THE US FEDERAL COURTS' DELIBERATE APPROACH: SHAPING THEIR ROLE IN CLIMATE REFORM THROUGH PROCEDURAL TOOLS

by

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ABSTRACT

Robust scholarly discussion covers recent climate change litigation. Building off these insights, this article contributes to forthcoming litigation by considering how calculated decisions illuminate the role federal courts are willing to play in current and future climate reform. U.S. federal courts have taken a purposeful approach to climate decisions, allowing them to form the path this growing form of litigation will take. Expanding on Hari Osofsky's suggestion that the Supreme Court has acted with the aim to "shape its role" in the climate debate, I consider how federal courts have used procedural doctrines to limit immediate climate litigation to judicial review over common law claims. Interestingly, the courts' approach seems to leave channels open for future court involvement subject to the legislative and executive branches' impending moves.

Specifically, I have found that U.S. federal courts have stalled in fully opening the courtroom doors to climate litigants. Rather, they have written decisions in a deliberate manner, building one step at a time without permanently closing the door to litigation while maintaining their flexibility to become more involved in future climate reform if necessary. Consequently, these decisions illustrate the role courts see for themselves, which is important to guide future climate litigation efforts. Since I find litigation complements alternative climate reform attempts, my intention is to decipher the courts' path to provide a guide future litigants may consider to most efficiently reach their climate reform goals.

Although much climate law manifests at the domestic level, U.S. precedents can set trends internationally. Thus, many other courts may react to the approach U.S. courts take, either adopting or rejecting it in their own paths to climate reform. Accordingly, this study contributes to the international climate litigation discussion by providing elucidation into the U.S. sphere, the trends from which will influence law and decision makers globally in their own future paths through climate litigation.

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Case Name (Decision)	Procedural History	Principle Law	Core Object/ Relief Sought	Justiciability Issues	Attributes Characterizing Decision	Decision or Outcome
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INTRODUCTION

Though they are not entirely confident of their role in climate reform, Justices have made clear through their decisions that they have not shut the door to using the courtroom as a forum for change. To show this, I illustrate how the courts have taken a deliberate approach to climate litigation: they have decided climate cases in a strategic way that allows them to shape the path litigants must follow to reach the door the justices have left open. This path, I argue, illustrates the role the Court is willing to play in the future of climate reform.

As climate litigation is set to continue, I aim to enable climate litigants to make the most productive use of their reform efforts. I do so by discussing how the judiciary has already laid out a path for climate litigants through its decisions and provide elucidation as to the route justices are building to the courthouse door. Understanding where the courts have gone will provide litigants with information to help them determine where the courts will go. This discussion will provide litigants a structure from which to make their efforts more productive and decrease the opportunity costs of litigation.

I do not argue whether litigation is or is not the proper avenue for climate reform. Countless authors before me have debated the wisdom of using climate litigation and have yet to reach a consensus. What I am saying is that considering today's reality, we must make the most productive use of litigation. Climate change has and will continue to devastate populations. US legislative and executive branches have not made meaningful steps toward climate reform and have even slid back on past successes. More importantly, neither these branches, nor their international counterparts seem posed to reform in the near future. But NGOs are vigilant actors who will continue to press forward using creative arguments for reform and the USSC has not closed the door to climate litigation. Rather, the courts have used procedural doctrines to limit immediate climate litigation to judicial review over common law claims. Interestingly, the court seems to have made conscious decisions to leave channels open for future involvement subject to the political branches' impending moves. In this way, courts have built a path to climate litigation building one step at a time without permanently closing the door to litigation while maintaining their flexibility to become more involved in future climate reform if necessary. In

other words, the USSC has kept the door open but has not yet finished constructing the steps climate litigants must take to get there.[1]

If and until the courts do close this door, climate litigation attempts will inevitably continue. If one accepts these premises to be true, we must consider the most productive approach forward, including how to decrease climate litigation's harm as it risks a negative shift in the public and courts' perception. I discuss only climate litigation and therefore focus on related literature as opposed to tackling the broader concern of climate litigation to illustrate the judiciary's ability to deal with public issues generally. Therefore, this paper provides value to those interested in the nuts and bolts of US Federal litigation and to those who seek to understand lessons learned from climate litigation as a vehicle to induce policy reform. Further, I seek to provide a tool by which groups may increase the benefits of climate litigation while decreasing its opportunity costs, making litigation a more productive tool in climate reform initiatives.

I begin this thesis with Chapter One, consisting of three subparts in which I provide a background of climate change and the regulation and litigation surrounding it, to illustrate the difficulty of regulating or litigating climate change matters. As this avenue of litigation is best described with reference to the specific cases, I introduce the pivotal cases in Chapter One but will delve further into the decisions throughout the paper. Next, I illustrate how litigation can be used as a tool to complement other avenues of climate policy reform. In this part, I argue that the complicated and multifaceted nature of climate change that has prevented successful comprehensive regulations has also allowed the induced and allowed the Courts' reluctance for favourable decisions that would open the judiciary up for a role in climate reform.

In Chapter Two, I will examine the Court's approach and ways in which the Court has strategically decided climate litigation. I begin Chapter Two by explaining what I mean by the Court's deliberate approach and introduce the attributes I find characterize such an approach. The rest of Chapter Two is broken down into four subparts each illustrating the Courts approach through the doctrines of standing, political question, displacement, and preemption. I find that though the Courts' deliberate and conscious approach may seem a pragmatic path to climate litigation, the USSC has effectively stymied any realistic chances climate litigants had to bring

[1] I would like to thank Professor Benjamin Richardson for his supervision and guidance throughout this thesis as well as Professors Darlene Johnstone and Shi Ling Hsu for their insight.

actions for public nuisance without much more than discomfort with a difficult case and concern for the Court's legitimacy. Though this first wave of public nuisance litigation achieved some desirable effects, these have largely been incidental to the claims. Rather, the Court has positioned itself to stand behind threshold doctrines to prevent a reasoned decision either to clearly preclude or allow this litigation to continue.

In Chapter Three, I find that the second wave of common law climate actions under public trust claims provide a more flexible platform for courts to see that climate actions may actually be appropriate for judicial involvement. I conclude this Chapter by summarizing the Court's path in order to provide a guide for future litigants.

CHAPTER ONE: CLIMATE CHANGE, REGULATORY FAILURES, AND THE COURTS

Chapter One consists of three subparts that will set the stage for my observation in Chapter Two that Courts have deliberately chosen not to shut the door on climate change, stalling instead to set out the steps litigants will need to follow to reach an action on their merits.

I: Climate Change

In the past century, the earth's temperature has risen over 0.7 C (1.3 F) and could warm to 6 C (11 F) by the end of this century.[2] The UN Security Council and the Intergovernmental Panel on Climate Change (IPCC), rank climate change as the next great threat to the global environment.[3] At the most basic level, particular "greenhouse gasses" (GHGs)[4] that are increasingly emitted by human activities absorb infrared radiation, or heat that the earth produces, but release only part of that heat to space; thus preventing reflected radiation from escaping, trapping it within the earth's atmosphere resulting in a warmer atmosphere.[5] This phenomenon, known as climate change, threatens the populations and ecosystems around the world. Beyond the more visible effects of sea level rise, glacial melt, drought, and severe storms, the instability created by climate change will have lasting negative effects on agriculture, public health, and ecosystems in all regions. Moreover, these effects introduce uncertainty that could undermine long-term plans for mitigation and adaptation.[6]

The term GHGs covers six man-made gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. These gases are all emitted

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[2] Robert Henson, *The Rough Guide to Climate Change: The Symptoms, The Science, and The Solutions*, 3d ed, (London, UK: Rough Guides, 2011) at 3-5.
[3] US Security Council meeting July 2011; Intergovernmental Panel on Climate Change, "Summary for Policy Makers" in S. Soloman et al (eds), Climate Change 2007: The Physical Basis, Contribution to Working Group I to the Fourth Report of the IPCC (Cambridge University Press, 1977), available at (http:// www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf) [IPCC].
[4] The IPCC defines the term Greenhouse gases as atmospheric gases that absorb and emit radiation causing a "greenhouse effect" of trapping heat in the Earth's atmosphere, contributing to global climate change. Common GHGs include: carbon dioxide, methane, nitrous oxide, ozone, and chlorofluorocarbons. IPCC, *supra* note *.
[5] *See* Henson, *supra* note 2.
[6] *Ibid*; *see also* UN Environment Programme Report: Keeping Track of Our Changing Environment: From Rio to Rio +20 (1992-2012), November 1, 2011.

through varying sources. Carbon dioxide emissions, contributing the most to climate change, come from fossil fuel burning in large factories, automobiles, transportation sectors, cement manufacturing, and deforestation.[7] Methane emissions come from waste decomposition, plant decay, agricultural practices, and coal mines. Both livestock production and automobile exhaust produce nitrous oxide. Finally, the remaining internationally regulated GHGS- hydrofluorocarbons and perfluorocarbons- are used as alternatives to previously phased-out CFCs and HCFCs in refrigerants, air conditioners, and other such products. As this description of causes shows and the IPCC confirms, the majority of GHGs emitted come from human activity and industry, however the sources themselves span almost every industry, service, or good.[8] Such a multifaceted problem poses incredible challenges in attempting to find a comprehensive solution through regulation at any and all levels of government.

Preventing some of the more dangerous results of climate change will require actors to stabilize the global mean temperature at today's level. The IPCC predicts that this would require worldwide emissions to be reduced by 50 to 85% from 2000 levels by the year 2050. Such a measure would require even greater percentage reductions by the United States, which currently emits roughly 22% of the world's GHGs but contains only five percent of the world's population.[9] Rather than await market signals to reduce GHG emissions, governments around the world have attempted to impose GHG regulations to stabilize the global mean temperature. These regulation attempts have met with varying levels of failure.

I have introduced the basic science, causes, and symptoms to climate change to set the background against which climate litigation is brought: a global problem with potentially devastating consequences. Throughout this Chapter, I will build on this background by considering how, in the current vacuum of meaningful climate change legislation, victims and representative litigants have turned to the courts to achieve reform and obtain redress.

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[7] *See* Henson, *supra* note 2 at 5-6.
[8] *Ibid* at 38-39.
[9] Terry Barker *et al*., "Technical Summary" in *Climate Change 2007: Mitigation of Climate Change, Contribution of Working Group IV to the Fourth Assessment Report of the IPCC*, (Bert Metz et al. eds., 2007) at 25-30, *available at* http://www.mnp.nl/ipcc/pages_media/AR4-chapters.html

II: Failures to Regulate

Unfortunately, despite overwhelming evidence of destruction caused by climate change, governments across the world have failed to enact comprehensive legislation regulating GHGs. Here, I first outline the current US regime regulating GHG emissions. I will then move to a brief discussion on the merits of regulating GHGs under existing federal environmental statutes and consider why climate reformers are pushing for brand new comprehensive GHG legislation to tackle the issue. Finally, I will consider the prospects for effective GHG legislation in the near future. I find, bleakly, that it does not appear Congress will make a meaningful change through comprehensive legislation on GHGs anytime soon. It is for this reason that scholars encourage climate litigation to "prod" Congressional action, which I argue has merit if used in conjunction with reforms through private and public avenues and at each level of organization. I conclude this subpart noting that whether its goal be achieving government action on serious GHG reform or to impose climate justice and obtain redress for victims of climate change, climate litigation is inevitable in the coming years. If I am right, then regardless of the wisdom of climate litigation, litigants should understand to Court's approach to climate litigation in an effort to make the most efficient use of this tool.

A. Current Attempts to Regulate GHGs

Over the past decade, climate change has become increasingly accepted leading to countless attempts to mitigate its effects through GHG regulations at every level of government. The majority of these regulations, however, have left much to be desired as regulatory attempts are stalled or fail at worse and have been watered down or splintered through disjoined industrial sectors leaving no comprehensive federal regulations. Although I appreciate that reform attempts occur at the international, regional, and state levels, I will focus on US Federal reform as these have largely been the subject of litigation.

Currently, the majority of GHG regulations in the US take place at the federal administrative level through authority Congress had previously granted to environmental agencies.[10] Many contend that the most desirable federal approach to climate change reform in the US is comprehensive federal legislation enacted by Congress. While the term

[10] C. P. Carlarne Climate, *Change Law & Policy* (Oxford Univ. Press, 2010) at 23.

"comprehensive legislation" is often mentioned but never explained, it generally refers to legislation covering all sectors emitting GHGs under one unified bill. Examples include the failed Waxman Markey Bill, and the McCain Lieberman Act.[11] Since Congress has thus far failed to take action, policy makers have turned to existing federal environmental statutes to seek regulation including the CAA, NEPA, ESA, and CWA. In this section, I will describe how policymakers and regulators have creatively used the existing Clean Air Act (CAA) to regulate GHG emissions through the Environmental Protection Agency (EPA). I will focus on the CAA as it has proved the most flexible to GHG regulation. I will also discuss the gaps in regulating through existing statutes. Finally, I conclude by describing policy makers continued push for Congressional legislation for Congress passed the Clear Air Act to authorize the EPA to regulate air pollutants hazardous to human health from both mobile and stationary sources.[12] Enacted in 1970, before the relation of GHGs to climate change was widely understood, the CAA was intended to create national regulations for more traditional pollutants.[13]

In 1999, based on findings by the IPCC that there is a connection between GHGs and climate change, a coalition of several petitioners led by the International Center for Technology Assessment petitioned the EPA to regulate GHGs emitted from motor vehicles under its authority to regulate air pollutants hazardous to human health.[14] In 2003, the EPA denied the petition merely stating that it had no authority to regulate GHGs as they were not considered "air pollutants" under the Act.[15] The EPA also noted that as a matter of policy it was opposed to implementing such regulations. In response, petitioners sought judicial review of the denial. This long fought battle resulted in the landmark 2007 *Massachusetts v EPA*, which I will discuss below.[16] For now it is sufficient to note that the Supreme Court found that GHGs do fit within the Act's definition of "air pollutants."[17] Accordingly, the Agency did have statutory authority to regulate GHGs emitted from motor vehicles. Thus, under §202(a) once the petition was made,

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[11] *See* Gregory E. Wannier, "Lessons Already Learned: An Analysis of Waxman markey under Current WTO Case Law (2010) 35 Ecol'y L Currents 36.
[12] 42 U.S.C. § 7401
[13] *See* Chris Wold, David Hunter, Melissa Powers, "Climate Change and the Law" (Lexis Nexis, Matthew Bender 2009) at 538-43.
[14] International Center for Technology Assessment: Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act (2009) Retrieved April 9, 2011 from http://www.icta.org/doc/ghgpet2.pdf
[15] *See Climate Change and the Law*, *supra* note 13 at 543-51.
[16] *See Massachusetts v EPA*, (2007) 127 S.Ct. 617.
[17] *Ibid*.

the EPA was required to make a reasoned endangerment finding to conclude whether it found GHGs to constitute a hazard to human health or not.[18] The Court admonished that a policy judgment did not amount to a reasoned finding, and so sent the EPA back to try again.

The EPA undertook this endangerment finding, and in 2009 determined that the concentration of six major GHGs in the atmosphere endanger the "public health and public welfare of current and future generations."[19] A resulting positive endangerment finding then gave the EPA the responsibility to issue permits and enforce emissions standards to mitigate the dangers posed by GHG emissions. Throughout the battle leading up to the USSC's *Massachusetts* decision, Congress has recognized to need to enact comprehensive national legislation to address climate change.[20] However, even though the number of climate change related legislative proposals has increased dramatically over the past decade, no such proposal had garnered sufficient political support to be passed.[21] By the end of 2009, it became clear that the 111th Congress, although initially posed to act, would fail to pass comprehensive climate change legislation. Accordingly, in 2010 the EPA solidified their plans to regulate GHG emissions from mobile and stationary sources through the CAA.[22]

By 2012, the EPA has implemented all three prongs of its regulatory approach, including: the Light Duty Vehicle GHG Emissions Standards and the Corporate Average Fuel Efficiency (CAFE) Rule;[23] California's waiver that allows the state to regulate regardless of federal occupation of the field; and the New Source Review program (NSR), a permitting program that requires "major" stationary GHG emitters such as factories, refineries and coal fired plants to obtain permits prior to constructing or modifying their plants.

Scholars find EPA regulations through the CAA are beneficial in that these regulations

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[18] *Ibid*.
[19] EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 239, 66496 (Dec. 15, 2009).
[20] *See* eg Senate Resolution 866, 109th Congress, 151 Cong Rec. S7033, S7033 (2005) ("Congress should enact a comprehensive and effective national program of mandatory, market-based limits and incentives on emissions of greenhouse gases that slow, stop, and reverse the growth of such emissions…").
[21] *See* The Center for Climate and Energy Solutions for a listing of notable federal legislative bills that have been introduced into Congress since 2005 but have not passed (The Center replaced the Pew Center on Global Climate Change) http://www.c2es.org/federal/archives. Congressional failures and reasons for such inaction will be discussed further below.
[22] *See* American Clean Energy and Security Act of 2009, H.R. 2454 (passed by House on Jun. 26, 2009). *See, e.g.,* Ian Talley, *Comprehensive 2010 Climate Bill Highly Unlikely, Murkowski Says,* WALL ST J, Mar. 11, 2010, http://online.wsj.com/article/SB10001424052748703625304575115803550688146.html.
[23] EPA & NHTSA, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25324 (May 7, 2010).

allow the EPA to at least begin to make significant emissions reductions in the absence of legislation.[24] Proponents note that while the CAA may be viable as a short-term option, serious GHG reduction needed to avoid climate change perils will require comprehensive legislation like Waxman Markey.[25] However, even the EPA's authority under the CAA is in jeopardy as opponents of the agency's regulations have brought numerous actions to federal courts challenging the EPA's underlying endangerment finding as well as the EPA's regulatory process.[26]

B. The Road to Comprehensive Climate Legislation

Since the Federal government has been unable to use existing statutes to regulate GHGs in a meaningful way, many advocates in search of more efficient and complete regulation continue to actively push for new comprehensive legislation specifically dealing with GHG emissions. From vehement refusal to ratify the Kyoto Protocol to the failure of President Obama's American Clean Energy and Security Act only one year into his presidency, past legislative attempts to pass comprehensive climate legislation have been consistently defeated.[27] Moreover, current attempts and proposals also face an uphill battle as bipartisan resistance on even minor legislative proposals has marred the 112th Congress during a debt crisis and measures to strip the EPAs authority to regulate GHGs.[28] As the Federal government has faced unending barriers to enacting a federal regime, the outlook for comprehensive legislation enactment in the foreseeable future is bleak. Thus, climate litigation both to achieve redress and to encourage governmental action is inevitable.

Even under the friendliest of governments, comprehensive climate legislation is inherently difficult to pass. Meaningful climate policies will have far reaching impacts, making the very nature of comprehensive legislation one of the barriers to its own enactment. Scholars also note that comprehensive change will require great coordination between levels of government, raising

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[24] *See eg* Greg Wannier "EPA's Impending Greenhouse Gas Regulations: Digging through the Morass of Litigation" White Paper at 3, Columbia Law School Center for Climate Change Law, November 23, 2010.
[25] Fraas D. Burtraw & N. Richardson, *Greenhouse Gas Regulation under the Clean Air Act: A Guide for Economists* (2011) (Discussion Paper No. RFF DP 11-08). Retrieved from the Resources for the Future website: http://www.rff.org/Publications/Pages/PublicationDetails.aspx?PublicationID=21461.
[26] *See eg* Wannier, *supra* note 11.
[27] *See* Peter Schwartz and Doug Randall, "An Abrupt Climate Change Scenario and Its Implications for United States National Security" (2003); *see also* "A Breakdown of the Senate Vote on the Climate Stewardship Act" (Nov 5, 2003) Grist.
[28] *See eg*. H.R. 97, Rep. Blackburn (R-TN) (This bill amends the Clean Air Act to exclude GHGs from the definition of "pollutant," and it prohibits the use of the Act for regulations related to climate change.)

federalism concerns.[29] Reformers are looking for a policy to cover a huge breadth of emitters in various industries and economic sectors, and achieve emissions reductions through multiple tools including traditional regulation, market-based approaches including cap and trade, emissions taxes, offsets, and economic incentives for competitive research and development.[30]

Finally, as the 112th Congress demonstrates, climate policy is a divisive issue. Even strong supporters of climate legislation in government must also represent the concerns of their constituents in order to retain office. Voters in oil, gas, and coal driven jurisdictions will often oppose measures that limit use of their resources. Still, even in states without resource driven economies, public support for climate legislation has become less than overwhelming.[31] Together, these and other factors make active regulatory reform seemingly impossible policy makers understandably reluctant to step up for active reform.

C. The Absence of Comprehensive Climate Legislation Infers Litigation Will Continue

With the Federal government facing a regulatory roadblock, inaction has encouraged advocates of reform to bring climate litigation in an effort to reach their goals including: to prod government action, to work as a sort of judicial regulation, and to obtain redress for harmed individuals. This leads me to contend that despite hostile decisions, litigation will continue.

Litigants have been known to turn to the courts in the absence of response from their political branches to push government action. Benjamin Ewing and Douglas A. Kysar argue that the corollary of a system of checks and balances is one branches' ability to "prod and plea" the other branches to act rather than passively retreat behind protections of limited government.[32] Kysar and Ewing apply this function to climate tort litigation, arguing that the judicial branch sells itself short when it merely dismisses these claims as outside its proper domain. The authors counsel the courts to instead undertake these cases as a vehicle through which it can "prod" the

[29] *See* John C. Dernbach, "Developing a Comprehensive Approach to Climate Change in the United States that Fully Integrates Levels of Governemnt and Economic Sectors" (2008) 26 Virginia Envt'l L J 227 at 229; *see also* Hari Osofsky, "Diagonal Federalism and Climate Change: Implications for the Obama Administration" (2011) 2 Alabama L Rev 62 (advocating a diagonal integration approach).
[30] Joseph E. Aldy and William Pizer, "Issues in Designing US Climate Change Policy" (2008) RFF Discussion Paper.
[31] Yale Project on Climate Change Communication, May 2011 (finding that although the American public is still concerned about climate change, the percentage of concerned Americans has action slipped since 2008, which is concerning as public support must be resounding to reduce the short-term political costs of action).
[32] *See generally* Benjamin Ewing & Douglas A. Kysar, "Prods and Pleas: Limited Government in an Era of Unlimited Harm" (2011) 121 Yale LJ 350.

other branches by taking action to make it difficult for the other branches to continue to avoid the issue.[33] Alternatively, the judicial branch may "plead" with the other branches by noting an important problem and asking for its resolution.[34] The effect would be to promote a dialogue between the branches, allowing more thoughtful consideration on issues that require authority where the legislature is incapable of acting.[35]

On the other hand, Professor Hunter counters that while prodding government to act through administrative and constitutional law may be appropriate, using tort law to push governmental action is inappropriate.[36] Additionally, Professor Epstein admonishes such use of the judicial system. Instead, he notes that the only solution for climate change is for the EPA to orchestrate the GHG reduction effort.[37] These scholars all agree, however, that the current Congress is "almost incapable of conducting routine business, let alone addressing urgent new policy issues in a constructive way."[38] In this paper, I do not argue the wisdom of using tort litigation to achieve reform, but rather note the link between regulatory inaction and continued litigation.

Additionally, even the prospect of litigation and potential damages awards have the ability to promote GHG emitters to reform their own actions regardless of Congressional stalemate. Finally, as there is no legislation under which victims of climate reform may seek redress for their harms, climate justice will likely continue to motivate continued litigation.[39] I argue below that climate litigation is posed to continue. If I am correct about this inevitability, then it behooves litigants to understand the calculated way in which justices have decided issues in order to shape the role the courts see for themselves on the future of climate reform.

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[33] *See ibid*.
[34] *See ibid*.
[35] *See* Douglas A Kysar, "Limited Government in an Era of Unlimited Harm" (2011) Huffington Post http://www.huffingtonpost.com/douglas-a-kysar/durban-climate-conference-_b_1121679.html; 11/30/11; *see also*, Jonathan Zasloff, "Courts in the Age of Dysfunction" (2011) 121 Yale LJ 479 (2012), http://yalelawjournal.org/2012/02/14/zasloff/html (finding that judicial prodding is appropriate and possibly even desired in three situations where legislative action is paralyzed in dysfunction).
[36] *See* Daniel A. Farber, "Preventing Policy Default: Fallbacks and Fail-safes in the Modern Administrative State" (2011) 121 Yale LJ 499.
[37] *See* Richard A. Epstein, "Beware of Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in the Context of Global Warming" (2011) 121 Yale LJ 317, (noting that the CAA is not suited to GHG reduction, Epstein leaves questions as to how the EPA would obtain further authority to regulate GHGs in an era where Congress does not seem posed to act if not under existing statutes).
[38] *See* Zasloff, *supra* note 35 at 479 (finding that judicial prodding is appropriate and possibly even desired in three situations where legislative action is paralyzed in dysfunction).
[39] *See generally* Maxine Burkett, "Climate Justice and the Elusive Climate Tort" (2011) 121 Yale LJ 115 at 116.

III: Climate Litigation as an Avenue to Reform

As I discussed above, Congress's stalemate on comprehensive climate legislation and strong moves to repudiate the EPA's authority to regulate GHGs signal an even less favourable picture for the future. But, since harms posed by climate change will only escalate with time and increased emissions, many groups will be left without relief or prospect of change. For this and many other reasons that I will discuss herein, climate litigants and reformers have turned to litigation and a plethora of alternative routes to achieve reform.[40] In this paper, I am concerned only with the use of climate litigation as an avenue to reform.[41]

While litigation has several limits and faces many challenges, these actions also provide important benefits that lead me to argue these actions will and should continue. Further litigation however, should proceed with a more effective methodology learned from past climate jurisprudence and with consideration for litigations' opportunity costs in order to make the most productive use of this avenue.

First, I will describe the basic elements of climate litigation by introducing readers to various causes of action, the litigants involved, and the limits of using climate litigation for reform. I will then discuss the challenges climate litigants will face in bringing these actions. I will temper this dreary illustration by canvassing the benefits of climate litigation even assuming actions are unsuccessful on the merits. Next I will demonstrate that climate litigation has already had a great impact on climate change reform using examples of recent cases. Finally, I will conclude that although litigation will not be the silver bullet to solve climate change, there are many reasons for litigants to continue down this path to reform.

D. US Judicial System

As the United States is organized as a federal system, the judiciary follows suit with two separate systems for state courts and federal courts. The majority of cases I will discuss in this thesis have been brought in federal court as within federal jurisdiction by nature of the parties

[40] *See* Julia Schatz, "Climate Change Litigation in Canada and the USA" (2009) RECIEL 18 (2), Blackwell Publishing: Massachusetts, USA at 129 (noting that reformers, policy makers and scientists alike are currently acting to prepare for climate change's possible effects: alternative avenues toward climate reform include local regulations, education, and an increased focus on adaptation technologies such as Carbon Capture and Sequestration).
[41] More specifically, I am concerned only with climate litigation in the United States as this has been the most active jurisdiction for these causes of actions in addition to being the jurisdiction with which I am most familiar.

and questions involved and the legislation in question. The Federal court system flows from the US District Courts to their geographically assigned Appellate or Circuit Courts, up to the USSC.[42] The second wave of climate litigation I will focus on in Chapter Three resides mainly in the state courts, which have their own separate trial, appellate, and supreme courts. The two systems function similarly, however as the federal court judges are nominated by the president and appointed for life upon Senate confirmation, these posts- especially the USSC seats- tend to be more ideologically divisive and are concerned with their legitimacy as the unelected branch of power in the Federal government.[43]

E. Types of Litigation

The goal of this section is not to provide a comprehensive empirical study of climate litigation.[44] Rather, I merely intend to introduce the reader to the field. Climate litigation is a recent phenomenon evolving with rising awareness and harms posed by climate change in the past two decades. Courts in the United States began seeing climate litigation in 1989 under the NEPA.[45] These claims continued steadily at one or two cases per year until 2004 when climate actions surged.[46] Since 1989 US courts have seen a total of 461 climate cases, with a record 170 cases filed in 2010, and just over 50 filed in 2011.[47] At this point it is necessary to define what constitutes climate litigation. As this is merely an introduction, I have decided to use a broad view finding that the umbrella term of climate litigation includes litigation motivated by or with a purpose regarding climate change.[48] Climate litigation connotes many different causes of actions, unified by the goals of compelling stronger government and private sector reforms, obtaining monetary redress for victims of climate change, and drawing political attention to the issues at stake. Generally these actions can be broken down into statutory and common law claims.

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[42] Understanding Federal and State Courts, available at www.uscourts.gov/educationalresources/FederalCourtBasics/CourtStructure/UnderstandingFederalCourts.aspx, last visited Nov 27, 2012.
[43] *See ibid*.
[44] For a comprehensive study, *see* David Markell & J.B. Ruhl, "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?" (2012) 64 Fla L Rev 15.
[45] *See ibid*.
[46] Arnold & Palmer, LLP, Climate Temporal Chart, (Arnold & Palmer LLP, undated), available at http://www.climatecasechart.com).
[47] *See ibid*.
[48] For a more detailed definition used in an empirical study, see Ruhl and Markell, *supra* note 46; *see also*, Schatz, supra note 40 at 129 (using a broad definition to introduce the are of climate change litigation).

1. Statutory Causes of Action

Although common law actions have received significant attention, the majority of cases under the climate litigation rubric are based on statutory claims.[49] Statutory claims generally regard requiring governmental action or applications regarding their decision making process under a certain statute.[50] Statutory claims in the US can be broken into categories according to the litigants' goals. First, litigants (mainly environmental NGOs) have brought a plethora of cases intending to force positive government action. Here, plaintiffs seek to require the EPA and various other executive agencies to act under their delegated authority to promulgate new or stricter regulations. These proposed regulations would either directly limit GHG emissions in the case of actions brought under the CAA, or indirectly limit these emissions by increasing standards required to comply with the provisions under the CWA, ESA, or local building codes, for example.

Massachusetts is an example of a state bringing a statutory claim against the EPA for failing to regulate GHGs. In *Massachusetts* the US Supreme Court found that by using sufficiently flexible language to allow for new climate threats, Congress had in fact provided regulatory authority over GHG regulations with the EPA under the CAA.[51] The lion's share of these cases are by states and environmental NGOs to force the EPA to regulate emissions under the CAA pursuant to the USSC's mandate in *Massachusetts*.

Next, environmental NGOs along with cities and states have brought litigation aiming to stop government action that is detrimental to climate reform or allows further GHG emissions. Generally these actions seek to prevent or limit a federal or state agency decision to authorize, permit, carry out, or fund a source of future or ongoing emissions alleging that the agency has violated an act's procedural or substantive requirements by failing to consider a proposed action's impact on climate change. The most numerous project challenges are those against government permitting approving coal-fired power plants, building developments, industrial facilities, and mining activities under the applicable federal or state NEPA.[52] Additionally, these plaintiffs have recently brought actions aiming to regulate private conduct through petitions for greater information disclosure by private entities whose activities impact GHG emissions. By

[49] *See generally* Markell and Ruhl, *supra* note 44, and Arnold Palmer Case Chart, *supra* note 46.
[50] *See ibid.*
[51] *See Massachusetts,* 549 US 497 (2007).
[52] *See generally* Arnold & Palmer Case Chart, *supra* note 46.

requiring information disclosure on private entities' climate risks, litigants hope to increase transparency regarding investors' risks and allow greater opportunities to monitor activities and increase accountability.

Finally, on the other side of the table are industry lawsuits typically brought by emitting industry groups to challenge government attempts to increase GHG regulations. Industry lawsuits include challenges to state and municipal vehicle standards by the automobile, and oil and gas sectors, and challenges to state action such as the California Air Resources Board. At the federal level, GHG emitting industries have widely challenged federal action by petitioning the EPA's endangerment findings and challenges to the reporting rule, the tailoring rule, and the PSD timing rule.[53] Since the United States lacks federal climate legislation, there has been no enforcement litigation; however, once Congress introduces federal legislation, these types of actions will inevitably increase and broaden the scope of the courts' role in climate reform.[54]

2. Common Law Causes of Action

Common law actions seek redress for climate related harms by stretching traditional common law principles to apply to actions emitting GHGs that contribute to climate change. Rather than seeking to increase or decrease regulation over climate change, civil suits attempt to hold private emitters, and more recently states, directly liable for harms caused from their GHG emissions or fiduciary obligations.[55]

Climate litigation based on common law tort theories has prompted much debate. Some argue that expanding traditional tort and equitable theories to provide climate relief is akin to judicial activism. Advocates of judicial conservativism argue these actions are an affront to the court's limited law interpreting jurisdiction because they allow courts to find liability where there was none before and where the legislative branch has for the most part refused to created widespread liability. On the other hand, this is not a new practice. Common law principles are a continuously evolving body of law. As such, they serve to fill in the gaps left by legislation.[56] In

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[53] *See ibid*.
[54] *See* Markell and Ruhl, *supra* note 44 at 10650
[55] *See* generally Schatz, *supra* note 40 (Common law theories generally include state and private plaintiffs suing private corporations for monetary or injunctive relief alleging that their operations emit GHGs that have significantly contributed to the climate change that has caused the alleged harm).
[56] *See* Shi Ling Hsu, "A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit, (2008) 78 U Colo L Rev ___ at 118.

fact, courts have previously expanded common law tort principles to provide relief for individuals in well-known mass torts such as asbestos, tobacco, handguns, and lead paint litigation. All of these actions were seen as radical departures at the time but have allowed our body of common law to grow and provide individuals with relief in appropriate situations.

As mentioned above, there are several types of traditional common law theories that may apply to find liability for actions contributing to climate change. Few litigants have attempted to bring actions under trespass or negligence as these theories require more judicial creativity than perhaps will be currently entertained. Public nuisance and the public trust doctrine, however, provide more plausible theories under which to apply tort law to climate change. I discuss these actions below.

a. Nuisance

The first wave of common law adjudication focused on claims of public nuisance, under which litigants argue GHG emissions increase risk to health and infrastructure through the effects of climate change. Private nuisance does not apply in this context; however, private parties in addition to state plaintiffs, may bring an action for public nuisance provided they meet certain thresholds. The claim requires plaintiffs to show defendants have undertaken an act that unreasonable interferes with the health, safety, or property rights of the community.[57] Recovery by a private party- as opposed to a state plaintiff- is available for public nuisance only if the private party suffered unique damages not suffered by the public at large.[58] Plaintiffs from more climate vulnerable areas such as low-lying coastal areas, arctic regions, or desert environments such as New Mexico are the types of climate victims better able to satisfy this requirement.

