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Welcome to the (Impenetrable) Jungle: Massachusetts v. EPA, the Clean Air Act and the Common Law of Public Nuisance

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Notes

WELCOME TO THE (IMPENETRABLE) JUNGLE: *MASSACHUSETTS V. EPA*, THE CLEAN AIR ACT AND THE COMMON LAW OF PUBLIC NUISANCE

> There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.[1]

I. INTRODUCTION

Environmental law and the common law doctrine of nuisance have long been intertwined.[2] The heightened awareness of environmental issues during the 1970s brought with it a vast statutory network at both the federal and state level that, in many cases, pushed nuisance actions out of the legal picture through displacement or preemption.[3] Nevertheless, litigants continue to employ nuisance actions in a wide range of environmental challenges—most recently against greenhouse gases, the main cause of global warming and climate change.[4]

In 2007, the effects of climate change were both dramatic and unprecedented.[5] For the first time in modern history, the Northwest Passage opened almost completely as the Arctic rapidly melted.[6] Bizarre weather events occurred across the world—a tornado in Brooklyn, a cyclone in the

1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 616 (W. Page Keeton ed., 5th ed. 1984) (discussing meaning of nuisance and its widespread and often confusing uses).

2. *See, e.g.*, Indianapolis Water Co. v. Am. Strawboard Co., 53 F. 970, 970 (C.C.D. Ind. 1893) (holding that water pollution constituted common law nuisance).

3. For a discussion of the proliferation of environmental statutory regulation in the 1970s, see *infra* notes 34-38 and accompanying text. For a discussion of the displacement and preemption doctrines in environmental law, see *infra* notes 99-129 and accompanying text.

4. *See, e.g.*, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267-68 (S.D.N.Y. 2005) (involving nuisance suit against power plants for emitting greenhouse gases). For a detailed discussion of *American Electric Power Co.*, see *infra* notes 40-47 and accompanying text.

5. *See* Jocelyn Rice, *Quantifying Global Warming*, DISCOVER, Jan. 2008, at 38-39 (summarizing notable study results and events regarding climate change in 2007).

6. *See* Associated Press, *Warming May Have Passed 'Tipping Point'*, CINCINNATI POST, Dec. 12, 2007, at 16A (describing "greatly accelerated" Arctic melting in 2007, including opening of Northwest Passage for first time in recorded history).

Middle East and significant snowfall in South Africa.[7] Al Gore and the Intergovernmental Panel on Climate Change (IPCC) won the 2007 Nobel Peace Prize for their research of and raising awareness about climate change.[8]

For better or worse, climate change made headlines and became part of the discourse on the future of the United States and the planet.[9] The Supreme Court joined that discourse in April 2007 with its decision in *Massachusetts v. EPA*.[10] Although that decision directly addressed only a few specific provisions of the Clean Air Act and the Environmental Protection Agency's interpretation of them, the decision will have important indirect effects on climate change litigation.[11]

This Note addresses the impact of the Supreme Court's recent decision in *Massachusetts v. EPA* on the future of common law nuisance actions that target global warming.[12] Part II provides a general overview of cli-

7. *See* Seth Borenstein, *This Year's Weird Weather*, TIME, Dec. 31, 2007, *available at* http://www.time.com/time/health/article/0,8599,1699110,00.html (summarizing 2007's strange weather and links to global warming and climate change). Although "[i]ndividual weather extremes can't be attributed to global warming," many such extremes in varied locations do point toward man-made climate change. *See id.* (explaining relationship between climate change and extreme weather events).

8. *See* Walter Gibbs & Sarah Lyall, *Gore Shares Peace Prize for Climate Change Work*, N.Y. TIMES, Oct. 13, 2007, at A1 (reporting on 2007 Noble Prize winners). The IPCC is a United Nations network of scientists. *See id.* (defining IPCC's role in international community). The Nobel Committee praised that organization and Gore "'for their efforts to build up and disseminate greater knowledge about man-made climate change.'" *Id.* (recognizing basis for award).

9. *See, e.g.*, Thomas Fuller & Andrew C. Revkin, *Climate Plan Looks Beyond Bush's Tenure*, N.Y. TIMES, Dec. 16, 2007, at A1, *available at* http://www.nytimes.com/2007/12/16/world/16climate.html?pagewanted=1&_r=1 (reporting on international talks in Bali regarding future climate change plans). *But see* Bryan Walsh, *The Gore Interview*, TIME, Dec. 31, 2007, at 98 (observing that climate change is not prominent issue in 2008 presidential campaigns and concluding that it will not become one until voters become more serious about issue and confront candidates).

10. 127 S. Ct. 1438 (2007). In the first paragraph of the opinion, the Court unequivocally recognized the fact that global warming is occurring:

> A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a "greenhouse gas."

Id. at 1438 (recognizing and summarizing science of climate change and global warming).

11. For a discussion of the Court's decision in *Massachusetts v. EPA*, see *infra* notes 48-98 and accompanying text. For a discussion of the indirect impacts of the Court's decision, see *infra* notes 154-73 and accompanying text.

12. *See generally* Joshua Steinberg, Casenote, *The Bone-Chilling Effects of Global Warming and the EPA's Cold-Shoulder Response to Pleas for Help, A Case Note on* Massachusetts v. EPA, 26 TEMP. J. SCI. TECH. & ENVTL. L. 169 (2007) (summarizing Court's decision in *Massachusetts v. EPA*, addressing prior precedent and conclud-

mate change and the legal landscape prior to *Massachusetts v. EPA*.[13] Part III contains a detailed summary of the Court's majority and dissenting opinions in that case.[14] Part IV provides an analysis of the Court's possible—yet seemingly unintended—displacement of the common law of nuisance by the Clean Air Act (CAA).[15] Part V suggests that the Court's decision positively impacts global warming litigation based on nuisance theories.[16] Finally, Part VI concludes that the most significant impact of *Massachusetts v. EPA* may be the Court's recognition of both the science of climate change and the important role courts must play in forming climate change solutions.[17]

II. SCIENCE AND HISTORY: CLIMATE CHANGE AND THE LEGAL LANDSCAPE PRIOR TO *MASSACHUSETTS V. EPA*

Although scientists, scholars, government officials and private citizens previously questioned the very existence of climate change, today most members of those groups recognize that such a phenomenon is indeed occurring—and at an ever-quickening pace.[18] Statistics and studies indicate an array of phenomena, including rising air and water temperatures, increased extreme weather events, rising sea levels, changes in both ocean currents and animal migration and rapidly melting glaciers and ice caps, among other things.[19] Despite these well-documented consequences of

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ing that Court's decision was positive step in right direction). For a more detailed summary and analysis of the issues decided by the Court, see *infra* notes 48-98 and accompanying text.

13. For a brief discussion of the science and legal background of climate change, see *infra* notes 18-47 and accompanying text.

14. For a summary of the Court's opinion in *Massachusetts v. EPA*, see *infra* notes 48-98 and accompanying text.

15. For a discussion of the displacement of common law in environmental law both before and after *Massachusetts v. EPA*, see *infra* notes 99-153 and accompanying text.

16. For a discussion of how the Court's decision in *Massachusetts v. EPA* implicitly and positively affects tort-based actions for global warming and climate change, see *infra* notes 154-73 and accompanying text.

17. For a summary of the issues the Court addressed directly and a discussion of the implicit impact of *Massachusetts v. EPA*, see *infra* notes 174-82 and accompanying text.

18. *See, e.g.*, Gregg Easterbrook, Op-Ed., *Finally Feeling the Heat*, N.Y. TIMES, May 24, 2006, at A27 (discussing initial uncertainty regarding science of global warming and concluding that "an artificially warming world is a real phenomenon posing real danger"); William Stevens, *On the Climate Change Beat, Doubt Gives Way to Certainty*, N.Y. TIMES, Feb. 6, 2007, at F1 (reflecting on cultural attitudes toward climate change over last decade and discussing recent research on certainty of climate change).

19. *See, e.g.*, WORKING GROUP I, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 1-18 (2007), *available at* http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_SPM.pdf (providing updated research on climate change and evaluating certainty in predicting future trends).

climate change, the United States Congress has yet to implement any meaningful or mandatory regulations to mitigate climate change.[20]

A. *Climate Change and Global Warming: The Basic Terms and Science*

In order to understand the law of climate change, one must understand the basic terminology and science of climate change.[21] Climate change refers to a variety of changes in the Earth's climate due to direct or indirect human activity that alters the composition of the atmosphere.[22] Global warming is one important component of climate change, but the terms are not interchangeable.[23]

Global warming—which refers to an increase in average air and water temperatures over time, is due in large part to the greenhouse effect—a natural phenomenon that human activities have significantly amplified.[24] The greenhouse effect refers to the process whereby a layer of gases (known as greenhouse gases, or GHGs) allows the sun's energy to enter the atmosphere but then prevents that energy from escaping, thus trap-

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20. *See* Dan Mensher, *Common Law on Ice: Using Federal Judge-Made Nuisance Law to Address the Interstate Effects of Greenhouse Gas Emissions*, 37 ENVTL. L. 463, 484 (2007) (discussing view that Clean Air Act does not regulate greenhouse gases and noting that "[a]lthough Congress has expressed its concern about climate change in other statutes, these programs do little more than encourage information development to guide future legislative acts"). As recently as December 2007, the federal government has expressed extreme reluctance to commit to mandatory emissions caps. *See* Fuller & Revkin, *supra* note 9, at 1 (discussing Bali climate change conference and resulting Bali Action Plan). The recently adopted Bali Plan "contains no binding commitments, which European countries had sought and the United States had fended off." *Id.* (detailing parameters of Bali Action Plan); *see also* John Ward Anderson, *U.N. Climate Talks End in Cloud of Discord*, WASH. POST, Sept. 1, 2007, at A20 ("Many industrialized countries, including the United States, are wary of strict and mandatory reductions in greenhouse gas emissions, fearing that such curbs could strike at core sectors of their economies.").

21. *See generally* AL GORE, AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT (2006) (explaining basic science of global warming and climate change).

22. *See* United Nations Framework Convention on Climate Change art. 1, ¶ 2, May 9, 1992, 1771 U.N.T.S. 107 (defining "climate change"). The United Nations Framework Convention on Climate Change (UNFCCC) draws an important distinction between natural climate variability and anthropogenic climate change. *See id.* (distinguishing different types of climate change). Other sources use the term "climate change" to include both human-produced and natural changes in climate. *See* U.S. Environmental Protection Agency, Climate Change: Basic Information, http://www.epa.gov/climatechange/basicinfo.html (last visited Feb. 23, 2008) (defining "climate change" expansively to include anthropogenic climate change as well as natural variations in climate temperatures over time).

23. *See* Amanda Staudt, Nancy Huddleston & Sandi Rudenstein, Nat'l Research Council, Understanding and Responding to Climate Change: Highlights of National Academies Reports 2 (2006), *available at* http://dels.nas.edu/basc/Climate-LOW.pdf (describing preferred nomenclature of climate change terminology).

24. *See id.* at 3 (explaining how greenhouse effect causes global warming and supporting explanation with graphical evidence).

ping the sun's heat energy in and around the Earth.[25] GHGs include a variety of gases, such as water vapor, carbon dioxide, methane, nitrous oxide and halocarbons.[26] The burning of fossil fuels has increased the level of GHGs in the atmosphere, causing a stronger greenhouse effect and higher temperatures.[27] The United States plays a significant role in the global warming phenomenon: it accounts for roughly 23% of the world's anthropogenic carbon dioxide emissions.[28]

B. *A Brief Overview of the Legal Landscape Surrounding Global Warming before* Massachusetts v. EPA

Originally, common law provided the legal means of controlling pollution, primarily through nuisance and trespass actions.[29] Early claims based on those tort concepts adhered to the Latin maxim *sic utere tuo, ut alienum non laedas*, which means "one should use his own property in such

25. *See id.* (same).

26. *See id.* (listing various gases associated with greenhouse effect and global warming). Although a variety of gases contribute to global warming, carbon dioxide is "by far the most significant greenhouse gas emitted by human activity." *See* Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance:* Connecticut v. American Electric Power, 16 FORDHAM ENVTL. L. REV. 407, 418 (2005) (describing process of global warming); *see also* David R. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L 1, 7 (2003) ("[C]arbon dioxide is the primary factor in recent anthropogenic warming.").

27. *See* STAUDT, HUDDLESTON & RUDENSTEIN, *supra* note 23, at 3 (describing effect of human activities on global warming).

