

The Supreme Court Disposes of a Nuisance Suit: *American Electric Power v. Connecticut*

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In *American Electric Power v. Connecticut*,¹ the Supreme Court confronted climate change litigation for the second time in five years. The Court's previous foray into this terrain yielded 2007's *Massachusetts v. EPA*, easily one of the most consequential decisions of the Roberts Court. In *Massachusetts*, a closely divided Court rebuked the Environmental Protection Agency for denying it had the authority to regulate greenhouse gas emissions and propped open the courthouse doors to future climate litigation.² In the wake of *Massachusetts*, EPA regulation of greenhouse gases proliferated,³ and warming-based litigation blossomed.⁴

The Court was cooler to global warming claims the second time around. In *AEP*, a unanimous Court hewed closely to well-settled precedent, turning down an ambitious effort to turn the federal

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¹ 131 S.Ct. 2527 (2011).

² 549 U.S. 497 (2007). For a discussion of this decision, see Andrew P. Morriss, *Litigating to Regulate: Massachusetts v. EPA*, 2006–07 *Cato Sup. Ct. Rev.* 193 (2007); Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 3 *Va. L. Rev.* In Brief 61 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf>.

³ For an overview of federal regulatory initiatives governing greenhouse gases, many of which were triggered by *Massachusetts v. EPA*, see Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation under the Obama Administration*, 34 *Harv. J. L. & Pub. Pol'y* 421 (2011).

⁴ As of December 31, 2009, over 130 climate change cases had been filed, a majority of them in federal court. See David Markell and J. B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 *Env'tl. L. Rep.* 10644 (2010). Only 18 climate cases were filed before 2006. *Id.* at 10650.

common law of nuisance into a judicially administered environmental regulatory regime. The Court avoided thorny jurisdictional questions and refused to open new avenues of litigation for climate plaintiffs. At the same time, the Court's narrow opinion did not retreat from its prior holdings in *Massachusetts*. It also refrained from erecting new obstacles to future suits, thus ensuring that climate litigation will continue. Yet in explaining its decision, the Court raised cautions about trying to make climate change policy through the judiciary. That climate change is a serious concern does not mean it is a matter for the courts.

I. A Nuisance Suit

In July 2004, eight states,⁵ the City of New York, and three conservation organizations⁶ filed suit in federal district court against several of the nation's largest electric power producers.⁷ The plaintiffs alleged that the power companies' greenhouse gas (GHG) emissions contributed to the public nuisance of global warming under federal common law.⁸ According to the complaints, the defendant companies were "the five largest emitters of carbon dioxide in the United States." Each company owned dozens of power plants throughout the United States that, taken together, were responsible for an estimated 650 million tons of carbon dioxide emissions each year. These emissions constitute approximately 10 percent of U.S. emissions and 2.5 percent of all anthropogenic GHG emissions worldwide.⁹

The complaints charged that global warming, and its consequent effects, constitute an interstate public nuisance subject to redress

⁵ The states that initially filed suit were California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin. New Jersey and Wisconsin subsequently withdrew from the suit. See AEP, 180 L. Ed. 2d at 443 n.3.

⁶ The three conservation groups were the Open Space Institute, Inc., Open Space Conservancy, Inc., and the Audubon Society of New Hampshire. See *id.* at 443 n.4.

⁷ The companies named in the suit were American Electric Power Company, Inc. (and American Electric Power Service Corporation, a wholly owned subsidiary), Southern Company, Xcel Energy, Inc., Cinergy Corporation, and the Tennessee Valley Authority. See AEP, 180 L. Ed. 2d at 443–44 n.5.

⁸ Although the cases were combined, they were initially filed as two separate lawsuits, one by the states and New York City, the other by the three conservation groups. See No. 04 Civ. 5669, 2004 WL 1685122 (S.D.N.Y. filed July 21, 2004); No. 04 Civ. 5670, 2004 WL 5614409 (S.D.N.Y., filed July 21, 2004).

⁹ AEP, 180 L. Ed. 2d at 444.

under federal common law.¹⁰ Among other things, plaintiffs cited concerns that average warmer temperatures would increase sea levels, reduce mountain snowpack, increase urban smog formation, and disrupt local ecosystems.¹¹

Relying on a series of cases beginning around the turn of the last century, the plaintiffs argued that federal courts had the power to enjoin activities that contribute to interstate pollution that could constitute a public nuisance.¹² As the plaintiffs noted, such equitable power had been invoked many times to control interstate pollution. As a remedy, the plaintiffs sought an injunction requiring each of the defendant power companies “to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.”¹³

Nuisance law traces its roots to the English law of the mid-13th century. Henry of Bracton, a prominent jurist of the time, wrote that “no one may do in his own estate any thing whereby damage or nuisance may happen to his neighbor.”¹⁴ So, for example, it was not permissible for one landowner to emit noxious odors or fumes onto the land of another or cause a neighbor’s land to be flooded. This principle became embodied in the Latin maxim *Sic utere tuo ut alienum non laedas*, or “Use your own property so as not to harm another’s.”¹⁵

While the law of private nuisance focused on those activities that interfered in the use or enjoyment of private land, the doctrine of public nuisance developed to address those activities that interfered with the rights of the public at large, such as obstructing a highway,

¹⁰ The plaintiffs’ complaints also alleged, in the alternative, that the defendants’ emissions would constitute a nuisance under applicable state law.

¹¹ See *Connecticut v. Am. Elec. Power*, 582 F.3d 309, 317–18 (2nd Cir. 2009).

¹² See, e.g., *Missouri v. Illinois*, 180 U.S. 208 (1901) (*Missouri I*); *Missouri v. Illinois*, 200 U.S. 496 (1906) (*Missouri II*); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *New York v. New Jersey*, 256 U.S. 296 (1921); *New Jersey v. New York*, 283 U.S. 473 (1931).

