent pollution requirements, those more stringent requirements enacted by the states are enforceable, at least insofar as the states can exercise personal jurisdiction over the defendants.¹⁸⁶

This retained right to impose more demanding restrictions on defendants is not limited to state statutory law; it also applies to state administrative law, and more importantly for the purposes of public nuisance actions, state common law decisions. In response to Illinois’s claim that the Clean Water Act allowed the federal courts to impose a stricter requirement based in *federal* common law in place of the less demanding Clean Water Act standard, the *Milwaukee II* Court said the following:

Respondents argue that congressional intent to preserve the federal common-law remedy recognized in [Milwaukee I] is evident in §§ 510 and 505(e) of the statute. Section 510 provides that nothing in the Act shall preclude States from adopting and enforcing limitations on the discharge of pollutants more stringent than those adopted under the Act. It is one thing, however, to say that States may adopt more stringent limitations through state administrative processes or even that states may establish such limitations through state nuisance law, and apply them to in-state discharges. It is quite another to say that States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to out-of-state dischargers.¹⁸⁷

¹⁸⁴ *Id.* at 312–13.

¹⁸⁵ *Milwaukee II*, 451 U.S. at 316 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

¹⁸⁶ See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (establishing the due-process criteria for the exercise of jurisdiction over out-of-state defendants).

¹⁸⁷ *Milwaukee II*, 451 U.S. at 327–28 (citations omitted).

This language demonstrates that the Court's holding in *Milwaukee II* applies to the displacement of federal common law, and says nothing about the preemption of state common law.

The same analysis applies in determining whether the plaintiffs in *AEP* should still have a state common law nuisance claim after the Court's finding that the CAA had displaced their federal common law claim.¹⁸⁸ Preemption of state law requires that Congress's intent to do so be clear and manifest.¹⁸⁹ An example of such a clear and manifest intent to preempt state law would be Section 209 of the Act: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part."¹⁹⁰ Thus, it seems extremely unlikely that the State of California could successfully sue automakers under a state common law public nuisance claim, since that would constitute an attempt to enforce its own standard on new car emissions, and Section 209 of the Act expressly forbids such state actions.

Not only does the CAA lack a provision expressly prohibiting the states from imposing their own, more stringent requirements for greenhouse gas emissions from stationary sources, it also includes a "citizen suits" provision. This provision states: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency),"¹⁹¹ thus further supporting the non-preemption of state law in this area.

But most important in this regard is the section of the CAA entitled "Retention of State Authority," which states that except for certain provisions regarding moving sources of emissions such as automobiles and aircraft,

[N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable

¹⁸⁸ See *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1282–84 (W.D. Tex. 1992).

¹⁸⁹ *Milwaukee II*, 451 U.S. at 316.

¹⁹⁰ 42 U.S.C. § 7543(a) (2006).

¹⁹¹ 42 U.S.C. § 7604(e) (2006).

implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.¹⁹²

The “Retention of State Authority” or “savings” provision of the CAA closely parallels Section 510 of the Clean Water Act, discussed by the *Milwaukee II* Court.¹⁹³ Assuming that state common law public nuisance suits would constitute a more stringent restriction on emitters of greenhouse gases over and above existing EPA requirements, the CAA preserves the state common law action against the defendants in *AEP*.¹⁹⁴

F. Limitations on the CAA's Savings Clause

It is important to note, however, that there are limits to the power of the CAA's savings clause to preserve the state common law action. In *Clean Air Markets v. Pataki*,¹⁹⁵ the Second Circuit Court of Appeals held that a New York statute aimed at reducing the effects of acid rain in the Adirondacks was preempted by the CAA in spite of the CAA's savings clause because the New York statute was in “actual conflict” with the CAA, due to its status “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁹⁶

The *Clean Air Markets* case had its origins in Congress's 1990 amendment of the CAA. Title IV of the 1990 amendments had the express purpose of reducing the effects of acid deposition, including acid rain, “through reductions in annual emissions of sulfur dioxide.”¹⁹⁷ Congress developed an emission allocation and transfer program, or cap-and-trade system,¹⁹⁸ where certain emitters were allowed an annual allowance of sulfur dioxide emissions, and if they emitted an amount less than their

¹⁹² 42 U.S.C. § 7416 (2006).

¹⁹³ *Milwaukee II*, 451 U.S. at 327–29.

¹⁹⁴ See *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 114–15 (1972) (stating that, while Congress has preempted the states with respect to emissions from most moving sources including automobiles and airplanes, the states retain broad authority under the CAA to control stationary sources such as factories and incinerators); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1282 (W.D. Tex. 1992) (holding that the CAA expressly permits more stringent state regulation of stationary sources).

¹⁹⁵ *Clean Air Mkts. Grp. v. Pataki*, 338 F.3d 82 (2d Cir. 2003).

¹⁹⁶ *Id.* at 84, 87 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁹⁷ *Id.* at 84 (quoting 42 U.S.C. § 7651(b) (2006)).

¹⁹⁸ *Id.*

quota, the excess allowances were transferrable to “any other person who [held] such allowances.”¹⁹⁹ The purpose of the cap-and-trade system was to create a financial incentive for utility companies to reduce their sulfur dioxide emissions.²⁰⁰

By the end of the twentieth century, acid rain was an especially serious problem in New York’s Adirondacks region.²⁰¹ According to the Second Circuit, the “thin, calcium-poor soils and igneous rocks in this area [made] it highly susceptible to acidification,” with acid deposition causing “substantial harm to aquatic life and other natural resources.”²⁰² Complicating the problem was the fact that sulfur dioxide emissions are capable of traveling hundreds of miles, and that much of the acid deposition in the Adirondacks originated not in New York, but instead in fourteen “upwind” states: New Jersey, Pennsylvania, Maryland, Delaware, Virginia, North Carolina, Tennessee, West Virginia, Ohio, Michigan, Illinois, Kentucky, Indiana, and Wisconsin.²⁰³

In 2000, the New York state legislature addressed this problem by passing the Air Pollution Mitigation Law, under which the New York State Public Service Commission was required to assess an “air pollution mitigation offset’ upon any New York utility whose SO₂ [sulfur dioxide] allowances [were] sold or traded to one of the fourteen upwind states.”²⁰⁴ Moreover, if the New York utility sold the emissions allowance to a non-upwind party, it could avoid the assessment of the offset payment only if the utility attached to the allowance a restrictive covenant preventing “their subsequent transfer to any of the fourteen upwind states.”²⁰⁵ Thus, the New York statute had the effect of undermining any transfer of excess sulfur dioxide allowances from New York utilities to parties in any of the fourteen upwind states, since the restrictive covenant would prevent the purchaser from making use of the allowance.²⁰⁶

A collection of “electricity generation companies, SO₂ emissions allowance brokers, mining companies, and trade associations” filed suit, claiming that the New York statute was preempted by Title IV of the 1990 CAA amendments.²⁰⁷ The defendants, including the state of New York,

¹⁹⁹ 42 U.S.C. § 7651(b).

