COMMON LAW ON ICE: USING FEDERAL JUDGE-MADE NUISANCE LAW TO ADDRESS THE INTERSTATE EFFECTS OF GREENHOUSE GAS EMISSIONS

BY

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In the face of rising greenhouse gas emissions, record global temperatures, and catastrophic weather events, the legislature and administration's refusal to act to address global warming has spurred numerous states and private citizens to turn to the courts for relief. These plaintiffs have turned to the federal common law of public nuisance as an alternative to statutory structures Congress failed to create and the administration refused to apply. Before the suit reaches the merits, however, the courts must decide whether the federal common law remains viable. Congress can displace federal common law through legislation, but until Congress speaks directly to the issue governed by common law, the judge-made law remains in force. As a result, if the Clean Air Act does not address global warming, and leaves greenhouse gasses unregulated, then it must also leave the common law intact, as an alternative route to address global warming.

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I. INTRODUCTION

The year 2005 was the warmest on record.[1] The concentration of carbon dioxide currently in our atmosphere is nearly thirty percent higher than it was a century ago.[2] New studies reveal that the polar ice cap is melting at a rate of nine percent a year, the ice's thickness having thinned forty percent since 1960.[3] And, in the wake of hurricanes Katrina and Rita, concerns that global warming will create more frequent and violent natural disasters appear real and ominous.[4]

Not only do worldwide observations confirm the ineluctable process of global warming, even those companies who produce significant amounts of greenhouse gases have acknowledged that anthropogenic climate change poses a significant problem for the world.[5] And, climate scientists are essentially unanimous in their conclusion that it is human production of greenhouse gases (GHGs), like carbon dioxide, from the burning of fossil fuels driving this climate change, rather than natural, cyclical climate shifts. Yet, for all the evidence and general consensus on the source of the problem and its ultimate consequences for the globe, the largest producer of GHGs, the United States, has done surprisingly little to address the issue.

A. The CAA Approach

The most natural legal framework in the United States to address global warming and greenhouse gases would appear to be the Clean Air Act (CAA).[6] Under the Act, the Environmental Protection Agency (EPA) has the authority to regulate air pollutants that pose a threat to human health or the

[1] J. Hansen et al., Goddard Institute for Space Studies, NASA, Global Temperature Trends: 2005 Summation, http://data.giss.nasa.gov/gistemp/2005/ (last visited Apr. 15, 2007).

[2] The Earth Institute at Columbia University, Intro to Climate Change, http://www.earth.columbia.edu/crosscutting/climate.html (last visited Apr. 15, 2007).

[3] *Id.*

[4] Geophysical Fluid Dynamics Laboratory, Nat'l Oceanographic & Atmospheric Admin., Global Warming and Hurricanes, http://www.gfdl.noaa.gov/~tk/glob_warm_hurr.html (last visited Apr. 15, 2007).

[5] *E.g.*, Chevron, Social Responsibility: Environment, http://www.chevron.com/social_responsibility/environment/ (last visited Apr. 15, 2007) ("We recognize that the use of fossil fuels has contributed to an increase in greenhouse gases—mainly carbon dioxide and methane—in the earth's atmosphere."); Duke Energy, Duke Energy Position on U.S. Climate Change Policy, http://www.duke-energy.com/environment/climate-change/duke-energy-position.asp (last visited Apr. 15, 2007) ("Most scientists believe that greenhouse gas emissions from human activities are influencing the earth's climate . . . . Duke Energy shares that view.")

[6] 42 U.S.C. §§ 7401–7671q (2000).

environment.[7] Currently, the CAA addresses toxic substances like lead and mercury, as well as particulate matter that can cause respiratory and visibility problems.[8] Congress has delegated the authority to EPA to determine what pollutants ought to be covered under the CAA—when, in EPA Administrator's "judgment [a substance] cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare," the administrator shall designate the substance as an air pollutant under the CAA.[9] Once EPA has listed a substance as an air pollutant, the CAA allows the agency to set emission levels on both stationary sources, like factories, and mobile sources, like cars and trucks.[10] Before any of these regulations can occur, however, the substance must be defined as an air pollutant. Without this designation, a substance will remain beyond the CAA's reach.

In 2003, EPA rejected a petition from interested parties and the comments of numerous states, and it decided not to list carbon dioxide as an air pollutant.[11] The agency decided that while carbon dioxide might pose some risks to human health and welfare, EPA neither had the statutory authority to regulate the substance or the belief that it was the type of substance Congress intended to reach under the CAA.[12] In response, a number of states, environmental organizations, and other interested parties sued EPA seeking court intervention to force EPA to include carbon dioxide as an air pollutant.[13] The D.C. Circuit found for EPA, but it divided three ways.[14] One judge believed that the plaintiffs lacked standing, one believed that the CAA did not obligate EPA to list carbon dioxide, while the final

[7] *See id.* § 7408(a)(1)(A) (stating that EPA Administrator shall publish a list of air pollutants "which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare").

[8] Both lead and particulate matter are criteria air pollutants for which "national ambient air quality standards" have been established. *See* EPA, National Ambient Air Quality Standards (NAAQS), http://www.epa.gov/air/criteria.html (last visited Apr. 15, 2007); *see also* 42 U.S.C. § 7412(c)(6) (2000) (listing mercury as a hazardous air pollutant).

[9] *See* 42 U.S.C. § 7408(a)(1)(A)–(B) (2000) (explaining that EPA administrator shall publish and revise periodically a list of air pollutants "which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and come from "numerous or diverse mobile or stationary sources").

[10] *See id.* § 7408(a)(1)(B) (explaining that the administrator is to create a list of air pollutants if "the presence of which . . . in the ambient air results from numerous or diverse mobile or stationary sources"); *see also id.* § 7409(1)(A) (stating that the administrator shall publish a "national primary ambient air quality standard" and a "national secondary ambient quality standard" "for each criteria air pollutant for which air quality criteria have been issued").

[11] *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,923 (Sept. 8, 2003) (explaining EPA's decision to deny the petition from the interested parties); Massachusetts v. Envtl. Prot. Agency (*Massachusetts*), 415 F.3d 50, 51-52 (D.C. Cir. 2005) (identifying the states urging EPA to regulate carbon dioxide).

[12] *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,925 (explaining that "the CAA does not authorize EPA to regulate for global climate change purposes"); *see also id.* at 52,927 (explaining that "congressional actions confirm that Congress did not authorize regulation under the CAA to address global climate change").

[13] *Massachusetts*, 415 F.3d at 53.

[14] *Id.*

judge believed that the plaintiffs did have standing and that carbon dioxide met the statutory requirements of an air pollutant, thus triggering EPA's duty to regulate it under the statute.[15]

B. Common Law to the Rescue?

Without a statutory tool to address the causes of global warming, states, cities, and citizens' groups concerned with the effects of climate change turned to common law.[16] Alleging that carbon dioxide emissions were creating a public nuisance by causing global warming, the plaintiffs sued the ten largest carbon dioxide-emitting power companies in the United States in federal court.[17] The plaintiffs argued that global warming is causing serious harm to the public through rising oceans, more violent storms, ecological damage, and other damage to public and private resources.[18] The plaintiffs traced these harms directly to carbon dioxide emissions, like those of the defendants.[19] As the defendants' emissions were traveling interstate, creating harms across the United States, the plaintiffs brought the suit under federal common law.[20]

On September 22, 2005, the court dismissed the public nuisance suit. The court, *sua sponte*, rejected the case because it deemed the issue to be a political question, and thus not fit for judicial review.[21] In part, the court based this decision on the defendants' argument that "there is no recognized federal common law cause of action to abate greenhouse gas emissions that allegedly contribute to global warming."[22] Without such law, the court would be left to fabricate and apply wholly new policy decisions, which could threaten the Constitutional divide between the three branches of federal government.[23]

The plaintiffs have appealed this decision to the Second Circuit, arguing, in part, that this holding ignores the history of federal common law in the context of interstate air pollution.[24] A century ago, the Supreme Court held that federal common law did provide a rule of decision for a public nuisance caused by interstate air pollution.[25] While the court would have to update the rule and apply it to the facts presented in the case, this kind of judicial application of common law is standard.[26]

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15 *Id.*

16 Connecticut v. Am. Elec. Power Co., Inc. (*AEP, Inc.*), 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

17 *Id.*

18 Complaint at 2–3, *AEP, Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (Nos. 04 Civ. 5669, 04 Civ. 5670).

19 *Id.*

20 *AEP, Inc.*, 406 F. Supp. 2d at 270.