28. *See* Robert R. Nordhaus, *New Wine into Old Bottles: The Feasibility of Greenhouse Gas Regulation Under the Clean Air Act*, 15 N.Y.U. ENVTL. L.J. 53, 54 (2007) (explaining American contribution to carbon dioxide emissions).

29. *See* Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 926 (1999) (discussing history of common law environmentalism and calling nuisance actions "the backbone" of such litigation). The distinctions between nuisance and trespass—which are closely related but conceptually different—have blurred over time. *See id.* at 935-36 (discussing evolution of nuisance and trespass actions). In early cases, trespass required a "direct and immediate physical invasion of the property" whereas nuisance provided redress for indirect invasions. *See id.* at 935-36 (noting early elements for nuisance and trespass actions). One commentator has noted that today, "[t]he basic distinction . . . is that trespass is an *intentional invasion* of a person's exclusive possession of property, whereas a nuisance is a *substantial and unreasonable interference* with the use and enjoyment of property." *Id.* at 936 (distinguishing between trespass and nuisance concepts); *see also* BRUCE YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT: CREATING WEALTH IN HUMMINGBIRD ECONOMIES 87-118 (1997) (discussing common law history of environmental law and referring to concept of nuisance in environmental law as "generally commonsensical"); Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 3-4 (2007) (noting that tort claims have been used to abate pollution since seventeenth century and continue to be used that way today); Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403, 406-08 (1997) (explaining history of common law nuisance actions as protection against pollution).

a manner as not to injure that of another."[30] That maxim gave rise to a strict judicial standard that left no room for justifying or balancing the effects of harmful activities.[31] With the advent of the Industrial Revolution and the resulting increase in air and water pollution, nuisance and trespass claims became more popular, but also forced courts to adopt a less absolutist balancing test in evaluating nuisances.[32] Courts still widely apply that balancing test in nuisance actions today, aiming to balance "the gravity of the harm" against "the utility of the actor's conduct."[33]

In the 1960s and 1970s, the health of the environment emerged as a pressing national issue.[34] Congress began to institute a wide range of statutes aimed at regulating pollutants and protecting the environment.[35]

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30. *See* Heimert, *supra* note 29, at 406 (recalling that early nuisance cases regarding pollution had rejected "utilitarian balancing" found in later cases and instead created "absolute" standard).

31. *See id.* (same).

32. *See id.* at 407 ("Increasing industrialization forced courts to acknowledge the tension between the absolute *sic utere tuo* doctrine and a landowner's right to put his property to beneficial use.").

33. *Cf.* RESTATEMENT (SECOND) OF TORTS § 826 (1979) (stating balancing test). Factors to be used in determining the gravity of the harm include the extent and character of the harm, "the social value that the law attaches to the type of use or enjoyment invaded[,] the suitability of the particular use of enjoyment invaded to the character of the locality . . . and the burden on the person harmed of avoiding the harm." *Id.* § 827 (listing probative factors to determine gravity of harm caused by nuisance). Factors to be used in determining the utility of the conduct causing the invasion include "the social value that the law attaches to the primary purpose of the conduct[,] the suitability of the conduct to the character of the locality . . . and the impracticability of preventing or avoiding the invasion." *Id.* § 828 (listing probative factors to determine utility of nuisance conduct). *But see* Czarnezki & Thomsen, *supra* note 29, at 4 ("Some courts, rather than adopting the balancing approach, instead look for a level of interference that crosses some liability threshold.").

34. *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 47-54 (2004) (discussing circumstances surrounding early days of environmental law). For example, Rachel Carson's *Silent Spring*, which revealed the environmental dangers of unregulated pesticides, was first published in 1962. *See* RACHEL CARSON, SILENT SPRING 15-17 (Houghton Mifflin 1962) (discussing widespread use of pesticides and associated dangers). In 1969, the nation witnessed the burning of the Cuyahoga River in Cleveland, Ohio, when an oil slick on the surface of the river caught fire. *See* Meiners & Yandle, *supra* note 29, at 949-50 (describing Cuyahoga River incident and explaining that incident had "shocked many Americans" and was arguably caused in part by Ohio's preference for statutory regulation over common law). Severe air pollution and smog became a significant problem in major American cities, such as Los Angeles. *See id.* at 950-51 (describing smog epidemics that severely endangered city's citizens and economy); *see also* LAZARUS, *supra* note 34, at 52 (describing smog epidemics). Gallup public opinion polls showed that between 1960 and 1970, the percentage of Americans who saw "'pollution/ecology as an important problem'" rose from one percent to twenty-five percent. *See id.* at 53 (discussing surveys that demonstrated public's growing awareness of environmental problems).

35. *See* James Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes*, 5 NAT. RESOURCES & ENV'T 29, 30 (1990) (referring to proliferation of statutes during this period as "veritable explosion"); *see also* LAZARUS, *supra* note 34, at 67-

The proliferation of such statutes served to complicate environmental law and often displaced traditional common law causes of action, especially at the federal level.[36] Statutes, however, do not always—or completely—displace the federal common law.[37] Furthermore, state common law actions often remain a viable avenue for traditional environmental tort litigation.[38]

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97 (describing and analyzing development of environmental law during 1970s). One commentator has noted that many of the federal statutes enacted during that period "were unprecedented in their reach." *See id.* at 70 (commenting on scope of federal regulation during 1970s). Congress enacted the National Environmental Policy Act of 1969 ("NEPA"), the Clean Air Act ("CAA"), the Noise Control Act, the Endangered Species Act ("ESA"), the Toxic Substances Control Act and the Clean Water Act Amendments during the 1970s. *See id.* (discussing federal environmental regulations in 1970s and providing chronology of enactment of those regulations). In December 1970, the Environmental Protection Agency (EPA) emerged as the overseer and executor of much of this legislation. *See id.* at 68 (explaining EPA's creation and duties).

36. *See* Meiners & Yandle, *supra* note 29, at 952-54 (assessing impact of environmental statutes on environmental common law and concluding that such statutes have "curtailed" common law through availability of alternative means of regulation and through displacement); *see also* Mensher, *supra* note 20, at 471-78 (discussing statutory displacement of federal common law in context of environmental law); Sevinsky, *supra* note 35, at 30 (noting that "the Supreme Court virtually gutted the federal common law of nuisance as an environmental remedy" when Court reasoned that "federal common-law nuisance claims were largely displaced by the comprehensive regulatory schemes"). According to one commentator, such statutory displacement precludes courts from "applying federal common law to remake Congress's policy choices." *See* Mensher, *supra* note 20, at 471 (stating that in many cases, statutes give Congress, more so than courts, "last word" in environmental regulation). Broad statutes displaced federal common law actions in areas such as water pollution, ocean pollution, drinking water pollution, air pollution and hazardous waste pollution. *See* Andrew McFee Thompson, Comment, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency*, 45 EMORY L. J. 1329, 1339-40 (1996) (discussing widespread deterioration of common law through displacement).

Part of the confusion in this area of the law is attributable to inconsistent use of the terms "preemption" and "displacement." *See* Mensher, *supra* note 20, at 468 (noting misunderstanding of and distinguishing between concepts of preemption and displacement). The Supreme Court has generally used the word "displacement" to refer to the situation in which a federal statute supplants federal common law; conversely, the Court has used the word "preemption" to refer to the more well-known situation in which federal law supplants state law. *See* Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 316 n.9 (1981) (defining displacement and preemption as used in environmental context). This Note will not use the terms interchangeably. For a discussion of the Court's decision in *Milwaukee II* and the analytical framework to determine whether a federal statute displaces common law, see *infra* notes 99-129 and accompanying text.

37. *See* Mensher, *supra* note 20, at 471 ("[B]efore rejecting a claim based on federal common law [because of statutory displacement], a court must determine if the legislation leaves interstices for the judge to fill."); *see also* United States v. Texas, 507 U.S. 529, 536 (1993) (holding that Federal Debt Collection Act did not displace federal common law regarding prejudgment interest liability).

38. *See, e.g.*, Int'l Paper Co. v. Ouellette, 479 U.S. 481, 496 (1987) (holding that Clean Water Act left room for nuisance actions based on state common law); New York v. Shore Realty Corp., 759 F.2d 1032, 1037, 1041 (2d Cir. 1985) (noting

Although common law nuisance has a long history as a means of regulating air, water and hazardous waste pollution, plaintiffs have only begun to apply that doctrine to the issue of global warming.[39] One of the first cases in which plaintiffs utilized a nuisance theory was *Connecticut v. American Electric Power Co.*[40] The plaintiffs in *American Electric Power Co.* were several states and various private environmental organizations who brought suit in a New York district court against power companies under state and federal common law.[41] The plaintiffs alleged that the defendants were liable for the "'public nuisance' of 'global warming.'"[42] Accord-

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that Comprehensive Environmental Response, Compensation and Liability Act of 1980 "expressly does not preempt state [common] law" and simultaneously holding that injunction was properly granted under state nuisance law and that defendant was liable under Act); Gutierrez v. Mobil Oil Corp., 798 F. Supp. 1280, 1285-86 (W.D. Tex. 1992) (holding that "[t]he Clean Air Act does not preempt source-state common law claims against a stationary source"); *see also* Czarnezki & Thomsen, *supra* note 29, at 8-11 (explaining that Clean Water Act and Clean Air Act do not displace state common law and that other federal statutes displace state law claims only to certain extent); Heimert, *supra* note 29, at 435 ("Federal pollution laws do not [displace] state nuisance law.").

39. *Cf.* Grossman, *supra* note 26, at 2 ("Until very recently, the idea of climate change litigation has been virtually ignored.").

40. 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

41. *See id.* at 267 (describing factual background of suit). The plaintiff states were California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont and Wisconsin. *See id.* (listing plaintiff states). New York City was a plaintiff as well. *See id.* (noting municipality among plaintiff states in case). The private environmental organizations that appeared as plaintiffs in the case were the Open Space Institute, Inc., the Open Space Conservancy, Inc. and the Audubon Society of New Hampshire. *See id.* (listing private plaintiffs in case). The defendants were American Electric Power Company, Inc., American Electric Power Service Corporation, the Southern Company, Tennessee Valley Authority, Xcel Energy, Inc. and Cinergy Corporation. *See id.* (listing defendants in case).

Interestingly, there was virtually no overlap between the plaintiff states and the location of the defendant power plants. *See* Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 331-32 (2005) (arguing that plaintiff states were engaging in cost-exporting behavior by litigating to force utilities in other states to pay to mitigate emissions although benefits of reduced emissions would be enjoyed by all). In fact, only one defendant power plant operated within a plaintiff state. *See id.* at 332 n.164 (indicating Wisconsin as only plaintiff state that housed defendant power plant). One commentator opined that because almost none of the defendants resided within the plaintiff states' boundaries, Connecticut and the other plaintiff states were "asking electric utilities in other [s]tates to bear steep abatement costs that [would] produce benefits, in the form of reduced risk of future global warming, which will be enjoyed in large measure by plaintiffs' citizens." *Id.* at 332 (emphasizing plaintiff states' cost-exporting behavior and arguing that such behavior would be prevented if states followed "golden rule[,]" by not asking others to reduce emissions when plaintiffs themselves did not require emissions reductions from utilities located within their own borders).

42. *See Am. Elec. Power Co.*, 406 F. Supp. 2d at 267 (citing plaintiff states' complaint). For the purpose of evaluating claims concerning global warming, it is important to distinguish between public nuisance and private nuisance because, as one commentator has noted, the two are "inherently different." *See* Sevinsky, *supra* note 35, at 32 (discussing periodic judicial confusion regarding nuisance actions). "Public nuisance is an act or omission that causes inconvenience or damage to the

ing to the plaintiffs, the defendants' carbon dioxide emissions were causing irreparable harm to the property, health, safety and well-being of people and the environment alike.[43]

The district court dismissed the suit, holding that the case involved a non-justiciable political question and that as such, the court lacked the power to decide it.[44] To support its decision not to hear the case, the district court cited the complexity of the problem, the lack of an initial policy determination made by Congress or the Executive branch regard-

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public health or public order, or an act which constitutes an obstruction of public rights. Normally, only public officers (attorneys general or district attorneys) have standing to sue to abate public nuisances." Meiners & Yandle, *supra* note 29, at 927 (emphasis omitted) (defining "public nuisance"). Public nuisance suits brought by public officials are "the civil analogue of criminal prosecutions" and often give rise to a less rigorous standing requirement. *See* Merrill, *supra* note 41, at 301 (discussing practicalities of litigating public nuisance cause of action).

