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Kivalina *at the Supreme Court: A Lost Opportunity for Federal Common Law*

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ABSTRACT

This Article discusses the status of federal common law in the wake of the Supreme Court's May, 2013 denial of petitioners' writ of certiorari in Native Village of Kivalina v. Exxonmobil. *A close reading of Supreme Court and recent appellate decisions on federal common law as applied to transboundary pollution reveals three views on the availability and function of federal common law where a federal statute addresses a category of environmental harms: presumptive displacement of federal common law when a federal statute creates a regulatory approach, presumptive coexistence of federal statutory and common law where a federal statute does not provide relief for injuries alleged under common law, and case-by-case balancing of the interfering effect of federal common law against the injuries left unaddressed by federal statutory law. The Court's current approach resides somewhere between presumptive displacement and case-by-case balancing, and although the Court offers various rationales for this approach in its latest federal common law opinion, the most convincing of these is that cases involving transboundary pollution, particularly those alleging global warming-induced injury, are cumbersome for federal courts to handle as common law matters. Allocation of judicial resources is within the Supreme Court's discretion to consider in rejecting a case, but it is a far more pragmatic than principled rationale, and thus less than satisfying as a court's primary reason for denying relief. A more principled approach, advocated by Justices Stevens and Blackmun in dissents to two key federal common law cases, is that the displacement analysis should begin with the premise that the*

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judicial system aims, first and foremost, to compensate the injured, and that a federal common law claim should be displaced only where the legislative-regulatory regime covering the subject of a common law claim directly addresses the injury alleged under common law.

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I. INTRODUCTION

On May 20, 2013, the Supreme Court denied the Native Village of Kivalina's petition for writ of certiorari, thus concluding the saga of a tiny native community's struggle to introduce a glimmer of justice into their flight from the sea seventy miles north of the Arctic Circle.[1] In a public nuisance action launched in 2008 in the U.S. District Court for the Northern District of California, the Alaskan tribe claimed that its retreat from the Chukchi Sea was forced by global warming-induced storms to which its village has been acutely vulnerable in recent years due to global warming-induced ice melts that exposed its shoreline to the ravages of these storms.[2] The tribe blamed

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[1] Native Village of Kivalina v. Exxonmobil, 663 F. Supp. 2d 863, 868–69 (N.D. Ca. 2009) (The Village is a self-governing, federally-recognized Tribe of Inupiat Eskimos established pursuant to the provisions of the Indian Reorganization Act of 1934, as amended in 1936. Members of the Village reside in Kivalina, which is a unified municipality incorporated under Alaska law in 1969 with a population of approximately 400 persons. Kivalina is located at the tip of a six-mile long barrier reef, approximately seventy miles north of the Arctic Circle, between the Chukchi Sea and the Kivalina and Wulik Rivers on the Northwest coast of Alaska.).

See also Petition for a Writ of Certiorari to the U.S. Court of Appeals for the 9th Circuit at 5, Native Village of Kivalina v. Exxonmobil (U.S. Feb. 25, 2013) (No. 12-1072), 2013 WL 794333 (The Native Village of Kivalina and the City of Kivalina serve as the governing bodies of an Inupiat Native Alaskan village of 400 persons. The Village is situated on a promontory at one end of a six-mile barrier island located off the northwest coast of Alaska.).

[2] *See Native Village of Kivalina*, 663 F. Supp. 2d at 869 ("Plaintiffs filed their Complaint on February 26, 2008. The Complaint alleged four claims for relief: (1) Federal Common Law; Public Nuisance; (2) State Law: Private and Public Nuisance; (3) Civil Conspiracy; and (4) Concert of Action." (referencing No. cv-08-1138 (N.D. Cal. Feb. 26, 2008)); *see also id*. ("The Kivalina coast is protected by Arctic sea ice that is present during the fall, winter and spring. The sea ice, which attaches to the Kivalina coast, acts as a barrier against the coastal storms and waves that affect the coast of the

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twenty-two major fossil-fuel producers for the global warming damages suffered.[3]

For environmentalists, indigenous rights advocates, and followers of David-and-Goliath legal battles, the *Kivalina* case is of great significance.[4] In *Kivalina*, an incontrovertibly innocent party demanded acknowledgment of its victimization by a global warming crisis spawned by unbounded industrial

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Chukchi Sea. As a result of global warming, however, the sea ice now attaches to the Kivalina coast later in the year and breaks up earlier and is thinner and less extensive than before, thus subjecting Kivalina to coastal storms waves and surges. The resulting erosion has reached the point where Kivalina is becoming uninhabitable. Plaintiffs allege that as a result, the Village will have to be relocated, at a cost estimated to range from $95 to $400 million."); *see also* Appellants' Consented-to Motion for Permission to File Overlength Brief at 8, Native Vill. v. Exxonmobil (9th Cir. Mar. 10, 2010) (No. 09-17490), 2010 WL 1684710 ("Houses and buildings are in imminent danger of falling into the sea. Critical infrastructure is threatened with permanent destruction. Kivalina must be relocated soon or be abandoned and cease to exist.")

[3] *Native Village of Kivalina*, 663 F. Supp. 2d at 869 ("As Defendants, Plaintiffs have named various oil companies, power companies and utility providers, all of whom are alleged to be jointly and severally liable for causing damage to Plaintiffs. The Complaint does not seek injunctive relief nor does it specify a particular amount of monetary damages. However, Plaintiffs claim that the effects of global warming mean that they will have to relocate the inhabitants of Kivalina at an estimated cost of $95 million to $400 million.").

[4] *See, e.g.*, Brief for Appellants' Consented-to Motion for Permission to File Overlength Brief at 3, Native Vill. v. Exxonmobil (9th Cir. Mar. 10, 2010) (No. 09-17490), 2010 WL 1684710 (identifying defendants as "electric utilities, oil companies and the nation's largest coal company [who] have contributed [to plaintiffs' injuries] by their massive emissions of greenhouse gases and production of fossil fuels.").

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development and exacerbated by greed.[5] As such, it was also an unique opportunity for the federal courts to assert their role as the branch of government through which injured persons may stand up and demand redress from those who injure them in connection with matters of national concern, regardless of the economic power and influence of the injurers and the disfunctionality of a Congress and administration that have failed in their duty to protect the public.[6] The Court's denial of certiorari leaves in its wake a profound sense of disappointment. Rather than take up a complex, controversial, cognizable injury, suffered by a uniquely vulnerable victim, the federal judiciary chose to display itself as cowed by the magnitude of the problem and humbled by the thorniness of its politics.[7] This sense of judicial

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[5] *See id.* at 3–4 (The plaintiffs claimed that, more than simply producing substantial amounts of greenhouse gases, certain of the defendants had engineered a massive misinformation campaign about the connection between fossil fuels and climate change, and that through this conspiracy "to sow doubt about global warming science and create a false 'scientific debate' about the causes and consequences of global warming so they could continue emitting greenhouse gases," these defendants had contributed significantly to the national paralysis over whether to reduce fossil fuel emissions as a means of curbing greenhouse gas emissions.).

[6] Apropos to this observation, much of the *Kivalina* case focused on the political question doctrine. *See, e.g.*, *Native Village of Kivalina*, 663 F. Supp. 3d at 871–77 (concluding that "by pressing this lawsuit, Plaintiffs are in effect asking this Court to make a political judgment . . . . Plaintiffs ignore that the allocation of fault—and cost—of global is a matter appropriately left for determination by the executive or legislative branch in the first instance."). The political question doctrine is not the focus of this Article.

[7] *See id.* at 875 ("Plaintiffs themselves concede that considerations involved in the emission of greenhouse gases and the resulting effects of global warming are 'entirely different' than those germane to water or air pollution cases. While a water pollution claim typically involves a discrete, geographically definable waterway, Plaintiffs' global warming claim is based on the emission of greenhouses gases from innumerable sources located throughout the world and *affecting the entire planet and its atmosphere"* (references omitted, italics original)).

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impotence comes from more than the Court's mere denial of certiorari, as the Court left intact a Ninth Circuit opinion that called into question the efficacy and scope of all federal common law, regardless of the efficacy or scope of federal legislation.[8] If a topic of national concern is the subject of complicated politics that prevent Congress from issuing legislation directly addressing it, the *Kivalina* tale indicates, that topic is too politically hot for the judiciary. At the same time, the *Kivalina* decisions indicate that if a topic of national concern is the subject of federal legislation, that topic is likewise unsuited for federal common law, regardless of whether the federal legislation actually encompasses the injury claimed in a federal common law action. For global warming victims, it seems, no circumstance warrants federal court relief.

This Article evaluates the presumptive displacement of federal common law where federal legislation addresses the type of harm responsible for injuries formerly redressable under common law but fails to provide relief for those injuries. Section II reviews the *Kivalina* case and places it in the context of *American Electric Power Co. v. Connecticut* ("*AEP*"),[9] the 2011 Supreme Court decision addressing federal common law in the context of a global warming-based public nuisance claim.[10] Section III revisits the seminal cases most widely cited in displacement analyses, noting the limited scope of some of these cases as well as the cogent objections raised by Justices Blackmun and Stevens in dissenting opinions in *Milwaukee v. Illinois* and *Middlesex County Sewerage Authority v. National Sea Clammers Association*.[11]

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[8] *Native Village of Kivalina*, 696 F.3d 849 (9th Cir. 2012) (holding that the Clean Air Act displaces federal common law of air pollution).

[9] *See generally* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (rejecting states' public nuisance claims for injunction against greenhouse gas emitters on displacement grounds).

[10] Part II, *supra* note 9 and accompanying text.

[11] Part III, *supra* note 9; *see Milwaukee*, 451 U.S. 304, 333 (1980) (Blackmun, J., dissenting); *see Middlesex*, 453 U.S. 1, 22 (1981) (Stevens, J., dissenting).

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Section IV identifies nine "simple truths" about federal common law as a preface to a discussion of three distinct approaches to the displacement analysis that may be elicited from the cases discussed in Parts II and III.[12] The first approach to displacement analysis is to presumptively displace federal common law wherever existing federal legislation could potentially address a matter that is also the subject of a federal common law claim. This approach rests heavily on the concern that federal common law could contradict or otherwise complicate federal regulatory efforts to address pollution uniformly, and readily raises separation of powers concerns about judicial interference with legislative and executive functions. A second, opposing approach to the displacement question is that federal common law should presumptively survive federal legislation where federal common law has existed on a subject and legislation neither expressly displaces it nor directly addressed the injury alleged in subsequent federal common law claims. This approach rests on the premise that the fundamental duty of the judiciary is to supply relief for injured parties, and courts should be disinclined to reject claims on principled grounds where alternative routes toward redress are nonexistent or appear hopeless.

The third approach lies between the first two. It applies a case-by-case analysis to the question of whether a federal statute addresses the same question as that posed by a federal common law claim, and whether, even if a common law claimant's injury will go unaddressed under statutory law, the court determines it prudent to allow the legislative-regulatory approach to blanket the subject matter. Under this approach, far fewer common law actions survive than are displaced, and thus some might characterize it as a more circuitous and seemingly thoughtful route to a presumptive displacement decision.

This Article concludes that the Supreme Court, in rejecting the *Kivalina* petition, adheres to the case-by-case approach, complete with its propensity to find against assertions of federal common law. The rejection further indicates that the presumptive survival position will continue to garner less

[12] Part IV, *supra* note 9 and accompanying text.

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consideration than it warrants. It is, to say the least, a disheartening conclusion. In a country plagued by long-range pollution, congressional paralysis and a petrochemical industry dedicated to impeding the development of cleaner energy technologies, a renewed acceptance of federal common law could address environmental injuries, albeit slowly, inefficiently and inconsistently,[13] even as the very problems inherent in judicial resolution of complex environmental disputes spur the political branches toward more effective action on global warming.

II. THE LOST *KIVALINA* MOMENT

> If the law truly holds that Kivalina is entitled to no compensation under federal law because its federal remedy has been displaced by a statute that provides no remedy at all, then the answer to this question of overriding importance should come from this Court.[14]

The *Kivalina* petition for writ of certiorari offers the Court an opportunity to resolve the issue of whether a federal common law claim for damages should be subject to the general presumption favoring displacement that applies to federal common law claims for injunctive relief.[15] As the petition notes, a conflict exists among Supreme Court precedents.[16] While the 1981 decision in *Middlesex* concluded that all federal common law of nuisance arising out of a water pollution injury is obliterated by the Clean

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[13] American Electric Power v. Connecticut, 131 S. Ct. 2527, 2539 ("The expert agency is surely better equipped to do the job that individual district judges issuing ad hoc, case-by-case injunctions.").

[14] Brief for Petitioner at 16, Native Vill. v. Exxonmobil Corp., No. 12-1072 (U.S. Feb. 25, 2013), 2013 WL 794333.

[15] *Id.* at 2 ("This case presents an opportunity for this Court to resolve a conflict in the Court's precedents as to whether a federal common law claim for *damages* is displaced by a regulatory statute like the Clean Air Act.").

[16] *Id.* (noting the "tension" in the Court's precedents on displacement of damages claims).

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Water Act ("CWA") due to that Act's "comprehensive scope,"[17] the 2008 decision in *Exxon Shipping Co. v. Baker* appears to draw back from the presumption that all federal common law addressing a type of pollution is swept aside by a federal statute addressing that type of pollution in a manner deemed comprehensive.[18] In *Exxon Shipping*, the Court reasoned that private claims arising under maritime common law for damages caused by water pollution could survive the promulgation of the CWA as long as such claims did not interfere with the purpose or operation of the statute.[19] According to the *Kivalina* Supreme Court petition, the Court's 2011 opinion in *AEP* adheres to the logic of *Exxon Shipping* by analyzing the potential for the federal common law claim for injunctive relief presented in that case to frustrate the operation of the Clean Air Act ("CAA").[20] In contrast, the 2012 Ninth Circuit *Kivalina* majority opinion applied a more sweeping brand of the presumption favoring displacement concluding, without analysis of the potential for interference, that the CAA displaced a federal common law claim for global warming-related damages.[21] As the Ninth Circuit *Kivalina*

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[17] Middlesex Cnty. Sewage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 22 (1981) (citing Milwaukee v. Illinois, 451 U.S. 304 (1981)) (for the proposition that comprehensive legislation obliterates all federal common law).

