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DOES THE JUDICIARY HAVE THE TOOLS FOR REGULATING GREENHOUSE GAS EMISSIONS?

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I. INTRODUCTION

In *American Electric Power Co. v. Connecticut*,[1] the Supreme Court of the United States spoke for the first time regarding the propriety of using common law tort actions to regulate greenhouse gas ("GHG") emissions in the United States. Eight state attorneys general, the City of New York, and several land trusts claimed a federal common law right of action against private and public energy companies to remedy alleged injuries associated with the "public nuisance" of global climate change.[2] A unanimous Court rejected the claim.[3] It held that the appropriate path for regulating GHG emissions is through the Environmental Protection Agency ("EPA") acting pursuant to congressional authority and that, through the Clean Air Act ("CAA"), Congress had displaced any federal common law action seeking to limit GHG emissions.[4] The Court did not stop there. It also stated that there is "no room for a parallel track" of tort litigation and issued a broad warning against global climate change

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1 131 S. Ct. 2527 (2011).

2 *See id.* at 2531–32.

3 The Court rendered an 8–0 decision. *See id.* at 2531. Justice Sotomayor did not participate in the decision. *Id.*

4 Before the *American Electric Power Co.* decision, the Court in *Massachusetts v. EPA* held that the CAA authorized the EPA to regulate emissions of four gases commonly characterized as GHGs, 549 U.S. 497, 532 (2007), and that the EPA arbitrarily abdicated its statutory authority to do so in denying rulemaking, *id.* at 534; *see infra* Part II.B.1 (discussing the Supreme Court's holding in *Massachusetts*).

litigation.[5] It said the judiciary, given its limited tools, does not have the institutional competence to determine "[t]he appropriate amount of regulation" for sources of carbon dioxide given the impact such a decision would have on the "energy needs" of the American people.[6]

Despite the strong sentiments the Court expressed in *American Power Electric Co.*, commentators favoring climate change litigation have tried to limit the reach of the Court's opinion. Their main arguments fit into three categories. First, they state that the Court's displacement ruling did not bar this case or any other climate change tort suit from proceeding under a *state's* common law.[7] While the Court acknowledged its opinion focused only on federal common law claims, the state claims had been dropped from the case earlier in the proceedings.[8] Second, they argue that common law tort suits that can be distinguished from the precise construct of *American Electric Power Co.* can proceed, including those brought by other types of plaintiffs or that seek other types of relief. Third, they say the Court's 4–4 split on the two constitutional questions—whether state attorneys general had constitutional standing to bring their claims and whether judicial remedies to limit fossil fuel emissions present innate political questions—was a victory for them.[9] They assert the split means there are no constitutional obstacles barring the judiciary from hearing any tort-based claim alleging that any defendant can be subject to liability for harms allegedly caused by global climate change.

This Article addresses each of these arguments, focusing on the legal, public policy, and practical considerations the Court raised in *American*

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5 *Am. Elec. Power Co.*, 131 S. Ct. at 2538.

6 *Id.* at 2539.

7 The Court reasoned "that the [CAA] and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Id*. at 2537. The Court distinguished this analysis from a finding that the CAA preempted any state tort action in this area, and left the decision open on the availability of such remedies for further consideration on remand. *Id*. at 2540; *see infra* Part II.B (examining the progress of climate change litigation from *Massachusetts* to *American Electric Power Co.*).

8 The plaintiffs in *American Electric Power Co.* had sought relief under state law where the defendants operate power plants, but because the Second Circuit ruled that the federal common law claim governed the case and "[n]one of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law," the Supreme Court did not address the state claims. 131 S. Ct. at 2540.

9 *See id*.; Hari M. Osofsky, *Litigation's Role in the Path of U.S. Federal Climate Change Regulation: Implications of* AEP v. Connecticut, 46 VAL. U. L. REV. 447, 451 (2012) ("The most important jurisprudential issues raised in the [*American Electric Power Co.*] appeal are standing . . . and the political question doctrine.").

Electric Power Co.[10] (In an article published before *American Electric Power Co.* was decided, we investigated the doctrinal issues with using the tort of public nuisance to regulate GHG emissions.[11]) Part II of the Article begins the discussion by putting global climate change litigation into context. First, the Article contextualizes the regulation of GHGs within the historical, multi-faceted development of U.S. energy policy.[12] It explains the complexity of focusing in isolation on any single component, no matter its importance, of the nation's energy policy.[13] Second, it puts *American Electric Power Co.* into the context of other lawsuits seeking to have courts determine America's energy policy based solely on environmental allegations with fossil fuels.[14] Part III focuses on the message the Court delivered in *American Electric Power Co.*, discussing what the Court's ruling means for other climate change cases.[15] Part IV analyzes the public policy consequences and "real world" impacts of isolating and establishing GHG emission limits through the judiciary.[16]

The Article concludes that federal and state judiciaries, given their institutional constraints, do not have the capabilities to establish GHG emission limits in an effective, consistent, and nondiscriminatory manner. It also shows that the Supreme Court, in *American Electric Power Co.*, provided a blueprint and broad mandate for state and federal courts to reject any claim that would "regulate" GHG emissions.

II. THE CONFLICT BETWEEN TRADITIONAL APPROACHES TO U.S. ENERGY POLICY AND GLOBAL CLIMATE CHANGE TORT LITIGATION

A. Regulating GHGs as Part of the Development of U.S. Energy Policy

Since the Industrial Revolution, energy and, as a result, energy policy have become integral to American social and political landscapes. American society requires energy sources to fuel many aspects of daily life, from electrifying homes and businesses, to enabling transportation

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10 The Court in *American Electric Power Co.* expressly cautioned that it "endorse[d] no particular view of the complicated issues related to carbon-dioxide emissions and climate change." 131 S. Ct at 2533 n.2.

11 *See* Victor E. Schwartz, Phil Goldberg & Corey Schaecher, *Why Trial Courts Have Been Quick to Cool "Global Warming" Suits*, 77 TENN. L. REV. 803, 834 (2010).

12 *See infra* Part II (examining the development of the U.S. energy policy and global warming cases in a judicial context).

13 *See infra* Part II.A (discussing the national energy policy and regulation of GHGs).

14 *See infra* Part II.B (discussing tort law allegations in courts regarding GHG limits).

15 *See infra* Part III (analyzing the Court's decision in *American Electric Power Co.* and its effect on global climate change law).

16 *See infra* Part IV (examining the real world effects and the public policy concerns of the Court's decision).

and so much more.[17] As the population has grown and technology has flourished, the need for energy has steadily increased. Over the past sixty years, energy consumption has tripled,[18] and by 2035, U.S. energy consumption is projected to increase by another fifteen percent.[19] Traditionally, the focal point of American energy policy has been to assure a continuous, affordable supply of energy to satisfy this demand.

Recent brown-outs in California and spikes in gasoline above four dollars per gallon have demonstrated the personal and economic hardships that can result when aspects of U.S. energy policy fail, even for a short period of time. Accordingly, for more than a hundred years, lawmakers have prioritized energy sources that are capable of large scale production and are relatively inexpensive and relatively safe. Those sources have consisted primarily of fossil fuels, namely coal, oil, and natural gas.[20] Together, these fuels account for eighty-three percent of U.S. energy production.[21] Any change in America's energy policy involving these fossil fuels, therefore, must fully consider the impact that change would have on the ways the United States produces and uses energy, including the affordability of electricity and gasoline for American consumers, the nation's global competiveness, foreign policy dynamics, and national security interests.[22] Concerns of environmentalists, including over GHG emissions represent only one

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17 *See* Rick Strange, *Weaving A Tangled Web: The Intersection of Energy Policy and Broader Government Policies*, 5 TEX. J. OIL GAS & ENERGY L. 1, 3 (2009) (stating that "Americans devour energy prodigiously" and "[b]ecause we consume so much energy, ensuring our access to it is a vital national concern").

18 *See Use of Energy in the United States Explained*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energyexplained/index.cfm?page=us_energy_use (last updated July 20, 2011).

19 *See* U.S. ENERGY INFO. ADMIN., DOE/EIA-0484, INTERNATIONAL ENERGY OUTLOOK 2010 (2010), *available at* www.eia.gov/oiaf/ieo/index.html.

20 *See* Mark Clayton, *'Fracking': Did Energy Department Report Clear Up Controversy?*, CHRISTIAN SCI. MONITOR, Aug. 11, 2011, *available at* 2011 WLNR 15949774 (discussing the "dramatic rise" in natural-gas production "from about [two] percent of America's gas supply a decade ago to about [thirty] percent today" as a result of "fracking" advancements); Peter S. Glaser, F. William Brownell & Victor E. Schwartz, *Managing Coal: How to Achieve Reasonable Risk with an Essential Resource*, 13 VERMONT ENVTL. L. REV. (forthcoming 2011) (manuscript at 11) (on file with authors) (detailing the major risks of mainstream energy sources).

21 *See Use of Energy in the United States Explained*, *supra* note 18.

22 *See, e.g.*, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011); *see also* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003) (stating EPA position that "climate change raises important foreign policy issues"); Leon Fuerth, *Energy, Homeland, and National Security*, *in* ENERGY & SECURITY: TOWARD A NEW FOREIGN POLICY STRATEGY 411 (Jan H. Kalicki & David L. Goldwyn eds., 2005) (discussing relationship between energy costs and national security interests).

aspect of the U.S. energy policy and must be integrated into this kaleidoscope.

1. Environmentalism as a Factor in U.S. Energy Policy

In the 1970s, policy issues relating to emissions of carbon dioxide and other GHGs reached the national dialogue. This occurred at the same time the environmental political movement secured significant legislative victories.[23] During that decade, Congress passed seminal pieces of environmental legislation, namely the National Environmental Policy Act ("NEPA"),[24] the CAA,[25] and the Clean Water Act ("CWA").[26] These statutes, although not directly addressing energy production or policy, established that the assessment of environmental impacts would have to be a factor in developing national policies for a range of areas.[27]

Legislation specifically addressing environmental impacts of energy production and use soon emerged. In 1975, Congress established Corporate Average Fuel Economy ("CAFE") standards for automotive vehicles sold in the United States.[28] The EPA was authorized to set CAFE standards at the "maximum feasible level" considering, among other things, "[t]echnological feasibility," "[e]conomic practicability,"

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[23] *See* Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 76 (2001).

[24] National Environmental Policy Act of 1969, Pub L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4327 (2006)). In the late 1990s, and continuing into the 2000s, various groups have used the NEPA to "assert[] climate change claims." Kevin T. Haroff, *On Thin Air: Standing, Climate Change, and the National Environmental Policy Act*, 46 VAL. U. L. REV. 411, 414 (2012).

[25] Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7407–7642 (2006)); *see History of the Clean Air Act*, EPA, http://www.epa.gov/air/caa/caa_history.html (last updated Nov. 16, 2010). The precursor to the CAA was the Air Pollution Control Act. *Id.*; *see* Air Pollution Control Act, Pub. L. No. 84-159, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401–7671q (2006)). It funded research into the scope and sources of air pollution. *History of the Clean Air Act*, *supra*. The initial CAA was passed in 1963, establishing a national program to address air pollution within the U.S. Public Health Service and authorizing additional research into techniques for monitoring and controlling air pollution. *Id.* It was significantly amended in 1970 to include substantive provisions and has been subsequently amended, most notably in 1977 and 1990. *Id.*

[26] Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006).

[27] *See* Mark Latham, Victor E. Schwartz & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737, 742–46 (2011) (discussing the seminal environmental legislation enacted in the 1970s).

[28] *See CAFE – Fuel Economy*, NHTSA, http://www.nhtsa.gov/fuel-economy (last visited Sept. 29, 2011).

and the national "[n]eed . . . to conserve energy."[29] These standards have increased gradually over time, encouraging more fuel efficient vehicles.[30]

Congress has followed a similar incremental approach with regard to global climate change allegations. The initial focus was on learning. In 1978, Congress established a "national climate program" to increase general knowledge "through research, data collection, assessments, information dissemination, and international cooperation."[31] In 1980, Congress commissioned a National Academy of Sciences study through the Energy Security Act to analyze the "projected impact, on the level of carbon dioxide in the atmosphere, of fossil fuel combustion, coal-conversion and related synthetic fuels activities."[32] In 1990, Congress enacted the Global Changes Research Act to establish a ten-year research program for global climate issues.[33]

This learning phase has given way to two decades of strategic initiatives toward reducing GHG emissions. Domestically, Congress has focused on a multi-disciplinary approach, enacting numerous subsidies and tax incentives aimed at two goals: to modernize fossil fuel production to reduce GHG emissions and to spur development of alternative energy sources that emit fewer GHGs.[34] For example, in his 2010 State of the Union speech, President Obama said that his national

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[29] *See CAFE Overview – Frequently Asked Questions*, NHTSA, http://www.nhtsa.gov/cars/rules/cafe/overview.htm (last visited Oct. 6, 2011) (internal quotation marks omitted).

