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A Perilous Climate:
How Domestic Electric Corporations Can Most Advantageously Prepare for and Respond to a Post-American Electric Existence

John H. Spittell*

I. Introduction

In the years following its discovery, global warming was commonly viewed as an unyielding monolith; a seemingly omnipotent threat to human existence persisting as the residual curse of the Industrial Revolution. However, through research and education that fostered greater public understanding of the causes of global warming, the dire perceptions of prior generations have begun to be replaced by cautious optimism that the ecological damage man begot can be tempered and, in some instances, ameliorated. With confidence in hand that global warming can not only be reduced, but eradicated entirely provided that proper ecological practices are enacted and adhered to by citizens, corporations, and nations as a whole, activists and politicians have been hard at work, seeking a wide breadth of means by which environmentally friendly policies can be introduced into the popular lexicon of law. The activists’ progress has been slow but methodical; a systematic, unyielding march in a battle against the status quo of corporate governance and the liberties provided by local governments to corporations with respect to ambulant emissions that are harmful to the environment.

Internationally, environmental activism has resulted in the implementation of progressive policies geared toward the reduction of greenhouse gases that contribute to global warming via ozone depletion. The focal point of the environmentalist effort at the turn of the century was the Kyoto Protocol,1 a treaty which imposed limitations on sovereign emissions of greenhouse gases. The Kyoto Protocol was

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adopted by a plethora of nations, yet the United States abstained.\textsuperscript{2} This desistence provided the United States with autonomy so as to better develop a strategic option for reducing greenhouse gas emissions in a way conducive to domestic corporate growth.\textsuperscript{3} However, this autonomy ultimately resulted in stagnation, as legislative propositions were consistently stultified by a strong corporate lobby and a lack of domestic public outcry for immediate reform. Corporations flourished in this stasis, but a move to environmentally responsible policies was always just off the horizon. Recently, those advocating an era of newfound corporate environmental liability for ambulant air emissions garnered a decisive victory via the Second Circuit's controversial holding in \textit{Connecticut v. American Electric Power Co.}\textsuperscript{4}

\textit{American Electric} was a landmark decision, garnering much interest in environmental as well as corporate circles. The decision, a veritable lightning rod for controversy and squabble between corporations that emit mass quantities of greenhouse gases and the citizens and properties impacted by these emissions, held that corporations that emit exorbitant amounts of greenhouse gases that exacerbate the problem of global warming can be held liable for damages under the common law of nuisance.\textsuperscript{5} This Note will examine the legal ramifications resulting from the \textit{American Electric} holding with respect to corporations that emit mass quantities of greenhouse gases and how these corporations can respond in a fashion most beneficial to global sustainability as well as corporate economic sustainability.

In response to \textit{American Electric}, stationary power companies who utilize technologies that emit mass amounts of greenhouse gases must respond two-fold: (1) the corporations must prepare strategies to offset losses resulting from judicially-imposed remedies, and (2) the corporations must alter their lobby strategies, directing efforts to domestic legislative reform rather than international legislative reform. Responding effectively will allow the corporations to minimize short-term losses and maximize long-term gains while also providing for a reduction in greenhouse gases conducive to alleviating the Earth of global warming.

This Note proceeds in six parts. Part II of this Note will summarize past instances in which environmentally offensive corporations were held liable under the common law of nuisance. Further, it will address

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item 582 F.3d 309, 392-93 (2nd Cir. 2009).
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
the procedural posture of *American Electric*. Part III of this Note will discuss the process by which the Second Circuit analyzed *American Electric* and ultimately reached its holding. Part IV will elaborate on what *American Electric*'s holding means for corporations that emit large amounts of greenhouse gases, focusing on the calculation of judicially-imposed remedies and the methods by which corporations can create capital in order to remain solvent. Part V will utilize a historical perspective and focus on how *American Electric* and its residual impact will affect corporate lobbying in the future with respect to effecting environmental regulations conducive to corporate sustainability. Part VI concludes.

II. Background

A. Setting the Stage for American Electric

The Second Circuit’s holding in *American Electric* has rendered corporations trepidatious about the possibilities for enforcement of common law claims of nuisance against their respective plants for contributions to environmental decline via greenhouse gas emissions. In fact, the possibility that corporations will be found liable under this schema is very real and will result in dire consequences for offending corporations unless they prepare for the prospective onslaught of litigation.

The truth is that even if stationary power company emissions are reduced to zero, the residual effect of emissions released prior to the cessation of emission will not be felt for years to come, and these corporations must prepare to be held accountable for impending lawsuits under the common law of nuisance. In planning for worst case scenarios, the corporations must determine how to best effect remedies to the situation. Luckily for the affected corporations, *American Electric* is not the first time that the courts have found that corporations may be held liable for damages under the common law of nuisance for environmental wrongs, and so the corporations can look to the past to plan for the future. The first such action addressing environmental denigration worth consideration by the corporations is the 1907 decision of *Georgia v. Tennessee Copper Co.* (*Tennessee Copper*).6

1. Tennessee Copper

*Tennessee Copper* addressed the State of Georgia’s (Georgia) action for enjoinment against the Tennessee Copper Company (*Tennessee Copper*).6

Copper), a Tennessee corporation.\textsuperscript{7} Georgia alleged that Tennessee Copper was releasing noxious sulfur dioxide emissions into air that traveled across state lines and caused a nuisance to its sovereign lands.\textsuperscript{8} More specifically, and similar to American Electric, Georgia alleged that Tennessee Copper's emissions were causing ecological destruction in five separate counties.\textsuperscript{9} The Supreme Court recognized that immediate rectifications to Tennessee Copper's emissions could not be effected.\textsuperscript{10} Therefore, the Court held that it would allow reasonable time for corrections, but upon failure to abate the emissions, an injunction would be imposed upon the corporation.\textsuperscript{11}

Eight years later, Georgia returned to the Supreme Court, alleging that Tennessee Copper had not abated its production of noxious emissions.\textsuperscript{12} In the interim between its appearances before the Court, Tennessee Copper had taken active steps to remedy its past wrongs, including installing purifying devices to reduce emissions, creating a fund to compensate the injured, and agreeing to subject its plant to inspections to ensure proper emissions methods were being used.\textsuperscript{13} In its review, the Court took a deferential approach that favored the prior holding and the plaintiff, imposing additional conditions of compliance upon the corporation to abate its continued emissions in order to further curb environmental harm inflicted upon Georgia.\textsuperscript{14} The Court's relative bent towards the preservation of environmental resources would become a continued theme amongst judicial holdings against corporations involved in ecological destruction. This trend would be reinforced in the 1972 holding of Illinois v. City of Milwaukee, Wisconsin (Milwaukee I)\textsuperscript{15} and the subsequent 1981 holding of Illinois v. City of Milwaukee, Wisconsin (Milwaukee II).\textsuperscript{16}

2. Milwaukee I

Milwaukee I had a serious influence on environmental reform, expanding upon the foundations created by Tennessee Copper and addressing the topic as to whether ecological destruction claims could be litigated under federal common law. In Milwaukee I, the State of Illi-
nois sought to bring an action against four Wisconsin cities for ecological harms caused by the cities' pollution of Lake Michigan, an interstate body of water.\textsuperscript{17} The Supreme Court looked to a variety of statutes in determining the adequacy of Illinois's claims, including the Federal Water Pollution Control Act (FWPCA).\textsuperscript{18} The Court deemed it acceptable that in its consideration of litigation involving ambient or interstate aspects, federal common law could be utilized, and such use would not be inconsistent with the FWPCA.\textsuperscript{19} However, the Court espoused the possibility that the creation of new federal laws and regulations could preempt the federal common law of nuisance.\textsuperscript{20} This final point was a major departure from \textit{Tennessee Copper}, as it left the door open for the legislature to enact novel legislation that would provide opportunity for corporations to avoid liability under the federal common law of nuisance and thereby avoid the possibility of severe impositions of monetary damages.

