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COULD OFFICIAL CLIMATE DENIAL REVIVE THE COMMON LAW AS A REGULATORY BACKSTOP?

MARK P. NEVITT & ROBERT V. PERCIVAL*

ABSTRACT

The Trump Administration is rapidly turning the clock back on climate policy and environmental regulation. Despite overwhelming, peer-reviewed scientific evidence, administration officials eager to promote greater use of fossil fuels are disregarding climate science. This Article argues that this massive and historic deregulation may spawn yet another wave of legal innovation as litigants, including states and their political subdivisions, return to the common law to protect the health of the planet. Prior to the emergence of the major federal environmental laws in the 1970s, the common law of nuisance gave rise to the earliest environmental decisions in U.S. history. In some of these cases, the Supreme Court issued injunctions to control significant sources of air and water pollution, but the Court later held that the Clean Water Act and Clean Air Act displaced the federal common law of nuisance.

This Article argues that official climate denial may yet revive the common law as a regulatory backstop. If the U.S. Environmental Protection Agency reverses its earlier endangerment finding for greenhouse gas emissions, the Clean Air Act may no longer displace the federal common law of nuisance. While expert administrative agencies normally are more competent than the judiciary in fashioning regulatory

* Mark P. Nevitt is the George Sharswood Fellow at the University of Pennsylvania Law School and a former active duty Navy Judge Advocate General (JAG) officer who served in the rank of commander. Robert V. Percival is the Robert F. Stanton Professor of Law & Director of the Environmental Law Program, University of Maryland Francis King Carey School of Law.

policy, agencies that deny climate science should expect to face judicial intervention. As described in this Article, such action is consistent with the historic role the judiciary has played when other branches of government failed to prevent significant environmental harm.

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"Global warming may be a 'crisis,' even 'the most pressing environmental problem of our time.' Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it. It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change."

— Chief Justice John Roberts, dissenting in *Massachusetts v. EPA* (2007)[1]

"The concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive."

— Donald J. Trump, Nov. 6, 2012[2]

INTRODUCTION

Prior to the advent of comprehensive regulatory programs to protect the environment, the common law served as the primary vehicle for redressing environmental harm. More than a century ago, states used the common law of interstate nuisance to seek redress for the most serious transboundary pollution problems.[3] Exercising its original jurisdiction over disputes between states, the U.S. Supreme Court issued injunctions

1. Massachusetts v. EPA, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting) (citation omitted).
2. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 6, 2012, 11:15 AM), https://twitter.com/realdonaldtrump/status/265895292191248385?lang=en [http://perma.cc/XN5S-TLQ6].
3. Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 200 U.S. 496 (1906).

limiting smelter emissions[4] and requiring cities to build sewage treatment plants[5] and garbage incinerators.[6]

Today the common law has been eclipsed by the enactment of federal legislation requiring agencies to regulate sources of pollution. These statutes have been interpreted broadly to give agencies great power to respond to emerging problems. For example, in *Massachusetts v. EPA* the U.S. Supreme Court held that the Clean Air Act (CAA) gives the U.S. Environmental Protection Agency (EPA) the authority to regulate greenhouse gas (GHG) emissions if they "endanger public health or welfare"[7] by contributing to global warming and climate change.[8] The Court rejected not only the claim that EPA lacked such authority, but also the agency's other rationales for refusing to take action.[9] Following the ruling, EPA had to decide "whether sufficient information exist[ed] to make an endangerment finding."[10] It made the endangerment finding two years later.[11]

In a series of cases beginning in the 1970s, the Court has held that the comprehensive regulatory programs erected by the Clean Water Act (CWA) and the CAA displace federal common law nuisance claims.[12] When states sought to use public nuisance law to address the threats posed by climate change, industry groups urged the Court to bar such actions on constitutional grounds.[13] Instead, in June 2011 the Court held in *American Electric Power Co., Inc. v. Connecticut* (*AEP*) that the CAA displaced federal common law nuisance claims in the context of regulating GHG emissions. At the time of the ruling, the Obama Administration EPA was moving aggressively to regulate GHG emissions. But, writing for a unanimous Court, Justice Ginsburg warned that a decision by the EPA *not*

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4. Georgia v. Tenn. Copper Co., 237 U.S. 474 (1915).
5. Wisconsin v. Illinois, 278 U.S. 367 (1929).
6. New Jersey v. New York City, 290 U.S. 237 (1933).
7. 42 U.S.C. § 7521(3)(D) (2012).
8. Massachusetts v. EPA, 549 U.S. 497, 533 (2007).
9. *Id.* at 528–34.
10. *Id.* at 534.
11. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,495 (Dec. 15, 2009).
12. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011) (holding that the CAA displaced the federal common law of interstate nuisance for regulating GHG emissions); City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304 (1981) (holding that the CWA displaced the federal common law of interstate nuisance). But the Court also made clear that federal environmental laws do not necessarily preempt state common law nuisance claims. Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) (holding that state law is not preempted as long as the law of the source state is applied). In *American Electric Power Co.*, the Court expressly reserved the question whether the CAA preempted *state* common law nuisance claims. 564 U.S. at 429.
13. *See infra* Part I.B.

to regulate greenhouse gas emissions would invite litigation and would be subject to judicial review.[14]

With the election of President Trump, federal environmental policy has sharply shifted. The President has announced his intent to withdraw the U.S. from the Paris Agreement that every other country in the world has accepted as a global response to climate change.[15] EPA is moving aggressively to repeal the Obama Administration's Clean Power Plan,[16] roll back Corporate Average Fuel Economy (CAFE) standards, and attempt to preempt state programs to reduce GHG emissions.[17] Many Trump supporters want EPA to reverse its finding that GHG emissions endanger public health and welfare by contributing to climate change.[18]

If the Trump EPA reverses the 2009 endangerment finding, this would foreclose the EPA's ability to use the CAA to regulate GHG emissions. This Article considers whether such an action unwittingly could revive the federal common law of nuisance as a regulatory backstop. While the Supreme Court ruled in *AEP* that the CAA displaces any federal common law right to seek abatement of carbon-dioxide emissions from fossil fuel-fired power plants, this was predicated on EPA actually making a reasoned and informed judgment of GHG emission dangers—not jettisoning agency expertise in favor of politics.[19] This litigation, particularly if brought by

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14. *AEP*, 564 U.S. at 426–27 ("EPA's judgment, we hasten to add, would not escape judicial review. . . . If the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse under federal law is to seek [judicial] review, and, ultimately, to petition for certiorari in this Court.").

15. Statement by President Trump on the Paris Climate Accord (June 1, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/ [https://perma.cc/J4D7-7V2G].

16. *See* Eric Lipton, *President's Rush to Deregulate Meets an Obstacle: The Courts*, N.Y. TIMES, Oct. 7, 2017 at A1. Administrator Pruitt moved swiftly to roll back Obama-era Clean Power Plan rules. *See, e.g.*, Brady Dennis & Juliet Eilperin, *EPA Chief Scott Pruitt Tells Coal Miners He Will Repeal Power Plant Rule Tuesday: 'The War Against Coal is Over,'* WASH. POST (Oct. 9, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/10/09/pruitt-tells-coal-miners-he-will-repeal-power-plan-rule-tuesday-the-war-on-coal-is-over/?noredirect=on&utm_term=.b0739170e67f [https://perma.cc/MJ86-65KL]. His successor has continued to do so. *See infra* note 17.

17. On August 21, 2018, EPA Acting Administrator Andrew Wheeler proposed the "Affordable Clean Energy Rule" that seeks to replace the Clean Power Plan. 83 Fed. Reg. 44,746 (Aug. 31, 2018); Press Release, EPA, EPA Proposes Affordable Clean Energy (ACE) Rule (Aug. 21, 2018), https://www.epa.gov/newsreleases/epa-proposes-affordable-clean-energy-ace-rule [https://perma.cc/AKD4-F5DT]. Mark Hand, *Widespread Disapproval Greets Trump's Rollback of Auto Emissions and Fuel Efficiency Standards*, THINK PROGRESS (Aug. 2, 2018, 10:28 AM), https://thinkprogress.org/widespread-disapproval-greets-trumps-rollback-of-auto-emissions-and-fuel-efficiency-standards-e5e65a8a4607/ [https://per ma.cc/KT56-ARR5].

18. Tom DiChristopher, *EPA Chief Scott Pruitt Won't Rule out Repealing the Foundation of Obama-Era Climate Change Rules*, CNBC (Jan. 30, 2018, 7:43 PM), https://www.cnbc.com/2018/01/30/epa-chief-scott-pruitt-wont-rule-out-repealing-endangerment-finding.html [https://perma.cc/4LMC-M4TT].

19. *See Milwaukee II*, 451 U.S. 304, 324 (1981) ("The question [for purposes of displacement] is whether the field has been occupied, not whether it has been occupied in a particular manner."). But this is predicated on *some* form of occupation; a refusal to occupy the field is an abdication of

states as *quasi-sovereigns* against EPA, could serve as a powerful prod to force federal action on climate change. After all, states have the "last word as to whether [their] mountains shall be stripped of their forests and [their] inhabitants shall breathe pure air."[20]

In light of the Trump EPA's current stance on environmental regulations, the Court's decision in *AEP*, and other nuisance cases decided by federal appellate courts,[21] this is a propitious time to reconsider the use of public nuisance law to redress environmental problems. This Article focuses on what we call "the common law of interstate nuisance"—a body of law developed when states, acting in a *parens patriae* capacity, sought to protect their citizens from environmental harm originating in other states through public nuisance actions under either federal or state common law.[22]

This Article makes two core arguments. First, it maintains that the common law of nuisance remains an essential backstop when existing regulatory authorities fail to address significant environmental problems. Second, reconnecting nuisance law to its historical roots, the Article maintains that common law litigation has served as an effective prod to help spur the development and implementation of new pollution control technology and to stimulate regulatory action to require its use, rather than serving as a vehicle for the judiciary to impose its own solutions for environmental problems.[23]

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responsibility. *See AEP*, 564 U.S. at 424 (reviewing the provisions of the CAA that require EPA to regulate emissions once a pollutant has been found to endanger public health or welfare).

20. Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).

21. Bell v. Cheswick Generating Station, 734 F.3d 188 (3d Cir. 2013); North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291 (4th Cir. 2010); Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765 (7th Cir. 2011).

22. *See* Sara Zdeb, Note, *From* Georgia v. Tennessee Copper *to* Massachusetts v. EPA*:* Parens Patriae *Standing for State Global-Warming Plaintiffs*, 96 GEO. L.J. 1059 (2008). State attorneys general also have sought to use public nuisance actions to recover damages from the manufacturers of tobacco products, firearms, and lead-based paint, *see, e.g.*, NAT'L ASS'N OF ATTORNEYS GEN., *Master Settlement Agreement*, http://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf [https://perma.cc/RF79-88ZJ] (settlement of tobacco litigation); District of Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633 (D.C. 2005) (firearms); City of Philadelphia v. Lead Indus. Ass'n, 994 F.2d 112 (3d Cir. 1993) (lead-based paint), but these mass products liability cases are not addressed in this Article. The Article also does not consider private nuisance litigation, including cases brought by private parties to redress harm allegedly caused by climate change. *See, e.g.*, Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009) (rejecting political question and lack of standing as grounds for dismissing lawsuit against oil companies for their contribution to climate change by victims of Hurricane Katrina who allege that climate change made the hurricane more severe), *reh'g granted en banc*, 598 F.3d 208 (5th Cir. 2010), *reh'g dismissed en banc*, 607 F.3d 1049 (5th Cir. 2010) (dismissing appeal for lack of quorum to transact judicial business due to disqualification of eight judges), *mandamus denied*, 562 U.S. 1133 (2011).

23. *Cf.* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011).

This Article proceeds in four parts. Part I reviews the history of the common law of interstate nuisance from the early twentieth century through the rise of the modern regulatory state.[24] Part II focuses on efforts to use this doctrine to control GHG emissions causing climate change, focusing on state efforts to require utilities operating coal-fired power plants to reduce their emissions. These efforts culminated in the Supreme Court's decision in *AEP v. Connecticut* holding that the CAA displaces federal common law. Part III then considers why *AEP* does not eliminate common law as a regulatory backstop, as illustrated by the Seventh Circuit's decision that it could be used to address problems not covered by existing regulatory statutes.[25] Part IV then considers how official climate denial could revitalize the common law and return the judiciary to its historic role of responding when the other branches fail to address significant environmental harm.

I. A HISTORY OF INTERSTATE NUISANCE LAW

Although *Erie Railroad Co. v. Tompkins* held that there "is no federal general common law,"[26] the Supreme Court has continually recognized that when dealing "with air and water in their ambient or interstate aspects, there *is* a federal common law . . . ."[27] Beginning in 1901 and over a half-century period prior to the modern environmental law movement that ushered in the modern federal environmental regulatory state, the Court recognized the right of states to bring common law nuisance actions to redress interstate pollution.[28] These cases were brought directly to the U.S. Supreme Court under its original jurisdiction conferred by Article III, Section 2 of the Constitution governing disputes between states.[29]

As noted above, the Court umpired interstate pollution disputes and issued injunctions limiting air and water pollution.[30] In other cases the

24. One of the authors previously has reviewed in detail the history of the federal common law of nuisance for interstate water pollution disputes. *See* Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717 (2004).

25. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765 (7th Cir. 2011).

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

27. Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91, 103 (1972) (emphasis added).

28. Missouri v. Illinois, 180 U.S. 208, 241–43 (1901).

29. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States . . . to Controversies between two or more States . . . ." U.S. CONST. art. III, § 2. The framers of the Constitution clearly contemplated that the Court would play an important role in resolving more than just boundary disputes between states. As Alexander Hamilton explained: "[T]here are many other sources, beside interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union. . . . Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control." THE FEDERALIST NO. 80, at 440 (Alexander Hamilton) (Colonial Press 1901).

30. *See supra* notes 4–6.

