I. INTRODUCTION

In 2004, in American Electric Power Company v. Connecticut, eight states, two conservation groups, and the City of New York brought suit in federal court against five defendants, alleged by the plaintiffs to be the largest producers of carbon dioxide in the United States, and among the largest such producers on the planet. According to the complaint, the five defendants account for ten percent of carbon dioxide emissions from all human activities in the United States. Plaintiffs, under a theory of the federal common law of nuisance, or in the alternative, state laws of public nuisance, sought injunctive relief in the form of caps on defendants’ carbon dioxide emissions for at least ten years.

Seven years later the Supreme Court held that the Clean Air Act, as enforced by the Environmental Protection Agency (“EPA”), both through its final rules, and its anticipated proposed rules, displaced plaintiffs’ federal common law right to seek pollutant abatement from the defendants. The Court noted that it had determined in Massachusetts v. EPA that greenhouse gases were “air pollutants” as that term is used in the Clean Air Act, and therefore subject to regulation by the EPA. The displacement in American Power was not novel; the Court had previously held in City of Milwaukee v. Illinois and Michigan, that once Congress exercises its power to regulate an area, statutory or regulatory authority displaces federal common law. What was new in American Electric was anticipatory delegation. As the Second Circuit Court of Appeals noted, at the time of its decision, the EPA had not actually begun to regulate greenhouse gases under the Clean Air Act. On this basis, the Second Circuit held that
federal law had not been displaced, since any proposed rules or findings by the EPA would have no legal effect on the matter before the court. The Supreme Court reversed. Though the EPA had not yet begun to regulate greenhouse gases, the Court held that greenhouse gases, nevertheless, were within the field occupied by the EPA. Congress had delegated to the EPA the decision about whether or not to regulate greenhouse gases. Accordingly, the Court reasoned, EPA regulatory authority was the only appropriate channel through which harm resulting from greenhouse gases could be redressed.

The extension of regulatory displacement of federal common law to regulations that are merely anticipated represents an unacceptably large incursion on the scope of federal common law. The Court’s curtailment, through anticipatory delegation in *American Power*, leaves vacant a hole that the federal common law once ably filled. This article will proceed as follows: Part II briefly traces some historical contours of federal common law from *Erie v. Tompkins* forward to *American Electric*. Also, a brief summary of the issue of standing and how *Massachusetts v. EPA* shaped standing in *American Electric* will be reviewed. Part III will show how the *American Electric* Court’s use of anticipatory delegation suffers from two defects: First, the Court’s decision leaves plaintiffs with cognizable claims the prospect of no redress. Because the court was willing to make injured parties wait for potential future regulations as a means of relief, parties suffering harm now face the prospect of unacceptably delayed relief, if that relief comes at all. Second, the Court in *American Electric* did not deal adequately with the bearing of its decision on the related issue of standing. The lack of practical redressability, as indicated in the first defect, creates paradoxical problems for justices on both sides of the standing question.
II. BACKGROUND: HISTORICAL CONTOURS OF FEDERAL COMMON LAW AND THE BACKDROP OF STANDING

A. From Erie Railroad Co. to Milwaukee I: Federal Common Law and Pollution Abatement

The *Erie v. Tompkins* famous declaration, “There is no federal general common law,” has governed federal adjudications since Justice Brandeis’ pronouncement some seventy-three years ago. The Court in *Erie* mandated that except for those matters governed by the Constitution or by acts of Congress, federal courts shall apply the substantive law of the states in which they sit. Yet since the very year in which *Erie* was decided, the Supreme Court has carved out exceptions to the general rule to provide for certain expressions of federal common law. Indeed, on the very day on which the decision in *Erie* was announced, the Court held in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* that its rule governing a state boundary dispute was federal common law.

To resolve these seemingly conflicting signals, since *Erie*, the Supreme Court has specified the areas in which federal common law may be said to govern. Specifically, the Court has stated that federal common law exists, in particular, in areas of national concern. As the Court stated in *American Electric*, the federal common law encompasses those areas identified by Congress or as required by the Constitution.

Until recently, interstate pollution abatement suits, brought on the theory of interstate nuisance has been one sphere in which the federal common law has controlled. Thomas Merrill has argued that since 1901, long before *Erie*, the Supreme Court effectively applied federal common law in several pollution abatement suits between states. In each case, the Court deemed that it would be inappropriate to apply the common laws of the party states. Consequently, the Court “drew on the general law of nuisance without referring to the laws of
either state.”

Indeed, in one of these early cases, Georgia v. Tennessee Copper Co., the court adopted language that would echo over sixty years later in Illinois v. City of Milwaukee (Milwaukee I), in that Court’s decision to abate a state’s water pollution emissions through federal common law. Thus, leading up the formal recognition of the federal common law of nuisance in pollution abatement, there was a de facto observance of it in Supreme Court jurisprudence.

B. Milwaukee I and II – Regulatory Displacement of Federal Common Law

In 1972, the State of Illinois brought an action against the City of Milwaukee, alleging that the city, its sewage commission, and the County’s Metropolitan Sewage Commission were polluting Lake Michigan through the release of untreated sewage. In Illinois v. City of Milwaukee, Wis., (Milwaukee I), the Supreme Court recognized a cause of action under the federal common law theory of public nuisance. But the court did not exercise original jurisdiction in the case, holding that the district court was an appropriate forum for the suit. The State of Illinois again sued the defendants, this time in federal district court (Milwaukee II), seeking abatement according to the federal common law doctrine of public nuisance. Five months after the suit was filed, Congress passed the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), which gave the EPA authority to regulate effluent emissions. “The Amendments established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit.” The District Court found that the federal common law of public nuisance had not been displaced by the statute. The Seventh Circuit affirmed in part and reversed in part. The court held that while FWPCA had not displaced federal common public nuisance law, the District Court had wrongly imposed limitations more stringent than those required by applicable permits and EPA regulations.
The Supreme Court vacated the Seventh Circuit’s decision and remanded the case.\textsuperscript{39} The Court held that though federal common law exists in areas of national concern, once Congress exercises its power to regulate such an area, statutory or regulatory authority displaces federal common law.\textsuperscript{40} The Court explained, “Federal common law is subject to the paramount authority of Congress.”\textsuperscript{41} The Court reasoned that Congress and agencies of the federal government, not the courts, were best positioned to handle the complex issues related to matters like environment protection.\textsuperscript{42}

The Court noted that through FWPCA, Congress “ha[d] occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.”\textsuperscript{43} Moreover, the problem of effluent limitations at the sites in question had been thoroughly addressed by FWPCA.\textsuperscript{44} The court reasoned, therefore, that FWPCA, displaced the federal common law of public nuisance. Furthermore, the Court reasoned, the State of Illinois did not avail itself of the statutory protections existing under the act.\textsuperscript{45} Accordingly, the Court concluded, no federal common law remedy was available to Illinois.\textsuperscript{46}

C. \textit{American Electric – Anticipatory Displacement}

In 2004, eight states and three non-profit land trusts filed suit in federal court against four private companies, and the Tennessee Valley Authority (TVA).\textsuperscript{47} “According to the complaint, the defendants were the five largest emitters of carbon dioxide in the United States.”\textsuperscript{48} The plaintiffs alleged that the defendants’ carbon dioxide production put the plaintiffs’ lands at risk, and endangered wildlife and ecosystems.\textsuperscript{49} The plaintiffs, therefore, sought injunctive relief, under the federal common law theory of interstate nuisance.\textsuperscript{50} Relief sought by the plaintiffs would require the defendants to cap carbon dioxide production and then annually reduce levels of production by a certain percentage for ten years.\textsuperscript{51}
The District Court dismissed the suit on the grounds that plaintiffs had raised a political
question.\textsuperscript{52} The Second Circuit reversed the District Court, holding that there was no political
question, and that the plaintiffs had sufficiently alleged Article III standing.\textsuperscript{53} Additionally, the
Second Circuit held on the merits that plaintiffs’ had stated a claim on the federal common law
type of nuisance, and that the Clean Air Act did not displace the federal common law on this
matter.\textsuperscript{54} Crucial to the Second Circuit’s decision was the fact that the EPA had not yet
promulgated regulations controlling the production of carbon dioxide.\textsuperscript{55}