Public nuisance requires a balancing test to evaluate the unreasonableness of the complained of activity.[59] Generally, as climate friendly technologies become more technologically and economically feasible, and the harms from climate change more pronounced, this balance should shift in favour of finding public nuisance liability. As of now, state attorney generals have brought two cases in public nuisance: *California v GM*, which Plaintiffs

[57] Restatement (Second) of Torts. at § 821 B.
[58] Restatement (Second) of Torts. at § 821 C.
[59] Restatement (Second) of Torts § 826, cmt. a. An activity is unreasonable when the gravity of the harm outweighs they utility of the actors conduct.

voluntarily dropped, and *Connecticut v AEP*, where the USSC found that federal CAA authority displaced common law tort liability.[60] Private plaintiffs have brought two more cases involving public nuisance causes of actions: *Comer v Murphy Oil* was dismissed originally as a political question, reversed on an *en banc* hearing, then dismissed in an odd procedural twist;[61] and *Kivalina v Exxon Mobile*, where the District Court dismissed the claim as a nonjusticiable political question and the Ninth Circuit recently delivered its opinion, which I will discuss below.[62]

b. Public Trust

In what I describe as the second wave of climate litigation, the plaintiffs' bar has recently brought cases under the public trust doctrine alleging that state officials have a fiduciary duty to hold the state's natural resources in trust for present and future citizens.[63] Litigants argue that federal and state governments have a mandatory duty to affirmatively preserve and protect the atmosphere from damage or loss and to refrain from using the atmosphere in a manner to damage future interests held by trust beneficiaries. They allege that by failing to act, these governments have allowed too many GHG emissions to enter the atmosphere, which have in turn harmed the atmospheric trust.[64]

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[60] *California v GM Corp et al*., 2007 US Dist LEXIS 68547 (ND Cal 2007) (dismissed Sept. 2007) (appeal pending) Request for continuance of oral argument (Jan. 2009) Appeal voluntarily dismissed (June 2009) [*CA v GM*]. Here, California sued six auto companies under public nuisance alleging that they were a substantial source of the greenhouse gas emissions, which caused climate change, resulting in damages to the state in the millions of dollars. The District Court dismissed as a non justiciable political question, and plaintiffs voluntarily dropped their appeal.); *see also AEP v Connecticut,* 564 US ___ (2011) [*AEP*].

[61] *Comer v Murphy Oil USA*, 585 F 3d 855 (5th Cir 2009), rehearing en banc granted, 598 F.3d 208 (5th Cir Feb 26, 2010), order dismissing appeal, 607 F.3d 1049 (5th Cir, 2010), petition for writ of mandamus denied, 131 S Ct 902 (2011) (complaint refiled May 2011). In this case, residents along the Mississippi Gulf Coast brought a class action in public nuisance against oil and energy companies alleging that their GHG emissions contributed to global warming, which caused sea levels to rise, exacerbating the intensity of Hurricane Katrina, destroying private and public property. The District Court dismissed on standing and political question grounds. On appeal, the Fifth Circuit initially reversed the District Court's findings in an en banc hearing. In a procedural twist, however, the court was able to duck out of this decision on a lack of quorum, reinstating the District Court's ruling and vacating the more activist Panel's findings of justiciability. *Ibid*.

[62] *Native Village of Kivalina v ExxonMobile Corp*, 663 F Supp 2d 863 (ND Cal 2009), affirmed No 09-17490 (9th Cir. Sept. 21, 2012) [*Kivalina*].

[63] Our Children's Trust has recently filed numerous actions: *Alec L. v Jackson* (ND Cal, filed May 2011) (federal complaint) *Barhaugh v State* (Montana Sup Ct denied June 2011); *In re Kids v Global Warming* (Iowa Dept of Nat Resources June 2011); *In re Bonser-Lain*, (Texas Comm. on Env. Quality June 2011)

[64] M.C. Wood, "Government's Atmospheric Trust Responsibility" (2007) 22 J Envtl L & Litig 369; & M.C. Wood, "Atmospheric Trust Litigation" Chapter in *Adjudicating Climate Change: Sub-National, National, & Supra-National Approaches* (William C.G. Burns & Hari M. Godowski eds) (Cambridge University: 2009).

US courts extended the public trust doctrine to environmental protection in the early 1980's with *Mono Lake*; however, the doctrine had not yet been applied specifically with the atmosphere as the subject of the trust.[65] Recently, environmental organizations have undertaken this doctrine as a new path to adjudication, acting together to bring cases against all 50 states and several federal agencies.[66] These suits ask the courts to issue a declaratory judgment affirming the fiduciary duty and to provide injunctive relief by requiring the government to make qualitative reductions in GHG emissions. Importantly, this theory of liability could potentially have worldwide application.

Several law professors have filed an *amicus* brief in support of the Plaintiffs' claims.[67] They argue that the public trust doctrine "properly applies to protect the nation's air and atmosphere" and therefore creates a fiduciary obligation in government to take immediate action to abate GHG pollution.[68] This is a novel claim, but it provides a more holistic and flexible platform that illustrates an appropriate role for the courts in climate reform. Beyond initially finding an atmospheric trust, issues on the merits will likely include: whether private parties require states to act affirmatively; which standing requirements are required to meet to bring a suit; and what level of knowledge the fiduciary states will be held to?

Common law actions represent only a minority of the total number of climate cases filed. Despite their small numbers, these cases have a huge impact in determining the judicial role in climate change because they push justices to consider how finding liability will impact and reflect society's willingness to hold groups liable for the harm caused by consumer actions.

F. Limits of Litigation as an Avenue to Reform

Although litigants have turned to courts to push reform in a vacuum of national legislation, this avenue is limited in several important ways. First, litigation's reactive nature leads judicially created law to evolve at a slower pace than legislation that could provide preventative measures. Moreover, as the adversarial system requires a dispute between two or

[65] *Nat'l Audubon Society, et al. v The Superior Court of Alpine County*, *et a*l., 33 Cal 3d 419 (1983) [*Mono Lake*].
[66] Collectively known as "Our Children's Trust".
[67] Brief for *Amicus Curaie* Law Professors, *Alec L, et al. v Lisa Jackson, et al*., USDC ND Cal, 2:11-cv-02203emc, filed December 7, 2011.
[68] *See ibid*.

more parties, each case is limited to the facts as related to the litigants at hand. Since climate change is a borderless issue that concerns numerous sectors and industries, many appropriately suggest that a comprehensive approach through legislation and regulation would be more efficient and appropriate to the roles each branch was created to perform.[69] This is clearly true; however, as seen above, since comprehensive legislation seems distant in today's current political environment, litigation remains as -an albeit less efficient- alternative. Thus, I find that litigation should be combined with other tools as opposed to being relied on its own.[70]

Moreover, litigation is not only incredibly time consuming, but as a corollary requires extensive financial resources.[71] This could not only prevent many harmed individuals from redressing their grievances, but allows those with extensive resources to indirectly shape policies to best suit their needs. Consequently, litigants with limited time and monetary resources must strongly weigh the opportunity costs of such litigation in relation to other avenues of reform available to them.[72] Finally, because courts are generalists, lacking the expertise in both climate change specifically and policy implementation generally, scholars note their concern over the courts' overall capacity to entertain these claims.[73] Thus, it is clear that climate litigation faces limits preventing it from being a successful avenue to reform on its own. However, as noted above, I argue climate litigation is still a worthwhile venture to achieve reform in conjunction with other efforts.

1. Challenges Climate Litigants Will Face

Aside from the institutional limits of using litigation as a method of reform, climate litigants will face many challenges in their actions. Here, I will introduce the basic challenges from the viewpoint of climate reformers, making reference to anti-reform cases where necessary to situate the jurisprudential environment. I will merely introduce the threshold issues in this chapter and will discuss their application in much more depth in Chapter Two.

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[69] David A. Grossman, "Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation" (2003) 28 Colum J Envt'l L 1 at 6.
[70] *See* Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change" (1974) 9 Law & Soc Rev 1 at 60 (finding that litigation alone will be unsuccessful in producing redistributive change to our legal system, rather litigation should be used in combination with other avenues).
[71] *See* Grossman, *supra* note 69.
[72] *See* Galanter, *supra* note 70 at 59 (noting that since reforms through climate change will be less total than their utopian goals, reformers will be "faced with the necessity of choosing which of their limited resources are most productive to create change").
[73] Mathew Miller, "Right Issue Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims" (2010) 10 Mich L Rev 2 at 257-89 [Matthew Miller].

a. Threshold Issues

Notwithstanding judicial review cases, the majority of climate actions have faced significant barriers to litigation by several justiciability doctrines. Justiciability, at its most basic, concerns the boundaries between the unelected judicial branch of government and the politically accountable executive and legislative branches.[74] These boundaries are defined by delineating each branch's scope of authority according to which matters are suitable for adjudication and which must be left for political resolution. Entrenched in the US Constitution is a republican form of government with a strict separation of powers delineating the federal judiciary's responsibilities through Article III.[75] The content of the Article III courts' jurisdiction has created an enduring debate over the proper role for the judiciary in government. This debate provides the basis of the courts' confusion and perhaps reluctance in creating a role for themselves in the climate change arena.

The overarching notion of justiciability as it relates to climate litigation includes the doctrines of standing, political question, displacement, and preemption.

i. Standing

Standing is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right."[76] The requirement concerns whether the plaintiff is the appropriate party to bring a claim as well as whether the party from whom he seeks redress is appropriate.[77] Standing does not address whether the actual claim asserted is appropriate or whether it is likely to succeed.[78] Rather, the basic premise of standing is that courts power to adjudicate claims is limited.[79]

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[74] *See* Erwin Chemerinsky, *Constitutional Law: Principles & Policies*, fifth ed. (2000) (Wolters Kluwer Law & Business).
[75] Article III, US Constitution, art. III.
[76] Blacks Law Dictionary 8th ed. at 1442.
[77] Standing is outside the umbrella of justiciability in Canada but within it in the US. *See* Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, (Toronto: Carswell, 1999).
[78] I Jeremy Gaston, "Standing on its Head: The Problem of Future Claimants in Mass Tort Class Actions" (1998) 77 Tex L Rev 215 at 219.
[79] See *Lujan v Defenders of Wildlife*, 504 US 555 at 559 (1992) (stating that federal courts only have the power to decide a "case" and "controversy") [*Lujan*]; *see also Lewis v Casey*, 518 US 343 at 349 (1996) (stating that standing is a "[p]rinciple that prevents courts of law from undertaking tasks assigned to the political branches. It is the role of

Emanating from Article III of the US Constitution, the modern test requires the federal courts to courts asses: (1) whether citizen plaintiffs can show that they have been injured or are likely to suffer an imminent injury; (2) whether these plaintiffs can show that the injury suffered is caused by the defendants alleged action; and (3) whether a favourable decision could adequately repair the harm complained of.[80] Climate litigants have faced barriers here because: it is difficult to prove the extent of an injury from sea level rise, ocean acidification, or intensified weather patterns; climate change symptoms do not harm victims directly after an ounce of GHGs have been emitted but rather require the greenhouse effect to take place; the diffuse nature of the atmosphere makes a finding of direct causation between a specific emitter's act to particular victim's harm practically impossible; and it is unlikely that one Court's decision will adequately repair the harms complained of.[81]

Additionally, US federal courts have imposed prudential standing requirements preventing third party standing, adjudicating generalized grievances, and those outside the zones of injury or interests as cognizable by the judiciary.[82] For climate litigants, these prudential requirements require plaintiffs to defend against threshold arguments that their claim is too abstract, their injury too attenuated, and that particular parties' claims against limited defendants are too narrow to adequately remedy the harms caused by climate change.[83] These prudential limits are motivated by concerns over separation of powers and thus aim to limit the courts from overreaching into policy issues more appropriate for resolution by the elected branches.[84] Prudential limits are not constitutionally required. Rather, they are imposed in a vein of judicial restraint by the court itself, and so may be expressly overridden by Congress.[85]

Notably, courts have applied an important alternative threshold for quasi-sovereign litigants, which has been integral to climate actions. *Parens patraie* standing holds state

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courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution").

[80] *Lujan,* 504 US 555.

[81] *See* Hsu, *supra* note 56.

[82] *See Allen v Wright*, 468 US 737 (1984).

[83] *See generally* David R. Hodas, "Standing and Climate Change: Can Anyone Complain About the Weather?" (2000) 15 Land Use & Transnat'l L 451.

[84] *See Raines v Byrd*, 521 US 811, 818, 820 (1997) (stating that standing is "built on a single basic idea—the idea of separation of powers").

[85] *See Flast v Cohen*, 392 US 83, 97 (1968) (stating prudential requirements are "based in policy rather than purely constitutional considerations"); *see also* Larry W. Yackle, *Federal Courts*, at 336 (3rd ed 2009) (finding that since prudential limitations are policy based, they may be relaxed in some circumstances).

plaintiffs to a lower threshold than private litigants with the understanding that state governments have a quasi-sovereign interest in protecting their citizens well being.[86] Without a finding of standing under regular or *parens patraie* standards, a federal court does not have jurisdiction to hear the case, and it will be dismissed before reaching its merits.[87]

ii. Political Question

A political question is one "that a court will not consider because it involves the exercise of discretionary power by the executive or legislative branch of government."[88] Article III of the Constitution created the federal judiciary and defined the ceiling of its power to adjudicate claims.[89] The federal courts being of courts of limited jurisdiction, have two primary restrictions of their power: first, Article III defines the scope of federal court authority; and second, judicial interpretation of Article III has created justiciability doctrines that restrict access to federal courts.[90] The doctrine is often explained as a necessary corollary to the separation of powers as it represents the idea that courts should abstain from resolving constitutional issues that are better left to the other, politically accountable branches.[91]

Many trace the roots of the doctrine to *Marbury v Madison* in which Chief Justice Marshall observed there are "irksome" and "delicate" questions that are inherently political and out of reach to the judiciary.[92] Many years thereafter, the USSC- who remained conscious of each branch's constitutionally delineated role in government as well as their own legitimacy as an unelected branch- engaged in a long fought decision in *Baker v Carr* over allegations that

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[86] *See* J Med Philos, "The Concept of the Person in the *Parens Patriae* Jurisdiction over Previously Competent Persons" (1992) 17(6) 605-45.
[87] *DaimlerChrysler Corp v Cumo*, 547 US 332 at 339-43.
[88] *Blacks Law Dictionary* at 1197.
[89] *Ibid* at 34.
[90] *Ibid* at 38-39 ("from a separation of powers perspective, a decision about the appropriate content of constitutional and statutory limits on federal judicial power is a question about the proper role for the federal judiciary in the tripartite scheme of American government.") (Article III provides that "[t]he judicial power shall extend to all cases, in law and equity, arising under the Constitution… to Controversies").
[91] H. Wechsler, *Principles, Politics, and Fundamental Law* (Cambridge: Harvard University Press, 191); *see* also *Marbury v Madison*, 5 US (1 Cranch) 137 at 165-66 (1803) [*Marbury*]; and *Baker v Carr*, 369 US 186 at 217 (1962) [*Baker*]; *see also US Dep't of Commerce v Montana*, 503 US 443 at 456 (1992).
[92] *See* Jess H Choper, "The Political Question Doctrine: Suggested Criteria" Duke LJ, Forthcoming at 47; *see* also *Marbury*, 5 US (1 Cranch) at 165-66; *see also* James R. May. "Constitutional Climate Change in the Courts" *Environmental Law*: Cosponsored by the Environmental Law Institute and The Smithsonian Institution, (2008) ALI-ABA Course of Study, Feb. 6-8 at 341.

voter redistricting violated the 14th Amendment's Equal Protection Clause.[93] The decision reformulated the Court's previous political questions doctrine and formally defined the modern test to determine the judiciary's boundaries. *Baker* lists six scenarios in which an issue will likely pose a non-justiciable political question into which courts "ought not enter the political thicket."[94] If defendants are able to show that the issue fits into one of the scenarios set out in *Baker v. Carr*, the issue is rendered a non-justiciable political question, forcing the litigants to turn to the other branches to find redress.[95]

Although this doctrine had fallen out of use, climate defendants revived it arguing that climate actions were barred as political questions because these cases could not be decided without courts making an initial policy decision of the kind that should be left for the political branches.[96] Several district courts have agreed and dismissed climate cases as non-justiciable political questions under the basic theory that "the constitutional role of the courts … is to decide concrete cases- not to serve as a convenient forum for policy debates."[97] I will more thoroughly discuss the courts' application of the political question doctrine in below.

iii. Displacement

The displacement doctrine requires federal courts to determine when federal legislation "speaks directly" to a question such to displace the federal common law in the area and avoid creating a parallel track of laws.[98] A federal common law, for instance, will be displaced simply when the field has been occupied as opposed to when it has been occupied in a certain manner.[99]

This doctrine does not have a large jurisprudential history; however, the USSC used displacement in a pivotal way in *AEP*. In *AEP,* although the Court had granted *certiorari* on the political question issue, it ended up avoiding the controversial political question doctrine by using the displacement theory to dismiss the public nuisance claim and put at least a temporary

[93] *Baker*, 369 US 186 at 217.
[94] *Ibid*; *see also Colegrove v Green*, 328 US 549 at 556 (1946).
[95] *See* Rachel E. Barkow, "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy" (2002) 102 Columbia L Rev 2.
[96] *See* Amelia Thorpe, "Tort-Based Climate Chante Litigation & The Political Question Doctrine" (2008) 24 J Land Use 79.
[97] *Massachusetts,* 549 U.S. 1029 (Justice Roberts dissenting).
[98] *City of Milwaukee v Illinois,* 541 US 304 at 324 (1981) [*Milwaukee II*].
[99] *Ibid*; *see also AEP*, 131 S. Ct at 2537 (rejecting the argument that the regulatory needed to have actually acted to occupy the field, and instead stating that the test was whether a regulatory body merely had the authority to regulate over the field).

end to the federal common law as a source of climate regulation. The USSC in *AEP* dismissed the case holding that federal common law regarding GHG emissions has been displaced by Congress's grant of authority to regulate GHGs to the EPA under the CAA.[100]

iv. Preemption

Preemption concerns the invalidity of state laws when they conflict with federal laws. The doctrine operates under the Supremacy Clause, which states that the US Constitution and all federal laws made pursuant to it are supreme.[101] Federal preemption of state law may occur expressly when the federal statute expressly states Congress's intent to preempt state law.[102] Alternatively, preemption may be implied when and to the extent that state laws conflict with federal laws,[103] or when the federal regulatory scheme is so pervasive as to occupy the area of law to such an extent that the courts may infer Congress did not intend for state laws to supplement it.[104]

No state GHG laws have been preempted by the Clean Air Act.[105] Nor have courts ruled whether climate change falls under state police powers, which would require state courts to find that statutes such as California's AB-32 preempt state common law. However, the Fourth Circuit's emphasis on *International Paper Co v Ouellette*[106] in *North Carolina v TVA*[107] extended preemption under the CAA further than the courts have gone before by finding federalism policy arguments more compelling than the savings clause of the CAA.[108] At a minimum, this seems to illustrate that at least this court is concerned with attaining a coherent national policy to the exclusion of piecemeal state policies.

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[100] *See AEP*, 131 S. Ct 2527.
[101] US Constitution, art VI, cl. 2.
[102] *English v General Electric Co*, 496 US 72 at 78-79 (1990).
[103] *Gibbons v Ogden*, 22 US 1 (1824).
[104] *Rice v Santa Fe Elevator Corp,* 331 US 218 (1947).
[105] Richard Davis, David M. Friedland, & James B. Slaughter, "The Fourth Circuit Limits Nuisance Suits and Strengthens Preemption Under Federal Environmental Laws" Beveridge & Diamond PC, Bulletin, July 30, 2010, online: <www.bdlaw.com/news-934.html>.
[106] *International Paper Co v Ouellette,* 479 US 481 (1987) [*Ouellette*].
[107] *North Carolina v TVA,* 09-1623_ F3d_ (2010).
[108] The savings clause allows states to regulate GHG emissions more strictly than the standard set by the federal floor.

b. Issues on the Merits

Although reaching these laudable objectives is clearly a goal of climate litigants, they are sobered by the plethora of problems these actions will face on the merits. The elements of these torts have not yet been litigated on their merits because these cases have been precluded on justiciability issues.[109] It is clear, however, that climate actions would present difficult obstacles on the merits: reaching for tenuous causation claims; considering how far to extend the duty of a greenhouse gas emitter; determining the reasonableness of conduct in a public nuisance suit as well as which actors in the supply chain of GHGs are the appropriate defendants; creating a formula from which to determine damages; using permits as a defense; applying a statute of limitations; determining personal jurisdiction and choice of law concerns; and even successorship liability.[110] Although recent cases such as *AEP* are separation of powers decisions at their core, that these issues await the court on the other side of these justiciability doctrines they have previously used as a shield, was clearly on the justices' minds.[111]

c. Underlying Judicial Restraint

In addition to these challenges, climate litigants also face an underlying theme of judicial restraint in the relatively unknown and seemingly technical area of climate change. I will more thoroughly develop this idea in Chapter Four. For now it is sufficient to note that judges have rarely been on the forefront of social, political, economic change. Nor, as the argument goes, should courts actively drive change, as this is a function left more appropriately to the politically responsible branches.

G. Benefits of Climate Litigation

Notwithstanding the limits and challenges catalogued above, climate litigation provides many influential benefits that justify its continued use as a tool in climate reform. These benefits may arise directly through the process of adjudicating a tort claim, or may be indirectly related to

[109] Michael B. Gerrard, "What Litigation of a Climate Nuisance Suit Might Look Like" (2011) 121 Yale LJ 135.
[110] *Ibid*.
[111] *Ibid* at 141.

the pursuit of the claim itself.[112] Success in climate litigation is often defined in terms broader than mere wins or losses. Rather, climate reformers and litigants in general adjudicate cases not only to seek redress for their harms but also for a variety of broader goals. So these parties measure success in terms of: generating public appreciation and understanding about climate change; raising awareness by presenting a strong a credible case for liability; inducing governmental and private entities to change their status quo; as well as providing a method of climate justice by opening up a forum for the climate vulnerable to air their grievances and concerns.[113]

In this section, I will illustrate some of the many benefits to climate litigation. This discussion is not exhaustive, but rather serves to ensure the importance of continuing to pursue climate actions even in the face of enormous challenges and to demonstrate how a broader definition of success is appropriate when applied to climate litigation. For example, actions concerning legislation have been useful to fill statutory gaps and explain how the legislation will function. Moreover, climate litigation allows parties who have not been able to find their voice through the traditional political process, to inject their concerns into the debate and push or stop government action.[114] Further, these actions raise public awareness by putting a face and a story on the effects that climate change is having so as to prevent individuals from burying their head in the sand, discounting climate change as something to be dealt with later.[115] Finally, litigation under common law causes of action plays a climate justice function in that it is victim focused and provides those harmed with an avenue to express their harms, to aggrieve their losses.[116] Additionally, these actions can deter emitters, and promote them to change their actions or at least internalizing these external costs of pollution by damages awards. In this way, litigation acts as a sort of regulation in itself.[117]

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[112] I will refer to these as Supra litigation goals.
[113] *See* Hsu, *supra* note 56 at 118; *see also* Hari Osofsky, "The Continuing Importance of Climate Change Litigation" (2010) Climate Law: Washington & Lee Legal Studies Paper No. 2010-3.
[114] *See* Burkett, *supra* note 39 at 116.
[115] *See generally* Hsu, *supra* note 56 at 60.
[116] Burkett, *supra* note 39 at 115 (arguing that common law nuisance claims "provide an important mechanism for the climate vulnerable to achieve corrective justice," which is one of tort law's most important goals).
[117] *See* Grossman, *supra* note 63 at 3; *see also* David Hunter and James Salzman, "Negligence in the Air: The Duty of Care in Climate Change Litigation" (2006) 155 U Pa L Rev 1741 at 1792; and Hsu, supra note 56 at 116 (finding that litigation can serve as a means of regulation inself since a finding of liability could have an enourmous ripple effect, promotong corporations to reform their activities in the face of being exposed as harming the environment).

In the face of failed policy and non existent political will, litigation is a means of encouraging legislative and executive action and keeping the issue on the political agenda.[118] Until those branches of governments enact effective regulatory mechanisms to address climate change as well as climate justice issues, litigation is likely to play "an essential role in the overall regulatory framework."[119] On the basis that doing something is better than doing nothing,[120] litigation may be a way to leverage other strategies, encourage negotiation, influence policy making, and to articulate the concerns of marginalized groups who may not be party to the litigation,[121] while maintaining the issue in public awareness and on the political agenda. By focusing on specific injuries and harms as is required in tort litigation, it may be easier to build awareness and political support.[122] Through the stories of victims, an increased urgency for legislative change and mitigation is felt.

At a more abstract level, tort law may also play a significant role in helping to establish standards of foresight and responsibility with respect to climate change adaptation needs by accepting the connection between GHG emissions and climate change is no longer unforeseeable.[123] In all, it is clear that climate litigation will face great obstacles on its merits and will certainly not solve climate change on its own. However, it is still an important tool in the kit of climate reform and should be used to advance the necessarily vast societal changes that climate change requires.[124]

H. Climate Change Litigation Has Already Had a Major Impact on Reform

In this section, I will illustrate three ways in which litigation has triggered reform. First, litigation has pushed government action towards reform. Second, litigation has functioned as a method of regulation in its own right. Third, climate actions have increased public awareness and enhanced public policy dialogue around climate change. After providing concrete examples

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[118] *See* Jolene Lin, "Climate Change and the Courts" (2011) Legal Studies, Forthcoming at 1.
[119] *See* Osofsky [Continuiung Importance], *supra* note 113 at 29.
[120] *See* Hsu, *supra* note 56 at 61.
[121] *See* Lin, *supra* note 118 at 2-4; *see also* Timothy D. Lytton, "Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate Change Litigation in Light of Lessons from Gun-Industry and Clergy- Sexual Abuse Lawsuits" (2008) 86 Texas L Rev 1837.
[122] *See* Hsu, *supra* note 56 at 60.
[123] *See* J.B. Ruhl, "Climate Change Adaptation and the Structural Transformation of Environmental Law" (2010) 40 Envt'l L 363 at 401.
[124] *See* Hsu, *supra* note 56 at 164-65; *see also* Osofsky [Continuing Importance], *supra* note 113.

for these responses I conclude by arguing that litigation efforts should continue in order to complement other efforts and further spur reform.

The starkest example illustrating how climate litigation has pushed government reform is found in *Massachusetts*. In this case, the USSC took an active step in finding that GHG emissions qualify as air pollutants under the CAA. This finding was important because it required the EPA to reconsider petitions for an endangerment finding regarding GHGs or at least to provide a reasoned opinion as to why conducting an endangerment finding was unnecessary.[125] In explaining this requirement, the Court admonished that the EPA must not merely undertake these reconsiderations with arbitrary conclusions, but rather was required to provide reasons to support its conclusion.[126] This finding led the EPA to undertake studies and subsequently make a positive endangerment finding that created the foundation for its most recent GHG targeted CAA regulations over stationary and mobile sources. Additionally, partly in response to the Supreme Courts' urging in *Massachusetts*, President Obama entered office with bold plans to implement stricter harmonized national vehicle emissions standards.[127] Though this enthusiasm has unfortunately waned, it is important to note this case as an example of climate change litigation having a direct impact on climate reform.

The USSC's decision in *Massachusetts* also heavily influenced government regulation at the local and state level. The Courts' notable shift towards urging government reform ensured local governments that the Federal government had similar policy goals.[128] This shift allowed local and state governments to push on with reform knowing that their emissions reductions would not be in vain should the Federal government simply rely on local and regional initiatives to solve the problem. Moreover, Professor Hunter, citing *Friends of the Earth v Mosbacher*,[129] which pushed government action to incorporate climate change concerns in decisions over public financing notes that domestic litigation does in fact compel government action.[130]

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[125] *See* Osofsky [Continuing Importance], *supra* note 113 at 12.
[126] *Massachusetts,* 549 US at 1462 ("Under the terms of the Clean Air Act, the EPA can avoid taking further action only if it determines that GHGs 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.")
[127] *See* Osofsky [Continuing Importance] *supra* note 113 at 22.
[128] *See ibid* at 12, 24.
[129] *Friends of the Earth v Mosbacher*, 2007 WL 962955 (ND Cal, 2007).
[130] *See* David B. Hunter, "The Implications of Climate Change Litigation for International Environmental Law Making" (2007) American University: WCL Research Paper No 2008-14.

Litigation may also be considered a form of regulation itself.[131] Around 2007, just after *Massachusetts*, energy industries began rebranding themselves as producing "clean" coal and "natural gas", to show a more climate friendly agenda and distinguish themselves from vilified GHG emitting actors.[132] Airlines soon followed suit as the industry began thinking proactively about climate change.[133] In this way, the reality of climate litigation has required corporate entities to publically acknowledge their effects on climate change. Unfortunately, many of these actions may be more in form than function; however, regulatory boards realizing the phenomenon of "greenwashing" have enacted standards for such terms.[134]

Additionally, climate litigation has impacted corporate responsibility practices. As investors become more aware of the climate litigation risks to many industrial sectors, they have become more demanding of information disclosure regarding the specific risks and opportunities to their investments.[135] This push has led to more support for SEC required information disclosures regarding investment risks related to climate change, which in turn increases the disclosing corporation's accountability to investors.[136] Climate litigation has even spurred widespread insurance reform and led attorneys to place much more focus on advising clients on climate change.[137]

Finally, climate litigation has impacted reform by increasing public awareness and facilitating a broader public policy discussion.[138] Regardless of a win on the merits, scholars find that these actions have a significant impact in public policy.[139] For example, in *Kivalina*,

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[131] *See generally* Hsu, *supra* note 56.
[132] *See* Hunter & Salzman, *supra* note 117 at 1792; *see also* Ben Elgin, "The Dirty Truth About Clean Coal" (June 19, 2008) Bloomberg Business Week, available at: http://www.businessweek.com/magazine/content/08_26/b4090055452749.htm; *see also* Rachel Mendleson, "Ethical Oil, Clean Oil, and Other Marketing Rebrands" (Mar 8, 2011) Huffington Post Canada, available at: http://www.huffingtonpost.ca/2011/08/04/ethical-oil_n_917989.html#s322097&title=Clean_coal
[133] For example, Quantus Airlines implemented more efficient traffic control practices and charges/taxes: Steve Creely "Quantus Looks to Five Year Target on Carbon Cuts" July 6 2007.
[134] Hagerman, Eric "Little Green Lies—How Companies Erect an Eco-Façade" Wired, published 2008-10-20, retrieved 2011-01-28.
[135] *See* Schatz, *supra* note 40 at 137.
[136] Elizabeth E. Hancock, "Red Dawn, Blue Thunder, Purple Rain: Corporate Risk of Liability for Global Climate Change and the SEC Disclosure Dilemma" (2004-2005) 17 Geo Int'l Envtl L Rev 233.
[137] Jeffrey Stempel, "Insurance and Climate Change Litigation" in *Adjudicating Climate Change: State, National, and International Approaches,* 230 (William C.G. Burns & Hari Osofsky, eds 2009); *see also* Kevin J. Healy and Jeffrey M. Tapick, "Climate Change: It's Not Just a Policy Issue for Corporate Counsel - It's a Legal Problem" (2004) 29 Colum J Envt'l L 89.
[138] *See* Osofsky [Continuing Importance], *supra* note 113 at 10.
[139] *See* Hunter & Salzman, *supra* note 117 ("Win or lose[…] litigation strategies are significantly changing and enhancing the public dialogue around climate change.")

that a village brought suit against several GHG emitters showcased the reality of how melting permafrost in Alaska has already caused severe displacement.[140] Additionally, though the link connecting climate change to hurricane intensity is not as strong, Ned Comer's class action by victims of Hurricane Katrina illustrates the real life link between GHG emissions and intensified weather patterns.

Success rates measured merely in terms of wins and losses may project a bleak outlook on the utility of climate litigation; however, these actions have in fact produced concrete responses toward positive climate reform. Debate over whether the courts are the appropriate forum for addressing the problem is constant and divided. I have not entertained these arguments because I do not posit that adjudication is the best or worst avenue for reform. Rather, I note that climate litigation is occurring. It faces limits and challenges, but I argue that its benefits remain strong incentives for those seeking to reform US climate policy. Accordingly, I find climate litigation is a valuable tool to complement other avenues of reform, but future efforts should consider the opportunity costs of litigating without considering ground already gained and understood.

[140] *See* Jon Schwartz, "Courts as Battlefields in Climate Fights" (July 26, 2010) available at: http://www.nytimes.com/2010/01/27/business/energy-environment/27lawsuits.html

CHAPTER TWO: CLIMATE LITIGATION: THE FIRST WAVE

In Chapter One, I provided a background of climate change and illustrated both the difficulties with regulating such a multifaceted issue and how litigation can be used as a tool to complement other avenues of climate policy reform. Here, I will examine the federal courts' approach and ways in which the USSC has strategically decided climate litigation through five subparts.

Though judicial decision making routinely exercises general legal interpretation methods, here I focus more specifically on justiciability doctrines raised in litigation. I consider how the courts have applied (or not applied), limited, or extended these theories in a seemingly calculated manner to shape their role in climate reform. Within each doctrine I trace each decision through the judicial procedure in several landmark cases, considering the effect of external factors and future implications of the justices' decisions. When applicable, I will discuss the attributes characterizing the USSC's deliberate approach and how these illustrate its future path in climate litigation.

In subpart IV, I introduce what I mean by the courts deliberate approach to climate litigation, and explain the attributes I have noted seem to characterize this approach. In the remaining parts I will dissect the Court's method through its use of threshold doctrines. I will cover standing, the political question doctrine, and the courts' limited jurisprudence on the merits through the doctrines of displacement and preemption.

Finally, I conclude Chapter Two arguing that the courts have made deliberate moves to shape litigation's future role in climate reform. On the positive side, I find this approach has been beneficial for climate reform's long-term goals because the judiciary has fulfilled a signaling function while also remaining a judicial backstop through judicial review. However, I also note that while the USSC's decisions may appear on the surface to be pragmatic, there are ideological currents at work that have led the Court to be perhaps a bit too eager to prevaricate responsibility for actions brought.

IV: Characteristics of the Court's Deliberate Approach

Whether or not litigation is the best way to achieve climate reform is not the issue here. Nor am I concerned with whether the litigants will prevail in a case on the merits. In fact, considering the extraordinary obstacles posed by these concerns, they will likely face numerous losses at the start. As discussed above, there are many other worthwhile reasons to bring climate change litigation. Rather than determine the efficacy of climate change litigation, I consider what the courts have done and argue that justices have decided these cases in a deliberate manner to shape their role in climate reform.

The most telling decisions in climate litigation have concerned struggle over the application of several justiciability doctrines. As noted above, the content of the Article III courts' jurisdiction has created an enduring debate over the proper role for the judiciary in government.[141] This debate provides the basis of the courts' confusion- and perhaps reluctance- in shaping the contours of its role in the climate reform through litigation.

A. Methodology

1. Doctrinal Approach

Through doctrinal research I have considered primary sources- case law and legislation- as well as secondary sources to describe how climate litigation has developed in terms of judicial reasoning and legislative enactment.[142] My research was not directed at finding a specific statement of the law but rather with analyzing the process of legal reasoning. To combat the claim that traditional doctrinal methods consider law only in a vacuum, I have complemented my doctrinal approach to get a fuller picture of how the law works in reality. I have done this by considering the legal decisions themselves as

[141] *See* discussion on justiciability above.
[142] *See* J.H. Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill: Univ of North Carolina Press, 1995) at 19.

empirical indicators of legal organization and illustrations of the laws interaction with its social environment.[143]

2. Focus on Federal Courts/ United States Supreme Court

In this thesis, I am interested in federal court judges' approach to litigation in regards to their role in a comprehensive climate reform effort. In Chapter Two, I will consider only federal decisions, as these have been the platform for the first wave of litigation in public nuisance. In Chapter Three, however, I will consider state forums in moving forward to the second litigation wave. Further, I have decided to consider only final decisions regarding climate change and not the associated complaints and court transcripts. I defend this position by noting that I am concerned with how the judges have decided to write their decision to add another step in the law, not with how the parties argued.

