Common-Law Climate Change Litigation After *American Electric Power v. Connecticut*

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Summary

Note: Despite this report being archived, the reader may find updated treatment of the topics covered herein in CRS Report R42613, *Climate Change and Existing Law: A Survey of Legal Issues Past, Present, and Future*, by (name redacted). See especially sections I, II.H., and III.A.

Congressional inaction on climate change has led concerned parties to explore other ways to address climate change—including lawsuits seeking to establish climate change impacts as a common law nuisance. The prospects for these common law suits are limited, however, owing in part to the unsuitability of private litigation for dealing with global problems like climate change. Recently, the outlook for federal common-law suits seeking injunctive relief vis-a-vis climate change became particularly dim. On June 20, 2011, the Supreme Court ruled in *American Electric Power Co., Inc. v. Connecticut* that given EPA's Clean Air Act authority over greenhouse gas (GHG) emissions—affirmed by the Court a few years ago—the federal common law of nuisance in the area of climate change is "displaced." Federal courts may not use federal common law to add their own judge-made GHG emission standards to those of EPA.

The displacement of federal common law by *American Electric Power* is only one of three threshold issues that have bedeviled lawsuits seeking to establish climate change as a common law nuisance. The standing inquiry requires a plaintiff in federal court to show actual or imminent injury caused by the defendant, and the likelihood that the injury will be redressed by the requested relief. Each of these factors can pose difficulties for the climate-change plaintiff. Similarly, the political question doctrine has led some courts to dismiss common-law climate change suits on the ground that the issue is better left with the political branches.

American Electric Power raises several questions. First, with federal common law displaced in the area of climate change, are state common law claims viable? Two threats to such claims are the possibility of preemption by the Clean Air Act (the sounder argument is against preemption), and the influence of the Supreme's Court's aversion to judge-made law in the climate change area so evident in *American Electric Power*. A second question is whether *American Electric Power* displaces climate-change-based federal common law actions when the remedy sought is monetary rather than injunctive. Finally, if Congress eliminates EPA authority over GHG emissions and is silent as to federal common law actions, does federal common law cease to be displaced so that such actions are again possible?

In addition to *American Electric Power*, there are two other active cases raising common law nuisance claims as to climate change. In *Village of Kivalina v. ExxonMobil Corp.,* a coastal Eskimo village is suing energy companies alleging that their GHG emissions have contributed to shoreline erosion, requiring relocation of the village. In *Comer v. Murphy Oil*, Gulf coast landowners are suing energy and chemical companies asserting that their GHG emissions intensified Hurricane Katrina, adding to plaintiffs' property damage. Both cases raise the above-noted issue whether *American Electric Power* applies to actions seeking monetary damages.

A second common law theory recently has entered the fray. Since May 2011, either a suit or rulemaking petition has been filed in every state arguing that the respective state has a "public trust" duty to the atmosphere that requires it to address climate change.

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I. Introduction

Congressional inaction on climate change has led various entities to pursue climate change measures off Capitol Hill. Either in hopes of making direct gains or to pressure Congress to act, such entities have looked to international forums, treaty negotiations, Environmental Protection Agency (EPA) action under the Clean Air Act (CAA), state and regional efforts, and—the topic here—common law suits. The principal focus of such suits has been to establish greenhouse gas (GHG) emissions and climate change impacts as a nuisance.

For reasons discussed in this report, the prospects of this common law litigation are limited. Recently, the outlook for at least those cases based on the *federal* common law of nuisance and seeking injunctive relief has particularly dimmed. In 2007, the Supreme Court held in *Massachusetts v. EPA* that the CAA gives EPA authority to regulate GHG emissions from new motor vehicles (and, by implication, other GHG sources).[1] EPA responded by beginning to erect a regulatory edifice under that act for GHG emissions.[2] On June 20, 2011, the Supreme Court then delivered federal common law of nuisance suits a major blow. In *American Electric Power Co., Inc. v. Connecticut*, it held that in light of EPA's authority over GHG emissions as clarified in *Massachusetts*, federal common law in the climate change area is "displaced."[3] That is, federal courts may not use federal common law to add their own judge-made GHG emission standards, whether or not EPA exercises its authority. Thus, the potential of federal common-law climate change lawsuits seeking to have courts develop emission standards now seems poor.

