

***AEP'S TIPPING POINT:  
IMPLIED PREEMPTION OF  
CLIMATE-CHANGE COMMON LAW CLAIMS***

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## **ABOUT WLF'S LEGAL STUDIES DIVISION**

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Ms. Duncan and Mr. Massey have been actively involved in climate change litigation and represented a group of *Amici* before the Supreme Court in *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011). Ms. Duncan also represented *Amici* before the *en banc* Fifth Circuit in *Comer v. Murphy Oil* and the Ninth Circuit in *Native Village of Kivalina v. ExxonMobil Corp.* During these cases, Ms. Duncan and Mr. Massey have collaborated with co-counsel Harvard Law Professor **Laurence H. Tribe** in *AEP*, and Harvard Law Professor **Richard H. Fallon**, in *Comer* and *Kivalina*. These collaborations have influenced the authors' thinking on these issues. While the thoughts expressed in this article are their own, the authors are grateful for Professors Tribe's and Fallon's contributions to the development of the ideas expressed in this article.

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## **Key Points in this WORKING PAPER:**

- Recent high-profile legal scholarship argues that courts should permit plaintiffs to use admittedly policy-oriented lawsuits of questionable merit, such as tort suits alleging harm from climate change, as a means of “prodding” legislatures into taking action.
- Treating court proceedings as a form of “political theater” is at odds with the Constitution, undermines judicial legitimacy, and forces defendants to play the unwilling pawn in such lawsuits at their own expense.
- Justice Ginsburg, in her *AEP v. Conn.* opinion, recognized that administrative law, not judge-made common law, is the appropriate vehicle for addressing complex issues such as climate change.
- Justice Ginsburg’s *AEP* opinion outlined the basis for a presumption *in favor of* preemption when an issue necessarily requires a uniform, national approach.

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## **INTRODUCTION**

In *‘Prods and Pleas’: Limited Government in An Era of Unlimited Harm*,<sup>1</sup> Professor Douglas A. Kysar and Benjamin Ewing ask the courts to tackle the issue of global climate change. The authors take aim at the Supreme Court’s recent decision in *American Electric Power Co., Inc. v. Connecticut* (“*AEP*”),<sup>2</sup> where the Court unanimously rejected federal common law nuisance claims for climate change and

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<sup>1</sup>Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011) (Hereinafter “*Prods and Pleas*”).

<sup>2</sup>131 S. Ct. 2527, 2540 (2011).

held that the Clean Air Act displaced them.<sup>3</sup>

The judiciary, Kysar and Ewing contend, should not be deterred from plunging into a thicket of policy and scientific questions where the political branches fear to tread. Instead, the courts should recognize tort liability for climate-change-related claims by accepting the predicate that carbon emissions contribute to global warming, which, in turn, cause increased risk of unlimited harm to every person on the planet. According to Professor Kysar and Mr. Ewing, emitting carbon dioxide constitutes a “wrong” or “misconduct”<sup>4</sup> that is actionable as a tort, even though carbon emissions are a natural byproduct of something every human does every day merely by breathing.<sup>5</sup> Nonetheless, the authors advocate for the justiciability of federal and state common law climate-change claims, which would impose absolute liability for ubiquitous conduct.<sup>6</sup>

Kysar and Ewing argue for a startling expansion of the judicial power. They encourage courts to reconceptualize Article III and to assume that any claim presents a genuine case or controversy if it can be pleaded in the language of a common law tort. Their argument for relaxing the requirements of Article III is ultimately a pragmatic one, driven by their belief that the political branches have been unable to remedy global warming quickly enough to comport with their view of effective social policy. Based exclusively, it seems, on the absence of a comprehensive regulatory scheme for greenhouse gas (GHG) reductions, Ewing and Kysar argue for massive judicial intervention at the behest of self-selected plaintiffs singling out a few defendants for retroactive application of GHG emissions standards devised by unelected judges. Rather than trusting democratic governance, Kysar and Ewing turn to the vague equity power of Article III courts for solutions to our thorniest and most

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<sup>3</sup>*Prods and Pleas*, 121 YALE L.J. at 414-18. Professor Kysar’s views on this subject are not surprising; he has participated as part of a group of *amicus* environmental and tort law professors who have submitted *amicus* briefs in favor of plaintiffs in each of the climate change cases pending in the federal courts. Professor Kysar authored the brief submitted by the law professor *amicus* in support of respondents to the Supreme Court in *AEP*.

<sup>4</sup>As climate change litigation involves the common law tort of public nuisance, the alleged “wrong” sought to be remedied is the unreasonable interference with a right common to the general public. *See* RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979) (defining public nuisance as “an unreasonable interference with a right common to the general public.”).

<sup>5</sup>*AEP*, 131 S. Ct. at 2538 (“After all, we each emit carbon dioxide merely by breathing.”).

<sup>6</sup>*Prods and Pleas*, 121 YALE L.J. at 382-84 & n.108; *see also* Brief of *Amicus Curiae* Law Professors in Support of Plaintiffs-Appellants Native Village of Kivalina and City of Kivalina at 21-22, *Native Village of Kivalina v. ExxonMobil*, No. 09-17490 (9th Cir).

complex international policy questions. For subject matters that risk catastrophic “unlimited” harm—like global warming and international terrorism—they would transform equity power into an expansive, supreme authority whereby the threat of “government by injunction” becomes a “necessary” means by which better law-making is achieved.<sup>7</sup>

Kysar and Ewing’s “prods and pleas” thesis is that courts should not dismiss climate change public nuisance claims on *any* jurisdictional grounds (standing or political question doctrine) or quasi-merits grounds (displacement or preemption)—even though the claims are unlikely to withstand summary judgment or a directed verdict<sup>8</sup>—simply to make a political statement that the government is not doing its job.<sup>9</sup> In the Kysar/Ewing world, this messaging function will “catalyze”<sup>10</sup> congressional “inaction” and “inertia” in a way that dismissal of climate change nuisance suits at the pleadings stage supposedly will not.<sup>11</sup> In short, Kysar and Ewing believe this judicial “colloquy”<sup>12</sup> function is necessary to jump-start “dysfunctional”

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<sup>7</sup>*Prods and Pleas*, 121 YALE L.J. at 353, 423-24.

<sup>8</sup>Kysar and Ewing acknowledge that common-law climate change claims likely would not withstand summary judgment. *See, e.g.*, “Although climate change plaintiffs still face long odds on the actual merits of their claims . . . .” (*Id.* at 350 (Abstract)); “Even when the ultimate result of such struggles is dismissal on the merits...” (*Id.* at 358); “At the merits stage, a variety of doctrinal hurdles for plaintiffs will remain and will most likely justify dismissal of the suits.” (*Id.* at 355-56); “At the outset, it must be acknowledged that the fit between climate change and tort law seems poor.” (*Id.* at 369); “If the paradigmatic tort is one in which A hits B—a clear, direct, and unlawful action by one actor against another that gives rise to an isolated, retrospective harm—then climate change lies conspicuously far outside this paradigm.” (*Id.*); “[C]ourts need not appeal to political question doctrine to dispense with cases . . . . Instead, they may . . . grant summary judgment for defendants on the merits—rejecting plaintiffs’ suits as a matter of law . . . . For instance, with respect to both *damages actions and suits for injunctive relief*, climate change plaintiffs face a significant challenge demonstrating that relief is appropriate given the extraordinary number of other contributors to the problem beyond named defendants.” (*Id.* at 383) (emphasis added).

<sup>9</sup>*See id.* at 356-57 (“In so doing, courts reveal gaps between the common law’s basic ideal of protection from harm imposed by others’ agency and the failure of other branches to step in when the complexity of such harm renders it unsuitable for judicial resolution.”); *id.* at 359 (“Substantive dismissals can implicitly acknowledge societal need and serve notice on those actors in government more capable of tackling a problem but less predisposed to try. However those other branches respond, the hope is that our institutional dynamics will be catalyzed and preserved”); *id.* at 377 (“That Congress increasingly seems to operate as a ‘broken branch’ only exacerbates these preexisting structural incentives for individuals to turn to the courts when new social harms arise.”).