B. Definitions

1. The Court's Approach

Regarding the USSC's calculated and deliberate methodology, I find that while on the surface, the Courts approach may appear to be pragmatic, once you looks deeper it seems the Courts decisions are really driven by an underlying uneasiness and reluctance to open up the judicial branch to this type of adjudication. This aversion follows regardless of whether climate actions truly pose serious justiciability concerns. The justices illustrate their recalcitrance through decisions written along ideological currents. For example, while liberal justices have expressed greater openness to climate litigation, they have narrowed their decisions so as not to fully open the courthouse doors right away. There could be several reasons for this. First, both liberal and conservative justices may desire greater evidence of causation before they hold governments and

[143] *See* Banaker, at 136.

companies liable for a relatively recent phenomenon. Additionally, even liberal justices may not be ready to deal with the overwhelming issues, resources, and expertise that a decision on the merits would require. Undertaking these cases without adequate resources could depress citizens' feelings of legitimacy for the Court.

Meanwhile, more conservative justices (who tend to be nominated by Republican Presidents) may be encouraged to stymie climate litigation tend towards an ideological preference for less interference with government and corporate activities. This preference may encourage these justices to stymie climate litigation. Further, justices are apt to argue that the courts are not the place to solve governance problems; rather, the population will vote with its feet if it feels the government is inadequately protecting the population's needs.

My discussion structures the USSCs decisions by establishing the jurisprudential attributes that characterize the Court's approach. One may even consider this course as the Court embarking on its own jurisprudential regime of climate litigation.[144] Decisions themselves demarcate the contours of this regime.[145] If the Court's approach has matured to be considered a jurisprudential regime, it does not yet seem as stable as those with a long jurisprudential history (such as a First Amendment jurisprudential regime, for example). The approach is, however, coherent to the extent that underlying characteristics and concerns can serve to elucidate and guide future litigation.

2. Characteristics/ Attributes of Pragmatic Approach

As Richards and Kritzer contend, "law at the Supreme Court level is to be found on the structures the justices create to guide future cases."[146] Therefore, in determining the most efficient way forward for climate litigants, I examine both the legal and extralegal factors influencing the Court.[147] This explains the characteristics I discuss below. These constraints constitute the concerns underlying the Court's climate

[144] *See* Jeffrey R. Lax and Kelly T. Rader, "Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?" (2010) 72 J of Politics 273 at 276.
[145] *See* Mark J. Richards and Herbert M. Kritzer, "Jurisprudential Regimes in Supreme Court Decision Making" (2002) 96 Amer Poli Sci Rev 2 at 305.
[146] *Ibid* at 306.
[147] Tracy E George and Lee Epstien, "On the Nature of Supreme Court Decision Making" (1992) 86 Amer Poli Sci Assoc 323 at 334.

decisions, which suggest that the broader context in which the Court operates in fact constrains its strategy.[148] I do not intend these factors to be clearly separated elements. Rather, these are overlapping features that, in the aggregate, characterize the Court's calculated and reasoned approach to shape their function in climate reform. I will introduce these attributes here and apply them specifically to the cases below in which they characterize the Justices' decisions.

a. Judicial Restraint (What is Not Said or Decided)

Judicial restraint describes decisions in which judges limit the exercise of their own power: respecting *stare decicis* and precedent.[149] This restraint is generally based on an inherent concern for upholding the unelected branches' legitimacy, as well as the courts view of their role as a body to decide legal disputes rather than to mold or shape future policy.[150] From a procedural standpoint, judicial restraint urges judges to refrain from deciding a legal issue unless it is necessary to the resolution of a concrete dispute between adverse parties.[151] Substantively, a judge practicing judicial restraint would review a constitutional decision with deference to the elected branches and invalidate actions only when constitutional limits have clearly been violated.[152]

Judicial restraint is illustrated by comparison to judicial activism, a term surrounded by substantial debate. The term has been used critically to describe judicial rulings where a judge allows his or her views about public policy outcomes to guide a decision. I do not employ this term critically. Rather I use judicial activism to describe judicial rulings motivated by a sense of the courts ability to make changes to the laws, statutes, or procedures at issue instead of sending the issue back to the elected branches. In this sense, a judicially activist court considers itself a check and balance against the

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[148] See Cornell Clayton and David A. May "A Political Regimes Approach to the Analysis of Legal Decisions" (1999) 32 Polity 233 at 234.
[149] *See* Lee Epstein and Thomas G. Walker, "The Role of the Supreme Court in American Society: Playing the Reconstruction Game" in *Contemplating Courts* (Lee Epstein ed) (Washington, DC: CQ Press, 1995); see also Jeffrey A. Segal, "Separation-of-Powers Games in the Positive Theory of Congress and Courts" (1997) 91 Amer Poli Sci Rev 28.
[150] *Ibid*.
[151] *Ibid*.
[152] *Ibid*.

majoritarian elected government, vested with the ability to decide legal issues with policy dimensions and more readily invalidate government action.[153]

b. Language Choice (What is Said)

How a judge presents a decision may be as important than what the decision actually is.[154] Thus, the Court's choice of language- whether to say something or not, and what language to use- indicates perhaps more about their view of their future role than an outcome does. Explaining the difficult role of a judge, Justice Benjamin N. Cordozo noted the "tension between the need for the law to be both sufficiently flexible to accommodate new cases as they arise and sufficiently rigid to maintain its predictive power."[155] Doubtlessly, judges today continue to face this tension in decision writing. Moreover, as all lawyers understand, language use in law is always deliberate and aims to never be haphazardly applied. It seems almost to clear to point out, but there is much to learn from the language judges use and do not use to convey their decisions. Throughout this Chapter, I will discuss the Court's use of language and demonstrate its potential effects on future jurisprudence.

c. Doctrine Choice

Although I will discuss *AEP* in detail below, for now it may be useful to provide a concrete example of what I mean by Doctrine Choice. In *AEP*, the USSC had several alternative doctrines on which it could have relied to reverse the Second Circuit's decision. Each would have had different implications for the case itself and for the development of climate change jurisprudence in general. More specifically, had the Court chosen to follow the path of all previous district courts; it could have dismissed the

[153] *Ibid*.
[154] *Ibid*.
[155] Lawrence M. Solam, *Language of Judges* (Univ of Chicago Press, 2010) at 12 (Cordozo expressed his dreams of harmony between the goals of progress and stability in decision writing.- "The Nature of Judicial Process" 1921, Cardozo).

climate nuisance action in its entirety as a non justiciable political question. This likely would have received harsh criticism from legal scholars; however- considering the doctrine's apparent malleability- may have stood, ending climate litigants' prospects of claims under the common law. Instead the Court took the alternate route of remanding the case on the issue of displacement. This route had the narrower effect of displacing only federal common law as opposed to state (which were remanded to the Circuit Court on the issue of preemption). This path also prompted EPA action and prevented congressional obstruction.

d. Signaling: Direct and Indirect Policy Making

As I introduced in Chapter One, litigation can influence government action in broader ways than simply imposing liability. Using this attribute, I consider the Court's acts in a more sweeping way than that limited by Ewing and Kysar's "Prods and Pleas" article. Rather, I find that the courts have acted through their decisions to signal and prompt favourable government action, to prevent or dissuade unfavourable actions, and even to directly and indirectly make or motivate climate policy.

e. Underlying Concerns

The Court, looking ahead to the role it could play in climate reform, seems to be sobered by several underlying concerns including: constitutional separation of powers; the federal judiciary's legitimacy as an unelected branch; and its flexibility to evolve into a more active or passive role in climate reform depending on the actions of the elected branches.

i. Separation of Powers

As I introduced in Chapter One, separation of powers is a model of governance that divides the government into branches and delineates separate and independent

powers for each branch. The model aims to prevent governmental abuse of power by ensuring that no one branch has more power than another. The concept of checks and balances draws from the same ideal, but is particular to the Unites States federal system today. This system acts to ensure a true separation of powers by providing mechanisms that allow one branch to limit the power of another. For example, the judicial branch's separation is checked and balanced by Congress's power to alter the composition and jurisdiction of the federal courts.[156]

Article III created an unelected judiciary in order to maintain the independence of the Courts. The idea was that the Justices should be free from fear of losing their jobs should they decide a case against government.[157] In this way, judicial independence is an ideal necessary to provide a judicial check on the other two branches actions. Aside from the protections of job loss or outright retribution for an unfavourable decision, judicial independence is not as clear as it seems on the surface. New justices will inevitably shift the balance of a USSC bench. Moreover, obtaining a strong majority on policies favourable to the administration of the day is one way to make Presidents' policies last beyond their term. Accordingly, USSC appointments are inherently strategic as Presidents will nominate a justice who will write predictable decisions based on their shared ideological beliefs, but still pass Senatorial scrutiny.

Concern over constitutional separation of powers affects judicial decisions in several ways that concern my thesis. First, the ideal cautions justices to restrain their decisions and limit their activism to stay within their constitutionally defined role. Additionally, the model provides justices with a constitutional ground to adopt theories of judicial restraint such as political question, standing, and displacement, which will be discussed below. On the other hand, separations of powers also enables the Courts to actively check the political branches from overstepping their constitutionally defined authority.

ii. Legitimacy of the Court

In a democratic system, legitimacy is necessary for a body to have the authority to meaningfully create, impose, or enforce laws and regulations on the affected population.

[156] *See* Segal, *supra* note 149.
[157] *See* Chemerinsky, *supra* note 74.

While the elected branches have derived their legitimacy by popular election, the importance of neutrality and objectivity in law requires the unelected judicial branch to retain the public's confidence and therefore legitimacy through their reasoned decisions. Without such legitimacy, the Court's decisions would have little effect. Critics and legal realists often claim loss of judicial legitimacy when decisions appear to be politically motivated, not well reasoned, or even activist in nature. As climate change has become a politically divisive issue, the justices are understandably concerned with these claims.

In addition to dependence on the ideological priorities in an appointments process, Courts are not independent of society in the sense that they are unelected so rely on the public legitimacy and respect in the institution to carry on its power. This concern for maintaining the public's trust was recently evident in the USSC's decision over Obamacare.[158] Although this case did not concern climate change, it is illustrative of legitimacy as an attribute of decisions. In this case, the Court did not allow the entire controversial health care act to pass constitutional muster, but it did pass enough of the Act to pass to accord with society's views towards the population's healthcare needs.[159] Had the Court completely ignored the population's concerns, the American people would have viewed the justices as being in the pockets of Congressional members. Such debate would have damaged the public's trust and feelings of legitimacy in the Court's decisions.

Though Supreme Court justices are nominated by the President and confirmed by the Senate, it is the American people who vote for the President himself. In this way, the voters ultimately pick additional members to their Supreme Court.[160] This notion has led commentators to observe that although the Court may try to "uphold the magnificent illusion that the Supreme Court operates at a higher place then the mortals who toil on the ground…the Court is a product of democracy and represents, with sometimes chilling precision, the best and worst of the people."[161]

This, in conjunction with Court's needs for the public's respect explains why the justices are generally determined never to stray too far from public opinion. For

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[158] *See* Stephen Breyer, *Making Our Democracy Work: A Judge's View* (2011) (Vintage).
[159] *See Nat'l Fed of Indep Bus, et al., v Sebelius, Sec of Health & Human Serv, et al*. (2012) 567 US __.
[160] For an explanation of the USSC's nomination process, *see* www.judiciary.senate.gov/nominations/judicial.ctm.
[161] *See generally* Jeffrey Toobin, *The Nine*, (Doubleday, 2007).

example, although the Courts may indeed prove an appropriate place for climate litigation, backlash through cries of tyrannical and undemocratic values could destroy any judicially activism in a society still remarkably divided (or less concerned) with the actual cost of climate change. Accordingly, the federal courts are attempting to protect their legitimacy by forestalling real advances in climate litigation.[162] They have done so throughout the first wave of litigation by standing behind the veil of justiciability doctrines that enables the courts to keep the door open until a time where their legitimacy will not be on the chopping block. As I will discuss in Chapter Three, the second wave, consisting of state actions and the public trust doctrine, may force the courts to deal with these issues head on.

Throughout this Chapter, I note in several decisions where the justices' apprehension over public and political acceptance shines through, and find that these concerns will continue through future litigation efforts.[163]

iii. Flexibility for Future Decisions

Case analysis and ultimately decision writing is a "process of analogical reasoning that involves parsing the issues in a case and referring to prior cases for guidance on acceptable alternatives."[164] Cass Sunstien argues this process allows judges flexibility but does not lead to unconstrained decision making.[165] Courts value flexibility because of the impact of *stare decicis* and precedent on future decisions. Notable especially in a volatile and uncertain area like climate change, the Court seems to also value flexibility in its future role. The Court illustrates its aim towards keeping its options open by leaving questions open for another time, court, or case. Another example is the Court's decision to resist applying a constitutional doctrine to dismiss a case when a more

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[162] Currently, the Court has had only a tenuous majority in controversial issues or any one climate issue (*see* for example *Massachusets* and *AEP*).
[163] *See* Richards & Kritzer, *supra* note 145 at 305 (rebutting legal realist arguments that USSC Justice's positions as electorally unaccountable allows them to ignore the role of law in decisions, Richards and Kritzer argue "freedom from review or electoral accountability does not prevent the justices themselves from erecting other constraints that shape their decision making process and / or outcomes.").
[164] *See* Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).
[165] *Ibid*.

temporary doctrine will have the same effect now but leave the court with options in the future.

C. Discussion: These Characteristics Shape the Court's Approach

It is "the opinions themselves, not who won or lost, are the crucial form of political behaviour by the [] courts, since it is the opinions which provide the constraining directions to the public and private decision makers who determine the 99% of conduct that never reaches the Court."[166] In considering how the USSC justices have written their climate opinions, I find that the Court has taken calculated actions to build a doctrinal structure to climate litigation that shapes their future role.

The Court's opinions reveal a common concern with the boundaries of their judicial role and that of the legislature. Separation of powers concerns arise because of the complexity of climate change and the need for comprehensive regulation. This leads the Court to worry that these issues may be better left to legislative prerogative. But the Court must balance this with its responsibility to provide relief or an avenue of redress. This responsibility requires the court's to act to their constitutional bounds, rather then a bit shy of them. Accordingly, as the line is close, the Court remains uneasy about the contours of its role and the reality that legislatures and the political process has until now failed to act.

Moreover, this incremental approach indicates that the courts also recognize and appreciate that a role does exist for the judiciary, even if that role is merely to hold governments accountable through judicial review.

Litigants should consider these concerns moving forward as they provide insight into the Court's desired role. I do not contend that all actions should reach their merits or that courts should implicitly act outside their capacity to find a solution. Comprehensive regulation may be the best way to achieve reform, but is far from a reality, which leads me to suggest that climate litigation can play a complementary role to other reform initiatives.

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[166] *See* Martin Shapiro, *Law and Politics in the Supreme Court*, (London: Free Press of Glencoe, 1964) at 39.

V: Standing

In this subsection I discuss how the Court has applied the standing doctrine to climate litigation. Standing requirements ensure both that the plaintiff is the correct party to bring the case and the defendant is the appropriate party from whom plaintiff should seek redress. To proceed beyond this threshold obstacle, litigants must meet the *Lujan* case or controversy test introduced above.[167]

The most troublesome prudential requirement to climate litigants has been that barring adjudication of a generalized grievance.[168] A majority, at five of the justices, currently sitting on the Supreme Court have accepted that the fact that an injury is widely shared does not automatically mean the injury constitutes a generalized grievance inappropriate for the court.[169] In fact they have found, as in other mass torts, a plaintiff who has suffered a concrete actual injury may sue even though many others have suffered similar injuries.[170]

However, not all sitting Justices have so broadly accepted that suits involving widespread injuries are not barred as generalized grievances.[171] Specifically, justices Scalia and Thomas have argued that Article III prohibits all widely suffered injuries as improper generalized grievances. Justices Scalia and Thomas argue that in these cases, the plaintiffs fail to show his or her injury is particularized in that it affected them personally and in an individual way.[172] In their *Massachusetts* dissent these justices, along with CJ Roberts and Justice Alito, expressed concerns that generalized injuries in a large population characterizes issues that are more suitable for elected branches.[173] The 4-4 split in *AEP* ran along the same line of dissenters, which leads me to note that arguments regarding climate actions as a generalized grievance may continue in future litigation regardless of the majority decisions in *Massachusetts* and its successors. Notably, this difference in opinion over generalized grievances also runs the divide

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[167] *See Lujan,* 504 U.S. 555.
[168] *See* Bradford Mank, "The Standing Tea Leaves in *American Electric Power Co v Conneticut*" (2011) 46 U Richmond L Rev 543.
[169] *Ibid*.
[170] *Ibid*. at 524-25.
[171] *Ibid*. at 550.
[172] *Ibid,* 550-51 (noting J. Scalia's dissent in *Atkins* 524 US at 35 (quoting *Lujan v Defenders of Wildlife*).
[173] *See Massachusetts*, (dissenting opinion, JJ. Roberts, Alito, Scalia, & Thomas).

between liberal and conservative justices, save for Justice Kennedy who has long cherished his position as the swing vote.

After discussing the USSC's approach to standing in climate actions through landmark USSC decisions, I conclude this section finding that the Court is more likely to find favourably for state plaintiffs with proof of harm (i.e. to their coastlines), to states as property owners seeking either an injunction or damages. The Court is less likely to find standing for individual plaintiffs or NGOs requesting damages, injunctions, or requesting regulation be passed.

A. *Massachusetts v EPA*: USSC Prods EPA Regulation by Extending *Parens Patriae* Standing to Climate Actions.

As introduced in Chapter One, *Massachusetts* arose from the EPA's denial of the ICTA's petition for an endangerment finding.

1. Lower Courts

In response to the EPA's refusal to acknowledge GHGs as "air pollutants," Massachusetts, along with 11 other coastal states, several cities, and numerous NGOs, sought judicial review of the EPA's refusal in the Court of Appeals for the DC Circuit. Regarding standing, Defendants- the EPA, several automakers and ten inland states that are home to these GHG producing industries- argued that Plaintiffs did not meet standing requirements to allow the court the jurisdiction to hear the case. The Circuit Court avoided a definitive ruling on standing, reasoning that overlap between the standing and merits inquiries made it permissible to proceed to the merits and dismiss the petition for review.[174]

One judge on the three judge panel dissented, finding that the plaintiffs did meet Article III standing requirements. Specifically, Judge Tatel reasoned that the Petitioners' claim of a "substantial probability" of coastal property loss from sea level rise met the

[174] *Massachusetts v EPA*, 415 F.3d 50 (2005).

test's injury prong.[175] Moreover, he found that petitioners had sufficiently provided, and respondents had failed to refute, that the EPA's failure to regulate and thus limit GHGs contributed to the sea level rise causing petitioners property loss.[176] Further, Judge Tatel explained that the fact that regulations would "delay and moderate many of the adverse impacts of global warming" was sufficient to find redressibility.[177] Finally, the lone dissenter declared that the loss of coastal property Massachusetts complained of was a "far cry" from a generalized grievance.[178] Judge Tatel's dissent clearly influenced the USSC on appeal as it referred to his reasoning at length in its final decision.[179]

Notably, Judge Tatel's dissent relied on evidence from former EPA climatologists' statements that reductions imposed by EPA regulation would in fact slow effects of climate change, as well as statements from EPA senior officials regarding future enforceable emission standards.[180] Popular acceptance of climate change as a concrete phenomenon was in its youth at this point. [181] Judge Tatel's choice to use the EPA's own evidence to support a finding against it seems to have been a clear choice aimed at legitimizing his finding of harm and redressibility requirements in the standing inquiry. These pieces of evidence seem to have emboldened the Circuit judge to extend jurisdiction over this case with the understanding that this move would not require the EPA to regulate anything that it had not already considered regulating.

2. USSC Decision

Plaintiffs appealed the Circuit Court's denial and the USSC granted *certiorari* in 2006, coming down with their decision in 2007.[182] In a 5-4 ruling, the USSC concluded that Plaintiffs met the Article III standing test required for the Court to exercise its

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[175] *See ibid.*
[176] *See ibid.*
[177] *See ibid.*
[178] *See ibid.*
[179] *See Massachusetts*, (2005) 415 F3d 40.
[180] *Ibid.*
[181] *See* IPCC Third Assessment (In 2005, although climate change was a widely accepted concern in the scientific community, the issue faced great criticism and confusion in the political arena and with public perception.)
[182] *See Massachusetts*, 549 US 497 (2007); *see also* Farber, *supra* note 56 (describing courts as policy instigators in finding that the USSC's first opinion on standing in climate litigation was a "prod" to the executive branch, exemplary of Ewing and Kysar's theory).

jurisdiction to hear the case on its merits. Once a majority found standing, the Court was able to move past the threshold issues to hold that Congress had authorized the EPA to regulate GHGs under the CAA. The Court was then able to hold the EPA's refusal was arbitrary and require the EPA to reconsider its endangerment finding after eliminating inappropriate policy considerations from its determination.[183]

a. Justice Steven's Relied on Several Justifications to Reach a Majority on Standing

Although the majority held plaintiffs satisfied standing requirements, the majority opinion itself fell short of doctrinal clarity. Rather, likely in an attempt to get the majority of five justices on board with his decision, Justice Stevens relied on several justifications to find state standing.[184] It was unclear from this decision precisely which justification was the most important to the finding in that case. But it was clear that it was Justice Steven's goal to pass the threshold issues to a place where he would be more able to influence policy and signal reform.[185] As I will revisit below, this confusion allowed *AEP* Defendants to make their strongest argument that special standing rights for the states were only to be applied in statutory claims not to those under the common law.[186] However, the Court in *AEP* seemed to make clear that this was not its intent in *Massachusetts*.[187]

First, Justice Stevens reasoned that the State had standing under a procedural right conferred in the CAA to challenge the EPA's decision to reject Plaintiffs' rulemaking petition.[188] Second, as a more generally applicable procedural justification, J. Stevens expressed that Congress may properly define what constitutes an injury, thus giving rise

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[183] *See Massachusetts, supra* note *.
[184] *See* Mank, *supra* note 168 at 554.
[185] *See infra* note 193 for discussion of *Georgia v Tennessee Copper*, 306 US at 237 (1907).
[186] *See* Mank, *supra* note 168 at 556.
[187] *See ibid*.
[188] *See Massachusetts* at 519-20; *see also* Mank, supra note 168 at 555-56 ("Congress has 'recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious.'" (*Massachusetts* at 520 citing 42 USC § 7607(b)(1); also discussed in *Mank, supra* note 168 at 556).

to a controversy or a claim where none existed before.[189] Stevens applied this reasoning to climate change responding to CJ Roberts claims of a generalized grievance more appropriate for the elected branches. Stevens rebutted, "Congress has the authority to authorize climate change challenges if it carefully defines such suits as constituting a concrete injury in an appropriate statute."[190] Finally, Justice Stevens was able to reach a majority by supplementing these two procedural justifications with that of the "special solicitude" afforded to States under their *parens patraie* capacity.[191] Though this justification is perhaps the most well known, it is also the most criticized by USSC dissenters.[192] It seems likely that Justice Stevens included two additional justifications for standing in anticipation of dissenters' counter arguments here.

Interestingly, without briefing from either party, Justice Stevens *sua sponte* suggested for the first time to Plaintiffs' counsel during oral argument that the "best case" to support Massachusetts' state standing argument was *Georgia v Tennessee Copper*.[193] Justice Stevens then relied on the case heavily in his decision, noting "well before the creation of the modern administrative state, we recognized that the states are not normal litigants for the purposes of invoking federal jurisdiction."[194] He then explained "[j]ust as Georgia's independent interest 'in all the earth and air within its domain' supported federal jurisdiction a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory today."[195] Stevens explained that the Court had invoked the *parens patraie* doctrine to preserve the states role in the federal system "by recognizing that states can file suit in federal court to protect their quasi sovereign

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[189] *See Massachusetts*, 549 US.
[190] *See* Mank, *supra* note 168 at 552; *see also Massachusetts* 549 US at 516 (majority opinion) (finding that the congressional authorization of EPA under the CAA was "of critical importance to the standing inquiry."))
[191] *See Massachusetts*, 549 US 1029.
[192] *See Massachusetts*, 549 US 1029 (dissenting opinion).
[193] *See Georgia v Tennesee Copper Co*, 306 US at 237 (1907) (expanded *parens patriae* from protecting only citizens' health to also protecting their land, air, and natural resources. J. Holmes emphasized in *Georgia v Tennessee Copper* that a "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.") [Tennessee Copper]; *see also*, Oyez Project, audiotape of oral argument in *Massachusetts v EPA* at 14:42 (http://oyez.org/cases/2000-2009/2006/2006_05_1120)
[194] *See Tennessee Copper*, supra note 193.
[195] *See Massachusetts* at 518-19 (*quoting Tennessee Copper, supra* note * at 237).

interest in their natural resources as well as their citizens health and welfare."[196] By initiating Plaintiffs' reliance on a case he found favourable, Justice Stevens took a deliberately active approach to extending standing here so that the Court could ultimately function as a check against the elected branches to hold them accountable. The majority equivocally focused the standing finding on *parens patraie* grounds. As only one member of each side must satisfy standing for the case to go forward, the Court was able to concentrate on states without specifically stating that standing applied only to states as opposed to other non governmental parties.[197]

Based on varying justifications, and perhaps the reality that this case concerned finding standing in a judicial review case as opposed to the first state standing case being in a climate tort action, the Court was able to find that the parties had standing to have their action heard.

b. *Massachusetts v EPA*: USSC Finds Standing by a 5-4 Majority

Once satisfied by some or all of these justifications, the majority of the Court found that Plaintiffs had met the test for Article III standing. First, the Court found the injury prong met because it was satisfied that Massachusetts had already lost coastline from sea level rise caused by climate change.[198] Rejecting the dissent's argument that this was a generalized grievance and so barred by Article III and prudential requirements, Justice Stevens expressed "that these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation."[199]

Next, the majority found the injury was caused by the EPA's failure to act. The EPA did not argue that climate change was caused in part by GHG emissions, but argued that any GHG emissions from vehicles that EPA could possibly regulate would be too

[196] *See* Mank, *supra* note 168 at 555.
[197] *See* Chemerinsky, *Constitutional Law*, *supra* note74.
[198] *See Massachusetts*, 549 U.S. 497 at 522.
[199] *See ibid* (Massachusetts alleged and court found a particularized injury in its capacity as a landowner of most of the affected coastline); *see also* Bradford Mank, "Standing and Future Generations: Does Massachusetts v EPA Open Standing for Generations to Come?" (2009) 34 Colum J Envt'l L 1 at 71-73 [Standing and Future Generations] ("[t]he harms associated with climate change are serious and well recognized").

insignificant to find causation.[200] This led to the majority's finding that "[a]t a minimum, therefore, EPA's refusal to regulate such emissions 'contributes' to Massachusetts's injuries."[201] The Court then observed that even if the EPA's failure to regulate was only one cause adding to the harm, their argument rested "on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum."[202] In finding causation, the Court acknowledged that at the summary judgment stage, causation need not rise to the level required as an element of a claim.[203] Rather, at this point the purpose of finding causation was solely to determine jurisdiction over the claim.[204]

Finally, in finding Plaintiffs' requested relief would redress the harm complained of, the Court emphasized that the EPA's duty to reduce future harm to Massachusetts did not depend on solving the problem entirely, in one fell swoop. Rather, the Court found that the EPA's duty continued even if it could not prevent all harms from climate change.[205] Once it found standing the majority was able to move beyond threshold issues to hold on the merits of the claim that Congress had authorized the EPA to regulate GHG's under the CAA. As such, the Court found the EPA's refusal arbitrary and ordered the EPA to revisit an endangerment finding over whether GHGs were harmful to human health.[206]

c. Chief Justice Roberts Dissenting Opinion: Illustrates Concerns Shared by Future *AEP* Dissenters

CJ Roberts' dissent in *Massachusetts* is important to consider in future climate litigation actions as it illustrates the dissenters concerns over the Court's role in climate reform. First, CJ Roberts argued justifiably, that the *parens patriae* doctrine did not provide Massachusetts with greater standing rights or relaxed standing requirements, but

[200] *See Massachusetts*, 549 US 497.
[201] *See ibid* at 523.
[202] *See ibid* at 523-24.
[203] *See ibid.*
[204] *See ibid* at 558.
[205] *See ibid* at 525 (characterizing standing as a threshold determination: "[w]hile if may be true that regulating motor vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it.")
[206] *See Massachusetts*, 549 U.S. 497.

rather only reduced the redressibility requirement.[207] Accordingly, worried that state standing was being used to weaken Article III requirements, Roberts argued that a narrow interpretation of *Tennessee Copper* was more appropriate. Under a narrow interpretation, the *parens patraie* doctrine does not stand for giving the states greater standing rights than individuals, but stands only for a state's right to sue in a representative capacity.[208]

In fact, CJ Roberts argued that far from relaxing requirements, *parens patriae* standing actually requires an additional hurdle for state litigants as they have to also demonstrate a quasi sovereign interest apart from the private parties' interests.[209] Expressing his concerns over the legitimacy of the Court's extension of *parens patraie* standing to climate actions, Roberts chastised the majority for weakening bedrock Article III requirements.[210] He argued that the majority's failure to further explain the term "special solicitude" seems to imply that the plaintiff petitioners were unable to prove standing in their own right.[211]

Second, CJ Roberts argued that the case was a nonjusticiable general grievance better suited for resolution by the political branches. Here, the Chief Justices' underlying concerns were those of separation of powers.[212] He further argued that the Courts' intrusion into policy issues is inappropriate because these issues were for the political branches.[213] Professor Mank notes that CJ Roberts' criticisms of the *Massachusetts'* majority's implicit relaxed standing for states are strong and justified.[214] Thus, he cautions, these claims may continue to be made because the *Massachusetts* majority opinion did not fully address them.[215] It is possible that liberal justices will continue to gloss over this special solicitude criticism and allow state standing as in *Massachusetts*.

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[207] *See ibid*.
[208] *See ibid* at 538 (CJ Roberts dissenting).
[209] *See ibid.*
[210] *See ibid.*
[211] *See* Mank, *supra* note 168 at 560.
[212] *See Massachuusets* at 539-40; *see also* Mank, *supra* note 163 at 563 ("[CJ Roberts] contended that the Court's lax application of standing principles in this case failed to consider separation of powers principles limiting the judiciary to 'concrete cases'").
[213] *See* Mank, *supra* note 163 at 559.
[214] *See ibid*.
[215] *See ibid* at 563 (*citing* Mank "Standing and Future Generations", *supra note* 199 at 76-77: "Roberts' 'dissenting opinion raised broader separation of powers issues about the role of Congress in establishing constitutional standing boundaries that the Court has never fully resolved.'").

However, if the Court's current configuration changes, these claims will likely have more traction with conservative justices.

3. *Massachusetts v EPA*: USSC's Decision Illustrates Several Characteristics of Its Calculated Approach to Climate Litigation.

Justice Stevens undertook a proactive effort to achieve a majority decision in favour of standing in this case. Not only did he provide several justifications for such a finding, but he actually provided Plaintiffs with the "best case" that he then heavily relied upon in writing the opinion. Though he no longer sits on the bench, Justice Steven's decision illustrates the Court's deliberate actions aimed at extending standing to the case at hand even though at first gloss it seemed to be an insurmountable, multifaceted policy issue.

a. Signaling Function

By finding that the states had standing under a theory of *parens patriae*, Professor Farber notes that the Court engaged in a prodding function by giving a "voice to individuals and actors whose grievances have been neglected by the other branches of government" and "structur[ing] that voice within the pedigreed, rationalized discourse of law and its principles."[216] Thus, by finding standing the Court gave States an avenue for redressing harms and a forum for expressing concerns.[217] This avenue now provides states with a forum for both broad public input as well as judicial review of EPA actions by a large class of possible future litigants. Moreover, the Court signaled to government the need for regulation, which indicated to the elected branches that the Courts recognized States rights to proactively protect their property and citizens' health by holding the EPA accountable for failure to act.

By finding standing, the Court was able to move to the merits where it found that Congress had conferred responsibility to regulate GHGs on the EPA and that arbitrary decisions not to regulate would face judicial review. By allowing a state to bring judicial review of the EPA's decision the Supreme Court engaged in indirect policy making.

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[216] *See Farber, supra* note 36 at 499.
[217] *Ibid*.

Specifically, it did so by foreclosing the Bush Administration's denial of climate science in the EPA's endangerment decision. This decision clearly signaled the need for the EPA to make an affirmative finding over whether GHG's did harm human health and as such required emissions standards.[218]

The Court's language choice also signaled regulatory action because it focused attention on climate change.[219] Justice Stevens explicitly stated that sea-level rise from climate change had already harmed Massachusetts and would continue to do so with "risk of catastrophic harm" if the EPA failed to act.[220] Farber asserts that through its choice of language, the Court performed a signaling function by "'holding up particular problems to the light' and thereby 'implicitly or explicitly *enter*[*ing*] into the conversation about what actions are called for and why.'"[221] This led to huge political and popular focus on climate change and on government's responsibility regarding climate regulations. In fact, Justice Stevens' language was applied later as both courts in *AEP* noted that the EPA's authority to regulate GHGs as a "pollutant" under the CAA was clear from *Massachusetts*.[222]

Perhaps the Court felt at its strength to be more activist in this decision and much more directly require government action. This may be because the Court in this case had fewer worries about its legitimacy as the IPCC had just come out with its fourth assessment. Moreover, although the finding arguably applied outside of statutory claims, the claim underlying the case was a statutory claim where the Court. Thus, the finding would require a governmental branch to act rather than requiring the Court to undertake these decisions alone as it would in a tort case, which seems to have induced more concern in the courts of their role.[223]

The Court's signaling function worked, as the EPA responded to the USSC's ruling by reconsidering and ultimately making a positive endangerment finding that

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[218] *See Farber, supra* note 36 (finding the court's decision "left no doubt that a decision of some kind by the EPA was mandatory—climate change was not an issue that the EPA could simply refuse to consider").
[219] *See Farber, supra* note 36.
[220] *See Massachusetts, supra* note 36.
[221] *See Farber, supra* note 36; *see also* Ewing, Benjamin and Kysar, Douglas A., " Prods and Pleas: Limited Government in an Era of Unlimited Harm" (January 27, 2011) No. 224; Yale LJ, Vol. 121.
[222] *See AEP v Conneticuit*, 406 F Supp 2d 265.
[223] *See ibid*.

GHGs endanger human health and safety.[224] Based on this finding, the EPA promulgated a set of regulations setting emissions standards that have all since come into force. Preferably, Congress would pass a comprehensive legislative framework to more directly address GHG emissions. However, considering political realities EPA action certainly seems to be the best available option for now.

b. Court's Deliberate Choice of Language

In his majority decision, J. Stevens noted the importance of Massachusetts being a sovereign state but did not expressly preclude extending standing to individuals in the future.[225] This language was a calculated choice. While Justice Stephens could have expressly precluded standing as to other plaintiffs, he chose not to and instead left the decision with some ambiguity.

c. Direct Policy Intervention

The Court's order required the elected branches to reconsider its finding only with regard to scientific findings. This order imposed evidence based regulatory policy as opposed to a more economic or cost benefit based policy on the EPA's decisions. This finding on the merits is a rare example of the Courts' direct policy intervention.

The USSC's decision in *Massachusetts* illustrates the majority's deliberate actions to open up standing. This case provided a favourable platform for an activist decision because it was a judicial review case where the Court was able to extend jurisdiction over this emerging area of law without raising concerns over separation of powers or its legitimacy. The Court's conscious approach in this case ultimately established its endorsement of the regulatory path to climate litigation, at least as applied to state

[224] One clearly cannot place all credit for EPA rule promulgation, or even positive endangerment finding in *Massachusetts*, but is was likely strong encouragement showed the elected branches that they will be held accountable, and that public perception of political support also required climate reform by the government to address climate change.

