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Defogging the Future: The Effect of American Electric Power on Future Lawsuits

*American Electric Power Co. Inc., v. Connecticut*¹

I. INTRODUCTION

The question of whether human activities are responsible for global warming has been a subject of debate and study for decades, and yet, remains unsolved.² Nevertheless, lawsuits alleging harm due to global warming have flooded the courts in recent years. One recent Supreme Court case concerning global warming issues was *American Electric Power Co. Inc., v. Connecticut*.³ In *American Electric*, the plaintiffs alleged the defendants' carbon dioxide emissions contributed to global warming, and therefore interfered with the rights of the public.⁴ Regrettably, the Supreme Court glazed over two major issues: why the plaintiffs had Article III standing, and why the political question doctrine failed to prevent the case from proceeding. Furthermore, the Court left

¹ 131 S. Ct. 2527 (2011) ("American Electric").

² Catalina Camia, *Climate change skeptic Inhofe endorses Rick Perry*, USA TODAY (Aug. 29, 2011), available at <http://content.usatoday.com/communities/onpolitics/post/2011/08/rick-perry-james-inhofe-presidential-endorsement-/1>.

³ *American Electric*, 131 S. Ct. at 2527.

⁴ *Id.* at 2534.

other questions regarding future possible causes of action unanswered. Due to the lack of guidance provided by *American Electric*, future litigants will struggle to predict the threshold needed for Article III standing, the effect of political question doctrine, and whether state common law and state statutory law will be preempted by the Clean Air Act. However, it may still be possible to predict *American Electric*'s effect on future cases regarding greenhouse gas emissions by examining *American Electric*, its history, and the precedent created by similar cases decided by the Supreme Court.

II. FACTS AND HOLDING

In *American Electric Power Co. Inc., v. Connecticut*,⁵ the Court held the Clean Air Act and the Environmental Protection Agency ("EPA") displaced and removed the right to sue under federal common law public nuisance claims.⁶ In July 2004, two groups of plaintiffs filed separate complaints in the Southern District of New York against five major electric power companies.⁷ The first group of plaintiffs included New York City and eight states.⁸ The second group was comprised of three

⁵ *Id.* at 2532.

⁶ *Id.* Greenhouse emission suits cannot no longer be brought under federal common law public nuisance. *See id.* Congress granted the EPA the authority to regulate greenhouse emissions; therefore the emissions were no longer covered under federal common law. *See id.*

⁷ *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2533 (2011).

⁸ *Id.* at 2533-34. The eight states were Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin. *Connecticut v. Am. Elec. Power Co.*,

non-profit land trusts.⁹ The plaintiffs alleged the defendants' "carbon-dioxide emissions created a 'substantial and unreasonable interference with public rights'" in violation of either the federal common law of interstate nuisance or state tort law.¹⁰ The plaintiffs sought injunctive relief requiring each defendant to cap its carbon dioxide ("CO₂") emissions while reducing its emissions by a certain percentage each year for at least a decade.¹¹

The district court dismissed both suits on the ground that the suits raised political questions, which, under the political question doctrine, cannot be decided by a court.¹² However, the Second Circuit reversed the district court, holding the plaintiffs were not barred by the political question doctrine and the plaintiffs had standing to bring their claims.¹³ The Second Circuit also held the plaintiffs had stated a claim under the

Inc., 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005) *vacated and remanded*, 582 F.3d 309 (2d Cir. 2009) *rev'd*, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (U.S. 2011).

⁹ *American Electric*, 131 S. Ct. at 2534.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* The political question doctrine exists to maintain the separation of power in each branch of the federal government. *See Nixon v. United States*, 506 U.S. 224, 228 (1993).

¹³ *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2534 (2011). Article III Standing has three elements: (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury and conduct of the defendant; (3) it is likely a favorable outcome will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

federal common law of nuisance, which the Clean Air Act had not displaced.¹⁴

The United States Supreme Court affirmed the Second Circuit's exercise of jurisdiction¹⁵ in a four-to-four vote.¹⁶ The Supreme Court went on to reverse the Second Circuit, holding the Clean Air Act and the EPA's authority displaced "any federal common law to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants," even if the EPA had not yet set standards governing emissions from power plants.¹⁷

III. LEGAL BACKGROUND

A. *The Clean Air Act and the EPA*

The first federal legislation to address the problem of air pollution was the Air Pollution Control Act of 1955, which set aside funds for

¹⁴ *American Electric*, 131 S. Ct. at 2534.

¹⁵ The plaintiffs had Article III standing under *Massachusetts v. EPA*, 549 U.S. 497 (2007).

¹⁶ *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011). When a court has a tie vote, the decision of the lower court is affirmed. See 28 U.S.C. § 2109 (2006). Justice Sotomayor **recused herself because she heard the case while she was still on the Second Circuit**. Benjamin Ewing, & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 Yale L.J. 350, 404 (2011).

¹⁷ *American Electric*, 131 S. Ct. at 2537.

federal research into the scope and cause of air pollution.¹⁸ Later, the Clean Air Act of 1963 established a federal program, under the United States Public Health Service, to research techniques for monitoring and controlling air pollution.¹⁹

In 1967, Congress enacted the Air Quality Act, which amended the Clean Air Act, and significantly expanded the federal government's involvement by establishing automobile emission standards.²⁰ The Air Quality Act also authorized more expansive studies and monitoring of air pollutant emissions, and the use of control techniques involving interstate transport pollutants.²¹

The Clean Air Act of 1970 represented a shift in the federal government's involvement in air pollution control by authorizing the creation of both federal and state regulations to control stationary²² and mobile sources of air pollution.²³ Shortly after its passage, Congress passed the National Environmental Policy Act establishing the U.S.

¹⁸ *History of the Clean Air Act*, U.S. EPA, (last updated Nov. 16, 2010), http://www.epa.gov/air/caa/caa_history.html.

¹⁹ *Id.*

²⁰ *History of the Clean Air Act*, *supra* note 18; Air Quality Act, Pub. L. No. 90-148, 81 Stat. 485 (1967).

²¹ *History of the Clean Air Act*, *supra* note 18.

²² *Id.* The stationary sources of pollution were usually industrial. *Id.* There were also four major programs created to regulate stationary sources: the National Ambient Air Quality Standards, State Implementation Plans, New Source Performance Standards, and National Emission Standards for Hazardous Air Pollutants. *Id.*

²³ *Id.* See Clean Air Act, Pub. L. No. 91-604, 77 Stat. 392 (1970).