Shortly after \textit{Milwaukee I} was decided, Congress enacted amendments to the FWPCA that addressed the specific issue of interstate water pollution regulation.\textsuperscript{21} Meanwhile, Illinois, rebuffed in \textit{Milwaukee I} from bringing its action directly to the Supreme Court via original jurisdiction, proceeded with its action against Milwaukee through the federal and appellate courts, ultimately reaching the Supreme Court again in the 1981 case of \textit{Milwaukee II}.\textsuperscript{22}

\section*{3. Milwaukee II}

\textit{Milwaukee II} presented the Court with a suit under federal common law by a collection of States seeking abatement of the City of Milwaukee's sewer discharges, mirroring the same factual basis proffered in \textit{Milwaukee I}.\textsuperscript{23} However, the passage of the FWPCA Amendments of 1972 altered the underlying legal platform for such claims, rendering the federal common law of nuisance preempted.\textsuperscript{24}

\begin{itemize}
\item[17.] 406 U.S. at 93.
\item[18.] \textit{Id.} at 101-102. The FWPCA, which has since been amended by 33 U.S.C. § 1251 (2006), declared that it was federal policy "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution" and that federal law controlled the pollution of interstate or navigable waters.
\item[19.] \textit{Milwaukee I}, 406 U.S. at 103 (citing Texas v. Pankey, 441 F.2d 236 (1971)).
\item[20.] \textit{Id.} at 107.
\item[22.] 451 U.S. 304 (1981).
\item[23.] \textit{Id.} at 310.
\item[24.] \textit{Id.} at 317. See also 33 U.S.C. § 1251(7)(b) (2006). The Federal Water Pollution Control Act Amendments of 1972 made it illegal to discharge pollutants into U.S. waters except pursuant to a permit that incorporated specific effluent limitation regulations of the Environmental Protection Agency. These permits, issued either by the EPA or a similar state agency, would be
More specifically, the Court held that the determination of whether federal statutory or federal common law governed started with the assumption that it is for Congress, not federal courts, to articulate standards to be applied under federal law. Furthermore, the Court held that no federal common law remedy was available to the States, as the restructuring of the FWPCA that gave rise to Milwaukee I supplanted the common law. Therefore, the Court held that the States could not impose more stringent effluent standards than those set out in the amended FWPCA and vacated and remanded the action. Although the plaintiffs in Milwaukee I and II were state actors, the holdings of Milwaukee I and II were embraced by the courts and subsequently expanded to apply to the District of Columbia, municipalities, and other non-state actors. It was in this legal environment that the American Electric case came to fruition over three decades later.

B. The Procedural Posture of American Electric

1. The States’ Complaint

In July 2004, California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, along with the City of New York ("the States") filed a complaint against American Electric Power Company, Inc., American Electric Power Service Corporation, Southern Company, the Tennessee Valley Authority, Xcel Energy, and Cinergy Corporation (hereafter collectively referred to as "the Defendants"). The complaint, seeking relief under the federal common law of nuisance, sought the abatement of the Defendants’ continued contributions to elevated levels of carbon dioxide and global warming.

The States, citing a variety of both governmental and non-governmental reports, provided a causal link between the Defendants’ contributions to greenhouse gas concentrations and global warming, in fact asserting a proportional relationship between the Defendants’

26. Id. The Amendments were viewed by Congress as a "total restructuring" of the FWPCA. S. COMM. ON PUBLIC WORKS, 93RD CONG. (Comm. Print 1973) (remarks of Chairman Blatnik of the House Committee which drafted the House version of the Amendments).
29. American Electric, 582 F.3d at 316.
30. Id.
emissions and the environmental injury. The States further averred that the ecological changes, caused in part by the Defendants’ carbon dioxide emissions, would have a substantial negative impact on the States’ environments, residents, and property, ultimately requiring billions of dollars in restorative expenditures.

The States’ complaint posited not only current injuries resulting from the Defendants’ emissions, but also future injuries due to befall the States as a direct consequence of the pollution. The complaint did not state the current impact of these environmental injuries upon the States, but it did discuss the effect of the changes with respect to future injuries, outlining a diverse range of ecologically disruptive effects upon the ecosystems of the States.

The States sought equitable relief, holding the Defendants jointly and severally liable for the creation of, contribution to, or maintaining of a public nuisance. The States also sought to permanently enjoin each Defendant to abate the nuisance by capping emissions and requiring a reduction in emissions by an undetermined percentage each year for no less than ten years.

2. The Non-State Actors’ Complaint

Concurrently with the States, the Open Space Institute, the Open Space Conservancy, and the Audubon Society of New Hampshire (hereafter collectively “the Land Trusts”) also filed a complaint against the Defendants. The Land Trusts, similar to the States, sought to abate the Defendants’ contributions to global warming. The Land Trusts based their claims against the Defendants on the federal common law of nuisance, or, alternatively, on “the statutory and/or common law of private and public nuisance of each of the states where Defendants own, manage, direct, and/or operate fossil fuel-fired electric generating facilities.”

A principal difference between the Land Trusts’ and the States’ complaint was that the Land Trusts

31. Id. at 317.
32. Id.
33. Id. at 317-18.
34. American Electric, 582 F.3d at 317-18.
35. Id. at 318.
36. Id.
37. Id. The Land Trusts are “nonprofit land trusts that acquire and maintain ecologically significant and sensitive properties for scientific and educational purposes, and for human use and enjoyment.” These Land Trusts are comprised of nature sanctuaries, wildlife preserves, and research laboratories, as well as recreational areas. The Land Trusts are also open to the public.
38. Id. at 319.
39. American Electric, 582 F.3d at 318.
specified special injuries to their property interests. The Land Trusts stated that the global warming created in part by the Defendants' greenhouse gas contributions would result in a devaluation of their land holdings while also interfering with the Land Trusts' efforts to preserve the land for scientific, educational, and recreational purposes.

3. The District Court's Holding

In the district court, the Defendants moved to dismiss the States' and Land Trusts' complaints on a variety of grounds. The Defendants collectively averred that the complaints failed to state a claim because no federal common law cause of action to abate greenhouse gas emission existed, because separation of powers principles precluded the court from adjudicating the decision, and because Congress had previously displaced federal common law with respect to global warming. The Defendants further claimed that the district court lacked jurisdiction over the complaints because neither plaintiff had standing to sue on the grounds of global warming and that the lack of standing divested the court of its federal question jurisdiction.

The district court dismissed the complaints on the grounds that the Plaintiffs' claims raised a non-justiciable political question. Relying on Baker v. Carr, the court held that no judicial determination could be made with respect to the issue of whether a suit could be brought under the common law of nuisance without an initial policy determination best suited for the non-judicial discretion of the legislative and executive branches of government.