The Supreme Court reversed the Second Circuit and held that the Clean Air Act displaced
the federal common law with respect to the production of greenhouse gases.\textsuperscript{56} On the question
of standing, the Court split 4-4, thereby affirming the decision of the Second Circuit.\textsuperscript{57} The
Court affirmed, as the Court did in \textit{Milwaukee I} and \textit{Milwaukee II}, that “it is primarily the office
of Congress, not the federal courts, to prescribe national policy in areas of special federal
interest.”\textsuperscript{58} Though the Second Circuit held, and the plaintiffs argued, that displacement of
federal common law was improper because the EPA had yet to promulgate regulations for
carbon dioxide emissions, the Supreme Court held the Clean Air Act had displaced the federal
common law of interstate nuisance, nonetheless.\textsuperscript{59} The Court, recalling its decision in
\textit{Milwaukee II}, reasoned, “the relevant question for purposes of displacement is ‘whether the field
has been occupied, not whether it has been occupied in a particular manner.’”\textsuperscript{60} Furthermore, the
court reasoned, the absence of a regulation concerning some specific emission did not validate
federal common law.\textsuperscript{61} The delegation itself, not specific implementations, is what displaces
federal common law.\textsuperscript{62}
D. *Massachusetts v. EPA: The Standing Precursor to American Electric*

As mentioned, the Court in *American Electric* split 4-4 on the question of standing. The divided justices fell on either side of the standing debate that had arisen four years earlier in *Massachusetts v. EPA*. The issues of standing and anticipatory delegation in *American Electric* have shared implications. Accordingly, a brief review of that doctrine, and its background in *Massachusetts* is in order.

1. **Standing in General.**

Standing has been labeled the “Rorschach test of federal courts.”[^63] It is a threshold question in cases before the Supreme Court.[^64] As the Court wrote in *Warth v. Seldin*, “In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant within the meaning of Art. III.”[^65] In the traditional model, to establish standing, a plaintiff must first allege that he or she has suffered an injury that is fairly traceable to the conduct of the defendant.[^66] The injury must be a “concrete and particularized injury that is either actual or imminent.”[^67] The plaintiff must also show that the harm suffered is likely to be redressed by the requested relief.[^68]

The Court has been careful to note that generalized grievances, including some environmental complaints, must, on occasion, be precluded for a lack of standing.[^69] As the Court in *Lujan v. Defenders of Wildlife*, stated:

> We have consistently held that a plaintiff raising only a generally available grievance about government-claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large-does not state an Article III case or controversy.[^70]

The Court’s concern in cases with generalized grievances has been “to avoid deciding questions of broad social import where no individual rights would be vindicated . . .”[^71] Until
1998, the Court’s jurisprudence was unclear with regard to what generalized grievances would constitute sufficient grounds to establish standing. But in 1998, in *Federal Election Commission v. Akins*, the Court provided some guidance. The *Akins* Court stated that where injuries are “widely shared” and “of an abstract and indefinite nature,” it would deny standing. On the other hand, the Court stated that when an injury was “sufficiently concrete and specific,” that injury might be such that it qualifies a plaintiff for Article III standing, even if it is “widely shared.”

2. **Standing in Massachusetts v. EPA and Its Progeny: American Electric**

In *Massachusetts v. EPA*, the Supreme Court relied on *Akins* in its determination of whether the plaintiffs had standing. In *Massachusetts*, twelve states and a variety of cities and conservation groups petitioned the Supreme Court to rule that the EPA must regulate greenhouse gases, according to section § 202(a)(1) of the Clean Air Act. The EPA, challenged the suit on the ground that Massachusetts lacked standing. Specifically, the EPA argued that “because greenhouse gas emissions inflict widespread harm, the doctrine of standing present[ed] an insuperable jurisdictional obstacle” to the plaintiffs’ complaint.

In a five to four split, the Court disagreed. Citing the *Akins* decision, the *Massachusetts* Court held that even though the climate change risks alleged by the state of Massachusetts were widely held, that did not “minimize Massachusetts' interest in the outcome of [the] litigation.” Moreover, the Court held, the State of Massachusetts, like other states, was not a normal litigant for standing determinations. Going back to *Georgia v. Tennessee Copper*, the Court noted that a state’s interest in the air and earth within its domain warranted federal jurisdiction. Accordingly, the Court reasoned, unlike a private individual, Massachusetts’ status as a quasi-sovereign state, entitled it to “special solicitude” for purposes of determining standing.
The dissent in *Massachusetts* accused the majority of not playing by the rules, but instead changing them midstream.\(^8^5\) Chief Justice Roberts asserted that the relaxing of standing requirements, where states are concerned, was not based in the Court’s jurisprudence.\(^8^6\) Indeed, wrote Roberts, the Court’s creation of “special solicitude” was nothing but an implicit concession that Massachusetts did not, in fact, have standing according to the traditional rule.\(^8^7\)

Both the arguments of majority and the dissent in *Massachusetts* found purchase four years later in *American Electric*. The Court in *American Electric* divided on the question of standing, each side reflecting the division in *Massachusetts v. EPA*.\(^8^8\) The 4-4 split affirmed the Second Circuit’s holding that the Plaintiffs had standing.\(^8^9\) With the standing question out of the way, the Court proceeded to consider whether federal common law had been displaced.\(^9^0\)

**III. DEFECTS OF ANTICIPATORY DELEGATION**

The Supreme Court’s decision in *American Electric* suffers from at least two defects:

First, it leaves plaintiffs who have suffered injury no avenue of redress if the injury touches an area that has been delegated to the EPA, but has not yet been regulated by the EPA. The problem is a practical one. Limitations of resources to the EPA, combined with the peculiar complexity of greenhouse gases and their contribution to global warming, result in a practical lack of redressibility.

Second, this lack of practical redressability undermines the Supreme Court’s holding that the Plaintiffs had standing to bring the suit. Anticipatory delegation raises certain paradoxical implications related to the Court’s split on standing. Those implications that make anticipatory delegation problematic.
A. Practical Lack of Redressability

“The redressability requirement asks whether the relief sought by the plaintiffs is likely to
cure the injury of which they complain.” In *American Electric*, the relief sought by the
plaintiffs was a judicially imposed curb on emissions, which would grow progressively over
time. The Supreme Court refused the relief sought by the plaintiffs because the Court deemed
EPA regulation of the field a sufficient avenue of relief for the plaintiffs. Part of that
regulatory scheme was rulemaking by the EPA according to § 7411 of the Clean Air Act. In
denying plaintiff’s requested relief in *American Electric*, the Court noted that the EPA had
agreed to complete its § 7411 rule making no later than May 2012.

Under the provisions of Rule § 7411, the EPA’s Administrator first publishes proposed
regulations establishing standards for stationary emission sources. After publication, the EPA
receives comments from interested persons on the proposed regulations. Within one year of
publication of the proposed regulations, the Administrator must promulgate final regulations,
including such amendments, as the Administrator deems appropriate. In reversing the Second
Circuit, the Supreme Court explained that this process provided an avenue for the relief sought
by the plaintiffs. The Court reasoned that there was therefore, “no need for a parallel track.”

The redress of civil harms is foundational. “The very essence of civil liberty certainly
consists in the right of every individual to claim the protection of the laws, whenever he receives
an injury. One of the first duties of government is to afford that protection.” The Supreme
Court has recognized that this duty extends to occasions when one state or its citizens through its
polluting activities, harm another state or its citizens. However, the form of relief anticipated
by the Court in *American Electric*, because it is speculative, fails to fulfill the duty of the federal
government to ensure the redress to which the plaintiffs are due.
1. The EPA’s Spotty Track Record in Publication.

The Supreme Court’s faith in anticipated relief through the EPA is overly-optimistic, given the EPA’s spotty track record in publishing legislatively mandated rules. Relief for the American Electric plaintiffs, through EPA channels, will likely be impeded by the EPA’s failure to publish, delays in correcting EPA omissions, and the peculiar complexities of the greenhouse gas problem, with which the EPA has struggled.

