

CONNECTICUT V. AMERICAN ELECTRIC POWER CO.

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Climate change is one of the most intractable challenges of our generation. As the national government has struggled to meet this challenge, concerned states, municipalities, and private entities have begun to turn to the courts for relief.¹ In *Connecticut v. American Electric Power Co.* (“AEP”),² the Court of Appeals for the Second Circuit announced that the federal common law of nuisance could potentially provide the basis for court-led regulation of the nation’s largest power generating companies. This Comment argues that such a use of federal common law is only appropriate if it is limited to suits brought by one or more of the fifty states.

I. THE COURT’S DECISION

In 2004, eight states, three land trusts, and the City of New York filed two coordinated lawsuits against five power generation companies, including the federally-chartered Tennessee Valley Authority (“TVA”). These utilities produce ten percent of all greenhouse gases emitted in the United States.³ The plaintiffs alleged that the utilities’ mode of power generation constituted a public nuisance under federal common law.⁴ They sought a permanent injunction subjecting defendants’ emissions to a cap that would decrease each year for ten subsequent years.⁵ The suits were consolidated in the District Court for the Southern District of New York, which dismissed the case on political question grounds.⁶ Four years later the Second Circuit reversed.

Judge Peter W. Hall’s opinion for a two-judge panel addressed five issues.⁷ First, the court reversed the district court’s specific holding that global warming involved a political question requiring policy judgments that fell within the political branches’ exclusive competence. Second, the court held that the plaintiffs had standing. Third, the court determined that the plaintiffs had stated a claim under the federal common law of nuisance. Fourth, the court held that the plaintiffs’ claims were not preempted by federal stat-

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¹ For a summary of the political hurdles to action on climate change, and the turn to lawsuits as a result of political frustration, see James R. May, *Climate Change, Constitutional Consignment and the Political Question Doctrine*, 85 DENV. U. L. REV. 919 (2008).

² 582 F.3d 309 (2d Cir. 2009).

³ *Id.* at 309.

⁴ *Id.* at 311.

⁵ *Id.*

⁶ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *rev’d*, 582 F.3d 308. See generally *Baker v. Carr*, 369 U.S. 186 (1962) (stating that certain issues are committed to resolution by the political branches by constitutional text or implication).

⁷ Justice Sonia Sotomayor was the panel’s third member, but was elevated to the Supreme Court before the court’s decision was rendered.

ute. Fifth, and finally, the court held that the TVA Act⁸ did not preclude plaintiffs' claims against the TVA.⁹

The Second Circuit's treatment of the district court's political-question concerns reflects the messy state of that doctrine.¹⁰ Noting that the Supreme Court has "only rarely" applied the six *Baker v. Carr* factors¹¹ to dismiss a case, the Second Circuit held that the Constitution did not commit mitigation of the harms caused by global warming to the political branches.¹² The court further determined that adjudication of the defendants' contribution to global warming was within the judiciary's institutional competence, and did not pose policy questions that could only be resolved by the political branches.¹³

The court's discussion of standing and its treatment of the TVA's statutory defenses may prove controversial, but were not innovative. The opinion's standing inquiry closely tracked Justice Stevens's majority opinion in *Massachusetts v. EPA*.¹⁴ The discussion evinced some frustration with *Massachusetts v. EPA*'s conflation of the *Lujan*¹⁵ three-prong test for private standing with the *parens patriae* doctrine for state standing, but declined to clarify the interaction between the two standing doctrines because "all of the plaintiffs ha[d] met the *Lujan* test."¹⁶ With regard to claims against the TVA, the court relied on substantial precedent to hold that Congress had endowed the TVA with private managerial discretion, rather than protected political discretion, over the structure of its line operations.¹⁷

Having dispensed with preliminary questions of justiciability, the court proceeded to address the sufficiency of the plaintiffs' substantive claims. In order to find that the plaintiffs had stated a cognizable claim under the federal common law of nuisance, the court had to find (1) that the federal common law of nuisance extended to carbon dioxide pollution, and (2) that this body of law was available to the parties involved, which included private and municipal plaintiffs.¹⁸

Finally, the court determined that the plaintiffs' claims were not preempted by statute. Although the Clean Air Act and associated legislation touch on areas closely related to the plaintiffs' claims, these acts do not

⁸ 16 U.S.C. §§ 831–831dd (2006).

⁹ *AEP*, 582 F.3d at 314–15. The relevant section of the TVA Act is codified at 16 U.S.C. § 831c(b).

¹⁰ See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

¹¹ In *Baker*, the Supreme Court proposed a six-prong test for determining whether questions are better left to the political branches. Relevant factors in the test include constitutional considerations, considerations of institutional competence, and the values of interbranch unanimity and respect. 369 U.S. at 217.

¹² *AEP*, 582 F.3d at 321.

¹³ See *id.* at 324, 326–30.

¹⁴ 549 U.S. 497 (2007).

¹⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

¹⁶ *AEP*, 582 F.3d at 338.

¹⁷ See *id.* at 389–91.