[30] *See* Nelson D. Schwartz, *American Energy Policy, Asleep at the Spigot*, N.Y. TIMES, Jul. 6, 2008, http://www.nytimes.com/2008/07/06/business/06oil.html?pagewanted=all ("Between 1974 and 1989, the efficiency of a typical car sold in the United States almost doubled, to 27.5 miles per gallon from 13.8.").

[31] Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003) (internal quotation marks omitted).

[32] Energy Security Act, Pub. L. No. 96-294, § 711(a)(1), 94 Stat. 611, 774 (1980).

[33] 15 U.S.C. §§ 2931–2939 (2006).

[34] *See, e.g.*, Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2010) (proposing a cap and trade program to reduce GHG emissions by eighty-three percent in 2050); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) (proposing a comprehensive cap and trade program); Safe Climate Act of 2006, H.R. 5642, 109th Cong. (2006) (proposing amendments to the CAA to achieve two percent annual reductions in GHGs between 2010 and 2050); Global Warming Pollution Reduction Act, S. 3698, 109th Cong. (2006) (providing a comprehensive set of amendments to the CAA aimed at reducing GHGs). Members of Congress have also sponsored bills that would assist state efforts to reduce GHGs. *See* PACE Assessment Protection Act of 2010, H.R. 5766, 111th Cong. (2010) (proposing to amend Fannie Mae and Freddie Mac underwriting standards to support state clean energy loan programs); PACE Assessment Protection Act of 2010, S. 3642, 111th Cong. (2010) (proposing a plan identical to the plan set forth in H.R. 5766); H.R. 3836, 111th Cong. (2009) (proposing a DOE credit program "to enhance the availability of private financing for clean energy technology deployment").

energy policy includes continued investment in clean coal technology.[35] He subsequently issued a presidential memorandum instructing federal officials to work toward "[r]apid commercial development and deployment of clean coal technologies" that "will help position the United States as a leader in the global clean energy race."[36] With regard to alternative and renewable energy sources, about a third of the cost of solar and wind energy is paid for through subsidies and tax incentives. Together, wind, solar, biomass, hydroelectric power, and other alternative energy sources account for about eight percent of U.S. energy production and continue to expand.[37]

Internationally, presidential administrations of both political parties have sought to develop a global international consensus on approaches to GHGs. American policymakers have been keenly aware that any unilateral action on GHG emissions would significantly and disproportionately increase the cost of energy in the United States. For example, in 1992, President George H. W. Bush signed the United Nations Framework Convention on Climate Change ("UNFCCC"), which was a nonbinding agreement between 154 nations designed to reduce atmospheric concentrations of carbon dioxide and other GHGs in order to "prevent dangerous anthropogenic interference with the [Earth's] climate system."[38] UNFCCC member nations negotiated the Kyoto Protocol that called for mandatory reductions of GHG emissions of developed nations.[39]

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[35] Barack Obama, Remarks by the President in State of the Union Address (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address. President Obama's predecessor, George W. Bush, also supported development of clean coal technology. *See, e.g.*, Robin Acton, *Bush Urges Clean Coal Technology for Electricity*, PITTSBURGH TRIB.-REV., Aug. 1, 2008, http://www.pittsburghlive.com/x/pittsburghtrib/news/s_580555.html.

[36] Press Release, The White House, Presidential Memorandum—A Comprehensive Federal Strategy on Carbon Capture and Storage (Feb. 3, 2010), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-a-comprehensive-federal-strategy-carbon-capture-and-storage.

[37] *See What is Energy? Explained: Sources of Energy*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energyexplained/index.cfm?page=about_sources_of_energy (last updated July 27, 2011). These sources, including biofuels, wind, solar, and hydroelectric power cannot power base-load electricity plants or broadly fuel the transportation industry. *See* C. Boyden Gray & Andrew R. Varcoe, *Octane, Clean Air, and Renewable Fuels: A Modest Step Toward Energy Independence*, 10 TEX. REV. L. & POL. 9, 12–15 (2005); Blair H. Moses, *The Energy Independence and Security Act of 2007: Can Biotechnology Help Overcome Potential Obstacles to Meeting Its Energy Goals?*, 3 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 41, 56–59 (2010).

[38] United Nations Framework Convention on Climate Change art. 2, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107.

[39] Kyoto Protocol to the Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22.

In 1997, President Clinton signed the Kyoto Protocol, but did not present it for ratification to the U.S. Senate, which expressed concern that the economic burdens of reducing carbon dioxide emissions would fall on industrialized nations.[40] Subsequently, President George W. Bush opposed the Kyoto Protocol, stating that it exempted developing nations, did not include two major types of pollutants, and would have had a significant negative economic impact on the United States.[41] President Obama participated in the Copenhagen Climate Conference that considered renewing the Kyoto Protocol, which is set to expire in 2012, and encouraged all nations to reduce GHG emissions. The conference resulted in a limited, non-binding agreement called the Copenhagen Accord.[42] This led to a December 2011 agreement by a conference of 194 countries to negotiate a new accord for binding emissions targets that would include the developing world, which is where most of the new sources of emissions are located.[43] As these efforts have shown, building global consensus takes time, but is achievable.

2. Balancing Environmentalism with Other Factors is Central to U.S. Energy Policy

U.S. policymakers have carefully balanced the above changes in GHG-related public policies against other aspects of U.S. energy policy, most notably the need to reduce dependence on foreign energy sources.[44] These issues have played out most dramatically with petroleum-based products, such as oil and gasoline, that are largely used in the transportation sector and for heating homes.[45] When demand for oil

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40 S. Res. 98, 105th Cong. (1997).

41 *See Bush: Kyoto Treaty Would Have Hurt Economy*, MSNBC.COM (June 30, 2005, 4:50 PM), http://www.msnbc.msn.com/id/8422343/ns/politics/t/bush-kyoto-treaty-would-have-hurt-economy/.

42 *See* Framework Convention on Climate Change, Copenhagen, Den., Dec. 7–19, 2009, *Report of the Conference of the Parties on its Fifteenth Session*, 4–9, U.N. DOC. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010), *available at* unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf#page=4; *see also* William Boyd, *Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage*, 32 U. PA. J. INT'L L. 457, 457 (2010) ("The 2009 United Nations Climate Conference in Copenhagen has been widely viewed as a failure.").

43 *See* Arthur Max, *Climate Conference President Says Agreement Reached on Course for Future Global Warming Talks*, CANADIAN BUS. (Dec. 11, 2011), http://www.canadianbusiness.com/article/61395--climate-conference-president-says-agreement-reached-on-course-for-future-global-warming-talks.

44 *See* JAY HAKES, A DECLARATION OF ENERGY INDEPENDENCE 15–20 (2008) (discussing the rapid growth in energy demand and policies employed by the United States to meet demand).

45 The transportation sector comprises approximately twenty-eight percent of the end-use energy in the United States, of which about ninety-five percent comes from petroleum

grew after World War II, the United States became a net importer of oil for the first time.[46] By the late 1950s, the country could no longer produce enough energy to meet its consumption.[47] Now, the United States consumes about twenty million barrels of oil per day, though it domestically produces less than half of that amount.[48] The remainder is imported from Canada, Mexico, Saudi Arabia, Venezuela, and Nigeria, among other countries.[49] These dynamics have placed considerable pressure on the United States to ally with countries hostile to American interests and have influenced U.S. military actions.[50]

U.S. policymakers have appreciated that energy shortages, whether caused by foreign influence or other factors, can have severe economic consequences for Americans of average means. In 2008, for example, when oil prices skyrocketed to over $145 a barrel,[51] causing gasoline prices to similarly soar to record highs,[52] the U.S. economy plunged further into a recession.[53] For some hourly workers, the increased cost of

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products. *See Use of Energy in the United States Explained*, *supra* note 18. For a discussion of petroleum-based product usage in heating homes, see *What is Energy?*, *supra* note 37.

[46] *See* HAKES, *supra* note 44, at 13; *see also* VITO A. STAGLIANO, A POLICY OF DISCONTENT: THE MAKING OF A NATIONAL ENERGY STRATEGY 2–69 (2001) (describing the rise of natural resources planning during the presidencies of Franklin Delano Roosevelt and Harry Truman).

[47] *See* U.S. ENERGY INFO. ADMIN., DOE/EIA-0384, ANNUAL ENERGY REVIEW 2010, at xix (2010), *available at* http://www.eia.gov/totalenergy/data/annual/pdf/aer.pdf.

[48] In 2010, the United States produced around 7.5 million barrels of oil per day and consumed approximately 19.15 million barrels per day. *See Oil: Crude and Petroleum Products Explained*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energyexplained/index.cfm?page=oil_home (click "Data & Statistics" tab) (last updated July 5, 2011). In comparison, the United States, in 2001, domestically produced around eight million barrels daily and consumed approximately 19.65 million barrels per day; consumption exceeded twenty million barrels per day throughout most of the previous decade. *See* Luis E. Cuervo, *OPEC From Myth to Reality*, 30 HOUS. J. INT'L L. 433, 446–47 (2008); Alex Kowalski, *Trade Deficit of U.S. Unexpectedly Surges on Increase in Crude-Oil Imports*, BLOOMBERG (July 12, 2011, 3:07 P.M), http://www.bloomberg.com/news/2011-07-12/trade-deficit-of-u-s-unexpectedly-surges-on-increase-in-crude-oil-imports.html; *Historical Data Graphs per Year*, INDEXMUNDI.COM, http://www.indexmundi.com/g/g.aspx?v=88&v=91&v=93&c=us&l=en (last visited Sept. 29, 2011).

[49] *See* Robert Rapier, *Top 10 Sources for U.S. Oil in 2009*, CONSUMER ENERGY REP. (Feb. 3, 2012, 4:55 PM), http://www.consumerenergyreport.com/2010/01/25/top-10-sources-for-u-s-oil-for-2009/.

[50] *See, e.g.*, Arthur Rizer, *The National Security Threat of Energy Dependence: A Call for A Nuclear Renaissance*, 2 HARV. NAT'L SEC. J. 193, 199–200 (2011) (tracing the relationship between United States' oil interests and war).

[51] *See* Rebekah Kebede, *Oil Hits Record Over $145*, REUTERS (July 3, 2008, 8:28 PM), http://uk.reuters.com/article/2008/07/03/us-markets-oil-idUKT14048520080703.

[52] *See id*.

[53] *See* James C. Cooper, *When Oil Prices Double, Recession Often Follows*, FISCAL TIMES (Apr. 25, 2011), http://www.thefiscaltimes.com/Columns/2011/04/25/When-Oil-Prices-

getting back and forth from a job made keeping those jobs infeasible after taxes, day care, and other such working-related expenses were calculated. Other impacts rippled throughout the U.S. economy, such as higher prices on food and other staples, which were felt broadly by many Americans.[54]

This relationship between affordable energy and the ability of Americans to meet their most basic needs has forced Congress to prioritize the goal of energy independence. While challenges on this front continue with petroleum-based products, there has been much success with the major sources of energy for electricity, including coal, natural gas, and nuclear power. In 1946, Congress enacted the Atomic Energy Act to spur development of nuclear energy for base-load electricity and establish a regulatory body, the Atomic Energy Commission.[55] In 1974, in response to the first oil crisis of the 1970s, Congress enacted legislation prohibiting power plants from relying on petroleum or natural gas as their primary source of power.[56] In 1978, Congress restricted construction of new power plants using oil or natural gas as a base load fuel, encouraging reliance on coal and nuclear energy.[57] Congress also enacted the Public Utility Regulatory Policies Act in 1978,[58] which marked an initial departure from the electricity regulatory model established by the Federal Power Act of 1920 and subsequent amendments in the 1930s,[59] and opened the path to greater competition in electric energy markets.[60] More recently, Congress

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Double-Recession-Often-Follows.aspx#page1 (discussing the relationship between rising oil prices and economic decline).