Even though Congress has mandated that the EPA promulgate regulations in the areas over which the agency has been delegated authority, those promulgations have often been significantly delayed or omitted. For example, in National Resources Defense Council v. United States E.P.A., the plaintiff sued the EPA for failure to promulgate regulations as required by the Clean Water Act, as amended in 33 U.S.C. § 1314(m). The amendments required the EPA to publish effluent limitation guidelines, and new source performance standards for storm water discharges in the construction industry. Two years after the amendment, the EPA had not published the rules. Plaintiffs moved for summary judgment to compel the EPA to publish, arguing that the Act imposed on the EPA a “nondiscretionary duty” to promulgate the standards. The court agreed. It held that the EPA’s “2004 decision not to promulgate national guidelines for the construction industry . . . [was] at odds with the expressly stated goals of the legislation.”

National Resources Defense Council is not an isolated example of the EPA’s failure to publish rules according to the expressly stated goals of Congress. On the contrary, examples of the EPA’s failure to promulgate rules according to nondiscretionary provisions of the Clean Air Act abound. In the first four years after the enactment of the 1990 amendments to the Clean Air Act, the EPA missed twenty-two of forty-two deadlines to publish rules. In 2006, the United
States Government Accountability Office ("GAO") found that “most of [the EPA’s] regulatory actions were completed late and major aspects of the program have still not been addressed.” Specifically, the GAO found that only one of the four categories of requirements had been published, resulting in 96 rules, and these were completed four years late. With regard to small stationary sources, the EPA had published only sixteen of seventy emissions standards. Furthermore the GAO found that as of 2005, the EPA had not yet even estimated “the level of resources necessary to comply with the remaining requirements of the 1990 amendments.” As a result of these failures, several suits pertaining to the EPA’s continuing failure to promulgate nondiscretionary rules are pending. Critical to the question of relief in the Atlantic Electric decision, was the presumption that the Plaintiffs had an avenue of relief through EPA regulatory efforts. The Supreme Court’s reasoning contradicts the findings of the GAO, which concluded: “As a result of the limited progress in implementing these requirements, EPA has not reduced human health risks from air toxics to the extent and in the time frames envisioned in the act.” Because of the EPA’s systemic failures to publish nondiscretionary rules, according to the provisions of the Clean Air Act, the Supreme Court’s decision in Atlantic Electric does not provide the plaintiffs with practical redress to harms suffered.

2. Delays in Correction of EPA Failures to Publish

The Court rightly noted that plaintiffs have judicial recourse, in the event that the EPA fails to fulfill its statutory duties. As the Supreme Court noted, “‘States and private parties may petition for a rulemaking on the matter, and EPA’s response will be reviewable in federal court.’” In practice, however, judicial correction of EPA failures along this path has been less than expeditious. In 1990, Congress enacted sweeping changes to the Clean Air Act. Included in these changes were requirements for the EPA to issue standards for area sources and
specific pollutants.\textsuperscript{120} These area sources were those in “which the Administrator [found] present a threat of adverse effects to human health or the environment.”\textsuperscript{121} Pollutants in the relevant sections included such chemicals as mercury and alkylated lead compounds.\textsuperscript{122} Within ten years of the 1990 amendments’ enactment, the EPA was to have promulgated rules concerning these areas’ sources and pollutants.\textsuperscript{123} In 2006, the EPA’s failure to publish rules as required by the 1990 amendments prompted the Sierra Club to seek an injunction against the EPA requiring publication of the rules.\textsuperscript{124} In \textit{Sierra Club v. Johnson}, the court ordered the EPA to promulgate the standards as required in the 1990 amendments, with respect to specific pollutants in § 112(c)(6), no later than December 15, 2007.\textsuperscript{125} Between August, 2006, and January, 2011, the EPA filed for, and received, several unopposed extensions to the court’s order in \textit{Sierra Club}.\textsuperscript{126} In January 2011, in an opposed action, the United States District Court for the District of Columbia granted what it termed a further “slight extension” to the EPA’s deadline.\textsuperscript{127} As of October 13, 2011, the EPA continues to defend what it terms a further “Delay Notice” in the promulgation of the rules in question.\textsuperscript{128} Twenty-one years after Congress enacted 1990 amendments to the Clean Air Act, important provisions concerning the control of harmful pollutants remain unimplemented.

The delays exemplified in the \textit{Sierra Club} cases above, have already begun to accrue with regard to the May, 2012 promulgations anticipated by the Supreme Court in \textit{American Electric}.\textsuperscript{129} In June, 2011, the EPA deferred until September 30, 2011, its obligation to publish the proposed rule, due July 26, 2011, which would be the precursor to the May 12, 2012 final rule.\textsuperscript{130} In September, however, the EPA indefinitely postponed its issuing of proposed New Source Performance Standards.\textsuperscript{131}
3. **Complexity of the Greenhouse Gas, and Flawed Endangerment Studies**

The delays in the anticipated rules are due, in part, to the nature of greenhouse-gas-as-pollutant analysis. Regulation of greenhouse gases as produced by power plants represents a problem of unusual depth and complexity for the EPA.\textsuperscript{132} Even the EPA’s own Inspector General, on September 26, 2011, found that the agency’s methodologies with regard to its endangerment studies related to greenhouse gases are seriously flawed.\textsuperscript{133} The flaws in the endangerment studies are critical to the problem raised in *American Electric*, because endangerment studies of greenhouse gases form the basis of the proposed and final rules.\textsuperscript{134} These rules open the way to what the Supreme Court in *American Electric* identified as the avenues of relief for the plaintiffs in that case.\textsuperscript{135}

However, there have been problems with the greenhouse gas endangerment studies. In *American Electric*, the Supreme Court recalled that in its decision in *Massachusetts v. EPA*, it held that greenhouse gases were pollutants within meaning of the Clean Air Act and therefore “within the EPA’s regulatory ken.”\textsuperscript{136} Because greenhouse gases were held to be governed by the Clean Air Act, the Court reasoned that the EPA Administrator had been tasked, under § 111 of the Act to list “categories of stationary sources” of greenhouse gases that “in her judgment ... cause, or contribute significantly to, air pollution which may reasonably be anticipated to *endanger* public health or welfare.”\textsuperscript{137} That is, the EPA had been tasked to perform an endangerment study to determine whether the public’s health or welfare was sufficiently at risk, so as to justify the promulgation of rules. In response to the *Massachusetts* decision, the EPA conducted a study to determine whether the requisite endangerment concerning greenhouse gases existed.\textsuperscript{138} The agency concluded that section 202(a) source categories contributed significantly
to global concentrations of greenhouse gases in such a way they “may be reasonably be anticipated both to endanger public health and to endanger public welfare.”

The EPA’s Inspector General found, however, the endangerment studies regarding greenhouse gases suffered from two critical flaws. First, the Inspector General found that the study’s use of highly influential scientific assessments in greenhouse gas endangerment studies did not adequately employ the principles of peer review. The report also found that the EPA’s assessment procedures of external data in its endangerment studies were not sufficiently clear. The endangerment findings had already come under fire by certain state authorities, challenging their accuracy and applicability. This report, by the EPA’s own Inspector General, will likely further exacerbate the EPA’s inability to promulgate the proposed rules anticipated by the Supreme Court in a timely manner.

4. Delay as a Practical Lack of Redressability

Because final rules published by the EPA are dependent upon the publication of the proposed rules and subsequent public comments, the final rule, anticipated by the Supreme Court in American Electric, faces indefinite postponement as well. Accordingly, the plaintiffs’ avenue of relief, as promised by the Court faces a delay of indeterminate length, if it is forthcoming at all. Notably, the Supreme Court in American Electric actually anticipated the possibility of the EPA failing to regulate greenhouse gases at all, but assured that such failure “would not escape judicial review.” Given the EPA’s track record of delay and omission on matters like the one in American Electric, however, the Court’s assurance does not engender optimism.

The maxim “Justice Delayed is Justice Denied,” is well known. As Chief Justice Warren Burger has stated,
A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law - in the larger sense - cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets.  