Conversely, private nuisance refers to "a nontrespassory invasion of another's interest in the private use and enjoyment of land." Meiners & Yandle, *supra* note 29, at 928 (defining "private nuisance"). In order to be actionable under private nuisance, a nontrespassory interference must be both "substantial and unreasonable." *See id.* (emphasis omitted) (same). Suits brought by private parties are subject to a more rigorous standing requirement. *See* Merrill, *supra* note 41, at 295-99 (discussing standing requirements). The Supreme Court's decision in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), provides an excellent example of the more stringent standing requirement for private citizen suits. *See id.* at 295-96 (referring to *Lujan* decision's effect on standing requirements).

43. *See Am. Elec. Power Co.*, 406 F. Supp. 2d at 267-68 (summarizing plaintiffs' various allegations regarding defendants' impact on global warming); *see also* Pawa & Krass, *supra* note 26, at 421-28 (detailing plaintiffs' allegations of injury due to global warming, which were allegedly caused in part by defendants' carbon dioxide emissions). Plaintiffs alleged injuries particular to their respective individual states and injuries shared by all states. *See id.* (discussing plaintiffs' allegations that defendants' emissions contributed to global warming across planet, would continue to do so for centuries and that global warming has specific and tangible local effects). For example, the plaintiffs alleged that global warming would increase crop stress and reduce farm yields, a situation that would significantly affect Iowa, a state with an agriculturally-based economy. *See id.* at 425 (noting detriment global warming may pose to Iowa). The states also alleged that the consequences of global warming were a threat to their respective sovereignties:

> The risk of wholesale change in climate and complete ecological disruption in the plaintiffs' jurisdictions constitutes an assault on their sovereign and quasi-sovereign interests. The States have an interest independent of and behind the titles of their citizens and in all the earth and air within their domains. By altering the plaintiff States' natural climate, global warming injures interests that are fundamental to the rights of these sovereigns, namely their interest in the integrity of an ecological system that supports their natural heritage and upon which all of their natural resources and much of their economies depend.

Id. at 427 (quoting Complaint ¶ 146, *Am. Elec. Power Co.*, 406 F. Supp. 2d 265) (arguing that climate change damages state sovereignty in addition to ecological and environmental injuries).

44. *See Am. Elec. Power Co.*, 406 F. Supp. 2d at 267, 272-74 (discussing requirement of judicial restraint when dealing with non-justiciable political questions and concluding case involves one such question).

ing global warming and the potential impact on foreign relations.[45] The plaintiffs argued their appeal before the Second Circuit in June 2006, but in light of *Massachusetts v. EPA*, the court postponed its decision and requested supplemental briefs in June 2007.[46] *American Electric Power Co.* demonstrates only some of the many potential difficulties that face global warming suits based on common law public nuisance.[47]

III. NARRATIVE ANALYSIS: THE SUPREME COURT'S DECISION IN *MASSACHUSETTS V. EPA*

A. *Factual Background*

Massachusetts v. EPA arose out of the Environmental Protection Agency (EPA)'s denial of a rulemaking petition in 2003.[48] In 1999, nineteen private organizations petitioned the EPA and requested that the agency begin to take steps to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act (CAA).[49] In September 2003, the

45. *See id.* (discussing factors involved in determining whether issue is political question).

46. *See* Michael B. Gerrard, *Environmental Law: Survey of Climate Change Litigation*, N.Y. L.J., Sept. 28, 2007, at 3 (summarizing current status of common law greenhouse gas emissions claims).

47. *See* Merrill, *supra* note 41, at 332 (noting that *American Electric Power Co.* serves as example that "[a]s with many suits that seek to achieve wide-ranging social and economic change, the plaintiffs must prevail against a variety of defenses in order to obtain relief"). *But see* Pawa & Krass, *supra* note 26, at 409 (describing practical impact of suit on defendants in *American Electric Power Co.*). Despite its ultimate dismissal, the suit nevertheless appeared to have an effect upon several of the defendants. *See id.* (same). Defendant Cinergy Corp. "subsequently announced its support for legal regulation of carbon dioxide." Defendant American Electric Power Co. "announced it would build a clean coal plant that can capture and sequester carbon dioxide emissions" and Defendant Xcel Energy joined the Plains CO2 Reduction Partnership in an effort to find new ways to reduce carbon dioxide emissions. *See id.* (reporting subsequent actions of several defendants following suit's dismissal). Those swift corporate reactions demonstrate that even an unsuccessful suit may nevertheless push defendant carbon dioxide emitters to take remedial measures. *Cf. id.* (implying that dismissal does not necessarily mean suit was unsuccessful).

48. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1449-50 (2007) (explaining genesis of instant controversy and basis of rulemaking petition); *see also* Green Mtn. Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 307-08 (D. Vt. 2007) (reviewing events that gave rise to *Massachusetts v. EPA*).

49. *See EPA*, 127 S. Ct. at 1449. According to the petitioner-organizations, the EPA itself had acknowledged its own authority to regulate carbon dioxide. *See id.* (detailing rulemaking petition's allegations regarding internal EPA discussions of issue of carbon dioxide emissions and global warming). The petitioners cited a 1998 memorandum written by the EPA's then-General Counsel stating that "'CO2 emissions are within the scope of EPA's authority to regulate[.]'" *See id.* (quoting memorandum from EPA's General Counsel, Jonathan Z. Cannon, to Carol M. Browner, EPA administrator (Apr. 10, 1998)) (discussing foundation of petitioners' argument that EPA had authority to regulate carbon emissions). The EPA's next General Counsel, Gary S. Guzy, held the same opinion. *See id.* (recounting that Guzy had announced such opinion to Congress just two weeks before would-be plaintiffs filed petition requesting regulation).

EPA denied the petition, concluding that the CAA did not give the EPA the authority to regulate greenhouse gases through mandatory regulations and that "even if the agency had the authority to set greenhouse gas emissions standards, it would [have] be[en] unwise to do so at [that] time."[50] In support of its conclusions, the EPA cited Congress's previous actions (and inactions) concerning climate change, as well as the potential for conflict between any EPA regulation and the Executive branch's "comprehensive approach" to climate change.[51] In response to the EPA's denial of their petition, the private organizations—joined by twelve states and four local governments—filed suit against the EPA, ten intervening states and six trade associations.[52] The plaintiffs alleged that the EPA had abandoned its duty under the CAA to regulate greenhouse gas emissions.[53]

50. *See id.* at 1449-50 (citing 68 Fed. Reg. 52922, 52925-31 (2003)) (stating date of and reasons for EPA's denial of petition). After the petition had been filed, the EPA solicited public comments on it. *See id.* at 1449 (outlining events leading up to denial of rulemaking petition). During the five month comment period, the EPA received more than 50,000 comments. *See id.* (citing 68 Fed. Reg. 52924 (2003)) (same). In addition, the White House requested a report that addressed the "certainties and uncertainties" of climate change from the National Research Council. *See id.* (noting presidential actions relating to rulemaking petition). The Council's resulting report, entitled *Climate Change: An Analysis of Some Key Questions*, supported earlier findings that greenhouse gases produced by humans were causing global warming. *See id.* at 1449-50 (emphasizing fact that rising temperatures were scientific certainty).

51. *See id.* at 1450-51 (summarizing EPA's rationale for denying rulemaking petition). The EPA noted Congress's emphasis on climate change research—as opposed to climate change regulation—in the 1990 amendments to the CAA. *See id.* at 1450 (same). The EPA also stated that expanding its authority based on the generalized language of the CAA was against Congress's intent because Congress had the opportunity to amend the CAA to expressly include GHGs but did not do so. *See id.* (same). "In essence, [the] EPA concluded that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the agency to address it." *Id.* (implying that EPA's logic in denying rulemaking petition and interpretations of congressional actions were flawed).

Furthermore, the EPA believed that exercising regulatory authority (if granted) was unwise because there remained "residual uncertainty" regarding the causation of global warming. *See id.* at 1451 (discussing EPA's reliance on statement in National Research Council's report that causal link between greenhouse gas concentrations and rising temperatures "cannot be unequivocally established") (internal quotations omitted). In addition, the EPA felt that its "piece-meal approach" to regulation would interfere with the President's "comprehensive approach" of voluntary standards and would "hamper the President's ability to persuade key developing countries to reduce greenhouse gas emissions." *Id.* (citing 68 Fed. Reg. 52931-52933 (2003)) (same).

52. *See id.* at 1446 n.1-4 (identifying parties and basic questions of case). The plaintiff states were California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington. *See id.* at n.2 (enumerating plaintiff states). The plaintiff local governments were the District of Columbia, American Samoa, New York City and Baltimore. *See id.* at n.3 (enumerating plaintiff local and municipal governments).

53. *See id.* at 1446 (identifying plaintiffs and basic questions of case). The Court narrowed the controversy down to two particular questions involving interpretation of the CAA: "whether [the] EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated

Prior to addressing the plaintiffs' claims, the Court first considered whether the plaintiffs had standing to bring the suit.[54]

B. *The Plaintiffs Meet the Threshold Obstacle of Establishing Standing*

Before they could address the merits of their suit, the plaintiffs faced the threshold obstacle of establishing standing.[55] The EPA argued that the plaintiffs lacked standing because the harms caused by greenhouse gas emissions were widespread.[56] The Court disagreed, and emphasized that the question of standing involved whether the plaintiffs have "such a personal stake in the outcome . . . to assure that concrete adverseness which sharpens the presentation of the issues."[57] The Court then addressed the specific standing requirements described in *Lujan v. Defenders of Wildlife*:[58] "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."[59] Additionally, the Court emphasized that a litigant who has a special procedural right given by Congress faces a less rigorous standard.[60] Moreover, the Court noted that only one of the plaintiffs must

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reasons for refusing to do so are consistent with the statute." *Id.* (identifying specific issues before Court).

54. For a discussion of the Court's analysis of the standing issue, see *infra* notes 55-70 and accompanying text.

55. *See EPA*, 127 S. Ct. at 1452-58 (evaluating EPA's argument that plaintiffs lacked standing and thus dismissal was warranted).

56. *See id.* at 1453 ("EPA maintains that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle.").

57. *See id.* (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)) (describing "gist" of standing doctrine).

58. 504 U.S. 555 (1992).

59. *EPA*, 127 S. Ct. at 1453 (citing *Lujan*, 504 U.S. at 560-61) (explaining *Lujan*'s basic standing requirements).

60. *See id.* at 1453 (quoting *Lujan*, 504 U.S. at 572 n.7) (discussing special standard for plaintiff with procedural right). The Court cited 42 U.S.C. § 7607(b)(1)—the statute that grants the right to sue an agency concerning promulgation of emissions standards—as the congressionally-afforded procedural right in this case. *See id.* (calling attention to portion of CAA granting procedural right); *see also* 42 U.S.C. § 7607(b)(1) (2001) (specifying that any petition for review of EPA Administrator's actions under CAA must be filed in United States courts of appeals). The relaxed standing requirement imposed upon a litigant that has a procedural right is satisfied "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *See EPA*, 127 S. Ct. at 1453 (citing Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 94-95 (D.C. Cir. 2002)) (discussing impact of existence of procedural right on standing requirements). In other words, a litigant with a procedural right need not meet all the usual requirements involving immediacy of the injury and redressability. *Cf. id.* (citing *Lujan*, 504 U.S. at 572 n.7) (same).

establish standing in order for the Court to hear the case.[61] Accordingly, the Court focused on Massachusetts's special status as a sovereign state and on its attempt to protect its unique quasi-sovereign interests.[62] The Court concluded that Massachusetts's sovereign status, combined with its recognized procedural right, entitled the state to "special solicitude" in the standing analysis.[63]

Having identified the appropriate level of scrutiny in its standing analysis, the Court concluded that Massachusetts had met all three standing requirements.[64] With respect to the injury requirement, the Court determined that although the harm alleged by Massachusetts is widely shared, the State nevertheless satisfied its burden.[65] The Court based that conclusion primarily on rising sea levels, which the Court acknowledged had begun and would continue to swallow Massachusetts's coastal land—much of which is owned by the State itself.[66] Additionally, the Court found that Massachusetts met the causation requirement, and in so doing, rejected the EPA's argument that "[the EPA's] decision not to regulate greenhouse gas emissions . . . contribute[d] so insignificantly to petitioners' injuries

61. *See EPA*, 127 S. Ct. at 1453-54 (citing Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 52 n.2 (2006)) (stressing fact that presence of single plaintiff with standing enables court to hear case).

62. *See id.* at 1454 (discussing Massachusetts's right to protect its quasi-sovereign interests). The Court made a point to distinguish the facts before it from the situation in *Lujan*: "[i]t is of considerable relevance that the party seeking review here is a sovereign state and not, as it was in *Lujan*, a private individual." *Id.* (explaining why *Lujan* was not controlling). The Court quoted Justice Holmes's decision in *Georgia v. Tennessee Copper Co.*:

> In [its capacity as a quasi-sovereign,] the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.