54 *See* INT'L ENERGY AGENCY, ANALYSIS OF THE IMPACT OF HIGH OIL PRICES ON THE GLOBAL ECONOMY 2 (2004), *available at* http://www.iea.org/textbase/npsum/high_oil04sum.pdf; *see also* Rizer, *supra* note 50, at 241 (describing the impact oil imports have on the U.S. balance of trade); Ambuj D. Sagar, Hongyan H. Oliver & Ananth P. Chikkatur, *Climate Change, Energy, and Developing Countries*, 7 VT. J. ENVTL. L. 4 (2006) (discussing disproportionate impacts of energy supply shortages on developing countries).

55 42 U.S.C. § 2011 (2006). The Energy Reorganization Act of 1974 abolished the Atomic Energy Commission and re-assigned its functions to two new agencies, the Energy Research and Development Administration and the Nuclear Regulatory Commission. *See* Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (codified as amended at 42 U.S.C. §§ 5801–5891 (2006)).

56 Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, § 2, 88 Stat. 246 (codified as amended at 15 U.S.C. §§ 792–798 (2006)).

57 Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 (codified as amended at 42 U.S.C. §§ 8301–8484 (2006)).

58 *See* Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 7, 15, 16, 42, and 43 U.S.C.).

59 16 U.S.C. § 824 (2006).

60 *See* Jeffery S. Dennis, *Twenty-Five Years of Electricity Law, Policy, and Regulation: A Look Back*, 25 NAT. RESOURCES & ENV'T 33, 34–35 (2010).

enacted the Energy Policy Act in 1992,[61] which gave rise to independent power producers,[62] the Energy Policy Act of 2005,[63] and the Energy Independence and Security Act of 2007.[64]

The initiatives advancing domestic production of fossil fuels all occurred at the same time Congress and the EPA were responding to concerns raised by environmental groups about global climate change.[65] U.S. energy policy has emphasized measured, balanced, and incremental solutions.

3. Climate Change Litigation is a Result of Frustration with this Balanced Approach

In the early 2000s, some environmentalists became frustrated with the need for this balanced, incremental approach.[66] They lamented that, as demonstrated by the recent failure of Congress to pass cap and trade legislation, the political will has never developed in the United States for environmental concerns over fossil fuel emissions to outweigh the other factors, such that the country would unilaterally limit GHG emissions.[67]

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61 Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered sections of 12, 16, 25, 26, 30, and 42 U.S.C.).

62 *See* Dennis, *supra* note 60, at 35.

63 Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 7, 10, 15, 16, 22, 26, and 42 U.S.C.).

64 Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (codified as amended in scattered sections of 2, 15, 40, 42, and 46 U.S.C.); *see also* Alison C. Graab, Note, *The Smart Grid: A Smart Solution to a Complicated Problem*, 52 WM. & MARY L. REV. 2051, 2067–71 (2011) (discussing key provisions of the Energy Policy Act of 2005 and Energy Independence and Security Act of 2007).

65 Even as U.S. policymakers were taking active steps with regards to global climate change allegations, "energy planners have [consistently] turned [back] to coal as an intermediate term (fifty to 100 years) or long-term (more than 100 years) energy source." A. Dan Tarlock, *Western Coal in Context*, 53 U. COLO. L. REV. 315, 318 (1982).

66 *See, e.g.*, Hari M. Osofsky, *Diagonal Federalism and Climate Change Implications for the Obama Administration*, 62 ALA. L. REV. 237, 246–53 (2011); Arnold W. Reitze, Jr., *Electric Power in a Carbon Constrained World*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 821, 837–79 (2010); Dennis, *supra* note 60, at 34–35; *see also* Darren M. Springer, *States Lead by Example on Energy Policy*, 23 NAT. RESOURCES & ENV'T 29 (2008) (discussing state efforts to reduce GHG emissions).

67 *See generally* CONG. BUDGET OFFICE, THE COSTS OF REDUCING GREENHOUSE-GAS EMISSIONS (2009) [hereinafter CBO, COSTS OF REDUCING GHGS] (analyzing the costs of various congressional proposals to reduce GHGs); CONG. BUDGET OFFICE, THE ECONOMIC EFFECTS OF LEGISLATION TO REDUCE GREENHOUSE-GAS EMISSIONS (2009) [hereinafter CBO, THE ECONOMIC EFFECTS OF LEGISLATION] (analyzing the economic impact of congressional proposals to reduce GHGs). According to the Congressional Budget Office ("CBO"), the proposed cap-and-trade provision in H.R. 2454 would reduce the United States' gross domestic product ("GDP") and would lead to slightly higher unemployment. CBO, COSTS OF REDUCING GHGS, *supra*, at 2. Additionally, the CBO estimates that the American Clean

The advocates filed several legal actions, including *American Electric Power Co.*, to force GHG limits through litigation.

With surprising candor, the lawyers acknowledged that the private tort suits, which were part of the overall litigation approach, were designed to force Congress and regulators to limit GHGs, not to actually subject the named companies to liability.[68] For example, Connecticut Attorney General Richard Blumenthal, the lead attorney general in *American Electric Power Co.*, said the suit was based on his "gut feeling [and] emotion, that CO_2 pollution and global warming were problems that needed to be addressed," and they were "brainstorming about what could be done" because action "wasn't coming from the federal government."[69] Echoed Maine Attorney General Stephen Rowe: "[I]t's a shame that we're here, here we are trying to sue polluters who are polluting because the federal government is being inactive."[70] Even Second Circuit Judge Peter Hall, who authored the Second Circuit opinion in *American Electric Power Co.* allowing the case to continue, has since conceded that "[y]ou really don't want a district judge supervising your relief in all of this stuff," but "[t]o the extent there is out there . . . some opportunity to pursue or continue to pursue a nuisance action, that may help in a political sense."[71]

B. Global Warming Allegations in the Courtroom

1. *Massachusetts v. EPA*

The first significant GHG emissions-related lawsuit was *Massachusetts v. EPA*, which sought to directly force the political

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Energy and Security Act of 2009 would lead to a reduction in GDP between 2015 and 2050. CBO, THE ECONOMIC EFFECTS OF LEGISLATION, *supra*, at 11.

68 *See, e.g.*, Robert Meltz, Cong. Research Serv., RL 32764, Climate Change Litigation: A Growing Phenomenon 1 (2008) ("Many proponents of litigation or unilateral state action freely concede that such initiatives are make-do efforts that, while making a small contribution to mitigating climate change, are also aimed at prodding the national government to act."); *see also* Daniel A. Farber, *Tort Law in the Era of Climate Change, Katrina, and 9/11: Exploring Liability for Extraordinary Risks*, 43 VAL. U. L. REV. 1075, 1091 (2009) ("Climate change litigation of various kinds is clearly on the rise, and the trend is to hold that potential damage from climate change is a legally cognizable injury.").

69 Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 COLUM. J. ENVTL. L. 335, 339 (2005) [hereinafter *Role of State Attorneys General*]. Attorney General Blumenthal led the first joint climate-change action. *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

70 *Role of State Attorneys General*, *supra* note 69, at 342–43.

71 *Key Judge Downplays Prospects for Successful Climate Change Suits*, CLEAN ENERGY REP. (Mar. 2, 2010), http://cleanenergyreport.com/20100302102610/Carbon-Control-Daily-News/News/key-judge-downplays-prospects-for-successful-climate-damages-suits/menu-id-202.html (alteration in original) (internal quotation marks omitted).

branches of government—namely the EPA—to regulate GHG emissions.[72] In this case, more than twenty parties—including twelve states, four territorial and local governments, and numerous trade associations[73]—petitioned for a review of the EPA's 2003 denial of a rulemaking request to regulate GHG emissions from motor vehicles.[74] The EPA denied the request on the grounds that the agency did not have the authority to regulate the emissions,[75] and alternatively asserted that even if it did have the authority, the piecemeal approach of regulating emissions solely for vehicles would conflict with the President's comprehensive approach to climate change.[76]

The U.S. Supreme Court ruled that, because GHGs fit within Congress's definition of pollutants, EPA has statutory authority to regulate the GHG emissions under the CAA.[77] As a result, the Supreme

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72 Massachusetts v. EPA, 549 U.S. 497, 505 (2007).

73 *Id*. Petitioners included California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *Id*. at 505 n.2. New York City, Baltimore, and Washington, D.C., the territory of American Samoa, and many private organizations, including the Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group also joined in the action. *Id*. at 505 n.3–4.

74 *See id*. at 505 (stating that the questions before the Court included "whether EPA has the statutory authority to regulate [GHG] emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute"); *see also* 42 U.S.C. § 7521(a)(1) (2006) (empowering the EPA Administrator to promulgate regulations governing air pollution from automobiles). Section 202(a)(1) of the CAA provides the EPA Administrator with authority to:

> [P]rescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

Id.

75 *Massachusetts*, 549 U.S. at 528; *see also* Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003) (noting that previous EPA General Counsels addressed the issue of EPA's authority to set control requirements for CO_2 emissions). They found that the CAA definition of "air pollutant" included CO_2 and therefore could be subject to regulation under the CAA if the applicable statutory criteria was met; both previous General Counsels also noted that the Agency had not made the requisite findings for such CO_2 emissions regulation. *Id.*

76 *Massachusetts*, 549 U.S. at 528.

77 *See id*. at 528 (noting that the EPA's argument that it lacked the authority under the CAA to regulate new vehicle emissions because carbon dioxide is not considered an air pollutant as defined in the Act was incorrect); *see also* Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 570–71 (2007) (concerning whether an energy company violated the CWA when it

Court set forth a means for EPA, should it decide to do so, to regulate GHG emissions pursuant to the Agency's congressional authority. Thus, *Massachusetts v. EPA* settled an issue of *administrative law*. The issue was solely whether the EPA's denial of a petition for a regulatory rulemaking was "arbitrary, capricious . . . or otherwise not in accordance with [statutory] law."[78] Such a review of administrative procedure and statutory interpretation is firmly within the province of the judiciary.[79] As it has made clear since, the Supreme Court was neither creating an avenue for courts to limit emissions nor subjecting private-sector interests to liability for contributing to global GHG emissions.[80]

2. Federal District Court Cases Against Private Entities

Soon after *Massachusetts v. EPA* was filed, four major global climate change tort lawsuits were launched against private-sector entities, namely the nation's largest utility, energy, and automobile companies.[81] These suits generally claim that the companies engaged in operations or made products that contributed to the build-up of GHGs in the atmosphere, causing the earth to warm, thereby creating a "public nuisance."[82] As discussed in Part I of this Article, the first of these cases,

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modified its coal power plants without first obtaining a permit); Nw. Envtl. Def. Ctr. v. Owens Corning Corp., 434 F. Supp. 2d 957, 959–60 (D. Or. 2006) (alleging a violation of the CAA for constructing a GHG-producing facility without a permit); James L. Arnone et al., *Global Climate Change Litigation*, *in* ENVIRONMENTAL LITIGATION: LAW AND STRATEGY 11–12 (Cary R. Perlman ed., 2009) (stating that the CAA empowers the EPA to set National Ambient Air Quality Standards ("NAAQS") to protect public health and the environment). Notably, only two published cases involve actions against the energy industry under the CAA, the most logical statute under which to bring claims related to GHG emissions. "The dearth of cases discussing [CAA] violations related to global climate change reflects the fact that the fight still centers on federal and state GHG regulation, not enforcement." *Id*. at 12.

78 *Massachusetts*, 549 U.S. at 528 (quoting 42 U.S.C. § 7607(d)(9) (2006)) (internal quotation marks omitted).

79 *See* 42 U.S.C. § 7607(d)(8) (2006).

80 *See* Arnone et al., *supra* note 77, at 8 ("Although the case is remarkable in itself, it was only the beginning of the wave of climate change litigation that the [United States] is now experiencing." (footnote omitted)).

81 *See generally* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (bringing suit against American Electric Power, a utility company), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (bringing suit against utility, energy, and oil companies); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (bringing suit against multiple automobile manufacturers); Comer v. Murphy Oil USA, Inc., 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (bringing suit against various oil and energy companies), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

82 *See Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005) (internal quotation marks omitted) (noting that allegations for common law public nuisance were attributed to

Connecticut v. American Electric Power, Co.,[83] was brought by several state attorneys general,[84] who sued to enjoin the defendant energy companies[85] to reduce their emissions of GHGs by specific percentages for a minimum of ten years.[86] In *California v. General Motors Corp.*,[87] the California attorney general sought to subject car manufacturers to liability for making cars that emit GHGs through vehicle exhaust.[88] Finally, two cases, *Comer v. Murphy Oil USA, Inc.* and *Native Village of Kivalina v. ExxonMobil Corp.*,[89] were filed by private individuals seeking to recover damages caused by weather-related events, including Hurricane Katrina, they alleged were caused or made more intense by global climate change.[90]

Federal district court judges in each case dismissed the claims as non-justiciable.[91] They concluded that deciding which GHG emitters in

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global warming which will allegedly cause irreparable harm to citizens and the environment).

