NOTES

AMERICAN ELECTRIC POWER V. CONNECTICUT: DISASTER AVERTED BY DISPLACING THE FEDERAL COMMON LAW OF NUISANCE

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I. INTRODUCTION

In 1938, the Supreme Court in *Erie Railroad Co. v. Tompkins*[1] signaled what many believed would be the death knell for federal common law.[2] The death of the federal common law did not come to fruition in many areas, specifically in environmental protection where "federal courts may fill in statutory interstices, and, if necessary, even fashion federal law."[3] The recent Supreme Court decision of *American Electric Power Co. v. Connecticut* (*AEP*) brought the continued viability of common law public nuisance in the context of environmental protection to the forefront of American jurisprudence.[4] In *AEP*, eight states, three land trusts, and New York City sued five of the largest power generating companies in America.[5] The defendants combined to produce over ten percent of all the greenhouse gases emitted in the United States, and the plaintiffs claimed that the greenhouse gas emissions constituted a public nuisance under federal common law and sought an injunction.[6]

Prior to the Supreme Court's decision, the Second Circuit examined the existing federal legislation in air pollution and the existing EPA regulations of greenhouse gases and found that the federal common law of nuisance was not displaced.[7] The Second Circuit reasoned that even though greenhouse gas regulation fell under the ambit of the Clean Air Act (CAA), any common law

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[1] 304 U.S. 64 (1938). The Court feared the dangers of forum shopping and held that there is "no federal general common law." *Id.* at 74–75, 78.

[2] *See, e.g.*, Bruce Williamson, Note, Illinois v. City of Milwaukee*: What Price Federal Common Law?*, 4 HARV. J.L. & PUB. POL'Y 323, 323 (1981) ("[T]he Court's declaration [in *Erie*] doubtlessly signalled the death of general federal common law.").

[3] *See* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535 (2011) (citation omitted) (internal quotation marks omitted) (discussing the use of federal common law in environmental protection).

[4] *Id.*

[5] *Id.* at 2533–34. For a more complete summary of the facts, see the Second Circuit decision. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 316–20 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

[6] *Am. Elec.*, 131 S. Ct. at 2533–35.

[7] The doctrine of displacement concerns whether a federal statute supersedes federal common law. David Goetz, *Second Circuit Says CO_2 is a Nuisance*, 37 ECOLOGY L.Q. 683, 689 (2010) (citing *Am. Elec.*, 582 F.3d at 371); *see also Am. Elec.*, 582 F.3d at 371–81 (describing the prior displacement standard and the lack of legislation to displace the plaintiffs' greenhouse gas nuisance claim).

cause of action would not be displaced until the Environmental Protection Agency (EPA) began regulating and not just studying greenhouse gas emissions.[8]

The Supreme Court reversed the Second Circuit, holding that the CAA and the actions it authorizes the EPA to take displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel power plants.[9] The Court found that whether an agency actually regulates the greenhouse gases is irrelevant; instead, if "Congress delegated to the EPA the decision whether and how to regulate carbon-dioxide emissions from power plants, the delegation displaces federal common law."[10]

The effect of greenhouse gases on climate change is one of the most important issues facing today's society, and determining the proper response in our American tripartite system of government is essential.[11] Given the importance of greenhouse gas regulation, courts must understand when existing environmental regulation and legislation displaces federal nuisance law.

Traditionally, the common law of public nuisance was used as a means of regulating various environmental issues such as air, water, and hazardous waste pollution.[12] This standard began to change in the 1960s and 1970s as environmental concerns became a prominent national concern.[13] This expanded environmental

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[8] *See id.* at 379 ("We cannot say, therefore, that EPA's issuance of *proposed* findings suffices to regulate greenhouse gasses in a way that 'speaks directly' to Plaintiffs' existing remedies under the federal common law." (emphasis added)).

[9] *Am. Elec.*, 131 S. Ct. at 2537.

[10] *Id.* at 2538; *see also* discussion *infra* notes 54–61.

[11] *See* John Carey, *Global Warming*, BUS. WK., Aug. 16, 2004, at 60 (describing the general consensus amongst scientists, government, and businesses to act on climate change); *see also* Robert H. Cutting & Lawrence B. Cahoon, *The "Gift" That Keeps on Giving: Global Warming Meets the Common Law*, 10 VT. J. ENVTL. L. 109, 111 (2008) (noting the significant consensus in the scientific community that global warming is real; will likely cost trillions in health effects; threatens the loss of property, crops and species; and is catching the attention of "mainstream media and main street America"); Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. L. REV. 1659, 1674 (2009) ("Few would contest that climate change has become the most pressing environmental problem in the world.").

[12] *See* P. Leigh Bausinger, Note, *Welcome to the (Impenetrable) Jungle:* Massachusetts v. EPA, *The Clean Air Act and the Common Law of Public Nuisance*, 53 VILL. L. REV. 527, 534 (2008) (noting the traditional use of common law nuisance for environmental issues and its only recent application to the global warming context).

[13] *See* Peter Manus, *One Hundred Years of Green: A Legal Perspective on Three Twentieth Century Nature Philosophers*, 59 U. PITT. L. REV. 557, 628–43 (1998) (discussing the

concern resulted in a boom of environmental legislation and regulation.[14] With the implementation of environmental statutes, many traditional common law causes of action were displaced, especially at the federal level.[15]

How have all these environmental statutes affected regulation of greenhouse gases? Not much. Until last year, the Executive and Legislative Branches, for all intents and purposes, did not regulate greenhouse gas emissions.[16] Until very recently, there was also very limited use of common law nuisance in the area of climate change.[17] The recent litigation of these claims, however, has created very interesting questions regarding the ability to regulate greenhouse gas emissions under the current structure of the CAA, the continued existence of the federal common law of nuisance, and the need for Congress to adapt a comprehensive climate change bill.

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advocacy of Rachel Carson, beginning in 1960, that led to the passing of environmental legislation).

[14] *See generally* Clean Water Act (CWA), 33 U.S.C. §§ 1251–1387 (2006); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (2006); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992 (2006); Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671 (2006); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006).

[15] Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 952–54 (1999) (concluding that environmental statutes had diminished the use of traditional common law remedies through various other means of regulation as well as through displacement).

[16] The Supreme Court's decision in *Massachusetts v. EPA* forced the EPA to begin inquiry into regulation of greenhouse gases. 549 U.S. 497, 532–35 (2007). Prior to that, Congressional appropriations explicitly barring developing or implementing rules prevented the Clinton Administration from regulating greenhouse gases, and during the Bush Administration the EPA decided that it did not have the authority to promulgate greenhouse gas regulation under the CAA. *See* Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63, 70, 72 n.31 (2007). For a discussion of EPA regulations after *Massachusetts*, see *infra* notes 21–31 and accompanying text. The two main comprehensive legislative actions have all failed to pass. *See infra* discussion Part II.A.*2*.

[17] *See* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 2 (2003) (commenting that, until recently, the idea of climate change litigation "has been virtually ignored"). The Supreme Court decision in *Massachusetts*, which required the EPA to regulate greenhouse gases, has acted as the spring board for many of these common law nuisance claims. *See* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011); Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *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).

In Part II this Note summarizes the role each branch of government has played in the regulation of greenhouse gases, introduces the concept of federal common law and public nuisance, and discusses the doctrine of displacement of common law. Part III of this Note focuses on the Second Circuit and Supreme Court's decisions in *AEP*, first, by discussing the danger of the Second Circuit standard and, second, by analyzing the probable effects of the standard espoused by the Supreme Court. In Part IV this Note concludes that the only appropriate solution to the issue of climate change is through a comprehensive congressional statute and calls on the Legislative Branch to take such action.

II. BACKGROUND

A. RESPONSES TO GREENHOUSE GAS REGULATION

In order to examine the displacement standard set out in *AEP*, this Note now examines the steps each branch has taken in the regulation of greenhouse gas emissions.

1. Executive Branch: Agency Regulation of Air Pollution and Greenhouse Gases. Congress first created legislation involving air pollution with the Air Pollution Control Act of 1955.[18] This Act was very limited in scope and only provided funds for federal research in air pollution.[19] Congress then passed the CAA in 1970—later amended in 1977 and 1990—which maintains a comprehensive framework for the monitor and control of air pollution and vests the EPA with enforcement powers.[20] Prior to 2007, the CAA did not regulate carbon dioxide, nor did it categorize greenhouse gases as "air pollutants."[21] However, after

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[18] ENVTL. PROT. AGENCY, *History of the Clean Air Act: Introduction*, http://www.epa.gov/oar/caa/caa_history.html (last visited Jan. 21, 2012).

[19] *Id.*

[20] *See* 42 U.S.C. §§ 7401–7671 (2006). For a thorough examination of the 1990 Amendment, see generally Kristen Thall Peters, *The Clean Air Act and the Amendments of 1990*, 8 SANTA CLARA COMPUTER & HIGH TECH. L.J. 233 (1992).

[21] *See Massachusetts*, 549 U.S. at 512 (describing the EPA's recognition that Congress did not intend for the agency to regulate carbon dioxide because Congress chose not to propose carbon dioxide emission standards for cars in 1990, but chose instead to address local air pollutants rather than a substance that is "fairly consistent in its concentration throughout the *world's* atmosphere" (citation omitted) (internal quotation marks omitted)); *see also*

the ruling in *Massachusetts v. EPA*, which required the EPA to begin examining the effects of greenhouse gases and their potential endangerment to public health,[22] the EPA began to delve into the regulation of greenhouse gases. The EPA enacted its first rule to regulate greenhouse gases six weeks after the *Massachusetts* decision and required that certain sources that annually emit more than 25,000 tons of greenhouse gases must report those emissions to the EPA; the rule, however, did not require any regulation of greenhouse gases.[23] Further, on December 7, 2009, eight months after the *Massachusetts* decision, the EPA issued an engenderment finding under Section 202(a) of the CAA: Six "well-mixed greenhouse gases"[24] in the atmosphere threaten the public health and welfare of current and future generations and the combined emissions of these well-mixed greenhouse gases from new motor vehicles contribute to greenhouse gas pollution.[25]

Neither of these initiatives taken by the EPA immediately regulated greenhouse gas emissions.[26] On May 7, 2010, the EPA, along with the Department of Transportation's National Highway Traffic Safety Administration, finally published a rule that would reduce greenhouse gas emissions from light-duty vehicles.[27] The

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Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003) (noting the reasons for the EPA decision not to initiate rulemaking for greenhouse gas regulation under the CAA).