¹³ 180 L. Ed. 2d. at 444.

¹⁴ See Elizabeth Brubaker, *The Common Law and the Environment: The Canadian Experience*, in *Who Owns the Environment?* 88–89 (Peter J. Hill and Roger E. Meiners eds., 1997).

¹⁵ See *Aldred’s Case*, 9 Co. Rep. 57b, 77 Eng. Rep. 816 (1610). This case, involving a dispute between a landowner and the owner of a neighboring pigsty, is the first known reported case to expressly rely upon this rule for its decision.

disrupting a public market, or fouling the air of the town square.¹⁶ Because public nuisance actions are intended to protect rights common to the public, they are most often filed by public authorities, acting on behalf of the state in its sovereign capacity. Those activities subject to suit as public nuisances are those also subject to regulation under the sovereign police power. Private parties may also file suits alleging public nuisances, but only if they are able to demonstrate that they have suffered a “special injury” to distinguish their interest from that of the public at large.¹⁷

The Restatement (Second) of Torts defines a public nuisance as “an unreasonable interference with a right common to the general public.”¹⁸ Though it does not provide a precise definition of what would constitute an “unreasonable” interference, the Restatement notes public nuisances are typically characterized by one or more of the following characteristics: (1) the offending conduct creates a “significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience”; (2) the conduct is “proscribed by statute, ordinance or administrative regulation”; and (3) the conduct is “of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.”¹⁹ As Professor Thomas Merrill observes, this only provides the most general guidance for resolving nuisance claims as it does not, for instance, make clear whether courts should balance the degree of harm against the utility of the defendant’s conduct or adopt something closer to a strict liability rule.²⁰

¹⁶ See William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 998–99 (1966).

¹⁷ See Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years after Boomer*, 54 Alb. L. Rev. 359, 364 (1990).

¹⁸ Restatement (Second) of Torts § 821B (1977).

¹⁹ *Id.*

²⁰ Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293, 329 (2005). See also *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (“nuisance standards often are vague and indeterminate”); *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 302 (4th Cir. 2010) (“while public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application.”).

Although public nuisance claims in federal court are not particularly common, states have repaired to the federal common law of interstate nuisance in seeking to reduce or eliminate pollution emanating from other jurisdictions. In the noted case of *Georgia v. Tennessee Copper Company*, for example, the state of Georgia sought relief from the “noxious gas” emitted by copper companies in an adjoining state.²¹ These emissions, Georgia claimed, caused the “wholesale destruction of forests, orchards, and crops” within its territory.²² In an opinion by Justice Oliver Wendell Holmes, the Supreme Court agreed that Georgia was entitled to relief, explaining:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.²³

In other cases, the Supreme Court recognized public nuisance claims against upstream discharges of untreated sewage and ocean dumping of waste, among other things.²⁴

The plaintiffs in *AEP* sought to claim that theirs was a straightforward nuisance suit of the sort federal courts had long accepted. Yet there are many ways in which global climate change is anything but an ordinary public nuisance. Among other things, the causal link between any one facility’s or industry’s emissions and the alleged interference in public rights is fairly attenuated. All of the defendant power companies’ facilities combined are responsible for less than three percent of the relevant GHG emissions. Any interference in public or other rights caused by the GHG emissions is indirect and only results from the aggregate accumulation of such emissions from all sources over time.

Past interstate nuisance actions have typically involved binary pollution problems in which pollution from State A is causing harms

²¹ *Georgia*, 206 U.S. at 236.

²² *Id.*

²³ *Id.* at 238.

²⁴ See, e.g., *Missouri I*, 180 U.S. at 208; *New Jersey*, 283 U.S. at 473.

in State B, or in which the parties can be identified as those causing and those being harmed by the allegedly polluting behavior. Yet with climate change, all states are both the sources of emissions and “victims” of the consequences, including states not party to any suit. While some facilities or some jurisdictions are responsible for more emissions than others any harms are ultimately the result of global atmospheric concentrations. Had the plaintiffs in *AEP* sued all domestic power producers—or even all GHG emitters within the nation—they still would not have reached all significant contributors to the alleged nuisance. For these reasons, some commentators suggest global warming is better conceptualized as a large-scale common-pool management problem than as an interstate pollution dispute.²⁵

Given the scale and complexity of climate change, it should be no surprise that judges have been reluctant to green-light nuisance suits against GHG emissions. In several cases, federal district court judges have dismissed climate-based nuisance suits filed against automakers and oil companies on the grounds that global warming is not suitable for resolution in the context of a common nuisance suit.²⁶ Although the potential consequences of global climate change can be characterized in nuisance-like terms, applying the law of public nuisance to GHG emissions would require stretching the bounds of the traditional nuisance action.

In *AEP*, the district court dismissed the complaints on the grounds that the plaintiffs’ “unprecedented ‘nuisance’ action” raised a “non-justiciable political question.”²⁷ Determining whether defendants’ emissions constituted or contributed to an actionable public nuisance and, if so, what relief to award were matters beyond judicial purview, the court concluded. The court explained that it lacked any discernible basis on which to balance the competing environmental and economic interests implicated by the suit. Unlike “simple nuisance

²⁵ See, e.g., David A. Dana, The Mismatch between Public Nuisance Law and Global Warming, 18 Sup. Ct. Econ. Rev. 9 (2010).

²⁶ See *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); *Comer v. Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (unpublished ruling), rev’d, 585 F.3d 855, 880 (2009), vacated 589 F.3d 208 (2010), appeal dismissed 607 F.3d 1049 (2010); *Native Vill. of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

²⁷ *Connecticut v. Am. Elec. Power*, 406 F. Supp. 2d 265, 271 (S.D.N.Y. 2005).

claim[s] of the kind courts have adjudicated in the past,” plaintiffs’ claims were of a “transcendently legislative nature.”²⁸ Insofar as climate change was an important matter of national—if not international—policy, the court concluded, it was a question best left to the political branches. The plaintiffs appealed.

