The Obsolescence of Environmental Common Law

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Obsolescence, the process of becoming obsolete, is a staple of our lives in the twenty-first century. As new and better technologies develop at a faster and faster pace, our existing technologies—smartphones, televisions, computers—become obsolete almost as soon as they are released to the public. Entire technologies, like the fax machine, emerge rapidly and then disappear just as quickly with the advent of a faster and easier alternative. With respect to technology, we have come to expect, even welcome, obsolescence, as it carries with it better alternatives.

The law, however, is another matter. By its very design, it is meant to change slowly. Justice Benjamin N. Cardozo once said, “the encroachments [to the established common law] are so gradual that their significance is at first obscured.”1 As a result, obsolescence is rare in the law. Once the law incorporates a particular doctrine, it is slow to discard it. Indeed, legal treatises of tort law published recently and those published hundreds of years ago show many similarities.

Surprisingly, one of the oldest and most utilized areas of our legal system, environmental common law, is currently on the verge of obsolescence. Environmental common law dates back to the seventeenth century.2 It survived the passage of seemingly comprehensive environmental statutes four decades ago.3 Now, however, a series of court decisions from the past three years hold that environmental common law actions, regardless of whether they are seeking injunctive relief or monetary damages, are preempted and displaced by federal statutes and regulations.

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DISPLACEMENT AND PREEMPTION

Although there is no general federal common law, in certain areas of national concern, such as environmental protection, federal courts have the power to fill in “statutory interstices” and if necessary, even “fashion federal law,” thus creating federal common law in those specific areas. Although federal common law is uncommon compared to other types of environmental litigation, federal courts are particularly likely to invoke this body of law in environmental contamination cases.5

Two legal doctrines are responsible for the recent decline of environmental common law. The first is displacement, a defense that bars the application of federal common law when a federal statute or regulation directly addresses the question at issue. In such a case, the statute displaces the prior federal common law. Because Congress has primacy in “prescri[bing] national policy in areas of special federal interest,” the courts lose their power to apply judge-made law when Congress “speak[s] directly to [the] question” at issue.”6

The second doctrine, preemption, invalidates common law when it conflicts with a federal statute. Preemption and displacement operate similarly. However, preemption applies less frequently because it requires congressional intent to override state law, whereas displacement requires only a statutory or regulatory act that substitutes for federal common law, regardless of intent.8

There are two types of preemption: express and implied.9 Express preemption applies only when a federal statute explicitly states it preempts state law.10 Implied preemption can be further divided into conflict and field preemption.11 Conflict preemption applies when a party is unable to comply with both the common law and the federal statute governing the issue or when the common law claim made by plaintiffs is an obstacle to the purposes of Congress in enacting the federal statute.12 Field preemption applies when the federal regulatory scheme enacted by Congress is so pervasive as to “occupy the field” in that area of the law.13 Both types of implied preemption, however, still require intent.

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8. See Milwaukee v. Illinois, 451 U.S. 304, 313, 315, 316-17 (1981) (Milwaukee II) (“[W]hen the question is whether federal statutory or federal common law governs . . . [,] the same sort of evidence of a clear and manifest purpose [that is required for preemption of state law] is not required.”); see also AEP, 131 S. Ct. at 2537 (“Legislative displacement of federal common law does not require the same sort of evidence of a clear and manifest [congressional] purpose demanded for preemption of state law.”) (internal quotation marks and citations omitted).
13. Id.
SETTING THE STAGE FOR OBsolescence

Two recent cases lay out the groundwork for the obsolescence of environmental common law.

1. NORTH CAROLINA v. TENNESSEE VALLEY AUTHORITY

In 2010 the U.S. Court of Appeals for the Fourth Circuit decided North Carolina v. Tennessee Valley Authority, finding preemption of state common law by the Clean Air Act (CAA) and reversing the trial court’s finding that emissions from four Tennessee Valley Authority (TVA) power plants in nearby states constituted a public nuisance to residents of North Carolina.14 The Fourth Circuit found that the trial court’s ruling was flawed for several reasons, as follows.