Burger’s admonishment is directly on point with respect to the Court’s decision in *American Electric*. Until that decision, states and their citizens, suffering harm from pollution at the hands of other states or their citizens have had two possible avenues of redress: In those spheres for which the EPA had actually promulgated final rules, the rules themselves, and their enforcement, provided relief. In those areas for which the EPA had not yet promulgated final rules, the federal common law of nuisance ably filled the gap, and ensured that a quasi-sovereign state would have “the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”

But now, with the decision in *American Electric*, a state or its citizens who suffer harm from a type of air pollution not yet regulated by the EPA, must wait for the EPA to regulate the pollution, its institutional delays to establish complex regulations notwithstanding, “since the field has been occupied.” The dissent in *Milwaukee II*, noted with frustration, a similar effect to the majority’s decision there. As Justice Blackman wrote, “Nine years ago, in *Illinois v. Milwaukee*, this Court unanimously determined that Illinois could bring a federal common-law action against the city of Milwaukee, three other Wisconsin cities, and two sewerage commissions . . . . Today, the Court decides that this 9-year judicial exercise has been just a meaningless charade.” As a result of the decision in *American Electric*, it is arguable that this eight year judicial exercise will also ultimately end up a “meaningless charade.” The Supreme
Court’s ruling is final, the EPA has yet to regulate GHG’s, it’s study methodologies have been found flawed by its own Inspector General, and the plaintiffs continue to suffer at the hands of the five largest American producers of carbon dioxide. Such are the consequences of anticipatory delegation. Given the EPA’s omissions, delays, and flawed studies, the prospective relief promised by the Supreme Court seems a practical fiction that will do little to secure abatement by the Defendants.\footnote{151}

**B. The Paradox of Anticipatory Delegation and Standing**

The *American Electric* Court only briefly touched on the question of the plaintiff’s standing in its decision.\footnote{152} The Court’s brevity, however, did not conceal the deep divide over the question. The Court split 4-4 on the issue, and in so doing, affirmed the decision of the Second Circuit.\footnote{153} Justice Ginsburg, writing for the Court, explained that the split in the *American Electric* decision reflected the Court’s division in *Massachusetts v. EPA*.\footnote{154} Four justices in *American Electric* held that under the rule of *Massachusetts*, the plaintiffs had Article III standing.\footnote{155} Four of the justices, subscribing to the dissent in *Massachusetts*, held that they did not.\footnote{156} The practical lack of redressibility, as discussed in the previous section, has implications for both sides on the standing issue and raises certain paradoxical problems. These paradoxes further illuminate flaws in the Court’s newly minted doctrine of anticipatory delegation.

1. **The Pro-Massachusetts Majority Faction Paradoxically Undermines Standing**

The majority in *Massachusetts v. EPA* held that the plaintiffs had Article III standing.\footnote{157} In *American Electric*, those justices who followed the holding of the majority in *Massachusetts* were the justices who were in the majority in *Massachusetts*, and Kagan, J.\footnote{158} These four
justices, in following the majority decision in *Massachusetts*, held that the Plaintiffs in *American Electric also* had Article III standing.

Redressability remains one of the three well-entrenched core requirements for standing. But even though the difficulties in redressibility bore directly on the question of standing, the Court in *American Electric* did not explicitly correlate the two in its decision. The Court was silent regarding difficulties the EPA might have in addressing the problem of greenhouse gases. Instead, the Court waxed on about the various ways in which the Clean Air Act, and the EPA’s regulation of it was the best possible scenario for relief. Herein lies one weakness of the Court’s decision, and the paradox of the Pro-*Massachusetts* Majority Faction in *American Electric*. The Pro-*Massachusetts* Majority Faction held that the plaintiffs in *American Electric* had standing. But the Court also held that the EPA’s regulation displaced the federal common law of nuisance. Had the EPA actually begun to promulgate greenhouse gas-related rules, the Court’s rationale might have been warranted, because there would have been the possibility of practical relief. The steps outlined by the Court would reflect, at least roughly, the process through which harm might ultimately be redressed, and which would be required for standing. But at the time of the decision, no such rules had been published, and, due to EPA delays since that time, substantial obstacles to the rules’ remain.

Indeed, given the recent trajectory of environmental law, the Court’s hope in the EPA’s ability to provide redress seems overly optimistic. The difficulty in environmental claims to assert redressability for standing purposes has grown. As Holly Doremus has written, “The most difficult issue for environmental litigants may be redressability: while it is becoming ever easier to show that climate change causes concrete and imminent injury, it is ever more difficult to show that any judicial remedy could solve the problem.” As an example, Matthew Miller
computed an estimated annual global percentage of actual greenhouse emission reductions that would have resulted had the Plaintiffs received the judicial relief they sought in *American Electric*.\(^{168}\) Miller found that even with a large judicially imposed reduction of 15% upon the Defendants in *American Electric*, the greenhouse gas curbs would have resulted in, at best, a 0.2% reduction in global greenhouse gases -- an amount that would decrease after the first year.\(^{169}\)

Miller argues that such small percentages do not satisfy the demand for redressability.\(^{170}\) Others, on the other hand, argue that redressibility jurisprudence is evolving to accommodate the new challenges of emerging environmental complaints. One such commentator, Andrew Long, has stated, that the decision in *Massachusetts* “reconceptualizes[d] environmental standing to recognize the difficulty, perhaps impossibility, of employing a private law framework . . . when deciding a challenge to agency action impacting complex natural systems.”\(^{171}\)

Long is suggesting that the doctrine of environmental redressability has evolved in *Massachusetts*.\(^{172}\) In *Massachusetts*, the majority held that the state had been harmed by rising sea levels due to global warming.\(^{173}\) That harm, the Court predicted, would continue.\(^{174}\) Even though EPA regulation of greenhouse gases might represent a small increment of improvement, the Court reasoned, it would be improvement, nonetheless.\(^{175}\) Because the risk of harm would be reduced to some extent if petitioners received the relief they sought, the majority held that petitioners had standing.\(^{176}\) Long, in reflecting on that decision, argues that the *Massachusetts* Court, faced with new complex challenges in environmental litigation adopted what he termed “the systemic ecological model of standing.”\(^{177}\) According to that model, the Court “accepts that changes to one input of a system may have real, if diffuse, effects on the system as a whole.”\(^{178}\)
Long says, those changes, though diffuse, constitute sufficient redress so as to establish standing.\textsuperscript{179}

Long’s suggested evolution in the doctrine of standing made sense in \textit{Massachusetts}, where Plaintiffs sought review of an EPA decision to not regulate greenhouse gases under the Clean Air Act.\textsuperscript{180} In that case the Court considered a change to an actual EPA ruling.\textsuperscript{181} That prospective change, if ordered, would have a “real, if diffuse” effect on the system as a whole.\textsuperscript{182} Accordingly, standing would be warranted, at least with respect to redressibility.

Jonathan Z. Cannon has summarized a chain of causality and redress that captures the logic in the \textit{Massachusetts} decision:

Justice Stevens fashions an extended chain of causation, which looks something like the following: Domestic motor vehicles emit greenhouse gases. Increased world greenhouse gas emissions have led to a heightened greenhouse effect, which has led to a global temperature rise, which has led to sea level rise, which has led to loss of Massachusetts’ coastline. EPA’s failure to regulate greenhouse gas emissions from automobiles contributes to this loss. A correction of that failure will moderate the loss. Hence injury, causation, and redressability were all satisfied.\textsuperscript{183}

It is no matter than the effects are proportionally slight, perhaps almost imperceptible. What matters is that every link in the chain is demonstrable, with a basis in fact. On the other hand the chain contemplated in \textit{American Electric} was speculative, at least at the point of the EPA’s involvement.\textsuperscript{184} Rules had not yet been promulgated.\textsuperscript{185} No similar chain of causation could be made complete because the EPA’s future action was largely contingent.

The Court in \textit{American Electric} reasoned this did not matter. Relying on \textit{Milwaukee II}, the Court in \textit{American Electric} asserted, “the relevant question for purposes of displacement is ‘whether the field has been occupied, not whether it has been occupied in a particular manner.’”\textsuperscript{186} This use of the rule from \textit{Milwaukee II}, however, overstates the rule as used by the
Milwaukee II Court. In that case, the plaintiffs argued that recourse to the federal common law of nuisance was appropriate because the Water Pollution Control Act Amendments of 1972 did not adequately regulate effluent limitations on overflows. The Court disagreed, because it deemed the effluent limitations desired by the plaintiffs to be “site specific.” In that context, the Milwaukee II Court concluded, “Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner.”

The “occupation of the field” principle, as used by the Court in Milwaukee II did not envision the kind of broad application embraced by the Court in American Electric. It was not intended to be an excuse through which the Court might avoid altogether the three-part test for Article III standing. At issue in American Electric were not site-specific requirements, nor specific regulations of general applicability, but an overarching scheme to control greenhouse gases as they contributed to global warming. In this way, the field had not been occupied, at least not in the original Milwaukee II sense. Nor, was there any real prospect that the field would be occupied in the near future.