[22] *See infra* notes 39–45 and accompanying text.

[23] *See* Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,260, 56,266–69 (Oct. 30, 2009) (codified at 40 C.F.R. § 98 (2010)) (presenting the general requirements of the rule).

[24] *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (including the gases carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)).

[25] *See id.* at 66,540 (finding that 23% of greenhouse gas emissions in the United States in 2007 were produced by the transportation sector, second only to the electricity generating sector).

[26] *See id.* at 66,499–500 (choosing instead to set only proposed controls or limits on emissions from transportation vehicles).

[27] *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (codified at 40 C.F.R. pts. 85, 86, 600). For the technical aspects of the Light-Duty Vehicle regulation, see 40 C.F.R. §§ 85.1902(b), (d), 86.1(b)(2)(xxxix)–(xl), 86.111-94(b), 86.113-04(a)(1), 86.127-12, 86.135-12, 86.165-12, 86.166-12.86.1801-12, 86.1803-01, 86.1806-05(a)(1), 86.1809-12, 86.1810-09(f),

rule took effect on January 2, 2011, and will become more stringently enforced until 2016.[28] Because of this regulation, after January 2, 2011, the EPA considers greenhouse gases to be pollutants subject to regulation under sections 165 and 169(1) of the CAA.[29] Further, after being classified as pollutants subject to regulation under these sections, the new rule will require stationary sources[30] to use "the best available control technology for each pollutant subject to regulation."[31] Such action indicates how the EPA has taken several concrete steps since *Massachusetts* to begin regulation of greenhouse gases.

2. Legislative Branch: Congressional Action on Greenhouse Gases. In the past several years, Congress also has stepped up its fight to combat greenhouse gas emissions.[32] Currently before the House of Representatives is the American Clean Energy and Security Act of 2009 (ACES, also known as the Waxman–Markey

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86.1818-12, 86.1823-08(m), 86.1827-01(a)(5), (f), 86.1829-01(b)(1)(i), (b)(1)(iii)(G), 86.1835-01, 86.1841-01(a)(3), (b), 86.1845-04(a)(1), (b)(5)(i), (c)(5)(i), 86.1846-01(a)(1), (b), 86.1848-10(c)(9), 86.1854-12, 86.1865-12-86.1867-12, 600.002-08, 600.006-08, 600.007-08(b)(4)–(b)(6), (c), (f), 600.008(a)(1), 600.010(d), 600.011-93, 600.101-12, 600.111-08, 600.113-12, 600.114-08, 600.201-12, 600.206-12, 600.208-12, 600.301-12, 600.501-12, 600.507-12, 600.509-12, 600.510-12, 600.512-12, 600.514-12 (2010).

[28] *See* 42 U.S.C. 7521(a)(1) (2006 & Supp. 2011) (authorizing the EPA to set standards for new motor vehicles); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. at 25,332 (codified at 40 C.F.R. 86.1818-12 (2011)) (establishing emission limits for passenger vehicles which will become more stringent before capping off in 2016).

[29] *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71) (outlining the greenhouse gas regulations for certain stationary sources).

[30] A stationary source is defined by the CAA as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3) (2006).

[31] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,549. Because greenhouse gases are now a pollutant under CAA sections 165(a) and 169(1), stationary sources applying for prevention of significant deterioration permits must now take into account the emission of greenhouse gases. The EPA passed a final rule on June 3, 2010, for the stationary source permitting process that limits the scope and effective date of greenhouse gas regulations for stationary sources to incrementally phase-in regulations beginning in January 2011. *Id.* at 31,516 (applying emissions limits for stationary sources). See codification at 40 C.F.R. pts. 51, 52, 70, 71 (2011).

[32] Congress has previously presented various types of climate change and greenhouse gas regulation bills. For a more comprehensive history of such legislation pre-dating those discussed herein, see generally Benjamin P. Harper, Note, *Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns*, 40 GA. L. REV. 661, 664–65 (2006).

Bill). The Bill is a comprehensive resolution that proposes to create clean energy jobs, achieve energy independence, reduce global warming pollution, and transition to a clean energy economy.[33] It would require a cap-and-trade system to limit greenhouse gas emissions and set emission caps for greenhouse gases, as well as provide discrete limits for clean energy, require energy efficiency, and introduce procedures to transition to a clean energy economy.[34] The Act would fall under the scope of the EPA and amend many provisions of the CAA to align the CAA with the goals of the new Act.[35]

There is also a bill in front of the Senate, the American Clean Energy Leadership Act of 2009,[36] that has not been passed by the Senate but has made it out of the Senate Committee on Energy and Natural Resources. It includes many of the same provisions as the Waxman–Markey Bill, such as introducing new clean technologies, creating new jobs and businesses through clean energy project financing, increasing energy efficiency in America, enhancing America's energy independence, and tackling future energy and climate challenges with smarter, more integrated planning.[37] Further, the Act intends to set up a Clean Energy Department Administration to facilitate tens of billions of dollars in new clean energy financing and requires a federal energy planning process and comprehensive energy plan one year into each new President's term.[38] It remains unclear whether this would usurp all of the CAA's power to regulate greenhouse gas emissions.

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[33] H.R. 2454, 111th Cong. (as passed by H. of Rep., June 26, 2009).

[34] *See* WORLD RESOURCES INSTITUTE, *WRI Brief Summary of the Waxman–Markey Discussion Draft*, 1–8 (2009), *available at* http://pdf.wri.org/wri_waxman_markey_draft_summary_20090331.pdf (summarizing the components of the Act).

[35] *See, e.g.*, H.R. 2454, 111th Cong. § 311 (as passed by H. of Rep., June 26, 2009) (adding "Title VII—Global Warming Pollution Reduction Program" to the CAA).

[36] American Clean Energy Leadership Act of 2009, S. 1462, 111th Cong. (2009) (as passed by the S. Comm. on Energy & Natural Res.), *available at* http://thomas.loc.gov/cgi-bin/query/Z?c111:S.1462: (last visited Jan. 21, 2012). A different greenhouse gas legislation bill, the Lieberman–Warner Climate Security Act of 2008, was defeated in the Senate during the 110th Congress. S. 3036, 110th Cong. (2008), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:S.3036: (last visited Jan. 21, 2012).

[37] S. COMM. ON ENERGY & NATURAL RES., AMERICAN CLEAN ENERGY LEADERSHIP ACT OF 2009, at 1 (Short Summary 2009).

[38] *Id.* at 1–2.

3. Judicial Branch: Public Nuisance Litigation on Greenhouse Gases. The regulation of greenhouse gases has found widespread litigation in federal courts in recent years.[39] In 2007, the landmark case *Massachusetts* came before the Supreme Court.[40] The case involved several states, local governments, and environmental groups appealing the EPA's decision not to regulate greenhouse gas emissions from new motor vehicles under section 202(a) of the CAA.[41] EPA argued that it could not regulate greenhouse gases under the CAA for two reasons: first, greenhouse gases were not categorized as "air pollutants" to be regulated under the CAA, and second, there was no certain causal relationship between rising global temperatures and human produced greenhouse gas emission.[42] In a 5-to-4 decisions, the Supreme Court ruled that the plaintiffs had standing to bring the suit and the EPA had statutory authority to regulate greenhouse gases under section 202(a) of the CAA.[43] The Court, however, did not require that the EPA regulate greenhouse gas emissions from automobiles, only that it evaluate whether the emissions were contributing to the endangerment of public health and the environment.[44] Should the EPA causally link greenhouse gases to endangerment, though, the Court held that the Agency was obligated to regulate such emissions and develop standards for light-duty motor vehicles.[45]

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[39] *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (litigating plaintiffs' attempt to limit emissions from coal-fired electricity plants); Massachusetts v. EPA, 549 U.S. 497, 504–05 (2007) (litigating EPA's denial of petition by private organizations for EPA to regulate greenhouse gas emissions); Comer v. Murphy Oil USA, 585 F.3d 855, 859 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (litigating class action against oil and energy companies alleging their operations caused emissions of greenhouse gases); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (litigating nuisance action based on emissions of greenhouse gases).

[40] *Massachusetts*, 549 U.S. 497.

[41] *See id.* at 504–07 (summarizing the plaintiffs' claims).

[42] *See id.* at 533 (discussing EPA's reasons for not regulating greenhouse gases).

[43] *See id.* at 498–500 (discussing plaintiffs' standing).

[44] *See id.* at 534–35 ("We need not and do not reach the question whether on remand EPA must make an endangerment finding . . . . We hold only that EPA must ground its reasons for action or inaction in the statute.").

[45] *See id.* ("If EPA makes a finding of endangerment, the [CAA] requires the Agency to regulate emissions of the deleterious pollutant from new motor vehicles."). These were the first two endangerment findings discussed *supra* notes 21–24.