Environmental Protection Agency ("EPA") to implement the Clean Air Act's provisions.²⁴

The Clean Air Act was further amended in 1977 to promote the achievement and maintenance of National Ambient Air Quality Standards ("NAAQS").²⁵ For areas that already met the NAAQS, the amendments contained provisions requiring the Prevention of Significant Deterioration ("PSD").²⁶ The amendments also addressed the requirements for areas that have not met the NAAQS.²⁷

Congress enacted its last major amendment to the Clean Air Act in 1990, increasing federal authority and responsibility by creating new areas of regulatory control: the control of acid rain (Acid Deposition Control) and the issuance of operating permits for stationary sources of pollution.²⁸ The 1990 amendments also expanded and modified provisions dealing with the attainment and maintenance of NAAQS.²⁹ Finally, the 1990 amendment created a program to phase out the use of chemicals that depleted the ozone layer.³⁰

²⁴ *History of the Clean Air Act*, *supra* note 18.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* The non-attainment areas for NAAQS are geographical areas "that [do] not meet one or more of the federal air quality standards." *Id.*

²⁸ *Id.* See Clean Air Act, Pub. L. No. 101-549, 104 Stat. 2399 (1990); *Supra* note 22 and accompanying text.

²⁹ *History of the Clean Air Act*, *supra* note 18.

³⁰ *Id.*

On the international level, negotiations aimed at curbing climate change began at the Rio de Janeiro Earth Summit in 1992.³¹ Several countries signed the Kyoto Protocol in 1997, which went into effect in 2005.³² From 2008 to 2012, the Kyoto Protocol required countries to reduce greenhouse emissions to five percent below the emission levels of 1990.³³ The Copenhagen Conference, which took place in December 2009, further opened the doors for global cooperation by recognizing the need to limit the increase in global temperature to 2 degrees Celsius below pre-industrial levels.³⁴ The countries agreed to monitor their efforts at reducing the global temperature, and report to the United Nations every two years.³⁵ More recently, world leaders met and signed the Cancun Agreements, which included a schedule for reviewing the efforts to maintain global temperature levels and to assess the need for stricter standards in the future.³⁶ The Cancun Agreements produced the most

³¹ CHRISTIAN DE PERTHUIS, ECONOMIC CHOICES IN A WARMING WORLD 5 (Michael Westlake trans., 2011).

³² *Id.* The United States refused to sign because the Kyoto Protocol did not set emission limits on developing countries. *Id.* at 199.

³³ *Kyoto Protocol*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (2011), http://unfccc.int/kyoto_protocol/items/2830.php.

³⁴ DE PERTHUIS, *supra* note 31, at 200-16; *Copenhagen Climate Deal meets Qualified UN Welcome*, BBC NEWS (Dec. 19, 2009), *available at* <http://news.bbc.co.uk/2/hi/science/nature/8422133.stm>.

³⁵ U.N. FCCC, 15th Sess., at 2, U.N. Doc. FCCC/CP/2009/L. (Dec. 18, 2009), *available at* unfccc.int/resource/docs/2009/cop15/eng/l07.pdf.

³⁶ *The Cancun Agreements*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (2011), <http://cancun.unfccc.int/cancun-agreements/significance-of-the-key-agreements-reached-at-cancun/#c45>. Like the Copenhagen Conference, the agreements are not legally binding. Jacob Werksman, *Q&A: The Legal Character and Legitimacy of the Cancun Agreements*, World Resources Institute, (Dec. 17, 2010),

comprehensive package to help developing countries keep their carbon emissions low.³⁷ The most recent conference, the United Nations Climate Change Conference, took place in November 2011 in Durban, South Africa.³⁸ The Parties agreed to adopt a universal legal agreement, regarding climate change, before 2015.³⁹

B. *Climate Control*

In 1850, the concentration of CO₂ in the global atmosphere was 280 parts per million (“ppm”).⁴⁰ The concentration reached 380 ppm by 2005, and continues to increase at a rate of about 2 ppm per year.⁴¹ The CO₂ concentration will have almost doubled by the end of the twenty-first century as compared to levels during the pre-industrial age.⁴² Meanwhile,

<http://www.wri.org/stories/2010/12/qa-legal-character-and-legitimacy-cancun-agreements>.

³⁷ *The Cancun Agreements*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (2011), <http://cancun.unfccc.int/cancun-agreements/significance-of-the-key-agreements-reached-at-cancun/#c45>.

³⁸ *Meetings*, UNITED NATIONS FRAMEWORK ON CLIMATE CHANGE (2011) <http://unfccc.int/2860.php>.

³⁹ *Durban Climate Change Conference - November/December 2011*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (2011), http://unfccc.int/meetings/durban_nov_2011/meeting/6245.php.

⁴⁰ DE PERTHUIS, *supra* note 31, at 17.

⁴¹ *Id.*

⁴² *Id.*

researchers at the University of California-Berkeley found the earth's surface temperature has increased about 1.8 degrees Fahrenheit since the 1950s.⁴³ Many scientists believe if drastic measures are not taken to combat the climate change, the economic progress that developing nations have made could stall or even reverse by 2050.⁴⁴

During the 2008 presidential election, global warming was one of the key issues.⁴⁵ Now, only a few years later, global warming has largely fallen to the political wayside in the United States.⁴⁶ Unlike the United States, global powers such as Australia, the European Union, and China, have passed legislation to greatly reduce the amount of their carbon dioxide emissions.⁴⁷ The United States remains the only "significant outlier."⁴⁸ With comparable living standards, the carbon

⁴³ Robert Rohde Et Al., *Berkeley Earth Temperature Averaging Process*, Berkeley Earth Surface Temperature 1, 2 (submitted for peer review October 2011), http://berkeleyearth.org/Resources/Berkeley_Earth_Averaging_Process.pdf.

