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Happy Air!: Strengthening the Role of Administrative Law in Environmental Enforcement

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**Happy Air!: Strengthening the Role of
Administrative Law in Environmental Enforcement**

Note on *American Electric Power Company, Inc. v. Connecticut*

By Erica Bourdon*

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I. INTRODUCTION

*Air has no Residence, no Neighbor,
No Ear, no Door,
No Apprehension of Another
Oh, Happy Air!*

*Ethereal Guest at e'en an Outcast's Pillow —
Essential Host, in Life's fain, wailing Inn,
Later than Light thy Consciousness accost me
Till it depart, persuading Mine —¹*

In her poem, Emily Dickinson captures the mysteries of that fundamental element of life that constantly surrounds us: air. Along with water, air is indeed life's "essential host." It is precisely this feature that requires our society to take actions toward monitoring and protecting its quality, both for ourselves and future generations. Dickinson's poem also speaks directly to the trait which stands as the most challenging obstacle to regulating air pollution. Air truly does have "no residence, no neighbor." It passes across borders effortlessly, and it is this ambient quality of air that motivates states to seek action against others on behalf of their citizens. This same need, however, also suggests the necessity and importance of uniform federal air pollution standards.

With the proliferation of scientific studies into climate change and greenhouse gas emissions, air pollution stands today as an increasingly important and controversial political, economic, and social issue. In the modern era, concern has grown not only to regulate pollution locally, but to protect citizens from emissions that

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¹ EMILY DICKINSON, THE COMPLETE POEMS OF EMILY DICKINSON, 483 (Thomas H. Johnson, ed., 1976).

originate elsewhere and have adverse effects on a national or global scale.

In *American Electric Power Co. v. Connecticut*,² the Supreme Court takes up the issue of air pollution regulation and wrestles with the question of whether individual states may bring suit in order to abate greenhouse gas emissions emanating from stationary sources³ located in other states. This lawsuit constitutes “a new breed of environmental enforcement, brought on by governmental officials that are separate from the agencies historically delegated with authority and empowered with expertise and resources to address environmental issues.”⁴ The states brought suit on two separate theories of nuisance—first, a state tort theory and second, a theory based on federal common law.⁵ Proponents of upholding the federal common law claim argue that “Americans deserve to be protected by the old and reliable common law when the vicissitudes of politics prevent competent protection.”⁶ They view the federal common law nuisance claim as a way to “prod” Congress or the administrative agency into action, arguing:

Just as the existence of divided and overlapping government authorities creates opportunities for those institutions to check and balance one another’s overreaches, it also opens space for them to prod and plead with one another when the danger instead is one of government underreach.⁷

² *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011).

³ “Stationary source” is a term of art defined as “any building, structure, facility or installation which emits or may emit any air pollutant.” 42 U.S.C. § 7411(a)(2) (2006). For example, a coal-fired power plant would be considered a stationary source, whereas an automobile would be considered a mobile source. These two types of sources fall under different regulatory schemes. See e.g. *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

⁴ KEVIN A. EWING, JASON B. HUTT, & ERIK E. PETERSEN, *Enforcement and Liability*, in ENVIRONMENTAL LAW HANDBOOK 67, 127 (19th ed. 2007).

⁵ *American Elec. Power Co.*, 131 S. Ct. at 2534.

⁶ John Wood, *Easier Said Than Done: Displacing Public Nuisance When States Sue for Climate Change Damages*, 41 ENVTL. LAW REP. 10316, 10325 (Apr. 2011).

⁷ Benjamin Ewing and Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L. J. (forthcoming 2012)

The interplay here between administrative agencies and federal common law has far reaching consequences both in environmental and administrative law. Where the Court's decision in the present case may be viewed on the one-hand as weakening state's ability to implement environmental laws by effectively eliminating one arrow in their quiver of enforcement, it may also be seen as strengthening or reinforcing the power of administrative agencies.

To reach their decision in *American Electric Power Co.*, the Court closely followed its previous analysis of the Clean Water Act. After splitting 4-4 on the issue of standing,⁸ the Court proceeded to

(Yale Law School, Public Law Working Paper No. 224). Ewing and Kysar argue that these tort theories of litigation and the availability of federal common law claims to litigants serves as a system of "prods and pleas" counter to the system of "checks and balances." *Id.* While checks and balances work in the federal system to limit the activities of the different branches of government, this "prods and pleas" system would, according to the theory they present, work as a way for different sections of the government to "push each other to action when changing social conditions require it . . ." *Id.* They assert that "courts and other governmental institutions should see calls for prodding and pleading not as redundant and overreaching, but rather as structurally necessitated; not as ahistorical or unoriginalist, but rather in keeping with the highest ideals and aspirations of the Founders themselves." *Id.* According to this principle, the suit would act as a way to push the EPA into action where necessary according to the states. Perhaps the Court in the present case felt that the settlement agreement previously issued sufficiently served that purpose.

The authors recognize the special significance of these types of cases concerning the welfare of the public-at-large saying:

The concern over third parties not before the court is particular to the administrative law context, where courts are keen to avoid the prospect of citizens using the power of judicial review to address policy issues in the abstract or to pursue some generalized interest in the proper administration of the law. This concern has less bearing in the common law context as it is the judicial branch itself that shapes and administers the relevant body of law.

Id. Essentially, what the authors are saying here is that because courts themselves administer the common law, they are less hesitant to make rulings, whereas when administrative law is involved, it is an agency rather than the court which oversees the implementation of the law and therefore, the courts are reluctant to place their own perspectives on the subject. This is the public policy concept behind displacement.

⁸ *American Elec. Power Co.*, 131 S. Ct. at 2535.

the merits of the case and its interpretation turns on Congress's delegation of rulemaking to the Environmental Protection Agency (EPA).⁹ The Court concluded that regulating emissions requires an "informed assessment of competing interests" and that "[t]he Clean Air Act entrusts such complex balancing to EPA . . .," rather than federal judges who are without the "scientific, economic, and technological resources an agency can utilize in coping with issues of this order."¹⁰ Displacement of federal law occurs when a federal statute or administrative agency regulation "governs a question previously the subject of Federal common law."¹¹ Displacement may be distinguished from preemption, which requires evidence of a "clear and manifest purpose" by Congress to override a state law, because it does not implicate the same concerns over the separation of powers between the states and federal government inherent in our federalist system.¹² Based on this doctrine of displacement, the Court's ruling shrinks the realm of federal common law even further to essentially eliminate it entirely, but does not reach the question of preemption of the state tort law cause of action.¹³

Part II of this Note provides the scientific background and historical context behind the Court's ruling. Understanding this decision requires a look not only at the history of federal common law and administrative law, but the climate change debate, patterns in environmental litigation and the history of the Clean Air Act itself. Part III looks at the factual basis and procedural history behind *American Electric Power Co.* Part IV analyzes the Court's approach to determining the issues of both (A) standing and (B) displacement, and Part V discusses the impact of these determinations. Specifically, Part V emphasizes the role of the Court's decision on administrative agencies and administrative law judges. Finally, in Part VI, this Note concludes with an assertion that the displacement of federal common law places an even greater responsibility on administrative agencies to protect our health and welfare, particularly our environment.

⁹ *Id.* at 2538.

¹⁰ *Id.* at 2539-40.

¹¹ *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 316 (1981).

¹² *Id.* at 316-17.

¹³ *American Elec. Power Co.*, 131 S. Ct. at 2540.

II. BACKGROUND

A. Climate Change

Greenhouse gases are those gases that trap heat in the Earth's atmosphere.¹⁴ Carbon dioxide (CO₂) is a greenhouse gas that occurs both naturally in the atmosphere and as a result of human processes, including the burning of fossil fuels and chemical reactions that take place during certain production processes like the manufacturing of cement.¹⁵ During a natural carbon cycle, the amount of CO₂ emitted into the atmosphere roughly cancels out the amount absorbed back into the atmosphere or oceans.¹⁶ The exponential increase in human activities such as deforestation and the burning of fossil fuels—oil, coal, and gas—that has taken place since the Industrial Revolution has caused the concentration of CO₂ in the Earth's atmosphere to

¹⁴ Greenhouse Gas Emissions, *Climate Change - Greenhouse Gas Emissions*, U.S. ENVTL. PROT. AGENCY (Apr. 20, 2011), <http://www.epa.gov/climatechange/emissions/index.html>. See generally Science, *Climate Change - Science*, U.S. ENVTL. PROT. AGENCY (Nov. 29, 2011), <http://www.epa.gov/climatechange/science/index.html>. Greenhouse gases occur naturally in the atmosphere and allow solar radiation from the sun to remain within our atmosphere, heating the Earth. *Id.* Without the greenhouse effect, “temperatures would be about 60°F lower than they are now, and life as we know it today would not be possible.” *Id.* The principal greenhouse gases emitted through human activity are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O) and the fluorinated gases (also called “F-gases” or high global warming potential gases) which includes hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. *Id.*

¹⁵ See Greenhouse Gas Emissions, *supra* note 14. The four principal greenhouse gases which occur both naturally and through human processes are carbon dioxide, methane, nitrous oxide, and fluorinated gases (hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride). *Id.*

¹⁶ Natural Sources and Sinks of Carbon Dioxide, *Climate Change - Greenhouse Gas Emissions*, U.S. ENVTL. PROT. AGENCY (Apr. 15, 2011), http://www.epa.gov/climatechange/emissions/co2_natural.html. A natural carbon cycle involves the exchange of carbon dioxide between sources and sinks. *Id.* Sources include animal and plant respiration and volcanic eruptions, which naturally admit carbon dioxide into the atmosphere. *Id.* Sinks, such as plant photosynthesis or oceans, then take in this carbon dioxide and continues the natural cycle. *Id.* When this cycle works in balance, the total emission from sources and the absorption from sinks is roughly equal. *Id.*

greatly increase.¹⁷ The natural sinks that remove carbon dioxide from the atmosphere are out paced by the increased emission into the atmosphere.¹⁸ This increased concentration of greenhouse gases in the Earth's atmosphere results in the phenomenon known as climate change or global warming.¹⁹

Research and debate about climate change began over a century ago when scientist Joseph Fourier first hypothesized that the earth's atmosphere traps heat radiation.²⁰ Despite Fourier's early research, it was not until 1859 that John Tyndall confirmed the existence of greenhouse gases by discovering that CO₂ in the atmosphere does block heat radiation.²¹ Much of this early scientific hypothesis and research into climate changes resulted from the study of ice ages, including Swedish chemist Svante Arrhenius' calculations of the amount of CO₂ necessary to significantly lower or raise the global temperature.²² Numerous news reports as early as the 1920's and 1930's (particularly from the Arctic) claimed temperatures were rising.²³ In 1957, Roger Revelle, an ocean chemist, and Hans Suess, a chemist and nuclear physicist, published a paper overturning the long-held belief that the oceans absorbed the

¹⁷ *Id.* According to the Environmental Protection Agency (EPA) the concentration of carbon dioxide in the Earth's atmosphere had expanded by 35% in 2005 since the Industrial Revolution of the 1700's.

