THE CONTINUING VITALITY OF THE CLIMATE CHANGE NUISANCE SUIT

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I. INTRODUCTION

In the last five years, a new species of tort claim has made its way into the federal courts. These suits target large-scale emitters of carbon dioxide and other greenhouse gases and allege damages due to the deleterious effects of global climate change.[1] Often brought by

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1. *See, e.g.,* Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009); Comer v. Murphy Oil USA, Inc., 585 F.3d 855 (5th Cir. 2009); Korsinsky v. EPA, No. 05 Civ. 859 (NRB), 2005 WL 2726871 (S.D.N.Y. Sept. 29, 2005); California v. Gen. Motors Corp., No. C06-05755 (MJJ), 2007 WL 2726871, (N.D. Cal. Sept. 17, 2007); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (each alleging injury resulting from climate change). These suits present few similarities other than the source of the alleged injury. Some involve money damages, and some involve plaintiffs seeking an injunction against greenhouse gas emitters. Some include plaintiffs representing tens of millions of people, and one includes only a

governmental entities or individual landowners, the suits have been used to target emitters nationwide, under the theory that emissions anywhere contribute to climate change everywhere.[2] Those who bring these suits view them as a powerful tool to compel the reduction of greenhouse gas emissions in the absence of a national regulatory scheme.[3] At least until recently, however, the federal judiciary refused to play along. Of the five federal nuisance suits brought between 2005 and 2009 that were premised solely on damages due to climate change, all were dismissed in district court on grounds of nonjusticiability, due either to the political question doctrine or to lack of standing.[4]

In late 2009, however, supporters of climate change tort suits won two key victories. On September 21, 2009, the Second Circuit Court of Appeals released its decision in *American Electric Power Co.* ("*AEP*")[5] and became the first federal court in the country to allow a common law nuisance claim to proceed to the merits against a defendant solely because of its alleged contributions to global climate change.[6] The suit was brought by several states, land trusts, and the City of New York against the five largest fossil fuel-fired power plants in the country, alleging that the greenhouse gases emitted by the plants injure the plaintiffs as land owners.[7] The governmental bodies further alleged that they had standing to sue on behalf of their citizen landowners.[8] The district court had granted the defendants' motion to dismiss, holding that the suit was barred by the political question doctrine.[9] The court of appeals, however, analyzed each of the defendants' arguments in detail, held that all were without merit, and vacated the district court's grant of the motion to

lone pro se plaintiff. For ease of reference throughout this Note, I will refer to these suits as "climate change torts" or "climate change nuisance suits."

2. See *Comer*, 585 F.3d at 860-61 for a typical framing of the argument. Plaintiffs alleged that defendants, U.S. oil and energy companies, used their property to produce greenhouse gasses, which contributed to global warming, which contributed to the ferocity of Hurricane Katrina, which in turn caused direct monetary damages to those living on the Gulf Coast. *Id.*

3. This is often the goal even in those cases in which only money damages are sought. The hope is that financial liability will compel changes in business practices.

4. Of the five cases brought in federal court by the end of 2009, one (*Korsinsky*) was dismissed solely on standing grounds, two (*General Motors* and *AEP*) were dismissed under the political question doctrine, and two (*Kivalina* and *Comer*) were dismissed on both grounds.

5. 582 F.3d 309 (2d Cir. 2009).

6. *Id.* at 315.

7. *AEP*, 582 F.3d at 316-17.

8. *Id.* at 334.

9. *Id.* at 319-20.

dismiss.[10]

Three weeks after *AEP*, the Fifth Circuit also held that a climate change nuisance suit could proceed to the merits.[11] In *Comer v. Murphy Oil, USA*,[12] the court of appeals reversed the lower court's dismissal of a putative class action suit brought by residents of Mississippi against oil and energy companies whose emissions allegedly contributed to the severity of Hurricane Katrina.[13] Perhaps building on the lessons of earlier unsuccessful attempts to invoke federal jurisdiction,[14] here the plaintiffs brought the action solely under Mississippi common law and premised federal jurisdiction on diversity of citizenship.[15] The Fifth Circuit held that plaintiffs had standing to sue and that they were not barred by the political question doctrine.[16]

Prior to these decisions, many commentators had analyzed and criticized the use of the political question doctrine to bar nuisance suits against greenhouse gas emitters,[17] and many more had explored the question of who should have standing to bring such a suit.[18] *AEP* and *Comer* suggest, however, that the federal judiciary has begun to accept the more expansive view of climate change tort justiciability long argued for by many commentators.[19] The one major issue left unresolved by these decisions, however, is also the issue

10. *Id.* at 392.

11. Comer v. Murphy Oil USA, Inc., 585 F.3d 855, 880 (5th Cir. 2009).

12. 585 F.3d 855 (5th Cir. 2009).

13. *Id.* at 860-61.

14. *See e.g.*, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005), *rev'd,* 582 F.3d 309 (2d Cir. 2009) (dismissing a suit premised solely on federal common law and seeking an injunction); California v. Gen. Motors Corp., No. C06-05755 (MJJ) 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing a suit brought under both federal and state law and seeking money damages).

15. *Comer*, 585 F.3d at 859-60.

16. *Id.* at 879-80.

17. *See, e.g.*, Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 CONN. L. REV. 591, 607-16 (2008); Phillip Weinberg, *"Political Questions": An Invasive Species Infecting the Courts*, 19 DUKE ENVTL. L. & POL'Y F. 155, 156-64 (2008).

18. *See, e.g.*, Ari N. Sommer, *Taking the Pitt Bull off the Leash: Siccing the Endangered Species Act on Climate Change*, 36 B.C. ENVTL. AFF. L. REV. 273, 292-96 (2009); Blake R. Bertagna, "*Standing" Up for the Environment: The Ability of Plaintiffs to Establish Legal Standing to Redress Injuries Caused by Global Warming*, 2006 BYU. L. REV. 415, 433-46 (2006).

19. *See, e.g.*, Weinberg, *supra* note 17, at 164 ("The political question doctrine is inapplicable to suits to enjoin, or recover damages for, environmental—and particularly climate change—injury. Its use by courts amounts to an unwarranted expansion of that limited doctrine into areas where, historically, the courts have been available to render justice to aggrieved parties.").

that has received the least scholarly attention; that is, the possibility of displacement of climate change nuisance suits by a federal regulatory scheme.[20]

In its analysis of whether federal statutes displaced the kind of common law cause of action brought by the plaintiffs, the court in *AEP* took great care to emphasize that future developments could undermine its reasoning.[21] Specifically, the court noted that the introduction of a comprehensive regulatory scheme by Congress or the Environmental Protection Agency ("EPA") under the Clean Air Act ("CAA") could displace nuisance suits arising out of greenhouse gas emissions.[22] When those regulations are formally adopted, the court noted, then courts will have to reanalyze whether such suits have been displaced.[23]

In the months since these decisions, the federal government has taken two steps which seem to make displacement a strong possibility. The EPA, which announced in April of 2009 that it planned to regulate greenhouse gas emissions in the near future,[24] released its proposed regulations on September 28, 2009.[25] Two days

20. It is important to distinguish the concept of *preemption* from that of *displacement*. The former occurs when a federal law or regulation supersedes a state law on the same matter. The latter refers to a situation in which a federal law or regulation supersedes federal common law doctrine. Interestingly, much has been written about the possible preemptive effects of proposed federal schemes to regulate green house gases. *See, e.g.,* Daniel A. Farber, *SYMPOSIUM: Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 900-23 (2008); Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. Rev. 1, 8-11 (2007). But little, heretofore, has been written on displacement.

21. *AEP*, 582 F.3d at 387-88. In fact, the opinion closes with an additional observation on the possibility of displacement that is worth quoting at length:

> With regard to air pollution, particularly greenhouse gases, this case occupies a niche similar to the one *Milwaukee I* occupied with respect to water pollution. With that in mind, the concluding words of *Milwaukee I* have an eerie resonance almost forty years later. To paraphrase: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. 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 greenhouse gases.