²⁰⁰ *Clean Air Mkts.*, 338 F.3d at 84.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Clean Air Mkts.*, 338 F.3d at 88–89.

²⁰⁷ *Id.* at 84–85.

appealed to the savings clause of the CAA, which, according to the Second Circuit, “reserves for the states the power to impose on their own utilities more stringent requirements for air pollution control or abatement than mandated by federal law.”²⁰⁸ New York’s position was that its restrictions on the CAA cap-and-trade system was simply the sort of more restrictive state regulation provided for by the CAA’s savings clause.²⁰⁹ However, the Second Circuit affirmed the district court’s rejection of this argument, partly because the New York statute had the effect of regulating emissions outside its borders.²¹⁰ This is potentially an important limitation on state common law public nuisance claims in the area of climate change, given the global nature of greenhouse gas emissions such as carbon dioxide.²¹¹

The Second Circuit’s decision in *Clean Air Markets* included other language that should be of concern to those interested in relying on the CAA’s savings clause to preserve a state law public nuisance claim for harms associated with climate change. In its discussion of the New York acid rain statute, the Second Circuit relied heavily on language from *Hillsborough County v. Automated Medical Labs*, a case decided by the Supreme Court in 1985.²¹² In *Hillsborough County*, the Supreme Court stated that the Supremacy Clause of the Constitution “invalidates state laws that ‘interfere with, or are contrary to,’ federal law”²¹³ and identified three distinct ways in which federal law may supersede state law under the Supremacy Clause.

First, “Congress is empowered to preempt state law by so stating in express terms.”²¹⁴ An example of such preemption of state law would be the CAA’s prohibition against state regulation of emissions from new automobiles.²¹⁵ Second, preemption of all state law in a given field “may be inferred where the scheme of federal regulation is sufficiently

²⁰⁸ *Id.* at 85.

²⁰⁹ *Id.* at 89.

²¹⁰ *Id.*

²¹¹ See PEW CTR. ON GLOBAL CLIMATE CHANGE, CLIMATE CHANGE 101: UNDERSTANDING AND RESPONDING TO GLOBAL CLIMATE CHANGE 6 (2011), available at http://www.c2es.org/docUploads/climate101-fullbook_0.pdf (noting that greenhouse gas emissions are rising fastest in developing countries such as China and India, and that while U.S. emissions are expected to remain relatively flat over the next decade, China’s and India’s emissions are projected to grow by approximately forty-five percent by 2020).

²¹² *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985).

²¹³ *Id.* at 712 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 82 (1824)).

²¹⁴ *Id.* at 713.

²¹⁵ See *supra* note 190 and accompanying text.

comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.”²¹⁶

Third, “[e]ven where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law.”²¹⁷ The *Hillsborough County* Court noted that an obvious instance in which state law actually conflicts with federal law occurs when “compliance with both . . . is a physical impossibility.”²¹⁸ But the Court also stated that an actual conflict between state and federal law exists when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in its enactment of federal legislation.²¹⁹

It is this third type of conflict between state and federal law that the Second Circuit found at work in the *Clean Air Markets* case. New York argued that its anti-acid rain statute actually supported the ultimate purpose of Title IV of the CAA amendments—i.e., “to protect natural resources.”²²⁰ But the Second Circuit pointed to another Supreme Court decision—*International Paper Co. v. Ouellette*—which held that “[i]n determining whether [a state law] stands as an obstacle to the full implementation of [a federal statute], it is not enough to say that the ultimate goal of both federal and state law is [the same].”²²¹ According to the Second Circuit, even in cases where the federal and state statutes share a common goal, the state law is preempted “if it interferes with the *methods* by which the federal statute was designed to reach this goal.”²²²

The Second Circuit held that the New York statute did indeed interfere with the methods chosen by Congress to deal with the problems of sulfur dioxide emissions and acid rain.²²³ It was the judgment of Congress that the best way of achieving reductions of sulfur dioxide, taking into consideration the interests of the nation as a whole, was the cap-and-trade system called for by Title IV.²²⁴ The New York statute did not merely impose an additional restriction on emitters of sulfur dioxide. It instead undermined the system of financial incentives designed by Congress to

²¹⁶ *Hillsborough Cnty.*, 471 U.S. at 713.

²¹⁷ *Id.*

²¹⁸ *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

²¹⁹ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

²²⁰ *Clean Air Mkts. Grp. v. Pataki*, 338 F.3d 82, 87 (2d Cir. 2003).

²²¹ *Id.* (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)).

²²² *Id.* (quoting *Int'l Paper Co.*, 479 U.S. at 494).

²²³ *Id.* at 87, 89.