Since the ruling in *Massachusetts*, three major cases have been litigated in federal courts regarding regulation of greenhouse gases under public nuisance law: *Native Village of Kivalina v. ExxonMobil*,[46] *Comer v. Murphy Oil*,[47] and *AEP*.[48] The plaintiffs in each of these cases sued large energy producers under the theory that climate change is a public nuisance—seeking damages in both *Kivalina*[49] and *Comer*[50] and an injunction in *AEP*.[51] The plaintiffs faced several hurdles in these cases: their suit may present a political question, they may lack standing, they may fail to state a claim under the federal common law of nuisance, and the common law of nuisance may be displaced.[52]

In July 2011, four years after the *Massachusetts* decision, the Supreme Court in *AEP* took a firm stance that the common law of nuisance was displaced by the CAA for abatement of carbon dioxide.[53] In doing so, the Supreme Court reversed the Second Circuit, which had held that the plaintiffs stated a claim under the federal common law of nuisance and that the claim was not displaced by the CAA.[54] To understand the Supreme Court's diversion from the Second Circuit, understanding the underpinnings of the Second Circuit's decision is essential.

In analyzing the plaintiffs' displacement claim, the Second Circuit looked at whether Congress had acted to regulate greenhouse gas emissions in any real way and ruled that it had not.[55] The court first looked at the CAA, which only sets out six criteria pollutants to be regulated under the National Ambient Air

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[46] 663 F. Supp. 2d 863 (N.D. Cal. 2009).

[47] 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

[48] Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011).

[49] *See Kivalina*, 663 F. Supp. 2d at 866.

[50] *Comer*, 585 F.3d at 858.

[51] *See Am. Elec.*, 131 S. Ct. at 2539–40.

[52] *See generally* Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827 (2008) (discussing the remedy of nuisance, the proper defendant, standing, displacement, and damages).

[53] *Am. Elec.*, 131 S. Ct. at 2540; *see also supra* notes 4–10 and accompanying text.

[54] *Id.* This Note will address the *AEP* displacement standard and will not analyze whether the complaint presented a political question, whether the plaintiffs had standing, or whether the plaintiffs sufficiently pled the elements of nuisance.

[55] *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 385–88 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011) (discussing the lack of greenhouse gas specific congressional legislation).

Quality Standards (NAAQS). Carbon dioxide was not listed among the criteria pollutants.[56] After *Massachusetts*, the EPA issued proposed endangerment findings suggesting that greenhouse gases from new motor vehicles endanger public health.[57] The Second Circuit found these proposed findings failed to "regulate greenhouse gases in a way that 'speaks directly' to Plaintiffs' problems and thereby displaces Plaintiffs' existing remedies under the federal common law."[58] In sum, the Second Circuit required that the EPA either "regulate greenhouse gas emissions or . . . regulate such emissions from stationary sources"[59] in order to thoroughly address the complaint.[60] The court also rejected the argument that statutes other than the CAA regulate greenhouse gases in a sufficient manner to displace federal common law.[61]

The Supreme Court succinctly reversed the Second Circuit in a unanimous opinion written by Justice Ginsburg.[62] The Court held "that the [CAA] and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions."[63] In determining when displacement occurs, the Court stated that "[t]he critical point is that Congress delegated to [the] EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law."[64] Thus, unlike the Second Circuit, the Court did not find it necessary that the EPA actually regulate carbon dioxide emissions; rather, the regulation of carbon dioxide emissions merely fell under the EPA's purview.

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[56] *Id.* at 376.

[57] *Id.* at 379.

[58] *Id.* (citation omitted).

[59] *See id.* at 381 (noting the standards set out for federal displacement in the landmark case *City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304 (1981)).

[60] *Id.*

[61] *Id.* at 381–88 (discussing potential displacement from statutes outside the CAA).

[62] *See generally* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011). Justice Alito and Justice Thomas concurred in part and in the judgment, agreeing with the Court's displacement analysis but still taking issue with the Court's contentious 5-to-4 ruling in *Massachusetts*. *Id.* at 2540–41 (Alito, J., concurring in part and concurring in judgment).

[63] *Id.* at 2537 (majority opinion).

[64] *Id.* at 2538.

To better frame the distinction between the displacement standards set out by the Second Circuit and Supreme Court in *AEP*, this Note now discusses the history of federal common law of nuisance and of common law displacement.

B. FEDERAL COMMON LAW

1. Federal Common Law of Nuisance. The common law of nuisance has been the backbone of environmental litigation.[65] Even after the Supreme Court in *Erie* declared that "[t]here is no federal general common law,"[66] the Supreme Court has carved out limited exceptions to the application of federal common law, including public nuisance law.[67]

Public nuisance is defined as an action or failure to act that unreasonably interferes with a right common to the general public.[68] Most scholars agree that the claims in *AEP* fall squarely within even the narrowest reading of federal public nuisance law.[69]

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[65] *See* Rogers Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 926–35 (1999) (discussing the various uses of nuisance under the federal common law in environmental claims).

[66] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[67] *See, e.g.*, Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91, 103 (1972) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . . ."), *superseded by statute*, Clean Water Act (CWA), 33 U.S.C. §§ 1251–3387 (2006); Calvin R. Dexter & Teresa J. Schwarzenbart, Note, City of Milwaukee v. Illinois*: The Demise of the Federal Common Law of Water Pollution*, 1982 WIS. L. REV. 627, 634–35 (noting that Justice Brandeis's decision in *Erie* declaring that there is no federal common law was immediately downtrodden by an opinion the same day allowing for the development of specialized federal common law including nuisance in *Hinderlinder v. LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)). Similar relief, although not expressly called "federal common law of nuisance" has been applied previously. *See generally* Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) (allowing the Supreme Court to grant an injunction against a Tennessee smelting facility polluting in Georgia); Missouri v. Illinois, 200 U.S. 496 (1906) (involving a nuisance claim stemming from Chicago sewage pollution in the Mississippi River and its detrimental effects downstream in Missouri), *superseded by statute*, CWA §§ 1251–3387.

[68] *See generally* RESTATEMENT (SECOND) OF TORTS § 821(B) (1977).

[69] *See, e.g.*, Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 309–11 (2005) (discussing that even "under the narrowest conception of the scope of the law" public nuisance would be a viable claim in *AEP*); Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance:* Connecticut v. American Electric Power, 16 FORDHAM ENVTL. L. REV. 407, 440–49 (2005) (discussing that environmental harm is a quintessential public nuisance and that the plaintiffs in *AEP* set out a proper public nuisance claim).

The question thus turns to whether the federal common law claim is displaced.

2. Federal Displacement Standard. Federal common law does not exist in a vacuum. In United States v. Kimbell Foods, the Supreme Court held that a court must apply federal common law only after determining that the legislation in question leaves gaps for the judge to fill.[70] Traditionally, courts protect state common law from preemption, but federal common law remains vulnerable to displacement.[71] The principle behind displacement is that any federal common law cause of action can be completely replaced by adequate federal legislation.[72]

The test is best expressed in the landmark Supreme Court case *City of Milwaukee v. Illinois* (*Milwaukee II*),[73] where the Court stated concisely that a cause of action is displaced when "federal statutory law governs a question previously the subject of federal common law."[74] The Court stated that the system of federal common law is a necessary pairing when federal legislation "has not spoken to a particular issue."[75] However, where "Congress addresses a question previously governed by a decision [that] rested on federal common law[,] the need for . . . lawmaking by federal courts disappears."[76] The Supreme Court in *County of Oneida v. Oneida Indian Nation* reinforced the *Milwaukee II* standard, holding that a court must consider "whether the statute '[speaks] *directly* to [the] question' otherwise answered by federal common law. As we stated in *Milwaukee II*, federal common law is

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[70] *See* United States v. Kimbell Foods, 440 U.S. 715, 727 (1979) (stating that "[i]t is precisely when Congress has not spoken" in federal legislation that the courts are directed to fill the interstices).

[71] Bausinger, *supra* note 12, at 545–46.

[72] It is important to set out the differences between federal preemption and federal displacement. Federal preemption, which is outside the scope of this Note, deals with federal law superseding state law, while displacement refers to the situation where federal statutory law governs a question previously the subject of federal common law. *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 371 n.37 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011) (explaining the difference between displacement and preemption). The appropriate analysis in determining whether displacement of the federal common law has occurred is not the same as the one employed in deciding if federal law preempts state law. *Id.*

[73] 451 U.S. 304 (1981).

[74] *Id.* at 316.

[75] *Id.* at 313.

[76] *Id.* at 314.

used as a 'necessary expedient' when Congress has not 'spoken to a *particular* issue.' "[77]

To put into context the displacement doctrine, understanding the factual circumstances that caused the Court to displace the public nuisance claim from *Illinois v. City of Milwaukee (Milwaukee I*) to *Milwaukee II* is helpful. In *Milwaukee I*, the State of Illinois filed suit against four cities in Wisconsin and the Sewerage Commission of the City of Milwaukee under the theory of public nuisance for the pollution of Lake Michigan, an interstate water.[78] At the time, the Federal Water Pollution Control Act (FWPCA), which has become known as the CWA since subsequent amendment, required the EPA to "prepare or develop comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries."[79] Further, section 10(a) of the FWPCA provided that "pollution of interstate or navigable waters [is] subject to abatement when it endangers the health or welfare of any persons"; however, the process of abatement was a long conference procedure that was intended to produce amicable settlements and, if needed, allowed the Attorney General to bring suit on behalf of the United States.[80] The Court determined that federal common law of nuisance relief was available because Illinois sought a remedy that was "not within the precise scope of remedies prescribed by Congress."[81] The Court left open the possibility that new federal legislation (with regard to water pollution) could preempt federal common law of nuisance, but, until then, courts could use public nuisance law to abate water pollution.[82]

Milwaukee II was in front of the Court nine years after *Milwaukee I*, and it followed "a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation considered in [*Milwaukee I*]."[83] After *Milwaukee I*, Congress acted with the

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[77] 470 U.S. 226, 236–37 (1985) (quoting *Milwaukee II*, 451 U.S. at 313–15) (alterations in original) (citations omitted).

