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The Heat is On: Will Climate Change Suits Pressure the Supreme Court to Evolve Its Federal Question Jurisdiction?

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THE HEAT IS ON: WILL CLIMATE CHANGE SUITS PRESSURE THE SUPREME COURT TO EVOLVE ITS FEDERAL QUESTION JURISDICTION?

ABSTRACT

Numerous municipalities have brought suit against large oil and gas producers for their infrastructure damages related to climate change. These climate cases present challenging questions of subject-matter jurisdiction. Bringing their cases in state court and grounding their claims purely in state law, the plaintiffs have sought to destroy the possibility of a federal forum. Nevertheless, defendant fossil fuel companies have consistently removed, arguing there is subject-matter jurisdiction based on complete preemption, an embedded federal question, or the federal common law. The circuit courts are split on whether these cases actually arise under federal law. This Note analyzes the circuit split, as well as predicts how the Supreme Court would rule should it resolve the question.

INTRODUCTION

Today, most agree that climate change presents a global issue of unprecedented magnitude.[1] However, public concern over climate change and its effects is a relatively recent occurrence. Guy Stewart Callendar published the first research linking CO_2 emissions to global warming in 1938, yet his work went largely unnoticed by the public.[2] Understandably, the country had more immediate concerns then, such as the Great Depression and the impending war.[3] It wasn't until the mid-twentieth century that societal concerns over pollution grew, triggered in part by the sudden death of twenty people in Donora, Pennsylvania from smog-related respiratory illnesses.[4] In response, Congress passed the Clean Air Act (CAA) which required the EPA to promulgate regulations for major pollutants, these regulations serving as minimum standards for the states.[5]

As societal concerns grow, the judiciary has become increasingly entangled in the resolution of climate change issues. For instance, a D.C. District Court recently invalidated the Biden administration's lease of 80 million acres within the Gulf of Mexico for offshore drilling, finding the administration's decision arbitrary for failing to account for environmental impacts.[6] This suit is just the tip of the iceberg, with 654 climate change suits being brought in 2017 in the United States alone.[7]

Over the past decade, countless states and municipalities have brought suit for their climate-change-related injuries. Their theory of the case is facially

1. Recent studies suggest 67% of the U.S. population does not believe the federal government is doing enough to address climate change. Cary Funk & Meg Hefferon, *U.S. Public Views on Climate and Energy*, PEW RES. CTR. (Nov. 25, 2019), https://www.pewresearch.org/science/2019/11/25/u-s-public-views-on-climate-and-energy [https://perma.cc/P77K-U9GW].

2. Zoe Applegate, *Guy Stewart Callendar: Global Warming Discovery Marked*, BBC NEWS (Apr. 26, 2013), https://www.bbc.com/news/uk-england-norfolk-22283372 [https://perma.cc/AA82-XMTZ].

3. *Great Depression and World War II, 1929-1945: Overview*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/overview [https://perma.cc/N7YP-DPSP] (last visited Feb. 19, 2023).

4. *See* E.T. Jacobs, J.L. Burgess & M.B. Abbott, *The Donora Smog Revisited: 70 Years After the Event That Inspired the Clean Air Act*, 108 AM. J. OF PUB. HEALTH S85, S85 (2018).

5. *Clean Air Act Requirements and History*, EPA (2022), https://www.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-history [https://perma.cc/366M-DCP9]; *The Clean Air Act in a Nutshell: How it Works*, EPA 1 (2013), https://www.epa.gov/sites/default/files/2015-05/documents/caa_nutshell.pdf [https://perma.cc/FQ3C-9SMT].

6. Nathan Rott, *A Federal Judge Canceled Major Oil and Gas Leases Over Climate Change*, NPR (Jan. 28, 2022), https://www.npr.org/2022/01/28/1076281662/federal-judge-canceled-gulf-oil-and-gas-leases-climate-change [https://perma.cc/575P-BM4T].

7. GLOBAL CLIMATE LITIGATION REPORT: 2020 STATUS REVIEW, U.N. ENV'T PROGRAMME 13 (2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y [https://perma.cc/3589-3BDP].

simple: the defendant oil and gas companies have contributed to and downplayed the effects of climate change caused by CO_2 emissions.[8] The plaintiffs argue that these emissions have created public and private nuisances, including flooding from rising sea levels and infrastructure damage from more frequent and intense precipitation.[9] They seek compensatory damages to offset these harms, as well as equitable relief enjoining the nuisance.[10] Underneath the simple facade of these cases lie complex issues, such as methods for measuring CO_2 emissions given their dissipating nature as well as balancing the social utility of fossil fuel production with its economic harms.

These climate cases also present challenging questions of subject-matter jurisdiction. Early climate change suits were brought in federal court and involved federal common law nuisance claims.[11] These cases were dismissed, the federal courts reasoning that federal common law nuisance claims were displaced by the CAA.[12] To avoid displacement, plaintiffs have most recently brought solely state law tort claims in state court.[13] Unsurprisingly, many defendants have sought to remove these cases to federal court proposing various grounds for federal jurisdiction pursuant to 28 U.S.C. § 1331,[14] often referred to as "arising under jurisdiction."[15] Defendants primarily argue for complete preemption, *Grable* jurisdiction, and jurisdiction based on the federal common law.[16] Some federal courts have accepted jurisdiction,[17] while others have not.[18]

In May of 2021, the Supreme Court remanded three climate change suits, authorizing the circuit courts to review all grounds for jurisdiction.[19] As these

8. *See, e.g.*, Complaint at 1–2, Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (No. 1:18-cv-02357-ELH).

9. *Id.* at 100–01.

10. *Id.* at 130.

11. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011).

12. *Id.*

13. *See, e.g.*, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005).

14. *See, e.g.*, Notice of Removal by Defendants Chevron Corporation and Chevron U.S.A., Inc., Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (No. 1:18-cv-02357-ELH) [hereinafter *Baltimore Notice of Removal*]; Notice of Removal by Defendant Shell Oil Products Company LLC, Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 146 (D. R.I. 2019) [hereinafter *Rhode Island Notice of Removal*].

15. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

16. *See, e.g.*, *Baltimore Notice of Removal*, *supra* note 14, at 6.

17. California v. BP P.L.C., No. C 17-06011, 2018 WL 1064293, (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *superseded*, 969 F. 3d 895 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021); City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *superseded*, 969 F. 3d 895 (9th Cir. 2020).

18. Mayor of Baltimore v. BP P.L.C., 388 F. Supp.3d 538 (D. Md. 2019); County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018).

19. On appeal, many circuit courts did not review federal common law, *Grable*, and complete preemption grounds for jurisdiction because they believed they lacked jurisdiction under 28 U.S.C.

cases make their way back through the federal courts, it is increasingly likely the highest court will be asked to resolve the jurisdictional question.[20]

Part I of this Note reviews federal jurisdiction doctrines as well as early climate change suits that have shaped climate litigation to its present form. Part II describes modern climate suits and the split in the federal courts as to whether there is arising under jurisdiction. Part III analyzes the split, determining most courts have correctly held there is no federal jurisdiction based on the well-pleaded complaint rule. Part III examines the uniformity of law, separation of powers, and federalism concerns these climate suits pose if given a state forum. This Note concludes that these concerns will lead the Supreme Court to evolve its arising under jurisprudence to take jurisdiction, likely basing its theory in prior doctrines such as jurisdiction based on an important federal interest, protective jurisdiction, or foreign policy grounds. Although federal jurisdiction will result in the displacement of these climate suits by the EPA's regulatory authority under the CAA, this is the proper outcome given the inherent complexity of these suits and the lack of judicial expertise on climate-change mitigation strategies.