²²⁴ *Id.* at 87–88.

effect what it understood to be the most efficient and cost-effective way of addressing the problems of sulfur dioxide emissions and acid rain, thereby “stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²²⁵

A recent decision by the Fourth Circuit Court of Appeals should be of additional concern to the plaintiffs in *AEP*. In *North Carolina v. TVA*, the Fourth Circuit reversed a lower court’s granting of an injunction requiring emissions controls on the defendant’s power generators.²²⁶ Although this was not a climate change case,²²⁷ it was a public nuisance action,²²⁸ and the Circuit Court ruled that North Carolina’s attempt to impose stricter requirements than those mandated by the CAA was preempted by the CAA in spite of the CAA’s savings clause.²²⁹

The Fourth Circuit cited the Supreme Court’s decision in *International Paper v. Ouellette*,²³⁰ which held that the savings clause of the Clean Water Act allows a state to impose more stringent standards on polluters within its own borders, but does not allow a state to impose stricter emission requirements on sources in other states.²³¹ The Fourth Circuit held that, while it would be permissible for North Carolina to impose more stringent mandates on emitters within its own borders, it did not have the authority to regulate emission sources in other states, such as Alabama and Tennessee.²³² This establishes an important limitation to state law climate change lawsuits: even if the CAA’s savings clause allows a state to impose more stringent requirements on in-state sources of greenhouse gases, it will have no authority to impose such standards on sources in other states.²³³

Also of concern for friends of the state law approach is the *Hillsborough County* Court’s second way in which federal law can supersede state law under the Supremacy Clause: preemption of all state law in a given field “may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference

²²⁵ *Id.*

²²⁶ *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010).

²²⁷ This case dealt with a group of toxins already heavily regulated by the CAA: sulfur dioxide, nitrous oxide, particulate matter, and ozone. *Id.* at 296.

²²⁸ *Id.* at 297.

²²⁹ *Id.* at 303–04.

²³⁰ *Int’l Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

²³¹ *See id.* at 493–94.

²³² *North Carolina*, 615 F.3d at 296, 302–03, 306.

²³³ *Id.* at 306–07.

that Congress ‘left no room’ for supplementary state regulation.”²³⁴ The implication here is that an explicit revocation of the CAA’s savings clause is not required to conclude that Congress has acted on an intent to abrogate the savings clause, at least for a limited area of law.²³⁵ If the pending EPA regulations turn out to be sufficiently comprehensive, so that one can reasonably infer that Congress has intended the federal approach to be the exclusive approach, then the state common law provisions would be preempted, in spite of the very strong language of the CAA’s savings clause.

In its *AEP* decision, the Supreme Court explicitly left open the question whether plaintiffs might have a cause of action under state law.²³⁶ However, there is language in the Court’s opinion suggesting that the Court might be inclined to find preemption of state law by the CAA and EPA regulations:

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.²³⁷

Although the Court offered these considerations in further support of the displacement of federal common law, one might use these same considerations to counsel against allowing state court judges and legislatures to upset the delicate balancing of national interests effected by the CAA and EPA regulations.

The *AEP* Court noted that the current federal regulatory regime explicitly provides for cooperation between the federal government and the states:

The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators. Each “standard of performance” EPA sets must “tak[e] into

²³⁴ *Hillsborough Cnty. v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

²³⁵ *See id.*

²³⁶ *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011).

²³⁷ *Id.* at 2539.

account the cost of achieving [emissions] reduction and any nonair quality health and environmental impact and energy requirements.” (EPA may permit state plans to deviate from generally applicable emissions standards upon demonstration that costs are “[u]n-reasonable”). EPA may “distinguish among classes, types, and sizes” of stationary sources in apportioning responsibility for emissions reductions. And the agency may waive compliance with emission limits to permit a facility to test drive an “innovative technological system” that has “not [yet] been adequately demonstrated.”²³⁸

Although the Court recognized that the states have an important role to play within the EPA’s regulatory scheme, which it described as allowing “each State to take the first cut at determining how best to achieve EPA emissions standards within its domain,” it is important to note that the standards remain the EPA’s standards, and it is not clear what role, if any, state court decisions based on common law public nuisance doctrine would play in the EPA’s regulatory scheme.²³⁹

The Savings Clause of the CAA explicitly provides that states are free to impose standards that are more stringent than those provided for in the Act. However, the courts have interpreted the Savings Clause as not allowing states to impose stricter standards that have the effect of interfering with the federal regulatory scheme.²⁴⁰ Given the unusually broad range of policy interests implicated by the regulation of greenhouse gas emissions, it is possible that the Supreme Court would find more restrictive state regulations in this area preempted by the federal regulatory scheme. Echoing many of the concerns raised by the federal district courts in dismissing climate change public nuisance cases on non-justiciability grounds,²⁴¹ the Court stated the following in *AEP*:

It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. 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

²³⁸ *Id.* (alterations in original) (citations omitted).

²³⁹ *Id.*

²⁴⁰ *See id.*

²⁴¹ *See, e.g., Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272–74 (S.D.N.Y. 2005); *infra* notes 283–285 and accompanying text.

the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.²⁴²

Although the Court's statement here referred to federal court judges, it would seem that any concerns about the lack of scientific expertise would apply equally to state court judges.

Because we do not yet know all of the details of the regulatory system the EPA will eventually implement for greenhouse gas emissions, it is difficult to say whether a state common law public nuisance claim would actually conflict with EPA regulations in the way that the New York statute conflicted with the CAA's Title IV cap-and-trade system.²⁴³ But it is at least clear that the mere presence of a savings clause in the CAA is not in itself sufficient to protect a state common law public nuisance action for greenhouse gas emissions.

IV. THE POLITICAL QUESTION DOCTRINE AND NON-JUSTICIABILITY

Although climate change public nuisance claims fared well at the circuit court level in the two instances where the Court of Appeals considered whether such claims could go forward,²⁴⁴ federal district courts have been unreceptive to such claims, with all four of the district courts to hear climate change public nuisance claims having dismissed them.²⁴⁵ However, instead of relying on the argument that federal and state public nuisance law had been displaced or preempted by federal statutory law,²⁴⁶

²⁴² *Am. Elec. Power Co.*, 131 S. Ct. at 2539–40.

²⁴³ In *Clean Air Markets* the court cited case law stating that “[f]ederal regulations have the same preemptive force as federal statutes.” *Clean Air Mkts. Grp. v. Pataki*, 338 F.3d 82, 88 (2003) (quoting *Freeman v. Burlington Broads., Inc.*, 204 F.3d 311, 321–22 (2d Cir. 2000)).

²⁴⁴ *Comer v. Murphy Oil, USA*, 585 F.3d 855 (5th Cir. 2009); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

²⁴⁵ See Brief for Petitioner, *supra* note 6, at 8–10; Solicitor General's Brief, *supra* note 15, at 10 n.5.