II. A Tale of Two Climate Cases

At the same time as the states and conservation groups were bringing their nuisance action against American Electric Power and other major electricity producers, several of the same states were suing the EPA alleging that GHG emissions constituted “pollutants” subject to regulation under the Clean Air Act.²⁹ Environmentalist groups had petitioned the EPA to regulate automotive GHG emissions several years earlier. After the Clinton administration demurred and the Bush administration denied their request, they filed suit.

Both cases sought the imposition of GHG emission controls, one through administrative regulation, the other through judicial fiat. Both were a reaction to the federal government’s steadfast refusal to adopt such policies on its own. If politicians in Washington, D.C., would not regulate GHGs, state attorneys general and environmentalist groups reasoned, perhaps litigation could force their hand. And if either case produced an unwieldy legal settlement, perhaps that would spur legislative action on Capitol Hill.³⁰

Although the cases raised different legal arguments, and followed different courses, their fates were intertwined. It was well understood that prevailing in one case would likely preclude victory in the other. Indeed, that was the point. The arguments used by the EPA and industry to defend against GHG emission controls in one case would undercut their arguments in the other. The EPA had determined GHGs were not subject to regulation under the CAA.³¹

²⁸ *Id.* at 272.

²⁹ See *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), rev’d 549 U.S. 497 (2007). A large number of nonprofit advocacy organizations were also involved in this suit.

³⁰ See John Schwartz, *Courts as Battlefields in Climate Fights*, N.Y. Times, Jan. 26, 2010, at A1 (noting legal cases were increasing pressure on Congress to enact climate change legislation).

³¹ See *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52922 (Sept. 8, 2003).

If that were so, the states argued, the CAA could not preclude common-law-based claims against GHG emissions.³² The aim was to place the EPA and those industry groups opposing regulation in a no-win situation, further enhancing the pressure for climate legislation.³³

The states eventually prevailed in *Massachusetts*. The Court held, among other things, that GHG emissions “fit well within the Clean Air Act’s capacious definition of ‘air pollutant,’” and could be regulated by the EPA.³⁴ Indeed, given the agency’s repeated statements over many years about the dangers posed by greenhouse warming, the *Massachusetts* decision ensured that GHGs would be regulated by the EPA. This disposition all but ensured the outcome of *AEP*—it just took a while for this message to be heard.

III. *AEP*’s Stop in the Second Circuit

Massachusetts was decided in April 2007. By that point, *AEP* had already been before the U.S. Court of Appeals for the Second Circuit for over a year,³⁵ where it would continue to sit. The three-judge panel assigned to the case requested supplemental briefing on the effect of *Massachusetts* on the parties’ arguments, but that did not accelerate the case’s disposition. An opinion would not issue for over two more years, by which time one of the panel’s judges, Sonia Sotomayor, had been nominated and confirmed to the Supreme Court.³⁶

³² See, e.g., Brief for Respondents Connecticut, et al. at 1–2, *Am. Elec. Power v. Connecticut* (2011) (No. 10-174) (noting state suit was filed in response to the EPA’s taking the position that it lacked the authority to regulate greenhouse gases under the Clean Air Act.).

³³ Not all of those involved in the suits would accept this characterization, however. See Schwartz, *supra* note 30, at A1 (quoting attorney Matthew F. Pawa denying that the cases were brought to influence federal policy).

³⁴ *Massachusetts*, 549 U.S. at 532.

³⁵ The appeal was filed in September 2005. The plaintiff-appellants’ initial briefs were filed in December 2005 and the Second Circuit heard oral argument in *AEP* in June 2006. See Marcia Coyle, *Questions Arise about Long Delay by Sotomayor-Led Panel in Climate Case*, Nat’l. L.J., May 29, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202431051311&slreturn=1&hbxlogin=1>.

³⁶ Then-Judge Sotomayor had been on the original three-judge panel that heard the case and called for supplemental briefing. She was confirmed as an associate justice to the U.S. Supreme Court on August 6, 2009; the Second Circuit released its opinion on September 21, 2009.

When the Second Circuit finally issued its decision in September 2009, four years after the case was docketed, it handed the plaintiffs a resounding (if short-lived) victory. The panel found that the district court had erred in dismissing the complaint on political question grounds, concluding that *all* the plaintiffs had standing and that they had properly stated claims under the federal common law of nuisance that were not displaced by the CAA.³⁷ This last conclusion was easily the weakest and least convincing portion of the panel's lengthy opinion. The Second Circuit accurately cited the Supreme Court's relevant precedents on displacement of federal common law, and quoted the appropriate test, but then proceeded to disregard them in resolving the case.

Whether federal common-law actions for interstate pollution are displaced turns on *legislative* action. As the Second Circuit explained, citing *Milwaukee v. Illinois (Milwaukee II)*, "Because 'federal common-law is subject to the paramount authority of Congress,' federal courts may resort to it only 'in absence of an applicable Act of Congress.'"³⁸ For this reason, it was generally presumed that federal common-law public nuisance actions against interstate air pollution were displaced by the CAA.³⁹ If the CAA's expansive statutory scheme

³⁷ AEP, 582 F.3d at 315.

³⁸ *Id.* at 371 (quoting *Milwaukee II*, 451 U.S. 304, 313 (1981)). The Second Circuit also cited *Milwaukee II*'s instructions that: "when Congress addresses a question previously governed by a decision rested on federal common law the need for . . . lawmaking by federal courts disappears" and "the question [of] whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." *Id.* (quoting *Milwaukee II*, 451 U.S. at 314, 315 n.8).