¹⁸ See *id.* at 349–71.

speak directly to the harms suffered and remedies demanded by the plaintiffs.¹⁹ However, the court noted that planned legislation and Environmental Protection Agency (“EPA”) regulation of greenhouse gases might displace similar lawsuits in the future.²⁰

* * *

Previous cases applying the federal common law of public nuisance (“federal nuisance law”) have been brought almost exclusively by state plaintiffs.²¹ Moreover, such cases have been sporadic, particularly in recent years.²² This Comment will argue that the Second Circuit should not have afforded the nonstate plaintiffs in *AEP* standing to sue under the federal common law of nuisance. Part II will discuss the doctrinal history of federal nuisance law, Part III will assess the Second Circuit’s decision to create a private right of action under federal nuisance law in light of that history, and Part IV will briefly consider the practical implications of opening the courts to private rights of action in federal nuisance cases, ultimately concluding that the Second Circuit’s grant of a private right of action to bring carbon tort suits under federal nuisance law was overbroad.

II. FEDERAL NUISANCE LAW AND CARBON TORTS

In *Erie Railroad Co. v. Tompkins*,²³ Justice Brandeis wrote that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law.”²⁴ Justice Brandeis’s proclamation was the death of federal general common law, but not of federal common law in general.²⁵ The existence of post-*Erie* federal common law is justified through one or both of two concerns. First, federal common law may be invoked to protect “uniquely federal interests” in those situations involving a substantial conflict between a federal interest and state law.²⁶ Second, courts can infer the existence of federal common law in cases where Con-

¹⁹ See *id.* at 387.

²⁰ See *id.* at 388.

²¹ See, e.g., *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91 (1972).

²² See Robert H. Cutting & Lawrence B. Cahoon, *The Gift that Keeps on Giving: Global Warming Meets the Common Law*, 10 VT. J. ENVTL. L. 109, 132 (2009) (noting that trans-boundary nuisance suits predate the *Erie* doctrine and do not bind modern courts).

²³ 304 U.S. 64 (1938).

²⁴ *Id.* at 78.

²⁵ See, e.g., *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). Writing for the Court in *Hinderlider*, an opinion issued on the same day as his opinion in *Erie*, Justice Brandeis noted that “whether the water of an interstate stream must be apportioned between the two States is a question of ‘federal common law’ upon which neither the statutes nor the decisions of either State can be conclusive.” *Id.* at 110 (emphasis added).

²⁶ *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964).

gress gives courts power to develop substantive law.²⁷ In these two cases, the "federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control."²⁸ Given the interstate (and arguably international) nature of the issue at hand in *AEP*, and the fact that no statute has delegated power to the federal courts in this instance, the federal common law of public nuisance is supported by the first justification but not the second. We argue that this first justification is sufficient to allow states, but not private parties, standing to sue under federal nuisance law.

A. Federal Nuisance Law After Erie

The federal common law of public nuisance, upon which the plaintiffs relied in *AEP*,²⁹ has a long history of use by state government plaintiffs in environmental cases. In 1906, the state of Missouri filed a federal nuisance action against Illinois, attempting to enjoin Chicago from dumping sewage into a canal that drained into the Mississippi River, which supplied St. Louis with water.³⁰ The very next year, the Supreme Court granted a preliminary injunction to the state of Georgia, preventing smelters in Tennessee from emitting noxious gases that were destroying forests, orchards, and crops on the other side of the state line.³¹ The Court noted that Georgia was entitled to its requested injunction rather than private damages because in its "quasi-sovereign" capacity, it had an interest in maintaining air purity within its territory.³² Additionally, New York and New Jersey have both alleged public nuisance in suing one another over sewage disposal practices.³³

Post-*Erie* federal common law in the public nuisance realm has continued to focus on issues of state sovereignty in cases brought by state plaintiffs. In *New Jersey v. New York*,³⁴ the Supreme Court allowed Pennsylvania to intervene in New Jersey's suit for injunctive relief against the state of New York in a water diversion action that would have affected both New Jersey

²⁷ See *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

²⁸ *Texas Industries*, 451 U.S. at 641.

²⁹ *AEP*, 582 F.3d at 314.

³⁰ *Missouri v. Illinois*, 200 U.S. 496 (1906). Missouri's request was denied because it was not clear to the Court that Illinois's actions actually caused the alleged damage. See *id.* at 522-26.

³¹ See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 239 (1907).

³² See *id.* at 237. The Tennessee Supreme Court denied an injunction on similar claims brought by private residents of the state of Georgia on the ground that the complainants should not be able to strip the property rights of the smelters even though the gases from the smelting plants were damaging the complainants' private property. See *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 667 (Tenn. 1904).

³³ See *New York v. New Jersey*, 256 U.S. 296 (1921); *New Jersey v. City of New York*, 283 U.S. 473 (1931).

³⁴ 345 U.S. 369 (1953).

and Pennsylvania.³⁵ Yet the Court denied the City of Philadelphia's motion to intervene, holding that "Philadelphia represents only a part of the citizens of Pennsylvania."³⁶

In *Illinois v. City of Milwaukee (Milwaukee I)*,³⁷ however, the Supreme Court arguably opened the door to suit by nonstate plaintiffs. The case was brought by a sovereign state, Illinois, and every case relied upon by the Court involved state sovereigns claiming that their sovereign interests were being infringed. Nonetheless, in an oft-quoted footnote, the Court stated that "it is not *only* the character of the parties that requires us to apply federal law" to the case at hand.³⁸

The Court's choice of phrase proved regrettable. In *AEP*, plaintiffs argued that the word "only" implied that the character of the parties was sufficient, but not necessary, to invoke federal common law. Conversely, defendants argued that the word "only" implied that the character of the parties was a necessary consideration, but not a sufficient one.³⁹