Even before *American Electric Power*, many argued that courts should be unreceptive to dealing with a global problem as complex as climate change through individual common law suits, as opposed to a specifically tailored statute.[4] Each suit, after all, brings before the court only a handful of defendants representing a tiny fraction of the problem. As well, nuisance law offers no clear standards to apply. Questions of causation are also substantial: even if the court accepts that man-made GHG emissions contribute to climate change, how can a plaintiff show that a particular adverse impact was caused by climate change, and further was caused by GHG emissions of the defendants? And should the defendants' contribution to worldwide GHG emissions be viewed as *de minimis*—too small for a court to bother with? Questions of remedy are likely to be particularly intractable: what amount of emission reduction, or monetary compensation, should be required of a defendant given the likely miniscule fraction of worldwide GHG emissions contributed by that defendant?

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[1] 549 U.S. 497 (2007).

[2] 74 Fed. Reg. 66,496 (Dec. 15, 2009) (EPA finalizes endangerment finding for GHG emissions from new motor vehicles); 75 Fed. Reg. 25,323 (May 7, 2010) (EPA GHG emission standards for new light-duty motor vehicles); and 75 Fed. Reg. 31,514 (June 3, 2010) (EPA promulgates "tailoring rule" limiting new source review of stationary sources of GHG emissions and limiting Title V permitting requirements). Additionally, on December 21, 2010, EPA entered into a settlement in which it agreed to issue new source performance standards for GHG emissions from electric power plants and oil refineries by 2012.

[3] 2011Westlaw 2437011 (U.S. June 20, 2011) (No. 10-174).

[4] *See, e.g*., Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. Pa. L. Rev. 1605, 1649 (2007) ("Realistically, the greatest function of litigation may be to prod legislative action."). *See also* Jim Gitzlaff, *Getting Back to Basics: Why Nuisance Claims Are of Limited Value in Shifting the Costs of Climate Change*, 39 Envtl. L. Rptr. 10,218 (March 2009). For a judicial take on the common law versus statute question, see *North Carolina v. Tennessee Valley Auth*., 615 F.3d 291, 302 (4th Cir. 2010) ("The contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark.").

Nonetheless, the use of nuisance lawsuits to attack climate change has its defenders.[5] They argue with some merit that even though nuisance law has never been used to deal with a problem as complex as climate change, many harms attributed to climate change—ecosystem and weather modifications, increased flooding, and harm to human health—are of a type traditionally covered by nuisance doctrine. And the Supreme Court has recognized that "public nuisance law, like common law generally, adapts to changing factual and scientific circumstances."[6]

By way of background, a nuisance may be either a private nuisance or a public nuisance. An activity constitutes a *private* nuisance if it is a substantial and unreasonable invasion of another's interest in the private use and enjoyment of land, without involving trespass.[7] Private nuisance actions are brought by the aggrieved landowner. An activity is a *public* nuisance if it creates an "unreasonable" interference with a right common to the general public.[8] Unreasonableness may rest on the activity significantly interfering with, among other things, public health and safety. Public nuisance cases are usually brought by the government rather than private entities, but may be brought by the latter if they suffer special injury.[9] Most of the common-law nuisance actions based on climate change have involved public nuisance.

Part II of this report notes the recurring threshold issues raised in nuisance litigation involving GHG emissions and climate change: "displacement" of federal common law, standing, and political question doctrine. By upholding the displacement barrier to suit, *American Electric Power* seems to have reduced the importance of the other two threshold issues. Part III describes the *American Electric Power* decision and speculates as to its likely aftermath and impact on climate change litigation generally. Part IV summarizes the other common law nuisance cases based on climate change, of which two remain active. Part V reviews the public trust doctrine suits, a recently filed group of cases that add a new common law theory to the litigation dealing with climate change.