³⁹ See, e.g., Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 *Ala. L. Rev.* 717, 768 n.476 (2004) ("Although the Supreme Court has not directly addressed the question of whether the federal Clean Air Act preempts federal common law in disputes over transboundary air pollution, it is widely assumed to do so, particularly in light of the Clean Air Act Amendments of 1990, which created a comprehensive federal permit scheme similar to that established by the Clean Water Act."); see also Gerald Torres, *Who Owns the Sky?* 19 *Pace Env'tl. L. Rev.* 515, 555 (2002) ("Since 1981, federal courts have recognized that the regulatory framework of the Clean Air Act has replaced the federal common law cause of action in nuisance."); James A. Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes*, 5 *Nat. Res. & Env't* 29, 30 (1990) (noting as "various comprehensive environmental statutes were put in place, the Supreme Court virtually gutted the federal common law of nuisance as an environmental remedy").

were to apply to GHGs, it would follow that federal common-law nuisance claims would be displaced as well.⁴⁰

Despite the clear language of *Milwaukee II*, the Second Circuit rejected the defendants' displacement claim. It focused not on the CAA itself, but on its implementation by the EPA. Since the EPA had not yet begun to exercise its authority to regulate GHGs, the Second Circuit reasoned, the states' nuisance claims had yet to be displaced. Whether or not such claims would be displaced in the future, the court added, would depend upon the precise contours of future EPA regulations governing GHGs.⁴¹ The Second Circuit's approach may have been reasonable had it been a question of first impression, but it was not. Further, by shifting the locus of displacement authority from Congress to the EPA, it made displacement hinge on particular policy choices that could change from one presidential administration to the next.

While the Second Circuit's failure to follow applicable Supreme Court precedents on the displacement of federal common law was the court's most conspicuous error, it was not the only questionable element of its opinion. On the question of standing, the Court concluded that all the plaintiffs—states and conservation groups alike—had standing. Yet it is only necessary for one plaintiff to demonstrate standing to maintain a federal court's jurisdiction. Once the Second Circuit had concluded that one or more of the states satisfied the constitutional standing requirements, it should have stopped.⁴² By stretching to consider the private conservation groups' standing, it also stretched the relevant standing precedents by, among other things, holding that the conservation groups could satisfy the injury-in-fact requirement without asserting any present harms. Not only did the conservation groups "not allege any current injury,"⁴³ those

⁴⁰ Before *Massachusetts v. EPA* was decided, I had heard more than one attorney involved in both cases concede this point. Strangely, once *Massachusetts* had been decided, this concession was forgotten.

⁴¹ AEP, 582 F.3d at 380 ("Until EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact 'speak[k] directly' to the 'particular issue' raised here by Plaintiffs.").

⁴² Consideration of the other plaintiffs' standing would only have been necessary insofar as the other plaintiffs were asserting different claims or seeking different relief.

⁴³ AEP, 582 F.3d at 341.

injuries they did allege would only manifest themselves over a period of many years and were based on predictions of the future. Nonetheless, the Second Circuit found that the private plaintiffs satisfied the requirement of an “actual or imminent” injury.

The Second Circuit also concluded that nonstate actors, including the private conservation groups, could sue under the federal common law of nuisance, despite the lack of meaningful precedent supporting this result.⁴⁴ In every case in which the Supreme Court has sustained suits alleging public nuisances under federal common law, the plaintiffs were states. Indeed, the Supreme Court often characterized such suits as analogous to disputes between sovereigns.⁴⁵ The Court was presented with the question of whether private parties could maintain a suit under the federal common law of nuisance in *National Sea Clammers Association v. City of New York*, but did not reach the question after it concluded federal common-law nuisance actions for interstate water pollution were displaced by federal law.⁴⁶ But the Second Circuit was undaunted, relying on the since-vacated opinion of the U.S. Court of Appeals for the Third Circuit in *National Sea Clammers*.⁴⁷ Yet, as with standing, this foray into the outer regions of federal common law was unnecessary once the Second Circuit concluded that the state parties could maintain the suit.

IV. Before the High Court

With several climate-based nuisance claims in federal court, it was likely one such case would be granted review. The odds of *AEP* being that case increased dramatically after the solicitor general submitted a brief supporting the power companies’ petition for certiorari. Whatever ideological sympathy the Obama administration may have had for the plaintiffs and their claims, the Department of

⁴⁴ See *id.* at 361 (noting “cases addressing the issue of whether private parties may sue under the federal common law of nuisance have been sparse”). “Sparse” may be something of an overstatement, however, as the Supreme Court noted in *AEP* that it has never “decided whether private citizens . . . may invoke the federal common law of nuisance to abate out-of-state pollution.” 131 S.Ct. at 2536.

⁴⁵ See, e.g., *Missouri I*, 180 U.S. at 241. See also Merrill, *supra* note 20, at 303.

⁴⁶ 453 U.S. 1, 11 n.17 (1981).

⁴⁷ *AEP*, 582 F.3d at 363.

Justice recognized the tenuous nature of the Second Circuit's opinion, particularly its untethered conclusion regarding the displacement of federal common-law claims. Given the positions traditionally espoused by the Justice Department, however—on standing in particular—the solicitor general's merits brief was quite restrained. It urged the Supreme Court to reverse the standing holding on prudential, rather than constitutional, grounds, and recommended remand so the Second Circuit could reconsider its displacement holding in light of subsequent regulatory events.⁴⁸ In the months following the circuit court's decision, the EPA had proceeded to propose and adopt expansive regulations of GHG emissions under the CAA. The SG's arguments provided a way for the Court to reverse the Second Circuit without necessarily precluding the continued use of public nuisance suits for other environmental purposes. Environmentalist groups were nonetheless dismayed.⁴⁹

Given the number of issues in the case, there was substantial speculation as to what the Court might do with *AEP*. After oral argument in April 2011, however, the ultimate outcome was no longer in doubt. The justices exhibited deep skepticism about using federal courts to drive climate policy across the board. Even the more liberal justices seemed uneasy with allowing federal judges a hand in balancing the equities involved with climate change. More than one justice suggested the plaintiffs were seeking to have federal judges perform the EPA's job. It was fairly clear the petitioners would prevail. The only question was on what grounds they would win, and whether the SG's modest arguments would carry the day.