[18] *See generally* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (finding that the Clean Water Act does not displace federal common law damage claims).

[19] *Id.* at 498 (concluding that punitive damages for private harms would not have "any frustrating effect on the CWA remedial scheme").

[20] Brief for Petitioner at 12–13, Native Vill. v. Exxonmobil Corp., No. 12-1072 (U.S. Feb. 25, 2013), 2013 WL 794333 (discussing American Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011), in which the Court concluded that the CAA displaces any federal common law right to seek injunctive relief in connection with carbon dioxide emissions).

[21] *Native Village of Kivalina*, 696 F.3d 849, 856–57 (9th Cir. 2012) (discerning no meaningful distinction between a claim seeking damages and one seeking an injunction, and therefore concluding that the CAA displaces all federal common law claims related to air pollution).

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concurrence pointed out, there is a conflict in the law of displacement.[22] Even the majority opinion speculated the Supreme Court might address the issue, given the opportunity.[23]

A. A CONFLICT LEFT INTACT

> The Supreme Court could, of course, modify the *Exxon/Middlesex* approach to displacement, and doubtlessly will have the opportunity to do so.[24]

The Supreme Court could have addressed the conflict this term. Instead, the Court left the Ninth Circuit decision in *Kivalina* to serve as the final word on displacement for the time being. One interpretation of the Court's inaction is that it rejects the idea of distinguishing between claims for damages and those for injunctive relief in the law of federal common law displacement, so that neither would be presumptively displaced more readily than the other. In all displacement cases, under this theory, a court must ask whether a federal statute "addresses [the same] question" as that posed by the federal common law claim.[25]

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[22] *Id.* at 858 (Pro, J., concurring) ("I write separately to address what I view as tension in Supreme Court authority on whether displacement of a claim for injunctive relief necessarily calls for displacement of a damages claim."); *see also id.* at 867–69 (Pro, J., concurring) (acknowledging the conflict between *Middlesex* and *Exxon Shipping*, but ultimately concluding that the *Kivalina* plaintiffs had no standing to bring their claims).

[23] *Id.* The statement, set forth in the text accompanying note 24, *infra*, can be read as an acknowledgement that the remedies issue warrants Supreme Court review.

[24] *Id.* (determining that "[u]nder *Exxon* and *Middlesex*, displacement of a federal common law right of action means displacement of remedies. Thus, *AEP* extinguished Kivalina's federal common law public nuisance damage action, along with the federal common law public nuisance abatement actions.").

[25] *AEP*, 131 S. Ct. at 2536–37.

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That oft-cited test, straightforward as it may seem, can lead to very different results depending on the degree of focus applied to the "addresses the same question" analysis.[26] In *AEP*, for example, the Court concluded that, because the CAA empowers the U.S. Environmental Protection Agency ("EPA") to regulate the carbon dioxide emissions generated by the defendants, the CAA displaced the plaintiffs' federal common law claims seeking an injunction against the defendants that characterized their greenhouse gas emissions as unreasonable and tortious.[27] By allowing such emissions, the Court determined, the EPA already determined the emissions are reasonable, and so a court's decision on the common law claim could disrupt, contradict, or at least confuse the agency's administration of the statute.[28]

Under an *AEP* application of the displacement test, however, the *Kivalina* decision could have come out very differently.[29] Certainly the Ninth Circuit purported to be following *AEP*. It dutifully observed that displacement is an "issue-specific inquiry" that requires identification of a "legislative solution to the particular [issue]" brought in the common law

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[26] For acknowledgment of this point, *see, e.g.*, *Native Village of Kivalina*, 696 F.3d at 856 ("Although plainly stated, application of the [displacement] test can prove complicated. The existence of laws generally applicable to the question [at issue in a federal common law claim] is not sufficient; the applicability of displacement is an issue-specific inquiry.").

[27] *AEP*, 131 S. Ct. at 2536–37.

[28] *Id.* (Under this theory, *Exxon Shipping* may be distinguished by virtue of the fact that the question posed in that case involved the level of care owed the public by shipowners, a question arising under maritime law and not addressed in the CWA or another environmental statute and thus incapable of interfering with the administration of those statutes.); *see also Exxon Shipping*, 554 U.S. at 479–80, 484–89.

[29] *Kivalina*, 696 F.3d at 856 (acknowledging that "[a]lthough [the displacement test may be] plainly stated, application of the test can prove complicated.").

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claim.[30] The crux of the Ninth Circuit opinion, however, is its observation that "Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources."[31] The court concluded that Congress "has therefore displaced federal common law."[32] The court, however, never considered whether the relief sought in the nuisance action would, if granted, disrupt or even overlap with the statute-based regulatory program. Thus the court appeared to apply the displacement doctrine in sweeping fashion, defining "question at issue" to mean "broad topic," in this case the broad topic being emissions of greenhouse gases and their impacts. Even the concurrence, which offered a far more detailed and nuanced discussion of displacement, ended the discussion with the unembellished conclusion that the comprehensive nature of the CAA demonstrates that Congress intended to obliterate federal common law actions for damages where emissions cause injury.[33] Thus, it appears that, to the Ninth Circuit, the "question at issue" is "directly addressed" when Congress promulgates a statute deemed comprehensive, regardless of whether that statute addresses the precise question being posed in a particular common law action.

B. LITERAL VERSUS BROAD-BRUSH DISPLACEMENT ANALYSIS

A more literal application of the *AEP* test leads to the opposite result, as the *Kivalina* plaintiffs were not asking the courts to re-regulate greenhouse gas emissions, or even to condemn or recalculate the defendants' EPA-

[30] *Kivalina*, 696 F.3d at 856 (quoting Mich. v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 777 (7th Cir. 2011)).

[31] *Kivalina*, 696 F.3d 856 (citing *Am. Elec. Power Co., Inc.*, 131 S. Ct. at 2530, 2537).

[32] *Id*.

[33] *Kivalina*, 696 F.3d at 866 (Pro, J., concurring) (equating the fact that Congress included no federal damages remedy in the CAA with a congressional choice not to allow federal damages actions against those whose emissions cause injury). One could as easily interpret Congress' silence on the matter as indicating its intent to allow federal damages actions to continue to be brought under common law.

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sanctioned emissions.[34] The *Kivalina* plaintiffs were claiming that those inviolable emissions had caused them compensable injury. Whether a claim for compensation calls for a court to address the same question as the CAA addresses when it authorizes EPA to set greenhouse gas emission standards is

[34] *See Native Village of Kivalina*, 663 F. Supp. 3d at 876 ("Plaintiffs emphasize that because they are not seeking injunctive relief, there is no need for the Court to delve into the task of retroactively determining what emission limits *should have* been imposed."); *see also* Appellants' Consented-to Motion for Permission to File Overlength Brief at 24–25, Native Village of Kivalina v. Exxonmobil, 663 F. Supp. 2d 863 (2009) (No. 09-17490), 2010 WL 1684710 ("[T]he central question in a damages case such as this is whether it is unreasonable for the defendant to engage in the interference without compensating the plaintiff for the harm that the interference has caused: In determining whether to award damages, the court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done. Although a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it. The question of unreasonableness in a damages action is therefore not one of whether the defendant's conduct is reasonable or unreasonable but rather one of who should bear the cost of that conduct." (citing RESTATEMENT (SECOND) OF TORTS § 821B cmt. I (1979)). *See also* Connecticut v. American Electric Power Co., 582 F.3d 309, 329 (2d Cir. 2009) (rejecting the defendants' political question argument) (*judgment reversed*, American Electric Power Co. v. Connecticut, 131 S. Ct. 2527 (2011)) (Plaintiffs' complaints do not ask the district court to decide overarching policy questions such as whether other industries or emission sources not before the court must also reduce emissions or determine how across-the-board emissions reduction would affect the economy and national security. In adjudicating the federal common law of nuisance claim pleaded here, the district court will be called upon to address and resolve the particular nuisance issue before it, which does not involve assessing and balancing the kind of broad interests that a legislature or a President might consider in formulating a national emissions policy. The question presented here is discrete, focusing on Defendants' alleged public nuisance and Plaintiffs' alleged injuries. As the [Plaintiffs] eloquently put it, "[t]hat Plaintiffs' injuries are part of a worldwide problem does not mean Defendants' contribution to that problem cannot be addressed through principled adjudication.).

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not nearly as clear as the question of whether a claim for an injunction could clash with EPA's administration of the CAA, which was the claim before the Court in *AEP*.[35] From a practical standpoint, only if the amount of damages sought by Kivalina would amount to a de facto enjoinment of the defendants' emissions, a conjecture hardly worth entertaining, would Kivalina's claim have threatened to interfere with or disrupt the emission allowance question addressed by the EPA in implementing the CAA.[36]

Additionally, there is nothing in the CAA or the EPA's regulations asserting that all harmful emissions shall be eliminated through the statute's implementation.[37] Air pollution injuries will occur, regardless of the EPA's efforts and the CAA's scope. Thus, even if the Court's message in declining to hear *Kivalina* was that the *AEP* approach applies regardless of the form of relief—that is, even if the Court's intent was to reject *Kivalina*'s invitation to differentiate categorically between displacement analyses where a plaintiff seeks damages and those where a plaintiff seeks an injunction—*Kivalina* nevertheless muddies the law of federal common law displacement. The Court left intact a circuit court decision that reverted to the broadest brand of displacement, the "topic displacement" presumption of *Middlesex*, thus

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[35] *See* Appellant's Consented-to Motion for Permission to File Overlength Brief at 11, Native Village of Kivalina v. Exxonmobil, 663 F. Supp. 2d 863 (2009) (No. 09-17490), 2010 WL 1684710 ("A district court has authority to issue orders to enforce the CAA's emissions standards or order the Administrator to do so and to apply any appropriate civil penalties. But neither the citizen-suit provision nor anything else in the CAA or any other statute or regulation addresses compensatory damages remedies for injuries caused by air pollution." (citations omitted)).

[36] *See id.* at 80 ("Kivalina only requests monetary relief; it does not ask a court to set any emissions standards that could even theoretically conflict with any standards that EPA might eventually set under the CAA.").

[37] *Kivalina*, 663 F. Supp. 2d at 863 (Pro, J., concurring) (The *Kivalina* concurrence quotes the Court in noting that "private claims for economic injury do not threaten similar interference with federal regulatory goals."); *cf. Exxon Shipping*, 554 U.S. at 489.

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implying the Court perceives no distinction between the displacement analyses of *Middlesex* and *AEP*.

III. THE FEDERAL COMMON LAW OF FEDERAL COMMON LAW

> To say that Congress "has spoken," is only to begin the inquiry; the critical question is what Congress has said.[38]

The primary source of federal common law's negative reputation and the primary justification for its rejection is a small collection of federal cases. These cases and the negative presumptions about federal common law that have emerged are worth reexamining in light of the recent surge of public nuisance claims arising out of injuries alleged to have been caused by global warming, and the ambiguity of the displacement test left in place by the Court's declination to hear *Kivalina*.

A. BEFORE DISPLACEMENT

1. ACID RAIN AND THE SCIENCE OF SEWAGE

At one point, federal common law was not subjected to the current level of skepticism. Justice Holmes' pithy 1907 opinion in *Georgia v. Tennessee Copper Co.* sets forth the premises that the law of nuisance applies where a private party's air pollution causes environmental harm, that equitable relief is likely the appropriate form of relief when an action is brought by a state in its quasi-sovereign capacity, and that a federal court possesses the capacity to craft common law under such circumstances.[39] A year earlier, however,

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[38] *Milwaukee*, 451 U.S. at 339 n.8 (Blackmun, J., dissenting) (references omitted).

[39] Georgia v. Tenn. Copper Co., 206 U.S. 230, 239–40 (1907) (The case involved a private party defendant whose operations in Tennessee generated sulphurous acid emissions, which fell over large tracts of Georgia as acid rain, causing wholesale destruction of crops, orchids, forests, and threatening the public health. The primary focus of the opinion is its finding that states maintain quasi-sovereign status, rendering more appropriate an action in

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Justice Holmes voiced caution over the exercise of federal common law in *Missouri v. Illinois*.[40] In that case, the Court observed, firstly, that in common law-based actions involving states as parties, while the federal courts maintain constitutionally-grounded original jurisdiction, the courts' authority would not override federal legislation.[41] The Court also cautioned that it should apply federal common law sparingly, only in cases "of serious magnitude, clearly and fully proved, and [where] the principle to be applied [is] one which the court is prepared deliberately to maintain against all considerations on the other side."[42] Of direct pertinence in evaluating the Court's current decision against hearing *Kivalina*, Justice Holmes' tone of elevated circumspection in *Missouri* is based in large part on his appreciation of the complex and evolving nature of the factual analysis involved in a case grounded upon allegations of long-range water pollution and its connection with an alleged spike in deaths and illnesses due to typhoid fever.[43] *Georgia*,

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equity than might have been the case had the plaintiff been a private party. Justice Harlan, concurring, opined that a private party's plea for injunctive relief should be treated identically to that brought by a state.).