⁴⁴ Rachel Nuwer, *Climate Change Imperils Global Prosperity, U.N. Warns*, N.Y. TIMES, Nov. 2, 2011, <http://green.blogs.nytimes.com/2011/11/02/climate-change-imperils-global-prosperity-u-n-warns/>. The effects of extreme weather caused by water and air pollution can greatly affect the production of crops in agricultural countries. *Id.* In addition, pollution also causes poor air quality, resulting in respiratory illnesses and death. *Id.*

⁴⁵ **Elisabeth Rosenthal**, *Where Did Global Warming Go?*, N.Y. TIMES, Oct. 15, 2011, <http://www.nytimes.com/2011/10/16/sunday-review/whatever-happened-to-global-warming.html?ref=globalwarming>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

emissions per capita from the United States are almost double that of Europe's and Japan's combined.⁴⁹

In sharp contrast to the rest of the United States, California has adopted a system that sets limits on greenhouse emissions and creates incentives for oil refineries, electricity generators and other polluters to clean up their plants.⁵⁰ California's plan, which takes effect in 2013, offers a financial incentive aimed at helping companies end the status quo of CO₂ emissions.⁵¹

C. *Article III Standing*

Another method of limiting CO₂ emissions, besides legislation, is through the courts. Standing is one of the requirements under Article III of the United States Constitution for a claim to be heard in federal court.⁵²

⁴⁹ DE PERTHUIS, *supra* note 31, at 63.

⁵⁰ Felicity Barringer, *California Adopts Limits on Greenhouse Gases*, N.Y. TIMES, Oct. 15, 2011, http://www.nytimes.com/2011/10/21/business/energy-environment/california-adopts-cap-and-trade-system-to-limit-emissions.html?_r=1&ref=globalwarming. By 2020, the regulations will have reduced greenhouse emissions to the 1990 levels. *Id.* The incentives are called cap and trade. *Id.* In a cap and trade system, the government will set a cap on the amount of greenhouse emission each plant will be allowed to produce. *Id.* The plants will be issued permits. *Id.* If a plant emits less greenhouse emissions than its cap, then the plant can sell its extra permits, earning a profit. *Id.*

⁵¹ *Id.*

⁵² *Baker v. Carr*, 369 U.S. 186, 206 (1962).

In addition to standing, a case must not contain a political question,⁵³ be “ripe,”⁵⁴ not “moot,”⁵⁵ and cannot ask for an advisory opinion.⁵⁶ The standing requirement exists to ensure the parties have a concrete stake in the controversy to justify employing the resources of the federal courts.⁵⁷ Three requirements must be met in order for the plaintiff to have Article III standing: (1) the plaintiff must have suffered an injury in fact,⁵⁸ (2)

⁵³ *Infra* note 58-64 and accompanying text.

⁵⁴ Ripeness is designed to prevent the courts, “through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Nat'l Park Hospitality Ass'n v. U.S. Dep't of Interior*, 538 U.S. 803, 807-08 (2003). In order to evaluate whether an action is ripe for review, the court will look at (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Id.* at 808.

⁵⁵ If a case is rendered moot, then the court lack jurisdiction to hear the issue. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983). A case becomes moot when the issues “presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979). A party lacks a legally cognizable interest in the outcome when (1) it is very unlikely that the alleged violation will recur and (2) interim relief or events have completely stopped the effects of the alleged violation. *Id.* (internal citations omitted).

⁵⁶ *U.S. v. Richardson*, 418 U.S. 166, 171 (1974); *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

⁵⁷ *See Baker*, 369 U.S. at 204; *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 170 (2000). The EPA cannot be sued if an action has already commenced and is “diligently prosecuting.” 33 U.S.C. § 1365(b)(1)(B) (2006); *Friends of the Earth*, 528 U.S. at 175.

⁵⁸ In order for there to be an injury-in-fact, there must be an (a) invasion of the legally protected interest that is concrete and particularized and (b) the invasion must be actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In order to

there must be a causal connection between the injury and conduct of the defendant, and (3) it must be likely that a favorable outcome will redress the injury.⁵⁹

D. *The Political Question Doctrine*

In addition to establishing standing,⁶⁰ a claimant in federal court must show the issue presented is not a political question.⁶¹ Federal courts cannot decide an issue if there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”⁶² Political questions are identified by looking at the issue and its relationship between the judiciary and the other two branches of the federal government.⁶³ The political question doctrine exists to maintain the separation of powers among the federal government’s three branches, and the analysis under the doctrine should be done on a case-by-case basis.⁶⁴

show injury for Article III standing, the plaintiff has to show injury to himself, and not the environment. *Friends of the Earth*, 528 U.S. at 181.

⁵⁹ *Lujan*, 504 U.S. at 560-61 (internal citations omitted). The plaintiff must demonstrate his standing. *Richardson*, 418 U.S. at 172.

⁶⁰ Article III has the requirement of case-or-controversy. *Lujan*, 504 U.S. at 559-61. Article III standing only requires a court to find injury-in-fact, causation, and the injury is redressable. *Id.* It does not require the court to consider ripeness, mootness, etc. *Id.*

⁶¹ *Baker v. Carr*, 369 U.S. 186, 209 (1962).

⁶² *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker*, 369 U.S. at 217).

⁶³ *Baker*, 369 U.S. at 210.

⁶⁴ *Id.* at 210-11.

The courts will ask whether there is “a lack of judicially discoverable and manageable standards for resolving” the claims presented.⁶⁵ There are also four other factors set forth in *Baker*⁶⁶ to consider in determining whether a controversy is a political question: (1) how difficult would it be for the courts to decide without an initial policy determination that is clearly meant for nonjudicial discretion; (2) whether the court would infringe on the other branches’ powers; (3) if there is an unusual need to adhere to a political decision already made; and (4) the potential embarrassment of mixed messages from various departments on one question.⁶⁷

IV. INSTANT DECISION

Justice Ginsburg delivered the opinion of the Supreme Court, beginning with the issues of Article III standing and the political question doctrine.⁶⁸ Four justices held the plaintiffs had Article III standing under

⁶⁵ *Id.* at 217.

⁶⁶ In *Baker v. Carr*, plaintiffs alleged the denial of equal protection under the Fourteenth Amendment because the votes of rural citizens were worth more than urban citizens because the legislative districts had not been redrawn. 369 U.S. at 187-88. The state of Texas argued that the Court could not hear the case because of the political question doctrine. *Id.* at 196. The Supreme Court eventually held that the case was not barred under the political question doctrine. *Id.* at 237.

⁶⁷ *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 953 (5th Cir. 2011), *cert. denied*, 10-1371, 2011 WL 4536527 (U.S. Oct. 3, 2011), and *cert. denied*, 10-1393, 2011 WL 4536529 (U.S. Oct. 3, 2011).