Furthermore, the district court rejected the Plaintiffs' assertions that the nuisance claims presented in the complaints were simple nuisance claims previously adjudicated by the courts, holding instead that the claims had such broad national and international implications that the nature of the issue was inherently legislative. Concluding that

40. Id. at 319.
41. Id.
42. Id.
44. American Electric, 582 F.3d at 319.
45. Id.
46. 369 U.S. 186, 198 (1962). Baker outlined six factors that are used to indicate the existence of a non-justiciable political question.
47. American Electric, 582 F.3d at 319.
48. Id. at 320. Specifically, the court believed that if it granted the Plaintiffs' requested relief and capped carbon emissions, the court would have to determine the level at which emissions capping should occur, the percentage reduction of the emissions, the schedule for implementing the emission reductions, the necessary implications of such relief with respect to the United
the claims involved matters best situated for resolution as determined by elected officials and that the imposition of such measures would be tantamount to judicial fiat, usurping the powers of the legislative and executive branches, the district court entered judgment for the Defendants, which the Plaintiffs timely appealed.49

II. The Second Circuit’s American Electric Opinion

On September 21, 2009, the Second Circuit held that corporations that emit mass quantities of greenhouse gases that exacerbate the problem of global warming can be held liable for damages under the common law of nuisance.50 In rendering its decision, the Court made several holdings. First, the Court held that the district court erred in dismissing the Plaintiffs’ complaints on political question grounds.51 Second, the Court held that all Plaintiffs had standing to bring their claims.52 Third, the Court held that the federal common law of nuisance governed the Plaintiffs’ claims.53 Fourth, the Court held that all Plaintiffs stated claims under the federal common law of nuisance.54 Fifth, and finally, the Court held that the Plaintiffs’ claims were not displaced by any prior existing statute.55 In consideration of these holdings, the Court remanded the case for further proceedings.56

A. Political Question Doctrine

In the Second Circuit’s decision, the Court initially addressed whether the district court was correct in holding that the Plaintiffs’ complaints were non-justiciable under the political question doctrine.57 In making its determination, the Second Circuit, like the district court before it, turned to the Supreme Court holding of Baker v. Carr.58 Upon consideration of the Baker factors, the Second Circuit held that the district court erred in dismissing the Plaintiffs’ complaints on the grounds that the complaints presented non-justiciable political questions.59

States’ negotiations with other nations regarding emissions reductions, and the availability of alternative energy resources. Id.

49. Id.
50. Id. at 315.
51. American Electric, 582 F.3d at 390.
52. Id. at 349.
53. Id. at 369.
54. Id. at 371.
55. Id. at 387.
56. American Electric, 582 F.3d at 393.
57. Id. at 321-32.
58. Id.; Baker, 369 U.S. at 217.
59. American Electric, 582 F.3d at 332.
B. Standing

As the district court had dismissed the action prior to reaching the issue of standing, it never made a determination as to whether the Plaintiffs could bring their claims before the court. Therefore, the Second Circuit had to establish whether standing did in fact exist for the Plaintiffs. The Court conducted a thorough review of the record and ultimately found that the States had \textit{parens patriae} standing and that the States and Land Trusts had Article III proprietary standing. Therefore, the Court allowed the parties to proceed with the action.

C. The Common Law of Nuisance

As the district court did not reach the issue as to whether the Plaintiffs stated a claim under the common law of nuisance, the Second Circuit addressed the issue for the first time with respect to the case. Current law holds that a public nuisance is an unreasonable interference with a "right common to the general public." This definition was adopted by the Supreme Court in \textit{Milwaukee I}, and has since been used in a variety of other public nuisance cases. The \textit{American Electric} court accepted this definition and applied it to the facts of the case.

1. Determination that the States Stated a Claim

The Court first examined whether the States made a claim under the federal common law of nuisance. The Defendants asserted that principles of constitutional necessity limited the scope of the cause of action for transboundary nuisance disputes between states and also asserted that the federal common law of nuisance was available only to abate immediately and severely harmful nuisances. The Court, however, found neither argument to be persuasive and held that the States, in alleging that the Defendants' emissions constituted a substantial and unreasonable interference with the public rights of their

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60. \textit{Id.}
61. \textit{Id.} at 333.
63. \textit{Id.} at 349.
64. \textit{American Electric}, 582 F.3d at 349.
65. \textit{Id.} at 352 (quoting \textit{RESTATEMENT (SECOND) OF TORTS} § 821B (1979)).
66. \textit{Id.} at 351. \textit{See also} Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1234 (3d Cir. 1980).
67. \textit{American Electric}, 582 F.3d at 352.
68. \textit{Id.}
69. \textit{Id.} at 355.
jurisdictions, had adequately alleged a complaint under the common law of nuisance.\textsuperscript{70}

2. Determination that the Non-State Actors Stated a Claim

The Court then addressed whether the non-state Plaintiffs stated a claim under the federal common law of nuisance.\textsuperscript{71} The Defendants argued that only states could bring federal common law claims of nuisance and that private plaintiffs could not invoke any federal common law cause of action to abate interstate nuisances.\textsuperscript{72} As this was an issue of first impression for the Second Circuit, the Court looked to other circuits for direction.\textsuperscript{73} In so doing, the Court adhered strongly to the Seventh Circuit’s holding that municipalities could assert federal common law of nuisance claims and the Third Circuit’s holding in \textit{National Sea Clammers Association v. City of New York}\textsuperscript{75} that private parties could bring federal common law nuisance claims.\textsuperscript{76} Upon review of these prior public nuisance cases, the Court determined that the non-state Plaintiffs could bring a claim.\textsuperscript{77}

The Court next looked to the Restatement (Second) of Torts Section 821C,\textsuperscript{78} which states, in pertinent part, who can recover for public nuisance.\textsuperscript{79} New York City alleged that Defendants’ emissions of greenhouse gases would ultimately increase the City’s temperature, which in turn would increase heat-related deaths, damage the coastal infrastructure, and wreak havoc on its denizens’ daily lives.\textsuperscript{80} Considering these contentions, the Court found that New York City sufficiently satisfied the requirements of Section 821C.\textsuperscript{81} The Land Trusts likewise asserted that the public rights of use, enjoyment, and preservation of aesthetic and ecological values would be damaged by Defendants’ emissions.\textsuperscript{82} Explicitly, the Land Trusts asserted a public right to a climate that would not drastically change as a result of greenhouse gas pollution, devastating the ecology and human popula-

\begin{footnotes}
\footnote{70. \textit{Id.} at 358.}
\footnote{71. \textit{Id.}}
\footnote{72. \textit{American Electric}, 582 F.3d at 358.}
\footnote{73. \textit{Id.} at 359.}
\footnote{74. \textit{Id.} at 359-60 (citing City of Evansville v. Ky. Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979)).}
\footnote{75. 616 F.2d 1222 (3rd Cir. 1980).}
\footnote{76. \textit{American Electric}, 582 F.3d at 363.}
\footnote{77. \textit{Id.} at 366.}
\footnote{78. \textsc{Restatement (Second) of Torts} § 821C (1979).}
\footnote{79. \textit{American Electric}, 582 F.3d at 366.}
\footnote{80. \textit{Id.}}
\footnote{81. \textit{Id.} at 367.}
\footnote{82. \textit{Id.}}
\end{footnotes}
Upon review, the Court found that the Land Trusts properly posited an interference with a public right, and further held that the Land Trusts suffered a harm different in kind or degree from that suffered by the general public, as the Land Trusts’ magnitude of land ownership and general purpose were adequately different from general public uses. In light of the above, the Court found that the non-state Plaintiffs established a claim for public nuisance actionable under the Second Circuit’s purview.

D. Displacement

Upon determining that the Plaintiffs sufficiently alleged a claim for public nuisance, the Court addressed whether the Plaintiffs’ claims were displaced by federal legislation. The displacement standard generally holds that federal common law is subject to the paramount authority of Congress and that courts may only resort to federal common law in the absence of an applicable act of Congress. The Second Circuit’s version of the displacement test required courts to consider whether a federal statute speaks directly to a question otherwise answered by federal common law, as federal common law is only used as a necessary expedient when Congress has not spoken to a particular issue.

