

## C O M M E N T S

# Easier Said Than Done: Displacing Public Nuisance When States Sue for Climate Change Damages

by John Wood

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Like a tripartite juggernaut, all three branches of the U.S. federal government are actively grappling with climate change in kind: legislation from the U.S. Congress; regulation from the U.S. Environmental Protection Agency (EPA); and litigation in the judiciary all may come to bear on carbon emissions as a causal genesis of climate change. When all three branches of the federal government concurrently engage in questions of the same subject matter, interesting separation-of-powers concerns are implicated. In particular, climate change litigation has implicated the doctrine of displacement. Displacement has been raised as a procedural defense to suit under the federal common law of nuisance. Intuitively, a federal common-law cause of action for, say, pollution should be displaced whenever either of the other two branches has adequately dealt with the pollution problem. That is, requiring a defendant to comply with a court order when it is already in compliance with legislation or regulation on the matter would both be onerous for the defendant and would trammel on congressional or executive authority. Not only separation-of-powers principles but institutional competency concerns militate in favor of displacing federal common-law causes of action regarding subject matter with which either of the other two branches has already dealt. If the federal common law of public nuisance for carbon emissions is displaced by legislation from Congress or regulation from EPA, then carbon emitters have repose from federal common-law liability as long as they are in compliance with the legislative or regulative requirements. Unfortunately, the law of displacement, when applied to a case brought by states under the federal common law of public nuisance, is not nearly as straightforward as the foregoing sketch would suggest. What we might initially consider to be a narrow procedural issue is, upon further analysis, extremely thorny.

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*Connecticut v. American Electric Power Co. Inc. (AEP)*<sup>1</sup> is the most significant federal environmental case<sup>2</sup> since *Massachusetts v. EPA*.<sup>3</sup> Decided by the U.S. Court of Appeals for the Second Circuit on September 21, 2009, the case involves the basic allegation<sup>4</sup> that defendant coal-powered utility companies emit carbon dioxide (CO<sub>2</sub>) at levels that contribute to global warming,<sup>5</sup> which caused and will cause further damage to human health and natural resources.<sup>6</sup> The causal chain is spelled out as:

[C]urrent injury as a result of the increase in carbon dioxide levels that has already caused the temperature to rise and change their climates; devastating future injury to their property from the continuing, incremental increases in temperature projected over the next 10 to 100 years; and increased risk of harm from global warming, including an abrupt and catastrophic change in climate when a tipping force of radiative forcing is reached.<sup>7</sup>

1. 582 F.3d 309, 39 ELR 20215 (2d Cir. 2009) [hereinafter *AEP*].
2. Other common-law nuisance and tort claims concerning climate change include *Comer v. Murphy Oil USA*, 607 F.3d 1049, 40 ELR 20147 (5th Cir. 2010), *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 39 ELR 20236 (N.D. Cal. 2009), and *California v. General Motors Corp.*, No. C06-05755, 37 ELR 20239 (N.D. Cal. 2007). Cases concerning whether the Clean Air Act (CAA) applies to climate change and whether it preempts state efforts include *Massachusetts v. EPA*, 549 U.S. 497, 37 ELR 20075 (2007), *Central Valley Chrysler-Jeep Inc. v. Goldstone*, No. CV-F-04-6663, 37 ELR 20309 (E.D. Cal. 2007), and *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, F. Supp. 2d 295, 37 ELR 20232 (D. Vt. Sept. 12, 2007).
3. See *Massachusetts v. EPA*, 549 U.S. 497, 37 ELR 20075 (2007). Since the U.S. Supreme Court in the foregoing case enjoined EPA to regulate greenhouse gases (GHGs), it could be argued that *AEP* is on a crash-course with *Massachusetts*. Of course, EPA has yet to actually regulate carbon dioxide (CO<sub>2</sub>) emissions. Nonetheless, that concern is beyond the scope of this Article.
4. Another way to style the causal allegation is that CO<sub>2</sub> levels are the precipitating cause of climate change. Because CO<sub>2</sub> is a GHG, I will usually hereafter refer to the pollutant in dispute as GHG emissions.
5. The specific allegation is that global warming is a public nuisance. I refer to the "evil" of the lawsuit as "climate change," "GHG emissions" or "CO<sub>2</sub> emissions" hereafter since "global warming" can be a misleading term to describe the effects of anthropogenic planetary heating (erratic weather patterns generally).
6. See *AEP*, 582 F.3d at 314.
7. See *id.* at 317 (internal quotations omitted).

More specifically, current injuries (by way of showing standing) are reduced mountain snowpack, earlier melting and associated flooding, reduced summer streamflows, declining water supplies that injure property owners, and coastal erosion.<sup>8</sup> Future injuries for standing purposes are sea-level rise leading to more severe floods; injuries to coastal infrastructure, including airports, subway stations, tunnels, vent shafts, storm sewers, wastewater treatment plants, and bridges; permanent inundation of coastal property; salinization of marshes and tidelands; destruction of wildlife habitats; accelerated beach erosion; saltwater intrusion of groundwater aquifers; lowered water levels in the Great Lakes and corresponding disruption of hydropower production; threatened agriculture; increased frequency and duration of heat waves; increased wildfires; loss of hardwood forests and fish populations; general widespread loss of ecological and aesthetic value of property; and the loss of scientific and educational uses of such land.<sup>9</sup> Increased risk of future harm constitutes an injury-in-fact.<sup>10</sup> This discussion is in no need of rhetorical hype: the temperature in the room is already 1,000 degrees, as they say; in certain respects the planet's habitability is at stake. Importantly, the remedy sought is not monetary compensation but an injunction to cap and incrementally reduce those greenhouse gas (GHG) emissions.<sup>11</sup>

The Second Circuit held that the plaintiffs (states, a municipality, and land trusts) presented justiciable claims (they were not political questions); had standing; stated claims under the federal common law of nuisance; which claims were not displaced; and that the defendant Tennessee Valley Authority did not have immunity.<sup>12</sup> The case was remanded to the U.S. District Court for the Southern District of New York. Defendants filed petition for certiorari. Recently, the Solicitor General filed a brief for the Tennessee Valley Authority in support of the petitioners.<sup>13</sup> To wit, the brief requested that the

Court should grant certiorari, vacate the judgments of the court of appeals, and remand to enable the court of appeals to consider [ . . . ] whether, in light of multiple actions that EPA has taken since the court of appeals issued its decision, any otherwise cognizable federal common-law claims here have been displaced.<sup>14</sup>

8. See *id.* at 341.

9. See *id.* at 341-42.

10. See *Baur v. Veneman*, 352 F.3d 625, 633 (2d Cir. 2003).

11. See *AEP*, 582 F.3d at 318.

12. See *id.* at 315.

13. Gabriel Nelson, *Obama Admin Urges Supreme Court to Vacate Greenhouse Gas "Nuisance" Ruling*, N.Y. TIMES, Aug. 25, 2010.