⁶⁸ *Am. Elec. Power Co. Inc. v. Connecticut*, 131 S. Ct. 2527, 2534 (2011).

Massachusetts.⁶⁹ However, the four other justices either agreed with dissent of *Massachusetts v. EPA*, or held *Massachusetts v. EPA* was distinguishable from the current case.⁷⁰ Due to an equally divided bench, the Court affirmed the Second Circuit's exercise of jurisdiction.⁷¹

In *Massachusetts v. EPA*, the Supreme Court held the state of Massachusetts had standing to petition for review⁷² of whether the Clean Air Act authorized the EPA to regulate greenhouse gas emissions from new motor vehicles in the event the EPA forms a "judgment" that such emissions contribute to climate change.⁷³ Furthermore, the EPA can avoid

⁶⁹ *Id.* at 2531

⁷⁰ *Id.* at 2535.

⁷¹ *Id.*

⁷² *Massachusetts v. U.S. Env'tl. Prot. Agency*, 549 U.S. 497, 526 (2007). When Congress gives a litigant a procedural right to protect his concrete interests, "the right to challenge agency action unlawfully withheld can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* at 517-18 (internal citations omitted). Massachusetts has standing if there is "a possibility that the requested relief will prompt the injury – causing a party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518 (internal citations omitted). Massachusetts is also a sovereign State, and has an interest in protecting its quasi-sovereign interests. *Id.* at 520. Massachusetts has also alleged injury, in that global sea levels have risen as a result of global warming, and will continue to do so. *Id.* at 522. Furthermore, Massachusetts owns a substantial amount of state coastal property, which will either be permanently or temporarily lost. *Id.* The EPA has not disputed the causal connection between greenhouse gases and global warming. *Id.* at 523. Therefore, the EPA's refusal to regulate emissions will contribute to Massachusetts' damages. *Id.* Massachusetts' risk will be somewhat reduced if the state receives the relief sought. *Id.* at 526.

⁷³ *Id.* at 528. One of the EPA's arguments was that greenhouse gases were not included in the Clean Air Act's definition of air pollutants. *Id.* at 511. However, the statute defines greenhouse gases as "any air pollution agent or combination of such agents, including any physical, chemical ... substance or matter which is emitted into other

taking regulatory action with respect to greenhouse gas emissions from new motor vehicles only if it can either determine that greenhouse gases do not contribute to climate change or provide some reasonable explanation as to why the EPA cannot or will not exercise its discretion to determine whether it has the authority.⁷⁴

In *Massachusetts v. EPA*'s dissent, the minority opinion stated the plaintiffs' claims were nonjusticiable because there was no judgment on whether global warming exists, what causes it, or the extent of the problem.⁷⁵ The Court believed the Article III standing requirements should not be relaxed merely because the injuries are asserted by a state.⁷⁶

otherwise enters the ambient air." 42 U.S.C. § 7602(g) (2006). Therefore, greenhouse gases are included within the definition, and the EPA is authorized to regulate the gases. *Massachusetts*, 549 U.S. at 529. Secondly, the EPA has affirmed that it had authority to regulate greenhouse gases in 1998. *Id.* at 531. There is no reason to read ambiguity into the statute. *Id.* Lastly, the EPA has the duty to protect the public's health and welfare. *Id.* at 532. There is no reason why two agencies, the EPA and DOT's mandate to promote energy efficiency, cannot both fulfill their obligations, and avoid inconsistencies. *Id.*

⁷⁴ *Id.* at 533. The EPA also declined to regulate greenhouse gases due to policy concerns. *Id.* Nevertheless, under the Clean Air Act, the EPA can only avoid taking action if the agency determines that greenhouse gases do not contribute to global warming. *Id.* The EPA also cannot avoid its responsibilities due to the uncertainty of climate change. *Id.* at 534. All that matter is if there is enough information to make an endangerment finding. *Id.*

⁷⁵ *Massachusetts v. U.S. Env'tl. Prot. Agency*, 549 U.S. 497, 535 (2007).

⁷⁶ *Id.* at 536. There is no basis or support for relaxing Article III standing in precedent. *Id.* 42 U.S.C. § 7607(b)(1) (2006) does not give States any special rights or status. *Id.* at 537. Case law does not treat public and private litigants any differently. *Id.* The injury asserted must be concrete and particularized. *Id.* at 541. There is not enough in the plaintiffs' declaration to have a concrete and particularized injury. *Id.* Furthermore, assertions of possible future injury will not satisfy Article III standing. *Id.* There is also

Environmental protection falls within Congress' power to regulate.
⁷⁷ A specialized federal common law has emerged, allowing federal common law suits brought by a state against another state to enjoin pollution being emitting from that state.⁷⁸ However, when Congress legislatively provides for claims formerly under federal common law, it is displaced when the statute "speak[s] directly at [the] issue."⁷⁹ In *American Electric*, the Court held that the EPA displaced federal common law because Congress authorized the EPA to control greenhouse gases.⁸⁰

V. COMMENT

American Electric left many questions unanswered. The Supreme Court held that federal common law nuisance claims had been displaced by the EPA.⁸¹ However, the Court chose not to discuss why it found the plaintiffs had Article III standing or why the political question doctrine

no causation because the connection between global warming and motor vehicles is too speculative. *Id.* at 544. In order for Massachusetts' injury to be redressable, the relief must be likely to cure the injury. *Id.* at 546. It is unlikely that regulating domestic motor vehicle emissions will reduce carbon dioxide in the atmosphere, and therefore redress Massachusetts' asserted loss of land. *Id.*

⁷⁷ *Am. Elec. Power Co. Inc., v. Connecticut*, 131 S. Ct. 2527, 2535 (2011).

⁷⁸ *Id.*

⁷⁹ *Id.* at 2538.

⁸⁰ *Id.*

⁸¹ *Id.*

was not a barrier in this case.⁸² The mystery surrounding Article III standing, the political question doctrine, and the possible preemption of state statutory law and state common law will cause more litigation as parties try to determine what suits will be permitted after *American Electric*.