Id. at 392-93.

22. *Id.* at 387-88.

23. *Id.* at 381. Another possibility, of course, is that a federal regulatory scheme might make it easier for plaintiffs to bring suit against large-scale greenhouse gas emitters who fail to comply with federal standards. Under a negligence per se theory, plaintiffs would be able to make a prima facie case against any violators. It is, however, quite likely that Congress would move to restrict private rights of action that interfered with the larger scheme.

24. John M. Broder, *E.P.A. Clears Path to Regulate Heat-Trapping Gases for First Time in the U.S.,* N.Y. TIMES, April 18, 2009, at A15.

25. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring

later, Senators Kerry and Boxer introduced a comprehensive greenhouse gas reduction bill in the Senate,[26] building off of a similar bill that passed in the House of Representatives a few months earlier.[27] Either of these measures, if adopted, seem likely to limit, if not completely displace, common law nuisance suits against greenhouse gas emitters.

This Note analyzes the extent to which the proposed EPA regulations displace common law claims and thus render moot the Second Circuit's holding in *AEP* and the Fifth Circuit's holding in *Comer*. Part II of this note provides a discussion of the five climate change nuisance suits that have thus far been brought in federal court and details the district court's resolution of each. This will provide the background necessary for understanding the significance of *AEP* and *Comer*. Part III analyzes the holdings of *AEP* and *Comer* in detail, specifically focusing on the treatment of displacement. Here, *AEP* will receive the lion's share of the attention, as the Fifth Circuit did not engage in a discussion of displacement.[28] Part IV applies the displacement test arising out of *AEP* to the proposed EPA regulations of greenhouse gas emissions and determines that, contrary to appearances, the regulations in their current state are unlikely to displace climate change torts. Part V argues that, as a matter of policy, the nation would be better served by a comprehensive set of greenhouse gas regulations than by a limited set of EPA regulations accompanied by private suits.

II. THE FIRST ATTEMPTS AT CLIMATE CHANGE NUISANCE SUITS: 2005-2009

Prior to late 2009, when the Second and Fifth Circuits released *AEP* and *Comer*, a total of five climate change nuisance suits had been brought in federal court. The first of these climate change tort suits was *Connecticut v. American Electric Power Co.* in 2005. A short summary of the suit has already been provided,[29] but some additional information is necessary to fully understand the district court's holding. The plaintiffs alleged that climate change had already begun to affect their citizens and property, and that if left unchecked, the

Rule, 74 Fed. Reg. 55,292, 55,294 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pt. 51, 52, 70, and 71).

26. Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009).

27. The American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009).

28. This is because the plaintiffs in *Comer* brought their suit under state tort law rather than the kind of interstitial federal common law used by the plaintiffs in *AEP*. *Compare* Comer v. Murphy Oil USA, Inc., 585 F.3d 855, 863 (5th Cir. 2009) *with* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 314 (2d Cir. 2009).

29. *See supra* text accompanying notes 5-10.

resulting damage would be catastrophic.[30] In the complaint, plaintiffs made reference to a number of scientific studies and reports that all established the link between the greenhouse gasses emitted by defendants and the resulting climate change that was affecting them.[31] They asked the court to hold each of the defendants joint and severally liable for the damage caused by global warming and to issue an injunction ordering defendants to cap their emissions and to continue reducing them for at least a decade.[32]

The district court balked at providing the extensive relief requested by the plaintiffs. Asserting that the first question a court must ask is whether it has jurisdiction, the court began (and ended) with an inquiry into the justiciability of the suit in light of the political question doctrine.[33] This analysis was framed by the factors delineated by the Supreme Court in *Baker v. Carr*.[34] Under *Baker*, a suit presents a non-justiciable political question when there is

> [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 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.[35]

The court focused on the third factor and held that resolving the suit would require a dizzying set of complex policy determinations that the judicial branch is simply unequipped to handle.[36] Thus, the court dismissed the suit on grounds that it presented a political question.[37]

The second climate change nuisance suit, *Korsinksy v. U.S. E.P.A.,*[38] was also brought in New York's Southern District in 2005.[39]

30. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005), *vacated and remanded,* 582 F.3d 309 (2d Cir. 2009).

31. *Id.*

32. *Id.* at 270.

33. *Id.* at 271.

34. 369 U.S. 186 (1962).

35. *Id.* at 217.

36. *AEP*, 406 F. Supp. 2d at 272 ("The scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation.").

37. *Id.* at 274.

38. Korsinsky v. U.S. E.P.A., No. 05-Civ. 859 (NRB), 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005).

39. *See id*. Plaintiff's requested relief was an injunction to force the defendants to

The plaintiff alleged that the defendants' failure to restrict carbon dioxide emissions and to themselves emit carbon dioxide had injured him because of his great sensitivity to environmental pollution and because of the "mental sickness" he had developed since learning of the dangers associated with carbon pollution.[40] The district court held that plaintiff had not articulated an injury sufficient to confer standing.[41] The court's analysis hardly touched on the subject matter of the suit, instead focusing on the conjectural and generalized nature of the alleged injury.[42]

One year after the district courts in *AEP* and *Korsinsky* granted motions to dismiss, the state of California attempted a different strategy to force a federal court to hear a federal common law nuisance suit against a greenhouse gas producer.[43] This suit, *California v. General Motors Corp.* ("*GMC*"),[44] targeted automakers and asked the court to award the state money damages for injuries already sustained due to global warming.[45] The request for damages rather than an injunction was meant to avoid the political question doctrine,[46] but the Northern District of California did not find the distinction meaningful and followed the Southern District of New York in holding the suit non-justiciable.[47]

adopt a device of his own invention which would purportedly "eliminate carbon dioxide emissions without significantly increasing the cost of process activities." *Id*. at *1.

40. *Id.* at *2.

41. *Id*.

42. *Id.* The court relied heavily on the standing analysis introduced by the Supreme Court in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). In the space of two paragraphs, the court managed to establish that plaintiff had failed to meet all three prongs.

43. Abate, *supra* note 17, at 598.

44. California v. Gen. Motors Corp., No. C06-05755 (MJJ), 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

45. Abate, *supra* note 17, at 597. California specifically alleged that vehicles produced by the six defendant manufacturers accounted for over thirty percent of carbon emissions in the state. *GMC,* C06-05755 MJJ, slip op. at *1. As a result of the climate change caused by such emissions, California alleged that it had endured increased erosion of its coastline and numerous problems stemming from the loss of snow pack on the Sierra Nevada Mountains. *Id.*

46. Abate, *supra* note 17, at 598 ("Rather than seek injunctive relief, the plaintiffs in *California v. General Motors* sought damages as a way to avoid dismissal on political question grounds—a fate that befell the plaintiff in *Connecticut v. American Electric Power Co*."). California also tried to avoid dismissal by bringing its claim under state as well as federal law. The district court, however, did not consider the state claim, holding that when a federal court dismisses all of the federal causes of action in a suit, it loses its supplemental jurisdiction over state claims. *GMC*, No. C06-05755 MJJ, slip op. at *15-16.

47. *See GMC*, No. C06-05755 MJJ, slip op. at *13 ("[T]he Court find that it cannot adjudicate Plaintiff's federal common law global warming nuisance tort claim without making an initial policy determination of a kind clearly for nonjudicial discretion.").