[40] *See generally* Missouri v. Illinois, 200 U.S. 496 (1906) (rejecting Missouri's contention that sewage discharged from Chicago was responsible for a spike in deaths from typhoid fever among Missouri citizens).

[41] *Id.* at 519 ("[I]f one state raises a controversy with another, this court must determine whether there is any principle of law, and if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature.").

[42] *Id.* at 521 (going on to explain that "[a]s to the principle to be laid down, the caution necessary is manifest," because federal common law precedents arising out of disputes involving states may be utilized by other states against one another in the manner of state court precedents between private citizens, perhaps with more resounding and unanticipated results).

[43] *Id.* at 522–24 (discussing the contradictory scientific evidence presented by the litigants). Later cases affirm the Court's concern about the difficulties of sorting environmental evidence. *See, e.g.*, New York v. New Jersey, 256 U.S. 296 (1921) (concluding, in a public nuisance action for an enjoinment of sewage discharges, that conflicting evidence rendered it

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nevertheless, stands for the proposition that where causation is established, federal common law is an appropriate vehicle for redressing transboundary environmental injuries.[44]

2. *ERIE*, OVERBLOWN

> It is well settled that a body of federal common law has survived the decision in *Erie R. Co. v. Tompkins*. Erie made clear that federal courts, as courts of limited jurisdiction, lack general power to formulate and impose their own rules of decision. The Court, however, did not there upset, nor has it since disturbed, a deeply rooted, more specialized federal common law that has arisen to effectuate federal interests embodied either in the Constitution or an Act of Congress. Chief among the federal interests served by this common law are the resolution of interstate disputes and the implementation of national statutory or regulatory policies.[45]

The case most renowned for declaring federal common law unconstitutional is *Erie R.R. Co. v. Tompkins*.[46] Indeed, the Ninth Circuit

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impossible for the Court to determine whether New Jersey sewage was polluting New York waters).

[44] *See generally* Georgia v. Tennessee Copper Co., 237 U.S. 474 (1915) (although standing for the acknowledgment of the appropriateness of federal common law in interstate pollution cases, is also an example of how ungainly interstate pollution cases can be). *See also* Georgia v. Tennessee Copper Co., 240 U.S. 650 (1916) (final decree setting forth a specific, multi-faceted injunction requirement diminished emissions, recordkeeping, inspections and compensation for inspectors to be deposited with the clerk of courts).

[45] *Milwaukee*, 451 U.S. at 334–35 (Blackmun, J., dissenting) (references and footnote omitted).

[46] *See generally* Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (eviscerating Swift v. Tyson, 16 Pet. 1 (1842), for its recognition of local and

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Kivalina opinion lauds *Erie* for its "announced extinction of federal general common law."[47] Certainly that characterization bears support, as the crux of the *Erie* opinion is the Court's pronouncement that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law."[48] The broad rejection of federal common law often attributed to *Erie*, however, ignores the case background, both factual and precedential, as well as a companion case issued on the same day.

The dispute in *Erie* arose when a man walking along a train track in Pennsylvania was struck by a protrusion from a passing train.[49] Seeking to avoid the common law of Pennsylvania, under which persons walking alongside train tracks were deemed trespassers and thus subject to a diminished duty of care, the injured party brought the action in federal court in New York, where the railroad company was incorporated.[50] No New York precedent contradicted the injured man's argument that his use of a well-worn footpath running alongside the tracks allowed him to claim the protections due a licensee. Thus, the issue before the Court was whether federal courts hearing diversity actions had the power to fashion common law or needed to apply the common law as developed in the court of the state where the injury had occurred. Although the discussion in the Court's opinion does not emphatically confine itself to diversity actions, a fair interpretation is that the

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general categories of common law and its recognition that federal courts had the authority to develop general common law).

[47] *Native Village of Kivalina*, 696 F.3d at 855 (The *Kivalina* opinion observes that, subsequent to *Erie*, the Supreme Court has gone on to "articulate a 'keener understanding' of the actual contours of federal common law" (citing *AEP*, 131 S. Ct. at 2535)).

[48] *Erie* at 78 (The Court goes on to deny any caveats to its pronouncement, observing that whether the state law is statutory or common law, or local or general in nature, the Constitution grants the federal courts no power to declare substantive rules of common law.).

[49] *Id*. at 69–70.

[50] *Id*.

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case addresses only those actions, and only where federal common law could conflict with existing, applicable state common law.

A second key element of *Erie*, perhaps more significant than it being a diversity action, is that up until *Erie*, courts differentiated between "general" and "local" common law.[51] Indeed, the primary discussion in the opinion is about the problems caused by that distinction and the Court's disapproval of *Swift v. Tyson*, the case credited with creating the general-local distinction.[52] Thus, although some sentences of the *Erie* opinion address federal common law quite broadly, the limitation in what might seem to read as a sweeping condemnation of all federal common law is the word "general," which reads as a descriptive adjective but was actually a legal term of art.[53] *Erie* eliminated the court-spawned idea that certain nationwide activities warranted the development of federal common law, regardless of the fact that common law on the matter had been developed in the courts of the state that was the locus of the injury. Thus, it was an important decision, but in no way a wholesale condemnation of federal common law.

3. *ERIE*'S OVERSHADOWED COMPANION CASE

Underscoring the premise that the so-called *Erie* doctrine cannot be divorced from its context is the decision in *Hinderlider v. La Plata Co*., decided by the Court on the same day as *Erie* and likewise written by Justice Brandeis.[54] *Hinderlider* involved a water rights dispute between a Colorado corporation and the state of Colorado. Colorado, operating under a compact between itself and New Mexico, administered the water of the La Plata River

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[51] *Id*. at 74–75 (criticizing the recognition of "general common law" as having had the effect of undermining state law).

[52] *Id*. at 69 (the Court launches its opinion with: "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.").

[53] *Id*. at 70–71 (Both the trial court and the Second Circuit had held that the question was "not of local, but of general, law.").

[54] Hinderlider v. La Plata Co., 304 U.S. 92 (1938).

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in a manner the plaintiff claimed prevented it from using the river's water for irrigation. The case differed from *Erie* in that it was not a diversity action.[55] As a dispute over rights to an interstate waterway and the validity of a two-state compact, *Hinderlider* presented a federal question.[56] While criticizing the Colorado court's decision that had preceded its own review, the Court stated that

> whether the water of an interstate stream must be apportioned between the two States is a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive. Jurisdiction over controversies concerning rights in interstate streams is no different than those concerning boundaries. These have been recognized as presenting federal questions.[57]

Justice Brandeis' words in *Hinderlider* make it clear he did not intend his simultaneously published opinion in *Erie* to be read as advocating for the evisceration of all federal common law.

B. A PRESUMPTIVE SYMBIOSIS BETWEEN FEDERAL STATUTORY AND COMMON LAW

1. BEFORE THE CLEAN WATER ACT

During the 1970s and thus concurrently with Congress' promulgation of the current slate of major federal environmental statutes, the Court addressed the issue of federal common law in connection with interstate water pollution in three high-profile opinions. The first, *Illinois v. Milwaukee*, was a public nuisance suit pleading for the abatement of sewage discharges by Milwaukee

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[55] *See Hinderlider*, 304 U.S. at 100.

[56] *Id*. at 101–04 (going on to address the issue of apportionment of water flowing in interstate streams as well as the constitutionality of multi-state compacts borne of negotiated compromise).

[57] *Id*. at 110.

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into Lake Michigan, an interstate water body with both Wisconsin and Illinois shorelines.[58] In considering the question of its jurisdiction over the matter, the Court professed to a long-held "philosophy that 'our original jurisdiction should be invoked sparingly'" before going on to attribute the Court's decision on whether to invoke its jurisdiction to considerations such as "the seriousness and dignity of the claim" as well as the availability of another forum.[59] On the question of statutory jurisdiction, the Court concluded that Title 28 U.S.C. § 1331(a)'s reference to civil actions arising "under the . . . laws . . . of the United States" authorized original jurisdiction in federal district courts for claims founded on federal common law. The Court reasoned that the word "law" is not meant to encompass only statutory law in discussions of either state or federal jurisdiction, but includes common law as well.[60] The Court then quoted the Tenth Circuit case of *Texas v. Pankey* to make the point that "the ecological rights of a State" are particularly appropriate for federal common law resolution.[61]

Pankey arose out of a dispute between New Mexico ranch owners and the state of Texas, which complained that chemical pesticides used by the ranchers flowed via the Canadian River across the border into Texas, where they threatened a major water supply. The issue before the Tenth Circuit was whether the Supreme Court's Constitution-based original jurisdiction over cases in which a state is a party is exclusive. Concluding that such cases may

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[58] *See* Illinois v. Milwaukee, 406 U.S. 91 (1972) (alleging that "200 million gallons of raw or inadequately treated sewage and other waste materials are discharged daily into the lake in the Milwaukee area alone." *Id*. at 93.).

[59] *Id.* (citing Utah v. United States, 394 U.S. 89 (1969)).

[60] *See id*. at 98–100. The Court summed up its analysis on the meaning of the term "law" in the context of federal jurisdiction with: "We see no reason not to give 'laws' its natural meaning, and therefore conclude that § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin." *Id*. at 100 (citation omitted).

[61] *Id.* at 99–100 (citing Texas v. Pankey, 441 F.2d 236, 240 (10th Cir. 1971)).

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be heard in federal district court, the court also noted the appropriateness of federal common law as a means of vindicating a state's environmental rights. The *Illinois* Court relied heavily on *Pankey* to reach the same conclusions.[62]

Illinois preceded the passage of the 1972 CWA and thus may be misconstrued as no longer relevant in its discussion of federal common law jurisdiction. As Justice Douglas' opinion observes, however, a number of federal statutes, including the precursor to the current CWA itself, addressed water pollution in the years leading up to 1972.[63] Thus *Illinois* considered the applicability of federal common law to water pollution against the backdrop of a federal regulatory regime addressing that broad concern.[64] Federal common law did not interfere with federal statutory law, according to the Court, where "[t]he remedy sought . . . is not within the precise scope of

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[62] The Court's quotation from *Texas v. Pankey* reads in full,

> As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.

Pankey, 441 F.2d at 240.

[63] The formal title of the CWA is the Federal Water Pollution Control Act Amendments. Its precursor was the Federal Water Pollution Control Act. 33 U.S.C. §§ 1151–1165 (1948) (current version at 33 U.S.C. §§ 1251–1387 (2012)).

[64] Other federal statutes directly addressing or encompassing water pollution and cited by the Court included the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (2012); the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (2012); the Fish and Wildlife Act, 16 U.S.C. §§ 742a–742j (2012); and the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661–667e (2012). *See Illinois*, 406 U.S. at 102.

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remedies prescribed by Congress."[65] Thus, the *Illinois* Court did not presume that federal legislation on an environmental topic evidenced a congressional intent to obliterate all federal common law on that topic. Indeed, the Court indicated that the presumption should be the opposite—that is, federal common law presumptively coexists with federal statutory law—in the environmental arena. "When we deal with air and water in their ambient or interstate aspects, there is federal common law," the opinion states unambiguously, before characterizing the relationship in a manner that might be termed symbiotic: "[w]hile the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision."[66]

The *Illinois* Court also observed that a federal statutory regime could very well displace federal common law, somewhat blunting these promising assertions on the scope and durability of federal court jurisdiction and common law.[67] Even as it made this statement, however, the Court affirmed its view on the appropriateness of federal common law, more so than state common law, for addressing interstate environmental matters.[68] Again quoting *Texas v. Pankey*, the Court stated:

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[65] *Illinois*, 406 U.S. at 103 (noting further that "the remedies which Congress provides are not necessarily the only federal remedies available." *Id.*).

[66] *Id*. at 103 n.5.

[67] *Id*. at 107–08 ("It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance"); *see also id*. at 107–08 n.9 ("Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights." (quoting Texas v. Pankey, 441 F.2d 236, 241–42 (10th Cir. 1971)).

[68] *Id*. (noting that federal courts should consider state standards as "relevant").

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> Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. The more would this seem to be imperative in the present era of growing concern on the part of a State about its ecological conditions and impairments of them.[69]

2. TWO POWERFUL DISSENTS

After asserting its original jurisdiction and its discretion on whether to exercise it over matters involving interstate pollution, the *Illinois* Court ultimately remitted the case to the federal district court.[70] Nine years later the case reached the Supreme Court again, where the Court determined that the CWA displaced all federal common law addressing water pollution.

A. JUSTICE BLACKMUN'S *MILWAUKEE* DISSENT

In *Milwaukee v. Illinois*, the Court faced a situation that was at the same time similar and very different from that which it faced nine years earlier.[71] The similarity was the fact that the state of Illinois still sought relief from Milwaukee's inadequate sewage treatment. The environmental rights of the state had not been vindicated for a decade. As a matter to be resolved through federal common law, however, the situation was almost diametrically opposed to that which Justice Douglas had confronted in 1972. Over the course of the nine-year interim, the federal district court had addressed the case. Finding the sewage discharges in question to constitute a nuisance as a matter of federal common law, the district court produced a plan through

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[69] *Id*. at 107–08 n.9.

[70] *Id.* at 108.

[71] Milwaukee v. Illinois, 451 U.S. 304, 309–10 (1981).

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which Milwaukee was to address its inadequate sewage treatment practices.[72] Concurrently, the Wisconsin Department of Natural Resources, operating under the CWA-authorized supervision of EPA, had both issued CWA permits to the sewage treatment facility and obtained, through the Wisconsin state court, a judgment establishing a timetable for a plan to control sewage overflows.[73] The Seventh Circuit Court of Appeals had upheld the applicability of federal common law, but had reversed the part of the district court's order mandating effluent treatment standards more stringent than those required under the CWA.[74]

The Supreme Court went further, determining that the CWA had displaced federal common law on interstate water pollution. After criticizing federal common law as being comprised of "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence," the Court went on to characterize its approach to the federal common law question as "start[ing] 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."[75]

On the basis of such statements, *Milwaukee* could be interpreted as mandating the presumptive eradication of any and all federal common law

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[72] *Id*. at 311–12 (In two separate orders, the district court ordered Milwaukee to eliminate overflows, achieve specific effluent limitations for treated sewage, and adhere to a timetable for the construction of a system to eliminate sewage overflows.).

