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Fish and Federalism: How the Asian Carp Litigation Highlights a Decifiency in the Federal Common Law Displacement Analysis

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NOTE

FISH AND FEDERALISM: HOW THE ASIAN CARP LITIGATION HIGHLIGHTS A DEFICIENCY IN THE FEDERAL COMMON LAW DISPLACEMENT ANALYSIS

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In response to the growing threat posed by the progress of Asian carp up the Mississippi River toward the Great Lakes, and with increased frustration with the federal response to the imminent problem, in 2010, five Great Lakes states sued the Army Corps of Engineers and the Metropolitan Water Reclamation District of Greater Chicago to force a more desirable and potentially more effective strategy to prevent the Asian carp from infiltrating the Great Lakes: closing the Chicago locks. This Note examines the federal common law displacement analysis through the lens of the Asian carp litigation. Both the Federal District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit denied the plaintiff States' request for a preliminary injunction, but allowed the plaintiffs to proceed with their federal common law claim against the Army Corps of Engineers. While both the district court and court of appeals correctly determined that the plaintiff States' federal common law nuisance claim was not displaced by congressional action and could thus continue to the merits stage, both courts failed to recognize the important and fundamental federalist function, i.e., exercising their sovereign function, that the states were performing in bringing their suit.

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INTRODUCTION

Since their introduction into the United States in the early 1970s, Asian carp have devastated the population of many native species in lakes and rivers. While most parties familiar with the Asian carp agree that their presence in the Mississippi River and the Great Lakes will wreak havoc on the native ecosystem and commercial fishing,[1] there is no consensus on the best solution to the problem. This Note analyzes the legal prospects of one potential solution: restoring hydrological separation of the Mississippi River watershed and Great Lakes watershed by closing the Chicago Locks (the Chicago Area Waterway System or CAWS). In 2010, five Great Lakes States[2] joined together to compel the Army Corps of Engineers (the Corps), which controls the Locks through federal agency delegation, and the Metropolitan Water Reclamation District of Greater Chicago (the District) to take more drastic measures to stop the migration of the Asian carp.

The States filed a complaint in the United States District Court for the Northern District of Illinois that included a request for a temporary and permanent injunction to force the Corps to close the Locks under the theory of public nuisance. The district court denied their request for an injunction, finding that the plaintiff States had not sufficiently proven potential harm, meaning the district court was not convinced that the carp had reached or would reach the Great Lakes. On appeal, the Court of Appeals for the Seventh Circuit denied the requested injunction for the same reason. While their request for injunction and appeal were denied, the States' claim raised important federalism issues regarding administrative displacement in common law nuisance claims.

Part I of this Note explains the States' litigation seeking to force the closure of the Locks in federal district court and the Seventh Circuit. Part II analyzes the intricacies of causes of action when an issue such as this one

1. *Asian Carp Fact Sheet*, MICH. DEP'T NATURAL RES., http://www.michigan.gov/dnr/0,4570,7-153-10364_52261_54896-232231--,00.html (last visited Apr. 13, 2013).

2. Michigan is the lead plaintiff in the primary litigation regarding the Asian carp presence in the Great Lakes. Michigan is joined in this action by Minnesota, Ohio, Pennsylvania, and Wisconsin (collectively known as the "States") as plaintiffs and the Grand Traverse Band of Ottawa and Chippewa Indians as intervenor. *See* Michigan v. U.S. Army Corps of Eng'rs, No. 10–CV–4457, 2010 WL 5018559, at *1 (N.D. Ill. Dec. 2, 2010).

has been partially delegated to an administrative agency.[3] Part III argues that when states are acting in their sovereign capacity, "special solicitude" must be given to their interests when determining whether their common law cause of action has been displaced by federal statutory law.

I. RECENT LITIGATION OF THE DISPUTE

Asian carp, specifically bighead and silver carp, are a collection of species native to Asia and imported to the United States for various reasons, including for experimental use in controlling algae in aquaculture and wastewater ponds.[4] Bighead and silver carp are of particular concern due to their size (bighead carp can grow up to five feet long and weigh one hundred pounds) and ability to readily adapt to new environments.[5] Asian carp have considerably upset, and even displaced, native fish populations and harmed fishing operations in rivers in the Mississippi River Basin.[6]

Asian carp escaped from aquaculture ponds in the 1990s into the lower Mississippi River.[7] Their population in that river has since increased exponentially.[8] As they have made their way up the Mississippi River, the potential impact of Asian carp in the Great Lakes has become particularly concerning.[9] The Asian carp's point of entry will likely be the Chicago Area

3. Common law causes of action are displaced when Congress delegates its legislative power to an administrative agency, like the Corps. When the question of displacement arises, the analysis is not difficult; the court simply asks whether Congress has spoken directly to the question that has arisen. *See* City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 315 (1981). However, the analysis can become more complicated when Congress was not explicit in its delegation and it must otherwise be decided by courts.

4. *Asian Carp Fact Sheet*, MICH. DEP'T NATURAL RES., http://www.michigan.gov/dnr/0,4570,7-153-10364_52261_54896-232231--,00.html (last visited Apr. 13, 2013).

5. Michigan v. U.S. Army Corps of Eng'rs, No. 10–CV–4457, 2010 WL 5018559, at *3 (N.D. Ill. Dec. 2, 2010).

6. *Id*.

7. *Frequently Asked Questions*, MICH. DEP'T NATURAL RES., http://www.michigan.gov/dnr/0,4570,7-153-10364_52261_54896-226898--,00.html (last visited Feb. 4, 2013).

8. Complaint for Injunctive and Declaratory Relief at 9, Michigan v. U.S. Army Corps of Eng'rs, No. 10–CV–4457, 2010 WL 5018559 (N.D. Ill. Dec. 2, 2010).

9. *See* BECKY CUDMORE ET AL., CAN. SCI. ADVISORY SECRETARIAT, Research Doc. 2011/114, *Binational Ecological Risk Assessment of Bigheaded Carps (*Hypophthalmichthys spp.*) for the Great Lakes Basin, at* v (2011), *available at* http://www.dfo-mpo.gc.ca/Csas-sccs/publications/resdocs-docrech/2011/2011_114-eng.pdf. A binational risk assessment performed by a team of United States and Canadian scientists in 2011 found that without significant intervention, the ecological threat to the Great Lakes included an increase in competition for food between the Asian carp and native species, leading to a reduced growth rate in native species population. *Id*. Specifically, Asian carp have the ability to dramatically change the plankton composition of the body of water they inhabit. Because plankton form the base of the food chain in the Great Lakes, the introduction of Asian carp would substantially alter the Great Lakes' ecosystem. *Id*. at 41. Interestingly, while this report examined a number of potential entry points for the Great Lakes, it identified the Chicago Area Waterway as the

Water System (CAWS),[10] the manmade series of canals connecting the Mississippi River and Lake Michigan. Plaintiff States' Attorneys General, along with state agencies, attempted to work outside of the court system with the Corps, the State of Illinois, and the District to find a satisfactory solution to halt the rapidly advancing Asian carp. When this path proved unsuccessful to the States, the Attorneys General decided to seek judicial remedies. The plaintiff States initially asked the Supreme Court for relief in 2010. Because CAWS has been the subject of a Supreme Court decree since 1929, the Supreme Court had the option to either reopen that decree or choose to exercise original jurisdiction over the dispute under Article III, Section 2 of the U.S. Constitution. After the Supreme Court declined either to reopen the decree or to exercise original jurisdiction,[11] the plaintiff States initiated a cause of action in the Northern District of Illinois.[12]

A. Asian Carp and the Chicago Area Waterway System

All parties to the 2010 district court litigation are aware of the problems posed by the rapid migration of Asian carp, including the possibility that Asian carp could travel through the CAWS into the Great Lakes.[13] Various agencies, including the Corps, proposed and studied potential responses to the migration, including responses specific to the CAWS that do not involve hydrological separation, or closing the Locks.[14]

The CAWS is a series of manmade locks[15] and canals connecting Lake Michigan to the Des Plaines River, which eventually feeds into the Mississippi River. In 1900, the District and the State of Illinois reversed the flow of the Chicago River to prevent sewage from returning to the Chicago's water supply, Lake Michigan.[16] Canals were also built to connect Lake Michigan to the Mississippi River Valley through a series of locks known as

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most likely point of entry for the Asian carp. *Id.* at v. The study also notes that because Asian carp have primarily established themselves in river systems, the exact ecosystem effects on a lake system are unclear. *Id.* at 41.