The court's analysis of the political question doctrine was much more detailed than that offered by the district court in *AEP*.[48] Instead of focusing solely on the third *Baker* factor,[49] the court held that each of the first three factors would alone be sufficient to bar the suit.[50] Under the first factor,[51] the court found that the Commerce Clause specifically grants Congress the ability to regulate commerce between the states and with foreign nations, and that Congress' failure to act on the issue of greenhouse gas regulations evinced a policy choice that the courts were bound to accept.[52] Under the second factor,[53] the court held that the global nature of greenhouse gas contributions precluded the formulation of "a manageable method of discerning the entities that are creating and contributing to the alleged nuisance."[54] Finally, under the third factor,[55] the court held that adjudicating plaintiff's claim would require it to determine whether climate change constitutes an "unreasonable interference with a right common to the general public."[56] Such a decision, the court noted, is inherently policy-based, and without clear guidance from the political branches it would be inappropriate for the judiciary to weigh in.[57]

The next attempt at a climate change tort, *Comer v. Murphy Oil*,[58] arose out of the damage done to the Gulf Coast by Hurricane

48. *Compare* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 271-72 (S.D.N.Y. 2005), *rev'd,* 582 F.3d 309 (2d Cir. 2009), *with* GMC, No. C06-05755 MJJ, slip op. at *6-15.

49. *AEP*, 406 F. Supp. 2d at 272 ("Although several of [the *Baker* factors] have formed the basis for finding that Plaintiffs raise a non-justiciable political question, the third indicator is particularly pertinent to this case.").

50. *GMC*, No. C06-05755 MJJ, slip op. at *15.

51. Whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Baker v. Carr, 369 U.S. 186, 217 (1962).

52. *GMC*, No. C06-05755 MJJ, slip op. at *14 ("The political branches have deliberately elected to refrain from any unilateral commitment to reducing such emissions domestically unless developing nations make a reciprocal commitment.").

53. Whether there is "a lack of judicially discoverable and manageable standards for resolving [the issue]." *Baker*, 369 U.S. at 217.

54. *GMC*, No. C06-05755 MJJ, slip op. at *15.

55. Whether the issue can be decided "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

56. *GMC*, No. C06-05755 MJJ, slip op. at *8 (quoting In re Oswego Barge Corp., 664 F.2d 327, 332 n.5 (2d Cir. 1981).

57. *Id.* at *10 ("Because a comprehensive global warming solution must be achieved by a broad array of domestic and international measures that are yet undefined, it would be premature and inappropriate for this Court to wade into this type of policy-making determination before the elected branches have done so.").

58. 585 F.3d 855 (5th Cir. 2009). The district court's decision was read from the bench and thus is unpublished. The Second Circuit, however, provided a transcription of the relevant portions of the district judge's analysis in its own opinion reversing the judgment, and thus all citations in this section will be to the Fifth Circuit decision.

Katrina.[59] Though just as unsuccessful on the district court level as the suits that had come before it, the complaint offered new refinements that plaintiffs hoped would avoid a holding of nonjusticiability.[60] As the brief sketch contained in Part I of this note indicates,[61] the novel aspects of the complaint did not save it from dismissal.[62] In its decision, the district court focused on the political question doctrine.[63] Although the court did not indicate which specific factors it relied on, it seems to have been most concerned with the lack of judicially manageable standards for resolving the case and the need for a policy determination better left to the political branches.[64]

The final climate change nuisance suit brought in federal court before the Second and Fifth Circuits issued *AEP* and *Comer,* was *Native Village of Kivalina v. Exxonmobil Corp.*[65] Plaintiffs in this suit were Inupiat Eskimo villagers living on a narrow reef well north of the Arctic Circle.[66] They brought suit against twenty-four energy and oil companies, seeking money damages for the erosion to their land caused by melting arctic ice.[67] The district court granted defendants' motion to dismiss on grounds similar to those seen in the preceding cases, namely, lack of standing and the political question doctrine.[68] The court's analysis of these doctrines, however, was different from any cases that had come before.

In its analysis of the political question doctrine, the court did not rely solely on the *Baker* factors as the courts in *AEP*, *GMC*, and *Comer* had;[69] instead it applied the reformulated factors contained in

59. *Id.* at 859.

60. The plaintiffs here followed the lead of the plaintiff in *GMC* by forgoing injunctive relief and asking only for money damages. *Id.* at 859-60. Additionally, the plaintiffs brought their suit under Mississippi tort law, probably to avoid any hesitation the court may have had in applying federal common law. *Id.*

61. *See supra* note 2, and text accompanying notes 11-16.

62. *Comer*, 585 F.3d at 860 n.2.

63. *Id.*

64. *Id.* ("Adjudication of Plaintiff's 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 these standards. These policy decisions are best left to the executive and legislative branches of government . . . .").

65. 663 F. Supp. 2d 863 (N.D. Cal. 2009).

66. *Id.* at 868-69.

67. *Id.* at 869-70. The arctic ice formed a seasonal barrier against the waves of the ocean that prevented erosion for much of the year. Plaintiffs alleged that this ice barrier was forming for shorter and shorter intervals, and that soon their land would be uninhabitable. The money recovered would be used to cover relocation costs, which plaintiffs estimated would run into the hundreds of millions. *Id.*

68. *Id.* at 883.

69. *See supra* text accompanying notes 34-37 and 48-57.

Justice Powell's concurring opinion in *Goldwater v. Carter*.[70] This formulation essentially keeps the first *Baker* factor unchanged, merges factors two and three into one inquiry, and combines the last three factors into one general question as to the prudence of hearing the suit.[71] The court rejected defendants' contention that climate change regulation had been committed to a coordinate branch,[72] but then it went on to hold the suit non-justiciable under the remaining factors. Specifically, the court found that there were no judicially manageable standards for weighing the "utility and benefit of the alleged nuisance against the harm caused,"[73] and that it should be left up to the political branches to determine which segment of society should bear the costs associated with global warming.[74]

Thus, by the beginning of 2009, every suit brought in federal court under a climate change nuisance theory had failed to reach consideration on the merits.[75] Moreover, many of the district court decisions granting the dismissal of these cases contained remarks indicating just how unlikely it was that such a suit could ever proceed.[76] Regulation of greenhouse gases, it seemed, would have to come from the political branches.[77]

III. SUCCESS IN THE COURTS OF APPEALS: THE TURN OF 2009

a. Connecticut v. American Electric Power Co.

This string of failures for environmentalists ended in late 2009 with the Second Circuit's holding in *Connecticut v. American Electric Power Co*.[78] There, the court not only reversed the district court's

70. 444 U.S. 996, 998-1001 (1979); *Kivalina*, 663 F. Supp. 2d at 872.

71. The three new factors in their entirety are: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" Goldwater v. Carter, 444 U.S. 996, 998 (Powell, J., concurring).

72. *Kivalina*, 663 F. Supp. 2d at 873 ("[N]one of the Defendants cite to any express provision of the Constitution or provision from which it can be inferred that the power to make the final determination regarding air pollution or global warming has been vested in either the executive or legislative branch of the government.").

73. *Id.* at 874.

74. *Id.* at 876.

75. *See* discussion *supra* Part II.

76. *See, e.g.,* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d at 271 n.6 ("[B]ecause the issue of Plaintiffs' standing is so intertwined with the merits and because the federal courts lack jurisdiction over *this patently political question*, I do not address the question of Plaintiffs' standing." (emphasis added)).

77. This was not so unlikely a thought in early 2009. With Barack Obama as President and a large Democratic majority in both houses of Congress, climate change legislation seemed imminent.