V. Obvious Displacement

On June 20, 2011, the Supreme Court announced its opinion in *AEP*, unanimously reversing the Second Circuit.⁵⁰ Although many

⁴⁸ Brief for the Tenn. Valley Auth. as Respondent Supporting Petitioners, *AEP v. Connecticut*, 131 S.Ct. 2527 (2011) (10-174).

⁴⁹ See Steven Mufson, *Obama Administration Sides with Utilities in Supreme Court Case about Climate Change*, Wash. Post, Aug. 26, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/26/AR2010082606632.html>.

⁵⁰ 131 S.Ct. 2527 (2011) (8-0). Justice Sotomayor was recused due to her participation in the case as a judge on the Second Circuit. Justice Samuel Alito wrote an opinion concurring in part and concurring in the judgment, joined by Justice Clarence Thomas, "on the assumption (which I make for the sake of argument because no party contends otherwise)" that the Supreme Court's interpretation of the CAA in *Massachusetts* was correct. *Id.* at 2540-41 (Alito, J., concurring).

issues were on the table, the Court confined its consideration to the question of displacement, because that was enough to decide the case. The Second Circuit's failure to follow the very precedents on which it purported to rely made it easy for the Court to coalesce in what could otherwise have been a divisive case. As Justice Ruth Bader Ginsburg explained for a unanimous Court, whether a federal regulatory program displaces preexisting federal common-law claims is dependent on what legislation Congress has enacted, not how such legislation has or will be implemented by federal regulatory agencies: "The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question at issue.'"⁵¹ If Congress adopted a statute governing GHG emissions, federal common-law actions concerning GHG emissions would be displaced without regard to the nature of the resulting regulatory regime. "As *Milwaukee II* made clear," Justice Ginsburg wrote, "the relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'"⁵²

Given the Supreme Court's prior holding that GHGs were subject to regulation under the CAA, displacement follows. As Justice Ginsburg explained,

the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. . . . And we think it equally plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants.⁵³

The "critical point," Justice Ginsburg explained, was that "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants,"⁵⁴ not whether the

⁵¹ *Id.* at 2537 (citation omitted) (Ginsburg, J., for the unanimous Court).

⁵² *Id.* at 2538 (quoting *Milwaukee II*, 451 U.S. at 324).

⁵³ *Id.* at 2537.

⁵⁴ *Id.* at 2538. To this, Justice Ginsburg added, somewhat cheekily, "Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit. After all, we each emit carbon dioxide merely by breathing." *Id.*

resulting regulations were effective or desirable.⁵⁵ Indeed, Justice Ginsburg noted, were the EPA to adopt inadequate regulations, or even to “decline to regulate carbon-dioxide emissions altogether,” it would be immaterial to the question of displacement.⁵⁶ Even if the Clean Water Act could be said to impose a more comprehensive system of effluent controls than the CAA, this was irrelevant, for “[o]f necessity, Congress selects different regulatory regimes to address different problems.”⁵⁷

In enacting the CAA, as interpreted in *Massachusetts*, Congress made the scope and stringency of federal GHG emissions something for the EPA to determine in the first instance. Should states or private groups disagree with the EPA’s policy conclusions, or believe that the EPA’s regulations are insufficiently stringent, they retain the ability to petition the agency or file suit in federal court, much as the states and environmentalist groups did in *Massachusetts*. What they cannot do is seek to transfer authority over emission controls from the political branches to the courts through the use of federal common law.

The Court’s opinion emphasized that federal common law is a disfavored remedy. “There is no federal general common law,” the opinion noted, quoting *Erie Railroad v. Tompkins*.⁵⁸ Instead, most questions governed by the common law are left to the states. Federal common law is reserved for “subjects within national legislative power where Congress has so directed,” such as in the case of antitrust law, or “where the basic scheme of the Constitution so demands,” such as where it is necessary to resolve interstate disputes.⁵⁹ In the absence of federal environmental statutes, interstate air and water pollution would be governed by federal common law, but only in the absence of relevant federal legislation. The federal common law of interstate nuisance is thus a backstop—a means of filling interstices insofar as is necessary to enable states to safeguard

⁵⁵ There are plenty of reasons to believe EPA regulation of greenhouse gases under the Clean Air Act is not desirable. See Adler, *supra* note 3.

⁵⁶ AEP, 131 S.Ct. at 2539. (“As *Milwaukee II* made clear, however, the relevant question for purposes of displacement is ‘whether the field has been occupied, not whether it has been occupied in a particular manner.’” (citation omitted)).

⁵⁷ *Id.* at 2538.

⁵⁸ *Id.* at 2535 (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

⁵⁹ *Id.* (citation omitted).

their sovereign interests in their own territory. Yet as the Court had held in *Milwaukee II*, “when Congress addresses a question previously governed by a decision rested on federal common law, the need for such an unusual exercise of law-making by federal courts disappears.”⁶⁰

Whereas the Court has adopted (though not always applied) a presumption against the preemption of state law, no such presumption applies with displacement. If anything, the constitutional structure would warrant a “special presumption” *against* the use of federal common law.⁶¹ Preemption of state law must be clearly shown so as to protect states’ sovereign interests within the federal system of dual sovereignty. No such interest protects the policymaking power of the federal courts. Justice Ginsburg explained that “it is primarily for the office of Congress, not the federal courts, to prescribe national policies in areas of special federal interest.”⁶² Thus, whereas the justices routinely disagree and divide over the *preemptive* effect of various federal laws, they were of one mind on the question of *displacement* and unanimously rejected the use of federal common law to control emissions already subject to administrative control under federal law.