¹⁸ See U.S. Greenhouse Gas Inventory, *Climate Change - Greenhouse Gas Emissions*, U.S. ENVTL. PROT. AGENCY (Aug. 5, 2011), <http://www.epa.gov/climatechange/emissions/usgginventory.html>.

¹⁹ See *Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2007), http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg1_report_the_physical_science_basis.htm.

²⁰ Thomas Lin, Andrew C. Revkin, Jeff Roth, Lisa Tarchak and Spencer Weart, *Science and Politics of Climate Change*, N.Y. TIMES (Dec. 7, 2009), http://www.nytimes.com/interactive/2009/12/07/science/20091207_CLIMATE_TIMELINE.html. Fourier made this hypothesis based on the study of ancient ice and analogized his theory of how the earth retains heat radiation to "a box with a glass cover." *Id.*

²¹ *Id.*

²² *Id.* In 1896, Arrhenius believed that with the rate of emissions from coal burning in the 1890's, the effects of climate change would likely not be felt for centuries. *Id.*

²³ *Id.*

excess CO₂ being emitted.²⁴ Their landmark paper, “regarded as the opening shot in the global warming debates,” asserted that the oceans could not absorb CO₂ at the same pace as humans were emitting it into the atmosphere.²⁵ In the 1960’s, Suess linked this excess emission of CO₂ to fossil fuels.²⁶

Just as the study of ice ages sparked the initial inquiries into climate change, it also ignited controversy, particularly in the early 1960’s. In 1966, studies of core samples drilled from the sea bed and ancient coral reefs offered concrete evidence that the ice ages resulted from changes in Earth’s orbit rather than greenhouse gases.²⁷ However, scientists continued to study the effects of increased greenhouse gas emissions on temperature and weather patterns.²⁸ Growing concern for the environment and a lack of understanding and consensus around air and water pollution led President Richard Nixon to create the EPA in 1970.²⁹ Debate continued, with the EPA

²⁴ *Id.*

²⁵ Lin, *supra* note 20.

²⁶ *Id.*

²⁷ *Id.* Edward Lorenz suggested the possibility that “trivial astronomical shifts” to the orbit of Earth may have brought on the ice ages. *Id.* Lorenz believed that even the slightest change could have catastrophic effects on the climate. *Id.* Shortly thereafter, on February 11, 1968, in an effort to better understand global weather patterns and our planet’s history, scientists drilled 7,111 feet into the ice beneath Antarctica. *Id.* The following year, the Nimbus 3 Satellite launched into orbit to study and measure atmospheric temperatures. *Id.*

²⁸ *Id.* The early 1970’s witnessed drastic changes in weather patterns resulting in droughts and diminished crop production across the globe. *Id.* Climate scientist concluded these alterations in weather patterns “posed a severe threat to agriculture” and could result in “mass starvation.” *Id.* In 1975, a team of scientists headed by Syukuro Manabe applied computer models simulating the rise in temperatures resulting from increased amounts of CO₂ in the atmosphere. *Id.*

²⁹ James M. Naughton, *Nixon Proposes 2 New Agencies on Environment*, N.Y. TIMES, July 10, 1970, at 1. President Nixon created the agency to combat what he saw as “the tendency of statutory departments to allow their resource development responsibilities to color their approach to environmental questions.” *Id.* at 14. He stated that, “[b]ecause environmental protection cuts across so many jurisdictions, and because arresting environmental deterioration is of great importance to the quality of life in our country and the world, I believe that in this case a strong, independent agency is needed.” *Id.* On December 4, 1970, William D. Ruckelshaus took office as the first Administrator of the EPA. *See The Guardian: Origins of the EPA*, ENV’T PROTECTION AGENCY (Spring 1992), <http://www.epa.gov/aboutepa/history/publications/print/origins.html>.

and the National Academy of Sciences publishing conflicting reports as to the severity and immediacy of concern over CO₂ levels in 1983.³⁰ Still seeking to reach a better understanding of the issue, the international community, including the United States, created the Intergovernmental Panel on Climate Change (IPCC).³¹ The decade of the 1990's saw both the juxtaposition of increasing skepticism of climate science in favor of economic growth set against ever more dire warnings of a need to reduce man's carbon footprint, particularly by the IPCC.³² The new millennium ushered in an era of increased media attention, scientific research and public concern over climate change, with the international community negotiating treaties to regulate emissions (the most well-known being the Kyoto Protocol),³³ some former skeptics in the scientific community acknowledging data supporting climate change,³⁴ and former Vice-President Al Gore receiving the Nobel Peace Prize for his efforts against global warming.³⁵ Disagreement has not disappeared,

³⁰ See Lin, *supra* note 20.

³¹ *Id.*

³² *Id.* See also *Assessment Reports*, IPCC, http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml (last visited Feb. 9, 2012).

³³ The Kyoto Protocol legally obliges signatory countries in the industrialized world to cut emissions of greenhouse gases under international law. United Nations, *Making those first steps count: An Introduction to the Kyoto Protocol*, FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/kyoto_protocol/items/6034.php (last visited Feb. 9, 2012). While originally adopted in Japan in 1997, the accord did not take effect until 2005. *Id.* It only binds developed countries, not developing nations and was never adopted by the United States. *Id.*

³⁴ Perhaps most notably, University of California, Berkeley physicist and former global warming skeptic Richard Muller undertook a study of the earth's surface temperature. Seth Borenstein, *Skeptic finds he now agrees global warming is real*, YAHOO! NEWS (Oct. 31, 2011), <http://news.yahoo.com/skeptic-finds-now-agrees-global-warming-real-142616605.html>. Specifically, Muller focused his research on "examin[ing] two chief criticisms by skeptics. One is that weather stations are unreliable; the other is that cities, which create heat islands, were skewing the temperature analysis." *Id.* He found a 1.6 degree increase in temperatures from the 1950s. *Id.* After undertaking the study, he concluded that "Greenhouse gases could have a disastrous impact on the world." *Id.*

³⁵ In 2007, the Nobel Foundation awarded former vice-president Al Gore Jr. and the Intergovernmental Panel on Climate Change the Nobel Peace Prize "for their efforts to build up and disseminate greater knowledge about man-made

however, as the scandal that became known as “climategate³⁶” led some to distrust the scientific community and concern for the state of the economy led others to call for less governmental regulations in an effort to promote industry.³⁷

B. Clean Air Act (CAA)

While water pollution had long been considered a federal problem, prior to the 1960’s many viewed air pollution as a state or local matter.³⁸ At that time, most of the laws regulating air quality were nuisance-based state law ordinances.³⁹ States derived the ability to regulate environmental pollution through their constitutional police powers, which allowed them to take measures in order to protect the health and welfare of their citizens; most declined

climate change, and to lay the foundations for the measures that are needed to counteract such change.” *The Nobel Peace Prize 2007*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/peace/laureates/2007/ (last visited Feb. 3, 2012).

³⁶ In November of 2009, hundreds of e-mails and documents hacked from a server at the University of East Anglia in Britain caused many to believe climate scientists had knowingly and intentionally misled the general public about the level of impact of human activities on climate change. Andrew C. Revkin, *Hacked E-Mail Is New Fodder for Climate Dispute*, N.Y. TIMES (Nov. 20, 2009), <http://www.nytimes.com/2009/11/21/science/earth/21climate.html>. The e-mails include discussions between scientists about “using a statistical ‘trick’ in a chart illustrating a recent sharp warming trend,” in analysis of tree-ring data and thermometer readings. *Id.* One of the scientists implicated in the correspondence, Michael Mann of Pennsylvania State University responded to the allegation by explaining that “dropping the use of the tree rings was never something that was hidden, and had been in the scientific literature for more than a decade. ‘It sounds incriminating, but when you look at what you’re talking about, there’s nothing there, . . .’” *Id.*

³⁷ See e.g. William Fulton, *Do Environmental Regulations Hurt the Economy?*, GOVERNING (Mar. 2010), <http://www.governing.com/columns/eo-engines/Do-Environmental-Regulations-Hurt.html>.