²⁴⁶ This is not surprising given the EPA's lack of regulations with respect to greenhouse gas emissions. Note the Solicitor General's emphasis on *future* EPA greenhouse gas regulations and actions taken *after* the circuit court's reversal of the district court in *AEP*. Solicitor General's Brief, *supra* note 15, at 22–32; see Brief for Petitioner, *supra* note 6, at 11. According to the Fifth Circuit Court of Appeals in *Comer*,

The Clean Air Act and other federal legislation on air quality are much less comprehensive than the [Clean Water Act], as amended. The defendants here do not contend, and the district courts in *American Electric* and *General Motors* did not hold, that any act of Congress had preempted state law with respect to global warming.

Comer, 585 F.3d at 878–79.

these district courts instead held that climate change public nuisance cases presented the courts with non-justiciable political questions.²⁴⁷

Somewhat surprisingly, the Supreme Court in *AEP* included no discussion of the political question doctrine, or the concept of a non-justiciable political question, in reversing the Second Circuit, instead relying exclusively on a displacement analysis. This Part describes the application of the political question doctrine to climate change public nuisance cases, and considers the plausibility of the district courts' conclusion on this score. The relative weakness of the non-justiciability argument, combined with the availability of a strong displacement argument, explains why the Supreme Court avoided the district courts' approach.

A. *The Political Question Doctrine*

Although the political question doctrine has its roots in *Marbury v. Madison*,²⁴⁸ the modern leading case²⁴⁹ for the doctrine is the Supreme Court's 1962 *Baker v. Carr*²⁵⁰ decision. According to Erwin Chemerinsky, "virtually every case considering the political question doctrine quotes" the following language from *Baker*²⁵¹:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment

²⁴⁷ See *supra* notes 31–59 and accompanying text.

²⁴⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169–70 (1803); see ERWIN CHEMERINSKY, FEDERAL JURISDICTION 148 (5th ed. 2007); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1458 (2005).

²⁴⁹ Lauren Fielder Redman, *The Foreign Sovereign Immunities Act: Using a "Shield" Statute as a "Sword" for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 FORDHAM INT'L L.J. 781, 806 (2008).

²⁵⁰ *Baker v. Carr*, 369 U.S. 186 (1962).

²⁵¹ CHEMERINSKY, *supra* note 248, at 149.

from multifarious pronouncements by various departments on one question.²⁵²

Chemerinsky criticizes this influential language as essentially useless in identifying what counts as a political question,²⁵³ and many other scholars have attacked the doctrine itself.²⁵⁴ Nevertheless, the doctrine survives,²⁵⁵ with courts sometimes relying on it in the context of environmental law.²⁵⁶

B. The AEP District Court's Appeal to the Political Question Doctrine: The Baker Factors

The district court's decision in *AEP* treated the political question doctrine as implicating constitutional issues of the separation of powers: "To determine if a case is justiciable in light of the separation of powers ordained by the Constitution, a court must decide 'whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.'"²⁵⁷ The court went on to extract from *Baker*²⁵⁸ the following six situations recognized by the courts:

[A]s indicating the existence of a non-justiciable political question: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's

²⁵² *Baker*, 369 U.S. at 217.

²⁵³ CHEMERINSKY, *supra* note 248, at 149.

²⁵⁴ *See id.*; Choper, *supra* note 248, at 1459; Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1033 (1985).

²⁵⁵ *See* Choper, *supra* note 248, at 1459–60.

²⁵⁶ *See* Philip Weinberg, "Political Questions": *An Invasive Species Infecting the Courts*, 19 DUKE ENVTL. L. & POL'Y F. 155 (2008) ("Recent court rulings have distorted the hoary 'political questions' doctrine into an excuse to evade the courts' responsibility to decide serious justiciable issues in environmental law.").

²⁵⁷ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 271 (S.D.N.Y. 2005) (quoting *Baker*, 369 U.S. at 198).

²⁵⁸ These "situations" represent the *AEP* district court's take on the *Baker* language cited by CHEMERINSKY, *supra* note 248.

undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁵⁹

C. *Baker Factor One and Displacement*

Situation [1] bears some resemblance to the displacement argument described in Part III. Indeed, the Fifth Circuit in *Comer* blurred the line between the displacement argument and the political question doctrine when it treated the first *Baker* factor as referring to both the text of the Constitution and to federal statutory law:

Plainly, the *Baker v. Carr* “formulations” were not written as stand-alone definitions of a “political question.” They are open-textured, interpretive guides to aid federal courts in deciding whether a question is entrusted by the Constitution or federal laws exclusively to a federal political branch for its decision. The *Baker* formulations are not self-sufficient definitions, but must be used together with the Constitution and federal laws to decide whether a particular constitutional or statutory provision commits a question solely to a political branch for decision.²⁶⁰

On this understanding of the first *Baker* factor, displacement by federal statute (such as the CAA) is one way in which an issue can become a non-justiciable political question.

The *Comer* court’s treatment of the first *Baker* factor as including federal statutory law is unusual, and most authorities treat the first *Baker* factor as involving only the text of the Constitution, and not federal statutory law.²⁶¹ Once it becomes clear that the first *Baker* factor requires a

²⁵⁹ *Connecticut*, 406 F. Supp. 2d at 271–72 (brackets in original).

²⁶⁰ *Comer v. Murphy Oil USA*, 585 F.3d at 855, 872 (5th Cir. 2009) (emphasis added); see also *id.* at 870, 875.