1. An Analysis of the Clean Air Act with Respect to the Instant Action

The Court first considered whether the Clean Air Act (CAA) displaced the federal common law of nuisance with respect to the Plaintiffs’ claims. In its review of whether the CAA displaced the federal...
common law of nuisance, the Court noted that no Supreme Court case has held that the CAA displaces federal common law in the area of air pollution.\textsuperscript{92} Further, the Court observed that the EPA failed to delineate published regulations under the CAA that speak directly to the Plaintiff's particular issue.\textsuperscript{93} Ultimately, the Court decided that until the EPA makes the requisite findings necessary to render carbon dioxide a regulated pollutant under the EPA's national ambient air quality standards, the CAA would not displace the federal common law with respect to regulating greenhouse gas emissions or the regulation of greenhouse gas emissions from stationary sources.\textsuperscript{94} Therefore, the federal common law of nuisance applied.\textsuperscript{95}

2. An Analysis of Other Domestic Legislation with Respect to the Instant Action

The Defendants also raised the displacement defense with respect to a series of other statutes, alleging that each statute worked to displace the Plaintiffs' claims under the federal common law of nuisance.\textsuperscript{96} The statutes included the National Climate Program Act of 1978,\textsuperscript{97} the Global Climate Protection Act of 1987,\textsuperscript{98} The Global Climate Change Act of 1990,\textsuperscript{99} the Energy Policy Act of 1992,\textsuperscript{100} and the Energy Police Act of 2005.\textsuperscript{101,102} Upon review, the Court deemed that all five statutes failed to address the regulation of greenhouse gas

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\textit{able at http://epa.gov/ttn/naaqs/} (last visited Oct. 10, 2010). Furthermore, the CAA distinguishes between stationary and mobile sources of air pollution. As the Defendants were immobile sources of emissions, the Court considered them as stationary for the purposes of its analysis. \textit{American Electric}, 582 F.3d at 376.
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\begin{flushright}
\textsuperscript{92.} Id. at 378.
\textsuperscript{93.} Id. at 379.
\textsuperscript{94.} Id. at 380. Of note, on December 7, 2009, the EPA Administrator signed a finding that current and projected concentrations of six key well-mixed greenhouse gases in the atmosphere threaten the public health and welfare of current and future generations. Carbon dioxide is one such well-mixed greenhouse gas. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). This finding is a prerequisite for future incorporation of carbon dioxide in the EPA's NAAQS.
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\textsuperscript{95.} \textit{American Electric}, 582 F.3d at 381.
\textsuperscript{96.} Id. at 381-85.
\textsuperscript{102.} \textit{American Electric}, 582 F.3d at 381-85.
\end{flushright}
emissions. Therefore, the Court found that the federal common law of nuisance governed the Plaintiffs’ claims.

3. An Analysis of Displacement Due to Foreign Policy Considerations

As a final defense, the Defendants argued that litigating the case would effectively undermine the nation’s strategy concerning global climate change and therefore would reduce the bargaining leverage needed by the President to implement his strategies. The Defendants premised this argument on the grounds that because the Supreme Court previously held that state law is preempted when it gives the President lesser bargaining power with other countries, the President’s ability to implement Congress’s approach with respect to climate change should displace the Plaintiffs’ claims. However, the Court found that this line of reasoning was a reiteration of the political question argument. Therefore, the Court rejected the Defendants’ argument and held that the federal common law of nuisance applied to the Plaintiffs’ claims.

The National Climate Program Act of 1978, the Global Climate Protection Act of 1987, and the Global Climate Change Act of 1990 were each enacted with the purpose of aiding in the public’s understanding of and response to natural and man-induced climate processes and their implications. The Court, recognizing that the statutes did not require actions to limit greenhouse gas emissions, but instead were focused merely on research and public relations, determined that the acts did not directly address the issues brought forth in the Plaintiffs’ claim and therefore did not displace the federal common law of nuisance. 

The Energy Policy Act of 1992 expanded the breadth of domestic climate legislation, focusing not only on research and public relations, but also on planning, strategy, technology development, assessment, and monitoring of greenhouse gas emissions. However, despite its extended scope, the statute still did not require any explicit action directly abating emissions. As the statute failed to specifically address the issue of remedying climate change, the Court found that the statute did not displace the federal common law of nuisance.

Finally, the Court considered the Energy Policy Act of 2005. Based on the fact that the senators, while debating the bill in Congress, stated that the bill did not include any provisions to address global warming, the Court found that this legislation failed to displace the federal common law of nuisance as well.

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103. Id. at 387. The National Climate Program Act of 1978, the Global Climate Protection Act of 1987, and the Global Climate Change Act of 1990 were each enacted with the purpose of aiding in the public’s understanding of and response to natural and man-induced climate processes and their implications. The Court, recognizing that the statutes did not require actions to limit greenhouse gas emissions, but instead were focused merely on research and public relations, determined that the acts did not directly address the issues brought forth in the Plaintiffs’ claim and therefore did not displace the federal common law of nuisance. Id.

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Finally, the Court considered the Energy Policy Act of 2005. Based on the fact that the senators, while debating the bill in Congress, stated that the bill did not include any provisions to address global warming, the Court found that this legislation failed to displace the federal common law of nuisance as well. Id. at 385.

104. American Electric, 582 F.3d at 387-88.
105. Id. at 388.
106. Id.
107. Id.
108. Id. at 388.
III. Future Consequences of the Second Circuit’s Holding with Respect to Corporations: Remedies, Their Calculation, and the Ability of Corporations to Cope with Their Imposition

A. A Discussion of Remedies for the Plaintiffs

Under the federal common law of nuisance, the normal procedure upon a finding of fault by a court is to first attempt to impose an injunction upon the offending party until the nuisance is abated.\(^\text{109}\) If the court determines that it would be unreasonable for a party to engage in the offensive conduct without paying for the harm caused to its surrounding community, damages may be awarded as well.\(^\text{110}\) Even if a party’s action is of great utility to society, it may still be unreasonable to inflict the harm resulting from the activity’s administration without compensating for it.\(^\text{111}\)

The utility corporations affected by the holding of American Electric must actively prepare for a finding of fault by courts under the common law of nuisance. Despite the great benefit that the corporations’ actions provide to society, the corporations will have to succumb to a court’s whim if the court, upon review, determines that the ambulant air emissions discharged by the corporations constitute an unreasonable impediment to plaintiffs’ quality of life. With the aforementioned considerations in mind, a discussion of the prospectively plausible remedial measures to be imposed upon the corporations follows.

1. Reduction of Emissions to an Acceptable Level

The first remedial measure which likely will be enforced upon the corporations will be a mandatory reduction in emissions akin to that imposed in *Tennessee Copper*.\(^\text{112}\) This reduction will need to provide ample temporal latitude for the affected corporations so that they may be able to install the proper corrective measures. The timetable for compliance must reflect the level of reduction mandated by the courts, so that, for instance, if a reduction to zero percent emissions is enforced, the corporations are given an adequate amount of time to effect such change. This timetable should be reasonable under both legal and scientific review. Furthermore, any failure to comply with the emissions reduction by the corporations should, in accordance

\(^{109}\) *Restatement (Second) of Torts* §821B, cmt. i (1979).

\(^{110}\) *Id.*

\(^{111}\) *Id.*

\(^{112}\) 206 U.S. 230 (1907).
with the common law of nuisance, result in the imposition of an injunction against the corporation until the corporation fulfills its obligations.

2. Money Damages

An alternative remedy for the American Electric plaintiffs (and similarly-situated parties in future litigations) would be to impose money damages upon the defendant corporations that are in defiance of their judicially-enforced obligations. The imposition of money damages gives rise to a variety of issues due to the amorphous nature of calculating when environmental harm itself occurs. That is, one must consider how to calculate current damages, how to calculate future damages, and how to distribute said damages.

a. How to Calculate Current Damages

The calculation of current damages to be imposed upon offending corporations is a tricky prospect, as the damages must be limited to a certain extent in order to allow for the continued viability of the electric companies. These limitations exist in two different capacities: temporal and volumetric.

First, it must be considered that the current damages will have to be feasibly limited with respect to temporal considerations. As the law currently stands, the date at which damages calculations would begin to accrue for each corporation found liable would be the date at which the plaintiff knew or reasonably should have known that each corporation's air emissions were negatively impacting the plaintiff. However, a problem is presented by the fact that it currently is not possible to determine at what specific point in time after their release into the atmosphere that ambulant air emissions begin to affect the environment. The corporations currently involved in the creation of ambulant emissions in excess of currently acceptable levels must not be held responsible for all harm ever effected by air pollution in the area. Other, now defunct corporations may have previously existed that contributed to the contemporary environmental state, and the currently offending corporations should not be held liable for actions they did not commit. This consideration must be taken under advisement by those who are charged with assessing damages to the liable corporations so as to guarantee a fair calculation of fault. Those that are found to be presently perpetrating a nuisance should not have to

pay for the damages caused by those that previously contributed to the problem but no longer exist.