³⁸ ARNOLD W. REITZE, STATIONARY SOURCE AIR POLLUTION LAW 5 (2005). See also J. Philip Bromberg, *How to Comply with the Clean Air Act*, in CLEAN AIR ACT HANDBOOK 23 (1983). In addition to the earlier development of technology to monitor and control water pollution, water’s role as a carrier and spreader of contagious disease, as well as its use as a pathway of interstate commerce landing it within the purview of the Commerce Clause, granted to water earlier federal involvement in regulation than air. *Id.*

³⁹ *Id.* at 6.

to exercise this power, however, and in the few states that did, laws took the form of local zoning ordinances.⁴⁰ Most localities directed these ordinances primarily against smoke.⁴¹ Historically, there has

⁴⁰ *Id.* at 6-7. *Hadacheck v. Sebastian* provides one early example of a local attempt to regulate air pollution. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). In 1915, the City of Los Angeles encompassed an area of 107.62 square miles with 75% devoted to residential use. *Id.* at 406. The city implemented a zoning ordinance making it “unlawful for any person to establish or operate a brickyard or brickkiln [sic], or any establishment, factory, or place for the manufacture or burning of brick within . . .” a three square mile area of the city. *Id.* at 404, 406. Plaintiff, Hadacheck, operated a brick making facility on his property which rested within the three square miles mentioned in the ordinance. *Id.* at 404. Defendant, the Los Angeles chief of police, took plaintiff into custody after his conviction of a misdemeanor for violating the ordinance. *Id.* at 404. Plaintiff asserted the law constituted an unlawful taking of his property without compensation and greatly diminished the value of his property in violation of the 14th Amendment of the U.S. Constitution. *Id.* at 407. Plaintiff appealed the denial of his writ of habeas corpus all the way up to the United States Supreme Court, who affirmed the findings of the California Supreme Court in upholding the validity of the ordinance. *Id.* at 414. The Supreme Court found the exercise of the city’s police power valid in prohibiting the burning of bricks as “fumes, gases, smoke, soot, steam, and dust arising from petitioner’s brick-making plant have from time to time caused sickness and serious discomfort to those living in the vicinity.” *Id.* at 408. This case illustrates an early attempt to regulate air quality based on concerns for the health of the citizens living in the municipality.

⁴¹ *See* Bromberg, *supra* note 38, at 25. Chicago was the first city to pass municipal legislation governing the quality of air in 1881, followed by Cincinnati shortly after. *Id.* at 26. Pittsburg passed its first regulations of air quality as early as 1885, followed by regulations in the city of Boston in 1901. *Id.* at 25. The regulation passed by the Board of Health of the City of Boston read in part:

No substance in any way liable to be distributed or blown about by wind or air currents shall be sieved, screened, agitated or otherwise handled or exposed in any street or public place, nor elsewhere in such a manner that particles or portions of such substances are scattered, blown or otherwise pass into or upon any such street or public place or into or upon any inhabited buildings. This shall not apply to the delivery of coal, provided suitable precautions for dampening are taken . . . No carpets, rugs, mats or similar articles shall be . . . dust particles or portions of said articles from being blown, scattered or otherwise passing from the place where such beating or cleaning is carried on. *Id.*

Oregon was the first state to adopt a comprehensive control on air quality in 1952, three years earlier than the first federal legislation on the topic. *Id.* at 26. In many

been a strong interplay between land use and environmental regulations.⁴² Over time, and as public concern regarding air quality in urban centers grew, some state governments did eventually enact comprehensive emission control ordinances before the federal government intervened in the regulation of air pollution.⁴³

The federal government did not play a role in the regulation of air pollution until the 1960s, urged on by the proliferation of coal-burning power plants in response to the growth in population and industry after WWII, further hastened on by an environmental catastrophe in Donora, Pennsylvania known today as “killer fog.”⁴⁴ On October 27, 1948 weather conditions and extreme air pollution from the American Steel & Wire Company and the Donora Zinc Works (both operated by the U.S. Steel Company) just outside the city of Donora, Pennsylvania formed a deadly combination killing

cities during this period, including Los Angeles as it became concerned with the growing effects of smog, the municipal agencies’ budgets were larger than that of the state agencies. J. Philip Bromberg, *How to Comply with the Clean Air Act*, in CLEAN AIR ACT HANDBOOK 23, 23-27 (1983). In 1967, California’s state budget for its agency dealing with air quality was \$2,400,000 compared to Los Angeles’ municipal agency budget of \$3,800,000 to address air pollution issues. *Id.* at 26.

⁴² *Id.* at 19.

⁴³ *Id.* at 8. See also R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 25-8 (1983).

⁴⁴ Bromberg, *supra* note 38, at 26. See also BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR (1981). Donora, a Pennsylvania town just 37 miles outside of Pittsburgh and situated close to both the Donora Zinc Works and U.S. Steel Corp. steel and wire plant, marked the site of one of the nation’s most memorable environmental disasters. *Id.* at 152. On October 29th, 1948, an unusual yellow smog enveloped the town likely caused by extraordinarily high concentrations of what subsequent researches have posited to have been Sulfur dioxide (SO₂). *Id.* As a result of the smog, in addition to the twenty people asphyxiated, 43% of the town suffered from some form of adverse health effects. *Id.* Then in December of 1952, a similar fog descended upon London resulting in 4,000 deaths in a two-week period. *Id.* at 152. “No pollutant monitors were present in Donora during the incident; a single monitoring site in London recorded extraordinarily high daily concentrations of SO₂ and particulates Other episodes have occurred in the world’s major cities since 1952, but none has been as serious.” *Id.* See also *1948 Killer Smog Triggered Pollution Control*, WWW.DONORASMOG.COM, http://www.donorasmog.com/newsarticles_files/article1948killersmog.htm (last visited Feb. 9, 2012).

twenty people and leaving half the city of 14,000 ill.⁴⁵ Six days later, rain finally came and cleared out the smog.⁴⁶ Researchers attribute the catastrophe to “an unusual weather inversion – a pocket of warm, stagnant air – that sat over the valley Underneath what was essentially a lid on the valley were sulfuric acid, nitrogen dioxide and other poisonous gases, including fluoride, that would normally rise into the atmosphere.”⁴⁷ The United States Steel Company denied responsibility, calling the smog “an act of God.”⁴⁸ Many credit the national attention gained by this environmental disaster as leading to the passage of the 1970 Clean Air Act.⁴⁹ In 2008, the town of Donora opened a museum to remember the lives lost in the smog with the slogan: “Clean Air Started Here.”⁵⁰

Federal involvement in air pollution regulation began with passage of a string of several congressional acts and evolved into the CAA we have today as administered by the EPA and its administrative law judges, and as interpreted by the Supreme Court.⁵¹

⁴⁵ *Donora Smog Held Near Catastrophe*, N.Y. TIMES, Dec. 24, 1948, at 26. Dr. Mills from the University of Cincinnati oversaw a house-to-house canvassing of Donora in the months following the smog in order to collect data in an attempt to better understand the catastrophe. *Id.* He reported twenty human deaths, as well as over 800 animals killed by the deadly smog. *Id.* “Of the 7,670 residents now questioned, 3,212 reported serious effects on that ‘fatal’ night; 603 of these were treated by physicians and 277 others begged unsuccessfully for such aid, many of them receiving treatment from city firemen and Red Cross workers.” *Id.* Dr. Mills also asserted that many of the residents who did not report any negative effects from the smog refused to do so in fear of losing their employment at the zinc plant. *Id.* This assertion was disputed by others, however, including the president of the Board of Health. *Id.*

⁴⁶ Sean D. Hamill, *Unveiling a Museum, a Pennsylvania Town Remembers the Smog That Killed 20*, N.Y. TIMES, Nov. 1, 2008, <http://www.nytimes.com/2008/11/02/us/02smog.html>.

⁴⁷ *Id.*

⁴⁸ See *Donora Smog Held Near Catastrophe*, *supra* note 43.

⁴⁹ See Hamill, *supra* note 46.

⁵⁰ *Id.*

⁵¹ These congressional acts being the Air Pollution Control Act of 1955, 69 Stat. 322, the Clean Air Act of 1963, 77 Stat. 392, and the Motor Vehicle Air Pollution Control Act of 1965, 79 Stat. 992. See Melnick, *supra* note 43, at 27.

While Congress passed the first Clean Air Act in 1963, originally administered by the U.S. Public Health Service,⁵²

Over the past four decades, the [CAA] has evolved from a set of principles designed to guide states in controlling sources of air pollution . . . to multiple levels of pollution control requirements (the 1970, 1977 and 1990 amendments to the act) that the federal government implements by regulations and that the states administer and apply.⁵³

The 1990 Amendments significantly impacted the implementation of air pollution controls as they shifted the focus from a “command-and-control” approach to a “market-control” approach.⁵⁴ It is under this approach that the regulation of emissions from stationary sources falls and the issue in the present case arises. The 1990 Amendments also provide for permitting and greatly expanded the authority of the EPA in regulating air pollution.⁵⁵ The Supreme Court has since interpreted the CAA in several ways, including its decision in *Massachusetts v. Environmental Protection Agency*, discussed *infra*, where the Court found that “greenhouse gases . . . qualify as ‘air pollutants’ within the meaning of the governing Clean Air Act provision,” and therefore fall under the regulatory authority of the EPA.⁵⁶

⁵² *History of the Clean Air Act*, U.S. ENVTL. PROTECTION AGENCY (Nov. 16, 2010), http://epa.gov/oar/caa/caa_history.html.

⁵³ F. WILLIAM BROWNELL, *Clean Air Act*, in ENVIRONMENTAL LAW HANDBOOK 231 (Sullivan ed., 19th ed. 2007).

⁵⁴ *Id.*

⁵⁵ *Id.* The 1990 Amendments to the CAA “[e]stablished permit program requirements”, “[e]xpanded and modified provisions concerning the attainment of National Ambient Air Quality Standards”, “[e]xpanded and modified enforcement authority”, and “[e]stablished a program to phase out the use of chemicals that deplete the ozone layer.” *History of the Clean Air Act*, U.S. ENVTL. PROTECTION AGENCY (Nov. 16, 2010), http://epa.gov/oar/caa/caa_history.html.