²⁶¹ Even the *Comer* Court seemed to recognize that the authorities it cited with regard to the first *Baker* factor were concerned with commitment of an issue to the political branches by the text of the *Constitution*, and not federal *statutory* law. See *id.* at 873, 875, 879; see also *Powell v. McCormack*, 395 U.S. 486, 519 (1969) (“In order to determine whether there has been a textual commitment to a coordinate department of the Government, [a court] must interpret the Constitution.”); Redish, *supra* note 254, at 1031.

commitment of an issue to a political branch by the text of the Constitution, it is not surprising that defendants²⁶² in climate change public nuisance cases have tended to gravitate toward the Commerce Clause,²⁶³ and those parts of the Constitution granting foreign policy-related powers, in applying the doctrine.²⁶⁴ Although it is undeniable that public nuisance suits for damages related to climate change have the potential for significant impact on interstate commerce and foreign policy, this is not enough to find a non-justiciable political question. As the Second Circuit pointed out in its *AEP* decision,²⁶⁵ the Supreme Court has made it clear that the fact that an issue has political implications does not in itself make it non-justiciable.²⁶⁶

The Second Circuit in *AEP* noted reasons for thinking that the Supreme Court would be hesitant to order dismissal of climate change cases by appeal to the political question doctrine, pointing out the high bar that the *Baker* Court set for non-justiciability: “Unless one of these formulations is *inextricable* from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence.”²⁶⁷ The Second Circuit also noted that, in spite of “ample litigation, the Supreme Court has only rarely found that a political question bars its adjudication of an issue.”²⁶⁸ The court also quoted one scholar who noted that, “in the almost forty years since *Baker v. Carr* was decided, a majority of the Court has found only two issues to present political questions, and both involved strong textual anchors for finding that the constitutional decision rested with the political branches.”²⁶⁹ Another

²⁶² *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 324–25 (2d Cir. 2009).

²⁶³ U.S. CONST. art. I, § 8, cl. 3.

²⁶⁴ U.S. CONST. art. II, § 2, cl. 2. See *California v. General Motors*, in which the district court found that the plaintiffs’ claim did implicate a textually demonstrable constitutional commitment to the political branches—viz., Congress’s power over interstate commerce and its authority over the conduct of foreign policy. No. C06-05755 MJJ, 2007 WL 2726871, at *13–14 (N.D. Cal. Sept. 17, 2007).

²⁶⁵ *Connecticut*, 582 F.3d at 323.

²⁶⁶ See *Baker v. Carr*, 369 U.S. 186, 211, 217 (1962) (cautioning that the doctrine “is one of ‘political questions,’ not one of ‘political cases’” and that with respect to foreign affairs “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance”).

²⁶⁷ *Connecticut*, 582 F.3d at 321 (quoting *Baker*, 369 U.S. at 217).

²⁶⁸ *Id.*

²⁶⁹ Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267–68 (2002). The first issue was whether the Supreme Court had the authority to supervise the Ohio National Guard in the wake of the 1970 Kent State shootings, while the second issue, which arose in the context of the Watergate controversy, was whether the Senate could impeach a federal judge based on the report of a fact-finding committee. *Id.* at 270–73.

scholar reinforces this sense of the weakness of the political question doctrine, pointing to the Supreme Court's *Bush v. Gore* decision, "in which the Justices voted 5 to 4 to resolve a presidential election dispute without so much as mentioning the doctrine."²⁷⁰

Given the lack of a clear textual basis in the Constitution for concluding that the regulation of greenhouse gas emissions is committed exclusively to the legislative and executive branches, it is not surprising that federal district courts seeking to avoid the adjudication of climate change public nuisance cases avoided basing dismissal on the first *Baker* factor,²⁷¹ despite its status as the most straightforward and least controversial of the factors.²⁷² Instead, district courts seeking to dismiss such cases have based their decisions on other *Baker* factors.

D. The Remaining Baker Factors: Policy Determinations and the Absence of Judicially Discoverable Standards

Returning to our list of the *Baker* factors, we are now in a position to understand the relationship between *Baker* factor [1] and the issue of displacement by federal statutory law. Whether one interprets *Baker* factor [1] narrowly, as involving the text of the Constitution, or more broadly as including federal statutory law, the first *Baker* factor is easy to grasp: once an issue has been textually committed to one of the political branches, that issue is no longer judiciable. Situations [4] through [6] are conceptually tied to the first *Baker* factor, and could be read as pragmatic or prudential reasons²⁷³ for the courts to refrain from passing judgment on issues entrusted to the political branches of government.²⁷⁴

²⁷⁰ Choper, *supra* note 248, at 1459.

²⁷¹ The exception here is the *California v. General Motors* court. No. C06-05755 MJJ, 2007 WL 2726871, at *13–14 (N.D. Cal. Sept. 17, 2007).

²⁷² See *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004); Choper, *supra* note 248, at 1463.

²⁷³ The Solicitor General proposed an alternative argument for reversal of the Second Circuit, based on a "prudential standing" theory, according to which the plaintiffs' suits should have been barred as generalized grievances more appropriately addressed by the political branches of our government. Solicitor General's Brief, *supra* note 15, at 11–22. The Supreme Court noted the Solicitor General's argument but dismissed it without discussion. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 n.6. The Court's lack of interest in the prudential standing argument is not surprising, given that the doctrine has in recent years fallen out of favor with the Supreme Court, and has been subjected to scathing criticism from academic critics, with some calling for abandonment of the doctrine. Barkow, *supra* note 269, at 267; David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1440–41 (1999).

²⁷⁴ See Solicitor General's Brief, *supra* note 15, at 11–22; ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1962); CHEMERINSKY, *supra* note 248, at 150–51.

Situations [2] and [3], however, are together conceptually distinct from the others, and suggest that, even absent an entrustment of the question to Congress or the executive branch by the Constitution directly,²⁷⁵ or by federal statutory law by way of the Constitution's Supremacy Clause,²⁷⁶ there are issues which, by their very nature, are beyond the competence of the judiciary. Accordingly, the district courts that have dismissed climate change public nuisance claims by relying on the political question doctrine have tended to use some combination of [2] and [3], holding that the adjudication of climate change public nuisance cases requires either an initial policy determination the court is not competent to make,²⁷⁷ or requires the court to decide the case in the absence of judicially discoverable and manageable standards.²⁷⁸

While the case for a reversal of the Second Circuit's *AEP* decision by appeal to the first *Baker* factor is weak, factors [2] and [3] provide more support. The district court in *AEP* rested its decision mainly on factor [3], holding that it could not decide the case without appeal to an initial policy determination requiring non-judicial discretion.²⁷⁹ The district court in *Kivalina* also relied on factor [3]²⁸⁰ in dismissing its climate change public nuisance case, but the *Kivalina* court relied on *Baker* factor [2] as well, finding that deciding the case would require issuing a decision without reference to judicially discoverable and manageable standards for resolving the case.²⁸¹

E. The Circuit Courts' Treatment of the Judiciability Issue

Although the district court in *AEP* relied mainly on the "initial policy determination" factor in its dismissal of the plaintiffs' case, the Second Circuit, in its review of the district court, considered arguments related both to this factor and factor [2], having to do with judicially

²⁷⁵ See, e.g., *Nixon v. United States*, 506 U.S. 224, 229 (1993) (providing an example of a constitutional grant of power to Congress).