Court denied relief because it found that plaintiff states had failed to prove sufficient causal injury and/or were themselves engaged in similar polluting activities.[31] At times the Court expressed discomfort umpiring interstate pollution disputes,[32] but it acknowledged its unique authority to vindicate the interests of states in protecting their citizens from transboundary pollution.[33]

Concerned about the fact-intensive and technical nature of such litigation, the Supreme Court eventually relegated interstate nuisance actions to the federal district courts.[34] After efforts to persuade states to adopt effective regulatory programs failed, in the early 1970s Congress adopted comprehensive national regulatory legislation to protect air and water quality. These laws included the CWA and CAA. Following these major legislative achievements, the Supreme Court pulled back even further, ruling that both the CWA[35] and CAA[36] displace the federal common law of interstate nuisance. But state common law nuisance actions using the law of the source state remain viable as both a litigation tool and prod for action.[37]

A. The Initial Public Nuisance Cases

1. Missouri v. Illinois (1906): The First Interstate Nuisance Case Decided by the Supreme Court

In the late nineteenth century and well before the passage of the CWA, most cities disposed of their sewage simply by dumping it untreated into nearby lakes or streams.[38] Not surprisingly, this caused massive public health issues. At the turn of the twentieth century, Chicago's widespread use of this practice spawned the first major interstate pollution dispute to reach the U.S. Supreme Court.[39] Chicago disposed of its raw sewage by dumping it directly into the Chicago River, which flowed into Lake Michigan, the source of the city's drinking water. Not surprisingly, the city suffered numerous health problems linked to contaminated drinking water including cholera epidemics and high death rates from typhoid

31. New York v. New Jersey, 256 U.S. 296 (1921); Missouri v. Illinois, 200 U.S. 496 (1906).
32. *New York*, 256 U.S. at 313.
33. Missouri v. Illinois, 180 U.S. 208, 241 (1901).
34. *Milwaukee I*, 406 U.S. 91 (1972).
35. *Milwaukee II*, 451 U.S. 304 (1981).
36. *AEP*, 564 U.S. 410 (2011).
37. Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987).
38. *See* Mayor of Newark v. Sayre, 45 A. 985, 988 (N.J. 1900) ("[F]rom time immemorial the right to connect [sewers] with navigable streams has been regarded as part of the jus publicum.").
39. Missouri v. Illinois, 200 U.S. 496 (1906).

fever.[40] To resolve the city's sewage disposal problem, the state of Illinois approved construction of a canal to reverse the flow of the Chicago River to take the sewage away from Lake Michigan.[41] By 1900 Chicago's sewage was flowing down the Chicago River to the Des Plaines River, which drained into the Mississippi River.[42] Because Missouri cities used the Mississippi as their source of drinking water, Missouri residents were alarmed.[43]

The Supreme Court allowed Missouri's attorney general to file a common law nuisance action against Illinois to enjoin Illinois and the Sanitary District of Chicago from discharging sewage through the canal.[44] In an initial ruling, Justice Shiras emphasized that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them,"[45] and "that an adequate remedy can only be found in this court at the suit of the State of Missouri."[46] In doing so, Justice Shiras dismissed Illinois's claim that individual private nuisance actions could be an adequate remedy for the harm Missouri alleged.[47]

After five years of intensive fact gathering before a special commissioner, a unanimous Court ultimately denied the relief sought by Missouri in February 1906.[48] Writing for the Court, Justice Oliver Wendell Holmes stated, "Before this court ought to intervene the case should be of serious magnitude, clearly and *fully* proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."[49] Holmes recognized that advances in scientific knowledge, such as acceptance of the germ theory of diseases, meant that nuisances could include even things that cannot "be detected by the unassisted senses."[50] But the Court ultimately held that Missouri had failed to prove sufficient causal injury: the experts for both sides were sharply split on whether Chicago sewage was capable of causing typhoid fever in St. Louis.[51] Further undermining Missouri's causal argument, there had not been an increase in typhoid cases in cities between St. Louis

40. *Id.* at 498; *see also Chicago's Quest for Pure Water*, CHI. TRIB., Jan. 2, 1900, at 9.
41. *Chicago's Quest for Pure Water*, *supra* note 40.
42. *Id.*; *Turn the River into Big Canal*, CHI. TRIB., Jan. 3, 1900, at 9.
43. *St. Louis Has Two Rebuffs*, CHI. TRIB., Jan. 4, 1900, at 5.
44. Missouri v. Illinois, 180 U.S. 208 (1901).
45. *Id.* at 241.
46. *Id.*
47. *Id.*
48. Missouri v. Illinois, 200 U.S. 496 (1906).
49. *Id.* at 521 (emphasis added).
50. *Id.* at 522.
51. *Id.* at 523.

and Chicago despite other cities disposing their raw sewage in the same river.[52]

2. *Georgia v. Tennessee Copper (1907): The Court Acknowledges States' Special Status as Quasi-Sovereigns*

Just one year after it decided *Missouri v. Illinois*, the Supreme Court in 1907 decided another prominent interstate public nuisance pollution dispute. This time the controversy involved Georgia's claim that sulfur dioxide emissions from two copper smelters located just across the border in Tennessee had destroyed crops and other vegetation in northern Georgia.[53] In October 1905 Georgia filed suit against the smelters in the U.S. Supreme Court.[54] The smelter owners successfully convinced the Court not to grant preliminary relief to the state of Georgia.[55] But the Court ordered that the case be tried on an expedited basis. After hearing two days of oral argument in February 1907, the Supreme Court released its decision on May 13, 1907.[56]

In an opinion by Justice Holmes the Court declared that Georgia had established its right to obtain an injunction requiring abatement of emissions from the smelters.[57] Holmes emphasized that this was not a lawsuit "between two private parties," but instead "a suit by a State for an injury to it in its capacity of *quasi*-sovereign."[58] Thus, he found it unnecessary for Georgia to establish that state-owned property had suffered significant harm because "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."[59]

Damages were not adequate to compensate Georgia, Holmes declared, because a state's quasi-sovereign rights cannot be bought.[60] Because a state's sovereign right to protect its citizens against transboundary

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52. *Id.* at 523–26.

53. Three years before, in 1904, the Tennessee Supreme Court had heard a private nuisance action brought against the same smelters by nearby landowners. It had awarded modest damages to the plaintiffs, but it emphatically rejected the plaintiffs' demands to require the smelters to abate their emissions in light of the great economic value of the enterprises. Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658 (Tenn. 1904).

54. On Oct. 4, 1905, Georgia filed its motion for approval to file a bill of complaint, which was approved by the Supreme Court on October 23, 1905. Case files of Georgia v. Tennessee Copper Co., Orig. No. 5, U.S. National Archives, Record Group 267.3.3.

55. Georgia v. Tenn. Copper Co., 206 U.S. 230, 236 (1907).

56. *Id.* at 230.

57. *Id.* at 239.

58. *Id.* at 237.

59. *Id.* at 237.

60. *Id.* at 237–38.

pollution was at stake, Holmes declared that the Court should be less inclined to give weight to the traditional factors relevant to the exercise of equitable discretion.[61] Holmes declared:

> 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.[62]

Reviewing the evidence, Holmes found it clear that the vast quantities of pollution from the smelters "cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case within the requirements of *Missouri v. Illinois* . . . ."[63] Having upheld Georgia's right to an injunction, Justice Holmes left it up to the state to decide if that was truly its preferred remedy.[64] He concluded his opinion by stating: "If the State of Georgia adheres to its determination, there is no alternative to issuing an injunction . . . ."[65] Rather than immediately issuing an injunction, the Court decided to allow "a reasonable time to the defendants to complete the structures that they now are building, and the efforts that they are making, to stop the fumes."[66]

While more than a "reasonable time" passed, a settlement was finally reached in February 1911 between the Tennessee Copper Company and the state of Georgia.[67] However, the operator of the second smelter, the Ducktown Sulphur, Copper & Iron Company, refused to settle. After even more hearings in the Supreme Court, the Court held in May 1915 that the Ducktown Company had not met its burden of proving that its emissions

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61. Balancing of the traditional factors to be considered before granting equitable relief had been a focal point of the parties' oral arguments. These factors included

> a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendants' business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place.

Id. at 238.

62. *Id.*

63. *Id.* at 238–39.

64. *Id.* at 239.

65. *Id.*

66. *Id.* at 239.

67. The company agreed to cut back on sulphur emissions from the smelter during the growing season from May 20 to September 1. Additionally, two years later a compensation fund was created for victims in Northern Georgia. Case files of Georgia v. Tennessee Copper Co., Orig. No. 5, U.S. National Archives, Record Group 267.3.3.

no longer were causing harm in Georgia.[68] On June 1, 1915, the Court issued a decree directing the Ducktown Company to limit sulfur emissions to twenty tons per day from April 10 to October 1 and forty tons per day during the rest of year.[69]

3. *Sewage, Garbage & Water Diversion Conflicts Decided by the Court*

Sewage disposal problems precipitated another interstate nuisance dispute filed in the U.S. Supreme Court in 1908. The state of New York sued New Jersey in an effort to block construction of a tunnel that would channel New Jersey sewage discharges away from the heavily polluted Passaic River into Upper New York Bay.[70] Justice John H. Clarke authored a unanimous decision holding that New York had *not* presented sufficient evidence to warrant issuance of an injunction.[71] The Court acknowledged New York's right to sue New Jersey, but it held that New York had not satisfied its burden of establishing a serious invasion of its rights "by clear and convincing evidence."[72] The Court also noted that the federal government had the right to stop New Jersey's sewage discharges if they subsequently caused harm as a result of the settlement agreement, which Charles Evan Hughes (lawyer for New York) described as the reason for his defeat.[73] In an unusual aside, Justice Clarke opined that such settlements were likely to effect better solutions to such disputes than any lawsuits.[74]

In 1929 New Jersey turned the tables on New York by suing New York City for dumping its garbage in the ocean where it eventually would wash up on New Jersey beaches.[75] This time the Court appointed a special master to hear testimony in the case.[76] The special master found that New York City had caused enough garbage to wash upon New Jersey shores to fill fifty trucks, damaging fishnets and making swimming impracticable.[77]

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68. Georgia v. Tenn. Copper Co., 237 U.S. 474, 476–77 (1915).

69. Georgia v. Tenn. Copper Co., 237 U.S. 678, 680 (1915).

70. New York v. New Jersey, 256 U.S. 296, 300 (1921).

71. *Id.* at 309–10, 312–13.

72. *Id.* at 309 (citing Missouri v. Illinois, 200 U.S. 496 (1906)). The Court emphasized that New York had failed to prove that there were visible suspended particles, odors, or a reduction in the dissolved oxygen content of the Bay sufficient to interfere with aquatic life. *Id.* at 310–11.

73. THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVAN HUGHES 194–95 (David J. Danelski & Joseph S. Tulchin eds., 1973).

74. "We cannot withhold the suggestion," that problems like the present case are "more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of . . . the States so vitally interested in it than by proceedings in any court . . . ." 256 U.S. at 313.

75. New Jersey v. City of New York, 283 U.S. 473 (1931).

76. *Id.* at 477.

77. *Id.* at 478.

The Court noted that "[t]he situs of the acts creating the nuisance, whether within or without the United States, is of no importance" because the harm occurred in the United States and the defendant was properly before the Court and subject to its jurisdiction.[78]

In December 1931 the Court issued an injunction barring New York City from dumping garbage into the ocean effective June 1, 1933, the date recommended by the special master in order to enable the city to build new incinerators.[79] The Court also ordered the city to use its existing incinerators at full capacity to reduce the amount of garbage dumped into the ocean and to report to the Court every six months concerning its progress in building new incinerators.[80] After it became clear that New York City would not meet the deadline for ending ocean dumping, contempt proceedings were held.[81] In December 1933 the Court extended the deadline to July 1, 1934, while imposing a $5,000 per day fine on the City if it missed this new deadline.[82]

Meanwhile, Illinois and the Sanitary District were also facing lawsuits filed by the upper Great Lakes states in the U.S. Supreme Court in the 1920's. Wisconsin, Michigan, and New York had sued Illinois and the Sanitary District for allegedly diverting so much water from Lake Michigan that it had reduced the level of the Great Lakes by five to six inches, causing serious injury to people and property.[83] Missouri and five other downstream states intervened to join Illinois as defendants because of their interest in keeping as much water as possible flowing through the drainage canal to the Mississippi River.[84]

The Court accepted jurisdiction and appointed former Justice Charles Evans Hughes to serve as a special master.[85] After taking extensive testimony, Hughes reported in November 1927 that the allegations by the upper Great Lakes states were correct.[86] In January 1929 the Court accepted Hughes's recommendations and ruled in favor of the upstream states. In an opinion by Chief Justice William Howard Taft, the Court rejected the notion that the Illinois and the Sanitary District were relieved from liability for harm caused to upstream states.[87] The Court concluded

78. *Id.* at 482.
79. New Jersey v. City of New York, 284 U.S. 585, 585–86 (1931) (per curiam).
80. *Id.* at 586.
81. New Jersey v. New York City, 290 U.S. 237, 238 (1933).
82. *Id.* at 240.
83. Wisconsin v. Illinois, 278 U.S. 367, 407–09 (1929).
84. Missouri, Kentucky, Tennessee, Louisiana, Mississippi, and Arkansas participated in the case as intervening defendants. *Id.* at 370.
85. *Id.*
86. *Id.* at 407–09.
87. *Id.* at 417–19.

that the upstream states were entitled to equitable relief,[88] and it ultimately issued an injunction requiring Chicago to build sewage treatment plants to reduce its need to divert water from Lake Michigan.[89]

B. The Court Sours on Hearing Interstate Nuisance Cases Following the Enactment of Federal Regulatory Statutes

The U.S. Supreme Court's long-time frustration with using its original jurisdiction to hear fact-intensive interstate nuisance suits and its difficulty in fashioning effective remedies ultimately led it to relegate such cases to the lower federal courts. On three occasions in 1971 and 1972, the Court declined requests to hear interstate nuisance cases in the exercise of its original jurisdiction.[90]

In 1970, prior to the passage of the CWA, the state of Ohio sought to bring an original action in the Court against the Wyandotte Chemical Corporation and Dow Chemical of Canada to stop and remediate mercury pollution in Lake Erie.[91] After scheduling an unusual oral argument on the question of whether to accept jurisdiction, the Court declined to hear the case.[92] In an opinion by Justice Harlan the Court explained that even though it could exercise its original jurisdiction to hear the case, "no necessity impels" the Court to be the "principal forum for settling such controversies."[93] Harlan lamented the Court's difficulty in resolving disputes of interstate air and water pollution.[94] Noting the decisions in *Missouri v. Illinois* and *New York v. New Jersey*, Harlan felt the Court's attempts to resolve the conflicts were futile because of the complex technical and political matters inherent in these cases.[95] This was exacerbated by the novel scientific questions that have no clear answer.[96] Acknowledging the intense public concern for the environment that then

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88. *Id.* at 418–21.

89. Wisconsin v. Illinois, 281 U.S. 179, 201 (1930); Wisconsin v. Illinois, 281 U.S. 696, 697 (1930) (per curiam).

90. Ohio v. Wyandotte Chems. Corp. 401 U.S. 493 (1971); *Milwaukee I*, 406 U.S. 91 (1972); Washington v. Gen. Motors Corp., 406 U.S. 109 (1972).

91. *Wyandotte Chems. Corp.*, 401 U.S. at 493.

92. *Id.* at 494.

93. *Id.* at 497.

94. *Id.* at 505.

95. *Id.* at 501–02.