⁵⁶ *American Elec. Power Co.*, 131 S. Ct. at 2532-33 (citing *Massachusetts v. ENVTL. PROT. AGENCY*, 549 U.S. 497, 528-29).

C. Environmental Litigation

The difficulties facing respondents in this case come as familiar ground in environmental litigation. Plaintiffs have historically struggled to overcome two barriers: the requirements of standing and justiciability.⁵⁷ However, respondents in the present case face a third issue, displacement. This relationship between environmental concerns and these areas of the law continues to grow and evolve, as illustrated by the present case.

The Supreme Court in *Erie Railroad Co. v. Tompkins*⁵⁸ disavowed the existence of a federal common law, however, just thirty-four years later in *Illinois v. City of Milwaukee (Milwaukee I)*,⁵⁹ with Justice Douglas writing for a unanimous court, held, “when we deal with air and water in their ambient or interstate aspects, there is a federal common law.”⁶⁰ *Milwaukee I* went even further in speaking to the current issue by stating, “It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance”⁶¹

⁵⁷ Kevin A. Gaynor, Benjamin S. Lippard, and Margaret E. Peloso, *Challenges Plaintiffs Face in Litigating Federal Common-Law Climate Change Claims*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10845 (Sept. 2010).

⁵⁸ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). In what began as a personal injury suit filed in federal court based on diversity jurisdiction, Justice Brandeis, writing for the majority, overturned the doctrine of *Swift v. Tyson*, 41 U.S. 1 (1842), which allowed federal courts deriving jurisdiction from diversity of citizenship to exercise independent judgment in interpreting the common law. *Erie*, 304 U.S. at 71. Finding the doctrine to have both political and social defects in that it “rendered impossible equal protection of the law,” the Supreme Court in *Erie R.R. Co. v. Tompkins* declared, “There is no federal general common law.” *Id.* at 74-78.

⁵⁹ *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) [hereinafter *Milwaukee I*].

⁶⁰ *Id.* at 103 (adopting the holding of the tenth circuit in *Texas v. Pankey*, 441 F.2d 236 (1971)).

⁶¹ *Id.* at 107. While the Court in *Milwaukee I* dealt specifically with water pollution and the application of the tort of public nuisance in that respect, they extended the concept to include air quality as well as water quality because of their ambient natures. *Id.* at 93.

Congress saw fit to amend the Federal Water Pollution Control Act in 1972 and established a new system requiring a permit for the discharge of any pollutants into the nation's waterways.⁶² The Supreme Court then granted certiorari to hear once again the claims of Illinois and Michigan against the sewage treatment plants in Milwaukee in *City of Milwaukee v. Illinois and Michigan (Milwaukee II)*.⁶³ The Court found these amendments and the delegation of their implementation to the EPA disallowed the invocation of federal common law as a remedy.⁶⁴ They clarified their earlier holding in *Milwaukee I* to establish that federal common law may only be created if not doing so would deny the plaintiffs any forum in which to protect their interests.⁶⁵ The Court explained its rationale as follows: "Not only are the technical problems difficult—doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise—but the general area is particularly unsuited to the approach inevitable under a regime of federal common law."⁶⁶

The possibility of displacement of federal common law by the passage of laws or regulations left open by the Court in *Milwaukee I* and exemplified in *Milwaukee II* came to fruition with the passage of the Clean Air Act of 1970 and the myriad lawsuits accompanying it.⁶⁷ After Congress amended the CAA in 1977, the Court decided *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, a hallmark of administrative law.⁶⁸ The Court held that the EPA as the

⁶² *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 310 (1981) [hereinafter *Milwaukee II*]. The Federal Water Pollution Control Act Amendments of 1972 gave the EPA power to regulate under this law and maintained any prior requirements established by the EPA as requirements for obtaining a permit. *Id.* at 311. Permits were then issued either by state agencies that qualified or by the EPA itself. *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 325.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See Melnick, *supra* note 43. Melnick contends that between 1970 and 1980, federal courts had heard "hundreds of cases dealing with air pollutants" and issued rulings "profoundly affecting national environmental policies" to fill in the void left open by the current legislation. *Id.* at 1.

⁶⁸ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

administrative agency delegated to implement the provisions of the CAA stood in a better position to enforce these regulations than a federal judge.⁶⁹

Massachusetts v. Environmental Protection Agency, decided in 2006, mirrors some of the same issues and concerns in the present case and, as discussed *infra*, controls the Court's reasoning.⁷⁰ In that case, several states brought suit against the EPA for failure to regulate emissions from motor vehicles under the CAA.⁷¹ The Court found that Massachusetts had standing because of its property interests in shoreline which would be threatened by the rise of sea levels caused by global warming, and this global warming stemmed from the emission of carbon dioxide into the atmosphere by automobiles.⁷² The Court further found that, "EPA has refused to comply with this clear statutory command" to regulate greenhouse gases.⁷³ The Court determined that the EPA had offered no "reasonable explanation" as to why it had not regulated greenhouse gases and directed them on remand to either base its inaction or action in regulating carbon dioxide on the statute.⁷⁴

Following the Supreme Court's decision in *Massachusetts v. Environmental Protection Agency*, the EPA entered into a settlement agreement and publically stated in part:

Under the proposed settlement agreement, EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and

⁶⁹ *Id.* at 845. The Court focused much of its analysis on the political questions stating, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Id.* at 866. *Chevron* stands for the notion that where an administration agency has undertaken to regulate in a certain area as delegated to do so by Congress, federal judges sit in no position to overrule the agency's legitimate policy determinations.

⁷⁰ *Massachusetts v. EPA*, 549 U.S. 497 (2006).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 533.

⁷⁴ *Id.* at 534-35.

modified EGUs that are subject to 40 CFR part 60, subpart Da. EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 CFR part 60, subpart Da if they were new sources. *Under the proposed settlement agreement EPA will take final action with respect to the proposed rule no later than May 26, 2012.* The proposed settlement agreement provides that EPA's fulfillment of its obligations under the agreement shall result in a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.⁷⁵

It is this settlement agreement, issued by the EPA between the time respondents filed suit in the present case and the Supreme Court issued its decision, which exemplifies the current state of enforcement of the CAA. A new ruling regarding the emission standards of carbon dioxide will be promulgated in mid-2012 and perhaps the area of environmental law will evolve once again to accommodate these regulations.

III. FACTS & PROCEDURAL HISTORY

Respondents consist of two separate groups bound together by a common threat.⁷⁶ In 2004, eight states and the city of New York

⁷⁵ Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 Fed. Reg. 82392 (Dec. 30, 2010) (emphasis added).

⁷⁶ Connecticut v. American Elec. Power Co., 582 F.3d 309, 314 (2d Cir. 2009). California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin, and the City of New York filed a complaint against American Electric Power Company, Inc., American Electric Power Service Corporation, Southern Company, the Tennessee Valley Authority, Excel Energy, and Cinergy Corporation in 2004. *Id.* Shortly thereafter in July of 2004, The Open Space Institute, Inc., The Open Space Conservancy, Inc., and the Audubon Society of New Hampshire filed a complaint against the same six plaintiffs. *Id.* Respondents

filed suit against petitioners, the five largest emitters of carbon dioxide in the United States; respondent land trusts filed a parallel suit shortly thereafter.⁷⁷ Collectively, the respondent states represent the interests of more than 77 million citizens and “their related environments, natural resources, and economies.”⁷⁸ Petitioners annually emit 650 million tons of carbon dioxide, constituting a quarter of all emissions from the domestic power sector and 10% of total domestic anthropogenic CO₂ emissions.⁷⁹ This carbon dioxide then works to trap heat in the Earth’s atmosphere resulting in the climate trend known as global warming, during which temperature levels rose approximately .75 to 5 degrees Fahrenheit between the years 1900 and 2005.⁸⁰ The EPA projects this trend of rising temperatures will continue, predicting an increase in temperature of around four to five degrees by the year 2100.⁸¹

“[W]armer average temperatures, later fall freezes and earlier spring thaws, and the decrease in average snowfall and duration of snow cover on the ground” are some of the injuries suffered by respondent states as a result of the increase in global temperatures caused by the emission of carbon dioxide and other greenhouse gases into the atmosphere.⁸² The respondent states estimate costs in the billions of dollars to respond to these problems caused by global

named American Electric Power Service Corporation as a defendant to the original lawsuit, however, they are not an emitter of carbon dioxide, but a management service for American Electric Power Company, Inc. *Id.*

⁷⁷ *Id.*

⁷⁸ Connecticut v. American Elec. Power Co., 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005).

⁷⁹ *American Elec. Power Co.*, 131 S. Ct. at 2534. This constitutes 2.5% of the world’s total emissions from human activities. *Id.*

⁸⁰ *American Elec. Power Co.*, 582 F.3d at 314.

