



What is the Political Question Doctrine? The political question doctrine is grounded in the separation of powers provided for in the U.S. Constitution. When another branch of government is better suited to address an issue, a court may resort to the political question doctrine to deem a matter nonjusticiable. In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Supreme Court outlined six factors that a court should consider in assessing whether a case should be dismissed for presenting a political question: (1) “a textually demonstrable constitutional commitment” to a coordinate political branch of government, (2) lack of judicially discoverable and manageable standards for resolving it, (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial determination, (4) impossibility of a court’s resolution without expressing lack of respect for the other branches of government, (5) an unusual need for “unquestioning adherence to a political decision already made, or (6) the possibility of multiple differing pronouncements from different branches of government on the same issue.

2. The Three Recent Cases. The three recent rulings involving nuisance claims are *State of Connecticut v. American Electric Power Co.*, (2d Cir. Nos. 05-5104-cv, 05-5119-cv, filed Sept. 21, 2009) (“*AEP*”), *Native Village of Kivalina v. ExxonMobil Corp.*, (N.D. Cal., No. C 08-1138 SBA, filed Sept. 30, 2009) (“*Kivalina*”), and *Comer v. Murphy Oil Co.*, (5<sup>th</sup> Cir. No. 07-60756, filed Oct. 16, 2009) (“*Comer*”). *Kivalina* was a District Court decision dismissing an action based on the political question doctrine and standing grounds. *AEP* and *Comer* were both from Courts of Appeal decisions reversing District Court dismissals of actions based on the political question doctrine; both of these Courts of Appeal additionally found that the plaintiffs had standing. *Kivalina* has now been appealed to the Ninth Circuit Court of Appeals, and the defendants in the *AEP* and *Comer* cases have filed motions with their respective courts of appeals for rehearing en banc. This report addresses the situation as it stands with the Northern District’s dismissal and the panel opinions of the Second and Fifth Circuits.

*AEP*. In *AEP*, a number of states and some land and open space conservancies brought suit under the federal common law of nuisance and alternatively the state law of nuisance. The District Court, asserting that the nuisance theory the plaintiffs articulated was “unprecedented,” dismissed the complaints based on the political question doctrine, citing in particular the third *Baker v. Carr* factor (that the plaintiffs’ claims were impossible to decide “without an initial policy determination of a kind clearly for nonjudicial discretion”). The Second Circuit Court of Appeals reversed. It found that public nuisance and

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the federal common law of nuisance could extend to the plaintiffs' claims despite the complex route of causation involved. And it relied on precedent to the effect that where a case involves "an ordinary tort suit, there is no impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion" (internal quotations omitted). Moreover, the Court noted, if there were a later policy determination by a coordinate branch – specifically, regulation by EPA or direct Congressional legislation on the question – such actions could displace the application of federal common law.

*Kivalina*. In *Kivalina*, the governing body of an Inupiat Eskimo village of 400 (a federally recognized Indian tribe) and the City in which the villagers reside brought an action under the federal common law of nuisance as well as under applicable state law of public and private nuisance against twenty-four oil, energy and utility companies for damages from global warming due to excessive emissions of greenhouse gases. The plaintiffs alleged that due to an already developing loss of sea ice which previously protected the village from storms and wave surges, they would be forced to abandon their traditional home and way of life, and sought damages relating to this harm. The District Court ruled that the federal common law cause of action presented a nonjusticiable political question based upon *Baker v. Carr*'s third factor, and found that the plaintiffs lacked Article III standing, and it then dismissed the additional state law claims. The District Court explicitly disagreed with the reasoning of the Second Circuit in its recently filed *AEP* opinion.

*Comer*. In *Comer*, a group of Mississippi Gulf Coast residents filed a putative class action in District Court based on Mississippi's law of public and private nuisance, relying on the District Court's diversity jurisdiction. The District Court dismissed the complaint on the basis of political question and standing. The Fifth Circuit Court of Appeals reversed on both points. With regard to the political question doctrine, the Court wrote that the doctrine should not be invoked simply "to abstain from deciding politically charged cases like this one," and found instead that the District Court had a duty to exercise jurisdiction unless the moving party can identify a constitutional provision or federal law that arguably commits a material issue in the case exclusively to a political branch." Noting that the Supreme Court has only dismissed two cases as presenting political questions since *Baker v. Carr*, and that a "federal court's dismissal of litigation between private citizens based on state common law, as presenting a nonjusticiable political question, has rarely, if at all, been affirmed by a federal court of appeals," (citations and internal footnote omitted), the Fifth Circuit panel found that political question considerations did not warrant dismissal. (The *Comer* complaint added an additional level of complexity in

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that they sought recovery for damages to their property due to Hurricane Katrina, on the theory that the GHG-induced climate change had caused or contributed to the severity of that event. One of the members of the panel indicated that he would have favored dismissal of the complaint on this alternative ground had the panel chosen to address it.)