78. 582 F.3d 309 (2d Cir. 2009).

holding that the suit was non-justiciable under the political question doctrine,[79] but went on to analyze and reject every other possible ground that could support a motion to dismiss, including lack of standing, failure to state a common law nuisance claim, and displacement by federal law.[80] In other words, the court rejected every argument that had previously been advanced by a defendant in a climate change nuisance suit,[81] and ensured that the case would be heard on the merits. Given the significance of this holding,[82] it is worth spending a moment on the *AEP* court's resolution of the justiciability doctrines that had proven such a stumbling block in earlier suits.

i. The Political Question Doctrine

The first section of the opinion is devoted to an extended analysis of the political question doctrine, in which the court applied all six of the *Baker* factors discussed above,[83] and found that none presented a bar to the plaintiffs' suit.[84] Under the first factor, which asks whether the issue being litigated has been textually committed to a coordinate branch, the court rejected defendants' argument that the general language of the Commerce Clause could be construed as a commitment to Congress of the sole power to regulate carbon emissions.[85] The court similarly rejected the notion that a suit brought by "domestic plaintiffs against domestic companies for domestic conduct" could implicate the executive's power to conduct foreign policy.[86] Thus, the first *Baker* factor produced no bar to suit.[87] The court found defendants' arguments under the second factor, which asks whether there are judicially manageable standards for resolving the case, equally unavailing.[88] The court observed that "federal courts have successfully adjudicated complex common law public nuisance cases for over a century,"[89] and that the Restatement (Second) of Torts has proven a more than adequate guide in

79. *Id.* at 332.

80. See *id.* at 392 for a summary of the court's holdings.

81. *See* discussion *supra* Part II.

82. This holding was especially significant given that it represented the first time that a circuit court had weighed in on whether such a suit was justiciable.

83. *See supra* text accompanying note 35.

84. *AEP*, 582 F.3d at 321-32.

85. *Id.* at 324.

86. *Id.* at 325.

87. *Id.*

88. *Id.* at 329 ("[W]e do not agree that there are no judicially manageable standards for resolving this case.").

89. *Id.* at 326.

fashioning remedies.[90]

The court then devoted considerable attention to the third factor, which asks whether the case can be decided without an initial policy determination better left to the political branches, because it was this factor that the district court relied on in granting the motion to dismiss.[91] The court dismissed the defendants' argument that a refusal by the political branches to introduce a regulatory scheme constituted a policy decision that bound the courts.[92] In fact, the very reason for the existence of the federal common law nuisance cause of action is to fill the gaps left in regulatory statutes.[93] Because courts need not wait for the political branches to provide a statutory remedy to plaintiffs harmed by greenhouse gas emissions, the third factor does not present a bar.[94]

Finally, the court dealt with the fourth through sixth factors in summary fashion. All of these factors essentially ask whether the court's decision might contravene the general policy set by the political branches.[95] Here the court relied on defendants' own brief, which in various places refers to differing and often contradictory official policies,[96] to find that there is as yet no clear national policy set by the political branches on greenhouse gas emissions.[97] In fact, the weight of the evidence seems to point to an emerging consensus in favor of reducing emissions, which plaintiffs' suit would serve to support.[98]

ii. Standing

Although the district court did not consider the question of standing, the Second Circuit devoted considerable effort to establishing that each plaintiff had standing to sue.[99] The court held

90. *Id.* at 327-28.

91. *Id.* at 330.

92. *Id.* at 331.

93. *Id.* at 330.

94. *Id.* at 330-31.

95. *Id.* at 331.

96. *Id.* ("At one point in their briefs, Defendants acknowledge that this country's official policy and Congress's strategy is to reduce the generation of greenhouse gasses. Elsewhere, they point to a policy of research as a prelude to formulating a coordinated national policy. They also assert that U.S. policy is '*not* to engage in unilateral reduction of domestic emissions . . . . '").

97. *Id.* at 331-32.

98. *See id.* at 332 (holding that although there is no "unified policy on greenhouse gas emissions" the enactment of some legislation addressing these issues suggests a growing concern within Congress).

99. The court of appeals justified its discussion of standing by reference to the Supreme Court's holding that "when a lower court dismisses a case without deciding whether standing exists and the basis for the dismissal was found to be error, the

that plaintiffs had standing both as property owners ("proprietors") and in their quasi-sovereign capacity of protectors of the well-being of their citizens (*parens patriae* standing).[100]

The court held that plaintiffs as proprietors were able to satisfy the general test for standing articulated by the Supreme Court in *Lujan v. Defenders of Wildlife*,[101] under which a plaintiff must show injury, causation and redressability.[102] The court held that at least some of the plaintiffs had sufficiently alleged current injury,[103] and that the future injury alleged by the remaining plaintiffs was sufficiently "imminent" to meet the requirement.[104]

Under the causation prong, the court held that the injury is "fairly traceable" to the carbon dioxide produced by defendants, even though defendants are only alleged to produce two and a half percent of worldwide man-made carbon emissions.[105] The court noted that under accepted nuisance law, a plaintiff need not allege that the particular particles released by defendants caused his or her specific injury,[106] rather "a plaintiff 'must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged' . . . . In this way a plaintiff demonstrates that a particular defendant's discharge has affected or has the potential to

Court has an obligation *sua sponte* to assure itself that the plaintiffs have Article III standing before delving into the merits." *Id.* at 333 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180 (2000)). The court's discussion of standing is much more extensive than is apparent from the discussion herein, but much of this is irrelevant for purposes of this Note.

100. *Id.* at 334.

101. 504 U.S. 555 (1992).

102. *Id.* at 560-61. The full *Lujan* test, as presented by the court in *AEP*, requires that:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of the injury has to be "fairly trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

AEP, 582 F.3d at 339 (quoting *Lujan*, 504 U.S. at 560-61).

103. *Id.* at 342. In its analysis, the court only details the injury alleged by California, which interestingly exactly parallels the injury that the state had unsuccessfully alleged in *California v. General Motors Corp. See* California v. Gen. Motors. Corp., No. C06-05755 (MJJ), 2007 WL 2726871, slip op at 1 (N.D. Cal. Sept. 17, 2007).

104. *AEP,* 582 F.3d at 343 (asserting that the imminence question does not turn on how soon the prospective injury will occur, but how certain it is it will occur.)

105. *Id.* at 347.

106. *Id.* at 346-47.

affect his interests."[107]

Under the redressability prong, the court rejected defendants' argument that because greenhouse gas emission is a worldwide phenomenon, any reduction in their emissions is unlikely to redress plaintiff's injury.[108] The court noted that the relevant question is not whether capping defendants' emissions would *reverse* the climate change affecting the plaintiffs, but whether capping it would *reduce* climate change. Here, the court held, plaintiffs have alleged that it would, and thus they have standing.[109]

The court also held that the states had *parens patriae* standing to sue on behalf of their citizens.[110] The court arrived at this conclusion by applying the so-called *Snapp*[111] test, which requires that a state: (1) "articulate an interest apart from the interest of private parties"; (2) "must express a quasi-sovereign interest"; and (3) have "alleged injury to a sufficiently substantial segment of its population."[112] If all of these elements are met, then a state has Constitutional standing to bring suit.[113] With little application to

107. *Id.* at 347 (quoting Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 161 (4th Cir. 2000).

108. *Id.* at 348-49.

109. *Id.* The court relies heavily on Massachusetts v. EPA, 549 U.S. 497 (2007), in this part of its analysis. In that case, the Supreme Court heard a suit against the EPA, in which plaintiffs sought to force the agency to regulate carbon dioxide emissions. Standing was, like here, premised on the damages caused by climate change, which in turn was caused by greenhouse gas emissions. *Massachusetts v. EPA*, 549 U.S. at 498-500. The Court held that the redressability prong was met, even though any domestic reduction in greenhouse gasses might be more than made up for by increased emissions in foreign nations like China and India. So long as an injunction would reduce the injury-causing emission, it redresses the injury. *Id.*

110. *AEP*, 582 F.3d at 338. *Parens Patriae* is an ancient common law concept that flows from the right of a sovereign to vindicate the rights of its subjects. In a case involving a suit between the states of Missouri and Illinois, the Supreme court provided this explanation for the continuing existence of the doctrine:

> But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering.

Missouri v. Illinois, 180 U.S. 208, 241 (1901).

111. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982).