21 *Id.* at 274.

22 *Id.* at 270.

23 *Id.* at 272.

24 *Id.*

25 Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907).

26 *E.g.*, Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91 (1972) (holding that federal common law was flexible to address issues of interstate water pollution).

In deciding this case, the Second Circuit must first determine whether common law provides a valid rule of decision for this type of interstate air pollution case, or whether the lower court was correct that there is no law to apply. Even if the Second Circuit finds that common law could provide an appropriate rule of decision, it will then need to decide if the common law remains viable, or if Congress has displaced the preexisting common law with legislation. If the plaintiffs receive a favorable outcome, they will need to prove their nuisance case in the district court below, a subject this Comment does not address.[27]

Although the ultimate outcome of the plaintiffs' case is uncertain, it seems likely that federal common law is an appropriate body of law for their nuisance claim. Although federal courts, unlike state courts, are not courts of general jurisdiction, they may create and apply federal common law where interstate issues dominate and the laws of one state would be inadequate or inappropriate to address the problem.[28] So as to the first issue before the court, it appears that federal common law would be correct. The more difficult question is whether the common law for air pollution remains viable in the face of the CAA.

Federal courts retain the ability to craft law to address federal questions only when Congress has not already done so.[29] Thus, for the plaintiffs to win, they will need to demonstrate that the CAA does not displace the common law. While the lower court spent little time on the issue of displacement, it appears to have applied the wrong test to determine the vitality of common law.[30] This misapplication is not surprising, as scholarly literature demonstrates that the relationship between federal statutory and common law is not a simple issue. Professor Merrill, for example, in his recent article on global warming, analyzed the extent to which the CAA displaces federal common law.[31] Rather than applying the federal common law displacement test discussed below, Professor Merrill uses a state law preemption test, where the analysis revolves around conflict and field preemption.[32] He concludes that there is a "presumption against judicial lawmaking," and so statutes are assumed to displace the common law.[33] Professor Merrill is undoubtedly correct that this presumption holds true in most situations. But, as the Supreme Court has clarified in a series of

[27] Plaintiffs will need to demonstrate that the global warming of which they complain is in fact causing them injury. Then, they will need to prove not just that the type of carbon dioxide emissions from the defendants' plants are causing this harm, but that the defendants are actually causing the harm. Finally, in order to satisfy standing requirements, the plaintiffs will need to demonstrate that the court has the ability to remedy the situation. In other words, the plaintiffs will have to show that they would gain at least partial remedy of the harms through a favorable decision.

[28] *Milwaukee I*, 406 U.S. at 104–05.

[29] *Id.* at 107.

[30] *AEP, Inc.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005).

[31] Thomas W. Merrill, *Global Warming As a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293 (2005).

[32] *Id.* at 311–15.

[33] *Id.* at 314.

cases, the presumption is actually reversed when the federal common law predates legislative action.[34]

Part of the confusion in this area of the law stems from the Supreme Court's use of language in its opinions. In *City of Milwaukee v. Illinois* (*Milwaukee II*),[35] for example, the Court discusses how federal statutory law can "pre-empt" the federal common law. In other cases, however, the Court describes this process as "displace[ment]," to stress the distinction from state law preemption.[36] As a result of the Court's inconsistent language, the proper test can appear rather unclear. Thus, while Professor Merrill is correct that "*Milwaukee II* is ambiguous as to what the standard for displacement of federal common law should be," later opinions clarify the test.[37]

In order to set the displacement discussion on sound legal footing, Part II of this Comment will begin by examining the Supreme Court's jurisprudence on the relationship between federal statutory law and federal common law, and how displacement of federal common law is separate and distinct from the preemption of state law. Part III will then examine how the CAA and other federal legislation interact with the common law at issue in this case, to determine what, if any, of the common law remains. Ultimately, in Part IV, the Comment concludes that while the plaintiffs in this case may have a difficult time establishing other elements of their case,[38] they do have valid common law on which to rely, contrary to the district court's finding.

II. THE CONTINUED ROLE OF FEDERAL COMMON LAW

This Part examines the current role of federal common law. First, it appears that federal law properly governs this case, and that state law would not be appropriate to address such interstate issues. The second, and more complicated issue this section examines is whether federal common law remains viable in the realm of interstate air pollution in the face of the CAA and other statutory schemes. While Congress's laws and policy choices are paramount, before abandoning federal common law, courts must determine whether Congress intended to displace the judge-made law or whether it continues as a separate rule of decision. Although the CAA and other legislation present generally comprehensive remedial schemes, as currently interpreted, it appears that they do not displace federal common law.

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34 United States v. Texas, 507 U.S. 529, 543 (1993).

35 451 U.S. 304 (1981).

36 *Id.* at 317 n.9.

37 Merrill, *supra* note 31, at 311.

38 For example, the plaintiffs may have a difficult time establishing the redressability prong of the standing requirements, because the defendants, combined, only produce approximately 10% of the world's carbon dioxide. Thus, 90% would continue, and at the rate of carbon emissions growth, the reductions in carbon emissions would be lost within a few years. However, this is an issue for another Comment.

A. The Role of Federal Common Law

Since the Supreme Court decided *Erie Railroad v. Tompkins*,[39] the application of federal common law has been confined to a narrow set of issues. In *Erie*, the Supreme Court held that federal courts cannot craft and apply federal common law to issues properly governed by state law. When a case is in federal court on diversity jurisdiction, the court must apply the relevant state law, if it exists, and cannot create its own federal common law.[40] This decision significantly limited the role of federal common law. Yet, as subsequent Supreme Court holdings demonstrate, federal common law remains alive in cases presenting federal issues.[41] For cases where federal or interstate issues predominate, such that no state law could properly apply, courts apply federal law.[42]

Interstate air pollution appears to present an issue for federal law. Because it is a conflict between states over harms flowing across state lines with broad implications for the rest of the Union, the law of a single state cannot provide the proper decisional framework. As Alexander Hamilton stressed, "[w]hatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control."[43] The *Erie* Court's concern for the uniformity of law and the role of states is not undermined through the application of federal law.

Indeed, federal courts have often applied federal common law to interstate pollution. For example, in 1900 the State of Missouri asked the Supreme Court to exercise its original jurisdiction in a suit over water pollution flowing from Illinois.[44] Missouri claimed that Illinois's reversal of the Chicago River was causing a nuisance by sending Chicago's sewage

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[39] 304 U.S. 64 (1938). The issue in *Erie* was whether the Tenth Amendment allowed federal courts to craft federal common law when presiding over a case based on diversity jurisdiction. The Tenth Amendment reserves to the states all powers not delegated to the federal government. Thus, unless the Constitution gives the federal government authority to act, state law applies. Prior to *Erie*, federal courts applied federal common law by holding that state common law was not actually law made by the state (but was rather an independent body of law that could be interpreted by federal judges). Thus, the Tenth Amendment did not prohibit federal common law. After *Erie*, the Court held that state common law was the proper rule of decision. In deciding that federal courts had to apply state law, the Court aimed to discourage forum shopping and promote continuity of law. Otherwise, parties could decide what law to apply merely by going to the federal courthouse rather than the state court.