### **How Do EPA's Recent Actions Affect the Prospects for These Cases or Others Like Them?**

As noted above, nuisance actions can be grounded under state law or federal common law. The Second Circuit panel in *AEP* reinstated the complaints at issue there insofar as they relied on the federal common law; the Fifth Circuit panel in *Comer* upheld a complaint based on Mississippi state nuisance law. Going forward, this could make a difference.

*Displacement v. Preemption: What Is the Difference?* In a series of cases involving water pollution that will likely be of significance in these GHG nuisance cases, the Supreme Court addressed the role of the federal common law, state common law, and federal statutes and regulation. Two appear particularly significant.

In *Illinois v. Milwaukee*, 406 U.S. 91 (1971) ("*Milwaukee I*"), the State of Illinois sought to bring suit challenging the City of Milwaukee's practice of dumping raw sewage into Lake Michigan on the ground of public nuisance. The Court noted that the Federal Water Pollution Control Act did not provide Illinois with a remedy, but concluded that this did not mean there was no remedy to be had. Looking to prior cases of its own and lower federal courts, the Court recognized that a federal common law of nuisance should apply to address the claim: "It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution." Accordingly, the Supreme Court stated that Illinois could seek a remedy in the U.S. District Courts, and Illinois did so.

In *Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), the District Court case the Supreme Court had authorized ten years previously made its way back to the Supreme Court. In the interim, Congress had amended the Federal Water Pollution Control Act such that no point source discharges to

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navigable waters could occur other than pursuant to a permit, and Milwaukee now had a permit under Wisconsin's federally-approved system. This time, the Supreme Court found that the federal common law of nuisance could no longer apply to Illinois' claims: "Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation . . . which certainly did not exist when [*Milwaukee I*] was decided." The Court concluded that separation of powers and federalism concerns dictated that the displacement of federal common law by federal statute would be subject to a far less rigorous analysis than that which would apply to the preemption of state law by federal statute: While evidence of a clear and manifest purpose was required for the preemption of state law, the Court wrote, "we start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."

*Displacement v. Preemption: What is the Difference?* Briefly, *AEP* applied federal nuisance law and found it not displaced; *Comer* applied state nuisance law and found it not preempted.

In *AEP*, the Second Circuit panel found that the federal common law of nuisance applied to the plaintiffs' actions for global warming pollution and concluded that it was not "displaced" by federal statute or regulation. The *AEP* panel noted in its September 2009 opinion that EPA was then considering regulating GHG emissions from motor vehicles under § 202 of the Clean Air Act (as the Supreme Court had required in *Massachusetts v. EPA*, 549 U.S. 497 (2007)). As a part of EPA's process, the agency was considering proposed findings (1) that GHG emissions from motor vehicles "cause, or contribute to" (the "Cause or Contribute" finding) (2) "air pollution which may reasonably be anticipated to endanger public health or welfare" (the "Endangerment" finding). The Second Circuit panel decided that EPA's process was not sufficient to displace federal common law for three reasons. First, the Court could not prejudge the Agency's decision on the two proposed findings. Second, even if EPA finalized the two findings (which EPA did, on December 7), this would only be a step toward the regulation of emissions from vehicles, and not stationary sources, such as the power plants that defendants in *AEP* operate. Third, even if EPA did take steps to regulate emissions from stationary sources, the Court could only then assess whether the statutory scheme bore resemblance to the the new "comprehensive" amended federal Clean Water Act regime which was incompatible with federal nuisance law in *Milwaukee II*. The panel found that federal nuisance

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common law did apply and was not displaced. Because *Milwaukee II* held that federal and state nuisance law could not apply simultaneously, the *AEP* panel concluded that the plaintiffs could not proceed with their state law nuisance claims.

In *Comer*, on the other hand, the plaintiffs' complaint relied on state nuisance law, and the panel of the Fifth Circuit concluded that *Milwaukee II* supported the notion that state nuisance law could apply, and that no party in before it had even argued that federal actions to date regarding climate change would preempt state law. *Comer's* panel pointed to the wording of *Milwaukee II* that the deference to a state's power to police its affairs required the proponent of preemption to meet a much higher standard than would a proponent for displacement of federal common law.