[78] Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91, 93 (1972).

[79] 33 U.S.C. § 1153 (1970) (amended 1972).

[80] *Milwaukee I*, 406 U.S. at 102–03 (internal quotation marks omitted).

[81] *Id.* at 103.

[82] *Id.* at 107.

[83] *Milwaukee II*, 451 U.S. at 304, 305 (1981).

intent to amend the FWPCA to provide a remedy for pollution abatement.[84] The Court granted certiorari to determine the effect of the legislation on the previous cause of action.[85] When the Court reviewed the new FWPCA amendments, they noted that this was a "comprehensive regulatory program" where "[*e*]*very* point source discharge is prohibited unless covered by a permit."[86] Further, and more importantly, the Court noted that "Congress'[s] intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation."[87] The Court then found that the federal common law of nuisance cause of action had been completely displaced because it was addressed thoroughly by the administrative scheme established by Congress, as contemplated by Congress.[88]

Finally, in 2005, the First Circuit in *United States v. Lahey Clinic Hospital, Inc.*[89] provided guidance on the issue of displacement with respect to agency action. In *Lahey* the court analyzed the extent to which the Medicare Act displaced any common law claims to recover Medicare overpayments.[90] Lahey argued that there was an implied conflict between the administrative remedial scheme and the common law.[91] The court held that this was a fundamental misunderstanding of displacement, saying that "[a]s for displacement of common law, the tests concern whether *Congress* directly spoke to the issue and

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[84] *See* Pub. L. No. 92-500, 86 Stat. 816 (1972) (examining the FWPCA, which was completely revamped in 1972—setting out such lofty goals as attaining zero discharge of pollutants into navigable waters by 1985 and bringing water quality to a level at which it can be used for fishing and recreation by 1983). Though it did not succeed in these lofty goals, it has been one of the most successful environmental acts in American history. *See* ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 580 (5th ed. 2007) (arguing that the CWA worked); Bruce Babbitt, *Between the Flood and the Rainbow: Our Covenant to Protect the Whole of Creation*, 2 ANIMAL L. 1, 2 (1996) (naming the CWA as the most successful of all environmental laws).

[85] *Milwaukee II*, 451 U.S. at 307–08.

[86] *Id.* at 317–18 (footnote omitted).

[87] *See id.* at 318.

[88] *See id.* at 317–19 (noting the comprehensive nature of the new FWPCA).

[89] 399 F.3d 1 (1st Cir. 2005).

[90] *Id.* at 3–4.

[91] *Id.* at 13. The court also addressed Lahey's failed claim of express conflict. *See id.* at 11–13 ("Lahey has provided no legislative history in support of its argument that Congress intended to repeal jurisdiction under § 1345.").

whether *Congress* intended to deprive the government of a longstanding power."[92]

3. Clean Air Act and Clean Water Act Historical Displacement. The Supreme Court in *Milwaukee II* laid out the basic framework for determining when the federal common law of nuisance can be used to abate pollution that is subject to a comprehensive statutory scheme.[93] The Court announced that the test for federal common law of nuisance displacement is "whether the scheme established by Congress addresses the problem formerly governed by federal common law."[94] In the context of environmental claims, many cases have used the *Milwaukee II* framework to find that a federal common law of nuisance remedy is not applicable when Congress creates a regulatory scheme for a specific type of pollution subject to the supervision of an expert administrative agency.[95] In other words, either a comprehensive regulatory program set up by Congress exists or not.

In the context of displacing common law nuisance under the CAA, the standard has turned on whether the CAA addressed the issue and not the number of regulations adopted for a certain pollutant by the EPA.[96] Several federal courts have found that if the source of pollution was regulated by the CAA then the CAA was comprehensive enough to displace the common law nuisance

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[92] *Id*. at 14.

[93] *See supra* notes 73–77 (background on *Milwaukee II*).

[94] City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 315 n.8 (1981); Wesley Kobylak, Annotation, *Pre-emption, by Provisions of Clean Air Act (42 USCS §§ 7401 et seq.), of Federal Common Law of Nuisance in Area of Air Pollution*, 61 A.L.R. FED. 859 (2010) (describing the test set out by the Supreme Court in *Milwaukee II* to be applied for displacement of federal common law of nuisance, which must now be applied for the CAA). The CAA does contain a savings clause that provides a citizens suit under "any statute or common law." 42 U.S.C. § 7604(e) (2006). However, this savings clause was also included in the CWA under *Milwaukee II* and the Court found that common law actions could be supplanted under the CWA. *Milwaukee II*, 451 U.S. at 328–29.

[95] In the context of the CAA, see *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981), and *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982), as well as *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (predating *Milwaukee II* and holding that even common law claims exist only "[i]n absence of an applicable Act of Congress").

[96] *See* Kobylak, *supra* note 94, at 860–61 (noting cases that have found displacement of federal common law of nuisance under the CAA on the grounds that Congress had directly addressed the problem at issue as opposed to the extent of agency regulation).

claim.[97] The Second Circuit in *New England Legal Foundation v. Costle*, however, did not go so far as to say that the CAA displaced all federal common law of nuisance with regard to any air pollution claims, only that it displaced claims explicitly covered by the CAA.[98] However, a district court in *Reeger v. Mill Service, Inc.* found enough similarity between the CWA and CAA to displace all federal common law of nuisance claims.[99] Unlike the CWA, which the Supreme Court considered in *Milwaukee II* in order to determine its comprehensive displacement nature, no CAA claim has reached the Supreme Court in the context of displacement. Finally, much of the jurisprudence on federal displacement centers on the separation of powers doctrine, specifically the proper relationship between the federal judiciary and the legislative branch in formulating legal remedies.

C. SEPARATION OF POWERS AND FEDERAL COMMON LAW

The separation of government into three separate branches is a fundamental safeguard against the accumulation of power in a single branch of government.[100] As the Supreme Court stated: "[t]o the [Legislature] has been committed the duty of making laws; to the [E]xecutive the duty of executing them; and to the [J]udiciary the duty of interpreting and applying them in cases properly brought before the courts."[101] The doctrine is violated where one branch "interfere[s] impermissibly" with the constitutionally assigned function of another or when one branch assumes a function that more properly is entrusted to another.[102] The Court

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[97] *See, e.g.*, *Kin-Buc*, 532 F. Supp. at 702 ("[T]he CAA establishes a complete regulatory procedure whereby . . . procedures for strict enforcement are created. . . . [T]here is no need for federal common law.").

[98] 666 F.2d at 32 ("In the instant case, we need not reach the broad question of whether the [CAA] totally preempts federal common law nuisance actions based on the emission of chemical pollutants into the air.").

[99] *See* 593 F. Supp. 360, 363 (W.D. Pa. 1984) (holding that the regulatory scheme under the CAA preempted federal common law).

[100] THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) ("The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.").

[101] Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

[102] I.N.S. v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring).

establishes these boundaries according to "common sense and the inherent necessities of the governmental coordination."[103]

Given this framework, what is the proper role of federal courts in shaping remedies for common law public nuisance? As a preliminary matter, the separation of powers doctrine creates a presumption in favor of common law displacement where Congress has legislated on the subject.[104] In *Milwaukee II* the Court found that the amended CWA legislated on the subject of water quality, thereby displacing any nuisance claim.[105] This finding cannot be read too broadly, however, because even at the time of *Milwaukee I*, basic water quality legislation had been enacted.[106] Overall, this displacement can be interpreted in two ways. Either a statute is comprehensive enough to occupy an entire field of regulatory lawmaking or a statute preempts common law remedies insofar as they conflict with it.[107]

Finally, certain powers are nondelegable. In *Clinton v. City of New York*, Justice Scalia observed that "[w]hen authorized Executive reduction or augmentation is allowed to go too far, it usurps the nondelegable function of Congress and violates the separation of powers."[108] In *Lahey*, the Court discussed the constitutional implications of granting the Executive Branch too much power to displace common law, noting that "to permit an agency by its actions to repeal an act of Congress or displace a long standing power of the United States would pose grave constitutional questions of violation of separation of powers."[109] However, the Court in *Lahey* did leave open the possibility that

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[103] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

[104] *See* Sen. Linie GMBH & Co. KG v. Sunway Line, Inc., 291 F.3d 145, 166 (2d Cir. 2002) (quoting United States v. Oswego Barge Corp., 664 F.2d 327, 335 (2d Cir. 1981)); *see also* City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 315 (noting where Congress has legislated there is no need for judicial lawmaking).

[105] *Milwaukee II*, 451 U.S. at 319.

[106] *See* Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91, 101–03 (1972) (canvassing the expanding array of federal laws safeguarding interstate navigable waters from pollution).

[107] *See* Merrill, *supra* note 69, at 311–12 (describing the two possible displacement standards to be interpreted from *Milwaukee II*).

[108] 524 U.S. 417, 465 (1998) (Scalia, J., concurring in part and dissenting in part).

[109] United States v. Lahey Clinic Hosp., Inc., 399 F.3d 1, 14 (1st Cir. 2005).

Congress could properly provide for the displacement of the common law by expressly delegating such power to an agency.[110]

In sum, the relationship between the common law of nuisance and displacement is complex. The following Part will analyze the Supreme Court's displacement standard in *AEP* in the context of this relationship and the implications of the standard on pending and future nuisance causes of action.