A. *The Future of Article III Standing*

Even after *American Electric*, Article III standing will unlikely prevent plaintiffs from bringing suit. *American Electric* was an opportunity for the Supreme Court to clarify the issue of Article III Standing for greenhouse gas emissions lawsuits.⁸³ Unfortunately, the Court neglected to explain why at least some of the plaintiffs had Article III Standing.⁸⁴ The Court simply stated:

“[f]our members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions... and...no other threshold obstacle bars review. Four members of the Court,

⁸² *Id.*

⁸³ Article III standing requires (1) the plaintiffs suffer an actual injury, (2) the injury must be caused by the defendant, and (3) the courts must be able to provide a remedy for that injury. *Supra* notes 13, 55-57.

⁸⁴ *Am. Elec. Power Co. Inc., v. Connecticut*, 131 S. Ct. 2527, 2535 (2011).

adhering to a dissenting opinion in **Massachusetts**...or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits.”⁸⁵

Even though the Supreme Court merely affirmed the Second Circuit's exercise of jurisdiction, at least one scholar has suggested that the Court is likely to hold there is Article III standing for similar cases in the future.⁸⁶ However, it is still unknown how the Justices decided the question of standing: was their decision based on *Massachusetts v. EPA*, distinguished from *Massachusetts v. EPA*, or did the decision lower the standard for standing.

One problem with standing under Article III is that the requirements are very indistinct and therefore, difficult to predict how a court will apply them. For example, the first element of standing requires the plaintiff have an actual injury. However, what qualifies as an injury is unclear. Using *Massachusetts v. EPA* as an example, global sea levels rising between ten and twenty centimeters over the last century as a result of global warming, and Massachusetts' costal property eventually being lost due to the rising sea levels was held to be an injury.⁸⁷ Almost anything can be considered an injury, giving courts wide discretion in

⁸⁵ *Id.*

⁸⁶ James R. May, *AEP v. Connecticut and the Future of the Political Question Doctrine*, 121 YALE L.J. ONLINE 127, 130 (2011).

⁸⁷ *Massachusetts v. U.S. Env'tl. Prot. Agency*, 549 U.S. 497, 522-23 (2007).

deciding which cases to hear. If a court wants to hear a case, then the court could simply say there was an injury; and, if the court does not want to hear a case, then there was no injury.

In *Massachusetts v. EPA*, for the second element of Article III standing, the Court also needed to decide if there was causation between global warming and the rising of the sea levels, leading to the eventual loss of land.⁸⁸ Due to the controversies regarding global warming, the Court could have decided the issue of causation based on how certain the Court felt that global warming is affecting the earth. If the Court believed in the existence of global warming, then the rising of the sea levels could be caused by the carbon dioxide emissions, and therefore, the element of causation would be satisfied. However, if the Court did not believe in global warming, then the Court would have found no causation between the rising of the sea levels and the carbon dioxide emissions.⁸⁹ Similar to the first element, the Court had broad discretion in deciding if the second element of Article III standing was met.

Moreover, the discretion given to the court demonstrates another problem with the standing doctrine. In order to decide *Massachusetts v. EPA*, the Court first had to decide if global warming existed and whether it was harmful. However, in deciding global warming did exist and was harmful, the Court also examined the merits of the case because without global warming due to greenhouse gases, there could be no injury and causation, as required by Article III standing. By examining and deciding that injury and causation, some of the requirements for Article III

⁸⁸ See *id.* at 523-24.

⁸⁹ In *Massachusetts v. E.P.A.*, the Court was confident about the effect of global warming; however, a few years later the Court backed away from its stance to a more equivocal one. Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 Yale L.J. Online 115, 118 (2011).

standing, were sufficient, the Court had already proceeded to examine the merits of the case.

The issue of Article III standing is currently uncertain due to the lack of explanation by the Supreme Court, but it is likely the courts will continue to accept that there is standing for plaintiffs who claim injury due to greenhouse emissions.⁹⁰ With the requirements of Article III standing met, the would-be litigants are free to present their cases in federal court, as long as the other threshold requirements are met.⁹¹

B. *Political Question Doctrine*

Another hurdle litigants have to pass before a court is willing to consider the merits of a case is the political question doctrine. However, the Supreme Court failed to clarify why the political question doctrine did not bar the plaintiffs in *American Electric*. The political doctrine is a self-imposed limitation on the courts designed to ensure the separation of powers.⁹² If the courts were to decide political questions, it would undermine the federal government's constitutionally created system of checks and balances.⁹³ The political question doctrine is used to prevent

⁹⁰ Adler, *surpa* note 90, at 313.

⁹¹ *Supra* notes 53-54.

⁹² *Baker v. Carr*, 369 U.S. 186, 211 (1962).

⁹³ *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005) *vacated and remanded*, 582 F.3d 309 (2d Cir. 2009) *rev'd*, 131 S. Ct. 2527, (2011).

the judicial branch from performing the functions of the executive and legislative branches.⁹⁴

Justice Ginsburg, Kennedy, Breyer, and Kagan held that the political question doctrine did not bar the plaintiffs' case.⁹⁵ Furthermore, Chief Justice Roberts and Justice Scalia joined the majority opinion without commenting on the issue of the political question doctrine.⁹⁶ Justice Alito and Thomas concurred, but also did not remark upon the political question doctrine.⁹⁷ Lastly, it is believed that Justice Sotomayor⁹⁸ would have likely sided with the Justices that found the plaintiffs had Article III standing.⁹⁹ Therefore, there are four Justices who believe that the political question doctrine did not bar this case. It can also be assumed from the silence of the other four Justices, and Justice Sotomayor's time on the Second Circuit,¹⁰⁰ that the other Justices at the very least do not disagree with how the political question doctrine was applied.¹⁰¹

The history of the political question doctrine suggests the Supreme Court was correct in concluding the doctrine did not bar this case from

⁹⁴ *Baker*, 369 U.S. at 211.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Justice Sotomayor recused herself.

⁹⁹ Jonathan H. Adler, *The Supreme Court Disposes of A Nuisance Suit: American Electric Power v. Connecticut*, CATO SUP. CT. REV., 2010-2011, at 295, 313.

¹⁰⁰ Justice Sotomayor did not participate in the decision on the Second Circuit.

¹⁰¹ May, *supra* note 85, at 130.

proceeding. However, federal common law is developed through case law, which is crafted by the judiciary. Neither the executive or legislative branches have any part in creating federal common law. The political question doctrine has always been applied to constitutional issues, not federal common law.¹⁰² The doctrine was kept within its boundaries when the Court refused to expand the use of it in *American Electric*.