<sup>10</sup>*Id.* at 359.

<sup>11</sup>*Id.* at 366 (“When formal legal limitations or forces of political inertia prevent the kind of democratic experimentalism that new governance thinkers advocate, prods and pleas offer a mechanism for public acknowledgment of such barriers.”); *id.* at 375 (“By struggling to apply common law principles to the harms of an ever more complex and interconnected world—and often precisely in failing to do so satisfactorily—courts deliver dignified, public pronouncements that legislative and administrative inertia have left our basic ideals unprotected.”).

<sup>12</sup>Kysar and Ewing refer to the function of the judiciary as providing a “site,” or “space,” for “the airing of grievances,” “serving a vital source of information gathering” and “intragovernmental feedback.” *Id.*

government and to trigger improved law-making. Kysar and Ewing propose a world in which judges use their inherent common law equitable and remedial discretion, in effect, to save Congress from itself.

What makes the Kysar/Ewing “prodding function” for the courts so remarkable—and easy to overlook as alarming—is their concession that courts, *federal and state*, ultimately should toss out these climate-change common law claims *on the merits*. They do not advocate for *actual* judicial imposition of carbon emissions caps on private energy companies.<sup>13</sup> They recognize that courts probably would go *too far* were they to actually impose such limits—through injunctions or money damages.<sup>14</sup> Rather, they believe courts should entertain common law claims *only to a point*—through the pleadings and discovery stage—but at the merits stage, the claims probably should be rejected. They contend these common law claims should at least withstand dismissal on jurisdictional grounds because justiciability doctrines, like standing or political question, and quasi-merits doctrines like displacement and preemption, should not bar the claims in order to permit operation of the “prod and plea” function during the course of discovery. In other words, the “court-as-colloquy” scheme theoretically would induce Congress to devise a national energy policy and develop comprehensive emissions standards, which Kysar and Ewing implicitly acknowledge the courts themselves constitutionally cannot do consistent with separation of powers principles. Thus, it is the *implied threat* of judicial imposition of emissions standards at the conclusion of the case, *not actual judicial intervention*, which “prods” Congress to perform what they believe would be

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at 375, 379. “If the heart of the political question and related doctrines . . . [is] mutual respect among the three branches of Government . . . [then] prodding and pleading . . . [is] akin to asking the other branches . . . to live up to their better instincts, rather than succumb to an institutional bias toward inaction.” *Id.* at 416-17. “[A]s coequal branches, and in light of the inevitable incompleteness and ambiguity of statutory commands, the federal courts and Congress are best seen as partners in an ongoing colloquy over the interpretation and lawfulness of statutes. Common law rulings—such as the injunction issued by the district court in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*—can be seen as an integral part of this colloquy.” *Id.* at 404. “Whether it is a legislature that succumbs to dysfunction or a court that abdicates its duty to adjudicate, when one branch falls down on the job, the elusive goal of balance may be thwarted just as much as when one branch usurps authority entrusted to another.” *Id.* at 411-12.

<sup>13</sup>*But see supra* n.12, discussing Kysar and Ewing’s belief that “the injunction issued by the district court in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*—can be seen as an integral part of this colloquy.”

<sup>14</sup>*Prods and Pleas*, 121 YALE L.J. at 355-56, 383; *see also supra* n.8.

better law-making.<sup>15</sup>

Even so qualified, however, this WORKING PAPER will argue that the Kysar/Ewing approach to climate-change common law claims is no less problematic to constitutional governance and Rule of Law principles. Their analysis represents a stark departure from the appropriate role of the federal courts envisioned by the Framers and established by the Constitution. Far from being consistent with “checks and balances,” their proposed system of “prods and pleas” would grow to become the exception that swallows the fundamental principle of limited government and popular accountability for three primary reasons.

First, as we argue throughout this WORKING PAPER, treating Article III judicial proceedings essentially as a form of political theater is completely at odds with the constitutionally mandated role of the courts.

Second, in Section I B, we attempt to demonstrate that even if this “prodding” function could be justified as a matter of constitutional text and structure, it would have enormous adverse practical consequences that Professor Kysar and Mr. Ewing largely ignore. Neither judicial resources nor the institutional capital of the courts are limitless. To the extent courts engage in overly political “messaging” functions with only a thinly-disguised pretense of adjudicating actual controversies, they risk undermining the legitimacy on which their public acceptance depends.<sup>16</sup> Our unelected judiciary is deliberately insulated from popular control through the mechanism of life tenure because, for the most part, it is not meant to play an overt role in the political arena.

Common law climate-change tort claims do not present an appropriate subject for aggrandizement of the traditional judicial role. When courts entertain such novel, far-reaching, cost-benefit-related common law claims—even if only for a short time—

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<sup>15</sup>See *supra* nn.8-11.

<sup>16</sup>See *generally* ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); Philip B. Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265, 265 (“[I]f the meaning of the Constitution is as fluid as the personal whims of the Court’s membership would make it, it is really no constitution at all.”); J. ELY, *DEMOCRACY AND DISTRUST* (1980) (examining legitimacy of judicial review when federal courts protect fundamental rights and/or embattled minorities, which the constitution carves from popular control and entrusts to the Judiciary to preserve and protect); Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARVARD L. REV. 43, 76 (1989) (“[J]udicial review is democratic when it reinforces the fundamental-rights that are part of American democracy.”).

they squander precious political capital upon which the Judiciary depends for its independence from popular control.<sup>17</sup> Such a blatant, political “colloquy” or “messaging” function would dilute the public’s trust in the impartiality of the courts. Neutrality principles are the bedrock upon which the Rule of Law theoretically depends. More pragmatically, distancing the Judiciary from such an overt political role is a necessary practical means by which the public accepts the courts’ constitutional interpretations as fair and impartial, which is critical to meaningfully protecting minority rights against majoritarian over-reaching.

Third, even if this “prod and plea” function could withstand scrutiny as an appropriate role for the courts in *some* cases (*e.g.*, those implicating civil liberties or equality interests) which would not unduly endanger impartiality and neutrality principles and could even bolster, not undermine, public trust in the judiciary, another constitutional check should still prevent courts from adopting such a “prodding” role in the context of climate change common law nuisance claims. Kysar and Ewing brush aside the enormous financial and other burdens that defendants in such tort suits would be required to bear. The defendant’s role in Kysar and Ewing’s court-as-colloquy scheme is to play the devil’s advocate. Through the coercive power of the court, defendants would be forced directly to spend millions of dollars amassing scientific data and expert testimony to disprove the plaintiffs’ theories of tort liability in lawsuits Kysar and Ewing readily admit are “most likely” meritless.<sup>18</sup> Indirectly, the defendants would be obliged to divert their attention from productive, job-creating endeavors, and their top executives would be required to respond to the politically motivated litigation in time-consuming depositions, planning sessions, and discovery proceedings. For many defendants, the lawsuit would be a “bet-the-company” proposition that could not safely be ignored, even if realistically the action stood little chance of success.

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<sup>17</sup>Laurence H. Tribe, Joshua D. Branson & Tristan L. Duncan, *Too Hot For Courts To Handle: Fuel Temperatures, Global Warming, And The Political Question Doctrine*, Washington Legal Foundation Critical Legal Issues WORKING PAPER Series, No. 196 at 2 (2010) (“[C]ourts squander the social and cultural capital they need in order to do what may be politically unpopular in preserving rights and protecting boundaries when they yield to the temptation to treat lawsuits as ubiquitously useful devices for making the world a better place.”).