II. Recurring Threshold Issues

As the court decisions in Parts III and IV show, the use of a nuisance action to address GHG emissions presents the plaintiff with daunting threshold hurdles—that is, issues that must be resolved at the outset of the litigation.[10] In light of *American Electric Power*, however, one of these threshold issues—whether the federal common law of nuisance has been displaced—will

[5] *See, e.g.*, Randall S. Abate, *Public Nuisance for the Environmental Justice Movement: The Right Thing and the Right Time*, 85 Wash. L. Rev. 197 (2010); Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 Envtl. L. Rptr. 10,230 (March 2009); Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. Rev. 1827 (2008) (arguing that a nuisance-based climate change regime essentially becomes a carbon tax); Daniel V. Mumford, *Curbing Carbon Dioxide Emissions Through the Rebirth of Public Nuisance Laws—Environmental Legislation by the Courts*, 30 Wm. & Mary Envtl. L. & Policy Rev. 195 (2005); David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1 (2003).

[6] *American Elec. Power*, 2011 Westlaw 2437011, *8.

[7] RESTATEMENT (SECOND) OF TORTS § 821D (1979).

[8] *Id.* at § 821B.

[9] To have suffered "special injury," a person must have incurred a different kind of interference than that suffered by the public at large, not just a greater harm from the same kind of interference. *Id.* at § 821B comments b. and d.

[10] *See generally* Kevin A. Gaynor et al., *Challenges Plaintiffs Face in Litigating Federal Common Law Climate Change Claims*, 40 Envtl. L. Rptr. (News and Analysis) 845 (Sept. 2010); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293 (2005).

likely prove the key one in future efforts to use federal common law to address climate change. Thus, the role of the two other threshold issues, standing and political question doctrine, has been reduced.

A. Displacement of Federal Common Law

Because GHG emissions move across state lines, the federal rather than state common law of nuisance seems, at first blush, applicable. Though the Supreme Court barred federal courts from developing a "general" common law 73 years ago (they should instead apply the substantive law of the state in which they sit),[11] the Court has since clarified that in areas of national concern, such as interstate pollution, the articulation of federal common law by the federal courts is appropriate.[12]

But federal common law may be displaced by acts of Congress. Such judicially created law, says the Supreme Court, is a "necessary expedient," and "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."[13] Otherwise put, "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance."[14] Thus, the question arose early on in some of the climate change cases whether the federal CAA displaces judge-made law in the climate change area. As noted at the outset, the displacement argument was strengthened by the Supreme Court's 2007 decision in *Massachusetts v. EPA*, holding that EPA has CAA authority to regulate GHG emissions. With the Court's 2011 decision in *American Electric Power*, the displacement question has been resolved: as for any GHG source over which EPA has been delegated regulatory authority under the CAA, that statute eliminates any role for federal common law in abating GHG emissions. EPA using the CAA, not district court judges, will set GHG emission limits. The test for whether displacement has occurred, said the Court, is "whether the statute speaks directly to the question at issue."[15] Given the holding in *Massachusetts* and CAA coverage of existing stationary emission sources, the act definitely does "speak[] directly" to the defendants' GHG emissions. (See Section III.A. for a detailed description of what *American Electric Power* held.)

B. Other, Now Less Important, Threshold Issues

The threshold issues made less important by *American Electric Power* in federal-common-law climate change litigation are, again, the standing issue and political question doctrine. Their importance has not been eliminated, however, as there remains the possibility that *American*

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[11] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), *quoted with approval in American Elec. Power*, 2011 Westlaw 2437011 at *7.

[12] *See, e.g.,* Illinois v. Milwaukee, 406 U.S. 91, 103 (1972) ("Milwaukee I") ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law."), *quoted with approval in American Elec. Power*, 2011 Westlaw 2437011 at *7.

[13] Milwaukee v. Illinois, 451 U.S. 304, 314 (1980) ("Milwaukee II"), *quoted with approval in American Elec. Power.*, 2011 Westlaw 2437011 at *9.

[14] *Milwaukee I*, 406 U.S. at 107. Indeed, there is a presumption in favor of such preemption. Matter of Oswego Barge Corp., 664 F.2d 327, 335 (2d Cir. 1981).

[15] American Elec. Power Co., Inc. v. Connecticut, 2011 Westlaw 2437011, *9 (June 20, 2011) (brackets and quotation marks omitted).

Electric Power will be held not to apply to all uses of federal common law in this area (see Section III.B. as to actions seeking monetary damages), not to mention state common law cases.