Similarly, equity and parity must be accorded when more than one corporation named in a nuisance suit is found liable for damages for harmful ambulant air emissions. If one corporation is found to have been contributing to global warming for thirty years, and a separate corporation also named in the action has been an equal offender for five years, the damages should be prorated so that the latter corporation's damages are tempered to one-sixth of the former corporation's damages. This temporal rationing of damages is necessary for justice to be properly served upon the respective companies.

The second factor to be considered in calculating damages is the volume of the specific gases emitted by a company named in the nuisance action. This factor can be addressed relatively easily when dealing with actions involving multiple parties, as a company's emissions can be readily gauged by its internal engineers in charge of emissions maintenance or by independently-hired scientists who specialize in the same field. Subsequent to the compilation of data and analysis of reports on the data, the total emissions contribution of each corporation can be compared with the total emissions contributions of the other named corporations in the action.

Upon determination of the temporal limitations and the volumetric contribution of the offending emissions, one should divide the total emissions by the length of time in which the emissions occurred to establish the total contribution of each corporation. Next, the totals should be divided against each other to determine percentage ownership of the harm in order to establish the percent liability for current damages. For example, consider a nuisance action brought against two electric companies, Company A and Company B. Company A emitted one hundred thousand pounds of harmful emissions over ten years. Company B emitted one hundred thousand pounds of harmful emissions over five years. The quotient of Company A's factors is ten thousand, while Company B's quotient is twenty thousand. Therefore, Company B should be forced to pay twice as much for its emissions, as its rate of pollution is twice as great.

114. The one-sixth fraction is derived by placing the corporation that concomitantly offended for the longer period of time in the denominator and placing the corporation that has concomitantly offended for the lesser number of years in the numerator. In the instant example, this results in a one-to-six ratio, providing for the reasoning that the lesser offending corporation, whose environmental offenses occurred for one-sixth as much time as its fellow offender, should pay a proportional amount of damages for the total time of offense.
b. How to Calculate Future Damages

The calculation of future damages poses another difficult hurdle for courts in determining the level of monetary compensation each corporation must pay victorious plaintiffs. Assuming that a plaintiff has qualified to receive compensation for future damages, the damages calculations should be based upon rigorous scientific and economic analysis. Looking to past and current scientific data, such as trends of environmental degradation at the affected plaintiffs' locations and trends of ambulant air emissions output by the corporations, environmental scientists should be able to predict a reasonable arc for the decline of pollution levels as well as a reasonable time frame for the prospective curative measures to have a corrective impact upon the injured environments. By converting this scientific data to discrete economic figures, that is, by calculating the specific costs of the curative measures necessary to fully effect the requisite environmental cures, economists can determine how much successful plaintiffs should reasonably receive as a damages award with respect to future harms.

c. How Current Damages Will Be Distributed

A variety of issues arise with respect to the distribution of damages to victorious plaintiffs in actions for damages in tort under the common law of nuisance. First, one must consider the apportionment of damages to be doled out amongst triumphant parties. Second, the question of how the damages will be paid out must be addressed. Finally, one must attend to how the damages awards will be put to use by the injured parties after the litigation concludes.

i. Apportionment of Damages

The scheme of apportionment of damages awards to successful plaintiffs will depend on the nature of the case itself. If only one state, municipality, or land trust is privy to the action, then the issue of divi-
sion of damages is moot, as the sole victor receives all of the spoils. However, if more than one party is privy to the action as plaintiff, then a division of damages must occur.

If the damages assessed are equivalent to the sum total of estimated injuries inflicted upon the plaintiffs, then the apportionment is simple, as the payouts will correspond to the damage caused. For instance, if State A has two million dollars worth of damage, State B has three million dollars worth of damage, and the court awards five million dollars worth of damages, then Company A takes forty percent of the damages award while Company B takes the remaining sixty percent. This results in equitable recovery for each injured party.

A damages award that does not equal the sum total of damages requested by the plaintiffs will require a more complex division of proceeds. This division, similar to the ideology behind the rubric established above for the calculation of volumetric contributions of emissions, should be premised upon the relative amount of current injury each plaintiff has at the time the damages are assessed. Exemplified, consider Land Trust A, which has two million dollars worth of environmental injury. Land Trust B is afflicted with one million dollars worth of injury. If the court determines that Corporation X is liable for one and a half million dollars, then the damages award should be split proportionately between the two land trusts – Land Trust A, representing a two-thirds stake, gets one million dollars, while Land Trust B, accounting for a one-third stake, receives five hundred thousand. This apportionment scheme provides for the most equitable result possible for each injured plaintiff.

ii. Disbursement of Damages

If the damages assessed against guilty corporations remain moderate in size, it can be assumed that the corporations can disburse the damages in a lump sum, as described in the hypothetical situations directly above. A lump sum payment would settle the debts owed by the corporations in one easy process, allowing the involved parties to move past the litigation quickly and effectively. However, while instances like the hypothetical situations above were limited to modest damages awards, when such situations are applied on the macro scale to states and large-scale land trusts, the damages awards levied against the offending corporations could be truly massive. If the awards are significant in nature, then the corporations may not be able to disburse the damages in a lump sum, and instead may have to opt for a structured payment plan. The purpose of opting into a structured payment plan would be to ensure that the corporations – in the instant
case, the public necessities of utilities – would not be bankrupted by the penalties. The structured payment plan would allow for the corporations to stay fiscally afloat while making sure that they felt the economic impact of damages upon their business. This payment plan would have to be temporally limited in a practical fashion according to the disposition and judgment of the court so as to make sure that the payment plan did not extend for an unreasonable amount of time under common logic.

iii. Limitations on How the Damages Will Be Used

One final consideration is whether the damages awards should be limited in post-disbursement usage to public works specifically targeted to ameliorate the environmental harm, or whether part of the damages should be allowed to be spent by the recipients on other public works or projects altogether. While under normal circumstances, victorious claimants are allowed to expend damages monies on whatever they deem appropriate, in this specific instance, due to the direct impact the injury has on the public, it is urged that the courts assessing these damages apply a limiting stipulation to the use of the awards. As the cause of action was specifically tailored to remedies sought for environmental degradation, courts should stipulate that all monies garnered from damages awards be put towards public works benefiting the affected agricultural areas, restoring the environment to its proper stasis. For the plaintiffs to act otherwise would be an invitation for protest and outcry by their respective denizens for improper exercise of governmental authority, and such a conflict should be avoided at all costs.

d. How Future Damages Will Be Distributed

With respect to future damages, the courts should apply the basic theory delineated above regarding the allocation of damages awards and the use to which the damages can be applied. The penalty assessed to each offending corporation should be proportional to the harm caused, and the corporations should have the choice to first provide a lump sum payment, or, if such a payment would bankrupt the corporation, a structured payment plan should be allowed. Further, the use of the future damages award by the corporations should be limited solely to remedial measures directly involving the environment for the benefit of the public.