<sup>18</sup>See *supra* n.8.

Notwithstanding the obvious problems with judicial manageability and fairness associated with such a common law scheme, Kysar and Ewing repeatedly argue that climate change tort suits should be allowed to proceed to the merits even if they ultimately—and predictably—will fail: “Particularly in the early stages of . . . climate change, it would be unwise to disable an institution such as the tort system from *engaging with the substance of the problem . . .*”<sup>19</sup> Thus, Kysar/Ewing regard defendants as a means to an end—judicial hostages in an expensive discovery process meant to induce Congress to mandate national, comprehensive emissions standards. This form of adjudication is permissible in their view so long as common-law litigation telegraphs something “substantive” to the political branches.<sup>20</sup> However, as also explained in Section I B, such a conception cannot comply with due process, and Kysar and Ewing fail to provide a coherent explanation how it does.

These tort lawsuits, therefore, would not genuinely seek to vindicate any “wrong” in the traditional sense. Kysar and Ewing readily admit that their desired remedy—comprehensive emission standards to address climate change—is not possible through an isolated, ad hoc, common-law suit.<sup>21</sup> Instead, the aim would be to improve in some indefinite way the political process by which a comprehensive international/national statutory scheme for climate-change is made.<sup>22</sup> In the Kysar and Ewing court-as-colloquy scheme, therefore, defendants face the specter of unlimited liability and unlimited costs in the name of remedying purported congressional “dysfunction.”<sup>23</sup>

Limited government cannot be preserved in such a world. Kysar and Ewing never offer a limiting principle to their “prods and pleas” function for the Judiciary. Their vision of tort law supplies no recognizable line between permissible and impermissible institutional involvement for the courts. Thus, the “prods and pleas” function is the very essence of arbitrary adjudication and is inconsistent with any serious notion of the rule of law.

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<sup>19</sup>*Prods and Pleas*, 121 YALE L.J. at 410 (emphasis added).

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* at 369.

<sup>22</sup>*See, e.g., id.* at 375, 379, 404, 411-12, 416-17.

<sup>23</sup>*Id.* at 411.

Finally, Kysar and Ewing criticize the Supreme Court’s decision in *AEP* which rejected public nuisance claims under federal common law as displaced by the Clean Air Act.<sup>24</sup> They similarly attack the U.S. Court of Appeals for the Fourth Circuit’s decision in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*,<sup>25</sup> which held that state common-law public nuisance claims were preempted by the Clean Air Act. Kysar and Ewing believe that neither displacement nor preemption are proper grounds for dismissal of either federal or state common law claims.<sup>26</sup>

In so concluding, they miss the landmark significance of the reasoning employed by Justice Ginsburg in *AEP*. As explained in Section II of this WORKING PAPER, the decision contains language strongly suggesting that state-by-state litigation is *not* an appropriate or constitutional means to regulate greenhouse-gas emissions, global climate change, or federal energy policy.<sup>27</sup> *Indeed, the Supreme Court implicitly telegraphed a “uniquely federal interest” subject-matter preemption doctrine, which would bar climate change nuisance claims premised on state law.* Although the Court did not expressly take up preemption because the parties had not briefed it, embedded in the Court’s reasoning is the foundation for an implied “uniquely federal interest” preemption doctrine. As discussed below, *this implied preemption doctrine involves a presumption in favor of preemption when claims implicate “uniquely federal interests” that require resolution under federal, not state, law—as is the case for a global subject matter like climate change claims.*

In contrast to Kysar and Ewing’s call for an expanded role for the common law, Justice Ginsburg and a unanimous Supreme Court foresaw the political branches, including expert administrative agencies like the Environmental Protection Agency (EPA), as the appropriate arena for resolving complex, scientific, national and international policy questions such as climate change. The Court appears to envision a more confined role for the Judicial Branch with respect to these common law claims. As argued in Section III of this WORKING PAPER, if a “prod and plea” function needs to be performed in our system of limited government for climate-change, that

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<sup>24</sup>*AEP*, 131 S. Ct. at 2540.

<sup>25</sup>615 F.3d 291 (4th Cir. 2010).

<sup>26</sup>*Prods and Pleas*, 121 YALE L.J. at 401-09.

<sup>27</sup>*AEP*, 131 S. Ct. at 2537 (“...for it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of *special federal interest*.”) (emphasis added).

function is better discharged by expert agencies through administrative law rather than by insulated and unaccountable courts. The issue is inherently systemic and international, and it entails cost-benefit and distributional decisions that only the political branches can make. Environmental activists and energy companies alike can catalyze the political branches to action through rulemaking petitions and public discussion of the issues. Judicial review of administrative rulemaking, not “parallel tort tracks,” therefore, is the appropriate “prod and plea.”

The core of climate-change claims is the notion of a “tipping point”—that theoretical point at which the earth’s atmosphere has become so saturated with man-made and/or natural GHG emissions that our global climate would “tip,” meaning it would no longer absorb GHGs safely without ramifications to global climate patterns and potential ensuing natural disasters.<sup>28</sup> Climate-change common law claims also implicate a constitutional tipping point—that point at which a nuisance claim goes too far and forces a court to necessarily function more like a legislature (a law-making body) and less like a court (a law-finding and law-application body). Separation of powers is designed to protect limited government by dividing power between the Executive, Legislative, and Judicial branches. The *AEP* Court had the opportunity to clarify the dividing line between judicial common law-making versus legislative law-making on political question grounds, but declined to do so.<sup>29</sup> Notwithstanding the Court’s jurisdictional side-step, a striking feature of the *AEP* opinion is its functional analysis of the roles of the Judiciary versus Congress and its delegates—expert administrative agencies—in devising regulatory standards.<sup>30</sup>

*AEP*’s functional analysis involved federalism considerations as well—and the proper role of federal law versus state law with respect to a “uniquely federal” subject matter like climate change.<sup>31</sup> Thus, *AEP*’s reasoning provides a glimpse into the

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<sup>28</sup>*Prods and Pleas*, 121 YALE L.J. at 352 n.2 (citing Timothy M. Lenton et al., *Tipping Elements in the Earth’s Climate System*, 105 PROC. NAT’L ACAD. SCI. 1786 (2008)).

<sup>29</sup>*AEP*, 131 S. Ct. at 2535 & n.6. Due to a recusal, the Court was split about whether any “threshold obstacle,” such as standing or the political question doctrine, barred adjudication of the plaintiffs’ claims, and thus affirmed the Second Circuit’s exercise of jurisdiction “by an equally divided Court.” Nevertheless, *AEP* ultimately held that the congressional scheme displaced federal common law. See *id.* at 2537 (“it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest”).

<sup>30</sup>*Id.* at 2538-40.

<sup>31</sup>*Id.* at 2535-37.

Court's current thinking about tipping points between judicial and legislative functions, federal and state law, and the common law and administrative law in our constitutional system of government that this WORKING PAPER explores to identify the more constitutionally appropriate "prod and plea" missed by Professor Kysar and Mr. Ewing.

Like our earth's atmosphere, so too our constitutional structure of government depends upon a fragile balance between intersecting and competing forces when complex, world-wide problems like climate change are at issue. It is not surprising that Professor Kysar and Mr. Ewing seek to find somewhere in our constitutional system of government a role for the courts to energize better policy-making for addressing climate change issues. However, they overshoot when they push the common law beyond the bounds the Constitution contemplates for our limited, federal-state system. In contrast, the *AEP* court unanimously pointed the way to administrative law, not common law, as the constitutionally appropriate vehicle by which climate change policies and standards should be devised.

Within the *AEP* framework, therefore, the appropriate "prod and plea" for the Court is judicial review of the procedures by which energy and environmental standards are democratically set by Congress and administered by the EPA. Cabined within its law-application function, the court's role can be—and in certain circumstances ought to be—aggressive, indeed "activist," to insure regulatory emissions standards are created consistent with Rule of Law principles and procedural requirements, which will instill public trust that the outcome is the product of a fair and representative process for the benefit of the common good.