[40] *Id.*

[41] *See, e.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (holding federal common law is still viable, in the absence of congressional action, where the interests of the federal government are at issue); United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973) (holding that interstitial federal law-making is a valid exercise for federal courts); *Milwaukee I*, 406 U.S. 91 (1972) (holding federal common law was the appropriate source of law for interstate issues that posed important federal issues).

[42] *See, e.g.*, *Milwaukee I*, 406 U.S. 91 (1972); Astoria Fed. Sav. & Loan v. Solimino, 501 U.S. 104 (1991) (holding that Congress acts against a background of federal common law and so federal courts may assume that this common law applies, "except 'when a statutory purpose to the contrary is evident'").

[43] THE FEDERALIST NO. 80 (Alexander Hamilton).

[44] Missouri v. Illinois, 200 U.S. 496, 519 (1906).

downstream to the Mississippi River. Although the Court ruled in favor of Illinois, it did recognize that federal common law was the proper framework for analyzing Missouri's public nuisance claim.[45]

Although *Missouri v. Illinois*[46] was decided before *Erie*, the Supreme Court has found that federal common law continues to apply to cases of interstate pollution, even post-*Erie*. In 1972, for example, the Supreme Court recognized that federal common law was the correct law to address interstate water pollution in the first suit between the City of Milwaukee and Illinois, *Milwaukee I*.[47] At issue again in that case was sewage flowing into interstate waters, this time from Wisconsin cities to the shores of Illinois. Justice Douglas, writing for a unanimous Court, noted that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law."[48] Thus, the Court concluded that "[t]he question is whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of 33 U.S.C. § 1331(a). We hold that it does."[49] In other words, because there was "an overriding federal interest in the need for a uniform rule of decision . . . [and] the controversy touches basic interests of federalism," federal law had to apply.[50] Although the Court declined to exercise original jurisdiction over the suit, it directed the case to district court, where federal common law of nuisance would be applied.[51]

The Court's application of federal law to interstate issues continued even after its decision to allow state law govern a nuisance suit over pollution traveling from New York to Vermont across Lake Champlain.[52] In *International Paper Co. v. Ouellette* (*International Paper*),[53] the Court held that the plaintiffs, Vermont citizens, could bring a nuisance suit against polluters in New York, but only under New York law. The Court arrived at this decision, not by overriding its past jurisprudence of applying federal law to interstate pollution, but because the Clean Water Act (CWA) explicitly created a role for state law within the federal scheme.[54] Thus, the Court determined that the federal law would apply, and that the CWA directed the Court to apply New York law as part of the CWA's remedial scheme.[55] *International Paper* demonstrates that federal law governs these types of controversies, but that Congress can delegate this authority, in limited instances, to states.[56] Ultimately, however, state law applied only because it had been explicitly included in the federal law.[57]

45 *Id.* at 522.
46 200 U.S. 496 (1906).
47 *Milwaukee I*, 406 U.S. 91 (1972).
48 *Id.* at 103.
49 *Id.* at 99.
50 *Id.* at 105 n.6.
51 *Id.* at 108.
52 Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987).
53 Id. at 487.
54 *Id.* at 489.
55 *Id.* at 497.
56 *Id.* at 488–91.
57 *Id.*

In the context of air pollution, the Supreme Court has recognized that federal common law governs interstate nuisance cases.[58] For example, Georgia, alleging the sulfur produced by an upwind and out-of-state metals smelter was causing harm to its forests and citizens, brought suit under federal common law to abate the nuisance.[59] The Supreme Court found that Georgia did state a valid claim of nuisance under federal common law, and granted the state's request for injunctive relief. Although the Court delayed the injunction, giving the defendant time to remedy the nuisance without complete cessation of its activity, it found that the interstate nature of the claim required federal law.[60] While this case pre-dates *Erie*, the logic for applying federal law remains, as the interstate nature of the nuisance poses similar federal issues to those in *Milwaukee I*. Thus, *Georgia v. Tennessee Copper Co.*[61] demonstrates that federal courts have enunciated a federal common law of nuisance in the air pollution context. The next question is whether this common law survives in the face of congressional action on air pollution and climate change.

B. Statutory Displacement

Even if the federal interests are paramount in interstate air pollution, Congress, and not the courts, has the last word in shaping federal law.[62] When Congress legislates, the resulting laws prevent federal courts from applying federal common law to remake Congress's policy choices.[63] Before removing themselves completely from the law-making field, however, federal courts must determine the extent to which the new law actually replaces federal common law. Where Congress has not legislated, federal courts retain a limited ability to create or apply common law to deal with federal questions presented by a lawsuit. Even where Congress has legislated, "the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts."[64] Thus, before rejecting a claim based on federal common law, a court must determine if the legislation leaves interstices for the judge to fill.

How much common law a statute displaces is determined through a two-part analysis. First, if legislation precedes common law, "courts are not free to 'supplement' Congress'[s] [enactment]."[65] In such cases, courts may only add law to areas left unaddressed by the statutory scheme, as courts presume that Congress intended its statute to be the sole rule of law.[66]

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58 Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).

59 *Id.* at 236.

60 *Id.* at 239.

61 206 U.S. 230 (1907).

62 Mobile Oil Corp. v. Higgenbotham, 436 U.S. 618 (1978); *Milwaukee II*, 451 U.S. 304 (1981).

63 *E.g.*, *Milwaukee II*, 451 U.S. at 323–33 (discussing indirect evidence of congressional intent regarding the continued availability of federal common law remedies under the statute at issue).

64 United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973).

65 *Mobile Oil Corp.*, 436 U.S. at 625.

66 United States v. Texas, 507 U.S. 529, 534 (1993).

Second, if Congress legislates against the background of preexisting common law, the opposite presumption prevails. Courts in this situation are to presume that Congress intended its legislation to enhance the common law rules in specific areas, but to leave the rest of the existing common law rules in place to fill the gaps left in the legislative framework.[67] Congress can displace preexisting common law, but absent an explicit desire to do so, courts are to continue applying the common law unless the statute specifically addresses the issue before the court.[68]

1. When Statutes Pre-Date Common Law

The Constitution provides that legislative authority "shall be vested in a Congress of the United States."[69] This exclusive lawmaking authority, however, is not absolute. As Congress cannot provide law for every federal issue that may arise, federal courts possess the authority to craft necessary rules of decision.[70] Yet, as the Supreme Court has held, once the legislature acts, "the need for such an unusual exercise of lawmaking by federal courts disappears."[71]

When parties ask courts to create new common law rules of decision or remedies, courts will presume that existing legislation leaves no room for courts to add new elements. This is so because where Congress has created comprehensive schemes, it has already made its policy choices through the legislative process. Were courts to be free to remake the law, they could "fashion new remedies that might upset carefully considered legislative programs."[72] This concern underlies the Supreme Court's decision in *Northwest Airlines, Inc. v. Transportation Workers Union of America*[73] to reject the labor union's request for the Court to imply a right of contribution into the Equal Pay Act of 1963 and the Civil Rights Act of 1964.[74] The Court declined the invitation to add a remedy to the already comprehensive scheme because it was "satisfied that it would be improper for us to add a right to contribution to the statutory rights that Congress created."[75]

When Congress has legislated in an area, courts may only add their own law when it is clear Congress has not addressed the particular issue.[76] Even if Congress is silent on an issue, the court may fill that silence only if Congress did not intentionally leave out a remedy.[77] As a result, there is a heavy presumption against courts creating law once Congress has acted in an area, as courts ought not undo the delicate balances the legislature has struck.