First, the trial court’s injunction, if allowed to stand, would “encourage courts to use vague public nuisance standards to scuttle the nation’s carefully created system for accommodating the need for energy production and the need for clean air.”15 “The result,” the Fourth Circuit went on to say, “would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike.”16

It had long been true that federal common law as applied to environmental cases was on life support. After International Paper Co. v. Ouellette,17 federal statutes often preempt air and water emissions claims seeking injunctive relief based on the common law. However the Fourth Circuit’s decision in North Carolina v. TVA went one step further, holding that the regulatory regime preempts common law claims made under source state law18 that would undermine its purpose. While the court said it “need not hold flatly that Congress has entirely preempted the field of emissions regulation,”19 its decision, in effect, did exactly that.

This decision has enormous implications for environmental litigation. It suggests that federal preemption is conceivable in every type of common law air and water emissions case. More importantly, it opens the door for defendants to convincingly argue preemption in other types of environmental common law cases and gives them the ammunition of an intelligent opinion from a well-respected court.

2. AMERICAN ELECTRIC POWER v. CONNECTICUT

In 2011, the U.S. Supreme Court decided American Electric Power Inc. v. Connecticut (“AEP”).20 By a vote of eight to zero, the Court reversed a Second

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15. Id. at 296.
16. Id.
18. Ouellette held that claims were preempted when brought under the common law of the state where the injury occurred (the affected state), whereas they were not preempted when brought under the common law of the state where the pollution originated (the source state). See id. at 497–98.
19. TVA, 615 F.3d at 302.
Circuit ruling and held that a lawsuit against five electric utilities to reduce greenhouse gas emissions could not proceed under a federal common law public nuisance theory because it was displaced by the CAA.\textsuperscript{21}

In her majority opinion, Justice Ginsburg authored a detailed and clear exegesis that, for all practical purposes, shut the door to any future federal common law claims involving environmental contamination; “We hold that the CAA and the [U.S. Environmental Protection Agency (EPA)] actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fueled fired power plants.”\textsuperscript{22} She noted that the requirements for invoking the displacement doctrine are less stringent than those for invoking preemption; “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.”\textsuperscript{23} The Court found that this test was clearly met; “[The case of] Massachusetts \textit{v. EPA} made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the [CAA]. And we think it equally plain that the [CAA] ‘speaks directly’ to emissions of carbon dioxide from the defendants’ plants.”\textsuperscript{24}

Justice Ginsburg rejected the notion that taking away federal common law would leave plaintiffs without redress, stating that “[t]he [CAA] provides multiple avenues of enforcement.”\textsuperscript{25} She noted that “[i]f States (or EPA) fail to enforce emissions limits against regulated sources, the [CAA] permits ‘any person’ to bring a civil enforcement action in federal court.”\textsuperscript{26} She further noted that “[i]f the EPA does not set emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA’s response will be reviewable in federal court.”\textsuperscript{27} She concluded by explaining that the CAA already provides the relief sought by the plaintiffs and that there is no basis to permit an identical common law action.\textsuperscript{28}

Justice Ginsburg finalized her displacement analysis by underscoring EPA’s suitability to regulate greenhouse gases;\textsuperscript{29} “It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.”\textsuperscript{30} She also underscored EPA’s ability to set a unified standard and drew a contrast to federal district judges, noting that judges cannot force other judges to follow their edicts.\textsuperscript{31}