83 *Id.*

84 *Am. Elec. Power Co.*, 406 F. Supp. 2d at 267. Respondents included Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin, and the City of New York. *Id.* This lawsuit was opposed by state attorneys general from more than twenty other states. *See* Brief of the States of Indiana, Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, West Virginia, and Wyoming, as Amici Curiae in Support of Petitioners, Am. Elec. Power Co. v. Connecticut (Feb. 7, 2011) (No. 10-174).

85 *Am. Elec. Power Co.*, 406 F. Supp. 2d at 267. Petitioners named American Electric Power Co., American Electric Power Service Corporation (together, "AEP"), the Southern Company, Tennessee Valley Authority, Xcel Energy, Inc., and Cinergy Corporation as defendants.

86 *See Am. Elec. Power Co.*, 131 S. Ct. at 2534 (noting that the plaintiffs sought injunctive relief requiring the defendants to reduce their carbon dioxide emissions for "at least a decade" (internal quotation marks omitted)).

87 No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

88 *See id.* at *1 (alleging that the six defendants produce vehicles that emit over 289 million metric tons of carbon dioxide, which represents over twenty percent of the human-generated carbon dioxide emissions in the United States).

89 Comer v. Murphy Oil USA, Inc., No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009).

90 *See Comer*, 585 F.3d at 859 (alleging that defendants' emissions of GHGs resulted in global warming, which increased sea levels and therefore added to the catastrophe of Hurricane Katrina); *Kivalina*, 663 F. Supp. 2d at 868 (alleging that global warming caused by defendants' carbon dioxide emissions caused harsher winter storms, which resulted in erosion of the Kivalina coast).

91 *See Kivalina*, 663 F. Supp. 2d at 883 (holding that the plaintiffs did not have standing to bring claims and the questions presented were barred by the political question doctrine); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *16 (N.D. Cal.

the United States should be subject to liability for global changes in weather patterns was an inherently political—not judicial—function.[92] As the *American Electric Power, Co.* trial court stated, "[t]he scope and magnitude of the relief [p]laintiffs seek reveals the transcendently legislative nature of this litigation."[93] To adjudicate the claims, the trial courts concluded they would have to cap defendants' emissions "by judicial fiat."[94] This would require courts to determine appropriate levels of GHG emissions; whether liability should rest with only a small segment of the industry; and the economic and national security implications of curtailing these emissions.[95] The *American Electric Power, Co.* trial court also stated that, "[b]ecause resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, 'an initial policy determination of a kind clearly for non-judicial discretion' is required."[96] Such weighing of interests, the court reasoned, is "consigned to the political branches, not the [j]udiciary."[97] Otherwise, the courts would be "exposing automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce within those [s]tates."[98]

Even though *Comer* and *Kivalina* were brought by private plaintiffs, not state attorneys general, the trial judges viewed the lawsuits in the same light as the other cases. Judge Dennis, in *Comer*, said the claims were embodiments of the ongoing "debate" over global climate change policy that "simply has no place in the court" until Congress sets standards that judges and juries can apply to decide cases: "These policy decisions are best left to the executive and legislative branches of the government, who are not only in the best position to make those decisions but are constitutionally empowered to do so."[99] The *Kivalina* trial judge decried that the lack of judicially discoverable and

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Sept. 17, 2007); *Comer*, 2007 WL 6942285, at *1; *Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005).

92 *See Kivalina*, 663 F. Supp. 2d at 871; *Gen. Motors*, 2007 WL 2726871, at *6–8; *Am. Elec. Power Co.*, 406 F. Supp. 2d at 272, (noting that decisions of this nature are best left to the legislative and executive branches and are not to be resolved by the judiciary); *see also Comer*, 585 F.3d at 860 n.2 (summarizing trial judge's ruling from the bench).

93 *Am. Elec. Power Co.*, 406 F. Supp. 2d at 272.

94 *Id.* at 274.

95 *Id.* at 272.

96 *Id.* at 274 (quoting Vieth v. Jubelirer, 541 U.S. 267, 278 (2004)).

97 *Id.*

98 California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *14 (N.D. Cal. Sept. 17, 2007) (citation omitted).

99 Comer v. Murphy Oil USA, Inc., 585 F.3d 855, 860 n.2 (2009).

manageable standards prohibited courts from "render[ing] a decision that is principled, rational, and based upon reasoned distinctions."[100]

These courts also explained that the "global" scope of these cases made climate change claims completely different from traditional public nuisance cases in which plaintiffs have successfully established liability for discrete, identifiable sources of pollution.[101] As the trial judge in *General Motors* stated, "there are multiple worldwide sources of atmospheric warming across myriad industries and multiple countries."[102] Further, the *Kivalina* judge wrote, "there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group [sic] at any particular point in time," or at any particular place.[103]

As a result, there are endless combinations and permutations of plaintiffs and defendants with no "manageable method of discerning the entities that are creating and contributing to the alleged nuisance."[104] This allows the plaintiffs to be in the position of picking winners and losers in the global climate change debate, as the litigation demonstrates *their* "political judgment that the two dozen [d]efendants . . . should be the only ones to bear the cost of contributing to global warming." [105] This situation, *Comer* continued, created "daunting evidentiary problems" for showing that any individual defendant's GHG emissions "affected the weather system."[106] In short, the significant trial management challenges these cases presented were judicially insurmountable and, as the trial judges ruled, raised constitutional concerns implicating the political question doctrine.[107]

Despite the trial courts' consensus, a panel of the Second Circuit Court of Appeals in *American Electric Power, Co.* and, initially, a panel of the Fifth Circuit Court of Appeals in *Comer* disagreed. Both courts,

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100 Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009) (citing Alperin v. Vatican Bank, 410 F.3d 532, 552 (9th Cir. 2005)).

101 *Gen. Motors Corp.*, 2007 WL 2726871, at *15.

102 *Id.*

103 *Kivalina*, 663 F. Supp. 2d at 880.

104 *Gen. Motors Corp.*, 2007 WL 2726871, at *15.

105 *Kivalina*, 663 F. Supp. 2d at 877.

106 Comer v. Murphy Oil USA, Inc., No. 1:05-CV-436-LG-RHW, 2007 WL 6942285, at *4 (S.D. Miss. Aug. 30, 2007).

107 *See Kivalina*, 663 F. Supp. 2d at 883, 880 (stating that the plaintiffs claim was barred, and granting defendants' motion to dismiss); *Gen. Motors Corp.*, 2007 WL 2726871, at *15 (noting that the court was left without a manageable method of discerning the creators of the alleged nuisance); *Comer*, 2006 WL 1066645, at *3 (noting that the broad classes of parties is not practical for this type of civil suit); *Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005) (stating that the questions presented are not ones for the judiciary to answer).

within weeks of each other, overturned the lower court dismissals and allowed the cases to proceed, though the Fifth Circuit later vacated that ruling.[108] The Second Circuit ruling, in particular, provided a major appellate victory for regulating GHG emissions through the judiciary.[109] It set forth a robust view of common law torts to gap fill federal legislation, stating that until federal laws and regulations address global climate change, "federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by [GHGs]."[110] Meanwhile, California's attorney general voluntarily withdrew the claim in *General Motors*,[111] and *Kivalina* is still pending in the Ninth Circuit.[112]

3. The Supreme Court's Ruling in *American Electric Power Co. v. Connecticut*

The U.S. Supreme Court granted *certiorari* in the Second Circuit case, marking the first time the High Court had agreed to hear a tort-based dispute alleging direct harm from global climate change. The Court unanimously reversed the Second Circuit's holding that had allowed the case to proceed on federal common law public nuisance grounds.

In an opinion authored by Justice Ginsburg, the Court reasoned that because Congress, through the CAA, "delegated to EPA the decision whether and how to regulate carbon-dioxide emissions" of the defendants, it acted to "displace[] [any] federal common law" right of action that might have existed.[113] The Court made clear that

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[108] *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 315 (2d Cir. 2009) (holding that the district court erred in dismissing the complaints on political question grounds and that plaintiffs had standing to bring the claims); Comer v. Murphy Oil USA, 585 F.3d 855, 860 (5th Cir. 2009) (concluding that plaintiffs had standing to assert claims and that those claims did not present nonjusticiable political questions); *see also* Comer v. Murphy Oil USA (*Comer II*), 607 F.3d 1049, 1053 (5th Cir. 2010) (noting that after reinstating the case, the Fifth Circuit decided to rehear the case en banc; however, a number of the judges had to recuse themselves, causing the court to lack a quorum to rehear the case).

[109] *Am. Elec. Power Co.*, 582 F.3d at 321, 323 ("Simply because an issue may have political implications does not make it non-justiciable."). The *Comer* plaintiffs re-filed this case and, as this Article was being sent to print, the federal district court dismissed the case again. *See* Memorandum Opinion and Order Granting Defendants' Motion to Dismiss, Comer v. Murphy Oil USA, Inc., No. 1:11-CV-00220-LG-RHW (S.D. Miss. Mar. 20, 2012).

[110] *Id.* at 392–93 (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 106 (1972)) (internal quotation marks omitted).

[111] Amanda Bronstad, *California's Global Warming Suit Melts Away*, LAW.COM (June 26, 2009), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202431782836.

[112] *See* Peter Glaser & Douglas A. Henderson, *Supreme Court Observations:* AEP v. Connecticut, WASH. LEGAL FOUND. (June 22, 2011), http://wlflegalpulse.com/2011/06/22/supreme-court-observations-aep-v-connecticut/ (noting that the *Kivalina* case remains pending in the Ninth Circuit).

[113] *See Am. Elec. Power Co.*, 131 S. Ct. at 2538.

displacement of the federal common law claim occurred when Congress enacted the CAA, which delegates authority to the EPA, and not from any specific EPA action. Thus, this decision echoed and reinforced the avenue for addressing emissions set forth in *Massachusetts v. EPA*.[114] In an ironic way, *Massachusetts*, which advocates of climate change litigation had relied on to support the private tort suits, laid the predicate for the Court's assertion that a "parallel track" through the common law did not exist to achieve the same end of regulating GHG emissions.[115]

III. *AMERICAN ELECTRIC POWER CO.*'S IMPACT ON THE FUTURE OF GLOBAL CLIMATE CHANGE LITIGATION

The import of the Supreme Court ruling in *American Electric Power Co.* is not limited to its displacement holding; the Court went to significant lengths to express the practical reasons why empowering the judiciary to regulate GHG emissions would be ill-advised regardless of the cause of action.[116] This theme was first discussed during oral arguments, as Justice Ginsberg signaled that she was troubled that climate change litigation would "set up a district judge . . . as a kind of super EPA."[117]

In the Court's opinion, she explained that judges do not have the basic tools the EPA has at its disposal to engage in the "complex balancing" necessary for determining appropriate levels of GHG emissions for American utilities and other GHG emitters.[118] For example, she stated that "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."[119] "[J]udges are confined by a record comprising the evidence the parties present."[120] Also, unlike Congress and EPA, "[j]udges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators" that

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114 *See id*. at 2532–33.

115 *Id.* at 2538. As the Court even stated, "[i]f EPA does not *set* emissions limits for a particular pollutant or source of pollution, [s]tates and private parties may petition for a rulemaking on the matter," but they may not pursue private tort litigation under a theory such as federal common law public nuisance. *Id.* (emphasis in original).

116 *See id*. at 2539 (noting that the prescribed order of decision-making under the Act is: (1) the expert administrative agency; and (2) federal judges, which is a reason to resist setting emissions standards by judicial decree).

117 Transcript of Oral Argument at 37–38, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (No. 10-174).

118 *Am. Elec. Power Co.*, 131 S. Ct. at 2539.

119 *Id*. at 2539–40.