Sidestepping Standing

In a typical case, a federal court must assure itself of jurisdiction before reaching the merits of the case. Article III of the Constitution restricts federal court jurisdiction to “Cases” and “Controversies,” and one requirement of Article III, as interpreted by the Supreme Court, is that the party seeking to invoke federal jurisdiction have standing. Not only was standing a threshold issue in *AEP*, but the question also presented the Court with an opportunity to clarify the implications of its decision to recognize the Commonwealth of Massachusetts’s standing to sue the EPA in *Massachusetts*. It was not to be. With Justice Sotomayor recused, the participating justices split evenly on the matter.⁶³ Four of the justices concluded that “at least some plaintiffs,” most likely the states, could establish standing

⁶⁰ 451 U.S. at 314.

⁶¹ See Merrill, *supra* note 20, at 314.

⁶² *AEP*, 131 S.Ct. at 2537.

⁶³ *Id.* at 2535.

under the Court's holding in *Massachusetts*.⁶⁴ Four others would have denied standing, as they either adhered to Chief Justice John Roberts's standing dissent in *Massachusetts* or found the case distinguishable.⁶⁵ Therefore, under longstanding Court practice, the Court affirmed the Second Circuit's exercise of jurisdiction without deciding that question, missing an opportunity to clarify the law of standing.⁶⁶

Climate change presents a particularly difficult standing challenge. Global warming is just that—a *global* phenomenon. GHG emissions, whether from motor vehicles, coal-fired power plants, or any other source, contribute to *global* GHG concentrations in the atmosphere that affect the *global* climate. As a consequence, concerns about global warming would appear to represent the sort of “generalized grievance” that is “common to all members of the public,”⁶⁷ and is therefore beyond the scope of Article III. Invoking the power of federal courts requires something more than an abstract legal wrong or a harm that is visited on the entire body politic.

Under *Lujan v. Defenders of Wildlife*, there are three necessary components to Article III standing.⁶⁸ First, the “plaintiff must have suffered an ‘injury in fact,’” that is both “actual or imminent” and “concrete and particularized.”⁶⁹ Second, there must be a “causal connection between the injury and the conduct complained of.”⁷⁰ Third, there must be a sufficient likelihood that “the injury will be ‘redressed by a favorable decision.’”⁷¹ Strictly applied, *Lujan*'s requirements would seem to create a problem for plaintiffs seeking to litigate warming-based claims. “The very concept of global warming

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ The defendant-petitioners and some *amici curiae* also maintained that plaintiffs' claims presented a nonjusticiable political question, as the district court had concluded. See, e.g., Brief Amicus Curiae of Cato Institute in Support of Petitioners, *Am. Elec. Power v. Connecticut*, 131 S.Ct. 2527 (2011) (No. 10-174). At least four justices rejected this claim, but it was not resolved by the Court. AEP, 131 S.Ct. at 2535.

⁶⁷ *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam); *Laird v. Tatum*, 408 U.S. 1, 13 (1972)).

⁶⁸ 504 U.S. 555 (1992).

⁶⁹ *Id.* at 560.

⁷⁰ *Id.*

⁷¹ *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 38, 43 (1976)).

seems inconsistent with [the] particularization requirement," observed Chief Justice Roberts in his *Massachusetts* dissent.⁷²

The Commonwealth of Massachusetts addressed this difficulty by focusing on a specific, concrete harm that would result from climatic warming: sea-level rise and the consequent flooding of Massachusetts's coast.⁷³ It submitted affidavits alleging that present and continuing anthropogenic GHG emissions would lead to increased sea-level rise that would, in turn, produce coastal flooding.⁷⁴ By focusing on sea-level rise, Massachusetts sought to satisfy the particularization requirement by demonstrating how global warming would affect it in a distinct and identifiable way.

The focus on sea-level rise eased the standing inquiry, but it did not make the problems go away. Under *Lujan*, an "injury in fact" must be *both* actual or imminent *and* concrete and particularized. Satisfying both of these requirements simultaneously remained a challenge, for insofar as Massachusetts sought to argue that its injury was occurring in the here and now, it became more difficult for it to identify the specific harms that were caused by anthropogenic contributions to climate change, as opposed to other factors (for example, subsidence, natural variation, and non-anthropogenic warming). In order to identify any particular quantum of its coastline under threat from global warming, Massachusetts had to rely on computer model projections far into the future. Specifically, Massachusetts cited estimates of projected sea-level rise due to global warming "by 2100."⁷⁵ Such harm may have been particular to the Commonwealth of Massachusetts—even if the amount attributable to anthropogenic emissions would still be measured in centimeters—but sea-level rise over the course of a century would not seem to be an "imminent" harm.

The Court further assisted the standing claim by announcing a "special solicitude" for state litigants.⁷⁶ Justice Stevens's opinion noted it was "of considerable relevance" that the petitioner was "a

⁷² 549 U.S. at 541 (Roberts, C.J., dissenting).

⁷³ *Id.* at 522 (majority opinion).

⁷⁴ *Id.* at 521–22.

⁷⁵ *Id.* at 523 n.20 (discussing "possible" effects of rising sea levels over the next century).

⁷⁶ *Id.* at 520.

sovereign State and not, as it was in *Lujan*, a private individual.⁷⁷ Because states had ceded a portion of their sovereignty to the federal government, they were entitled to this “special solicitude” when seeking to invoke the authority of federal courts. With this clarification “in mind,” the Court concluded that the loss of even small portions of Massachusetts’s coastline would be a sufficient injury under Article III.⁷⁸ This aspect of the *Massachusetts* holding would certainly seem to establish that the state plaintiffs in *AEP* had suffered an equivalent injury, and the Second Circuit held as much.⁷⁹ But injury-in-fact is only one component on the inquiry and is not, by itself, sufficient to establish standing.