96. *Id.* at 501–03, 504–05. The papers of the late Justice Thurgood Marshall reveal that on the morning of oral argument, Chief Justice Burger distributed an unusual memo strongly cautioning his colleagues about the implications of a decision to hear the case. The Chief Justice cited the vast range of pollution problems facing the fifty states and the complexity of the issues. "If we do grant leave to file, I believe we should consider appointing not one but three Special Masters, at least one of whom should be a scientist with background in the subject matter and without conflicting attachments or published positions on the subject matter." Memorandum from Chief Justice Warren E. Burger to the Conference (Jan. 18, 1971) (on file with the Library of Congress).

prevailed, Justice Harlan conceded that stopping pollution "is manifestly a matter of fundamental import and utmost urgency."[97] But he described the Court's refusal to hear the case as reflecting "that our competence is necessarily limited, not that our concern should be kept within narrow bounds."[98]

Only Justice William O. Douglas dissented. He, too, acknowledged the complexity of the issues presented by the case, but he argued that they were no more difficult than the complex issues that arise in water rights disputes between states that the Court routinely hears.[99] Douglas cited the long-running dispute between Wisconsin and Illinois over the diversion of waters from Lake Michigan as well as disputes between Arizona and California over the Colorado River and disputes between Colorado, Wyoming and Nebraska over the waters of the North Platte River.[100]

1. Milwaukee I (1972): The Court Keeps Federal Common Law Nuisance Claims Alive, but Relegates Them to Lower Federal Courts

In *Illinois v. City of Milwaukee* (*Milwaukee I*), Illinois sought permission from the Supreme Court to bring an original action against four Wisconsin cities for polluting Lake Michigan through the discharge of 200 million gallons of raw or poorly treated sewage each day.[101] The case was decided six months before Congress enacted, over President Nixon's veto, comprehensive new federal legislation, popularly known as the Clean Water Act (CWA), which required a permit for all point source discharges of pollutants.[102] The Court noted that "Congress has enacted numerous laws touching interstate waters," including the 1899 Rivers and Harbors Act that banned unpermitted discharges of refuse to navigable waters.[103] Federal law also authorized a cumbersome, and ultimately futile, interstate conference procedure as a vehicle for settling interstate water pollution

97. *Wyandotte Chems. Corp.*, 401 U.S. at 505.
98. *Id.*
99. *Id.* at 511 (Douglas, J., dissenting).
100. *Id.*
101. *Milwaukee I*, 406 U.S. 91, 93 (1972).
102. The official name of the CWA is the Federal Water Pollution Control Act, 33 U.S.C. § 1251–1387 (2012).
103. *Milwaukee I*, 406 U.S. at 101.

disputes.[104] In *Milwaukee I*, the Court rejected arguments that these laws displaced Illinois's action.[105]

In *Milwaukee I*, the Court held that states could bring federal common law nuisance actions in the district courts because they arise under federal law within the meaning of 28 U.S.C. § 1331.[106] The Court cited with approval the Tenth Circuit's holding in *Texas v. Pankey*[107] as proof that federal district courts could hear interstate nuisance actions.[108] Quoting from *Pankey* in a footnote, the Court stated that "[u]ntil the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights."[109] But it also explained that "consideration of state standards may be relevant" because "a State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor."[110] The Court explained that when lower federal courts hear interstate nuisance actions "[t]here are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern."[111]

Writing for a unanimous Court, Justice William O. Douglas noted:

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.[112]

The Court recognized that "this original suit normally might be the appropriate vehicle for resolving this controversy," but it chose instead to exercise its "discretion to remit the parties to an appropriate district court whose powers are adequate to resolve the issues."[113]

In a lawsuit between two states—Vermont and New York—the Court agreed to hear an interstate pollution dispute in exercise of its original

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104. *See, e.g.*, U.S. Dep't of Interior, Fed. Water Pollution Control Admin., Transcript of Conference *in re* Pollution of Lake Superior and its Tributary Basin in the States of Minnesota, Wisconsin, and Michigan (1969), https://nepis.epa.gov/Exe/ZyPDF.cgi/20016W3S.PDF?Dockey=20016W3S.PDF [https://perma.cc/3EPP-D62X].

105. *Milwaukee I*, 406 U.S. at 107.

106. *Id.* at 98–99.

107. 441 F.2d 236 (10th Cir. 1971).

108. *Milwaukee I*, 406 U.S. at 99–101.

109. *Id.* at 107 n.9 (quoting Texas v. Pankey, 441 F.2d at 241).

110. *Id.* at 107.

111. *Id.* at 107–08.

112. *Id.* at 107.

113. *Id.* at 108 (footnote omitted).

jurisdiction. In *Vermont v. New York*,[114] the Court appointed a Special Master, who was able to negotiate a settlement between the parties involving a paper mill in New York.[115] However, the Court stunned the parties in June 1974 by refusing to approve a proposed consent decree.[116] The Court explained that it did not want to assume continuing responsibility for supervising implementation of a consent decree in the absence of any law to apply.[117] This "would materially change the function of the Court in these interstate contests" to one of performing arbitral rather than judicial functions.[118]

In sum, the Supreme Court's rulings in *Milwaukee I* and *Vermont v. New York* demonstrated that it was growing increasingly weary of exercising its original jurisdiction in such complex interstate nuisance claims. And with the passage of the CWA in 1972, the Court finally had the opportunity to rule on federal common law nuisance claims in the context of a comprehensive federal regulatory regime. This all came to a head in *Milwaukee II*, discussed below.

2. *Milwaukee II (1981): Preemption and the Clean Water Act*

After failing to convince the U.S. Supreme Court to hear its nuisance action against the City of Milwaukee as an original action, Illinois re-filed its lawsuit in federal district court in Illinois. Less than five months later, Congress enacted the Federal Water Pollution Control Act Amendments in October 1972 (Clean Water Act) over President Nixon's veto.[119] This set up a showdown over whether the common law had been preempted because Illinois maintained that the permits issued to Milwaukee's plants still allowed levels of pollutant discharges that would constitute public nuisances.[120]

After a six-month trial, in July 1977 the Illinois federal district court upheld the state's claim that Milwaukee's discharge constituted a public nuisance under federal common law and rejected the argument that the new CWA permit program preempted the federal common law of nuisance.[121] It ordered the city to meet more stringent effluent limits and to construct facilities to eliminate combined sewer overflows by 1989.[122]

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114. Vermont v. New York, 417 U.S. 270 (1974) (per curiam).
115. *Id.* at 270–71.
116. *Id.* at 274.
117. *Id.* at 277.
118. *Id.*
119. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92–500, 86 Stat. 816.
120. *Milwaukee II*, 451 U.S. 304, 310–11 (1981).
121. *Id.* at 311.
122. *Id.* at 311–12.

On appeal the Seventh Circuit recognized the comprehensiveness of the CWA's new regulatory program for controlling pollution;[123] however, it still affirmed the district court's holding that federal common law was not pre-empted.[124] The court noted that § 510 of the CWA[125] preserves the authority of states to adopt more stringent standards than required by the CWA, and it cited § 511's directive that the CWA not be construed to limit the federal authority, to include federal common law.[126] The court also noted that the savings clause in the citizen suit provision of the CWA[127] expressly preserved any common law claims, which it interpreted to include both state and federal common law.[128] While concluding that the district court had failed to justify imposing more stringent effluent limits for certain pollutants, the Seventh Circuit affirmed the district court's order to eliminate combined sewer overflows and to impose a new limit on phosphorus discharges.[129]

When Milwaukee sought review of the Seventh Circuit's decision by the U.S. Supreme Court, the Court initially voted to deny review.[130] However, after Justice White drafted a dissent from denial of certiorari questioning the competence of courts to impose effluent limits stricter than those required in existing permits,[131] the Court agreed to hear the case.[132] At oral argument the Solicitor General appeared as an amicus supporting Illinois's position that the CWA did not preempt the federal common law of nuisance.[133] But in April 1981 the Court held that the Act had preempted federal common law when it finally decided *Milwaukee II*.[134]

In an opinion by Justice Rehnquist, the Court noted that legislative preemption of *federal* common law did not implicate the same federalism concerns that require clear expressions of congressional intent before *state*

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123. Illinois v. Milwaukee, 599 F.2d 151, 162 (7th Cir. 1979), *vacated*, *Milwaukee II*, 451 U.S. at 304.

124. *Illinois*, 599 F.2d at 162, 177.

125. 33 U.S.C. § 1370 (2012).

126. *Illinois*, 599 F.2d at 162; 33 U.S.C. § 1371.

127. Clean Water Act § 505, 33 U.S.C. § 1365 (2012).

128. *Illinois*, 599 F.2d at 163.

129. *Id.* at 177.

130. Memorandum from Justice Byron R. White circulating Draft Dissent from Denial of Certiorari (Mar. 3, 1980) (on file with Library of Congress).

131. In his draft dissent Justice White noted that he did "not necessarily disagree with the decision below," but "that there is substantial doubt as to whether Congress intended that inexpert federal courts, guided by principles of common-law nuisance and maxims of equity jurisprudence, could impose environmental duties stricter than those adopted through democratic processes and developed by supposedly expert federal and state agencies." Justice White expressed the fear that "many interstate bodies of water . . . could become the subject of federal common-law nuisance actions." *Id.*

132. 445 U.S. 926 (1980) (mem.).

133. *Id.* at 307.

134. *Id.* at 304.

law may be preempted.[135] Justice Rehnquist interpreted the language of § 505(e) narrowly to mean:

> [T]hat nothing *in § 505*, the citizen-suit provision, should be read as limiting any other remedies which might exist. . . . [I]t means only that the provision of such suit does not revoke other remedies. It most assuredly cannot be read to mean that the [CWA] as a whole does not supplant formerly available federal common-law actions but only that the particular section authorizing citizen suits does not do so.[136]

Citing the comprehensive nature of the CWA's regulatory scheme and the technical complexities courts would have to confront to formulate pollution control standards, Justice Rehnquist concluded that Congress implicitly had supplanted federal common law by adopting a comprehensive regulatory scheme for water pollution control.[137] Justice Rehnquist concluded that "[t]he establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois v. Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law."[138] He went on to note that application of federal common law would be

> peculiarly inappropriate in areas as complex as water pollution control. . . . Not only are the technical problems difficult—doubtless the reason Congress vested authority to administer the [CWA] in administrative agencies possessing the necessary expertise—but the general area is particularly unsuited to the approach inevitable under a regime of federal common law. Congress criticized past approaches to water pollution control as being "sporadic" and "ad hoc," apt characterizations of any judicial approach applying federal common law.[139]

Justice Rehnquist noted that Illinois was free to pursue its case for more stringent controls on Milwaukee's discharges before the Wisconsin state agency responsible for issuing Milwaukee a permit under the CWA.[140] But he maintained that "[i]t would be quite inconsistent with this scheme if federal courts were . . . to 'write their own ticket' under the guise of

135. *Id.* at 316–17.
136. *Id.* at 328–29.
137. *Id.* at 317–19.
138. *Id.* at 319 (citing Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971)).
139. *Id.* at 325 (citations omitted).
140. *Id.* at 326.

federal common law after permits have already been issued and permittees have been planning and operating in reliance on them."[141]

In dissent, Justice Blackmun, joined by two other Justices, argued that the savings clause and legislative history of the Act clearly expressed intent by Congress to *not* preempt federal common law.[142] While conceding that interstate nuisance cases often are complex, Blackmun argued, "[T]hey do not require courts to perform functions beyond their traditional capacities or experience."[143] He concluded that the Court's decision was particularly unfortunate because it would undermine efforts to promote "a more uniform federal approach to the problem of alleviating interstate pollution . . . ."[144]

Milwaukee II's impact was immediate as applied to analogous federal regulatory regimes. Two months after its decision in *Milwaukee II*, the Court held that the Ocean Dumping Act's permit scheme pre-empted federal common law.[145] In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, the Court concluded that regulating discharges to such waters[146] displaced the federal common law of nuisance because it "is no less comprehensive, with respect to ocean dumping, than are analogous provisions" in the CWA.[147]

Two decades later, when it rejected Exxon's claim that the CWA preempted private claims for punitive damages for pollution caused by the Exxon Valdez spill, the Court distinguished *Milwaukee II* and *National Sea Clammers*.[148] The Court described these as cases "where plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the CWA."[149] The "private claims for economic injury" in the Exxon Valdez litigation "do not threaten similar interference with federal regulatory goals," the Court explained.[150]

But *Milwaukee II* did not eliminate all common law nuisance actions. Left unresolved was the question of whether the CWA preempts *state* common law nuisance actions. This would have to wait for the Court's decision in *International Paper Co. v. Ouellette*, which has important

141. *Id.*
142. *Id.* at 332, 338–39 (Blackmun, J., dissenting).
143. *Id.* at 349.
144. *Id.* at 353.
145. Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 22 (1981).
146. Marine Protection Research and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052.
147. *Nat'l Sea Clammers*, 453 U.S. at 22.
148. Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).
149. *Id.* at 489 n.7.
150. *Id.*

significance for future climate-change common law state nuisance claims, as discussed below.

3. International Paper Co. v. Ouellette (1987): The Court Preserves State Common Law Claims

In 1987, six years after *Milwaukee II* was decided, the Supreme Court decided *International Paper Co. v. Ouellette*, re-affirming the viability of state common law nuisance claims.[151] In *Ouellette*, the Court held that the CWA did not preempt state common law so long as the law of the source state was applied.[152] *Ouellette* involved a private nuisance action brought by lakeshore property owners in Vermont state court against the same paper mill that had spawned *Vermont v. New York*.[153] The defendant removed the action to federal court, asserting that the CWA preempted the state common law claim in light of the *Milwaukee II* decision.[154]

In *Ouellette*, the Solicitor General again appeared as an amicus to support the plaintiffs' position that the CWA did not preempt state common law actions.[155] The Court agreed, but five Justices insisted that in transboundary nuisance cases only the common law of the *source* state could apply.[156] The papers of the late Justice Thurgood Marshall indicate that these Justices struggled mightily to come up with a legal justification for this conclusion, which was largely a product of what they thought would represent good policy.[157]

Justice Powell's majority opinion ultimately rested preemption of the receiving state's common law on the fear that downstream states could interfere with the goals of the CWA by dictating unreasonably stringent and potentially conflicting standards on upstream sources.[158] But he concluded that "nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State," citing

151. Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987).
152. *Id.* at 498–500.
153. *Id.* at 484.
154. *Id.*
155. *Id.* at 498.
156. *Id.* at 498–500.
157. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10606, 10618 (1993). Justice Powell, who had been assigned the task of drafting the majority opinion, had sent the other Justices an unusual memo asking for ideas concerning how to reach this result. Memorandum to the Conference from Justice Powell (Nov. 17, 1986) (on file with the Library of Congress). Justice Scalia proposed the idea of interpreting *Milwaukee I* as implicitly preempting state common law by recognizing that the federal courts could apply federal common law in interstate nuisance disputes. He proposed that the Court then declare that Congress, by adopting the CWA, had resuscitated state common law, but only when the law of source states was applied. Memorandum to the Conference from Justice Scalia (Nov. 18, 1986) (on file with the Library of Congress).
158. *Ouellette*, 479 U.S. at 494–96.

the express preservation of the right of states to impose more stringent standards on their own point sources in the Act's savings clause.[159] The four dissenters criticized any preemption of state common law and argued that federal courts should apply normal choice-of-law principles when hearing state common law actions over interstate pollution.[160]

The Table below displays the core environmental common law nuisance claims throughout the twentieth century and where state and federal common law nuisance claims stood at the beginning of the twenty-first century:

Table 1: The Evolution of Twentieth Century Interstate Nuisance Claims

Case Name	***Year***	***Federal Common Law Public Nuisance Claims?***	***State Common Law Public Nuisance Claims?***
Missouri v. Illinois	1906	Missouri had failed to prove sufficient causal injury	Not specifically addressed
Georgia v. Tennessee Copper	1907	States have important "*quasi*-sovereign" interests	Not specifically addressed
Milwaukee I	1972	Not displaced prior to enactment of comprehensive CWA	Not specifically addressed
Milwaukee II	1981	CWA has displaced such claims	Not specifically addressed
International Paper Co. v. Ouellette	1987	Not specifically addressed	Allowed as long as the law of the source state is preserved

159. *Id.* at 497; 33 U.S.C. § 1365(e) (2012) ("Statutory or common law rights not restricted—Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).").