In Lujan, upon which the majority in Massachusetts relied, the Court wrote, “it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve. There is no standing.” The same uncertainty results from American Electric as a result of the Court’s new anticipatory delegation doctrine. Because the EPA’s regulation was speculative, any relief resulting from regulation would be conjectural. Anticipatory delegation cast doubt on whether relief is actually available, it also, therefore casts doubt on plaintiffs’ claim of standing. Had the plaintiffs in American Electric been allowed to
pursue their claim under the federal common law of nuisance, there might have been some possibility of redress. But the Court’s doctrine of anticipatory delegation precluded that, because the EPA’s contingent action was, and is, largely in doubt. In this way, paradoxically, the pro-
Massachusetts-majority Faction in American Electric, which affirmed standing, undermined its own holding that standing exists. By preempting the federal common law, the faction delegated relief to an agency in no position to provide it. That anticipatory delegation yields this contradictory result, further darkens its usefulness.

2. The Pro-Massachusetts-Dissent Paradoxically Affirms Standing

A similar paradox results when anticipatory delegation is applied to the holding of those justices in American Electric who sided with the dissent in Massachusetts v. EPA with regard to the issue of standing. There is no characterization of the specific points of disagreement that split the American Electric Court on the question – only that the Court followed the lines of the majority and dissent opinions in Massachusetts.194 The same four justices opposing standing in Massachusetts also opposed it in American Electric.195 The dissent in Massachusetts groaned over what it termed as the majority’s “. . . tenuous link between petitioners’ alleged injury and the indeterminate fractional domestic emissions at issue . . .”196 Chief Justice Roberts reasoned that contributions from other global sources of greenhouse gases further clouded the question of redressibility.197 Because these other external sources of greenhouse gas emissions were not before the Court, any redress as envisioned by the majority, was, according to the Chief Justice, “pure conjecture.”198 The dissent also dismissed the “special solicitude” provision to which the majority said the State of Massachusetts was entitled, in virtue of its particular status as a state.199 Chief Justice Roberts criticized the “special solicitude” provision for being unclear with regard to application.200 Instead, the dissent claimed that Massachusetts had not met the requirement for
standing, particularly because its arguments regarding redressibility were too attenuated. The dissent dryly observed: “No matter, the Court reasons, because any decrease in domestic emissions will ‘slow the pace of global emissions increases, no matter what happens elsewhere.’ Every little bit helps, so Massachusetts can sue over any little bit.” The Pro-Massachusetts-dissent faction’s standing commitments reflected a more traditional understanding, such as that expressed in *Lujan*, with no small degree of skepticism where generalized grievances are the basis of a complaint.

Under the newly minted the doctrine of anticipatory delegation, however, the *American Electric* Court’s solution for relief is strikingly similar to the relief the dissent opposed in *Massachusetts* as insufficient to establish standing. To begin with, even though dissent argued that there was no standing in *Massachusetts*, and also held that the Plaintiffs in *American Electric* did not have standing, the dissent still calls the proposed regulation of greenhouse gases, “. . .the same relief the plaintiffs seek. . .” On its face, that seems not only an acknowledgement of redressibility, which the dissent in *Massachusetts* contested, but also a provision of specific relief to redress harm. To describe the proposed EPA regulation of greenhouse gases as “relief” implies redressability, and thereby undermines the faction’s contention that Plaintiffs have no standing.

Beyond the facial problem, however, the Pro-Massachusetts-dissent faction is beset by paradoxes arising from its doctrine of anticipatory delegation. The dissent’s charge that the majority had engaged in “pure conjecture” in its standing analysis, might be leveled against the dissent itself. At first blush, the regulatory process, as outlined by the Court, ostensibly accomplishes the goal of redress. The EPA Administrator is to list categories of stationary sources, the emissions of which may reasonably be anticipated to endanger public health or
welfare. Following this, the agency must list standards of performance from new sources. The agency then regulates existing sources, issues guidelines, and pursues avenues of enforcement at the state and federal level. Should the EPA fail to make rules as required, States and private parties may petition for rulemaking in federal court. On the whole, the regulatory scheme appears sound. But as noted, EPA’s actual regulation of greenhouse gases is significantly delayed, if on track at all. Not only has the EPA Administrator not listed categories of stationary sources reasonably anticipated to endanger public health or welfare, but the studies and proposed rules upon which those categories are based have also been delayed indefinitely. Given the current lack of progress by the EPA, it not relief of the plaintiffs’ injury, at this stage also “pure conjecture”?

In Massachusetts, the dissent criticized the majority for justifying its redressability requirement for standing in objectionably small increments. “Every little bit helps so Massachusetts can sue for every little bit.” Given the pace at which EPA regulation is unfolding, however, it is hard to see how the Court in American Electric is not subject to the same charge. Because anticipatory delegation preempts the federal common law, the EPA must be the avenue of relief. Because of the EPA’s delays, however, progress toward relief for the Plaintiffs in American Electric is nearly imperceptible, if not stalled altogether. Granted, the causal chain endorsed by the majority in Massachusetts is of a different kind than the series of steps that must be taken by the EPA in the agency’s regulation of greenhouse gases. And, as has been observed, the first link in EPA’s regulation of greenhouse gases still has not occurred. But both causal chains are processes, gradually implemented, that are intended to bring the Plaintiff’s relief.
In the same way, the dissent in *Massachusetts* criticized the majority for using sleight of hand to link up the three elements of the standing test.215 “What must be likely to be redressed is the particular injury in fact.”216 But through its use of anticipatory delegation, is not the Massachusetts dissent, and its *American Electric* counterpart, performing the same sleight of hand trick? The faction’s criticism was that the connection between the harm suffered and the relief sought by plaintiffs in *Massachusetts* was too attenuated.217 The same may be said of the *American Electric* Court’s promised relief in view of anticipatory delegation. Because anticipatory delegation preempts federal common law, redress is available only through the interminably faltering EPA. Progress toward relief, under *American Electric*, therefore, is both slow and uncertain, so as to call the link between the harm suffered and the relief attained tenuous at best.

In summary, even though the Pro-Massachusetts-dissent faction is opposed to the majority’s theory of standing in *Massachusetts*, the faction’s own plan for relief in *American Electric* is subject to virtually all the same criticism. Ironically, this paradox is mainly as a consequence of the Court’s adoption of anticipatory delegation. By thrusting the agency into the center of the problem, the Court has prevented the plaintiffs from considering other, more efficient, more effective options. *American Electric* Court does not study the EPA’s efficiency, or the degree to which, historically, the agency has promulgated rules. The plaintiffs are told, in essence, “Sit tight. Don’t worry about relief. We’ll get around to it.”

The paradoxes that plague both sides of the division on standing suggest that something is wrong with the Court’s use of anticipatory delegation as a means to displace federal common law. For justices who support the *Massachusetts* majority, anticipatory delegation undermines the majority’s holding that standing exists. For justices supporting the *Massachusetts* dissent,
anticipatory delegation subjects the Court’s holding in *American Electric* to the same scrutiny applied by the dissent in *Massachusetts*. The best way forward is to jettison anticipatory delegation, and return to the rule as articulated in *Massachusetts*.

**IV. IMPLICATIONS**

**A. Implications for the Plaintiffs in *American Electric***

1. *Anticipatory Delegation Not Likely to Be Overturned.*

   The dark underside of *American Electric* is that the plaintiffs -- eight states, two conservation groups, and the City of New York -- continue to suffer harm at the hands of the five largest American producers of greenhouse gases, while the Plaintiffs wait for the EPA to get its house in order.\(^{218}\) Meanwhile, the problem of greenhouse gases goes largely unabated.\(^{219}\) Given the Court’s present disposition on the displacement of federal common law, and because the EPA is stalled in publishing proposed rules, it is not likely that the Plaintiffs will experience any relief for the foreseeable future. In any event, Court indicated that it is disposed toward displacement. The Court in *American Electric* was clear: “[F]or it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest.”\(^{220}\) In this way, the doctrine of anticipatory delegation is not likely to be overturned.