14. On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, Brief for the Tennessee Valley Authority in Support of Petitioners, No. 10-174, 10-11, *American Electric Power Co. v. Connecticut—Response*, available at <http://www.justice.gov/osg/briefs/2010/0responses/2010-0174.resp.pdf> [hereinafter *Petition*].

The Solicitor General goes on to enumerate steps EPA has taken addressed to climate change, spelling out the incremental approach that will ultimately render carbon emissions "subject to" regulation.<sup>15</sup> The brief also claims that EPA has implemented the Clean Air Act (CAA)<sup>16</sup> in such a way as to speak directly to the plaintiffs' nuisance claims.<sup>17</sup> The brief also argues that in conducting a displacement analysis, the courts are not to scrutinize the adequacy or sufficiency of the congressional solution.<sup>18</sup> Facing myriad legal challenges, it is not guaranteed that EPA will succeed in regulating carbon emissions.<sup>19</sup> Neither is it guaranteed, even if successful in passing regulations, that they will be effective.<sup>20</sup> It is the author's position that, understood under an alternative but plausible theory, assessing the adequacy of the climate change response is precisely what the courts are called to do in conducting a displacement analysis in this context.

Plaintiffs in *AEP* are practically riding on the wake of *Massachusetts*, which granted the plaintiff state standing based on quasi-sovereign and proprietary interests in language that "appears to conflate, to an extent, State *parens patriae* standing and proprietary standing."<sup>21</sup> The court apparently found "injury to a State as a quasi-sovereign is a sufficiently concrete injury to be cognizable under Article III, and its finding of such injury is reinforced by the fact that the State is also a landowner and suffers injury to its land."<sup>22</sup> With standing firmly in place for the plaintiff, the next question logically is whether the proposals from Congress or the executive will displace the federal common law of nuisance. There has been plenty of noise from Con-

15. *Id.* at 25-28.

16. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

17. *Petition*, *supra* note 14, at 31.

18. *Petition*, *supra* note 14, at 32.

19. See Kim Chipman, *Lisa Jackson's High-Wire Act on Carbon Controls*, BLOOMBERG BUSINESSWEEK, Sept. 2, 2010, [http://www.businessweek.com/magazine/content/10\\_37/b4194023962290.htm](http://www.businessweek.com/magazine/content/10_37/b4194023962290.htm) (last visited Sept. 5, 2010):

[B]usiness groups, led by the U.S. Chamber of Commerce, are taking Jackson to court, saying she has no authority to regulate greenhouse gases under the Clean Air Act.

Some Democrats from coal-producing states want to stop or postpone the EPA's efforts. Senator Jay Rockefeller (D-W. Va.) has readied a measure that would delay any rule for two years. To succeed, he would need 18 other Democrats to join 41 Republicans—not impossible, considering that half the states mine coal or burn it for most of their electricity.

An environmental group, the Center for Biological Diversity, sued the agency in early August, claiming the tailored regulations leave out too many large polluters. Texas Governor Rick Perry, meanwhile, has filed a lawsuit against the EPA for singling out refineries and power plants.

20. See *id.*:

Former House Energy & Commerce Committee Chairman John Dingell (D-Mich.) has warned that attempts to use existing law to regulate carbon will create a "glorious mess." So far, he seems to be right. [ . . . ] "There is only so much this agency can do under the Clean Air Act," she concedes.

21. See *AEP*, 582 F.3d at 338.

22. See *id.* (interpreting the standing analysis from the Supreme Court's opinion in *Massachusetts*).

gress and the executive concerning climate change, with the executive in the lead as far as meaningfully responding.<sup>23</sup> But the mere grant of power to regulate GHGs is not enough to displace existing common law if it has not been wielded via a specific promulgated regulation.<sup>24</sup> Ultimately, the court will likely conduct a displacement<sup>25</sup> analysis prior to reaching the merits of the nuisance claim.

## I. Displacement Analysis

Displacement should not be considered a one-way ratchet that augments the congressional domain while diminishing the judiciary's power. Because stating displacement simply as a restraint on the application of federal common law ignores the supplemental role federal common law ought to play in the balance of powers, it is important to note that "Federal common law is a necessary expedient to which Federal courts may turn when compelled to consider Federal questions which cannot be answered from Federal statutes alone."<sup>26</sup> As an aside, it is a wonder why the court said "may" instead of "must." If the court is compelled to answer a federal question that the statute does not provide an answer to, the court *must* turn to federal common law.

At any rate, the Second Circuit avoided the field preemption or conflict preemption analysis suggested by Prof.