160. *Ouellette*, 479 U.S. at 501–02 (Brennan, J., dissenting); *id.* at 509 (Stevens, J., dissenting).

II. COMMON LAW CLIMATE LITIGATION

At the dawn of the twenty-first century, the Supreme Court was effectively out of the business of utilizing its original jurisdiction to hear interstate pollution disputes. It was widely assumed that the CAA Amendments of 1990, which added a comprehensive federal permit program to the CAA, would also displace federal common law nuisance actions for interstate air pollution whenever a court was forced squarely to confront such a case.[161] But the CAA's express preemption clause only covers motor vehicle-related claims—it does not expressly address non-motor vehicle-related claims.[162] And under *Ouellette*, state common law nuisance actions for transboundary pollution remained alive so long as the law of the source state was applied.[163] It was not until more than two decades later when the Supreme Court addressed the CAA regulatory regime in the context of federal common law nuisance claims in *AEP*.

A. AEP v. Connecticut in District Court: An Initial Test for Common Law Nuisance Claims Under the Clean Air Act

In July 2004 eight states and the City of New York filed a federal and state common law nuisance action against five of the largest electric

161. The Ninth Circuit in *National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1989), held that the CWA preempts a federal common law nuisance action against the Los Angeles Department of Water and Power for damage it caused by diverting water from Mono Lake, but it reserved judgment on the question whether the federal CAA would preempt a federal common law nuisance action against the Department for air pollution. The Ninth Circuit held that a federal common law action was not available under the facts of the case because, unlike the situation in *Georgia v. Tennessee Copper Co.*, there was no interstate dispute involved. *Id.* at 1204–05. A dissenting judge argued that there is a uniquely federal interest in preserving air quality even in intrastate disputes. *Id.* at 1208–09 (Reinhardt, J., dissenting). Even before the 1990 CAA Amendments were adopted, some lower federal courts had suggested that the CAA could preempt federal common law nuisance actions for interstate air pollution. *See* United States v. Kin-Buc, Inc., 532 F. Supp. 699 (D.N.J 1982); New England Legal Found. v. Costle, 666 F.2d 30, 32 n.2 (2d Cir. 1981).

162. 42 U.S.C. § 7543(a) (2012).

163. Professor Daniel Farber has described the significance of *Ouellette* for the vitality of common law nuisance actions in the following terms: "after hanging by its fingernails from a cliff in *Milwaukee II*, the common law came roaring back in the final episode." DANIEL A. FARBER, *The Story of* Boomer*: Pollution and the Common Law*, *in* ENVIRONMENTAL LAW STORIES 7, 40 (Richard J. Lazarus & Oliver A. Houck eds., 2005). The requirement that the state common law of the source state be applied did not significantly disadvantage the plaintiffs in *Ouellette*. On remand, New York nuisance law proved no more favorable to the paper company than Vermont's would have been. The company ultimately settled with the plaintiffs for five million dollars, including the establishment of a trust fund for environmental projects in the Lake Champlain area. The colorful story of this litigation is recounted by Peter Langrock, the plaintiffs' lawyer, in PETER LANGROCK, ADDISON COUNTY JUSTICE: TALES FROM A VERMONT COURTHOUSE 69–86 (1997).

utilities in the United States.[164] The suit alleged that power plants operated by the defendant utilities contribute 10 percent of U.S. emissions of carbon dioxide (CO_2), a greenhouse gas that contributes to global warming and climate change.[165] The plaintiff further claimed that global warming already had begun to alter the climate of the United States and that it was causing significant harm to them.[166] In their lawsuit, they sought an order holding the defendants jointly and severally liable for contributing to global warming and an injunction ordering the companies to cap their emissions of CO_2 and then to reduce them by a specified percentage each year for at least a decade.[167]

The case raised the question of whether the CAA preempts the federal common law of nuisance for interstate air pollution.[168] While the CAA was amended in 1990 to add a comprehensive permit program similar to the CWA, at the time the lawsuit was filed the CAA had *not* been used to regulate CO_2. During the George W. Bush Administration, EPA's general counsel asserted that the agency lacked the authority to regulate CO_2 emissions under the CAA.[169]

On September 15, 2005, Federal District Judge Loretta Preska dismissed the states' lawsuit without reaching the critical preemption issue.[170] Instead, she held that the case presented non-justiciable political questions.[171] In doing so, she distinguished previous interstate nuisance cases like *Georgia v. Tennessee Copper* and *New Jersey v. New York City*, by noting that none "has touched on so many areas of national and international policy" as the climate change litigation,[172] stating:

> The explicit statements of Congress and the Executive on the issue of global climate change in general and their specific refusal to impose the limits on carbon dioxide emissions Plaintiffs now seek to impose by judicial fiat confirm that making the "initial policy determination[s]" addressing global climate change is an undertaking for the political branches.[173]

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164. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267–68 (S.D.N.Y. 2005), *rev'd*, 564 U.S. 410 (2011). The five states included Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin. *Id.*

165. *Id.* at 268.

166. *Id.*

167. *Id.* at 270.

168. *Id.*

169. *See* Massachusetts v. EPA, 549 U.S. 497, 512 (2007).

170. 406 F. Supp. 2d at 265.

171. *Id.* at 274.

172. *Id.* at 272.

173. *Id.* at 274 (alteration in original).

Judge Preska further noted that "[b]ecause resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests," the case "present[s] non-justiciable political questions that are consigned to the political branches, not the Judiciary."[174]

Judge Preska's decision was appealed to the U.S. Court of Appeals for the Second Circuit, which heard oral argument in June 2006. But the appellate court put the case on hold while waiting for the U.S. Supreme Court to decide *Massachusetts v. EPA*, a case that challenged the George W. Bush Administration's authority to regulate emissions of GHGs under the CAA.[175]

B. The Intervening Ruling in Massachusetts v. EPA (2007) and the Second Circuit's Subsequent Ruling in AEP v. Connecticut (2009)

In *Massachusetts v. EPA*, the Court in a closely decided 5–4 held that climate change sufficiently affected the state of Massachusetts to give it standing to challenge EPA's failure to regulate emissions of GHGs.[176] On the merits, the Court held that EPA *did* have the authority to regulate emissions of GHGs under the CAA if it found that they "endanger" public health or welfare by contributing to global warming and climate change.[177] The Court remanded the case to EPA to consider whether to make an "endangerment finding."[178]

The Court's decision, written by Justice Stevens, relied heavily on *Georgia v. Tennessee Copper Co.*, the century-old nuisance case discussed in Part I. Despite not being cited in any of the many briefs filed with the

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174. *Id.*

175. Massachusetts v. EPA, 549 U.S. 497 (2007).

176. *Id.*

177. *Id.* at 527–28.

178. *Id.* at 534–35. The Administrative Procedure Act grants the public the right to petition agencies for the issuance of rules. 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."). While agencies have an obligation to respond to these petitions, in practice they often are ignored for many years and it is extremely difficult to establish that a failure to respond is agency action "unreasonably delayed" that can be redressed by judicial review. *See, e.g.*, Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70 (D.C. Cir. 1984). Indeed, the landmark *Massachusetts v. EPA* litigation never would have made it through the courthouse doors except for the fact that the Bush Administration wanted to trumpet its new policy decision that EPA did *not* have the authority to regulate GHG emissions under the CAA. It thus seized upon a petition from an obscure NGO asking EPA to conduct a rulemaking on GHG emissions from mobile sources and denied it to emphasize the new policy. EPA Press Release, EPA Denies Petition to Regulate Greenhouse Gas Emissions from Motor Vehicles, August 28, 2003, https://archive.epa.gov/epapages/newsroom_archive/newsreleases/694c8f3b7c16ff6085256d900065fdad.html. Had that not happened, the petition probably could still be sitting at EPA unanswered and *Massachusetts v. EPA* never would have made it to court.

Court,[179] Justice Stevens turned to Justice Holmes's century-old reasoning on the status of states in interstate nuisance claims, re-affirming that, "[w]ell before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction."[180] He further noted, "Just as Georgia's independent interest 'in all the earth and air within its domain' supported federal jurisdiction a century ago, so too does Massachusetts's well-founded desire to preserve its sovereign territory today."[181]

After a round of supplemental briefing on *Massachusetts v. EPA*'s impact, two years elapsed before the Second Circuit panel released its decision in *AEP*.[182] The decision was released on September 21, 2009, just six weeks after one of the panel's members, Judge Sonia Sotomayor, had been elevated to the U.S. Supreme Court.[183] The remaining two judges on the panel, Judge Hall, joined by Judge McLaughlin, issued a ninety-page opinion that reversed Judge Preska's decision and held that climate change was not a non-justiciable "political question."[184] The court held that the states had *parens patriae* and Article III standing, and New York City and the land trusts who had joined the litigation had Article III standing.[185] The court also found that the CAA did not displace the plaintiffs' common law nuisance claim, allowing the case to go forward to trial.[186]

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179. The first mention of the *Georgia v. Tennessee Copper* precedent occurred at oral argument. Justice Kennedy suggested the case when counsel for Massachusetts was struggling to respond to a question concerning what his "best case" was supporting the state's standing. *See* Oral Argument at 14:42, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120), http://www.oyez.org/cases/2000-2009/2006/2006_05_1120 [https://perma.cc/MZN7-3YVL].

180. Massachusetts v. EPA, 549 U.S. at 518.

181. *Id.* at 519 ("When a state enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India . . . ."). *Id.*

182. Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

183. Adam Liptak, *Justices Rebuff States on Utilities' Gas Emissions*, N.Y. TIMES, June 21, 2011, at A18.

184. 582 F.3d at 309.

185. *Id.* at 392. *Parens patriae* means "[t]he state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY (7th ed. 1999). *See also* Zdeb, *supra* note 22.

186. 582 F.3d at 392. The panel usefully explained the difference between displacement and preemption in the following terms:

> [T]he concept of "displacement" refers to a situation in which "federal statutory law governs a question previously the subject of federal common law." The term "pre-emption," in contrast, generally addresses a circumstance in which a federal statute supersedes state law, but courts have also frequently used the word "pre-emption" when discussing whether a statute displaces federal common law. We further note that the "appropriate analysis" in determining whether displacement of the federal common law has occurred "is not the same as that employed in deciding if federal law pre-empts state law."

Id. at 371 n.37 (citations omitted) (quoting *Milwaukee II*, 451 U.S. 304, 316 (1981)).

The court noted that *Massachusetts v. EPA* made it "clear that EPA has statutory authority to regulate greenhouse gases as a 'pollutant' under the Clean Air Act."[187] The court concluded, "until EPA makes the requisite findings, for the purposes of our displacement analysis the CAA does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources."[188] Thus, it concluded that the problem has not been "thoroughly addressed" by the CAA, unlike the situation in *Milwaukee II* in the context of the CWA.[189] *Milwaukee II* addressed the viability of federal common law water pollution nuisance claims in the aftermath of the CWA's passage.[190] The Court in *Milwaukee II* found that the CWA supplanted federal common law when Congress adopted a comprehensive regulatory scheme for water pollution control.[191] The CAA presents a more difficult problem—the extent to which Congress has delegated to the EPA the ability to regulate greenhouse gas emissions. Hence, the Second Circuit found that "neither Congress nor EPA has regulated greenhouse gas emissions from stationary sources in such a way as to 'speak directly' to the 'particular issue' raised by Plaintiffs."[192] Thus, it concluded that the CAA had not displaced Connecticut's lawsuit.[193]

C. AEP v. Connecticut (2011): Displacing Federal Common Law Claims but Leaving the Door Open for State Common Law Claims

The Supreme Court agreed to review the Second Circuit's decision in *AEP*.[194] Numerous industry groups implored the Court to follow the federal district court's holding that climate change litigation raised non-justiciable political questions or to reject the lawsuit on the grounds that the effects of climate change were too diffuse or uncertain to give rise to Article III standing.[195] Some private nuisance actions had been filed against oil companies seeking damages for their contribution to climate change and many defendants hoped the Supreme Court would preclude all such litigation on constitutional grounds. The Solicitor General,

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187. *Id.* at 378.

188. 582 F.3d at 381. The endangerment finding was made in December 2009. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,495 (Dec. 15, 2009).

189. *Id.* (quoting *Milwaukee II*, 451 U.S. 304, 320 (1981)).

190. *Milwaukee II*, 451 U.S. 304, 310–12 (1981).

191. *Id.* at 317–19.

192. 582 F.3d at 387.

193. *Id.* at 387–88.

194. *AEP*, 564 U.S. 410 (2011).

195. A total of twenty amicus briefs supporting the utility defendants were filed by various groups, including trade associations representing the utility, oil, auto, chemical, and construction industries. *Id.* at 414–15.

representing the Tennessee Valley Authority, argued that the Court should dismiss the case not for lack of Article III standing, but for lack of prudential standing because the global nature of climate change is a generalized grievance best addressed by the political branches of government.[196] Due to the recusal of the recently appointed Justice Sonia Sotomayor, only eight Justices heard the case.[197] The four key components of the ruling are discussed below.

First, by a split 4–4 vote, the Court affirmed the Second Circuit's rejection of arguments that (1) the plaintiffs lacked standing and that (2) the case raised a non-justiciable political question.[198] The Court stated that four of its members "would hold that at least some plaintiffs have Article III standing under *Massachusetts* [*v. EPA*], which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions, and, further, that no other threshold obstacle bars review" including the political question doctrine and the Solicitor General's argument that the case should be dismissed because of a prudential bar to adjudicating generalized grievances.[199] Four other Justices—likely the dissenters in *Massachusetts v. EPA*—"would hold that none of the plaintiffs have Article III standing."[200]

Second, in her opinion for the otherwise unanimous Court, Justice Ginsburg addressed the propriety of federal courts fashioning federal common law in the area of environmental protection.[201] Citing *Erie Railroad Co. v. Tompkins*, she explained: "The 'new' federal common law addresses 'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands."[202] Justice Ginsburg declared that "[e]nvironmental protection is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal

196. *See* Brief for Tennessee Valley Authority as Respondent Supporting Petitioners at 14–24, *AEP*, 564 U.S. 410 (2011) (No. 10-174).