[225] *See Massachusetts*, 549 US 497 at 518 (stating that Massachusetts's special position and interest was greatly important to finding standing: "[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.")

plaintiffs. This has proved to be a substantial first step in providing a flexible basis from which the Court may later broaden the judiciary's jurisdiction.

B. *Comer v Murphy Oil*: USSC Denies Opportunity to Rule on Non Governmental Standing

On January 10, 2011, after granting certiorari in *AEP* but while awaiting oral hearing of the case, the USSC denied petition for mandamus of the Fifth Circuit's *Comer v Murphy Oil*.[226] Non-governmental Plaintiffs brought *Comer* against numerous GHG emitting corporations on a theory of public nuisance caused by Defendants' contributions to GHG emissions that allegedly caused or worsened Hurricane Katrina's effects.[227] The District Court had dismissed the case for lack of standing as well as holding that the case presented a nonjusticiable political question.[228] On appeal the Fifth Circuit reversed, finding that Plaintiffs met standing requirements and the political question doctrine did not bar the case.[229] The Fifth Circuit vacated their decision once the *en banc* panel granted a hearing. However once the *en banc* panel lost a quorum, the District Court's ruling stood as final.[230]

Plaintiffs petitioned the USSC for a writ of mandamus, which the USSC denied without comment.[231] A decision in *Comer* would turn on the same threshold issues of standing and political question in a public nuisance case. Thus, it is notable that some of the Plaintiffs in *AEP*, which was granted *certiorari*, were states, while the Plaintiffs in *Comer*, whose writ was denied, were all nongovernmental parties.[232] USSC had already expressed concern over opening up standing to private parties by focusing on state standing in *Massachusetts* and noted the importance of the state's quasi-sovereign status to find standing.[233]

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[226] *See* "Civil Procedure: Quorum Requirements- Fifth Circuit Leaves Panel Decision Vacated Upon Loss of En Banc Quorum - Comer v Murphy Oil USA Inc, et al," 585 F3d 855, 879 (5th Cir 2009).
[227] *See Comer v Murphy Oil USA Inc, et al*, No 05 cv 436LG (SD Miss Aug 30, 2007).
[228] *See ibid*.
[229] *See Comer*, 585 F3d 855, 879 (5th Cir 2009).
[230] *See ibid*.
[231] *See Comer*, 607 F3d 1049 (5th Cir 2010).
[232] *See Comer*, 585 F3d 855 (5th Cir 2009).
[233] *See Massachusetts*, 549 US 497.

After explicitly reasoning that states are "entitled to special solitude" in *Massachusetts*, it is telling that the Court was prepared to deal with state standing again in *AEP* but was not prepared to make a decision regarding standing in public nuisance for nongovernmental parties.[234] A ruling in *Comer* would have forced the USSC to make a definitive choice or at least statement as to how far it was willing to extend standing in climate litigation. I feel that this early in the climate litigation arena, while the political and public perception of climate regulation was- and remains- volatile, it seems the Court was not prepared to close the courthouse door permanently to nongovernmental standing. Nor was it ready to open the door completely. Rather, by denying mandamus and withholding this decision for another case at a later date, the Court deliberately delayed such a definite ruling. Instead, the Court was able to allow its signaling function to continue through less than extraordinary holdings to maintain its legitimacy as an unelected branch. This approach also allowed the Court to maintain its flexibility to extend standing at a later date if need be.[235] In short, even if *Comer* were an appropriate case on which to make this ruling, it certainly came at the wrong time.[236]

After the USSC denied the petition for mandamus, Plaintiffs re-filed the case in the US Southern District of Mississippi.[237] The Mississippi federal court dismissed on theories of *res judicata* and collateral estoppel as the case had already reached a final decision on its merits.[238] Though it could have stopped there, the District Court took an activist stance and went on to comment on standing and political question. The Court expressly found that the case presented a nonjusticiable political question because Plaintiffs basically asked the Court to determine what levels of GHGs are reasonable, a

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[234] *See* "Civil Procedure: Quorum Requirements- Fifth Circuit Leaves Panel Decision Vacated Upon Loss of En Banc Quorum - *Comer v Murphy Oil USA Inc, et al*." (Alternatively it may be true that the Court was satisfied with the 5th Circuits's *en banc* ruling, there were likely many reasons to deny mandamus; however, that a ruling in this case would require a more concrete stand on nongovernmental standing prior to the AEP case was likely at least one factor motivating such judicial constraint.

[235] For example, the Court may want to step into a more proactive role if the context of climate reform changes: the Federal government could fail to act leaving a gap in regulation, climate science may become more comprehensive, allowing a stronger finding of causation in tort claims, or even allowing a more clear cut approach to redressibility in the form of damages or an injunction.

[236] This is a bit of a stretch; however, and may increase concerns of legitimacy by the public if one individual is able to sue essentially all of the energy companies worsening the effects of a hurricaine. I should note here, as Professor Hsu warns, climate litigation must not be used to lay blame solely on companies while individuals themselves are the ones demanding and using this oil.

[237] *Comer II* (*Ned Comer et al v Murphy Oil USA*, No. 1: 11 CV220 LG – RH W (SD Miss Mar 20, 2012).

[238] *See ibid*.

responsibility Congress left to the EPA.[239] Further, the District Court found Plaintiffs lacked Article III standing, holding that Plaintiffs' argument that Defendants' acts had contributed to the kinds of injuries that they suffered as insufficient. The Court expressed that a positive standing finding required Plaintiffs to show a stronger causal relation between the injury complained of and the acts alleged.

It seems here, as with most District Courts, reluctance to actually deal with these difficult cases on the merits in the future underlay the decision. This anti-climate tort activism will likely continue to characterize District Court Decisions until the USSC provides a decision to the contrary applicable across all districts.

C. *AEP v Connecticut*: Proving That a Loss May Still Be Considered a Win

In *AEP,* the Court split along the same dissenting lines as in *Massachusetts* on the issue of standing.[240] Here, Connecticut along with seven other states and the City of New York brought an action against the five largest GHG emitters in the U.S., requesting abatement of the Defendants' ongoing contribution to a public nuisance.[241] At issue in *AEP* was whether litigants could use a federal common law nuisance claim as a vehicle for seeking redress for GHG emissions.[242] The USSC's 2011 decision resulted in a 4-4 tie concerning the issue of standing along the same voting lines as *Massachusetts*.

Therefore, it affirmed Circuit Court's holding but is not binding as precedent beyond the Second Circuit.[243] Nonetheless, *AEP* reaffirmed *Massachusetts's* standing decision by recognizing special solicitude for states suing as *parens patriae* to protect their natural resources, property, or citizen's health and wellbeing.[244] Further, it arguably expanded *Massachusetts* to include common law claims.[245] Although it only provides

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[239] *See ibid*.
[240] *See Massachusetts v EPA*, 549 US 497 (2007).
[241] *See AEP*, 131 S Ct 2527.
[242] *See ibid.*
[243] *See* Daniel A. Farber, "Standing on Hot Air: *American Electric Power* and the Bankruptcy of Standing Doctrine" (2011) 121 Yale LJ 121 [Farber, Hot Air].
[244] *See* Mank "Standing Tea Leaves", *supra* note 168.
[245] *Ibid*.

persuasive authority, the opinion still offers clues as to the Court's likely rulings in future standing cases.

1. Lower Courts

In 2005, the District Court for the Southern District of New York granted Defendants' motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction.[246] Although Defendants' had argued that Plaintiffs lacked standing, the District Court explicitly declined to address the issue, and instead granted the motion on grounds that the claims presented a non justiciable political question.[247] Plaintiffs appealed to the Second Circuit, which reversed in a 90-page opinion, ruling that the case was not barred by the political question doctrine.[248] Since the Circuit Court reversed the dismissal on political question grounds, it still had to address remaining threshold obstacles to reach the merits of the case. The Court expressly held "*all of* [the] Plaintiffs have standing…[.]"[249] This finding clearly included private parties, an extension that had not been made in *Massachusetts*.[250]

The Circuit Court first found Plaintiffs met the injury requirement, reasoning that both the state Plaintiffs and the land trust Plaintiffs had experienced harm from loss of land by sea level rise.[251] Regarding claims of future harm, the Court expressed that

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[246] *Conneticut*, 406 F Supp 2d 265.

[247] *See* Mank "Standing Tea Leaves", *supra* note 168 at 569; *see also Connecticut*, 406 F Supp 2d 265 at fn 6) District Court invoked the PQD to dismiss the suit and did not deal with standing because only need to dismiss on one theory of justiciability. Specifically, it found that the issue was barred by Baker b/c of "the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion"; *see also Connecticut* 406 F. Supp. 2d at 272-73 (quoting *Vieth v Jubelirer*, 541 US 267, 278 (2003)) (the Court reasoned that Plaintiff's injunctive prayer for relief, requiring the EPA to regulate carbon emissions reductions was non justiciable because it would require the court to undergo may policy decisions. These include the need to determine the appropriate level to cap emissions, and timelines for the reductions); *see also* Mank "Standing Tea Leaves," *supra* note 168 at 567 & *Connecticut* 406 F. Supp. 2d at 274 (the Court found the "identification and balancing of economic, environmental, foreign policy, and national security interests" are policy concerns more appropriate for resolution by the elected branches).

[248] *Conneticuit v AEP,* 582 F.3d 309.

[249] *See* Mank, "Standing Tea Leaves", *supra* note 168 at 567 (noting that between 2006 when the case was argued and 2009 when the case was decided, the USSC delivered its decision in *Massachusetts*, which the Second Ciruit discussed extensively in its decision finding the states had standing under *parens patriae* and Article III, and that remaining Plaintiffs (New York City and several land trusts) had standing under Article II) *Connecticut v AEP*, 582 F.3d 309 at 338 [emphasis added].

[250] *See* Cecilia O'Connell Miller, "Climate Change Litigation in the Wake of *AEP v Connecticut* and *AES v Steadfas*t: Out to Pasture But Not Out of Steam" (2012) 5 Golden Gate Univ Environ LJ 343 at 344.

[251] This was an unnecessary move since only one plaintiff needs to have standing for the action to continue.

inevitable harms are still certain even if they are not imminent.[252] Next, in line with *Massachusetts,* the Court found that a significant contribution was sufficient to establish causation and a traceable injury even if there were other contributing factors to the rise in GHG emissions.[253] Finally, the Court again followed the USSC by holding that a request for regulations aimed to slow the effects of climate change is sufficient to meet the redressibility prong.[254]

As far as this reasoning was applied to the state Plaintiffs, the Second Circuit's decision was in line with the USSC's approach in *Massachusetts*. The Court's expansion of standing to include New York City and land trust plaintiffs, however was a questionable application of *Massachusetts*, which had avoided addressing this issue. Professor Mank argues that since the remedies sought from both plaintiffs were the same, and in light of only needing one plaintiff with standing, the Court likely should have "avoided [this] thorny issue of standing for private plaintiffs."[255] The Circuit Court's decision also took a more activist stance to support jurisdiction over climate litigation by characterizing the case as an "ordinary tort suit" akin to other public nuisance cases that it has widely handled in the past.[256] Scholars cried out in response, arguing that this opinion oversimplified the issues in the case, allowing the judiciary to overstep its boundaries and begin policy balancing in their decisions.[257]

2. USSC

The Court granted *certiorari* on the issues of standing, political question, and displacement.[258] Regarding standing, Defendants had based their appeal to the USSC on lack of both Article III and prudential standing. They argued that Plaintiffs had failed to demonstrate an injury in fact traceable to Defendants' conduct under *Massachusetts'*

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[252] *Conneticuit*, 582 F3d at 342-44; *see also Massachusetts*, 549 U.S. 497 at 521-23.
[253] *Conneticuit*, 582 F3d at 345-47.
[254] *Ibid.*
[255] *See* Mank "Standing Tea Leaves", *supra* note 168 at 571.
[256] *Ibid* at 567 (Mank considers the Second Circuit's characterization of *AEP* as an "ordinary tort suit" as crucial in its finding that the case was suitable for judicial resolution).
[257] The Court may have garnered more respect if it had been more honest in its decision by recognizing that yes, this will be a difficult case to deal with, and yes it would be better left to the elected branches in the first instance, however, the cases do provide same elements and may be appropriate for tort to allow harmed climate victims an avenue of redress.
[258] *AEP v Conneticuit*, No 20-174, Dec 6, 2009.

"meaningful contribution" standard. Although the Court in *AEP* ultimately held the Plaintiffs' claims were displaced, it affirmed state standing to sue for government failures.[259] The Court's finding of standing for judicial review at a minimum allows the judiciary to act in its signaling function as a backstop against regulatory failures.[260]

Though the Court dealt with standing slightly more thoroughly than a decision ending in a tie requires, its holding on the issue was limited to one paragraph.[261] Thus, I will quickly consider the parties briefs here to provide a fuller understanding of the arguments facing the Court. The Parties briefs also demonstrate the importance of understanding the Court's approach

First, the Utilities made two arguments against state standing for common law claims that would have required the USSC to implicitly overrule *Massachusetts*.[262] *Massachusetts* was decided only four years prior with many of the same justices on the bench, so it was unlikely that the Court would take this radical of a move, especially considering its restraint in the area so far. The Utilities more plausible argument reasoned that the standing analysis in statutory rights cases, including *Massachusetts* does not apply to common law actions like *AEP*. Professor Mank notes that this was the most plausible basis for distinguishing *Massachusetts* because Justice Stevens emphasized that the fact that Congress had authorized the right to bring a procedural claim against the EPA for its failure or arbitrariness in rule promulgation was a critical factor to finding standing.[263] On the other hand, Mank finds the State Plaintiffs' argument that states deserve special solicitude in statutory andnon statutory cases is just as plausible. Professor Mank explains this is because the Court also greatly emphasized the

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[259] *See AEP*, 131 S Ct 2527.

[260] *See* Robert Percival, "Of Coal, Climate and Carp: Reconsidering the Common Law of Interstate Nuisance" (2012) U of Maryland Legal Studies Research Paper No. 2012-12 at 40-41 ("[w]hen regulatory and political processes fail to prevent significant harm from transboundary pollution, the threat of ligitgation remains a useful prod to action bby other branches of government.")

[261] *See* Brendan Koerner, What Happens in a Supreme Court Tie? SLATE (Nov. 2, 2004 4:46pm) http://www.slate.com/news_and_politics/explainer/2004/11/what_happens_in_ascotus_tie.html ("Tradition holds that the court's per curium opinion in such a tie is usually very, very terse, often consisting of no more that a single sentence: 'The judgment is affirmed by an equally divided court.'")

[262] *See* Mank, *supra* note 168 at 574. These arguments were that Plaintiffs' alleged injuries were not fairly traceable to D's emissions and that the alleged harms would not be redressed by the relief sought. The Utilities attempted to distinguish the case from *Massachusetts* on the ground that relief against a tort defendant must actually redress the P's injury. Although this argument may have been more plausible before Massachusetts, the Majority under Justice Stevens had clearly rejected these same arguments as raised by CJ Roberts in his *Massachusetts* dissent.

[263] *See* Mank, *supra* note 168; *see also Massachusetts* at 549 US 497 at 575.

"importance of giving 'special solicitude' to state standing where a state is protecting its quasi-sovereign interests regarding its natural resources or the health of its citizens."[264]

Next, the Solicitor General's Brief for TVA argued that the prudential standing doctrine barred generalized grievances. Again, this reasoning was more consistent with CJ Roberts' dissent in *Massachusetts*, so was inconsistent with the majority finding in *Massachusetts* as well as other USSC decisions addressing generalized grievances.[265] These two briefs indicate that reusing arguments- without stronger reasoning to distinguish their application to the current case- was a waste of time and resources. Had the parties focused on more nuanced aspects of the case; perhaps they may have had more luck. Although the case was dismissed, it was certainly not in the strongest, nor most permanent way possible. Though the Defendants were not wrong to argue for the Court to change its previous holdings, the more efficient way to go forward may be to narrow its previous interpretation or the limit the case to its facts- as seemed to be the strongest argument in *AEP*- that *parens partiae* should not extend to common law claims.[266]

Finally, Connecticut's brief argued that the Courts *Massachusetts* standing analysis applies to find standing was met in *AEP* as well.[267] The Plaintiffs' brief further cautioned the Court that it should reject the TVA's generalized grievance arguments as these would cause the Court to muddle standing principles with those more properly

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[264] *See Massachusetts* at 518-520; *see also* Mank "Standing Tea Leaves", *supra* note 168 at 576-78 (finding it unfortunate that *Massachusetts'* language and reasoning could be used to argue either side). But I argue this flexible language was used with purpose- to gain more votes for standing, or to encourage more flexibility. As it stands after *Massachusetts*, the *parens patriae* doctrine applies equally in statutory, regulatory, and common law actions. Moreover, *Georgia v Tennessee Copper* applied *parens patraie* in a public nuisance, which boded well for *AEP* Plaintiffs. Noting the tension between separation of powers and the Courts' responsibility to hear appropriate cases, Mank argues that there should be no distinction between regulatory and common law claims at this threshold level, but rather that any distinction or crossover should be made on the merits. It seems the Court is acting to help ensure plaintiffs still get their time in Court and that Courts act to fulfill their responsibilities, not just to shy away when cases are tough.

[265] *See also* Mank, *supra* note 168 at 572.

[266] Under *Massachusetts*, at least some of the state Plaintiffs had Article III standing in their capacity as sovereign landowners. But the Court "sought to limit the *Massachusetts* decision to its facts as a case involving a sovereign state seeking to protect state owned land- so that could not be expanded." *See* Mank, *supra* note 168 at 582. But since only need one Plaintiff to have standing for the case to go forward, this brief did not address whether the other Plaintiffs did or did not have standing. *Ibid* at 584.

[267] The Plaintiffs first argued their allegations were sufficient to establish Article III standing at this stage (for a motion to dismiss- standard lower that motion for summary judgment, which is where the USSC decided *Massachusetts*). Further, the Plaintiffs argued that since the states were able to show a concrete injury, there are no prudential limits that require dismissal of the case (following *Massachusetts'* majority reasoning that the global nature of climate change does not automatically refute a finding of standing to hear a case in federal court.)

addressed under the political question doctrine, which illustrated some confusion between the two doctrines.[268]

On the issue of standing, the Court tied in a 4-4 vote.[269] Therefore, its holding on standing is not binding precedent, but did have the effect of affirming the Second Circuit's finding of standing as applied to the case at hand. The Court's standing ruling consisted of only one paragraph that sent scholars reeling in speculation:

> The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions; and further, that no other threshold obstacle bars review. Four members of the court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits.[270]

Though unnamed in the opinion, it is fairly clear that the four justices in favour of standing without any other obstacles to review are Ginsburg, Breyer, Kagan and Kennedy.[271] Likewise, the four who disagree with this finding are Roberts, Scalia, Thomas and Alito.[272] Justice Sotomayor was recused from this case because she was on the Second Circuit panel in the *AEP*. Although Sotomayor's recusal created an even split and thus no binding precedent, the fact that she was the justice recused and has

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[268] *See* Mank, *supra* note 168 at 589; *see also* Stuart Banner and James May, "American Electric Power Co Inc v State of Conneticuit: Brief of Law Professors as Smici Curaie in Support of Respondents" (2012) 46 Valparaiso L Rev 2, Winter 2002.
[269] *AEP*. 131 S Ct at 2353.
[270] *Ibid*.
[271] *See* Mank, "Standing Tea Leaves", *supra* note 168.
[272] Thomas and Alito filed a concurrence casting doubt on *Massachusetts*, in which neither Roberts nor Scalia joined. Four justices found standing following the majority line of reasoning in *Massachusetts*. Four dissenters rejected standing either "adhering to a dissenting opinion in *Massachusetts* or regarding tat decision as distinguishable." *Massachusetts*, 131 S Ct, at 2535. J Kagan was not on the Court during *Massachusetts* as she was nominated in 2010, but Mank notes that commentators find that her previous voting record and general endorsement of a permissive view of standing for plaintiffs allude to her being the fourth pro standing justice. *see* Mank, *supra* note 168 at 593. Mank further speculates Justice Sotomajor's likely vote on standing finding that she has generally endorsed a permissive view of standing while on the USSC and that she may be influenced by her colleagues at the Second Circuit. *Ibid* at 593 (noting *Ariz Christian Sch Tuition Org*, 563 US at__, 131 S Ct at 1450-62 (J Kagan dissenting)).

previously given standing a liberal application bodes well for future plaintiffs.[273] Therefore, scholars predict that should another case come up on which she participated there would apparently be a 5-4 majority to allow climate change nuisance litigation, but for CAA displacement.[274]

Some confusion surrounds Justice Ginsburg's comments that four justices would hold that at least some of the Plaintiffs have Article III standing under *Massachusetts* and that these justices also "believe that no other threshold obstacle bars review."[275] While some scholars argue this remark means these four justices reject the political question defense, others contend is suggests that they reject generalized grievance as a prudential bar to standing in this case.[276] In each of these scenarios, however, the Courts' underlying concerns involve the same separation of powers and capacity arguments. Alternatively, Professor Gerrard finds that, when considered in conjunction with *Massachusetts* one could infer from this paragraph that Justice Kennedy believes only states would have standing to bring a claim.[277] If this were true, it would provide a 5-4 majority against any kinds of GHG nuisance claims and perhaps even public trust claims by non-states.[278]

3. Attributes Characterizing the Court's Approach

a. Language Choice: What Was Said Provided Insight for Future Litigants

Traditionally, the practice in cases involving a tie vote is to simply announce "the judgment is affirmed by an equally divided court."[279] But here, the *AEP* Court took the "unusual step of providing some explanation for how the court divided on the standing question, which provided important information about the positions of the Justices on the

[273] *See* Mank, *supra* note 168 at 593.
[274] *See* Michael B. Gerrard, "Today's Supreme Court Decision in *AEP v Connecticut*" (2011) June 20th, 2011, Center for Climate Change Law on Columbia's Climate Law Blog [Today's Decision].
[275] *AEP* at 2535, n.6.
[276] *See* Miller, *supra* note 250 at 357 (noting that this statement "intimat[es] that Defendant's eleventh hour prudential argument barring generalized grievances was unmeritorious").
[277] *See* Gerrard "Today's Decision", *supra* note 274.
[278] *Ibid*.
[279] *See* Koerner, *supra* note 261.

issue."[280] I feel it is important to note that the Justices took this extra step, as their motivation seems to have been to provide insight into future cases.

For example, Professor Mank notes that the Court's distinction that "some plaintiffs" had standing most likely means the State Plaintiffs because the *Massachusetts* decision referred to only clearly endorsed standing rights for states to bring climate actions.[281] Further, the Court's extended articulation of their ruling gives hints as to who the justices were on each side by referring to the voting in *Massachusetts*. Out of the Justices that were on the Court during both the *Massachusetts* and *AEP* decisions, Justices Kennedy, Ginsburg, and Breyer remained on the Bench and voted for the majority in *Massachusetts*.

Reference to likely voting is especially significant as it relates to Justice Kennedy's vote as the traditional swing vote. As discussed above, during *Massachusetts* oral argument it was Justice Kennedy that alerted Plaintiffs to *Tennessee Copper* to support their arguments. This led many to believe that the "decision's recognition of special state standing rights under the *parens patriae* doctrine was arguably [Justice Kennedy's] idea."[282] Professor Gerrard notes that the *AEP* decision's language referring the finding of Article III standing under *Massachusetts*, when read in conjunction with *Massachusetts*, may allow an inference that Justice Kennedy may only support state standing only (but extended to any kind of GHG claim- nuisance or not) but that there may be a 5-4 majority against standing in any case by a non state.[283] All four dissenting justices in *Massachusetts* remain on the Court for *AEP* and likely ruled the same way: Chief Justice Roberts, and Justices Scalia, Thomas, and Alito.

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[280] *See* Mank, *supra* note 168 at 544-45.
[281] *Ibid* at 596; *see also* Jonathan Alder, "The Supreme Court Disposes of a Nuisance Suit: American Electric Power v. Connecticut" (2010-2011) Cato Sup Ct Rev 295 at 309-10 (finding that the *AEP's* reference to "some plaintiffs" most likely referred to State Plaintiffs).
[282] *See* Mank, *supra* note 168 at 592.
[283] *Ibid*; *see also* Michael B. Gerrard, "*American Electric Power* Leaves Open Many Questions for Climate Litigation" (2011) NYLJ July 14, 2011, available at http: www.arnoldporter.com/resources/documents/Arnold&POrterLLP_NewYorkLawJournal_Gerrard_7.14.11.pdf.

Regarding footnote 6 of *AEP* decision,[284] Mank finds this statement means two things. First, that "four justices implicitly reject the petitioners' argument that the political question doctrine barred the Plaintiffs' suit."[285] And second that these "same four justices implicitly rejected the TVA's argument that the prudential standing doctrine barred the Plaintiffs' suit because it was a generalized grievance."[286] Both of these arguments were based on separation of powers concerns, which these four justices seem to feel is less concerning than the alternative of allowing Congress to isolate its actions from review.[287] It seems clear that the Court's conscious word choice in only one paragraph deliberately provides insight into the justices' positions on standing.

b. Restraint: The Importance of What the Court Left Unsaid.[288]

By four justices finding standing in a common law case, they implicitly eliminated the requirement of a statutory procedural right as a basis for meeting standing requirements.[289] In this way, *AEP* arguably adopted broader standing analysis to allow standing on non statutory common law claims.[290] Even though *AEP* is not binding outside the Second Circuit, this decision indicates how the justices will likely vote once an appropriate case comes to the Court again. Most importantly it indicates whether standing for common law claims will be further expanded to non state plaintiffs in *Kivalina*. Therefore, the Court has left itself open to pursue its signaling function by

[284] *AEP,* 131 S Ct at 2535 n.6 ("[i]n addition to renewing the political question argument made below, the petitioners now assert an additional threshold obstacle: they seek dismissal because of a 'prudential' bar to the adjudication of generalized grievances purportedly distinct from Article III's bar.")
[285] *See* Mank, *supra* note 168 at 597-98.
[286] *Ibid* at 598.
[287] If the Court found that the states had standing only when Congress authorized such standing though a statutory procedural right, then Congress could simply amend this to take away such authorization, thus insulating, at least temporarily, itself from review.
[288] *See* Miller, *supra* note 250 at 344.
[289] *See* Mank, *supra* note 168 at 545.
[290] *Ibid* at 597 ("accordingly, four justices appear willing to extend the standing analysis in *Massachusetts* to common law actions by the state.").

providing the possibility of "litigation as a useful prod to action by other branches of government."[291]

What the Court did choose to say in conjunction with what it chose not to say resulted in a refusal to narrow the reach of standing analysis in *Massachusetts* under arguments for generalized grievances. It also broadened or expanded standing rights beyond *Massachusetts* to include common law cases brought by states. By taking this deliberate and considered approach, the Court has ensured that, at a minimum, states will have the jurisdiction to have their climate injury case heard by federal courts. Again, the Court did this only implicitly. Though they said more than they needed to, the justices practiced restraint in not stating a finding as to private plaintiffs, which could potentially open up the floodgates and affect the Court's legitimacy. Though it could have ruled on the issue by clearly limiting the *AEP* holding to state standing, the Court illustrated their future concerns more subtly, leaving that decision flexibly open for another day and another case.

This restraint leaves two remaining issues over standing. The first concerns whether the Court will find private party standing in either common law or regulatory cases. The USSC will likely have to decide this issue in *Kivalina* after the Ninth Circuit decides this case on appeal. While *Kivalina's* federal common law nuisance claims may be displaced under *AEP*, state common law claims remain viable so the Court will have to address standing.[292] Even though the majority of justices after *AEP* seem to be in favour of finding standing, this claim is limited to state standing. In *Kivalina*, there is a strong argument that the state standing doctrine "is inapplicable to a village that never gave up the type of political sovereignty enjoyed by a state before it joined the United States."[293] Consequently, the Court will have to address non governmental standing in this threshold determination. The second issue surrounds standing in state common law public nuisance actions. As I will discuss below, *AEP's* displacement of federal common

[291] *See* Percival, *supra* note 260 at 40-41 ("[d]irect judicial intervention to stop interstate pollution is rare today. But where regulation fails, common law remedies remain an important backstop whose importance may increase at a time of audacious efforts by some members of Congress to roll back Federal environmental regulations.").
[292] *Kivalina*, 663 F Supp 2d 863 (ND Cal 2009).
[293] *Ibid* at 882; *see also* Mank, *supra* note 168 at 601.

law actions and endorsement of state common law actions in the alternative bring this question to the forefront.

4. *AEP's* Effect Moving Forward

Looking forward, *AEP* must be considered in conjunction with two recent cases without state plaintiffs, which have dismissed cases and found no standing at the district court level.[294] In these two opinions, *Amigos Bravos* and *Sierra Club*, the district courts appear to be raising the barriers to individuals' and citizen groups' standing to bring climate change litigation. These cases raise barriers by precluding plaintiffs from challenging federal agency actions on those grounds.[295] I discuss these cases next, but here I note that the federal judiciary, under its current configuration, has recognized that States have *parens patriae* standing to allege climate change injuries. All district courts considering the issue, however, have rejected individual or environmental group standing as plaintiffs in climate based common law actions.[296] These private litigants often face a troublesome application of the standing doctrine as it essentially requires plaintiffs to prove merits based issues too early on in the case where they should be required only to prove threshold issues.[297]

The courts have applied a lower threshold of standing to states while holding private plaintiffs to the higher threshold. This indicates that courts endorse claims brought by state attorney generals but are not comfortable with the potentially open ended class of plaintiffs that could flood the courts upon a favourable grant of standing for private plaintiffs. As such, the courts have temporarily redirected climate change litigation from going down a potentially open ended, resource intensive, and legitimacy destroying path of individual litigation. Instead the courts have favoured managing

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[294] *See Amigos Bravos v US Bureau of Land Management*, 2011 WL 3924489, No 6:09-cv-00037-RB-LFG, (DC NM) (8/3/11) (holding that the Plaintiffs must show that BLM's actions both increased the risk of environmental harm and that the plaintiffs either have a geographical nexus to or actually use the sites affected by the agency action) [Amigos Bravos]; *see also Sierra Club v US Defense Energy Support Center*, 2011 WL 3321296, No 01:11-cv-41, (DC ED Va) (7/29/11) [Sierra Club].

[295] Additional information on the EPA rule being challenged can be found in "U.S. EPA Defers Greenhouse Gas Permitting Requirements for Some Biogenic Emissions," in the Summer 2011 edition of The Climate Report, Jones Day

[296] *Ibid*.

[297] *Ibid.*

litigation by only a small number of governmental litigants perhaps to prevent vexatious or conflicting decisions.[298]

a. *Amigos Bravos:* In Wake of *AEP*, District Court Cites *Massachusetts* Without Reference to *AEP* to Deny Individual Standing

i. Decision

In response to the Bureau of Land Management's approval of oil and gas lease sales, three environmental groups petitioned the decision.[299] After protests proved unsuccessful, Amigos Bravos filed a complaint in the District Court of New Mexico alleging that BLM's failure to consider GHG emissions and climate change impacts from its actions in authorizing the leases was contrary to several federal acts.[300] Regarding standing, Plaintiffs asserted that because their claims rested on procedural violations, their standing requirements are relaxed.[301] On August 30, 2011 in the wake of *AEP,* the Court ultimately dismissed the case upon a finding that the nongovernmental Plaintiffs failed to meet *Lujan's* Article III requirements.[302] Of note here was the Court's distinction from *Massachusetts*, its decision not to cite *AEP*, and its concerns regarding relaxed standing arguments.

The Court first ruled Plaintiffs failed to meet the injury prong by showing only a hypothetical, conjectural injury.[303] The Court noted that a finding of injury would be possible only if Plaintiffs presented scientific evidence or recorded observations of an actual or imminent threat from climate change as well as use or interest in each of the sites. Although the Court recognized that under *Massachusetts* there "may be a generally accepted scientific consensus with regard to global climate change,"[304] it distinguished a

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[298] It is important to note that individuals and NGO's have joined these cases as parties and intervenors. While the courts have not stated whether these groups would have standing on their own, it seems clear that the action must be brought on behalf of a state attorney general to benefit from the lower standing threshold of *parens patraie*.

[299] These environmental groups included Amigos Bravos, the Natural Resources Defense Council, and the Southwest Environmental Center (collectively "Amigos Bravos").

[300] These Acts included the Administrative Procedure Act, the NEPA, the Federal Land Policy and Management Act, and the Mineral Leasing Act.

[301] *See Amigos Bravos et al v BLM* No 09cv37, No 6:09-cv-00037-RB-LFG,US District Ct NM 8.3.11.

[302] *See Amigos Bravos*, No 09cv37*; see also Lujan*, 504 US at 560-61.

[303] *See Amigos Bravos*, No 09cv37.

[304] *See Massachusetts,* 549 US at 521-23.

general finding of world wide climate change from the effect on specific geographic areas, such as New Mexico's environment.[305] Expressing skepticism over the validity of climate injuries, the Court dismissed Plaintiffs' personal observations of climate change as "pure conjecture."[306] The District Court further cautioned its concerns over accepting climate change as an injury because this may open up the courts to a flood of litigation over a harm perhaps more properly addressed by the elected branches.[307] The Court made clear that more concrete environmental damage caused by the Defendants' acts, such as noise, odor, and other pollution, could not be used to prove the climate change harms alleged.[308]

Next, the Court found that Plaintiffs had failed to show how Defendants alleged actions caused the harms complained of. It recognized that under *Massachusetts*, Plaintiffs only needed to show the emissions from the leases' operation "meaningfully contributed" to climate change.[309] However, it found that even assuming the worst of the alleged harms, the resulting GHG emissions would account for only 0.0009% of global emissions.[310] The Court found this was not comparable to the 6% alleged contribution in *Massachusetts* or the 2.5% in *AEP*.[311] In this way, it cautioned that a finding of causation of climate change here would implicate the court's credibility/ legitimacy.[312]

The Court did find the third element of standing could be relaxed, as the harm claimed was a procedural injury.[313] Consequently it reasoned that Plaintiffs met the redressibility prong by showing that if the Court were to set aside BLM's decision on the leases, BLM would have to reevaluate them, thereby redressing Plaintiffs' claims.[314]

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[305] *See Amigos Bravos* at 26.
[306] *Ibid* at 21.
[307] *Ibid* at 18 (The court stated that these grievances were best left to the political process, not judicial review: "[w]ith climate change, the Court must enforce some limits on what constitutes an injury-in-fact; otherwise, it would be overwhelmed by a flood of lawsuits asserting generalized grievances against polluters large and small.")
[308] *Ibid* at 25-27.
[309] *Ibid* at 27 (*citing Massachusetts,* 549 US at 523-25).
[310] *Ibid*.
[311] *See for example Massachusetts* and *AEP*.
[312] *Ibid* at 23. (Given plaintiffs' alleged injuries of significant climate impact, the court found it "stretches credibility to believe" that the relatively small amount of GHG emissions were fairly traceable to plaintiffs' alleged injuries.)
[313] *Amigos Bravos* at 25, *citing Summers v Earth Island Inst*, 129 S Ct 1142, 1151 (2009).
[314] *Ibid* at 24-25.