The standing issue asks whether a party is an appropriate one to invoke the jurisdiction of a federal court created under Article III of the Constitution (this includes the district courts). Only a party with standing can bring suit in such courts. As developed by the Supreme Court, standing has constitutional and prudential (court-created) components. The constitutional side stems from the limitation of federal court jurisdiction in Article III to "Cases" and "Controversies." As explicated by the Court, this constraint demands that a plaintiff in federal court demonstrate (1) actual or imminent injury that is concrete and particularized, and not speculative; (2) that the injury is or will be caused by the defendant; and (3) that the injury likely will be redressed by a favorable court decision.[16]

A suit seeking relief from climate change impacts may run into difficulty with each of the three constitutional standing requirements. For example, climate change modeling generally predicts only large-scale effects, allowing defendants to argue in many cases that the particular injury suffered by plaintiff was not shown to have been caused by climate change. Or defendants might contend that their GHG emissions were (or will be) at best a *de minimis* contributor to plaintiff's injury.

State plaintiffs may have a choice. They may bring suit as owners of natural resources or other property, in which case they face the same standing requirements as private entities, described above. Alternatively, states may sue in their *parens patriae* capacity—that is, as protector of their quasi-sovereign interests—in which case the Article III requirement is differently stated. For *parens patriae* standing, a state must articulate a quasi-sovereign interest—that is, one apart from the interests of particular private parties. A state's interest in the "health and well-being—both physical and economic—of its residents in general,"[17] if a substantial portion of those residents is affected, is a well-established quasi-sovereign interest.[18] Owing to these quasi-sovereign interests, the Court said in *Massachusetts* in 2007 that states are "not normal litigants for purposes of invoking federal jurisdiction," but rather face a lower standing threshold.[19] Parenthetically, this was a 5-4 decision, and in *American Electric Power* in 2011 the Court's split on the standing issue was still evident—the holding of the court below that plaintiffs had standing was affirmed, but by an equally divided vote. The Court's even split (4-4) could happen, however, only because Justice Sotomayor recused herself; in a future case where she did not, the Court might vote 5-4 in favor of standing, or at least state standing, if the *American Electric Power* displacement barrier does not apply.

Unlike constitutional standing principles, the rules of prudential standing are not dictated by Article III. Rather, they are "judicially self-imposed limits on the exercise of federal jurisdiction."[20] One such prudential principle is "the rule barring adjudication of generalized grievances more appropriately addressed in the legislative branches."[21] Plainly this may be a

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[16] *See, e.g.,* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

[17] Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982).

[18] *Id.* at 604-605.

[19] Massachusetts v. EPA, 549 U.S. 497, 518 (2007).

[20] Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004), *quoting* Allen v. Wright, 468 U.S. 737, 751 (1984).

[21] *Elk Grove Unified School Dist.*, 542 U.S. at 12.

concern with cases alleging climate change injuries, at least where such injuries are not concrete and personal.[22]

Political question doctrine leads a court to dismiss an action seen as presenting a "political question." The doctrine is "designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government."[23] However, deciding whether a matter has been committed by the Constitution to a nonjudicial branch of government is a "delicate exercise,"[24] and is decided on a case-by-case basis. The six factors indicating a non-justiciable political question were famously stated by the Supreme Court in *Baker v. Carr* in 1962.[25] Of these, the first three have played a role in the climate-change nuisance cases:

> Prominent on the surface of any case held to involve a political question is found [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion....

Yet *Baker* made clear it was setting a high threshold for nonjusticiability. Since *Baker* was decided almost a half-century ago, the Court has found few issues to present political questions, but the doctrine has been ubiquitous in the nuisance/climate change litigation. In *American Electric Power*, however, the Court was less than clear as to use of the political question doctrine in climate change litigation. The opinion remarks that "[f]our members of the Court would hold that at least some plaintiffs have Article III standing ... and further that *no other threshold obstacle bars review*."[26] The italicized phrase arguably includes the political question issue. The opinion makes no comparable statement, however, as to the four other members of the Court; it notes only that they would find no standing.

III. *American Electric Power*

A. The Decision

American Electric Power originated when eight states, New York City, and three private land trusts brought nuisance actions, later consolidated, against five electric utility companies. The defendant utilities were chosen as allegedly the nation's largest emitters of CO_2, the major GHG, through their fossil-fuel electric power plants. Plaintiffs sought to require the electric utilities to abate their contribution to the nuisance of climate change by reducing their CO_2 emissions. No

[22] The Supreme Court has expressly rejected the argument that just because climate change causes widespread harm, standing doctrine presents an insurmountable obstacle to establishing federal jurisdiction. But "[w]hile it does not matter how many persons have been injured by the alleged action [being challenged], the party must show that the action injures him in a concrete and personal way." Massachusetts v. EPA, 549 U.S. 497, 517 (2007), *quoting* Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring).