Finally, the Court noted that the plaintiffs also sought relief under state law, though the Second Circuit did not reach these claims because it held that

\begin{itemize}
\item \textsuperscript{21} \textit{Id}. at 2532.
\item \textsuperscript{22} \textit{Id}. at 2532, 2537.
\item \textsuperscript{23} \textit{Id}.
\item \textsuperscript{24} \textit{Id}. As explained \textit{supra}, the standard for determining displacement is whether Congress “speak[s] directly to [the] question at issue.” AEP, 131 S. Ct. at 2537 (quoting Mobil Oil Corp \textit{v. Higginbotham}, 436 U.S. 618, 625 (1978)).
\item \textsuperscript{25} \textit{Id}. at 2538.
\item \textsuperscript{26} AEP, 131 S. Ct. at 2538.
\item \textsuperscript{27} \textit{Id}.
\item \textsuperscript{28} \textit{Id}.
\item \textsuperscript{29} \textit{Id}. at 2539.
\item \textsuperscript{30} \textit{Id}.
\item \textsuperscript{31} \textit{Id}. at 2540.
\end{itemize}
federal common law governed. The Court left this matter “open for consideration on remand.” However, the Justices’ comments at oral argument suggest that at least some of them would also have been inclined to find preemption of state law claims based on the CAA. Justice Kennedy expressed doubt at the idea that there is neither federal common law nor displacement of state law. Chief Justice Roberts seemed to believe that there was little difference between displacement and preemption; “That sounds like . . . preemption to me and not displacement, or at least preemption with another label.” Justice Scalia implied that he might be inclined to find preemption as well. Given that preemption was not at issue in the AEP case, the Justices seemed unusually interested in the subject, perhaps anticipating that preemption would become an important future consideration in similar such litigation.

Though the chief focus in AEP was displacement, the outcome also strengthened the preemption defense because of the close relationship between the two concepts. While the Court did not explicitly consider preemption, its language on displacement was so resolute that it strengthened the preemption defense as well. The opinion foretold trial courts’ receptiveness to the argument that the CAA preempted state common law claims in other climate change litigation. But it did more than that; the opinion also suggested Supreme Court support for the broader notion that environmental common law is not untouchable and can be preempted by federal statutory law. The Court’s finding of displacement is already at least halfway to preemption—all that remains is taking the additional step of finding that Congress intended to foreclose other avenues of relief. Given that the Court’s decision in AEP held that the CAA “speaks directly” to the issue of carbon dioxide emissions and suggested that the CAA occupies the entire field, and given the Court’s finding that Congress “prescribed” that the first decision maker under the CAA “is the expert administrative agency,” the additional step to preemption is a decidedly small one. Preemption has been a popular subject for the Supreme Court in recent years, but it has largely been confined to other areas of the law, such as pharmaceutical product liability litigation. The AEP decision signaled the Court’s willingness to apply preemption in environmental law as well.

32. AEP, 131 S. Ct. at 2540.
33. Id.
35. Id. at 47.
36. Id. at 15, 48.
38. AEP, 131 S. Ct. at 2537.
39. Id. at 2538.
40. Id. at 2539.
THE ENVIRONMENTAL COMMON LAW KILLER—
NATIVE VILLAGE OF KIVALINA v. EXXONMOBIL CORP.

DECISION

Most recently, Native Village of Kivalina v. ExxonMobil Corp. ("Kivalina") built upon the preemption groundwork laid in North Carolina v. TVA and AEP. Similar to AEP, Kivalina was a public nuisance suit alleging that defendants’ emissions had contributed to global warming. However, unlike in AEP, the plaintiffs in Kivalina sought monetary damages, rather than injunctive relief.

Though the District Court for the Northern District of California dismissed Kivalina on political question and standing grounds, the Ninth Circuit focused its appellate review on displacement. This focus was not surprising given the similarities between this case and AEP, which the Supreme Court decided only several months earlier.

In Kivalina, Judge Sidney Thomas relied heavily on the Supreme Court’s decision in AEP; “[the Supreme Court] has already determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law.” Judge Thomas noted a key distinction in the remedies sought in Kivalina and AEP—Kivalina sought damages for harm caused by past emissions, whereas AEP sought abatement. Relying most heavily on the Supreme Court’s 1981 decision in Middlesex County Sewerage Authority v. National Sea Clammers Association, he found that “the Supreme Court has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement.” Thus, Judge Thomas concluded, “under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies.”