2. *Procedures for Plaintiffs in American Electric*

   If and when the EPA actually promulgates rules governing stationary source emissions of greenhouse gases, the *American Electric* plaintiffs will need to be prepared to hold the EPA’s feet to the fire. The Court in *American Electric* identified four specific ways in which plaintiffs might speed the EPA’s hand.\(^{221}\) First, plaintiffs will have an opportunity to petition the EPA for a rulemaking.\(^{222}\) Should the EPA choose not to perform the rulemaking, that decision is reviewable in federal court.\(^{223}\) Once the EPA does publish rules, they will initially be proposed
rules, and plaintiffs will have an opportunity to comment with the rest of the public on those rules.224 Once final rules are published, the EPA monitors enforcement of the rule.225 Because the Court in *American Electric* displaced federal common law through anticipatory delegation, the plaintiffs in *American Electric* must be prepared to litigate through the EPA.

B. Implications for Similarly Situated Cases

1. Anticipatory Delegation Severely Curtails the Role of Federal Common Law in Environmental Complaints.

*American Electric* is the new bellwether for federal common law preemption, at least in the area of environmental law. Under the rule in *American Electric*, an agency need not have regulated an area for there to have been preemption of the federal common law.226 As long as a comprehensive federal regulatory scheme has delegated the field to the agency, federal common law is preempted with regard to the entire field.227 In *American Electric*, the Supreme Court again emphasized that “[W]hen Congress addresses a question previously governed by a decision rested on federal common law . . . the need for such an unusual exercise of law-making by federal courts disappears . . . for it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest.”228 In other words, the federal common law serves as a stopgap. Once the political branches have exercised their considerable investigative muscle, and applied the resulting research to enact national policy, it is the role of the Court to recede and allow the work of the political branches to proceed.

The problem, of course, will arise anytime there is a substantive delay between the time an injury is suffered and the time when the area in which the injury occurred is regulated by an agency. In some cases, the delay may be lengthy, since the injury may occur in an area that the agency does not presently regulate. In that case, the agency may be put on notice by the
judiciary that it must regulate, in which case the administrative processes of regulation begins. But for prospective plaintiffs after American Electric, it should be noted that even though there may be a substantive delay, if the agency is determined to have occupied the field, the plaintiff will probably not have recourse to relief until the agency begins its regulation.

2. **Anticipatory Delegation Does Not Make Preemption Fait Accompli**

   The holding in American Electric, though it further impedes on the territory of federal common law, does not doom every environmental complaint by the doctrine of anticipatory delegation. The Court made clear that the key question with regard to displacement is “whether the field has been occupied.”

   Several commentators have noted that while regulatory preemption of federal common law is sometimes appropriate, a complete abrogation of the common law through regulatory schemes leaves open certain gaps, which the common law once ably filled. Robert L. Glicksman, gives the following example:

   Suppose, for example, that Milwaukee is complying with all federally issued effluent limitations as well as any additional limitations issued by Wisconsin. The Clean Water Act may provide no basis for Illinois to seek an abatement of Milwaukee's discharges through the application of Illinois' more stringent effluent limitations, even if those discharges are causing harm to Illinois residents or resources. The preemption of federal common-law remedies may leave Illinois unable to protect its ‘right to be free from unreasonable interference with its natural environment and resources when the interference stems from another State or its citizens.

   According to Glicksman, because there is a hole in coverage in the Clean Water Act, unless there is opportunity for relief under the federal common law of nuisance, Illinois may have no avenue of redress for the harm it has suffered.

   Another example concerns the question of nonpoint source pollution and its contribution to what is called the “Dead Zone” in the Gulf of Mexico.
explains that the Dead Zone is a large area off the coasts of Louisiana and Texas in the Gulf of Mexico. Because of nutrient rich runoff flowing out of the Mississippi River basin, this area of Gulf is seasonally depleted of oxygen, such that nearly all aquatic life cannot survive. The main sources of the oxygen-depleting nutrients (phosphorous and nitrogen) are fertilizers used in farms along the river basin. Szalay explains that the Clean Water Act has not addressed this form of pollution since the Clean Water Act primarily target of regulatory control is point source pollution.

In anticipation of the Supreme Court decision in American Electric, Szalay considered the Second Circuit’s decision for the same case and reasoned that if the Second Circuit’s holding were applied to the problem of nonpoint sources, the federal common law of nuisance should be applicable. Now that the Supreme Court has reversed the Second Circuit, what outcome for Szalay’s nonpoint sources? The nonpoint sources are distinguishable from the regulations in American Electric, since the EPA had expressly entered into an agreement to regulate greenhouse gases. Whether that distinction is enough claim that the EPA has not occupied the field remains to be seen. But that ultimately will be the question.

3. The Question of Standing for Environmental Complaints is Still Hotly Contested.

The split in American Electric on the question of standing reveals that the deep division on the justiciability of environmental claims remains changed since Massachusetts v. EPA. Jonathan Cannon observes that the decision in Massachusetts represented an “enormous, if narrow, victory for environmentalists.” Cannon goes on to argue that the change in the Supreme Court runs deeply: “The Court has accepted—
indeed has seemed to internalize—the beliefs, assumptions, and values that animate the environmentalists’ views on climate change.”

The dissent on the other hand, according to Cannon, “claims that the Court has exceeded its institutional bounds and stepped into a policy role for which it is unsuited.”

That the Supreme Court in American Electric adopted, without comment, its rationale in Massachusetts with regard to standing, suggests that each side remains firmly entrenched in their respective positions. That there was absolutely no discussion of the question, fully four years after the sharp debate in Massachusetts, may not bode well. Where communication breaks down, there can be no meeting of the minds, no consensus.

V. CONCLUSION

The decision in American Electric is the next natural encroachment on the ever-shrinking territory of the federal common law. Whether that encroachment is desirable depends on the degree to which judicial remedies are preferable to those crafted by the Executive, the legislature or their agencies.

The problem in American Electric is anticipatory delegation. The Court, in holding that the EPA had occupied the field with regard to greenhouse gas emissions from stationary sources deprived the Plaintiffs of the opportunity to seek redress for their injuries. When relief might finally come to the state plaintiffs is anyone’s guess.

Anticipatory delegation yields results, which if taken with the holding are paradoxical. It is paradoxical on the one hand to hold that Plaintiffs have standing, and yet provide no practical means of redress for harm suffered. On the other hand, it is also paradoxical to hold that plaintiffs have no standing on the basis of lack of redressibility, and yet embrace a form of relief that mirrors the relief sought by plaintiffs in important ways.
Holly Doremus was correct when she wrote, “Perhaps, the clearest lesson . . . is that the law of environmental standing remains exquisitely murky. It will surely continue to bedevil litigants, law students, and judges for years to come.”242
NOTES

1 131 S.Ct. 2527 (2011).


4 Id. at 2. See Thomas W. Merrill, Global Warming As A Public Nuisance, 30 Colum. J. Envtl. L. 293, 306 (2005). Merrill explains that the complaint could have been brought under federal common law, or state common law, but not both. Id. “Federal common law is in effect a type of preemption of state law. When a court holds that a matter is governed by federal common law, state law is automatically preempted, and a federal rule of decision applies instead.” Id. at 307.

5 American Electric Power, 131 S.Ct. at 2538 (discussing rulemaking under the Clean Air Act, 42 U.S.C.A. § 7411.


7 American Electric Power, 131 S.Ct. at 2533.


“Until EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact “speak[] directly” to the “particular issue” raised here by Plaintiffs, which is otherwise governed by federal common law.” *Id.* at 380 (relying on the rule for displacement as articulated in *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985)).

*American Power*, 131 S.Ct. at 2538.

*Id.*

*Id.*

*Id.*


*Id.*

*See*, Martha A. Field, Martha A. Field, *Sources Of Law: The Scope Of Federal Common Law*, 99 Harv. L. Rev. 881, 885 (1986) (concluding that the mixed message from Supreme Court that year obfuscated the boundaries of the federal common law from day one).

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10 *Id.* at 379-80.

11 *American Power*, 131 S.Ct. at 2538.

12 *Id.*

13 *Id.*

14 *Id.*


16 *Erie v. Tompkins*, 304 U.S. 64, 78 (1938).

17 *Id.*

18 *See*, Martha A. Field, Martha A. Field, *Sources Of Law: The Scope Of Federal Common Law*, 99 Harv. L. Rev. 881, 885 (1986) (concluding that the mixed message from Supreme Court that year obfuscated the boundaries of the federal common law from day one).