197. Justice Sonia Sotomayor recused herself because she had been on the Second Circuit panel that initially heard oral argument in the case, although she was elevated to the Supreme Court before the Second Circuit released its decision with the two remaining judges on the panel agreeing to reverse the district court. *See, e.g.*, Lawrence Hurley, *Supreme Court Takes up Climate "Nuisance" Case*, N.Y. TIMES (Dec. 6, 2010), https://archive.nytimes.com/www.nytimes.com/gwire/2010/12/06/06greenwire-supreme-court-takes-up-climate-nuisance-case-71478.html?emc=rss&pagewanted=all&partner=rss (noting that Justice Sotomayer had recused herself from hearing the case).

198. *AEP*, 564 U.S. at 419–420.

199. *Id.* at 420 & n.6 (citation omitted).

200. *Id.* at 420.

201. *Id.* at 420–23.

202. *Id.* at 421 (quoting Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 422 (1964)).

law.'"[203] She quoted the statement in *Milwaukee I* that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law."[204]

Justice Ginsburg then noted that the Court had never decided whether private citizens or political subdivisions (e.g., cities, municipalities) could use the federal common law of nuisance to seek redress for interstate pollution.[205] "Nor have we ever held that a State may sue to abate any and all manner of pollution originating outside its borders."[206] Justice Ginsburg noted that the defendants sought to distinguish this case from previous interstate nuisance cases because of the "scale and complexity" of climate change.[207] But, citing Justice Holmes's recognition of the germ theory of disease in *Missouri v. Illinois*, she observed, "[P]ublic nuisance law, like common law generally, adapts to changing scientific and factual circumstances."[208]

On the critical federal common law displacement issue, the Court held "that 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 powerplants [sic]."[209] The test for displacement "is simply whether the statute 'speaks[s] directly to [the] question' at issue," the Court declared, and the CAA "'speaks directly' to emissions of carbon dioxide" from power plants.[210] While EPA had yet to finish its endangerment rulemaking, the Court rejected the plaintiffs' argument that federal common law is not displaced until EPA actually exercises its authority to regulate greenhouse gas emissions.[211]

Justice Ginsburg's opinion explained that the "critical point is that Congress delegated to EPA the decision *whether* and *how* to regulate carbon-dioxide emissions from powerplants [sic]; the delegation is what displaces federal common law."[212] Further, "were EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its ongoing § 7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the Agency's expert

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203. *Id.* (quoting Henry J. Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964)).

204. *Id.* (quoting *Milwaukee I*, 406 U.S. 91, 103 (1972)).

205. *Id.* at 422.

206. *Id.*

207. *Id.*

208. *Id.* at 423 (citing Missouri v. Illinois, 200 U.S. 496, 522 (1906)).

209. *Id.* at 424.

210. *Id.* (alterations in original) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

211. *Id.* at 425–26.

212. *Id.* at 426 (emphasis added).

determination."[213] Justice Ginsburg took pains to emphasize that EPA, as the expert administrative agency entrusted by Congress with the task of controlling air pollution, "is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions."[214]

Third, in critical language with widespread implications for future climate change-related litigation, she emphasized that a future EPA decision to not regulate CO_2 emissions "would not escape judicial review"[215] and that "EPA may not decline to regulate carbon-dioxide emissions from powerplants [sic] if refusal to act would be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[216] The order of decision-making prescribed by Congress—"the first decider under the Act is the expert administrative agency, the second, federal judges"—is fitting because the "appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum."[217]

Nonetheless, Justice Ginsburg emphasized the critical role that federal courts have in overseeing EPA's actions—just not in the first instance. While the federal courts "would have no warrant to employ the federal common law of nuisance to upset the Agency's expert determination," such a determination would still be subject to the Administrative Procedure Act.[218] While EPA can establish emissions standards for GHGs that, "'in [the Administrator's] judgment,' 'caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare . . . . '[t]he use of the word *judgment* . . . *is not a roving license.*"[219] Any refusal to regulate carbon-dioxide emissions remains subject to the citizen suit provisions of the CAA and a refusal to act must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[220] In sum, Justice Ginsburg called attention to potential future litigation in the event that EPA decides to not regulate GHG emissions at the conclusion of the rulemaking process.[221] In light of this language for a unanimous Court, it seems likely that the Supreme Court would closely scrutinize any decision by the Trump EPA

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213. *Id.*
214. *Id.* at 428.
215. *Id.* at 426.
216. *Id.* at 427 (quoting 42 U.S.C. § 7607(d)(9)(A)).
217. *Id.*
218. *Id.* at 426.
219. *Id.* at 426–27 (alterations in original) (emphasis added) (citation omitted) (quoting 42 U.S.C. § 7411(b)(1)(A) and Massachusetts v. EPA, 549 U.S. 497, 533 (2007)).
220. *Id.* at 427 (quoting 42 U.S.C. § 7607(d)(9)(A)).
221. "If the plaintiffs in this case 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." *Id.*

to reverse the endangerment finding.

Fourth, Justice Ginsburg specifically reserved judgment on the question whether *state* common law nuisance actions were preempted by the CAA, noting that it was a question that had not been briefed or argued.[222] Although preemption of state common law was not a question presented to the Court, she affirmatively cited *Ouellette*'s holding that the CWA did not preempt such suits when the law of the source state was applied,[223] thus leaving the door open for future state law suits. Justice Alito, joined by Justice Thomas, filed the following concurrence "I concur in the judgment, and I agree with the Court's displacement analysis on the assumption (which I make for the sake of argument because no party contends otherwise) that the interpretation of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, adopted by the majority in *Massachusetts v. EPA,* 549 U.S. 497 (2007), is correct." The two still contest the Court's holding in *Massachusetts.*

In sum, the Supreme Court's decision in *AEP* confirmed that the CAA broadly displaced the federal common law of nuisance for climate change-related claims by delegating to EPA the responsibility for developing a regulatory response to the problem. In doing so, it rejected efforts to erect constitutional obstacles to climate litigation (such as the political question doctrine) even as it blocked the use of federal common law actions. The Supreme Court also affirmed that states have standing to sue, reaffirming the historical role that the Court has played in resolving environmental disputes between states.[224] By briefly addressing the viability of future state law litigation, the Court at least kept the door open for future climate litigation.

III. FEDERAL COMMON LAW IN THE WAKE OF AEP V. CONNECTICUT

The rationale for displacement of federal common law in *AEP* was that the CAA delegated to EPA the responsibility to prevent harm from climate change.[225] The lower federal courts have addressed displacement issues in the two decisions discussed below. The Seventh Circuit has held that transboundary environmental problems, such as invasive species, not directly addressed by the CWA can still serve as the basis for a federal common law action.[226] The Ninth Circuit has dismissed a federal common

222. *Id.* at 429.
223. *Id.*
224. *Id.* at 509–10.
225. *Id.* at 424–26.
226. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765 (7th Cir. 2011).

law action seeking damages from fossil fuel industries due to harm caused by climate change.[227]

A. Michigan v. U.S. Army Corps of Engineers: The Seventh Circuit Confirms the Role of the Common Law as a Regulatory Backstop

The continued viability of federal common law as a regulatory backstop was confirmed by the U.S. Court of Appeals for the Seventh Circuit in *Michigan v. U.S. Army Corps of Engineers*.[228] In this case, states filed a federal common law nuisance action in an effort to stop the spread of two invasive species of Asian carp (bighead carp and silver carp) into the Great Lakes.[229] Initially imported into the U.S. by fish farms in Arkansas, the carp escaped to the Mississippi River and worked their way upstream to the Chicago Sanitary and Ship Canal—the very canal that gave rise to the *Missouri v. Illinois* case—from which it is feared they will enter Lake Michigan and spread throughout the Great Lakes.[230]

After failing to persuade the U.S. Supreme Court to act, five states filed a federal public nuisance action in federal district court in Illinois on July 19, 2010.[231] The suit alleged that the U.S. Army Corps of Engineers had created a public nuisance by managing the Chicago Area Waterway System (CAWS) in a manner that would allow the Asian carp to reach the Great Lakes.[232] The states asked the court to issue an injunction requiring the closing of the CAWS locks and requiring the Corps to develop a plan to permanently separate the carp-infested Chicago River from Lake Michigan.[233] The Corps noted that to date Congress had directed the Corps only to study options for preventing the transfer of invasive aquatic species between the two basins.[234]

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227. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

228. 667 F.3d at 765.

229. *See id.* at 768–69. The U.S. Fish and Wildlife Service has designated one species of Asian carp—the silver carp—as an injurious species, 50 C.F.R. § 16.13(a)(2)(v)(D) (2017), making it a federal crime under the Lacey Act, 16 U.S.C. § 3372, to transport them into or around the United States. Injurious Wildlife Species; Silver Carp (Hypophthelmichthys molitrix) and Largescale Silver Carp (Hypophthelmichthys harmandi), 72 Fed. Reg. 37,459 (July 10, 2007). A similar listing for bighead carp remains under review.

230. *U.S. Army Corps of Eng'rs*, 667 F.3d at 768. The carp, which can grow to sixty pounds or more, "are voracious eaters that consume small organisms on which the entire food chain relies; they crowd out native species as they enter new environments; they reproduce at a high rate; they travel quickly and adapt readily; and they have a dangerous habit of jumping out of the water and harming people and property." *U.S. Army Corps of Eng'rs*, 667 F.3d at 768; *see also* Michigan v. U.S. Army Corps of Eng'rs, No. 10–CV–4457, 2010 WL 5018559, at *3 (N.D. Ill. Dec. 2, 2010).

231. *U.S. Army Corps of Eng'rs*, 2010 WL 5018559, at *1 & n.1.

232. *Id.* at *3–4.

233. *Id.* at *1–2.

234. *Id.* at *11.

Despite upholding the right of the Great Lakes states to bring a federal nuisance action, Judge Dow denied their request for a preliminary injunction.[235] He concluded that while the potential damage to the Great Lakes was high, the level of certainty that any damage will occur is low.[236] He also noted that judicial restraint was in order because "multiple federal and state agencies are expending significant effort carrying out their statutory and regulatory duties to maintain and operate the CAWS, study and address the threat of Asian carp, and take whatever emergency measures they deem appropriate to prevent Asian carp 'from dispersing into the Great Lakes.'"[237]

The plaintiff States appealed Judge Dow's ruling to the U.S. Court of Appeals for the Seventh Circuit. In July 2011, while the appeal was pending, the Corps of Engineers released a list of forty aquatic invasive species that it believes pose the greatest risk of migrating through the CAWS.[238] This list included thirty species, including zebra mussels, that pose a significant risk to the Mississippi River Basin and ten, including the Asian carp, that threaten the Great Lakes.[239] This study helped mobilize a bipartisan coalition of state attorneys general to lobby Congress to require permanent ecological separation between the Great Lakes and Mississippi River basins.[240]

On August 24, 2011, the U.S. Court of Appeals for the Seventh Circuit upheld the district court decision refusing to require the Corps to take additional action to control Asian carp.[241] Although it denied the states the relief they requested, the court affirmed their right to use the federal common law of nuisance to address the threat posed by the Asian carp, while reserving the question whether a state can bring a public nuisance claim against a federal agency.[242] The court became the first U.S. Court of Appeals to assess the impact of the Supreme Court's *AEP* decision on the federal common law of nuisance.

The Seventh Circuit panel, in an opinion by Judge Diane Wood, rejected the defendants' arguments that nuisance actions must be confined to traditional pollutants:[243]

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235. *Id.* at *34.
236. *Id.* at *30.
237. *Id.*
238. *See Schuette Building National Coalition Against Aquatic Invasive Species*, MICHIGAN.GOV (Aug. 31, 2011), http://www.michigan.gov/som/0,4669,7-192-26847-261562--,00.html [https://perma. cc/BYL2-69R6].
239. *Id.*
240. *Id.*
241. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 769 (7th Cir. 2011).
242. *Id.*
243. *Id.* at 771.

> While it may be true that the introduction of an invasive species of fish into a new ecosystem does not fit the concept of nuisance as neatly as a spill of toxic chemicals into a stream, we do not think the Supreme Court has limited the concept of public nuisance as much as the defendants suggest.[244]

Further, the court declared that "[i]t would be arbitrary to conclude that this type of action extends to the harm caused by industrial pollution but not to the environmental and economic destruction caused by the introduction of an invasive, non-native organism into a new ecosystem . . . ."[245]

Relying on the statement in *AEP* that "the delegation is what displaces," the Corps of Engineers and the City of Chicago argued that the Supreme Court had created a new and more expansive test for displacement: federal common law is displaced once Congress indicates its intention to delegate a particular problem to an executive agency.[246] The Seventh Circuit panel rejected this argument.[247] It concluded that "the Court did not establish a new test based solely on Congress's delegation of regulatory power; it simply pointed out that delegation is one type of congressional action that is evidence of displacement."[248] It stressed that in *AEP* the Supreme Court emphasized the comprehensive nature of the CAA even with respect to regulation of greenhouse gas emissions, the multiple avenues for public and private enforcement, and the right of the public to seek judicial review of denials of petitions for rulemakings.[249]

In contrast to the CAA's provisions, "congressional efforts to curb the migration of invasive species, and of invasive carp in particular, have yet to reach the level of detail one sees in the air or water pollution schemes."[250] The court surveyed existing federal legislation on invasive species.[251] The Seventh Circuit panel concluded that "[a]lthough this legislation demonstrates that Congress is aware of the problem of invasive species generally, and carp in particular, it falls far short" of the provisions of the CAA or CWA that were found to displace federal common law.[252] The court noted "neither the Corps nor any other agency has been empowered actively to regulate the problem of invasive carp, and Congress has not required any agency to establish a single standard to deal

244. *Id.*
245. *Id.*
246. *Id.* at 777 (quoting *AEP*, 564 U.S. 410, 426 (2011)).
247. *Id.*
248. *Id.* at 777–78.
249. *Id.* at 778.
250. *Id.* at 778–79.
251. *Id.*
252. *Id.* at 780.

with the problem or to take any other action."[253] It also emphasized that no enforcement mechanism has been created by Congress that would give parties adversely affected by the carp recourse to the courts.[254] Thus, the court concluded that federal common law had not been displaced.[255]

While ultimately finding that it was not an abuse of discretion in the lower court's decision to not issue a preliminary injunction, the court took issue with Judge Dow's assessment of the risks posed by the carp.[256] The court believed that the plaintiffs demonstrated "a good or perhaps even a substantial likelihood of harm—that is, a non-trivial chance that the carp will invade Lake Michigan in numbers great enough to constitute a public nuisance."[257]

The Seventh Circuit ruled that *AEP* did not *entirely* displace the federal common law of nuisance to address *all* transboundary environmental problems. The court upheld use of the federal common law of interstate nuisance to address the threat to the Great Lakes posed by invasive species of Asian carp.[258] After holding that the concept of interstate nuisance was sufficiently broad to embrace the spread of invasive species, the court rejected claims that *AEP* had relaxed the test for finding displacement.[259] It is not enough that Congress indicates its intention to delegate a particular problem to an executive agency, the Seventh Circuit panel stated.[260] Rather, delegation is only "one type of congressional action that is evidence of displacement."[261] Even though Congress had mentioned the invasive carp and directed that the problem be studied, the court concluded that congressional awareness of a problem "falls far short" of the kind of displacement for interstate nuisances previously found in the CWA and CAA.[262] This represents a fair reading of the *AEP* decision, particularly in the context of an emerging environmental controversy not directly addressed by existing legislation.