For uniquely federal subject matters, like climate-change, the *AEP* Court identified this sequence of decision-making (*i.e.* (1) Congress, (2) EPA, (3) judicial review of rule-making petitions), as the constitutionally more appropriate "prod and plea" than common law nuisance claims to protect our quality of life with respect to the earth's environment.

## I. THE COMMON LAW, CONSTITUTIONAL LAW, AND THE RULE OF LAW

Disregarding the limitations placed on the judicial power by Article III and its justiciability doctrines, Kysar and Ewing assert that courts should aggressively expand their authority by adjudicating all common-law tort claims on the merits.<sup>32</sup> Kysar and Ewing essentially argue that when faced with a common-law tort, federal courts should assume that it is justiciable and proceed to the merits. There are two significant problems with this argument. First, it engages in semantic cataloging. Second, it ignores the nature of tort litigation and the due process of civil litigants.

### A. Semantic Cataloging and Nonjusticiable Common Law Claims

Kysar and Ewing suggest that justiciability doctrines should virtually never be a hurdle to adjudication of common-law tort claims.<sup>33</sup> However, the Supreme Court has explained that the determination of whether a dispute is amenable to sufficiently principled resolution to comply with Article III requires a “discriminating analysis of the particular question posed” and in particular “the possible consequences of judicial action.”<sup>34</sup> The fact that a particular claim may bear a common-law label is not enough. *Baker v. Carr*<sup>35</sup> held that courts may not rely on mere “semantic cataloging” when evaluating whether a case presents political questions.<sup>36</sup>

Plainly, the justiciability of a claim cannot depend on the description affixed by a litigant or a court. Otherwise, resourceful attorneys could circumvent separation of powers merely by placing a common-law label on their claims.<sup>37</sup> A claim’s justiciability instead turns on the issues underlying the claim.<sup>38</sup> In *Luther v.*

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<sup>32</sup> *Prods and Pleas*, 121 YALE L.J. at 375.

<sup>33</sup> *Id.*

<sup>34</sup> *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

<sup>35</sup> 369 U.S. 186 (1962).

<sup>36</sup> *Id.* at 217.

<sup>37</sup> Laurence H. Tribe, Joshua D. Branson & Tristan L. Duncan, *Too Hot For Courts To Handle: Fuel Temperatures, Global Warming, And The Political Question Doctrine*, Washington Legal Foundation Critical Legal Issues WORKING PAPER Series, No. 196 at 13-14 (2010) (“Thus, simply because the plaintiffs alleged a traditional cause of action with which courts have experience, the Second Circuit—essentially confusing a label with an argument—concluded that it was an ‘ordinary tort suit’ and therefore justiciable.”).

<sup>38</sup> *Id.*

*Borden*,<sup>39</sup> for example, the Supreme Court held that a common-law trespass claim was nonjusticiable because it required a court to decide which of two competing entities was the legitimate government of a state—a matter for Congress to resolve. The case involved Martin Luther of Rhode Island, who (like his German protestant namesake) was apparently a vociferous dissenter. Luther opposed the existing “charter” government of Rhode Island and supported the rebel “peoples’ government.” When state officers came into his house to arrest him, he asserted that they had no lawful authority. However, the trial court refused to charge the jury (as Luther requested) that the rebel government was the “true” and authentic government of Rhode Island. The jury returned a verdict for defendants and the trial court dismissed the common law trespass claim.<sup>40</sup> The Supreme Court affirmed the trial court’s refusal to allow a political question to enter the case, because the predicate to liability for the common law trespass was whether or not a duty existed by defendants to not unreasonably intrude on the Luthers’ home—and determining the existence of a common-law duty involved inextricable political questions. Whether or not such a duty could be judicially created depended upon judicial recognition of the legitimacy of the rebel government.

The heart of the decision was the Court’s conclusion that the determination of the legitimate government of Rhode Island was committed to Congress by Article IV, section 4 of the Constitution, and that Congress, in turn, had delegated that power to the President.<sup>41</sup> Even though the trespass claim was couched in common law language, the Court saw the claim for what it was and explained that it was nothing more than the vehicle by which the plaintiff was improperly trying to litigate “political rights and political questions” committed to Congress, and by delegation, the President to decide.<sup>42</sup> “[W]hether they [the people of Rhode Island] have changed it [their government] or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow

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<sup>39</sup>48 U.S. (7 How.) 1, 4 (1849).

<sup>40</sup>*Luther*, 48 U.S. at 18-19.

<sup>41</sup>*Id.* at 42-43.

<sup>42</sup>*Id.* at 46-47.

it.”<sup>43</sup> The Court also focused on the lack of judicially manageable standards: “if the Circuit Court had entered upon this inquiry, by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it? It is the province of a court to expound the law, not to make it.”<sup>44</sup>

A century later, the Court articulated similar concerns in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*,<sup>45</sup> in holding that the Civil Aeronautics Act did not authorize judicial review of certain orders of the Civil Aeronautics Board regarding overseas air service, even though judicial review of administrative action is a familiar form of action. The Court cited separation of powers concerns regarding the lack of judicially manageable standards: “[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.”<sup>46</sup>

Three decades later, in *Gilligan v. Morgan*,<sup>47</sup> the Court held that a civil rights action under the Fourteenth Amendment was nonjusticiable because it requested injunctive relief seeking the judicial creation and supervision of new standards for militia discipline—a topic within Congress’ purview, even though civil rights actions are familiar federal claims. And in *Vieth*<sup>48</sup>, the Court held that an ordinarily justiciable equal protection challenge was a political question due to a lack of judicially manageable standards for determining when a political gerrymander goes “too far.”<sup>49</sup> Civil rights and equal protection claims, of course, are squarely within the zone of ordinarily justiciable causes of action. If they are subject to dismissal under the political question doctrine, then common-law tort claims are surely no different.

In short, Kysar and Ewing ignore the long history of cases that have been dismissed on political question grounds, even though they were (in the case of *Luther*

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<sup>43</sup>*Id.* at 47.

<sup>44</sup>*Id.* at 41.

<sup>45</sup>333 U.S. 103, 110-14 (1948).

<sup>46</sup> *Id.* at 111.

<sup>47</sup>413 U.S. 1, 7-10 (1973).

<sup>48</sup>*Vieth v. Jubelirer*, 541 U.S. 267, 296-97 (2004).

<sup>49</sup>*See id.* at 290-91.

*v. Borden*) or could have been (in the case of *Gilligan* and *Vieth*) stated in the language of a common law tort. Merely labeling a claim as a “common law” action does not make it justiciable.

## **B. Constitutional Limits to “Creative Common Law-making”**

Reduced to its essence, Kysar and Ewing’s argument appears to be that common law solutions to address climate change are constitutionally “necessary” because of congressional “inertia” or “inaction” on that topic.<sup>50</sup> But this argument is little more than a claim that there should be more stringent regulation than Congress has authorized and that it should be enforced by remedies that Congress has not provided. Article III courts lack such authority. Just as the Executive Branch has no authority to do Congress’ job for it, neither does the Judiciary. That constitutional prohibition, of course, is the whole point of *separation of powers*.<sup>51</sup>

In their quest for supposedly improved lawmaking, Kysar and Ewing lose sight of the ultimate object of separation of powers: a structural means by which the rule of law is preserved. The Constitution’s limits on the judicial power, like its limits on legislative and executive powers, serve to preserve and protect ordered liberty.<sup>52</sup> A massive expansion of the judicial power, even if purportedly justified by a threat of unlimited harm, would pose an unacceptable danger to individual liberties because “necessity” knows no limit. And Kysar and Ewing offer no limit other than “necessity” and the faith that inherent judicial discretion “in the common law tradition” is limit enough.<sup>53</sup>

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<sup>50</sup>See, e.g., *Prods and Pleas*, 121 YALE L.J. at 353, 362, 375.