III. ANALYSIS: CORRECTING THE DANGEROUS SECOND CIRCUIT DISPLACEMENT STANDARD IN *AEP* AND ITS IMPLICATIONS

The increasing regulation and litigation relating to greenhouse gases requires that each branch of government understands their role to play in the process. This Part examines the Second Circuit and Supreme Court common law displacement standards in *AEP* and that case's implications on future greenhouse gas and climate change litigation. Finally, this Part concludes by offering a pragmatic critique of the challenges surrounding regulation of greenhouse gases under the current CAA and calls for comprehensive legislative action.

A. DISPLACEMENT

1. The Second Circuit's Incorrect Displacement Analysis. In the words of Judge Hall, author of the Second Circuit's opinion in *AEP*, the court "held [that] none of the legislation truly displaced or was intended by Congress to displace the common law."[111] Instead, the court found that "until [the] EPA makes the requisite findings," the CAA does not regulate greenhouse gases.[112] The fundamental flaw in the court's reasoning is that "[t]he relevant precedents stress that whether federal environmental regulations displace federal common law actions for interstate pollution turns on legislative action."[113] Neglecting this foundational principle,

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[110] *Id*. at 13.

[111] Peter Hall, *Remarks on* Connecticut v. American Electric Power, 40 ENVTL. L. REP. NEWS & ANALYSIS 10,953, 10,955 (2010) (discussing his own opinion of *AEP*).

[112] Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 381 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

[113] Johnathan H. Adler, *The SG's Brief in* American Electric Power v. Connecticut,

the Second Circuit analysis mistakenly proceeds from the assumption that legislation and regulation are interchangeable for the purposes of displacement.

The Second Circuit significantly erred by ignoring relevant precedent in determining whether the plaintiffs' suit was displaced under the CAA. The court instead created a paradoxical situation where the EPA coexists with the common law of public nuisance, at least until the EPA promulgates sufficient rulemaking to regulate greenhouse gases.[114] The court also made no representation of how many regulations or what type of regulations would be needed to displace common law public nuisance claims.[115]

In creating this standard, the Second Circuit did correctly focus on *Milwaukee I* and *Milwaukee II*.[116] The court based its displacement inquiry on the fact that regulating greenhouse gases and stationary sources had not been "thoroughly addressed" by the EPA.[117] To reach this conclusion the court tries to distinguish the present case from *Milwaukee II* under the assumption that the text in *Massachusetts* to establish that greenhouse gases were subject to regulation was overly broad.[118] This analysis is misguided. The proper displacement analysis to determine "thoroughly addressed" turns only on the overall congressional statute, the CAA. Even if the statute's "air pollutant" definition is

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VOLOKH CONSPIRACY (Aug. 27, 2010, 2:58 PM), http://volokh.com/2010/08/27/the-sgs-brief-in-american-electric-power-v-connecticut/ (commenting on the recent Second Circuit decision in *AEP*); *see also infra* Part III.A.*3*.

[114] *See Am. Elec.*, 582 F.3d at 381 (finding that the "CAA does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources" until the EPA makes the requisite findings and, "[a]ccordingly, the problem of which Plaintiffs complain certainly has not 'been thoroughly addressed' by the CAA." (quoting City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 320 (1981))). This problem is exacerbated by the fact that the Supreme Court in *Massachusetts* ruled that greenhouse gases are clearly within the scope of the CAA and mandated regulation. *See supra* notes 38–43.

[115] *Am. Elec.*, 582 F.3d at 381.

[116] *See id.* at 371–74 (recognizing that the common law nuisance displacement analysis begins with *Milwaukee I* and *Milwaukee II*).

[117] *Id.* at 381.

[118] *Id.* at 378 ("[A]s one commentator has noted, 'CAA Section 302(g) provides a definition of "air pollutant" that is . . . absurdly broad.' " (quoting Christopher T. Giovinazzo, *Defending Overstatement: The Symbolic Clean Air Act and Carbon Dioxide*, 30 HARV. ENVTL. L. REV. 99, 151–52 (2006))).

overly broad and the findings of endangerment have not been completed, the common law of nuisance should be displaced because greenhouse gases are "specific pollutants" subject to a "comprehensive regulatory program supervised by an expert administrative agency."[119] Overall, the Second Circuit's approach, which focused on agency regulation rather than legislative displacement, "invites judicial interference in the administrative process not countenanced since *Chevron U.S.A., Inc. v. Natural Resources Defense Council*."[120]

Furthermore, the Second Circuit ruling created a direct tension with the Supreme Court's decision in *Massachusetts*. In *Massachusetts,* the Supreme Court required that the EPA inquire into the regulation of greenhouse gases.[121] The Court also found that the CAA provided adequate statutory guidance to regulate greenhouse gases.[122] Thus, once the Supreme Court determined that the CAA reaches greenhouse gases, in essence it found that Congress intended the CAA to reach greenhouse gas emissions and that displacement should follow.[123]

The Second Circuit in *AEP*, however, did not reach this conclusion. The Second Circuit examined whether the legislation actually regulates the public nuisance at issue.[124] The court found that the *Massachusetts* decision only required the EPA to begin an inquiry into whether or not greenhouse gases endanger public health and that it had not begun to regulate them.[125] Yet, the Court in *Massachusetts* determined that Congress, under the CAA,

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[119] *Milwaukee II*, 451 U.S. at, 322.

[120] *See* Brief *Amicus Curiae* of Center for Constitutional Jurisprudence in Support of Petitioners at 5, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (No. 10-174), 2010 WL 3501259, at *5 [hereinafter Center for Constitutional Jurisprudence Amicus Brief].

[121] *See supra* notes 40–45 (discussing the holding in *Massachusetts* requiring the EPA to begin inquiry into whether greenhouse gases are dangerous to the public health).

[122] Massachusetts v. EPA, 549 U.S. 511, 528 (2007).

[123] *See* Jonathan H. Adler, *The SG's Brief in American Electric Power v. Connecticut*, VOLOKH CONSPIRACY (Aug. 27, 2010, 2:58 PM), http://volokh.com/2010/08/27/the-sgs-brief-in-american-electric-power-v-connecticut/ (discussing both the relevant precedent stating that whether federal environmental regulations displace federal common law turns on legislative action and the logical displacement after *Massachusetts* because the EPA was now required to regulate greenhouse gases).

[124] Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 376–78 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

[125] *Id.* at 379.

gave the EPA power to regulate greenhouse gases;[126] the CAA therefore should displace any federal common law of nuisance claim. Many legal scholars agreed that pre-*Massachusetts* the CAA did not displace a common law public nuisance suit; however, most agreed that if the CAA reached greenhouse gases, as it does post-*Massachusetts*, it should displace any public nuisance suit.[127]

Overall, the Second Circuit significantly erred in not displacing the public nuisance suit, especially post-*Massachusetts*. As Professor Dan Mensher discussed before *Massachusetts*: "If [the CAA reached greenhouse gases], this suit under common law would be preempted. Of course, if that was the case, then this suit would be unnecessary, as the CAA would provide for [greenhouse gas] regulation."[128]

2. Pragmatic Concerns with the Second Circuit's Displacement Standard. In addition to the fundamental flaws with the Second Circuit's opinion, practical dangers persist with the Second Circuit's displacement standard. The Second Circuit standard creates the distinct dilemma of requiring a court to decide whether an agency has "regulated" a particular nuisance. Under this standard, when an expert agency decides that a pollutant is not a

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[126] *Massachusetts*, 549 U.S. at 532.

[127] *See* Harper, *supra* note 32, at 693 ("Given the fact that the [CAA], as currently interpreted by the EPA and the courts, does not regulate greenhouse gases, it would appear that the statute does not preempt the federal common law in the area of climate change." (footnote omitted)); Sarah Olinger, *Filling the Void in an Otherwise Occupied Field: Using Federal Common Law to Regulate Carbon Dioxide in the Absence of a Preemptive Statute,* 24 PACE ENVTL. L. REV. 237, 265 (2007) (noting that the CAA cannot be considered comprehensive until Congress speaks to carbon dioxide emission limits); Pawa & Krass, *supra* note 69, at 461–68 (discussing the lack of carbon dioxide legislation under the CAA as dispositive for no displacement); Zasloff, *supra* note 52, at 1850 ("*Massachusetts* [ ] only strengthens the case against federal common law, because it demonstrates that Congress has in fact created a comprehensive scheme for dealing with carbon dioxide."). One legal scholar, Professor Thomas Merrill, even argued pre-*Massachusetts* that the CAA was sufficiently comprehensive to displace any greenhouse gas nuisance suit. *See* Merrill, *supra* note 69, at 316–19 (noting that a greenhouse gas nuisance cause of action is preempted by the CAA either under field pre-emption theory or conflict pre-emption theory if carbon dioxide were listed as an air pollutant).

[128] Dan Mensher, *Common Law on Ice: Using Federal Judge-Made Nuisance Law to Address the Interstate Effects of Greenhouse Gas Emissions*, 37 ENVTL. L. 463, 479 n.143 (2007). Professor Jonathan Zasloff warned that it would be "playing with words" if "any time the federal government inadequately enforces a regulatory statute, federal common law should take its place." Zasloff, *supra* note 52, at 1850–51.

hazard to health or implements minimal regulations, these regulations could be challenged beyond the rule-and-comment rulemaking provisions under nuisance law. This would create a litany of litigation and a cumbersome judicial process. The role of the Judiciary is to determine if an expert agency is acting arbitrarily or capriciously—not to determine if the requisite level of regulation for a specific pollutant has been reached.[129]

Further, the Judicial Branch is also poorly suited for handling the large issue of regulating greenhouse gases.[130] The major issue created by allowing the common law of nuisance to govern greenhouse gas regulation is that nuisance law is not an effective mechanism for regulating greenhouse gases.[131] Greenhouse gas regulation is unlike previous pollution abatement cases handled under nuisance law that attempted to mitigate a specific act of pollution directly damaging a protectable interest.[132] The district court in *Kivalina* distinguished the regulation of greenhouse gases under public nuisance from any other pollutant because the "[p]laintiffs' global warming claim [was] based on the emission of greenhouse gases from innumerable sources located throughout the world and *affecting the entire planet and its atmosphere*."[133]

Further, any federal courts that enact greenhouse regulations under nuisance law besides the Supreme Court will create a patchwork of distinct public nuisance law among the federal circuit

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[129] Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2539 (2011) ("EPA may not decline to regulate carbon-dioxide emissions from power plants if refusal would be arbitrary, capricious, [or] an abuse of discretion . . . . If plaintiffs are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition for certiorari in this Court." (internal citations omitted)).