10. *Id.* at v.

11. Michigan v. Illinois, 130 S. Ct. 1166 (2010).

12. Michigan v. U.S. Army Corps of Eng'rs, 2010 WL 5018559.

13. *See id.* at *4.

14. *Id.* at *4-7.

15. Roughly seven million tons of cargo and 19,000 recreational boats pass through just one lock each year. *Id.* at *3. Locks, by raising and lowering water levels between disparate bodies of water, connect two bodies of water that because of their levels would otherwise not allow a canal (and therefore connection) to be built between them.

16. *Id.* at *2; JOEL BRAMMEIER ET AL., GREAT LAKES FISHERY COMM'N, PRELIMINARY FEASIBILITY OF ECOLOGICAL SEPARATION OF THE MISSISSIPPI RIVER AND THE GREAT LAKES TO PREVENT THE TRANSFER OF AQUATIC INVASIVE SPECIES 5–6, 10 (2008). Since 1860, the Chicago River has been a central artery for industrial activity in the Chicago area. *Id.* at 10.

the Chicago Sanitary and Ship Canal.[17] In addition to addressing sanitary concerns, the locks serve as a main artery of economic navigation[18] and assist the Coast Guard in responding to emergencies and managing downstream flood control. The District and the Corps jointly operate the CAWS pursuant to federal authorizing statues.[19]

B. Supreme Court Jurisdiction over the Dispute

After attempting to work with the State of Illinois, the District, and the Corps on a satisfactory solution to the Asian carp problem, the States petitioned the Supreme Court to reopen the 1929 decree from the initial Chicago locks case, *Wisconsin v. Illinois*.[20] Ultimately, the States were unsuccessful in convincing the Court to hear the case, either under supplemental jurisdiction based on the decree, or under original jurisdiction.[21]

In what is sometimes known as the *Chicago Sanitary District* case, the Supreme Court exercised original jurisdiction over a suit to enjoin Illinois and the Chicago Sanitary District from withdrawing water from Lake Michigan.[22] The Court chose to retain continuing jurisdiction over any supplemental decree or decree modification regarding its order to prevent excessive diversion.[23] The Court has since modified or supplemented the decree three times, most recently in 1967.[24] Paragraph 7 of the 1967 decree specifically retains jurisdiction for the Court "for the purpose of making any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy."[25]

On this basis, the States argued that the Asian carp posed a new specific harm that was not decided at the time of the 1967 decree: disruption of

17. Michigan v. U.S. Army Corps of Eng'rs, 2010 WL 5018559, at *2–3. The Rivers and Harbors Appropriation Act of 1899, section 9, 33 U.S.C. § 401 (2006), authorized the Corps to build and oversee the connections between the watersheds.

18. Depending on the year, approximately 25 million tons of commodities move through CAWS each year along with 45,000–65,000 recreational vessels. BRAMMEIER ET AL., *supra* note 16, at 50.

19. Michigan v. U.S. Army Corps of Eng'rs, 2010 WL 5018559, at *3. Authorizing statutes for the Army Corps of Engineers include: sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401-02, section 404 of the CWA, 33 U.S.C. § 1344, and section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1413.

20. Wisconsin v. Illinois, 278 U.S. 367 (1929). This is possible because all parties to the 1929 suit are present again in the Asian carp dispute.

21. Michigan v. Illinois, 130 S. Ct. 1166 (2010).

22. Wisconsin v. Illinois, 278 U.S. at 399.

23. Wisconsin v. Illinois, 281 U.S. 696, para 7 (1930).

24. Wisconsin v. Illinois, 388 U.S. 426, 430 (1967).

25. *Id*.

native fish populations and commercial fishing.[26] The States argued that the connectivity of the watersheds at issue in the initial decree puts this issue within the supplemental jurisdiction of the Court.[27] The decree allows for further actions for relief or modification of the initial decree when a "changed circumstance or unforeseen issue not previously litigated arises."[28] In order to invoke the Court's continuing jurisdiction, the States must "show that [they] will suffer a substantial injury in the absence of the modification."[29] The States argued that the dangers and harm threatened by the presence of the Asian carp in the Great Lakes will cause a substantial injury without modification to the decree.[30]

In addition to arguing for supplemental jurisdiction under the 1967 decree, the States argued for original jurisdiction under Article III, Section 2 of the U.S. Constitution, which grants the Court original jurisdiction over cases in which a state is a party.[31] The States claimed to meet the two-prong test for granting original jurisdiction under *Mississippi v. Louisiana*.[32] First, "focusing on the 'seriousness and dignity' of the claim,"[33] the States argued they have a "vital interest" in protecting their waters and natural resources and that the presence of the Asian carp would pose serious economic and ecological harm to the States.[34] Second, the States argued that they had no alternative forum for seeking declaratory and injunctive relief.[35] Because the State of Illinois remains an "indispensable party,"[36] the Court may exercise original and exclusive jurisdiction. Nevertheless, the Court denied the States' petition for both continued jurisdiction of the 1967 decree and original jurisdiction without explanation.[37]

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26. Brief and Appendix in Support of Motion to Reopen and for a Supplemental Decree at 3, Michigan v. Illinois, 130 S. Ct. 1166 (2010) (Nos. 1–3, original).

27. *Id*. at 4–6.

28. *Id*. at 16 (quoting Arizona v. California, 460 U.S. 605, 619 (1983)).

29. *Id*. at 18.

30. *Id*. at 25.

31. *See id*. at 31.

32. *Id*. (citing Mississippi v. Louisiana, 506 U.S. 73 (1992)). In determining whether to exercise original jurisdiction, the Court looks at two factors. Mississippi v. Louisiana, 506 U.S. 73, 77 (1992). First, the Court assesses the nature of the dispute, "focusing on the 'seriousness and dignity of the claim' . . . ." *Id*. (quoting Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91 (1972)). Second, the Court considers the availability of an alternative forum. *Id*.

33. Brief and Appendix in Support of Motion to Reopen and for a Supplemental Decree, *supra* note 26, at 32 (quoting Mississippi v. Louisiana, 506 U.S. at 77).

34. *Id*. at 32–33.

35. *Id*. at 33.

36. *Id*. The Court continues to hold the State of Illinois responsible for the maintenance and control of the diversion project. *Id*.

37. Wisconsin v. Illinois, 130 S. Ct. 1166 (2010). According to *Utah v. United States*, 394 U.S. 89, 95 (1969), original jurisdiction is to be used sparingly. However, *Milwaukee I* recognizes that the question of appropriateness "necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered

C. The Nuisance Suit and the APA

After the Supreme Court denied their request to hear the case, the plaintiff States filed a complaint against the Corps and Chicago Sanitary District in the District Court for the Northern District of Illinois, seeking a preliminary and permanent injunction to compel the defendants to take all available measures to prevent the immigration of Asian carp into Lake Michigan and the Great Lakes watershed.[38] In the litigation filed July 19, 2010, the States contended that neither defendant had taken the necessary steps to abate a public nuisance (i.e., the Asian carp's presence in the Great Lakes).[39] The States alleged both a federal common law nuisance claim and a claim for judicial review of agency action under the Administrative Procedure Act (APA).[40] In alleging the public nuisance claim, the plaintiffs needed to prove a "condition, action, or failure to act that unreasonably interferes with a right common to the general public."[41] The APA claim requested judicial review of agency action under 5 U.S.C. section 702, arguing that the plaintiffs "suffer[ed a] legal wrong because of agency action."[42]

The plaintiffs sought to compel the Corps to take specific measures to stop the spread of Asian carp into Lake Michigan and the Great Lakes. They requested that the Corps use the "best available methods to block the passage" of the carp.[43] This request recognized that the "best available methods" may involve capturing or killing the Asian carp, rather than simply blocking the Asian carp's entrance into Lake Michigan. Next, the plaintiffs asked that the Corps temporarily close the O'Brien Lock and Dam and the Chicago River Controlling Works. For other points of connectivity, the plaintiffs asked the Corps to install and maintain grates, screens, or block nets in order to prevent the Asian carp from migrating into Lake Michigan. In addition to the physical barriers, the plaintiffs requested both chemical and electronic barriers, and continuous monitoring for Asian carp in CAWS.[44] Among these, the most dramatic remedy sought was the temporary closing and cessation of operation of the locks at the O'Brien Lock and Dam and the Chicago River Controlling Works. Closure of these locks would essentially separate the Great Lakes water system from the

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may be litigated, and where appropriate relief may be had." Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91, 93 (1972). Additionally, the Supreme Court's exercise of original jurisdiction is discretionary. *Id*. at 108.