I. BACKGROUND AND HISTORY

A. Federal Subject-Matter Jurisdiction

1. Arising Under Jurisdiction and the Well-Pleaded Complaint Rule

Federal subject-matter jurisdiction is found in primarily two instances: (1) when the case involves diversity of citizenship among the parties and they meet the minimum amount in controversy requirement;[21] or (2) when the case involves a question "arising under" federal law.[22] If a case is initially filed in state court, a party may be able to remove the case if the federal court would

§ 1447(d). However, the Supreme Court held that the circuit courts do have jurisdiction to consider all grounds for removal in 2021. *See* BP P.L.C v. Mayor & City Council of Baltimore, 141 S. Ct. 1532, 1543 (2021).

20. The parties in *Boulder County v. Suncor Energy* are currently briefing their appeal before the Court. *See* Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County, SCOTUS BLOG, https://www.scotusblog.com/case-files/cases/suncor-energy-u-s-a-inc-v-board-of-county-commissioners-of-boulder-county [https://perma.cc/2EBG-V9EX] (last visited Aug. 13, 2022).

21. 28 U.S.C. § 1332 ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States."). However, there are some statutory limitations for removal based on diversity. *See* 28 U.S.C. § 1441(b)(2) (providing that an action cannot be removed if a defendant is a citizen of the State in which the action was brought); 28 U.S.C. § 1446(c)(1) (providing removal based on diversity cannot be sought one year after the action is filed).

22. 28 U.S.C. § 1331.

have original jurisdiction over it, either pursuant to diversity or arising under jurisdiction.[23]

But what constitutes "arising under" jurisdiction? The answer to this question requires a brief look at history. In line with notions of state sovereignty and fear of tyranny that permeated the founding, many framers were apprehensive about a strong national government including a federal judiciary.[24] Despite this belief, there was a consensus that federal courts might be needed for structural and practical reasons.[25] First, the framers were concerned about state court disregard of crucial federal provisions that would undermine federal interests.[26] Second, the framers believed federal courts could support uniformity in the interpretation and application of federal law and the Constitution.[27]

Article III, Section 2 is the product of this balancing act by the framers, granting the judiciary limited power to hear cases "arising under this Constitution, the Laws of the United States, and Treaties . . . ."[28] While this power was vested in one federal Supreme Court, Article III also granted Congress the authority to create lower federal courts "from time to time."[29] Congress crafted lower federal courts shortly after the founding, and later granted them arising under jurisdiction in 1875, echoing the same state court compliance and uniformity of law concerns of the founders.[30] This grant of power is found at 28 U.S.C. § 1331, paralleling the constitutional grant of power.[31]

Although the Supreme Court has interpreted Article III jurisdiction to exist in all cases in which there is a federal ingredient,[32] it has construed § 1331

23. 28 U.S.C. § 1441(a) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

24. Lee H. Rosenthal & Gregory P. Joseph, *Foundations of U.S. Federalism*, 101 JUDICATURE 39, 41 (2017).

25. Anthony J. Bellia, Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 296 (2007).

26. *Id.* at 314.

27. *Id.* at 315.

28. U.S. CONST. art. III, § 2, cl. 1. ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").

29. U.S. CONST. art. III, § 1.

30. ANDREW NOLAN & RICHARD M. THOMPSON II, CONGRESSIONAL POWER TO CREATE FEDERAL COURTS: A LEGAL OVERVIEW 10 (Cong. Rsch. Serv., Oct. 1, 2014), https://sgp.fas.org/crs/misc/R43746.pdf [https://perma.cc/XPV5-LDAT].

31. 28 U.S.C. § 1331.

32. Christopher A. Cotropia, *Counterclaims, The Well-Pleaded Complaint, and Federal Jurisdiction*, 33 HOFSTRA L. REV. 4 (2004).

narrowly.[33] In determining whether there is arising under jurisdiction for § 1331 purposes, federal courts turn to the well-pleaded complaint rule. As described in the landmark case of *Louisville and Nashville Railroad Co. v. Mottley*, this rule requires that the federal element in the case be found in the plaintiff's cause of action, not within a defense or counterclaim.[34] Accordingly, the Supreme Court has deemed the plaintiff the master of their complaint, avoiding removal to federal court based on arising under jurisdiction by simply pleading purely state law claims.[35]

2. *Grable* Jurisdiction

Whether a plaintiff's claim arises under federal law is typically a straightforward question. For example, when the federal law creates the cause of action, such as a civil rights claim pursuant to 42 U.S.C. § 1983, that claim is arising under federal law.[36] However, arising under jurisdiction is not always this simple. The Supreme Court has previously found arising under jurisdiction when there are federal issues embedded in the state law claims requiring a federal approach.[37] Such jurisdiction is often called "embedded" federal question jurisdiction, or *Grable* jurisdiction, named for the case to first succinctly describe the doctrine.[38] For *Grable* jurisdiction to be found, the federal question must be: (1) necessarily raised; (2) disputed; (3) substantial; and (4) capable of resolution in a federal court without disrupting the federal-state balance approved by Congress.[39] Federal courts have most often found *Grable* jurisdiction when the constitutionality of a federal statute is at issue or when the case requires the interpretation of a federal regulatory scheme.[40]

3. Preemption

The well-pleaded complaint rule dictates an arising under jurisdiction analysis and makes it possible for a plaintiff to avoid federal court by pleading solely state law claims. The Supreme Court has seemed to endorse this sort of forum-shopping.[41] However, a notable exception to the well-pleaded complaint

33. Paul J. Mishkin, *The Federal Question in the District Courts*, 53 COLUM. L. REV. 157, 160–61 (1953).

34. Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

35. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

36. Rory Ryan, *No Welcome Mat, No Problem?: Federal-Question Jurisdiction After Grable*, 80 ST. JOHN'S L. REV. 621, 629 (2006).

37. *Id.* at 630.

38. Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).

39. *Id.* at 313–314.

40. *See, e.g.*, Smith v. Kansas City & Title Tr. Co., 255 U.S. 180, 201–02 (1921); Broder v. Cablevision Sys., 418 F.3d 187, 195–96 (2d Cir. 2005).

41. Caterpillar Inc. v. Williams, 482 U.S. 386, 399 (1987) ("[T]he plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.").

rule is the doctrine of complete preemption, whereby a state claim may be converted into a federal cause of action when federal law has completely preempted the state cause of action.[42] This conversion provides grounds for arising under jurisdiction, even if the suit was initially filed in state court.[43]

For complete preemption to be found, congressional intent to completely preempt must be shown.[44] Congressional intent can be shown through the text of the statute,[45] the legislative history,[46] or when Congress intends for the federal scheme to provide the exclusive cause of action.[47] Due to the congressional intent requirement, complete preemption has been found in only a few select statutes.[48]

Importantly, complete preemption is different from the doctrine of ordinary preemption. Ordinary preemption provides that Congress can override conflicting state laws.[49] Unlike complete preemption, ordinary preemption does not provide grounds for arising under jurisdiction or removal because the claim must still be held to the well-pleaded complaint rule.[50] Simply put, ordinary preemption is a defense to be adjudicated on the merits and does not offer choice-of-forum benefits.

4. The Federal Common Law and Displacement

When the Supreme Court famously held in *Erie* that "[t]here is no general federal common law,"[51] the Court was only articulating a choice-of-law rule for tort or contract cases in federal court pursuant to diversity jurisdiction.[52] Indeed, federal common law exists today, though the extent to which remains an area of

42. *Id.* at 393.

43. 14C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3722.2 (Rev. 4th ed. 2018).

44. Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from* California v. BP, 117 MICH. L. REV. ONLINE 25, 33 (2018).

45. *See, e.g.*, Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987) (finding express congressional intent to preempt through the text of a statute providing that "actions in Federal or State courts are to be regarded as arising under the laws of the United States").