### *Are We There Yet? Would We Get to Displacement or Preemption Through Regulation?*

*1. AEP – Displacement, Then and Now.* With regard to displacement, the Second Circuit panel in *AEP* (on September 21, 2009) found that we would not likely get to displacement of federal common law by regulation under the existing Clean Air Act for a long, long time, if ever. It did so by concluding that to achieve the regulation of stationary sources under the Clean Air Act that would arguably be comparable to the “comprehensive” new Clean Water Act scheme in *Milwaukee II*, EPA would need to designate GHGs as a “criteria pollutant [or pollutants]” under the Clean Air Act, finding that GHGs are air pollutants present in “ambient air” resulting from “numerous or diverse mobile and stationary sources,” such that GHG emissions would become the subject of National Ambient Air Quality Standards (NAAQS). A NAAQS is a levels EPA sets under the Act which requires states to plan for maintenance or reductions in the ambient levels of a the specific criteria pollutant in the state's State Implementation Plan. The *AEP* panel noted that EPA had not even proposed designating GHGs as criteria pollutants.

However, there is a bit more complexity to the situation than the *AEP* opinion explicitly recognized, and the time at which some regulation may occur is arguably much sooner than it may have seemed when the Court's decision was issued September 21. First of all, EPA finalized its “Endangerment” and “Cause or Contribute” findings under § 202 on December 7, and indicated that it anticipated issuing the § 202 regulation regarding GHG emissions from automobiles in March of the coming year. Second, EPA itself has stated that a

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rule adding GHGs as a “pollutant” under § 202 of the Clean Air Act would trigger “self-effectuating” provisions in other parts of the Act relating to what are known as “PSD” and “Title V” permits for stationary sources. See Environmental Protection Agency, “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule,” 74 Fed. Reg. 55292, 55340 (Oct. 27, 2009) (“Proposed Tailoring Rule.”)

Specifically, even if EPA does not set a NAAQS by designating the class of GHGs as “criteria pollutant[s],” the Clean Air Act and EPA’s existing regulations provide that PSD Permits would have to be issued to new or significantly modified major stationary sources based on GHG emissions; to obtain a PSD Permit the source would have to demonstrate that it applies Best Available Control Technology (“BACT”) for the pollutant. Additionally, Title V Permits, which do not add substantive requirements, but serve to state in one document all requirements applicable to a source to assist with recordkeeping, would have to be issued to major sources. (Title V permits contain procedural requirements including monitoring, reporting, and certification).

To simplify a very complicated set of requirements, the applicable default thresholds for permits for pollutants that have not been designated as criteria pollutants under the PSD and Title V provisions are somewhere between 0 and 250 tons per year, depending on the situation. Since applying these default thresholds to GHG emissions would bring in “an enormous influx of [required] permits” for sources not covered by the existing programs, which EPA estimated would be on the order of “tens of thousands of PSD permits and millions of Title V permits,” EPA issued a “Proposed Tailoring Rule.” The Proposed Tailoring Rule seeks to blunt this administrative and economic burden by setting permit thresholds for GHGs at 10,000 to 25,000 tons per year, depending upon the program at issue, significantly limiting the number of permits required in the next few years. The Proposed Rule calls for EPA to study a more expanded program over the next five years.

The regulation of stationary sources for GHGs under the Clean Air Act’s PSD and Title V provisions could cover anywhere between “a lot” and “a few” of new entities (“a lot” if EPA does not finalize the Proposed Tailoring Rule but does finalize the automobiles rule, or “a few” if EPA finalizes both, though litigation over the Tailoring Rule would be likely). But the Second Circuit panel’s contention - that the Clean Air Act does not present the same

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“comprehensive regulatory scheme” as the revised Clean Water Act in *Milwaukee II* – likely still remains valid because the Clean Air Act scheme apparently would not provide a remedy for addressing those emissions - other than through BACT determinations on specified major stationary sources under the PSD program.

2. The CBD/350.org Petition. A couple of environmental organizations – the Center for Biological Diversity and 350.org – filed a petition for rulemaking earlier this month asking EPA to establish NAAQS for GHGs as criteria pollutants. Most of the major environmental groups in the U.S. have not taken the approach of urging NAAQS for GHGs, seeking legislation addressing GHGs by amending the Clean Air Act instead. And EPA recently stated in its Tailoring Proposal that it had no present plans to address GHGs with any NAAQS. So though EPA’s designating GHGs as a criteria pollutant and setting a NAAQS would present a closer case on displacement of federal law, such a rulemaking almost certainly will not happen anytime soon.