120 *Id*.

would facilitate an objective, comprehensive evaluation of GHG emission limits.[121] The Court continued that it was "fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of [GHG] emissions,"[122] and that setting GHG emission limits "is undoubtedly an area 'within national *legislative* power.'"[123]

A. The Requirements of Common Law Liability Do Not Provide a Valid Process for Fairly Determining Who, If Anyone, Should Have to Restrict Their GHG Emissions

The Supreme Court's concerns with global climate change tort litigation appears to be that, regardless of the tort or court, it is impossible to assign liability in a legally principled, judicious manner. As suggested by the Court's opinion, there are two hurdles common to all tort theories that cannot be overcome: no defendant can be deemed the "cause" of an injury allegedly stemming from global climate change and judicially-available remedies will not cure, stop, or slow GHG accumulation in the atmosphere. If a plaintiff cannot prove that the defendant caused her harm or the court cannot order an appropriate remedy, there is no liability and the courts cannot "regulate" the defendant's conduct.

1. Climate Change Injuries, Even if They Exist, Are Not Caused By Any Defendant

The first task for any government body in regulating conduct is to determine which group of people or businesses must abide by its rulings. As the Supreme Court noted, the EPA can decide whose GHGs to regulate if it chooses to do so.[124] By contrast, courts cannot choose who to "regulate." First, they can only apply the law to those named in the litigation. As history has shown, plaintiffs' lawyers would prioritize companies perceived to have "deep pockets" and a major stake in the litigation such that they might settle or pay an award. Other businesses and individuals that emit GHGs would not be before the court.[125] In addition, all tort law, including public nuisance theory, can only subject an entity to liability, if the entity is a legal cause of the alleged injury;

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121 *Id.* at 2540.

122 *See id.* ("The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.").

123 *Id.* at 2535 (emphasis added) (quoting Henry J. Friendly, *In Praise of* Erie – *And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964)).

124 *See id.* at 2537–39.

125 *See supra* Part II.B (discussing climate change tort litigation).

there must be "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered."[126]

It has become clear through the cases to date that actual causation cannot be established in global climate change cases without grossly distorting the meaning of these requirements.[127] The release of carbon dioxide or other GHGs is not particular to any individual company or industry; numerous human activities and natural occurrences release these gases into the atmosphere. For example, GHGs are released through fossil fuel combustion at factories, power plants, and other manufacturing facilities as well as through exhaust from airplanes, ships, cars, trucks, and many other types of vehicles.[128] These sources are also stationed throughout the world, with an estimated eighty-three percent of GHG emissions occurring outside of the United States.[129]

Further, there are numerous natural sources of GHGs, including volcanic eruptions, ocean-atmosphere exchange (where the ocean absorbs and releases carbon dioxide), and, of course, the respiration processes of living, aerobic organisms (i.e., breathing).[130] These GHGs are then mixed with all other GHGs that have been emitted over the past 150 years in the atmosphere, where GHGs from any one source cannot be distinguished from any other.[131] The allegations in these cases are

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126 W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 41, at 263 (W. Page Keeton ed., 5th ed. 1984).

127 In tort litigation, a plaintiff alleging a climate change injury must be able to show that a defendant's emissions are the actual cause of global climate change and, in turn, the specific injury alleged. Also, the defendant's conduct must have been the proximate cause of the alleged injury, i.e., the specific injury to the plaintiff must have been reasonably foreseeable as a result of the defendant's conduct. *See* Schwartz, et al., *supra* note 11, at 834; *see* FOWLER V. HARPER ET AL., THE LAW OF TORTS § 20.2 (1986) ("Through all the diverse theories of proximate cause runs a common thread; almost all agree that defendant's wrongful conduct must be a cause in fact of plaintiff's injury before there is liability.").

128 *See Human-Related Sources and Sinks of Carbon Dioxide*, EPA, http://www.epa.gov/climatechange/emissions/co2_human.html (last updated Apr. 14, 2001) (listing a variety of human activities that lead to carbon dioxide emissions).

129 *See* Kyoto Protocol to the Framework Convention on Climate Change, annex A, Dec. 11, 1997, 2303 U.N.T.S. 148 (noting that under the Kyoto Protocol, the following six gases have been categorized as GHGs: (1) carbon dioxide; (2) methane; (3) nitrous oxide; (4) hydrofluorocarbons; (5) perfluorocarbons; (6) and sulphur hexafluoride); *see also* Jane A. Leggett et al., Cong. Research Serv., RL 34659, China's Greenhouse Gas Emissions and Mitigation Policies 7 (2008) (stating that carbon dioxide is absorbed by naturally occurring activities such as forest management and land use).

130 *See Natural Sources and Sinks of Carbon Dioxide*, EPA, http://www.epa.gov/climatechange/emissions/co2_natural.html (last updated Apr. 14, 2011) (noting the primary natural processes that release carbon dioxide into the atmosphere).

131 *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 345 (2d Cir. 2009) (noting that plaintiffs could not allege particular harms that would be caused directly by defendants' actions, nor could they allege that the emissions alone would cause future harm).

that this 150-year accumulation and mix of GHGs has materially increased the earth's air and water temperatures, melting polar ice, raising sea levels, and causing more frequent and intense weather events. These events have, in turn, allegedly injured plaintiffs beyond that which would have occurred if the GHGs had not collected in the atmosphere.[132]

Therefore, even if the allegations are true—and the Supreme Court "caution[ed]" that it "endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change"[133]—the six utilities named in *American Electric Power Co.* did not cause the alleged injuries. First, the Supreme Court made clear that the defendants were not the actual, "but-for" cause of the states' and land trusts' specific alleged injuries. The Court said that even the plaintiffs acknowledged that "[s]imilar suits could be mounted . . . against 'thousands or hundreds or tens' of other defendants fitting the description 'large contributors' to carbon-dioxide emissions."[134] The same is true for the defendants in *Kivalina* and *Comer*, as no one can say that any handful of companies caused a hurricane to strengthen or ice barrier to melt.[135]

These companies also cannot be deemed the legal cause of the injuries, which looks at "the significance of the defendant's conduct [and] the appropriate scope of liability," as well as "heavy elements of moral and policy judgment."[136] The above Rube Goldberg-esque

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132 *See supra* note 89 and accompanying text (noting plaintiffs' claims that GHG emissions led to weather related tragedies); *see also Am. Elec. Power Co.*, 582 F.3d at 314 (discussing how plaintiffs' generally assert that these climate changes are adverse and seek damages without attempting to tie the alleged effect to any specific event or set of injuries).

133 *Am. Elec. Power Co.*, 131 S. Ct. at 2533 n.2. As this statement suggests, the law and policy arguments, both in *American Electric Power, Co.* and this Article, are independent of the scientific veracity of the factual allegations.

134 *Id.* at 2540.

135 It is said that:

> An intervening force is one which joins with the defendant's conduct to cause the injury. Such a force, whether it be human, animal, mechanical, or natural is considered intervening because it occurs after the defendant's conduct. An intervening force will only act to cut off proximate cause if it is characterized as superseding . . . . [W]hile courts are quick to find negligence of a third party foreseeable and hence not superseding, criminal acts are often characterized as extraordinarily unforeseeable and hence superseding.

JOHN L. DIAMOND, CASES AND MATERIALS ON TORTS 256 (1st ed. 2001). Generally, a party is not liable unless it "increase[s] an unreasonable risk of harm through its intervention." KEETON ET AL., *supra* note 126, at 305.

136 DAN B. DOBBS, THE LAW OF TORTS § 167, at 408 (2000). For example:

> [S]uppose that a surgeon negligently performs a vasectomy. Because the surgery was negligently performed, the patient fathers a child. The child, at the age of [thirteen], sets fire to the plaintiff's barn. Is the

causation allegations demonstrate the remoteness of the conduct to the harm alleged. Specific injuries from Hurricane Katrina, for example, are not among the harms any reasonable person who emits GHGs would have foreseen as a result of its activities.

Without the causation filter, no defendant could avoid future liability unless they stop all GHG emissions, which cannot occur so long as fossil fuels continue to be a staple of American energy consumption. Allowing such cases to proceed would mean that any time someone sustains an injury allegedly caused by global climate change, including droughts, severe weather, hurricanes, and warmer temperatures, the same defendants could be subject to liability over and over again.[137] As a result, and in addition to these practical concerns, the inability to establish causation in these cases raises constitutional issues because defendants would be denied their due process safeguard of notice that it was potentially engaged in liability-inducing activities.

2. There is No Remedy the Courts Could Order that Would Address the Alleged Injuries

There also is no remedy the courts could order that would address the alleged injuries. Even if plaintiffs won *American Electric Power Co.* and the six utilities named had "to cap [their] carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade,"[138] the plaintiffs' alleged harms would not be redressed. The reduction—or even the elimination—of GHG emissions by any defendant, even under plaintiffs' allegations, would have no effect on stopping or slowing climate change. The multitude of other sources throughout the world would render such a remedy hollow. Therefore, isolating the defendants in *American Electric Power Co.* could not, as plaintiffs' suggest, lead to "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector."[139]

Further, given the lack of any overarching standards, different jurisdictions would undoubtedly develop different emission limits. What one judge decides is a reasonable limit for the defendant, another

> surgeon liable for the loss of the barn? He was negligent in performing the vasectomy, and his negligence is a cause in fact of the fire and the loss of the barn. . . . Courts are likely in such a case to say that the surgeon's negligence is not a proximate cause of the harm done.

Id. § 180, at 444.

137 *See* Gibson v. Am. Cyanamid Co., 719 F. Supp. 2d 1031, 1034 (E.D. Wis. 2010) (holding that risk contribution violates due process).

138 131 S. Ct. at 2534 (internal quotation marks omitted).

139 *Id.* at 2539.

judge may decide is unreasonable. Also, an emissions limit for one company or industry may not be reasonable for another. This "lack [of] authority to render precedential decisions binding other judges, even members of the same court," was a significant concern of the Supreme Court.[140] The resulting liability system would create legal chaos.[141]

Any regulation of GHGs, therefore, cannot be aimed at remedying a specific injury, but to address, to the extent needed, broad-based environmental allegations of climate change. As the Supreme Court wisely observed, given modern society's pervasive reliance on fossil fuels, not even Congress could "preemptively prohibit every discharge of carbon dioxide unless covered by a permit."[142] Rather, for each industry and operator, "standard[s] of performance" would have to be set based on long-term goals.[143] As the Supreme Court explained, agencies under congressional authorization are uniquely competent to perform this task.[144] Consider the balancing EPA undergoes in implementing the CAA. It "must 'tak[e] into account the cost of achieving [emissions] reduction and any nonair quality health and environmental impact and energy requirements."[145] It "may 'distinguish among classes, types, and sizes' of stationary sources in apportioning responsibility for emissions reductions."[146] It also "may waive compliance with emission limits to permit a facility to test drive an 'innovative technological system' that has 'not [yet] been adequately demonstrated.'"[147]

For these reasons, which are common to all tort theories, it would be arbitrary and unfair for any individual or group to be blamed for causing or be solely accountable for remedying a specific climate change injury. By going beyond its holding in *American Electric Power Co.* that the CAA displaced federal common law and laying the foundation for the above points, the Supreme Court provided a roadmap for how this decision should be followed in future climate change tort cases.

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140 *Id.* at 2540.

141 *See supra* Part II.B.2 (noting that the courts lack judicially manageable standards in such cases).

142 *Am. Elec. Power Co.*, 131 S. Ct. at 2538.

143 *Id.*

144 *Id.*

145 131 S. Ct. 2527, 2539 (alterations in original) (citations omitted).

146 *Id.* (citations omitted).

147 *Id.* (alteration in original) (quoting 42 U.S.C. § 7411(j)(1)(A)).

B. American Electric Power Co.*'s Impact on Climate Change Going Forward*

Advocates of global climate change tort suits have downplayed the Supreme Court's policy statements in *American Electric Power Co.*, both in the media and in a briefing to the Ninth Circuit as to how *American Electric Power Co*. should be applied in *Kivalina*.[148] In an effort to narrow the ruling, they have focused on the following three issues that may determine how lower courts will apply *American Electric Power Co.* to the cases before them. As this section of the Article discusses, the Court's roadmap should be followed, regardless of whether the controlling law, parties involved, or remedies sought are identical to *American Electric Power Co.*

1. State vs. Federal Claims

The first argument for climate change litigation proponents is that state common law claims remain fully viable for regulating GHG emissions. The argument is based on the fact that *American Electric Power Co.* held that Congress displaced only federal common law claims and the legal analysis for why the federal claims were displaced does not apply to state claims.