<sup>51</sup>*Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) (explaining that the problem with appeals to “necessity of the case” as a basis for asserting power over an issue otherwise committed to Congress, when Congress has failed to act to the degree that the other branch of government (in that case the President) believes is reasonable is that “necessity knows no law.”).

<sup>52</sup>See *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) (explaining that the “constitutional structure of our Government” exists to “protect[ ] individual liberty.”); see also *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (“Constitution diffuses power the better to secure liberty....”).

<sup>53</sup>*INS v. Chadha*, 462 U.S. 919, 951 (1983) (“The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”).

However, “judicial action must be governed by *standard, by rule,*” and “must be principled, rational, and based upon reasoned distinctions.”<sup>54</sup> Federal courts have no authority to issue advisory opinions; rather they exist to resolve ripe cases and controversies, where the plaintiff can establish an injury in fact fairly traceable to the actions of the defendant. They do not exist to resolve political questions or take on issues properly committed to another branch of government. The federal courts are not some glorified complaint department, and they are not authorized to entertain meritless and non-justiciable claims in order to allow a space for “airing grievances” or providing a substitute for town-hall meetings. In fact, when an issue affects all persons in the population, its generalized nature provides less reason—not more—for the courts to get involved. The Supreme Court has repeatedly held that generalized grievances fall outside the “Case or Controversy” requirement of Article III.<sup>55</sup> The Court’s “refusal to serve as a forum for generalized grievances has a lengthy pedigree.”<sup>56</sup>

Lawmaking is a function assigned to Congress, not the courts. “[T]he Constitution is neither silent nor equivocal about who shall make the laws.”<sup>57</sup> “[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.”<sup>58</sup> “The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones. . . .”<sup>59</sup> Justiciability doctrines, such as the political question doctrine, operate as a check on the judiciary to ensure courts are properly operating within their limited sphere.<sup>60</sup>

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<sup>54</sup> *Vieth*, 541 U.S. at 278 (emphases in original).

<sup>55</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-75 (1992).

<sup>56</sup> *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam).

<sup>57</sup> *Youngstown*, 343 U.S. at 587.

<sup>58</sup> *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955).

<sup>59</sup> *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984); see also *AEP*, 131 S. Ct. at 2539-40 (citing *Chevron* and explaining how resolving the issues that would be presented in a climate change case fall outside the institutional competence of the courts as “[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.”).

<sup>60</sup> *U. S. Dept. of Commerce v. Montana*, 503 U.S. 442, 456-57 (1992)); cf. *Mistretta v. United States*, 488 U.S. 361, 381-82 (1989) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (explaining that the primary purpose of separation of powers is to prevent “encroachment or aggrandizement [by] one branch at the expense of the other[s]”); *Bond*, 131 S. Ct. at 2365 (explaining that the “constitutional structure of our Government” exists to “protect[ ] individual liberty.”); *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (“Constitution diffuses power the better to secure liberty....”); *AEP*, 131 S. Ct. at 2539-40.

The landmark Steel Seizure case of *Youngstown Sheet & Tube Co. v. Sawyer*, though not a political question case as such, illustrates the separation of powers issues at stake.<sup>61</sup> There, the Supreme Court denied President Truman's attempt to assume federal control of steel mills essential to the U.S. war effort in Korea. To be sure, *Youngstown* involved separation of powers between the Executive and Legislative branches, and judicial power was not directly at issue, but the functional analysis of the powers of the respective political branches remains relevant here.<sup>62</sup> *Youngstown* concerned an Executive Order compelling steel companies to *continue operations* supplying steel for the war effort.<sup>63</sup> In climate-change cases, plaintiffs ask the courts to issue injunctions, or abatement orders, against utilities to *discontinue operations* or otherwise cut back energy production to reduce GHG emissions. In *Youngstown*, the Supreme Court, after examining the respective powers of the President and Congress, concluded that the Executive Order mandating continued steel operations exceeded presidential power and encroached on congressional authority. The Executive Order at issue involved the use of legislative power to *make* law not the executive's power to *enforce* the law.

In climate change cases, the plaintiffs would ask the courts (rather than the executive) to legislate, but judicial legislation would be every bit as much an affront to the separation of powers. An award of damages would embody a legislative judgment about what carbon emissions policy ought to be, derived from a cost-benefit analysis of costs to plaintiffs versus utility of continued energy production at current levels. As such, like the policy question in *Youngstown*, it would be inherently legislative. In the context of the unique, global, inherently systemic nature of climate change, balancing of competing considerations of costs and utility is not possible in any traditional common-law calculus. Indeed, such substantive, non-interstitial, law-making in the guise of the common law unconstitutionally aggrandizes judicial power

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<sup>61</sup>Like the political question doctrine, the displacement analysis, of which Kysar and Ewing are equally critical, plays an essential separation of powers function. In *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), the Supreme Court held that federal courts are prohibited from imposing novel duties enforced by liability rules, even in domains of uniquely federal interest. *Id.* at 316-17; *AEP*, 131 S. Ct. at 2536 (“...the Court remains mindful that it does not have creative [law-making] power akin to that vested in Congress.” (citing *Missouri v. Illinois*, 200 U.S. 496, 519 (1906) and *Standard Oil*, 332 U.S. at 308, 314)).

<sup>62</sup>*See, e.g., Hollingsworth v. Perry*, 130 S. Ct. 705, 715 (2010) (explaining in a different context that “[i]f courts are to require that others follow regular procedures, courts must do so as well.”).

<sup>63</sup>*See generally Youngstown*, 343 U.S. 581.

beyond the Judiciary's law-application function and unconstitutionally violates separation of power principles.

Kysar and Ewing recognize as much when they acknowledge that climate change is not a traditional pollution problem.<sup>64</sup> The alleged relationship between carbon emissions and climate change “does not operate like the kind of simple, short-term, more linear relationship between cause and effect that most people . . . assume is at work when they contemplate pollution.”<sup>65</sup> As the Solicitor General observed in *AEP* on behalf of the United States:

The problem is not simply that many plaintiffs could bring such claims and that many defendants could be sued. It is also that essentially any potential plaintiff could claim to have been injured by any (or all) of the potential defendants. The medium that transmits injury to potential plaintiffs is literally the Earth's entire atmosphere—making it impossible to consider the sort of focused and more geographically proximate effects that were characteristic of traditional nuisance suits targeted at particular nearby sources of water or air pollution.”<sup>66</sup>

The limitless range of potential parties, the nebulous nature of public nuisance claims, and the inherently global nature of climatic interactions combine to produce something that is different in kind from traditional pollution cases.<sup>67</sup>

Indeed, these issues illustrate why public nuisance law is incapable of providing meaningful judicially manageable standards in a climate change case. The

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<sup>64</sup>*Prods and Pleas*, 121 YALE L.J. at 369 (“If the paradigmatic tort is one in which A hits B—a clear, direct, and unlawful action by one actor against another that gives rise to an isolated, retrospective harm—then climate change lies conspicuously far outside this paradigm.”).

<sup>65</sup>Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1164 (2009).

<sup>66</sup>Merits Brief of the Tennessee Valley Authority at 17, *AEP*, 131 S. Ct. 2527 (2011) (No. 10-174), 2011 WL 317143.