However, future damages pose the added problems of determining what the proper level of damages is and how to properly impose the penalty upon the offending corporations. As future events are inher-
ently unpredictable, it is recommended that the courts embrace a deposit-refund system so as to provide for the most equity for the corporations assessed with the penalty.\textsuperscript{117} A deposit-refund system is premised upon two fundamental tenets: that the arena of scientific research of global warming's impact is still not an exact science, and that the corporations should be fairly, and not unduly, penalized for their wrongdoing.\textsuperscript{118} Under the deposit-refund system, an adjudicating court, upon determining future damages should be assessed, would create a trust into which offending corporations would pay the assessed future damages.\textsuperscript{119} The offending corporations would then deposit their penalties into this trust, which would remain undisturbed by the plaintiffs unless funds were needed to effect remedial measures to offset the harm the corporations caused.\textsuperscript{120} If at some future point a scientific breakthrough were to occur that would allow for the plaintiffs to remedy their injuries at a lesser cost than originally anticipated, thereby rendering the initial future damages assessment to be excessive, the corporations could petition the court to refund a percentage of the monies left in the trust to their corporations.\textsuperscript{121} If, in light of the new evidence, the court deemed the original damages to be excessive, the court could then refund a reasonable amount of money to the corporations, providing for the most just outcome possible for all parties involved in the litigation.\textsuperscript{122}

B. How the Affected Companies Can Remain Sustainable and How Consumers Will Be Affected Negatively

The question of how to raise adequate capital so as to provide for the sustainability of the major corporations involved in \textit{American Electric} is also a serious problem. More specifically, it must be considered that the damages penalties imposed upon the offending corporations could be so extensive as to be catastrophic to their respective viability. As many of these corporations provide power to broad swaths of consumers, thereby rendering their existence a necessary component for the national infrastructure, their sustainability is im-

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\textsuperscript{117} The premise for the deposit-refund system has been proposed as a means for dealing with environmental lawsuits for damages in tort in the European Union. Konstantinos Tsekouras, \textit{Exploiting the implementation potential of alternative instruments: design options for environmental liability funds}, in \textit{IMPLEMENTING EU ENVIRONMENTAL POLICY: NEW DIRECTIONS AND OLD PROBLEMS} 134, 160 (Christoph Knill & Andrea Lenschow eds., 2000).

\textsuperscript{118} Id.

\textsuperscript{119} Id.

\textsuperscript{120} Id.

\textsuperscript{121} Id.

\textsuperscript{122} Tsekouras, \textit{supra} note' 117, at 160.
perative and cannot be compromised. If the damages imposed are such that economic viability becomes even a remote concern, consumers may be forced to share in the corporate losses indirectly.

1. Corporate Imposition of Higher Utility Prices

One such means by which the corporations could seek to raise capital to offset the judicially-imposed losses would be through the introduction of higher utility rates on the public. These higher rates could be imposed through fractional percent increases to both residential and commercial customers. Such minimal increases would have only a slight impact upon individual residents and businesses, but in cumulation would provide for enough funds to offset corporate losses and allow for continued operation. If measures such as fractional increases are deemed necessary, the increases should be regulated by federal law, limiting the increase to a timetable so that once the corporations reached a point at which all damages were paid and the rates began resulting in residual gains for each corporation, the rate would be reduced to its original state, and any residual gains would be paid back to consumers through a surplus disbursement. In this fashion, the electric corporations would sustain losses but remain just above the baseline level of sustainability. Furthermore, the residual losses accrued by consumers would be minimized as much as possible and the states and land trusts would receive adequate compensation for the harm caused to them by the corporations, thereby serving the purpose of the damages award.

2. Imposition of a State Tax to Assist the Corporations

Another means by which the corporations could attain the funds necessary to maintain sustainability would be through the imposition of an electricity tax by the states in which the corporations reside. This tax, which could be as little as a fraction of a percent, would be applied to consumers' monthly electric intake, adding a nominal charge to the total payment due. This tax would be nominal in nature so as not to impose a burden upon the consumers. Spread thinly but applying to a great population, the tax could accrue a large enough sum to offset losses resulting from damages arising from litigation. Similar to the proposal for imposing higher rates to offset losses, once the affected corporations reached a point at which all damages were paid and the funds accruing from the tax began resulting in residual gains for the corporation, the tax would be lifted and the residual
gains garnered from the tax by the state would be returned to the consumers through a structured surplus disbursement.  

C. Corporate Involvement in Emissions Trading Can Provide Economic Gains that Would Help Offset Losses Resulting from Adverse Litigation

While consumers could be forced to bear at least part of the brunt of damages imposed on the corporations, ample situations also exist that provide opportunities for the accrual of residual economic gain that could be used by the corporations to offset losses from adverse tort decisions. The most favorable of these prospects is investment and trading in the carbon market.

1. The Basics of Emissions Trading for Corporations

Emissions trading (also called “cap-and-trade”) poses a valid opportunity for individual and corporate economic gain in an era of environmental regulation. The concept of cap-and-trade is based

123. It must be noted that a tax would be extremely difficult to implement democratically in certain states. To explain, it is posed for one to consider that in the specific case of ambulant air emissions, the pollution does not spread in all directions upon its release from a source, but instead moves with the wind, from west to east. As the pollution travels, therefore, so does the environmental harm resulting from the pollution. Thus, if an electric company producing large amounts of ambulant air emissions resides near Philadelphia, it is much more likely that New York, New Jersey, and Delaware will encounter more of the company's air pollution than the state of Pennsylvania. Therefore, the former states will likely suffer far more environmental degradation as a result of these emissions. In this hypothetical situation, if the injured states sued the Philadelphia-based company for damages in tort under the common law of nuisance and subsequently won their case, the Philadelphia corporation would have to pay damages to those states, thereby providing remedy for the citizens of the injured states. If Pennsylvania then sought to impose a fractional tax upon its citizens in order to raise funds to keep the offending corporation from being rendered bankrupt, the tax would essentially be used to aid citizens of another state at the expense of Pennsylvanians.

Citizens of a state housing an offending corporation would likely be adamantly opposed to a tax which provides their state citizens no direct tangible benefit, as they would see no immediate upside to their loss of income. This disconnect between the immediate, dire economic realities of the electric company in having to pay out damages and the citizenry paying to offset the corporation's losses would result in political discord. Politicians, embroiled in seeking to balance the need of the utility with the need of their constituency, would likely succumb to a stalemate that would prevent the state from enacting its policy and prevent corporations from accumulating the funds necessary to remain operable.

However, such a situation as described above does not necessarily have to occur. By utilizing intuitive policy planning and issue framing, the politicians in charge of implementing such a tax could assuage the public's anger, thereby circumventing—or at least tempering—public dissension and allowing for corporate sustainability to occur.

upon the theory that corporations, in instituting compliance measures that align with mandatory pollution regulations, will choose the most cost-effective means of compliance available. In essence, corporations will choose emissions reductions where the least expensive solutions exist while opting to allow the continued production of emissions that would be unduly expensive to reduce. At its simplest form, emissions trading provides economic incentives for corporations to reduce their emissions and comply with restrictive emissions standards.

Under normal circumstances for emissions trading, a governmental administrative body will institute target levels of emissions as a guideline for corporations to reduce their emissions to environmentally feasible levels. As emissions reduction targets are imposed, cap-and-trade plans are implemented to minimize the costs on corporations in meeting regulatory demands. The "cap" component of the cap-and-trade system is essentially the limit on emissions itself, a threshold that is methodically lowered until a corporation’s emissions reach a designated target level determined by the regulatory body imposing the limitation. After the cap is established, the affected corporations are issued emission permits along with an equivalent number of credits, which constitute an allowance. These allowances, which represent the right to produce a specific amount of emissions, cannot cumulatively exceed the enforced cap level. If a company desires to increase its emissions allowance, it must purchase credits from a corporation that holds credits in excess of its needs. The purchase and sale of these credits is the “trade” of the cap-and-trade system. At its core, the trade is premised upon the notion that purchasers are

132. Id.
133. Id.
paying for the right to pollute beyond their mandated limit, while sellers are concomitantly being recompensed for reducing their emissions to a level beyond that which is required by the imposed limitations. This mechanism promotes active and competitive reduction of emissions while concurrently reinforcing the valued corporate principles of efficiency and cost-cutting.