Since the Plaintiffs had not satisfied the other two prongs, however, the Court dismissed Plaintiffs' climate claims for lack of standing.[315]

ii. Effect

This decision's import lay in its being one of the first climate standing decision in the wake of *AEP*. Considering *AEP's* non binding effect, scholars await future rulings to see *AEP's* impact and whether the standing reasoning was cited in lower courts, even as persuasive authority. Here, the Court repeatedly distinguished this case from the *Massachusetts.*[316] The Court never once cited reasoning from *AEP*.[317] Even though it is not controlling authority, the Court could have cited the justices reasoning as persuasive as the decision provided the most recent insight into the USSC's stance on standing. The Court did not, and instead stuck with *Massachusetts* as solid precedent, constantly distinguishing it to find private Plaintiffs lacked standing.

Moreover, it was notable that the Court seemed to echo CJ Robert's concerns from his *Massachusetts* dissent about relaxing the standing requirements. CJ Roberts argued that standing is not actually relaxed for states bringing a case, but rather, it is simply a way for the state to represent its citizens concerns. Here, the Judge expressed concerns of relaxing the injury and causation elements of Article III standing in procedural claims, but noted that only the redressibility prong may be relaxed.

Though this Court indicated a more conservative view of standing and seemed to argue that standing should be limited to states, it would be a mistake to take this claim to mean that the court had foreclosed on individual or non governmental standing. First, district courts decisions are often opposed to extending standing, but this has not prevented higher courts from reversing.[318] Second, Plaintiffs in this case did not provide sufficient scientific evidence or recorded observations of their harms.[319] To say that climate change can cause cognizable harms, does not mean that these need not be proven

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[315] *Ibid* at 27.
[316] While Plaintiff States in *Massachusetts* had shown, through expert testimony, concrete injury to the States' coastline, the *Amigos Bravos* Plaintiffs provided only non-expert observations of individual climate change injuries.
[317] *See AEP,* 131 S Ct 2527.
[318] *See* Arnold and Palmer Case Chart, *supra* note 46.
[319] *See Amigos Bravos*, No 09cv37.

in court. Moreover, the Plaintiffs here, as opposed to state sovereign Massachusetts, had not shown a concrete interest via property ownership. And the causation percentage was incredibly low compared to that of *Massachusetts* and *AEP*. In short, this case did not present facts upon which the Court could make an extraordinary finding such to explicitly extend standing on climate claims to individuals. Such a move likely would have compromised the Courts' legitimacy and been overturned on appeal.

b. Sierra Club v US Defense Energy Support Center

i. Decision

The Sierra Club and other environmental groups brought an action in the Eastern District of Virginia challenging Department of Defense ("DOD") procurement policy permitting the purchase of fuel developed from Canadian oil sands.[320] The lawsuit was based on § 526 of the 2007 Energy Independence and Security Act ("EISA"), which forbids federal agencies from purchasing synthetic and alternative fuels "unless the contract specifies that the life-cycle greenhouse gas emissions [from that fuel is] less than or equal to such emissions from [conventional fuel]."[321] The Sierra Club alleged that DOD's procurement of fuel derived from Canadian oil sands violates EISA § 526, the APA, and NEPA.[322] Plaintiffs further alleged that DOD's actions caused an increased risk of harm to its members' health, recreational, economic and aesthetic interests due to the increased GHG emissions and global warming effects of DOD's conduct and that if DOD complied with APA procedures, it may change its decision, to Sierra Club's benefit.

On July 29, 2011, the District Court applied the same standing test from *Amigos Bravos* to dismiss the suit for lack of Article III standing. First, the Court found that although the Sierra Club had alleged injury from global warming generally, this was insufficient to find an injury in fact as it had not alleged that its members would suffer injuries directly from DOD's purchasing contracts.[323] Further, it reasoned that even if

[320] *See Sierra Club,* No. 01:11-cv-41*,* U.S. Dist. Ct. E.D. Va. *(*7/29/11*)*.
[321] Energy Independence and Security Act, Pub L 110-40, §526 (2007) ["EISA"].
[322] *See generally Sierra Club*, No. 01:11-cv-41, U.S. Dist. Ct. E.D. Va. (7/29/11).
[323] *Sierra Club*, No. 01:11-cv-41*,* U.S. Dist. Ct. E.D. Va. *(*7/29/11*)* at 9.

DOD violated APA's procedures, Sierra Club could not show a "concrete and particularized injury" to their members as a result.[324]

Next, the Court found that the Sierra Club failed to plead a causal connection between its members' injuries and DOD's fuel contracts. Plaintiffs had shown only an insufficient "attenuated causal chain" to demonstrate a cause-and-effect relationship between DOD's actions and their climate change injuries.[325] Moreover, in what seemed to be a backwards step for climate victims, the Court found Plaintiffs were unable to affirmatively show that their injuries were not caused by third parties, or that even if DOD did not purchase fuel from the oil sands, others would not do so or that decreased emissions by avoiding DOD contracts would not be offset by GHG emissions elsewhere.[326] The Court further found Plaintiffs failed to meet standing's redressibility requirements. Finally, reasoning under the prudential prohibition of generalized grievances, the Court dismissed the case to "avoid the adjudication of 'abstract questions of wide public significance… pervasively shared and most appropriately addressed in the representative branches.'"[327] In fact, it strongly held Sierra Club's claims were "exactly the type of claim" the prudential standing doctrine cautions the court against hearing.[328]

c. Native Village of Kivalina v Exxon Mobile

The Native Village of Kivalina brought a public nuisance suit against Exxon Mobile and a list of other large GHG emitters. The Village alleged Defendants' emissions contributed to climate change, which in turn caused the permafrost under their community to shift, destroying it and requiring relocation.

At trial, the Northern District of California dismissed the claim finding Plaintiffs did not rise to the level of a sovereign and as private plaintiffs they had not overcome standing. This was the same court that dismissed plaintiffs in *California v GM* for want of standing. Plaintiffs appealed to the Ninth Circuit Court of Appeal, and after oral

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[324] *Ibid.*
[325] *Ibid* at 12.
[326] *See ibid*.
[327] *See ibid* at 16*, citing Valley Forge Christian College v Americans United For Separation of Church and State, Inc.*, 454 US 464 at 474 (1982).
[328] *Ibid*.

arguments took place in November 2011 the Court spent almost a year intently watching other decisions before handing down its appellate opinion at the end of September 2012.[329]

A three judge panel consisting of circuit court judges Sidney R. Thomas and Richard R. Clifton as well as district judge Philip M. Pro delivered the opinion for the Ninth Circuit. The majority affirmed dismissal by the District Court solely on displacement grounds as applied in AEP, which I will discuss below. I argue that the majority's decision to hold on displacement as opposed to standing grounds was a deliberate doctrine choice both to shape future climate litigation and to maintain judicial legitimacy. The panel could easily have adopted Judge Pro's standing holding, or even fashioned a brief finding. That these Circuit Court judges did not, however, is in line with past circuit court judges greater willingness to find standing in climate litigation.

Justice Pro wrote a separate concurring opinion to share his finding that Kivalina lacked standing to sue. In his lengthy concurrence, Judge Pro clearly spelled out his concern for individuals' capacity to sue by finding the Village had not met its burden to show that its harms were fairly traceable to the Defendant's emitting activities.[330] Importantly, Judge Pro distinguished between private and state plaintiffs. After acknowledging that the USSC had approved the States' ability to challenge the EPA's failure to regulate GHGs in *Massachusetts*, he went on to express that "[i]t is quite another [thing] to hold that a private party has standing to pick and choose amongst all the greenhouse case emitters throughout history to hold liable for millions of dollars of damages."[331] Though the concurrence does not form part of the majority opinion, this distaste for private standing seems to be indicative of District Court Judges. Accordingly, it seems clear that although Circuit Court Judges may buck the trend, both district judges and Supreme Court Justices will be more willing to uphold a state's standing to sue as opposed to a private plaintiff.

The USSC, in declining to rule on non governmental standing where it does not have to has left the contours of their jurisdiction in climate litigation flexible rather than

[329] *See Native Village of Kivalina v ExxonMobil*, No. 09-17490, DC No. 4:08-cv-01138-SBA (9th Cir 2012).
[330] *See ibid*, opinion at 11675.
[331] *See ibid*, opinion at 11676.

enact a permanent barrier to non governmental parties to bring a claim for redress.[332] On the other hand, the Court's willingness to say more than necessary deliberately gave future litigants an indication as to how justices would rule in further climate cases that reach them on the issue of standing. Throughout these decisions, though it seems the Court is comfortable with state sovereign standing, it has not yet explicitly ruled out standing for individuals. As I will discuss in Part III, this may change throughout the second wave of climate litigation.

[332] *See* Percival, *supra* note 260 at 24.

XI: POLITICAL QUESTION: GONE FOR NOW BUT PERHAPS NOT FOR GOOD

In this Chapter, I discuss the Court's application of the political question doctrine and its underlying concerns over climate litigation. Thus far, the USSC has declined to thoroughly discuss the political question doctrine's effect on the Court's role in climate reform. In fact, the Court has only made brief mention of the doctrine in one decision despite granting *certiorari* on the issue.[333] In that case, it did not engage the issue but rather simply inferred by noting that "no other threshold issue barred review" that the doctrine would not be a successful defense.[334] In light of this sparse USSC jurisprudence, I will supplement this discussion with the lower courts treatment as well as implications of the Court's refusal to engage in this argument. I find that the Court's refusal to erect such a constitutional barrier to climate litigation has been a deliberate doctrinal choice to allow flexibility. This flexibility has allowed the Court to keep the door to these actions open for future court involvement in climate reform adjudication.

A. California v GM

As discussed above, California sued six of the world's largest automakers for monetary damages arising out of the Defendants' vehicles' contribution to climate change, which they allege has harmed California.[335] The District Court dismissed the action under the political question doctrine without reaching the preemption and displacement arguments. Following the Southern District of New York's reasoning in *Connecticut v AEP*, the Northern District of California held that the case presented a non justiciable political question and expressly declined to "inject[] itself into the global warming thicket."[336] The Court first reasoned the Plaintiffs' nuisance claim would require it "to make an initial decision as to what is unreasonable in the context of carbon

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[333] *See AEP, 131 S Ct 2527.*
[334] *Ibid*.
[335] *CA v GM,* 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. 2007) (concluding that climate change litigation requires of courts a "balancing of . . . competing interests . . . to be made by the political branches").
[336] *Ibid*.

dioxide emissions."[337] To do this, the Court would have to balance competing interests of reducing emissions with economic and industrial concerns, which it felt was an issue for the elected branches to resolve.[338]

Next, the Court found Plaintiffs' claims requesting monetary damages for Defendants' international auto sales implicated both Congress's interstate commerce authority and the Executive Branch's foreign policy power.[339] Since these areas are constitutionally committed to the political branches of the federal government, the political question doctrine acted as a bar. Finally, the Court rejected Plaintiffs' claims that the nuisance suit merely presented issues that the Court routinely resolves, holding instead that it lacked "judicially discoverable or manageable standards" to resolve the case.[340] In its decision, the Court noted that it read *Massachusetts* to place policy decisions concerning carbon emissions in the hands of the political branches, not the judiciary.[341] Though Plaintiffs appealed this decision, they voluntarily dismissed their appeal in 2009.[342]

B. Comer v. Murphy Oil Company

In *Comer v. Murphy Oil Company* (*Comer I*), Plaintiffs brought claims for damages against energy, fossil fuel and chemical companies alleging that their contributions to climate change increased Hurricane Katrina's strength and consequently its destruction. The District Court for the Southern District of Mississippi dismissed the case for lack of standing and as a non justiciable political question.[343] Plaintiffs appealed the District Court's finding and were initially successful before the Fifth Circuit, which reversed and found the case did not present a non justiciable political question.[344] This case came just after the Second Circuit's decision in *Connecticut v. AEP*, creating the

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[337] *See ibid*.
[338] *See ibid*.
[339] *See ibid*.
[340] *See ibid*.
[341] *See CA v GM,* 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. 2007).
[342] State of California voluntarily dismissed its Appeal in 2009.
[343] *See Comer v Murphy Oil*, 2007 WL 6942285 (SD Miss Aug 30, 2007) [Comer I].
[344] *See Comer*, 585 F 3d 855 at 879 (5th Cir 2009) ("[t]he defendants have failed to show how any of the issues inherent in the Plaintiffs' nuisance, trespass, and negligence claims have been committed by the Constitution or federal laws 'wholly and indivisibly' to a federal political branch.")

impression that climate litigation may proceed past threshold issues.[345] The Fifth Circuit soon accepted appeal *en banc*, which automatically vacated the District Court's decision. Once the *en banc* courts quorum dissolved, it was required to dismiss the appeal, leaving the District Court's decision as controlling law.[346] The Supreme Court then refused to issue a mandamus order, so the Plaintiffs, ever determined, decided to re-file the case.[347]

The District Court dismissed *Comer II* on collateral estoppel and *res judicata* grounds.[348] Though it could have relied solely on these procedural grounds, in an "abundance of caution" the court revisited the issues of standing and political question.[349] It found again that the political question doctrine barred review of the case, reasoning "there are no judicially discoverable and manageable standards for resolving the issues presented, and because the case would require the Court to make initial policy determinations that have been entrusted to the EPA by Congress."[350]

C. Native Village of *Kivalina* v *Exxon Mobile*

In this case brought by the Alaskan Native Village of Kivalina against Exxon Mobil and other significant carbon emitters, the District Court for the Northern District of California again dismissed a public nuisance case as a non justiciable political question. Applying *Baker*, the Court found that although climate change was not textually committed to another branch of the government, resolving the case would require in initial policy decision of a kind not suited for the judicial branch.[351] The Court expressed its concern that the adversarial system was incapable of providing resolution to the worldwide problem of climate change.[352]

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[345] *AEP,* 582 F3d 309.
[346] *See* Civil Procedure (2012) 124 Harv L Rev 2.
[347] *See Comer et al v Murphy Oil USA et al,* No 11 cv. 00220 (SD Miss) (Comer II).
[348] *See ibid* at slip op at 29.
[349] *Ibid*.
[350] *Ibid*.
[351] *Ibid* (noting that this policy balancing would require analysis of the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development. Moreover, resolution of the case would require the court to make a policy decision over allocation of fault and cost for climate change, which it reasoned is a matter appropriately left for determination by the executive or legislative branch).
[352] *See Kivalina,* 663 F Supp 2d 863 (ND Cal 2009).

This view is widely shared by the district courts, likely because these justices feel uncomfortable with the pressure of the potential class of cases that a favourable ruling could open up. Such a floodgate would leave these judges on the front line in deciding far reaching issues regarding the future of climate reform and liability for GHG emissions.[353] Moreover regarding common law claims in particular, the federal judicial branch is weary of overstepping its authority for fear of losing its legitimacy. Accordingly, it has shown an aversion to expanding public nuisance liability by directing concerns over the line between acceptable emission levels and negligent conduct to the executive and legislative branches of government. Interestingly, and unsurprisingly, the Ninth Circuit did not even mention the PQD in affirming the dismissal of Kivalina's claim.[354]

D. Connecticut v AEP

1. Lower Courts

As noted above, a collection of states brought this case in the District Court for the SDNY, alleging injuries from the effects of climate change under public nuisance and negligence. The District Court dismissed the case as a non justiciable political question because the politically unaccountable federal court felt it could not properly adjudicate the claim without first making the sort of "initial policy determinations that must be made by the elected branches."[355] The District Court further admonished Plaintiff's allegations as "extraordinary," "patently political," and "transcendently legislative."[356]

The Second Circuit in *Connecticut v AEP* reversed holding that the political question doctrine did not bar review as climate change is neither constitutionally assigned nor prudentially left to the elected branches.[357] This decision followed the line of reasoning argued by James R. May and Stuart Banner in their *amicus* brief on behalf of law professors. The *amicus* contends first that the political question doctrine was never

[353] *See* Matthew Miller, *supra* note73.
[354] *See Kivalina v Exxon Mobile,* No. 09-17490, DC No. 4:08-cv-01138-SBA (9th Cir 2012).
[355] *See Connecticut v AEP*, 406 F Supp 2d at 273 (SDNY, 2005).
[356] *Ibid.*
[357] *See Connecticut v AEP*, 582 F 3d 309 at 331-32 (Second Cir, 2009).

intended to bar review of non constitutional claims and alternatively that even if the doctrine applied, it did not preclude review of common law claims.[358]

In response the district courts' use of the political question doctrine as a bar, the circuit courts have had a habit of reversing these issues on appeal.[359] Like the distinction discussed above in the standing section, there could be many reasons for this stark contrast at the appellate level. Notably, it seems that while the district courts express worry over dealing with the plethora of difficult evidentiary and causation issues that would inevitably flow from climate litigation, the appellate courts are able to focus their attention on the legal reasoning at hand. Accordingly, they have tended to reject the political questions doctrine as a bar to judicial review, averring that it is not appropriate for the courts to shy away from complex issues because they pose complex issues and have a political aspect. Until these courts receive a clear decision either way from the USSC, it seems litigants will continue to bring these arguments successfully in District Courts.

2. USSC: Declined to Address

a. Decision

The USSC has only had one occasion to consider the political question doctrine's application to climate change. Although the Court granted *certiorari* on the issue, it declined to actually engage the doctrine, instead merely noting, "no other threshold obstacle bars review."[360] Rather, the Court dismissed the federal claims under the doctrine of displacement.[361] Although the USSC avoided the controversial political question doctrine, the Court's use of displacement still expresses discomfort with having the federal courts play a competing role with the EPA's regulatory authority. This deference is based in the idea that the expert agency is better equipped to deal with these concerns. Thus it expresses the same concerns as the prudential considerations espoused in the second half of the *Baker* test. Considering the current political climate, the Court's

[358] *See* Brenner & May, Amicus Brief, *supra* note 268.
[359] *See generally* Arnold & Palmer Case Chart, *supra* note 46.
[360] *See AEP*, 131 S Ct 2527.
[361] *See* James R. May, "*AEP v Connecticut* and the Future of the Political Question Doctrine" (2011) 121 Yale LJ 127.

use of displacement in place of the political question doctrine is telling because the political question doctrine could come into play again if Congress removes the EPA's authority to regulate GHGs.

b. Attributes Characterizing the Courts' Approach

Although the political question doctrine is arguably applicable only to constitutional issues, the courts have used the doctrine to flesh out concerns over the judiciary's place in dealing with climate reform. There are many problems with applying the political question doctrine to climate change cases; however, courts have entertained this defense in pivotal cases. That the USSC struggles over how to answer to arguments that the political question doctrine bars review as a condition of separation of powers, tends to illustrate the Court's own insecurities about its role in climate litigation.

i. Language Choice

Even though it had granted *certiorari* on the issue, the USSC declined to engage in discussion on the issue of political question. Rather, it simply noted that the four justices who had found standing in the case would also hold that "no other threshold obstacle bars review."[362] As noted above, speculation continues as to whether this meant that these justices felt that standing was not barred as a generalized grievance, or that the political question doctrine did not apply, or both.[363] Instead, the Court made a clear doctrinal choice to dismiss the claim on displacement grounds, which implicates similar concerns of separation of powers and the judiciary's legitimacy as an elected branch. This led scholars to note that "[w]hat the court left unsaid provides the greatest harbinger for the future of climate change litigation."[364]

The Court's declination to address Second Circuit's ruling that political question doctrine did not bar climate change claims, left that part of the decision intact.[365] Still, the rest of the Court's opinion "provides significant guidance as to how the Court may

[362] *See AEP,* 131 S Ct 2527.
[363] *See ibid*.
[364] *See* Miller*, supra* note 250 at 344; *see also AEP*, 131 S Ct at 2539.
[365] *See* Miller, *supra* note 250 at 357; *see also Connecticut v AEP*, 582 F3d at 332.

have considered the issue, had the displacement theory not been dispositive."[366] For example, in its discussion over displacement, the Court concluded that federal agencies have priority over federal courts in decision making over carbon emissions.[367] Moreover, the Justices noted concern for having the judiciary deal with this issue in the first instance and identified additional reasons that agencies should remain in the priority position:[368] first, an agency determination would bind all citizens not just the parties; and second, they warned of a possible flood of litigation should the courts open themselves up to these cases.[369] Instead, the Court shaped its role as a backstop to regulatory failures where it is available to review the constitutionality of the agencies' decisions. By recognizing that the federal courts and ultimately the USSC would play a role in climate change litigation the Court ensured that climate litigation would continue at least in its judicial review form.

ii. Doctrinal Choice

The Court made a calculated decision to dismiss this case on the grounds of displacement as opposed to political question. Although the immediate effect of using the two doctrines is the same (dismissal), dismissing the case on a theory of displacement is less permanent and more flexible in a politically volatile environment where the displacement ruling could soon become moot. Even if Congress stripped the EPA of authority, some prongs (the need for initial policy decision) would still trigger political question to bar the federal common law, so this would be a much more permanent ruling.[370] Therefore, as Professor Percival finds, "[t]he Court properly rejects efforts to erect constitutional barriers to climate litigation even as it blocks the use of federal common law in such claims."[371]

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[366] *See* Miller, *supra* note 250 at 357
[367] *See ibid* at 357-58.
[368] *See generally* Miller, *supra* note 250.
[369] *Ibid*.
[370] *See* Percival, *supra* note 260 at 24 ("Because the Court found displacement of federal common law on the CAA's delegation of authority to the EPA, were a future Congress to strip the EPA of such authority, federal common law actions could come back into play.")
[371] *Ibid*.

iii. Flexibility

The Court's decision to dismiss the case on a theory of displacement of federal common law by EPA authority left the USSC with a flexible position for future cases. This was a very narrow ruling as the Court did no more than necessary to deal with the case in front of them. The ruling follows the Court's trend of forestalling concrete and far reaching rulings for future cases when the Court may have more information and therefore would not risk triggering legitimacy concerns. Flexibility lies in the Court's leaving state common law open as an avenue, allowing room to distinguish cases like *Kivalina* on damages, and even its own decision moot upon withdrawal of the EPA's authority to regulate. This choice was also interesting as the Court essentially shut down both sides of this argument- pro-reform NGO's and opponent industrial sectors- while leaving breathing room for the EPA to act.

VII: DISPLACEMENT

The next procedural theory the courts have used is displacement. The doctrine requires federal courts to determine when federal legislation "speaks directly" to a question such to displace the federal common law in the area and avoid creating a parallel track of laws. A federal common law, for instance, will be displaced simply when another branch has the authority to occupy a field has been occupied as opposed to when the field has been occupied in a certain manner.[372]

A. AEP v Connecticut

1. Lower Courts

The Second Circuit recognized that the EPA clearly had authority to regulate GHGs after the USSC's holding in *Massachusetts*. However, the Court went on to hold that regardless of the fact that Congress had given the EPA this authority, the CAA did not displace federal common law actions until the EPA regulates GHG emissions or

[372] *Milwaukee II,* 541 US 304, 324 (1981); *see also AEP*, 131 S Ct at 2537 (rejecting the argument that the regulatory needed to have actually acted to occupy the field, instead stating the test was whether a regulatory body merely had the authority to regulate over the field).

decides not to.[373] The Second Circuit was able to reach this finding by unfortunately applying the wrong standard, which allowed it to distinguish the case from *Milwaukee II's* finding that whether federal environmental regulations displace federal common law actions turns on *legislative* action.[374]

Milwaukee II's standard reasons that "[b]ecause 'federal common law is subject to the paramount authority of Congress,' federal courts may resort to it only 'in absence of an applicable Act of Congress.'"[375] So, if the CAA's expansive statutory scheme was to apply to GHGs as the Court found in *Massachusetts*, it would follow that federal common law nuisance claims would be displaced.[376] The Second Circuit in *AEP*, however, rejected this reasoning and focused on the EPA's implementation of the CAA instead of the CAA itself. Following this reasoning, the Court found that the EPA's inaction on GHG regulations precluded a finding that these branches had "spoke directly" to the "particular issue" raised by plaintiffs.[377]

Rather, the proper test concerns whether the legislation itself "speaks directly" to the issue. This reasoning was misplaced and would lead to instability as "displacement [would] hinge upon particular policy choices that could change from one administration to the next."[378] Adler contends the Second Circuit's failure to follow the precedents it cited made it easy for the USSC to come to a unanimous decision on what could have otherwise been a divisive case.[379] Specifically, the USSC was able to dismiss the federal claims by overturning the Second Circuit's finding without resorting to the political question issues.[380]

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[373] *See Conneticuit v AEP,* 582 F3d at 381.
[374] *See* Jonathan H. Adler, "A Tale of Two Climate Cases" (2011) 121 Yale LJ 109, ("[t]his conclusion was easily the weakest and least convincing portion of the panel's lengthy opinion, largely because it failed to apply the very formula for displacement it cited from the relevant precedents.") [Two Climate Cases].
[375] *See Milwaukee II,* 541 US 304.
[376] *See ibid*.
[377] *See Conneticuit v AEP,* 582 F3d at 387-88.
[378] *See* Adler "Two Climate Cases", *supra* note 374.
[379] *See ibid*.
[380] *See ibid*.

2. USSC

a. Decision

Displacement does not have a large jurisprudential history; however, the USSC used the doctrine in a pivotal way in *AEP*. Although the Supreme Court had granted *certiorari* on the political question issue, it avoided ruling on political question grounds by using displacement to dismiss the public nuisance claim to stymie federal common law as a source of climate regulation. Rejecting the Plaintiffs' argument and Second Circuit's holding that displacement does not occur until the EPA actually regulates GHGs, the USSC affirmed the *Milwaukee II* test finding that "the relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'"[381] Justice Ginsburg explained for the unanimous court that the "critical point" was when "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants" not, as the Second Circuit reasoned, whether and how the EPA acted upon the delegation.[382] The Court further stated that even the EPA's decision to adopt inadequate regulations or to "decline to regulate carbon-dioxide emissions altogether," would not change the displacement holding after a finding that of Congressional delegation.[383] Thus, through *AEP*, the Supreme Court again placed responsibility for climate regulation in the hands of Congress and the EPA. This effectively cleared common law litigation from the EPA's plate, leaving it breathing room to pass regulations.[384] Further, the decision implicitly pointed future litigants to bring common law actions through state rather than federal courts.

b. Attributes Characterizing the Court's Approach

In dismissing this case on the theory of displacement, the Court acted deliberately in two ways. First, the Court purposefully forestalled federal common law litigation as an avenue while refusing to take the judiciary out of the equation (in more than a judicial review role) permanently. It did so by erecting permanent constitutional barriers through

[381] *See AEP*, 131 S Ct at 2538
[382] *See ibid*.
[383] *See ibid*.
[384] *See* Epstein, "Beware of Prods and Pleas" *supra* note 37 at 317.

the political question or a far reaching application of the standing doctrine.[385] Rather, the Court has applied displacement to express its concerns over separation of powers and its capacity to resolve these issues to delay these actions while prompting the government to act. Which brings me to the second way that the Court acted deliberately. In *AEP* the Court made a conscious effort prevent congressional action that would thwart comprehensive regulation. It did so by taking away the benefit of stripping the EPA of authority to regulate GHGs. This has allowed the EPA the space to breathe and to be able to actually promulgate GHG regulations.

i. Shaping Role/ Comprehensive Approach

Professor Percival notes that the *AEP* Court's emphasis on the possibility of judicial review over EPA decisions under the CAA's review provisions was overly optimistic. He finds that it "suggests that [Justice Ginsburg's] rationale for displacement of federal common law actions is founded in part on the notion that the judiciary will be able to police irrational inaction by the [EPA]."[386] Thus the Court seems to still want to play an active role in climate policy reform but is exercising restraint in setting the contours of this role. The Court is clear that it does not want to police or regulate in the first instance but remains enthusiastic about ensuring that climate reform moves forward. As I hope to show throughout this chapter, the Court has deliberately created a framework for climate change litigation through the combination of their decisions in *AEP* and *Massachusetts*, the theme of which has been "not now, but maybe soon".[387]

In explaining its displacement holding, the Court in *AEP* made three interrelated points that will shape the possibilities for U.S. climate litigation.[388] First, the USSC forestalled federal common law nuisance actions as avenue to influence climate reform, so long as the EPA has regulatory authority. In this way, it seems the Court currently views its role as limited and somewhat supervisory as opposed to the EPA, but has ensured flexibility in this role through its deliberate choices in litigation.[389]

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[385] *See* Percival, *supra* note 260.
[386] *See ibid* at 31-32.
[387] *See* Hari M. Osofsky, "*AEP v. Connecticut's* Implications for the Future of Climate Change Litigation" (2011) 121 Yale LJ 101.
[388] *See ibid*.
[389] *See ibid*.

Second, the Court reinforced the appropriateness of judicial participation through regulatory suits challenging the EPA.[390] Professor Osofsky notes this "combination suggests that the Court remains open to the value of climate change litigation but is pushing the litigation along a regulatory-focused course."[391] Justice Ginsburg ensured the Court's continued role at least in a judicial review capacity by emphasizing the importance of the Court's exercise of judicial review over whether and how the EPA exercises the authority."[392] Moreover, through its statement that the next issue will concern preemption, the Court endorsed state common law as an avenue for nuisance claims in the mean time. In this way, the Court ensured the actions would continue, indicating it feels there is still a place for litigation in climate reform.

Third, although the USSC unanimously held that the CAA displaced the federal common law of nuisance, "the justices rejected pleas that they permanently bury such litigation on constitutional (political question or standing) grounds."[393] As I will discuss further below, applying the displacement theory to dismiss federal common law claims was not as strong a blow to the plaintiffs' bar as one might have thought. Rather, the Court understood this that a likely act of Congress to strip the EPA of this authority would render this decision moot. Some also suggest the Court wrote the opinion to undermine these Congressional efforts to begin with.[394] Finally, Justice Ginsburg's emphasis on the importance of the Court's judicial review role and her decision to remind parties that citizens may enforce emissions limits under citizen suit provisions, illustrates the view all eight participating justices share of the Courts role in reform.[395] By declaring this continued participation, the Court shapes its current role as one responsible for oversight, but leaves flexibility for more active intervention in the future.[396]

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[390] *See AEP,* 131 S Ct 2527 ("[i]f the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition for certiorari.")
[391] *See* Osofsky, *supra* note 387 .
[392] *See AEP,* 131 S Ct at 2536; *see also* Percival, *supra* note * at 31.
[393] *See AEP,* 131 S Ct at 2535; *see also* Percival, *supra* note* at 30.
[394] *See generally* Jeffrey N. Stedman, "Climate Change & Public Nuisance Law: AEP v Conneticuit & Its Implications for State Common Law Actions" (2012) 36 Wm & Mary Ent'l L & Pol'y Rev 865.
[395] *See AEP*, 131 S Ct at 2538.
[396] *See* Percival, *supra* note 260 at 31.

ii. Signaling

AEP limited federal common law as a "parallel track" for regulating GHG emissions. But through their doctrinal choice, the Court maintained possibilities for judicial involvement in future common law nuisance actions. So, although the Court's displacement forestalled federal common law actions over climate change, it did so "only by insisting that the problem is being addressed by existing federal regulatory authorities."[397] Professor Osofsky finds this approach did put pressure on Congress as it considers curtailing the EPA's authority to regulate GHGs under the CAA and will continue to do so as new legislation is proposed.[398] Similarly, Professor Percival echoes this reasoning when he urges that the USSC's displacement decision can still act as a prod in that it "provides a useful backstop against current efforts in Congress to roll back Federal regulatory programs".[399] The common law was never intended as a vehicle for judiciary to impose its own solutions, but can certainly lie as a reminder that the elected branches failure to fulfill their responsibilities will not go unnoticed.[400]

iii. Restraint

In her majority *AEP* opinion, Justice Ginsburg provided important insight into how the Court views its own role in climate reform. She noted the importance of deference to agencies when promulgating regulation over harms that would otherwise be the object of common law actions brought to the federal court.[401] Justice Ginsburg discussed several reasons why courts are particularly ill-suited for climate change claims: setting appropriate targets requires considerations of economic, environmental, and other tradeoffs; these decisions require legislative policy-making in this balancing test; the EPA is better equipped that judges on an *ad hoc* basis.[402] Her discussion illustrates the Court's discomfort with taking on these cases at this point in time.

While these concerns bode poorly for litigants seeking redress for harms from climate change, I argue that the Justices decided this case with full awareness of the

[397] *See ibid* at 41.
[398] *See* Osofsky, *supra* note 387.
[399] *See* Percival, *supra* note 260 at 29.
[400] *See ibid* at 2 (finding that federal common law can serve as a backstop and source of redress for harm when federal regulatory authorities fail to address emerging environmental problems).
[401] *See AEP*, 131 S Ct 2527.
[402] *See ibid*.

current scientific and political context of climate change reform. As such, they have not precluded themselves from future involvement in climate reform. Rather, the justices have limited their role until the political branches have had a chance to sort out reform in the first instance and until climate science reaches a popular consensus that would provide legitimacy to their decisions. Moreover, in noting its concerns, the Court does not suggest total reliance on Congressional and EPA actions to address climate change. Rather, it merely recognizes that their access to greater resources and capacity for policymaking indicates that these bodies serve fundamental roles in shaping GHG regulation in the first place. In fact, this is their purpose within the US tripartite system.[403]

Slight hesitance is well founded, as climate nuisance cases seeking injunctive relief are far from a one-time judicial order. These require complex and continuous adjustments in the regulation of that specific defendant's operations. This active aspect of injunctive relief drives concerns: over the capacity of the court to fulfill this function,; leads to the Courts' potential loss of legitimacy as an unelected branch overstepping into the roles of the elected branches; and sets the high potential for conflict between judicial and administrative management of climate change.[404] Thus, the Court argues it has acted appropriately with restraint to stop itself from unwisely launching into "nonstop judicial management of carbon dioxide emissions when the EPA is hard at work on the same issue."[405] It remains to be seen whether the second wave of climate litigation through state public nuisance and public trust claims will be met with similar reluctance from state courts. Additionally, I feel encouraged that these claims may even coax the federal justices out from behind the veil of procedural theories to accept a seemingly appropriate position for climate litigation through public trust.

iv. Doctrine Choice

While the USSC was hearing and deciding *AEP*, the political context surrounding climate change was volatile. Although the Obama Administration had entered the White

[403] *See* Allison Fischman, "Preserving Legal Avenues for Climate Justice in Florida Post *American Electric Power*" (2012) 64 Florida L Rev 295 at 298 ("*AEP* brings to the forefront normative questions about the role of the Courts in addressing Climate Change impacts.")
[404] *See generally* Epstien, *supra* note 37.
[405] *See ibid*.

House with promises of environmental policy advancement, the realities of more immediate concerns were on the forefront of voters- and therefore elected governments'-agendas. In 2011, the US economy was still depressed. The Country continued to experience increased unemployment rates and a worsening mortgage crisis. Additionally, a near crippling deficit brought budget concerns to the forefront as any spending that could be characterized as in excess was attacked. Related to this was the reality that by 2010 Democrats no longer had control over Congress, leading to a Congressional stalemate on politically and economically divisive issues. Consequently, by 2011, legislation aimed at blocking the EPA's ability to regulate climate change became the focus of much industry driven congressional attention.[406]

At this time, both the Senate and the House had introduced legislation intended to restrict the EPA's regulatory authority by explicitly excluding GHG's from the definition of "air pollutant" under CAA Section 302(g). Proposed in response to *Massachusetts*, these efforts also intended to broadly prohibit governmental actors from promulgating rules taking into consideration GHG emissions to address climate change.[407] Further, many other bills aim to invalidate a number of prior agency actions, including: EPA's "endangerment finding", "timing rule", "tailoring rule", EPA's rule requiring industry to monitor and report GHG emissions; and even preclude legal action against sources of GHGs based on their contribution to climate change or any effect resulting from atmospheric concentrations of GHGs.[408] The majority of these bills aim to prohibit any member of the Executive from promulgating or enforcing regulations controlling GHG emissions, taking any action in response to climate change, considering climate effects when implementing of enforcing any other laws.[409]

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[406] *See* Brian Bowman, "Tracking Congressional Climate Legislation" (2011) Climate Law Blog, 29/03/2011 http://blogs.law.columbia.edu/climatechange/2011/03/29/tracking-congressional-climate-legislation/.