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67 *Id.*
68 *Id.*
69 U.S. CONST. art. I, § I.
70 *E.g.*, United States v. Little Lake Misere Land Co., 412 U.S. 580, 595 (1973).
71 *Milwaukee II*, 451 U.S. 304, 314 (1981).
72 Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 97 (1981).
73 451 U.S. 77 (1981).
74 *Id.*
75 *Id.*
76 *Little Lake Misere Land Co.*, 412 U.S. 580 (1973).
77 *Nw. Airlines, Inc.*, 451 U.S. at 97.

2. When Common Law Comes First

The concerns about disrupting established law, however, are reversed when Congress creates new law in an area already governed by judge-made rules of decision. As long ago as *Fairfax's Devisee v. Hunter's Lessee*,[78] the Supreme Court has recognized the importance of retaining long-established common law rules. When Congress legislates against a backdrop of preexisting federal common law, the presumption in favor of retaining long-standing principles of law promotes continuity in the law and avoids creating inconsistencies.[79] The concerns that motivate courts to refrain from adding to comprehensive legislative programs produce opposite outcomes when courts have preceded the legislature in fashioning rules of decision.[80] Thus, when Congress legislates in an area already governed by common law, "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'"[81] In such situations, Congress has decided to enhance the common law. Doing away with the underlying common law completely could undermine the very goals Congress sought to further. And, enhancing certain areas of the law certainly does not imply a congressional desire to do away with other parts of the law.

The Supreme Court's most recent affirmation and application of this cannon of statutory construction illustrates how the courts are to manage the relationship between statutory and common law.[82] In *United States. v. Texas*,[83] the Court analyzed the displacement effect of the Debt Collection Act. In this case, the U.S. Department of Agriculture sued Texas under a long-standing common law principle to collect interest on debts owed to the agency.[84] Texas, which had incurred a debt to the federal government through the food stamp program, argued that the Debt Collection Act,[85] which comprehensively regulates how the government may collect debts, displaced the common law in this area.[86] The Act authorizes agencies to collect interest from "persons," but is silent on interest obligations from "states."[87] Texas argued that the omission of "states" indicated that Congress intended to allow states to avoid interest payments, even though preexisting common law had allowed its collection from all parties, including states.[88] Additionally, the state asserted that the "presumption favoring retention of existing law is appropriate only with respect to state common law or federal

78 11 U.S. (7 Cranch) 603, 623 (1812).
79 United States v. Texas, 507 U.S. 529, 529 (1993).
80 *Id.* at 534.
81 Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).
82 *Texas*, 507 U.S. at 529.
83 507 U.S. 529 (1993).
84 *Id.* at 530–31.
85 31 U.S.C. § 3717 (2000).
86 *Texas*, 507 U.S. at 534–35.
87 31 U.S.C. § 3717(a)(1) (2000).
88 *Texas*, 507 U.S. at 534–35.

maritime law."[89] Texas concluded that because Congress did not include states among those obligated to pay interest under the Debt Collection Act, the statute displaced the federal agency's common law right to collect prejudgment interest.[90]

The Court disagreed. Chief Justice Rehnquist, writing for an 8-to-1 majority, began by reaffirming the presumption of retaining common law.[91] When Congress passed the Debt Collection Act of 1982, federal courts had already developed rules of decision governing interest payments on debts owed to the federal government.[92] As a result, the Chief Justice noted that when Congress legislates in an area already governed by long-established and familiar principles, "[it] does not write upon a clean slate."[93] In this situation, it is not only appropriate to assume Congress knows what the court-created standards are, but that these standards continue in force until Congress takes action to displace them.[94] Absent any explicit common law displacement provision in the statute, Texas had to demonstrate that the continued application of the common law would conflict with the statutory scheme, or that Congress desired the legislation to be the sole means to address the issue.[95] Here, the Court concluded that the statute's mere silence on the issue of state liability for prejudgment interest did not demonstrate an intention to displace the common law rule.[96]

3. When Is Statutory Intent to Displace Evident?

Of course, even where there is preexisting common law, Congress still can displace it, leaving statutory law as the sole rule of decision. Although the presumption is in favor of retaining established law, when Congress explicitly says that legislation is meant to displace common law, or the statute speaks "directly to [the] question" otherwise answered by federal common law, the common law must give way to congressional policy.[97] It is straightforward for courts to find displacement when Congress specifically expresses this intent. In the absence of an express intent to displace, however, courts are left with a more difficult task of determining if legislation meets the standard of "directly addressing" an issue such that it eliminates the formerly governing common law. Although the Supreme Court has not enunciated an exact standard for determining the preemptive scope of legislation, case law demonstrates that Congress must do more than simply legislate generally in an area to

89 *Id.* at 534.

90 *Id.*

91 *Id.* at 535.

92 *Id.*; *see* West Virginia v. United States, 479 U.S. 305 (1987) (holding West Virginia liable for prejudgment interest owed to the Federal Government for relief money provided under the Disaster Relief Act).

93 *Texas*, 507 U.S. at 534.

94 *Id.*

95 *Id.*

96 *Id.* at 534–36.

97 *Milwaukee II*, 451 U.S. 304, 315 (1981).

displace common law. The Court has found displacement only where existing common law directly conflicts with the statute.

The relationship between the legislative history and the jurisprudential development of displacement in the CWA context is particularly illustrative of the Court's approach to statutory superiority. In 1972, the Supreme Court decided the first of two cases brought by the State of Illinois against Milwaukee and other cities in Wisconsin for creating a public nuisance in Illinois by discharging sewage into Lake Michigan.[98] While the Court declined to exercise its original jurisdiction in *Milwaukee I*, it did hold that Illinois could bring its common law suit in a district court, as the 1965 version of the CWA did not displace the existing common law of nuisance for interstate water pollution.[99] The Court reasoned that because the 1965 version of the CWA then in place was entirely voluntary, structured around incentives to encourage states to deal with the problems of water pollution, the common law survived this legislation.[100] Without federal enforceability or any mandatory standards, the Court concluded that this legislative structure did not evince congressional desire to occupy the field to the exclusion of common law.[101]

Five months after the *Milwaukee I* decision, Congress radically altered the CWA.[102] The revisions divided sources of water pollution into two realms, point and nonpoint source pollution,[103] and created complex programs that dealt comprehensively with point sources of pollution.[104] Most notably, Congress created the National Pollution Discharge Elimination System (NPDES) permit program to regulate point sources.[105] Under this program, the "discharge of any pollutant by any person" from a point source to waters of the United States is illegal, unless it has received a NPDES permit.[106] Congress gave EPA the permit-writing task,[107] and created a structure of cooperative federalism to encourage states to become "authorized" to manage the permit process for sources within their borders.[108] Issued either by the state or EPA, the NPDES permit system includes detailed limits and controls on the

98 *Milwaukee I*, 406 U.S. 91 (1971).

99 *Id.* at 103–04.

100 *See id.* at 102–03 (noting states are not required to regulate under the CWA and federal courts may fashion common law "where federal rights are concerned").

101 *Id.* at 107.

102 33 U.S.C. §§ 1251–1387 (2000); *Milwaukee II*, 451 U.S. at 314.

103 33 U.S.C. § 1362 (2000). A point source is defined as being "any discernible, confined and discrete conveyance" of pollutants to waters of the United States. This includes pipes, ditches, vessels, and other such sources. *Id.* § 1362(14). Every other source of water pollution that does not meet the point source definition is treated as a "nonpoint source." *See, e.g.*, *id.* § 1329. Nonpoint sources include unconfined storm or agricultural runoff.

104 *See, e.g.*, *id.* §§ 1311, 1342 (requiring technology-based effluent limitations and prohibiting all discharges of pollutants into navigable waters without a permit).

105 *Id.* § 1342.

106 *Id.* § 1311(a).

107 *Id.* § 1342(a).