[73] *Id*. at 310–11.

[74] *Id.* at 312 (quoting the Court of Appeals as having determined that "[i]n applying the federal common law of nuisance in a water pollution case, a court should not ignore the Act but should look to its policies and principles for guidance").

[75] *Id.* at 316–17 ("Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.").

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touching on an area of social concern in the face of a federal statute addressing the same broad topic, regardless of whether the statute addressed the injury that federal common law had addressed. Certain elements of the case, however, recommend another interpretation. First, factually the Court was faced with two plans to correct Milwaukee's sewage problem, one based on federal common law and the other imposed by a state court at the behest of the agency charged with implementing the federal statute. The federal common law and statute-based plans addressed the very same problem, rendering the federal common law plan at best superfluous and quite possibly contradictory to the statute-based plan, under either a broad or close displacement analysis.[76] Another sign that *Milwaukee* should not be read as endorsing a broad presumptive displacement doctrine comes early in the opinion, where, when discussing a precedent, the Court characterized the displacement analysis as answering "whether the legislative scheme 'spoke directly to a question'—in that case the question of damages . . . ."[77] This language supports a displacement analysis that focuses on whether federal statutory law provides redress in place of common law, rather than simply whether a statute covers the same subject area formerly covered by federal common law. It also displays that sensitivity to the form of relief requested is appropriate in displacement analysis.

In addition to the above, although the amount of detail the *Milwaukee* Court offered to prove that the CWA was intended to supplant federal

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[76] *Id.* at 320–24 (detailing the regulatory plan to control discharges and refusing to interfere with that plan. "There is no 'interstice' here to be filled by federal common law: overflows are covered by the Act and have been addressed by the regulatory regime established by the Act. Although a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the Act, such disagreement alone is no basis for the creation of federal common law." *Id.*).

[77] *Milwaukee*, 451 U.S. at 315 (discussing Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), in which the Court determined that the Death on the High Seas Act, in addressing damages but not every issue of wrongful-death law, nevertheless displaced the general maritime law on the issue of damages for loss of society).

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common law could be interpreted as mere thoroughness, it also may demonstrate the level of analysis the Court considered warranted in displacement determinations. For example, in comparing the current CWA with the water pollution control act in existence when the Court decided *Illinois*, the *Milwaukee* Court observed that Congress had characterized the prior law as "inadequate in every vital aspect."[78] Next, the Court embarked on a lengthy discussion of the current CWA's comprehensive nature, including the universal applicability of the CWA permit requirement, the rigor of the effluent discharge and overflow control programs, and the statute-based opportunities for states to participate in permitting processes taking place in neighboring states.[79] These passages indicate that the Court intended that displacement only be found at the conclusion of a close analysis of whether the statute in question addresses the injury—not simply the subject matter—formerly addressed under federal common law.

Working against this generous reading of *Milwaukee*, however, is the Court's treatment of a savings provision of the CWA that preserves "any right which any person may have under any statute or common law . . . to seek any other relief . . . ."[80] The Court seized on the fact that the provision's applicability is limited to the statute's citizen suit section, concluding from this that the provision "cannot be read to mean that the Act as a whole does not supplant formerly available federal common-law actions."[81] This strained reading of the statute's savings clause, coupled with the Court's initial statements about the tenuous position of federal common law in the constitutional scheme, indicates that the *Milwaukee* Court's ultimate goal was

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[78] *Id.* at 318.

[79] *Id*. at 317–27 (reviewing congressional intent to create a comprehensive scheme and its success in doing so).

[80] *Id*. at 328 (quoting CWA § 505(e); 33 U.S.C. § 1365).

[81] *Id.* at 329 (finding the notion "unlikely" that the reference to common law in § 505(e) was meant to include federal common law).

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to drive federal common law out of the courts where a statute justifies such a retreat, even where such justification is based on meager logic.[82]

In dissent, Justice Blackmun addressed the key issue arising in displacement analyses, that of how presumptively federal statutory law should supplant federal common law where the two address various aspects of a single broad topic.[83] Justice Blackmun's opening salve was both concise and pointed.

> In contrasting congressional displacement of the common law with federal pre-emption of state law, the Court assumes that as soon as Congress "addresses a question previously governed" by federal common law, "the need for such an unusual exercise of lawmaking by federal courts disappears." This "automatic displacement" approach is inadequate in two respects. It fails to reflect the unique role of federal common law plays in resolving disputes between one State and the citizens or government of another. In addition, it ignores this Court's frequent recognition that federal common law may complement congressional action in the fulfillment of federal policies.[84]

Justice Blackmun debated both the Court's result-oriented reading of the CWA savings provisions and its equally dubious determination that congressional statements about the comprehensive nature of the CWA conclusively signal a legislative intent to obliterate all federal common law addressing water pollution.[85]

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[82] *Id*. at 315 (identifying displacement of federal common law as based on the principle of separation of powers).

[83] *Milwaukee*, 451 U.S. at 333–34.

[84] *Id.* (citation and footnote omitted).

[85] *Id*. at 339–42 (explaining that CWA § 505(e)'s "in this section" language could more naturally be read as Congress' intent that none of the

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Perhaps the most powerful passage in Justice Blackmun's dissent, however, was his argument for the utility of federal common law as a complement to federal statutory law and an appropriate vehicle through which to address interstate disputes where the nation has an interest in decisional uniformity.[86] Justice Blackmun pointed out that federal common law is appropriate where the interstate nature of a controversy renders inappropriate the law of either state.[87] It is appropriate, Justice Blackmun observed, to aid states to protect against unreasonable interference in their natural environment and resources causes by other states or their citizens.[88] Federal common law also applies, Justice Blackmun noted, where common law must "fill the interstices of a pervasively federal framework."[89] Finally, Justice Blackmun argued that federal common law is appropriate where a

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procedural and jurisdictional limitations imposed upon plaintiffs who chose to sue under the citizen-suit provisions of the CWA should be imposed upon those suing under pre-existing causes of action such as common law. In connection with section 505(e), Justice Blackmun also disputes the Court's assertion that the reference to "any . . . common law" should be read as a reference to state common law only. *Id.* at 340). *See also id.* at 342–43 (Blackmun discusses congressional intent in producing a comprehensive statute, pointing out that "[t]he fact that legislators may characterize their efforts as more 'comprehensive' than prior legislation hardly prevents them from authorizing the continued existence of supplemental legal and equitable solutions to the broad and serious problem addressed.").

[86] *Id*. at 334–38.

[87] *Id*. at 335 (pointing out that where interstate disputes arise, "it is clear under our federal system that laws of one State cannot impose upon the sovereign rights and interests of another").

[88] *Id*. at 335 (citing to *Georgia*, *Missouri*, and *Illinois*, among other Supreme Court decisions ranging from 1907 through 1972).

[89] *Milwaukee*, 451 U.S. at 336 (pointing out that where the federal interest is sufficiently strong, courts may rely on federal common law to settle disputes where the federal statute or the Constitution fail to provide a precise answer).

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federal interest in uniformity presides.[90] Interstate pollution, he concluded, is such an area.[91]

B. JUSTICE STEVENS' *MIDDLESEX* DISSENT

Justice Blackmun's defense of federal common law was echoed, only months later, by Justice Stevens in his dissenting opinion in *Middlesex*.[92] The case involved claims for injunctive relief as well as compensatory and punitive damages brought in federal district court in New Jersey by fishermen and shell-fishermen who averred that sewage emanating from New York, New Jersey, and maritime vessels had polluted the Atlantic Ocean off the east coast to the extent that it threatened the fishing, clamming and lobster industries operating in those waters.[93] Along with multiple statute-based claims, the plaintiffs presented claims based on the federal common law of nuisance.[94] The Court concluded, without analysis, that the CWA had fully displaced the federal common law of nuisance.[95] Tellingly, the Court's

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[90] *Id*. at 336–37.

[91] *Id*. (arguing that in Illinois v. City of Milwaukee, 406 U.S. 91, 101–03 (1972), the Court held that "the abiding federal interest in the purity of interstate waters justified application of federal common law.").

[92] Middlesex County Sewerage Authority v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 22 (1981).

[93] *Id*. at 4–5 (The plaintiffs linked the sewage discharge to a massive algal bloom that, once dead, created an oxygen deficiency near the ocean floor where it settled, thereby killing shellfish, other ocean-bottom dwellers and other marine life.).

[94] *Id*. at 4–8 (detailing claims based on the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (1972) (amended 1977), and the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1401–1445 (1972)).

[95] *Id*. at 21 n.17 (The Court thereby deflected the question of whether a private party could ever claim damages under the federal common law of nuisance.). *See also id*. at 21–22 (characterizing *Milwaukee* as holding that

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separate statutory discussion focused on whether the CWA or the Marine Protection, Research, and Sanctuaries Act ("MPRSA") authorizes a private right of action, concluding that neither Act does. That is, the Court displaced federal common law in an opinion expressly acknowledging that the displacing statute does not supply private citizens with an alternative means of seeking the relief they might have obtained under federal common law. Thus, the *Middlesex* Court utilized the crudest form of the displacement analysis, considering only whether a federal statute addresses a broad topic—here, water pollution—to conclude that all federal common law on that broad topic has been summarily extinguished, regardless of the availability of relief under the administrative scheme.

Another instructive element of *Middlesex* is that the plaintiffs contended that the federal administrators whose duty it was to administer the statutes in play were allowing the two states to discharge in excess of amounts allowed by the two federal statutes.[96] Noting that the statutes provide processes through which citizens may seek judicial review against agencies for dereliction of their statutory duties, the Court concluded that such avenues were an injured party's sole legal recourse.[97] The Court also rejected the argument, which it raised *sua sponte*, that the defendants could bring suit under 42 U.S.C. § 1983, which authorizes suits claiming violations of federal statutes by state officials. The Court concluded that a federal statute's provision of "sufficiently comprehensive" remedial devices demonstrates a congressional intent to preclude suit under section 1983.[98] In sum, according to *Middlesex*, a party injured by pollution where discharges breach a federal statute has no judicial recourse against the polluter and no means of

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"the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the [Federal Water Pollution Control Act], which was completely revised soon after the decision in *Illinois v. Milwaukee*.").

[96] *Middlesex*, 453 U.S. at 12.

[97] *Id.* at 13–15 (Defendants had missed statutory deadlines for such suits, and thus had no recourse against the agencies.).

[98] *Id*. at 19–20.

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collecting compensation for the injury. The party's only recourse under federal law is to beg the administering agency to protect it against future injury. Without ambiguity, in this instance the Court did not apply a brand of displacement analysis that included inquiry into whether a federal statute addresses the actual issue, or remedy, that is the focus of a federal common law claim.

Justice Stevens thus had much from which to dissent. First, Justice Stevens parsed statutory language and dredged legislative histories to reach conclusions opposed to the Court's about Congress' intent to displace federal common law in promulgating the CWA.[99] "Despite their comprehensive enforcement mechanisms, both statutes expressly preserve all legal remedies otherwise available," Justice Stevens pointed out, then quoted from the Senate Report on the CWA as evidence that legislators had intended that "[c]ompliance with requirements under this Act would not be a defense to a common law action for pollution damage."[100] Perhaps the most powerful element of Justice Stevens' dissent, however, is the simple logic he employed to question the Court's aggressive campaign against federal common law. "When should a person injured by a violation of federal law be allowed to recover his damages in a federal court?" he queried at the outset of his opinion.[101] "[R]ules are meant to be obeyed, and those who violate them should be held responsible for their misdeeds," he went on, as if feeling his way along a sequence of successive intrinsic truths.[102] "Since the earliest days

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[99] *Id*. at 29–31.

[100] *Id.* at 29; *see also id.* at 32.

[101] *Id*. at 22 (characterizing the question as "seemingly simple" and "more difficult than most substantive questions that come before [the Court]").

[102] *Middlesex*, 453 U.S. at 24 (noting that for most of the court's history, conservative justices considered it appropriate to allow private parties injured through the violation of a statute enacted to protect the interests of the private parties to seek relief in the courts).

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of the common law, it has been the business of courts to fashion remedies for wrongs."[103]

After debunking the Court's analysis and its apparent priorities, Justice Stevens attributed the Court's increasingly contrived roadblocks to federal court access to its "concern[ ] about the burdens imposed upon the federal judiciary, the quality of the work product of Congress, and the sheer bulk of new federal legislation . . . ."[104] These valid, pragmatic yet unprincipled concerns, Justice Stevens worried, had prompted the courts to fashion displacement formulas aimed at compromising "the simple common-law presumption" of court access for the injured citizen.[105] "The touchstone now is congressional intent," Justice Stevens noted, identifying the latest judge-fabricated rationale to "further restrict the availability of private remedies."[106] In considering the situation before the *Middlesex* Court, Justice Stevens concluded his critique of the Court's resolve to banish federal common law from the dockets with the observation that

> apart from these two statutes, the dumping operations of petitioners would constitute a common-law nuisance for which respondents would have a federal remedy. The net effect of the Court's analysis of the legislative intent is therefore a conclusion that Congress, by enacting the Clean Water Act and the MPRSA, deliberately deprived respondents of effective federal remedies that would otherwise have been available to them. In my judgment, the language of both statutes, as well as their legislative history, belies this improbable conclusion.[107]

Near the end of his *Middlesex* dissent, Justice Stevens observed that

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[103] *Id*. at 24.