C. *The Future of Greenhouse Gas Emission Claims*

After the Supreme Court decided there were no Article III or political question obstacles, it proceeded to the merits. Looking back at *Massachusetts v. EPA*, the Supreme Court held the EPA had the authority to regulate and set standards for greenhouse gas emissions.¹⁰³ The EPA has agreed to set greenhouse gas emission standards from fossil fuel-fired power plants by May 2012.¹⁰⁴ States and private parties may petition for

¹⁰² Brief of Law Professors as Amici Curiae in Support of Respondents at 14, *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) (No. 2011 WL 970338). In interpreting constitutional issues, the Supreme Court has the final word. *See Marbury v. Madison*, 5 U.S. 137, 146 (1803). Conversely, judicially-created federal common law is easily replaced by either of the two branches. *See Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011). In order to replace federal common law, the statute or regulation replacing the common law does not even have to specifically address it. *Id.* The statute only has to touch upon the issue. *Id.* Thus, preempting federal common law is much more easily done than preempting state law.

¹⁰³ 549 U.S. at 535.

¹⁰⁴ *See Proposed Settlement Agreement, Clean Air Act Citizen Suit*, 75 Fed. Reg. 82392-01 (Dec. 30, 2010); Reply Brief for Tennessee Valley Authority as Respondent Supporting Petitioners at 18, *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) (No. 10-174); *Am. Elec.*, 131 S. Ct. at 2533. On April 13, 2012, the EPA issued a

rulemaking¹⁰⁵ if the EPA does not set standards, and the EPA's disposition of such petitions is typically reviewable by the federal courts.¹⁰⁶ The Clean Air Act also gives citizens the ability to bring civil suit against the United States or governmental agency.¹⁰⁷ However, even if the EPA has the authority to set regulations and refuses to do so, courts should not set the greenhouse gas emission standards, though a court may be forced to do so under federal common law.¹⁰⁸

The Supreme Court in *American Electric* held the Clean Air Act displaces federal common law in regards to limiting carbon dioxide emissions – “[t]here is no room for a parallel track.”¹⁰⁹ Furthermore, the actual displacement of federal common law takes place when Congress

proposed rule setting new source performance standards for carbon dioxide in new fossil fuel-fired steam and combined cycle electric utility generating units (“EGU”) capable of generating more than 25 megawatts. Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22392 (Apr. 13, 2012). Only new fossil fuel EGUs would be subject to a maximum carbon dioxide emissions rate of 1,000 pounds per megawatt-hour. *Id.* The proposed rule also contains an alternative compliance opinion, allowing new coal-fired EGUs to be built without meeting the proposed standard if: the EGUs (1) emits less than 1,800 pounds per megawatt for the first 10 years of its operation; and (2) the EGUs commit to reducing their carbon emissions to below 600 pounds per megawatt for the next twenty years. *Id.*

¹⁰⁵ 5 U.S.C. § 553(e) (2006) (petitioning for rulemaking is a process where interested parties can petition an agency for the issuance or amendment of a rule). *Id.*

¹⁰⁶ *American Electric*, 131 S. Ct. at 2538. The EPA agreed to set the standards due to a litigation settlement. *Id.*

¹⁰⁷ See 42 U.S.C. § 7607(b)(1) (2006); *Massachusetts v. U.S. Env'tl. Prot. Agency*, 549 U.S. 497, 516–17, 529, 535 (2007).

¹⁰⁸ *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2536–37 (2011).

¹⁰⁹ *Id.* at 2530–31.

delegates the regulation of carbon dioxide emissions, not when the EPA actually sets the standards.¹¹⁰

Despite the elimination of the federal common law claims relating to carbon dioxide emissions, a State or private party may currently still bring a suit under state law or state common law.¹¹¹ The Supreme Court stated if a plaintiff was dissatisfied with the EPA's actions, the state or private party "may petition for a rulemaking on the matter, and EPA's response will be reviewable" in the court of appeals.¹¹² The state or private party may then petition for certiorari to the Supreme Court.¹¹³ The federal courts can then force the agency to take action.¹¹⁴ The Supreme Court seems to encourage litigation through a regulatory agency approach, rather than through a state nuisance claim.

Nevertheless, the Supreme Court left unanswered the question of whether a public nuisance claim under state law for carbon dioxide emissions could successfully be brought.¹¹⁵ It is more difficult for Congress to preempt state law than to preempt federal common law. Preemption of state law "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its

¹¹⁰ *Id.* at 2538.

¹¹¹ *Id.* at 2539. The Supreme Court has left the question of whether a lawsuit may proceed under state law or state common law open for consideration in the future. *Id.*

¹¹² *Id.* at 2530.

¹¹³ *Id.* at 2530-31, 2539; 28 U.S.C. § 2112 (2006).

¹¹⁴ See generally *Massachusetts v. U.S. Env'tl. Prot. Agency*, 549 U.S. 497 (2007).

¹¹⁵ *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2531 (2011).

structure and purpose.”¹¹⁶ Even so, a claim in state court will encounter the same problems in federal court. In order to decide the case, the state court will have to weigh the harm caused by global warming, economic factors, and environmental effects. One difference is, in a state court, the political question doctrine will not apply to the case at hand due to the doctrine’s purpose of preventing the branches of the federal government from encroaching on each branch’s responsibilities.¹¹⁷ Plaintiffs could flock to state courts as a result of the inability to sue under federal common law. If a plaintiff does not want to sue under the Clean Air Act, then the plaintiff’s only recourse is to sue in state court. Subsequently, the state courts may see a large increase in global warming lawsuits.

Even though it will be difficult for a state court to make decisions regarding issues of global warming, state courts will probably still have to wrestle with the issue because the Clean Air Act will likely displace state common law and only partially displace state nuisance law.¹¹⁸ The Supreme Court has dealt with a similar situation before under the Clean Water Act.¹¹⁹ In *City of Milwaukee v. Illinois & Michigan*, Illinois brought suit, under federal common law, against the city of Milwaukee

¹¹⁶ See “Supremacy Clause” U.S. Const. amend. VI, § 2; *Gade v. National Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L.Ed.2d 604 (1977); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95, 103 S. Ct. 2890, 2899, 77 L.Ed.2d 490 (1983); *Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 152-153, 102 S. Ct. 3014, 3022, 73 L.Ed.2d 664 (1982)).

¹¹⁷ May, *supra* note 85, at 132.