⁸¹ *Id.* The EPA’s estimate of global temperature increase seems optimistic in relation to other estimates. Respondent land trusts cite reports predicting a much bleaker outcome. They cite to the Intergovernmental Panel on Climate Change who estimates global temperatures will have risen approximately 2.5 to 10.4 degrees Fahrenheit between 1990 and 2100. *Id.*

⁸² *Id.* at 317. The respondent states also assert they will suffer myriad future injuries from petitioners’ unrestrained emitting of carbon dioxide. *Id.* at 317-18. These future injuries include: increased smog leading to respiratory issues, substantial coastal erosion, salinization of marshes and water supplies, prolonged heat waves resulting in a higher frequency of heat related illness and death, increased wildfires and the disruption of ecosystems. *Id.* at 318.

warming and assert a direct causal link between petitioner's emissions of carbon dioxide and their injuries.⁸³ Respondent land trusts suffer slightly different injuries than the respondent states that represent the general public.⁸⁴ The Open Space Institute (OSI) and Open Space Conservancy (organized to carry out the purposes of the OSI) together hold land and easements valuing approximately \$56 million and the Audubon Society of New Hampshire (Audubon) owns over 6,000 acres of land for conservation.⁸⁵ Global warming from greenhouse gases causes permanent damage to the land held by these trusts by diminishing their value through the destruction of wildlife habitat, for example.⁸⁶ Because these pieces of land were specifically selected by the trusts for purchase based on their aesthetic as well as ecological value, the harm caused by global warming will directly diminish their value and frustrate their purpose of conservation and scientific study.⁸⁷

Together, the plaintiff states and land trusts sought relief in Federal District Court in the Southern District of New York requesting the court place a cap on the carbon dioxide emissions of defendants and then reduce the capped amount annually under a theory of a federal common law tort of nuisance and alternatively under a state tort theory.⁸⁸ The district court dismissed the case in 2005 on a motion for summary judgment declaring the issue a non-justiciable political question.⁸⁹ Plaintiffs appealed to the Second

⁸³ *Id.* at 317. Further, California suffered a reduction in its mountain snowpack, leading to a decrease in available drinking water obtained from the summer runoff into stream flows. *Id.*

⁸⁴ *Id.* at 318. The three land trusts are non-profit organizations formed for the purpose of acquiring and preserving "ecologically significant and sensitive properties for scientific and educational purposes," as well as for the enjoyment of the public at large. *Id.* The land trusts own a variety of different properties with unique environmental significance, including nature sanctuaries, wildlife preserves and open spaces. *Id.*

⁸⁵ *Id.*

⁸⁶ *American Elec. Power Co.*, 582 F.3d at 317. Respondent land trusts assert for example that the rise in coastal waters will inundate some of their properties and cause irreversible damage to forests, marshes and other wildlife habitats. *Id.* at 318.

⁸⁷ *Id.* at 318-19.

⁸⁸ *American Elec. Power Co.*, 131 S. Ct. at 2532.

⁸⁹ *Id.* at 2534.

Circuit, and the Court of Appeals reversed the finding of the lower court.⁹⁰ In doing so, the court of appeals relied heavily on *Milwaukee I*,⁹¹ which confirmed the existence of a federal common law concerning air and water⁹² and found the EPA's lack of regulation on the matter dispositive.⁹³ The Supreme Court granted certiorari on December 6, 2010.⁹⁴

IV. ANALYSIS OF OPINION

Justice Ginsburg delivered the opinion of the Court, with Justice Alito filing a concurrence in which Justice Thomas joined.⁹⁵ She begins with a brief overview of the Court's analysis and determination in *Massachusetts v. Environmental Protection Agency*, and the EPA's response to the decision of that case.⁹⁶ Following a cursory overview of the procedural history, Justice Ginsburg then briefly addresses the issue of standing before delving into a detailed analysis of the displacement of federal common law.⁹⁷

A. Standing

Justice Ginsburg devotes only a small portion of her opinion to addressing the petitioners' assertion that the federal courts lacked authority to adjudicate the respondents' claims, although it has historically appeared as a major hurdle to plaintiffs in environmental cases. Article III of the Constitution, which governs federal courts, limits their jurisdiction to "cases" and "controversies."⁹⁸ This

⁹⁰ *Id.*

⁹¹ *Milwaukee I*, 406 U.S. at 91.

⁹² *Id.* at 103 (holding that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law").

⁹³ *American Elec. Power Co.*, 131 S. Ct. at 2535.

⁹⁴ *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 813 (2010).

⁹⁵ *American Elec. Power Co.*, 131 S. Ct. at 2531. Justice Alito, with whom Justice Thomas joins, concurs in the judgment and the analysis assuming, *arguendo*, the Court previously analyzed and interpreted the CAA in *Massachusetts v. EPA*—in which both dissented—correctly. *Id.* at 2540-41.

⁹⁶ *Id.* at 2532-33.

⁹⁷ *Id.* at 2533-40.

⁹⁸ U.S. Const. Art. III, Sect. 2.

language has previously been interpreted to require “questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process,” thereby precluding all political questions.⁹⁹

The Court’s 5-4 split over this issue in a similar case just four years earlier illustrates this point.¹⁰⁰ With only eight Justices taking part in the decision of the present case,¹⁰¹ Justice Ginsburg notes, “Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts* Four members of the Court, adhering to a dissenting opinion in *Massachusetts* . . . or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing.”¹⁰²

For many hoping the present case would bring clarity to the issue of standing in environmental suits, the Court’s equally divided split simply extends the shaky groundwork already in place, rather than building a concrete base for plaintiffs to rely on in future suits. Allotting only one paragraph to even mentioning this threshold issue leaves much in this area to question and does not fully resolve the issue. The Court entirely relies on their decision in *Massachusetts*,

⁹⁹ *Flast v. Cohen*, 392 U.S. 83, 95 (1968). In determining whether a private citizen met the requirements of standing simply by virtue of being a taxpayer, the Court grappled with the issues of both standing and justiciability as a subset of the doctrine of standing. *Id.* at 99. The Court found that the taxpayer-appellants in that case had sufficiently established standing through a showing that use of taxpayer funds through Congress’s power to spend for the general welfare in that case violated the Establishment and Free Exercise Clauses of the First Amendment. *Id.* at 103.

¹⁰⁰ *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497, 516 (2006). In 2007, Massachusetts asserted standing to bring suit against the EPA for failure to regulate carbon emissions from vehicles based on their unique position of owning several miles of coastline which they asserted would be diminished by a rise in sea level during global warming directly caused by the release of carbon emissions into the atmosphere. *Id.* Justice Stevens, writing for the majority, found Massachusetts to have standing to bring the suit. Justices Kennedy, Souter, Ginsburg and Breyer joined in his majority opinion. *Id.* Both Chief Justice Roberts and Justice Scalia filed dissenting opinions with which Justice Thomas and Justice Alito joined both, arguing that in fact, Massachusetts and the other petitioners lacked standing to sue because they did not suffer a personal or direct injury. *Id.* at 535-60.

¹⁰¹ Justice Sotomayor took no part in the decision or consideration of this case. *See American Elec. Power Co.*, 131 S. Ct. at 2540.

¹⁰² *Id.* at 2535.

but gives no explanation as to why or how they came to their conclusion. Perhaps they analogized California's depleting snow packs with Massachusetts's declining shoreline, but they do nothing to clarify that in the opinion.¹⁰³

The changing composition of the Court may impact the issue of standing in suits under the CAA and may well have played a part in the present case. Since the Court decided *Massachusetts* back in 2007, Justice Stevens and Justice Souter retired and Justice Sotomayor and Justice Kagan succeeded them. This change in the composition of the Court may have some effect on the decision of standing since both Justices Stevens and Souter found Massachusetts to meet the case or controversy requirement in 2007.¹⁰⁴

The equally divided split and Justice Ginsburg's superficial treatment of the questions of standing and justiciability leave open uncertainty for future plaintiff's attempting to bring suit in federal court. Justice Alito, who dissented in *Massachusetts*, wrote separately to concur in just two sentences.¹⁰⁵ His shift from dissenting in *Massachusetts* to concurring in the present case at first glance seems to suggest he has abandoned his previous rationale and shifted allegiances, however, his use of the term "for the sake of argument" suggests otherwise.¹⁰⁶ The cryptic phrasing of Justice Alito's dissent and the terse treatment of the issue by Justice Ginsburg leave the door open for future dissention over the matter in the federal courts and does nothing to clarify the Court's previous findings in *Massachusetts*.

¹⁰³ *Id.* at 2535.

¹⁰⁴ *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497, 501 (2006).

¹⁰⁵ *American Elec. Power Co.*, 131 S. Ct. at 2540-41. Justice Alito, joined by Justice Thomas, concurring in part and concurring in the judgment, wrote, "I concur in the judgment, and I agree with the Court's displacement analysis on the assumption (which I make for the sake of argument because no party contends otherwise) that the interpretation of the Clean Air Act, 42 U.S.C. § 7401, adopted by the majority in *Massachusetts v. E.P.A.*, 549 U.S. 497 . . . (2007), is correct." *Id.*

¹⁰⁶ *Id.*

B. Displacement

Justice Ginsburg begins her discussion of displacement by stating, “‘There is no federal general common law,’ *Erie Railroad Co. v. Tompkins*. . . famously recognized. In the wake of *Erie*, however, a keener understanding developed.”¹⁰⁷ She then goes on to address the exception to the *Erie* rule which allows for federal common law in areas “‘within national legislative power,’ one in which federal courts may fill in ‘statutory interstices,’ and, if necessary, even ‘fashion federal law.’”¹⁰⁸ She agrees with petitioners that environmental protections fall into the category of this exceptions, however, she asserts that “[r]ecognition that a subject is meet for federal law governance, however, does not necessarily mean that federal courts should create the controlling law.”¹⁰⁹

After recognizing the existence of a federal common law and placing air pollution within the purview of such a law, Ginsburg addresses the alternative possibilities of which law should apply to the regulation of carbon emissions from stationary sources.¹¹⁰ She first addresses the possibility of applying state common law to the issue, but determines such as inappropriate based on the interstate characteristics of the pollution.¹¹¹ She distinguishes the cases respondent states and land trusts cite as precedent for their assertions of a tort theory of state nuisance law as instances which permitted states to file suits challenging “activity harmful to their citizens’ health and welfare.”¹¹²

Here, the Court deals with a case not of permitting a state to sue in order to benefit its citizens’ health or welfare, but to abate “any and all manner of pollution originating outside its borders.”¹¹³

¹⁰⁷ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *American Elec. Power Co.*, 131 S. Ct. at 2535.