Id. (quoting 206 U.S. 230, 237 (1907)) (exploring historical basis of state's special status in standing analysis). By entering the Union, a State forfeits some of its sovereign rights and entrusts those rights to the federal government, which includes federal agencies. *See EPA*, 127 S. Ct. at 1454 (same). When one of those federal agencies—such as the EPA—declines to fulfill its duty to safeguard those sovereign rights, the offended State is entitled to challenge that decision. *See id.* (applying Holmes's analysis to *Massachusetts v. EPA*).

63. *See EPA*, 127 S. Ct. at 1454-55 (discussing Massachusetts's unique circumstances regarding standing).

64. *See id.* at 1458 (holding that petitioners "have standing to challenge the EPA's denial of their rulemaking petition").

65. *See id.* at 1455-56 (citing Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998)) (analyzing whether Massachusetts fulfilled injury requirement of standing doctrine).

66. *See id.* at 1456, 1456 n.19 (describing "particularized" injury to Massachusetts). Plaintiffs' affidavits alleged that over the course of the twentieth century, global warming caused sea levels to rise between ten and twenty centimeters. *See id.* at 1456 (discussing factual basis of Massachusetts's injury). Massachusetts further alleged to have suffered a particularized injury because coastal property had already been lost due to increased flooding events; the State claimed that more property would be lost as sea levels continued to rise as a result of global warming. *See id.* (same).

that the agency cannot be haled into federal court to answer for them."[67] Finally, the Court concluded that the plaintiffs' harm was redressable.[68] According to the Court, the risk of harm stemming from global warming would be reduced to some extent if the plaintiffs prevailed.[69] After concluding that Massachusetts possessed the requisite standing, the Court then turned to the merits of the case.[70]

C. *The Clean Air Act Gives the EPA Authority to Regulate Greenhouse Gases*

In addressing the text of the CAA, the Court had "little trouble" finding that section 202(a)(1)—which provides that the EPA shall regulate emissions that contribute to air pollution—gives the EPA the authority to regulate greenhouse gas emissions from new motor vehicles.[71] The EPA's principal argument—that it lacked such authority to regulate—rested on

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67. *See id.* at 1457 (analyzing whether Massachusetts had fulfilled causation requirement of standing doctrine). The EPA did not argue that greenhouse gases from human activities do not cause global warming; rather, it argued that the causal link between the plaintiffs' injuries and its own failure to regulate new motor vehicle emissions was too tenuous. *See id.* (addressing EPA's arguments that plaintiffs did not fulfill causation requirement). The Court responded that the EPA's argument "rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum." *Id.* (rejecting EPA's argument that regulation of emissions would do little to affect global warming). In fact, the Court explained that incremental change was precisely the type of change frequently addressed by regulatory agencies. *See id.* (same).

68. *See id.* at 1458 (analyzing whether Massachusetts had fulfilled redressability requirement of standing doctrine). "Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace the older one is essentially irrelevant." *Id.* (rejecting EPA's argument that plaintiffs did not fulfill redressability requirement because emissions regulation would not reverse global warming). The Court, in its assessment, also deemed irrelevant the fact that other developing nations such as China and India were very soon due to contribute huge amounts of greenhouse gases, and were thus likely to substantially affect global warming. *See id.* (arguing that emissions regulation in U.S. would mitigate global warming regardless of actions of other nations).

69. *See id.* (holding that although risk of catastrophic harm to Massachusetts's shores is remote but real, such risk would be reduced if petitioners' request for relief were granted).

70. For a discussion of the Court's analysis of the merits of the case, see *infra* notes 71-85 and accompanying text.

71. *See EPA*, 127 S. Ct. at 1459-60 (evaluating relevant statutory text). Section 202(a)(1) of the CAA provides in relevant part that:

> The [EPA] Administrator shall by regulation prescribe (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.

42 U.S.C. § 7521(a)(1) (2001) (requiring EPA Administrator to promulgate emissions standards for new motor vehicles in particular circumstances).

its interpretation of the CAA's definition of "air pollutant," which the EPA did not believe included carbon dioxide or other greenhouse gases.[72] The Court's textual interpretation of the definition, however, found that the term "embraces all airborne compounds of whatever stripe."[73] Furthermore, the Court rejected the EPA's extra-textual assertion that a more narrow definition was appropriate in light of Congress's clear legislative focus on research rather than mandatory regulations in the area of climate change.[74]

After disposing of the EPA's textual argument, the Court then rejected the agency's comity argument—specifically, that the agency's regulation of greenhouse gases would infringe upon the duties of the Department of Transportation (DOT) because such regulation would require the EPA to tighten mileage standards.[75] The Court held that although the EPA and DOT have distinct statutory duties, those duties may occasionally overlap.[76] Having concluded that greenhouse gases fall

72. *See EPA*, 127 S. Ct. at 1460 (discussing EPA's interpretation of "air pollutant" under CAA). The CAA defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. 7602(g) (2001) (defining "air pollutant").

73. *See EPA*, 127 S. Ct. at 1460 (discussing EPA's argument regarding definition of "air pollutant" under CAA). In making the determination that carbon dioxide and other greenhouse gases are included within the CAA's definition of "air pollutant," the Court highlighted the repeated use of the word "any" in the CAA's definitional language; the Court explained that the word "any" signaled expansive meaning. *See id.* at 1460 n.25 (citing Dep't of Housing & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002)) (construing statutory language in light of past interpretations of similar language).

74. *See id.* at 1460-61 (addressing EPA's argument that Congress did not intend for CAA to include greenhouse gases). According to the Court, the EPA failed to identify any congressional actions that clearly demonstrated Congress's intent regarding greenhouse gases and the CAA. *See id.* at 1460 (noting EPA's lack of proof to support its construction of definition of "air pollutant"). As a result, the EPA could not overcome what the Court called an "unambiguous" statute. *See id.* (construing statutory language without extrinsic evidence). In response to the EPA's argument that Congress intends research rather than regulations, the Court explained:

> And unlike EPA, we have no difficulty reconciling Congress' various efforts to promote interagency collaboration and research to better understand climate change with the agency's pre-existing mandate to regulate "any air pollutant" that may endanger the public welfare . . . . Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it.

Id. (citing 42 U.S.C. § 7601(a)(1) (2001)) (rejecting EPA's argument that carbon dioxide was not intended to be regulated under CAA).

75. *See id.* at 1461-62 (citing 68 Fed. Reg. 52929 (2003)) (discussing EPA's "agency overlap" argument).

76. *See id.* at 1462 (discussing relationship between EPA and DOT). The Court explained that the EPA's statutory duties related to the environment are to protect the public's "health" and "welfare." *See id.* (citing 42 U.S.C. § 7521(a)(1) (2001)) (defining general scope of EPA's duties). Conversely, the Court recognized that the DOT's statutory duties related to the environment are to promote

under the CAA's "capacious" definition of "air pollutant," the Court held that the EPA had the authority to regulate the emission of such gases, despite the EPA's protestations that such regulation was unwise.[77]

D. *The EPA's Alternative Reasons for Not Regulating Greenhouse Gases Are Not in Accordance with the Clean Air Act*

Despite the EPA's vehement claims that the CAA did not permit the agency to regulate greenhouse gases, the Court held that the CAA in fact did not permit the EPA to refrain from greenhouse gas regulation.[78] The EPA offered various reasons why it believed it should not regulate greenhouse gases; among them, the possibility of interference with the Executive branch's approach to climate change and the scientific uncertainty still surrounding global warming.[79] In response, the Court noted that the CAA did not delegate to the EPA the authority to make such policy determinations.[80] Instead, the Court explained that the EPA must make a statutorily limited judgment (also called an endangerment finding) of whether the air pollutant in question—here, greenhouse gas emissions—"cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare."[81] If the EPA makes that judgment in the affirmative, the CAA requires that the EPA regulate the air pollutant.[82]

In this case, the EPA made no such judgment.[83] Accordingly, the Court concluded that the EPA's denial of the plaintiffs' rulemaking petition was "arbitrary, capricious . . . or otherwise not in accordance with

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energy efficiency. *See id.* (citing Energy and Policy Conservation Act sec. 2(5), 42 U.S.C. § 6201(5) (2001)) (defining general scope of DOT's duties).

77. *See id.* (acknowledging that "[w]hile the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the [CAA] obsolete").

78. *See id.* at 1462-64 (addressing EPA's alternative basis for denying plaintiffs' rulemaking petition).

79. *See id.* at 1462-63 (citing 68 Fed. Reg. 52932 (2003)) (discussing EPA's justifications behind decision not to regulate carbon dioxide emissions).

80. *See id.* at 1462 (discussing EPA's lack of authority to render decisions based on policy judgments).

81. *Id.* (quoting 42 U.S.C. § 7521(a)(1) (2001)) (explaining requisite findings EPA must make before deciding whether or not to regulate). The Court considered that such a judgment should not be used as a "roving license to ignore the statutory text" but rather an "exercise [of] discretion within defined statutory limits." *See id.* (same).

82. *See id.* (citing 42 U.S.C. § 7521(a)(1) (2001)) (noting that "[i]f [the] EPA makes a finding of endangerment, the [CAA] requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles").

83. *See id.* ("[The] EPA has refused to comply with this clear statutory command.").

law."[84] After rejecting each EPA argument, the Court remanded the case and instructed the EPA to "ground its reasons for action or inaction in the statute."[85]

E. *The Dissenting Opinions*

1. *Chief Justice Roberts's Dissent*

Chief Justice Roberts dissented and was joined by Justices Scalia, Thomas and Alito.[86] The Chief Justice argued that the plaintiffs' claims were non-justiciable because the plaintiffs lacked standing to bring the suit.[87] In particular, Chief Justice Roberts criticized the majority's relaxed standard based on Massachusetts's status as a sovereign state.[88] Rather than relaxing the requirements, Chief Justice Roberts argued that sovereign status added an additional requirement: "the articulation of a 'quasi-sovereign interest' '*apart* from the interests of particular private parties.'"[89] According to Chief Justice Roberts, Massachusetts failed to meet any of the standing tests, regardless of which test was applied.[90]

Turning to the injury requirement, Chief Justice Roberts opined that "the very concept of global warming seems inconsistent with [the particularized injury] requirement."[91] The Chief Justice further argued that Massachusetts's claim regarding loss of coastal property as an actual injury was

84. *See id.* at 1463 (quoting 42 U.S.C. § 7607(d)(9)(A)) (holding that even under narrow scope of review, EPA's decision not to act must be overturned).

85. *See id.* at 1462-63 ("Under the clear terms of the [CAA], EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.").

86. *See id.* at 1463-71 (Roberts, C.J., dissenting) (listing Justices who joined in dissent).

87. *See id.* at 1463-64 (acknowledging problem of global warming but arguing that problem would be better dealt with by other governmental branches). *Compare id.* (finding greenhouse gas emissions challenge non-justiciable due to lack of standing), *with* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (finding greenhouse gas emissions challenge non-justiciable due to political question doctrine).

88. *See EPA*, 127 S. Ct. at 1464-67 (Roberts, C.J., dissenting) (discussing objections to majority's analysis of standing requirements for states). Chief Justice Roberts opined that "[r]elaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence, and support for any such 'special solicitude' is conspicuously absent from the Court's opinion." *Id.* at 1464 (same).

89. *See id.* at 1465 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982)) (determining that state status imposes additional standing requirement).

90. *See id.* at 1466-67 (articulating opinion that Massachusetts failed to show standing either under *parens patriae* test or traditional test as laid out in *Lujan*).

91. *See id.* at 1467 (characterizing global warming as harm suffered by everyone and thus one that cannot become particularized injury for purposes of standing).

too conjectural and lacked imminence.[92] Similarly, the Chief Justice believed that the causal link between the lack of emission standards for new vehicles and the loss of coastal property was too tenuous to satisfy the causation requirement for standing.[93] Finally, Chief Justice Roberts reasoned that because of that tenuous causal link, the plaintiffs could not produce sufficient proof that the EPA standards for emissions would redress Massachusetts's injury.[94]

2. *Justice Scalia's Dissent*

In addition to joining in full the Chief Justice's dissent concerning the issue of standing, Justice Scalia wrote a dissenting opinion that addressed the merits of the plaintiffs' claim.[95] Justice Scalia emphasized that courts should not second-guess the broad discretionary authority granted to the EPA under the CAA.[96] In addition, Justice Scalia argued that the EPA's basis for exercising that discretion and choosing not to regulate greenhouse gases—that scientific uncertainty still surrounds global warm-

92. *See id.* (arguing that Massachusetts lacked standing). Regarding whether the loss of coastal land was "actual," Chief Justice Roberts argued that "aside from a single conclusory statement, there is nothing in petitioners' 43 standing declarations and accompanying exhibits to support an inference of actual loss of Massachusetts coastal land from 20th century global sea level increases. It is pure conjecture." *Id.* (questioning evidentiary support for Massachusetts's claim of injury). The Chief Justice also questioned the imminence of the alleged injury, and argued that the petitioners' models—which presented the risk of rising sea levels on an extended timeline—"render[ed] requirements of imminence and immediacy utterly toothless." *See id.* at 1468 (rejecting projected models of harm as evidence of imminent injury requiring redressability).