[23] United States v. Munoz-Flores, 495 U.S. 385, 394 (1990).

[24] *Baker*, 369 U.S. at 211.

[25] 369 U.S. 186, 216 (1962).

[26] American Elec. Power Co., Inc. v. Connecticut, 2011 Westlaw 2437011, *7 (June 20, 2011) (U.S. No. 10-174) (emphasis added).

precise amount of emissions reduction was demanded. Plaintiffs cited both the federal common law of nuisance, and, in the alternative, state common law and statutory nuisance law.

In 2005, the federal district court dismissed the case on political question grounds. It held that because resolving the issues in the case required a balancing of economic, environmental, foreign policy, and national security interests, the court needed guidance from the political branches.[27] The absence of such guidance (there being no federal regulation of CO_2 as of 2005) meant to the court that the case satisfied one of the factors identified in *Baker v. Carr* as indicating a political question—namely, the case was "impossib[le] [to] decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion." On appeal, the Second Circuit held in 2009 that the district court erred when it dismissed the case on political question grounds, that all plaintiffs had standing, and that the federal common law of nuisance had not been displaced by the CAA regulatory scheme.[28]

While all three threshold issues were presented to the Supreme Court in the petition for certiorari, the Court's decision was devoted almost entirely to the displacement question. This tight focus on displacement had been presaged by the oral argument before the Court, when nearly all the justices' questions were aimed in that direction—probably because displacement was the easiest-to-resolve threshold issue. The opening premise of the Court's opinion, which was unanimous on the displacement issue, was that when Congress addresses a question, "the need for such an unusual exercise of law-making [as federal common law] disappears."[29] "The test," it said, "for whether congressional legislation excludes ... federal common law is simply *whether the statute speaks directly to the question at issue*."[30]

So does the CAA "speak directly" to CO_2 emissions from existing fossil-fuel-fired power plants such as those of the defendants in the case? Yes, said the Court, owing to two simple facts. First, "*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the act."[31] Second, CAA section 111 instructs EPA to list categories of stationary sources that "contribute significantly to air pollution that may reasonably be anticipated to endanger public health or welfare"[32] and then establish standards of performance for new and modified sources in each category. Section 111(d) then requires regulation of *existing* sources within such categories—bringing in defendants' power plants. Concededly, 111(d) regulations are adopted by the states, but they are created pursuant to federal guidelines and receive federal oversight. Moreover, the fact that EPA has not yet *actually* exercised this authority as to GHG emissions from existing fossil-fuel-fired power plants is not the point. It is the *delegation* of the authority from Congress to EPA, the Court stressed, that displaces the common law, no matter how, or even whether, EPA chooses to exercise it. With this reasoning, the Court's holding was inescapable:

> The Clean Air Act and the EPA actions it authorizes displace any federal common law to seek abatement of carbon dioxide emissions from fossil-fuel fired [sic] power plants. *Massachusetts* [*v. EPA*] made plain that emissions of carbon dioxide qualify as air pollution

[27] 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

[28] 582 F.3d 309 (2d Cir. 2009).

[29] 2011 Westlaw 2437011, *9.

[30] *Id.* (emphasis added).

[31] *Id.*

[32] CAA § 111(b)(1)(A); 42 U.S.C. § 7411(b)(1)(A).

> subject to regulation under the Act.... And we think it equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants.

Buttressing its holding, the Court stressed the complex nature of climate change and the policy determinations on which government action must be based. "The Clean Air Act entrusts such complex balancing to EPA in the first instance,"[33] it said. "The expert agency is surely better equipped to do the job than individual district court judges issuing ad hoc, case-by-case injunctions."[34] In light of its holding, the Court remanded the case to the Second Circuit for further proceedings.