[104] *Id*. at 24–25.

[105] *Id*.

[106] *Id.*

[107] *Middlesex*, 453 U.S. at 27.

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> [t]he effect of the Court's holding in *Milwaukee* [] was to make the city of Milwaukee's compliance with the requirements of the Clean Water Act a complete defense to a federal common-law nuisance action for pollution damage. . . . Today, the Court pursues the pre-emption rationale of *Milwaukee* [] to its inexorable conclusion and holds that even noncompliance with the requirements of the Clean Water Act and the MPRSA is a defense to a federal common-law nuisance claim.[108]

In so stating, Justice Stevens underscored the perversity of the displacement doctrine as it had evolved to that point.

While declaring the federal common law of nuisance fully displaced by the CWA and the MPRSA, and thus vacating and remanding the portion of the lower court opinion stating otherwise, the Supreme Court expressly declined to address the lower court's determination that a private plaintiff's federal common law nuisance suit seeking damages survived the promulgation of the federal statutes.[109] Thus, even *Middlesex* offers some indication that displacement analysis warrants some level of nuance.

C. ENVIRONMENTAL FEDERAL COMMON LAW AFTER 2000

1. *EXXON SHIPPING*—OUTLIER OR FAITHFUL APPLICATION OF *MILWAUKEE*?

> [T]his case differs from . . . *Middlesex* and *Milwaukee*, where plaintiffs' common law nuisance claims amounted

[108] *Id.* at 31.

[109] *Id.* at 11 n.17 ("We therefore need not discuss the question whether the federal common law of nuisance could ever be the basis of a suit for damages by a private party.").

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> to arguments for effluent-discharge standards different from those provided by the CWA.[110]

In 2008, the Court added another disappointing chapter to the Exxon Valdez saga with its decision in *Exxon Shipping Co. v. Baker*. There, the Court slashed a jury's punitive damage award through application of its newly minted 1:1 ratio for compensatory and punitive damages.[111] This decision crafted federal common law through its opinion somewhat alleviated the growing sense that the federal environmental legislative regime had rendered federal common law extinct in environmental matters.

The *Exxon Shipping* opinion focused largely on the history and unique nature of punitive damages; in addition, the case involved maritime law.[112]

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[110] Exxon Shipping v. Baker, 554 U.S. 471, 489 n.7 (2008) (perceiving a clear distinction between claims for economic injury that do and do not threaten interference with a federal regulatory scheme).

[111] *Exxon Shipping*, 554 U.S. 471. *See also In re* the Exxon Valdez, 296 F. Supp. 2d 1071 (D. Alaska 2004), *vacated and remanded sub nom. In re* Exxon Valdez, 472 F.3d 600 (9th Cir. 2006), *opinion amended and superseded on denial of reh'g*, 490 F.3d 1066 (9th Cir. 2007), *vacated sub nom.* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008), *and vacated sub nom. In re* Exxon Valdez, 490 F.3d 1066 (9th Cir. 2007), *vacated sub nom.* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (where Exxon's 1989 grounding of an oil supertanker in Alaska resulted in a district court decision of a $4.5 billion award in punitive damages); *see also In re* Exxon Valdez, 490 F.3d 1066 (9th Cir. 2007), *vacated sub nom.* Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (where the Ninth Circuit Court of Appeals vacated and remanded for a reduction of the punitive damages to $2.5 billion. The Supreme Court devised a 1:1 formula for determining punitive damages based on the compensatory damages award, thereby reducing the award to $507.5 million.).

[112] *Id.* at 475–76 (The opinion opens with the observation that "[t]here are three questions of maritime law before us," and includes the displacement issue among those questions of maritime law with words that also could be said to limit the scope to punitive damages: "whether punitive damages have

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Due to either of these factors, *Exxon Shipping* is arguably limited in its precedential value, and thus not rightly counted among the key decisions on federal common law.[113] Indeed, Justice Souter's opinion utters the term "federal common law" only in a statement about the enduring nature of maritime law,[114] and the most definitive statement about whether the Court's assertion of jurisdiction is authorized, which appears in Justice Ginsberg's partial concurrence, rested on the fact that the case addressed a maritime issue.[115] Perhaps of even greater significance vis-à-vis the position of *Exxon*

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been bared implicitly by federal statutory law making no provision for them.").

[113] *See, e.g.*, *Native Village of Kivalina*, 696 F.3d 849, 865–66 (9th Cir. 2012) (Pro, J., concurring) (acknowledging differences between *Exxon Shipping*, on the one hand, and *Milwaukee II* and *Middlesex*, on the other. The concurrence offered two explanations for the differences: *Exxon*'s departure from *Milwaukee II* and *Middlesex* may be explained by the fact that the defendants in *Exxon* apparently did not argue that the federal maritime common law claim was displaced in its entirety and conceded liability and compensatory damages. Another explanation may be that the *Exxon* Court viewed [33 U.S.C.] § 1321(o) [a saving provision preserving non-CWA-based damages liability for injuries caused by discharges of oil and hazardous substances] as not so comprehensive as to displace federal maritime common law negligence claims for damages, unlike the CWA provisions the *Milwaukee* Court found displaced federal common law nuisance claims. *Id.* at 866. Judge Pro ultimately put the case aside, concluding that "Regardless of *Exxon*'s effect on the viability of federal maritime common law negligence claims for damages under § 1321, *Milwaukee II*, *Middlesex*, *AEP*, and the comprehensive nature of the CAA lead to the conclusion that Kivalina's federal common law nuisance claim for damages in this case is displaced." *Id.*).

[114] Exxon Shipping Co. v. Baker, 554 U.S. 471, 483 (2008) (Souter, J., discussing the issue of corporate liability for punitive damages on the basis of acts of corporate agents).

[115] *Id*. at 523 (Ginsberg, J., concurring in part and in part) ("The controversy here presented arises under federal maritime jurisdiction," and,

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Shipping in a displacement discussion is the majority's own characterization of "modern-day maritime cases" as uniquely suited to "judicial action to modify a common law landscape largely of our own making."[116] Nevertheless, the Court addressed the issue of displacement in language that does not limit its applicability to maritime or punitive damages cases in absolute terms, and thus its logic cannot be cabined off conclusively.[117]

The *Exxon Shipping* majority's displacement discussion was short and straightforward. First, the Court expressed a sensible reluctance to interpret legislative silence on existing common law as an intent to displace it, noting that "we find it too hard to conclude that a statute expressly geared to protecting 'water,' 'shorelines,' and 'natural resources' was intended to eliminate *sub silentio* oil companies' common law duties to refrain from

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beyond question, "the Court possess the power to craft the rule it announces today.") (citations omitted).

[116] *Id.* at 508 n.21. The justification for the Court's development of common law is cast as a response to Justice Stevens' partial concurrence-partial dissent, which faults the Court for "embarking on a new lawmaking venture" in its punitive damage analysis. Although at first blush this may appear to contradict Justice Stevens' *Middlesex* dissent, Justice Stevens' opinion does not undermine his *Middlesex* dissent. First, Justice Stevens concurred with the section of the *Exxon Shipping* opinion addressing displacement generally. Second, his objection to the section on punitive damages confined itself to an examination of admiralty law. *Id.* at 516–22. Generally, Justice Stevens appeared to object primarily to the Court replacing an existing jury award. *Id.* at 522. Thus, the circumstance is nothing like that of *Middlesex*, where the Court's decision left an injury without redress.

[117] Particularly with regard to punitive damages, the Court seemed to scoff at the notion of treating those damages like a special class in connection with the displacement question. The Court accused Exxon of using an "untenable" litigation tactic when it attempted to convince the Court to focus its displacement analysis on punitive damages only. "But nothing in the statutory text points to fragmenting the recovery scheme in this way, and we have rejected similar attempts to sever remedies from their causes of action." *Id*. at 489.

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injuring the bodies and livelihoods of private individuals."[118] The Court next identified the core displacement issue as whether a statute indicates an intent to "occupy the entire field of pollution," then broke down the analysis of this issue into two questions: whether the statute speaks directly to the question addressed by the common law, and whether the common law in question would have any "frustrating effect" on the federal legislative scheme.[119] In a footnote, the Court drew a distinction between the displacement question before it in *Exxon Shipping* and those the Court faced in *Middlesex* and *Milwaukee*, where the common law claims for injunctive relief, if successful, would have interfered with CWA-mandated discharge standards. "[P]rivate claims for economic injury do not threaten similar interference with federal regulatory goals," the Court observed.[120] The Court even made note of the fact that Exxon, in its brief to the Court, disclaimed taking the position that the CWA displaced compensatory remedies for economic injuries resulting from water pollution. This indicated a strong presumption that statutes do not displace damage claims.[121]

The primary distinction between the *Exxon Shipping* approach and that of *Middlesex*, however, is more significant than the *Exxon Shipping* Court's demonstrated willingness to accept that a federal common law claim may or

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[118] *Id*. at 488–89 (rejecting the argument that "any tort action predicated on an oil spill is preempted unless [the CWA] expressly preserves it," particularly as the CWA contains a savings clause reserving "'obligations . . . under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil.'"). *Id.* at 488 (citing CWA, 33 U.S.C. § 1321(o)).

[119] *Id*. at 489 (quoting United States v. Texas, 507 U.S. 529 (1993)).

[120] *Exxon Shipping*, 554 U.S. at 489 n.7.

[121] *Id.* at 489 (speculating that Exxon disclaimed this part of its argument "[p]erhaps on account of its overbreadth."). The primary focus of this passage, and the entire displacement discussion, is on whether the CWA displaces punitive damages. The opinion appears to presume that the CWA does not displace the federal maritime common law of compensatory damages for economic losses.

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may not threaten interference with the administration of a statute—a question that, in many cases, could turn simply on the type of relief sought. It is the degree of focus that a court is willing to apply to the question of common law and statutory coverage that distinguishes the two brands of displacement analysis from one another. *Middlesex*, its logic grounded in a powerful presumption favoring displacement, broadly defined the CWA's coverage to encompass all regulation of all waters of the United States, while *Exxon Shipping*, grounded in a presumption favoring common law survival, focused far more pointedly on whether the CWA's language or its administration actually addresses or prohibits the awarding of common law damages.[122] This is a key, perhaps unarticulated, distinction between the two cases.

2. *AMERICAN ELECTRIC POWER V. CONNECTICUT*—THE COURT'S FINAL WORD ON DISPLACEMENT

In 2007 and 2011, the Court published two key opinions on the CAA, *Massachusetts v. EPA* and *AEP*.[123] *Massachusetts* affirmed that the CAA covers greenhouse gases as a form of pollution, thus mandating the development of motor vehicle greenhouse gas emission standards where the EPA determines that such gases pose a danger to human health and welfare by overheating the atmosphere.[124] In its turn, *AEP* held that the CAA

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[122] *See, e.g.*, *Exxon Shipping*, 554 U.S. at 502 (discussing the relationship between due process review and punitive damage awards under federal maritime law, the Court made clear its approach to the common law survival issue: "Our review of punitive damages today, then, considers . . . the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of a statute."). The statement characterizes congressional silence in the CWA on the punitive damages issue as "the absence of a statute." *Id.*

[123] Massachusetts v. EPA, 549 U.S. 497, 497 (2007); *AEP*, 131 S. Ct. at 2527 (2011).

[124] *Massachusetts*, 549 U.S. at 558–59. *See* Endangerment and Cause of Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch.

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displaces any right to seek an injunction barring or limiting greenhouse gas emissions under federal common law.[125] The *AEP* holding seemed a foregone conclusion, as the victory on the scope of the statute in the first of the two cases increased the likelihood that the Court would find that a statue of such breadth displaced federal common law in the second case. As if in affirmation of such predictions, the *AEP* decision was unanimous.[126] Nevertheless, the opinion by Justice Ginsberg reveals a level of sensitivity to the law of displacement missing from at least one of the Court's prior decisions.

AEP was a public nuisance action brought by a collection of states, New York City, and several private land trusts, against a collection of private power companies and the Tennessee Valley Authority. The plaintiffs pled for a decree establishing an initial carbon dioxide emissions cap followed by annual diminishing carbon dioxide emission levels for each defendant.[127] At

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1) (explaining that in 2009, EPA announced its acceptance that anthropogenic emissions of six gases account for unprecedented atmospheric greenhouse gas concentrations, which pose significant risks to human health and welfare); *see* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pt. 85, 86, 600 and 49 C.F.R. pt. 531, 533, 536, 537, 538) (explaining the EPA and the National Highway Traffic Safety Administration joint regulation, the "Tailpipe Rule," setting light-duty vehicle greenhouse gas emission and fuel economy standards). EPA also launched rulemaking to address heavier vehicle emissions, and initiated rulemaking to set emissions limits for fossil-fuel power plants.

[125] *AEP*, 131 S. Ct. at 2537 ("We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.").

[126] *Id.* at 2540–41 (Thomas, J., concurring) (expressly agreeing with the Court's displacement analysis).

[127] *See AEP*, 131 S. Ct. at 2533–34 nn.3–5. The *AEP* plaintiffs included California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin, New York City, Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire. The defendants were American Electric Power Co., a wholly owned subsidiary of AEP,

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the appellate level, in a decision preceding *Massachusetts*, the Second Circuit recognized federal common law addressing greenhouse gases, concluding that it could not determine whether Congress, in passing the CAA, had spoken to the particular issue raised by the plaintiffs unless or until EPA issued regulations addressing the matter.[128]

The Second Circuit addressed a number of issues integral to common law claims, some of which had previously proved troublesome. First, in the context of its political question analysis, the court rejected the argument that environmental common law cases were too complex for the judiciary, calling for courts to tackle unmanageable policy questions about public health, cost, and environmental impact. Observing that "federal courts have successfully adjudicated complex common law public nuisance cases for over a century,"[129] after citing multiple cases in which courts had done so, the Second Circuit concluded:

Southern Co., Xcel Energy Inc., and Cinergy Corp. Plaintiffs included claims under both the federal common law of public nuisance and state tort law.