93. *See id.* at 1468-69 (characterizing link between alleged injury and domestic emissions as tenuous). Chief Justice Roberts referenced the complexity of global warming, and concluded that the causal link was "far too speculative" because the "[p]etitioners [were] never able to trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards." *Id.* at 1469 (addressing petitioners' inability to trace injury to alleged harm).

94. *See id.* at 1469-71 (describing impact of other nations' emissions and concluding that EPA standards were not likely to redress plaintiffs' actual injury). The Chief Justice explained that "even if regulation *does* reduce emissions—to some indeterminate degree, given events elsewhere in the world—the Court never explains why that makes it *likely* that the injury in fact—the loss of land—will be redressed." *Id.* at 1470 (questioning ability to redress loss of land through reduced emissions).

95. *See id.* at 1471-78 (Scalia, J., dissenting) (dissenting primarily on merits of case). Chief Justice Roberts and Justices Thomas and Alito joined Scalia in his dissent on the merits. *See id.* at 1471 (listing dissenting Justices joining Justice Scalia).

96. *See id.* at 1471-74 (discussing EPA's broad discretionary authority). Justice Scalia agreed that the "EPA's interpretation of the discretion conferred by the statutory reference to 'its judgment' [in § 201(a)(1) of the CAA] is not only reasonable, it is the most natural reading of the text." *Id.* at 1473 (criticizing Court for not acknowledging EPA's interpretation of text).

ing—was valid and should have satisfied the Court.[97] Finally, Justice Scalia adamantly disagreed with the Court's construction of the definition of "air pollutant"; the Justice argued that the Court should have deferred to the EPA's interpretative determination that greenhouse gases were not "air pollutant[s]" under the CAA.[98]

IV. THE POSSIBLE DISPLACEMENT OF THE COMMON LAW OF NUISANCE BY THE CAA AS A RESULT OF THE COURT'S RULING IN *MASSACHUSETTS V. EPA*

A. *The Displacement Doctrine in Environmental Law*

1. *Establishing the Analytical Framework for Displacement:* Milwaukee I & II

The shift in environmental law from actions rooted in common law to those arising from complex statutory regulatory schemes necessarily implicates questions of federalism and the potential displacement of the common law by statutes.[99] Traditionally, courts ardently protect state common law from displacement.[100] Federal common law, however, remains vulner-

97. *See id.* at 1474-75 (quoting in large part EPA's argument regarding "scientific uncertainty" as justification for declining to regulate greenhouse gases).

98. *See id.* at 1475-77 (describing EPA's interpretation of "air pollutant" as "eminently reasonable" and deserving of deference by Court).

99. *See, e.g.*, Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304 (1981) (addressing displacement of federal common law by Water Pollution Act Amendments of 1972); *see also* Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) (addressing displacement of state common law by Clean Water Act); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (addressing federal common law displacement by Comprehensive Environmental Response, Compensation and Liability Act of 1980); Gutierrez v. Mobil Oil Corp., 798 F. Supp. 1280 (W.D. Tex. 1992) (addressing state common law displacement by Clean Air Act); United States v. Kin-Buc, Inc., 532 F. Supp. 699 (D.N.J. 1982) (addressing displacement of federal common law by Clean Air Act and Federal Water Pollution Control Act). *See generally* Heimert, *supra* note 29, at 465 ("[C]omprehensive new air and water pollution statutes created questions as to whether previously existing federal common-law causes of action survived or had been supplanted by statute."). For a brief discussion of the common law roots of environmental law and the subsequent move to statutory regulation, see *supra* notes 29-47 and accompanying text.

The Supreme Court explained how statutory displacement of common law is connected to issues of federalism: "The enactment of a federal rule in an area of national concern . . . is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *Milwaukee II*, 451 U.S. at 312-13 (citing Wallis v. Pan Am. Petrol. Corp., 384 U.S. 63, 68 (1966)) (addressing importance of federalism in representative democracy). The Court then stated that statutory displacement reflects "due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy." *See id.* at 316 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959)) (same); *see also* Merrill, *supra* note 41, at 313-14 (discussing how displacement raises issues of federalism and separation of power distinct from those issues raised by state law preemption).

100. *See* Heimert, *supra* note 29, at 435-36 (stating that "[f]ederal pollution laws do not preempt state nuisance law"); *see also Milwaukee II*, 451 U.S. at 316-17 (distinguishing between displacement of federal common law and preemption of

able to displacement.[101] The major environmental case illustrating displacement of the federal common law and the application of the governing analytic framework is *Milwaukee v. Illinois (Milwaukee II).*[102]

Milwaukee II arose out of Illinois's lawsuit against Milwaukee over water pollution stemming from the Milwaukee sewer system's overflow into Lake Michigan, a problem previously litigated in *Illinois v. Milwaukee (Milwaukee I).*[103] In *Milwaukee I,* the Supreme Court recognized the existence of federal common law nuisance actions for the abatement of interstate water pollution and held that the Federal Water Pollution Control Act did not displace federal common law.[104] Less than one year after *Milwaukee I* was decided, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 ("Amendments"), which established an extensive permit system for the discharge of pollutants into American waters.[105] In *Milwaukee II,* the Court concluded that the Amendments displaced federal common law nuisance actions because the Act was "an all-encompassing program of water pollution regulation."[106]

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state law). In evaluating instances of possible preemption of state law, the courts must begin "'with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 316 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)) (discussing presumptions in analyzing potential preemption); *see also Ouellette,* 479 U.S. at 500 (holding that state common law nuisance actions are still permitted under Clean Water Act); *Gutierrez,* 798 F. Supp. at 1285 (holding that CAA did not displace state common law claims arising out of emissions of toxic substances from storage tanks when state actions required more stringent pollution control than CAA).

101. *See* Meiners & Yandle, *supra* note 29, at 953 (discussing widespread displacement of federal environmental common law).

102. 451 U.S. 304 (1981).

103. 406 U.S. 91, 93 (1972); *see also Milwaukee II,* 451 U.S. at 307-10 (detailing water pollution problem and holding in *Milwaukee I*).

104. *See Milwaukee I,* 406 U.S. at 98-109 ("[A]pplication of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act."); *see also Milwaukee II,* 451 U.S. at 309-11 (referencing *Milwaukee I*'s holding that "Illinois could appeal to federal common law to abate a public nuisance in interstate or navigable waters").

105. *See Milwaukee II,* 451 U.S. at 311-12 (explaining effect of Amendments). The Amendments delegated to the EPA the task of administering the Act and its new Amendments. *See id.* at 310-11 (discussing new system of regulation created by Amendments).

106. *See id.* at 318 (discussing Congress's intent in enacting Amendments). The Court distinguished the scope of the statutes governing water pollution prior to the enactment of the Amendments—and upon which the reasoning in *Milwaukee I* was based—from the scope of the Amendments:

> The 1972 Amendments to the Federal Water Pollution Control Act were not merely another law "touching interstate waters" of the sort surveyed in [*Milwaukee I*] and found inadequate to supplant federal common law. Rather, the Amendments were viewed by Congress as a "total restructuring" and "complete rewriting" of the existing water pollution legislation considered in that case.

Id. at 317 (quoting 118 CONG. REC. 9419, 10204 (1972) (statement of Rep. Blatnik), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL

In determining whether the Act displaced the federal common law, the Court began with the assumption that "it is for Congress, not the federal courts, to articulate the appropriate standards to be applied as a matter of federal law."[107] The Court then examined whether the federal statute was comprehensive or whether it left gaps that required supplementary regulation by the common law.[108] The Court ultimately determined that where Congress's intent to establish a comprehensive regulatory scheme in a particular (and complex) field is clear and the statute "addresses the problem formerly governed by federal common law," the federal common law can no longer exist.[109]

2. *The Potential Displacement Power of the CAA*

Courts have applied the *Milwaukee II* framework to many cases involving statutory displacement of federal common law.[110] Nevertheless, questions remain about when and to what extent the federal common law of nuisance is displaced.[111] Two different interpretations of the standard under *Milwaukee II* are possible: field displacement and conflict displace-

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ACT AMENDMENTS OF 1972, at 350-51 (1973); 118 CONG. REC. 9419, 10206-07 (1972) (statement of Rep. Jones), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 359-60 (1973)) (using legislative history to assist in defining scope of federal statute).

107. *See id.* at 316-17 (describing appropriate displacement analysis and distinguishing between displacement of state law and displacement of federal law). The *Milwaukee I* Court explicitly recognized the somewhat rocky historical status of federal common law as a viable body of law. *See id.* at 312-14 (noting that unlike state courts, federal courts are not general common law courts and that development of federal common law occurs only in isolated, highly circumscribed instances).

108. *See id.* at 314 (noting that precedent allows federal common law to survive until Congress enacts comprehensive legislation); *see also id.* at 317-19 (exploring comprehensiveness of Amendments and determining that such comprehensiveness "suggests that there is no room for courts to attempt to improve on that program with federal common law").

109. *See id.* at 315 n.8, 317-27 (explaining why federal common law must give way to statutes under facts of case); *see also* Grossman, *supra* note 26, at 33-37 (discussing displacement of federal common law by statute); Mensher, *supra* note 20, at 474-79 (explaining when statutory intent to displace is evident and considering scope of that displacement in context of *Milwaukee II*).

110. *See, e.g.*, Nat'l Audubon Soc'y v. Dep't of Water, 869 F.2d 1196, 1200-05 (9th Cir. 1988) (applying *Milwaukee II* and holding that plaintiff's air and water pollution claims based on federal common law of nuisance were displaced by CAA and Federal Water Pollution Control Act, respectively); New England Legal Found. v. Costle, 666 F.2d 30, 32-33 (2d Cir. 1981) (applying *Milwaukee II* and holding that CAA displaced plaintiff's federal common law claim for equitable relief from power plant's burning of high sulfur fuel); United States v. Kin-Buc, Inc., 532 F. Supp. 699, 702 (D.N.J. 1982) (applying *Milwaukee II* and holding that plaintiff's claim under federal common law of nuisance was displaced by CAA because CAA established "a complete regulatory procedure" governing pollutants complained of by plaintiff).

111. *See* Merrill, *supra* note 41, at 311 (explaining "*Milwaukee II* is ambiguous as to what the standard for displacement of federal common law should be").

ment.[112] Field displacement occurs when Congress has legislated so comprehensively in a particular area "that it can be said that the federal legislation 'occupies the field.'"[113] Conflict displacement, in comparison, occurs when a statute specifically addresses the particular action or remedy that gives rise to the common law claim.[114] Reading *Milwaukee II* as a case of field displacement creates a broader holding that increases the potential for displacement of federal common law in subsequent cases.[115] The text of *Milwaukee II* arguably supports either of these displacement theories.[116]

Although persuasive, *Milwaukee II* is not dispositive in answering whether the CAA will displace federal common law in the area of air pollution, which is the area from which climate change litigation originates.[117] The CAA is similar, but not identical, to the Federal Water Pollution Control Act, and there is considerable support for the view that the CAA is less comprehensive than the Federal Water Pollution Control Act—an important factor in the *Milwaukee II* analysis.[118] Significantly, the Supreme

112. *See id.* (describing alternate interpretations of *Milwaukee II* and forecasting which interpretation defendants and plaintiffs would prefer). Field and conflict displacement are constructed by analogy from the preemption doctrines of field preemption and conflict preemption, which apply when determining whether state law is preempted by federal law—as opposed to when federal common law is displaced by federal statute. *See id.* at n.83 (explaining analogy); *see also* Sarah Olinger, *Filling the Void in an Otherwise Occupied Field: Using Federal Common Law to Regulate Carbon Dioxide in the Absence of a Preemptive Statute*, 24 PACE ENVTL. L. REV. 237, 250 (2007) (explaining distinction between field and conflict preemption).