B. Native Village of Kivalina v. ExxonMobil Corp.: The Ninth Circuit Applies AEP to Dismiss Cities' Federal Common Law Climate Claims

In *Native Village of Kivalina v. ExxonMobil Corp.* the U.S. Court of Appeals for the Ninth Circuit dismissed a federal common law nuisance

253. *Id.*
254. *Id.*
255. *Id. at* 772.
256. *Id.* at 785.
257. *Id.* at 769.
258. *Id.* at 772–73.
259. *Id.*
260. *Id.* at 777.
261. *Id.* at 777–78.
262. *Id.* at 780.

action brought against energy, oil and utility companies by the municipal governments of cities located on the tip of a barrier island in Alaska.[263] The cities alleged that fossil fuels produced and used by the defendants had contributed to climate change, that the defendants conspired to promote deliberate misrepresentation of climate change science, and that rising sea levels ultimately would require their residents to relocate.[264] They sought $400 million in damages to pay for relocation of the villages.[265]

A federal district court in California initially dismissed the lawsuit on the ground that it raised a non-justiciable political question and that plaintiffs lacked standing.[266] On appeal, the Ninth Circuit noted that *AEP* reaffirmed that "federal common law can apply to transboundary pollution suits," which most often "are founded on a theory of public nuisance."[267] Citing *AEP*, the court noted that a "successful public nuisance claim generally requires proof that a defendant's activity unreasonably interfered with the use or enjoyment of a public right and thereby caused the public-at-large substantial and widespread harm."[268] However, the court also noted that "[f]ederal common law is subject to the paramount authority of Congress."[269]

The court then noted that deciding whether a federal statute displaces federal common law "can prove complicated" because "the applicability of displacement is an issue-specific inquiry."[270] Quoting *Michigan v. U.S. Army Corps of Engineers*, the court stated that "the salient question is 'whether Congress has provided a sufficient legislative solution to the particular [issue] to warrant a conclusion that [the] legislation has occupied the field to the exclusion of federal common law.' Put more plainly, 'how much congressional action is enough?'"[271] But the panel concluded that "[w]e need not engage in that complex issue and fact-specific analysis in this case, because we have direct Supreme Court guidance" from the *AEP* decision.[272] The Court in *AEP* had highlighted that "Congress has directly addressed the issue of domestic greenhouse

263. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

264. *Id.* at 853–54.

265. *See, e.g.*, Felicity Barringer, *Flooded Village Files Suit, Citing Corporate Link to Climate Change*, N.Y. TIMES (Feb. 27, 2008), https://www.nytimes.com/2008/02/27/us/27alaska.html.

266. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *rev'd*, 696 F.3d 849 (9th Cir. 2012).

267. *Kivalina*, 696 F.3d at 855.

268. *Id.* (citing Missouri v. Illinois, 200 U.S. 496, 521 (1906); Connecticut v. Am. Elec. Power Co., 582 F. 3d 309, 357 (2d Cir. 2009)).

269. *Id.* at 856.

270. *Id.* at 856.

271. *Id.* (alterations in original) (citations omitted) (quoting Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 777 (7th Cir. 2011)).

272. *Id.*

gas emissions from stationary sources and has therefore displaced federal common law."[273]

The Ninth Circuit's decision in *Kivalina* confirms that the federal common law of interstate nuisance has been displaced by the CAA's delegation to EPA of the responsibility to control GHG emissions that endanger public health and welfare by contributing to climate change. The theory behind displacement is that Congress has required EPA, rather than the courts, to respond to the problem. That is scant comfort to the citizens of the Village of Kivalina, but it does place the onus on EPA to take action to deal with climate change.

The table below reflects the current state of interstate nuisance claims—to include how federal courts have treated states—in light of *Massachusetts v. EPA*, *AEP*, and the other cases discussed above.

Table 2: Summary of Interstate Nuisance Claims from Massachusetts v. EPA to Present

Case Name	***Federal Common Law of Nuisance?***	***State Common Law of Nuisance?***	***"Special Solicitude" to States as Litigants?***
Massachusetts v. EPA	Not addressed	Not addressed	Reaffirmed (quoting *Georgia v. Tennessee Copper Co.*)
Native Village of Kivalina v. ExxonMobil (2012)	CAA displaces any federal common law right to seek abatement of CO_2 emissions	Not addressed	Not addressed
AEP v. Connecticut (2011)	CAA displaces any federal common law right to seek abatement of CO_2 emissions	Discussed, but specifically mentioned that it was not preempted	Reaffirmed
Michigan v. United States Army Corps (2011)	Not displaced in the context of invasive species	Not addressed	Reaffirmed

273. *Id.*

IV. COULD OFFICIAL CLIMATE DENIAL REVIVE THE COMMON LAW?

After the Supreme Court's *Milwaukee II* and *AEP* decisions, the federal common law of nuisance risks being dismissed as a historical curiosity. After all, the Court ruled in *AEP* that the CAA has displaced the federal common law of nuisance for climate change claims.[274] Yet if the Trump administration repeals EPA's endangerment finding or Congress amends the CAA to deprive EPA of authority to regulate GHG emissions, federal common law may no longer be displaced. Skeptics of this argument may assert that common law nuisance litigation remains an antiquated strategy that no longer has viability in the face of complex and comprehensive environmental laws and regulations—regardless of what administration is in power and what its governing policy preferences are. Yet the Court's reasoning in both *Milwaukee II and AEP* relied heavily on the regulations being developed and implemented by an *expert* administrative agency.[275] The Court in *AEP* highlighted the extent to which the Court will defer to agency expertise.[276] After all, the CAA entrusts its implementation to EPA which, as the Court noted, is "better equipped to the job" in light of its "scientific, economic, and technological resources."[277] What, then, if the expert agency dismisses this scientific expertise and this resource advantage? What level of deference should be shown by the Court? This Part of the Article explores the consequences of the massive environmental deregulatory efforts currently underway at the Trump EPA, which may breathe new life into this centuries-old doctrine, forcing us to re-conceptualize these common law claims.

A. The Enduring Legacy of the Federal Common Law of Interstate Nuisance

Transboundary pollution problems served as a principal justification for federalizing U.S. environmental protection law, but until recently they have been poorly addressed by federal regulatory programs.[278] Despite agencies' greater expertise in determining appropriate levels of pollution

274. *AEP*, 564 U.S. 410 (2011).
275. *Milwaukee II*, 451 U.S. 304, 325–26 (1981); *AEP*, 564 U.S. at 428.
276. *AEP*, 564 U.S. at 428.
277. *Id.*
278. *See* Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 932 (1997) ("Notwithstanding the broad general trend toward centralized regulatory authority in environmental law, and the widespread invocation of transboundary pollution as a justification for that trend, little meaningful regulation of transboundary pollution actually exists.").

control, political forces often have stymied agency action.[279] For example, the CAA has long had provisions authorizing EPA to regulate transboundary air pollution,[280] but the agency refused to use these authorities until President Clinton's second term.[281] This history convinces Professor Thomas Merrill that, "insofar as multi-jurisdictional air pollution problems are concerned, some type of decisive congressional intervention is required before effective regulatory action will be taken against the problem."[282]

During the long legislative gridlock over acid rain and interstate ozone transport problems, environmental groups tried mightily to convince the federal judiciary to require EPA to exercise its CAA authority to regulate transboundary pollution. Plaintiffs repeatedly were rebuffed. Courts cited the difficulty of proving interstate interference with attainment and maintenance of national air quality standards given the difficulty of tracing the transport of pollutants over long distances.[283] At times they candidly admitted their preference for greater direction from Congress concerning how to resolve what were perceived as fierce regional conflicts.[284] Yet the very political factors that made agency officials reluctant to act, including differential impacts on source and victim states, also made it difficult for Congress to legislate to resolve transboundary pollution problems.[285]

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279. *See, e.g.*, Suzanne Goldenberg, *The Worst of Times: Bush's Environmental Legacy Examined*, THE GUARDIAN (Jan. 16, 2009), https://www.theguardian.com/politics/2009/jan/16/green politics-georgebush [https://perma.cc/E8JF-3WSD].

280. *See* § 110(a)(2)(D) of the CAA, 42 U.S.C. § 7410(a)(2)(D) (2016), which requires state implementation plans (SIPs) to contain measures to ensure that in-state emissions will not "contribute significantly to nonattainment in, or interfere with maintenance by, any other State" of any national ambient air quality standard (NAAQS). A downwind state may petition EPA under § 126(b), 42 U.S.C. § 7426(b), for a finding that a major stationary source or group of sources is interfering with the state's air quality in violation of § 110. If such a finding is made, the source may not operate after three months unless it complies with an EPA order to come into compliance within three years. § 7426(c).

281. *See* John H. Cushman, Jr., *Clinton Sharply Tightens Air Pollution Regulations Despite Concern over Costs*, N.Y. TIMES, June 26, 1997, at A1.

282. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 314 (2005).

283. *See, e.g.*, New York v. EPA, 852 F.2d 574 (D.C. Cir. 1988).

284. In one such case, then-Circuit Judge Ruth Bader Ginsburg explained, in a remarkably candid concurring opinion, why she had refused to require EPA to act:

> As counsel for the EPA acknowledged at oral argument, the EPA has taken *no* action against sources of interstate air pollution under either Section 126(b) or Section 110(a)(2)(E) in the decade-plus since those provisions were enacted. Congress, when it is so minded, is fully capable of instructing the EPA to address particular matters promptly. . . . Congress did not supply such direction in this instance; instead, it allowed and has left unchecked the EPA's current approach to interstate air pollution. The judiciary, therefore, is not the proper place in which to urge alteration of the Agency's course.

Id. at 581 (Ginsburg, J., concurring) (citations omitted).

285. *See* Richard B. Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts*, 6 HARV. ENVTL. L. REV. 241, 243 (1982).

The states that today are trying to use the common law of interstate nuisance to prevent invasive carp from reaching the Great Lakes view such litigation as only one part of a much larger strategy for persuading government actors to intervene.[286] They realize that preliminary defeats in litigation can lay the groundwork for future success in court.[287] In *Michigan v. U.S. Army Corps of Engineers*, the common law nuisance suit—while ultimately unsuccessful—may have spurred the Corps to release a study on invasive species.[288] This study served as the basis for separate but important congressional action that addressed some of the litigants underlying concerns.[289] It is likely that the threat of losing the common law lawsuit spurred the Corps to take action. As *Michigan v. U.S. Army Corps of Engineers* reaffirmed the use of the federal common law for certain environmental actions, the threat of losing the lawsuit—not to mention the high costs of litigation and discovery—will continue to shine light on environmental issues in the face of delay or inaction. The converse also can be true, but such common law actions can engage the federal courts and Congress "as partners in an ongoing colloquy over the interpretation and lawfulness of statutes" with common law judgments functioning as "an integral part of this colloquy."[290]

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286. In response to the district court's decision denying a preliminary injunction, Nick Schroeck of the Great Lakes Environmental Law Center stated:

> This fight, however, is worth having. And to the extent that Plaintiffs can increase the federal and state response to the crisis and expedite the completion of the hydrological separation study (which is the real solution to Asian carp and the next invasive species, whatever it may be) this case continues to have importance. For the rest of us who care about the Great Lakes, we must continue to press for action from the White House and Congress. As the legal battle over injunctions and common law public nuisance demonstrates, the current law is, at best, inadequate and we need comprehensive federal legislation attacking aquatic invasive species from all vectors.

Noah Hall, *Another Setback in the Legal Fight to Keep Asian Carp out of the Great Lakes*, GREAT LAKES LAW (Dec. 6, 2010), http://www.greatlakeslaw.org/blog/2010/12/another-setback-in-the-legal-fight-to-keep-asian-carp-out-of-the-great-lakes.html [https://perma.cc/N6VL-J8AT].

287. Thomas Cmar of the Natural Resources Defense Council states:

> Judge Dow is correct that there are federal and state agencies working on this . . . most notably the Army Corps of Engineers. The problem is that the Army Corps is working on this far too slowly, and in the wrong way. Rather than lasering in on bold, effective action to prevent the Asian carp from establishing a population in Lake Michigan, the Corps is conducting a study that they think will take over 5 years and cost over $25 million—and even then, they have not committed to deciding on an option that will fully prevent Asian carp from moving through the CAWS, but only one that will "reduce the risk" of carp getting into the Lake. That's far from an adequate response, and if the White House or Congress doesn't step in and provide the Corps with some adult supervision, the Asian carp saga could end up back in court—this time on a legal issue that the Corps is less likely to win.

Id.

288. *See Schuette Building National Coalition Against Aquatic Invasive Species*, *supra* note 247.

289. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 779 (7th Cir. 2011). Section 1538 of the Moving Ahead for Progress in the 21st Century Act, Public Law 112-141.

290. Ewing & Kysar, *supra* note 23, at 404.

When the regulatory and political processes fail to prevent significant harm, the threat of common law litigation can be a useful catalyst for action by other branches of government.[291] Clearly, the common law of interstate nuisance has other virtues apart from the well-known deterrent impact of tort law. Benjamin Ewing and Douglas Kysar describe the role of the modern common law of nuisance as part of a complex mosaic of "[o]verlapping governance mechanisms" that "help to span jurisdictions and to marshal different fact-finding competencies, remedial powers, and value orientations."[292] Such mechanisms help to "ensure a fuller and more inclusive characterization of emerging threats to social and environmental well-being."[293] They are part of what Ewing and Kysar describe as "prods and pleas," a kind of check against institutions that fail to perform their assigned roles to meet societal needs.[294]

In the climate change context, few people expected that an interstate nuisance action to address climate change ultimately would be successful.[295] But climate litigation—discussed in greater detail below—is partially successful as a way to place greater pressure on companies.

Although the Supreme Court in *AEP* unanimously decided that the federal common law of interstate nuisance was displaced by the CAA,[296] the Justices (by a 4–4 vote) rejected pleas that they permanently bar such litigation on constitutional (political question or standing) grounds.[297] Relying on the late Judge Henry Friendly's 1964 Benjamin Cardozo Lecture on *In Praise of* Erie*—and of the New Federal Common Law*,[298] Justice Ginsburg boldly declared that environmental protection is "an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'"[299]

Citing many of the cases discussed in Part I of this paper (*Missouri v. Illinois*, *New Jersey v. City of New York*, *Georgia v. Tennessee Copper*, and *Milwaukee I*), Justice Ginsburg noted that the Court often has

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291. But the state common law of nuisance is not without its own dangers. This action can include not only new laws or regulatory action to address emerging or neglected problems, but also laws to restrict the scope of state common law. UTAH CODE ANN. §78B-4-515 (LexisNexis 2018); *see also* TEX. HEALTH & SAFETY CODE ANN. § 382.05102 (West 2017) (insulating permitted discharges from nuisance liability premised on climate change).

292. Ewing & Kysar, *supra* note 23, at 410.

293. *Id.*

294. *Id.* at 411.

295. *See, e.g.*, Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135 (2011).

296. *AEP*, 564 U.S. 410 (2011).