Thomas Merrill,<sup>27</sup> and rightly so. Displacement analysis "involves an assessment of the scope of the legislation and whether the scheme established by Congress [and presumably EPA] addresses the problem."<sup>28</sup> Implied by the nature of this inquiry is the notion that if Congress' or EPA's scheme does *not* address the problem, the federal common law is not displaced, no matter what lip-service the statute or regulation pays to GHG emissions or climate change resulting therefrom. This understanding of displacement runs against a conclusory and possibly incorrect remark put forward in the conclusion of the court of appeals' *Baker* analysis. After stipulating that "[t]he legislative branch is free to amend the Clean Air Act [or, presumably, to pass a new piece of legislation] to regulate carbon dioxide emissions, and the executive branch, by way of the EPA, is free to regulate emissions, assuming its reasoning is not divorced from the statutory text," the court said that "[e]ither of these actions would override *any decision* made by the district court under the federal common law."<sup>29</sup> But, to be sure, executive or congressional action, in itself, is insufficient to displace the federal common law. Actual emissions reduction alone could displace the federal common law. To say that either congressional or executive regulation of CO<sub>2</sub>, *simpliciter*, would override any decision by the district court under the federal common law, demonstrates a conclusory reading of the displacement analysis. Of course, because it was not in the displacement section of the opinion, it was mere dicta. Displacement only occurs if the congressional or executive action passes the displacement test, not merely by virtue of the fact that Congress or the executive acted.

The precise test applied when answering a displacement question is not as easy to articulate as would be desirable.<sup>30</sup> The standard for analysis in a displacement question is formulated in sundry ways. This is a situation where the law professes to provide a "strict test,"<sup>31</sup> yet gives us instead variously ambiguous criteria upon which to base a decision (as appellate court opinions often show). Displacement of the federal common law does not occur, notwithstanding the existence of a statute or regulation, if "the remedy sought" by the plaintiff is "not within the precise scope of remedies prescribed by Congress" or EPA.<sup>32</sup> Alternatively, displacement does not occur unless the congressional or executive program is "self-consciously comprehensive" in

23. It far exceeds the scope of this Article to describe all the relevant moves made by Congress and the executive concerning climate change. Suffice it to say the interplay between political parties and branches of government concerning climate change has been fascinating from the perspective of a social scientist, but depressing from the point of view of the environmentalist.

24. See *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 13-18 (1st Cir. 2005).

25. The lion's share of the discussion in this Article is novel, insofar as I am concerned with the doctrinal peculiarities of the displacement jurisprudence. I take as a premise the factual allegations made by the plaintiff in *AEP*. I do not explore the merits of the nuisance claim or the policy debate over institutional competency. Other articles weighing in on displacement in the context of climate change include the following: P. Leigh Bausinger, *Welcome to the (Impenetrable) Jungle: Massachusetts v. EPA, The Clean Air Act and the Common Law of Public Nuisance*, 53 VILL. L. REV. 527 (2008); Sarah Olinger, *Filling the Void in an Otherwise Occupied Field: Using Federal Common Law to Regulate Carbon Dioxide in the Absence of a Preemptive Statute*, 24 PACE ENVTL. L. REV. 237 (2007); Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 FORDHAM ENVTL. L. REV. 407 (2005); Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827 (2008); Tiffany L. Taylor, *Georgia v. Tennessee Copper Co. to Massachusetts v. EPA: An Overview of America's History of Air Pollution Regulation and Its Effect on Future Remedies to Climate Change*, 38 U. MEM. L. REV. 763 (2008); Ken Alex, *A Period of Consequences: Global Warming as Public Nuisance*, 26 STAN. ENVTL. L.J. 77 (2007); Dan Mensher, *Common Law on Ice: Using Federal Judge-Made Nuisance Law to Address the Interstate Effects of Greenhouse Gas Emissions*, 37 ENVTL. L. 463 (2007); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293 (2005); Symposium, *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel*, 30 COLUM. J. ENVTL. L. 351 (2005); Robert H. Cutting & Lawrence B. Cahoon, *The Reality of Carbon Taxes in the 21st Century: The "Gift" That Keeps on Giving: Global Warming Meets the Common Law*, 10 VT. J. ENVTL. L. 109 (2008); David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1 (2003). See also Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998 (2001).

26. See *AEP*, 582 F.3d at 371 (internal citations omitted). What other source of law would properly answer a federal question?

27. See Merrill, *supra* note 25, at 311, attesting that "*Milwaukee II* is ambiguous as to what the standard for displacement of federal common law should be." Merrill's analogue to field and conflict preemption in the displacement context has been influential. See, e.g., Bausinger, *supra* note 25, at 548 n.112; Olinger, *supra* note 25, at 250.

28. See *AEP*, 582 F.3d at 371 (internal citations omitted).

29. *AEP*, 582 F.3d at 332 (internal citations omitted) (emphasis added).

30. See, by way of contrast, the field- and conflict-preemption analogue to displacement from Merrill, *supra* note 25, at 311-16.

31. See *In re Oswego Barge Corp.*, 664 F.2d 327, 335, 12 ELR 20119 (2d Cir. 1981) (quoting *Milwaukee II*, 451 U.S. at 315).

32. See *AEP*, 582 F.3d at 372, (quoting *Milwaukee I*). I assume the displacement analysis is identical whether the "displacing" law is a congressional statute or a regulation promulgated by an agency authorized by a statute to regulate that subject, even though the question is traditionally formulated as whether the federal common law is displaced "by Congress."

such a way that “strongly suggests that there is no room for courts to attempt to improve on that program with Federal common law.”<sup>33</sup> Or, only if the problem has been “thoroughly addressed” by statute or regulation such that there is no interstice to be filled, the federal common law is displaced.<sup>34</sup> Another version has it that courts are allowed to supplement statutory or regulatory schemes with the federal common law, as long as doing so does not render the statutory or regulatory solution “meaningless.”<sup>35</sup> These formulations tend to militate in favor of retaining the federal common law unless it really would stymie the statutory or regulatory scheme. But not all formulations carry such an implication.

Conversely, the displacement test can be stated in such a way as to imply that any congressional action automatically displaces the federal common law. In this vein, the displacement inquiry can be formulated as “whether the field has been occupied, not whether it has been occupied in a particular manner.”<sup>36</sup> This test would, on its face, allow mere pretext to be talismanic: any law concerning carbon emissions, even a badly drawn law that would foreseeably result in a total policy failure, could displace the federal common law. A more exacting formulation, but one which still implies that federal common law should disappear, is that federal common law is displaced “as to every question to which the legislative scheme spoke directly, and every problem that Congress has addressed.”<sup>37</sup>

The different rhetorical implications of the foregoing formulations of the displacement standard reflect the tension inherent in the displacement context resulting from dueling presumptions.<sup>38</sup> Institutional competency concerns may tilt one’s intuition toward finding displacement when Congress or the executive proffers a solution, while the notion of the common law as the glacial and incremental accretion of prudent legal reasoning tilts one’s intuitions toward finding the federal common law displaced if and only if there is an explicit statutory or regulatory purpose to do so. A preference for policy decisions of this magnitude to be made by politically accountable government actors is matched by the exigencies of the situation, which seem to call for all three branches to remain competent to reign in carbon emissions.