¹¹⁸ See *Int’l Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

¹¹⁹ See *City of Milwaukee v. Illinois & Michigan* (“*Milwaukee II*”), 451 U.S. 304 (1981) (holding the Clean Water Act displaces federal common law); See *Int’l Paper Co.*, 479 U.S. at 481 (1987) (holding the Clean Water Act partially displaces state nuisance law).

and other cities because the cities discharged inadequately treated and untreated sewage into Lake Michigan.¹²⁰ The Supreme Court held the Clean Water Act displaced all federal common law.¹²¹ In both *City of Milwaukee v. Illinois & Michigan* and *American Electric Power Co. Inc., v. Connecticut*, the Supreme Court followed similar reasoning in holding the respective Acts displaced federal common law.¹²² In *City of Milwaukee v. Illinois & Michigan*, the Supreme Court vacated the judgment and remanded the case,¹²³ without deciding if state nuisance law was also displaced under the Clean Water Act.¹²⁴

¹²⁰ *City of Milwaukee*, 451 U.S. at 308-09.

¹²¹ *Id.* at 332; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987).

¹²² *See City of Milwaukee*, at 314-17; *See American Electric*, 131 S. Ct. at 2558.

¹²³ *City of Milwaukee*, 451 U.S. at 304. On remand, *People of State of Ill. v. City of Milwaukee* ("Milwaukee II"), 731 F.2d 403 (7th Cir. 1984) ended up in the 7th Circuit. The parties asked the court if the Clean Water Act also displaced a state's common or statutory law when determining liability and remedies between two states. *Id.* at 406. The court held that the Clean Water Act did preclude Illinois from applying state law in interstate water pollution. *Id.* at 414. Despite the savings clause within the Clean Water Act, which "authorize[d] a suit for enforcement in the federal judicial district in which the source is located ... [n]othing 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)." *Id.* at 413-14 (quoting Subsection (e) of § 1365). The court felt it was implausible that Congress meant to preserve state or common law because discharges would have to meet both the "statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states." *Id.* at 414. It would render any permit issued under the Clean Water Act meaningless. *Id.* Therefore, the Clean Water Act also precludes both state and common law. *Id.* at 406.

¹²⁴ *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 328 (1981).

Six years later, the Supreme Court answered that question in *International Paper Co. v. Ouellette*.¹²⁵ Vermont landowners brought suit against a New York pulp and paper mill under Vermont nuisance common law.¹²⁶ The Supreme Court held the Clean Water Act preempted Vermont nuisance law, but it was possible for suit to be brought under New York law.¹²⁷

The Court began its analysis by noting the Clean Water Act gave states a significant role in protecting their own territories by regulating their own pollution.¹²⁸ For example, before the federal government issues a permit, the EPA Administrator must first “obtain certification from the source State that the proposed discharge complies with the state’s technology-based standards and water-quality-based standards.”¹²⁹ On the other hand, the Clean Water Act provides states with a much smaller role in the regulation of pollution from another state.¹³⁰ An affected state only has the opportunity to object to the proposed standards at a public hearing.¹³¹ An affected state’s only remedy is to apply to the EPA Administrator, who has the authority to void the permit if the pollution has

¹²⁵ *Int’l Paper Co. v. Ouellette* 479 U.S. 481 (1987).

¹²⁶ *Id.* at 484. International Paper Company (“IPC”), the New York company, operates a pulp and paper mill, and discharged pollutants into Lake Champlain. *Id.* at 483-84.

¹²⁷ *Id.* at 500.

¹²⁸ *Id.* at 489; 33 U.S.C. § 1251(b) (2006).

¹²⁹ *Int’l Paper Co.*, 479 U.S. at 490; 33 U.S.C. § 1341(a)(1) (2006).

¹³⁰ *Int’l Paper Co.*, 479 U.S. at 490.

¹³¹ *Int’l Paper Co. v. Ouellette* 479 U.S. 481 (1987) (citing 33 U.S.C. § 1341(a)(2) (2006); *People of State of Ill. v. City of Milwaukee*, 731 F.2d 403, 412 (7th Cir. 1984)).

an undue effect on interstate waters.¹³² Affected states do not have the ability to regulate out-of-state pollution.¹³³

After the Court concluded affected states have a lesser role in regulating the pollution of another state, the Court went on to examine if the saving clause had preserved the right to sue under state or common law.¹³⁴ The savings clause stated:

“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).”¹³⁵

The Supreme Court interpreted this provision narrowly.¹³⁶ The savings clause stated “nothing in this section” will affect the right to sue.¹³⁷ The Court interpreted the savings clause as only referring to the provisions

¹³² *Int'l Paper Co.*, 479 U.S. at 490-91 (citing 33 U.S.C. § 1342(d)(2)).

¹³³ *Id.*

¹³⁴ *Int'l Paper Co.*, 479 U.S. at 492.

¹³⁵ 33 U.S.C. § 1365(e) (2006) (emphasis added).

¹³⁶ *Int'l Paper Co.*, 479 U.S. at 492-93.

¹³⁷ 33 U.S.C. § 1365(e) (2006); *Int'l Paper Co. v. Ouellette* 479 U.S. 481, 493 (1987).

within the section.¹³⁸ Therefore, the savings clause did not preserve the right to sue under state statutory law or state common law.¹³⁹

The Court continued its analysis by looking at the purpose and history of the Clean Water Act, and concluded that if states were allowed to regulate other states' pollution, it would frustrate the purpose of the Clean Water Act.¹⁴⁰ Therefore, the Court held an affected state may not bring a claim under state common law.¹⁴¹ Common law nuisance standards are often vague, and if a common law suit were allowed to proceed, the suit would hinder the Clean Water Act's purpose of establishing "clear and identifiable" standards of discharge.¹⁴² Furthermore, pollution discharges would be forced to meet the common law standards of every state the discharge flows into.¹⁴³

An affected state suing under its state statutory law would also have the same problems as a suit brought under common law. If the affected state were to sue under its own law, then the affected states, through lawsuits, could regulate the discharge from the source state. The affected state could effectively circumvent the Clean Water Act's permit

¹³⁸ *Int'l Paper Co.*, 479 U.S. at 493.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 496-97.

¹⁴² *Id.* at 496.