113. *See* Merrill, *supra* note 41, at 311 (defining field displacement and discussing how defendants will want to argue that reading in order to more easily foreclose on federal common law nuisance actions).

114. *See id.* at 311-13 (defining conflict displacement and suggesting that plaintiffs will likely argue conflict displacement reading in order to minimize displacement of federal common law nuisance actions).

115. *See id.* at 316-19 (discussing potential for field displacement interpretation as compared to conflict displacement interpretation).

116. *See id.* at 312 n.85-86, 313 (evaluating passages of *Milwaukee II* opinion that support each interpretation). *But see* Olinger, *supra* note 112, at 450 (calling *Milwaukee II* "a classic example of field [displacement]").

117. *See* Benjamin P. Harper, Note, *Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns*, 40 GA. L. REV. 661, 681-84 (2006) (discussing holding of *Milwaukee II* and its relationship to CAA displacement).

118. *See id.* at 682 (noting that "[t]he [CAA], which primarily relied on general nationwide air quality standard rather than individual permitting requirements for all sources of pollution, is less comprehensive than the Clean Water Act" and that comprehensiveness was "primary concern" in *Milwaukee II*). Nevertheless, some expansions of the CAA—such as the 1990 Amendments—have pushed the CAA in the direction of greater comprehensiveness. *See id.* at 682-83 (addressing how CAA Amendments expanded CAA scope by permitting regulations and programs similar to Clean Water Act); *see also* Nat'l Audubon Soc'y v. Dep' t of Water, 869 F.2d 1196, 1212-14 (9th Cir. 1989) (Reinhardt, J., dissenting) (suggesting that CAA is less comprehensive than Federal Water Pollution Control Act); New England Legal Found. v. Costle, 666 F.2d 30, 32 n.2 (2d Cir. 1981) (noting that CAA

Court has never considered a case that directly addressed whether the CAA displaces the federal common law of nuisance.[119] In the only circuit court case concerning that issue, the Second Circuit held that the CAA displaced federal common law nuisance actions for air pollution stemming from the burning of high sulfur fuel, but only to the extent that the CAA already regulated the particular source.[120] The Second Circuit, however, did not reach the "broad question of whether the [CAA] totally [displaces] federal common law actions based on the emission of chemical pollutants into the air."[121]

Courts generally afford state common law nuisance claims greater protection from preemption by federal statutes.[122] For example, in *Inter-*

"differs substantially" from Federal Water Pollution Control Act in ways material to *Milwaukee II* displacement analysis); Pawa & Krass, *supra* note 26, at 464 (noting "the [CAA] more closely resembles the pre-1972 Federal Water Pollution Control Act . . . and is fundamentally different from the post-1972 water pollution law at issue in *Milwaukee II*."). *But see* Merrill, *supra* note 41, at 316-17 (arguing that "[i]t is impossible to say that the [CAA] is less comprehensive than the [Federal Water Pollution Control Act] based on pages of legislation or volumes of regulations or economic activity affected or dollars of compliance costs").

119. *See* Merrill, *supra* note 41, at 311 (commenting that "[t]he Supreme Court has never addressed the question whether the federal common law of nuisance has been displaced in the context of interstate air pollution" and concluding that "the issue is not foreclosed").

120. *See Costle*, 666 F.2d at 32-33 (noting that power plant's use of high sulfur fuel had been approved by EPA and thus could not be restricted through common law means); *see also* Mensher, *supra* note 20, at 479 (describing Second Circuit's holding); Merrill, *supra* note 41, at 311 (summarizing Second Circuit's holding in *Costle* and holding of district courts in other cases involving displacement by CAA).

121. *See Costle*, 666 F.2d at 32 (expressly reserving question of CAA displacement of federal common law in certain circumstances). The court then described the differences between the CAA and the Federal Water Pollution Control Act (the displacing statute in *Milwaukee II*). *See id.* at 32 n.2 (discussing differences between Water Pollution Act and CAA). The circuit court found those differences to be "substantial" and "especially significant" in terms of displacement potential. *See id.* (noting significant differences between Water Pollution Act and CAA, including fact that Water Pollution Act regulates every point source of pollution while CAA only requires regulation of sources found to threaten national ambient air quality standards).

122. *See* Sevinsky, *supra* note 35, at 30 (addressing continued vitality of state common law despite growth of federal statutory system). Much of the actual enforcement of environmental protection laws occurs at the state level. *See id.* (explaining how states' environmental statutes allow for environmental enforcement at state level). In addition to enforcing federal statutes, states have also successfully employed the common law:

> [F]or the most part states did not allow the new statutes to displace their potent common-law heritage. To the contrary, ancient common-law remedies like public nuisance were dusted off, tuned up, and applied vigorously by state attorneys general to some of the most persistent modern environmental problems, often in conjunction with the new statutes. For the most part, state statutes either expressly preserved common-law remedies or courts have been reluctant to infer revocation without an express statutory expression that the legislature intended to supplant common law.

national Paper Co. v. Ouellette,[123] landowners in Vermont sued a paper mill in New York, alleging that the mill's discharge of pulp into Lake Champlain constituted a common law nuisance under Vermont law.[124] The Supreme Court in *International Paper* held that the Federal Water Pollution Control Act did not preempt the state common law actions, although the common law must be that of the source state—in that case, New York.[125] Similarly, in *Gutierrez v. Mobil Oil Corp.*,[126] the plaintiffs sued Mobil Oil in a Texas district court for various tort actions, including trespass and nuisance, claiming that Mobil Oil's storage facility was leaking and contaminating the air, water and soil.[127] The *Guiterrez* court held that the CAA did not preempt the plaintiffs' state common law claims because Congress did not intend to preempt state law and the common law provided remedies different from, and supplementary to, the CAA.[128] Both *International Paper* and *Guiterrez* clearly demonstrate the deference given to established state common law actions.[129]

B. *The Clean Air Act, Greenhouse Gases and Federal Common Law Displacement after* Massachusetts v. EPA

Massachusetts v. EPA established that the CAA considers carbon dioxide and other greenhouse gases to be "air pollutant[s.]"[130] Most suits in-

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Id. (discussing strength of state common law in environmental actions); *see also* Grossman, *supra* note 26, at 37 (setting forth standard applied to determination of state common law preemption).

123. 479 U.S. 481 (1987).

124. *See id.* at 483-85 (describing factual background and plaintiffs' allegations).

125. *See id.* at 500 (holding that "[n]othing in the [Federal Water Protection Control] Act prevents a court sitting in an affected State from hearing a common-law nuisance suit" and that source-state law must be applied because "the application of affected-state laws would be incompatible with the Act's delegation of authority and its comprehensive regulation of water pollution").

126. 798 F. Supp. 1280 (W.D. Tex. 1992).

127. *See id.* at 1281 (describing factual background and plaintiffs' allegations).

128. *See id.* at 1282-83, 1285-86 (discussing lack of preemption by CAA and explaining differences between remedies available under CAA and common law).

129. *Cf.* Sevinsky, *supra* note 35, at 30 (addressing continued vitality of state common law despite growth of federal statutory system).

130. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1460 (2007) (holding that carbon dioxide falls under CAA's "sweeping" definition of "air pollutant"). For a detailed discussion of the Supreme Court's decision in *Massachusetts v. EPA*, see *supra* notes 48-98 and accompanying text.

Although the Supreme Court technically remanded the case for the EPA to "make a reasoned judgment" whether "greenhouse gases contribute to climate change" as required by 42 U.S.C. § 7521(a)(1), the practical result of the Court's holding is that the EPA must regulate carbon dioxide and other greenhouse gases under the CAA. *See EPA*, 127 S. Ct. at 1462 (remanding case); Jonathan H. Adler, Massachusetts v. EPA *Heats Up Climate Policy No Less than Administrative Law: A Comment on Professors Watts and Wildermuth*, 102 NW. U. L. REV. 32, 37 (2007) (discussing regulatory implications of *Massachusetts v. EPA* and recognizing that EPA must now regulate carbon dioxide under CAA). Adler noted that "[w]hatever impact *Massa-*

volving global warming will likely target carbon dioxide, which is the most significant anthropogenic greenhouse gas.[131] The Court's decision in *Massachusetts v. EPA* raises an important question regarding the viability of climate change tort actions: does the CAA, which now regulates greenhouse gas emissions, displace federal common law nuisance actions?[132] If so, the CAA forecloses the option of common law litigation for climate change.[133] Prior to the Court's decision, many scholars reasoned that because the CAA would be the federal statute likely to displace the common law, and because both the EPA and the district court had ruled that the CAA did not apply to greenhouse gas emissions, the federal common law remained intact.[134]

The Court's decision in *Massachusetts v. EPA* complicates the question of displacement, but even under that new holding, it remains possible that the CAA does not completely displace the federal common law and that the federal common law remains a viable basis for suit in climate change litigation.[135] When applying *Milwaukee II*'s analytic framework, the CAA should not displace federal common law of nuisance in the greenhouse

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chusetts v. EPA has on [other legal issues, such as standing in administrative law], one thing is certain: Barring congressional intervention, this decision will cause the EPA to regulate the emission of greenhouse gases from new motor vehicles, as well as from other sources." *Id.* (explaining impact of Court's decision in *Massachusetts v. EPA* on EPA regulation under CAA).

131. *Cf.* California v. Gen. Motors Corp., No. C06-05755, slip op. 2007 WL 2726871, at *1 (N.D. Cal. Sept. 17, 2007) (stating that human activities emit more carbon dioxide than any other gas); Pawa & Krass, *supra* note 26, at 418 (describing important role of carbon dioxide emissions in greenhouse effect and global warming). The few lawsuits that have already been filed using federal common law nuisance causes of action for global warming have focused on carbon dioxide emissions. *See, e.g.*, Comer v. Murphy Oil USA, Inc., No. 05-CV-436LG, slip op. (S.D. Miss. Aug. 30, 2007) (appeal pending) (alleging injury from carbon dioxide emissions); Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (alleging power plant's carbon dioxide emissions contribute to global warming).

132. *See* Harper, *supra* note 117, at 691 (analyzing whether federal nuisance actions related to carbon dioxide emissions are displaced by CAA and discussing district court's decision to uphold EPA's interpretation of "air pollutants" in *Massachusetts v. EPA*).

133. *See id.* (questioning whether federal common law is preempted by CAA); Mensher, *supra* note 20, at 480-81 (discussing possibility of federal common law's displacement by CAA).

134. *See, e.g.*, Grossman, *supra* note 26, at 36-37 (noting that displacement by CAA is impossible because "[n]ot only are carbon dioxide emissions unregulated by the CAA, . . . but climate change itself is outside the scope of the statute"); Harper, *supra* note 117, at 691-93 (reasoning that federal common law is not displaced by CAA because CAA does not regulate greenhouse gases, as established by EPA and district court in *Massachusetts v. EPA*); Mensher, *supra* note 20, at 480-84 (explaining that federal common law is not displaced by CAA).

135. *See* Mensher, *supra* note 20, at 483 (arguing that CAA's regulation of carbon dioxide does not necessarily signal displacement of federal common law); Olinger, *supra* note 112, at 265 (noting that "[a]ctions in federal common law nuisance have existed concurrently with the CAA").

gas context.[136] Compelling evidence exists that Congress did not intend for the CAA to regulate greenhouse gases or climate change at all, let alone in a comprehensive fashion.[137] In light of *Milwaukee II*'s marked emphasis on congressional intention in promulgating regulations in a judicial displacement analysis, such evidence is important.[138]

Regardless of congressional intent, there are four additional reasons why the CAA does not comprehensively "occupy the field" of greenhouse gas regulation.[139] First, the CAA does not regulate all potential sources of

136. *Cf.* Olinger, *supra* note 112, at 264-66 (analyzing CAA under *Milwaukee II* framework and concluding that federal common law of nuisance for carbon dioxide emissions actions would not be displaced). *But see* Mensher, *supra* note 20, at 484 (arguing that if EPA makes judgment on remand that CAA regulates greenhouse gases, CAA "would likely displace the common law").