Of interest to corporate entities as well is the fact that non-polluting organizations, including environmental groups, may also involve themselves in the cap-and-trade system by purchasing and selling credits. The ability of these non-polluting organizations to involve themselves in cap-and-trade is important, as their participation allows for the organizations to have a direct impact on the credit prices in the marketplace and, resultantly, on the corporations themselves. Moreover, corporations have the option of donating their credits to non-corporate entities for tax deductions. The flexibility gained from non-polluting organization participation provides for additional variety of options for the corporations in determining the most advantageous economic policy in trading emissions while concomitantly allowing the polluting corporations' opposition to have a stake in the corporations' sustainability.

Furthermore, an emissions futures market currently exists, providing a tool for corporations to hedge their exposure to possible future United States carbon policy and carbon allowance prices. While the emissions futures market is still in its infancy, there are many benefits to its existence with respect to the sustained viability of emissions trading as a practical means of addressing corporate environmental harms. Currently, in carbon markets alone, futures trading exists for over twenty-five separate types of contracts, providing a panoply of

135. See EGENHOFER & LEGGE, supra note 131, at 28.


options for corporations interested in investing in emissions futures. These futures offer alternatives to investing in basic cap-and-trade contracts, allowing corporations to integrate emissions trading strategies into their company policy creation. This is especially important for utilities such as electric companies, as their utilization of the futures market will allow for the corporations to fix costs so they can adequately price their product to yield an adequate rate of return, ultimately providing not only for the corporations’ sustainability, but also for long-term growth.

2. New Legislation that Could Affect the Emissions Market

The statutory landscape of domestic emissions trading is in a state of constant flux, as the medium is a fledgling industry as compared to traditional modes of investment. Recently, the House of Representatives passed the American Clean Energy & Security Act (ACES), and the legislation is now preparing for consideration in the Senate. ACES is a comprehensive reformulation of domestic climate policy, proposing, amongst other revisions, a federal cap-and-trade system. This legislation would render cap-and-trade not a voluntary choice for corporations, but a mandated mechanism instituted by the government in order to gradually reduce harmful emissions. While under ACES, individual companies would be free to choose how they would like to best utilize cap-and-trade in reducing their emissions, a complete failure to reduce emissions would result in detrimental costs to the corporation, such as fines.

144. H.R. 2454, 111th Cong. (2009). ACES would also require electric utility companies to meet 20% of their electricity demand through renewable energy sources and energy efficiency by 2020. The legislation would subsidize clean energy technologies while promoting energy efficiency. Further, the bill would protect consumers from energy price increases. Id. The EPA has estimated that the reductions in carbon pollution required by the legislation will cost American families less than a postage stamp per day. The bill would require a 17% reduction in emissions reduction from 2005 levels by 2020 and an 80% reduction in domestic emissions by 2050. Letter from Douglas Elmendorf, Congressional Budget Office to Congressman Dave Camp (June 19, 2009) (online at http://energycommerce.house.gov/Press_111/20090620/cbowaxmanmarkey.pdf).
146. Id. It should also be noted that a similar legislation, the Clean Energy Jobs and American Power Act, was recently introduced into the Senate. S. 1799, 111th Cong. (2009). The bill, similar to ACES, has an overall goal of reducing greenhouse gas emissions by 20% (compared
3. How Corporations Can Deal with the Legislation so as to Create the Most Fiscally Beneficial Global Carbon Market

Of pertinent interest to the electric utility corporations affected by *American Electric* is the possibility that if ACES is ratified by Congress, the global carbon market could become the largest commodity market in the world.\textsuperscript{147} Such an emergence could also provide opportunity for favorable federal emissions regulations, with electric utility corporations joining forces with financial corporations to create a powerful lobby in the carbon market. The stars are already aligning for such a union, as the presence of the financial lobby in climate legislation has increased by roughly one hundred thirty representatives since 2003.\textsuperscript{148} The financial firms, if they behave according to traditional capitalist tendencies,\textsuperscript{149} will push for weak, pliable regulatory standards. Such flimsy regulations would provide for greater opportunity for the firms to exploit a nascent industry, thereby increasing the chance for maximized gains by those involved in the market.\textsuperscript{150} This freedom from cumbrance could be a boon for the electric utility corporations that are inherently involved in the trades, as the development of a strategic investment policy in carbon trading that properly exploits the weak market standards would allow these companies to maximize their profits and residual fiscal gains while coming into compliance with the federal emissions regulations imposed by Congress. In short, the electric companies would be placed in an advantageous economic position while the consumers, states, and land trusts would be placed in an advantageous environmental position, thereby creating a de facto reciprocity of benefit.

with 2005 levels) by 2020, and by 83\% by 2050. *Id.* The Clean Energy Jobs and American Power Act lacks an economy-wide cap-and-trade system, as seen in ACES. *Id.* However, the bill would force electric utilities to face limits on their greenhouse gas emissions by establishing a market to allow the utilities to trade pollution permits. Of note, the primary utility industry trade group, Edison Electric Institute, endorsed the bill. John M. Broder, *Senate Gets a Climate and Energy Bill, Modified by a Gulf Spill That Still Grows*, N.Y. TIMES, May 13, 2010, at A18.


149. For a discussion on the merits of a financial laissez-faire approach in allowing for the traditional free market economy first proposed by Adam Smith, see KEVIN DOWD, MONEY AND THE MARKET: ESSAYS ON FREE BANKING 17-25 (2001).

150. *Id.*
IV. The Effects of American Electric on Corporate Lobbying for Legislative Change to Emissions Standards

While corporations impacted by the holding of *American Electric* must actively look towards the immediate issue of minimizing the adverse economic impact caused by compulsory emissions reforms by utilizing the best possible measures available to offset losses accrued, the corporations also must look to their lobby as a tool for effecting favorable change. Lessons may be gleaned from comparing *Tennessee Copper* and *Milwaukee I* and *II*. Namely, the corporations in *Tennessee Copper* took an obstinate, archaic approach to addressing and remedying the problems they faced in litigation, choosing to fight their battle through prolonged litigation and opting for compliance with only the bare minimum standards for operations mandated by the Court. This myopic, stale strategy resulted in both fiscal and legal losses for the corporations and could have been addressed in a manner more advantageous for long-term corporate sustainability. In contrast, the entities affected by *Milwaukee I* took a different approach, pushing for the institution of new legislation more favorable to corporate needs that would adequately address their issue while concomitantly supplanting the more unfavorable federal common law. The past precedent of legislative change effected between the holdings of *Milwaukee I* and *II* shows that lobbying can be a useful tool if utilized effectively.

A. The Kyoto Protocol: Domestic Corporate Concerns and Responses

Corporate lobbying played a massive role in the United States' decision not to adopt the Kyoto Protocol ("the Protocol"). As a basis point, the elemental foundations of the Protocol must be discussed. The Protocol was the result of a series of conferences and summits that began with the 1992 Rio Earth Summit Conference, where the United Nations Framework Convention on Climate Change was

151. 237 U.S. 474.
152. 406 U.S. 91.
153. 451 U.S. 304.
155. *Id.* at 477-78.
156. This new legislation was embodied in the 1972 FWPCA Amendments, which delineated more specific bases by which polluters had to comply, thereby providing well-defined limits for corporations to develop internal policies compliant with federal and state standards. *See* 33 U.S.C. 1251 et seq. (2006).
adopted, and ended after a 1997 “Conference of the Parties” in Kyoto, Japan. The Protocol essentially serves as an international agreement to limit the emissions of greenhouse gases. Its fundamental premise was that developed countries, essentially the largest energy users and greenhouse gas producers, should bear the brunt of reducing emissions to avoid climate change, and the Protocol specifically required the United States to reduce emissions to seven percent below 1990 levels by 2012.