[128] Connecticut v. AEP, 582 F.3d 309, 380 (2d Cir. 2009) (concluding that "[u]ntil EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact 'speak[] directly' to the 'particular issue' raised here by Plaintiff, which is otherwise governed by federal common law.") (citing to County of Oneida v. Oneida Indian Nation of N.Y. State, 470 U.S. 226, 236–37 (1985)).

[129] *Connecticut*, 582 F.3d at 362 (citing Missouri v. Illinois, 180 U.S. 208 (1901) (where Missouri claimed Illinois sewage endangered health of Missouri citizens, Court allowed that Missouri could maintain a suit for equitable relief before sustaining actual injuries); Missouri v. Illinois, 200 U.S. 496 (1906) (determining, upon examination of scientific evidence, that Missouri had not established that its water pollution emanated from Illinois); Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) (determining validity of Georgia's pollution-based claims and allowing defendants to construct emission control structures while also ordering defendants to set up victim compensation fund); Georgia v. Tenn. Copper Co., 237 U.S. 474 (1915) (motion to enter final decree ordering specific injunctive relief to reduce

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> Federal courts have long been up to the task of assessing complex scientific evidence in cases where the cause of action was based either upon the federal common law or upon a statute. They are adept in balancing the equities and in rendering judgment. The fact that a case may present complex issues is not a reason for federal courts to shy away from adjudication; when a court is possessed of jurisdiction, it generally must exercise it. Additionally, the fact that this case is governed by recognized judicial standards under the federal common law of nuisance "obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion" and "further undermines the claim that such suits related to matters that are constitutionally committed to another branch."[130]

In connection with its political question analysis, the Second Circuit rejected that congressional silence on a matter of national interest should be interpreted as a congressional intent that the matter be unaddressed by federal

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sulfur dioxide emissions from several Tennessee plants); Georgia v. Tenn. Copper Co., 237 U.S. 678 (1915) (assessing the relevancy of certain facts to emissions limits); Georgia v. Tenn. Copper Co., 240 U.S. 650 (1916) (issuing final decree setting emissions limits, imposing monitoring requirements, requiring compensation scheme for inspectors, and apportioning costs); New Jersey v. City of New York, 283 U.S. 473 (1931) (considering injunction for public nuisance for ocean garbage dumping); North Dakota v. Minnesota, 263 U.S. 365 (1923) (accepting claim for injunction but rejecting damage claim where Minnesota's alteration of Illinois River flooded North Dakota farmland); New York v. New Jersey, 256 U.S. 296 (1921) (rejecting claim for injunction where conflicting evidence made it impossible to determine whether New Jersey was polluting New York waters).

[130] *Connecticut*, 582 F. 3d at 329 (citations omitted) (quoting, in part, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (analyzing political question doctrine)).

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common law.[131] Adopting a similar approach to the rationale in Justices Blackmun and Steven's *Milwaukee* and *Middlesex* dissents, the Second Circuit adhered to the view that where Congress left regulatory gaps with no guidance, it should be presumed that the legislative intent was for common law to fill the interstices.[132] The court also rejected that global warming, and its complex international policy implications, bars the courts from addressing via federal common law any and all injuries alleged to have resulted from global warming.[133] Such nuisance actions require case-by-case analysis, the court reasoned, to determine whether a federal common law decision establishes or interferes with the development of a national or international policy. "[T]he relief for which Plaintiffs pray applies in only the most tangential and attenuated way to the expansive domestic and foreign policy issues raised by Defendants."[134]

The Supreme Court accepted the Second Circuit's political question analysis, but rejected the lower court's refusal to reject a federal common law claim on the grounds that it was too early to determine whether EPA, in regulating under the CAA, would address the very issue at the core of the federal common law claim. The Court instead concluded that it was the judiciary's task to discern the scope of legislation and whether it displaced

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[131] *Id.* at 330 (citing United States v. Texas, 507 U.S. 529, 535 (1993), to conclude that "Congress's mere refusal to legislate . . . falls far short of an expression of legislative intent to supplant the existing common law in that area.").

[132] *Id.* (citing Khulamani v. Barklay Nat'l Bank Ltd., 504 F.3d 254, 287 (2d Cir. 2007)).

[133] *Id.* at 324–25 (noting that a domestic suit seeking to abate a public nuisance alleged to have caused specific injuries to the plaintiff does not authorize a court to set across-the-board or mandatory emissions limitations applying to any entities not party to the suit).

[134] *Id.* at 325. *See also id.* at 325 n.5 (differentiating the situation where plaintiffs seek to limit emissions from six domestic coal-fired electricity plants from one in which plaintiffs sued the President "in an effort to force him to sign international global warming treaties.").

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federal common law, regardless of agency implementation or lack thereof.[135] Because the CAA blanketed the subject of greenhouse gas emissions by providing for comprehensive emissions standard setting from stationary sources, the emissions covered included those deemed responsible for the greenhouse effect, and the injunction requested by the plaintiffs would set greenhouse gas emissions standards for the defendants, the Court reasoned the common law overlapped with the statute in a way that could directly obstruct its implementation. There is no legal significance, the Court determined, to the question of whether EPA had implemented or planned to implement the statute.[136] The focus of a displacement inquiry is the statute itself.[137]

The *AEP* Court summarized its view on whether the CAA displaces the plaintiffs' claims with the simple observation that "[w]e see no room for a parallel track."[138] The Court implicitly acknowledged that federal statutory law and federal common law may coexist where the common law fills a gap left by the statute and does not interfere with its operation. In keeping with this understanding of the federal common law's role, the Court recognized the "new" federal common law, which it described as encompassing national

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[135] *AEP*, 131 S. Ct. at 2540 ("The Second Circuit erred, we hold, in ruling that federal judges may set limits on greenhouse gas emissions in face of a law empowering EPA to set the same limits . . . .").

[136] *Id.* at 2538 ("The Clean Air Act is no less an exercise of the legislature's 'considered judgment' concerning the regulation of air pollution because it permits emissions *until* EPA acts" (*citing Middlesex*)).

[137] *Id.* ("The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law.").

[138] *Id*. (concluding a discussion of the scope of the CAA, its multiple enforcement vehicles, and EPA's current efforts to implement carbon dioxide emission standards).

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concerns that are also within Congress' power to address legislatively.[139] The Court recognized environmental protection as such a national concern, and as such acknowledged that the federal courts bear the authority to fill gaps left by statutory law and, "if necessary, even 'fashion federal law.'"[140] Although the *AEP* Court rejected the states' federal common law claims before it, the displacement analysis was more liberal and sensitive to the utility of federal common law than that of some of its predecessor opinions. This makes it all the more puzzling that the Court would leave the Ninth Circuit *Kivalina* decision intact.

The *AEP* opinion is both thorough in scope and clear in explanation. Claiming a "keener understanding" of federal common law than that of the *Erie* Court, the Court recognized the benefits of federal common law as well as the limits to of some of the precedents oft-cited by those who would smother it.[141] The Court's goal was to lay out the various rationales for a federal court to decide cases on bases other than federal common law. Adopting state common law where possible, the Court observed, is "the prudent course."[142] Furthermore, the Court noted, it has yet to decide whether private citizens or municipalities may invoke federal common law against cross-boundary polluters; nor has it defined the parameters of the types of cross-boundary pollution that a state may call upon a court to enjoin.[143] Perhaps the most significant worry that the Court expressed dealt with the

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[139] *Id*. at 2535 (quoting Henry Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964), to state that *Erie* inspired "the emergence of a federal decisional law in areas of national concern.").

[140] *AEP*, 131 S. Ct. at 2535.

[141] *Id.* (discussing the new federal common law after clarifying the limits to *Erie*).

[142] *Id.* at 2536 (quoting United States v. Kimbell Foods, 440 U.S. 715, 740 (1979)).

[143] *Id*. (reciting various limits to a federal court's exercise of its power to create federal common law).

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"scale and complexity" of the global warming problem, which it cast as differing in nature from "the more bounded pollution giving rise to past federal nuisance suits."[144]

In spite of its overall goal of controlling applications of federal common law, *AEP* also applied its careful limiting language to itself. The Court's statutory analysis interpreted literally the "speaks directly" language at the core of the displacement question.[145] To be sure, the Court was careful to clarify its view that displacement analysis does not require literal duplication of action and impact between statute and common law before the statute displaces federal common law.[146] Nor, the Court pointed out, must all potential injuries be addressed under a displacing statute or its implementing agency, although the agency's judgment would be subject to court review.[147] The Court offered a relatively nuanced, neutral view of how displacement operates.

Perhaps the most significant limit on the scope of *AEP* is its holding, which applies its finding of displacement to "any federal common law right to seek abatement" of greenhouse gas emissions from the defendants' plants, thus apparently leaving suits for damages to be examined another day.[148]

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[144] *Id.*

[145] *Id.* at 2537–38 (parsing the Clean Air Act to find that the statute covers greenhouse gas emissions from stationary sources in a plenary manner, leaving no room for additional or alternative standards to be developed under federal common law); *see also id*. at 2539 (addressing the various tasks assigned EPA under the CAA resulting in a panoply of emissions standards).

[146] *AEP*, 131 S. Ct. at 2538–39.

[147] *Id.* (clarifying that EPA's delayed or limited application of statutory standards is immaterial to the displacement analysis, but that flawed actions by the agency could be subject to judicial review under the processes included in the statute).

[148] *Id*. at 2537.

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Apart from the holding, the opinion might appear to encompass both actions for equitable relief and damages, but in fact the Court did limit both its discussion and its case references to matters of equity. *Exxon Shipping*, the Court's federal common law decision that focuses directly on forms of relief, is neither discussed nor cited in the *AEP* opinion, and the analyses of both *AEP* and *Milwaukee* mention that the court-developed standards sought in these cases would have interfered with the statutory plan. Thus, *AEP* logically left intact and unaddressed federal common law claims for damages, as a claim for injunctive relief will almost unavoidably clash with some discharge allowance or potential discharge allowance calculated or to be calculated by EPA, while a damages claim seeks payment for an injury sustained by the plaintiff, and need face concern with statute-based standards. A defendant's compliance with any existing statute-based standards and whether such compliance shields the defendant from liability will likely to be critical issues in a court's decision on a claim for damages, but unless the successful damages claim would significantly impact the behavior of those to whom the statute-based standards apply, the common law case could not be said to invade or disrupt the statutory program.[149]

[149] The opposing view is that the looming threat of tort liability complicates decision-making and operating for regulated parties who already may endure technically complex, time-consuming and expensive regulatory approval and oversight processes. That viewpoint is considered in cases such as *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). In *International Paper Co*., which focused on state common law in the aftermath of *Milwaukee*, the Court concluded that inherent in federal legislation cast as comprehensive, such as the CWA, is an understanding that dischargers should not be vulnerable to unlimited state common law liability when their government-sanctioned outflows cause injury. *Id.* at 497–98. *International Paper Co*. carved out an exception for the common law of the pollution source state, which the Court reasoned subjected discharger to a manageable, predictable range of liabilities. *Id.*

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IV. ASSESSING THE STATUS OF FEDERAL COMMON LAW

A. NINE SIMPLE TRUTHS OF FEDERAL COMMON LAW

Careful review of the last century's landmark federal common law cases reveals what might be termed a list of simple truths about federal common law, stated and repeated by the courts over the decades as they have grappled with questions regarding the parameters, function, and utility of federal common law. A number of these may be termed cautions against the over-extension of federal common law. First, courts entertaining federal common law claims over the past century seem to agree that federal common law should be applied sparingly.[150] Second, federal common law should not be tolerated where it encourages forum shopping[151] or, thirdly, directly interferes

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[150] *See, e.g.*, *AEP*, 131 S. Ct. at 2536 ("[T]he Court remains mindful that it does not have creative power akin to that vested in Congress."); *see also Illinois*, 406 U.S. at 93 ("It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.") (quoting Utah v. United States, 394 U.S. 89, 95 (1969)); *Milwaukee*, 451 U.S. at 312 ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."); *id.* at 314 ("[Federal common law] is resorted to '[i]n absence of an applicable Act of Congress,' and because the Court is compelled to consider federal questions 'which cannot be answered from federal statutes alone.'" (quoting Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943)); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 469 (1942)).

[151] *Erie R.R*, 304 U.S. at 74 (criticizing the doctrine of Swift v. Tyson, 16 Pet. 1 (1842), as having "introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. . . . In attempting to promote uniformity of law throughout the United States, the doctrine has prevented uniformity in the administration of the law of the state."); *see also id.* at 76 ("In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of

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with a federal statute.[152] A fourth basic tenet of federal common law is that where a federal statute directly addresses an injury that is the basis of a federal common law plaintiff's claim, the flawed or delayed agency administration of the federal statute is immaterial to the core question of federal common law's applicability, which is whether Congress has addressed the issue that the federal common law claim has placed before a court.[153]

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citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule." (footnote omitted)).