137. *See* Olinger, *supra* note 112, at 258 ("Congress did not intend for the EPA to regulate CO2 through the CAA."). One commentator has noted that in constructing the 1990 Amendments to the CAA, Congress "deliberat[ly] reject[ed]" provisions that called for mandatory regulation of carbon dioxide and other greenhouse gases. *See id.* at 258-59 (reviewing legislative history of CAA regarding greenhouse gas regulation); *cf. also* Massachusetts v. EPA, 127 S. Ct. 1438, 1447 (2007) (acknowledging that when Congress first enacted CAA, "the study of climate change was in its infancy"). It is difficult to believe that Congress intended to promulgate regulations in an area even the scientific community did not yet understand. *Cf.* Olinger, *supra* note 112, at 260 (discussing unlikely scenario that Congress was trying to regulate CO2). Later, as scientific knowledge about greenhouse gases and climate change progressed, Congress nevertheless repeatedly emphasized research over regulation, implicitly reinforcing the conclusion that it did not intend to regulate greenhouse gases under the CAA or any other federal statute. *See id.* at 1450 (describing EPA's analysis of Congress's past decisions regarding climate change); Matthew Visick, *If Not Now, When? The California Global Warming Solutions Act of 2006: California's Final Steps Toward Comprehensive Mandatory Greenhouse Gas Regulation*, 13 HASTINGS W. NW. J. ENVTL. L. & POL'Y 249, 250 (2007) (describing Legislative and Executive branches' exclusively research-oriented response to increasing evidence of climate change).

138. *See* Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 318 (1981) ("Congress's *intent* in enacting the Amendments [to the Federal Water Pollution Control Act] was clearly to establish an all-encompassing program of water pollution regulation.") (emphasis added). The *Milwaukee II* Court reiterated this point, noting that it was Congress's "clear *intent* . . . to do something quite different with the 1972 Amendments." *See id.* at 318 n.10 (emphasis added) (addressing scope of Amendments). The Court cited a substantial amount of legislative history regarding Congress's intentions in enacting those Amendments as support for its determination of comprehensiveness. *See id.* at 318-19, 318 n.12 (reviewing broad support of legislators recorded in legislative history). The Court further labeled the Amendments "a *self-consciously* comprehensive program," and referred to Congress's "contemplat[ion]" of the thoroughness of the statute, further indicating intention as an analytical factor. *See id.* at 319-20 (emphasis added) (implying importance of intent in determining comprehensiveness).

139. *See* Olinger, *supra* note 112, at 260 ("[A]s written, the CAA only addresses [carbon dioxide] in the context of nonregulatory strategies."); *id.* at 264-65 (analyzing potential CAA displacement under "comprehensiveness" prong of *Milwaukee II*); *see also* California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *9 (N.D. Cal. Sept. 17, 2007) ("[T]he [CAA] do[es] not directly address the issue of global warming and carbon dioxide emissions standards."). The court in *California v. General Motors Corp.*, a post-*Massachusetts v. EPA* decision, stated that "a

greenhouse gases.[140] Second, because the CAA cannot sufficiently address the problem of greenhouse gas emissions, the Act leaves gaps for the federal common law to fill.[141] Third, the CAA would be a poor mechanism for regulation of greenhouse gases, which are fundamentally different from the air pollutants currently regulated by the CAA.[142] Fourth, in order for the CAA to properly regulate either greenhouse gases themselves or the promulgation of other federal statutes to regulate climate

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comprehensive global warming solution must be achieved by a broad array of domestic and international measures that are yet undefined," implying that the CAA's regulation of greenhouse gases is not comprehensive. *See id.* (discussing comprehensiveness of global warming remedies, including CAA regulation); California's Supplemental Brief Re: *Massachusetts v. EPA* at 5, California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *9 (N.D. Cal. Sept. 17, 2007) (arguing that "[the CAA], however, provides no comprehensive response or remedy, and, of course, no regulation exists currently, and may not for a period of years"). For a discussion of the comprehensiveness of the CAA as compared to the Federal Water Pollution Control Act, the displacing statute in *Milwaukee II*, see *supra* notes 106-09, 117-18, and 121 and accompanying text.

140. *See* Olinger, *supra* note 112, at 264 (stating that CAA does not regulate all pollutants and sources of such pollutants but that "the CAA selectively regulates pollutants and their sources . . . .").

141. *See id.* at 265 ("To satisfy the . . . *Milwaukee II* test, the regulatory scheme of the CAA must sufficiently address any issues of [carbon dioxide] regulation previously governed by federal common law."); *see also Milwaukee II*, 451 U.S. at 323 (finding that precise problem complained of by plaintiffs was regulated by federal statute and thus "[t]here is no 'interstice' here to be filled by federal common law"); Nordhaus, *supra* note 28, at 72 (noting "combination of gaps" in regulation of greenhouse gases under CAA).

142. *Cf.* Janine Maney, *Carbon Dioxide Emissions, Climate Change, and the Clean Air Act: An Analysis of Whether Carbon Dioxide Should be Listed as a Criteria Pollutant*, 13 N.Y.U. ENVTL. L.J. 298, 371-75 (2005) (addressing policy considerations of regulating carbon dioxide under CAA and noting difficulty of such regulation under National Ambient Air Quality Standards (NAAQS) system); Olinger, *supra* note 112, at 261-64 (referring to regulation of carbon dioxide as "impossibility" based on CAA's current regulatory design); Jonathan B. Wiener, Commentary, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1966-67 (2007) (discussing problems of regulating carbon dioxide and other greenhouse gases under CAA). One commentator has suggested that successfully regulating carbon dioxide on a comprehensive statutory level requires international cooperation:

> [R]egulation of carbon dioxide under the National Ambient Air Quality Standards (NAAQS) and State Implementation Plans (SIPs) of Clean Air Act sections 109 and 110 would likely fail if carbon dioxide were listed as a "pollutant" by the EPA under section 108 of the Clean Air Act. No SIP could, on its own, attain a serious NAAQS for GHGs without international cooperation. The problem is not whether carbon dioxide qualifies as a pollutant [one of the main substantive issues of *Massachusetts v. EPA*], but that state-based ambient standards are a mismatch with a globally mixing GHG. Only international cooperation on emissions limitations can effectively reduce ambient concentrations.

Id. (asserting need for international regulatory efforts); *see also* Nordhaus, *supra* note 28, at 63 (stating that CAA cannot control global carbon dioxide levels and "does not provide a workable framework on which to erect a domestic climate policy").

change, the Act would require modifications that will take a long time to implement.[143] Thus, when applying the displacement analysis framework of *Milwaukee II*, the CAA should not displace federal common law of nuisance in the greenhouse gas context.[144]

If, however, the Supreme Court subsequently determines that the CAA does displace federal common law actions, the consequences will be serious. Significantly, the CAA's design cannot properly regulate carbon dioxide and other greenhouse gases.[145] Thus, by finding that the CAA displaces federal common law, the Court would be prematurely shutting down a developing area of the common law of nuisance in favor of a poorly designed statute.[146] Moreover, the Court would further the shift away from the common law and toward purely statutory regulation, a trend that has harmed other areas of environmental law, such as water law.[147]

C. *The CAA, Carbon Dioxide and State Common Law Displacement after* Massachusetts v. EPA

In general, because courts give state common law more deference in displacement analysis, federal statutes such as the CAA are less likely to displace state common law.[148] For example, in *Feikema v. Texaco, Inc.*,[149]

143. *See* Ken Alex, *Global Warming as Public Nuisance*, 43 STAN. J. INT'L L. 77, 90 (2007) (noting that once EPA decides to regulate, it will take years to put regulations in place); *cf.* Nordhaus, *supra* note 28, at 72 ("If the petitioners prevail in Massachusetts v. EPA [which they did], Congress may be faced with a choice of allowing GHG regulation to proceed under an imperfect Clean Air Act regulatory regime, or enacting a new regulatory regime specifically designed for cost-effective control of GHGs."). Amending the "imperfect" CAA will not be easy; one commentator referred to the Act as "the most complicated statute in history." Erich Birch, *Air Quality Regulation in the United States: A Complicated System Yields Laudable Results*, BUS. L. TODAY, Aug. 16, 2007, at 13 (noting complexity of CAA). Moreover, much of the CAA overlaps and interlocks with individual state regulations and other related federal regulations and statutes, making the process of revising or amending the CAA even more difficult. *See id.* (describing complex network of federal and state regulations).

144. For a discussion of why the common law should not be displaced by the CAA, see *supra* notes 130-43 and accompanying text.

145. For a more detailed discussion of the problems associated with attempting to regulate greenhouse gases through the CAA, see *supra* notes 139-43 and accompanying text.

146. *See* Sevinsky, *supra* note 35, at 29 (discussing general benefits of common law public nuisance actions in environmental law).

147. *See generally* Meiners & Yandle, *supra* note 29, at 946-63 (discussing benefits of environmental regulation through common law as opposed to statutes).

148. *See supra* notes 107-16 and accompanying text (discussing standard applied to displacement of state common law by federal statutes and cases addressing this issue). Notably, a state statute rarely preempts a state environmental common law. *See* Thompson, *supra* note 36, at 1347-48 (explaining that preemption of state common law by state statute "appears to be the rare exception, and not the rule[,]" but conceding that preemptive strength does vary).

149. 16 F.3d 1408 (4th Cir. 1994).

the Fourth Circuit allowed private homeowners to sue Texaco under Virginia's common law of nuisance, despite the existence of the federal Resource Conservation and Recovery Act.[150] Accordingly, courts are not likely to allow the CAA to displace all state common law nuisance actions in the context of greenhouse gas emissions.[151] It is important to note, however, that despite the continued viability of state common law actions from a displacement point of view, litigants may nevertheless face difficulties in pursuing state common law theories of recovery because of the inherently interstate (and global) nature of greenhouse gas emissions.[152] In fact, one commentator has argued that state-level actions may actually impede climate protection.[153]

V. THE IMPACT OF *MASSACHUSETTS V. EPA* ON COMMON LAW NUISANCE ACTIONS

Assuming that the CAA does not displace the common law, *Massachusetts v. EPA* will have a significant impact on future common law nuisance actions against emitters of greenhouse gases.[154] Prior to the Supreme

150. *See id.* at 1417-18 (holding that plaintiffs could claim damages under state common law because federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901-6992k, did not preempt state law). The court in *Feikma* noted that "[t]he Supreme Court has held repeatedly that state law damage claims are not necessarily preempted by federal statutes that regulate the same field." *See id.* at 1417 (discussing survival of state law claims due to lack of preemption).

151. *Cf.* Grossman, *supra* note 26, at 37-38 (determining that in light of precedent, "it seems that the CAA would not [displace] a climate change tort claim based on the common law of the source state—for instance, one in which many coal-fired electric utilities reside"); *see also* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987) (holding that Federal Water Pollution Control Act does not preclude source-state nuisance claims); Gutierrez v. Mobil Oil Corp., 798 F. Supp. 1280, 1285-86 (W.D. Tex. 1992) (holding that "[t]he Clean Air Act does not preempt source-state common law claims against a stationary source").

152. *See* Wiener, *supra* note 142, at 1965 (recognizing "high political hurdle for state-level actions" against greenhouse gases). One commentator explained:

> [B]ecause GHGs mix globally and have global impacts, local abatement actions pose local costs, yet deliver essentially no local climate benefits. This in turn suggests that local actions will often be difficult to enact. Each state (or country) has an incentive to free ride on other states' (or countries') actions, enjoying the global benefits without bearing the local costs.

Id. (arguing that local efforts toward emissions mitigation lead to high local costs without yielding significant local benefits).

153. *See id.* at 1966-67 (discussing "normative disadvantages" of actions by states to regulate climate change, either through statutes or common law). *But see* Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN. ST. ENVTL. L. REV. 15 (2004) (discussing successful state, local and private approaches to climate change but ultimately concluding that large-scale federal efforts are necessary for real progress).

154. *Cf.* Daniel Mumford, Note, *Curbing Carbon Dioxide Emissions Through the Rebirth of Public Nuisance Laws—Environmental Legislation by the Courts*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 195, 227 (2005) (discussing obstacles climate change plaintiffs will face, many of which *Massachusetts v. EPA* implicitly addressed). For a

Court's expansive discussion of climate change and global warming in *Massachusetts v. EPA*, many scholars had hypothesized that plaintiffs who relied upon public nuisance theories of liability would have difficulty succeeding.[155] Nevertheless, the Court's decision—specifically, its in-depth standing analysis—implicitly mitigates the potential difficulties previously identified as obstacles to public nuisance causes of action: injury and causation.[156]

A. *Showing an Injury: A Lighter Burden*

In pursuing a public nuisance action, a plaintiff must show "an act or omission that causes inconvenience or damage to the public health or public order"—in short, an injury.[157] Prior to *Massachusetts v. EPA*, the element of injury posed a formidable challenge to plaintiffs.[158] Nevertheless, the Court's favorable response to plaintiffs' injury argument, albeit in the context of standing, gives future plaintiffs in nuisance claims a distinct advantage.[159]

In *Massachusetts v. EPA*, the Court found that the plaintiffs had demonstrated an imminent, actual and particularized injury: the loss of coastal property.[160] Significantly, the Court recognized such an injury was widely-shared, but the Court did not find that that affected whether an injury had materialized.[161] Interestingly, rather than focusing on Massachusetts's loss as a sovereign state attempting to protect the health and safety of its citizens, the Court focused on Massachusetts's loss as a prop-

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discussion of the lesser burden for plaintiffs regarding the injury requirement, see *infra* notes 157-66 and accompanying text. For a discussion of the more lenient causation requirement, see *infra* notes 167-73 and accompanying text.