46. *See, e.g.*, Wyeth v. Levine, 555 U.S. 555 (2009) (finding the legislative history of the Food Drug and Cosmetic Act to not show congressional intent to preempt).

47. Beneficial Nat'l. Bank v. Anderson, 539 U.S. 1, 10 n.5 (2003).

48. Complete preemption has only been found in the Labor Management Relations Act, *Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557 (1968), the Employee Retirement Income Security Act, *Metropolitan Life Insurance Co.*, 481 U.S. 58 (1987), and the National Bank Act, *Beneficial National Bank*, 539 U.S. 1 (2003).

49. 81A C.J.S. *States* § 49 (2021).

50. *See* Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 13–14 (1983).

51. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

52. *Id.*

confusion.[53] Federal common law is often used as a gap-filler for holes in a statutory scheme,[54] in admiralty cases,[55] and in cases when there is a strong national or federal concern.[56] However, the Supreme Court has been resistant to the creation of federal common law, maintaining that common lawmaking should only be conducted when it is "necessary to protect uniquely federal interests."[57] Despite the elusive nature of the concept, claims that are governed by the federal common law provide grounds for arising under jurisdiction.[58]

A corollary concept to the federal common law is displacement. Often described as preemption at the lateral, federal level, displacement occurs when a federal statute supplants federal common law.[59] The standard for displacement is easier to satisfy than the standard for ordinary preemption because federalism issues are not presented at the lateral level.[60] Thus, if Congress has passed a law that "speaks directly to the question at issue," the federal common law is displaced.[61]

B. The First Wave of Climate Suits

Despite the complexity of arising under jurisdiction doctrines, whether there is arising under jurisdiction is evident in most cases. The federal issue often arises on the face of the plaintiff's complaint because their cause of action was created by federal law.[62] Indeed, early climate cases were governed by the federal common law and consequently did not present the same arising under jurisdiction questions as their modern counterparts. However, early climate suits posed unique issues regarding displacement and the federal common law, with these decisions shaping climate change litigation strategies today.

The first wave of climate litigation targeted greenhouse gas (GHG) emitters. In *Connecticut v. American Electric and Power Co.* (*AEP*), various public and private plaintiffs brought a federal common law nuisance action against the five largest fossil fuel emitters in the United States.[63] The plaintiffs included the States of Rhode Island, New York, Vermont, and Wisconsin, who sought an order enjoining the defendants to reduce their carbon emissions.[64]

53. 14 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4514 (3d ed., Apr. 2021 Update).

54. Malla Pollack, *Litigation of Federal Common Law*, 150 AM. JUR. TRIALS 489, § 5 (2017).

55. WRIGHT & MILLER, *supra* note 53.

56. *Id.*

57. *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981).

58. Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972).

59. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011).

60. *Id.* at 423.

61. *Id.* at 424.

62. Ryan, *supra* note 36, at 629.

63. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005).

64. *Id.* at 267, 270.

The Supreme Court first acknowledged that the case appeared to be governed by federal common law, relying on precedential cases involving environmental, air, and water disputes.[65] However, by the time the case had reached the Supreme Court, the EPA had been granted regulatory authority over CO_2 emissions.[66] Thus, the Supreme Court found that the CAA had displaced any existing federal common law right to recover and denied the request for injunctive relief.[67]

The same year that *AEP* was being litigated, the City of Kivalina, Alaska and a group of native Inuit people brought federal common law claims against various oil and gas companies for their emissions.[68] Rising global temperatures threatened to destroy the infrastructure in which the city sat.[69] Rather than seeking injunctive relief as the plaintiffs did in *AEP*, the city sought money damages for their climate-change-related injuries.[70] Given the Supreme Court's decision in *AEP*, the Ninth Circuit found the EPA displaced the plaintiffs' federal common law claim, regardless of the type of remedy sought.[71]

In summary, early climate suits sought to hold oil and gas companies liable for their harmful emissions. However, the Supreme Court's decision in *AEP* foreclosed these federal common law claims, with *Kivalina* further clarifying that claims for both injunctive relief and money damages were displaced by the CAA. Lacking a federal forum, plaintiffs turned to the state courts in hopes of keeping their climate suits viable.

II. THE CIRCUIT SPLIT

After *AEP* and *Kivalina* closed the door to litigation against GHG emitters in federal court, a new strategy was required. As an alternative, plaintiffs began to target fossil fuel producers in state court. Grounding their claims in state tort law strategically avoided displacement because such claims did not offer a federal forum.[72] For good measure, the plaintiffs also targeted fossil fuel

65. *Am. Elec. Power Co.*, 564 U.S. at 421.

66. *Id.* at 416–17.

67. *Id.* at 411, 424.

68. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd* 696 F.3d 849 (9th Cir. 2012); Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1384 (2020).

69. *Kivalina*, 663 F. Supp. 2d at 869. For more information on climate mitigation efforts by the Inupiat people to preserve their native land, *see* Alan Taylor, *The Impact of Climate Change on Kivalina, Alaska*, ATLANTIC (Sept. 18, 2019), https://www.theatlantic.com/photo/2019/09/photos-impacts-climate-change-kivalina-alaska/598282/ [https://perma.cc/A9WC-L8CT]; *Relocating Kivalina*, U.S. CLIMATE CHANGE RESILIENCE TOOLKIT, https://toolkit.climate.gov/case-studies/relocating-kivalina [https://perma.cc/6WYU-3649] (last visited Feb. 19, 2023).

70. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857 (9th Cir. 2012).

71. *Id.*

72. *See, e.g.*, Reply Brief at 4–10, City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (No. 18-2188).

producers rather than GHG emitters.[73] They reasoned this would avoid displacement because the CAA only granted the EPA regulatory authority over emissions, not fossil fuel production.[74]

This section will analyze cases in which arising under jurisdiction was found, as well as cases where arising under jurisdiction was not found and the case remanded to state court. While defendants often brought varying and obscure grounds for removal,[75] this Note will focus solely on federal common law, complete preemption, and *Grable* grounds.

A. Cases Arising Under Federal Law

1. *California v. BP P.L.C.*

Given the international nature of climate change, the Northern District of California in *California v. BP P.L.C.* found climate change suits required a uniform rule of decision that could only be achieved through the crafting of federal common law.[76] Since federal common law was controlling, the court reasoned this alone justified arising under jurisdiction, regardless of the well-pleaded complaint.[77] This holding has set the stage for subsequent climate suits, with many federal courts disagreeing with this determination.

In 2017, the City of Oakland and San Francisco brought an action against various multinational oil companies grounding their claims in state nuisance law.[78] The plaintiffs sought an abatement fund to support infrastructure projects to protect against sea level rise.[79] The case was initially brought in state court, only to be quickly removed by the defendants pursuant to the court's arising under jurisdiction, including jurisdiction based on the federal common law, *Grable*, and complete preemption.[80]

The district court concluded that the plaintiffs' state nuisance claims were necessarily governed by federal common law and took jurisdiction over the case.[81] The court reasoned that the case implicated foreign nations, apportioning fault for the damages caused by global emissions, and coastal waters. These areas have all been traditionally governed by the federal common law as the

73. *Id.* at 5–14.

74. *Id.*

75. For example, the defendants in *Mayor of Baltimore v. BP P.L.C.* argued for removal based on federal officer grounds, federal enclaves, and removal pursuant to the Outer Continental Shelf Lands Act. *See Baltimore Notice of Removal*, *supra* note 14, at 7–8.

76. California v. BP P.L.C., No. C 17-06011, 2018 WL 1064293, at *2 (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *superseded*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021).

77. *Id.*

78. *Id.* at *1.