38. Michigan v. U.S. Army Corps of Eng'rs, No. 10–CV–4457, 2010 WL 5018559, at *1–2 (N.D. Ill. Dec 2, 2010).

39. *Id*. at *12.

40. Complaint for Injunctive and Declaratory Relief, *supra* note 8, at 26, 29.

41. *Id*. at 26.

42. *Id*. at 29.

43. *Id*. at 32.

44. Michigan v. U.S. Army Corps of Eng'rs, 2010 WL 5018559, at *1–2.

Mississippi River basin, halting shipping through the canals and recreational activities.[45]

Prior to the litigation, the Corps and the District implemented an experimental Dispersal Barrier System (a system of multiple underwater, charged cables).[46] The States argued that this would be insufficient to stop the Asian carp from entering the Great Lakes, because there are other routes for the carp to enter Lake Michigan, and eDNA[47] evidence suggested that the barrier system does not work.[48] The defendants, on the other hand, argued that the District and the Corps are continuing to work with state and local governments to prevent the Asian carp from entering the Great Lakes, and that the requested relief would "threaten public safety and flood control, substantially affect regional and national economies, and greatly disrupt transportation systems on which those economies rely."[49] The parties also disputed the presence of Asian carp in the CAWS, particularly the accuracy of the eDNA testing to assess the progression of Asian carp.[50]

The district court denied the plaintiff States' request for a preliminary injunction, on the basis that the States had not sufficiently proven potential harm, a requirement for granting a preliminary injunction. The court found that there was no evidence that the current electronic barrier[51] had failed

45. *Id*. at *1–2. Historically, the Chicago River flowed east into Lake Michigan, but currently flows west away toward the Mississippi. BRAMMEIER ET AL., *supra* note 16, at 5. The hydrological separation of the Mississippi River from the Great Lakes was one of the most significant geographical features of the Chicago area and the hydrological connection had been contemplated for 200 years. *See id*. at 8–10. Shipping from the Great Lakes to ports other than the port of Chicago (which is located on the canal, not Lake Michigan) would be impossible with the barrier because the hydrological separation would prevent water (and ships, boats, goods) from flowing from one body to another.

46. "An electric fish barrier consists of passing an electrical current through water, forming a barricade. Electric current passes between the electrodes via the water column and produces an electric field. The field is similar to a bell-shaped curve which is stronger at the center. The system is designed so that as a fish enters the electric field, the electric current makes them increasingly uncomfortable and they swim back the way they came." *Frequently Asked Questions*, ASIAN CARP CONTROL, http://www.asiancarp.org/faq.asp#43 (last visited Feb. 10, 2013).

47. Environmental DNA (eDNA) is the detection of living organism's genetic material by sampling the non-living environment (earth, wind, water). ENVTL. RES. CENTER FOR AQUATIC CONSERVATION U. NOTRE DAME, http://edna.nd.edu/Environmental_DNA_at_ND/Home.html (last visited Mar. 24, 2013).

48. Complaint for Injunctive and Declaratory Relief, *supra* note 8, at 13–14.

49. Michigan v. U.S. Army Corps of Eng'rs, 2010 WL 5018559, at *12.

50. *See id*. at *16, *26.

51. "Electronic barriers are expected to be highly effective against fish but are ineffective on planktonic stages, as are acoustic and light barriers." BRAMMEIER ET AL., *supra* note 16, at 74. The first electronic barrier began operation in 2002; a second was added in 2009, but cannot be operated at full capacity and must be periodically shut down for maintenance; and a third barrier has been proposed. Complaint for Injunctive and Declaratory Relief, *supra* note 8, at 12–13.

and agreed with the Corps that the possibility of a self-sustaining population beyond the barrier and in the Great Lakes is "not imminent in a legal sense and remains unknown based on the characteristics of Asian carp and the Lake Michigan environment."[52]

"A party seeking a preliminary injunction must demonstrate as a threshold matter that (1) its case has some likelihood of succeeding on the merits; (2) no adequate remedy at law exists; and (3) it will suffer irreparable harm if preliminary relief is denied."[53] More specifically, the Supreme Court has defined "irreparable harm" as the moving party demonstrating "that irreparable harm is *likely* in the absence of an injunction," and that simply the possibility of harm is not sufficient.[54] Courts balance two factors when considering injunctive relief: (1) the irreparable harm the moving party will suffer if the injunction is not granted, and (2) the harm the non-moving party will suffer if the injunction is granted.[55] This balancing test is supplemented by the consideration of the public interest served by the relief and effects on nonparties.[56]

The States claimed relief under the APA as well as on the basis of federal common law nuisance. APA section 702 provides relief to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[57] The district court held that the States "have a minimal chance of success on the merits" of the APA claim, as the "evidence does not support the view that the Corps' actions were wrong at all, much less arbitrary and capricious."[58] The district court was not persuaded by the evidence presented by the plaintiffs that the carp had reached the Great Lakes.[59] With that, the Corps' actions were not arbitrary and capricious because the evidence they used in their decisionmaking was sound.

The court next addressed the plaintiff States' nuisance claim. As a threshold matter, the sovereign immunity of the United States must be waived in order to proceed with a nuisance claim against a federal agency. The defendants argued that the purpose of the Federal Torts Claims Act

52. Michigan v. U.S. Army Corps of Eng'rs, 2010 WL 5018559, at *13.

53. *Id*.

54. *Id*. (quoting Winter v. Natural Resources Defense Council, 129 S. Ct. 365, 375–76 (2008)).

55. *Id*.

56. *Id*.

57. *Id*. at *14 (quoting Administrative Procedure Act § 702, 5 U.S.C. § 702 (2006)).

58. *Id*. at *15 (identifying Administrative Procedure Act § 706(2), 5 U.S.C. § 706(2) (2006) as a means by which a court may "[h]old unlawful and set aside" any agency action that is "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

59. *See id*. at *27.