108 *Id.* § 1342(b).

discharge of effluent from the permitted facility, and controls how future effluent reduction and management will be achieved.[109]

As a result of this comprehensive revision of the statutory framework, the Supreme Court found in *Milwaukee II* that the 1972 version of the CWA now did displace federal common law.[110] It held that the new legislation demonstrated Congress's desire to comprehensively regulate the field of water pollution and leave no room for other court-made rules.[111] The Court noted that EPA had issued NPDES permits to the defendant cities that contained detailed effluent limits.[112] As such, were the Court to fashion new restrictions on the point sources, it would essentially remake policy choices Congress and EPA had already made.[113] In other words, because Congress had already comprehensively addressed the issue before the Court, there was no longer a need for judge-made law. The Supreme Court reiterated this finding of displacement in a case two months later, saying "that the federal common law of nuisance has been fully pre-empted in the area of ocean pollution."[114] Thus, even though federal common law had preceded statutory solutions, because Congress created a new comprehensive legislative scheme, it displaced the preexisting common law.

4. But What Is the Scope of the Law's Displacement?

While it is clear that Congress always retains the authority to override common law with new legislation,[115] the real issue for a court is to determine how comprehensive a law is, and how much, if any, room it leaves for preexisting judge-made law. If a statute were truly "comprehensive," then there would be nothing left for common law to do. But, even comprehensive laws have boundaries. Common law ought to remain at the edges and in the interstices of even the broadest laws. Again, the jurisprudence surrounding the CWA and its relationship to common law provides a helpful example of this legal interaction.

The Court in *Milwaukee II* used very broad language to describe its holding.[116] It suggested that Congress had completely replaced common law in

109 *Id.* § 1342.

110 *See Milwaukee II*, 451 U.S. 304, 319 (1981) ("[T]he 1972 Amendment . . . establish[ed] 'a comprehensive program for controlling and abating water pollution.' The establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for the courts to attempt to improve on that program with federal common law." (citation omitted)).

111 *See id.* at 318–19 ("Congress'[s] intent in enacting the [1972] Amendment was clearly to establish an all-encompassing program of water pollution regulation.").

112 *Id.* at 319–20.

113 *See id.*

114 Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 11 (1981).

115 *See, e.g.*, *Texas*, 507 U.S. 529, 534 (1993) (finding that Congress must enact legislation that directly addresses a common law principle in order to abrogate that principle); *see Milwaukee II*, 451 U.S. 304 (holding that Congress's 1972 Amendment to the CWA supplanted any federal common law involving effluent limitations on discharges from treatment plants).

116 *Milwaukee II*, 451 U.S. at 317–20.

the realm of water pollution.[117] Apart from its sweeping characterization, however, the Court's logic rests on much narrower grounds. Then-Associate Justice Rehnquist explained that common law could not apply because it "would be quite inconsistent with [the NPDES] scheme if federal courts were in effect to 'write their own ticket' under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them."[118] In other words, the Court was concerned that, were it to add to the controls required by EPA through the NPDES permit, the Court would be remaking legislative decisions.[119] This language suggests that the Court's decision rested on the potential conflict between statutory and common law in the NPDES context, rather than the fact that the CWA is simply a broad statute.[120] Thus, read narrowly, *Milwaukee II* stands for the proposition that NPDES permits displace a federal court's ability to shape new remedies under nuisance law.

In its 2001 *In re Exxon Valdez*[121] opinion, the Ninth Circuit applied this narrower reading of *Milwaukee II*, and found that the CWA did not speak to every issue of water pollution, and thus left some interstices to be filled by common law.[122] At issue in the case was whether the CWA prevented the private plaintiffs from seeking damages outside of the CWA context for the harms they had suffered as a result of the massive oil spill in Prince William Sound.[123] The defendants argued that as the CWA provided a complete penalty structure and remedial scheme, it displaced all other related common law claims.[124] The CWA effective at the time of the spill limited civil penalties to $50,000 per incident, and allowed $250,000 per incident only where the government could show that the spill was the result of willful misconduct.[125] The Ninth Circuit disagreed that these provisions displaced federal common law, and held that the Act's penalties were different than those the plaintiffs sought.[126] While it acknowledged that "the question is not without doubt,"[127] the court found that the statutory penalty "is for damage to public resources, enforceable by the United States, and the monetary limit does not necessarily conflict with greater punitive amounts for private interests harmed."[128] The court allowed the common law claims to proceed, because, although the CWA is comprehensive, it did not directly answer the issue before the court. Drawing on jurisprudence after *Milwaukee II*, the court reasoned that "[w]here a private remedy does not interfere with administrative judgments (as it would have in *Milwaukee* [*II*]) and does not conflict with the statutory scheme (as it

117 *Id.* at 319–20.
118 *Id.* at 326.
119 *Id.*
120 *Id.* at 325–26.
121 *In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001).
122 *Id.* at 1230–31.
123 *Id.* at 1229–31.
124 *Id.*
125 33 U.S.C. § 1321(b)(6)(B) (1988) (repealed 1990).
126 *In re Exxon Valdez*, 270 F.3d at 1230.
127 *Id.*
128 *Id.* at 1231.

would have in *Sea Clammers*), a statute providing a comprehensive scheme of public remedies need not be read to preempt a preexisting common law private remedy."[129] As the fundamental test is whether Congress meant to displace preexisting common law, the court reasoned that the "absence of any private right of action in the Act for damage from oil pollution may more reasonably be construed as leaving private claims alone than as implicitly destroying them."[130]

The Ninth Circuit's narrower approach to displacement comports with the Supreme Court's *United States v. Texas*[131] holding. As discussed above, the eight-member majority in *Texas* held that, although the Debt Collection Act is comprehensive and does address many aspects of interest collection, it does not speak to the issue of whether interest can be collected from states. Thus, because the statute does not answer or address the specific question that was before the Court, the Court determined that Congress did not intend to displace the existing rules, and thus the common law survived subsequent legislation.[132]

While the Court's holding might appear at odds with its decision in *Milwaukee II*, in fact it helps to elucidate the Court's test and suggests that the narrow reading of *Milwaukee II* is correct. The comprehensiveness of a statute alone does not mean that it displaces common law in the entire field. The CWA is comprehensive, at least so far as it deals with point source pollution.[133] So, too, is the Debt Collection Act comprehensive in so far as it deals with interest to be collected from "persons."[134] But, because the Debt Collection Act does not address the collection of interest from "states" it does not eliminate the common law that does. Similarly, as the Ninth Circuit held, because the CWA does not address the specific issue of punitive damages for harm caused to private rights, the common law persists, even though the statute is very comprehensive in other areas.[135]

Ultimately, the Supreme Court's jurisprudence demonstrates that there is a bifurcated test for determining federal common law displacement. If a federal court is asked to add a remedy to supplement federal legislation, the presumption is that Congress has intended its scheme to be the sole rule for controversies in the area.[136] If, however, Congress legislates against a background of preexisting common law, courts are to presume that the common law rules continue to exist and augment the congressional structure.[137] In such a situation, in order for a statute to displace longstanding rules of decision, it must address the issue involved in the suit, or otherwise demonstrate Congress's desire for it to provide the sole rule of decision.

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129 *Id.*

130 *Id.*

131 *Texas*, 507 U.S. 529 (1993).

132 *Id.* at 534–36.

133 *Milwaukee II*, 451 U.S 304, 318–19 (1981).

134 *Texas*, 507 U.S. at 535.

135 *In re Exxon Valdez*, 270 F.3d at 1230–31.

136 Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 97 (1981).

137 *Texas*, 507 U.S. at 534.