79. *Id.*

80. *Id.*

81. *Id.* at *2.

Supreme Court had reiterated in cases such as *AEP*.[82] Given the international nature of the suit, a uniform rule of decision was required justifying the application of federal common law and jurisdiction.[83]

Although the court acknowledged the plaintiffs only pled state law claims, it determined the well-pleaded complaint rule did not prevent removal. The court reasoned that federal jurisdiction exists for those claims arising under federal common law, regardless of where the federal issue arises.[84]

After taking jurisdiction, the court dismissed the case on the merits.[85] First, the court did not find the defendants' production of fossil fuels to be unreasonable as required under the state's nuisance action.[86] While the court acknowledged that global warming presents serious environmental concerns, it also recognized that the "modern world has literally been fueled by oil and coal."[87] Given the economic utility of the defendants' actions, the sale and production of fossil fuels could not be deemed unreasonable.[88] Second, the court found that the Supreme Court's holding in *AEP* suggested the plaintiffs' claims were displaced by the CAA, despite the suit targeting fossil fuel producers rather than emitters.[89] Finally, the district court exercised judicial restraint, expounding on the separation of powers concerns presented by the case.[90] An abatement fund to support the people of California based on foreign emissions would result in judicial overreaching and implicate "the interests of countless governments, both foreign and domestic."[91] In short, issues of climate change required a solution more comprehensive than could be supplied by a federal judge.[92]

After two years of litigation in the district court, the Ninth Circuit ruled that the district court's failure to apply the well-pleaded complaint rule was improper and vacated its holding.[93] The Ninth Circuit also rejected the defendants' argument on appeal for *Grable* jurisdiction, reasoning that a state-law claim for public nuisance did not "necessarily raise" a substantial federal question because there was no interpretation of, or challenge to, a federal statute.[94] Finally, it also rejected jurisdiction based on complete preemption due to a lack of congressional intent to preempt.[95]

82. *Id.* at *5.
83. *Id.* at *3.
84. *Id.*
85. City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018).
86. *Id.* at 1023.
87. *Id.*
88. *Id.* at 1024.
89. *Id.*
90. *Id.*
91. *Id.* at 1026.
92. *Id.* at 1029.
93. City of Oakland v. BP PLC, 969 F.3d 895, 908 (9th Cir. 2020).
94. *Id.* at 906.
95. *Id.* at 907.

2. *City of New York v. BP P.L.C.*

As the litigation in California progressed, the City of New York simultaneously brought suit against oil and gas companies for their contributions to climate change, pleading common law nuisance and trespass.[96] Unlike *California*, the City of New York filed suit in a federal district court pursuant to diversity jurisdiction, a crucial procedural aspect in understanding the circuit split.[97]

The court first found that federal common law governed the plaintiff's claims,[98] agreeing with the *California* court that climate change required a federal rule of decision "necessary to protect uniquely federal interests."[99] The court also held that cases implicating interstate pollution are solely within the realm of federal common law, citing to *AEP* and *Kivalina*.[100]

After determining that the federal common law governed the plaintiff's claims, the second issue was whether the CAA displaced the plaintiff's common law claims given the holdings in *AEP* and *Kivalina*.[101] The plaintiff argued against displacement, reasoning the CAA did not regulate the production of fossil fuels, only the resulting emissions.[102] The court rejected this argument, reasoning that the damages were still to be measured according to climate-change-related injuries caused by emissions and thus came within the regulatory authority of the EPA.[103] Because the plaintiff's claims were displaced by the CAA, the district court dismissed their complaint.[104]

The Second Circuit affirmed the dismissal,[105] expressing separation of powers and federalism concerns, such as state judiciaries acting as a regulator. It reasoned that if fossil fuel producers sought to reduce their liability from a suit in one state, they would be required to reevaluate their production nationally given the dissipating nature of GHGs.[106] Large damages could even force the defendants to cease production altogether.[107] Moreover, state courts were sure

96. City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 470 (S.D.N.Y. 2018), *aff'd*, City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (citing Amended Complaint at 68–73, City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 18 CV 182), 2018 WL 8064051).

97. Amended Complaint at 23, City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 18 CV 182), 2018 WL 8064051.

98. City of New York, 325 F. Supp. 3d at 471.

99. *Id.*

100. *Id.* at 472.

101. *Id.*

102. *Id.* at 474.

103. *Id.*

104. *Id.* at 476.

105. City of New York v. Chevron Corp., 993 F.3d 81, 103 (2d Cir. 2021). The plaintiffs did not seek Supreme Court review.

106. *Id.* at 92.

107. *Id.* at 93.

to differ in their determination as to the balance between climate change mitigation strategies and maintaining economic output.[108] Thus, the case required a uniform rule of decision only possible within the federal courts.

The Second Circuit also addressed the procedural difference in the case before them than in other cases where removal had been deemed improper.[109] It is important to note that the court could consider displacement and preemption grounds on the merits because the complaint was initially filed in federal court under diversity jurisdiction.[110] Thus, the well-pleaded complaint rule did not need to be applied.

B. Cases Deemed Not to Arise Under Federal Law

Unlike the courts in *California* and *City of New York*, the majority of federal courts who have faced climate change suits, pleading purely state law claims and lacking diversity, have found there to be no federal jurisdiction.[111] The most notorious of these cases is *Mayor of Baltimore v. BP P.L.C.* because of its recent review by the Supreme Court.[112] This section will analyze various cases in which removal was deemed improper, using *Baltimore* as a framework and its rejection of federal common law, *Grable*, and complete preemption grounds for jurisdiction.

The plaintiffs in *Baltimore* brought forward nuisance and consumer fraud claims against twenty-six national oil and gas corporations in a Baltimore circuit court,[113] from which the defendants sought to remove claiming arising under jurisdiction.[114] Similar to other climate suits, the defendants argued that the public nuisance claim was governed by federal common law in order to gain access to a federal forum.[115] The district court rejected this argument, observing that the city's claims were based in Maryland common law and not in federal

108. *Id.*

109. *Id.* at 94.

110. Amended Complaint at 23, City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 18 CV 182), 2018 WL 8064051.

111. Mayor of Baltimore v. BP P.L.C, 388 F. Supp. 3d 538, 561 (D. Md. 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021); County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, at 939 (N.D. Cal. 2018), *aff'd in part*, 960 F.3d 586 (9th Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021); Connecticut v. Exxon Mobil Corp., No. 3:20-cv-1555(JCH), 2021 WL 2389739, at *7 (D. Conn. June 2, 2021); Boulder Cnty. v. Suncor Energy (U.S.A) Inc., 405 F. Supp. 3d 947, 961 (D. Colo. 2019), *aff'd in part*, 965 F.3d 792 (10th Cir. 2020), *vacated*, 141 S. Ct. 2667 (2021); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 150 (D. R.I. 2019), *aff'd*, 979 F. 3d 50 (1st Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021).

112. BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532 (2021).

113. Complaint at 107–130, Mayor of Baltimore, 388 F. Supp. 3d 538 (D. Md. 2019) (No. 1:18-cv-02357-ELH), 2018 WL 4236520.

114. *Baltimore*, 388 F. Supp. 3d at 548–49.