[152] *See, e.g.*, *Milwaukee*, 451 U.S. at 313 ("We have always recognized that federal common law is 'subject to the paramount authority of Congress.'" (citing New Jersey v. New York, 283 U.S. 336, 348 (1931)); *see also id.* at 319–20 ("Turning to the particular claims involved in this case, the action of Congress in supplanting the federal common law is perhaps clearest when the question of effluent limitations for discharges from the two treatment plants is considered. The duly issued permits under which the city Commission discharges treated sewage from the Jones Island and South Shore treatment plants incorporate, as required by the Act, the specific effluent limitations established by EPA regulations pursuant to § 301 of the Act. There is thus no question that the problem of effluent limitation has been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress. This being so there is no basis for a federal court to impose more stringent limitations than those imposed under the regulatory regime by reference to federal common law." (references omitted)).

[153] *See AEP*, 131 S. Ct. at 2538 ("The plaintiffs argue, as the Second Circuit held, that federal common law is not displaced until EPA actually exercises its regulatory authority, *i.e.*, until it sets standards governing emissions from the defendants' plants. We disagree. . . . The critical point is that Congress delegated to the EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law."). *See also Middlesex Cnty. Sewage Auth.*, 453 U.S. at 12–13 (rejecting the framing of the issue as whether federal agencies breached the statutes involved and whether the defendants breached the terms of their federally granted permits). *Id.* at 13 ("The key to the inquiry is the intent of the Legislature."). *See also Milwaukee*, 451 U.S. at 314 ("[W]hen Congress addresses a question previously governed by a decision rested on

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Finally, where state common law adequately addresses a claimed injury, a federal court may decline to apply federal common law.[154]

Countering these prohibitions are additional "simple truths" lauding the virtues of federal common law. A sixth judicial premise, for example, is that courts have acknowledged that federal common law may be appropriately applied where an injury is serious and the claim imbued with a level of

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federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."). *Id.* at 315 ("[T]he question was whether the legislative scheme 'spoke directly to the question'—in that case the question of damages—not whether Congress had affirmatively proscribed the use of federal common law." (citing Mobil Oil v. Higginbotham, 436 U.S. 618 (1978) (determining that The Death on the High Seas Act speaks directly to the issue of wrongful death on the high seas, thus displacing general maritime law on the issue of damages for loss of society)). *See also Native Village of Kivalina*, 696 F.3d at 858 ("Congressional action, not executive action, is the touchstone of displacement analysis.").

[154] *See AEP*, 131 S. Ct. at 2536 ("Absent a demonstrated need for a federal rule of decision, the Court has taken 'the prudent course' of 'adopt[ing] the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.'" (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 740 (1979)). *See also Milwaukee*, 451 U.S. at 313 ("When Congress has not spoken to a particular issue, however, and when there exists a 'significant conflict between some federal policy or interest and the use of state law,' the Court has found it necessary, in a 'few and restricted' instances, to develop federal common law." (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966), and Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)). *Id.* at 314 n.7 ("If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used."). *But see Milwaukee*, 451 U.S. at 354 (Blackmun, J., dissenting) ("Instead of promoting a more uniform federal approach to the problem of alleviating interstate pollution, I fear that today's decision will lead States to turn to their own courts for statutory or common-law assistance in filling the interstices of the federal statute. Rather than encourage such a prospect, I would adhere to the principles clearly enunciated in *Illinois v. Milwaukee*, and affirm the judgment of the Court of Appeals.").

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gravitas that warrants judicial attention.[155] The courts have observed that federal common law may be appropriate to fill gaps left by statutory law,[156] and also that damage claims may not pose a threat to a federal statutory scheme in the direct manner of a common law-based equitable claim.[157] As a ninth and perhaps most frequently repeated among these judicial observations, courts from *Georgia* through *AEP* have acknowledged, expressly or by virtue of their studied consideration of the pollution-based common law claims before them, that federal common law is an appropriate legal means for addressing cross-boundary environmental injuries.[158]

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[155] *See Illinois*, 406 U.S. at 93 ("And the question of what is appropriate [for the Court to invoke its original jurisdiction] concerns, of course, the seriousness and dignity of the claim . . . ."); *see also* Missouri v. Illinois, 200 U.S. 496, 521 (1906) ("Before this court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.")

[156] *See Illinois*, 406 U.S. at 103–04 ("The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. . . . The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act."). *See also Milwaukee*, 451 U.S. at 323 (acknowledging that federal common law may fill statutory gaps with the observation, "[T]here is no 'interstice' here to be filled by federal common law"); *AEP*, 131 S. Ct. at 2538 (considering whether "a parallel track" for federal common law on greenhouse gas emissions exists in light of the CAA requirement that EPA address such emissions).

[157] *See, e.g.*, National Sea Clammers Ass'n. v. City of New York, 616 F.2d 1222, 1234 (1980) (recognizing that a federal common law nuisance claim may be brought by private parties for the recovery of damages); *Exxon Shipping*, 554 U.S. at 489 n.7.

[158] *See, e.g.*, *Illinois*, 406 U.S. at 103 ("When we deal with air and water in their ambient or interstate aspects, there is federal common law . . . ." (footnote and reference omitted)). *See also* Missouri v. Illinois, 180 U.S. 208,

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The dissenting opinions of Justices Blackmun and Stevens in *Milwaukee* and *Middlesex*, far from contradicting these "simple truths" of federal common law elicited from multiple leading federal common law cases, instead both echo and presage the observations offered by multiple majority opinions preceding and following those dissents. As in the *Georgia*, *Hinderlider*, and *Illinois* opinions, Justice Blackmun in his *Milwaukee* dissent

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241 (1901) (holding that federal jurisdiction exists and application of nuisance law is appropriate where a state alleges that contagious and typhoidal diseases introduced into a river by a neighboring state may spread themselves through a neighboring state); Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907), at 237 ("[T]he state has an interest . . . in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. . . . 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."); *Milwaukee*, 451 U.S. at 315 n.8 ("[I]nterstate disputes frequently call for the application of a federal rule when Congress has not spoken."); *id.* at 335 (Blackmun, J., dissenting) ("Long before the 1972 decision in *Illinois v. Milwaukee*, federal common law enunciated by this Court assured each State the right to be free from unreasonable interference with its natural environmental and resources when the interference stems from another State or its citizens."); *Texas*, 441 F.2d at 240 ("As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States."); *id.* at 242 ("[W]e hold that . . . the ecological controversy involved is one which is entitled to the application of federal common law as a basis for the existence and determination of the rights in the situation . . . ."); *Native Village of Kivalina*, 696 F.3d at 855–56 (acknowledging the history of federal common law applications to transboundary pollution suits); *AEP*, 131 S. Ct. at 2535 ("Environmental protection is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" (quoting Henry Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964)).

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asserted the appropriateness of federal common law as a complement to statutory law, as well as its unique utility in interstate disputes.[159] Similarly, as in the *Missouri* and *AEP* opinions, Justice Stevens in his *Middlesex* dissent pointed to the daunting complexity of environmental cases as a motivation for

[159] *See Milwaukee*, 451 U.S. at 333–34 (Blackmun, J., dissenting) ("[T]he Court assumes that as soon as Congress 'addresses a question previously governed' by federal common law, 'the need for such an unusual exercise of lawmaking by federal courts disappears.' This 'automatic displacement' approach is inadequate in two respects. It fails to reflect the unique role federal common law plays in resolving disputes between one State and the citizens of government of another. In addition, it ignores this Court's frequent recognition that federal common law may complement congressional action in the fulfillment of federal policies."). *Id.* at 336 ("If the federal interest is sufficiently strong, federal common law may be drawn upon in settling disputes even through the statute or Constitution along provides no precise answer to the question posed."). *See also id.* at 335 ("Both before and after *Erie*, the Court has fashioned federal law where the interstate nature of a controversy renders inappropriate the law of either State."). For like sentiments expressed in earlier Supreme Court majority opinions, see Georgia v. Tenn. Copper Co., 206 U.S. at 238 ("It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale . . . by the acts of persons beyond its control."); *Hinderlider*, 304 U.S. at 104–05 (acknowledging that a water rights dispute between states "could obviously have been determined by a suit in this Court"); *id.* at 110 (stating that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive. Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions." (citations and footnotes omitted)); *Illinois*, 406 U.S. at 99 ("The question is whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a). We hold that it does . . . .").

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federal courts to shy away from federal common law actions.[160] It is the prioritization of justice over all other considerations that relegated the expressions of such sentiments by Justices Blackmun and Stevens to the status of dissenters.[161] Justice Blackmun insisted that federal common law be

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[160] *See Middlesex*, 453 U.S. at 25 (Stevens, J., concurring in part and dissenting in part) ("The touchstone now is congressional intent. Because legislative history is unlikely to reveal affirmative evidence of a congressional intent to authorize a specific procedure that the statute itself fails to mention, that touchstone will further restrict the availability of private remedies."). *Id.* at 31 ("The effect of the Court's holding in *Milwaukee* was to make the city of Milwaukee's compliance with the requirements of the Clean Water Act a complete defense to a federal common-law nuisance action for pollution damage. It was, and still is, difficult for me to reconcile that holding with the . . . statutes and the Senate Report . . . particularly the statement: 'Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.' S. REP. NO. 92-414, at 81 (1971), 1972 U.S.C.C.A.N. 3746 (1972). Today, the Court pursues the pre-emption rationale of *Milwaukee v. Illinois* to its inexorable conclusion and holds that even noncompliance with the requirements of the Clean Water Act and the MPRSA is a defense to a federal common-law nuisance claim."). For observations on the complexity of environmental law in earlier and later cases, *see, e.g.*, *Missouri*, 200 U.S. at 522 (discussing the difficulty of the science involved in that case); *AEP*, 131 S. Ct. at 2539–40 ("It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. . . . Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present.").

[161] *See Middlesex*, 453 U.S. at 24 ("[R]ules are meant to be obeyed, and those who violate them should be held responsible for their misdeeds.").

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relied upon to provide uniformity on issues of national scope.[162] Justice Stevens declared that the mission of the judiciary is first and foremost the remedying of injuries. He then faulted the majority for deflecting difficult cases due to administrative concerns.[163] In Justice Stevens' words:

> First, we must assume that the complaint speaks the truth when it alleges that the petitioners have dumped large quantities of sewage and toxic waste in the Atlantic Ocean and its tributaries, and that these dumping operations have violated the substantive provisions of the Clean Water Act and the MPRSA. Second, we must also assume that these illegal operations have caused an injury to respondents' commercial interests . . . . Finally, we must assume that, apart from these two statutes, the dumping operations of petitioners would constitute a common-law nuisance for which respondents would have a federal remedy. The net effect of the Court's analysis of the legislative intent is therefore a conclusion that Congress, by enacting the Clean Water Act and the MPRSA, deliberately deprived respondents of effective federal remedies that would otherwise have been available to them.[164]

These sentiments could have been part of the Supreme Court's decision on whether to accept certiorari in *Kivalina.* Certainly global warming is an issue for which a uniform judicial policy would make sense. Certainly the injury claimed is serious and deserving of the dignity inherent in the Supreme Court's attention. Most certainly of all, the current Court's cautious approach

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[162] *Milwaukee*, 451 U.S. at 337 (Blackmun, J., dissenting) ("If the federal interest is sufficiently strong, federal common law may be drawn upon in settling disputes even though the statute or Constitution alone provides no precise answer to the question posed.").

[163] *Middlesex*, 453 U.S. at 24 ("Since the earliest days of the common law, it has been the business of courts to fashion remedies for wrongs.").

[164] *Id.* at 27.

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to federal common law left the *Kivalina* plaintiffs with unremedied injuries, at least on the federal level.

B. THREE APPROACHES TO DISPLACEMENT

The Supreme Court's decision to deny certiorari to *Kivalina* may be interpreted in a number of ways. It is very possible, for example, that the Court intended to signal that it considered the distinction between a federal common law case seeking equitable relief and one seeking damages to be meaningless for purposes of displacement analysis.[165] Where a statute addresses a national interest on a scale that Congress deems comprehensive, the Court will look no further to determine whether federal common law would disrupt or duplicate the statute's operation, and will not consider whether federal common law might provide redress for injuries ignored by the statute.[166] Disruption is assumed, and non-responsiveness to certain injuries must be part of Congress' plan.[167] If this is the message from

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[165] *See, e.g.*, *Native Village of Kivalina*, 696 F.3d at 857 ("In *Middlesex*, the Supreme Court considered a public nuisance claim of damage to fishing grounds caused by discharges and ocean dumping of sewage. The Court held that the cause of action was displaced, including the damage remedy. Thus, under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies." (citations omitted)).

[166] *See, e.g.*, *Milwaukee*, 451 U.S. at 317 ("Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."). *See also id.* at 319, distinguishing itself from *Illinois* ("The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois v. Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law.").

[167] *See, e.g.*, *Native Village of Kivalina*, 696 F.3d at 856 ("We need not engage in that complex issue and fact-specific analysis in this case, because we have direct Supreme Court guidance. The Supreme Court has already

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Kivalina, then the current Court embraces a presumptive displacement mindset much like that of the *Middlesex* Court.[168] This seems unlikely in light of *AEP*, which, although citing *Middlesex* approvingly for the proposition that a federal agency's manner of administering its legislative mandates does not impact the displacement decision, presented a more focused displacement analysis than *Middlesex*.[169]

On the other end of the displacement spectrum is the view presented by Justice Stevens in his *Middlesex* dissent, whereby there exists a presumptive coexistence of federal statutory and common law, with the core question of a displacement analysis being whether an injury over which the federal courts have jurisdiction would be left without redress absent federal common law to

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determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law.").

[168] *Middlesex* focused primarily on analysis of citizen suit provisions and other statutory rights of action. The opinion dispenses with the federal common law displacement issue without analysis, claiming reliance on *Milwaukee*.

> The Court has now held that the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the FWPCA . . . . This decision [*Milwaukee*] disposes entirely of respondents' federal common-law claims, since there is no reason to suppose that the pre-emptive effect of the FWPCA is any less when pollution of coastal waters is at issue.