3. Comer: State Law Nuisance and Preemption. The Fifth Circuit *Comer* panel relied on state nuisance law and thus did not engage in a displacement analysis. The advantage to the *Comer* plaintiffs is that it is generally much more difficult to establish preemption of state law. In general, there is a “presumption against preemption” with regard to traditional areas of state control such as state police powers and laws regarding health and safety, *see e.g., Wyeth v. Levine*, 129 S.Ct. 1187, 1194 (2009), and the Supreme Court has stated that such preemption should occur “only if that is the clear and manifest purpose of Congress,” *Dept. of Revenue v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994) (internal citations and quotations omitted). And with regard to stationary sources, the present Clean Air Act has an express savings clause indicating that more stringent state regulations are not preempted. 42 U.S.C. § 7416.

There are two potential considerations plaintiffs in *Comer* or other state law cases may face. First, there may be a successful argument that state law cannot apply in a case where the alleged nuisance has such an interstate nature. *Milwaukee I* suggested that federal common law may be required “where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism.” *Milwaukee I*, 406 U.S. at 105, n.6. *Milwaukee II* suggested the opposite, 451 U.S. at 327, 328 n.19. But if more nuisance cases develop (and this seems likely), and *en banc* consideration proceeds in *Comer*, the federalism argument may gain more traction. If federal common law governs, the Defendants have arguments that the potential plaintiffs are limited to States. (Defendants in *AEP* did make this argument – unsuccessfully so far).

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Second, to the extent that plaintiffs have sued manufacturers of transportation fuels for motor vehicles (that is, oil companies like Exxon, or refiners), their preemption argument regarding emissions of fuels from vehicles would differ. Clean Air Act § 211 provides that no state may prescribe or attempt to enforce any control or prohibition respecting a “characteristic” of a fuel in a motor vehicle if the Administrator has adopted a different prohibition relating to that characteristic. Since the Administrator has not yet adopted regulations regarding the GHG content of fuels, it would appear that this section would not likely impede a nuisance claim. *ExxonMobil v. EPA*, 217 F.3d 1246, 1254-1255 (9<sup>th</sup> Cir. 2000), *Exxon v. City of New York*, 548 F.2d 1088 (1977) (interpreting preemption provision more broadly before statute referred to “characteristics”). (Emissions from refineries themselves would be subject to the stationary source analysis above).

### **How Would Proposed Federal Legislation Affect the Cases?**

Now that we’ve covered the regulatory front, what would the status of the nuisance cases be under the federal bills presently meant to address climate change and GHG emissions? Both Kerry-Boxer (now in the Senate) and Waxman-Markey (which passed the House) would bar states from implementing a “cap and trade program” or “system of [GHG] regulation under which a State or political subdivision issues a limited number of tradable instruments in the nature of emission allowances” and requires their surrender for units of GHGs emitted “during a compliance period.” Other than such a system of allowances, the bills permit more stringent state regulation. No doubt, plaintiffs will argue that suits for damages for past emissions should proceed; the defendants will contend that *Milwaukee II* states that a comprehensive scheme of federal regulation including permits precludes a federal nuisance suit and that state nuisance claims should not be permitted because of the need for federal uniformity.

Many expect that Kerry-Boxer would not pass from the Senate chamber in its present form. Senators Cantwell and Collins have proposed the text of a bill that does not presently explicitly address preemption. Senators Kerry, Graham and Lieberman also have issued a “blueprint” for a future bill. The blueprint calls for “regulatory predictability,” stating that the “absence of national greenhouse gas emissions standards has invited a patchwork of inconsistent state and regional regulations.” It is possible that the text of any bill resulting from the Kerry-Graham-Lieberman effort would contain more stringent language on preemption.

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## **Conclusion**

Defendants in *AEP* and *Comer* are asking for reconsideration *en banc* by their respective Courts of Appeals. Plaintiffs in *Kivalina* have appealed to their Court of Appeals. Nuisance litigation and the potential liability that could result are not likely to be vanishing into thin air anytime soon.

For further information or resources on this topic, please contact Hannah Bentley at [hbentley@bentleyesquire.com](mailto:hbentley@bentleyesquire.com).

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