This debate has not been much informed by case law. A decade after *Milwaukee I*, in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,⁴⁰ the Supreme Court raised, but did not reach, the issue of "whether a private citizen has standing to sue for damages under the federal common law of nuisance."⁴¹ The First, Second, and Ninth Circuits have dismissed federal nuisance suits brought by nonstate plaintiffs on other grounds.⁴²

Of the few federal appellate courts that have discussed the standing of nonstate plaintiffs in federal nuisance cases, three have either explicitly or implicitly held that private plaintiffs lack standing to sue. The Third Circuit declined to infer a private right of action under the Rivers and Harbors Appropriation Act of 1899 ("RHA").⁴³ The Second and Fourth Circuits affirmed cases suggesting that actions under the federal nuisance law had to be brought by plaintiffs seeking relief on behalf of states or the United States.⁴⁴

³⁵ See *id.* at 371.

³⁶ *Id.* at 373.

³⁷ 406 U.S. 91 (1972).

³⁸ *Id.* at 105 n.6 (emphasis added).

³⁹ *AEP*, 582 F.3d at 364.

⁴⁰ 453 U.S. 1 (1981).

⁴¹ *Id.* at 11; see *id.* at 21–22.

⁴² See *Mattoon v. City of Pittsfield*, 980 F.2d 1, 4–5 (1st Cir. 1992) (statutory preemption); *New England Legal Found. v. Costle*, 666 F.2d 30, 32 (2d Cir. 1981) (statutory preemption); *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1203–04, 1205–06 (9th Cir. 1988) (statutory preemption of water pollution claims; lack of federal interest in air pollution claims).

⁴³ 33 U.S.C. §§ 401–418 (2006); see *Red Star Towing & Transp. Co. v. Dep't of Transp. of N.J.*, 423 F.2d 104, 105 & n.3 (3d Cir. 1970).

⁴⁴ See *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1277–80 (D. Conn. 1976), *aff'd mem. sub nom. E. End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977) (finding neither the RHA nor the federal common law of water pollution afforded a basis for invoking federal jurisdiction in a damages action brought by private plaintiffs for pollution); *id.* at 1281 ("Even if . . . the federal nuisance law right of action should be extended to private plaintiffs, at the very least this right of action should be limited to suits involving pollution with an impact on more than one state." (emphasis added)); *Comm. for Consideration of Jones Falls*

District court cases have also largely precluded private parties from maintaining federal common law nuisance claims.⁴⁵

However, the Seventh Circuit allowed three municipal corporations to sue under federal nuisance law in *City of Evansville v. Kentucky Liquid Recycling, Inc.*,⁴⁶ and, in his emphatic dissent in *National Audubon Society v. Department of Water*,⁴⁷ the Ninth Circuit's Judge Reinhardt implied that private rights of action in interstate water cases, such as *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,⁴⁸ compelled recognition of parallel rights in federal nuisance cases. In a footnote, the Fourth Circuit in *Committee for Consideration of Jones Falls Sewage System v. Train* relied on *Hinderlider* in noting that "[i]t is not essential that one or more states be formal parties if the interests of the state are sufficiently implicated," though the court did not dispute the district court's suggestion that plaintiffs must be seeking relief on behalf of states to bring suit in such cases.⁴⁹

AEP, then, was decided against a background of conflicting, albeit often opaque and summary, discussions of private rights of action under a federal nuisance law developed through suits brought almost exclusively by states or by the federal government.

B. Federal Nuisance Law in *AEP*

In *AEP*, the Second Circuit resolved the ambiguity in *Milwaukee I*'s footnote in favor of a right of action for municipal and private plaintiffs. Drawing on *City of Evansville*, the court interpreted pre-*Milwaukee I* Supreme Court language limiting rights of action under federal nuisance law as applicable only to cases in the Court's original jurisdiction.⁵⁰ In the Second Circuit's view, *Milwaukee I* "untethered" federal nuisance law from its roots as a body of law used to resolve conflicts between states within the Supreme Court's original jurisdiction.⁵¹

Shortly after *Milwaukee I*, the Second Circuit observed, other courts of appeals began to permit the federal government to sue in the district courts to "abate a public nuisance under federal common law."⁵² Relying, again, on language from *City of Evansville*, the court held that these cases estab-

Sewage Sys. v. Train, 375 F. Supp. 1148 (D. Md. 1974), *aff'd on other grounds*, 539 F.2d 1006 (4th Cir. 1976).

⁴⁵ See *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1038 (9th Cir. 2004) (discussing ruling below (unpublished) of the District Court for the District of Idaho); *Jones Falls*, 375 F. Supp. at 1154-55; *Parsell*, 421 F. Supp. at 1277-80. *But see* *Twp. of Long Beach v. City of New York*, 445 F. Supp. 1203, 1213-14 (D.N.J. 1978) ("The extension of [*Milwaukee I*] to include governmental units does not appear to be a drastic or an unwarranted application.")

⁴⁶ 604 F.2d 1008, 1017-19 (7th Cir. 1979).

⁴⁷ 869 F.2d at 1211 (Reinhardt, J., dissenting).

⁴⁸ 304 U.S. 92 (1938).