Middlesex, 453 U.S. at 21–22. The *Middlesex* decision may not be as absolute a rejection of federal common law as its reputation may suggest. The Court specifically refrained from addressing "the question whether the federal common law of nuisance could ever be the basis of a suit for damages by a private party." *Id.* at 11 n.17.

[169] *AEP*, 131 S. Ct. at 2535 (claiming "a keener understanding" of federal common law than that of earlier generations and then acknowledging that *Erie* sparked an emergence of federal common law on issues of national concern) (reference omitted).

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fill the gaps in a statutory program.[170] Although the *AEP* opinion's reference to parallel tracks indicates an open-mindedness to the idea of statutory law and common law complementing one another in addressing matters of national concern, the facts of *Kivalina* indicate that the current Court has not embraced Justice Stevens' pro-federal common law view. After all, the concern in *Kivalina*, cross-boundary pollution, is national in scope. The relief requested, compensation for Kivalina's relocation, was finite and did not threaten the defendants' continued operation vis-à-vis the CAA. Most significantly, the injury to Kivalina goes unredressed under federal law without the Court's recognition that federal common law has a part to play in repairing the harm to the tribe.[171] *Kivalina* seems to be the exact type of circumstance that troubled Justices Stevens and Blackmun.[172] If today's Court is troubled by Kivalina's plight, it certainly does not share these Justices' perspective on how displacement law may take those troubles into account.

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[170] *See Middlesex*, 453 U.S. at 22–27 (Stevens, J., concurring in part and dissenting in part) (pointing out that the majority view on displacement deprives a party injured by the pollution of another party of any effective federal remedies).

[171] *See Native Village of Kivalina*, 696 F.3d at 858 (acknowledging that the court's application of displacement leaves Kivalina at the mercy of the legislative and executive branches, as well as the sea).

[172] *Milwaukee*, 451 U.S. at 338–39 (Blackmun, J., dissenting) ("Congress had 'spoken to' the particular problem of interstate water pollution as far back as 1888, and in 1948 did so in a broad and systematic fashion with the enactment of the Water Pollution Control Act (also known as the Clean Water Act). In *Illinois v. Milwaukee*, the Court properly regarded such expressions of congressional intent as not an obstacle but an incentive to application of the federal common law. The fact that Congress in 1972 once again addressed the complicated and difficult problem of purifying our Nation's waters should not be taken as presumptive evidence, let alone conclusive proof, that Congress meant to foreclose pre-existing approaches to controlling interstate water pollution. Where the possible extinction of federal common law is at issue, a reviewing court is obligated to look not only at the magnitude of the legislative action but also with some care to the evidence of specific congressional intent.").

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A third approach to the displacement issue lies between the two extremes, requiring a nuanced case-by-case analysis that focuses on the question of whether Congress has asserted plenary control over a matter formerly the subject of federal common law with sensitivity to both the potential for common law to interfere with the statutory program and the potential for common law to fill statutory gaps.[173] The *AEP* Court appeared to endorse such an approach, although with a marked propensity to cede to Congress all control over matters of national importance where Congress has staked out its authority.[174]

The case-by-case approach, of course, warrants that the Court address the still unanswered question of whether a public nuisance action seeking damages presents a circumstance where federal common law neither threatens nor obstructs the CAA. The Court's decision against taking up this opportunity to provide guidance on this issue prompts several interpretations. First, it seems likely that the Court considers *Exxon Shipping* an outlier case,

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[173] *AEP*, 131 S. Ct. at 2537 ("The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." (citing Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

[174] *Id.* at 2537–38 (finding that the CAA directs EPA to establish carbon dioxide emission standards from the defendants, and also provides multiple avenues for enforcement, including enforcement against EPA for refraining from setting required standards stating "the Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law."); *id.* at 2538–39 ("The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law. Indeed, were EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its ongoing section 7411 rulemaking, the federal courts would have not warrant to employ the federal common law of nuisance to upset the agency's expert determination.").

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limited in precedential scope to cases arising under maritime law.[175] As noted above, in *AEP* the Court did not mention *Exxon Shipping*, which was its latest statement on federal common law at the time. In addition, the Court's decision against hearing *Kivalina* indicates that it does not perceive there to be a conflict between *Exxon Shipping* and *Middlesex*. In other words, the Court considers *Exxon Shipping* to be limited as a precedent to the punitive damages issue that case put before the Court, which Justice Souter's opinion proves that the Court considered itself eminently capable of handling, while *Kivalina* is more akin to *Middlesex* for the simple reason that it presents a cross-boundary environmental problem that the Court considers too unwieldy for the judicial setting.

C. *MASSACHUSETTS V. EPA* ON FEDERAL COMMON LAW

> If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty . . . is irrelevant.[176]

Perhaps the most reasoned interpretation of the Court's decision against hearing *Kivalina*, then, is that it chooses to leave the issue of global warming to the regulators.[177] The "culprit" justifying the hands-off approach is

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[175] *See Exxon Shipping*, 554 U.S. at 481 (defining the pertinent issue as "We granted certiorari to consider . . . whether the Clean Water Act forecloses the award of punitive damages in maritime spill cases.").

[176] Massachusetts v. EPA, 549 U.S. 497, 534 (2007).

[177] *AEP*, 131 S. Ct. at 2538 (concluding that the CAA displaces federal common law, stating "As *Milwaukee II* made clear, . . . the relevant question for purposes of displacement is 'whether the field has been occupied not whether it has been occupied in a particular manner.' Of necessity, Congress selects different regulatory regimes to address different problems. Congress could hardly preemptively prohibit every discharge of carbon dioxide unless

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Massachusetts v. EPA, the 2007 decision that both established the CAA's coverage of gases contributing to global warming and, in so doing, launched a series of EPA efforts to regulate greenhouse gas emissions from both mobile and stationary sources. On its face, the *Kivalina* declination to address global warming through federal common law on the basis of its own recent declaration of EPA's regulatory responsibilities makes sense, as a century of Supreme Court cases have held fast to the premise that federal common law gives way to comprehensive federal regulation where court decisions may replicate, contradict, or otherwise confuse the regulatory program in a manner that threatens to disrupt it. Thus, one may conclude, *Massachusetts* precipitated the environmental losses in both *AEP* and *Kivalina.* When Justice Stevens' *Massachusetts* majority opinion is considered more closely, however, it appears to be more in keeping with the sentiments of Justice Blackmun's *Milwaukee* dissent and Justice Stevens' own *Middlesex* dissent than it is with the majority opinions in the federal common law cases that presumptively displace wherever a justification may be identified.

First, Justice Stevens does not shy away from evaluating the science of anthropogenic global warming, even where EPA, the so-called experts on environmental science, have concluded that the science is too uncertain to act upon.[178] Justice Stevens evaluates the science and concluded that EPA's inaction was not justified on the basis of the persistent dispute over mankind's

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covered by a permit. After all, we each emit carbon dioxide merely by breathing.").

[178] *Massachusetts*, 549 U.S. at 504–09 (evaluating the scientific studies asserting anthropogenic global warming over the decades); *id.* at 521 ("The harms associated with climate change are serious and well-recognized."); *id.* at 523 ("EPA does not dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming. At a minimum, therefore, EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries."); *id.* at 524 ("[R]educing domestic automobile emissions is hardly a tentative step. Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere . . . .").

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contributions to the greenhouse gas problem.[179] Although Justice Stevens was accused of taking political action,[180] in actuality he was calling out politicking where a statute did not allow it.[181] According to the majority, the

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[179] *Massachusetts*, 549 U.S. at 534–35 ("The statutory question is whether sufficient information exists to make an endangerment finding. . . . EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore 'arbitrary, capricious, . . . or otherwise not in accordance with law.' . . . [E]PA must ground its reasons for action or inaction in the statute." (citations omitted)).

[180] *Id.* at 547 (Roberts, J., dissenting) ("The constitutional role of the courts, however, is to decide concrete cases—not to serve as a convenient forum for policy debate."). *See also id.* at 558 (Scalia, J., dissenting) ("Once again, in the face of textual ambiguity, the Court's application of *Chevron* deference to EPA's interpretation of the word 'including' is nowhere to be found. Evidently, the Court defers only to those reasonable interpretations it favors." (footnote omitted)); *id.* at 560 ("The Court's alarm over global warming may or may not be justified, but it ought no distort the outcome of this litigation. This is a straightforward administration-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.").

[181] *Massachusetts*, 549 U.S. at 533–34 ("Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. . . . [E]PA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate. For example, EPA said that a number of voluntary Executive Branch programs already provide an effective response to the threat of global warming, that regulating greenhouse bases might impair the President's ability to negotiate with 'key developing nations' to reduce emissions, and that curtaining motor-vehicle emissions would reflect 'an inefficient, piecemeal approach to address the climate change issue.' Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident

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CAA provision under review required scientific study and science-based conclusions regardless of agency politics.[182] Justice Stevens' exertion of the Court's judicial power to force the execution of legislation was, in spirit, diametrically opposed to the judicial stance taken in *Middlesex*, *AEP*, and the Ninth Circuit *Kivalina* opinion, all cases in which the judiciary deemed itself impotent in the face of a statute authorizing a comprehensive regulatory scheme, regardless of the actual implementation of that scheme.[183] The hands-on *Massachusetts* majority opinion is far more akin to the *Exxon Shipping* opinion, where the Court exercised its authority to address, directly, a policy the Court perceived as unfair or at least inappropriate.

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they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment.").

[182] *Id.* at 534 ("Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time.").

[183] *See, e.g.*, *Middlesex*, 453 U.S. at 12 (refusing to address respondents' claims that the federal agencies entrusted with protecting against illegal discharges to waters of the United States had permitted dumping in excess of the amounts permitted under federal law and that the defendant states had violated the terms of these permits). *See AEP*, 131 S. Ct. at 2539–40 ("The expert agency is surely better equipped to do the job [of regulating greenhouse gas emissions] than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issues rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties presented. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.").

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Secondly, in *Massachusetts* Justice Stevens rejected the argument that the scope and complexity of global warming render it inappropriate for the judicial format. In the context of the standing discussion, Justice Stevens assailed "the erroneous presumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum."[184] He rejected the premise that projected gas emission from China and India should strip the U.S. judiciary of its power to address domestic emissions due to the inseparable and nondomestic nature of the greenhouse gas effect and its impacts.[185] Again, the spirit of Justice Stevens' approach was the opposite of that taken in *Middlesex* and *AEP*, where the majorities appeared to bow with relief before the scientific complexities of global warming, declaring themselves unequal to the task of discerning individual victims or purveyors amid the political machinations.[186] The *Massachusetts* majority seemed more in line with the Second Circuit's approach in *AEP*, where the Court seized on a perceived wrong and addressed it.[187]

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[184] *Massachusetts*, 549 U.S. at 499 ("Agencies, like legislatures, do not generally resolve massive problems in one fell swoop, but instead whittle away over time, refining their approach as circumstances change and they develop a more nuanced understanding of how best to proceed." (references omitted)).

[185] *Id.* at 525–26 ("Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emission substantially over the next century: a reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.").

[186] *See, e.g.*, *AEP*, 131 S. Ct. at 253 n.2 ("The Court, we caution, endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change.").

[187] Connecticut v. American Electric Power, 582 F.3d 309, 326 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (U.S. 2011) ("[F]ederal courts have successfully adjudicated complex common law public nuisance cases for over a century."); *id.* at 328 ("Federal courts have applied well-settled tort rules to a variety of new and complex problems."); *id.* at 329 ("The fact that a case may present complex issues is not a reason for federal

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Massachusetts cannot be compared with *AEP* or even *Middlesex* on the primary substantive issue addressed in those cases, as *Massachusetts* was not a federal common law case. But in terms of the decision being the product of an activist bench that considered its highest priority the righting of wrongs and where its role complemented the federal regulatory system, *Massachusetts* finds kinship with the views that Justices Blackmun and Stevens expressed on federal common law in their *Milwaukee* and *Middlesex* dissents. If one of the two Justices were on the bench today, there might have been a dissent issued, protesting the Court's decision against accepting certiorari in *Kivalina*.

V. CONCLUSION

> Our conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea. But the solution of Kivalina's dire circumstances must rest in the hands of the legislative and executive branches of our government, not the federal common law.[188]

"[W]e are acting here in the position of a common law court of law review, faced with a perceived defect in a common law remedy," Justice Souter wrote in *Exxon Shipping*, apparently perceiving a need to justify the Court's federal common law activism in that 2008 opinion.[189] In contrast, the Court has exhibited no such need to rationalize its recent non-activism. Without comment, the Supreme Court's denial of certiorari in *Kivalina* leaves intact a Ninth Circuit decision that harkens back to *Middlesex*, arguably the

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courts to shy away from adjudication; when a court is possessed of jurisdiction, it generally must exercise it.").

[188] *Native Village of Kivalina*, 696 F.3d 849, 858 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390, 185 L. Ed. 2d 1116 (U.S. 2013) (basing the holding entirely on displacement doctrine, which the court deems blind to the issue of remedies).

[189] *Exxon Shipping*, 554 U.S. at 507 (admitting that "some will murmur that this [development of a punitive-to-compensatory damage ration] smacks too much of policy and too little of principle.").

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most egregious in a line of cases that presumptively eradicate federal common law with only the shallowest form of displacement analysis. More significantly, however, the Supreme Court's decision against hearing *Kivalina* leaves *AEP* as its final statement to date on federal common law. That decision, far from echoing the logic or spirit of *Middlesex*, acknowledged the concurrent utility of regulatory and federal common law where federal common law may complement a regulatory program without interfering with it. Thus, the Court leaves federal common law in a state of ambiguity.

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