²⁷⁶ U.S. CONST. art. VI, para. 2.

²⁷⁷ See *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *6–13 (N.D. Cal. Sept. 17, 2007); *infra* notes 279–280.

²⁷⁸ See *infra* note 281; *California*, 2007 WL 2726871, at *14–16.

²⁷⁹ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272–73 (S.D.N.Y. 2005). The *AEP* district court's only mention of a "lack of judicially discoverable and manageable standards" comes in the context of the court's listing of the various *Baker* factors. *Id.* at 272.

²⁸⁰ *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009).

²⁸¹ *Id.* at 876. The *Kivalina* court also found a lack of Article III standing. *Id.* at 883; *cf. supra* note 47.

discoverable and manageable standards.²⁸² Thus, the Second Circuit's decision offers a useful framework for considering the viability of political question defenses in climate change public nuisance cases in general.

It is perhaps not surprising that federal district courts and circuit courts differ on whether deciding public nuisance climate change cases require the courts to venture beyond their natural realm of competence, given that the burdens of fact-finding will fall primarily on the district courts. The district court in *AEP*, in justifying its dismissal of the plaintiffs' action, listed the considerations that would have to be addressed in settling the case at hand:

[G]iven the numerous contributors of greenhouse gases, should the societal costs of reducing such emissions be borne by just a segment of the electricity-generating industry and their industrial and other consumers?

Should those costs be spread across the entire electricity-generating industry (including utilities in the plaintiff States)? Other industries?

What are the economic implications of these choices?

What are the implications for the nation's energy independence and, by extension, its national security?²⁸³

The district court in *Comer* raised similar concerns in justifying its dismissal of plaintiffs' claims for damages related to Hurricane Katrina²⁸⁴:

"[T]he problem [in this case] is one in which this court is simply ill-equipped or unequipped with the power that it has to address these issues." . . . [I]t is a debate which simply has no place in the court, until such time as Congress enacts legislation which sets appropriate standards by which this court can measure conduct . . . and develops standards by which . . . juries can adjudicate facts and apply the law Under the circumstances, I think that the plaintiffs are asking the court to develop those standards,

²⁸² *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 326–32 (2d Cir. 2009).

²⁸³ *Connecticut*, 406 F. Supp. at 273.

²⁸⁴ *Comer v. Murphy Oil USA*, 585 F.3d 855, 860 nn. 1–2 (5th Cir. 2009) (quoting the hearing transcript from the district court).

and it is something that this court simply is not empowered to do. . . . [Plaintiffs' complaint asks] this court to do what *Baker v. Carr* told me not to do, and that is to balance economic, environmental, foreign policy, and national security interests and make an initial policy determination of a kind which is simply nonjudicial. Adjudication of Plaintiffs' claims in this case would necessitate the formulation of standards dictating, for example, the amount of greenhouse gas emissions that would be excessive and the scientific and policy reasons behind those standards. These policy decisions are best left to the executive and legislative branches of the government, who are not only in the best position to make those decisions but are constitutionally empowered to do so.²⁸⁵

This passage illustrates both the discomfort a district court judge might find in addressing the various public policy issues surrounding climate change, along with the way in which *Baker* factors [2] and [3] can merge in a court's reasoning about such cases, despite other courts' treatment of these factors as distinct.

Although the Second Circuit attempted to break apart *Baker* factors [2] and [3], devoting separate sections in its opinion to them,²⁸⁶ a common theme appears in both sections—viz., that what the plaintiffs in *AEP* are asking the courts to do is not significantly different from what state and federal courts have done over the years in applying the common law principles of nuisance law.²⁸⁷ On the question of whether public nuisance law provides the courts with judicially discoverable and manageable standards to decide cases such as *AEP*, the Second Circuit pointed to a series of cases where the federal courts have appealed to the rules and standards of tort law in adjudicating various water and air pollution nuisance cases.

The Second Circuit noted a pair of Supreme Court cases from the early 1900s to illustrate the competence of the federal courts in deciding cases by appeal to the standards of ordinary nuisance law. In 1901, the Supreme Court decided *Missouri I*, a public nuisance case in which Missouri sued to prevent Illinois from dumping sewage into the Mississippi River, holding that Missouri could maintain a lawsuit for

²⁸⁵ *Id.* at 860 n.2.

²⁸⁶ *Connecticut*, 582 F.3d at 326–31.

²⁸⁷ *Id.*

equitable relief even before it had suffered injury.²⁸⁸ When Illinois started to discharge into the river, Missouri sued again, this time seeking an injunction against the discharge as a public nuisance.²⁸⁹ According to the Second Circuit, the Supreme Court in *Missouri II* “carefully appraised the sophisticated scientific and expert evidence offered (such as whether the typhoid bacillus could survive the waterborne journey), weighed the equities, and concluded that Missouri had not made its case, particularly with respect to establishing injury and causation.”²⁹⁰

For another example of what the Second Circuit described as “the federal courts’ masterful handling of complex public nuisance issues” it cited a series of appearances the State of Georgia made before the Supreme Court in its public nuisance suit against a pair of Tennessee copper foundries.²⁹¹ Georgia claimed that emissions from the copper plants were destroying forests, orchards, and crops in Georgia. Between 1907 and 1916, the Supreme Court issued four decisions in this dispute, eventually setting definitive emission limits, imposing monitoring requirements, and apportioning damages among the defendants.²⁹² According to the Second Circuit, the Missouri and Georgia cases were just the “first in a long line of federal common law of nuisance cases where federal courts employed familiar public nuisance precepts, grappled with complex scientific evidence, and resolved the issues presented, based on a fully developed record.”²⁹³

While the cases cited by the Second Circuit undeniably show a history of application of traditional nuisance doctrine to settle interstate pollution disputes, climate change public nuisance cases such as *AEP* are

²⁸⁸ *Missouri v. Illinois (Missouri I)*, 180 U.S. 208, 248 (1901).