Perhaps the most illuminating formulation of the displacement inquiry is this one. The court must determine which scenario obtains: (1) the “regulatory coverage leaves a gap which Federal common law can appropriately fill”; or (2) “the Federal common law overlaps with an existing regulatory scheme but would supply a different approach than the one Congress has mandated.”<sup>39</sup> If the court finds situation (1) obtains, the federal common law is not displaced, but it is displaced if situation (2) obtains. There

are still issues with this formulation. What does it mean to “appropriately” fill a regulatory gap? Could a court find there is in fact a regulatory gap, and yet hold that the federal common law is inapt to fill it? Under the second scenario, does it make sense that a simply “different approach” is sufficient to displace the federal common law, especially when the federal common law is not displaced where the remedy sought by the plaintiff is not addressed by the statutory or regulatory scheme (implying a different approach because the common law’s remedy is nonexistent under the statute or regulation)? If “overlapping with a difference” is sufficient to displace the federal common law, then badly drawn, impotent congressional or executive regulation could displace the federal common law by providing different (and worse) forms of regulation than nuisance action would allow. It is not clear that any policy concerns relevant to the dispute at hand are satisfied by displacing the federal common law with less effective regulatory schemes from the other branches. Common sense tells us that the question should be whether the other branch has proffered a superior remedy, not just a different one.

If a statutory or regulatory program is implemented, the court must ask if it is comprehensive, but even this question is trickier than first meets the eye. In order to answer this question, one must know how to evaluate the comprehensiveness of a regulatory scheme. “It is not clear whether courts should evaluate the CAA’s comprehensiveness by the comprehensiveness of its regulatory programs or by the comprehensiveness of its coverage of pollutants.”<sup>40</sup> “Comprehensive” in terms of the regulation of all pollutants in that medium (air), or “comprehensive” in terms of its coverage of the emissions of that pollutant in particular (GHG emissions)? Another necessary question to ask, even if the program is found to be comprehensive, is whether the relief otherwise provided by the judiciary is within the precise scope of remedies prescribed by Congress or the executive.<sup>41</sup> In other words, is an injunction to protect property rights and public health available under the congressional or executive scheme? If not, then the federal common law of nuisance must stand. And if the judiciary’s attachment of liability would reach sources of GHG emissions not otherwise subject to congressional or executive regulation, or parties not subject to the statutory or regulatory scheme, then there is a de facto interstice in such programs. The “automatic displace” version of the displacement standard starts to look less tenable.

At this stage in the analysis, lingering questions plague our application of the displacement test. What is the proper standard for determining whether a program has “comprehensively” addressed CO<sub>2</sub> emissions and/or climate change? At what level of generality are we to make that finding? Is any affirmative regulatory effort from Congress or the executive talismanic in terms of finding displacement, or does the court take a hard look at the science of the regula-

33. See *AEP*, 582 F.3d at 373 (quoting *Milwaukee II*).

34. See *id.* at 381 (quoting *Milwaukee II*).

35. See *id.* at 374 (quoting *Milwaukee II*).

36. See *id.*

37. See *id.* at 374 (quoting *In re Oswego Barge Corp.*).

38. See *id.*

39. See *Milwaukee II*, 451 U.S. at 324 n.18.

40. Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F.L. REV. 39, 96 (2007).

41. See *AEP*, 582 F.3d at 372.

tion and determine whether the control mechanisms are sufficient to remove the harm? For policy reasons, we ought to prefer something like a hard-look standard of review in the displacement context. We do not want a certainly protective common law to be knocked out by a less-than-protective substitute. A hard look, as opposed to a wink, should guarantee the legitimacy of the controlling law.

I propose a distillation of the sundry formulations of the displacement analysis as articulated in *Milwaukee II* and applied by lower federal courts. The displacement test in the most abstract is whether the displacing law “spoke directly” to the issue and whether the law “adequately addressed” the issue. Further distilled, the substance of the various permutations of the displacement test is whether the congressional or executive scheme is *comprehensive* and *adequate*. That is, does the language of the law purport to comprehensively cover (speak directly to) the problem? And, does the regulatory mechanism of the law indeed adequately solve (address) the problem? Granted those are essentially the two factors at stake, the next logical question is whether these factors are independently sufficient, or mutually necessary. If comprehensiveness and adequacy are *independently sufficient*, then if the court finds that the regulation does not speak directly to property loss (is not comprehensive) but does in fact mitigate climate change risk (is adequate), the federal common law should be displaced. Also, if the considerations are independently sufficient, if the court finds that the regulation does “speak directly” to property loss (is comprehensive) but does not adequately “address the problem” (is not adequate), then the federal common law would be displaced, even though it would leave plaintiffs out to dry, so to speak. However, if the considerations are *mutually necessary*, then the court must find that the statute or regulation speaks directly to the issue (is comprehensive) *and* addresses the problem (is adequate) in order to displace the federal common law. From the point of view of the plaintiffs, all that matters is whether the alternative to the common law of public nuisance is adequate. Indeed, the two-factored displacement test (comprehensiveness and adequacy) is unnecessarily confusing.

A better, stricter test would simply be whether the displacing law is adequate. The answer to the displacement analysis should turn on the adequacy of the displacing law, rather than its comprehensiveness. As long as the evil sought to be remedied is eradicated, it does not matter whether a bill “speaks directly” or remains silent on the harm in question. Ancillary or incidental benefits to statutes and regulations are nonetheless real and should not be ignored in evaluating the legitimacy of the regulatory scheme.<sup>42</sup> If a statute or regulation would reduce GHG emissions, such that it would adequately address the problem alleged by the plaintiffs, it is immaterial if the statute or regulation directly mentions the plaintiffs’ problem. Comprehen-

siveness as a necessary condition could be grounds for *not* finding displacement, even if the problem had been averted merely because of the absence of a formality, such as a label or talismanic phrase, and at the same time, comprehensiveness could be grounds for displacing the common law by a manifestly inadequate law. Such a criterion is repugnant to reason.