¹⁰⁸ *American Elec. Power Co.*, 131 S. Ct. at 2535 (citing *Erie*, 304 U.S. at 421-22).

¹⁰⁹ *Id.* at 2536.

¹¹⁰ *Id.*

¹¹¹ *Id.* Justice Ginsburg writes, “And where, as here, borrowing the law of a particular State would be inappropriate, the Court remains mindful that it does not have creative power akin to that vested in Congress.” *Id.*

¹¹² *Id.*

¹¹³ *American Elec. Power Co.*, 131 S. Ct. at 2535.

Further, the case presents an issue of first impression to the Court by dealing with not only a state as a plaintiff, but whether a political subdivision, in the case of New York City and private citizens, the land trusts, may invoke the federal common law of nuisance to abate pollution.¹¹⁴

After addressing federal common law, Justice Ginsburg next turns to the issue of public nuisance laws. She asserts that the court has “recognized that public nuisance law, like common law generally, adapts to changing scientific and factual circumstances.”¹¹⁵ Once she groups federal common law and state nuisance laws together, Justice Ginsburg next dismisses the entire idea of them as one of academic pursuit only.¹¹⁶ She finds that, “[a]ny such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.”¹¹⁷

Justice Ginsburg rests her analysis of displacement of federal common law on the Court’s holding in *Milwaukee II*, which found that once Congress acts on an issue previously governed by federal common law, the need for that common law disappears.¹¹⁸ She offers that, “The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute ‘speaks directly to [the] question’ at issue.”¹¹⁹ By this analysis, she analogizes the enactment of the Clean Water Act with the CAA and holds that the CAA and the actions it authorizes for the EPA to take “displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”¹²⁰ She outlines the procedures to be taken for enforcement under the act and reinforces the Court’s previous finding that CO₂ qualifies as an air pollutant under the CAA.¹²¹ Once the EPA lists categories of stationary sources to be controlled, each state then issues its performance standards and if the states or the EPA fail to enforce the

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2536.

¹¹⁶ *Id.* at 2537.

¹¹⁷ *Id.*

¹¹⁸ *American Elec. Power Co.*, 131 S. Ct. at 2537.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

standards they have set, the CAA “permits ‘any person’ to bring a civil enforcement action in federal court.”¹²²

Justice Ginsburg devotes the remainder of her opinion to reconciling the issue of the timing of the present case and the displacement of the federal common law. After determining that the CAA displaces the federal common law, she offers that a plaintiff might have recourse against the EPA for not acting upon its mandate.¹²³ She previously stated that because the EPA entered into a settlement agreement in which the agency agreed to set standards for fossil-fuel power plant’s greenhouse gas emissions, the federal common law has therefore been displaced.¹²⁴ The issue here is that the present litigation began before the settlement agreement existed, although many of the parties to the settlement agreement are also parties to the present case.¹²⁵ Here the Court diverges from the holdings of the Second Circuit, which found displacement only to occur at the time of actual rulemaking.¹²⁶ She addresses this issue by stating, “The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law.”¹²⁷ She primarily bases her argument on the idea of agency expertise above that of individual federal judges making case-by-case determinations and the complexity of the delegated requirements in the CAA.¹²⁸ She determines that these two ideas “cannot be reconciled with the decision making scheme” established by Congress.¹²⁹ Justice Ginsburg solidly bases this analysis on the

¹²² *Id.* at 2537-38. (citing § 7604(a)).

¹²³ *American Elec. Power Co.*, 131 S. Ct. at 2538. Justice Ginsburg writes, “If EPA does not set emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA’s response will be reviewable in federal court.” *Id.* This was the case in *Massachusetts*, where petitioners sought to require the EPA to regulate emissions from automobiles as a required under the CAA. See *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497, 516 (2006).

¹²⁴ *American Elec. Power Co.*, 131 S. Ct. at 2538.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 2539-40.

¹²⁹ *American Elec. Power Co.*, 131 S. Ct. at 2540.

Chevron Doctrine, but it leaves unanswered the question, during these dead waiting periods, what recourse do states and private citizens have against harm caused by those not yet regulated by the administrative agency delegated to do so?¹³⁰

V. IMPACT

A. *Federal Common Law*

Erie refuted the existence of federal common law, but *Milwaukee I* reserved it only when dealing with water and air in their ambient states. Unlike other areas of the law, environmental issues, specifically those dealing with water and air, can be seen as inherently national since, as respondents argued in this case, pollution originating in Alabama effects the health and quality of life of citizens in California, as well as the value of their personal property, even though the two states are not contiguous. The Supreme Court recognized in *Milwaukee II*, the creation of federal common law in matters of water pollution arose from their concern that without such laws plaintiffs had no other forum in which to preserve their interests.¹³¹

As explained in *Milwaukee II*, when deciding whether to apply federal statutory or common law the Court's analysis begins "with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."¹³² Justice Scalia noted in *Milwaukee II* that "when Congress addresses a question previously governed by a decision

¹³⁰ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). In one of the most influential cases dealing with administrative law, the Supreme Court upheld the EPA's definition of "statutory source" for purposes of regulation as per the CAA. *Id.* It established a two-part test by which a court must interpret an agency's construction of a statute. First, the court must determine "whether Congress has directly spoken to the precise question at issue, and second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 842-43.

¹³¹ *Milwaukee II*, 451 U.S. at 325.

¹³² *Id.* at 317.

rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.”¹³³

Prior to the decision in the present case, courts and academics believed that unlike the Clean Water Act and the Federal Water Pollution Control Act, the CAA failed to displace federal common law in the area of air pollution control because it did not regulate all the potential sources of air pollution.¹³⁴ However, following Justice Ginsburg’s reasoning in the present case, the CAA does displace all federal common law claims regarding air pollutants. The present decision makes clear that we need no longer determine whether federal common law applies after the passage of the CAA. Justice Ginsburg plainly states, “it is an academic question whether, in the absence of the Clean Air Act and the EPA actions the Act authorizes, the plaintiffs could state a federal common law claim for curtailment

¹³³ *Id.* at 314.

¹³⁴ *Id.* See also *Connecticut v. American Elec. Power Co.*, 582 F. 3d. 309, 378 (2009). In their analysis of the instant case, the Second Circuit reasoned that “no Supreme Court case has held that the CAA has displaced federal common law in the area of air pollution” and disagreed with the district court in New Jersey’s finding that congressional findings calling the law “comprehensive,” “equated the CAA with the FWPCA” and thus, automatically finding federal common law preempted without further analysis. *Id.* at n.47; *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982). See also John Wood, *Easier Said Than Done: Displacing Public Nuisance When States Sue for Climate Change Damages*, 41 ENV’T L. REP. 10316 (Apr. 2011). Wood argues that, “involvement on the part of the judiciary and the states is more justified in the context of climate change . . . because of the degree of uncertainty pervading the issue . . .” and therefore, “the option value of environmental control mechanisms increases.” *Id.* at 10323. He analogizes the role of the judiciary to a baseball game, offering:

The judiciary is the pinch hitter (via nuisance liability), in case EPA promises to hit a foul (by promulgating a regulatory scheme that exceeds authority under the CAA), and in case Congress promises to bunt (via legislation that compromises too much and fails to mitigate climate change risks); and the judiciary is the backstop, in case either branch strikes out (that is, fails to regulate carbon emissions); and the judiciary is the umpire, as to the adequacy of the executive and congressional measures (federal common-law protection is the equitable standard against which executive and congressional schemes are evaluated).

Id. at 10325.

of greenhouse gas emissions because of their contribution to global warming.”¹³⁵

Even though at the time of the Court’s holding, the EPA had yet to issue standards regarding the emission of CO₂ from statutory sources, the remedy of federal common law suit still sits unavailable to respondents, despite the fact that they filed their suit prior to the settlement agreement in which the EPA agreed to regulate such sources. Further, Justice Ginsburg later offers states or private parties the option to petition the EPA for a rulemaking on the matter if these parties feel the EPA sits outside of compliance with the CAA.¹³⁶

The Court’s decision in the present case eliminates the federal common law of nuisance altogether. With the holding in *Milwaukee I* reserving federal common law only to areas of air and water in their ambient states, and the Court later finding that “the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the FWPCA [Federal Water Pollution Control Act] . . . ,”¹³⁷ the action effectively no longer existed for water pollution. The holdings in the present case eliminate the federal common law nuisance action for abatement of air pollution. These two decisions taken together abolish both areas in which such a claim of nuisance might have been made, thereby removing it all together in environmental law.¹³⁸

Since the holding in the present case, it has been applied by several district courts,¹³⁹ as well as the Seventh Circuit in *Michigan*

¹³⁵ *American Elec. Power Co.*, 131 S. Ct. at 2537.

¹³⁶ *Id.* at 2538.

¹³⁷ *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 22 (1981).