While the premise for this argument is true, the conclusion is inconsistent with *American Electric Power Co*. First, the Court did not bar state common law climate change actions because those claims were not before the Court. The Court noted at the end of its opinion that "plaintiffs also sought relief under state law, in particular, the law of each [s]tate where the defendants operate power plants. The Second Circuit did not reach the state law claims because it held that federal common law governed."[149] Because the parties had not "addressed the availability of a claim under state nuisance law," the Court left "the matter open for consideration on remand."[150] The Supreme Court's lack of opportunity to squarely address state claims is far different from endorsing them.

Second, from a legal perspective, Congress cannot "displace" state claims.[151] To determine whether state claims remain viable, the Court would have to determine whether Congress, in enacting the CAA,

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148 *See* Brief for Appellant, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. Mar. 10, 2010).

149 *Am. Elec. Power Co.*, 131 S. Ct. at 2540 (citations omitted).

150 *Id.*

151 *Id.*

expressly or impliedly preempted state actions.[152] Preemption analyses are based on congressional intent rather than simply whether Congress entered the relevant field, which is the test the Court applied in holding that Congress displaced federal actions.[153] The fact that the Court did not undertake a preemption analysis in *American Electric Power Co.* has been played up by climate change tort litigation advocates in hopes of finding a federal or state court judge that will allow a state-based claim to proceed beyond a motion to dismiss.

The legal distinctions between federal and state actions, as well as displacement and preemption, though, do not overcome the Court's statements of policy that the judiciary is simply not the appropriate branch for making determinations on whether and how to cap GHG emissions.[154] The Court stated that there ought not be a "parallel track" of tort litigation, and EPA regulation does not distinguish parallel tracks of federal tort litigation from state tort litigation.[155] The policy rationale is the same. In oral argument, Justice Kennedy identified this point and the legal awkwardness of only having a federal cause of action before them. In anticipation that some might bring such a state claim, he observed that "[i]t would be very odd"—in the illogical sense—for state courts to set national caps on GHG emission when federal courts are barred from doing so.[156] The Court also wrote in its opinion that because of the national scope of this issue, "here, borrowing the law of a particular [s]tate would be inappropriate."[157] *American Electric Power Co.* simply did not create an opportunity for state courts to take these cases and endeavor to set national energy policy on emission caps.[158]

2. Who Has Standing To Bring Which Claims?

The second battleground is whether the plaintiffs bringing the action have constitutional standing to seek a remedy against the named defendants. Constitutional standing is a case-by-case assessment, determined anew for the parties, cause of action, and facts in each individual case. A plaintiff's "irreducible constitutional minimum of standing" is to show an "injury in fact" that is "fairly . . . trace[able] to

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152 *See id.* ("[T]he availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the [CAA].").

153 *Id.* at 2537.

154 *See id.* at 2539.

155 *Id.* at 2538.

156 Transcript of Oral Argument at 32, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (No. 10-174).

157 *Am. Elec. Power Co.*, 131 S. Ct. at 2536.

158 *See id.* at 2531.

the challenged action of the defendant" and "likely . . . redress[able] by a favorable decision."[159]

In *Massachusetts v. EPA*, the Supreme Court determined that state attorneys general had constitutional standing to file an administrative law action against the EPA to require the EPA to make decisions regarding GHG emission standards.[160] In distinguishing attorneys general from other types of plaintiffs, the Court wrote that "[i]t is of considerable relevance that the party seeking review here is a sovereign [s]tate and not . . . a private individual."[161] The Court continued that under the CAA, "Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the emission of [GHGs]" and "recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious."[162] Accordingly, "[g]iven that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solitude in our standing analysis."[163] The Court reasoned that the remedy sought, namely broad EPA regulations of GHGs, would reduce the risk that such harm would occur, thereby sufficiently redressing the harm Massachusetts alleged.[164]

In *American Electric Power Co.*, the Supreme Court was presented with the issue of whether the attorneys general possessed constitutional standing to bring a tort action against private entities to cap emissions.[165] The issue was not discussed in any detail. The opinion simply states that four of the justices believed the issue was settled in *Massachusetts v. EPA*, and four justices would hold that none of the plaintiffs have Article III standing.[166] Thus, "by an equally divided Court, [it affirmed] the Second Circuit's exercise of jurisdiction."[167] Climate change litigation proponents will likely extrapolate the granting of standing in *Massachusetts v. EPA* and the affirmation of the Second Circuit's granting of standing in *American Electric Power Co.* to conclude that the standing question has been answered: Standing exists for global climate change cases generally, regardless of the plaintiffs bringing the cases or purpose of the action.

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159 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (alterations in original) (internal quotation marks omitted).

160 549 U.S. 497, 517–18 (2007).

161 *Id.* at 518.

162 *Id.* at 519–20 (internal quotation marks omitted).

163 *Id.* at 520.

164 *See id.*

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

166 *Id.* at 2534.

167 *Id.* at 2535.

Any fair reading of *Lujan*, *Massachusetts v. EPA*, and *American Electric Power Co.* suggests that such an argument should fail. A court must engage in a fresh analysis of traceability and redressability in each case for the specific plaintiffs, specific defendants, specific harms alleged, and specific remedies sought. With respect to attorney general suits over global climate change, just because the Court provided special standing to states to seek federal administrative action in *Massachusetts v. EPA*, it does not mean that they also have standing to bring tort suits or other actions alleging global climate change harms against individual defendants. The Second Circuit in *American Electric Power Co.* glossed over this critical distinction in allowing state attorneys general standing for a climate change tort case, conceding only that "[s]tate standing is not monolithic and depends on the role a state takes when it litigates in a particular case."[168] Unfortunately, the four justices that would have extended standing to the attorneys general in the *American Electric Power Co.* tort action provided no guidance for future courts as to how the affirmation of the Second Circuit's ruling should be applied to other cases.

From a traceability and redressability standpoint, the two cases present very different issues. As discussed above, the Court in *Massachusetts* explained that when Congress has afforded a procedural right to challenge an agency's actions, litigants "can assert that right without meeting all the normal standards for redressability and immediacy" that satisfy standing.[169] Thus, in *Massachusetts*, states needed to show only that the EPA improperly discounted or ignored evidence suggesting GHG emissions could *generally* lead to global climate change, and that regulating them would *generally* reduce the risk of the alleged climate change harms to the state.[170] By contrast, a tort action against a private entity requires a plaintiff to prove standing with much greater specificity. It must show a *specific* injury directly traceable to a particular defendant's emissions *and* that the remedy sought against

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168 Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 335 (2d Cir. 2009) (citing Connecticut v. Cahill, 217 F.3d 93, 97 (2d Cir. 2000)). The court, having additionally determined that the case did not present non-justiciable political questions that would act to bar standing, went on to hold that the claimants satisfied the Supreme Court's basic standing requirements. *Id.* at 338. The Supreme Court, in *Lujan v. Defenders of Wildlife*, laid out its basic standing analysis, which requires a claimant to show injury, causation, and redressability. 504 U.S. 555, 560–61 (1992); *see supra* Part II.B (discussing climate change tort litigation).

169 Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007) (internal quotation marks omitted).

170 *See id.* at 499.

that particular defendant would redress that specific injury.[171] As discussed in the previous section, this presents an insurmountable hurdle.[172] No such correlation can be made given the allegations that climate change is the result of 150 years of global emissions from all over the world comingling in the atmosphere.[173]

It is abundantly clear, though, that none of these rulings provide any support for a finding that private plaintiffs have standing to bring global climate change tort suits against individual defendants. Just the opposite is true. In *Massachusetts*, the Court took pains to explain that its holding was premised on the fact "that [s]tates are not normal litigants for the purposes of invoking federal jurisdiction."[174] Further, the four justices that would have granted standing in *American Electric Power Co.* clarified that *Massachusetts v. EPA* would only apply to "at least some plaintiffs," implying that the private plaintiffs and possibly the City of New York would not have standing on their own.[175] In *Kivalina*, therefore, the private community in Alaska will have to show that the melting of the sea ice barrier can be traced to the *specific* emissions of the defendants and that the remedy sought will redress that injury. Also, the *Comer* plaintiffs will have to prove that Hurricane Katrina can be traced to the specific defendants' emissions. Case law suggests that the Supreme Court would not extend the standing granted to attorneys general in *Massachusetts v. EPA* to those cases.

3. Does it Matter if Plaintiffs Seek Injunctive Relief, Damages, or Another Remedy?

Another way climate change litigation proponents have tried to limit *American Electric Power Co.* is by arguing that the case only precludes actions that seek to directly regulate emission levels, namely injunctive relief and abatement, and not money damages. In *Kivalina*, this argument has already surfaced, as plaintiffs have pointed to the Supreme Court's statement of holding "that the [CAA] and the EPA actions it authorizes displace any federal common law right *to seek abatement* of carbon-dioxide emissions from fossil-fuel fired power plants."[176] They

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171 *See id.* at 517 ("[A] litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.").

172 *See supra* Part III.A (arguing that courts are not equipped to determine tort liability for climate change cases).

173 *See Am. Elec. Power Co.*, 582 F.3d at 336–38.

174 *Massachusetts*, 549 U.S. at 518.

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

176 *Id.* at 2537 (emphasis added).

argue that they are only seeking damages to be compensated for the "severe" harm caused by global climate change, not to regulate or abate emissions. Even if society determines that the current levels of emissions are to continue, the argument is that those who are severely injured by that conduct should still be able to seek monetary damages for those severe injuries.[177]

While this argument may sound appealing, it is not consistent with the law. The Supreme Court, as well as other courts, have consistently held and repeatedly reaffirmed that tort damages "regulate" conduct in the same way that state legislation and regulations do.[178] In numerous preemption rulings, the Supreme Court has made clear that state "positive" law and tort law are equivalent because both impose legal requirements.[179] This is because a person subject to liability for certain conduct will have to change that conduct to avoid future liability in the same way it would change conduct to comply with statutes and regulations. For example, in *Bates v. Dow Agrosciences LLC*,[180] the Court held that common-law actions were preempted because a finding for monetary liability would impose state law requirements for labeling or packaging in addition to or different from those required under the applicable federal laws.[181] In fact, the purpose of using tort litigation damages to regulate GHG emissions is implicit in the title of the Valparaiso University School of Law's symposium—*Civil Litigation as a Tool for Regulating Climate Change*—for which this Article was written. Such tort claims, which do not go through legislative or regulatory hearings, have the potential to have a far greater, unfair, and inconsistent

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177 In *Kivalina*, for example, the plaintiffs wrongly argued to the Ninth Circuit that "[t]he question of unreasonableness in a damages action is therefore not one of whether the defendant's conduct is reasonable or unreasonable but rather one of who should bear the cost of that conduct." Brief for Appellant at 25, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. Mar. 10, 2010).

178 *See infra* Part IV.C (explaining why regulation through litigation is not feasible).

179 *See* Riegel v. Medtronic, Inc., 552 U.S. 312, 325 (2008) ("[E]xcluding common-law duties from the scope of pre-emption would make little sense.").

180 544 U.S. 431 (2005).

181 *See id.* at 432–33 (holding that a provision of the Federal Insecticide, Fungicide, and Rodenticide Act preempted common-law actions because they imposed state law requirements for labeling or packaging in addition to or different from those required under federal law); Geier v. Am. Honda Motor Co., 529 U.S. 861, 871 (2000); *see also* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 523–24 (1992) (holding that a provision of the Public Health Cigarette Smoking Act of 1969 preempted common law actions because they would impose state law requirements or prohibitions based on smoking and health with respect to the advertising or promotion of any cigarettes whose packages were labeled in accordance with federal law).

regulatory effect than statutes or regulations.[182] This was the exact concern the Court expressed in opposing a separate track of civil liability on GHG emissions.[183]

In addition, this argument has particular shortcomings within the tort of public nuisance. This tort has specific rules as to when it can be used and seeking monetary damages for severe harms from a public nuisance is not one of them. Under centuries of jurisprudence, monetary damages are only available when private plaintiffs are injured by a public nuisance in a way that is "different [in kind] from that suffered by other persons."[184] As the Restatement (Second) makes clear, "[i]t is not enough that [one] has suffered the same kind of harm or interference but to a greater extent or degree."[185]

Assuming, for example, that the allegations of plaintiffs in *Kivalina* and *Comer* are true, they are only suggesting that the public nuisance of global climate change has impacted them in a "severe" way (i.e., to a far greater degree than others). Indeed, they have fully acknowledged that, even under their allegations, global climate change impacts weather patterns for everyone. Simply claiming a "severe" climate change injury, which is how they distinguish their claims from *American Electric Power Co*., is not sufficient for recovering monetary damages under the tort of public nuisance. As environmental attorneys have long-appreciated, "the thoroughly entrenched 'special injury rule' and its constant companion, the strict 'different-in-kind' test," are gatekeepers that limit the availability of public nuisance actions.[186]

Therefore, to state a claim for monetary damages from a public nuisance, the plaintiffs must first demonstrate whether a public nuisance exists and whether a particular defendant is responsible for it. This requires proving the fundamental elements of the tort: that

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182 *See Geier*, 529 U.S. at 871 ("[R]ules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different [s]tates reach different decisions on similar facts.").