<sup>67</sup>The following helpful analogy by Professor Tribe illustrates how public nuisance lawsuits premised upon climate change cause and effect are judicially unmanageable and not well-suited to judicial resolution: “It is as though the defendants were accused, through their combined activities, of causing an aggregate shift of the Earth's axis in a potentially dangerous direction, through a complex interaction of the effects of what the defendants were doing in emitting certain gases and of what tens of millions of others, not parties to the lawsuit, were doing in addition to naturally-occurring emissions of those same gases. Unlike the situation in which specific, identifiable pollution sources discharge some noxious material onto a plaintiff's home—a situation in which it would of course be helpful, even if only marginally so, to order each of those sources to emit less of the noxious gas—the notion that the Earth's tilt would be helpfully corrected, at least a little, by telling each of the tens of millions of emitters just to do a little less of what is currently being done would be sheer fantasy, demonstrating more about the institutional limits of the judicial process than about the problem of global tilt.”

*Restatement (Second) of Torts' Introduction* even acknowledges as much when it states that courts “regard the law of torts as a dynamic set of norms, inviting adaptation as social conditions and prevailing values change [but] *within the limits of the judicial function.*”<sup>68</sup> Professor Wechsler’s introductory statement begs the key question: what exactly defines the limit of the judicial function in the context of common law claims implicating national and international federal interests, as in climate change cases? The Restatement recognizes that courts should root their judgments of “unreasonableness” in nuisance cases in “community standards,” because, apart from community standards, “there is often no uniformly acceptable scale or standard of social values to which courts can refer.”<sup>69</sup> In a case predicated on emissions that occur across the country and indeed across the globe, there is, in the words of the Restatement, no relevant community and “no uniformly acceptable scale or standard of values to which courts can refer.”<sup>70</sup> In climate change cases, therefore, for which it is clear that no “community standards” exist, a court could not proceed without making *uncabined policy judgments* that even the Restatement recognizes courts should eschew as “outside the limits of the judicial function.”<sup>71</sup>

The relief sought in climate change litigation has the direct effect of regulating the generation of electricity at power plants, therefore, in a manner quite similar to the way that the executive order in *Youngstown* regulated the commercial activities of industrial facilities. The implied textual commitment to Congress is the same.<sup>72</sup> The only difference is that Kysar and Ewing suggest that the Judiciary, rather than the Executive Branch, encroach on congressional lawmaking power. But judicial legislation would be equally a violation of the separation of powers.

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<sup>68</sup>Herbert Wechsler, *Introduction* to RESTATEMENT (SECOND) OF TORTS, vol. 4, at viii (1979) (emphasis added).

<sup>69</sup>RESTATEMENT (SECOND) OF TORTS § 828 cmt. b.

<sup>70</sup>*Id.*

<sup>71</sup>*See generally* JESSE DUKEMINIER ET AL., PROPERTY 665 (6th ed. 2006); *AEP*, 131 S. Ct. at 2539 (“[T]his prescribed order of decisionmaking—the first decider under the Act is the expert administrative agency, the second, federal judges—is yet another reason to resist *setting emissions standards by judicial decree under federal tort law. The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required.*”) (emphasis added).

<sup>72</sup>*See AEP*, 131 S. Ct. at 2539-40.

Kysar and Ewing apparently don't dispute this. Rather, they argue that a judicial abatement order is unlikely because the claims "most likely" will fail on the merits.<sup>73</sup> But rule of law principles eschew singling out a few to bear the burdens that ought to in fairness be borne by the many.<sup>74</sup> Applying vague tort law principles to climate change alleged "wrongs" would do the opposite. It would permit self-selected plaintiffs to single out a few defendants as the vehicle for inducing unelected judges to *devise* previously unforeseeable emissions standards according to a factual record that necessarily would exclude from consideration other causal contributors in a judicially unmanageable, and unavoidably arbitrary, way.

Kysar and Ewing's proposal involving the judicial establishment of a retroactive liability regime, therefore, would unquestionably "involve a possible element of surprise, in view of the settled contrary practice,"<sup>75</sup> that could, potentially, raise concerns of fundamental fairness and/or a judicial taking under the Fifth and/or Fourteenth Amendments.<sup>76</sup> It should therefore be avoided.<sup>77</sup>

## **II. AEP's NEW IMPLIED PREEMPTION DOCTRINE AND THE "UNIQUELY FEDERAL INTERESTS" PRESUMPTION**

Kysar and Ewing are critical generally of *AEP* for dismissing the federal common law claims on displacement grounds, but hold out hope that state law claims

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<sup>73</sup>See *supra* n.8.

<sup>74</sup>*Armstrong v. United States*, 364 U.S. 40, 49 (1960) (noting that the purpose of the Takings Clause is to restrict government "from forcing some people alone to bear the public burdens which, in all fairness and justice should be borne by the public as a whole.") .

<sup>75</sup>*Standard Oil*, 332 U.S. at 316.

<sup>76</sup>*Cf. E. Enters. v. Apfel*, 524 U.S. 498 (1998) (plurality opinion) (imposition of large, unanticipated, and disproportionate liability based on past conduct violates the Constitution as a deprivation of due process or a regulatory taking); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (plurality opinion) (discussing circumstances in which a judicial taking might arise: "It would be absurd to allow a State to do by judicial decree what the Taking Clause forbids it to do by legislative fiat."); *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d at 305-06(4th Cir. 2010) ("It is crucial therefore that courts in this highly technical arena respect the strengths of the agency processes on which Congress has placed its imprimatur. Regulations and permits, while hardly perfect, provide an opportunity for *predictable standards* that are scientifically grounded and thus give rise to broad *reliance interests*....It is not open to this court to...*upset the reliance interests* of source states and permit holders [energy company defendants] in favor of the nebulous rules of public nuisance.") (emphasis added).

<sup>77</sup>See *Youngstown*, 343 U.S. at 631-32 (1952) (Douglas, J., concurring) (arguing that Presidential power to take over operation of steel mills should be narrowly construed because it could amount to a regulatory taking of private property for public use and therefore, give rise to rights to compensation); *id.* at 655 (Jackson, J., concurring) (same); *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-47 (D.C. Cir. 1994) (narrowly construing agency order to avoid taking).

will survive, and ought not be dismissed on implied preemption grounds.<sup>78</sup> Accordingly, they strongly disagree with the preemption analysis in the recent Fourth Circuit *TVA* decision dismissing state common law nuisance claims in the air pollution context as preempted by the Clean Air Act. However, *AEP* contains language strongly suggesting that state-by-state litigation is *not* an appropriate or constitutional means to regulate greenhouse-gas emissions, global climate change, or federal energy policy.<sup>79</sup>

Justice Ginsburg, writing for the Court, began by determining whether Plaintiffs' claims should be governed by state or federal common law. She explained that *Erie R. Co. v. Tompkins*<sup>80</sup> "required 'federal courts [to] follow state decisions on matters of substantive law appropriately cognizable by the states,'" but that federal law governs "'subjects within national legislative power where Congress has so directed' or where *the basic scheme of the Constitution so demands*."<sup>81</sup> She then observed that "[e]nvironmental protection is undoubtedly an area 'within national legislative power.'"<sup>82</sup>

Justice Ginsburg then turned her attention to whether there was a need for a federal rule of decision.<sup>83</sup> However, she determined that "any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions."<sup>84</sup> She then reviewed the scope of the Clean Air Act and the EPA's implementing regulations to ascertain whether federal common law could provide a "parallel track."<sup>85</sup> As the Clean Air Act constituted the Legislature's "considered judgment concerning the regulation of air pollution" and "permits emissions *until* EPA acts," the Court held that it displaced any federal common law claims governing air pollution.<sup>86</sup>

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<sup>78</sup>*See, e.g., Prods and Pleas*, 121 YALE L.J. at 401-409.

<sup>79</sup>*AEP*, 131 S. Ct. at 2537 ("... for it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of *special federal interest*") (emphasis added).

<sup>80</sup>304 U.S. 64 (1938).

<sup>81</sup>*AEP*, 131 S. Ct. at 2535 (emphasis added).