115. *Id.* at 549.

law.[116] The district court viewed this as a "cleverly veiled preemption argument" which still needed to be held to the well-pleaded complaint rule.[117] Because the grounds for federal jurisdiction had not been shown on the face of the complaint, removal was improper.[118]

The *Baltimore* court further acknowledged cases in which arising under jurisdiction was found but distinguished or critiqued these holdings. The court expressly distinguished the case before them from *City of New York* where the district court had diversity jurisdiction at the outset and could consider displacement on the merits rather than at the preliminary removal stage.[119] Moreover, the court critiqued the arising under jurisdiction analysis in *California* for its failure to apply the well-pleaded complaint rule.[120]

Other federal courts faced with similar climate change suits have agreed with the *Baltimore* court's analysis of federal common law as grounds for removal. Indeed, some have expressly disagreed with the district court's analysis in *California* for its failure to apply the well-pleaded complaint rule.[121]

Next, the defendants in *Baltimore* argued that *Grable* jurisdiction should be found. The defendants asserted that the international nature of the suit involving global climate change should be heard in federal court.[122] The district court dismissed this argument because the argument failed the first prong of the *Grable* analysis, requiring the federal question to be necessarily raised.[123] Although climate change is of national concern and the topic of foreign policy as exemplified by the Paris Agreement, there was no federal law that needed to be resolved for the case to proceed.[124]

As in *Baltimore*, the defendants' arguments for *Grable* jurisdiction were rejected in various other climate suits for failing the necessarily raised element.[125] Best described by the Northern District of California in *County of San Mateo v. Chevron Corp.*, "[t]he defendants have not pointed to a specific issue of federal law that must necessarily be resolved to adjudicate the state law claims."[126] While the defendants could point to federal issues in a generalized

116. *Id.* at 555.

117. *Id.*

118. *Id.* at 556.

119. *Id.* at 557.

120. *Id.* at 556.

121. County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018); Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 962 (D. Colo. 2019).

122. *Baltimore*, 388 F. Supp. 3d at 559.

123. *Id.*

124. *Id.*

125. Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 44 (L.R., D. Mass. 2020); *San Mateo*, 294 F. Supp. 3d at 938; Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 151 (D. R.I. 2019); *Boulder Cnty.*, 405 F. Supp. 3d at 965.

126. *San Mateo*, 294 F. Supp. 3d at 938.

way, the *Grable* test requires more specificity.[127] Even in *Connecticut v. Exxon Mobil Corp.*, where state fraud claims were brought that required the court to look to the Federal Trade Commission's definition of unfair or deceptive acts,[128] the definition served as mere guidance. Thus, no issue of federal law was necessarily raised.[129]

Finally, the defendants in *Baltimore* argued that the CAA completely preempted the state law claims justifying their removal. Defendants cited in part the district court's decision in *City of New York* to justify this assertion.[130] However, the holding in *City of New York* rested on a displacement analysis for a claim initially filed in federal court, different from a complete preemption analysis for purposes of arising under jurisdiction. The *Baltimore* court made this distinction and correctly applied a complete preemption analysis, rejecting jurisdiction based on a lack of congressional intent to completely preempt the state cause of action.[131]

Other courts have agreed and denied jurisdiction based on complete preemption,[132] observing the CAA contains an express savings clause that preserves state causes of action.[133] Some federal courts have further noted that the provisions of the CAA encourage cooperation between the states and federal government, undermining defendants' assertions that Congress intended to preempt state law.[134]

III. ANALYSIS

A. Analysis of the Circuit Split

As described in Part II, there is a current split among the federal courts as to whether arising under jurisdiction exists over climate change suits. Despite the procedural complexity of these cases as well as the facial disagreement among the courts on the question of arising under jurisdiction, a deeper analysis reveals the decisions are largely in unison. No court has yet accepted complete preemption as justifying removal given the savings clause of the CAA.[135] *Grable*

127. *Id.*

128. *Connecticut,* 2021 WL 2389739, at *9.

129. *Id.*

130. *Baltimore Notice of Removal*, *supra* note 14, at 26.

131. Mayor of Baltimore v. BP P.L.C, 388 F. Supp. 3d 538, 562 (D. Md. 2019).

132. *San Mateo*, 294 F. Supp. 3d at 938; Boulder Cnty. v. Suncor Energy (U.S.A) Inc., 405 F. Supp. 3d 947, 970 (D. Colo. 2019).

133. 42 U.S.C. § 7604(e) ("Nothing in this section shall restrict any right . . . under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief.").

134. Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 150 (D. R.I. 2019), *aff'd*, 979 F. 3d 50 (1st Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021).

135. *Supra* § II.

jurisdiction has also been consistently rejected as the state law claims do not necessarily raise any issue of federal law.[136]

The disagreement among the federal courts is whether federal common law alone can justify removal. The varying holdings in these cases can be attributed to the procedural status of the case and the well-pleaded complaint rule. As described in *Mottley*, this rule requires the federal element of the case to be found within the plaintiff's claim, not as a defense by the defendant.[137] The claims brought by plaintiffs have been strategically crafted to only plead state actions such as fraud, private nuisance, public nuisance, and trespass, and do not facially display a federal issue justifying removal. Thus, most federal courts correctly applied the well-pleaded complaint rule and deemed removal improper.[138]

While two federal courts did find arising under jurisdiction, their reasoning is flawed or procedurally distinguishable. Although the *California* court deemed federal common law justified removal, this decision was reversed by the Ninth Circuit and has been largely criticized by other federal judges and legal scholars for its failure to apply the well-pleaded complaint rule.[139] And although the district court in *City of New York* found the federal common law to be controlling, it had jurisdiction pursuant to diversity. Thus, the court could consider the question of displacement on the merits and not within the confines of the forum question.[140]

Defendants have argued the federal common law is grounds for removal aside from the well-pleaded complaint rule. As one defendant asserted, "the fact that climate-change claims are necessarily governed by federal common law makes them removable to federal court under 28 U.S.C. §§ 1331 and 1441."[141] Unsurprisingly, their strategy is to recast their claim as federal to gain access to a federal forum where displacement is likely.

To support this theory, the defendants rely on cases such as *City of Milwaukee v. Illinois*, *AEP*, *International Paper Co. v. Ouellette*, and *Oneida*

136. *Id.*

137. Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

138. *Supra* § II(B).

139. City of Oakland v. BP PLC, 969 F.3d 895, 906 (9th Cir. 2020); Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538, 556–57 (D. Md. 2019) (describing the holding in *California* as "at odds with the firmly established principle that ordinary preemption does not give rise to federal question jurisdiction."); Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 962 (D. Colo. 2019) (asserting the holding in *California* "failed to discuss or note the significance of the difference between removal jurisdiction, which implicates the well-pleaded complaint rule, and federal jurisdiction that is invoked at the outset such as in *AEP* and *Kivalina*.").

140. City of New York v. Chevron Corp., 993 F.3d 81, 89 (2d Cir. 2021).

141. Suppl. Br. of Appellants at 9, Boulder Cnty. v. Suncor Energy (U.S.A) Inc., 405 F. Supp. 3d 947 (D. Colo. 2019) (No. 18-1672), 2021 WL 3134851; Appellant's Reply Br. at 8–9, Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (No. 19-1644).

Indian Nation of N.Y. State v. Oneida County.[142] However, there are key flaws with each of these cases as controlling precedent. First, *Milwaukee* and *AEP* were initially filed in federal court under federal common law nuisance claims and thus the federal issues were raised on the face of the plaintiffs' complaints.[143] Any reference to federal common law in these holdings was an adjudication on the merits, not at the preliminary removal stage. Similarly, the Supreme Court's discussion in *International Paper* was regarding an ordinary preemption analysis on the merits, not for the purpose of determining whether there was federal jurisdiction at the outset.[144]

Oneida is also distinguishable. In *Oneida*, the Oneida Indian Nation brought suit in a New York state court asserting possessory rights to five million acres of land ceded to the state.[145] The defendant removed and the Supreme Court held removal was proper after determining the federal issues appeared on the face of the plaintiff's complaint.[146] The federal issues included tribal possessory rights arising out of treaties and a federal law that allowed for the extinguishment of tribal title.[147] Thus, *Oneida* is distinguishable in that removal was based on the federal nature of the plaintiff's claims, whereas present-day climate suits involve only claims under state common law.