[130] *See* Matthew Hall, *A Catastrophic Conundrum*, *But Not a Nuisance: Why the Judicial Branch is Ill-Suited to Set Emissions Restrictions on Domestic Energy Producers Through the Common Law Nuisance Doctrine*, 13 CHAP. L. REV. 265, 275–79 (2010) (arguing that nuisance does not provide the needed unified and widespread emission reduction policy to combat climate change).

[131] *See* Brief of Law Professors as Amici Curiae in Support of Petitioners at 6, *Am. Elec.*, 131 S. Ct. 2527 (No. 10-174), 2011 WL 461629, at *26–27 (noting the complex scientific, social, economic, and political issues involved in environmental protection).

[132] *See* Hall, *supra* note 130, at 275 ("If sewage going into a river is damaging interests downstream, it seems simple enough to conclude that stopping the dumping will prevent the damage. Global warming is unique in that it does not fit this model.").

[133] Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009).

courts when a national standard is needed.[134] This patchwork of national standards also presents a major jurisprudential problem because it grants an abusive amount of power to plaintiffs by allowing them to choose who and where to sue.[135]

In 2010,[136] the Fourth Circuit warned of the danger of applying common law nuisance to greenhouse gas regulation in *North Carolina ex rel. Cooper v. TVA*, stating that "public nuisance law doubtless[ly] encompasses environmental concerns [and] does so at such a level of generality as to provide almost no standard of application."[137]

Finally, the regulation of greenhouse gas emissions is a complex scientific and technical problem that will have important economic and political impacts. Such should not be left to the one branch in our system of government with no accountability.[138] The common law of nuisance provides no judicially discoverable and manageable standards, and courts cannot reach a resolution of a nuisance case in any "reasoned manner."[139]

These are just several illustrations of the pragmatic perils of leaving greenhouse gas regulation in the hands of the Judicial Branch. Justice Ginsburg eloquently summarized this fact, stating

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[134] *See* Center for Constitutional Jurisprudence Amicus Brief, *supra* note 120, at 6, *Am. Elec.*, 131 S. Ct. 2527 (No. 10-174), 2010 WL 3501259, at *6 (arguing for one national standard for greenhouse gas emissions). This is the main issue from a pragmatic judicial regulation perspective. The same patchwork regulation would become a problem if state nuisance law causes of action were allowed to proceed, an option left open by the Supreme court in *AEP*. *See infra* notes 155–56 and accompanying text.

[135] PHIL GOLDBERG, PROGRESSIVE POLICY INST., WHY PROGRESSIVES SHOULD COOL TO "GLOBAL WARMING" LAWSUITS (2010) ("From a jurisprudence perspective, it is particularly troubling that plaintiffs would have the extraordinary, and inappropriate, power to pick winners and losers in the climate change debate by deciding whom to sue.").

[136] 615 F.3d 291 (4th Cir. 2010). Even though *TVA* involved a state law nuisance claim, many of the overarching dangers of nuisance are the same whether applied to federal or state law nuisance. *Id.* at 296.

[137] *Id*. at 302.

[138] *Cf.* Harper, *supra* note 32, at 696 (discussing the difficulty in relying on the judicial branch to regulate greenhouse gas emissions under public nuisance law).

[139] *See* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009) (describing the overly vast scope of the claim and the lack of guidance provided by nuisance law). Both the *Kivalina* court and the district court in *AEP* focused on this aspect of pragmatic judicial resolution for rejecting the suits on political question grounds. *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (holding that these public nuisance causes of action presented non-justifiable political questions), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

that the Court "endorses no particular view of the *complicated issues* related to carbon-dioxide emissions and climate change."[140]

3. The Supreme Court's Displacement Standard and Its Implications. The Supreme Court corrected many of the significant flaws of the Second Circuit decision. The Court found that the "critical point" was whether "Congress delegated to [the] EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law."[141] This standard is not only immensely more manageable but is also more consistent with prior precedent.

In analyzing the possible displacement of the federal common law of nuisance, the Supreme Court focused almost exclusively on *Milwaukee II*.[142] The Court noted that under the CWA in *Milwaukee II* the EPA requires a permit for every point source discharge, whereas the CAA allows air pollution "*until* [the] EPA acts."[143] The decision is up to Congress to establish "different regulatory regimes to address different problems."[144] Thus, "were [the] EPA to decline to regulate carbon-dioxide emissions altogether" courts would "have no warrant to employ the federal common law of nuisance to upset the agency's expert determination."[145]

The Court's reasoning acts as a salvation for both energy emitters and environmentalists.[146] Although the Court does not issue an injunction on the emission of greenhouse gases, the ruling will help the EPA. Environmental Defense Fund President Fred Krupp said that the "most important thing about this decision is

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[140] Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2533 n.2 (2011) (emphasis added).

[141] *Id.* at 2538.

[142] *See id.* at 2538–40 (discussing *Milwaukee II*'s effect on the displacement doctrine). The Court also extensively discusses *Massachusetts*, but only in the context of how that case makes the *Milwaukee II* displacement test much more manageable. *Id.* at 2537.

[143] *Id.* at 2538.

[144] *Id.*

[145] *Id.* at 2538–39. The Court does point out that the normal agency review for arbitrary, capricious, or abuse of discretion review will still apply to the EPA's judgments. *Id.* at 2539.

[146] *See Utilities, EPA Both Winners in Supreme Court GHG Ruling,* ENVTL. LEADER (June 21, 2011), http://www.environmentalleader.com/2011/06/21/utilities-epa-both-winners-in-supreme-court-ghg-ruling/ (discussing the victory for utility companies and how the decision empowers the EPA to regulate greenhouse gases).

that it buttresses the foundation for [the] EPA to do its job."[147] Instead of allowing federal judges who "lack the scientific, economic, and technological resources" of an agency to attempt to address the problem, Congress designated an expert agency to "serve as a primary regulator of greenhouse gas emissions."[148] This prevents federal district judges from "issuing ad hoc, case-by-case injunctions" and prevents a barrage of potential litigation.[149]

Further, the standard is one that is very easy to adjudicate. The old *Milwaukee II* standard created certain judicial tension regarding displacement.[150] The new *AEP* test allows Congress to delegate only the decision of "whether and how to regulate."[151] This delegation is "what displaces federal common law."[152] What the *AEP* test implies is that displacement carries an implied negative power. Because the CAA does not require permits for emissions until the EPA identifies a pollutant as endangering the public health,[153] if the EPA has not decided to regulate a specific pollutant, any federal public nuisance cause of action would still be displaced. This implied negative power creates a manageable standard for courts by providing a simple displacement answer in most contexts.

This decision, however, leaves open the possibility that future plaintiffs will have no remedy against unregulated air pollution. Under the new *AEP* standard, potential plaintiffs looking to enjoin a particular defendant's emission of an unregulated pollutant are left in a very poor position. Under section 111 of the CAA, the EPA is directed to list categories of stationary sources if it "causes, or contributes significantly to, air pollution which may reasonably

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[147] *Id.* (internal quotation marks omitted).

[148] *Am. Elec.*, 131 S. Ct. at 2539.

[149] *Id.*

[150] Legal scholars had opined that "[t]he precise test applied when answering a displacement question is not as easy to articulate as would be desirable." *See* John Wood, *Easier Said Than Done: Displacing Public Nuisance When States Sue For Climate Change Damages,* 41 ENVTL. L. REP. NEWS & ANALYSIS 10,316, 10,318–20 (2011) (discussing the variety of ways to state the *Milwaukee II* displacement test); *see also supra* Part II.B.*3* (discussing the different outcomes of various CAA and CWA displacement cases).

[151] *Am. Elec.,* 131 S. Ct. at 2538.

[152] *Id.*

[153] *See* CAA, 42 U.S.C. § 7409 (2006) (requiring air quality standards only for pollutants that endanger public health and welfare).

be anticipated to endanger public health or welfare."[154] Thus, if the EPA chooses not to list a source as endangering public health and a court does not find that such a decision was arbitrary, capricious, or an abuse of discretion, no legal remedy exists in the Judicial, Executive, or Legislative Branches other than legislative amendment to the CAA.

Overall, the decision in *AEP* has completely foreclosed any avenue to enjoin any type of air pollution under the federal common law of nuisance. If the EPA decides to regulate a pollutant, such represents the decision of the expert agency. The Court, however, did not foreclose the possibility of a nuisance cause of action under applicable state law.[155] This avenue has a chance of success because, as the Court has already stated with regard to the CWA, it does not preclude "aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State."[156]

4. Effect of the New AEP *Standard on Other Climate Change Cases.* *AEP* also raises the interesting question of how cases such as *Comer* and *Kivalina* will now be decided.[157] In those cases, the plaintiffs sued under private and public nuisance theories (among other tort theories) but were seeking monetary damages. Further, the damages sought were from discrete events—Hurricane Katrina in *Comer* and flooding in *Kivalina*—which were allegedly attributable to the defendant's contributions to climate change.[158] Would the fact that these are allegedly discrete events, for which plaintiffs are seeking money damages and not an injunction, alter the outcome that was seen in *AEP*?[159]

Plaintiffs in both *Comer* and *Kivalina* may be successful in continuing litigation after *AEP* under common law tort claims.