Because GHG emissions are global pollutants and not intrinsically hazardous or toxic, what matters is not the comprehensiveness of a regulation. Comprehensiveness is irrelevant under either definition of “comprehensive,” whether in terms of the medium of air generally, or in terms of carbon emissions in particular. Nor does the statement of comprehensiveness in the preamble, or the specific mention of the defendants’ type of behavior, matter. Whether a statute or regulation displaces the common law should turn on the adequacy of, rather than any label affixed to, the law. What matters is the *efficaciousness* of the statute or regulation in mitigating climate change risks, protecting property rights, and protecting public health, by whatever means. Under this formulation of the displacement analysis, a law that subsidized urban agriculture and solar power, which had the fortuitous effect of lowering GHG emissions to a safe level, would be eligible to displace the common law of nuisance for climate change; however, a law that spoke directly to the perils of climate change and our need to regulate the responsible parties, but which failed to actually mitigate climate change impacts, would not be eligible to displace the common law of nuisance. Adequacy is a far more useful criterion than comprehensiveness.

A basic principle that seems to underlie the displacement analysis is that courts cannot summarily dismiss the common law when faced with congressional or executive regulations on the same subject matter. The court must scrutinize the comprehensiveness and adequacy of the regulatory regime before finding that it displaces the common law. This reinforces a structural feature that preserves the equitable influence of the judiciary: displacement analysis prevents underprotective regulations from displacing incumbent, more protective remedies under federal common law.<sup>43</sup> Due to separation-of-powers concerns, the common law cannot, *ex post*, impose more stringent regulations than Congress or EPA on GHG emissions, but due to balance of powers concerns, it has the stature to withstand attempts to chip away at its *ex ante* standards of protection. Whether the statute or regulation “addresses” the problem is a loaded question, then, and must be resolved by taking a hard look at the sufficiency of the statutory or executive scheme. The federal common law of nuisance should be displaced only if the regulatory mechanism from either branch’s proposal is sufficiently stringent to protect the plaintiffs. When neither of the other two branches has adequately protected the plaintiffs, it would be a gross miscarriage of justice to deny them the right to try cases of

42. See RICHARD REVESZ & MICHAEL LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND HUMAN HEALTH 58-61 (2008).

43. This principle is consistent with, if not bolstered by, *United States v. Texas*, 507 U.S. 529, 543 (1993).

unreasonable interference with property and human health based on a muddled procedural test.

## II. Separation of Powers Is to Displacement What Federalism Is to Preemption

Conceptually, displacement should be distinguished from preemption. Displacement should generally be characterized as a separation-of-powers doctrine because it governs the relation between the three branches of the federal government. It has been stated that the appropriate analysis for determining whether displacement has occurred is not the same as a preemption analysis,<sup>44</sup> though the word “pre-empt” is commonly used in legal discourse to refer to a situation where one kind of law knocks out another kind of law, regardless of the source of either law. Displacement, properly so called, refers to a situation where “a Federal statutory law governs a question previously the subject of Federal common law.”<sup>45</sup> Displacement occurs when an act of Congress overrides federal common law. By a process of delegated rulemaking, displacement could also occur when an administrative agency, such as EPA, publishes regulations stemming from delegated rulemaking power granted by Congress. The executive could take action that displaces the federal common law, insofar as the pertinent agency is executing federal statutory law. On the other hand, preemption, properly so called, refers to a situation where “a Federal statute supersedes a State law.”<sup>46</sup> Preemption should generally be characterized as a federalism doctrine because it governs the relation between the federal government and the states. In general, displacement questions arise in the separation-of-powers context, and preemption questions arise in the federalism context.

To enhance our understanding of displacement doctrine, we must bear in mind the distinction between *displacement* and *preemption* as stated by then-Justice William H. Rehnquist in the majority opinion of *Milwaukee II*:

[T]he appropriate analysis in determining if Federal statutory law governs a question previously the subject of Federal common law is not the same as that employed in deciding if Federal law pre-empts State law. In considering the latter question we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. While we have not hesitated to find pre-emption of State law, whether express or implied, when Congress has so indicated, or when enforcement of State regulations would impair Federal superintendence of the field, our analysis has included due regard for the presuppositions of our embracing Federal system, including the principle of diffusion of power not

as a matter of doctrinaire localism but as a promoter of democracy. Such concerns are not implicated in the same fashion when the question is whether Federal statutory or Federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required. Indeed, as noted, in cases such as the present we start with the assumption that it is for Congress, not Federal courts, to articulate the appropriate standards to be applied as a matter of Federal law.<sup>47</sup>

In short, displacement is not the same as preemption, because preemption implicates federalism concerns for historic police powers of the states, whereas displacement does not involve such concerns.

According to Justice Rehnquist, a presumption applies in favor of Congress in the displacement context, whereas concerns for democracy allow for something of a balance of state with federal interests in the preemption context.

It appears that the Court will find displacement of federal common law where the tests for express or implied preemption are met. The difference seems to be that, in cases where the form of displacement would be akin to implied field preemption, the Court will infer displacement from a lesser degree of field coverage than it would require for state law preemption.<sup>48</sup>

The practical effect of this distinction would be that the common law is more likely to be knocked out by an act of Congress (or the executive acting pursuant to a congressional delegation of authority) when it is federal than when it is state. Whether this is true is an empirical question beyond the scope of this inquiry. Suffice it to say that it matters to the outcome of the litigation what presumption the court brings to the question. Judging from the majority of *Milwaukee II*, when the question is one of displacement, a presumption obtains that gives priority to Congress.