20 But see Field, supra note 17 at 885. Field argues that the traditional view that the federal law governs only discrete, specified domains is based on a misreading of Erie. Id. at 888. Erie, according to Field, was not so much about delimited federal common law, as it was about establishing positively our conception of what state law is. Id. Accordingly, Field posits that the scope of federal common law should be much broader, limited only in that, “[a federal] court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule.” Id. at 887.


22 American Electric Power, 131 S.Ct. at 2535.


25 Id.
26 Id.


28 See Davis, supra note 22 at 791. As cited by Davis, the George v. Tennessee Court stated, “It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains ... should not be further destroyed or threatened by the act of persons beyond its control. . .” 206 U.S. 230, 238 (1907).

29 See Robert L. Glicksman, Federal Preemption And Private Legal Remedies For Pollution, 134 U. Pa. L. Rev. 121, 152 (claiming that early federal common nuisance law jurisprudence was rooted in the interests of federalism, as well the preservation of natural resources under state quasi-sovereignty).


31 See Davis, supra note 23 at 796 (stating that the court’s justification for its use of federal common law stemmed from Congressional commitment to preserving national waterways).

32 Id. at 108.


34 Id. at 310.

35 Id.

36 Id. at 311.

37 Id. at 312.

38 Id.

39 Id. at 332.
40 Id. at 314. See Merrill, supra note 4 at 314. (noting that underlying the displacement of federal common law by legislation or regulatory rules is an important separation of powers question, “namely, whether the Article III courts are permitted to establish rules of decision in a particular area when Congress has not acted”).

41 Id. at 313.

42 Id.

43 Id. at 317.

44 Id. at 320.

45 Id. at 326.

46 Id. at 332.

47 American Electric Power, 131 S.Ct. at 2534.

48 Id.

49 Id.

50 Id.

51 Id.

52 Id.

53 Id.

54 Id. at

55 Id. at 2535. Note that at the time of the Second Circuit’s decision, in order to regulate GHGs from motor vehicles, the EPA was required to have made findings that GHGs “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” Connecticut v. American Elec. Power Co., Inc., 582 F.3d 309, 379 (2nd Cir. 2009)
(citing 42 U.S.C. § 7408(a)(1)(A)). Additionally, because stationary sources were under review, the EPA was required to have found that ambient air results from diverse, multiple mobile and stationary sources. *Id.* The EPA made no such findings. *Id.* The Second Circuit noted that even were the EPA to publish findings, these would have no legislative effect, but would require that proposed and final rules be promulgated before actually regulate GHGs. *Id.* at 380. As the court stated, “Until EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact “speak[ ] directly” to the “particular issue” raised here by Plaintiffs, which is otherwise governed by federal common law.” *Id*

56 *Id.* at 2540.

57 *Id.* at 2535. One side of the division aligned itself with the majority in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which held that a state had Article III standing to bring a suit against the EPA for failure to regulate pollutants. The other side of the division aligned itself with the dissent opinion in the same case.

58 *Id.* at 2537. *See* Merrill, *supra* note 4, who though writing before the decision in *American Power*, anticipates the Court’s reasoning, and agrees, arguing that it is Congress, not the courts, that is best equipped to deal with “significant multijurisdictional air pollution problems.”

59 *Id.* at 2538.

60 *Id.* at 2539 (citing *City of Milwaukee*, 451 U.S., at 324).

61 *Id.* at 2538.

62 *Id.*
See Daniel E. Ho and Erica L. Ross, Did Liberal Justices Invent The Standing Doctrine? An Empirical Study Of The Evolution Of Standing, 1921-2006, 62 Stan. L. Rev. 591, 594 (2010) (noting that “standing remains one of the most contested areas of federal law, with criticisms of the doctrine nearing the number of commentators”).


Id.


Id.

See Bradford Mank, Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts V. EPA's New Standing Test For States, 49 Wm. & Mary L. Rev. 1701, 1710-1711 (2008) (noting that the Supreme Court has stated that such generalized injuries are often best remedied through the actions of the political branches instead of the judiciary).

Lujan, 504 U.S. at 573.


See Bradford, supra note 131 at 1712.

Federal Election Com'n v. Akins, 524 U.S. 11 (1998). See Bradford, supra note 130 at 1714 (commenting that the Akins decision, though providing some clarification, did not “settle all questions about when plaintiffs alleging generalized grievances are entitled to standing”).

Akins, 524 U.S. at 34.

Id. at 24.

Stevens, J., delivered the opinion of the Court, in which Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Roberts, C.J., filed a dissenting opinion, in which Scalia, Thomas, and Alito, JJ., joined. Scalia, J., filed a dissenting opinion, in which Roberts, C.J., and Thomas and Alito, JJ., joined. *Id.* at 501.

But see Bradford, *supra* note 131 at 1746 (noting that the Court's decision did not sketch out the parameters of “special solicitude” with regard to its standing determination. Indeed, Bradford writes, “The Court was ambiguous about whether Massachusetts satisfied normal standing requirements or met those requirements only because it was a state”).

*Massachusetts v. E.P.A.*, 549 U.S. at 536.

Id.

Id. at 540. This the Chief Justice took to be both boon and bane: “The good news is that the Court's “special solicitude” for Massachusetts limits the future applicability of the diluted standing requirements applied in this case. The bad news is that the Court's self-professed relaxation of those Article III requirements has caused us to transgress “the proper—and properly limited—role of the courts in a democratic society.” *Id.* at 548.

*American Electric Power*, 131 S.Ct. at 2535.
90 Id.

91 See Merrill, supra note 4 at 298.

92 American Electric Power, 131 S.Ct. at 2534.

93 Id. at 2538.

94 Id. at 2537.

95 Id.

96 42 U.S.C.A. § 7411(b)(1)(B). Categories of stationary emission sources are also defined and established by the EPA Administrator. Sources are so defined if, in the Administrator’s judgment, the source “causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” § 7411(b)(1)(A).

97 § 7411(b)(1)(B).

98 Id.

99 American Electric Power, 131 S.Ct. at 2538.

100 Id.

101 Marbury v. Madison, 1 Cranch 137 (1803).

102 See Georgia v. Tennessee Copper Co., 206 U.S. at 237 (declaring “the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air”); See also, Glicksman, supra note 29 at 153 (Asserting that federal protection guards against the kind of encroachment that “threatens the integrity of the invaded
state's sovereignty, and thereby threatens individual liberty by diminishing the capacity of the invaded state's citizens for self-determination”).

103 437 F.Supp.2d 1137, 1144 (C.D. Cal. 2006).

104 Id.

105 Id.

106 Id. at 1157.

107 Id. at 1160.

108 Id.


111 Id. at 4.

112 Id.

113 Id.

114 In October, 2011, Earthjustice, on behalf of six plaintiffs gave notice, pursuant to 42 U.S.C. §7604(b)(2) and 40 C.F.R. Pt. 54, of intent to sue the EPA for failure to promulgate rules for national ambient air quality standards as required by the Clean Air Act. See Earthjustice, Notice Of Citizen Suit Under Section 304 Of The Clean Air Act Regarding Failure To Perform

115 American Electric Power, 131 S.Ct. at 2538.


117 American Electric Power, 131 S.Ct. at 2538.

118 Id.


120 Id. at 2537-38.

121 Id. at 2537. Area sources as described in § 112(c)(3).

122 Id. at 3538. Specific pollutants as described in § 112(c)(6).

123 Id. at 2562.


125 Id. at 61.


127 Id. at 14 (noting that the EPA had not “even attempted to show that a more expeditious schedule would be impossible”).

129 See Andrea Field, Comments of the Utility Air Regulatory Group on EPA’s Plan to Propose and Finalize Clean Air Act Section 111 Performance Standards for Electric Generating Units, Docket ID: EPA-HQ-OAR-2011-0090 at 2, available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2011-0090-2770, last accessed November 15, 2011 (arguing “it is not unheard of for the Agency to take three to five years in which to conduct and complete proceedings to set section 111(b) NSPS and section 111(d) emission guidelines. It is, however, unheard of -- and unreasonable -- for EPA to try to conduct such proceedings for a large and complex source category in less than 18 months”).


132 See Field, supra note 88 at 2 (explaining that “In particular, additional time is needed because EPA has never before developed NSPS for greenhouse gas emissions from any source category, and the issues that arise will thus be novel, numerous, and complex”).