¹⁴³ *Int'l Paper Co. v. Ouellette* 479 U.S. 481, 496 (1987).

system and the source state's regulation.¹⁴⁴ Thus, an affected state cannot bring suit under its own law.¹⁴⁵

However, nothing in the Clean Water Act prevents a state from suing under the source state's own law.¹⁴⁶ The Clean Water Act allows states to set higher standards of discharge and authorizes suits under state action.¹⁴⁷ An action under the source state's law would not "disturb the balance among federal, source-state, and affected-state interests."¹⁴⁸ The source state would not be subject to numerous and vague standards of other states.¹⁴⁹ Furthermore, it would not thwart the Clean Water Act's permit system.¹⁵⁰ Therefore, *International Paper Co. v. Ouellette* held, in a lawsuit between two states, subject to the Clean Water Act, the plaintiff cannot sue under the plaintiff's own state law; however, the plaintiff may sue under the defendant's state law.¹⁵¹

An analogy can be made between the Clean Water Act and the Clean Air Act due to their similarities.¹⁵² By comparing the *People of*

¹⁴⁴ *Id.* at 495.

¹⁴⁵ *Id.* at 497.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 499.

¹⁴⁹ *Int'l Paper Co. v. Ouellette* 479 U.S. 481, 499 (1987).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 487.

¹⁵² *See* Clean Air Act, 42 U.S.C. §§ 7601-7700 (2006); *See* Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006).

State of Ill. v. City of Milwaukee,¹⁵³ *American Electric Power Co. Inc., v. Connecticut*,¹⁵⁴ and *International Paper Co. v. Ouellette*, it may be possible to predict how the Supreme Court will decide if state statutory and state common law claims will also preempted by the Clean Air Act.

The Clean Water Act's savings provision is similar to the Clean Air Act's. The Clean Air Act's savings provision states:

“[n]othing in this section shall restrict any right which any person ... may have under statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief ... Nothing in this section or in any other law of the United States shall be constructed to prohibit, exclude, or restrict any State ... from bring any enforcement action or obtaining any judicial remedy or sanction in any State or local court.”¹⁵⁵

Because the two savings clauses are so similar, it is likely the Court will use the same analysis for both. Therefore, the savings clause in the Clean Air Act will probably be interpreted as not expressively preserving the right to sue under state statutory or state common law. If that is true, the Court will look at the purpose of the Clean Air Act. If the Clean Air Act allows a state to sue under the affected state's statutory or common law,

¹⁵³ *Milwaukee II*, 731 F.2d 403 (7th Cir. 1984).

¹⁵⁴ *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011).

¹⁵⁵ 42 U.S.C. § 7604(e)(1) (2006).

the regulations would be just as chaotic.¹⁵⁶ An affected state could also effectively regulate the pollution of another state, creating numerous standards to be met. Conversely, if an affected state sued under the source state's own pollution law, then the source state would not be subject to the regulations of another state. Thereby, ensuring a state only has to meet one standard to avoid being sued.

The Supreme Court has held the Clean Air Act has replaced federal common law, and it is likely that state common law will be preempted.¹⁵⁷ Additionally, the Court is likely to hold that state law will be partially displaced. The Court appears to be encouraging lawsuits through regulations.¹⁵⁸ Nevertheless, forcing plaintiffs to proceed only through a regulatory approach rather than also allowing lawsuits through federal or state common law is not a good approach. Due the very nature of its indistinct requirements, common law can serve as an indication of the effectiveness of the regulations. If the regulations of the Clean Air Act were set too low, then companies would be brought to court for injunctions and other damages. If the standards were sufficient, then the penalties imposed by the regulations would be enough to ensure there is no need to sue under common law. The common law suits would serve as an incentive for power plants to keep their greenhouse emissions low and would signal how satisfied people are with the regulations.

The courts also have broad discretion in allowing cases to be heard because of the indistinctness and vagueness of Article III standing.¹⁵⁹

¹⁵⁶ The discharge from water is very difficult to predict where it would end up, however, it is still easier to compare than air pollution.

¹⁵⁷ *American Electric*, 131 S. Ct. at 2537-38.

¹⁵⁸ *See id.* at 2539.

¹⁵⁹ *See supra* pgs. 12-13.

Plaintiffs have to meet the three elements, which can be difficult due to the nature of carbon dioxide emissions.

Lastly, the public concern about global warming has started to die down over the past few years.¹⁶⁰ Congress has been working on controlling global warming, but climate change has taken a backseat to the other problems the country is facing.¹⁶¹ If Congress chooses to suspend or eliminate the regulations concerning greenhouse emissions, then it should be possible to sue under federal common law again. It remains to be seen how Congress will deal with global warming during the 2012 presidential election.

VI. CONCLUSION

American Electric left many questions to be decided in the future. *American Electric* answered whether a plaintiff could bring a claim for the emission of carbon dioxide through federal common law, but left the question of if a case could be brought under state statutory law or state common law.¹⁶² Additionally, the Supreme Court did not clarify its stance

¹⁶⁰ Hari M. Osofsky, *AEP v. Connecticut's Implications for the Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101, 104 (2011).

¹⁶¹ See Elisabeth Rosenthal, *Where did Global Warming Go?*, N.Y. TIMES, Oct. 15, 2011, available at <http://www.nytimes.com/2011/10/16/sunday-review/whatever-happened-to-global-warming.html?pagewanted=all>; See Joe Romm, *The Failed Presidency of Barack Obama, Part 2, Climate Progress*, THINK PROGRESS (Nov 4, 2010, 4:26 PM), <http://thinkprogress.org/romm/2010/11/04/206982/the-failed-presidency-of-barack-obama-2/>.

¹⁶² *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2532-33 (2011).

on Article III standing or the political question doctrine. It remains to be seen why the Justices thought there was standing. Did the Court still agree with their decision in *Massachusetts v. EPA*? Did the Court want to distinguish *Massachusetts v. EPA*? Or did the Court again lower standing requirements to allow the plaintiffs to sue?

Despite the lack of clarification, it is not likely the Court will allow Article III standing or the political question doctrine to prevent plaintiffs from presenting their case. Lawsuits under the Clean Air Act, through a regulatory agency, will be allowed in the future.¹⁶³ It is likely carbon dioxide emission lawsuits will be allowed to proceed under the state law of the polluting state. However, the Clean Air Act will likely close off all other avenues. *American Electric* left many questions unanswered, and people will be watching closely to see what the Court does in the future.

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¹⁶³ *Id.* at 2533-35.