112. *AEP*, 582 F.3d at 335-36. This test has been used less in modern times than when it was first articulated, because most instances of *parens patriae* standing have been justified by reference to a specific statute, thus making the *Snapp* test unnecessary. *Id.* at 336.

113. *Id.*

specific facts, the court announced that the plaintiff states had satisfied the elements.[114]

iii. Failure to State a Common Law Nuisance Claim

Although the district court had addressed the question of whether the plaintiffs had failed to state a claim under the federal common law of nuisance, the court of appeals decided to address it "[i]n the interest of judicial economy."[115] The court began by finding that the most commonly accepted standard in the federal courts for determining what counts as a nuisance sufficient to give rise to suit, was simply that contained in the Restatement (Second) of Torts.[116] The court looked specifically to §821B(2), which describes three typical public nuisance situations, two of which the court held resembled the situation alleged by the plaintiffs.[117] Finally, the court easily disposed of defendants' arguments that "constitutional necessity" limits the reach of a nuisance clams to disputes between states and that common law nuisance should only be extended as far as would have been justified at the time of the nation's founding.[118]

iv. Displacement

The court finally turned its attention to the question of whether current federal statutes or regulations displace the nuisance suit brought by the states.[119] This analysis was necessary because the states brought their suit under federal common law.[120] Federal common law is a limited body of law that federal courts rely on to "effectuate federal interests embodied either in the Constitution or

114. *Id*. at 339.

115. *Id.* at 349.

116. *Id.* at 351-52. Restatement (Second) of Torts § 821B(1) defines public nuisance as that which creates an "unreasonable interference with a right common to the general public."

117. § 821B(2) reads:

> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent and long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B(2). The court found that both §821B(2)(a) and (c) matched the plaintiff's complaint.

118. *AEP*, 582 F.3d at 353-57.

119. *Id.* at 371.

120. *Id.* at 314.

an Act of Congress" in the absence of a statute that directly deals with the issue.[121] One field in which courts have had to make extensive use of federal common law is in the resolution of disputes between states.[122] This has been especially common in situations in which one state or its citizens emit a pollutant that has a negative effect on another state or its citizens.[123] In these cases, the courts have consistently held that states have a quasi-sovereign interest in protecting their citizens from public nuisances, and that even when no statute affords a state a particular remedy, the federal courts must provide a venue for states to seek abatement.[124] The aggregate of the remedies fashioned by the courts make up "what may not improperly be called interstate common law."[125]

Despite the clear necessity of federal common law, the courts have long recognized that it should only be resorted to in the very rare circumstance that a court is compelled to decide a federal question for which Congress has provided no guidance.[126] The

121. City of Milwaukee v. Illinois, 451 U.S. 304, 334-35 (1981) (Blackmun, J., dissenting). Now that generations of law students have been raised on the Supreme Court's (seemingly) clear statement in *Erie Railroad v. Tomkins* that "[t]here is no federal general common law," any reference to federal common law is at once suspect. 304 U.S. 64, 78 (1938). Yet, federal common law in some form has continued to exist since *Erie*, and will continue to exist for the foreseeable future. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 365-66 (5th ed. 2007). Aside from the use of federal common law to resolve disputes between the states, which is constitutionally delegated to the Supreme Court, Professor Chemerinsky identifies two main situations in which the federal courts still rely on common law: when federal rules are needed to protect uniquely federal interests that cannot be left to the state courts, and when the Court moves beyond the text of a statute to infer provisions that would help effectuate Congress's intent. *Id.*

122. *See* Nebraska v. Wyoming, 325 U.S. 589 (1945); Kansas v. Colorado 206 U.S. 46, 95-98 (1907) (both using federal common law to apportion water rights between states); Cissna v. Tennessee, 246 U.S. 289 (1918) (using federal common law to resolve a border dispute between two states).

123. *See* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 200 U.S. 496 (1906); New Jersey v. City of New York, 283 U.S. 473 (1931); New York v. New Jersey, 256 U.S. 296 (1921).

124. *See Tennessee Copper*, 206 U.S. at 237 ("When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.").

125. Kansas v. Colorado, 206 U.S. 46, 98 (1907).

126. City of Milwaukee v. Illinois, 451 U.S. 304, 313-14 (1981) ("We have always recognized that federal common law is 'subject to the paramount authority of Congress.' It is resorted to '[i]n absence of an applicable Act of Congress,' and because the Court is compelled to consider federal questions 'which cannot be answered from federal statutes alone.'" (citations omitted)); Committee for Consideration of Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976) (noting that federal common law is a "necessary expedient" to be used only when no statute exists). *See*

moment "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."[127] This process of a statute preempting federal common law is known as "displacement."[128]

The court in *AEP* recognized that the two leading cases on displacement of nuisance suits are *Illinois v. City of Milwaukee*[129] ("*Milwaukee I*") and *City of Milwaukee v. Illinois*[130] ("*Milwaukee II*").[131] These cases dealt with the question of whether the Federal Water Pollution Act and similar acts of Congress displaced federal common law nuisance suits arising out of water pollution.[132] In *Milwaukee I*, the state of Illinois brought suit against four cities and several utilities in Wisconsin for discharging 200 million gallons of sewage and other waste into Lake Michigan, which borders Illinois.[133] Illinois brought suit under federal nuisance common law and requested that the Court fashion a remedy to end or limit the public nuisance.[134] The Court held that such a suit was not displaced by the many federal statutes touching on interstate water pollution,[135] and that the suit could go forward in district court.[136] In

also The Rules of Decision Act, 28 U.S.C. §1652 (2006), a statute which was passed as a part of the original Judiciary Act of 1789 and by its terms seems to leave no place for federal common law. The statute dictates that: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply." This would seem to suggest that federal courts must always use state law to resolve disputes when a federal source is unavailable. Of course, relying on one state's law to resolve a dispute between states would defeat the purpose of assigning such suits to the federal courts, and the Supreme Court has wisely ignored this statute when adjudicating interstate disputes.

127. City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981).

128. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 371 n.37 (2d Cir. 2009).

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

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

131. *AEP*, 582 F.3d at 371. The court in *AEP* is not the only one to recognize the preeminent place of the *Milwaukee* line in displacement analysis. *See United States v. Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) ("With respect to non-maritime federal common law, the Court has recently articulated a strict test for determining the preemptive effect of a federal statute.").

132. *Milwaukee I*, 406 U.S. at 102; *Milwaukee II*, 451 U.S. at 317-18.

133. *Milwaukee I*, 406 U.S. at 93.

134. *Id.*

135. *Id.* at 104 ("The application of federal common law to abate a public nuisance in interstate or navigable commerce is not inconsistent with the Water Pollution Control Act.").

136. *Milwaukee I* was in the unusual position of having been heard by the Supreme Court before a district court. Illinois had sought to invoke the Court's original jurisdiction, claiming that as a suit between states, Article III, Section 2, Clause 2 of the Constitution dictated that the case should go directly to the Supreme Court. *Id.* at

a particularly perceptive moment, however, the Court added that

> it may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. 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.[137]

The new federal laws envisioned by the Court came almost immediately after it pronounced its judgment. In response to the inadequacies in the water pollution regulatory scheme that suits like *Milwaukee I* had revealed,[138] Congress passed the Federal Water Pollution Control Act Amendments of 1972 ("FWPCAA").[139] By 1981, the suit that the Supreme Court had remitted a decade earlier had worked its way back up,[140] and the Court was again called on to decide if the current state of the federal laws displaced Illinois' suit.[141] This time, the Court held that the suit was displaced and also provided a much more extensive treatment of the concept of displacement than it had theretofore given.[142]

The Court began by considering the purpose of the FWPCAA.[143] It found that "Congress's intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation."[144] As opposed to the variety of Acts that had merely "touched" state waters when the Court considered the suit a decade prior,[145] the Court was now confronted with a law that prohibited "[*e*]*very* point source discharge . . . unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals."[146] The Court surveyed a

93-94. When the Court denied that portion of Illinois's claim, it remitted the case "to an appropriate district court whose powers are adequate to resolve the issue." *Id.* at 108.