²⁸⁹ *Missouri v. Illinois (Missouri II)*, 200 U.S. 496, 517–18 (1906).

²⁹⁰ *Connecticut*, 582 F.3d at 326–27.

²⁹¹ *Id.* at 327.

²⁹² *Georgia v. Tenn. Copper Co.*, 240 U.S. 650, 650–51 (1916).

²⁹³ *Connecticut*, 582 F.3d at 327. The court then cited several cases as further examples: *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91 (1972) (holding that sewage discharge was a public nuisance which could be adjudicated by the federal courts due to the Clean Water Act’s lack of remedy); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (“seeking to enjoin New York from dumping garbage into the ocean and polluting New Jersey beaches and water”); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (“seeking to enjoin, as a public nuisance, a Minnesota irrigation project that contributed to flooding of North Dakota farmland”); *New York v. New Jersey*, 256 U.S. 296 (1921) (“seeking to enjoin sewage discharge into boundary waters and causing pollution”); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) (“alleging interference with navigation on Ohio River by low bridge as constituting public nuisance”).

arguably distinguishable. All of the cases cited by the Second Circuit involved localized disputes between adjacent states or parties in adjacent states.²⁹⁴ The Supreme Court's ordering a Tennessee copper plant to stop emitting fumes that are passing the state border into Georgia and damaging property there or ordering New York to stop damaging New Jersey's shoreline by dumping its garbage into the river are not the kind of decisions that can be expected to have very wide ranging consequences akin to a federal court's issuing of an injunction against a power company for its contribution to climate change, which is by its very nature a global phenomenon, with causes and effects diffused throughout the world.²⁹⁵

The Second Circuit was dismissive of the defendants' claims that climate change public nuisance lawsuits implicated the political branches' authority to regulate foreign policy and interstate commerce.²⁹⁶ However, it is undeniable that a federal court's decision to issue an injunction against a large power company to reduce its greenhouse gas emissions to certain specified levels²⁹⁷ would have implications with respect to foreign policy and the national economy that would be absent or significantly attenuated in the line of much more localized cases trumpeted by the Second Circuit.²⁹⁸

In its consideration of the district court's holding that deciding the case at hand required a non-judicial initial policy determination, the Second Circuit again pointed to past cases of the federal courts using nuisance law to settle interstate pollution cases, focusing especially on *Milwaukee I*,²⁹⁹ emphasizing that "if regulatory gaps exist, common law fills those interstices."³⁰⁰ However, characterizing what the Second Circuit would have the district court do in this case as mere interstitial gap filling understates the wide range of complex policy issues implicated by such a decision.³⁰¹

²⁹⁴ *Connecticut*, 582 F.3d at 326–27. The Court cited only cases involving bordering states: New York and New Jersey; North Dakota and Minnesota; Illinois and Wisconsin; Georgia and Tennessee; and Missouri and Illinois. *Id.*; see *supra* note 293 (summarizing several of the cases cited by the Second Circuit).

²⁹⁵ See Solicitor General's Brief, *supra* note 15, at 14–15; PEW CTR. ON GLOBAL CLIMATE CHANGE, *supra* note 211.

²⁹⁶ *Connecticut*, 582 F.3d at 324.

²⁹⁷ See *id.* at 318 (noting that petitioners sought this type of relief in *AEP*).

²⁹⁸ See *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *13–14 (N.D. Cal. Sept. 17, 2007).

²⁹⁹ *Connecticut*, 582 F.3d at 330.

³⁰⁰ *Id.*; *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 287 (2d Cir. 2007); see *United States v. Kimbell Foods*, 440 U.S. 715, 727 (1979).

³⁰¹ See Brief for Petitioner, *supra* note 6, at 31–34; Solicitor General's Brief, *supra* note 15, at 14–17.

Whereas it was plausible for the Court in *Milwaukee I* to think that Illinois's lack of a remedy against Milwaukee was the result of the legislature failing to consider the possibility of such an interstate harm, it is simply not plausible to contend that the lack of greenhouse gas regulations is due to legislative oversight. It is instead a consequence of the lack of consensus in our political culture about the best way, all things considered, for the government to address the problem of climate change.³⁰²

Given the disanalogies between climate change cases and the sort of public nuisance cases relied upon by the Second Circuit, the Supreme Court probably could have justified reversal of the Second Circuit on non-justiciability grounds, especially in light of the wide range of public policy issues implicated by climate change. But the political question doctrine has endured harsh criticism in recent years, and there is evidence that the doctrine has fallen out of favor with the Supreme Court.³⁰³ It is therefore not surprising that the Court instead relied on displacement analysis in reversing the Second Circuit.

Although the Court found displacement of the federal common law claim independently of any regulatory activity by the EPA,³⁰⁴ one cannot help but suspect that the fact of such activity encouraged the Court to ignore the more problematic political question doctrine and instead rely on a displacement analysis. Accordingly, if the various district courts had been able to consider the climate change cases in light of recent EPA regulatory activity, it is possible that those courts too would have relied on a displacement analysis, instead of holding that the cases presented them with non-justiciable political questions.³⁰⁵

³⁰² See Elisabeth Rosenthal, *Where Did Global Warming Go?*, N.Y. TIMES, Oct. 15, 2011, http://www.nytimes.com/2011/10/16/sunday-review/whatever-happened-to-global-warming.html?_r=2&pagewanted=1&hp (describing the difficulties associated with passing climate change legislation in the United States).

³⁰³ See *supra* notes 253–256, 267–270, 283–285 and accompanying text.

³⁰⁴ *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011).