⁴⁹ *Jones Falls*, 539 F.2d at 1009 n.8.

⁵⁰ *AEP*, 582 F.3d at 360 (citing *City of Evansville*, 604 F.2d at 1017-18); *accord Long Beach*, 445 F. Supp. at 1213-14.

⁵¹ *AEP*, 582 F.3d at 359.

⁵² *Id.* (quoting *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974)).

lished the right of any level of government to sue whenever it was required to “spend public funds because of pollution of an interstate waterway by acts done in another state.”⁵³ According to the Second Circuit, such cases presented “an overriding federal interest in the need for a uniform rule of decision” which was paralleled in the case of out-of-state air pollution bleeding into other states.⁵⁴

In the court’s view, this interest in uniformity provided a “distinct” and self-sufficient ground “for invoking federal common law” which permitted federal nuisance law to extend to private plaintiffs. The Second Circuit cited *Banco Nacional de Cuba v. Sabbatino*⁵⁵ for the proposition that such an interest in uniformity had justified the extension of the federal common law of foreign relations to cover suits between private parties.⁵⁶

Yet, the act of state doctrine articulated in *Sabbatino* demonstrates that a body of federal common law need not imply the existence of standing for a right of action under that body of law. The act of state doctrine provides a rule of decision in cases brought on other underlying claims where one of the parties acts pursuant to sovereign state authority.⁵⁷ It constitutes a defense of suit on otherwise cognizable causes of action, but it would be odd to recognize such a defense at law as itself authorizing a new class of lawsuits. In developing federal common law, courts must simultaneously define the contours of rights of action under the federal common law and set out the prudential concerns of standing in determining which parties are appropriate to bring such actions.⁵⁸ The Second Circuit appears to have collapsed the two ends of the analysis. The court assumed that having recognized the potential application of federal common law to the underlying dispute, it did not need to inquire whether the federal common law of public nuisance should also create a right of action for non-federal government actors at all, let alone one open to private entities and municipalities in addition to states.

III. ARTICULATING THE FEDERAL INTEREST

In those cases where the courts have created a private right of action to enforce a federal law that lacks an enforcement provision, they have done so

⁵³ *Id.* at 360 (quoting *Evansville*, 604 F.2d at 1018).

⁵⁴ *Id.* (quoting *Evansville*, 604 F.2d at 1017–18).

⁵⁵ 376 U.S. 398 (1964).

⁵⁶ See *AEP*, 309 F.3d at 365. The court’s interpretation of *Sabbatino* is not without controversy. See Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 859 (1997) (describing *Sabbatino* as grounded in constitutionally inspired — though not constitutionally mandated — separation-of-powers concerns rather than a generic interest in uniformity).

⁵⁷ See *W.S. Kirkpatrick & Co., Inc. v. Evtl. Tectonics Corp., Int’l*, 493 U.S. 400, 409 (1990).

⁵⁸ See, e.g., *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (noting that, in extending *Bivens* actions for violations of constitutional rights, “the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation” (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983))).

under a congressional delegation of authority "to create governing rules of law."⁵⁹ For instance, the Supreme Court has read private rights of action into the Taft-Hartley Act,⁶⁰ enabling the courts to develop common law principles to resolve labor-management disputes.⁶¹ The Supreme Court has also read private rights of action into the federal Employee Retirement Income Security Act ("ERISA"),⁶² enabling federal courts to develop common law governing how benefits should be coordinated among plans,⁶³ and determining whether equitable estoppel should be a defense to ERISA-based claims,⁶⁴ and the Sherman Act,⁶⁵ enabling federal courts to create federal common law defining liability under the Act.⁶⁶

However, without a clear indication that Congress intended the courts to create federal common law to authorize a private right of action, the Supreme Court has declined to find such a right.⁶⁷ In *Touche Ross & Co. v. Redington*,⁶⁸ for example, the Supreme Court asserted that its "task is limited solely to determining whether Congress intended to create the private right of action."⁶⁹ Of course, in implying a right of action into a federal statute, the court has an additional reason for caution: it must avoid upsetting a congressionally-calibrated level of deterrence.

However, the Court's behavior in enforcing constitutional rights suggests that the principle exemplified in *Touche Ross* can be extended beyond the statutory context. While *Bivens* actions⁷⁰ are an exception to the general rule against implied private rights of action under federal law, they are the exception that prove the rule. The Supreme Court has strictly limited *Bivens* actions to areas of constitutional precedent that reflect deep and lasting societal consensus.⁷¹ Because of their narrow scope and their tendency to reflect established constitutional norms that Congress should be assumed to sup-

⁵⁹ *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981). We exclude judicial review of statutes and circumscription of governmental action from this analysis because courts in those cases are acting to forestall government action or regulation.

⁶⁰ 29 U.S.C. §§ 141-144, 171-187 (2006).

⁶¹ *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957).

⁶² 29 U.S.C. §§ 1001-1461.

⁶³ *PM Group Life Ins. Co. v. W. Growers Assurance Trust*, 953 F.2d 543 (9th Cir. 1992).

⁶⁴ *Greany v. W. Farm Bureau Life Ins. Co.*, 973 F.2d 812 (9th Cir. 1992).

⁶⁵ 15 U.S.C. §§ 1-7 (2006).