Even if a climate-related harm satisfies the injury-in-fact requirement, a plaintiff must still demonstrate that the injury is fairly traceable to the conduct complained of and that any such injury would be redressed by a victory in court. Here again, strict application of traditional standing requirements would appear to be fatal, as it would be nearly impossible to attribute any degree of warming-induced harm to a subset of domestic GHG emissions, or to identify with any degree of precision the extent to which such harms could be avoided by a reduction in emissions on the margin.

In *Massachusetts*, the Court eased these difficulties by noting that Massachusetts was seeking to vindicate a “procedural right” to challenge unlawful agency action (or inaction) sanctioned by Congress. According to the Court, it was “of critical importance” that Congress had “authorized this type of challenge to EPA action.”⁸⁰ This authorization made the difference because, as the Court had held in *Lujan*,

⁷⁷ *Id.* at 518.

⁷⁸ The majority based Massachusetts’s injury on the fact that “global seal levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming,” *id.* at 522, even though plaintiff’s affidavit did not attribute all, or even any specific portion, of this sea-level rise to anthropogenic GHG emissions. See MacCracken Decl. ¶5(c), Stdg. App. at 225, *Massachusetts*, 549 U.S. 497 (No. 05-1120).

⁷⁹ 582 F.3d at 344. The Second Circuit also inexplicably went on to hold that the City of New York and the private litigants had Article III standing even though the private litigants did “not allege any current injury.” *Id.* at 341. This holding was inexplicable because it was completely unnecessary to the disposition of the case as it is only necessary for one plaintiff to possess standing for the Court to have jurisdiction. See *Massachusetts*, 541 U.S. at 518 (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

⁸⁰ *Massachusetts*, 549 U.S. at 516.

the “normal standards for redressability and immediacy” required for Article III jurisdiction are relaxed when a litigant is seeking to vindicate procedural rights created by Congress.⁸¹ This relaxation was certainly useful to the petitioners in *Massachusetts*, but it could not help the plaintiffs in *AEP*. Even assuming that the Court properly recognized a procedural right in *Massachusetts*,⁸² the *AEP* plaintiffs claimed no such right—nor could they as their claim rested on the federal common law of nuisance. Thus, insofar as the existence of a procedural right was necessary to establish the requisite degree of traceability and redressability for purposes of standing in *Massachusetts*, there was ample basis to distinguish the standing claim in *AEP*. Nonetheless, it appears no justice who had been in the *Massachusetts* majority was interested in distinguishing the cases on that basis.

Although the Court did not resolve the standing claim, one might surmise that a majority of the current justices would have found for the plaintiffs on this issue. In her relatively brief time on the Court, Justice Sotomayor, who sat on the Second Circuit panel below through oral argument and supplemental briefing, has indicated that she is likely to side with those justices urging a more permissive approach to standing.⁸³ If that is so, she would have joined Justice Anthony Kennedy and the “liberal” justices to find that at least one state plaintiff satisfied Article III’s standing requirements. The only question is whether the resulting majority would have rested squarely on *Massachusetts* or, recognizing the distinctions between the cases, would have lowered the standing hurdle even further.

VII. The Future of Climate Litigation

The Supreme Court’s holding that the CAA displaces public nuisance suits under federal common law does not mean the states and conservation groups are left without legal remedy. As initially filed, the suits also asserted state-law-based claims alleging a public nuisance under the law of the 20 states in which defendants’ power

⁸¹ Lujan, 504 U.S. at 572 n.7.

⁸² This is a nontrivial assumption. See Jonathan H. Adler, Standing Still in the Roberts Court, 59 Case W. Res. L. Rev. 1061, 1076–77 (2009); Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth about Precedent*, 93 Va. L. Rev. In Brief 75, 80 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/cass.pdf>.

⁸³ See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011)

facilities are located. The Second Circuit did not reach this issue, as it concluded plaintiffs had viable federal common-law claims.⁸⁴ As a consequence, the Supreme Court did not consider whether the CAA preempts public nuisance suits under state law or even whether such claims are viable. This subject was not briefed, and the Court expressly left the matter “open for consideration on remand.”⁸⁵

The displacement of federal common law implicates a different legal standard than does the preemption of state-law-based claims.⁸⁶ Whereas the invocation of federal common law is generally disfavored, so too is the federal preemption of state law. As noted above, if a federal statute “speaks directly” to a given question, that is sufficient to displace federal common-law claims—even if the federal legislation does not resolve the problem at hand. More is required, however, to preempt state-law-based claims. As a general matter, preemption will not be found unless the Court concludes preemption “was the clear and manifest purpose of Congress”⁸⁷ or that “a scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.”⁸⁸ This more stringent standard protects the states’ sovereign interests in maintaining their police powers free of federal interference.⁸⁹

In the case of interstate water pollution, the Court’s prior holdings that the federal Clean Water Act displaces federal common-law public nuisance suits have not preempted state-law-based claims against interstate water pollution. Under *International Paper Co. v. Ouellette*, states may file public nuisance suits against sources of interstate pollution so long as such claims are brought under the

⁸⁴ *Milwaukee II*, 451 U.S. at 314 n.7 (“If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used.”). See also Merrill, *supra* note 20, at 306 (“Federal common law and state common law are not cumulative causes of action . . . They are mutually exclusive.”).

⁸⁵ AEP, 131 S.Ct. at 2540.

⁸⁶ See Merrill, *supra* note 20, at 314.

⁸⁷ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁸⁸ *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983).