III. THE CONTINUED VITALITY OF NUISANCE FROM INTERSTATE AIR POLLUTION

For the city, state, and citizen plaintiffs seeking relief from global warming through federal nuisance law, this relationship between common law and congressional acts will play a central role in their appeal to the Second Circuit. In order to proceed to the merits of their nuisance claim, the plaintiffs will need to demonstrate that Congress has not displaced the federal common law of interstate air pollution nuisance since the Court first applied it in 1907.[138] The lower court decided that the case was unjusticiable, in large part because it believed there was no federal common law to apply.[139] The most recent jurisprudence and agency action, however, suggest that the common law does survive subsequent legislation, and the plaintiffs have correctly invoked federal nuisance to redress the defendants' carbon emissions.

The most likely congressional action to displace the plaintiffs' nuisance claims is the CAA. In the only case that has addressed the CAA's displacement force, the Second Circuit found that the CAA displaces common law, at least to the extent that the CAA already regulated a source.[140] The court held that common law cannot be used to make a source reduce its emissions below the amount authorized by its CAA permit.[141] In other words, if the CAA allows a party to emit a particular amount of pollution, common law no longer applies to that emission, as Congress has addressed the issue. The question remains, however, if the CAA also prevents common law from addressing pollution left unregulated by the CAA. As EPA has found that the CAA does not allow the regulation of GHGs and global warming, and the D.C. Circuit has upheld this decision,[142] it is likely that the CAA, as currently interpreted and implemented,[143] leaves any common law in this area untouched.

Congress has, however, specifically addressed climate change and GHGs in other statutory programs. For example, Congress has authorized EPA to develop "nonregulatory strategies" to deal with substances like

138 Georgia v. Tenn. Copper Co., 206 U.S. 230, 230 (1907).

139 *AEP, Inc.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005).

140 New England Legal Foundation v. Costle, 666 F.2d 30 (2d Cir. 1981) (holding that plaintiff's common law claims for nuisance from pollution caused by the defendant using high sulfur fuel were precluded because EPA, working through the CAA, had already addressed the issue, and thus any court action would remake the policy decisions).

141 *Id.*

142 *Massachusetts v. Envtl. Prot. Agency*, 415 F.3d 50, 58 (D.C. Cir. 2005), *rev'd* 127 S.Ct. 1438 (2007).

143 Although both the agency and court found that the CAA does not reach carbon dioxide, or at least gives EPA the discretion to decide if it ought to regulate, these decisions are on tenuous grounds. Indeed, Judge Tatel's vigorous dissent in the case demonstrates that the decision that the CAA does not regulate GHGs is far from unanimous. Rather, as Judge Tatel's comprehensive explanation makes clear, the statutory language and apparent congressional intent seem to favor interpreting the statute to reach GHGs. *Massachusetts*, 415 F.3d at 69 (Tatel, J., dissenting). If that was the case, this suit under common law would be preempted. Of course, if that was the case, then this suit would be unnecessary, as the CAA would provide for GHG regulation.

carbon dioxide,[144] established a "national climate program" to study global warming,[145] and created research programs to develop our understanding of climate change.[146] While these provisions do suggest that Congress is aware of and interested in global warming, they do not demonstrate congressional intent to dispose of any other existing mechanisms to combat the emission of GHGs. Ultimately, this Comment concludes that none of the current statutory programs evince congressional intent to eliminate common law in this context,[147] and thus the plaintiffs in *Connecticut v. American Electric Power Co.* (*AEP, Inc.*)[148] likely have stated a justiciable claim under the judge-made law of nuisance.

A. The Clean Air Act

After EPA's recent decision not to regulate GHGs and the D.C. Circuit's opinion upholding the agency's decision, it is likely that the CAA does not displace common law in the area of GHG regulation. In 2003, EPA decided it had no authority to define carbon dioxide as an air pollutant under the CAA.[149] Even if it did have such authority, EPA determined that it would not exercise that authority.[150] In a very divided opinion, the D.C. Circuit upheld the decision not to regulate.[151]

While the Act does not directly address the issue of global warming, Congress did direct EPA to regulate "air pollutants" through a variety of mechanisms.[152] Before setting limits on emissions, EPA must determine what substances meet the definition of "air pollutant."[153] According to the statute, an air pollutant is defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant."[154] This definition, EPA concluded, did not, or should not, include GHGs, like carbon dioxide.[155]

144 42 U.S.C. § 7403(g) (2000).

145 15 U.S.C. § 2902 (2000).

146 *Id.* §§ 2931–38.

147 At least not as interpreted by EPA and the D.C. Circuit. *See Massachusetts*, 415 F.3d at 58 (describing the D.C. Circuit's agreement with EPA's interpretation that they are not required to regulate greenhouse gases).

148 *AEP, Inc.*, 406 F. Supp. 2d. 265 (S.D.N.Y. 2005).

149 Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Envtl. Prot. Agency Sept. 8, 2003)(notice of denial of petition for rulemaking).

150 *Id.*

151 *Massachusetts*, 415 F.3d at 58–59.

152 *See, e.g.*, 42 U.S.C. § 7409 (2000) (regulating air pollutants through national primary and secondary ambient air quality standards that must be attained and maintained).

153 *See id.* § 7408 (requiring publication of a list of air pollutants "for the purpose" of the national ambient air standards).

154 *Id.* § 7602(g).

155 Control of Emissions, 68 Fed. Reg. at 52,925. While the D.C. Circuit upheld EPA's decision not to regulate GHGs, its opinion is so fractured that it does not provide great help in understanding the statute. In *Massachusetts*, one judge believed that the CAA did not give EPA

For the plaintiffs in *AEP, Inc.*, EPA's 2003 rulemaking[156] and the court's agreement help to demonstrate that the CAA does not reach GHGs and thus cannot preempt the common law.[157] While *Massachusetts v. Environmental Protection Agency* (*Massachusetts*)[158] might have been a setback for those seeking a statutory hook to halt climate change, it strongly suggests that the CAA does not displace the common law in this area.[159]

1. EPA's Interpretation of the CAA and GHG Regulation

On October 20, 1999, the International Center for Technology Assessment and other environmental organizations petitioned EPA to exercise its regulatory power to address GHG emissions from motor vehicles.[160] After going through the process of notice and comment, "EPA conclude[d] that it cannot and should not regulate GHG emissions from U.S. motor vehicles under the CAA."[161] Not only did it find no authority to regulate GHGs from cars and trucks, but it also concluded that "[b]ased on a thorough review of the CAA, its legislative history, other congressional action and Supreme Court precedent, EPA believes that the CAA does not authorize regulation to address global climate change."[162]

EPA began its analysis of the CAA structure by noting the recent Supreme Court holding in *Food & Drug Administration v. Brown & Williamson*,[163] where the Court cautioned agencies to read their statutory authorizations narrowly, and to "be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of . . . such magnitude to an administrative agency."[164] With this admonition in mind, EPA looked at the CAA and its legislative history to determine if Congress would likely have intended EPA to recognize and regulate GHGs as "air pollutants."[165]

the authority to regulate carbon dioxide, and if it did that EPA may exercise its discretion not to regulate the GHG. 415 F.3d at 58. Another judge disagreed and found that the CAA creates a non-discretionary duty for EPA to regulate carbon dioxide. *Id.* at 82 (Tatel, J., dissenting). And the third judge believed that the plaintiffs lacked standing. *Id.* at 59 (Sentelle, J., dissenting in part and concurring). This Comment focuses on EPA's rulemaking, as it is the current rule addressing the CAA's GHG reach.

156 Control of Emissions, 68 Fed. Reg. at 52,925.

157 *Massachusetts*, 415 F.3d at 58 (majority opinion).

158 415 F.3d 50 (D.C. Cir. 2005), *rev'd* 127 S.Ct. 1438 (2007).

159 This is perhaps an appropriate moment for me to note that I do not necessarily believe that EPA or the D.C. Circuit are correct that the CAA does not mandate the regulation of carbon dioxide as an air pollutant. Judge Tatel's dissent is well reasoned and appears to cling more faithfully to the language and the intent of the CAA. That said, if the CAA does not reach carbon dioxide, and EPA is correct, then a consequence is that the CAA also does not displace common law, as will be discussed below.