⁶⁶ *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 644 (1981) (contours of treble damages under the Sherman Act defined by intent of Congress as expressed in the Sherman Act, 15 U.S.C. §§ 1-2, and the Clayton Act, *id.* § 15); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

⁶⁷ *See, e.g., Texas Indus.*, 451 U.S. at 643-44 (declining to find a right of contribution against third party defendants under the Sherman Antitrust Act). The Supreme Court had applied this principle in an environmental case one month earlier. *See California v. Sierra Club*, 451 U.S. 287, 294-96 (1981) (declining to find a private right of action under the RHA).

⁶⁸ 442 U.S. 560 (1979).

⁶⁹ *Id.* at 568.

⁷⁰ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (creating a limited implied right of action against federal government officials who have violated an individual's constitutional rights).

⁷¹ *See, e.g., Wilkie v. Robbins*, 551 U.S. 537 (2007).

port,⁷² *Bivens* actions reflect the intuition that it is Congress's place, not the courts', "to evaluate . . . the national interest."⁷³

Even where the courts have seen fit to authorize private rights of action, private actors have not been entitled to elide that national interest. Courts grant individuals the right to effectively act as private attorneys general only when authorized by congressional statutes.⁷⁴ Consequently, in opting to enforce a given statute by obtaining an injunction, individuals are "vindicating a policy that Congress considered of the highest priority"⁷⁵ even if at the same time they are acting in their own interests. Moreover, in the sense that congressional statutes are the articulation of the national interest by the branch of government closest to the popular will, private attorneys general acting to enforce federal statutes are also enforcing a presumed societal consensus. Such actions are therefore inherently legitimate.⁷⁶

In contrast, putative private attorneys general acting under federal nuisance law may be contravening the popular will. Where no statute exists, as in the case of federal nuisance law, there should be no presumption that an individual seeking an injunction is acting in the national interest. Congress has chosen not to act, so there is no evidence of a federal desire to regulate.⁷⁷

However, the absence of an individual right to bring a carbon tort action on the public's behalf does not deny that right to state plaintiffs. Where the federal government has chosen not to act, the power to speak in the common interest resolves to the states.⁷⁸ States have a "quasi-sovereign" interest in protecting the well-being of their citizens.⁷⁹ Where states have

⁷² This assumption might be reached in one of at least two ways. One might argue that Congress should represent the popular will, and the Constitution is a repository of the popular will. See Akhil Reed Amar, *The Central Meaning of Republican Government*, 65 U. COLO. L. REV. 749 (1994) (defining popular sovereignty as the central pillar of constitutional republican government). Alternately, one might argue that courts should simply treat the Constitution as a "super-statute" and imply rights of action into the Constitution in the same way that they might imply rights of action into federal statutes. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887-90, 915-19, 934-37 (1986); see also Henry P. Monaghan, *Third Party Standing*, 89 COLUM. L. REV. 277, 314 n.199 (1984) ("[T]here is no a priori reason to suppose that the Constitution itself should differ from statutes in providing a basis for the generation of an interstitial federal common law."). Both arguments, particularly the former, are open to attack on the basis of interpretive indeterminacy. See Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981) ("We have precious little reason to believe that the will of the judges can be controlled by the rationalism of Grand Theory.").

⁷³ *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 331 (1994).

⁷⁴ See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (holding courts cannot authorize an exception to the "American Rule" in the absence of statutory authorization).

⁷⁵ *Newman v. Figgie Park Enters., Inc.*, 390 U.S. 400, 402 (1968).

⁷⁶ See, e.g., George Kateb, *The Moral Distinctiveness of Representative Democracy*, 91 ETHICS 357 (1981).

⁷⁷ For a response to the objection that a private plaintiff may not be acting as a private regulator or private attorney general, see *infra* note 85.

⁷⁸ See U.S. CONST. amend. X.

⁷⁹ See, e.g., *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008).

acted to vindicate this interest through *parens patriae* litigation,⁸⁰ courts recognize a presumption that a state's actions adequately represent the interests of its citizens, such that individual citizens may be precluded from bringing suit on related claims under the doctrine of *res judicata*.⁸¹

Furthermore, on a theoretical level, the decisions of the state are legitimized by the electoral accountability of state officials.⁸² Indeed, of the eight state plaintiffs in *AEP*, all but New Jersey have directly elected attorneys general, many of whom have continuing political aspirations.⁸³ Thus, if a state brings a lawsuit for an injunction, that action should be considered an action representative of the people of that state as a whole. Of course, if the court accepts the plaintiff state's arguments, its ruling could constrain other states' freedom of action. This horizontal federalism concern explains why the case must be heard in federal court, under federal common law. Other states have a full opportunity to intervene in a neutral forum, and to attempt to bend the outcome to reflect their interests. Should an affected state decide not to join the fray, those decisions are likewise made by officials accountable to the popular will.

By contrast, an individual seeking to enjoin a particular action where the state has opted not to bring suit is attempting to supersede the elected representatives of the popular will. Where the state has chosen not to seek an injunction under its powers of *parens patriae*, this decision results from the working of the state's democratic political process.⁸⁴ Enabling a private party to seek and obtain an injunction in contravention of the state's decision could allow defeated political minorities to circumvent representative state institutions.⁸⁵

⁸⁰ See *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464 (10th Cir. 1993) (state may sue to protect citizens against pollution of air over its territory or pollution of interstate waters in which state has rights, but may not sue to directly assert rights of private individuals).