(FTCA)[60] is to provide monetary damages to those wronged by the federal government, not to provide equitable relief, and therefore the court is precluded from "exercising jurisdiction over any freestanding cause of action based on the federal common law of nuisance."[61] Section 702 of the APA provided the waiver of sovereign immunity for the States' APA claim, but the section's waiver is not limited only to actions brought under the APA. Instead, it is a "law of general application" that reaches civil matters arising under federal law, including nuisance claims.[62] The court decided that it "need not offer a definitive view on the difficult legal issue presented by" the sovereign immunity defense, however, in continuing to address the plaintiff States' request for a preliminary injunction, because it did not find the defendant's claims of sovereign immunity were persuasive.[63]

The crux of the issue in the federal common law nuisance claim was to determine whether the existing federal statutory scheme displaced the plaintiff States' cause of action. The district court stated that "[a] cause of action has been displaced when federal statutory law governs a question previously the subject of federal common law."[64]

The district court found that the statutory scheme did not displace the common law action and analogized this case to that of *Illinois v. City of Milwaukee* (*Milwaukee I*).[65] In *Milwaukee I*, Illinois asked the Supreme Court to exercise original jurisdiction when it alleged, under a federal common law nuisance claim, that Milwaukee and its subdivisions discharged "raw or inadequately treated sewage" into Lake Michigan.[66] While the Court declined to exercise original jurisdiction, it decided that the Water Pollution Control Act (the Clean Water Act or "CWA"), which controls discharges into navigable waters, did not displace Illinois' federal common law cause of action.[67]

The district court in *Michigan v. U.S. Army Corps of Engineers* explained that the "federal statutes cited by Defendants and the City as having pur-

60. Federal Torts Claims Act, 28 U.S.C. §§ 1346(b) (2006).

61. Michigan v. U.S. Army Corps of Eng'rs, 2010 WL 5018559, at *16.

62. *Id.* at *16–17 (quoting Blagojevich v. Gates, 519 F.3d 370, 372 (2008)).

63. *Id.* at *18.

64. *Id.* A full discussion of federal common law displacement can be found in Part II of this Note.

65. *Id.* at *20 (citing Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91 (1972)). *Cf.* City of Milwaukee v. Illinois (*Milwaukee II*) 451 U.S. 304, 315 (1981) (holding that in order to displace the federal common law, the legislation must "[speak] directly to a question").

66. Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. at 93 (1972). The procedural posture of this opinion is indicative of the unique character of original jurisdiction. This opinion is a denial of a motion to file a bill of complaint. The Supreme Court denied the motion, declining to allow Illinois the ability to file a complaint with the Supreme Court. *Id.* at 108.

67. *Id.* at 103–04 ("[T]he remedies which Congress provides are not necessarily the only federal remedies available.").

portedly displaced federal common law do not comprehensively and specifically address the threat of an Asian carp invasion of Lake Michigan through the CAWS to the degree found in *Milwaukee II*,[68] nor do they provide a specific mandate or methods for adequately addressing the threat."[69] A single mention of barriers in 16 U.S.C. section 4722(i)(3) to prevent the spread of aquatic nuisance species from the Great Lakes to the Mississippi River basin "is not a comprehensive program for preventing Asian carp introduction and establishment in the Great Lakes."[70] The court found that none of the laws cited by the defendants, "either individually or together, constitute the kind of all-encompassing scheme that would satisfy *Milwaukee II*."[71] "Those statues [cited by the defendants] simply do not approach the level of comprehensiveness, specificity, and all-inclusiveness found by the Supreme Court . . . in *Milwaukee II*."[72]

D. The Seventh Circuit Appeal of the Nuisance Claim

Following the denial of a preliminary injunction in the district court, the States appealed to the Seventh Circuit Court of Appeals for relief. Again finding a lack of evidence of probable harm, the States' request for a preliminary injunction was denied. But according to its interpretation of the facts, the court of appeals found a greater likelihood of success on the merits than did the district court.[73] While the district court found the States to have "at best, a very modest likelihood of success,"[74] the court of appeals found "that the district court underestimated the likely merit of the states' claim, particularly at this early stage of the case."[75] The States appealed to the Supreme Court.[76] Their petition was denied, and on

68. In *Milwaukee II*, the Court held that the permitting scheme enacted by Congress in response to Milwaukee I was comprehensive enogh to displace the common law. Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304 (1981).

69. Michigan v. U.S. Army Corps of Eng'rs, No. 10–CV–4457, 2010 WL 5018559, at *20 (N.D. Ill. Dec. 2, 2010). The defendants cited the Aquatic Nuisance and Pollution Control section of Title 16, 16 U.S.C. § 4722(i)(3) (2006); the Water Resources Development Act of 2007, Pub. L. No. 110-114, § 3061(d) (2007); the amended Water Resources Development Act of 2010, H.R. 5892, 111th Cong. § 3013 (2010); and the Energy and Water Development and Related Agencies Appropriations Act, Pub. L. No. 111-85, § 126 (2009), as federal statutes that displace the States' federal common law claim. Michigan v. U.S. Army Corps of Eng'rs, 2010 WL 5018559, at *5–6.

70. *Id. at *20.*

71. *Id.*

72. *Id.*

73. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 770 (7th Cir. 2011).

74. *Id.* at 21.

75. *Id.*

76. Michigan v. U.S. Army Corps of Engineers, 132 S. Ct. 1635 (2012).

December 3, 2012, the district court dismissed the case on separate grounds.[77]

In discussing the displacement of federal common law, the court of appeals recognized the need for federal common law to "fill in 'statutory interstices,' and if necessary, even 'fashion federal law' " in areas "within national legislative power."[78] The use of federal common law to govern interstate nuisance disputes stems from the needs of the federal system.[79] Invoking *Tennessee Copper*, the court recognized that "when the states joined the union and in doing so abandoned their right to abate foreign nuisance by force, 'they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in [the Supreme Court].' "[80] Federal common law becomes essential when "there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism."[81]

More specifically, federal common law is available when dealing "with air and water in their ambient and interstate aspects."[82] The court of appeals went on to say, "we know that this body of law applies in a dispute about 'the pollution of a body of water such as Lake Michigan bounded, as it is, by four states.' "[83] This is not an unlimited application of common law to any nuisance; rather, it is limited only to nuisance specific to those resources in their ambient aspects. The Supreme Court "has never 'held that a State may sue to abate any and all manner of pollution originating outside its borders.' "[84] This is an important distinction. The Corps argued that the common law does not apply here, as in it did in *Milwaukee I*, because the defendants were not emitting traditional pollutants, like waste water, as in *Milwaukee I*.[85] The court of appeals quickly dismissed this argument:[86]

77. Michigan v. U.S. Army Corps of Eng'rs, No. 10 C 4457, 2012 WL 6016926, at *15 (N.D. Ill. Dec. 3, 2012). Here, a different judge on the district court ruled that because the Corps was statutorily required to maintain navigation on the Great Lakes, the Corps' failure to take steps to close the locks is not a public nuisance or in any way unlawful. *Id*.

78. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d at 770 (quoting Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964)).

79. *Id*.

80. *Id*. (quoting Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).

81. *Id*. (quoting Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91, 105 n.6 (1972)).

82. *Id*. at 771. "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Id*. (quoting Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957)).

83. *Id*. (quoting Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. at 105 n.6).

84. *Id*. (quoting Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2536 (2011)).

85. *Id*.

"A public nuisance is defined as a substantial and unreasonable interference with a right common to the general public, usually affecting the public health, safety, peace, comfort, or convenience," and the court "know[s] of no rule saying that the defendants must emit a 'traditional pollutant' in order for federal common law to apply."[87]

When deciding whether federal common law was displaced, the court of appeals acknowledged that the displacement question "is whether Congress has provided a sufficient legislative solution to the particular interstate nuisance here to warrant a conclusion that this legislation has occupied the field to the exclusion of federal common law."[88] The court recognized that Congress has not been silent on Asian carp, but rephrased its concern by asking "how much congressional action is enough?"[89] The court took issue with the defendants' argument that "the delegation is what displaces federal law."[90] The delegation of authority over the CAWS "is one type of congressional action that is evidence of displacement," but it is not necessarily a definitive one.[91] The test remains "whether the statute 'speak[s] directly to [the] question.' "[92] The court reasoned that, while Congress had spoken to the issue of Asian carp,[93] the congressional action had "yet to reach the level of detail one sees in the air or water pollution schemes" found to displace the common law in *American Electric Power Co. v. Connecticut*[94] and *Milwaukee II*.[95] In order to displace the common law in *Milwaukee II*, the Court required there to be a "comprehensive regulatory program supervised by an expert administrative agency," in which "*[e]very* point source discharge is prohibited unless covered by a permit."[96] Legislation passed regarding Asian carp "demonstrates that Congress is aware of the problem of invasive species generally, and carp in particular, [but the

86. *Id*. The court also notes that "the defendants bear responsibility for nuisances caused by their operation of a manmade waterway between the Great Lakes and Mississippi watersheds." *Id*.