³⁰⁵ Would the Court's invocation of the political question doctrine have precluded plaintiffs from proceeding with a state common law public nuisance claim? The answer is clearly no, especially if the Court's reversal were based on *Baker* factors [2] or [3]. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 882–83 (N.D. Cal. 2009); *California v. Gen. Motors*, No. C06-05755 MJJ, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007), (both dismissing complaint without prejudice, explicitly allowing the plaintiffs to refile in state court). The Supreme Court has made clear that the political question doctrine does not apply to state courts: "This Court, of course, may not prohibit state courts from deciding political questions, any more than it may prohibit them from deciding questions that are moot, so long as they do not trench upon exclusively federal questions of foreign policy." *Goldwater v. Carter*, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J.,

CONCLUSION

There has been much hand-wringing of late over the issue of climate change and public nuisance doctrine, with some predicting a tidal wave of costly litigation against utilities and other emitters of greenhouse gases. The Supreme Court's recent decision in *AEP v. Connecticut*, holding that any such cause of action based on federal common law was displaced by the CAA, showed much of this excitement to be unwarranted. However, the Court explicitly left open the possibility that such cases could proceed under state law.

The Court's decision in *AEP* has a number of important implications. There were several arguments available to the Court, under which it could have reversed the Second Circuit's decision. The Court could have followed the path of the district courts, who had unanimously dismissed climate change public nuisance cases as presenting non-justiciable political questions. The Court's ignoring of such an approach in favor of a displacement analysis should undermine future appeals to the political question doctrine, which had already suffered harsh criticism from the legal academy.³⁰⁶ Similarly, it is noteworthy that the Court all but ignored the Solicitor General's prudential standing argument, which is another doctrine that has fallen out of favor with the Supreme Court in recent years.³⁰⁷

The Court's opinion in *AEP* is also striking for its indifference to legislative history, especially in light of the attention paid to such history by the *Milwaukee II* Court.³⁰⁸ There were no dissenting Justices in *AEP*, which supports one scholar's contention that, while legislative history is alive and well at the Supreme Court, the Justices tend to appeal to it only in close, difficult cases, when other interpretive approaches are inadequate.³⁰⁹

concurring) (citations omitted). The Court has also made clear that the political question doctrine is grounded in the Constitution's limitation of federal court jurisdiction to cases and controversies, and that this requirement does not extend to state courts. *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (noting that the cases and controversies requirement of the Constitution does not preclude state courts from issuing purely advisory opinions). It should be noted, however, that some states retain their own versions of the political questions doctrine, sometimes based in state constitutional provisions. For a survey of the various state approaches to the political question doctrine, see generally Jay M. Zitter, *Construction and Application of Political Question Doctrine by State Courts*, 9 A.L.R.6th 177 (2005).

³⁰⁶ See *supra* notes 267–270 and accompanying text.

³⁰⁷ See *Am. Elec. Power Co.*, 131 S. Ct. at 2535 n.6; Solicitor General's Brief, *supra* note 15, at 17–22.

³⁰⁸ See *supra* notes 117–119 and accompanying text.

³⁰⁹ Cross, *supra* note 164, at 1995.

Perhaps most surprising is the Court's holding that the regulatory actions taken by the EPA subsequent to the Second Circuit's decision were not necessary to find displacement of federal common law. Both the Second Circuit and the Solicitor General seemed to presuppose that the issue of displacement would turn on whether the EPA regulations enacted after the Second Circuit's decision would be extensive enough to constitute preemption of federal common law in this area.³¹⁰ However, the Supreme Court made clear that the CAA was itself sufficient to displace federal common law; the EPA could, if it wished, exercise its discretion not to regulate greenhouse gases at all, and so long as the agency issued a reasonable explanation of its decision, there would still be displacement of federal common law.³¹¹

Finally, the Court explicitly left open the question of whether the CAA preempts public nuisance claims under state law. The Act's savings clause suggests that such state law claims are preserved, so long as they are based on state requirements more stringent than federal regulations. However, even the savings clause cannot protect from preemption those state court decisions that undermine or interfere with the federal regulatory scheme, and there is language in the Court's *AEP* opinion suggesting that the Supreme Court might find preemption of state common law decisions, in spite of the savings clause.³¹²

Another important limitation on state common law public nuisance cases is the inability of states to regulate greenhouse gas emitters located in other states.³¹³ Moreover, even if state public nuisance cases could go

³¹⁰ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 379–81 (2d Cir. 2009); Solicitor General's Brief, *supra* note 15, at 8–9, 22–32.

³¹¹ *See Am. Elec. Power Co.*, 131 S. Ct. at 2533, 2538–39. This point takes on additional importance in light of Republican Party opposition to the EPA's greenhouse gas regulations. *See, e.g.*, John M. Broder, *E.P.A. Scales Back Emission Rules*, N.Y. TIMES, Feb. 23, 2011, <http://www.nytimes.com/2011/02/24/science/earth/24emissions.html>; John M. Broder, *House Republicans Take E.P.A. Chief to Task*, N.Y. TIMES, Feb. 9, 2011, <http://www.nytimes.com/2011/02/10/science/earth/10emissions.html>; Gabriel Nelson, *Republican Victories Boost Effort to Block EPA's Climate Rules*, N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/gwire/2010/11/03/03greenwire-republican-victories-boost-effort-to-block-epa-72986.html>. Although one might think that repeal of EPA regulations on greenhouse gas emissions would reopen the door to federal public nuisance lawsuits, the Court's holding that it is the CAA, and not the regulations themselves, that provides preemption makes it clear that federal common law is preempted even if the EPA decides not to regulate greenhouse gases at all.

³¹² *See supra* notes 236–242 and accompanying text.

³¹³ *See supra* notes 226–233 and accompanying text.

forward as legitimate causes of action, there are very serious questions whether such claims could succeed on the merits. For example, an obvious problem for such nuisance cases, should they ever get to the stage of courts considering the substance of the claims, is the question of how to establish causation and apportion liability from multiple causal sources.³¹⁴

Some scholars friendly to the state common law approach have suggested that causation in the area of climate change might be modeled on approaches found in certain product liability cases, involving items such as DES and asbestos.³¹⁵ Such an approach, if successful, would somewhat ironically vindicate Swiss Re's prediction that climate change legislation could be "the new asbestos."³¹⁶

³¹⁴ See, e.g., Grossman, *supra* note 30, at 22–33.

³¹⁵ *Id.* at 22–24.

³¹⁶ See *supra* note 8 and accompanying text.