¹³⁸ Federal common law may still exist as an avenue for litigants in areas exclusively governed by federal law, such as bankruptcy, admiralty or antitrust. *See Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

¹³⁹ *See e.g.* *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 6:09-cv-00037-RB-LFG, 2011 WL 3924489 (D. N. M. Aug. 3, 2011).; *Union Pac. R. Co. v. U.S. Dep’t of Homeland Sec.*, No. 8:08CV336, 2011 WL 6337599 (D. Neb. Dec. 19, 2011); *Pac. Coast Fed’n of Fishermen’s Ass’n v. Locke*, No. C 10-04790 CRB, 2011 WL 3443533 (N.D. Cal. Aug. 5, 2011); *U.S. v. Eme Homer City Generation L.P.*, No. 2:11-cv-19, WL 4859993 (W.D. Pa. Oct. 12, 2011); *Genesee Cnty. Emp. Retirement Sys. v. Thornburg Mortg. Sec. Trust*, No. CIV 09-0300 JB/KMB, 2011 WL 5840482 (D. N.M. Nov. 12, 2011).

v. U.S. Army Corps of Engineers.¹⁴⁰ In that case, plaintiffs brought suit under a theory of the federal common law of nuisance based on alleged mismanagement by defendants of the Chicago Area Waterways System.¹⁴¹ They asserted that such mismanagement would allow invasive carp to enter the ecosystem of the Great Lakes damaging the ecology of the lake system and threatening “billion-dollar industries that depend on the existing ecosystem.”¹⁴² Applying the reasoning of *American Electric Power Co.*, the Seventh Circuit found that defendants, along with administrative agencies and experts, had launched “a full-scale effort to stop the carp from reaching the Great Lakes,” and promised to continue taking further steps to avoid the potential ecological disaster.¹⁴³ The court found that even without the “formal legal regime that caused the Supreme Court to find displacement . . . we have something close to it.”¹⁴⁴ The Seventh Circuit found displacement of the common law based on the regulatory scheme and denied plaintiff’s injunction.

The application of the holding by the Seventh Circuit demonstrates the impact of the displacement analysis and its bolstering of administrative power. In that case, rather than one Congressional act or one agency’s rulemaking, the court found that several agencies taking steps (or promising future steps) to combat a perceived harm was sufficient to justify displacement of the federal common law of nuisance. This illustrates the growing reliance on and authority of administrative law in our environmental regulatory system.

The closing of the door to federal common law suits for plaintiffs wishing to abate air pollution may weaken the role of federal judges in the area of environmental law, but on the other hand, it strengthens the role of the administrative law judges. The present case takes an entire genre of litigation—air pollution—and places it outside the realm of federal judge determination and solely into the hands of the administrative agency to which Congress delegated the task. Still, depending on the future course of the EPA’s

¹⁴⁰ *Michigan v. U.S. Army Corps of Eng’rs*, No. 10-3891, 2011 WL 3836457 (7th Cir. Sept. 13, 2011).

¹⁴¹ *Id.* at *1.

¹⁴² *Id.*

¹⁴³ *Id.* at *2.

¹⁴⁴ *Id.*

regulation of greenhouse gas emissions, perhaps, the door will open again someday. For now, however, the decision in this case firmly establishes the EPA as the deciding voice in the regulation of air quality and deeply erodes the power of the states in an area they traditionally controlled.

B. State Nuisance Tort

The Court declines to take up respondents' state law claims, as did the Second Circuit Court of Appeals.¹⁴⁵ Justice Ginsburg writes, "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act."¹⁴⁶ The respondents sought relief under the state tort law of nuisance in the source state of the emissions.¹⁴⁷ The Restatement (Second) of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public."¹⁴⁸ The use of public nuisance to abate air pollution in the form of smoke dates back as far as King Edward III in England.¹⁴⁹ Nuisance law today takes the form of statutes, common

¹⁴⁵ *American Elec. Power Co.*, 131 S. Ct. at 2540.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Restatement (Second) of Torts § 821B (1977). The Restatement goes on to give three factors to consider in determining whether the interference is unreasonable:

- (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
- (b) whether the conduct is proscribed by a statute, ordinance, or administrative regulations, or
- (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

At common law, public nuisance covered a broad range of conduct including the keeping of diseased animals, the shooting of fireworks in the street, or even the operating of a house of prostitution. Restatement (Second) of Torts § 821B cmt. b (1977).

¹⁴⁹ Restatement (Second) of Torts § 821B cmt. a (1977). At this time, public nuisance was thought of as an "infringement of the rights of the Crown," and was documented to have "extended to the invasion of the rights of the public,

law or a mixture of both depending on the state.¹⁵⁰ For example, California defines nuisance as “[a]nything which is injurious to health . . . ”¹⁵¹ and a public nuisance as “one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.”¹⁵²

Observers have noted a resurgence in the use of public nuisance in the area of environmental law,¹⁵³ but some courts have been reluctant to rule on such a theory. Recently, in *North Carolina v. Tennessee Valley Authority*,¹⁵⁴ the Fourth Circuit Court of Appeals stated, “The ancient common law of public nuisance is not ordinarily the means by which such major conflicts among governmental

represented by the Crown, by such things as . . . smoke from a lime-pit that inconvenienced a whole town.” *Id.* This tort can be distinguished from private nuisance because it does not require interference with the enjoyment of one’s land. Restatement (Second) of Torts § 821B cmt. h (1977).

¹⁵⁰ Emily Sangi, *The Gap-Filling Role of Nuisance in Interstate Air Pollution*, 38 *ECOLOGY L.Q.* 479, 502 (2011).

¹⁵¹ CAL. CIV. CODE § 3479 (West 2011). The statute offers a non-exhaustive list of what might constitute a nuisance including, “the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.” *Id.*

¹⁵² CAL. CIV. CODE § 3480 (West 2011).

¹⁵³ F. William Brownell, *State Common Law of Public Nuisance in the Modern Administrative State*, 24 *NAT. RESOURCES & ENV’T* 34, 34 (2009-2010).

¹⁵⁴ *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010). The state of North Carolina brought suit against the Tennessee Valley Authority operating plants in Alabama, Tennessee and Kentucky. North Carolina passed a law requiring public utilities operating coal-fired generator units to reduce their emissions to more stringent levels than those required by the EPA pursuant to the CAA. Subsequently, North Carolina became aware of emissions arising from Tennessee Valley Authority plants located in other states moving eastward across its borders. They brought an action seeking injunction against these coal-fired power plants. The Fourth Circuit applied the Supreme Court’s holding in *Int’l Paper Co. v. Ouellette*, 479 U.S. 481 (1987), that the court must apply the nuisance law of the source state, and the claim failed under both Alabama and Kentucky law. They argued finding otherwise would undermine the regulatory scheme established by Congress and the EPA.

entities are resolved in . . . American governance.”¹⁵⁵ The Fourth Circuit articulated the chief concern associated with the use of nuisance to promulgate air standards.¹⁵⁶ It warned that upholding such a ruling “would encourage courts to use vague public nuisance standards to scuttle the nation’s carefully created system for accommodating the need for energy production and the need for clean air. The result would be . . . a confused patchwork of standards, to the detriment of industry and the environment alike.”¹⁵⁷ Dissemination of standardized regulations by a federal agency eliminated the problem of a “patchwork of standards” by creating uniformity.

Those critical of the CAA, however, believe rather than creating uniformity, it actually incentivizes states to literally blow their pollution elsewhere through its regulatory scheme of National Ambient Air Quality Standards (NAAQS) and State Implementation Plans (SIPs).¹⁵⁸ They view these standards as “underinclusive . . . because a state could meet the applicable ambient standards but nonetheless export a great deal of pollution to downwind states because the sources in the state . . . are located near the interstate border.”¹⁵⁹ A state initiated public nuisance suit against another state

¹⁵⁵ *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 301 (4th Cir. 2010) (quoting *North Carolina v. Tenn. Valley Auth.*, 593 F. Supp. 2d 812, 815 (W.D.N.C. 2009)).

¹⁵⁶ *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010).

¹⁵⁷ *Id.*

¹⁵⁸ F. William Brownell, *Clean Air Act in ENVIRONMENTAL LAW HANDBOOK* 231, 232-42 (Sullivan ed., 19th ed. 2007). The CAA addresses ambient air pollution by setting NAAQS for certain pollutants which endanger the public health. *Id.* These are set levels of certain elements in the air which are to be reviewed and revised every five years and creates a substantial challenge to the EPA’s effective implementation of the CAA. *Id.* The pollutants regulated include sulfur dioxide, nitrogen dioxide, particulate matter, carbon monoxide, ozone and lead. *Id.* These NAAQS are enforced upon the states in the form of SIPs. This grants authority to each state to regulate emissions from sources within its borders in order to meet the NAAQS. SIPs have numerous requirements and must be updated within three years of any new or updated NAAQS. *Id.*

¹⁵⁹ Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2350 (June 1996). Arguing that empirical data illustrates the increased use of tall stacks after the 1970 enactment of the CAA, Revesz asserts:

exhibiting such behavior may act as a way to fill in the regulatory gap.

As discussed *supra*, application of the CAA often mirrors that of the Clean Water Act, and the *American Electric Power Co.* Court has deemed this to be the same when dealing with the idea of public nuisance.¹⁶⁰ Both statutes contain nearly identical savings clauses and the Court interpreted the Clean Water Act's savings clause in *International Paper Co. v. Ouellette*,¹⁶¹ as "not preclud[ing] aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State."¹⁶² The present case extends this holding to the CAA.¹⁶³ By doing so, the Court's decision leaves this door ajar as a potential future avenue for states' grievances by not decisively taking up the issue on the merits.¹⁶⁴ Consequently, public nuisance action in the source state may continue to play a viable role in reducing ambient air pollution by providing states inundated with external pollution an avenue outside of the administrative law context in which to address grievances.

C. Role of the Administrative Law Judges

In "[o]ne of the most significant changes in civil enforcement," the 1990 Amendments to the Clean Air Act granted

The best evidence that states do indeed encourage sources to use tall stacks can be found in the provisions of the SIPs adopted by at least fifteen states These SIPs allowed sources to meet the NAAQS by using taller stacks rather than by reducing emissions. In those SIPs, the permissible level of emissions was an increasing function of the height of the stack. If the stack was sufficiently high, the effects would be felt only in the downwind states and would therefore have no impact on in-state ambient air-quality levels. Through these measures, the states created strong incentives for their firms to externalize the effects of their sources of pollution. *Id.* at 2351-52.