B. Likely Aftermath and Other Impacts

On the remand of *American Electric Power*, the Second Circuit presumably will dismiss the federal common law claims in the case. The court now may have to determine the fate of the *state* common law claims, which it did not address in its prior decision.[35] One issue will be whether the CAA preempts state common law claims regarding GHG emissions.[36] The answer might well be no, in light of CAA non-preemption provisions[37] and the general presumption against federal preemption of state law. Even if not preempted, however, plaintiffs asserting state common law may have an uphill climb. The Supreme Court's extended discussion in *American Electric Power* of why judges are ill-equipped to resolve climate change questions in the first instance (as opposed to during review of agency action) is likely to prove influential with courts adjudicating state as well as federal common law claims.

If the merits of the state common law nuisance claims are reached (in *American Electric Power* or other litigation), which state's common law will apply? Under relevant precedent, it is probable that the applicable state law will be that of the state where the particular GHG source is located—that is, a court probably will not apply the law of an affected state against an out-of-state source.[38] Applying the nuisance law of the source's state, a problem for plaintiffs may be establishing that a plant in compliance with state-issued permits can at the same time be a nuisance under that state's law.[39]

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[33] 2011 Westlaw 2437011, *11.

[34] *Id.*

[35] Since the Second Circuit had found that the federal common law claims in the case were viable, those claims precluded any role for state common law. *See* International Paper Co. v. Ouellette, 479 U.S. 481, 488 (1987). Thus, the court did not have to adjudicate the plaintiffs' state common law claims.

[36] The Supreme Court expressly reserved this question.

[37] *See* CAA § 304(e), 42 U.S.C. § 7604(e) (providing that nothing in the CAA citizen suit section "shall restrict any right which any person ... may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief...."); CAA § 116, 42 U.S.C. § 7416 ("... nothing in this act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce" any air pollution standard or requirement).

[38] This principle, that the law of the source state governs, was announced in International Paper Co. v. Ouellette, 479 U.S. 481, 492-494 (1987). *International Paper* arose in the context of interstate *water* pollution. In a recent case, however, the court emphatically held that the same principle applies to interstate *air* pollution. North Carolina v. Tennessee Valley Auth., 615 F.3d 291, 306 (4th Cir. 2010).

[39] *North Carolina*, 615 F.3d at 309 ("It would be odd, to say the least, for specific state laws and regulations to expressly permit a power plant to operate and then have a generic statute countermand those permissions on public nuisance grounds.").

A provocative question now getting attention is whether *American Electric Power* displaces climate-change-based federal common law actions seeking *monetary* relief.[40] In that case, plaintiffs sought only *injunctive* relief: a court order requiring the defendants to reduce their GHG emissions. The Court's reasons for finding displacement seem heavily skewed to that form of relief—for example, the lack of federal court expertise for setting GHG emission standards, and the unacceptability of having EPA standards and judicial standards as parallel tracks. These concerns are arguably not present in a monetary damages case where the court's only task is to determine, by a preponderance of the evidence, that plaintiff's injury was proximately caused by the defendant's emissions. No standard setting is involved. As the next section notes, the applicability of *American Electric Power* to cases seeking damages may be resolved soon in *Village of Kivalina*.

Finally, the Supreme Court decision has no direct effect on EPA's emerging GHG regulation program. Indirectly, however, the decision gives the program added impetus. For one thing, it reaffirms the *Massachusetts v. EPA* holding that the CAA authorizes EPA to regulate GHG emissions. For another, it underscores the complexity of climate change and the consequent need for administrative expertise such as EPA's in grappling with it. Of course, if Congress succeeds in eliminating EPA authority over GHG emissions, or certain sources of such emissions, a very different question arises. In the (perhaps unlikely) event that such a law would be silent as to its intended impact on common law claims, it could be argued that elimination of EPA authority over GHGs also eliminates any displacement of federal common law. That resurrects the possibility of judge-made emission standards, if it is determined that climate change constitutes a nuisance.

IV. Other Common Law of Nuisance Cases Based on Climate Change

Three climate change cases invoking the common law of nuisance are currently active. One is *American Electric Power Co*,, described above. The others are *Village of Kivalina v. ExxonMobil Corp.* and *Comer v. Murphy Oil USA*, discussed here. None of these pending cases, nor the finally resolved cases discussed afterward, have seen anything approaching a decision on the merits—all have been preoccupied exclusively with threshold issues. Thus we do not yet know whether GHG emissions can constitute a nuisance.