<sup>82</sup>*Id.*

<sup>83</sup>*Id.* at 2536.

<sup>84</sup>*Id.* at 2537.

<sup>85</sup>*Id.* at 2538.

<sup>86</sup>*Id.* (emphasis in original)

The Court’s ruling discussed in detail why the Judiciary should not set climate change policy: “Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek counsel of regulators in the states where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present.”<sup>87</sup>

By first determining that the subject matter of carbon dioxide emissions constituted a “special federal interest,”<sup>88</sup> Justice Ginsburg supplied an important idea, easy to overlook, but pivotal for demonstrating the preemptive effect of federal law over state nuisance claims. Her analysis recognizes that some issues and claims are so uniquely federal in nature that they cannot be resolved by state common law. Rather the rule of decision must come from federal law.

As Justice Ginsburg explained: “Recognition that a subject is *meet for federal law governance*, however, does not necessarily mean that federal courts should create the controlling law.... [W]here, as here, *borrowing the law of a particular State would be inappropriate*, the Court remains mindful that it does not have creative power akin to that vested in Congress.”<sup>89</sup> This language begs the question: if state law is “inappropriate,” then is it necessarily preempted?

In *United States v. Standard Oil Co.*,<sup>90</sup> the Supreme Court recognized that state law cannot provide the rule of decision in cases involving a uniquely federal interest. *Standard Oil* involved a common-law tort action, brought by the government itself, based on injuries to a soldier from an ordinary traffic accident.<sup>91</sup> The Supreme Court held that the case presented a matter of such inherently federal interest that it was governed by federal law.<sup>92</sup>

However, the Supreme Court also reasoned that the development of a liability regime lay beyond the practical and constitutional competence of the federal courts.<sup>93</sup>

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<sup>87</sup>*Id.* at 2540.

<sup>88</sup>*Id.* at 2535-36.

<sup>89</sup>*Id.* at 2536 (citing *Missouri*, 200 U. S. at 519 and *Standard Oil Co.*, 332 U.S. 301) (emphasis added).

<sup>90</sup>332 U.S. 301 (1947).

<sup>91</sup>*Id.*

<sup>92</sup>*Id.* at 305.

<sup>93</sup>*Id.* at 313.

The requisite policy judgments and their “conversion into law” were “a proper subject for congressional action, not for any creative power of ours.”<sup>94</sup> The Court also hesitated to create federal tort liability because it “would involve a possible element of surprise, in view of the settled contrary practice, which action by congress would avoid...”<sup>95</sup>

When Congress legislates on a matter historically subject to state regulation, courts typically invoke a presumption against preemption.<sup>96</sup> However, when the subject matter is uniquely federal and when uniquely federal interests are at stake, the traditional presumption against preemption makes little sense and should be abandoned.<sup>97</sup> The Supreme Court has instructed that a presumption against preemption does not apply in fields that have long been “reserved for federal regulation.”<sup>98</sup> “[A]n ‘assumption’ of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.”<sup>99</sup> In *United States v. Locke*, for example, the Court held that there was no presumption against federal preemption in the context of oil pollution and tanker vessel navigation because “Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme.”<sup>100</sup> In *Buckman Co. v. Plaintiffs’ Legal Comm.*,<sup>101</sup> the Court reaffirmed that, in areas of uniquely federal interests, “in contrast to situations implicating ‘federalism concerns and the historic primacy of state regulation of matters of health and safety,’ no presumption against pre-emption obtains.”

An important federal interest not only dispels the presumption *against* preemption but also countenances a heavy thumb on the scale *in favor of* preemption. The Supreme Court has opined that “an area of uniquely federal interest,” “[t]he conflict with federal policy need not be as sharp as that which must

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<sup>94</sup>*Id.* at 314.

<sup>95</sup>*Id.* at 316.

<sup>96</sup>*See, e.g., Wyeth v. Levine*, 555 U.S. 555, 565-66 (2009).

<sup>97</sup>*See, e.g., id.* at 624 n.14 (Alito, J., dissenting) (explaining that the Supreme Court has never held that a “presumption” *against* preemption existed in cases where the subject matter is “reserved for federal regulation.”).

<sup>98</sup>*United States v. Locke*, 529 U.S. 89, 111 (2000).

<sup>99</sup>*Id.* at 108.

<sup>100</sup>*Id.*

<sup>101</sup>531 U.S. 341, 348 (2001).

exist for ordinary pre-emption.”<sup>102</sup> Thus, a “savings clause” in a federal statute should not be construed to allow state claims as the subject matter is outside the realm of state control.<sup>103</sup> Just as federal courts should leave to the states “what ought to be left to them,” what is federal in nature should be left to federal resolution.<sup>104</sup>

In short, tort claims alleging global climate change harms are precisely the kinds of legal actions that inherently implicate uniquely federal interests and therefore cannot be resolved by state common law. Construing *AEP*'s invocation of *Standard Oil* as a basis for implied preemption of state common law climate change claims is bolstered by other pre-*AEP* air-pollution cases. For example, the Fourth Circuit's decision in *North Carolina v. Tennessee Valley Authority*,<sup>105</sup> applied a broad preemption analysis and held state-common-law nuisance claims to be preempted by the Clean Air Act, despite its savings clause. In so holding, the Court employed logic and language similar to Justice Ginsburg's “uniquely federal interest” analysis and her admonition against judicially-imposed emissions standards: “If allowed to stand, the injunction would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system of accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards to the detriment of industry and the environment alike.”<sup>106</sup>

Similarly, in *Farina v. Nokia Inc.*<sup>107</sup> a federal appeals court applied preemption principles to reject class action claims by plaintiffs alleging that cell phone use was dangerous and seeking a judicial order requiring the defendants to provide a headset for use with each phone. Even though the case involved health and safety issues, an area traditionally regulated by the states, the Third Circuit found preemption based on the need for uniformity in the cell phone market. The federal court of appeals also explained that conflict preemption is particularly appropriate

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<sup>102</sup>*Boyle v. United Techs. Corp.*, 487 U.S. 500, 507-08 (1988); see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003) (restating principle and quoting *Boyle*).

<sup>103</sup>See, e.g., *Standard Oil*, 332 U.S. at 308-09.

<sup>104</sup>*AEP*, 131 S. Ct. at 2535.

<sup>105</sup>615 F.3d at 302-04.

<sup>106</sup>*Id.* at 296.

<sup>107</sup>625 F.3d 97, 133-34 (3d Cir. 2010).

when the federal regulatory system formulates policy by carefully balancing competing values, such as technical feasibility and costs. As the *Farina* Court held, allowing state common law and consumer fraud claims to proceed improperly “permits a re-balancing of those considerations.”

Justice Ginsburg’s analysis in *AEP* resonates with both *Standard Oil* and lower court cases such as *TVA* and *Farina*. The inescapable implication is that cases involving global climate change are federal in nature and must be resolved by federal law, which necessarily preempts state common law claims.<sup>108</sup>

### **III. *AEP*’s PROD AND PLEAD: RULEMAKING PETITIONS NOT “PARALLEL [TORT] TRACKS”**

*AEP* effectively rejected the Kysar/Ewing tort law “prods and plea” function for federal courts when the Court unanimously held that the Clean Air Act displaced all federal common law claims for remedying climate change related harms. Instead, *AEP* suggested that there is one, and only one, institution within our constitutional federal-state system of governance that has the authority to legislate on a subject matter of such uniquely federal interest as global greenhouse gas emissions, and that institution is Congress and its delegate, EPA.<sup>109</sup>

Kysar and Ewing overlook the “prod and plea” supplied by Justice Ginsburg in her *AEP* analysis, however. Although she rejects a common law tort system as serving such a prod and plea role, she explicitly paints a roadmap for how carbon emission standards ought to be devised and enforced, *i.e.*, rulemaking petitions and public discussion provide the constitutionally appropriate “prods and pleas” for addressing a vast systemic, universal problem like “global climate change,” not a “parallel track” of judge-made tort law.