297. *Id.* at 420.

298. Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

299. *AEP*, 564 U.S. at 421 (quoting Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421–22 (1964)).

entertained "federal common-law suits brought by one State to abate pollution emanating from another State."[300] She appropriately described these cases as instances in which "States were permitted to sue to challenge activity harmful to their citizens' health and welfare."[301] Thus, the *AEP* Court actually endorsed the notion that protection against interstate air and water pollution is an area where "specialized federal common law" makes sense.

Justice Ginsburg's opinion sheds some light on the criteria the Court will use in determining whether regulatory legislation has displaced the federal common law of interstate nuisance. Prior to the Court's decision, there had been considerable debate over the appropriate standard for finding displacement.[302] Justice Rehnquist's majority opinion in *Milwaukee II* had emphasized the comprehensive nature of the CWA's prohibition of unpermitted discharges of water pollution.[303] In *AEP*, Justice Ginsburg framed the test as involving whether the regulatory statute "speaks directly" to the emissions the plaintiffs seek to control.[304] In light of the Court's decision in *Massachusetts v. EPA* that GHG emissions could be regulated under the CAA, EPA's subsequent "endangerment finding," and regulatory initiatives to control GHG emissions, the *AEP* Court had no trouble finding displacement of the federal common law.[305]

The Court did not provide a specific roadmap addressing how courts are to determine whether a statute "speaks directly" to the transboundary emissions targeted by the interstate nuisance action.[306] General coverage is probably not enough, but a Supreme Court decision like *Massachusetts v. EPA* that expressly confirms such regulatory authority and requires EPA to determine whether or not to exercise it, seems to qualify.[307]

Further, Justice Ginsburg's decision discussed the judiciary's role in exercising judicial review over whether and how the EPA exercises this authority.[308] She noted that "[i]f EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court."[309] Justice Ginsburg also notes the continual

300. *Id.*
301. *Id.* at 422.
302. *See, e.g.*, *Milwaukee II*, 451 U.S. 304, 315–20 (1981).
303. *Id.* at 317–19.
304. *AEP*, 564 U.S. at 424.
305. *Id.*
306. *Id.* at 424–25.
307. Massachusetts v. EPA, 549 U.S. 497, 528–29 (2007).
308. *AEP*, 564 U.S. at 425.
309. *Id.*

availability of citizen suits to enforce emissions limits against regulated sources.[310] This suggests that the judiciary should continue to play an important oversight role. Under Justice Ginsburg's rubric, while federal common law may be displaced in the CAA context for now, the judiciary will play a critical role to police any subsequent decisions by regulatory authorities to eschew regulation.

Lastly, the Supreme Court expressly reserved judgment on the question of whether the CAA preempts the application of *state* common law in lawsuits involving interstate nuisance claims.[311] Citing *Ouellette*, Justice Ginsburg noted that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act."[312] Because the issue had not been briefed or argued in the *AEP* litigation, the court deferred judgment on this issue.[313] Yet *Ouellette* made it clear that the CWA's displacement of the federal common law of interstate nuisance did not displace state common law so long as the law of the source state, rather than the law of the downwind state, was used.[314]

B. Why Official Climate Denial May Backfire and Revive the Common Law

Because action by the Trump EPA to repeal EPA's endangerment finding would be unlikely to survive judicial review, Congress may seek to deny EPA authority to regulate GHG emissions. This clearly would revitalize federal common law claims because Congress no longer would have delegated by statute responsibility to EPA to respond to the climate change problem.[315] And there are other avenues by which the door remains open for common law nuisance claims in climate change litigation.

1. A Reversal of EPA's "Endangerment" Finding

Even as EPA seeks to repeal its existing regulations controlling GHG emissions, the agency's 2009 finding that such emissions endanger public health and welfare creates a legal obligation under the CAA for the agency to control them. If the agency seeks to avoid this obligation by reversing its endangerment finding, such a decision would be subject to judicial

310. *Id.*
311. *Id.* at 429.
312. *Id.* (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 489, 491 (1987)).
313. *Id.*
314. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 489 (1987).
315. At least one law has been proposed to do just that. Within the last year, the House considered H.R. 637, the "Stopping EPA Overreach Act of 2017," which would exclude GHGs from regulation under the CAA. H.R. 637, 115th Cong. (2017).

review.[316] In his testimony before the Senate Environment and Public Works Committee on January 30, 2018, then-EPA administrator Scott Pruitt stated that he would not rule out commencing a rulemaking to reverse the endangerment finding.[317] If the agency ultimately reverses the endangerment finding, the courts would closely scrutinize such a decision, as Justice Ginsburg took care to highlight in *AEP*.[318]

In light of the overwhelming scientific evidence supporting EPA's endangerment finding, any reversal would be unlikely to survive judicial review. This may explain the Trump Administration's hesitance to pursue such an action, despite its aggressive moves to repeal GHG emissions regulations. Justice Ginsburg's strong language in *AEP* suggests that the rationale for federal common law displacement is founded in part on the notion that the judiciary will be available to police irrational action by the expert agency charged by law with protecting the public against air pollutants that endanger public health or welfare.

When another administration bent on deregulation assumed office in 1981, it immediately sought to rescind a regulation requiring passive restraints on motor vehicles. But the Supreme Court in its famous *State Farm* decision held that this action was arbitrary and capricious because the rulemaking record overwhelmingly demonstrated the life-saving benefits of air bags.[319] Because of this decision, the regulation ultimately went into effect and hundreds of thousands of lives have been saved and millions of serious injuries have been prevented.[320] The lesson of this history is that a new administration must have a sound factual and legal basis for changing course or it risks having its actions overturned in court. While agencies are often afforded great discretion regardless of the political administration, agency decisions are not "unimpeachable."[321] Indeed, *State Farm* affirmed that efforts to promote the underlying policy preferences of a new administration only go so far.[322] The Court will use the Administrative Procedure Act's arbitrary and capricious standard if the agency cannot articulate a satisfactory explanation for a dramatic change in course.[323] In the context of future climate litigation, the CAA delegates great discretion to the EPA as the expert agency to regulate greenhouse

316. 5 U.S.C. § 706 (2012).

317. DiChristopher, *supra* note 18.

318. *See, e.g.*, Tom DiChristopher, *Climate Change Deniers Are Plotting Trump's Path to the Holy Grail of Deregulation*, CNBC (Nov. 22, 2017 11:15 AM), https://www.cnbc.com/2017/11/22/climate-change-deniers-plot-trumps-path-to-deregulation.html [https://perma.cc/5JDV-7473].

319. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

320. The full story is told in MICHAEL R. LEMOV, CAR SAFETY WARS: ONE HUNDRED YEARS OF TECHNOLOGY, POLITICS, AND DEATH 147–74 (2015).

321. *State Farm*, 463 U.S. at 50.

322. *Id.* at 50–51.

323. *Id.* at 46–47.

gas emissions.[324] Nevertheless, the EPA must follow the rulemaking process for the promulgation and recession of applicable rules concerning air pollutants to include GHGs. *State Farm* instructs us that failure to establish a legal and factual record to support agency action will make it vulnerable to reversal under the APA.

In the unlikely event that a reversal of the endangerment finding was upheld in court, would the federal common law of nuisance still be displaced? The *AEP* Court expressly disagreed with the argument "that federal common law is not displaced until EPA actually exercises its regulatory authority, *i.e.*, until it sets standards governing emissions from the defendants' plants."[325] Instead, it concluded that:

> The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants; the delegation is what displaces federal common law. Indeed, were EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its ongoing § 7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the Agency's expert determination.[326]

This indicates clearly that if reversal of an endangerment finding were upheld in court, federal common law still would be displaced. But the reason for this displacement would be because an expert agency had made a decision that reviewing courts found to be supported by facts and law. Thus, only if GHG emissions in fact do not endanger public health or welfare can a reversal of the endangerment finding preclude common law litigation.

2. *If Congress Amends the Clean Air Act to Reverse Massachusetts v. EPA, Federal Common Law Would Be Revived*

If congressional proposals to amend the CAA to deprive EPA of its authority to regulate GHG emissions prove successful, the core rationale for displacement of federal common law will disappear entirely. Indeed, the legal landscape would be fundamentally changed if the EPA was stripped of such authority—and there have been calls to do just that. For example, House Bill 637, "Stopping EPA Overreach Act of 2017," "would

324. 42 U.S.C. § 7411(b)(1)(A) (2012).
325. *AEP*, 564 U.S. 410, 425–26 (2011).
326. *Id.* at 426.

exclude GHGs from regulation under the [CAA]."[327] If this proposed legislation or similar legislation becomes law, federal common law nuisance claims brought by states in the fight to reduce GHG emissions clearly would become legally viable once again. No longer would the CAA, in the words of *AEP*, "delegate[] to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants."[328] Thus, states would be free to sue the owners of such power plants using federal common law nuisance claims.

3. State Common Law Nuisance Claims Remain Viable

Because *AEP* did not address state common law nuisance claims, the Supreme Court's ruling in *Ouellette* remains good law. Thus, state common law nuisance claims remain a possible pathway for future climate change litigation provided that the law of the source state is applied.[329] While it may seem strange to apply the common law of source states to a global problem, there is little actual variance in the law from state to state.

In *Bell v. Cheswick Generating Station*, 1,500 individuals who live within a mile of a coal-fired power plant in Pennsylvania filed a class action private nuisance action against the facility.[330] They asserted several state law tort theories, but the defendant Plant countered that because it already "was subject to comprehensive regulation under the [CAA] it owed no extra duty of care to the members of the Class under state tort law."[331]

Based on the savings clause and the plain language of the CAA, the Third Circuit ruled that the CAA did not preempt source state common law tort actions.[332] In doing so, the court relied heavily on *Ouellette*'s reasoning and the Court's reliance on the CWA's savings clause that allowed states to impose higher standards on their *own* point sources.[333] The defendant power plant in *Bell* argued that the CAA's savings clause did not address boundary rights and was narrower than and distinguishable from that found in the CWA.[334] But the court was unconvinced,

327. H.R. 637, 115th Cong. (2017); LINDA TSANG, CONG. RESEARCH SERV., R44807, U.S. CLIMATE CHANGE REGULATION AND LITIGATION: SELECTED LEGAL ISSUES 38 (2017).

328. 564 U.S. at 426.

329. Bell v. Cheswick Generating Station, 734 F.3d 188, 196–97 (3d Cir. 2013).

330. *Id.* at 189.

331. *Id.*

332. *Id.* at 190.

333. *Id.* at 194–95. The CAA citizen suit "savings clause" states, "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 42 U.S.C. § 7604(e) (2012).

334. *Bell*, 734 F.3d at 195.

highlighting that the absence of boundary language in the CAA's savings clause merely indicates that "*there are no such jurisdictional boundaries or rights which apply to the air.*"[335] If anything, Congress intended to preserve more rights for the states.

Although *Bell v. Cheswick* was a private nuisance action that did not involve interstate pollution, it has relevance for future climate change litigation. It reaffirms the logic in earlier cases that courts will not assume that the powers of the state are preempted by a federal act "unless that was the clear and manifest purpose of Congress."[336]

In *Ouellette* the Supreme Court explained that the application of the common law of the source state would alleviate concerns that state common law actions would interfere with the federal regulatory infrastructure.[337] However, in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, the Fourth Circuit suggested that compliance with federal CAA regulations should insulate power plants from any state tort action that seeks to impose "different" standards than the regulatory scheme.[338] In the North Carolina case a federal district judge had ordered upwind, out-of-state coal-fired power plants to reduce their emissions because they were causing a public nuisance.[339] This decision was reversed on appeal by the Fourth Circuit, which noted that the plants were not violating existing CAA regulations.[340]

The Fourth Circuit concluded that the district court's decision improperly applied home state law extraterritorially, though this is questionable given that there are not substantial differences in the common law from state to state.[341] While the court was careful not to contradict *Ouellette*, acknowledging that "only source state law . . . could impose more stringent emissions rates than those required by federal law,"[342] it did not specify how the nuisance law of the source states was any less stringent than North Carolina's own legislation.[343]

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335. *Id. See also* Scott Gallisdorfer, Note, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After* AEP v. Connecticut, 99 VA. L. REV. 131, 150 (2013) (stating that "the two statutes feature nearly identical savings clauses and employ similar 'cooperative federalism' structures").

336. *Bell*, 734 F.3d at 198 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

337. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 495–96 (1987). "An action brought against IPC under New York [source state] nuisance law would not frustrate the goals of the CWA as would a suit governed by Vermont [affected state] law." *Id.* at 498.

338. North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 303 (4th Cir. 2010).

339. *Id.* at 296–97.

340. *Id.* at 300.

341. *Id.* at 306–07.

342. *Id.* at 308.

343. N.C. GEN. STAT. § 143-215.107D (2018). See North Carolina ex rel. Cooper v. Tennessee Valley Authority, 593 F.Supp. 2d 812, 829–31 (discussion of the common law of nuisance in Alabama, Kentucky and Tennessee).

The Supreme Court in *Ouellette* endorsed application of source state common law precisely because these concerns about inconsistent regulation do not apply when such law is used.[344] The Court recognized a "regulatory partnership" between the federal government and the source state due to the role envisioned for the source state within the CWA.[345] Like the CAA, the CWA establishes source state permitting systems and allows states to impose stricter standards than those required by federal law without undermining the federal-state regulatory partnership.[346] Thus, the Court held an action brought under source state law "would not frustrate the goals of the CWA"[347] because it did not upset the balance among the interests of the federal government, the source state, and the affected state, and because it restricted the number of "indeterminate . . . potential regulations" to only a single additional authority.[348] The Fourth Circuit correctly noted that *Ouellette* did not *foreclose* all state tort actions,[349] yet it failed to recognize the Court's nuanced distinction between affected and source state actions when it concluded that *Ouellette* supported its contention that due to their "considerable potential mischief . . . the strongest cautionary presumption" should apply against state nuisance actions.[350]

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344. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 498–99 (1987).

345. *Id.* at 490–91, 499.

346. The Court pointed to its earlier decisions holding that when imposing stricter limitation standards authorized under the CWA, a source state may do so by either state statute *or nuisance law*. *Id.* at 497.

347. *Id.* at 498.

348. *Id.* at 499.

349. *See* North Carolina *ex rel.* Cooper v. Tenn. Valley Auth, 615 F.3d 291, 303 (4th Cir. 2010). ("The *Ouellette* Court itself explicitly refrained from categorically preempting every nuisance action brought under source state law.").