Of pertinent interest is the fact that the Protocol allowed trading in emissions. Similar to the methodology behind corporate emissions trading discussed above, the Protocol’s emissions trading guidelines prescribed that countries could buy the right to emit a certain amount of carbon dioxide from countries that value money more than their right to emit. However, the Kyoto formulation of emissions trading contained a number of caveats. For example, the Protocol required the trading to involve either a reduction in emissions or an enhancement of greenhouse gas removal that would be additional to any that would otherwise occur. Furthermore, the country buying emissions rights had to be in compliance with the Protocol, and any trading had to be supplemental to domestic actions for the purpose of reducing emissions.

1. American Legislative Reasoning for Not Adopting the Protocol

The United States, despite being a signatory to the Kyoto Protocol, never ratified the concord. As the Protocol is non-binding unless

159. See Kyoto Protocol, supra note 1, art. 2.
160. Kyoto Protocol, supra note 1, art. 11.
162. Kyoto Protocol, supra note 1, art. 17.
163. Eric Shaffner, Repudiation and Regret: Is the United States Sitting Out the Kyoto Protocol to Its Economic Detriment? 37 Envtl. L. 441, 454 (2007). The Kyoto Protocol emissions trading system was patterned after the successful sulfur dioxide emissions trading system created as a component of the U.S. Acid Rain Program instituted in the 1990’s.
164. See Kyoto Protocol, supra note 1, art. 6.1(d).
165. Id.
166. The United States’ decision to be merely a signatory and not a full-fledged member nation of the Protocol stems from the United States Senate’s unanimous passage of the Byrd-Hagel Resolution, which addressed the belief that the United States should not be bound to a protocol that did not include compulsory timetables for developing nations as well as industrialized na-
ratified by an adoptive state government, the United States’ signature constitutes merely a symbolic gesture, pleading to stand with other nations in expressing that climate change is a growing concern that needs to be addressed and remedied in the near future so as to protect the Earth’s fragile ecosystem.

In lieu of adopting the Kyoto Protocol, the United States signed the Asia Pacific Partnership on Clean Development and Climate (APP). While technically a formal step towards the United States embracing the revisionist goals of corrective climate change, the APP failed to proffer an enforcement mechanism and therefore was tantamount to another mere gesture by the United States, which increasingly displayed isolationist tendencies with respect to economic regulation. Congress responded to the Kyoto Protocol and the APP by proposing the America’s Climate Security Act of 2007 (the “Cap and Trade Bill”), which pushed for greater United States alignment with the Kyoto Protocol standards and goals. Calling for a variety of reforms, the bill was slated to impose emission limits on various industries, including the electric utility industry, while also providing assistance both to the affected corporations and to the consumers who would be affected by the corporate emissions restructuring. However, the Cap and Trade bill stagnated in Congress in 2008, halted by the hazard of a faltering domestic economy along with a strong push by electric utility lobby groups to avoid the imposition of emissions caps.
2. The Role of the Electric Utility Lobby

The electric utility lobby has long had a perceptible impact on domestic legislation. Since 1998, electric utility lobbyist groups have spent nearly $1.2 billion, rendering it the third most powerful industrial lobby by expenditure.\(^{175}\) Like most corporate lobbies, the electric utility lobby pushes for laissez-faire policies that allow for the maximum force of capitalism to be attained, thereby rendering great inflows of profits at limited short-term expense.\(^{176}\) The lobby's power has increased over the past decade, peaking in 2008 during a zenith of hype over the Kyoto Protocol and slightly receding since.\(^{177}\) This lobby had a great influence in the United States' decision not to adopt the Kyoto Protocol in the late Nineties, as the proposed emissions restrictions would have devastated the industry by forcing it to expend gross amounts of capital to comply with the stringent environmental limitations in a short amount of time.\(^{178}\)

The electric companies named in *American Electric* are not divested from the electric lobby efforts. In fact, the corporations have played and continue to play a pivotal role. Over the last decade American Electric contributed over $20 million to the electric utility lobby,\(^{179}\) while Xcel Energy spent over $15 million.\(^{180}\) Southern Company, one of the largest contributors in the industry, spent over $90 million.\(^{181}\) Furthermore, the lobby efforts in the areas of energy and the environment by the *American Electric* corporations and the electric utility industry in general have been steadily increasing as the decade has progressed.\(^{182}\) In light of the *American Electric* holding, and in the

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\(^{175}\) *Lobbying Spending Database: Top Entries (July 28, 2010)*, available at [http://www.opensecrets.org/lobby/top.php?showYear=&indexType=i].

\(^{176}\) *Rogers, supra* note 171, at 129.


\(^{178}\) CorpWatch: Corporate Campaign to Corrupt The Kyoto Protocol Continues After COP-6 (Apr. 1, 2001), [http://www.corpwatch.org/article.php?id=980].


face of competitive lobbying in opposition to the electric utility companies' interests as the Kyoto Protocol's reign reaches an end, the electric utility industry must refocus its lobby efforts on the specific purpose of refashioning the CAA so as to render it preemptive of the national common law of nuisance. Concentrating on this specific goal provides the best possibility of legislative reform that would void the holding of American Electric.

B. Corporations Must Now Focus on the Clean Air Act so as to Eliminate Tort Liability for Damages Under the Common Law of Nuisance

When considering whether a statute preempts federal common law, the Supreme Court must take "an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." In order for preemption to occur, the statute must speak directly to the issue in question. If Congress has not clearly addressed a particular issue, the courts must apply federal common law.

Many courts have mentioned that the CAA and FWPCA have many analogous characteristics, alluding to the idea that the similar statutory bases and purposes require similar judicial interpretation in preempting the federal common law of nuisance. However, the CAA's current structure differs significantly from the amended FWPCA that preempted the common law of nuisance in Milwaukee II, a fact that likely was determinative as to how the Second Circuit ruled in American Electric. The FWPCA's standards originally were not fully comprehensive and therefore were subsequently altered after Milwaukee I to encompass all effluent emissions, rendering the amended version of the FWPCA's statutory structure a suitable archetype for preemption of the federal common law of nuisance. The majority opinion in Milwaukee II found it especially significant in preempting the federal common law that under the amended

185. Id. at 315.
186. Id.; see also County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 237 (1985).
FWPCA, rechristened the Clean Water Act, the EPA regulated *every* instance of effluent emission.\textsuperscript{190} Conversely, under the CAA, the states and the EPA do not have omnipresent control over all sources of emissions, but only over the sources they collectively determine to threaten the NAAQS.\textsuperscript{191} As the CAA is currently not all-encompassing, and in fact more comparable to the original version of the FWPCA, the electric utility lobby should take heed from past precedent and aim to initiate favorable reforms, thereby rendering the statute fully inclusive so as to displace the common law and subvert the holding of *American Electric*.

The use of legislative reform by corporations as a proactive measure to supplant the common law of nuisance and combat adverse judicial holdings has been successful in the past. As evidenced in the work by the corporate lobby in influencing the amending of the FWPCA prior to *Milwaukee II*, legislative reform can have a positive effect for corporations that have been adversely adjudicated.\textsuperscript{192} Provided that the electric utility lobby mobilizes quickly to induce favorable reform, the industry could curtail losses and end up with a sympathetic statutory construction for its practices.

V. Conclusion

The *American Electric* holding was a key victory for environmental reform activists and a striking blow for the electric utility industry. The holding is a defining moment in environmental adjudication that could result in a flood of litigation by states, municipalities, and conservation trusts for redress of harms to the ambient air quality. The corporations must be proactive in their preparation for a litigious climate by developing fiscal stratagems to best counteract the outflow of capital through judicially imposed damages. Further, the *American Electric* holding could prompt the impetus for domestic emissions policy reform. Utilizing the lessons of past precedent, the corporations subject to impending lawsuits under the post-*American Electric* regime can adequately prepare not only for impending actions under the common law of nuisance, but also for instigating favorable legislative reform.

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\textsuperscript{190} Milwaukee II, 451 U.S. at 318.


\textsuperscript{192} Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 21-22 (1981).