Judge Thomas then confronted one of the plaintiffs’ arguments, namely, displacement is not a viable argument where there is no federal statutory remedy for monetary damages as a result of climate change. He rejected that argument, noting that “if the federal common law cause of action has been displaced by legislation, that means that the field has been made the subject of comprehensive legislation by Congress” and that “[w]hen Congress has acted to occupy the entire field, that action displaces any previously available federal common law action” including remedies. Judge Thomas held that “AEP extinguished Kivalina’s federal common law public nuisance damages action, along with the federal common law public nuisance abatement actions.”

While expressing sympathy for the plaintiffs, Judge Thomas stated that the

42. Id. at 857.
43. Id. at 856; see also AEP, 131 S. Ct. at 2537.
44. Id. at 857.
46. Id.
47. Kivalina, 696 F.3d at 857.
48. Id.
49. Id.
solution to their problems rested “in the hands of the legislative and executive branches of our government, not the federal common law,” an apparent nod to the district court’s reliance on the political question doctrine.

**CONCURRENCE**

Judge Philip Pro’s lengthy concurrence treated the displacement issue in much more detail. He wrote separately because of the “tension in Supreme Court authority on whether displacement of a claim for injunctive relief necessarily calls for displacement of a damages claim.” This nuanced concurrence stands in marked contrast to Judge Thomas’s decision, which resolved the displacement issue matter-of-factly and without any real acknowledgement of discord in Supreme Court authority.

Judge Pro explained that the Supreme Court’s 2008 decision in *Exxon Shipping Co. v. Baker*, appears to be a “departure” from *Middlesex*, the case relied upon by Judge Thomas. He examined *Exxon* in meticulous detail and came to an altogether different conclusion than Judge Thomas did in the majority—that *Exxon* not only does not support *Middlesex* as Judge Thomas held but that *Exxon* “appears to depart” from *Middlesex*. Despite this disagreement, Judge Pro ultimately reached the same conclusion as Judge Thomas, albeit after much more hand wringing. He characterized *Exxon* an outlier, arguing that it “stray[ed]” from *Middlesex*. His concurrence relied instead on “*Milwaukee II, Middlesex, AEP*, and the comprehensive nature of the CAA.”

Judge Pro, like Judge Thomas, found that the lack of a federal remedy is not dispositive, explaining that Congress deliberately chose not to include a damages remedy in the CAA. He reasoned that if the trial court had permitted a damages remedy, it would be in direct conflict with Congress’ decision not to permit such a remedy.

**SIGNIFICANCE**

The *Kivalina* decision builds on the injunctive action decisions in *North Carolina v. TVA* and *AEP*, and applies them to an action for monetary damages. This is an important leap. It is particularly difficult to convince courts to apply a displacement or preemption defense in environmental common law actions to monetary damage claims, especially when the federal statutes, usually the CAA

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50. Id. at 858.
51. Id.
53. *Kivalina*, 696 F.3d at 862.
55. *Kivalina*, 696 F.3d at 857. Judge Thomas even referred to the “Exxon/Middlesex approach.”
56. Id. However, he only mentioned the result in Exxon and did not delve into the nuances of Exxon as Judge Pro did.
57. Id. at 863–65.
58. Id. at 866.
59. Id. (quoting Milwaukee II, 451 U.S. at 324 n. 18).
60. Id.
and Clean Water Act, do not provide for such a remedy. However doing so may be easier after Kivalina, which makes a compelling case for why displacement, and by implication preemption, should bar common law environmental actions.

Displacement has not been a particularly important legal doctrine for environmental common law. It is narrowly construed, only applicable to federal common law suits, which are also very rare. The Kivalina decision is not important because of its implications for displacement, but because of its likely effect on the related doctrine of preemption. The application of displacement in Kivalina was merely a stepping-stone for a much more important development—the expansion of the doctrine of preemption in environmental common law actions.