⁸⁹ See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (“This assumption provides assurance that ‘the federal-state balance’ will not be disturbed unintentionally by Congress or unnecessarily by the courts.”).

common law of the *source* state.⁹⁰ There is no *a priori* reason why a similar standard would not apply in the context of interstate air pollution. Among other things, the CAA contains a savings clause that is quite similar to that contained in the Clean Water Act.⁹¹

While *AEP* does not preclude state-law-based nuisance actions, Justice Ginsburg's opinion offered cautionary notes about the potential consequences of allowing such suits to proceed. Whatever the value of public nuisance claims generally, she explained why courts are particularly ill-suited to address climate change claims. Identifying and setting appropriate GHG emission targets requires the consideration of numerous tradeoffs—economic, environmental, and otherwise. Considering how to balance such competing considerations is typically the sort of legislative policy judgment Congress either delegates to an administrative agency or reserves for itself. In *AEP*, Justice Ginsburg noted, it was “altogether fitting” that Congress concluded that “an expert agency” was “best suited to serve as primary regulator of greenhouse gases.”⁹² As she explained:

The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. . . . Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present.⁹³

Whatever the limitations of agency rulemaking, there is no reason to think state judges, or even federal judges applying state law, would fare any better. If anything, the application of variable state standards to a global, interjurisdictional concern could further frustrate the development of a coherent climate change policy. As Justice Ginsburg noted, allowing these lawsuits to proceed could open the

⁹⁰ 479 U.S. at 481.

⁹¹ Compare 33 U.S.C. § 1365(e) (2011) and 42 U.S.C. § 7604(a)(1) (2011).

⁹² 131 S.Ct. at 2539.

⁹³ *Id.* at 2539–40.

door to lawsuits against “‘thousands or hundreds or tens’ of other defendants” deemed to be “‘large contributors’” to GHG emissions.⁹⁴ Yet displacement alone is not sufficient to prevent the proliferation of climate lawsuits. State-law nuisance claims could just as easily thrust climate policy into the hands of the judiciary.

Conclusion

AEP was undoubtedly a victory for the corporate defendants, but it was quite a limited one. Existing precedent clearly called for displacement, so such a holding does not, in itself, prevent further climate-based nuisance litigation in either federal or state court. The displacement holding could also complicate industry efforts to limit federal regulatory authority over GHG emissions. Should Congress enact legislation withdrawing EPA authority over GHGs under the CAA, for example, public nuisance suits under federal common law could be revived.⁹⁵

More broadly, recognizing the impracticability of adjudicating climate policy in the context of individual nuisance suits in federal court does not in any way minimize the seriousness of global climate change, nor does it necessarily cast doubt on the potential value of common-law litigation to address conventional pollution. Libertarians and others have argued that using the common law to address environmental pollution concerns is better than resorting to decision-making by centralized administrative agencies.⁹⁶ While global climate change is anything but a typical environmental pollution concern, even a modest warming could produce the sorts of harms

⁹⁴ *Id.* at 2540 (quoting Transcript of Oral Argument at 57, *AEP*, 131 S.Ct. 2527 (No. 10-174)).

⁹⁵ See Douglas Kysar, *Supreme Court Ruling Is Good, Bad and Ugly*, 474 *Nature* 421 (2011).

⁹⁶ See, e.g., Terry Anderson & Donald Leal, *Free Market Environmentalism* 132 (rev. ed. 2001) (“The free market environmental approach to pollution is to establish property rights to the pollution disposal medium and allow owners of those rights to bargain over how the resource will be used.”); see also Jonathan H. Adler & Andrew P. Morriss, *Introduction: Common Law Environmental Protection*, 58 *Case W. Res. L. Rev.* 575 (2008); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 *Geo. Mason L. Rev.* 923 (1999); Elizabeth Brubaker, *Property Rights in the Defence of Nature* (1995); Bruce Yandle, *Common Sense and Common Law for the Environment: Creating Wealth in Hummingbird Economies* (1997); Fred L. Smith Jr., *A Free-Market Environmental Program*, 11 *Cato J.* 457 (1992).

common-law nuisance actions have addressed.⁹⁷ The common law has long recognized actions that cause the flooding of a neighbor's land as a trespass or nuisance, and even so-called skeptics recognize global warming could produce a measurable increase in sea level.⁹⁸

Yet opening the door to climate-based nuisance suits could unleash a torrent of litigation. Given the ubiquity of GHG emissions, allowing suits against one set of firms inevitably opens the door to suits against others—without any prospect of addressing the underlying concern. Given the global nature of the problem, climate change can only be mitigated or averted on a global scale. Reducing emissions from the 5, 50, or 500 largest GHG emitters within the United States will have no appreciable effect on the accumulation of GHGs in the broader atmosphere.

The global nature of climate change also counsels against trying to fit it within the contours of common-law nuisance claims. In many respects, climate change presents a common-pool resource management problem in which the challenge is not simply to prevent one group from polluting another, but also how to manage the aggregate effects of human activity on a given resource that is shared by all.⁹⁹ And whether or not there is a scientific consensus about the scope and scale of human influence on the global climate, addressing climate change requires confronting fundamental tradeoffs among economic, environmental, and ethical concerns. Some degree of human influence on the climate is inevitable, so the question becomes what degree of interference is desirable or acceptable—and what ameliorative or adaptive measures are warranted.

Such questions lie far beyond the capability of common-law courts. For better or worse, then, we have to leave climate change in the hands of the political process, to be addressed—if at all—by legislative and (duly authorized) administrative action.

⁹⁷ See, e.g., Jonathan H. Adler, *Taking Property Rights Seriously: The Case of Climate Change*, 26 *Soc. Phil. & Pol'y* 296 (2009).

⁹⁸ See, e.g., Patrick J. Michaels and Robert C. Balling, Jr., *The Satanic Gases: Clearing the Air about Global Warming* 162 (2000) (predicting a warming-induced sea-level rise of 5 to 11 inches over the next century).

⁹⁹ See Dana, *supra* note 25, at 12 (“Global warming, however, is not best conceived as a binary pollution dispute between producers and recipients of ‘pollution’; rather, global warming is an issue of how to manage a common natural resource (the atmosphere) so that the human ‘load’ on the resource will not push the resource beyond a ‘tipping point’ it is generally understood we (human kind) should not want to reach.”).