[407] This would necessarily include the Clean Air Act (CAA), the Clean Water Act, the National (CWA), the Environmental Policy Act (EPA), and the Endangered Species Act. (ESA) *See* Julia Ciardullo, "The Climate Battle Continues: Two Senate Bills Seek to Block EPA Regulation of Greenhouse Gases" (2011) Posted on February 2nd, 2011.

[408] House Republicans Seek to Bar EPA From Regulating Greenhouse Gases, http://www.chron.com/disp/story.mpl/nation/7408456.html (Feb. 1, 2011).

[409] *See eg* Columbia Climate Legislation Tracker. Notable proposals include: H.R.1023 No More Excuses Energy Act of 2011; H.R.910 & S.482 Energy Tax Prevention Act of 2011; H.R.750 & S.228 Defending America's Affordable Energy and Jobs Act; H.R.199 Protect America's Energy and Manufacturing Jobs Act of 2011; and H.R.97 Free Industry Act.

The Court's conscious and deliberate doctrine choice in the face of the current political and social context surrounding climate change, illustrated their future role in climate reform in several ways. First, the Court prompted the EPA to act. Each of these above mentioned bills would make *AEP's* common law nuisance displacement a moot point because displacement relies on federal law actually speaking directly to the particular problem.[410] Therefore, if federal law no longer speaks to climate change as proposed by these bills, the Court's holding would become irrelevant, bringing the prospect of climate nuisance litigation back to the forefront. The temporary nature of the holding allows the Court to make clear that it is not out of this game for good.

Because the Court found displacement of federal common law on the CAA's delegation of authority to the EPA, were a future Congress to strip the EPA of authority to regulate GHGs, federal common law actions could come back into play."[411] The Court knew that this was a possibility considering House and Senate legislation at the time of the oral arguments. This awareness is notable. It makes clear that the Court has refused to erect permanent constitutional barriers to its future action. No doubt signaling the Executive and more specifically the EPA that it is ready to allow litigants to take up the slack if need be.

The Court's choice to reiterate *Massachusetts'* strong language regarding the importance of judicial discretion to avoid regulating GHGs underscores the primacy of the EPA's role in setting GHG standards in the first instance.[412] Thus, the decision demonstrates to role that the Court sees for itself in climate reform, which seems to be: not yet, as the EPA should deal with this problem first, but we are here if need be (i.e. if governmental politics gets in the way). Not only is this made clear to future litigants, but it is also a clear and resounding reminder to governmental actors. The Court's prompt in *AEP* that the judicial branch remains as a backstop against arbitrary action "reminds the EPA (and any future executive that might be less inclined to address climate change) of the limits of agency discretion to avoid regulating GHGs."[413] Moreover, their warning

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[410] *See* Robert Meltz. "Climate Change Litigation: A Survey, Congressional Research Service, Report for Congress", May 14, 2009.
[411] *See* Percival, *supra* note 260 at 24.
[412] *See* Katherine A. Trisolini, "The Sweet Taste of Defeat: *American Electric Power v Connecticut* and Federal GHG Regulation" (2012) 30 UCLA J of Environ L & Pol'y 227 at 239-40.
[413] *See ibid* at 240.

not to mess around was made clear to Congressional members opposing EPA regulation. The Court takes this issue seriously, and though the EPA should deal with it first, something does in fact need to be done and the Court does not approve of political infighting blocking governmental action.

Second, the Court precludes harmful government action by removing the motivation for Congressional anti EPA bills. Although it is clear that a comprehensive act created to deal with climate change would be optimal, it is equally clear that due to political deadlock, this is unlikely to occur. Conscious of this, the Court has acted to ensure that the EPA retains its authority as well as clear any acts that could impede the EPA's efforts at reform. This decision prevents Congressional members opposing the climate regulations from overturning the Court's ruling in *Massachusetts* that the EPA has authority to regulate under the CAA.[414] By reminding the Congressional members that the Court may allow common law actions in federal courts- that could prove costly at a minimum to government and industry- the Court deflates any incentive that Congressional opposition had to eviscerate the EPA's ability to place limits on GHG emissions.

The USSC's decision to dismiss *AEP* on displacement rather than political question impacted the Congressional proposals discussed above by draining their industry support. Professor Trisolini reasons that the industry lobbyists who previously opposed GHG regulation became hesitant to encourage uncertainty that could result from future common law litigation should they move forward with these proposals.[415] This change seems to have affected proposals by Congressional members. After *AEP*, members shifted tactics from proposing bills that strip the EPA's authority to instead proposing tax and funding restructuring bills to bleed the EPA out of the financial ability to properly regulate.[416]

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[414] *See ibid* at 228-29 (Professor Trisolini argues the Court's displacement decision actually "impeded congressional Republicans' efforts to obstruct the EPA's climate change efforts by amending the act.")
[415] *See ibid* at 241.
[416] See Paige Winfield Cunningham, "EPA's Funding Facing Roll Back, Wash Times, July 25, 2011, http://washingtontimes.com/news/2011/july/25/epa-s-funding-facing0rollback. I note that there are many bills proposing to defund EPA regulations of climate change. These would not change the status of displacement as the test is not whether the EPA has regulated, but rather, whether Congress has given the EPA the authority to regulate GHGs under the CAA in the first instance. For example, the House passed H.R. 1, the Continuing Resolution for the fiscal year 2011 budget on February 19th. It contained several

Had the Court stuck with the District Courts' approach of dismissing climate nuisance actions as non justiciable political questions, there is little doubt the Congressional bills opposing climate regulations would still be on the table, viably attempting to strip the EPA of its authority. By stonewalling Congressional attempts to stop the EPA's climate regulation efforts, the Court has thoughtfully given the EPA room to promulgate and implement the current 2011-2012 scheme. Although it is not a separate comprehensive scheme directed only to climate change, Professor Trissolini argues this "decision appreciable advances the development of a federal regulatory regime to address climate change."[417]

Finally, the Court resisted efforts to permanently remove federal common law claims over climate change from the judicial branch's jurisdiction. Instead it created flexibility for its future role in reform.[418] The Court could likely have come up with a convincing argument that climate change is barred as a non justiciable political question better left to the executive branch. However, that it rejected this permanent out and instead dismissed the federal claims on dismissal was telling. This doctrine choice of displacement over political question provided the Court with flexibility to readdress the federal common law as an avenue for relief if the EPA no longer has authority to regulate GHG's. Thus, the Court afforded itself some versatility to delay a more permanent finding that would either preclude the Court from future participation in climate litigation. Instead of making such a decision now, the Court has carved a path where it may wait until climate science provides more certainly surrounding the cause and effect relationship between emissions and effects like sea level rise. In this way, the Court has eluded any responsibility to make a decision that could raise concerns of legitimacy from climate skeptics and pro industry groups.

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provisions and amendments prohibiting the EPA from utilizing funds to regulate greenhouse gas emissions.

[417] *See* Trisolini, *supra* note 412 at 229.

[418] *See* Percival, *supra* note 260 at 24.

v. Language Choice

First, the Court explicitly endorsed environmental law as a proper area for federal law. *AEP* clearly proclaims environmental protection as "an area 'within national legislative power' in which the federal courts may fill the institutionary gaps and if necessary, fashion federal law."[419] In fact, all justices agreed with Justice Ginsburg's "ringing endorsement of the concept of 'new federal common law' to protect the environment."[420] The Court's decision to note that environmental law is in fact a proper subject for federal common law (if it were not displaced) shows that it is leaving the door cracked open to take a more active role in climate policy should consequences become more dire, or government continuously fail to act to regulate GHGs.

While this endorsement was clear, the decision also expressed the Courts' concern over its expertise by emphasizing that the EPA "is surely better equipped to do the job than individual district judges issuing ad hoc case by case injunctions."[421] Specifically, it noted that the EPA had access to far greater scientific, economic, and technological expertise and resources than justices have.[422] In doing so, the Court affirmed that the current appropriate order of decision making was for the "expert administrative agency to first weigh the policy and economic needs to find the appropriate level of GHG regulations. The federal judges then remain as the second decision maker."[423] This implies that should the first decision maker no longer have this authority, the second (the federal judges) would move up in the decision-making hierarchy.

Further, the Court's decision in *AEP* made clear that state common law is the most appropriate current option outside judicial review. It did so by reserving judgment on preemption, noting the issue had not been briefed.[424] In stating that it was to reserve judgment, the Court made a deliberate decision to cite *Ouelette*, which points Plaintiffs to more established jurisprudence on preemption in transboundary environmental issues

[419] *See AEP*, 131 S Ct at 2535
[420] *See* Percival, *supra* note 260 at 30; *see also AEP*, 131 S Ct at 2535-36.
[421] *See AEP*, 131 S Ct at 2539.
[422] *See ibid*.
[423] *See ibid*.
[424] *See ibid* at 2540.

perhaps to encourage and shape litigation down this path.[425] Moreover, in citing *Ouelette* and pointing this action as well as future litigants to state courts, the USSC explicitly stated that it would require more to find that state common law claims were preempted than to find that federal common law actions are displaced. I will discuss the Court's actions with regard to these issues below.

Finally, another aspect of language choice as a characteristic of the Court's calculated approach to climate litigation is to note what the Court did not say. In deciding this case, the Court left several questions open. In this way the Court ensured avenues for future litigation as well as illustrated the Court's focus on providing flexible opportunities for future participation through restraint in their decisions. For example, the Court did not determine whether *AEP* displacement applies to displace common law claims requesting monetary relief as opposed to injunctive relief or declaration. Additionally, *AEP* left untouched state claims by individuals and non-governmental organizations challenging power plants based on their GHG emissions, and claims brought under a theory of public trust.[426]

Even though Justice Ginsburg noted that displacement would still occur should the EPA exercise its authority and decline to act. She emphasized that this did not leave litigants without an avenue to redress as the Court would still exercise its judicial review capacity to ensure that the EPA's acts were constitutional and not "arbitrary, capricious, an abuse of discretion or otherwise not in accord with the law."[427] In this way the Court ensured a continuing role at a minimum through judicial review. Further, it encouraged state common law as an avenue. The state courts and legislatures in general are traditionally seen as a laboratory for novel actions, so these forums may be less concerned with impairing their legitimacy than federal courts. The USSC may have endorsed this route knowing that the federal courts may be unable to resolve the problem fully, leaving Congress in the likely position to overrule such a decision by limiting the Court's authority or by enacting or amending legislation as it attempted to do in reaction to *Massachusetts*.

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[425] *See Ouelette*, 479 US at 540-41 (holding that the CWA did not preempt state common law where the law of the source state was applied).
[426] *See* Osofsky, *supra* note 387.
[427] *See AEP,* 131 S Ct at 2538.

B. Native Village of Kivalina v Exxon Mobile

The Plaintiffs' bar waited anxiously for the Ninth Circuit's *Kivalina* decision regarding whether claims seeking injunctive as opposed to monetary damages should be treated differently in a displacement analysis. The majority succinctly acknowledged *AEP's* displacement rule and applied it to dismiss *Kivalina's* case. Many argued, and still do argue, that the fact that the Plaintiffs in *AEP* sought injunctive relief while those in *Kivalina* sought damages was a material distinction. The Court disagreed and simply concluded that current USSC jurisprudence provides that "if a cause of action is displaced, displacement is extended to all remedies."[428] The Court's reasoning was that the displacement focuses on the cause of action rather than the remedy, and that the remedy follows the cause of action. Accordingly, if the CAA displaces any federal common law public nuisance causes of action, then it displaces all of these actions regardless of the remedy sought. Scholars have admonished the majority's perfunctory treatment of this distinction. The majority panel's affirmance on a narrower ground acts to retain the judiciary's legitimacy, especially that of the Ninth Circuit as it relates to recent USSC jurisprudence directly on point.

Judge Pro's concurrence again treated this issue in greater detail. He ultimately agreed with the majority's finding by discussed a concerning tension in the USSC's displacement jurisprudence: the Court's rulings in *Middlesex County Sewerage Authority v National Sea Clammers Association*[429] and *Exxon Shipping Co v Baker*[430] were not completely in line. Specifically, while the Court relied on *Middlesex's* finding that displacement applies regardless of remedy sought, the USSC seemed to ignore *Exxon's* finding that suggested, "severing rights and remedies is appropriate as between damages and injunctive relief in some circumstances."[431]

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[428] See Kivalina No. 09-17490, DC No. 4:08-cv-01138-SBA (9th Cir 2012) at 11655.
[429] 453 US 1, 4 (1981).
[430] 554 US 471(2008).
[431] *See Kivalina* No. 09-17490, DC No. 4:08-cv-01138-SBA (9th Cir 2012) at 11663-65. The majority and concurrence also addressed a retroactivity claim which has caused great discussion, but is out of thie scope of this paper. *See* Jonathan Zasloff, "Ninth Circuit Rules Against Indian Tribe's Climate Change Suit",

C. Cases in the Wake of *AEP*: *AEP* Displacement Application in Lower Courts

1. *Alec L v Lisa Jackson, et al*: District Court Dismisses in Alternative on Theory of Displacement Citing *AEP*

As introduced in Chapter One, a coalition of environmental groups brought actions requesting injunctions under the public trust doctrine. The vast majority of these cases were brought in state courts, which I will discuss in Chapter Three. However, Our Children's Trust brought *Alec L. v Lisa Jackson*, *et al* in a federal forum. In late May 2012, the Federal District Court for the District of Columbia dismissed the case in the first instance for lack of subject matter jurisdiction finding there was no diversity jurisdiction under 28 USC § 1331.[432] The Court in *Milwaukee I* had held that the state could bring a federal common law nuisance action in district courts because the doctrine at hand arose under federal law within the meaning of 28 USC § 1331 and so was sufficient for a finding of subject matter jurisdiction.[433] Distinguishing this case from *Milwaukee I*, the District Court for the District of Columbia reasoned that since the public trust doctrine is a creature of state law, it is not matter "arising under" federal law.[434] Having dismissed the case for lack of subject matter jurisdiction, the Court declined to rule on political question or standing. The Court did, however, rule in the alternative that even if the federal common law is not solely a matter of state common law, but is also one of states, then the CAA would displace it anyways.[435]

This was one of the first climate related case to apply *AEP's* displacement ruling, so its reasoning is illustrative of the holding's possible future implications. In broadly interpreting *AEP* to find that the CAA displaced all federal common law, the District Court rejected Plaintiffs' argument that *AEP* was limited to public nuisance displacement but applied the doctrine to this public trust case.[436] Further, the Court placed strong emphasis on reaffirming concerns expressed in the USSC decision over the judiciary's

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September 21, 2012, aailable on: http://legalplanet.wordpress.com/2012/09/21/ninth-circuit-rules-against-indan-tribes-climate-change-suit/.

[432] 28 U.S.C. § 1331.

[433] *See Illinois v City of Milwaukee* (Milwaukee I) 406 US 91 at 98-99 (1972).

[434] *See Alec L, 1:11-cv-02235* at 8-9 (*citing PPL Montana LLC v Montana*, 565 US at 1235 (2012)) ("the public trust doctrine remains a matter of state law" and its "contours… do not depend on the Constitution.")

[435] *See ibid.*

[436] *See ibid*.

limited capacity to determine these issues. The decision frames the issue as one just as much about government structure and separation of powers as about GHG emissions and climate change.[437] It will be integral to future litigants to address these concerns to determine whether *AEP* displaces only those common law claims requesting injunctive relief or includes those seeking monetary damages. This is because an injunctive order would require the court to act more like a regulator, invoking separation of powers concerns while determining a monetary award would not carry such similar concerns.

In its alternate holding that even if the public trust doctrine were a federal doctrine such to invoke subject matter jurisdiction under §1331, the claims would be displaced, this court interpreted *AEP* broadly as displacing all federal common law in general, not just public nuisance.[438] The Court did not distinguish between whether it considers displacement to extend to actions requesting damages as opposed to injunctive or declaratory relief as were requested in both *AEP* and *Alec L v Lisa Jackson*.[439] Several scholars note this distinction in relief requested is important as it may provide further arguments to distinguish *AEP*.[440] Specifically, the District Court in this case further affirmed the USSC's reasoning in *AEP* that the concern at issue with displacement and preventing a parallel track. Both courts were concerned that Plaintiffs were seeking to have federal courts, in the first instance, determine at what level carbon dioxide emissions become unreasonable, as well as the most practical, feasible, and economically viable level of reduction. Concerns that the Court is not equipped to create public regulations from common law claims may be distinguished from the Court's ability to award damages.[441] If litigants consider the Court's reluctance and legitimacy concerns, however, they might wait until increased scientific clarity allows courts to more clearly determine an appropriate level of damages.

The District Court in *Alec L* concluded by ensuring Plaintiffs that this ruling should not be the end of their attempt to hold government accountable for GHG

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[437] *See ibid,* at 10 ("Ultimately, this case is about the fundamental nature of out government and our constitutional system, just as much- if not more so- than it is about emissions, the atmosphere or the climate.")
[438] *See ibid.*
[439] *See ibid.*
[440] *See Alec L, 1:11-cv-02235* at 8-9.
[441] *See ibid.*

regulations.[442] The decision encouraged "just because an issue is not appropriate for a federal court to resolve or that one sweeping judicial remedy will be insufficient to solve the problem at hand, that the parties should give up."[443] In fact, the Judge expressly urged the parties (plaintiffs, federal agencies, and defendant intervenors) to continue to collaborate in finding a solution to protect and preserve the environment.[444] Moreover, the effect of *Alec L's* finding that public trust is a state law not federal law issue was not fatal to the over 50 *Our Children's Trust* cases filed in state courts in 2011 as these state claims were not subject to displacement (although preemption may become an issue). Rather, this case simply provides that state courts are the proper avenue, rather then perhaps having the decision made by one federal court, whose decision would be more widely applicable.

2. Michigan v Army Corps of Engineers

Although not brought under the CAA, *Michigan v. Army Corps of Engineers* provides some hope for litigants seeking to avoid dismissal by displacement.[445] In this case the Seventh Circuit rejected Defendants' argument the USSC in *AEP* created a more expansive test for displacement, noting instead that it was the comprehensive nature of the CAA regarding GHG emissions and enforcement opportunities that led to the displacement.[446] The Court also noted the USSC's emphasis on the CAA's "multiple avenues for private and public enforcement as well as the right of the public to seek judicial review of denials of petitions for undertakings.[447] The Court focused on comprehensiveness, finding that the CWA's provisions as related to the issue at hand did not rise to the same level of comprehensiveness and so did not displace the common law.[448]

The Seventh Circuit's decision indicates that, even after *AEP*, the federal common law retains some relevance for addressing a very narrow class of transboundary

[442] *See Alec L* (DDC 2011).
[443] *See ibid* at 11.
[444] *See ibid*.
[445] *See Michigan v Army Corps of Engineers*, 2011 W L 3836457 (7th Cir 2011).
[446] *See ibid*.
[447] *See ibid* at 12.
[448] *See ibid*.

environmental problems.[449] Yet the Court's denial of relief also reflects the reality that the agencies are far better equipped, or at least the judiciary feels the agencies are far better equipped, than it to formulate solutions to these problems.[450] Professor Percival emphasizes that "this reality should shape a reconsideration of the role of interstate nuisance law."[451]

AEP builds from the Court's decision in *Massachusetts* but it is also important to note that the justices do not decide these cases in a vacuum. Rather, that *AEP* also took place in a broader context where in which state, federal, and international courts face an increasing number of cases involving climate change.[452] Additionally, *AEP* was as a necessary outgrowth of USSC's *Massachusetts* decision that the Court had to take to structure their role in future climate litigation.[453] *AEP* and *Massachusetts* were brought at the same time and sought to impose GHG emission controls in a reaction to government's failure to do so on their own. In finding a favourable decision for the environment in *Massachusetts,* the Court endorsed its view that regulatory-based climate litigation was an appropriate way to challenge the emissions in the area. In contrast, the Court made it clear in *AEP* that the federal common law was not an adequate basis for challenging GHG emissions when it found that the EPA's power under the CAA displaced any federal common law.[454] In *AEP,* the Court found that Congress's adoption of a statute governing GHG emissions displaced federal common law even if the EPA decides not to regulate. The critical point was whether the field was occupied not whether it has been occupied in a particular manner.

The Court in *AEP* dealt only with federal common law. Accordingly, the door for state common law claims may remain open. What is important to note for this article, is that in finding that there was no room for a parallel track of regulation between the two branches, the Court reinforced its preference for a limited role in GHG reform, at least for

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[449] *See* Percival, *supra* note 260 at 29.
[450] *See ibid*.
[451] *See ibid*.
[452] *See* Osofsky, *supra* note 387.
[453] *See generally* Richard O. Faulk and John S. Gray, "Defendants Win "Round One" of Climate Change Litigation in United States Supreme Court" (2011) 32 Westlaw Environ J 1 at 1-7.
[454] *See* Alder "Two Cases", *supra* note 379 (noting further that *AEPs* effect is limited to its request for injunctive relief, so plaintiffs requesting monetary damages, as those in *Kivalina*, are able to distinguish the cases and evade its precedent).

the time being. Professor Percival warns against mistaking *AEP* as the death knell of common law interstate nuisance in environmental claims.[455] As discussed above, the decision displaces only federal common law and only so long as the EPA has the authority to regulate GHGs under the CAA. Further, he encourages that the federal common law may continue to be used regarding narrow problems not directly spoken to in a comprehensive scheme and that litigants may still address these problems through state common law sections so long as the law of the source state is applied.[456]

VIII: PREEMPTION

Similar to displacement, the USSC has only once mentioned preemption in a case concerning climate litigation. Unlike displacement, *AEP*'s preemption discussion merely concerned the Court's decision to remand the remaining claims to the Second Circuit, which it charged with ruling on the issue.

A. AEP

1. Decision

In *AEP,* the USSC explicitly did not decide whether the CAA preempts state law nuisance actions or over the viability of Connecticut's state common law claims by noting that the parties had neither briefed nor argued the issue.[457] Rather, the Court remanded the remaining state law claims to the Second Circuit on the issue of preemption.[458] Thus, although the opinion limited federal common law as a "parallel track" for challenging the EPA's regulatory decisions, it retained opportunities for courts be involved in common law nuisance actions. This approach put pressure not only on Congress in its consideration of proposals aimed at limiting the EPA's authority to

[455] *See generally* Percival, *supra* note 260.
[456] *See* Percival, *supra* note 260 at 29.
[457] *See generally AEP*, 131 S Ct 2527.
[458] *See ibid* at 2540.

regulate GHGs under the CAA, but also on the EPA to ensure its actions were reasoned as opposed to arbitrary or capricious.[459]

2. Attributes Characterizing the Court's Approach

a. Restraint: What the Court Did Not Say

By declining to determine whether the CAA preempted the remaining state claims, the Court ensured future litigation if even only over preemption. This delay's timing is notable, as the Ninth Circuit was about to begin arguments in the ongoing *Kivalina* appeal where the viability of some of these claims depended on the preemption finding. Had the Court in *AEP* found that the CAA preempted state common law claims, the Ninth Circuit would have been able to dismiss *Kivalina* without much delay. Instead, oral arguments took place in November 2011, the decision was not handed down until September 2012.

The Court's declination to rule on preemption allowed not only this action to continue, but also points future litigants to state common law as a likely or at least possible avenue for relief. The Court encouraged litigation in state courts while resisting arguments that would end its own jurisdiction permanently in the future, which illustrates restraint in shaping climate litigation's future.[460] This approach leads Miller to note that *AEP*'s pass on preemption did not thwart state litigation but "may well have redirected those suits back to state courts."[461] The Court's deliberate and restrained approach to climate litigation has led it to guarantee future climate change litigation even in dismissing *AEP's* federal common law claims in what seemed to be a loss for reformers. As Miller concludes, *AEP* "at most represents a bump in the road for plaintiffs seeking redress for climate liabilities."[462]

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[459] *See generally* Miller, *supra* note 250; *see also* Osofsky, *supra* note 387 .
[460] *See* Miller, *supra* note 250 at 344.
[461] *See ibid* at 362.
[462] *See ibid* at 374.

b. Language Choice

Although the Court refrained from ruling on preemption, it took deliberate steps to provide insight as to its position on the issue. The Court did this in two ways. First, once the Court had declined to rule on preemption, it did not need to discuss the issue further, but could have left preemption to the Second Circuit's direction. The *AEP* Court however, not one to miss an opportunity to provide guidance to future climate litigants, cited *Ouelette*.[463] By doing so, the Court seemed to point future litigants and deciding courts to follow a more stable jurisprudence rather than forge its own under the CAA. The Court in *Ouelette* held that the Clean Water Act (CWA) did not preempt state common law nuisance claims so long as the law of the source state was applied.[464] This is significant because the Court in *Ouellette* allowed a flexible approach to these claims when it "refused to hold that these suits must be brought in source-state courts, but only that source state law must apply."[465] Therefore, the Court's decision to cite *Ouelette*, Miller notes, "implicitly confirmed the legitimacy of initiating suits applying the law of the state from where emissions could occur, which would leave the door open to future federal court litigation applying state law."[466]

Further, *Milwaukee II*'s concern over federal and state common law coexisting placed a few hurdles in front of state law claims under the CWA. But *AEP's* displacement of federal common law removed this hurdle as it relates to claims under the CAA because the decision precluded concerns of coexisting state and federal common law. In this way, the Court shaped future "contours of such litigation in noting that 'the Clean Water Act does not preclude aggrieved individuals from bringing a nuisance claim pursuant to the law of the source state.'"[467]

Though the CAA has not yet preempted any state GHG laws,[468] the Fourth Circuit's emphasis on *Ouellette* in *North Carolina v. TVA*[469] extended preemption under

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[463] *See Ouelette,* 479 US 481 ("[t]he Clean Water Act does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the source state'").
[464] *See ibid*.
[465] *See* Miller, *supra* note 250 at 360; *see also AEP,* 131 S Ct at 2540.
[466] *See* Miller, *supra* note 250 at 360.
[467] *See ibid* at 359-60; *see also AEP*, 131 S Ct at 2540.
[468] *See* Richard Davis, David M. Friedland, & James B. Slaughter, "The Fourth Circuit Limits Nuisance Suits and Strengthens Preemption Under Federal Environmental Laws" Beveridge & Diamond PC, Bulletin, July 30, 2010, online: <www.bdlaw.com/news-934.html>.

the CAA further than the courts have gone before by finding federalism policy arguments more compelling than the savings clause of the CAA.[470] This recent application of *Ouelette* may allow arguments that the CAA preempts state nuisance law.[471] By emphasizing, "compliance with existing regulations is a complete defense to a common law nuisance action" this decision would remove state common law as an avenue to redress harm that occurs as a result of inadequate regulations.[472] But under the CWA, as Justice Ginsburg pointed out, the state's ability to impose stricter standards than those under federal acts would not result in preemption because stricter standard would not "frustrate the goals of the CWA".[473]

Second, the Court emphasized that the standard to preempt state common law is much higher than that required to displace federal common law.[474] Although the Court expressly did not rule on preemption, scholars note, "dicta supports plaintiffs ability to proceed under state tort law."[475] Here, it is important that Justice Ginsburg pointed to the higher standards necessary to find preemption even though the statement was not necessary to the ruling the court relied on.[476] In remanding the remaining state law claims to the Second Circuit on the issue of preemption, the Court noted "[l]egislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded by preemption of state law."[477]

The test for preemption is whether the "state law… interferes with the methods by which the federal statute was designed to reach its goal".[478] Meanwhile, a finding of displacement requires only that the statute "speaks directly to the question at issue."[479]

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[469] *See North Carolina v TVA*, 09-1623_F 3d_, 2010, US App, Lexis 15286 [North Carolina].
[470] The savings clause allows states to regulate GHG emissions more strictly than the standard set by the federal floor.
[471] *See* Percival, *supra* note 260 at 35 (discussing *North Carolina*).
[472] *See ibid*; *see also* Robert Meltz, "Common Law Climate Change Litigation After *AEP v Conneticuit*" Congressional Researcher Report, August 16, 2011 (warning that there might be a plausible defense that compliance with state regulations should then displace state common law).
[473] *See Ouelette,* 479 US at 499; *see also* Percival, *supra* note 260 at 36.
[474] *See AEP,* 131 S Ct at 2527
[475] *See* Trisolini, *supra* note 412 at 243.
[476] *See ibid* (Ginsburg reminded readers of the higher burden for preemption, which stems from principles of federalism).
[477] *See AEP*, 131 S Ct 2527.
[478] *See Ouellette*, 479 US at 494 (finding the federal statute preempted the Michigan Act because it directly interfered with the federal statute's purpose of prohibiting "producers" associations from coercing producers to agree to membership…that would impinge on the producer's independence.")
[479] *See AEP*, 131 S Ct at 2537 (quoting *Mobil Oil Corp v Higginbotham*, 436 US 618 at 625 (1978)).

The standard is higher because of importance of federalism concerns underlying preemption. *Milwaukee II* found a strong presumption against Federal preemption because it allows federal laws to supersede "historic police powers of the States".[480] As such, the Court in *Milwaukee II* held preemption should not be inferred without determining that this "was the clear and manifest purpose of Congress."[481] Preemption differs from displacement in that the latter does not implicate federalism concerns because these cases begin with the "assumption that it is for Congress, not the federal courts, to articulate the appropriate standards" of federal law.[482]

Accordingly, the possibility of bringing state law claims under the CAA, may be more likely than under the CWA, but is not entirely clear. The *Ouelette* Court affirmed that preemption must not be lightly inferred, noting the CWA should not preempt state common law without a clear finding that Congress intended to preempt state laws.[483] This higher standard encourages Professor Percival to predict that it should be difficult for the courts to find that the CAA preempts state common law, especially considering the savings clauses and waivers at play with the CAA.[484]

c. Doctrine Choice

Though the Court refrained from ruling on the issue of preemption, it did express its concerns over the judiciary's capacity to deal with climate litigation. Specifically, Justice Ginsburg's opinion explained that setting appropriate emissions standards requires balancing of many economic, environmental, and policy tradeoffs, and that the task of balancing these competing interests is more appropriately in the realm of the elected branches.[485] These concerns led the Court to express their feelings that it is particularly ill suited to addressing climate change claims.[486] Rather, the decision deferred to the EPA finding that it "is surely better equipped to do the job than individual district judges

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[480] *See Milwaukee II,* 54 US 304 at 316; see also John William Hite III, "Note: Federal Preemption: *Illinois v City of Milwaukee* (Milwaukee I)" (Dec 1985) 60 Tul L Rev 407.
[481] *See ibid*.
[482] *See ibid* at 317.
[483] *See ibid* at 491.
[484] *See* Percival, *supra* note 260 at 37.
[485] *See generally AEP*, 131 S Ct 2425.
[486] *See generally* Adler "Two Cases", *supra* note 379.

issuing ad hoc, case by case injunctions."[487] This has led scholars to worry *AEP* could chill state-law-based nuisance actions as there is no reason to think that state judges, or even federal judges applying state law, would fare any better.[488] If anything, the application of variable state standards to matters of a global, interjurisdictional concern could further frustrate the development of a coherent climate change policy.[489]

Even if the state claims are not preempted, state plaintiffs will certainly have to contend with the impact of the USSC's discussion concerning the judiciary's incapacity to resolve climate change in the first instance as opposed to in their role of judicial review over EPA action. Litigants may minimize these concerns by limiting the court's role to hearing only cases requesting monetary relief, which would not require courts to act like elected branches in setting regulations. This more narrow interpretation of the Court's concerns would follow its approach of restraint, flexibility and conscious language choice.

In all, the outlook for future cases remains somewhat promising. Professor Percival encourages that even considering the Court's concerns over judicial competence in *AEP*, preemption of state common law will be more difficult to find because of it's higher standard, federalism concerns, and in light of the federal environmental statutes' savings clauses.[490] Thus, even though the Court expressed concern, state common law claims seem to remain a viable avenue for relief. In fact, state courts may even provide a more appropriate forum considering their role as a laboratory for novel claims, their freedom from strict constitutional separation of powers concerns, and their liberalized standing requirements.[491]

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[487] *See AEP,* 131 S Ct 2425.
[488] *See generally* Adler "Two Cases", *supra* note 379.
[489] *See* James R. May, "*AEP v Connecticut* and the Future of the Political Question Doctrine" (2011) 121 Yale LJ 127.
[490] *See* Percival, *supra* note 379 at 37; *see also* Lisa Heinzerling, "Federalism and Climate Change: The Role of the States in a Future Federal Regime" (2008) 50 Ariz L Rev 925 (questioning whether federal preemption will be invoked in the future to block more stringent state laws to control emissions of greenhouse gases).
[491] For example: California law relaxes standing requirements. *See* Robert A. Wyman, Jr. and Michael G. Romey, Pamphlet, Greenhouse Gas Tort Litigation s. 1.07(1)(d)(i) (Bradley M. Martin ed 2010). Further, some states lower standing requirements in cases concerning environmental issues pursuant to enshrining environmental rights into their state constitutions. *See ibid* at 361.

B. Comer II

After the USSC had declined the Plaintiff's writ, the Southern District of Mississippi heard the refiled *Comer* and found under *Massachusetts* that the CAA preempted Plaintiffs' claims.[492] The Court further read *AEP* as extending to state and federal common law claims, as well as to claims for damages as well as injunctive relief. This District Court's decision should be taken with a grain of salt, however. First, it decided many issues that it did not need to decide as the court could have dismissed strongly on just *res judicata* or collateral estoppel. The Court did not need to go forth "under an abundance of caution" to decide the remaining issues brought to the Court.[493]

Moreover, this is not necessarily a fair reading of *AEP*. First the Court had expressly declined to rule on preemption. And second, the Court's history on the issue suggests a narrower reading because the Court has not previously taken such extraordinary action in cases concerning climate change litigation. Further, considering that the USSC emphasized the regulatory aspect of injunctive relief in *AEP* and *Alec L*, it is not clear that the Court did displace both injunctive and monetary federal common law in *AEP*.