134 American Electric Power, 131 S.Ct. at 2537.
The Supreme Court noted two components to the relief: First, rulemaking: “Once EPA lists a category, the agency must establish standards of performance for emission of pollutants from new or modified sources within that category.” Id. Second, enforcement, which may be delegated to the states, but which continues to be monitored by the EPA. Id. at 2538.

Id. at 2533.

Id. at 2537 (citing 42 U.S.C. § 7411(b)(1)(A)) (Emphasis added).

Environmental Protection Agency, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 FR 66496, 66499. The EPA described the nature of its study as follows: “In order to determine if emissions of the well-mixed greenhouse gases from CAA section 202(a) source categories contribute to the air pollution that endangers public health and welfare, the Administrator compared the emissions from these CAA section 202(a) source categories to total global and total U.S. greenhouse gas emissions, finding that these source categories are responsible for about 4 percent of total global well-mixed greenhouse gas emissions and just over 23 percent of total U.S. well-mixed greenhouse gas emissions.” Id. at 66499.

Id. at 66497, 66499


Id. at 26.


For a useful table describing the progress of rules promulgation, See, United States General Accounting Office, Report to Congressional Requesters, supra note 77 at 15.
144 American Electric Power, 131 S.Ct. at 2539.


147 See infra notes 30-46 and accompanying text.


149 American Electric Power, 131 S.Ct. at 2538.

150 City of Milwaukee, 451 U.S. at 332-33 (citation omitted).

151 See Guardians Ass'n v. Civil Service Com'n of City of New York, 463 U.S. 582, 627 (1983) (Marshall, dissenting) (Justice Marshall reasoning that "[r]estricting relief to prospective remedies can only encourage recipients acting in bad faith to make no effort to comply with the statute and to stall private litigants in the knowledge that justice delayed will be justice denied").

152 American Electric Power, 131 S.Ct. at 2535.

153 Id.

154 Id.

155 Id.

156 Id.

157 Massachusetts v. E.P.A., 549 U.S. at 526. The Second Circuit in its decision in American Electric, based its justification for granting plaintiffs standing, in large part, on the holding of Massachusetts. See American Electric, 582 F.3d at 349 (holding that the Massachusetts holding
with regard to remedies “undercuts Defendants' position that a reduction in their emissions will not have an impact on Plaintiffs' injuries because global warming will continue due to emissions by other parties. As the States rightly assert: “Even if emissions increase elsewhere, the magnitude of Plaintiffs' injuries will be less if Defendants' emissions are reduced than they would be without a remedy”).

158 E.g., Stevens, Kennedy, and Ginsburg, JJ. Sotomayer, J took no part in the case. See American Electric Power, 131 S.Ct. at 2531.


160 American Electric Power, 131 S.Ct. at 2535. But see, Massachusetts, 549 U.S. at 525-526 (holding that the relief plaintiffs sought would reduce the risk of catastrophic harm due to global warming “to some extent,” thereby concluding the requirement of redressability had been met). Arguably the Court in American Electric incorporated this rationale by way of reference.


162 Id. at 2539-40 (noting the availability of judicial review of EPA action or inaction, the expert nature of the EPA, the extensive cooperation between federal and state authorities, and the comparative inability of the judiciary to make sufficiently informed decisions).

163 American Electric Power, 131 S.Ct. at 2537.

164 See Stubbs, supra note 159 at 111 (noting that “If redressability is no longer tethered to the likelihood of addressing the plaintiff’s specific harm alleged, redressability becomes another completely subjective inquiry by the court”).
165 Id. at 111-112 (stating that a proper redressability inquiry turns on whether the court considers the form of redress valuable).


168 See Miller, supra note 166 at 282-284.

169 Id. at 284.

170 Id. (observing that “It is unprecedented in public nuisance litigation to entertain a claim that sues for equitable relief from less than 0.2% of the nuisance”).


172 Id. at 112.


174 Id. at 527.

175 Id. at 524, (Noting that often regulation of problems takes place in slow, incremental steps: “EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum”).

176 Id. at 526.

177 Id.
Id. (speculating that the systemic ecological model will “provide circumstances where judicial review will be real, meaningful, and appropriately focused on a critical legal question.) But see Miller, supra note 166 at 282 (arguing that finding redressibility in climate nuisance suits “would render the redressability requirement semantically hollow and practically meaningless, since plaintiffs can gain only nominal relief from the climate harms at hand”).

Id.  

179 Id.  

178 Massachusetts v. E.P.A., 549 U.S. at 505.

180 Id.

181 See Long, supra note 157 at 526.


183 American Electric Power, 131 S.Ct. at 2538

184 Id.

185 Id. at 2537-39 (citing City of Milwaukee v. Illinois and Michigan, 451 U.S. at 324).

186 Id. at 324.

187 City of Milwaukee v. Illinois and Michigan, 451 U.S. at 323.

188 Id.

189 See Cannon, supra note 183 at 57 (noting that standing requires that relief be capable of redressing the harm resulting from the legal violation complained of).

190 American Electric Power, 131 S.Ct. at 2534 (explaining that “All plaintiffs sought injunctive relief requiring each defendant “to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade”).
The Second Circuit understood Milwaukee II in this sense, noting that the new federal legislation had “occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency,” in which “[e]very point source discharge is prohibited unless covered by a permit.” American Electric, 582 F.3d at 373.

Lujan v. Defenders of Wildlife, 504 U.S. at 571.

American Electric Power, 131 S.Ct. at 2535.

E.g., Roberts, CJ, Scalia, Thomas, and Alito, JJ.

Massachusetts v. E.P.A., 549 U.S. at 545.

Id.

Id. at 546. Chief Justice Roberts explained that, “when an the existence of an element of standing ‘depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,’ a party must present facts supporting an assertion that the actor will proceed in such a manner.” (citing Lujan v. Defenders of Wildlife, 504 U.S. at 545-46). In other words, to prevail on the question of standing, the plaintiffs had to offer evidence that other independent actors affecting greenhouse gas levels, such as large countries, would behave in predictable ways.

Id. at 540.

Id.

Id. at 542.

Id. at 546.

Lujan v. Defenders of Wildlife, 504 U.S. at 560-561.


206 American Electric Power, 131 S.Ct. at 2537.

207 Id.

208 Id. at 2537-38.

209 Id. at 2538.

210 See supra notes 109-116, and accompanying text.

211 See supra, note 116.

212 Massachusetts v. E.P.A., 549 U.S. at 546.

213 American Electric Power, 131 S.Ct. at 2538.

214 See supra notes 109-116, and accompanying text.

215 Id.

216 Id.

217 Massachusetts v. EPA, 549 U.S. at 546.

218 American Electric Power, 131 S.Ct. at 2533-34.

219 Massachusetts v. EPA, 549 U.S. at 521-522 (citing climate scientist Michael MacCracken who warns that there is a “strong consensus” among climate scientists that global warming threatens a rise in sea levels, “severe and irreversible changes to natural ecosystems;” “significant reduction in water storage in winter snowpack,” “an increase in the spread of disease,” and “an increase in the ferocity of hurricanes”).

220 American Electric Power, 131 S.Ct. at 2537.

221 Id. at 2538.

222 Id.
223 *Id.* at 2539.

224 *Id.* at 2533.

225 *Id.* at 2538.

226 *Id.*

227 *Id.*

228 *Id.* at 2537.

229 *Id.* at 2538.

230 See Glicksman, *supra* note 29 at 166-67 (holding forth gaps in the Clean Water Act as an example of those which federal common law fills).

231 See Glicksman, *supra* note 29 at 166.

232 *Id.* at 167 (suggesting that “a state's resort to federal common-law remedies against an out-of-state polluter may very well promote the accommodation of conflicting state interests by providing a federal rule and forum to resolve the dispute”).


234 *Id.*

235 *Id.* at 217. Costs of the seasonal oxygen depletion to area fisheries and shrimp fishermen cost the United States Economy in excess of $50 million per year. *Id.* at 220.

236 *Id.*

237 *Id.* (explaining that Point source pollution is that which is “directly conveyed into the receiving water body through a pipe”).
238 Id. at 245-246 (reasoning that the Clean Water Act fails to regulate nonpoint source pollution).

239 See Cannon, supra note 183 at 53.

240 Id. at 61.

241 Id. at 62.

242 See Doremus, supra note 167 at 3.