¹⁶⁰ *American Elec. Power Co.*, 131 S. Ct. at 2540.

¹⁶¹ *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

¹⁶² *American Elec. Power Co.*, 131 S. Ct. at 2540 (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. at 497).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

the EPA the ability to enforce administrative penalties through the Office of the Administrator rather than referring all cases to the Department of Justice and the court system.¹⁶⁵ Modeled after the Clean Water Act, the Amendments limit jurisdiction of an Administrative Law Judge (ALJ) to matters in which “the total penalty sought does not exceed \$200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action . . . ,” unless the EPA Administrator and the Attorney General agree to a higher penalty.¹⁶⁶ Throughout the course of enforcement, ALJs may serve as neutrals during an Alternative Dispute Resolution process or fact-finders and decision makers during litigation.¹⁶⁷ The Environmental Appeals Board reviews appeals of ALJ decisions.¹⁶⁸ The Administrative Procedure Act governs these proceedings.¹⁶⁹ The inclusion of this change in the

¹⁶⁵ F. WILLIAM BROWNELL, *Clean Air Act*, in ENVIRONMENTAL LAW HANDBOOK 231, 290 (Sullivan ed., 19th ed. 2007). The CAA also authorizes criminal prosecutions of those who *knowingly* violate the statute. *Id.* at 291. Since the 1990 Amendments to the CAA, criminal penalties have increased to five years imprisonment and a fine of \$250,000 per day for individuals and \$500,000 per day for corporations. *Id.* Criminal penalties may also be incurred for lower standards of mens rea including negligence. *Id.* at 291-92. The Department of Justice oversees the prosecution of these criminal penalties through the courts, rather than before an ALJ.

¹⁶⁶ 42 U.S.C. § 7413(d)(1) (2006).

¹⁶⁷ U.S. Evtl. Protection Agency, *Citizen's Guide*, OFFICE OF ADMIN. L. JUDGES (Oct. 2010), available at <http://www.epa.gov/oalj/orders/citizens-guide.pdf>. The EPA offers mediation services free of charge in which an ALJ, appointed by the Office of Administrative Law Judges, serves as the neutral. U.S. Evtl. Protection Agency, *About the Office of Administrative Law Judges* (Jan. 30, 2012), www.epa.gov/oalj/about.htm. If no resolution can be reached through mediation a different ALJ will be assigned to the case for litigation. *Id.*

This system in which ALJs serve both as neutrals and as adjudicators has been critiqued by those who question their ability to truly serve as neutrals while on the payroll of the EPA and by those who understand the difficulty of one person playing both roles. While the ALJ who serves as the mediator for a case will not ultimately be the same person appointed to oversee the adjudication and make a determination, the EPA ALJs do wear both hats. This requires them not only to be well-versed in the environmental laws in which they administer and administrative procedures, but also the art of mediation and alternative dispute resolution.

¹⁶⁸ *Office of Administrative Law Judges*, U.S. ENVTL. PROTECTION AGENCY (Jan. 30, 2012), <http://www.epa.gov/oalj/>.

¹⁶⁹ Administrative Procedures Act, 5 U.S.C. § 500 (1966).

1990 Amendments grants the EPA greater autonomy to enforce the CAA and a heightened ability to quickly reach settlement agreements.¹⁷⁰

The Court's decision in the present case, precluding federal courts from promulgating standards for greenhouse gas emissions, limits future enforcement to three avenues: EPA initiated suits either before an ALJ or district judge depending on the penalty amount, state public nuisance actions as discussed *supra*, or citizen suits.¹⁷¹

¹⁷⁰ See Brownell, *supra* note 165, at 290.

¹⁷¹ 42 U.S.C. § 7604. This code section, which authorizes citizen suits to enforce the provisions of the Clean Air Act reads in pertinent part:

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

....

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which

While states may still find standing to bring suit under a state nuisance tort scheme, as discussed above, the emphasis of enforcement on the EPA and the placement of air pollution regulations within the administrative law context gives great responsibility and influence to the ALJs charged with overseeing prosecution and litigation under the CAA.

Data reported for EPA's fiscal year of 2011 illustrates the importance of and emphasis placed on ALJs in administering the CAA. In the agency's Enforcement and Compliance Annual Results, the EPA reported \$19 million in penalties assessed under the CAA by ALJs.¹⁷² That number rose steeply from \$6 million assessed in both 2009 and 2010, an increase of more than 310%.¹⁷³ Additionally, the EPA issued 1,735 final administrative penalty orders and 1,324 administrative compliance orders.¹⁷⁴ The EPA reported it "focuses

the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right. *Id.*

The statute grants to citizens the ability to bring suit against the EPA Administrator or against polluters not being prosecuted by the Administrator. While the statute grants jurisdiction to the district courts and not to the ALJs, the statute still grants considerable power to the administrative agency by requiring the administrator receive notice of the suit, not allowing judgment to be entered without fulfillment of the notice period requirement and, most importantly, by allowing intervention by the administrator to become a party to the suit. *Id.*

¹⁷² FY2011 Enforcement & Compliance Annual Results, *Office of Enforcement and Compliance Assurance*, U.S. ENVTL. PROTECTION AGENCY (Dec. 8, 2011), <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2011/resultscharts-fy2011.pdf>.

¹⁷³ *Id.* The total amount of administrative penalties levied by the EPA in fiscal year 2011 was \$48 million, the majority being violations of the CAA, followed by the Clean Water Act. *Id.*

¹⁷⁴ *Id.*

on larger administrative cases,” rather than civil judicial cases, with only 182 civil judicial conclusions in 2011.¹⁷⁵

The numerical and monetary data illuminates the pivotal role ALJs play in administering and upholding the EPA's regulations under the CAA. Orders issued by ALJs differ from holdings by federal courts in both the amount that can be litigated and the appeals process. While ALJs may preside over only cases in which the fine does not exceed a certain amount prescribed by legislation, federal courts may oversee adjudication of much larger claims. These dual avenues of enforcement allow the EPA flexibility in prosecuting offenders whose crimes carry a lesser fine without forcing the agency through the often expensive and time consuming process of litigation in the federal courts. An administrative law hearing provides a more efficient and expeditious alternative to prosecute companies or persons violating environmental laws. Additionally, all appeals of orders issued by ALJ's go through the Environmental Appeals Board rather than through the appellate court system. With the Court's holding ushering in an end to federal common law, and the limited scope of availability for state nuisance tort claims, the ALJs may well become the keystone of the CAA.

VI. CONCLUSION

While *American Electric Power Co.* settles the questions regarding the federal common law of nuisance, it does little to clarify the issue of standing, which remains both a source of confusion and an obstacle to plaintiffs in environmental suits. The Court's decision also leaves open the avenue of state tort causes of action, particularly nuisance, for states seeking abatement of cross-border air pollution. On the surface, it may seem as though the displacement of federal common law weakens the cause of environmentalist, but when viewed through the lenses of administrative law, the opposite seems true.

Rather than weakening environmental law, *American Electric Power Co.* may be read as strengthening administrative law. Indeed, the mission of the EPA is to ensure that “all Americans are protected

¹⁷⁵ *Id.* at 10.

from significant risks to human health and the environment . . .” and that “environmental protection contributes to making our communities and ecosystems diverse, sustainable and economically productive.”¹⁷⁶ By consolidating the power to achieve these goals in one independent administrative agency it allows for uniform standards across the country, a streamlined method of enforcement, and the application of the law by specialized experts in the field, rather than piecemeal application by federal judges.

The ruling in *American Electric Power Co.* eliminates the federal common law cause of action for nuisance at the present time, but leaves open the possibility of revival in the future if the current regulatory scheme changes or new issues arise in climate change science that are not fully addressed by the CAA and EPA’s system of enforcement. The test laid out by the Court provides guidance for future decisions analyzing displacement, directing them to determine whether federal statutes and administrative regulations speak directly to the issue for which plaintiffs seek redress.

As the controversy surrounding climate change continues and the battle over greenhouse gas regulations, particularly CO₂ emissions from industrial sources, marches on as a political topic of debate, the determination in the present case reaffirms the Court’s prior decision in *Massachusetts v. Environmental Protection Agency* that the CAA authorizes the EPA to regulate greenhouse gases.¹⁷⁷ Although the Court hesitates to openly endorse a particular view of climate change,¹⁷⁸ its determination that Congress intended the EPA to regulate greenhouse gases and that the EPA has ultimate authority in the area, seems to acknowledge the issue as a real and pressing matter requiring action.

The Court’s decision marks a step forward both for environmental law and administrative law. It endorses both climate change regulation and administrative authority. *American Electric Power Co.* entrusts to administrative agencies and administrative law

¹⁷⁶ *Our Mission and What We Do*, U.S. ENVTL. PROTECTION AGENCY (June 8, 2011) <http://www.epa.gov/aboutepa/whatwedo.html>.

¹⁷⁷ *American Elec. Power Co.*, 131 S. Ct. at 2532; *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497 (2007).

¹⁷⁸ “The Court, we caution, endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change.” *American Elec. Power* 131 S. Ct. at n.2.

judges the responsibility of protecting that precious commodity essential to all life, yet despite so much research, still shrouded in controversy and mystery: air. Even in light of the Court's decision and the EPA's future regulations, as long as skeptics exist in the scientific community and greenhouse gas emissions remain a topic of political discussion, air will remain:

*A Little road not made of man,
Enabled of the eye,
Accessible to thill of bee,
Or cart of butterfly.*

*If town it have, beyond itself,
'Tis that I cannot say;
I only sigh,—no vehicle
Bears me along that way.¹⁷⁹*

¹⁷⁹ EMILY DICKINSON, *THE COMPLETE POEMS OF EMILY DICKINSON* 321 (Thomas H. Johnson, ed., 1976).