As it stands, the District Court's dismissal continues to make it more difficult for future plaintiffs to hold GHG emitters liable in tort for alleged harm caused by climate change, at least in Mississippi. It is unlikely though, that the District Court will have the final say. The Plaintiffs are likely to appeal to the Fifth Circuit, which in the past has been more open to the Plaintiffs' claims. The Fifth Circuit's 2009 vacated opinion held that Plaintiffs had standing to bring their negligence claims and that those claims did not present nonjusticiable political questions.[494] That being said, although the Fifth Circuit held for Plaintiffs in 2009, there is no guarantee that it will do so again, even if it reverses the District Court on *res judicata* and collateral estoppel. Significantly, at the time of the Fifth Circuit's decision in *Comer I*, the EPA was not regulating GHGs to the extent it is today and the Supreme Court had not yet decided *AEP*. Based on these developments,

[492] *See Comer II,* No: 11-cv-00220 (SD Miss 2010).
[493] *See ibid*.
[494] *See Comer*, 607 F3d 1049.

the Fifth Circuit could very well find that the CAA preempts Plaintiffs' state law claims.[495]

C. Native Village of Kivalina v Exxon Mobile

The Ninth Circuit majority panel in *Kivalina* expressed that the solution of climate change lay not with the courts but with the legislative branches through regulatory reform.[496] This is absolutely true, as I have argued, and would even suggest that a solution further lays within individuals in their daily lives. But on a positive note in the path to using climate litigation as a tool to prompt reform, the Ninth Circuit made clear that federal jurisprudence did nothing to displace Plaintiffs' state claims, which survived the dismissal and affirmance.[497]

In *AEP*, the USSC did not rule on issue of whether the CAA preempts a potential nuisance claim in state court, stating instead that since the issue was not briefed or argued, they would "leave the matter open for consideration on remand". [498] In doing so, the Court declined to forestall litigation on this theory by fully dismissing the case and giving an opinion on preemption. Writing the decision this way allows the Plaintiffs in AEP (who have already invested a lot of resources to get the case to this point) to "continue to hold potentially viable state law nuisance claims, seeking redress for climate change injuries."[499] It also encourages plaintiffs to bring viable state law claims in state courts.

Further, Professor Trisolini contends that Congress has not made any purpose to preempt state common law actions explicit or clear, so the state claims should not be preempted. She argues that the EPA certainly knows how to do this when it wants so, as illustrated by the Act's waiver of mobile source preemption for California, which "shows

[495] *See* May, *supra* note 361 at 127.
[496] *See Kivalina*, (9th Cir 2012) Opinion at 111671.
[497] *See Kivalina*, (9th Cir 2012) Opinion at 111671; see also J. Wylie Donald, "Ninth Circuit Displaces Kivalina v ExxonMobile Climate Change Liability Case", September 21, 2012, available at http://climatelawyers.com/category/Climate-Change-Litigation.aspx.
[498] *See AEP,* 131 S Ct at 2540.
[499] *See* Miller, *supra* note 250 at 359.

that Congress explicitly and specifically framed the scope of state authority, leaving little to know interpretation."[500] The author further finds that preemption is unlikely, arguing that "not only that the CAA lacks a provision expressly prohibiting the states from imposing their own, more stringent requirements for GHG emissions from stationary sources, it also includes a 'citizen suit provision' preventing any restrictions on individuals or groups rights to enforce emissions standards or seek relief."[501]

Recent developments confirm my findings concerning the Courts' deliberate decisions. Recently the Supreme Court has granted and denied cases in determining their docket for the Court's next term. Interestingly, the Court just granted *certiorari* to review two high profile Clean Water Act cases from the Ninth Circuit, but simultaneously denied review in a MAJOR federalism case over a shipping industry challenge to the California Air Resources Board (CARB)- in which the Petitioners argue that CARB is preempted by federal law. This case would raise significant and difficult questions about the extent of federal- state authority in environmental acts.

Additionally, in July 2012, the DC Circuit held in *Coalition for Responsible Government v EPA* that the EPA's endangerment finding (that was motivated, if not required, by the USSC's *Massachusetts*), was neither arbitrary nor capricious, thus affirming the basis of the EPA's GHG regulations. Regarding the remaining regulations it was interesting to see that by finding the Coalition had no standing to challenge the EPA's tailoring and tailpipe rules, the Court used standing limits were IN FAVOUR of allowing climate regulation to continue.[502] The Court also found that Texas (a *parens patriae* plaintiff) did not meet standing requirements. It explained the Plaintiffs' lack of Injury meant they had failed to show standing. The Court reasoned that since the tailoring rule exemption actually helped states like Texas by apparently lessening their burden of administrating and enforcing the permitting proposals.

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[500] *See* Trisolini, *supra* note 412 at 242; *see also* CAA §304 (a) 42 WC § 7604(e) (providing that nothing in the CAA citizen suit section "shall restrict any right which any person…may have under any statute or common law to seek enforcement of any emissions standard or limitation or to seek any other relief…" CAA §116 42 USC ¶7416 ("… Nothing in this act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce" any air pollution standard or requirement.)

[501] *See* Stedman, "Climate Change and Public Nuisance Law", *supra* note 394 at 893; *see also* 42 USC § 7543(a) (2006) and 42 USC § 5604 (e) (2006).

[502] *See Coalition for Responsible Government v EPA*, No 09-1322 (DC Cir 2012).

Going forward on the issue of state standing, this also shows that states who acknowledge climate change is happening and show it has been harmed may have an easier time proving *parens patraie*. Plaintiffs in this case will likely challenge the standing finding, so depending on whether and what extent the Supreme Court grants *certorari*, this may soon become an issue.

Finally, Professor Osofsky also found this DC Circuit opinion illustrated climate litigation's role in shaping the US regulatory path. As I noted earlier, I build on this, noting that the Court's finding of EPA's authority over GHG regulations became legitimate and in fact required under *Massachusetts* when the Court seemed to engage in direct policy making. The Supreme Court then reinforced the appropriateness of the regulatory body in the first place to deal with climate policy by forestalling access under common law claims. I note that the USSC also played an indirect policy role by both prodding favourable EPA action and preventing Congressional action to obstruct the EPA. Its decision to do this was characterized by a deliberate doctrinal choice not to deal with the more permanent Political question doctrine, but rather to use the more temporary displacement doctrine. In *Coalition for Responsible Government*, the DC Circuit followed the Supreme Court's calculated path, reinforcing the first round of GHG regulations and denying standing to speculative harm claims by GHG regulatory opposition.

CHAPTER THREE: MOVING FORWARD- THE SECOND WAVE OF LITIGATION

As I discussed in Chapter Two, the USSC has deliberately forestalled federal climate litigation by declining to erect permanent constitutional barriers to block these actions.[503] Instead, the Court has used procedural theories including displacement and a curious approach to both standing and political question to raise separation of power concerns. Through this approach, the Court has effectively delayed deciding the merits of climate actions and passed the buck by prodding the other two branches of government into action.

The Court's decisions illustrate their reticence over whether common law adjudication through the judiciary is an appropriate vehicle to deal with climate change. The range of the justices' discomfort unsurprisingly follows ideological differences over the appropriate role for courts in a tripartite government generally. Liberal justices caution their holdings by citing concerns over the Courts' involvement. Meanwhile, conservative justices label climate change as off limits for the Court and so base their arguments in the dangers of moving beyond the Courts' role, precluding these cases altogether as inappropriate fodder for judicial involvement.[504] Overall, the Court would rather play the safe route - interpreting and filling in the law - than face controversy in holding governmental agencies or private firms liable in tort. This approach has characterized the first wave of climate litigation. Where the Court has hidden behind the veil of procedural doctrines to keep litigants at bay while simultaneously maintaining the Court's less controversial judicial review role. In this way, the justices have forestalled opening the courthouse door while maintaining the Court's role in a less controversial judicial review function after the government either acts or refuses to act regarding climate regulation.

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[503] *See* Percival, *supra* note 260 (finding that the Court's *AEP* decision to characterize environmental law as a proper subject for federal common law illustrated that the Court is leaving the door cracked open to allow it to take a more active role in future climate policy).

[504] *See for example*, earlier discussion regarding Justice Ginsburg and Steven's majority findings and Justice Scalia's dissents.

The USSC's decision in *AEP* turned the tide of climate litigation to its second wave.[505] Tracy Hester describes the third wave as climate litigation moving from federal claims in federal courts to "a broader and more varied host of state law actions in both federal and state courts."[506] Specifically, Hester expects climate litigation to continue in at least the following three ways: 1) federal court review of preemption (most likely under a theory that EPA authority has occupied the field); 2) the *AEP* Plaintiffs' remanded state law claims; 3) and future state claims on public nuisance, public trust, and as yet undiscovered theories where "lynch pin issues remain unaddressed."[507]

By way of federal public nuisance claims, the first wave was in line with attempts to form comprehensive reform until both federal reform and litigation attempts hit a wall around *AEP*.[508] Now the second wave is moving toward state law under state public nuisance and public trust claims. This shift to state claims and state venues is similarly aligned with the current focus on more local or state initiatives toward reform.[509] Consequently, scholars and practitioners see promise in this second wave in terms of more cases reaching the merits, requiring governments to regulate, or at least framing the issue in a way that judges begin to accept climate change as an appropriate subject for litigation in the first instance.[510]

The second wave has shifted generally to state law claims, but more importantly to a coalition of public trust litigation. This new platform may be the catalyst to illustrate to Courts that they are in fact an appropriate venue to address climate reform in the first instance as opposed to merely in a judicial review role. This approach may prove to be more flexible and holistic than public nuisance. While public nuisance litigants effectively request the Court to set a reasonable level of GHG emissions, determine

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[505] *See* Tracy Hester, "A New Front Blowing in: State Law and the Future of Climate Change Public Nuisance Litigation" (2012) 31 Stan Envtl LJ 49 at 89.
[506] *See ibid*.
[507] *See ibid* at 37.
[508] *See generally ibid*.
[509] *See generally* Benjamin Richardson, *Local Climate Change Law: Environmental Regulation in Cities & Other Localities* (Pub. Edward Elgin Publishing) (IUCN Academy of Environmental Law, 2012).
[510] *See* Richard O. Faulk, "Uncommon Law: Ruminations on Public Nuisance" (2011) 18 Mo Envt'l & Pol'y Rev. 1 at 13-22 (discussing the shift from a first wave in litigation seeking to regulate emissions and obtain damages through public nuisance claims to the second wave, featuring a shift to state courts and the public trust doctrine).

whether and by how much the defendant exceeded that judge made level, and finally determine causation and damages.

The public trust approach differs in that litigants essentially ask the court to hold the government to its obligation to act adequately to protect the atmosphere in trust for the public and future generations. Plaintiffs bringing negligence claims ask the court to set a standard for GHG emissions at which the defendants' emissions become unreasonable and thus give rise to liability. However, the public trust doctrine asks the court to find a state obligation where the court would require the state to meet this obligation in whichever manner they choose.

I contend that it is the nature of judiciary to develop (albeit not at a pace ahead of societal acceptance) and help regulation evolve to reflect the actions the public tolerates and finds reasonable. The judicial branch will always be involved with the bounds of regulation. As the Government has moved to address society's need for climate regulation, so too must the Court grow to recognize they are an appropriate forum for dispute resolution of claims resulting from this growth. Therefore, I argue that under this new and more nuanced second wave of litigation, the courts cannot, simply rely on arguments that all common law based climate litigation is outside the boundaries of their judicial role.

I have broken Chapter Threes into two subparts. First, I will cover the availability of state claims in state and federal forums, their benefits, and remaining hurdles. And second, I will discuss the rising public trust theory and its potential to illustrate to the judicial branch the appropriateness of climate litigation as an avenue to reform.[511] The state claims I discuss throughout this subpart, state public nuisance claims and public trust arguments, possess several similar characteristics. Professor Albert Lin has found that both doctrines share a common goal of safeguarding community interests and serve as responses to political failure.[512] Further, they both merit continued attention in climate

[511] Although I will only cover state public nuisance claims and public trust arguments, cases regarding climate insurance policies could also be said to fall into the second wave. These cases concern disagreements between insurers and the insured regarding policy coverage for harms resulting from climate change. As the cases tend to rely on the policy language, their reasoning falls outside of the scope of my paper. However, I urge litigants, corporations, and insurers to consider the effect of these cases on the path towards climate reform.

[512] *See* Albert C. Lin, "Public Trust and Public Nuisance: Common Law Peas in a Pod, Symposium - The Public Trust Doctrine: 30 Years Later" (2012) at 1084.

reform as complementary systems: a public trust sets out rights regarding the trust resources while public nuisance sets tort limits on private and governmental freedom of action.[513] While both theories pose promise for the second wave's future, they deserve separate discussion. I discussed the public nuisance theory at great extent in the first two chapters and while procedural hurdles vary under state claims or in state forums, the state claims do not differ greatly on the substantive level. Further, as I will cover the procedural aspects of state claims and state forums in the first subpart, my later discussion on public trust in will focus on the substantive law and its ability to provide a holistic and flexible platform from which litigants may demonstrate the appropriateness of climate litigations. I conclude Chapter Three noting that the second wave of climate litigation poses great potential to shape future climate reform. Moreover, this shift demonstrates the endurance and creativity held by climate reformers to shape the court as an avenue for reform when other government branches fail to respond.

IX: PUBLIC NUISANCE CLAIMS ARISING UNDER STATE LAW

Climate claims arising under state tort law in state courts have remained rare despite the notable cases brought in federal court under federal law.[514] With the recent turn towards the second wave, however, these cases seem set to surge. I will first discuss the increasing climate claims under state law, benefits of this approach as opposed to bringing federal claims, as well as hurdles that will remain even under state law. In the second half of this part, I will discuss litigants' option of filing state claims in either federal or state courts. I conclude finding that while common law cases under state law and in state forums will not simply sail to a decision on the merits, these claims represent a promising future for climate litigants and are worthy of their consideration.

[513] *See generally ibid*.
[514] *See* Hester, *supra* note 505 at 50; *see also* Markell and Ruhl Empirical Survey, *supra* note 44; *and* Arnold & Palmer Case Chart, *supra* note 46.

A. State Claims

1. Benefits of Bringing State Claims

State claims are those arising under state laws, state constitutions, and the majority of common law within the states' jurisdiction. While litigants may often have a choice over how to fashion their claim, I find several benefits to bringing state law claims to advance climate reform. I will discuss these benefits in three categories: procedural, practical, and tactical.

To begin with, litigants could benefit from fashioning climate claims under state law in terms of procedure. Bringing state law claim would allow litigants to avoid compliance with strict justiciability requirements imposed by the US Constitution. Litigants who bring state claims may make the most of friendlier standing and political question theories in state constitutions.[515] Procedural benefits relate to the choice to bring these claims in state courts, so I will cover these more thoroughly in the second half of this subpart.

Practically, more causes of actions arise under areas of state law than those under federal. First, the US Constitution does not provide a right to a healthy environment but several state constitutions do just that.[516] This allows for state claims to enforce constitutional obligations, which is one of the bases of the public trust doctrine. Further, state law includes most environmental plans, licenses, and policies that are under the state government's authority, which broadens the types of claims litigants can use. Moreover, state and local climate initiatives have increased dramatically in the past few years, increasing rights and obligations under state law.[517] Finally, as opposed to federal court justices who are appointed for a life term, state court judges are either elected or appointed for a term of years.[518] This lack of tenure tends to be a factor in why state court judges are more attuned to public sentiment regarding the Courts' role. So, where a state court judge is aware he is up for reelection or has certain post judgeship career

[515] *See generally* Hester, *supra* note 505.
[516] *See supra* discussion regarding Public Trust at part X.
[517] *See* Jonathan Zasloff, "The Judicial Carbon Tax: Restructuring Public Nuisance and Climate Change" (2008) 55 UCLA L Rev 1827 at 1852-58 (discussing benefit of state authority on environmental issues).
[518] *See* US Court's Webpage: Educational Resources: Understanding Federal and State Courts, Accessed September 1, 2012.
http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx

goals, he or she tend to consider public policy as in tune with the public's current state. This motivation is discordant with the USSC and other federal justices who are sometimes seen as adapting to policy changes at a conservative or even glacial pace. This discussion simply canvasses examples of the practical benefits to bringing claims under state law in lieu of or in addition to federal claims and by no means is intended to be exhaustive.

Finally at the tactical level, Professor Trisolini finds state claims could advance the federal GHG regulations regardless of a resolution on the merits. She explains two ways in which this would occur. First, state public nuisance suits provide laboratories for developing models of damage assessment and perhaps are more read to deal with more novel claims.[519] Second, varied rulings on these state law claims may push regulated industries to support a comprehensive federal scheme instead of being subject to diverse state law requirements across state lines.[520] Moreover, at trial, judges and juries in state courts are drawn from neighbouring areas. These decision makers may be more personally affected by harms complained of by virtue of their geographical proximity and as such may be more willing to ensure future avenues of redress. Finally, state judges often have more experience with the nuances of state law, which may translate into greater foresight into the shape of future state environmental law.[521] In these ways, litigants may be able to influence both federal and state reform at the same time.

2. Remaining Hurdle to Cases under State Law

The biggest potential hurdle to bringing a climate nuisance claim under state law is the possibility a court finds the CAA preempts state climate laws. Federal law may preempt state climate laws in two ways. Here, I discuss only preemption under the CAA as preemption by the Dormant Commerce Clause falls outside the scope of this paper.[522]

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[519] *See* Trisolini, *supra* note 412 at 243.
[520] *See ibid*.
[521] *See* Miller, *supra* note 250 at 360-61; *citing* H. William Rylaarsdam, et al., California Practice Guide: Civil Procedure Before Trial, 3:654 (2011) (finding federal judges to be more receptive and familiar with federal claims and defenses).
[522] *See Hunt v Washington State Apple Cider Adver Comm'n*, (1977) 432 US 333 (finding that the dormant commerce clause basically prohibits state programs or laws from discriminating against interstate commerce or unduly burdening the flow of commerce across state lines).

Other obstacles may include due process and issues concerning the full faith and credit clause; however, these hurdles are speculative at this point so fall outside the scope of my discussion.[523]

As discussed more thoroughly above, in *AEP* the USSC expressly reserved judgment on the issue of the CAA's preemption of state law claims, remanding this issue instead. The test for preemption is much more exacting than that for displacement. Federal laws may displace federal common law upon a finding of general intent to delegate authority to a federal agency.[524] However, preemption of state laws requires Congress to either entirely occupy the field of regulation or clearly express its intent to preempt an inconsistent state law.[525] Moreover, the Fourth Circuit in *North Carolina ex rel Cooper v TVA* found that the CAA's Savings Clause[526] preserves a state's ability to impose more demanding emissions limits only for those sources within their jurisdiction, as opposed to sources emitting GHGs across state borders, and as a corollary, only authorizes state claims for relief from "injuries caused by emissions from facilities operating within the state."[527]

Thus, *AEP*'s finding that the Congress's grant of authority to the EPA displaces federal common law does not automatically mean that this same grant, or even the CAA itself, preempt state environmental legislation. Rather, Congress must meet a high threshold to clearly and explicitly state its intention that federal law preempts a state environmental law. Since the EPA did not clearly express such intent on the face of the CAA's most recent round of regulations, a finding of preemption seems unlikely.[528] Judge Thomas's majority opinion for the Ninth Circuit's panel in *Kivalina* reiterated the judiciary's understanding that displacement did not leave plaintiffs without a remedy.[529] Rather plaintiffs remain free to pursue public nuisance actions under state common law.

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[523] *See* Allison Fischman, "Preserving Legal Avenues for Climate Justice in Florida Post *AEP*" (2012) 64 Florida L Rev, 295.
[524] *See AEP,* 131 S Ct at 2537.
[525] *See Wyeth v Levine*, 555 US 555 at 564-65 (2009).
[526] 42 USC § 7604(e).
[527] *See North Carolina v TVA*, 615 F 3d 291 at 303-04 (2011).
[528] *See generally* Hester, *supra* note 505 at 82-83 (arguing that threshold state doctrines will still apply to claims brought under principles of public trust).
[529] *See Kivalina*, (9th Cir 2012) Opinion.

Further, the USSC's decision to remand state remaining claims on the issue of preemption in *AEP* still leaves a path for litigants aside from the obstructed federal common law road.[530] Plaintiffs may still bring state law public nuisance claims in either state or federal courts. Hester encourages though "[t]hese approaches each have their drawbacks, [] they offer an opportunity to continue attempts to impose liability on sizable emitters of GHGs for their historic and current conduct."[531] Accordingly, litigants' optimism about their changes with preemption in state court litigation would be justified, and in line with the USSC Justices' intimation that state courts provide a forum for this litigation.

Related to the open question of preemption, federalism concerns could result in state courts being unwilling to abandon the restraint illustrated by the Federal Courts and the USSC in considering these difficult actions. Specifically, state judges will likely have to address the concerns put forth by USSC justices throughout these climate actions. That being said, judges in state courts tend to feel less pressure to maintain legitimacy as the unelected federal courts. Moreover these judges are also residents of their jurisdictions, which may lead to a more connected and active role in maintaining the state's environment, and closer personal ties with the public's wellbeing. These factors may influence state judges to take more of an activist role even in the face of federalism pressures as Judge Gisella Triana did in Texas.

B. Forums

The federal and state constitutions lay out their respective courts' jurisdiction. At the most basic level, the US Constitution limits federal court jurisdiction to certain issues reserved for resolution by Article III courts.[532] The state courts may hear all those areas not expressly limited to the federal courts.[533] While litigants may bring actions based in state law in state courts, they may also have the choice to file these claims in federal court. This occurs when the litigants meet subject matter jurisdiction,[534] and when the

[530] *See ibid*.
[531] *See ibid* at 88
[532] *See* US Constitution, art III.
[533] See Richard D. Freer & Wendy Collins Perdue, Civil Procedure: Cases, Materials, and Questions (2008) (5th ed, Lexis Nexis).
[534] 28 USC § 1332 requires complete diversity between litigants on either side of an action.

court finds supplemental jurisdiction allows it to hear both state and federal claims in the interest of efficiency.[535] These supplemental state claims must not ground the action, however, as the US Courts will not tolerate situations where the state tail wags the federal dog.

Since state courts operate separately from their federal counterparts, they are not bound to Article III's justiciability limits including standing and political question, which have plagued federal climate claims. Rather, state constitutions and statutes set out each state judiciary's bounds. Since states generally follow less strict requirements, these courts often provide friendlier forums for litigants. In this section, I will first discuss the benefit of bringing the second wave of actions in state courts to advance both a federal regulatory scheme and climate reform generally. Next, I will briefly discuss the continued availability of federal courts as a forum for state claims.

1. State Claims in State Courts

The second wave of litigation proves promising not only because of a shift to claims arising under state law but also due to a shift in locus to state courts. State courts general jurisdiction status allows them to provide a friendlier forum for litigants because they may operate under their own constitutionally or statutorily enshrined justiciability precepts.[536] This freedom from Article III's constraints has allowed state courts the power to hear a wider array of cases including those a federal court would find nonjusticiable.[537] Specifically, plaintiffs in state courts benefit from liberalized standing requirements as well as the state courts' freedom from Article III induced federal political question doctrine.

First, though state courts are not strictly bound by Article III's case or controversy requirements, they have all recognized the importance of some form of standing

[535] 28 USC § 1367 requires the claims over which the court merely has supplemental jurisdiction to arise from the same transaction as the underlying claim.
[536] *See* Hester, *supra* note 505 at 63
[537] *See ibid*; *see also* James W. Doggett, "Trickle Down" Constitutional Interpretation: Should Federal Linits on Legislative Conferral of Standing Be Imported into State Constitutional Law?" (2008) 108 Colum L Rev 839 at 840.

analysis.[538] States may expand their own standing requirements constitutionally or through a statutory right of action. At the constitutional level, Article III does not bind state courts, even if they are addressing claims arising under federal law.[539] For example, California's standing test does not consider the *Lujan* requirements of concrete injury and redressibility as essential to a plaintiff's standing to bring a claim.[540]

Additionally, the Michigan Supreme Court has recently liberalized their state standing requirements to a more prudential approach based on factors as opposed to elements.[541] These changes are monumental to climate litigants because one major hurdle first wave litigants had to face was describing how the defendants' actions harmed them in a particular manner as opposed to the general risks climate change poses to the population as a whole. Relaxing the specific injury requirement would widen the pool of potential plaintiffs from the limited *parens patraie* role. In addition, loosening redressibility would preclude arguments that if the court cannot fix climate change, then the court does not have jurisdiction to hear the claim. Factor based tests akin to Michigan's will allow the courts to determine the Plaintiff's standing on a case by case basis with a more tailored consideration of the claim at hand.

Scholars note that though many state courts still require a specific injury, state courts around the nation are trending towards liberal standing requirements to allow greater access to the courts.[542] Further, many states have enacted provisions assuring broad citizen standing for environmental rights in cases seeking either damages or injunctive relief.[543] These liberalized standing requirements allow plaintiffs to cross

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[538] *See* Kenneth Charette, "Standing Alone?: The Michigan Supreme Court, the Lansing Decision, and the Liberalization of the Standing Doctrine" (2012) 116 Penn St L Rev 119 at 206. (2012))
[539] *See* Wyman & Romey, *supra* note 491 at § 1.07(1)(b); *see also ASARCO, Inc v Kadish*, 490 US 605 at 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts . . . .").
[540] *See* Miller, *supra* note 250 at 360-361; citing Wyman & Romey, supra note 491 at 110, § 1.07(1)(b)(i); *see also National Paint & Coatings Ass'n v California*, 68 Cal Rptr 2d 360 at 365 (Ct App 1997).
[541] *See* Charette, supra note 538 at 213-14 (finding the new Michigan standing test will allow more environmental litigants to overcome the previously restrictive specific injury requirement as well as the court's decision to empower the legislature to grant standing rights in environmental statutes).
[542] *See* Charette, *supra* note 538 at 208 (noting that Oregon has also recently liberalized their standing requirements).
[543] Conn. Gen. Stat. §§ 22a-14 to 20 (2011); Fla. Stat. Ann. § 402.412 (West 2011); Ind. Code §§ 13-30-1-1 to 13-30-1-12 (2011); Iowa Code § 455B. 111 (2011); LA. Rev. Stat. Ann. § 30:2026 (West 2011); MD. Code Ann., Nat. Resources §§ 1-501 to 1-508 (West 2011); Mass. Gen. Laws ch. 214, § 7A (2011); Minn. Stat. §§ 116B.01-.13 (2011); Nev. Rev. Stat. Ann. §§ 41.540-.570 (West 2011); N.J. STAT. ANN. §§ 2A:35A-1 to 2A:35A-14 (West 2011); N.D. Cent. Code §§ 32-40-01 to 32-40-11 (2011); S.D. Codified Laws §§ 34A- 10-1 to 34A-10-17 (2011).

threshold issues in cases where they would not otherwise satisfy federal constitutional standing requirements.[544]

Second, state courts also enjoy some degree of freedom from federal constitutional constraints on nonjusticiability and political questions.[545] Though the political question doctrine grew out of concerns espoused in Article III, the USSC has never suggested it bind state judiciaries.[546] The absence of a strict *Baker* test will prove a major benefit to litigants in state courts since all district courts have dismissed climate public nuisance actions as non justiciable political questions.[547] Moreover as I noted above in discussing state claims, state courts often act as laboratories for the federal courts.[548] This has led to the state courts traditionally taking more novel claims, as they are less concerned with the decisions' impact on the federal level or with Article III's restraints.

In all, the state courts provide climate litigants a friendlier forum to address their grievances and gain accountability. These characteristics not only induce state policy reform but also have great practical potential to advance the federal regulatory regime. The reality of national companies complying with multiple diverse standards will prod them into agreeing to one federal regulation instead.[549] Thus, though climate actions will still face an uphill battle, the second wave's shift towards state courts will likely prove beneficial for climate reform.

2. State Claims in Federal Courts

Though state courts could prove superlative in future climate reform efforts, federal courts will undoubtedly remain involved. Though the USSC's *AEP* decision may have hindered litigants ability to bring federal common law claims seeking injunctive relief, the USSC's deliberate language choice informs us that this decision was written in a calculated manner.

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[544] *See* Hester, *supra* note 505 at 64.
[545] *See ibid* at 66.
[546] *See ibid* ("state courts and legislatures may choose to adopt a similar approach for their independent reasons. Federal decisional law, however, does not compel them to follow that path.")
[547] *See* Stedman, *supra* note 394 at 868.
[548] *See* Trisolini, *supra* note 412 at 243.
[549] *See ibid*.

Upon scholarly predictions that since litigants in AEP sought injunctive damages, the case could be distinguished from cases seeking monetary relief. Going forward in their appeal, this distinction became a material issue for Plaintiffs in *Kivalina*. Moreover, Both Professor Gerrard and Robert Meltz noted that distinguishing *AEP* in terms of relief requested seemed plausible. They explained this prediction grew from the Court's reasoning for displacement discussed the availability of relief and concern over setting two tracks of EPA standards, which would not be an issue when seeking monetary damages.[550] Similarly, Professor Trisolini argued that the CAA should not preempt state common law suits seeking damages, especially when the litigants seek only damages and no injunctive or declaratory relief.[551] After the Ninth Circuit's *Kivalina* opinion, it seems the relief distinction did not hold as much promise as many thought.[552]

Further, the Court may have simply noted its concerns to encourage the state courts to follow the federal courts' restrained approach. Plaintiffs bringing a state claim for monetary damages may have a strong argument that the USSC in *AEP* did not intend to restrict claims requesting monetary relief, but rather only intended its trepidation towards cases seeking an injunction from the federal courts.[553] In addition, the federal courts could remain involved by virtue of removal or the defendants being governmental parties.[554]

As I have discussed, the second wave of climate litigation has shifted litigants' attention to the opportunities offered by state laws and courts. The USSC has temporarily shut off the federal common law as an avenue toward climate reform. However, litigants may continue to bring public nuisance claims under state law in both state courts under their general jurisdiction and federal courts under diversity or supplemental jurisdiction. In fact, the state court avenue may prove more fruitful for the future of climate reform. Though state courts do often look to federal courts for guidance, many state court decisions adopt broader standards. These broader rulings allow claimants access in state

[550] *See ibid; see also* Meltz, *supra* note 410 at 8.
[551] *See* Trisolini, *supra* note 412 at 242.
[552] *See Kivalina*, DC No 4:08-cv-01138-SBA (finding that displacement applies equally to cases seeking injunctive more monetary relief).
[553] Though the Ninth Circuit made clear that if did not accept the relief distinction, state courts may still have an argument depending on the applicable state climate regulations.
[554] *See* Hester, *supra* note 505 at 76.

courts when the federal courts deny them through justiciability doctrines.[555] This is imperative for the second wave because it is characterized not only by a shift to state laws and state courts but also by a varied range of newly applied legal theories, including public trust.[556]

X: PUBLIC TRUST DOCTRINE

Here, I expound on the Public Trust Doctrine (PTD) as an important theory characterizing the second wave of climate litigation. First, I will supplement my brief introduction from Chapter One, illustrating the doctrine's flexible and holistic nature. Next, I argue the doctrine provides a strong platform from which to demonstrate to the courts that while the judiciary may not be ready for all types of climate litigation at common law, their wholesale refusal of climate change as a subject matter is both premature and shortsighted. After discussing the PTD's basics and potential, I explore the doctrine in action during the beginning of climate change's second wave. Litigants have appropriately focused most of their attention on the doctrine under state law. Accordingly, I focus on state actions as opposed to the minority of federal claims. Finally, I contend litigants should take heed of lessons learned throughout the Court's treatment of climate actions and focus litigation energy on a wider array of actions at the state and municipal level. I flag this suggestion, however, reminding litigants that while litigation is certainly an important tool in climate reform's kit, it is not the silver bullet and so litigants should not afford it the resources as if it were.

A. Basics of the Public Trust Doctrine

The PTD is a creature of state law, where each state applies its principles differently; making the doctrine one that has evolved within each state "in light of the

[555] *See ibid* at 67 (finding state courts' expanded access to remedies is notable with environmental claims under state constitutions and environmental rights statutes).
[556] I mean newly applied to climate actions, not that they are entirely new theories.

particular histories and the needs of each state."[557] Consequently, I will introduce the doctrine's basic principles to illustrate its applicability but note to potential litigants that the doctrine will vary by state.

1. Theory

There are two ends of basic theory of public trust. One end imparts public rights of use or access amounting to public ownership.[558] The other places a positive fiduciary obligation on public officials to preserve the subject of the trust for the benefit of the trustee. So while one aspect of the doctrine protects public use, the other protects public interest.[559] Here, the latter requires the government to consider the public's interest in the atmosphere when it acts or decides not to act. The public interest branch of the PTD is premised on the idea that certain resources are preserved for the public and that the government is required to maintain them for the public's reasonable use.

Any public trust, regardless of the resource, has three components. First the trust resource, which is not subject to private ownership but rather is held in trust. Second, the government authorities who as trustees are obliged to preserve the trust resources for the beneficiaries. Since the trust resources are generally intangible, the trustees must consider how their decisions and actions affect resource preservation. The trustee is held to the fiduciary obligation- the punctilio of an honour, to act in good faith for the best interest of the beneficiaries. Therefore, the trustee of an atmospheric trust would be: obliged to avoid acting on opportunities that may damage the resource; may be required to consider the resource in making these determinations; and may not deplete the resource in a way that harms the interests of the beneficiary. Finally, the beneficiaries are both current and future citizens who may hold trustees accountable for degradation of the trust resource. Since the trust is based on the idea of intergenerational equality, neither the

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[557] *See generally* Robin Kundis Craig, "A Comparative Guide to the Western State's Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust" (2010) 37 Ecology LQ 53; *see also* Robin Kundis Craig, "A Comparative Guide to the Eastern Public Trust Doctrine: Classification of States, Property Rights, & State Summaries" (2007) 16 Penn St Envt'l L Rev 1 at 113.
[558] *See Nollan v California Coastal Commission*, 483 US 825 and *Dolan v City of Tigard*, 512 US 374 (1994).
[559] *See* Michael Blumm "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision," 44 U of Cal Davis L R (forthcoming 2011) at 916.

trustees nor the current beneficiaries may use the trust resources at the expense of the future generation's entitlement.

USSC first adopted the PTD in 1892 in *Illinois Central RR v Illinois* to find navigable waters within a public trust and therefore not subject to private restrictions, but rather protected by the government for the public. Joseph Sax reignited the PTD to successfully extend the public trust to non navigable waters in the Mono Lake case.[560] Environmental policy makers and courts adopted the principles into water law regarding navigable waterways, water access, water quality standards and water rights, fish and wildlife resources, and recently, the atmosphere.[561] The USSC has further characterized the trustee's duty as one held "like all other power of government, as a trust for the benefit of the people and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good."[562]

Since its height after *Mono Lake*, environmental lawyers had not utilized the PTD to extend trust protection until Mary C. Wood's work revived the doctrine to argue for an atmospheric trust.[563] Several scholars point out that though the doctrine has had a huge impact in countless countries, it has had less of an impact in the US where it was born. They reason that judicial restraint may be one factor for this: judges are fearful of being labeled activist and seen as tyrannical, where as other countries with courts that have more confidence in their role do not have the same concerns.[564]

As noted above, the public trust has two ends, each providing an avenue by which public rights supersede private rights to the same resource. The public access branch

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[560] *See* Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68 Mich L Rev 471 at 558-66 (1970) (Sax's article resulted in the court finding a public trust. *See* Nat'l Audubon Soc'y v Super Ct of Alpine Co, 658 P2d 709 at 712 (Cal 1983) ("[t]he foundation of the PTD is the government's authority to supervise and control the natural resource that is the subject of the trust.")

[561] *See* Richard M. Frank, "Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future, The Symposium - The Public Trust Doctrine: 30 Years Later" at 665.

[562] *See Geer v Connecticut*, 161 US 519 (*overruled*, *Hughes v Oklahoma*, 441 US 322 at 529 (1979)).

[563] *See generally* Mary Christina Wood, "Nature's Trust: A Legal, Political and Moral Frame for Global Warming"(2007) 34 Boston College Envtl Aff L Rev 577; *see also* Mary Christina Wood, "Nature's Trust: Reclaiming an Environmental Discourse" (2007) 25 Virginia LJ 243; and Gerald Torres, "Who Owns the Sky?" (2002) 19 Pace Envt'l L Rev 515.