However, it should be pointed out that a dissenting opinion was filed in *Milwaukee II*, authored by Justice Harry A. Blackmun, and joined by Justices Thurgood Marshall and John Paul Stevens. Consider the counterpoint to the majority’s treatment of the preemption versus displacement considerations:

I have no quarrel with the Court’s distinction between the issues of Federalism at stake in assessing congressional pre-emption of State law and the separation-of-powers concerns that are implicated here. But there is more to this distinction than the Court suggests. In deciding whether Federal law pre-empts State law, the Court must be sensitive to the potential frustration of national purposes if the States are permitted to control conduct that is the subject of Federal regulation. For this reason, in pre-emption analysis the role of Federal law is often determined on an “all or nothing” basis. On the other hand, where Federal

44. See *AEP*, 582 F.3d at 371.

45. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 316, 11 ELR 20406 (1981) [hereinafter *Milwaukee I*].

46. See *AEP*, 582 F.3d at 371, n.37.

47. See *Milwaukee II*, 451 U.S. 304, 316-17 (1981) (internal quotations and citations omitted).

48. Benjamin Ewing & Douglas A. Kysar, *Climate Change, Courts, and the Common Law*, vol. 121 YALE L.J. n.124, 2011 (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1749398](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749398).

interests alone are at stake, participation by the Federal courts is often desirable, and indeed necessary, if Federal policies developed by Congress are to be fully effectuated. The whole concept of interstitial Federal lawmaking suggests a cooperative interaction between courts and Congress that is less attainable where Federal-State questions are involved.<sup>49</sup>

In other words, when sitting in the posture of a displacement analysis, the Court should adopt a presumption in favor of preserving the federal common law as a policy-enforcement mechanism that bolsters congressional solutions. Further, Justice Blackmun complicates the federalism concern of the majority by highlighting the limitation to state sovereignty at the line of frustrating national purposes. Clearly, the role for the Court, as envisioned by the dissent, is at odds with the majority's stated presumption in favor of displacing the judiciary, even in the absence of a clear and manifest purpose from Congress. It is the author's opinion that *it is gratuitously bad policy to displace the federal common law absent a clear and manifest purpose by Congress*. Otherwise any legislation touching climate change could potentially displace a common-law regime, regardless of how apt the common law is for the problem presented, and regardless if the judiciary had available manageable standards to resolve the dispute.

The practical effect of the dissent's conception of displacement would be a presumption in favor of retaining the federal common law precisely where Congress extends its reach. This presumption is the polar opposite to the presumption in favor of displacing the federal common law where Congress expresses any affirmative policy. Indeed, the dissent's theory of displacement allows for a robust role for the judiciary in developing federal common law that is not to be pejoratively labeled "legislating from the bench." That is the enforcement of national policy, rather than the abstention from governance. Perhaps, it is not a sound national policy to remove the common law and the courts from the regulatory arena where the nation faces down the most exigent of circumstances.

When the plaintiff is a state, the reasoning of both the majority and dissent in *Milwaukee II* fails to capture the full subtlety of the problem. While both attempt to keep separation-of-powers and federalism concerns distinct, the facts of *AEP* muddle that otherwise tidy conceptual distinction. The context for finding preemption of state law by federal law is conceptually distinct from the context of finding displacement of federal common law by statute. Yet, the fact that numerous states have resorted to litigation under the federal common law to defend the health and welfare of their citizens, as well as their property rights, independent of any cause of action from the CAA, might be seen as rendering this displacement situation more analytically akin to a conflict between state and federal policy than it does a conflict between federal common law and

federal statute. That is, since the states are using the federal common law as a vehicle to effectuate their traditional police powers, the federalism policy considerations against preempting state law support upholding federal common law in the *displacement* context. The role of states in implementing police powers identified by Justice Rehnquist in the preemption context takes place in the displacement context as well, when the plaintiffs suing under the federal common law are, in fact, states. Therefore, it is impossible to consider a displacement question (when the states are plaintiffs) without giving due consideration to federalism concerns, because federal common law is then a mechanism for states to protect their property and citizens in pursuit of fulfilling their traditional police power-wielding role. Yes, federalism concerns are implicated in the preemption context that are not in the ordinary displacement context. Yes, preemption is "all or nothing," while displacement allows for a supplemental role by the judiciary. But (contra the majority) federalism concerns are implicated in the displacement context when the plaintiffs are states, and (contra the dissent) declaring that the judiciary should supplement congressional enforcement does not resolve the thorny question of how to balance federalism concerns with an otherwise tidy separation-of-powers vision of the federal system. The displacement analysis in *AEP*, therefore, is more complicated than either the majority or dissent of *Milwaukee II* envisioned.

Perhaps, the role of the states in the separation of powers is representation reinforcement for geographical subunits whose interests would otherwise be overlooked in the national political process. If one conceives of states as playing a legitimate role in the separation of powers, it becomes readily apparent that separation-of-powers concerns extend beyond the basic impetus to keep the judiciary out of the business of addressing climate change. Allowing states to litigate under the common law of nuisance does not just promote federalism, it also "provid[es] the means of overcoming temporary legislative or political impasses."<sup>50</sup> It is this point about federalism and the separation of powers that is especially resonant with the U.S. response to climate change. Separation-of-powers and federalism doctrines should have the effect of making government work, rather than exacerbating vicious passivity in the face of public danger.

The question may as well be whether the judiciary is going to facilitate congressional and administrative responses to climate change, or whether the judiciary is going to sit this one out entirely. Given the scope of the problem presented by climate change and the fact that the product of the other two branches' struggles is a quagmire of evasive incrementalism, it is critical to note that

the separation of powers, rather than being an impediment to the functioning of government, can be used as the means of resolving intra- or intergovernmental impasses.

49. See *Milwaukee II*, 451 U.S. 304, 333, n.2 (1981) (Blackmun, J. dissenting) (internal citations omitted).

50. Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of Separation of Powers*, 53 AM. U.L. REV. 1, 22 (2004) (internal citations and quotations omitted).