⁸¹ See *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994).

⁸² See *Kateb*, *supra* note 76.

⁸³ In fact, the New York and California attorney generals are both likely to be the Democratic Party's candidates in their states' upcoming gubernatorial races. See Danny Hakim, *Cuomo Hands Patterson Case to an Ex-Judge*, N.Y. TIMES, Mar. 12, 2010, at A1; Juliet Williams, *Liberal Activist Challenges Brown in CA Gov's Race*, ABC NEWS, Apr. 6, 2010, <http://abcnews.go.com/Politics/wireStory?id=10295165>.

⁸⁴ One potential objection to this position is that the failure of a state to bring suit may not reflect the absolute policy preferences of state officials, but instead their need to prioritize in the face of limited time and resources. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539 (1983) ("A court could not [recognize] widely-supported but never-enacted proposals as law without dishonoring the procedural aspects of the legislative process, in which lack of time is a vital ingredient"). Just as legislative time constraints reflect conscious constitutional design, the time and resource constraints imposed on state attorneys general might represent substantive policy decisions on the extent of authority voters wish to place in the hands of their elected or appointed officials. If the state polity really wished the attorney general to pursue a carbon tort lawsuit, it could expand his budget.

⁸⁵ A strong counterargument is that a private litigant has a private right to vindicate harm inflicted upon him in the courts, regardless of the result of state-level politicking. Surely, New York investors are not precluded from bringing securities suits simply because Attorney General Cuomo has not seen fit to investigate the company in question. Yet, there is no harm until someone has defined a baseline right in the law. Congress has not done this under federal law.

The democratic concern with legitimate representation suggests that the courts should not distinguish between private and municipal rights of action. Residents of municipalities and other state subdivisions are already represented in state government, and allowing them to bring suits under the federal common law of nuisance would enable them to evade the state's internal political structure.⁸⁶ The state government, elected by the very people that the municipality's decision is affecting, chose not to act.⁸⁷ The federal courts should resist being drawn into potential "intramural dispute[s]" within a state.⁸⁸

In effect, allowing municipalities to sue on behalf of, or alongside, the state raises the prospect of a tyranny of the minority. Rather than distinguishing the Supreme Court's original-docket jurisprudence, the Second Circuit should have declined to allow nonstate actors to be parties to the suit in *AEP*.

IV. PRACTICABILITY OF ADJUDICATION

Many readers who find our argument convincing thus far will nonetheless respond that *someone* has to do *something* about global warming. Scientists tell us that we may be running out of time to reverse — or even control — the impact of rising temperatures on our climate.⁸⁹ Congress has proved intransigent; foreign diplomats even more so.⁹⁰ Thus, the federal courts must leave every legal threat on the table, if only to prompt the other branches to act. To turn a conservative phrase to liberal ends: the Constitu-

See supra text accompanying notes 71–73. The logic of asserting a uniquely federal interest suggests that the states cannot do this under state law. *See supra* text accompanying note 28. Our argument is that the state can try to fill this void by bringing federal suits in an essentially regulatory capacity. *See supra* text accompanying notes 74–77. Individuals, of course, can invoke no private regulatory capacity.

⁸⁶ Cf. David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 *YALE L.J.* 2218 (2006). Supporting a broadening of the sphere of constitutionally-protected municipal action, Barron argues that cities should be thought of as "independent constitutional interpreters," *id.* at 2220, with regard to localized regulation, but that "[w]hen a city's constitutional claim, if accepted, would . . . bind every locality to follow a single course, then its interpretive independence from the state should be . . . at its lowest ebb." *Id.* at 2222 (internal quotation omitted). Thus, even though California's gay marriage ban had a greater quantitative effect on San Francisco than on other Californian cities, San Francisco was properly without standing to challenge California's gay marriage ban. *Id.* at 2223. Similarly, while global warming might have a particularly severe effect on densely-packed New York City as compared to other New York municipalities, *see AEP*, 582 F.3d at 367, that need not give the City a right to sue.

⁸⁷ In a case where state and municipal interests are perfectly aligned, permitting municipal intervention would not pose legitimacy problems, but would be redundant.

⁸⁸ *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

⁸⁹ *See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007 — SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS (2007), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

⁹⁰ *See, e.g.*, Alister Doyle, *UN Climate Talks Resume, Scant Chance of a 2010 Deal*, *REUTERS*, Apr. 8, 2010, <http://www.reuters.com/article/idUSTRE6372AT20100408>.

tion is not a suicide pact.⁹¹ Yet adjudication of large numbers of mass tort cases outside the mass accident context has the potential to land litigants in a judicial quagmire. By contrast, restricted rights of action under federal common law will keep carbon torts practically adjudicable in the federal courts, and could even mitigate a political backlash against unelected federal judges regulating global warming.