350. *Id.* Although *Ouellette* dealt only with the CWA, and not the CAA, many lower courts have indicated that this would not make a difference. *See, e.g.*, Technical Rubber Co. v. Buckeye Egg Farm, L.P., No. 2:99-CV-1413, 2000 U.S. Dist. LEXIS 8602, at *15–16 (S.D. Ohio June 16, 2000) (quoting Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 343 (6th Cir. 1989)) (holding the CAA did not preempt plaintiff's source state nuisance claims, citing *Ouellette* and explaining, "there was no reason to think that the result with regard to air pollution" and the CAA should be any different); Gutierrez v. Mobil Oil Corp, 798 F. Supp. 1280, 1283 (W.D. Tex. 1992) (similar holding and finding that "Congress did not intend to preempt state authority" with respect to the CAA). *See also* People *ex rel.* Madigan v. PSI Energy, Inc., 847 N.E.2d 514, 517–18 (Ill. App. Ct. 2006) (rejecting plaintiff's nuisance claims because they were brought under the law of Illinois, as opposed to the source state law of Indiana). *Cf.* Her Majesty the Queen in Right of Province of Ontario v. Detroit, 874 F.2d 332 (6th Cir. 1989) (finding the CAA did not preempt plaintiff's suit under state statutory law, the Michigan Environmental Protection Act). *But see* Clean Air Mkts. Grp. v. Pataki, 338 F.3d 82, 88–89 (2d Cir. 2003) (finding New York's cap and trade emissions program preempted by the CAA because its placement of restrictions on upwind transfers directly contradicted Congress's mandate that this type of state program could not restrict allowance trading). These courts recognize that *Ouellette* distinguished between state common law actions that remained viable because they applied the law of the source state and those that did not. *See, e.g.*, Bravman v. Baxter Healthcare Corp., 842 F. Supp. 747, 752 (S.D.N.Y. 1994) (citing *Ouellette* for the proposition that "although the Clean Water Act preempts nuisance actions under state law against out-of-state sources, it does not

When it declared that any state tort action seeking to establish standards "different" from the state or federal scheme deserves the "strongest cautionary presumption" against it,[351] the Fourth Circuit ignored the Supreme Court's directive in *Ouellette* "not [to] lightly infer preemption."[352] Although the Fourth Circuit was careful not to "state categorically . . . a flat-out preemption" rule, its "strongest cautionary presumption" language encourages trial courts to characterize *all* state tort actions involving air pollution, regardless of whether applying the common law of an affected or source state, as inherently suspect.[353] This imposes a much higher burden on plaintiffs than the Supreme Court ever intended.

If compliance with existing regulations is a complete defense to a common law nuisance action, this would remove the ability of the common law to serve its traditional role as a backstop to redress harm that is not adequately prevented by regulation. Ever since a British court in 1862 in *Bamford v. Turnley* overruled *Hole v. Barlow*, it has been recognized that the mere fact that a source or activity is not violating existing regulations should not be a defense to nuisance liability.[354]

In *Milwaukee II* the Court explained that the standard for inferring displacement of "federal common law is not the same as that employed in deciding if federal law pre-empts state law."[355] The latter, because it involves superseding the "historic police powers of the States" should not be inferred without a determination that it "was the clear and manifest purpose of Congress" to do so.[356] Federalism concerns are not implicated in assessing displacement of *federal* common law, the Court explained, because in such cases "we start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."[357] Thus, despite the concerns expressed in *AEP* about judicial competence to decide complex transboundary nuisance cases, it remains difficult to find preemption of source state common law, particularly in light of the savings clauses contained in the federal environmental statutes.[358] Several cities, counties and states have filed

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preempt such actions against in-state polluters"); *Technical Rubber Co.*, 2000 U.S. Dist. LEXIS 8602, at *15–16 (recognizing that *Ouellette* preempted only affected state tort actions, but permitted source state tort actions).

351. *North Carolina ex rel. Cooper*, 615 F.3d at 303.

352. *Ouellette*, 479 U.S. at 491.

353. *North Carolina ex rel. Cooper*, 615 F.3d at 303.

354. Bamford v. Turnley (1862) 122 Eng. Rep. 27, 30 (overruling Hole v Barlow (1858) 140 Eng. Rep. 1113, 4 C.B.N.S. 334).

355. *Milwaukee II*, 451 U.S. 304, 316 (1981).

356. *Id.* (quoting Jones v Rath Packing Co., 430 U.S. 519, 525 (1977)).

357. *Id.* at 317 (footnote omitted).

358. One must be cautious about making predictions concerning preemption particularly in light

common law nuisance suits against oil companies, seeking remedies in the face of damage wrought by climate change as part of a broader climate change litigation strategy.[359] In March 2018 Federal District Judge Vince Chhabria rejected an effort by oil companies to remove to federal court a state nuisance law climate suit brought by San Mateo and Marin counties and the city of Imperial Beach, California.[360] Judge Chhabria ruled that the cases were properly brought in California state court.[361] On June 25, 2018, Federal District Judge William Alsup dismissed a similar climate nuisance suit filed by the cities of Oakland and San Francisco.[362] After holding a "science tutorial" on climate change, Judge Alsup concluded that the dispute "is not over science."[363] He observed, "All parties agree that fossil fuels have led to global warming and ocean rise and will continue to do so, and that eventually the navigable waters of the United States will intrude upon Oakland and San Francisco."[364] Judge Alsup noted that if the lawsuit only pertained to GHG emissions within the U.S., it would be displaced by *AEP* and *Kivalina*.[365] But because it also involved emissions caused by the defendants' product sold outside the U.S., he did not find displacement.[366] Instead he concluded that the lawsuits "are foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems . . . ."[367]

On July 19, 2018, Federal District Judge John F. Keenan dismissed the city of New York's common law nuisance suit against BP, Chevron, Conoco Phillips, ExxonMobil and Royal Dutch Shell for fossil fuel production that contributes to climate change.[368] Citing *AEP*, the judge held that the CAA displaces the federal common law of nuisance because

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of the tug-of-war over preemption in state products liability cases involving pharmaceuticals, Wyeth v. Levine, 555 U.S. 555 (2009), medical devices, Riegel v. Medtronic, Inc., 552 U.S. 312 (2008), and highway safety standards, Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000). *See* Lisa Heinzerling, *Climate, Preemption, and the Executive Branches*, 50 ARIZ. L. REV. 925 (2008) (questioning whether federal preemption will be invoked in the future to block more stringent state laws to control emissions of GHGs).

359. One commentator asserted that the fossil fuel industry's "tobacco moment" has arrived. Douglas Kysar, *Fossil Fuel Industry's 'Tobacco Moment' Has Arrived*, LAW360 (Jul. 28, 2017), https://www.law360.com/california/articles/948361.

360. County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018).

361. *Id.* at 937.

362. City of Oakland v. BP P.L.C., No. C 17-06011 WHA, 2018 WL 3109726, at *3, *9 (N.D. Cal. June 25, 2018).

363. *Id.* at *3–4.

364. *Id.* at *4.

365. *Id.* at *6.

366. *Id.*

367. *Id.*

368. City of New York v. BP P.L.C., No. 18 Civ. 182 (JFK), 2018 U.S. Dist. LEXIS 120934 (S.D.N.Y. July 19, 2018).

it gives EPA responsibility to regulate emissions of GHGs.[369] Responding to the city's state law nuisance claim, Judge Keenan distinguished the case from *AEP*, which refused to decide whether the CAA displaces state law nuisance claims.[370] Because New York City's case involved the use of fossil fuels sold worldwide, rather than emissions from specific power plants as in AEP, the judge held that state nuisance law could not be used because a single federal standard should apply.[371]

As discussed below, innovative climate litigation has been filed in several other states.[372] Although it remains to be seen how successful these lawsuits will be, they reflect an increased willingness by state and local governments to address the multifaceted problems caused by climate change through common law nuisance litigation.

4. Other Avenues for Climate Change Litigation

Finally, common law claims brought under legal theories other than nuisance law, such as the public trust doctrine, have added yet another new dimension to climate change litigation. For example, in the highly reported and closely watched "Children's Crusade" case, twenty-one individuals (all under twenty years of age) have sued the United States to compel the reduction of CO_2 emissions.[373] In *Juliana v. United States*, the litigants are alleging (1) violations of substantive due process rights to life, liberty and property and (2) common law violations of the public trust doctrine.[374] While this litigation is in the early stages, it represents another effort to use the common law—in this case the public trust doctrine—to safeguard the environment for future generations.[375]

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369. *Id.* at *14.

370. *Id.* at *19.

371. *Id.* at *19–20.

372. *See, e.g.*, John Schwartz, *Young People are Suing the Trump Administration over Climate Change. She's Their Lawyer*, N.Y. TIMES (Oct. 23, 2018) available at: https://www.nytimes.com/2018/10/23/climate/kids-climate-lawsuit-lawyer.html. See Sabin Center for Climate Change Law, U.S. Litigation Database, U.S. Climate Change Litigation, http://climatecasechart.com/case-category/environmentalist-lawsuits-state-law-claims/.

373. Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016).

374. *Id.* at 1233.

375. The public trust doctrine is a common law principle with ancient origins whereby the government has a duty to safeguard certain natural resources for the benefit of the public. The plaintiffs in *Juliana* seek a declaration that their rights have been violated and an order requiring federal officials to develop a plan to control emissions of GHGs. The court rejected the government's argument that the case raises a non-justiciable political question and has allowed discovery to proceed. *Id.* at 1241–42. The Justice Department asked both the Ninth Circuit and the U.S. Supreme Court to issue a writ of mandamus to halt discovery and a subsequent trial. After the Ninth Circuit denied the motion, *In re* United States, 884 F.3d 830 (9th Cir. 2018), the Supreme Court on July 30, 2018, also denied relief, United States v. U.S. Dist. Court for Dist. of Or., No. 18A65, 2018 WL 3615551 (U.S. July 30, 2018). In an unsigned order the Court called the government's request for relief "premature." *Id.* However, the Court cautioned that the "breadth of respondents' claims is striking," and it opined

Using constitutional and tort theories, courts in Pakistan and the Netherlands have ordered the government to take more aggressive action to control GHG emissions. In September 2015 the Lahore High Court Green Bench found that the Pakistani Government's failure to implement the National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy during the 2014–30 period "offends the fundamental rights of the citizens which need to be safeguarded."[376] Invoking the right to life and the right to dignity in Pakistan's Constitution, the court ordered government ministries and departments to prepare a list of adaptation measures and to implement Pakistan's National Climate Change Policy. It established a Climate Change Commission to help it monitor their progress.[377]

In the Netherlands the Urgenda Foundation, a Dutch environmental group, joined by nearly nine hundred Dutch citizens, sued the federal government for its adoption of GHG reduction goals that allegedly violated the government's constitutional duty of care to protect them.[378] In June 2015 a Dutch district court in The Hague cited the European Convention on Human Rights and tort law theories to order the Dutch government to take stronger measures to respond to climate change.[379] The court mandated that the Dutch government reduce emissions of GHGs by twenty-five percent below 1990 levels by the year 2020.[380] The court concluded that the government's previous seventeen percent reduction goal was inadequate to meet the nation's fair share of the emissions reductions required to protect its citizens.

CONCLUSION

Congress first enacted comprehensive federal regulatory programs to protect the environment in the early 1970s. Prior to the enactment of such programs, the common law of nuisance was the primary legal vehicle for redressing pollution problems. Early in the twentieth century, states invoked the federal common law of nuisance to seek intervention by the

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that "the justiciability of those claims presents substantial grounds for difference of opinion." *Id.* The Court's order cautioned the federal district court hearing the case to "take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions." *Id.* On October 19, 2018 Chief Justice Roberts issued a temporary stay of discovery and the trial. *In re* United States, et al., No. 18A410, https://www.supremecourt.gov/orders/courtorders/101918zr1_086c.pdf.

376. Ashgar Leghari v. Fed'n of Pakistan, (Sept. 4, 2015) W.P. No. 25501/2015 (Lahore High Ct.).

377. *Id.*

378. Urgenda Found. v. Kingdom of the Netherlands (Rb. Haag 2015).

379. *Id.*

380. *Id.* The Dutch government is appealing this decision.

U.S. Supreme Court in disputes over transboundary air and water pollution. The Court, exercising its original jurisdiction over disputes between states, heard several interstate nuisance cases and used its equitable powers to stop environmentally destructive actions.

After more than a century of evolution, the federal common law of interstate nuisance has been largely eclipsed by the rise of the regulatory state. The Court has held that the CAA and CWA displace federal common law for pollution problems they comprehensively regulate. But for emerging problems not covered by existing regulatory programs, like invasive species, the federal common law may remain a viable option.

In *AEP* the Court held that federal common law nuisance actions to redress climate change had been displaced by the CAA in light of its decision in *Massachusetts v. EPA* that the Act delegated to EPA the responsibility to regulate greenhouse gas emissions.[381] But the Court reaffirmed the standing of states to sue, rejected the notion such lawsuits raise non-justiciable political questions, and left open the door to *state* common law nuisance actions to redress climate change.[382] Principles of federalism and the extensive savings clauses in the federal environmental laws will make it difficult to preempt the state common law of nuisance. Thus, if a state can show that its residents are suffering significant injury that federal regulatory authorities have failed to prevent and for which an express decision to preempt state law has not been made, state common law actions founded on the law of the source state will remain available.

In *AEP*, the Court reaffirmed that environmental protection was a proper subject for the development of federal common law.[383] It also emphasized that expert administrative agencies generally are more capable than the judiciary at fashioning solutions for complex environmental problems.[384] Yet the judiciary has played an important role as a catalyst for action when activities causing significant harm otherwise have escaped regulation. Direct judicial intervention to stop interstate pollution is rare today, but when regulation fails, common law remedies can serve as an important backstop. The Trump Administration's aggressive efforts to dismantle regulation of GHG emissions and to deny the reality of climate change could revive federal common law,[385] particularly if EPA reverses

381. *AEP*, 564 U.S. 410, 424 (2011).

382. *Id.* at 420.

383. *Id.* at 421 (quoting Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421–22 (1964)).

384. *Id.* at 424.

385. Fear of reviving federal common law nuisance suits reportedly was a factor in industry lawyers praising the Trump Administration for proposing new, albeit much weaker, regulations of GHG emissions to replace the Obama Administration's Clean Power Plan. Ellen M. Gilmer, *Proposed*

its endangerment finding or Congress overrules *Massachusetts v. EPA*.

Judicial intervention to stop interstate pollution remains rare, but the common law of interstate nuisance still retains vitality as a backstop when regulation fails to respond to a serious problem.[386] And this is particularly true when states sue. Moreover, in light of the judiciary's historic role in responding when the other branches of government fail to address significant environmental harm, the common law may return as a viable catalyst for change if official climate denial persists.[387]

The Court in *AEP* was surely correct that administrative agencies like EPA possess greater expertise than the judiciary in fashioning responses to climate change. This is why Congress has assigned EPA the primary responsibility for protecting the public against pollutants that endanger public health or welfare. But displacement of federal common law is not a license to deny or ignore a global environmental crisis. If EPA becomes the captive of official climate change denial, common law litigation may return to its historic role as an important catalyst for action.

Climate Rule May Help Hamstring Nuisance Claims, E&E NEWS, (Aug. 24, 2018), https://www.eenews.net/stories/1060095165/print [https://perma.cc/XZE6-HBP6].

386. Ewing & Kysar, *supra* note 23.

387. Indeed, despite the environmental litigants' defeat in the Fourth Circuit in *North Carolina. ex rel. Cooper v. Tennessee Valley Authority*, the threat of future litigation brought the parties to the negotiating table, resulting in significant decreases in air pollution. *See supra* Part III.