137. *Id.* at 107.

138. S. Rep. No. 92-414, at 7 (1971) (finding that "the Federal water pollution control program . . . has been inadequate in every vital respect.").

139. Pub. L. No. 92-500, 86 Stat. 816 (codified as 33 U.S.C. § 1351).

140. Both the district court and Court of Appeals for the Seventh Circuit had found that the new amendments to the Federal Water Pollution Control Act did not displace Illinois's suit, but disagreed over the appropriate remedies. *Milwaukee II*, 451 U.S. at 311-12.

141. *Id.* at 307-08.

142. *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 371 (2d Cir. 2009) ("The state of Illinois's suit against the City of Milwaukee resulted in the leading Supreme Court cases addressing the circumstances under which courts may find Congress has displaced the federal common law.").

143. *Milwaukee II*, 451 U.S. at 317.

144. *Id.* at 318.

145. *See id.* at 317.

146. *Id.* at 318.

number of congressional reports and statements by the bill's sponsors, all of which emphasized how comprehensive the FWPCAA was intended to be.[147]

The Court then moved from discussing the FWPCAA in general, to the provisions most relevant to Illinois's claims: those governing the limitations placed on effluents released by treatment plants.[148] The FWCPAA empowered the EPA (or any local agency designated by the EPA) to issue permits that would establish the specific effluent limitations on covered facilities.[149] Here, the treatment plants at the center of Illinois' suit had been issued permits by the Wisconsin Department of Natural Resources ("DNR"), which had been granted the authority to issue such permits by the EPA.[150] When the treatment plants failed to operate according to the terms of the permits, DNR brought an enforcement action in state court that resulted in a court order against the plants to compel compliance with the terms of the permits.[151] In the Court's view, this process clearly indicated that the regulations passed by Congress left no room for the federal judiciary to fashion remedies according to common law.[152] In other words, there was "no 'interstice' here to be filled by federal common law."[153]

Finally, the Court took care to note that just because more stringent standards than those adopted by Congress or the EPA are possible, it does not follow that it is the court's place to defy the policy judgments of those bodies and use federal common law to enforce stricter standards.[154] An interstice is not created by a looser standard than that which a plaintiff would have like to have seen adopted.[155] The question a court must answer is whether Congress has occupied an entire field with its regulations, not whether it has occupied it in a way that meets with the court's approval.[156]

The *Milwaukee II* decision thus identified several factors that a court must consider when determining if a federal statute or

147. *See id.* at 317-19.

148. *Id.* at 319.

149. *Milwaukee II*, 451 U.S. at 319-20.

150. *Id.* at 321-23.

151. *Id.* at 322.

152. *Id.* at 323.

153. *Id.*

154. *Id.* at 320.

155. *Id.* at 323-24.

156. *Id.* at 324. The court further explained this point by asking "what inadequacy in the treatment by Congress the courts below rectified through creation of federal common law. In imposing stricter effluent limitations the District Court was not 'filling a gap' in the regulatory scheme, it was simply providing a different regulatory scheme." *Id.* at 131 n.18.

regulation displaces a common law cause of action. To summarize the preceding, the court should inquire as to whether the new enactment directly addresses the issue, whether it regulates every instance of the activity, and whether those who adopted the statute or regulation intended for it to be comprehensive.[157] In making this inquiry, a court should not be led astray by the possibility of stricter regulations than those adopted by Congress or an agency; it should only ask whether the regulations that do exist occupy the entire field.[158] The court in *AEP* reduced these factors to the single question of whether a federal statute or regulation "speaks directly" to a "particular issue" that would otherwise be settled by common law.[159] Thus, even what appears to be a comprehensive regulatory scheme may still have gaps that do not address a particular plaintiff's injury.[160] It is the court's job to determine whether a gap is one "which federal common law can appropriately fill," or whether the use of federal common law would merely "supply a different approach than the one Congress has mandated."[161]

The court applied this test to the current state of regulations under the CAA and other provisions and found that none displaced this field of federal common law.[162] With no other bars, the court held that the suit could proceed to the merits.[163]

b. Comer v. Murphy Oil USA

The court's analysis in *Comer* is not nearly as comprehensive as that provided *AEP*, and did not address the possibility of

157. *See supra* text accompanying notes 143-53.

158. *See supra* text accompanying notes 154-56.

159. *AEP*, 582 F.3d at 374. In framing the issue this way, the court followed the lead of both the Supreme Court and the Second Circuit itself. In *County of Oneida v. Oneida Indian Nation of N.Y. State*, the Supreme Court restated the inquiry it had undertaken in *Milwaukee II* as the question of "whether the federal statute '[speaks] *directly* to [the] question' otherwise answered by federal common law. As we stated in *Milwaukee II*, federal common law is used as a 'necessary expedient' when Congress has not 'spoken to a *particular* issue.'" *Id.* (quoting County of Oneida v. Oneida Indian Nation, of N.Y. State, 470 U.S. 226, 236-37 (1985) (citations omitted)). In *Matter of Oswego Barge Corp.*, the Second Circuit interpreted *Milwaukee II* as creating a

> strict test for determining the presumptive effect of a federal statute. Instead of inquiring whether "Congress ha[s] affirmatively proscribed the use of federal common law," we are to conclude that federal common law has been preempted as to every question to which the legislative scheme "spoke directly," and every problem that Congress has "addressed."

664 F.2d 327, 335 (2d Cir. 1981) (quoting *Milwaukee II*, 451 U.S. at 315 (internal citations omitted)).

160. *AEP*, 582 F.3d at 374.

161. *Id.*

162. *Id.* at 315, 392

163. *Id.*

displacement,[164] so the discussion of this case need not detain us long. The court began by holding that plaintiffs satisfied both state and federal standing requirements.[165] The injury and redressability prongs did not present as much of an issue as they had in *AEP* because the plaintiffs were requesting monetary damages for "actual, concrete injury" to their homes and property.[166] In addressing the causation prong, the court relied heavily on the Supreme Court's reasoning in *Massachusetts v. EPA*.[167] In that case, the Court had accepted a very similar theory of causation: greenhouse gases cause climate change, which causes damage to property.[168] The court held that because the line of causation was essentially the same, the plaintiffs here had standing.[169]

The court then turned to a political question doctrine analysis, which had formed the heart of the district court's decision to dismiss.[170] Here, the court held that it did not need to engage in an application of the *Baker* factors because the case did not present the types of concerns normally associated with the political question doctrine.[171] The court gave three reasons for this judgment: first, claims under state law are almost never non-justiciable due to the political question doctrine;[172] second, common law tort claims rarely implicate the doctrine;[173] third, suits requesting money damages are much less likely to be non-justiciable than those requesting injunctive relief.[174]

With standing established and no bar from the political question doctrine, the court ruled that the suit could go forward.[175]

IV. THE PROPOSED EPA REGULATIONS

We arrive now to the question of whether the holdings of *AEP* and *Comer* will be displaced by the actions of the political branches. This section will focus on the effect of new rules proposed by the

164. No discussion of displacement was necessary because the plaintiffs were not suing under federal common law.

165. Comer v. Murphy Oil USA, 585 F.3d 855, 860 (5th Cir. 2009). The discussion of standing under state law was necessary because plaintiffs brought the action under Mississippi tort law and were in federal court due to diversity. *Id.* at 859-60.

166. *See id.* at 863.

167. *Id.* at 865-67.

168. *See id.* at 865.

169. *Id.* at 867.

170. *See id.* at 860 n.2.

171. *Id.* at 875.

172. *Id.* at 873.

173. *Id.* at 873-74.