AEP was an action for purely injunctive relief. However, in *Comer v. Murphy Oil USA*,⁹² the Fifth Circuit determined that a state-law action for damages by victims of Hurricane Katrina against carbon emitters was not barred by the political question doctrine. The Northern District of California dismissed an action for damages by the Alaskan village of Kivalina, which is threatened by rising sea levels; an appeal is pending in the Ninth Circuit.⁹³ Nervous energy companies and their insurers have begun to worry that *AEP*, *Comer*, and a potential Ninth Circuit reversal of *Kivalina* will catalyze a wave of private or municipal climate change litigation for monetary damages.⁹⁴

Any such wave is likely to be limited to federal claims heard in federal courts. First, *AEP* suggests that federal nuisance law would preempt any available state law.⁹⁵ Second, even if federal common law were held not to preempt state law, it is entirely unclear that any significant group of states recognizes carbon dioxide emissions as a public nuisance.⁹⁶ Thus it is likely that federal common law litigation in federal courts will, in practice, constitute the entire field of carbon tort litigation. As a result, in defining the class of plaintiffs eligible to bring federal carbon tort actions, the federal courts have the ability to limit the field of carbon litigation.

⁹¹ *Terminiello v. City of Chicago*, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting); RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

⁹² 585 F.3d 855 (5th Cir. 2009), *reh'g en banc dismissed*, 2010 WL 2136658 (5th Cir. May 28, 2010).

⁹³ *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 6, 2009).

⁹⁴ Swiss Re, the world's second largest reinsurer, views American carbon tort litigation as one of two "major drivers" of increased insurance risk from litigation in the medium-term, the second being litigation growing out of the recent financial crisis. A Swiss Re report recognizes that climate change litigation has met with early reversals in the courts, but notes that the same was true of asbestos litigation. *See SWISS RE, FOCUS REPORT: THE GLOBALIZATION OF COLLECTIVE REDRESS 3* (2009), *available at* <http://www.swissre.com/publications> (search "Redress").

⁹⁵ *AEP*, 582 F.3d at 392 ("[I]f federal common law exists, it is because state law cannot be used.") (citing *Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 314 n. 7 (1981)); *cf. Comer*, 585 F.3d 855 (permitting state law carbon tort claim but noting with regard to political question concerns that "plaintiffs . . . do not seek injunctive relief," *id.* at 860, that "[c]laims for damages are . . . considerably less likely to [be] nonjusticiable . . . [than] claims for injunctive relief," *id.* at 874, and courts have "equitable discretion" to abstain from granting an injunction even when presented with a violation of law, *id.* at 877 n.17 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1978))).

⁹⁶ *See Comer*, 585 F.3d at 880 (pointing out that "the alleged chain of causation" between global warming and Hurricane Katrina may not "satisf[y] the proximate cause requirement under Mississippi state common law").

Limiting the number of plaintiffs eligible to bring lawsuits may be the only way to keep carbon torts practically adjudicable in the federal system. Creative attempts to efficiently dispose of asbestos cases were twice struck down by the Supreme Court in the late 1990s, suggesting that courts may not be “in a position to retool themselves” to confront spikes in their dockets.⁹⁷ Cases currently on the books leave defense counsel well placed to argue that carbon torts raise significant individual issues of fact that defeat a finding of class cohesiveness for class action certification.⁹⁸ Given these significant individual issues, administrative consolidation and contractual aggregation of claims for settlement may not be sufficient to resolve claims en masse.⁹⁹

This is not to suggest that there is no flexibility in the procedures governing complex litigation. Where defendants do not have an incentive to stonewall at all costs,¹⁰⁰ parties can settle complex cases involving individu-

⁹⁷ Samuel Issacharoff, “Shocked”: *Mass Torts and Aggregate Asbestos Litigation after Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1927 (2002).

⁹⁸ See FED. R. CIV. P. 23(b)(1)–(3). Several federal appellate courts have begun analyzing class actions for injunctive relief under a “cohesiveness” test that can, in practice, parallel the Rule 23(b)(3) predominance inquiry. See, e.g., *Romberio v. Unumprovident Corp.*, 2009 WL 87510 (6th Cir. Jan 12, 2009); *Lemon v. Int’l Union of Operating Eng’rs, Local No. 139*, 216 F.3d 577, 580 (7th Cir. 2000); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998); AMERICAN LAW OF PRODUCTS LIABILITY 3D § 51:55 (2010). Potential issues that would frustrate a cohesiveness or predominance inquiry would vary depending on the underlying claims. Consider an injunctive class of persons differentially affected by global warming than the general public because they are coastal landowners in a single neighborhood. Individual issues could include (1) assumption of risk for later-in-time purchasers, (2) causation for owners of property that is erosion-prone for other reasons, and (3) consent for those property owners who have chosen to pay lower rates for coal power rather than opt into renewable energy schemes. There could be thousands of such inchoate classes across the country, and if certifying each individual class would be difficult, certifying a consolidated class would be unthinkable. As just one example, coastal landowners presumably already know how they will be affected by global warming, while inland farmers will have a hard time predicting long-term weather patterns. To phrase this example differently, inland farmers will remain an “exposure only” class even after coastal landowners have suffered diminution in property values. Cf. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (finding conflicts of interest between “exposure only” plaintiffs and plaintiffs with manifested injury precluded class certification).

⁹⁹ Administrative consolidation may speed discovery or permit bellwether trials to provide “information on the value of the cases” that promotes informally aggregated, contractual settlement. *In re Chevron USA, Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997). However, aggregated settlements based on extrapolation from common discovery may not be approved unless “competent, scientific, statistical evidence that identifies the variables involved and that provides a sample of sufficient size so as to permit a finding that there is a sufficient level of confidence that the results obtained reflect results that would be obtained from trials of the whole.” *Id.* at 1020 (rejecting district court bellwether trial plan on grounds that trials were not representative). The larger the group of potential variables, the harder it is to construct such a statistically representative sample. Public nuisance cases arising from global warming are likely to involve a multiplicity of variables. See *supra* note 98.