183 Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2539 (2011); *see* Appellants' Supplemental Brief on AEP v. Connecticut, Native Vill. of Kivalina v. ExxonMobile Corp., No. 09-17490 (filed Nov. 4, 2011). Professor Robert Reich, President Clinton's Secretary of Labor, is often credited with coining the phrase "regulation through litigation." Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22. He has stated that lawsuits under this notion are "faux legislation, which sacrifices democracy." *Id.*; *see* Mark A. Behrens & Rochelle M. Tedesco, *Addressing Regulation Through Litigation: Some Solutions to Government Sponsored Lawsuits*, 3 ENGAGE 109, 109 (2002); Victor E. Schwartz & Leah Lorber, State Farm v. Avery*: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1215 (2001).

184 RESTATEMENT (SECOND) OF TORTS § 821C cmt. b (1979).

185 *Id.*

186 Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 759 (2001).

"unreasonable conduct by the tortfeasor . . . interfere[ed] with [a] public right"; the tortfeasor had "control of the public nuisance"; and the public nuisance was the factual and proximate cause of the alleged injuries. Only then can the appropriate remedy be considered.[187] Our earlier writings provide a comprehensive discussion of the tort of public nuisance and what must be shown to succeed in a public nuisance claim generally and with respect to global climate change.[188]

The bottom line is that under legal doctrine and public policy, as expressed in *American Electric Power Co.*, lower courts should continue rejecting global climate change tort cases.

IV. THE PUBLIC POLICY CONSEQUENCES OF PERMITTING THE JUDICIARY TO REGULATE GHG EMISSIONS AND DETERMINE U.S. ENERGY POLICY

If lower courts ignore the Supreme Court's message and endeavor to set U.S. energy policy by focusing solely on allegations in litigation over GHG emissions, the practical results would likely be a disjointed, nonsensical U.S. energy policy. As this section of the Article discusses, the supply of electricity and other energy sources would likely be compromised, and the resulting increase of energy costs to American consumers could push basic needs out of the reach of average Americans. Further, this litigation would become a model for advocates of other policies not adopted through the political process, causing American courts to become a common destination for "regulating" all sorts of products and conduct.

A. Picking Winners and Losers in Tort Litigation Would Disrupt Energy Supply in Ways that Would Not Follow Any Rational, Overarching Strategy for U.S. Energy Policy

A significant shortcoming of having courts set emission limits, as discussed above, is that plaintiffs' lawyers, in choosing whom to name as defendants, and judges, in deciding where to set emission levels, would get to pick the "winners" and "losers" in the global climate change debate. The result would be a piecemeal approach to GHG emissions

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187 Schwartz et al., *supra* note 11, at 818; *see* RESTATEMENT (SECOND) OF TORTS § 821A cmt. c (1979) ("If the conduct of the defendant is not of a kind that subjects him to liability . . . the nuisance exists, but he is not liable for it.").

188 *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 552–61 (2006); Schwartz et al., *supra* note 11, at 834.

that might not comport at all with a well-reasoned, appropriate national energy policy.[189]

The *American Electric Power Co.* case against the American utility companies demonstrates how this ad hoc approach might play out with the ability of the utilities to meet the electricity generation needs of American families and businesses. Currently, only three sources can provide a steady, reliable output of energy for generating the "base" amount of electricity the public needs throughout the day: coal, natural gas, and nuclear power. Coal produces about forty-six percent of the electricity production in the United States, followed by natural gas at twenty-four percent and nuclear power at about twenty percent.[190] If a judicially-imposed cap on emissions made coal and natural gas less affordable or available, utilities would have to immediately reduce fossil fuel emissions and rely on energy sources that do not emit GHGs—which is the very goal of those filing these suits. While these individuals and groups may be frustrated with the incremental approach being taken in Congress, it is clear that the blunt tool of imposing these results through the courts is not a realistic option.

First, the technology for reducing fossil fuel emissions to be in compliance with such a court ruling may not be available or economically feasible, either immediately with respect to damage awards or for meeting deadlines in an abatement order. This is not to say that progress is not being made. Since the mid-1980s, the government has invested $3 billion to develop and test clean coal technologies.[191] This approach has provided significant dividends, as new coal-burning power plants emit ninety percent less pollutants than plants they replace.[192] As a result, while coal use has tripled since the 1970s, regulated emissions from coal-based electricity has decreased by

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[189] *See* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2539 (2011) (noting that Congress should make these determinations, not federal judges on an "ad hoc, case-by-case" basis). Courts could, for example, choose to prioritize how energy is produced in the United States simply by adjusting arbitrary emission limits among coal-burning power plants and facilities consuming natural gas. They could also impose emission limits that grind either or both activities to a halt. The permutations are as endless as the inconsistencies that would predictably develop. *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (explaining how courts could regulate "by judicial fiat"); *cf.* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819) ("An unlimited power to tax involves, necessarily, a power to destroy . . . .").

[190] *See* U.S. ENERGY INFO. ADMIN., SHORT-TERM ENERGY OUTLOOK 8 (2012), *available at* http://www.eia.gov/forecasts/steo/pdf/steo_full.pdf.

[191] *See Cleaning Up Coal*, U.S. DEP'T ENERGY, http://www.fe.doe.gov/education/energylessons/coal/index.html (last updated Oct. 9, 2008).

[192] *See Clean Coal Technology*, NAT'L MINING ASS'N, http://www.nma.org/pdf/fact_sheets/cct.pdf (last visited Jan. 25, 2012) (citing findings of the National Energy Technology Laboratory).

nearly forty percent.[193] President Obama has repeatedly asserted that his energy policy includes continued investment in clean coal technology.[194] This includes the development of "ultra-supercritical" units, which operate at higher efficiency levels, and carbon capture and storage techniques that minimize the release of carbon dioxide from coal generation.[195]

Second, it is not realistic to think that other sources of energy, including nuclear, wind, and solar, can materially replace coal and gas. Nuclear power, the only other base-load source of electricity, is not positioned to be the "winner" in the global climate change debate. Given safety and waste-disposal concerns,[196] America has not invested in new generations of nuclear power plants, and the existing, aging plants are already producing at full capacity. The remaining fuels, namely wind and solar, are not "base-load" sources of electricity; they provide two percent and one percent, respectively, of the United States' power generation.[197] They can only supplement the grid during peak times and facilitate discrete tasks,[198] as both can only provide electricity

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193 *See id*.

194 *See* Barack Obama, Remarks by the President in State of the Union Address (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address. President G. W. Bush also supported development of clean coal technology. *See, e.g.*, Robin Acton, *Bush Urges Clean Coal Technology for Electricity*, TRIB. LIVE NEWS (Aug. 1, 2008), http://www.pittsburghlive.com/x/pittsburghtrib/news/s_580555.html.

195 *See id.*; *see also* Glaser, *supra* note 20, (manuscript at 35) (discussing "ultra-supercritical" combustion technology).

196 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-48, NUCLEAR WASTE MANAGEMENT: KEY ATTRIBUTES, CHALLENGES, AND COSTS FOR THE YUCCA MOUNTAIN REPOSITORY AND TWO POTENTIAL ALTERNATIVES (2009), *available at* http://www.gao.gov/new.items/d1048.pdf; David Biello, *Spent Nuclear Fuel: A Trash Heap Deadly for 250,000 Years or a Renewable Energy Source?*, SCIENTIFIC AM. (Jan. 28, 2009), http://www.scientificamerican.com/article.cfm?id=nuclear-waste-lethal-trash-or-renewable-energy-source&print=true.

197 *See* U.S. ENERGY INFO. ADMIN., RENEWABLE ENERGY CONSUMPTION AND ELECTRICITY PRELIMINARY STATISTICS 2010, at 5 (2011) [hereinafter RENEWABLE ENERGY CONSUMPTION AND ELECTRICITY], *available at* http://www.eia.gov/renewable/annual/preliminary/pdf/preliminary.pdf; *see also* Sarah Pizzo, Note, *When Saving the Environment Hurts the Environment: Balancing Solar Energy Development with Land and Wildlife Conservation in a Warming Climate*, 22 COLO. J. INT'L ENVTL. L. & POL'Y 123, 131 (2011) (noting that solar energy accounts for a small percentage of U.S. energy demand).

198 As Julio Friedmann of Lawrence Livermore National Laboratory has explained, each alternative energy form is severely "limited by cost, limited by scale, limited by physics and chemistry, [or] limited by thermodynamics." James Fallows, *Dirty Coal, Clean Future*, THE ATLANTIC (Dec. 2010), http://www.theatlantic.com/magazine/archive/2010/12/dirty-coal-clean-future/8307/. Friedmann also stated that, "[s]olar and wind power are going to be important, but it is really hard to get them beyond [ten] percent of total power supply.'" *Id*.

intermittently and in select areas of the country.[199] Wind and solar farms also have met significant resistance. As the "Cape Wind" project in Massachusetts has shown, wind farms are often opposed by local communities voicing concerns about aesthetics, noise, safety, navigation, property values, changes to the seascape, the impact on tourism, and environmental issues, such as disturbances to marine animal and migratory bird populations.[200] Solar farms are opposed by land and wildlife conservationists because they require five to ten acres of land per megawatt of capacity.[201]

The practical shortcomings of imposing a judicial remedy here were the same types of issues that weighed down the cap and trade legislation that failed to pass Congress in 2009 and 2010. In the end, Congress and regulators have seen the wisdom of addressing each energy challenge in a nuanced way, shying away from any "one-size-fits-all" approach.[202] Indeed, developing technologies to facilitate greater reliance on alternative sources of energy has been a growing, stable part of America's energy policy through targeted subsidies and tax credits.[203] This targeted, incremental approach will no doubt continue providing results, just as it has over the past forty years in reducing coal-related emissions and in raising gas mileage rates.[204]

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[199] California, Nevada, and Florida account for eighty-eight percent of solar power generation, followed by Colorado, New Jersey, Ohio, Illinois, Arizona, North Carolina, and Pennsylvania. *See* RENEWABLE ENERGY CONSUMPTION AND ELECTRICITY, *supra* note 197, at 11 (finding California, Nevada, and Florida each provide more than five times as much solar energy generation as any other state). Solar power generation is negligible in most other states. *See id.*

[200] *See* NAT'L RENEWABLE ENERGY LAB., LARGE-SCALE OFFSHORE WIND POWER IN THE UNITED STATES: ASSESSMENT OF OPPORTUNITIES AND BARRIERS 8 (2010), *available at* http://www.nrel.gov/wind/pdfs/40745.pdf; Dominic Spinelli, Note, *Historic Preservation & Offshore Wind Energy: Lessons Learned from the Cape Wind Saga*, 46 GONZ. L. REV. 741, 748 (2010).

[201] For example, the solar mirror field proposed for just outside the Mojave National Preserve will consume some 3,400 acres (5.3 square miles). *See Ivanpah Solar Electric Generating System*, CAL. ENERGY COMM'N, http://www.energy.ca.gov/sitingcases/ivanpah/index.html (last updated Mar. 11, 2011).

[202] *See, e.g.*, California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *2 (N.D. Cal. Sept. 17, 2007) (seeking money damages from defendant automobile companies "for creating, contributing to, and maintaining a public nuisance").

[203] *See* Moses, *supra* note 37, at 41 (discussing alternative energy incentives in the Energy Independence and Security Act of 2007); Graab, *supra* note 64, at 2070–71 (noting that Congress has been aware of the need to decrease the United States' dependence on oil and has attempted to create incentives for producers of renewable energy sources).

[204] *See supra* Part II.A (examining the development of GHG regulations as part of a broader U.S. environmental policy).