174. *Id.* at 874.

175. *Id.* at 879-80.

EPA. A legislatively-produced regulatory scheme might also displace climate change torts, and in fact the current administration has indicated that it would prefer that a comprehensive scheme come from Congress rather than an unelected agency.[176] It is not clear, however, when such a scheme would be passed. Thus, rather than speculate on possible bills, this Note will focus on the regulations proposed by the EPA, which, for the reasons indicated below, are unlikely to displace climate change torts.[177]

a. The Relevant EPA Regulations

The EPA's authority to regulate the emission of greenhouse gases ("GHGs") derives from the Clean Air Act ("CAA"). Under the CAA, the EPA Administrator is instructed to determine which "air pollutant[s] . . . in his judgment cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."[178] When such a determination is made, the Administrator must then promulgate "national ambient air quality standards"[179] that each state is required to implement within its borders.[180] For many years, the EPA had only made determinations and set national ambient air quality standards for six pollutants, none of which were targeted because of their potential for causing climate change.[181] Moreover, the EPA had long asserted that the CAA did not grant it the authority to regulate GHG emissions, and that it would decline to do so even if it were so empowered.[182]

A 2007 decision by the Supreme Court changed all of this. Unhappy with the EPA's stance on GHGs, and dissatisfied with its interpretation of the CAA, a group of states, local governments and

176. John M. Broder, *E.P.A. Delays Plants' Pollution Permits*, N.Y. TIMES, Mar. 29, 2010 ("President Obama and members of his cabinet have repeatedly said that they would prefer that Congress act to address climate change through comprehensive energy legislation. But the administration is moving forward with a regulatory plan in case Congress continues to be deadlocked on the issue.").

177. It seems appropriate at this point to recall the closing words of the Court in *Milwaukee I*, and to remember that "it may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." Illinois v. City of Milwaukee, 406 U.S. 91, 107 (1972).

178. 42 U.S.C. § 7408(a)(1)(A) (2006).

179. *Id.* § 7409(a).

180. *Id.* § 7407.

181. These pollutants are: sulfur dioxide, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead. *See* 40 C.F.R. §§ 50.4 to 50.16.

182. *See* Control of Emissions from New Highway Vehicles and Engines 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003) (in which the EPA "concludes that it cannot and should not regulate GHG emissions from U.S. motor vehicles under the CAA. Based on a thorough review of the CAA, its legislative history, other congressional action and Supreme Court precedent, EPA believes that the CAA does not authorize regulation to address global climate change.").

private organizations brought suit to force the EPA to regulate GHG emissions from motor vehicles.[183] The Court held that not only did the EPA have the authority to regulate GHGs, but that its stated reasons for not doing so were irrational.[184] It ordered the EPA to reconsider whether the terms of the CAA required it to regulate GHGs.[185]

In April of 2009, the EPA responded by announcing that it planned to officially determine that GHGs do pose a threat to public health and issued what is known as an Endangerment Finding.[186] Once official, this determination would allow the EPA to place restrictions on the GHGs emitted by vehicle tailpipes in a rule that the EPA refers to as the "light-duty vehicle rule."[187] This determination would also, however, trigger other provisions of the CAA which would *require* the EPA to regulate "major stationary sources" of GHGs.[188] A major stationary source is statutorily defined as one that emits more than 100 or 250 (depending on the source) tons per year ("tpy") of a given air pollutant.[189] Thus, in order for the EPA to set emissions standards for motor vehicles, it would also be statutorily required to begin issuing permits and monitoring all buildings that produce GHGs above a certain threshold mandated by the CAA.

This created a problem for the agency. Under current rules, the EPA oversees about 15,000 stationary sources and processes applications for roughly 300 new sources a year.[190] If it were required to begin issuing permits to all stationary sources producing more than 100 or 250 tpy of GHGs, the number of covered facilities would balloon to over 6 million, and the EPA would receive requests for

183. Massachusetts v. EPA, 549 U.S. 497, 533-35 (2007).

184. *Id.* at 534-35.

185. *Id.* at 535.

186. John M. Broder, *E.P.A. Clears Way for Greenhouse Gas Rules*, N.Y. TIMES, Apr. 17, 2009. The Endangerment Finding would cover six new gases, collectively termed greenhouse gases ("GHGs"). These gases are: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. EPA, *Fact Sheet – Proposed Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, http://www.epa.gov/nsr/fs20090930action.html (last visited Apr. 4, 2010) [hereinafter *Fact Sheet*].

187. *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, EPA, http://epa.gov/climatechange/endangerment.html (last visited Apr. 4, 2010).

188. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,294 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pt. 51, 52, 70, and 71).

189. 40 C.F.R. 52.21(b)(1); *see also* 74 Fed. Reg. at 55,297.

190. 74 Fed. Reg. at 55,295.

40,000 new permits a year.[191] To deal with this clearly unacceptable outcome, the EPA proposed the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule ("Tailoring Rule") on September 28, 2009.[192] The purpose of this rule is to raise the emission threshold from the unmanageable 100 or 250 tpy, to 10,000 or 25,000 tpy, which would reduce the number of covered facilities from 6 million to 13,600, with an expected 400 additional applications every year.[193]

Although this rule addresses the initial problem created by the Endangerment Finding, it creates an additional one in that it in effect ignores the statutory command contained within the CAA to regulate all stationary sources that emit more that 100 or 250 typ of covered air pollutants. Agencies, or course, are normally not permitted to ignore the terms of statutes that they are assigned to administer. The EPA's solution to this problem has important consequences for our displacement analysis, and it is worth taking a moment to understand it.

To justify the Tailoring Rule, the EPA cites to the doctrines known as "absurd results" and "administrative necessity."[194] It claims that these little-used doctrines allow agencies to ignore the text of their enabling statutes in very limited situations.[195] The EPA argues that a literal application of the statute would be absurd, because it would create tensions with other provisions of the CAA and would undermine Congress's clear intent.[196] It also argues that administrative necessity compels this rule because without it the agency would be unable to perform its statutorily defined function.[197] The doctrine of administrative necessity allows the EPA to phase in the requirements slowly and streamline their application.[198]

These doctrines frame the EPA's entire presentation of the

191. *Id.*

192. 74 Fed. Reg. 55,292.

193. *Id.* at 55,330-31. As for those sources not covered by the Tailoring Rule, the EPA says it plans to "use regulatory and/or non-regulatory tools for reducing emissions from smaller GHG sources because we believe that these tools will likely result in more efficient and cost-effective regulation than would case-by-case permitting." *Id.* at 55,340.

194. *Id.* at 55,303.

195. *Id.*

196. *Id.* The EPA argues, for example, that the sudden influx of new permit applications would make it impossible for it to meet the various time limitations placed on it to process applications. It would also undermine Congress's intent not to hamper economic process, in that industry would have to wait years to make build new stationary sources or to expand existing covered facilities. *Id.* at 55,303-04, 08-12.

197. *Id.* at 55,311-12.

198. *Id.*

Tailoring Rule.[199] Nowhere in the extensive preamble to the rule or in the EPA's other official pronouncements does the agency argue that regulating stationary sources of GHG is necessary to prevent environmental degradation or to protect the public health.[200] One might expect a rule initiating the regulation of carbon dioxide and other greenhouse gases to be couched in terms of environmental protection; instead, it is presented in terms of administrative efficiency.[201] In fact, the very name of the rule indicates that its focus is on granting regulatory relief, and not extending any new regulations to the nation's industries.