¹⁰⁰ Note, however, that companies unable to switch from fossil to renewable fuels face a potentially endless train of litigation and may have more incentive to stonewall than to settle because no settlement can provide them with “global peace” and allow them to continue with their line of business. See RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT*, at x (2007).

alized damages and causation through informal aggregation.¹⁰¹ Arguably, some courts have begun to “recogni[ze] that . . . class action reform may have been carried to an excess.”¹⁰²

However, carbon tort litigation will take place in the shadow of larger political battles surrounding climate change. In the decision below in *AEP*, the district court found that carbon torts posed nonjusticiable questions of policy selection.¹⁰³ Whether or not one agrees with that court’s legal conclusion, it is hard to contest that carbon tort adjudication is likely to precipitate policymaking.¹⁰⁴ As a result, judges developing public nuisance law in carbon tort cases are highly vulnerable to claims that they are usurping democratic power.¹⁰⁵ These allegations will be particularly powerful in the context of a debate that has already begun to expose “elitist-versus-populist tensions.”¹⁰⁶ If courts cannot convincingly tie procedural decisions to historically sustained practice, their credibility — and their resolve — may falter.

Managing, and perhaps formally consolidating, litigation brought by a subset of states will require much less procedural and doctrinal innovation than managing litigation brought by countless towns, landowners, and perhaps natural disaster victims. Moreover, limiting plaintiffs to state executive branches takes ammunition away from those who would argue that the federal courts are an undemocratic forum for regulating global warming.¹⁰⁷

¹⁰¹ See, e.g., Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008) (discussing, inter alia, the 44,000–plaintiff Vioxx settlement).

¹⁰² Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1478 (2005) (internal quotation omitted).

¹⁰³ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

¹⁰⁴ In fact, this is its goal. See Press Release, Office of the Attorney Gen. of Conn., Attorney General Praises Court Ruling Reinstating Global Warming Lawsuit (Sept. 21, 2009), available at <http://www.ct.gov/ag/cwp/view.asp?A=3673&Q=447400>.

¹⁰⁵ E.g., Posting of Daniel Fisher to Forbes: Business in the Beltway, <http://blogs.forbes.com/beltway/2010/01/29/al-gores-lawyer-slams-global-warming-suits/> (Jan 29, 2010, 2:48 PM) (discussing a paper by Laurence Tribe).

¹⁰⁶ Leslie Kaufman, *Among Weathercasters, Doubt on Warming*, N.Y. TIMES, Mar. 30, 2010, at A1.

¹⁰⁷ The attorneys general themselves will serve as politically visible spokespersons in favor of the adjudicative process. However, this need not be a merely rhetorical point. Discussing representative litigation, Issacharoff argues that a legitimacy deficit arises when an agent gains practical control of his principal’s case in court, leading to the need to create appropriate governance structures to select and control the agent. See Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 S. CT. REV. 337, 339–40. This legitimacy problem is arguably paralleled when a private plaintiff seeks to represent the public’s interest. However, when the actor is a politically representative government, this concern should largely fall away. See NAGAREDA, *supra* note 100, at 38–39 (2009) (describing public actions through politically representative branches of government as one of two paradigms of legitimate law, the other being contract). Issacharoff notes that ensuring class-members have a “voice” and participate in the conduct of litigation could, when practicably achievable, enhance legitimacy of class actions. Political accountability could serve as a form of “voice” in the context of government-led public interest litigation. See Issacharoff, *supra*, at 371. *But see* Kip Viscusi, *Tobacco Regulation and Taxation Through Litigation*, in REGULATION THROUGH LITIGATION 22–51 (Kip Viscusi ed., 2002) (arguing that state attorney general litiga-

States are acting to safeguard their citizens' "health, welfare, and safety,"¹⁰⁸ and are acting through branches of government politically accountable to those citizens.¹⁰⁹

From both a substantive and a political standpoint, then, the Second Circuit may have been too quick to allow nonstate actors a right of action in *AEP*. Implying a private right of action into federal nuisance law diverges from the history of that body of law, as well as consistent Supreme Court precedent demanding caution when implying rights of action into the federal law. Moreover, state attorneys general are already litigating global warming issues. Thus, removing private plaintiffs from the picture will not slow the pace of environmental regulation. In fact, limiting the class of potential plaintiffs able to bring carbon tort claims under federal law will add significantly to the practical utility of the federal courts as a forum for resolving the public nuisance effects of global warming.

tion against tobacco plaintiffs preempted the normal role of the legislative branch and regulatory agencies).

¹⁰⁸ Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 *TUL. L. REV.* 1859, 1869 (2000). *But see* Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 *B.C. L. REV.* 913, 953 (2008) (applying federal separation-of-powers principles to state constitutions by analogy to argue that state attorneys general who bring *parens patriae* actions violate principles of separation of powers and possibly the Guarantee Clause of the U.S. Constitution).

¹⁰⁹ *See* Henry J. Abraham & Robert R. Benedetti, *The State Attorney General: A Friend of the Court?*, 117 *U. PA. L. REV.* 795, 797 (1969) (noting that many attorneys general are independently elected and arguing that they properly wield executive and regulatory "quasi-judicial" power).