In *Village of Kivalina*, an Inupiat Eskimo village on the northwest Alaska coast sued 24 oil and energy companies, claiming that the large quantities of GHGs they emit contribute to climate change. Climate change, the village contends, is destroying the village by melting Arctic sea ice that formerly protected it from winter storms, leading to massive coastal erosion that will require relocating the village's inhabitants at a cost of $95 million to $400 million. Plaintiffs invoke the federal common law of public nuisance, and state statutory or common law of private and public nuisance. They further press a civil conspiracy claim, asserting that some of the defendants have engaged in agreements to participate in the intentional creation or maintenance of a public nuisance—that is, global warming—by misleading the public as to the science of global warming. The suit seeks monetary damages.

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[40] *See, e.g.,* Michael B. Gerrard*, 'American Electric Power' Leaves Open Many Questions for Climate Litigation*, New York Law Journal, July 14, 2011, and discussion of *Village of Kivalina v. ExxonMobil* in Part IV of report.

In 2009, the district court held that the federal nuisance claim was barred by political question doctrine and lack of standing.[41] The village appealed to the Ninth Circuit,[42] which stayed the case pending the Supreme Court decision in *American Electric Power*. The reactivation of this case is the first judicial development following that decision. Counsel for plaintiffs reportedly are arguing that *American Electric Power* applies only to injunctive-relief cases, not, as here, where a monetary remedy is sought. Note also in the preceding paragraph that there are claims in this case other than those based on federal common law.

As an aside, the liability insurer of one of the *Kivalina* defendants has filed suit seeking a declaratory judgment that should the defendant be found liable for damages in *Kivalina*, the insurer's general liability policies with the defendant will not apply.[43]

Comer v. Murphy Oil USA litigation has been reactivated after a seeming demise. Owners of Gulf coast property damaged by Hurricane Katrina sued certain oil, coal, and chemical companies under state law. They alleged a multistep chain of causation—that the GHGs emitted by the defendant companies, by contributing to global warming with consequent sea level rise and warmer sea water, caused Hurricane Katrina to intensify and increased the harm to plaintiffs' property. On this basis, plaintiffs asserted state-law tort claims, including negligence, nuisance (public and private), and trespass, and sought compensatory damages. They also requested punitive damages for gross negligence. Further, they claimed conspiracy to commit fraudulent misrepresentation, alleging, as in *Village of Kivalina*, that the oil and coal companies disseminated misinformation about global warming. Finally, plaintiffs made claims against their home insurance companies (e.g., breach of fiduciary duty claim for misrepresenting policy coverage, and violation of a state consumer-protection act) and their mortgage companies (arguing that they may not claim sums owed by plaintiffs for the value of the mortgaged property that was uninsured).

The federal district court dismissed the action for lack of plaintiff standing, and also found the claims precluded by the political question doctrine.[44] Then, in 2009, the Fifth Circuit reversed.[45] Relying on the Supreme Court's approval of standing in *Massachusetts v. EPA*, the panel ruled that the *Comer* plaintiffs similarly had Article III standing as to their tort claims. Plaintiffs, however, were held to lack standing as to their other claims. On the other major issue in the case, the circuit court held, contrary to the district court, that the tort claims were not barred by the political question doctrine. At this point, however, events took an odd turn. In 2010, after taking the case *en banc*, the Fifth Circuit announced it lacked a quorum, so the appeal had to be dismissed.[46] Indeed, the court concluded it could not even reinstate the vacated panel decision. The effect was to deny appeal of the original district court dismissal, which the Fifth Circuit effectively reinstated. However, on May 27, 2011, the plaintiffs refiled the case (with minor modifications), creating a second opportunity for a ruling on whether *American Electric Power* applies to cases seeking damages.

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[41] 663 F. Supp. 2d 863 (N.D. Cal. 2009).

[42] No. 09-17490.

[43] Steadfast Ins. Co. v. The AES Corp., No. 08-858 (Arlington County, Va., Cir. Ct. filed July 2008).

[44] 2007 WL 6942285 (S.D. Miss. August 30, 2007).

[45] 585 F.3d 855 (5th Cir. 2009).

[46] 607 F.3d 1049 (5th Cir. 2010).