As a federal appeals court noted, the resolution of conflict between the coordinate branches [is] an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system.<sup>51</sup>

Congress need not stand alone when standing up to a national problem. To be sure, involvement on the part of the judiciary and the states is more justified in the context of climate change than it was on the facts of *Milwaukee II*, because of the degree of uncertainty pervading the issue of climate change internationally and domestically. When uncertainty is rampant in a regulatory field, the option value of environmental control mechanisms increases. “[T]he common law’s ability to respond to unique circumstances is intrinsically valuable; predictability and consistency are not the only values served by the law.”<sup>52</sup> This consideration alone should support retaining the federal common law as a viable policy instrument for reducing carbon emissions. That said, it is not clear that there is any persuasive policy to support the majority of *Milwaukee II*’s position that the federal common law could be displaced absent evidence of a clear and manifest purpose by Congress. To displace the federal common law in the absence of any evidence of a clear and manifest congressional purpose could itself frustrate congressional purposes. It is not unimaginable that Congress would pass a climate change law under the assumption that the federal common law of nuisance would remain intact at the periphery of the statute, reining in noncompliant emitters by imposing liability under a theory of public nuisance.

The presumption in favor of displacing the federal common law absent a clear purpose from Congress, as flagged by the majority in *Milwaukee II*, is in conflict with another presumption, also stated by the U.S. Supreme Court. That is, statutes that invade the common law are to be read with a presumption favoring retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.<sup>53</sup> In fact, this directly contravenes the Court’s statement in *Milwaukee II* that the federal common law may be displaced absent a clear and manifest congressional intention to do so. Any doubt as to the familiarity of the legal principles for deciding interstate air pollution in particular should be resolved by recalling Justice Oliver Wendell Holmes’ opinion in *Georgia v. Tennessee Copper* from over 100 years ago.<sup>54</sup> The utilization of the “field preemption” framework as an analogy for what the court must decide in answering a displacement question is not innocuous shorthand since as it ignores the presumption in favor of retaining incumbent federal common law. In light of the unique parties of *AEP* (the plaintiffs include states), the unique nature of climate change as a global, economic, social, and environmental problem, and the

analytic problems presented by confusing displacement with preemption, the displacement analysis potentially necessary to resolve the case cannot be answered based on existing jurisprudence alone. Indeed, *Milwaukee II* is less a fountainhead than a trickle of precedent in an unrefined field of jurisprudence.

### III. Common Law of Public Nuisance

It is not unimaginable that Congress would pass climate change legislation under the assumption that the federal common law of public nuisance would remain intact. The federal common law of nuisance is, after all, the underlying backbone of modern environmental law.<sup>55</sup> As such, a few remarks about the federal common law of nuisance are in order.<sup>56</sup> Federal nuisance doctrine and *Milwaukee I* remain good law even after *Milwaukee II* for unregulated pollution.<sup>57</sup> Where federal common law applies, it preempts state law, but where federal common law is displaced by federal statute, the CAA’s savings clause retains state nuisance actions<sup>58</sup> (which is why federal and state nuisance claims are pled in the alternative: if the federal common law is displaced, then under *International Paper Co. v. Ouellette*<sup>59</sup> the state nuisance claims will be triggered).

A perhaps underappreciated aspect of public nuisance law in this case is its resemblance to strict liability when compared with negligence-based private nuisance standards. The balancing of interests familiar to nuisance claims is inapt for a suit between a sovereign and a private party—insofar as the plaintiffs allege injuries to public health with a remedy in the form of an injunction, a balancing of interests is not even conducted.<sup>60</sup> In the words of Justice Holmes:

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit [. . .]. Some peculiarities necessarily mark a suit of this kind. If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The States by entering the Union did not sink to the position of private owners subject to one system of private law. *This court has*

51. *Id.* 25-26 (quoting *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 130 (D.C. Cir. 1977)).

52. Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F. L. REV. 39, 104.

53. See *United States v. Texas*, 507 U.S. 529, 543 (1993).

54. See *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907) [hereinafter *Tennessee Copper*].

55. For a rich discussion of the history of nuisance law, see Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89 (1998).

56. These general principles are highlighted in an article by counsel for the plaintiff in *AEP*, Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 FORDHAM ENVTL. L. REV. 407 (2005).

57. *Id.* at 443.

58. *Id.* at 444.

59. 479 U.S. 481, 17 ELR 20327 (1987).

60. See *Tennessee Copper*, 206 U.S. 230, 237-38 (1907).

*not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power.*<sup>61</sup>

In sum, the cost-benefit analysis familiar to the context of nuisance cases is inapt for an action such as this, where the plaintiff is a quasi-sovereign. This could be interpreted to suggest that liability for public nuisance is not based in negligence standards that involve risk-utility balancing, but rather in the deterrence rationale of strict liability. Federalism concerns again rear their head in the displacement context, since the federal common law is the tool of last resort for states to defend their quasi-sovereign interests.

Public nuisance law is rooted in equity, with the corresponding flexibility of judicial remedies. One hundred and twenty three years ago, Justice John M. Harlan described the equitable roots of nuisance law:

The grounds of this jurisdiction . . . of public nuisances, is the ability of the courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future. . . . This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury.<sup>62</sup>

There is no question that Article III courts have a public policy rationale for hearing nuisance claims, as well as special equitable power to arbitrate such disputes. In particular, the courts are available for plaintiffs precisely because they can be more speedy, effectual, and permanent than other sources of law.

Unless the court actually finds a nuisance, it is irrelevant to the defendant whether the federal common law of nuisance is displaced. Therefore, a discussion of the law of public nuisance is warranted, even though our main concern is with the law of displacement. Because the Second Circuit opinion was limited to justiciability concerns rather than litigation of the substantive merits, certain arguments that may become relevant were not advanced. Contemplating the controlling substantive law of nuisance will inform our reading of the displacement analysis, for reasons to be shown.