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[154] *Id.* § 7411(b)(1)(A).

[155] *See Am. Elec.*, 131 S. Ct. at 2540 (declining to decide plaintiffs' state law claims).

[156] Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987).

[157] *See supra* notes 46–52 (discussing *Comer* and *Kivalina*).

[158] *See* Comer v. Murphy Oil USA, 585 F.3d 855, 859 (5th Cir. 2009), Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009).

[159] Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135, 135 (2011), http://yalelawjournal.org/2011/09/13/gerrard.html ("Some plaintiffs' lawyers are also arguing that the decision [in *AEP*] leaves room for seeking money damages (rather than injunctive relief) even in a federal common law case.").

The Supreme Court has made sufficiently clear that enacting nay rules regulating greenhouse gases is the role of the EPA first, and the Judiciary second.[160] However, under the structure of the CAA, the EPA can issue permits and injunctions against polluters but cannot issue monetary damages.[161]

In May of 2011, *Comer* was refiled in the Southern District of Missouri.[162] The new suit alleges common law torts including state and federal public and private nuisance, trespass, and negligence.[163] Lindene Patton, the Chief Climate Product Officer for Zurich Financial Services, an insurance provider, states that "the *AEP* case only addresses nuisance cases and does not address broader theories under tort liability law. . . . The plaintiffs bar may still continue to file demands and claims for other types of tort damages."[164]

The recent *Comer* filing has a chance of surviving dismissal after *AEP* for one reason: the plaintiffs are seeking monetary damages. The Court in *AEP* found it critical that Congress delegated "whether and how" to regulate carbon dioxide emissions from power plants.[165] Similarly, in *Milwaukee I* the Court decided that the common law of nuisance was not displaced because the remedy sought was "not within the precise scope of remedies provided by Congress."[166] The CAA does not prescribe monetary damages to plaintiffs and the CAA does not delegate to the EPA whether and how to award monetary damages for air pollutants that may have injured specific plaintiffs.[167] Therefore, the

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[160] *Am. Elec.*, 131 S. Ct. at 2539.

[161] *See* Torres Maysonet v. Drillex, S.E., 229 F. Supp. 2d 105, 108–09 (D.P.R. 2002) (noting that the CAA does not provide for monetary damages).

[162] *See* J. Wylie Donald, Comer *Resurgens: Life After* American Electric Power v. Connecticut, CLIMATE LAWYERS BLOG (July 7, 2011, 13:23), http://climatelawyers.com/post/2011/07/07/Comer-Resurgens-Life-After-American-Electric-Power-v-Connecticut.aspx (describing the ongoing *Comer* litigation).

[163] *See generally* Class Action Complaint, Comer v. Murphy Oil USA, No. 11-cv-00220, 2011 WL 2947582 (S.D. Miss. May 27, 2011) [hereinafter *Comer* Class Action Complaint].

[164] Donald, *supra* note 162 (quotation marks omitted).

[165] *Am. Elec.*, 131 S. Ct. at 2538.

[166] Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91, 103 (1971).

[167] *See Comer* Class Action Complaint, *supra* note 163, ¶¶ 10–11.

possibility remains that the plaintiffs' claims will not be immediately displaced by the *AEP* holding.[168]

Finally, although it may be *possible* for common law tort claims seeking monetary damages to proceed,[169] such a result would be disastrous for society. The new *Comer* complaint lists over fifty of the largest oil, gas, energy, and chemical companies in the United States.[170] For a single federal judge to spread liability amongst these companies due to the impact of Hurricane Katrina is unfathomable. Not only are there serious scientific issues but also impossible causation issues. The Judiciary is incapable of handling this type of litigation beyond what may amount to a mere guessing game. Thus, although the common law torts may not be displaced, their application in a case for monetary damages due to climate change would be a grave danger to society.[171]

5. What if the EPA Is Stripped of Its Ability to Regulate Greenhouse Gases or Changes Its Stance on Regulation? The question that arises under the new AEP standard is what would be the result of a federal common law of nuisance suit on greenhouse gas regulation if the EPA is stripped of the authority to regulate greenhouse gases. This is not an abstract notion. In February 2011, House Republicans introduced legislation to strip the EPA of its ability to regulate carbon dioxide emissions.[172] If such legislation is enacted, the issue would become whether stripping the EPA of the power to regulate greenhouse gases

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[168] For a complete examination of the difficulty in establishing jurisdiction, liability, causation, damages, and other issues under a nuisance suit for damages, see generally Gerrard, *supra* note 159.

[169] For other potential common law torts alleged, see *Comer* Class Action Complaint, *supra* note 163, ¶¶ 12–42. Further, this is only looking at displacement as a potential defense; the potentially larger hurdle of standing that has often been the initial barrier to plaintiffs in climate change litigation still exists.

[170] *See id.* ¶¶ 2–3.

[171] *See supra* notes 130–40 (discussing the pragmatic difficulties of potential litigation of greenhouse gases in courts).

[172] *See* Dina Fine Maron, *New Anti-EPA Bill Aims to 'Rein in' Agency's Climate Rules Permanently*, N.Y. TIMES CLIMATEWIRE, Mar. 4, 2011, http://www.nytimes.com/cwire/2011/03/04/04climatewire-new-anti-epa-bill-aims-to-rein-in-agencys-cl-37816.html (describing potential new legislation); Lauren Morello et al., *Republicans Gut EPA Climate Rules, Slash Deeply Into Climate Research, Aid and Technology Programs*, N.Y. TIMES CLIMATEWIRE, Feb. 14, 2011, http://www.nytimes.com/cwire/2011/02/14/14climatewire-republicans-gut-epa-climate-rules-slash-deep-87716.html?pagewanted=all (same).

would open the door for potential plaintiffs to bring a new common law nuisance suit.

Under the Supreme Court's *AEP* language, the test is whether Congress has delegated "whether and how to regulate carbon-dioxide emissions."[173] Under a plain reading of the Court's opinion, if Congress strips the EPA of the ability to regulate greenhouse gases, then Congress has no longer delegated "whether and how" to regulate greenhouse gases. Thus, the Republicans worried about executive overreach and costly regulations will be opening the door for an unelected federal Judiciary to overreach and shape the regulation of greenhouse gases.[174] This result is most likely not the consequence the Republicans seek. If a court were to order an injunction, it could potentially be much harsher than EPA regulations.[175]

Furthermore, what if the EPA changes course and modifies its rules for stationary and mobile sources? A suit was brought in February 2011 by the states of Texas and Virginia to get the EPA to back away from its finding that greenhouse gases are a threat to public health.[176] If the EPA were to completely alter its regulation of greenhouse gases, or if the President were to ask the EPA not to enforce the regulations, the possibility of common law litigation might be reopened. Such a result is unlikely, however.[177] The

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[173] Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2538 (2011).

[174] *See* John M. Broder, *House Panel Votes to Strip E.P.A. of Power to Regulate Greenhouse Gases*, N.Y. TIMES, Mar. 11, 2011, at A18, *available at* http://www.nytimes.com/2011/03/11/science/earth/11climate.html ("Republicans and their industry allies accuse the administration of levying taxes on traditional energy sources through costly environmental regulations, threatening the economic recovery and driving jobs overseas.").

[175] In theory, a court could require a complete injunction against energy emitters, thereby creating a much larger burden on businesses and the economy than anything the EPA has proposed.

[176] *See* Alexandra Cheney, *Virginia Files Challenge to E.P.A. Greenhouse Gas Regulation*, N.Y. TIMES GREEN BLOG (Feb. 18, 2010, 1:30 PM), http://green.blogs.nytimes.com/2010/02/18/virginia-files-challenge-to-e-p-a-greenhouse-gas-regulation/. Texas has also filed suits appealing the EPA's decision to take responsibility of greenhouse gas permitting in Texas and petitioning for a review of the EPA's finding that Texas was not in compliance with the EPA's greenhouse gas regulations. Lawrence Hurley, *Texas Faces Uphill Legal Battle Against EPA's Greenhouse Gas Regs*, N.Y. TIMES GREENWIRE, Jan. 5, 2011, http://www.nytimes.com/gwire/2011/01/05/05greenwire-texas-faces-uphill-legal-battle-against-epas-g-56151.html. In all, thirteen states are currently challenging the EPA regulations. *Id.*

[177] President Obama's recent decision to ask the EPA to withdraw a proposed air quality rule has ensured that there will be litigation from environmental groups. *See* Nathan

Supreme Court discussed the order of decisionmaking in *AEP*, stating "the first [ ] decider under the [CAA] is the expert administrative agency, the second, federal judges—is yet another reason to resist setting emissions standards by judicial decree under federal tort law."[178] Thus, any change in the EPA's regulation or a decree by the President probably would not alter the inability of plaintiffs to obtain relief under the federal common law of nuisance under *AEP*.

B. DISPLACEMENT AS REQUIRED BY THE SEPARATION OF POWERS

The Supreme Court opinion also corrects the Second Circuit's two possible violations of the doctrine of separation of powers.[179] First, the Second Circuit's opinion in *AEP* raised issues concerning the extended grant of power to the Executive Branch.[180] The Second Circuit attempted to shift the locus of displacement from the Legislature to the Executive.[181] If such were to occur, the question then arises whether this is a constitutional shift in power to the Executive Branch. *Milwaukee II* and its progeny have clearly found that the power to displace federal common law is vested in Congress, not the Executive.[182] This Executive Branch augmentation was explicitly warned against in *Clinton*,[183] and the executive power to displace or repeal common law was explicitly disallowed by the First Circuit in *Lahey*.[184] The Supreme Court

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Koppel, *Obama's Environmental Announcement Could Spark Litigation*, WALL ST. J. L. BLOG, Sept. 2, 2011, http://blogs.wsj.com/law/2011/09/02/obamas-environmental-announcement-could-spark-litigation.