87. *Id*.

88. *Id*. at 777.

89. *Id*.

90. *Id*. (quoting Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2538 (2011)).

91. *Id*. at 777–78.

92. *Id.* at 778 (quoting Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2537 (2011)).

93. Congress has most recently attempted to address the issue through the proposed Stop Invasive Species Act, an amendment to the Transportation Bill that required the Corps to expedite its plan to block the carp from entering the Great Lakes. S. 2317, 112th Cong. (2012); H.R. 4406, 112th Cong. (2012).

94. *AEP v. Connecticut* held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2537 (2011).

95. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 778–79 (7th Cir. 2011).

96. *Id*. at 777 (quoting City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 317–18 (1981)).

legislation] falls far short of the mark set by the Clean Air Act or the Federal Water Pollution Control Act."[97] "Congress has not passed any substantive statute that speaks directly to the interstate nuisance about which the states are complaining."[98] Notably, the Supreme Court recognized that "Congress has not provided any enforcement mechanism or recourse for any entity or party negatively affected by the carp, and there is certainly no recourse to the courts under the minimal scheme that has been established."[99]

Similarly to the district court, the court of appeals found that the Corps did not benefit from sovereign immunity in a federal common law tort suit, holding that "the waiver contained in § 702 of the APA subjects the Corps to the plaintiffs' common-law claims for declaratory and injunctive relief."[100] The court of appeals looked to congressional intent in amending the APA, noting that "it gave every indication that it intended to provide specific relief for all nonstatutory claims against the government."[101]

The point of digression between the district and appellate courts was the standard applied in analyzing the likelihood of success by the district court. Distinguishing the legal standard during the preliminary injunction and the merits stages, the court of appeals held that "a plaintiff in the former position needs only to show 'a likelihood of success on the merits rather than actual success.' "[102] This creates a lower "threshold for establishing [the] likelihood of success."[103] The court of appeals determined that the district court missed this distinguishing factor: "[b]y applying directly the law of public nuisance, the judge seems to have required the plaintiff states actually to show that they were entitled to permanent injunction relief during the preliminary injunction hearing."[104] Instead, the States "needed only to present a claim plausible enough that (if the other preliminary injunction factors cut in their favor) the entry of a preliminary injunction would be an appropriate step."[105]

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97. *Id*. at 779 (noting that the legislation regarding Asian carp does not rise to the all-encompassing level of comprehensiveness that the Clean Air Act and Federal Water Pollution Control Act do).

98. *Id*.

99. *Id*. at 780.

100. *Id*. at 776. This does not, however, mean that common law claims rely on section 702 for their cause of action; instead it provides immunity for common law claims. It is a mere coincidence that section 702 provides both a statutory cause of action and immunity from a common law cause of action.

101. *Id*. at 775–76.

102. *Id*. at 782 (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987)).

103. *Id*.

104. *Id*. at 782–83 (referencing the lower court's finding "that the states 'ha[d] not made a convincing case' that the fish had pushed into the CAWS").

105. *Id*. at 783.

However, the court of appeals upheld the district court's denial of the preliminary injunction.[106]

> [T]he preliminary injunction the states have requested would impose substantial costs, yet given the current state of the record, we are not convinced that the preliminary injunction would assure much of a reduction in the risk of the invasive carp establishing themselves in Lake Michigan in the near future. That the balance of harms at this stage of the litigation favors the defendants might be enough by itself to support a conclusion that preliminary relief is not warranted, even though we have concluded that the states have demonstrated a likelihood of success on the merits and a threat of irreparable harm.[107]

The district and appellate courts recognized that the plaintiff States' federal common law cause of action was warranted and not precluded by federal displacement. While both courts agreed that the Corps' authorizing statutes were not sufficient to displace the States' common law cause of action, neither recognized the special status of the States in bringing federal causes of action in their sovereign capacity, as courts have in previous discussions of federal displacement.[108]

II. ADMINISTRATIVE DISPLACEMENT OF FEDERAL COMMON LAW CAUSES OF ACTION AND STATES' SOVEREIGN PROTECTION

When analyzing the prospect of displacement of federal common law causes of action, courts apply the reasoning put forth in *Milwaukee I* and *Milwaukee II*, each of which analyzed the CWA's permitting scheme. Both the district and appellate courts in the Asian carp litigation correctly decided that the Corps' statutory authorization did not displace the States' federal common law cause of action. However, their analysis failed to recognize the States' unique position in making their claims.

In the Asian carp litigation, both the district and appellate courts applied the administrative displacement reasoning found in the seminal cases, *Milwaukee I* and *Milwaukee II*, finding that a federal common law cause of action was not displaced by the Water Pollution Control Act, as it was in *Milwaukee II*. Following the Supreme Court's 1972 decision in *Milwaukee I*,[109] Congress enacted the Federal Water Pollution Control Act

106. *Id.* at 800.

107. *Id.* at 795–96.

108. *See, e.g.*, Georgia v. Tenn. Copper Inc., 206 U.S. 230 (1907).

109. In *Milwaukee I*, Illinois filed a motion for leave to file a bill of complaint, asking the Court to take original jurisdiction. While the Court denied Illinois' motion on the

Amendments of 1972. Congress passed these amendments to the CWA in response to the City of Milwaukee's action in *Milwaukee I*.[110] The amendments established a regulatory system that requires permits to discharge pollutants into the nation's waters.[111] The Environmental Protection Agency (EPA) is "charged with administering the Act [and] . . . has promulgated regulations establishing specific effluent limitations[;] those limitations are incorporated as conditions of the permit."[112] The Wisconsin Department of Natural Resources, under the supervision of the EPA, issued discharge permits to the City of Milwaukee.[113]

After the Supreme Court denied Illinois' motion for original jurisdiction in its *Milwaukee I* opinion, Illinois brought its claim to the district court.[114] The district court ruled in favor of Illinois' federal common law nuisance claim.[115] The city appealed, and the Seventh Circuit affirmed that the amendments did not displace Illinois' federal common law nuisance claim.[116] The City of Milwaukee appealed to the Supreme Court.

A. Milwaukee II and the Displacement Analysis

The parties in *Milwaukee II* asked the Court to decide whether the CWA amendments preempted or displaced Illinois' federal common law nuisance claim.[117] First, the Court recognized that the federal judiciary is not usually charged with the task of enacting and shaping federal rules.[118] However, "[w]hen Congress has not spoken to a particular issue . . . and when there exists a 'significant conflict between some federal policy or interest and the use of state law,'" judge-made federal law is sometimes

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grounds that (1) Illinois had an available remedy in a lower court and (2) the parties were not states, it nonetheless found that the federal common law had not been displaced. Illinois v. City of Milwaukee (*Milwaukee I*) 406 U.S. 91, at 103 (1972).

110. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 310 (1981).

111. *Id*.

112. *Id*. at 311.

113. *Id*.

114. *Id*. at 309. Because *Milwaukee I* was decided as a denial of a motion for leave to file a bill of complaint, *Milwaukee II* is a continuation of the same cause of action raised in *Milwaukee I*.

115. *Id*. at 311.

116. *Id*. at 312.

117. "Part of the confusion in this area of the law is attributable to inconsistent use of the terms 'preemption' and 'displacement' . . . . The Supreme Court has generally used the word 'displacement' to refer to the situation in which a federal statute supplants federal common law; conversely, the Court has used the word 'preemption' to refer to the more well-known situation in which federal law supplants state law." P. Leigh Bausinger, Note, *Welcome to the (Impenetrable) Jungle:* Massachusetts v. EPA*, the Clean Air Act, and the Common Law of Nuisance*, 53 VILL. L. REV. 527, 533 n.36 (2008).

118. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. at 312–13.

necessary.[119] Even in these rare instances, federal common law is always "subject to the paramount authority of Congress."[120] The Court more specifically framed the question of displacement as "whether the [Amendments] 'spoke directly to [the] question.' "[121]

In determining whether the amendments 'spoke directly to the question,' then-Associate Justice Rehnquist held that Congress "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."[122] He used congressional intent to justify this interpretation of the purpose of the amendments, stating that they were viewed as a "total restructuring" and "complete rewriting."[123] Rehnquist also turned to legislative history to show that Congress' intent was to "establish an all-encompassing program of water pollution regulation."[124] The comprehensive regulatory program, he reasoned, "strongly suggests that there is no room for courts to attempt to improve on that program with federal common law."[125] He may also have believed that giving courts the ability to entertain claims over agency actions may grant judicial oversight where Congress did not intend to do so.[126]

Turning to the state permitting scheme under the CWA that was at issue in *Milwaukee II*, Rehnquist found that the administrative system addressed the problem at issue: overflows from sewage discharge. Thus, the federal courts had "no basis . . . to impose more stringent limitations than those imposed" under the regulatory scheme,[127] since the regulatory scheme left no "interstice . . . to be filled by federal common law."[128] The Court held that "[t]he question is whether the field has been occupied, not whether it has been occupied in a particular manner."[129]

The Court went on to address the technical nature of water pollution control, holding that federal common law is particularly unsuited for complex technical problems. The complex, technical nature of water pollution, the Court reasoned, is further evidence that Congress intended the issues to

119. *Id*. at 313 (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, at 68 (1966)).

120. *Id*. at 313 (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931)).

121. *Id*. at 315.

122. *Id*. at 317.

123. *Id*. at 317 (quoting HOUSE DEBATE ON H.R. 11896 (1972), *reprinted in* CONG. RESEARCH SERVICE, NO. 93-1, 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 350, 359 (1973)).

124. *Id*. at 318.

125. *Id*. at 319.

126. *See* Shell J. Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 HARV. ENVTL. L. REV. 41, at 57 (1983).

127. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. at 320.

128. *Id*. at 323.

129. *Id*. at 324.

be resolved by an expert agency, in this case the EPA.[130] The Court noted that Congress found its past displacement analyses to be "sporadic" and "ad hoc," and the Court instead assumed that a comprehensive regulatory approach would provide a better solution to the problem.[131] Administrative displacement eliminates some of the uncertainties inherent in the federal common law system because a federal agency is able to control the remedy through prospective regulation, rather than having the judiciary craft "ad hoc" remedies and states attempt to seek multiple avenues for addressing their claims.[132]

Next, the Court found that the amendments gave states options for recourse within the statutory mechanism (the permitting scheme), supporting its decision that the amendments supplant the common law.[133] The lack of forum to protect state interests was a main concern of the Court in *Milwaukee I*.[134] The creation of an alternate forum for resolving interstate disputes showed congressional intent for the statute to represent the complete remedy.[135] The availability of an alternate forum, like the administrative appeals system found in *Milwaukee II*, is critical to protecting a state's interest in protecting its ambient air and water and should play a crucial role in the displacement analysis when states act to protect their sovereign interests. Without an avenue for redressing harms or wrongs (administrative or otherwise, as in tort), states unwittingly sacrifice sovereign ability to abate nuisances emanating from other states or outside sources through avenues such as the courts.[136]

The Court later addressed Illinois' argument that the amendments specifically preserve the federal common law. Section 505(e) states: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."[137] Contrary to Illinois' urging, the Court adopted a narrow reading of this provision, limiting it to citizen suits.[138] The Court recognized that Subsection 505(e) is "virtually identical to subsections in the citizen-suit provisions of several environmental

130. *Id*. at 325.
131. *Id*. at 325.
132. *See* Bleiweiss, *supra* note 126, at 57.
133. *See* City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. at 326.
134. *See* Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. at 93–94 (1972).
135. Bleiweiss, *supra* note 126, at 62.
136. Georgia v. Tenn. Copper Inc., 206 U.S. 230, 237 (1907).
137. 33 U.S.C. § 1365(e) (2006).
138. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. at 328.

statutes"; therefore it should be limited to citizen suits, not actions brought by states.[139]

Ultimately, the majority concluded that three factors go into determining whether a statute displaces the common law. First, Congress must intend the regulation to be comprehensive. Second, the act must regulate every instance of a particular act (and empower an expert agency to supervise and direct this scheme). Finally, the Court recognized the importance of states' ability to seek relief when wronged and, in order to displace the common law, the statutory scheme must provide states the ability to seek redress or participate in the permitting process.

B. Blackmun's Dissent

Writing for the dissent, Justice Blackmun found flaws in the majority's reasoning that Congress intended for the amendments to displace the federal common law in this instance.[140] Blackmun argued for requiring more explicit Congressional intent to displace the common law, finding that an "automatic displacement" is inadequate, and rejecting the majority's finding of intent to enact a comprehensive regulatory scheme.[141] He argued that the Court improperly took Congress' intent to enact a comprehensive regulatory scheme as a proxy for its intent to displace the common law.[142] Blackmun argued that the mere displacement of federal common law by Congress through a regulatory or permitting scheme was not sufficient to satisfy the needs of states or other parties provided by common law.[143]

First, Blackmun faulted the Court's assumption that congressional action addressing a specific question automatically removes the need for federal common law.[144] He argued that "automatic displacement" is flawed because it both "fails to reflect the unique role federal common law plays in resolving disputes between one State and the citizens or government of another" and ignores the "frequent recognition that federal common law may complement congressional action in the fulfillment of federal policies," rather than be replaced it.[145] He took particular interest in the ability of federal common law to assist in the resolution of interstate disputes and

139. *Id*. 328–29.
140. *Id*. at 333–34
141. *Id*. at 334.
142. *Id*. at 333–34.
143. *Id*. at 334. The Seventh Circuit echoed this differentiation in denying a preliminary injunction in the Asian carp case, noting that a comprehensive regulatory scheme is evidence of intent to displace, but not dispositive of that intent. Michigan v. U.S. Army Corps of Eng'rs, No. 10–CV–4457, 2010 WL 5018559, at *19 (N.D. Ill. Dec. 2, 2010) ("Apparent comprehensiveness of Congressional legislation is only one indication of displacement.").
144. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. at 333–34.
145. *Id*. at 334–35.

expressed concern that without federal common law causes of action, disputes would remain unaddressed.[146] He grounded his argument in Article III, Section 2 of the U.S. Constitution, which "explicitly extends the judicial power of the United States to controversies between a State and another State or its citizens, and [the] Court, in equitably resolving such disputes, has developed a body of 'what may not improperly be called interstate common law.' "[147]

The historical basis of this reasoning came from the 1907 case *Georgia v. Tennessee Copper Co.*[148] Blackmun used *Tennessee Copper* to illustrate each state's long-held right "to be free from unreasonable interference with its natural environment and resources when the interference stems from another State or its citizens."[149] The Court in *Tennessee Copper* famously recognized the special status of states in regards to their natural resources, stating:

> When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the grounds of their still remaining quasi–sovereign interests; and the alternative to force is a suit in this court.[150]

Blackmun next reframed the question the Court dealt with as "whether, given its presumed awareness [of the relevant common law history], Congress, in passing these Amendments, intended to prevent recourse to the federal common law of nuisance."[151] This, he reasoned, required a more significant inquiry into congressional intent than whether Congress has simply spoken to the problem; rather, it required specific congressional intent to displace the common law.[152] Addressing the complex problems of water pollution by enacting the 1972 Amendments "should not be taken as presumptive evidence, let alone conclusive proof, that Congress meant to foreclose pre-existing approaches to controlling interstate water pollution."[153]

146. *Id.* at 223–36.
147. *Id.* at 335 (quoting Kansas v. Colorado, 206 U.S. 46, 98 (1907)).
148. Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907).
149. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. at 335.
150. Georgia v. Tenn. Copper Co., 206 U.S. at 237.
151. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. at 338.
152. *Id.* at 338–39.
153. *Id.* at 338.