As of this writing, the Endangerment Finding and the accompanying Tailoring Rule are the only GHG regulations officially proposed by the federal government. If there is to be displacement of the climate change tort suit it is to these regulations we must look.

b. The EPA Regulations Will Not Displace Climate Change Torts

This Note earlier identified the factors a court will consider when determining whether a federal common law cause of action will be displaced.[202] From the seminal case *Milwaukee II*, the important questions were: Whether an enactment directly addresses the issue; Whether it regulates every instance of the activity; and Whether those who adopted the statute or regulation intended for it to be comprehensive.[203] The court in *AEP* boiled this approach down to the single question of whether a federal statute or regulation "speaks directly" to a "particular issue" that would otherwise be settled by common law.[204] As will be demonstrated, both of these approaches lead to the conclusion that climate change nuisance suits will not be

199. *See, e.g., id.* at 55,330 ("The rationale for this level is to reduce the administrative burden to the point where it is no longer administratively impossible to implement the PSD program."); *id.* at 55,331 ("We believe that any threshold lower than 25,000 tpy CO[2], would create undue administrative burdens.").

200. One section of the preamble, entitled *What Are the Costs of the Proposed Rule for Society?*, does discuss the impact of the rule on the environment. *Id.* at 55,334. However, the section reads as a justification for not regulating small sources, rather than a justification for regulating at all. *Id.* at 55,340 ("Thus, while potential benefits would be foregone by excluding smaller sources from the permitting programs, these benefits are likely to be small.").

201. *See, e.g.*, *id.* at 55,339 ("This proposed rulemaking does not impose economic burdens or costs on any sources or permitting authorities, but should be viewed as regulatory relief for smaller GHG emission sources and for permitting authorities. . . . Since this rule does not impose regulatory requirements but rather lessens the regulatory burden of the CAA requirements to smaller sources of rule.").

202. *See supra* Part III.A.iii

203. *See supra* notes 157-58 and accompanying text.

204. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 387 (2d Cir. 2009).

displaced by the proposed EPA regulations.

To begin with the first of the *Milwaukee II* factors, whether the EPA regulations directly address the issue in climate change torts, the answer heavily depends on how broadly the issue is framed. If the issue is understood as "the emission of GHGs which contribute to climate change," then clearly the EPA regulations have not directly addressed this issue. In fact, the purpose of the Tailoring Rule is primarily to *restrict* the scope of the EPA's finding that GHGs are a danger to public health, not to develop a response to it.[205] As a result of the proposed rule, only a small percentage of the total number of emitters would be required to seek permits—while the vast majority would be left to their own devices.[206] If, however, the issue is more restrictively defined as the emission of GHGs by large-scale emitters, then the question is a much closer one. Stationary sources that produce GHGs over a certain threshold will be required to go through a permitting process, and presumably one very similar to that which the Court in *Milwaukee II* detailed in its discussion of the amendments to the FWPCA.[207] Thus the regulations could be interpreted to have addressed the particular issue in those *AEP* and *Comer*.

Perhaps the way out of this dilemma is to look to *AEP*'s framing of the question, which is whether a plaintiff's *particular issue* has been directly addressed.[208] Both *AEP* and *Comer* solely targeted very large GHG emitters; in fact, the plaintiffs in *AEP* specifically targeted the biggest emitters in the domestic power industry.[209] Thus a court might define the issue in *AEP* or *Comer* in the more restrictive sense detailed above, that is, as GHG emissions by large-scale emitters. If this were the case, the Tailoring Rule might be said to address the particular issue complained of by the plaintiffs. In other words, the EPA could be seen to have introduced a comprehensive regulation to deal with the contributions of large-scale emitters of GHGs to climate change.

This would leave open the counter-intuitive possibility, however, that the largest emitters of GHGs would be immune to private suits,

205. *See Fact Sheet*, *supra* note 186 ("The proposed thresholds would 'tailor' the permit programs to limit which facilities would be required to obtain NSR and title V permits . . . .").

206. *See* 74 Fed. Reg. 55,292, 55,333.

207. *See Milwaukee II*, 451 U.S. at 320-22 (describing the extensive procedures required to obtain a permit under the FWPCA and the consequences for breach of the terms of the permit); *see also* Rosemary Lyster & Eric Coonan, *The Precautionary Principle: A Thrill Ride on the Roller Coaster of Energy & Climate Law*, 18 REV. ENV. COMMUNITY & INT'L ENVTL. L. 38, 42 (2009).

208. *AEP*, 582 F.3d at 374.

209. *Id.* at 314.

while suits against smaller emitters would not be displaced. Luckily, this first factor is not all that a court has to consider. The other two factors so clearly counsel against displacement that it would be difficult to imagine a court following this line of reasoning.

The second *Milwaukee II* factor, whether every instance of the offending activity has been regulated, clearly points to a finding of non-displacement. Under the proposed EPA rules, the vast majority of GHG sources will remain completely unregulated.[210] One of the principal facts that the court in *Milwaukee II* relied on in its finding of displacement was that "[*e*]*very* point discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals."[211] Here, the number of emitters required to apply for permits and submit to the "administrative apparatus established by Congress" will number in the tens of thousands, while unregulated emitters will number in the millions.

It would be a different matter if the EPA (or Congress) had made a policy judgment to exclude small-scale emitters from regulation because their contributions to the aggregate of GHGs were insignificant. In such a case, one could argue that allowing some unrestricted emission of GHGs was part of the general regulatory scheme established by the agency.[212] But here, the EPA chose to limit the reach of its regulations solely to avoid the administrative difficulties associated with a more ambitious scheme.[213] Non-coverage due to lack of resources is much more like a "gap" in the regulatory scheme than it is an intentional decision to withhold regulation.

The final *Milwaukee II* factor, whether the scheme was intended to be comprehensive, undoubtedly points against displacement. In *Milwaukee II*, the Court made much of the extensive legislative history behind the amendments to the FWPCA, which plainly indicated that Congress intended the act to be all-encompassing.[214] As indicated in the discussion of the preceding two factors, the Tailoring Rule was intended to do the opposite; that is, prevent a comprehensiveness that would have otherwise gone into effect after the Endangerment Finding. It was specifically designed to limit regulation to a specific subset of GHG emissions and not to occupy the entire field of possible GHG limitations.

210. *See supra* text accompanying notes 192-93.

211. *Milwaukee II*, 451 U.S. at 318.

212. In the words of the court in *AEP*, the court would be applying a different approach rather than filling a gap in the law. *AEP*, 582 F.3d at 374.

213. *See supra* text accompanying notes 194-201.

214. *See Milwaukee II*, 451 U.S. at 317-18 (citing the comments of several legislators, all of whom emphasized the "comprehensive" nature of the legislation).

Thus, an application of the factors identified in *Milwaukee II*, and referenced by the court in *AEP*, indicates that the proposed EPA rules will not displace climate change tort suits.

V. CONCLUSION

This Note has demonstrated both the importance of the holdings in *AEP* and *Comer*, and the strong likelihood that the proposed EPA rules will not displace the climate change tort suits that they allow. If any displacement would occur, it would only be against suits targeting those large emitters that the EPA will require to apply for permits, and not against the millions of small-scale emitters exempted from the rule. This partial displacement possibility, though, would serve to immunize the emitters of what the EPA estimates to be sixty-eight percent of the nation's GHGs,[215] while leaving small-scale emitters open to ruinous litigation.

Whatever the final word is on the effects of the proposed EPA rule, it is becoming increasing clear that some action from the legislative branch is sorely necessary. Even opponents to GHG regulation must now recognize that in the absence of a comprehensive federal scheme, individuals and entities will be able to bring suit against GHG emitters under either federal or state law. Clearly the best result for all would be a carefully-considered regulatory system that balances the interests of industry and those of the public as a whole. Despite the visceral appeal of taking on the biggest carbon producers in an openly adversarial forum, climate change tort suits cannot provide the national uniformity that the present situation demands. Instead, they will lead to unpredictable damages awards and inconsistent forms of injunctive relief. A private right of action against greenhouse gas emitters should only exist as a supplement to federal regulation, not as a replacement.

215. 74 Fed. Reg. at 55,333.