The crux of the public nuisance inquiry is whether the GHG emission levels stemming from electric-generating unit (EGU) operations are unreasonable. The law on this question is the definition of public nuisance set out in the *Restatement (Second) of Torts*, §821B. Even if the Federal common law of nuisance is displaced, the CAA includes a savings clause for state law, and a majority of states have

adopted the Restatement's definition of public nuisance,<sup>63</sup> so the analysis will be the same whether the federal cause of action drops out. A public nuisance has two elements: an (1) "unreasonable interference" with (2) a "right common to the general public."<sup>64</sup> Since the issue of public rights to shoreline property and public infrastructure is beyond dispute, the main question is whether that forecasted interference is unreasonable. For the definition of "unreasonable" in this context, we turn to §821B(2):

Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience, or (b) whether the conduct is proscribed by statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent and long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

*These conditions are independently sufficient*, as they are listed in the disjunctive. An affirmative answer to *any* of these three questions is sufficient to deem the activity unreasonable and therefore a public nuisance as a matter of law.

It is arguable that the plaintiffs have alleged facts and harms that are obviously sufficient to survive summary judgment and which meet the definition of unreasonableness under both §§821B(2)(a) and 821B(2)(c). But of far more interest to our present purposes is subsection (b): Defendant's behavior is a public nuisance if that conduct is "proscribed by statute, ordinance or administrative regulation."<sup>65</sup> If a statute or an administrative regulation proscribes GHG emissions, then common-law liability attaches for such emissions as a matter of law.

At this point, we can see something like a structural loophole in the law. The law of public nuisance is such that if a stationary source is noncompliant with a congressional reduction mandate or an executive regulation of GHG emissions, such emissions from that source are unlawful and ipso facto a public nuisance. Rather than displace the federal common law of public nuisance, a congressional or executive GHG emissions reduction mandate would create a legal hook upon which a finding of public nuisance would be predicated under §821B(2)(b). This proposition has support. It has been said that pollution that interferes with a public right is unreasonable (and therefore common-law liability attaches) when that pollution is proscribed by statute.<sup>66</sup> This proposition is especially persuasive, as it comes from the fountainhead for application of the Restatement's definition of public nuisance to the federal

63. See David A. Grossman, *Warming Up to Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVT'L. L. 1, 53 (2003).

64. RESTATEMENT (SECOND) OF TORTS, §821B(1).

65. RESTATEMENT (SECOND) OF TORTS, §821B(2)(b).

66. See *United States v. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D. Vt. 1973), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

61. *Id.* (internal citations omitted) (emphasis added).

62. See *Mugler v. Kansas*, 123 U.S. 623, 673 (1887).

common law of nuisance. To argue displacement in this situation would have the law manifestly contradict itself. It would be strange bootstrapping indeed for the regulation that renders defendants' behavior unreasonable as a matter of law under the common law of nuisance, and at the same time, to insulate that very behavior from civil liability by displacing the common law of nuisance. This structural argument, along with the doctrine of absurd results, militates against the use of congressional or executive law to displace the very cause of action it creates.

In light of the fact that the Restatement's definition of public nuisance ties into law from the other branches (indeed, "statutes" could be from state legislatures, not just Congress; "ordinances" come from cities and municipalities; and administrative "regulations" could be state as well as federal), the displacement question is uniquely complicated when the cause of action is one of public nuisance. The public-nuisance cause of action is built to last, it would seem. By predicating itself in part on action by the other branches, the common law of public nuisance seems to be immune from displacement as a structural matter.

#### IV. Conclusion(s)

The displacement analysis, unto itself, poses a challenge, because it has been formulated in so many ways, none of which provide a strict test. The displacement analysis is additionally complicated when the plaintiff is a quasi-sovereign, because federalism concerns bleed into the separation-of-powers context. Lastly, the displacement analysis is uniquely complicated when the common-law cause of action is that of public nuisance, which ties into law from other branches. In light of these challenges, one would hope the Supreme Court would grant certiorari to *AEP* and weigh in on these issues.

The only legitimate reason for displacing the federal common law of nuisance here is that the congressional or executive solution adequately protects these plaintiffs from the harms they allege, not technically or temporarily, but fully and permanently. Without taking a hard look at the congressional or executive scheme, this outcome legitimacy could be wanting. Hence, I advocate an appropriately thorough standard of review in terms of the science and compliance dynamics of whatever promulgated regulatory scheme. Actually limiting carbon emissions should be the key to displacement and nothing less. Nor should the Court find displacement *sua sponte* absent congressional purpose.

The judiciary should play an active role in ensuring that the legislative and executive branches effectuate their duties to the public. For instance, if the congressional solution was a mere pretext for subsidizing additional pollution at the expense of the plaintiffs, the court should not find the federal common law displaced. Americans deserve to be protected by the old and reliable common law when the vicissitudes of politics prevent competent protection. Another hypothetical that supports the admonition to take a hard look at the displacing law would be if the executive solution were a mere vehicle for effectuating a problematic international climate change agreement that, as a scientific matter, would fail to mitigate the risk, resulting in loss to the plaintiffs. If plaintiffs deserve to have their rights protected at all, the federal common law should serve that purpose when no other law suffices. The federal common law is no brooding omnipresence, but neither is it impotent.

Indeed, when real harm is inflicted, citizens get far better relief through common-law suits than they do from appeals to the Environmental Protection Agency. Eventually [ . . . ] citizens will recognize that the common law, bolstered by local regulation, can protect the environment more effectively and fairly than can congressional statutes and bureaucratic regulations.<sup>67</sup>

One way to characterize the role of the judiciary in this context is as follows. The judiciary is the pinch hitter (via nuisance liability), in case EPA promises to hit a foul (by promulgating a regulatory scheme that exceeds authority under the CAA), and in case Congress promises to bunt (via legislation that compromises too much and fails to mitigate climate change risks); and the judiciary is the backstop, in case either branch strikes out (that is, fails to regulate carbon emissions); and the judiciary is the umpire, as to the adequacy of the executive and congressional measures (federal common-law protection is the equitable standard against which executive and congressional schemes are evaluated). Separated powers are not necessarily agonistic. Our task of mitigating climate change risks can be accomplished within the strictures and the spirit of the U.S. Constitution, which "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."<sup>68</sup>

67. See Property and Environment Research Center, PERC Reports, vol. 16, no. 2 (Summer 1998).

68. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson concurring).