Next he addressed the language of subsection 505(e). He argued that the language of the statute[154] preserved the right of states, which are included in the statute's definition of "person," to bring an action "against the governmental entities who are charged with enforcing the statute."[155] Blackmun cited additional evidence to support his claim that Congress did not intend to extinguish the federal common law of nuisance, including the lack of a "unitary enforcement structure," noting that states may choose to enact more stringent pollution standards.[156] "Thus, under the statutory scheme, any permit issued by the EPA or a qualifying state agency does not insulate a discharge from liability under other federal or state law."[157]

Blackmun also took issue with the legislative history used by the Court to conclude that the comprehensive statute was intended to displace the common law: "The fact that legislators may characterize their efforts as more 'comprehensive' than prior legislation hardly prevents them from authorizing the continued existence of supplemental legal and equitable solutions to the broad and serious problem addressed."[158] Blackmun went on to cite a Senate Report that explicitly describes the congressional intent of section 505(e) to avoid displacing rights or remedies offered by other laws (including the availability of damages).[159] The Senate, in its report, noted that "section [505(e)] would specifically preserve any rights or remedies under any other law" and "[c]ompliance with requirements under [the amendments] would not be a defense to a common law action for pollution damages."[160] This language, recognizing a continued right to bring a common law cause of action, shows that Congress did not intend to preclude those actions.

Finally, the availability of the administrative mechanism of notice and hearing,[161] according to Blackmun, should not preclude the option of

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154. "Nothing in this section shall restrict any right which *any person* (or class of persons) may have under *any statute or common law* to seek . . . *any other relief*." *Id*. at 338 (quoting 33 U.S.C. § 1365(e) (2006)).

155. *Id*. at 339–40.

156. *Id*. at 340–41. Because Congress was open to the suggestion that states enact more stringent pollution control mechanisms, it can be reasoned that it did not see its action in the instant case as an all-encompassing regulation for water pollution.

157. *Id*. at 341.

158. *Id.* at 342.

159. *Id*. at 343.

160. *Id*. at 343 (quoting S. Rep. No.92-414, at 81 (1971)).

161. Notice and hearing (along with notice and comment rulemaking) allows anyone (states, non-profits, citizens, etc.) to give comments to agencies prior to their final action. Agencies are then required to address all meaningful comments from participants in taking its action. United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977) ("It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.").

judicial remedies.[162] Nothing in section 402, the notice and hearing process, "suggests that a neighboring State's participation in the permit-granting process is anything other than voluntary and optional."[163] The legislative history showed that the Conference Committee expressly rejected participation in the administrative mechanism as a jurisdictional bar. A showing that legislative history anticipated the creation of a notice and hearing administrative procedure did not foreclose a federal common law action, without explicitly saying so.[164]

C. Displacement after Milwaukee II

The holding in *Milwaukee II* has been read to recognize two types of displacement: field displacement and conflict displacement. The ambiguity posed by the dual readings of *Milwaukee II* has created continued uncertainty in displacement analysis. Field displacement occurs when legislation is so extensive and complete that it amounts to "occupy[ing] the field."[165] The field displacement rationale further holds that Congressional silence on a particular issue should be read to mean that the legislation is sufficiently comprehensive and complete that there is no remaining interstices for federal common law to supplement and that Congress intended for the legislation to be all-inclusive, even when Congress legislates comprehensively.[166] It can then be argued that "[s]ilence in the midst of comprehensiveness instead means that Congress intended to leave a subject unregulated."[167] Without Congress explicitly signaling otherwise, Merrill argues that courts will probably read such silence to mean Congress did not intend for the federal common law to be displaced.[168]

Alternately, conflict displacement occurs when legislation specifically addresses the particular action or remedy that gives rise to the common law claim.[169] Whether conflict displacement has occurred may be determined by asking "whether Congress has provided an effective regulatory mechanism," different than that possible under common law, for dealing with a particular pollution problem.[170] This rationale comes from the understanding that common law remedies are assumed in certain disputes and those common

162. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. at 345.
163. *Id*.
164. *Id*. at 345–46.
165. Bausinger, *supra* note 117, at 548.
166. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 313 (2005).
167. *Id*.
168. *Id*.
169. *See id*.
170. *Id*. at 311–13.

law remedies should be expected to remain available unless Congress explicitly spoke to that particular type of dispute.[171]

Recently the Court took up the question of displacement of federal common law by the Clean Air Act in *AEP v. Connecticut*. The Court applied the conflict displacement rationale, finding that the Clean Air Act displaces the "common law right to seek abatement" of carbon dioxide pollution as a public nuisance.[172] The Court took great interest in the Clean Air Act's avenues for enforcement in holding that the Act provides the same relief as sought through federal common law.[173] Justice Ginsberg, writing for the majority, held that Congress delegated the regulation of carbon dioxide emissions to the EPA and that EPA's decision not to regulate is within that delegated power.[174] "The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law."[175] Simply because the agency chose not to regulate does not give the federal courts authority to use federal common law to overturn that agency decision.[176] Again, the Court recognized the need to defer to the EPA's expertise and prevent "ad hoc, case-by-case injunctions."[177]

Both the district and appellate courts correctly concluded that the States were entitled to bring a federal common law cause of action to abate the Asian carp public nuisance. However, the ambiguity in the effects of displacement (either field displacement or conflict displacement) highlights one of the deficiencies in the displacement analysis. Particularly when States are acting in their sovereign capacity, courts must recognize a State's obligation to protect themselves from out-of-state sources of pollution.

CONCLUSION

In deciding whether a common law cause of action was displaced when states are exercising their sovereign rights, courts should not only go through the *Milwaukee II* displacement analysis, but they must also consider additional relevant factors in deciding cases regarding states sovereignty. Specifically, courts should apply similar reasoning to the displacement analysis as has been discussed in the standing requirement and availability of alternative forums. The Court has previously recognized the special

171. *Id.* at 313.
172. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2537 (2011).
173. *Id.* at 2538.
174. *Id.*
175. *Id.*
176. *Id.* at 2538–39.
177. *Id.* at 2539–40 (invoking *Chevron*-style deference).

status of states in these analyses, and must continue to do so in the displacement analysis.

Most recently in *Massachusetts v. EPA*, when discussing the standing requirement, the Court recognized the special status of the state of Massachusetts in bringing a claim as a sovereign entity. In discussing Massachusetts' standing to challenge an EPA rulemaking petition, the Court recognized that Massachusetts has an "independent interest 'in all the earth and air within its domain' " and in protecting its sovereign territory.[178] The Court specifically references the dignity of states, which are not "mere provinces or political corporations"; in the standing determination, it is significant if the plaintiff is a state acting as a sovereign.[179] The Court notes that states give up certain powers when entering the Union, including traditional dispute resolution methods, such as invading or negotiating a treaty.[180] Because states give up such power to the federal government, they are forced to rely on federal agencies and Congress to protect their interests.

The specific federalism issues at stake when states are unable to bring common law causes of action to abate nuisances originating in other states have been recognized in the Court's decisions since *Tennessee Copper*. Bausinger highlights the "special solicitude" given to Massachusetts due to its sovereign status.[181] This special solicitude given to Massachusetts in its attempt to protect its quasi-sovereign interest is as applicable in the displacement analysis as in the standing analysis. In further recognition of the special federalism concerns arising out of interstate conflicts, courts note the need for remedies, when not provided by statute, in "what may not improperly be called interstate common law."[182]

The special status afforded to states when bringing action against other states in their sovereign capacity originates in Justice Holmes' majority opinion in *Tennessee Copper v. Georgia*. In an action to enjoin Tennessee Copper Company from releasing noxious gas over Georgia territory, Holmes stated,

> The case has been argued largely as if it were one between two private parties; but it is not . . . . This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the

178. Massachusetts v. EPA, 549 U.S. 497, 519 (2007).

179. *Id*. (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)).

180. *Id*. at 519 ("Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.").