B. Courts, Unlike Regulations Through Congressional Authority, Cannot Soften Any Unfair, Disproportionate Impact the Regulations Would Have on American Consumers and Businesses

Through the nuanced approach discussed above, Congress can also emphasize reforms that are mindful of the fact that costs associated with implementing new regulations are borne directly by energy consumers, businesses that rely on affordable energy to survive and compete, and energy sector workers. As indicated, any isolated decision on GHG emissions will undoubtedly increase the costs of generating electricity,[205] curtail energy output,[206] and cause energy producers to relocate operations outside of the reach of the new "regulations."[207] Unlike courts, Congress can find ways to reach these goals without infringing on the primary benefits of inexpensive energy, which has been a driving force in America's economic success and led to a major increase in people's standard of living and life spans for more than a century and a half.[208]

As advocates for the poor and elderly have expressed over the past few years, limiting GHG emissions too much too quickly, whether through litigation, legislation, or regulation, would disproportionately impact their constituents.[209] Already, American households earning between $10,000 and $30,000 are estimated to allocate twenty-three percent of their 2011 after-tax income to energy—a level more than twice the national average and a sixty-five percent increase over the past ten years.[210] The Affordable Power Alliance,[211] an umbrella organization of several advocacy groups, issued a report in 2010 showing that potential

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[205] The degree of such cost increases would depend on how "reasonable" a particular defendant's emissions were, which, for reasons discussed throughout this section, would be difficult to estimate.

[206] *See generally* CONG. BUDGET OFFICE, THE ECONOMIC EFFECTS OF RECENT INCREASES IN ENERGY PRICES 1 (2006), *available at* http://www.cbo.gov/ftpdocs/74xx/doc7420/07-21-Energy%20DIST.pdf (discussing specific disruptions to the growth in energy supplies).

[207] *See, e.g.*, LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, U.S. TORT LIABILITY INDEX: 2010 REPORT 9 (2010), *available at* http://www.pacificresearch.org/docLib/20100525_Tort_Liability_Index_2010.pdf (discussing tort liability system as significant factor in the decision of businesses to enter a state).

[208] *See* Glaser, *supra* note 20, (manuscript at 47); *see also* Myron Ebell, *Increase Access to Energy*, COMPETITIVE ENTERPRISE INST., Jan. 19, 2011, at 19, *available at* http://cei.org/agenda-congress/increase-access-energy-0 (urging Congress to take various steps to make energy more affordable).

[209] *See* EUGENE M. TRISKO, ENERGY COST IMPACTS ON AMERICAN FAMILIES, 2001–2011 (2011), *available at* http://www.americaspower.org/sites/default/files/Energy_Cost_Burdens_on_American_Families_2011.pdf.

[210] *See id.* at 2.

[211] *See About Us*, AFFORDABLE POWER ALLIANCE, http://www.affordablepoweralliance.org/Aboutus.aspx (last visited Jan. 26, 2012).

EPA regulations on GHG emissions could cause gasoline and residential electricity prices to increase by fifty percent and industry electricity and natural gas prices to go up by seventy-five percent by 2030.[212] EPA can consider these impacts during its notice and comment rulemaking, but courts cannot. Nor can courts consider the impact of their "regulations" on government assistance programs, such as the Low Income Home Energy Assistance Program, which would need to be increased significantly if home-heating oil prices had to incorporate costs allegedly related to global climate change.[213]

Should utilities not be able to generate sufficient electricity in compliance with a court order, the brown-outs in California from a decade ago can give a glimpse as to the impact an electricity shortage could have on communities.[214] During the March 2001 eight hour rolling blackouts, the average electricity shutoff period was ninety minutes, which was projected to translate into twenty hours of outage per customer if the crisis were to continue over the summer.[215] This projected impact included a $4.6 billion reduction in household income for Californians, a loss of nearly 136,000 jobs, and a $21.8 billion hit to the gross state output.[216] Fortunately, that crisis was avoided, in part, by the ability of energy policymakers to make adjustments. Policymakers would likely be hamstrung, though, if the brown-outs—whether more or less drastic than those projected for the summer of 2001—were caused by judicially-imposed limits that companies had to meet or be subject to massive, additional liability.

Any such cost increases or energy shortages would have broad ripple effects. This is why GHG emissions have been a focal point of both national and international policymakers. If American businesses, from manufacturers to service companies, had to adjust to more expensive, less available energy, then they would be significantly disadvantaged. Already, the recent rise in energy costs has taken its toll on American companies' ability to compete internationally. The

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212 *See* AFFORDABLE POWER ALLIANCE, POTENTIAL IMPACT OF THE EPA ENDANGERMENT FINDING ON LOW INCOME GROUPS AND MINORITIES 1 (2010), *available at* http://www.Affordablepoweralliance.org/LinkClick.aspx?fileticket=yXQwPRYFUF8%3D&tabid=40.

213 *See* Jad Mouawad, *Baby, It's Going to Be Cold Outside*, N.Y. TIMES, Aug. 6, 2008, at C1, C6.

214 *See, e.g.*, *Rotational or Rolling Blackouts*, CONSUMER ENERGY CENTER, http://www.consumerenergycenter.org/tips/blackouts.html (last visited Jan. 26, 2012) (discussing California's recent history of rolling blackouts).

215 *See* AUS CONSULTANTS, IMPACT OF A CONTINUING ELECTRICITY CRISIS ON THE CALIFORNIA ECONOMY ii (2001), *available at* http://www.caltax.org/member/taxletter/Reference/AUSStudyfinal.pdf.

216 *See id.* at ii–iii.

chemical industry, for example, was once dominated by American businesses. But, as the Commerce Department has found, energy cost increases "have eroded the U.S. chemicals industry's competitive position,"[217] with the United States' trade balance for chemicals declining from $16.8 billion in net exports in 1997 to $218 million in net exports in 2006.[218] "Chemical plants are closing in the United States, as companies move their facilities and dollars to countries where natural gas is cheaper, particularly to the Middle East where natural gas prices are a fraction of prices in the United States."[219] Metal, pulp, and paper industries have had similar experiences.[220]

Other sectors would be deeply affected, regardless of international competition. Consider the energy sectors themselves, as the natural gas industry alone employs over 600,000 workers directly and helps create an estimated three million other American jobs.[221] The transportation industry would also be hit hard. Rising energy costs have been a significant factor in the recent challenges facing the airline industry; and for taxi cab and truck drivers whose incomes are modest, energy costs constitute a significant part of their expenses. Here, judicially-mandated reductions in GHGs could directly determine their economic viability.[222]

These and other impacts of whether and how to reduce GHGs, which are central to U.S. energy policy, would not be before a court when fashioning an abatement plan, granting injunctive relief, or imposing billions of dollars of liability in tort cases over GHG emissions.

C. The Validation of "Regulation Through Litigation"?

The reason for the concern demonstrated in this Article over the potential lawlessness of global climate change litigation and the remedies that courts might impose is that these lawsuits lack the

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217 *See* U.S. DEP'T OF COMMERCE, INT'L TRADE ADMIN., OFFICE OF ENERGY & ENVTL. INDUS., ENERGY POLICY AND U.S. INDUSTRY COMPETITIVENESS 5 (2007), *available at* http://ita.doc.gov/td/energy/energy%20use%20by%20industry.pdf.

218 *See id.*

219 *Id.*

220 *See id.* at 6–7; *see also id.* at 7 ("High natural gas prices have led to the closure of all U.S. direct-reduced iron steel mills."). "From 2000 to 2005, the cost of fuels and purchased electricity for the pulp and paper industry increased from $6.9 billion to $8.8 billion, a [twenty-six] percent increase," which has been attributed to "the closing of 232 mills and loss of 182,000 jobs." *Id.*

221 *See* AMERICA'S NATURAL GAS ALLIANCE, NATURAL GAS: WORKING FOR AMERICA, *available at* http://www.anga.us/media/40995/us%20economy.pdf ("[T]he natural gas industry supports [approximately] 2.8 million jobs in the United States.").

222 *See* Glaser, *supra* note 20, (manuscript at 49) (discussing the importance of low energy production costs for U.S. job growth during the 1980s and 1990s and how increased competition from China has eroded this advantage).

lynchpin that keeps all tort liability from being rudderless: objective wrongdoing. The defendants are not being sued over a product defect or negligent conduct, but because their products, like many other products in modern society, have inherent characteristics that are an essential part of the product or process itself.[223] As a result, liability is determined by factors outside the control of those forced to pay. Such super strict or absolute liability is only available in an extremely narrow set of circumstances, namely when one engages in abnormally dangerous conduct. Courts have broadly rejected theories that would require manufacturers, in essence, to be insurers of their products.[224] This is why, for example, courts do not subject beer manufacturers to liability for drunk driving accidents or sugar producers to liability for tooth decay or diabetes.

Robert Reich, who was President Clinton's Secretary of Labor, created a term in the 1990s for tort suits whose true purpose is political change: "regulation through litigation." The massive liability exposure does not simply compensate a plaintiff, but regulates an industry. At first, Secretary Reich favorably appreciated the power of such litigation to achieve what he thought were important policy objectives. He soon reversed course, however, calling the lawsuits "faux legislation, which sacrifices democracy."[225] Harvard Law School's Laurence Tribe, in applying the regulation through litigation concept to global climate change cases, editorialized against the litigation, saying "its very identification as a judicially redressable source of injury cries out for the response that the plaintiffs have taken their 'petition for redress of

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[223] *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 954 (2009).

[224] *See, e.g.*, City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 421 (3d Cir. 2002) (dismissing public-nuisance claims under Pennsylvania law); Ganim v. Smith & Wesson Corp., 780 A.2d 98, 133 (Conn. 2001) (dismissing public-nuisance claims under Connecticut law); Penelas v. Arms Tech., Inc., 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001) (dismissing public-nuisance claims under Florida law); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1148 (Ill. 2004) (dismissing public-nuisance claims under Illinois law); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 113 (Mo. 2007) (en banc) ("The city alleges in its complaint that before 1978 the defendants 'produced, manufactured, processed, distributed, and marketed' lead paint and pigment."); *In re* Lead Paint Litig., 924 A.2d 484 (N.J. 2007); People *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 203 (App. Div. 2003) (dismissing public-nuisance claims under New York law); State v. Lead Indus. Ass'n, 951 A.2d 428, 434 (R.I. 2008) ("[T]he then Attorney General, on behalf of the State of Rhode Island . . . filed suit against various former lead pigment manufacturers . . . .").

[225] *See* Reich, *supra* note 183.

grievances' to the wrong institution altogether."[226] The Obama administration ("The Administration") underscored this point when its Solicitor General submitted a brief to the Supreme Court to urge the Court to grant *certiorari* in *American Electric Power Co.* The Administration explained that the Court should dismiss the suit because the "regulatory approach is preferable to what would result if multiple district courts—acting without the benefit of even the most basic statutory guidance—could use common-law [tort] claims to sit as arbiters of scientific and technology-related disputes and *de facto* regulators of power plants and other sources of pollution."[227]

These individuals, none of whom could be labeled as "conservative" in their views on public policy, recognized that process matters in the American legal system. The ends of achieving a policy goal or revenue source, regardless of how desirous, do not justify the means of misusing the hallowed American civil justice system, particularly when doing so would cause undue hardship for American consumers and businesses. Ruling otherwise would invite any group that fails to get its way in the political arena to turn to the courts in hopes of finding a judge or appellate panel to agree with its agenda and endorse its litigation.

V. CONCLUSION

The Supreme Court has historically embraced the American tort system and, when rejecting preemption defenses, has argued for a vibrant civil litigation system for compensating individuals harmed by misconduct, and for correcting that misconduct. Given this public policy backdrop, it is particularly noteworthy that the unanimous *American Electric Power Co.* Court, led by Justice Ginsburg, chose to expound on why tort litigation does not provide the tools for courts to decide emission standards for GHGs. Rather, the Court was clear that global issues of "this order" should rest entirely with the executive and legislative branches.[228] Lower courts should follow the Supreme Court's blueprint and reject climate change tort cases, regardless of the

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[226] Laurence H. Tribe, Joshua D. Branson & Tristan L. Duncan, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 12 (Wash. Legal Found., Working Paper No. 169, 2010), *available at* http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf.

[227] *See* Brief for the Tennessee Valley Authority Supporting Petitioners at 1617, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (June 20, 2011) (No. 10-174).

[228] *See* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2539–40 (2011) (concluding that these issues should be left to the political branches because federal courts are ill equipped to deal with these issues).

combinations and permutations of plaintiffs and defendants or how creative and inviting the pleadings may seem.