The two no-longer-active cases deserve but brief mention. In *California v. General Motors Corp.*, that state sued auto manufacturers based on the alleged contributions of their vehicles, through GHG emissions, to climate change impacts in the state. The suit asserted that these impacts constitute a public nuisance under federal common law, and sought damages. In 2007, the district court dismissed on a political question rationale.[47] California appealed to the Ninth Circuit, but in 2009 motioned for voluntary dismissal, which the circuit granted. Dismissal was sought as part of an agreement between the state, the Obama Administration, and the automobile manufacturers. Finally, *Korsinsky v. U.S. EPA* was a *pro se* action apparently alleging that GHG emissions, by contributing to climate change, threatened plaintiff's health due to his enhanced vulnerability as an older person with sinus problems. He appeared to have requested an injunction ordering EPA to require less pollution and ordering polluters to use his invention for reducing CO_2 emissions. The district court dismissed for lack of standing, and the Second Circuit affirmed on the same ground in 2006.[48]

V. A New Common Law Theory Enters the Fray: Public Trust Doctrine

Since May 2011, the nuisance lawsuits above have been joined by a coordinated campaign of lawsuits and rulemaking petitions seeking to attack climate change by an entirely different common law theory: public trust doctrine. The claim is that the states and the federal government have a public trust responsibility to protect the atmosphere, and have failed to exercise that responsibility to deal with the threat of climate change. Many of the plaintiffs and petitioners are children and teenagers, represented by their guardians ad litem. The lawsuits and petitions are being coordinated by Our Children's Trust, an Oregon nonprofit.[49]

As background, the public trust doctrine is an ancient common law principle with origins in Roman law and the Magna Carta. It asserts that certain natural resources are held by the sovereign in special status.[50] Key aspects of that special status are that government may neither alienate public trust resources nor, more pertinent here, permit their injury by private parties. Rather, government has an affirmative duty to safeguard these resources for the benefit of the general public. The doctrine is generally a principle of state law, though there is limited recognition of a federal counterpart. After tidelands and the beds of navigable waterways, fish and wildlife are the natural resources most traditionally associated with the public trust doctrine; courts do not appear to have applied the doctrine to the atmosphere yet, as the suits and petitions here are seeking.

As for the lawsuits, each one reportedly asks the court for declaratory relief proclaiming that the atmosphere is a public trust resource and that the government in question has a fiduciary duty as trustee to protect it. Twelve suits have been filed—against the United States, Alaska, Arizona, California, Colorado, Iowa, Minnesota, Montana, New Mexico, Oregon, Texas, and

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[47] 2007 WL 2726871 (N.D. Cal. September 17, 2007).

[48] 192 Fed. Appx. 71 (2d Cir. 2006).

[49] Further details are available at http://www.ourchildrenstrust.org.

[50] *See generally* Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 69 Mich. L. Rev. 471 (1970), and Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. Davis L. Rev. 195 (1980).

Washington.[51] The Montana suit is unique in alleging a basis for extending the public trust to the atmosphere under the state constitution and state statute.[52] Some of the suits ask for injunctive relief as well. For example, the suit against the United States asserts that the federal government has violated its trustee duties by allowing unsafe amounts of GHGs into the atmosphere and asks for an injunction requiring it to take action "consistent with the United States government's equitable share of the global effort."[53] None of the suits seek monetary damages.

The rulemaking petitions cover each state where no lawsuit was filed.[54] Each one, CRS is informed, cites the public trust doctrine and asks the appropriate state agency to regulate GHG emissions based thereon.[55] At this writing, a few of the petitions have been dismissed.

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[51] Links to the filed complaints may be found at http://www.ourchildrens trust.org.

[52] Barhaugh v. State of Montana, No. OP 11-0258 (Mont. Supreme Ct. filed May 4, 2011). The complaint cites, in the Montana constitution, art. IX, sec. 1 ("The state … shall maintain … a clean and healthful environment in Montana for present and future generations."), and art. II, sec. 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment....").

[53] Alec L. v. Jackson, No. 11-CV-2203 (N.D. Cal. filed May 4, 2011).

[54] *See* http://www.ourchildrenstrust.org.

[55] Telephone conversation with Julia Olson, Executive Program Program Director, Our Children's Trust. Ms. Olson is the senior attorney coordinating the lawsuits and petitions.

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