181. Bausinger, *supra* note 117, at 539.

182. Kansas v. Colorado, 206 U.S. 46, 98 (1907).

> state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.[183]

In acknowledgment of state sovereignty in bringing nuisance abatement claims, courts distinguish the need for alternate forums, state participation, and remedies as valid and unique considerations when dealing with state claims of right under federal common law.

Alternate forums, such as administrative or other means for addressing disputes available to parties, when statutorily created, may suggest that Congress decided the statutory remedy was to be the entire remedy.[184] In order for a statute to speak directly to the question at issue in the common law claim, as required to displace the common law cause of action, "a federal statute must provide some recourse for the problem at issue in the federal common law claim."[185] The merits of remedies (statutory or common law) may be debated, and it is reasonable to argue that a coordinated, comprehensive statutory and regulatory framework may be preferable.

Yet in the Asian carp litigation, no such framework existed; a patchwork of statutes gives the Corps jurisdiction over the infrastructure critical to the Asian carp's spread, rather than a comprehensive framework like the CWA's permitting scheme in *Milwaukee II*.[186] Therefore, states must be afforded a forum to assert their common law rights. It falls to the federal courts to "provide a venue for states to seek abatement" when they are furthering "a quasi-sovereign interest in protecting their citizens."[187] The plaintiff States recognized the importance of forums in their petitions to the Supreme Court urging it to exercise either continuing or original jurisdiction over the Asian carp dispute.

States must also be afforded the right to participate in the administrative process. In *Milwaukee II*, the Court addressed one of the serious concerns of *Milwaukee I*:

> It is also significant that Congress addressed in the 1972 Amendments one of the major concerns underlying the recognition of federal common law in [*Milwaukee I*]. We were concerned in that case that Illinois did not have any forum in which to protect its interests unless federal common law were created . . . . The statutory scheme established by Congress provides a forum for the pursuit of

183. Georgia v. Tenn. Copper Inc., 206 U.S. 230, 236–37 (1907).

184. Bleiweiss, *supra* note 126, at 62.

185. Ken Alex, *A Period of Consequences: Global Warming as Public Nuisance*, 43 STAN. J. INT'L L. 77, 88 (2007).

186. *See id.*

187. Sean Mullen, Note, *The Continuing Vitality of the Climate change Nuisance Suit*, 63 RUTGERS L. REV. 697, 712 (2011).

> such claims before expert agencies by means of the permit-granting process.[188]

Administrative involvement is not the only way in which a state's interest may be furthered. Because of the technical nature of many environmental nuisance claims, the Supreme Court is often reluctant to hear interstate claims under original jurisdiction.[189] "While [*Milwaukee II*] is now a century old, the Court's struggle with technical complexity, scientific uncertainty regarding distant causation, and complicating conduct in the affected state has continued to this day."[190] However, it can be noted that complex and technical matters are not wholly insurmountable for the Court. The practice of appointing Special Masters is frequently used when the Court invokes original jurisdiction.[191] Technical and fact-specific environmental disputes, like the Asian carp litigation, have also contributed to the Court's preference for alternative solutions to dealing with interstate environmental claims.[192]

Legislative solutions (including administrative remedies) and interstate bargaining are cited as two avenues to satisfy the concern about state participation. However, both of these methods frequently do not provide an adequate resolution.[193] Ultimately, due to the nature of the problems and solutions, interstate environmental issues need to be solved through federal regulatory programs.[194] In the case of Asian carp, for example, a comprehensive and effective regulatory scheme dealing with the invasive fish would be preferable to each state or municipality attempting to achieve the same goal through various means. The Court has noted that agency involvement in a regulatory scheme that allows for state participation, like the CWA, is one way to resolve interstate pollution issues.[195] In the case of water pollution, however, it can be argued that the EPA "should act as an arbitrator of interstate disputes."[196]

Another option—interstate bargaining for congressionally approved compacts[197]—allows full state participation in dealing with interstate

188. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 325–26 (1981).

189. *See* Noah D. Hall, *Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy*, 32 HARV. ENVTL. L. REV. 49, 64 (2008).

190. *Id*. at 65.

191. *See id*. at 67.

192. *See id*. at 70.

193. *Id*. It may also be argued that since the passage of the Seventeenth Amendment, states are no longer represented in their sovereign capacity in the legislative process.

194. *See id*.

195. *See id*. at 74.

196. *Id*.

197. Article 1, Section 10 of the U.S. Constitution permits states to enter into compacts, subject to Congressional approval. U.S. CONST. art I, § 10, cl. 3.

environmental harms.[198] Compacts are agreements between states enacted through state legislatures, subject to congressional authority.[199] "Since most interstate environmental harms are regional rather than national in scope, compacts between the few interested and affected states make more sense than federal involvement."[200] Unfortunately, interstate compacts are rare due to the high political costs of entering into such compacts.[201]

Finally, statutory remedies provide another avenue by which state interests may be furthered. In *County of Oneida v. Oneida Indian Nation*, the Court explicitly recognized the necessity of remedies in a statute in order for that statute to displace the common law.[202] The Court stated that "the Nonintercourse Act does not speak directly to the question of remedies for unlawful conveyances;" thus, no displacement is found.[203] This explicit recognition of remedies as a factor in the Court's decision on common law displacement acknowledges a litigating party's rights to some sort of resolution of the issue at hand. It is true that *Oneida* did not involve a state party,[204] but the case recognizes that litigants have certain interests in the outcome that must be addressed, either by statute or common law.

Statutory remedies may satisfy the sovereign interests of states and are frequently considered in the displacement discussion. *AEP* demonstrates that remedies are an important indicator of displacement. In citing to *Onieda*, the *AEP* Court was unequivocal about the importance of remedial provisions in the displacement calculations. To determine whether the CAA displaces the action at issue in *AEP*, the Court cited ongoing enforcement and administrative penalties for noncompliance as proper statutory remedies satisfying the need for remedial measures.[205] The CAA goes even further in that "[i]n specified circumstances, the Act imposes criminal penalties on any person who knowingly violates emissions standards issued under [the Act]."[206]

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198. *See* Hall, *supra* note 189, at 75. While this Note does generally not address issues of horizontal federalism, involvement in such activities may abate the concerns about state participation in the process governing interstate environmental harms. "The failure to address the problem through vertical federalism (with the federal government imposing a solution on the state) has been mirrored by a failure to address the problem through horizontal federalism (with states imposing solutions on themselves)." *Id*.

199. *Id*. at 76.

200. *Id*.

201. *Id*. at 77.

202. Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 237–39 (1985).

203. *Id*. at 236–37.

204. Interests of Indian Tribes, while not on the level of the states, are recognized as sovereign by the federal government. While *Oneida* is not wholly reflective of the state/federal dichotomy presented by the Asian carp litigation, its ruling is still applicable.

205. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. at 2538.

206. *Id*.

Statutory remedies are not necessarily preferable, but arguably, a coordinated, comprehensive regulatory framework is preferable to states bringing suit against a range of agencies and industries. Without such a comprehensive solution, however, courts must be able to exercise jurisdiction.[207] The availability of remedial measures, particularly when state sovereignty is at issue, closes the interstices common law remedies are meant to fill.[208]

Ultimately, as shown through the lens of the Asian carp litigation, sovereign interests must be protected when states seek to protect their national resources. Because the plaintiff States in *Michigan v. Army Corps of Engineers* were left without any administrative remedy, they sought protection of their sovereignty through the federal court system. While at this point their victory on the point of federal common law may seem pyrrhic, the case was nonetheless an important reminder of states' need to protect their sovereignty over the air and water in their territory. As recognized in *Massachusetts v. EPA*, one state may not invade another to protect its interest in the ambient air, water, or even land.[209] Courts must continue to recognize the important principles highlighted in that sentiment and in *Tennessee Copper* when deciding whether a state's cause of action is displaced by Congressional delegation. Without such recognition, states' ability to effectively care for their natural resources may be irreparably harmed.

207. *See* Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. at 237-240.
208. *See* City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 336 (1981).
209. Massachusetts v. EPA, 549 U.S. 497, 519 (2007).