The key holding in Kivalina is: “When Congress has acted to occupy the entire field, that action displaces any previously available common law action.” While this phrase referred specifically to displacement, it applies with equal force to preemption. By holding that Congress has acted to occupy the entire field, even in damages claims, the Ninth Circuit has effectively held that such damages claims meet the legal definition for preemption in addition to displacement. Thus, the Kivalina decision has provided the legal justification for expanding the preemption defense in all environmental common law actions, under both federal and state law. Indeed, it threatens the continued relevance of environmental common law. Even more so because preemption, unlike displacement, is not a narrow doctrine nor is rarely applied. Preemption can be applied to virtually any environmental federal or state common law claim.

OTHER SIGNIFICANT RECENT CASES

At least two other recent decisions have similarly held that environmental common law claims are preempted. In Comer v. Murphy Oil USA, Inc. (Comer), a federal district court in Mississippi held that the CAA preempted the plaintiffs’ claims for damages related to climate change. The court based its holding on AEP, despite the plaintiffs’ attempt to argue that AEP was limited to federal common law nuisance claims for injunctive relief. The court found that the plaintiffs’ claim for damages necessarily called for a determination as to whether defendants’ emissions were reasonable, that this was a decision that had been “entrusted by Congress to the EPA,” and that “plaintiffs’ entire lawsuit [was] displaced by the CAA.”

61. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 175 (2000) (“The [Clean Water] Act authorizes district courts in citizen-suit proceedings to enter injunctions and to assess civil penalties, which are payable to the United States Treasury.”); Maysonet v. Drillex, 229 F. Supp. 2d 105, 109 (D. P.R. 2002) (“Given that the citizen suit provisions of the CAA and Noise Control Act simply provide for injunctive remedies and the fact that the Plaintiffs seek only monetary damages, renders the complaint inconsistent with the available remedies and claims under these federal statutes. Thus, this Court has no subject matter jurisdiction to entertain a damages claim under these federal environmental statutes.”).
62. Id. at 857.
64. Id. at 865.
65. Id.
Again, a federal district court in Pennsylvania reached a similar conclusion in *Bell v. Cheswick Generating Station* (*Bell*).66 There, the plaintiffs filed a class action complaint seeking damages on behalf of approximately 1500 individuals who asserted that emissions from a coal-fired electrical generating facility damaged their properties.67 The court relied on *TVA*, *AEP*, and *Comer* in finding that the plaintiffs’ claims “impermissibly encroach on and interfere with [the CAA’s] regulatory scheme.”68

Both *Comer* and *Bell* demonstrate that the application of the preemption defense to environmental cases is not confined to *Kivalina*; rather, it is a growing trend.

**OUTLOOK FOR THE FUTURE**

The question of the extent to which environmental common law tort claims should be permitted in today’s world where there are federal and state statutes and regulations regarding every conceivable subject matter, has long been an undercurrent in environmental litigation. With *Kivalina*, the balance has shifted decisively in favor of preemption. This change has the potential to rewrite environmental law in a profound way. Indeed, the effects have already been seen in the decisions of *Comer* and *Bell*, for example. In the future, more trial courts are likely to be receptive to preemption defenses in environmental contamination suits for either injunctive relief or damages.

Suits grounded in federal and state environmental statutes may become the sole mechanism for plaintiffs to seek injunctive relief and perhaps even money damages. On one hand, this is a positive development for corporate defendants who prefer the certainty of clearly defined statutes and regulations to the unpredictable vagaries of common law negligence and nuisance suits. However on the other hand, environmental plaintiffs will likely be disappointed by the unavailability of flexible mechanisms of relief that offer paths to more favorable judgments.

It is impossible to predict what will happen in the future, but one thing is certain—environmental common law now faces one of its gravest threats and its very survival is at stake. If courts continue to apply the preemption defense to environmental claims, environmental common law may go the way of the fax machine; it may become obsolete.

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67. *Id.* at *5.
68. *Id.* at *23.