The most convincing Supreme Court precedent the defendants point to is the case of *Avco Corp. v. Aero Lodge No. 735* involving the enforcement of a collective bargaining agreement.[148] There, the Supreme Court deemed removal was proper because the action necessarily involved federal law.[149] However, scholars have noted the Court provided a shallow analysis for this assertion and failed to apply the well-pleaded complaint rule.[150] Accordingly, this case has been interpreted as falling within the Supreme Court's complete preemption line

142. Appellant's Reply Brief at 8–9, Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (No. 19-1644); Amicus Br. of Indiana and 13 Other States in Support of Appellants and Reversal at 6, Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (No. 19-1644); Suppl. Br. of Appellants at 9, Boulder Cnty. v. Suncor Energy (U.S.A) Inc., 405 F. Supp. 3d 947 (D. Colo. 2019) (No. 18-1672), 2021 WL 3134851.

143. Complaint, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (1:04-cv-05669-LAP), 2004 WL 5614397; City of Milwaukee v. Illinois, 451 U.S. 304, 310 (1981).

144. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 493–94 (1987).

145. Petition for a Writ of Cert. to the United States Court of Appeals for the Second Circuit at 5, Oneida Indian Nation of N. Y. State v. Oneida Cty., New York, 414 U.S. 661 (1974) (No. 72-851) [hereinafter *Oneida Pet. for Cert.*]; Oneida Indian Nation of N.Y. State v. Oneida Cnty., 414 U.S. 661, 664–65 (1974).

146. Oneida Pet. for Cert., *supra* note 145, at 5; *Oneida,* 414 U.S. at 675–76.

147. *Oneida*, 414 U.S. at 677–78.

148. 390 U.S. 557, 560 (1968).

149. Amicus Br. of Indiana and 13 Other States in Supp. of Appellants and Reversal at 13–14, Mayor of Baltimore v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020) (No. 19-1644), 2021 WL 3660997.

150. F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 918 (2009).

of cases,[151] a valid exception to the well-pleaded complaint rule. As complete preemption has been largely rejected under these climate suits,[152] this precedent fails to successfully bolster the defendants' argument.

The defendants' assertion that removal is justified based on the federal common law fails to account for the well-pleaded complaint rule.[153] Thus, cases initially brought in federal court are likely to be displaced based on the Supreme Court's holding in *AEP* and its current arising under jurisdiction jurisprudence. However, actions brought in state court pleading purely state claims can avoid displacement through the well-pleaded complaint rule.

B. Challenges Presented by Climate Litigation in State Courts

While the district court's opinion in *California* has been criticized for its failure to apply the well-pleaded complaint rule, the concerns the court described are rational. The court recognized that a fragmented approach to climate change litigation, where suits are brought in state courts across the country, would be costly, ineffective, and fail to account for the global nature of climate change and emissions.[154] Indeed, even the district courts that found the *California* court's analysis flawed agree that the outcome under the well-pleaded complaint rule is concerning. For example, the district court in *Massachusetts v. Exxon Mobil Corp.* expressed concern that the case raised issues of foreign policy that are typically heard in a federal forum.[155] The district court in *Connecticut v. Exxon Mobil Corp.* further recognized that resolving these climate suits in a federal forum would be convenient in establishing a uniform rule of law.[156] This section briefly describes these concerns.

1. Uniformity of Decisions

Uniformity behind the application and interpretation of federal law motivated the founders to craft arising under jurisdiction.[157] When cases presenting issues of national and international concern can be adjudicated in federal courts, uniformity is more achievable.[158] Chief Justice Marshall described federal arising under jurisdiction as essential to preventing as many

151. *Id.*

152. *See, e.g.*, Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 970 (D. Colo. 2019).

153. Indeed, the defendants' notice of removal in *Rhode Island* makes no mention of the well-pleaded complaint rule except for in the context of *Grable* jurisdiction. *See Rhode Island Notice of Removal*, *supra* note 14, at 22–23.

154. California v. BP P.L.C., No. C 17-06011, 2018 WL 1064293, at *5 (N.D. Cal. 2018).

155. *Massachusetts*, 462 F. Supp. 3d at 43.

156. *Connecticut*, 2021 WL 2389739, at *7.

157. Bellia, *supra* note 25, at 315.

158. Cotropia, *supra* note 32, at 38.

interpretations of federal law "as there are States."[159] Moreover, federal jurisdiction furthers uniformity by ensuring defendants are treated the same among their class.[160]

The desire for a uniform approach continues today, with the Supreme Court recently holding in *AEP* that federal common law might control in cases where there is a "demonstrated need for a federal rule of decision."[161] The Court in *AEP* expressly lamented the notion of an ad hoc, case-by-case approach to climate litigation.[162] However, the well-pleaded complaint rule frustrates the uniform interpretation and application of federal law. Allowing climate suits to proceed in state court will result in a fifty-state solution to climate change, far from offering a uniform rule of law. State proceedings could result in differing treatments of the same defendants, including varying levels of liability and methods of calculating damages.

2. Separation of Powers and Federalism Concerns

The continuation of these climate suits in state courts poses serious separation of powers and federalism concerns. First, large damage awards or injunctive relief in one state could result in the improper judicial regulation of our nation's energy production,[163] an outcome the Supreme Court has been particularly concerned about.[164] Damage awards also require balancing climate change harms with economic output, a policy decision Congress and the executive branch are more capable of making. As the Supreme Court in *AEP* maintained, "[a]long with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance."[165] Finally, state proceedings that reduce fossil fuel production could undermine the executive's leverage in acquiring reduction commitments from other nations, implicating foreign affairs.[166]

State courts will also be required to make culpability and apportionment of harm decisions that involve policy considerations. As the *California* court recognized, the conduct purporting to make the defendant liable—the production and sale of fossil fuels—is not only legal in every country but has

159. Bellia, *supra* note 25, at 330.

160. Cotropia, *supra* note 32, at 38.

161. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 422 (2011).

162. *Id.* at 428.

163. *Global Climate Litigation Report: 2020 Status Review*, U.N. ENV'T PROGRAMME 40 (2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y [https://perma.cc/J563-EMYV].

164. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572–73 (1996); San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 247 (1959).

165. *Am. Elec. Power Co.*, 564 U.S. at 427.

166. City of New York v. Chevron Corp., 993 F.3d 81, 93 (2d Cir. 2021); Appellant's Reply Brief at 15, Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (No. 19-1644).

been openly endorsed.[167] While producers are accountable for the production of fossil fuels, society is at-large responsible for its combustion that created harmful emissions. As the *California* court asked, "would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded?"[168]

These climate suits and the challenges they present in state court best exemplify the downfalls of the well-pleaded complaint rule.[169] The rule is often underinclusive, failing to encompass those cases where important policy concerns would justify federal jurisdiction.[170] As one scholar writes, the well-pleaded complaint rule "admits of no exception for cases in which the federal issue is important or as to which the federal bench's interpretation would be salutary."[171] While the static nature of the well-pleaded complaint rule helps to reduce the federal docket load, state courts then carry the weight. State courts often expend even further judicial resources to understand the uniquely federal issues that federal courts are more expert in.[172]

C. The Supreme Court: Crafting a New Rule Based on Prior Doctrine

The Supreme Court's review of the jurisdictional question appears imminent given that three climate suits are currently working their way back through the circuit courts after being vacated in 2021.[173] Given the uniformity of law, separation of powers, and federalism concerns these climate cases present, the Supreme Court is likely to revisit its prior, though perhaps underdeveloped, jurisdictional doctrines to justify federal jurisdiction despite the well-pleaded complaint rule. Potential doctrines the Court could reconsider include jurisdiction based on an important federal interest, protective jurisdiction, or jurisdiction based on foreign policy implications.[174]

1. Jurisdiction Based on an Important Federal Interest

The Supreme Court has before held that an important federal interest can justify federal jurisdiction, regardless of whether the federal issue arises on the

167. City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018).

168. *Id.* at 1023.