[178] *Am. Elec.*, 131 S. Ct. at 2539.

[179] The Supreme Court in *AEP* did not address any possible separation of powers violations.

[180] Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 324 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

[181] *See id.* at 332 ("[T]he [E]xecutive [B]ranch, by way of the EPA, is free to regulate emissions, assuming its reasoning is not 'divorced from the statutory text.'" (quoting Massachusetts v. EPA, 549 U.S. 497, 532 (2007))).

[182] *See generally supra* Part II.B.*2* (elaborating on the notion that federal displacement is vested in the Legislature and not the Executive Branch).

[183] Clinton v. City of New York, 524 U.S. 417, 465 (1998) (warning that excessive executive power encroaching into legislative power violates the separation of powers doctrine) (Scalia, J., concurring in part and dissenting in part).

[184] *See generally supra* Part II.C (discussing how augmenting the Executive Branch with extra power is a violation of the separation of powers).

remedies this potential expansion of executive power by reinstating the proper inquiry of focusing *only* on what the Legislative Branch has delegated.[185]

Additionally, the Second Circuit's standard extended the Judiciary's power beyond its constitutional reach.[186] The Second Circuit attempted to transcend the traditional power of the federal common law, which is used *only* when Congress has not legislated.[187] Congress established the CAA as a comprehensive air pollution regulatory program.[188] Once the EPA was required to regulate greenhouse gases after *Massachusetts*, the Second Circuit could not reasonably have seen a need for additional lawmaking in the control of greenhouse gas emissions. The Supreme Court unmistakably perceived the tension between the overwhelming discretion the Second Circuit wanted to appropriate to trial judges in *AEP* and the Supreme Court's holding in *Massachusetts*.[189] In *AEP* the Court further found that not only is the Second Circuit's decision "[irreconcilable] with the decisionmaking scheme Congress enacted,"[190] but also that the Circuit "erred . . . in ruling that federal judges may set limits on greenhouse gas emissions in face of a law empowering [the] EPA to set the same limits."[191] The Supreme Court then set out a standard that maintains a traditional division of power between the three branches of

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[185] *See supra* notes 141–53 and accompanying text (discussing the focus of the Supreme Court in *AEP* as only on whether Congress has delegated power to an agency and not what the agency is doing).

[186] *See* Brief *Amicus Curiae* of Center for Constitutional Jurisprudence in Support of Petitioners at 2–4, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (No. 10-174), 2011 WL 396515, at *2–4 (advocating that the intervention of federal courts exceeds the boundary of judicial authority and that the role of courts is deciding what the law *is* and not what it *should be*).

[187] *See* City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 313 (1981) ("When Congress has not spoken to a particular issue, however, 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." (citations omitted) (internal quotation marks omitted)).

[188] *See* ENVTL. PROT. AGENCY, *supra* note 18 (examining the history of the CAA).

[189] *See Am. Elec.*, 131 S. Ct. at 2532 (beginning the opinion with the holding in *Massachusetts*).

[190] *Id.* at 2540.

[191] *Id.*

government and does not empower any branch beyond its constitutional limits.

C. PRAGMATIC APPROACH: WHY THE EXECUTIVE BRANCH IS ILL-SUITED TO DEAL WITH GREENHOUSE GAS REGULATION

The EPA openly admitted to not being in the best position to regulate greenhouse gases under the current provisions of the CAA.[192] Using an outdated regulatory model never designed to regulate greenhouse gases is not the best way to obtain the desired results.[193] As Congressman John Dingell,[194] who chaired the House Energy and Commerce Committee during the 1990 CAA Amendment, summarized in 2009:

> [T]he Supreme Court, in Massachusetts v. EPA [sic], erroneously found that greenhouse gases are pollutants covered by the [CAA]. The [CAA] was not designed to regulate greenhouse gases, as the then-Chairman of the House Energy and Commerce Committee I know what was intended when we wrote the legislation. I have said from the beginning that such regulation will result in a glorious mess and regulation of greenhouse gas emissions should be left to Congress.[195]

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[192] *See* Gabriel Nelson, *U.S. Chamber Sues EPA Over Greenhouse Gas 'Endangerment' Decision*, N.Y. TIMES GREENWIRE (Aug. 16, 2010), http://www.nytimes.com/gwire/2010/08/16/16greenwire-us-chamber-sues-epa-over-greenhouse-gas-endang-81491.html (noting that the EPA had admitted that attempting to regulate "climate change under the [CAA] would create an absurd result" (internal quotation marks omitted)).

[193] *See* ARNOLD W. REITZE JR., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 416 (2001), *available at* http://books.google.com/books?id=M8w5yJbNTD0C&pg=PR1&dq (noting that during the most recent amendments to the CAA in 1990 legislation was proposed in Congress to regulate greenhouse gases and ozone-depleting substances but was not included in the CAA). Further, one of the basic rules of statutory construction is that congressional silence after considering a proposal cannot be a basis for claiming congressional authorization. *Id.* (citing Immigration & Naturalization Serv. v. Cardozo-Fonseca, 480 U.S. 421, 442–43 (1987)).

[194] Congressman John Dingell, Michigan's 15th Congressional District.

[195] Press Release, John D. Dingell, Dingell on EPA Action Concerning Greenhouse Gases (Dec. 7, 2009), http://dingell.house.gov/news/press-releases/2009/12/091207EPAGreenhouseGases.shtml (discussing his thoughts on EPA regulation). Congressman Dingell further added, "The House has passed the American Clean Energy and Security Act of 2009. I urge

This issue was brought to the forefront by the language of the Second Circuit's opinion that "[w]e express no opinion at this time as to whether the actual regulation of greenhouse gas emissions under the CAA by [the] EPA, if and when such regulation should come to pass, would displace Plaintiffs' cause of action under the federal common law."[196] Luckily the Supreme Court corrected this abominable language, which would have created a standard where no one would ever know when the common law was displaced. Nevertheless, fundamental flaws in the structure of the CAA persist that affect its ability to regulate greenhouse gases.[197]

If greenhouse gases are listed as criteria pollutants, the structure of the CAA requires stationary sources to be regulated under either new source performance standards or new source review requirements.[198] However, there is no cost-effective, commercially available control for stationary sources now or in the foreseeable future, frustrating the purpose of the CAA.[199] Finally, designing an appropriate ambient level of greenhouse gas levels under the CAA would be extremely difficult, if not impossible.[200] A recent paper sponsored by the environmentalist group Resources for the Future describes the perils of regulation without Congressional action:

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the Senate to set a rigorous schedule for their companion legislation." *Id.*

[196] Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 381 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

[197] *See* Olinger, *supra* note 127, at 261–64 (discussing the difficulties of regulating greenhouse gas emissions under the CAA); *see also* REITZE, *supra* note 193, at 413–18 (discussing whether greenhouse gases are even air pollutants and the difficulty of regulating their emissions under the current CAA programs to prevent significant deterioration and for new source performance standards).

[198] *See* CAA, 42 U.S.C. § 7411(a)(1) (2006) (requiring technology based standards to limit emission levels to the best level possible taking into account cost and energy requirements).

[199] *See* REITZE, *supra* note 193, at 417 (describing the lack of reasonable greenhouse gas emission control that can be applied for stationary sources). This same problem arises if the EPA tried to regulate mobile source emissions. *Id.* As Time Magazine noted: "Still, it's far from clear exactly how the EPA will regulate carbon. Regulations would call for new plants to take on the 'best available technologies' to control carbon emissions, but the EPA hasn't specified what those technologies are." Bryan Walsh, *EPA Prepares to Take the Lead on Regulating CO_2*, TIME, Feb. 23, 2010, http://www.time.com/time/health/article/0,8599,1967585,00.html#ixzz1APgkizAa.

[200] *See* REITZE, *supra* note 193, at 417 (noting the difficulty in setting appropriate CO_2 levels under the current CAA); *see also* Olinger, *supra* note 127, at 262 ("[I]t would be extremely difficult to designate a nonattainment area for CO_2.").

> The likelihood of drawn-out litigation would increase, and the EPA might be forced by courts to act more quickly than it would like, stretching agency resources and possibly undermining the quality of eventual regulation. The political fallout for courts and the EPA could also be significant if either or both are perceived to be imposing a suboptimal but vast regulatory program in an undemocratic fashion.[201]

In sum, the CAA in its current form is very poorly suited to regulate greenhouse gases and further action by the Executive Branch or Judiciary may further exacerbate the problem.

IV. CONCLUSION

The Supreme Court in *AEP* corrected a dangerous Second Circuit common law displacement standard and returned the displacement test back to where it belongs. By focusing the displacement test exclusively on the Legislative Branch, the Court correctly follows prior precedent and establishes the certainty of displacement for all energy emitters and the EPA. Furthermore, the *AEP* standard ensures that each branch of the government retains its traditional power and does not unconstitutionally expand its power.

At a time when the EPA begins to regulate greenhouse gas regulations under the CAA and litigants continue to sue under various public nuisance theories,[202] Congress must take its rightful place and give the Nation what it desperately needs—a comprehensive climate change bill. Climate change is a major issue facing the current generation, and we can only hope that Congress can provide a real solution to the problem.

Damian Michael Brychcy

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[201] *See* Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act*: *Does* Chevron v. NRDC *Set the EPA Free?* 2 (Res. for the Future, Discussion Paper No. 09-05, 2009), *available at* http://www.rff.org/RFF/Documents/RFF-DP-09-50.pdf.

[202] Additionally, because the Supreme Court left open the possibility of state nuisance common law, more litigation may arise.