160 Control of Emissions, 68 Fed. Reg. at 52,922–23.

161 *Id.* at 52,925.

162 *Id.*

163 Food & Drug Admin. v. Brown & Williamson, 529 U.S. 120 (2000).

164 *Id.* at 121 (2000).

165 Control of Emissions, 68 Fed. Reg. at 52,922–23.

The 1990 amendments to the CAA provide the most relevant guidance as to how Congress viewed carbon dioxide, its potential to cause global warming, and the appropriate federal response to the issue. While three provisions contain specific mention of global warming, none of them calls for more than further research and monitoring of GHGs. For example, Congress directed EPA to measure carbon dioxide emissions from utilities required to obtain Title V permits.[166] Congress also asked EPA to ascertain the "global warming potential" of substances that deplete stratospheric ozone, which does not include carbon dioxide.[167] And, finally, the amendments added section 103(g), which calls on EPA to develop "nonregulatory" strategies to demonstrate how to prevent the emission of a variety of air pollutants, including carbon dioxide.[168] None of these three provisions allows EPA to regulate GHGs or carbon dioxide. Indeed, section 103(g), the only provision of the three to specifically mention carbon dioxide, emphasizes that it authorizes only "nonregulatory" strategies, and concludes by reiterating that "[n]othing in this subsection shall be construed to authorize the implementation on any person of air pollution control requirements."[169]

EPA, in its denial of rulemaking, concluded that, although these amendments to the CAA suggest that Congress is aware of global warming concerns, it did not believe that it was yet appropriate to create federal GHG regulations.[170] Additionally, that Congress decided to *add* these GHG specific provisions to the CAA suggests that Congress did not believe that GHGs were already included the Act as of 1990.[171] And, as Congress added the sections and directed EPA to address GHGs outside of the typical air pollutant control mechanisms, this strongly suggests that Congress does not view GHGs as being air pollutants to be regulated by CAA.[172] Thus, EPA concluded that the CAA is not an appropriate legislative mechanism through which to address the concerns of global warming.[173]

As EPA has gone through notice and comment rulemaking, it is likely that the agency's construction of the CAA's scope is due *Chevron* deference.[174] Under this doctrine, a court is to defer to the agency's statutory interpretation, unless the term in the statute is clear on its face, or if the interpretation contradicts or is inconsistent with the statute.[175]

166 Clean Water Act, sec. 821, § 7651k, 104 Stat. 2699 (1990).

167 42 U.S.C. § 7671a(e) (2000).

168 *Id.* § 7403(g).

169 *Id.*

170 EPA noted that "[w]hile Congress did not expressly preclude agencies from taking regulatory action under other statutes, its actions strongly indicate that when Congress was amending the CAA in 1990, it was awaiting further information before deciding *itself* whether regulation to address global climate change is warranted and, if so, what form it should take." Control of Emissions, 68 Fed. Reg. at 52,927.

171 *Id.*

172 *Id.*

173 *Id.*

174 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 468 U.S. 837 (1984).

175 *Id.* at 842–43.

Although the *Massachusetts* court upheld EPA's decision, it appears that the term "air pollutant" does include GHGs, and thus EPA ought to regulate carbon dioxide under the CAA. However, if EPA and the D.C. Circuit are correct, and "air pollutant" does not allow the regulation of GHGs, then the courts should defer to the Agency's interpretation.[176] If this is the case, then the CAA does not speak to the potentially harmful effects of GHGs, and thus the statute cannot displace preexisting common law in this area.

2. Discretionary Delegation and Displacement

Even if EPA was incorrect, and the CAA did authorize it to regulate GHGs for their potential to create global warming, it is likely that the CAA still does not displace common law. Unless Judge Tatel's dissent is correct, that EPA must regulate carbon dioxide as an air pollutant,[177] EPA has a non-mandatory duty to list substances as air pollutants. Congress directed EPA to regulate emission, which, "in [its] judgment cause, or contribute to, air pollution."[178] This language led the D.C. Circuit to agree with EPA that the CAA did not mandate EPA to treat carbon dioxide as an air pollutant, even if it met the general characteristics Congress provided.[179] If Congress did give EPA the authority to reach global warming in the CAA, that kind of permissive, non-mandatory grant of administrative authority does not displace federal common law, at least until the agency actually acts on the grant of power.[180]

The most recent circuit court to analyze the statutory displacement of common law found that when Congress merely grants an agency the ability to make certain regulations, unless the agency does promulgate regulations, this does not displace preexisting federal common law.[181] In *United States v. Lahey ClinicHospital, Inc.* (*Lahey*),[182] the First Circuit had to determine the extent to which the Medicare Act displaced common law.[183] At issue in *Lahey* was whether the Medicare Act fully addressed how the federal government was to recoup Medicare overpayments. In attempting to prevent the Department of Health and Human Services from suing it under traditional common law authority, "Lahey contend[ed] that the Medicare Act is a 'comprehensive scheme' enacted by Congress that 'directly addresses' the United States' remedy for collecting overpayments, and therefore the need for the common law remedy 'disappears.'"[184] In particular, the hospital pointed to the fact that the Act authorizes the Department to make rules to address how to collect Medicare

176 *Id.* at 843–44.
177 *Massachusetts*, 415 F.3d 50, 67, 73 (D.C. Cir. 2005), *rev'd* 127 S.Ct. 1438 (2007).
178 42 U.S.C. § 7521(a)(1) (2000).
179 *Massachusetts*, 415 F.3d. at 57–58.
180 United States v. Lahey Clinic Hosp., Inc., 399 F.3d 1, 13–18 (1st Cir. 2005).
181 *Id.*
182 399 F.3d 1 (1st Cir. 2005).
183 *Id.* at 4.
184 *Id.* at 15.

overpayments. This, the hospital argued, illustrated Congress's desire for the Act to be the sole source of authority in dealing with Medicare issues.

The First Circuit disagreed. It held that "[a]lthough provisions of the Medicare Act expressly authorize the secretary to reopen initial payment determinations and to recoup overpayments administratively in certain circumstances, *see* 42 U.S.C. §1395g(a) and 1395gg, the statute does not displace the United States' long standing power to collect monies wrongfully paid through an action independent of the administrative scheme."[185] This made sense, the First Circuit reasoned, because until the agency took action, there would be no federal law to displace the common law.[186] Surely Congress would not mean to eliminate existing remedies merely by allowing the agency to take action in some cases where it saw fit.[187] Here, "the Secretary chose to allow for only particular remedies in the administrative scheme, an indication that the administrative scheme is not exclusive of other remedies elsewhere."[188]

Were, however, EPA to decide that the CAA did provide for the regulation of GHGs, this regulation would likely displace the common law. To determine if the EPA regulation did displace the common law, a court would need to proceed through a two-step process. First, it would need to ask if EPA had the authority to regulate GHGs under the statutory grant of authority. If the court found that the agency did, it would then have to determine if the regulations left room for common law. At this stage, the court would be guided by the analysis in *New England Legal Foundation v. Costle*[189] and find that the common law is displaced to the extent the Act and its regulations already limit the emission of the air pollutant in question. Thus, it is likely that were EPA to decide to regulate GHG emissions for their contribution to global warming, the need for common law would disappear, and only the statutory framework of the CAA would govern the issues of the interstate impacts of climate-changing air pollution. Yet, as EPA has not exercised any authority under the CAA to regulate GHGs, even if the statute authorized such regulation, the common law remains viable.

B. Other Laws Addressing Carbon Dioxide and Global Warming

If the CAA does not displace the federal common law of nuisance for interstate air pollution, the next question for the Second Circuit is whether any other statutes do. Although Congress has expressed its concern about climate change in other statutes, these programs do little more than encourage information development to guide future legislative acts. As Congress has not regulated global warming or GHGs in these statutes, it appears that the common law survives.