169. *See* Simona Grossi, *A Modified Theory of the Law of Federal Courts: The Case of Arising-Under Jurisdiction*, 88 WASH. L. REV. 961, 965 (2013) (arguing the mechanical approach to arising under jurisdiction hinders the purposes behind the granting of arising under jurisdiction).

170. Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309, 319 (2007).

171. *Id.* at 318.

172. Cotropia, *supra* note 32, at 47.

173. U.S. Sup. Ct. Order, 593 U.S. (May 24, 2021).

174. *See* Keith Goldberg, *Energy Litigation to Watch in 2022*, LAW 360 (Jan. 3, 2020), https://www.law360.com/articles/1444375/energy-litigation-to-watch-in-2022 [https://perma.cc/JJB8-ZENC].

face of the well-pleaded complaint. In the case of *Merrell Dow Pharmaceuticals Inc. v. Thompson* for example, the plaintiffs filed an action against a pharmaceutical company for a drug that caused deformities in children.[175] Although the plaintiffs brought solely state law negligence claims,[176] the defendants removed to federal court. They asserted there was a federal ingredient because the plaintiffs' claims relied on the defendants' noncompliance with federal law—the Food, Drug, and Cosmetic Act (FDCA)– to show a breach of duty.[177]

The Court ultimately found removal to be improper, reasoning in part that the uniform interpretation of the FDCA was not a sufficient federal interest.[178] However, the Court suggested a more important federal interest could justify removal.[179] For instance, removal was proper in a case involving the constitutionality of a federal statute but was not proper in a case involving a mere state tort law claim that incorporated a federal statute.[180] Thus, *Merrell Dow* anticipates that an important federal interest can justify jurisdiction, so long as the federal interest is substantial.

The Supreme Court's holding in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing* also evidences the Court's willingness to deviate from the well-pleaded complaint rule when there is an important federal interest. The Court reiterated that arising under jurisdiction "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."[181]

Although *Merrell Dow* and *Grable & Sons* have come to establish the doctrine of *Grable* jurisdiction,[182] these cases provide key insight into how the Supreme Court may view the federal jurisdiction question in modern climate suits. As described, these climate cases present issues of uniformity, separation of powers, and federalism.[183] Unlike the mere incorporation of federal law in a state claim as in *Merrell Dow*, the federal interests in these cases are substantial. More than just a uniform interpretation of the law, the federal interests include maintaining energy production, economic output, and the executive branch's ability to negotiate with other countries over climate change mitigation strategies. The substantive complexity of these climate suits requires the

175. Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804 (1986).
176. *Id.*
177. *Id.*
178. *Id.* at 815–16.
179. *Id.* at 816.
180. *Id.*
181. *Grable*, 545 U.S. at 312.
182. *Id.* at 311–12.
183. *Supra* § III(B)(1).

"experience, solicitude, and hope of uniformity that a federal forum offers" as the *Grable* Court contemplated.[184] These federal interests should justify federal jurisdiction.

2. Protective Jurisdiction

In addition to the *Merrell Dow* and *Grable* line of cases that stress the importance of the federal interest, the Supreme Court has ventured away from the traditional rules of arising under jurisdiction to create "protective jurisdiction." The purpose of protective jurisdiction is to provide the benefits of a federal forum to a potential class of litigants, even though a federal ingredient does not appear on the face of the well-pleaded complaint.[185]

While protective jurisdiction has traditionally been applied in cases where the federal government is a named party, the Supreme Court has previously extended this doctrine to the Red Cross in *American National Red Cross v. S.G.*[186] Although the opinion largely relied on the entity's federal charter, scholars contend that a better explanation for the decision is the protection of Congress' legitimate Article I interests including shielding federal entities from state court hostility.[187] Since the Red Cross engaged in various activities that served governmental interests, it had effectively operated as an agent of the government therefore rendering it worthy of protection.[188]

In addition to protecting a particular litigant, Professor Mishkin maintains that protective jurisdiction is also applied for the protection of a robust federal program.[189] Such was the case with the Taft-Hartley Act regulating labor relations, with Professor Mishkin explaining that:

> [E]ven though the rules governing collective bargaining agreements continue to be state-fashioned, nonetheless the mode of their application and enforcement may play a very substantial part in the labor-management relations of interstate industry and commerce—an area in which the national government has labored long and hard.[190]

The Supreme Court could apply protective jurisdiction in these climate suits to shelter the defendant fossil fuel producers. While the defendants are not federally chartered entities as in *Red Cross*, the nation has relied on their

184. *Grable*, 545 U.S. at 312.

185. RICHARD H. FALLON, JR., JOHN. F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 749 (6th ed. 2009).

186. Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 259 (1992); Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism and the Federal Courts*, 54 FLA. L. REV. 361, 383 (2002).

187. Segall, *supra* note 186, at 373.

188. *Id.*

189. Fallon, *supra* note 185, at 760.

190. *Id.*

production for decades.[191] The federal government has also endorsed the production of fossil fuels through the provision of large tax subsidies and below-market leases of public lands to producers.[192] Indeed, in just fiscal year 2019, the federal government collected $4.882 billion from the lease of 24 million acres of onshore federal land to fossil fuel producers.[193] Such entanglement could lead the Court to take jurisdiction to protect the defendants from the potential hostility of a state court.

Professor Mishkin's theory of protective jurisdiction could also be applied to protect the statutory scheme of the CAA. Although the CAA exemplifies cooperative federalism between the states and federal government, emissions regulation has been a federal government interest since the mid-twentieth century.[194] Should the EPA begin to regulate emissions more comprehensively—a likely step given the Biden administration's stance on climate change and the EPA's recent announcement that it will promulgate regulations over emissions from electrical power plants—protection will be needed to prevent this regulatory authority from being undermined by state litigation.[195]

3. Foreign Policy Grounds for Federal Jurisdiction

Finally, the foreign policy concerns in these climate suits could also provide a potential route to federal jurisdiction. The Supreme Court has held that cases implicating foreign relations are necessarily governed by federal common

191. *See Fossil Fuels Account for the Largest Share of U.S. Energy Production and Consumption*, U.S. ENERGY INFO. ADMIN. (Sept. 14, 2020), https://www.eia.gov/todayinenergy/detail.php?id=45096 [https://perma.cc/P4NL-UVTZ].

192. *See Fact Sheet: Fossil Fuel Subsidies: A Closer Look at Tax Breaks and Societal Costs*, ENV'T & ENERGY STUDY INST. (July 29, 2019), https://www.eesi.org/files/FactSheet_Fossil_Fuel_Subsidies_0719.pdf [https://perma.cc/CL7D-SSFV]; G20 governments provide $584 billion annually to oil and gas production. *Doubling Back and Doubling Down*: *G20 Scorecard on Fossil Fuel Funding* at iv, INT'L INST. FOR SUSTAINABLE DEV., https://www.iisd.org/system/files/2020-11/g20-scorecard-report.pdf [https://perma.cc/6HRY-XQED]; *Biden Calls for Higher Fees for Oil, Gas Leasing on Federal Land, Stops Short of Ban*, NPR (Nov. 26, 2021), https://www.npr.org/2021/11/26/1059398764/biden-calls-for-higher-fees-for-oil-gas-leasing-on-federal-land-stops-short-of-b [https://perma.cc/JYU3-TR2A].