155. *See* Grossman, *supra* note 26, at 6-7, 52-59 (analyzing various obstacles plaintiffs will face in nuisance-based climate change actions); Mensher, *supra* note 20, at 487 (noting "evidentiary hurdles" related to common law public nuisance actions against greenhouse gas emitters); Pawa & Krass, *supra* note 26, at 446-48 (discussing challenges of meeting "special injury" requirement for public nuisance).

156. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1452-59 (2007) (addressing standing requirements of injury, causation and redressability); *see also* Christine A. Klein, *The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*, 48 B.C. L. REV. 1155, 1225-29 (2007) (recognizing that global warming suits based on nuisance law have been "gaining traction" and overcoming previously-predicted difficulties). For a summary of the Court's decision concerning the requirement of standing, see *supra* notes 55-70 and accompanying text.

157. *See* Meiners & Yandle, *supra* note 29, at 927 (defining "public nuisance").

158. *See* Mumford, supra note 154, at 210 ("The case for harms of global warming becomes . . . vulnerable when the plaintiffs attempt to demonstrate the actual harms to their specific state.").

159. *See EPA*, 127 S. Ct. at 1455-57 (accepting plaintiffs' injury as fulfilling standing requirement).

160. *See id.* at 1456 (accepting argument that global warming and climate change were causing sea levels to rise and "swallow Massachusetts's coastline").

161. *See id.* (rejecting EPA's argument that because climate change risks are "widely-shared," plaintiffs do not meet injury requirement).

erty owner.[162] The former approach would be out of reach to private plaintiffs, but the latter will be more widely applicable.[163] In essence, because the Court has legitimized the "land-loss-due-to-sea-rise" argument as a concrete injury, future plaintiffs involved in nuisance claims have a distinct advantage.[164]

The Court further advantaged plaintiffs when it gave credence to other consequences and potential injuries that future litigants may allege. Those potential consequences include: "severe and irreversible changes to natural ecosystems," "a reduction in water storage in the winter snowpack," higher rates of disease and an increase in the intensity of severe weather events.[165] By acknowledging the reality of such climate change-related injuries, the Court opened the door for plaintiffs to sue under a theory of public nuisance governed by common law.[166]

B. *Showing Causation: Allowing for a More Tenuous Chain*

In a public nuisance action, as with any tort-based claim, the plaintiff must show causation.[167] Similar to its impact on the requisite showing of injury, *Massachusetts v. EPA* established a chain of causation that future plaintiffs may utilize in other environmental suits.[168] In fact, the causal chain established in *Massachusetts v. EPA* involves steps that are more inferential—and arguably more tenuous—than would likely exist in a typical climate change suit such as a private plaintiff's suit against a power plant.[169]

162. *See id.* (noting that Massachusetts owned much of affected coastline property and thus had asserted particularized injury as landowner). *Compare id.* (discussing state as private landowner), *with* Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (discussing state as "quasi-sovereign" with rights above and apart from those of private landowners).

163. *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1802 (2007) (referring to *Massachusetts v. EPA* as "unique case" and stating that not all standing arguments used by Massachusetts will be available to non-state plaintiffs). One commentator acknowledged the importance of Massachusetts's state status to its standing argument, but nevertheless opined that "the Court is willing to recognize standing even for nontraditional plaintiffs" and that "*Lujan* is on the decline." *See id.* (discussing Supreme Court's treatment of state as property owner and analyzing relaxation of *Lujan* standing requirements).

164. *Cf. EPA*, 127 S. Ct. at 1456 (holding that loss of land constitutes injury and considering impact of Massachusetts's status as private property owner).

165. *See id.* (implying that harms other than loss of land may satisfy injury requirement in climate change cases).

166. *See* Bressman, *supra* note 163, at 1802 (implying that more plaintiffs will succeed in establishing standing and thus reaching merits of their cases).

167. *See* Bradford C. Mank, *Civil Remedies*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW 200-05 (Michael B. Gerrard ed., 2007) (addressing general and specific causation elements of tort action for nuisance in global warming suits).

168. *See EPA*, 127 S. Ct. at 1457-58 (discussing whether plaintiffs had met causation requirement for standing and accepting causation argument that required many inferential—and arguably tenuous—steps).

169. *See id.* at 1468-69 (Roberts, C.J., dissenting) (refuting plaintiffs' causal connection arguments as overly tenuous and rejecting majority's acceptance of

In *Massachusetts v. EPA*, the plaintiffs alleged that the denial of a rulemaking petition led to an increase in the amount of carbon dioxide in the atmosphere, a phenomenon that subsequently resulted in sea-level increases.[170] The average climate change suit, however, will not involve that initial rulemaking-denial step. Instead, plaintiffs will have to demonstrate--through a much more logical chain of causation—that the defendant's actions, such as the burning of fossil fuels, increases the greenhouse gases in the atmosphere, a much more logical chain of causation.[171] Because the Court has already endorsed a more complicated causal link, plaintiffs will likely face a lesser burden when attempting to convince courts that a more direct link satisfies the tort causation requirement.[172] That lesser burden, when coupled with the Court's seemingly relaxed injury requirement, indicates that plaintiffs should be able to more easily bring climate change suits based on common law nuisance theories of recovery.[173]

VI. CONCLUSION

The Court's decision in *Massachusetts v. EPA* significantly and explicitly affects environmental standing, judicial review of administrative law and the relationship between the EPA and the courts.[174] After *Massachusetts v. EPA*, environmental law plaintiffs—particularly climate change plaintiffs—will be able to more easily satisfy the standing requirements that had previously proven a formidable obstacle.[175] A more lenient approach

those arguments). The Court also foreclosed the EPA's argument that the EPA's actions contributed only a small amount of greenhouse gas to the atmosphere when compared to the contributions made by developing industrial nations, such as India and China; that foreclosure may impact future defendants. *See EPA*, 127 S. Ct. at 1457 (reasoning that small reductions are better than no reductions, regardless of actions of other countries). The Court reasoned that large problems were often solved by small, incremental steps. *See id.* ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop . . . . They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed.") (internal citations omitted).

170. *See EPA*, 127 S. Ct. at 1450 (discussing EPA's denial of rulemaking petition); *id.* at 1456 (addressing Massachusetts's alleged injuries in general and rising sea level in particular).

171. *See* Pawa & Krass, *supra* note 26, at 420 (recalling that power plant defendants did not seriously dispute allegations that their plants emitted large amounts of greenhouse gases).

172. *See, e.g.*, Grossman, *supra* note 26, at 14-15 (suggesting that Alaskans will be among first private global warming plaintiffs and forecasting their comparatively simple chain of causation argument).

173. *See* Dru Stevenson, *Special Solicitude for State Standing:* Massachusetts v. EPA, 112 PENN. ST. L. REV. 1, 9 n.38 (2007) (explaining that more relaxed standing requirements allow more plaintiffs to successfully file suits).

174. *See, e.g.*, Steinberg, *supra* note 12, at 182-89 (analyzing *Massachusetts v. EPA*'s direct effects on standing, relationship between administrative agencies and courts and EPA authority).

175. *Compare EPA*, 127 S. Ct. at 1453-58 (finding that plaintiffs had met injury, causation and redressability burdens to establish standing in greenhouse gas emis-

to standing generally allows for increased judicial review of administrative decisions and an increased supervisory role over the EPA for the courts.[176]

Massachusetts v. EPA also raised complicated questions of displacement, preemption and federalism.[177] Although the Clean Air Act should not displace the common law of nuisance as applied to greenhouse gas emissions, courts have not provided significant guidance on that issue.[178] Moreover, federalism concerns and preemption doctrines should maintain the viability of state common law nuisance actions for greenhouse gas emissions in the face of the federal statute.[179]

Standing, displacement, preemption and federalism considerations notwithstanding, perhaps the most significant consequence of *Massachusetts v. EPA* is less legally certain.[180] The Court, by taking seriously the plaintiffs' claim that global warming caused concrete injuries, recognized the legitimacy of the science of global warming and the critical importance of addressing that phenomenon—whether through challenging the denial of a rulemaking petition or through the ancient common law doc-

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sions case), *with* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-78 (1992) (holding that plaintiffs did not have standing to pursue suit regarding protection of endangered species). For a discussion of how *Massachusetts v. EPA* impacted the standing requirements for environmental law plaintiffs, see *supra* notes 154-73 and accompanying text. For a detailed analysis of the seemingly different standing requirements for states—including the impact of "special solicitude"—as opposed to private citizens established by *Massachusetts v. EPA*, see generally Stevenson, *supra* note 173, at 1-40.

176. *See* Stevenson, *supra* note 173, at 9 n.38 ("Even if future courts disagree with the specific result in [*Massachusetts v. EPA*], the decision provides courts with more opportunities to review and scrutinize agency decisions in other regulatory fields."); *see also The Supreme Court, 2006 Term—Leading Cases, Limits on Agency Discretion*, 121 HARV. L. REV. 415, 420 (2007) (arguing that *Massachusetts v. EPA* may represent "an emerging shift away from the expansive deference of the *Chevron* era and toward greater judicial oversight of administrative action."). *But see* E. Donald Elliot, *Strengthening Science's Voice at the EPA*, 66 LAW & CONTEMP. PROBS. 45, 49-53 (2003) (arguing that judicial review of EPA decisions is "too episodic, confused, and inconsistent to have much of a systematic effect on reforming agency practices"). For a discussion of the standard of review the Court in *Massachusetts v. EPA* applied in reviewing the EPA's decision, see *supra* notes 84-85 and accompanying text.

177. For a discussion of displacement and preemption issues raised by *Massachusetts v. EPA*, see *supra* notes 110-47 and accompanying text. For a discussion of federalism issues raised by *Massachusetts v. EPA*, see *supra* note 99.

178. For a discussion of the displacement issues, see *supra* notes 99-153 and accompanying text.

179. For a discussion of federalism concerns and preemption of state common law, see *supra* notes 99-129 and accompanying text.

180. *Cf.* Harper, *supra* note 117, at 696-98 (discussing "potential value of failed climate change litigation," including increased public awareness and consolidation of power in hands of political advocates in favor of meaningfully addressing climate change); Klein, *supra* note 156, at 1229-33 (arguing that global warming suits based on nuisance and other theories serve as "legislative catalysts"); Mank, *supra* note 167, at 239 ("[P]laintiffs are likely to continue to file climate change suits as a way to influence the political debate about reducing GHGs.").

trine of nuisance.[181] Nuisance may be a jungle, but it is also a necessary and effective judicial tool—at least for now.[182]

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181. *See* EPA, 127 S. Ct. at 1446-49 (adopting scientific view that global warming is related to greenhouse gas emissions and summarizing history of scientific evidence of and support for global warming since 1959). The *EPA* Court cited and quoted with approval the reports of the Intergovernmental Panel on Climate Change (IPCC), an organization that recently won the Nobel Peace Prize, with Al Gore, for research on climate change. *See id.* at 1447 n.10, 1448-49 (stating that "the IPCC concluded that 'emissions resulting from human activities are substantially increasing the atmospheric concentrations . . . [, which] will enhance the greenhouse effect, resulting on average in an additional warming of the Earth's surface'"); Gibbs and Lyall, *supra* note 8, at A1 (reporting on Nobel Peace Prize winners, paraphrasing head of IPCC as saying "science had won out over skepticism" and noting that IPCC "has issued a series of increasingly grim reports in the last two decades assessing issues surrounding climate change").

182. *Cf.* Alex, *supra* note 143, at 96 (arguing that courts should be involved in shaping strategies to deal with climate change). One commentator wrote:

> In this era of consequences, it is time to act. Each branch of government must assume its responsibilities and exercise its assigned constitutional role. As long as the political branches remain in a state of inactivity, taking no measures to address global warming, federal courts will have a substantial role to play in protecting the people and the natural resources of . . . each injured state that requests judicial intervention. In order to play that role, courts need only turn to an established body of law well-suited to address the phenomenon of global warming: public nuisance doctrine under the federal common law.

Id. (arguing that federal courts should employ nuisance doctrine to protect environment and take steps against global warming).