185 *Id.* at 16.
186 *Id.*
187 *Id.*
188 *Id.*
189 666 F.2d 30 (2d Cir. 1981); *see also supra* note 140 and accompanying text.

In 1978, Congress passed the National Climate Program Act.[190] The stated goal of the Act is to "establish a national climate program that will assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications."[191] While Congress expressed its interest in and concern about climate change, it did not take any action that would displace common law. Indeed, aside from directing the Secretary of State to declare an "International Year of Global Climate Protection" and to report on the current knowledge of climate change, the Act does little more than encourage research through monetary grants and other incentives.[192] As discussed above, the Supreme Court has already found that when a statute addresses an issue through research, it does not displace common law.[193] Thus, the National Climate Program Act leaves the common law in place.

Similarly, the Global Change Research Act of 1990[194] does not displace common law. Congress stated that the goal of the Act is to "provide for development and coordination of a comprehensive and integrated United States research program which will assist the Nation and the world to understand, assess, predict, and respond to human-induced and natural processes of global change."[195] Again, as the Act does not address the specific concerns of the plaintiffs in *AEP, Inc.*, but instead is aimed at developing scientific knowledge, the Act does not evince congressional desire to regulate the field or displace the common law.

IV. CONCLUSION

With the current agency and court opinions on the CAA, and its limited ability to address GHGs, the plaintiffs in *AEP, Inc.* likely have a valid claim of nuisance under federal common law. Although federal common law occupies a delicate position in the federal legal system, sandwiched between state law and federal statutory law, it can fill the interstices left in federal statutes, like those EPA believes Congress left in the CAA in regards to global warming.[196] When the issue presented in a case implicates fundamentally federal issues, as it does here, then federal law must control.[197] If there is no statutory law to govern the action, then the federal system demands that federal courts fashion new rules of decision to decide the issue.[198] As the Supreme Court has repeatedly noted, this type of judge-

190 Pub. L. No. 95-367, 92 Stat. 601 (1978) (codified at 15 U.S.C. § 2901 (2000)).

191 *Id.* § 3.

192 Pub. L. No. 100-204, §§ 1104–05, 101 Stat. 1407, 1409 (1987) (codified in scattered sections of 22 U.S.C.).

193 *See supra* notes 98–101 and accompanying text.

194 Pub. L. No. 101-606, 104 Stat. 3096 (1990) (codified at 15 U.S.C. § 2931 (2000)).

195 *Id.* § 2931(b).

196 Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003).

197 *See Milwaukee I*, 406 U.S. 91, 103 (1972) (stating that when "deal[ing] with air and water in their ambient or interstate aspects, there is a federal common law").

198 *See id.*; *see also, e.g.*, United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973)

made law carries with it the same force and effect as statutory law.[199] While the legislature has the authority to trump common law,[200] Congress must demonstrate its desire to displace long-standing judge-made rules.[201] Even after Congress addresses an area of concern, generally common law remains as a complimentary rule, acting as a backdrop to statutes.[202]

The global warming suit illustrates why this relationship between statutory and common law makes sense. Prior to the CAA, the Supreme Court recognized that citizens could seek redress under federal common law from harms caused by interstate air pollution.[203] If EPA and the D.C. Circuit are correct that the CAA does not mandate the regulation of carbon dioxide or other GHGs, it would be absurd to say that Congress intended to do away with the common law without specifically providing so in the legislation.

Congress certainly could do away with common law through legislation. In fact, many of the same plaintiffs in *Massachusetts* believed that the CAA *did* displace the common law for global warming pollution when they challenged EPA's decision not to regulate carbon dioxide and other GHGs.[204] If the plaintiffs were correct that the CAA required EPA to regulate carbon dioxide emissions, then there would be no common law for this suit. But, by denying the request to address carbon dioxide through the CAA, EPA cannot displace all other avenues of relief.

It is not surprising, however, that the plaintiffs have turned to common law as their last approach to global warming. The evidentiary hurdles and complexity of their case are much higher than they would have been had the CAA applied. For example, to prevail in their nuisance case, the plaintiffs will need to demonstrate that carbon dioxide emissions are causing global warming which poses a threat to the plaintiffs' well-being, and that the defendants' emissions in particular are causing their harm.[205] Were GHGs included as air pollutants under the CAA, the plaintiffs would not need to show harm from the defendants' emissions. Instead, EPA would set limits on the emissions, and regulate them as it does other air pollutants.[206]

(holding that the Migratory Bird Conservation Act's failure to explicitly indicate whether state or federal law should be applied in interpreting federal land acquisition agreements under the Act did not justify limiting the reach of federal law, stating that "the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts").

199 *Milwaukee I*, 406 U.S. at 100 (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 393 (1959) (Brennan, J., dissenting and concurring)) ("[federal common law] rules are as fully 'laws' of the United States as if they had been enacted by Congress"); *see also Texas*, 507 U.S. 529 (1993) (explaining the longstanding principle that statutes are presumed to retain long-established common-law principles).

200 *See Milwaukee II*, 451 U.S. 304, 317 (1981) (holding that the Federal Water Pollution Control Act displaced federal common law as applied to claims respecting discharges of untreated sewage into Lake Michigan and overflows from the Milwaukee sewage system).

201 *Texas*, 507 U.S. at 534.

202 *Id.*

203 Georgia v. Tenn. Copper Co., 206 U.S. 230, 230 (1907).

204 *Massachusetts*, 415 F.3d 50, 53 (D.C. Cir. 2005), *rev'd* 127 S.Ct. 1438 (2007).

205 *AEP, Inc.*, 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005).

206 *See* Clean Air Act, 42 U.S.C. §§ 7409, 7602 (2000) (providing for national primary and

While the evidentiary hurdles of common law may be higher, the result of a successful nuisance suit could be dramatic. Were carbon dioxide an air pollutant under the CAA, EPA could establish a flexible regulatory system that would be phased in over time. The remedy for a typical nuisance suit, however, is an injunction. The court must stop the nuisance-causing activity.[207] In the *Tennessee Copper* case, in which the State of Georgia successfully sued a mining company over its sulfur emissions, which were destroying the state's forests, the Supreme Court forced the mining company to cease all sulfur emissions within "a reasonable time."[208] As the evidence available now suggests that carbon dioxide emitted today will remain in our atmosphere for decades to centuries,[209] the fastest way to avert or slow global warming would be to order the defendants to shut down their plants and cease emitting GHGs. Even without such a drastic result, a successful nuisance claim would be much more difficult to implement and monitor than the regulation through the CAA.

This suit illustrates the important function common law can play in our legal system. Not only does it act as a catch-all that provides some rule of decision when Congress has yet to act on an issue, it can also signal Congress that it ought to address an issue. If the plaintiffs in this case are successful, the results for the defendants, and others like them, could be quite drastic. For the plaintiffs, too, the solution would be less than ideal, as they would have to bring other suits to address other sources of GHGs. The rather messy outcome of a successful common law suit could act as an incentive for congressional action. Perhaps that action would simply eliminate common law carbon dioxide nuisance claims altogether. But, perhaps it would force parties to negotiate and add carbon dioxide regulation into the CAA. In either case, courts ought to protect the vitality of common law to preserve its role in the development of environmental jurisprudence.

secondary ambient air quality standards).

[207] *See, e.g.*, Sullivan v. Royer, 13 P. 655, 656 (1887) (holding that enjoining public nuisance is an appropriate remedy).

[208] *Tenn. Copper Co.*, 206 U.S. at 239.

[209] Intergovernmental Panel on Climate Change Working Group I, Summary for Policymakers: The Science of Climate Change, http://www.ipcc.ch/pub/sarsum1.htm. (last visited Apr. 15, 2007).