193. *Revenues and Disbursements from Oil and Natural Gas Production on Federal Lands*, CONG. RSCH. SERV. (Sept. 22, 2020), https://sgp.fas.org/crs/misc/R46537.pdf [https://perma.cc/2G7T-WTAU].

194. *Clean Air Act Requirements and History*, EPA, https://www.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-history [https://perma.cc/P5TF-6JHA].

195. *See* Emma Newburger, *Biden's Infrastructure Bill Includes $50 Billion to Fight Climate Change Disasters*, CNBC (Nov. 15, 2021), https://www.cnbc.com/2021/11/15/biden-signs-infrastructure-bill-how-it-fights-climate-change.html [https://perma.cc/2PKL-K9MF]; Timothy Puko, *New EPA Rules To Target Power Plant Pollution,* WALL ST. J. (Jan. 25, 2022), https://www.wsj.com/articles/new-epa-rules-to-target-power-plant-pollution-11643112003 [https://perma.cc/34JP-L3LU].

law.[196] This theory met a removal analysis in *Torres v. Southern Peru Copper Corp*., where hundreds of Peruvian citizens brought state nuisance and tort claims against a copper smelting company.[197] Peru's national government and the defendant smelting company were considerably intertwined, with the government owning the land on which the mining company operated, while also extensively regulating the mining industry.[198] The action was initially filed in state court but later removed by the defendants.[199] The defendants argued that the case was governed by federal common law and thus federal jurisdiction was proper.[200] The Southern District of Texas agreed, reasoning the case implicated "Peru's sovereign interests by seeking damages for activities and policies in which the government actively has been engaged."[201]

Accordingly, *Torres* stands for two propositions. First, foreign policy implications with another sovereign can be sufficient to justify federal jurisdiction without regard to the well-pleaded complaint. Other circuits have agreed.[202] Second, akin to the reasoning behind protective jurisdiction, federal jurisdiction might be proper when the defendant's purported illegal conduct has been sponsored by a federal government.[203]

Admittedly, the *Torres* opinion has not gone without its critiques and its approach has never been formally adopted by the Supreme Court.[204] Thus, the plaintiffs in modern climate suits have correctly argued that the defendants "cannot transform the [plaintiffs'] claims into federal ones by pointing to the national and global dimensions of climate change."[205] However, the *Torres* approach is readily applicable to these climate suits, as the cases threaten to undermine the executive's leverage in obtaining GHG-reduction commitments from other nations. Moreover, like the defendant copper smelting company in *Torres*, the defendant fossil fuel producers in climate suits are significantly tied up with the federal government given the extensive governmental regulation of

196. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (U.S.N.Y. 1964).

197. Torres v. Southern Peru Copper Corp., 113 F.3d 540, 541–42 (5th Cir. 1997).

198. *Id.* at 543.

199. *Id.* at 541–42.

200. *Id.* at 542.

201. *Id.* at 543.

202. Republic of Philippines v. Marcos, 806 F.2d 344, 354 (2d Cir. 1986).

203. *Id.*

204. *See* Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001) (refusing to create an exception to the well-pled complaint rule because foreign nations were implicated in the suit).

205. Suppl. Br. of the States of Maryland, California, Connecticut, Delaware, Hawai'i, Maine, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, the Commonwealth of Massachusetts, and the District of Columbia as Amici Curiae Supporting Plaintiff-Appellee at 5, Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (No. 19-1644). *See also* Brief of Scholars of Foreign Relations and Federal Courts as Amici Curiae in Support of Plaintiff-Appellee for Affirmance at 4, Mayor of Baltimore v. BP P.L.C., 952 F.3d 452 (4th Cir. 2021) (No. 19-1644).

their activities and the use of public lands for fossil fuel production. Both grounds may justify federal jurisdiction.

If the Court were to determine federal jurisdiction is proper based on an important federal interest, protective jurisdiction, or jurisdiction based on foreign policy grounds, the claims are likely to be displaced by the CAA given the Court's holding in *AEP*. Although the plaintiffs have also attempted to avoid displacement by targeting fossil fuel producers, rather than $C0_2$ emitters, the distinction has been rejected by at least two federal courts.[206] Thus, the recent strategies climate change plaintiffs have taken to keep their suits viable in state court are likely to fail.

Unfortunately for plaintiffs, a finding of federal jurisdiction would result in the complete loss of a legal forum—state or federal. Although this is a concerning result given the dire need for climate change action, Congress and the executive branch are more qualified to make the culpability, apportionment of harm, and foreign policy decisions implicated in these cases. Indeed, the judiciary has routinely admitted it lacks the necessary expertise on climate science, economic implications, and foreign policy to craft climate-mitigation strategies.[207]

CONCLUSION

Modern climate suits present a split in the federal courts as to whether there is arising under jurisdiction. The federal courts are in unison in their rejection of *Grable* and complete preemption grounds for removal. However, the federal courts disagree as to whether the federal common law can justify federal jurisdiction. The split largely depends on the procedural posture of these cases, with suits brought in state court pleading purely state law claims remaining viable due to the well-pleaded complaint rule.

Should the Supreme Court be asked to resolve the question and find federal jurisdiction improper, further strengthening the well-pleaded complaint rule, these climate cases will proceed in state courts across the country. Issues these cases present on the merits are beyond the scope of this Note, but include the proper application of abstention doctrines,[208] ordinary preemption by the

206. City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018); City of New York v. BP, P.L.C., 325 F. Supp. 3d 466, 474 (S.D.N.Y. 2018). Plaintiffs have also argued that the displacement of the federal common law by the CAA revives the state common law claims. However, this argument has been unsuccessful. *See San Mateo*, 294 F. Supp. 3d at 937; Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 40 (L.R., D. Mass. 2020).

207. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 427 (2011).

208. *See* Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENV'T L. REV. 49, 67–73 (2018).

CAA,[209] as well as methods for apportioning and calculating damages.[210] If the Supreme Court avoids review on the preliminary jurisdictional questions, it is equally likely it will be asked to review these merit-based questions pursuant to its appellate jurisdiction.[211]

However, given the serious uniformity of law, separation of powers, and federalism concerns these climate suits present, the Supreme Court is likely to find federal jurisdiction. In doing so, the Court may revisit its prior doctrines such as jurisdiction based on an important federal interest, protective jurisdiction, or jurisdiction based on foreign policy implications. If the Court were to determine federal jurisdiction is proper, the claims are likely to be displaced by the CAA given the Court's holding in *AEP*. Unfortunately for plaintiffs, such a finding would likely result in the complete loss of a legal forum—state or federal.

The uphill battle the plaintiffs face in these suits is concerning, given that climate change and its effects are undoubtedly the most serious issue humankind will face in the next century.[212] However, as the federal courts have admitted, Congress and the executive branch are better suited to make nuanced decisions on climate change mitigation strategies.[213]

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209. *See* Tyler Runsten, C*limate Change Regulation, Preemption, and the Dormant Commerce Clause*, 72 HASTINGS L.J. 1313 (2021).

210. *See* Juliette Fortin & Patrick Hebreard, *Damages Valuation in Climate Change Disputes*, FTI CONSULTING, INC. (Sept. 2020), https://www.fticonsulting.com/-/media/files/emea--files/insights/articles/2020/sep/damages-valuation-climate-change-disputes.pdf?rev=c20cf865284843f297296e13be55320a&hash=A195738FA30EC83CBCF1749A693738F2 [https://perma.cc/R2HS-REM9].

211. 28 U.S.C. § 1257 ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari").

212. *See* Lonnie G. Thompson, *Climate Change: The Evidence and Our Options*, 33 BEHAVIOR ANALYST 2 (2010).

213. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 427 (2011).

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