[564] *See* Jonathan Zasloff, "The Public Trust Doctrine: A Prophet without Honour" May 1, 2011, legalplanet.wordpress.com/2011/05/01/the-public-trust-doctrine-a-prophet-without-honour.; *see also* "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision," 44 U of Cal Davis L R (forthcoming 2011).

grants a public right of access regardless of private ownership, as in the case of water bodies. The public interest branch, on the other hand, justifies restrictions on private use in order to preserve ecological systems.[565] The latter explains how the PTD could effectively prevent private actions that harm the atmosphere, such as GHG emissions.[566]

Upon finding the atmosphere is a trust resource, the trustee government comes under a fiduciary obligation to preserve it for the benefit of the current and future population as beneficiaries. The trustee is generally entitled to determine how it will uphold this obligation. Practically speaking, the government's options include passing state legislation aimed at reducing GHG emissions and delegating some reductions authority to local and municipal governments. Since the doctrine provides the ability to severely burden natural resource use, legislation setting out the trust is essential to balance property rights with liberty and economic growth.[567] In addition to actively passing GHG regulations, the fiduciary obligation will require the state government to consider how its actions and inactions affect the atmosphere currently and in the future. The corollary to the state government's fiduciary obligation is the citizen's right to hold the fiduciary liable for failing to fulfill this obligation. By following this approach, a court is not directly setting policy in excess of its role, but rather is holding the government accountable to do so in a way it sees fit.

2. Bases

In the public interest branch of the PTD, the court relies on three sources to base the doctrine. Some courts have characterized the doctrine as founded in the state constitutional law while others have relied on state legislation. Some ground the doctrine in the nature of state's sovereign power, and finally some from its growth in common law.[568] Depending on applicable state's laws, the Court may use any one base or a combination to invalidate private action that places state public resources in jeopardy or

[565] *See* Blumm, *supra* note 559 at 917 and 925.
[566] *See ibid* at 918.
[567] *See ibid* at 925.
[568] *See* Frank, *supra* note 561 at 685; for example, California courts have found all bases serve as a foundation to the doctrine. *See also* Richard Frank, *The Public Trust Doctrine in CA Environmental Law*, Ch. 2, §2.04 (Matthew Bender, 2011).

state inaction that fails to protect it from harm.[569] Importantly, there has been a trend towards courts integrating common law public trust, state constitutional environ protection, and state statutes to protect environ as a matter of state law.[570] This combination undoubtedly provides a stronger and more integrated approach than merely relying on one base for the doctrine. The PTD as a creature of state law, so litigators must look to state law to determine how a particular state has defined the scope of its PTD, if at all.[571]

First, environmental organizations have focused attention on expanding common law from non navigable water ways as a resource to include the atmosphere. Alternatively, some claimants make a nuanced adjustment, arguing the atmosphere should be included in the definition of natural resource as a trust resource. Either way, the first base upon which to ground the PTD is to extend the common law duty some states already have in place to include the atmosphere is the first base upon which to ground a PTD. This may be the most controversial way, however, as critics argue that this is judge made law outside the scope of the courts' role. Additionally, courts may ground an atmospheric trust by finding in statutorily created environmental obligations. For example, Michigan's Environmental Protection Act extends the public trust to authorize legal actions "for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment or destruction."[572]

Finally, though the US Constitution does not address environmental rights, almost one half of state constitutions have expressly recognized environmental concerns as an overarching policy or ensure citizens rights to environmental quality.[573] Scholars urge that these state provisions possess unexploited opportunities to shape environmental law

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[569] *See generally* Alexandra B. Klass, "Modern Trust Principles: Recognizing Rights and Integrating Standards" (2006) 82 Notre Dame L Rev 699.
[570] *See generally ibid*.
[571] *See* Frank, *supra* note 561 (Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future) at 684; *see also Illinois Central RR v Illinois*, 146 US 387 at 461-62 (1982).
[572] Environ Protection Act 1970, Mich. Comp. Laws Ann. §691-1202(1) (West 1989).
[573] *See* James May and William Romanowicz, "Environmental Rights in State Constitutions" (2011) in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW, p. 305, James R. May, ed., American Bar Association, 2011; Widener Law School Legal Studies Research Paper No. 11-47. ("[N]early one-half of US states explicitly recognize either some variation of an environmental concern as an overarching state policy or purport to provide a basic civil right to a quality environment." (306)).

because courts discussing the PTD often rely on broad environmental provisions.[574] State constitutions address environmental concerns in a variety of ways: from a general policy of preserving natural areas, to control pollution, often to conserve and either protect, replenish, develop, or to manage, again illustrating these provisions potential.[575]

James May notes these constitutional environmental provisions have not been the subject of thorough substantive interpretation.[576] Accordingly, there is room for judicial advocacy to flesh out the scope of these rights. Should the court be receptive, this provides a ripe opportunity for growing the foundation of future climate reform. May hypothesizes that judges have avoided discussing constitutional provisions for a range of concerns.[577] These include: "recognizing and enforcing emerging constitutional features, to restraining economic development and property rights, to entering [] political thickets, and to providing causes of action that may displace other legislative prerogatives granted to affected persons, such as state citizen suits to enforce state pollution control requirements."[578] These concerns resemble some of those voiced at the federal level; however, as discussed above the state courts tend to feel less restricted by the separation of powers and strict justiciability concerns imposed under the federal constitution.[579]

Though state constitutional provisions provide a base in which to ground state PTD actions, substantive issues remain and state courts are split over whether they may enforce environmental rights without legislative implementation.[580] Importantly, grounding a PTD in a constitutional right allows the most legitimacy, security, and longevity for the doctrine. If a court finds that the public trust is based in the constitution, it constitutionally limits legislative power to act in a way that harms the resources held in

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[574] *See* Alexandra B. Klass, "Modern Trust Principles: Recognizing Rights and Integrating Standards" (2006) 82 Notre Dame L Rev 699 at 746 ("approach conveys a strong sense of need for an ecology based approach to resource protection, and...relationship between humans and their environment."; *see also* May and Romanowicz, *supra* note 573 at 305.
[575] *See* May and Romanowicz, *supra* note 573 at 306-07.
[576] *See ibid* at 307.
[577] *See ibid* at 307.
[578] *See ibid*.
[579] *See generally* Robert A. McLaren, "Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation" (1990) 12 U Haw L Rev 123 at 149; *see generally* James R. May & Erin Daly, "Vindicating Fundamental Environmental Rights Worldwide" (2009) 11 Or Rev Itl L 365.
[580] *See* May and Romanowicz, *supra* note 573 at 301-13 (substantive issues include whether the right is self executing, the nature of the right, the scope of the right, whether it concerns the anthropogenic or biocentric environment, who is entitled to vindicate these environmental rights, and for that matter against whom, and the nature of the remedy available whether it be equitable, declaratory, or damages, the standard of review of the right).

trust for the public.[581] As a constitutional limit, it would be difficult for the state legislature to destroy this interest without amending the constitution.

Several states have constitutional provisions in place to protect citizen's rights to natural resources and rights to a clean environment. For example, Montana's Article IX, Section 1 provides: the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations; (2) the legislature shall provide for the administration and enforcement of this duty; and (3) the legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.[582] Meanwhile, Pennsylvania's Article 1, Section 27 expounds two important principles.[583] First, citizens of the state hold rights for their environment's preservation. And second, the state government holds trustee responsibilities to protect that environment on behalf of future generations.[584]

Further, Hawaii's Article XI, Section 1 requires the State and its municipal counterparts to actively conserve the environment and promote future use consistent with conservation goals. In 1979, the state amended its constitution to declare its position as trustee of Hawaii's natural resources for the people's benefit.[585] Finally, Illinois included in its constitution a section imposing a duty on both the state and individuals to preserve and maintain a healthy environment for the current and future generations. The article charges the general assembly with enabling these duty holders to implement and enforce

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[581] *See* Klass, *supra* note 569 at 733.
[582] *See* Montana Constitution, Article IX, Section 1
[583] *See* Pennsylvania Constitution, Article 1, Section 27, Amended 1972, "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."
[584] *See ibid*; *see also Payne v Kassab*, 312 A.2d 66, 93 (Pa. Comm W Ct. 1973) (relying on both the public trust doctrine and the Pennsylvania Constitution to extend responsibility to preserve "clean air & [] the natural, scenic, historic, and esthetic values of the environment.")
[585] Hawaii, Article XI, Section 1 "For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State; *see also* [Add Const Con 1978 and election Nov 7, 1978] requiring All public natural resources be held in trust by the State for the benefit of the people.

the section, and even provides a private cause of action to enforce this right.[586] These states are not alone in their constitutional provisions, and the number is growing.[587]

B. The Public Trust Doctrine's Ability to Change Court's Vision of Climate Litigation

1. The Public Trust Doctrine is a Flexible and Holistic Platform for Reform

The PTD has taken center stage in the second wave of climate litigation. Both public nuisance and public trust actions aim towards protecting the public interest from harmful private actions. Claims under public nuisance, however, have faced substantial obstacles in the first wave of litigation. At the beginning of the second wave, the PTD's characteristics provide greater opportunity for litigants to reach their goals through litigation. First, the doctrine is flexible enough to extend the trust to include the atmosphere as illustrated by its evolving past. Second, the PTD provides courts with more holistic remedial options than does a claim for public nuisance. I will discuss these two characteristics in turn.

Regarding flexibility, the principles underlying the PTD make it appropriate for Courts to expand the concept to include an atmospheric trust resource.[588] Both scholars and courts have characterized the PTD as a flexible doctrine, which "by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances."[589] The doctrine's history itself illustrates its flexibility.[590] This

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[586] Illinois Constitution article XI, s.1. : The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy. Section 2: Rights of the Individual: Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

[587] Colorado Constitution , Article XVIII, Section 6; Florida Constitution , Article II, Section 7; Idaho Constitution, Article XI, Section 2; Louisiana Constitution, Article IX, Section 1; Michigan Constitution, Article IV, Section 52

[588] *See* Lin, *supra* note 512 at 1081-82.

[589] *See in re Water Use Permit Applications*, 9 P3d 409 at 447 (Haw. 2000); *see also New Jersey Supreme Court v Matthews* 471 A2d at 365 (1984) quoting *Borough of Neptune City v Borough of Avon-by-the-Sea*, 294 A2d 47 at 54 (NJ 1972) ("[a]rcane judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of th e public it was created to benefit.'"); *see also Weden v San Jaun Co*, 958 P2d 273 at 283 (Wash. 1998) (characterizing the PTD as a "flexible method for judicial protection of public interests…").

characteristic was a factor in the *Mono Lake* Court's decision to extend the doctrine from navigable waterways to include non navigable waters. The Court acknowledged the doctrine's flexible nature by stating its objectives have "evolved in tandem with the changing public perception of the values and uses of waterways."[591]

Scholars argue expanding the PTD to include or create an atmospheric trust is appropriate for several reasons. First, this would not be a radical change as the atmosphere already shares characteristics with other public trust resources like water as it defies division into distinct parcels subject to exclusive individual ownership and people depend on its maintenance for life.[592] Further, proponents of extending the PTD to include the atmosphere respond to critics by noting that the atmosphere poses no material difference in regulating from waters as extended in *Mono Lake*: both are diffuse, move freely between borders, serve as channels for commerce, and are integral to the health of the population as well as nature and wildlife.[593]

Moreover, the PTD operates differently than a remedy for public nuisance. The PTD in a more holistic remedy that I predict Courts may find more hospitable to their legitimacy concerns. Once a court declares a trust obligation, it can craft a declaratory judgment setting forth these principles: then everyone would understand the government's responsibility and be able to hold it accountable to act.[594] A judge can also order an "accounting" against any level of government. This means government would have to measure its carbon footprint and then show the court it is reducing the footprint in

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[590] *See* David C. Slade, *The Public Trust Doctrine in Motion* (2008).
[591] *See Nat'l Audubon Society v Superior Court of Alpine County* 658 P2d 709, (1983); *see also* Munro, Gregory S., The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana (2012). 73 Mont. L. Rev. 123.
[592] *See* Blumm, *supra note* 559 at 926.
[593] *See* Munro, *supra note* 591 at 143-44, 159 ("[b]y their nature, common law doctrines in general and the public trust doctrine in particular are flexible enough to accommodate extensions of the law to fit the needs of society"); *see generally also* Douglas Grant, "Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad" (2001) 33 Ariz St LJ 849 ("[i]t is true that in contrast to the waters and beds of navigable streams, a state does not own the air. But the lack of governmental ownership should not prevent extension of the public trust doctrine to the air. There are cases containing language that suggests state ownership of natural resources is not a prerequisite for applying the reserved powers doctrine. In *Stone v Mississippi*, […]the Court said: "No legislature can bargain away the public health or the public morals. . . . The supervision of both these subjects of governmental power is continuing in its nature . . . . [T]he power of governing is a trust committed by the people to the government, no part of which can be granted away.")
[594] *See generally* Mary Christina Wood, "Nature's Trust: A Legal, Political and Moral Frame for Global Warming (2007) 34 Boston College Envt'l Aff L Rev 577.

accordance with its fiduciary duty.[595] So the court would not be determining how the government would accomplish these reductions, rather the elected branches would determine how best to meet their obligations. If the government then failed to fulfill its responsibilities, the doctrine would provide a way for the public to hold government accountable. Additionally, a Court can also apply injunctive backstops to ensure governments act in accordance with their responsibility.[596] Therefore, a PTD remedy functions by allowing a court to hold the government to an obligation to protect the public by preserving their interests in the atmosphere. But it does not mean that the court tells the state how to go about fulfilling its obligation.[597]

A PTD need not operate under one base. Rather, integrating common law public trust principles with strong legislation complement each other and provide crucial policy direction to the trusts' principles. Working off of mutually reinforcing bases rather than just one, for example, would allow a court to provide judicial review in cases where there is no statutory right of action.[598] Additionally, grounding a trust in a constitutional right would arguably provide a means for redress upon government actions inconsistent with the public's best interests in the atmosphere even in the absence of a statutory right. Thus, the PTD's integrated nature allows it to work cooperatively with the statutory and regulatory standards to provide incentives to preserve the environmental trust resources.[599]

2. These Characteristics Should Encourage the Court to Realize Its Role In Climate Reform

The PTD's comprehensive principles led Joseph Sax to characterize the PTD not a set of standards, but rather is a technique for courts to mend "perceived imperfections" in the political process.[600] I follow this claim, finding that the PTD's resurgence in the

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[595] *See ibid*.
[596] *See ibid*.
[597] *See* Blumm, *supra* note 559 at 929, ("[a]n extension of the public trust to the atmosphere would not mandate exclusive public ownership of productive assets; rather, it provides a rationale for legislation to shape private actions, safeguard environmental health, and call upon courts to permit or encourage the adjustment of private rights necessary to achieve indispensable public ends.")
[598] *See* Klass, *supra* note 569 at 701, 748.
[599] *See ibid* at 744-45.
[600] *See* Sax, *supra* note 560 at 509, 521.

second wave poses similar potential to reform the courts' aversion to climate litigation. Even in 1970, Sax was critical of how judges' used of threshold theories to avoid problematic policies before the court.[601] Working towards his goal of including non navigable water in the public trust, Sax aimed to use the PTD as an "important and poorly understood medium for better obtaining that wisdom that leads to intelligent public policy."[602] Sax's approach to environmental policy reform is just as imperative today as it was 40 years ago. As I discussed in Chapter One, climate change is occurring, it will affect populations across the globe, and for the most part governments have failed to address these problems.

The Court's decisions during the first wave of litigation were driven by its reluctance over the appropriateness of common law adjudication as a vehicle to address climate change. This is a cop out. The Court has merely eluded difficult decisions and unpopular rulings by focusing its decisions on traditional notions of jurisdiction, which it believes is a less controversial way to avoid judicial involvement in climate litigation. Rather than deal conclusively with justiciability, providing clarity to litigants, the court has used threshold doctrines as a tactic to postpone difficult decisions to a time where the Court's legitimacy will be less at stake because the need to act on climate change will be clear. Some reluctance is understandable in public nuisance cases because of their technical and controversial issues. However, the PTD illustrates that there are in fact judicial doctrines that could be harnessed to appropriately deal with climate change in the courts.

The second wave of climate litigation and the public trust may succeed in illustrating to the courts that the judicial branch is an appropriate forum to redress climate harms. This approach provides the courts with a remedy that allows them to avoid the task of setting a reasonable level of GHG emissions, determining whether and by how much the defendant exceeded that, and determining causation and damages as a public nuisance based request for injunctive relief does. Rather, in a less interventionist way,

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[601] *See ibid* at 558 ("[i]t should be obvious that courts operate with extraordinary degree of freedom and that the procedural devices they employ are very significantly determined by their attitudes about the propriety of the policies which are before them.").
[602] *See ibid* at 557-58.

the PTD essentially asks a court to hold the government to its obligations to act adequately to protect the atmosphere in trust for current and future generations.

Taking a step back, William Araiza offers a nuanced view of the PTD's function that I find could ease the anxiety over judicial decision making. He addresses criticism that expanding the PTD leads a court to embrace a judicial role outside of its authority by suggesting a broader view of the doctrine. Under Araiza's view, courts would treat it as a "canon of construction rather than a freestanding, legally binding, legal principle."[603] As he explains, the "protected status of public trust values, and government obligation to protect those values, would take the form of a background principle against positive legislation and administrative actions are construed and reviewed."[604] Under this view, the PTD wouldn't be an independently legally binding cause of action, but would act as an interpretive aid. Beneficiaries would have an independent cause of action only once there was a trust resource, an obligation, and a failure to live up to the obligation. Arazia explains his version of the doctrine as accurately reflecting, "the force of the doctrine as a normatively attractive, deeply rooted, but ambiguously grounded legal principle that raises legitimate concerns about the role of the judiciary."[605] This view would likely satisfy concerns of even conservative justices over the potential for climate claims to bring the judiciary outside its traditional role.

As I introduced above, the PTD is a flexible and holistic doctrine as opposed to the public nuisance doctrine previously relied on in the first wave. The doctrine supplies a court with a remedial role it may feel more comfortable with. This is because it allows a court to determine whether the atmosphere falls within the public trust such to oblige government action to protect it, but the leaves policy making over the appropriate regulation to the state governments. I argue that the federal courts should take this opportunity to realize their role in climate litigation and step out a bit from behind the curtain of reluctant rulings focused on threshold issues. In addition, the doctrine could prove more powerful than public nuisance in regards to environmental litigation for four

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[603] *See* Araiza, William D., The Public Trust Doctrine as an Interpretive Canon (May 22, 2012). 45 U.C. Davis L. Rev. 693 (2012); Brooklyn Law School, Legal Studies Paper No. 280 at 698 (*discussing* Richard Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine" (1986) 71 Iowa L Rev 631 at 656-715.
[604] *See ibid*.
[605] *See* Arazia, *supra* note 603 at 698.

reasons. It is quasi constitutional, not subject to displacement, and more open to assertion by members of the public. Moreover, it more "fully captures the fundamental idea that government has an obligation to protect the environment for the benefit of the public, now and into the future."[606] Either way the courts consider these principles, declaring an atmospheric public trust would productively empower judges to use familiar legal tools to require governments to consider how their action and inaction affects the resource they are under a duty to protect.[607]

C. Current Public Trust Atmospheric Litigation

Growing tired of the federal governments' failure to act in the area of climate change, Mary C. Wood began researching the power of the PTD to impose fiduciary responsibilities on the government to preserve the atmosphere. Her articles, inspired by Joseph Sax's work on the PTD years earlier, set out the theories on which a group of environmental lawyers under the umbrella organization Our Children's Trust ("OTC) built a coalition aimed at finding an atmospheric trust.[608] Wood reasons that expanding the PTD shifts the entire paradigm of climate regulation because it demands that each level of government act to protect public and consequently the atmosphere on which they rely. She characterizes the current US government's resource management framework as based on a permit system that fails to adequately address modern environmental concerns because it is focused on political needs, expediency, and short term interests in resource extrapolation. Expanding the PTD would remedy this spiral toward a climate crisis because the fiduciary obligation would not be fulfilled by a focus on political or monetary gain, but rather the needs of the population as a whole.[609]

Based on Wood's theory, in May 2011 Our Children's Trust filed administrative proceedings with state environmental agencies across the nation requesting the state adopt legislation to reduce GHG emissions. The OTC based their petitions on the PTD

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[606] *See* Lin, *supra* note 512 at 1097.
[607] *See* Blumm, *supra* note 559 at 927.
[608] *See* Mary Christina Wood, "Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift" (2009) 39 Environ Law.
[609] *See ibid* at 54-61

and argued on the basis of intergenerational equality that an atmospheric trust obliges the states to preserve the atmosphere for the benefit of the current and future population.[610] Iowa's Department of Natural Resources was among the first to deny the OTC's petition.[611] Several states soon followed suit and the trust was then able to bring judicial review actions to obtain judgments from the courts over each state's potential adoption of an atmospheric trust.[612] Since then, the coalition has filed numerous claims in federal courts as well as in all 50 states.[613]

1. Federal Claims

On the federal level, Judge Wilkins of the District Court for the District of Columbia dismissed *Alec L v Lisa Jackson* on two alternative grounds.[614] First, he found the PTD is a creature of state not federal law, leaving the court without original jurisdiction to hear the case. He found in the alternative that even if the PTD were a creature of federal common law, the EPA's authority to regulate would displace the common law under *AEP*.[615] Judge Wilkins' language choice is notable here because he did not need an alternative ground to dismiss the case but still chose to cite *AEP* for the first time as authoritative on the issue. As of yet, no further federal courts have issued decisions.[616]

2. State Claims

As noted above, the OTC has filed public trust actions in each state. Only a few courts have reached a decision, however, and have done so with varying results. In *Sanders Reed v Martinez*, Judge Singleton denied Defendants' Motion to Dismiss thereby allowing Plaintiff's public trust action against the New Mexico Government to

[610] *See* Ourchildrenstrust.org/page/31/legalaction.
[611] *See In re Kids v Global Warming* (Iowa Dep't of Nat. Resources, June 22, 2011).
[612] Ourchildrenstrust.org/page/31/legalaction.
[613] Ourchildrenstrust.org
[614] *See Alec L v. Lisa Jackson,* No x-11-2203 EMC.
[615] *See ibid.*
[616] See Arnold Palmer Climate Case Chart- Chart #44, September 2012 update.

proceed.[617] The judge's order did not address the PTD but stated that Plaintiffs made a substantive allegation that the legislature's process of setting air quality standards "had gone astray" such that the state was ignoring the atmosphere in its consideration of GHG emissions.[618] Preemption will be the most relevant issue going forward with this case, as the court will likely have to answer Defendant's arguments that the CAA preempts state regulation, thereby relieving them of the ability or obligation to legislate GHG reductions. Though state regulations do not conflict with the federal CAA so long as the state is only seeking more stringent but not conflicting regulations, only time will tell how each court will rule.[619]

Next, in *Angela Bosner-Lain, et al v Texas Commision of Environmental Quality* the Texas Commission of Environmental Quality (TCEQ) had denied Plaintiffs' petition for rulemaking regarding GHG emissions.[620] In response, Plaintiffs sought judicial review arguing that the PTD obliged the Texas Government to regulate emissions for the atmosphere's preservation and care. At trial, the Court relied on both environmental provisions in the Texas Constitution and the Texas CAA to ground the PTD's application to the atmosphere. First, the Court found that the constitution incorporates the public trust obligation because it: 1) protects "the conservation and development of all the resources in the state;" 2) declares conservation of those resources "public rights and duties" and; 3) directs the legislature to pass appropriate laws to protect these resources. Secondly, relying on statutory law, the Court found the Texas CAA to be an additional ground of the TCEQ's authority to act "to protect against adverse effects including global warming."[621] The Court's reliance on not only one but two bases to ground the PTD's expansion to the atmosphere signaled a strong turn towards finding a governmental

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[617] *See Sanders-Reed v Martinez*, NM Dist Ct No D-101-CV-2011-1514, Final decision July 14, 2012 (Plaintiff sought to compel state of NM to recognize the application of public trust to the atmosphere to require it to act to regulate and reduce GHG emissions.)
[618] *See ibid; see also* William A Ruskin, "Plaintiffs Add 'Public Trust' Doctrine to the Tool Box," Lexocology, (2012) 27 TXLR 815.
[619] *See Angela Bosner-Lain, et al v Texas Commission of Environmental Quality,* Case # D-1-GN-11-002194) (finding that the TCEQ's finding that the PTD was exclusively limited to the conservation of water was invalid under judicial review, but ultimately upholding the commissions discretion to deny a petition for rulemaking).
[620] *See ibid*.
[621] *See ibid*.

obligation at the state level to protect the public from harms caused to the atmosphere by GHG emissions.

Although Judge Gisela Triana found all natural resources are protected by the public trust and further by Texas' Constitution, this was merely dictum.[622] The last sentence of the court's final judgment held that "in light of other state and federal litigation, the Court finds that it is a reasonable exercise of [the Commission's] rulemaking discretion not to proceed with the requested petition for rulemaking at this time."[623] The Court's dictum endorsed an expansion to the atmospheric trust but was not willing to require action in such a political issue. Rather, its decision to rely on the Commission's discretion even when the court had found its reasoning legally invalid was effectively a dismissal, in not as many words. Though this was an unfortunate result for climate litigants, judicial recognition of the PTD's application to the atmosphere is a huge step forward in the second wave's advance. Moreover, this dictum shows the creativity and endurance of litigants and willingness of some judges to at least acknowledge that courts may have a role to play. Though these two cases returned relatively positive results for climate reform, Phillip Blum hypothesizes that more reluctant states will likely await their appeal before taking further action.

Proving that state court reception of the PTD claims has been varied, the Oregon Trial Court dismissed a state level public trust case.[624] Plaintiffs argued Oregon's existing GHG legislation had inadequate goals that resulted in the state failing in its obligation to adequately protect the atmosphere as a public trust.[625] The trial court rejected this argument on several grounds. First, the Court found that the proposed remedy (to order strengthened regulations) would exceed the Court's authority under the Declaratory Judgment Act because it would require the Court to "extend the law by creating a new duty rather than by reinterpreting a pre-existing law."[626] This argument seems to have a better shot in states without GHG regulations in place. Or, instead of attacking the wisdom of the legislation directly, perhaps plaintiffs could request courts to

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[622] *See ibid*.
[623] *See ibid*, Final Order August 2, 2012.
[624] *See Chernaik v Kitzhaber*, case No 16-11-09273, Lake County Circuit Ct, Oregon, April 5, 2012 [*Chernaik*].
[625] This case found that Oregon has adopted GHG regulations. *See* ORS 486A, 205(1).
[626] *See generally Chernaik*, No 16-11-09273.

require periodic scientific studies and reports to find that the regulations are still doing enough and if found to not be doing enough, then a court could order the state to fix it.[627] Second, the Court held that separation of powers barred Plaintiffs' claim.[628] It noted that what the Court feels about the merit of the GHG regulations is beside the point and the wisdom of the regulation is not a proper judicial function.[629] Third, the Court found the political question doctrine barred the claims on the bases that Plaintiffs' request for the Court to cap GHG levels at their recommendation is a function for the legislature. The legislature in this case had already set a policy decision and followed through on passing the legislation.[630]

Again under OTC's umbrella, 12 Montana youth filed *Baraugh v Montana* in response to Montana's failure to regulate GHGs upon strong recommendation to do so by the State's Climate Change Advisory Committee.[631] Plaintiffs filed the petition invoking the Supreme Court's original jurisdiction to hear constitutional issues of major import in urgent circumstances that render the normal litigation process inadequate. Specifically, they requested the Court find an atmospheric trust with the affirmative duty to protect and preserve the trust resource, including by establishing GHG regulations to limit emissions.[632] Plaintiffs' decision to file a petition for original jurisdiction with the state supreme court as opposed to the trial court was strategic beacause it was the most efficient way to hopefully return a declaration within 60 days that the State was indeed responsible under the PTD for protecting the atmosphere.[633] Likely motivated by reluctance to become involved or perhaps even the Court's distrust of the Plaintiffs' tactic,[634] the Court denied Plaintiffs' petition, dismissing the action on procedural

[627] *See ibid* ("[j]udges are not supposed to challenge the wisdom of the legislation themselves, but can ensure that the government is in fact fulfilling its obligation.").
[628] *See ibid*.
[629] *See ibid*.
[630] *See ibid*.
[631] *See Baraugh v Montana* at 1.
[632] *See ibid* at 16.
[633] *See generally* Gregory Munro, "The Public Trust Doctrine and the Montana Constitution as a Legal Basis for Climate Litigation in Montana" (2012) 73 Mont L Rev 123 at 158 (article responds to Montana Supreme Court's denial of original jurisdiction in *Baraugh v Montana*).
[634] *See ibid* (noting that this case was the only one out of over 50 cases in the ATL that was brought on original jurisdiction).

grounds.[635] The Court pointed Plaintiffs to the district court to re-file under the federal courts' limited jurisdiction.[636]

Climate cases, even under PTD principles, have and will continue to face an uphill battle, mostly because judges are reluctant to get too involved in a technical and politically sensitive matter. But as I have argued, the PTD poses great promise as an avenue to show the court that it is an appropriate venue to address climate change.

D. The Second Wave's Promising Future

The doctrine's future growth will depend on how courts see the jurisprudential source. For example, if a court bases an atmospheric trust in constitutional law, the doctrine will be better able to withstand legislative challenges. This is because legislators will be restricted in modifying the government's constitutionally based obligation to protect the atmosphere.[637] Citing Justice Ginsburg's comments in *AEP* that characterized climate change as beyond judicial capacity, scholars express concern that the USSC would not likely accept authority to order reductions in emissions without legislative direction and administrative support. But I urge readers to note an important distinction. Justice Ginsburg expressed these concerns in response to a public nuisance claims, which would effectively require the court to set a standard of reasonable emission against which to judge defendants' actions an act criticized as legislating from the bench. The public trust requests a different remedy. Instead of setting an emissions standard, the court in a public trust claim would not have to take such a controversial role. Rather, a court could find a remedy in a less direct way by finding a government's obligation to preserve it. How the government acts to preserve it is then up to the elected branches themselves- and they can delegate that out to a group with more expertise. This is not the same concern, which leads me to argue that public trust may just be the platform that illustrates to judges that they may be an appropriate forum for climate litigation. Moreover as Edith Brown Weiss notes, environmental government regulations have for years made a

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[635] *See ibid*.
[636] *See ibid*; Several other state courts have dismissed OTC actions, for example Alaska (*Kanuk v Alaska Dep't of Nat'l Resources*, Case No 3AN- 11-0747CL1AK, Super Ct Mar 16, 2012); and Washington (*Stivak v Washington*, Case No. 11-2-16008-4-Sea, (King Co Super Ct Feb 29, 2012)).
[637] *See* Frank, *supra* note 561 at 686.

Faustian bargain in that it has exchanged its environment for the economic prosperity built on exploiting natural resources. Incorporating the atmosphere into the public trust will address this by requiring state governments to refocus the goals of state environmental legislation.[638]

The federal government has failed to pass comprehensive climate reform and instead solely relies on the CAA. So the gaps in regulation abound and make it effectively impossible for the US to reduce emissions to the threshold level. Public trust principles operate to fill these gaps by protecting the atmosphere as a trust resource, and then ordering action consistent with the government's fiduciary obligation. This would allow the judiciary to shape a path to more comprehensive regulation while eluding the judiciary's concerns posed by public nuisance. Moreover, the PTD would provide a more integrated approach because a court could rely on the public trust doctrine "along with statutory and constitutional policies and standards."[639]

Throughout Chapter Three, I have introduced the second wave of climate litigation as a shift to more varied state claims in both state and federal forums. Because litigants could benefit from lower threshold requirements, this shift could provide the catalyst to move climate cases beyond arguments over threshold justiciability doctrines towards the merits. I also discussed the PTD's application to find an atmospheric trust. Due to its flexible and comprehensive nature, the PTD provides an opportunity for litigants to show courts that there are some climate cases capable of judicial resolution. Accordingly, if the judiciary can set its reluctance aside to consider the PTD as an organizing principle for society, the doctrine will prove critical to "defin[e] and remind[] the government of its role as a fiduciary and guarantor for the interests of the public."[640]

CONCLUSION

Litigation is necessary but not sufficient complement to other avenues to reform. Though macro level international agreements can prove daunting as seen by Rio +20,

[638] *See* Edith Brown Weiss, "Our Rights and Obligations to Future Generations for the Environment" (1990) 84 Am J Intl L 198 at 206.
[639] *See* Klass, *supra* note 569 at 753.
[640] *See generally* Lin, *supra* note 512.

these meetings enable international and state level leaders of all types to come together and discuss common goals. Even if these leaders do not come to one agreement, these discussions move climate reform because the participating governments and private entities return home with new goals and implementing strategies. Moreover, additional avenues including regional agreements, voluntary corporate action and CSR, and individual changes at the local level provide immense opportunities for advancing reform, but these methods would benefit from supporting legislation and an avenue for enforcement. Though a comprehensive federal regulatory scheme is desirable, it does not seem likely in the coming future. Therefore, I assert climate litigants efforts would be more efficiently spent focusing reform through each avenue in regional, state, and local courts and governments. I am not alone in this suggestion.[641]

As noted, enforceability and redress through the judicial branch remains imperative to advancing climate reform. That being said, climate litigation should not and could never take the place of congressional reform on GHG emissions. Courts are not properly equipped to make a reasoned federal regulatory scheme. This is simply not their purpose. Rather, climate litigation must be viewed as one tool in reformers' kits. Litigation provides an opportunity to advance theories of liability and new ways of thinking about responsibilities, as well as enforce and provide redress for harms caused by these failures.

As I have discussed throughout this paper, deliberate decisions in transformative cases such as *AEP* have led myself and other scholars to note that the Courts have taken "measured approaches to the epic issues before them, reserving for a later day key issues." Future litigants must consider this general approach in determining the most efficient ways to proceed in affecting climate reform. More specifically, the Court's first wave decisions have shaped a path to litigation that enables states in their *parens patraie* capacity to have the greatest change at advancing past threshold standing requirements. The status as private litigants and whether there is room for a distinction between public nuisance cases requesting injunctive or monetary relief. Since *AEP*, however, climate

[641] For discussion regarding local climate law, *see generally* Benjamin Richardson., *Local Climate Change Law: Environmental Regulation in Cities and Other Localities* (Edward Elgar Publishing, Cheltenham, 2012); xviii; 401 pp.

litigation has turned the tide to its second wave in which claims move towards those arising under state law, specifically the PTD.

Accordingly, I contend litigants should take heed of lessons learned throughout the Court's treatment of climate actions and focus litigation energy on a wider array of actions such as the public trust doctrine at the state and municipal level. I flag this suggestion, however, reminding litigants that while litigation is certainly an important tool in climate reform's kit, it is not a silver bullet and so litigants should not afford it the resources as if it were. Rather reform advocates should take lessons from the shift from the first wave in federal jurisdiction to the second, which has shifted to states and local jurisdictions. At a time where climate change is no longer an eventuality, future possibility, or prediction, but is occurring now, action is required of every person, every court, and every legislature for now and for the future to prevent harm and preserve our environment for future generations.[642]

[642] *See* James Hansen, "Climate Change is Here- And Worse Than We Thought" (op ed) Washington Post August 3, 2012); *see also* Roger Kennedy (forward in Burns H Weston & Tracy Bach, "Recalibrating the Law of Humans with Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice" (2009) x Vt L Sch & U Iowa ("[a]ction is required of everyone, every jurisdiction, every court, every legislature- and across time- long a very long 'now'"); *see generally* Weiss, *supra* note 638.

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