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<sup>108</sup>*AEP*, 131 S. Ct. at 2535-37.

<sup>109</sup>Of course, responsibility for resolving global problems such as climate change also is vested in the President who is the nation’s chief representative in the domain of foreign affairs. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936). A treaty-based or other internationally negotiated response to the global problem of climate change ultimately may be the only meaningful resolution, given the need for international cooperation. *Cf. Garamendi*, 539 U.S. at 424 (invalidating a state law because it interfered with presidential prerogatives by giving “the President less to offer and less economic and diplomatic leverage” in negotiations with foreign governments) (internal citation and quotation omitted).

Justice Ginsburg begins her analysis for the Court with *Massachusetts v. EPA*,<sup>110</sup> which held that the Clean Air Act,<sup>111</sup> “authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases.... Because EPA had authority to set greenhouse gas emission standards and had offered no ‘reasoned explanation’ for failing to do so, we concluded that the agency had not acted ‘in accordance with law’ when it denied the requested rulemaking.”<sup>112</sup> In other words, the Court concluded that EPA had not done its job. EPA’s alleged “inaction,” “inertia,” “dysfunction,” were redressable as a matter of administrative law and procedural rule-making, not as a matter of tort law.

Justice Ginsburg directly addressed the issue of regulatory silence and whether such “silence” is license for the Judiciary to step in and perform a standard-setting function otherwise constitutionally committed to Congress. The unanimous *AEP* Court unequivocally said no: “The plaintiffs argue, as the Second Circuit held, that federal common law is not displaced until EPA actually exercises its regulatory authority, i.e., *until it sets standards* governing emissions from the defendants’ plants. We disagree.”<sup>113</sup> The Court went on to explain that:

[T]he relevant question for purposes of displacement is ‘whether the field has been occupied, not whether it has been occupied in a particular manner.’....The Clean Air Act is no less an exercise of the legislature’s ‘considered judgment’ concerning the regulation of air pollution because it *permits emissions until EPA acts*....The critical point is that Congress delegated to EPA the decision *whether...to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law*. Indeed, *were EPA to decline to regulate carbon-dioxide emissions altogether....*, the federal courts would have *no warrant to employ the federal common law of nuisance* to upset the agency’s expert determination.<sup>114</sup>

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<sup>110</sup>549 U.S. 497 (2007).

<sup>111</sup>42 U.S.C. § 7401 et seq.

<sup>112</sup>*AEP*, 131 S. Ct. at 2532-33.

<sup>113</sup>*Id.* at 2538 (emphasis added).

<sup>114</sup>*Id.* at 2538-39 (emphasis added) (internal citations omitted).

As Justice Kagan recently put it in another case and context: “pause on that for a moment.”<sup>115</sup> The upshot of *AEP* is that regulatory silence is construed as a prohibition against common law-making, not permission to fill the void.<sup>116</sup>

Does this mean, as Kysar and Ewing suggest, that “dysfunctional government” is the result? Not at all. As the Court observed in *AEP*, “Federal courts...can review agency action...to ensure compliance with the statute Congress enacted.”<sup>117</sup> In other words, the constitutionally appropriate way to guarantee each governmental institution is doing its job—is appropriately checking each other and balancing each other to accomplish limited *and effective* governance—is to adhere to the “prescribed order of decisionmaking—the first decider under the Act is the expert administrative agency, the second, the federal judges....”<sup>118</sup>

As the Court explained in *AEP*,

If 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....The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.<sup>119</sup>

This judicial “prod and plea,” therefore, maximizes institutional competencies, consistent with separation of powers principles. Within its law-application domain, the judiciary can be appropriately assertive—even aggressive—in ensuring compliance with the standards governing proper lawmaking, including, enforcement of rule of law principles.<sup>120</sup> Kysar and Ewing’s proposed additional, expansive “prod

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<sup>115</sup> *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1455 (2011) (Kagan, J., dissenting).

<sup>116</sup> This is consistent with longstanding Supreme Court precedent including *Luther*, 48 U.S. at 42 which recognized that when a specific subject matter was constitutionally committed to Congress, even in the absence of congressional pronouncement, “the *right to decide is placed there, and not in the courts.*” *Id.* at 42 (emphasis added); see also *id.* at 43 (“It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee.”).

<sup>117</sup> *AEP*, 131 S. Ct. at 2539.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 2538 (internal citations omitted).

<sup>120</sup> *Id.* (“Federal courts...can review agency action (or a final rule declining to take action) to ensure compliance with the statute Congress enacted....EPA may not decline to regulate carbon-dioxide emissions...if refusal to act would be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’.... this prescribed order of decisionmaking—the first decider under the Act is the expert administrative agency, the second, federal judges—is yet another reason to resist *setting*

and plea” function for the judiciary is wholly unnecessary and detrimental to the very considerations—individual liberty, minority rights and political accountability<sup>121</sup>—that are the object of checks-and-balances constraints in the first place.

## CONCLUSION

Ultimately, Kysar and Ewing ignore that justiciability and preemption doctrines are about much more than simply observing the procedural niceties of an organization chart. They are concerned with the deprivations of liberty and property, as well as denials of equality, that arise unless we adhere to the separation-of-powers principles and structural divisions of federal and state power these doctrines reflect. Kysar and Ewing instead propose that we submit ourselves to government by judiciary, but their approach would exact a terrible price. It would permit self-selected plaintiffs, accountable to nobody, to arbitrarily single out their preferred handful of defendants to bear the burden of addressing their perceived harm, when there is no reason to believe their harm would thereby be addressed and every reason to believe that, even if it would, the burden should be borne by the public as a whole in a far more equitable way.<sup>122</sup> As Justice Jackson said in *Youngstown*, “That authority [vested by the Constitution in a federal branch] must be matched against words of the Fifth Amendment that ‘No person shall be . . . deprived of life, liberty, or property, without due process of law . . .’ One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of

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*emissions standards by judicial decree under federal tort law.* The appropriate amount of regulation in any particular greenhouse gas-producing sector *cannot be prescribed in a vacuum*: as with other questions of national or international policy, informed assessment of competing interests is required.” (emphasis added) (internal citations omitted).

<sup>121</sup>See *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (“Constitution diffuses power the better to secure liberty....”); see also *Bond*, 131 S. Ct. at 2364-2365 (“The Framers concluded that allocation of powers between the National Government and the States enhances freedom...by protecting the people[] from whom all governmental powers are derived....By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power....The structural principles secured by the separation of powers protect the individual as well.”); cf. *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting) (“implicit ordering of relationships within the federal system” are as much “engrained in the fabric of the [Constitution] as its express provisions.”).

<sup>122</sup>*Amicus* Brief of Consumer Energy Alliance, et al. at 16-17, *AEP*, 131 S. Ct. 2527 (No. 10-174), 2011 WL 465740.

laws, not men, and that we submit ourselves to rulers only if under rules.”<sup>123</sup>

There will always be potential threats of “unlimited harm.” We should not forget that in the 223 years since the Constitution was ratified, this nation has survived a civil war, an influenza pandemic, two world wars, the great depression, the cold war (with its ever present threat of nuclear annihilation), and numerous natural disasters—all without the wholesale expansion of the judiciary’s authority advocated by Kysar and Ewing. The relevant lesson of *AEP* is that limited government is best preserved by confining the common law to the Judiciary’s *law-application and law-finding* function. *Common-lawmaking* “in a vacuum” is off-limits.<sup>124</sup> Rather, improved law-making is facilitated, or “catalyzed,” by robust judicial review of agency rule-making. That kind of targeted judicial review, which appropriately insures rule-making conforms to rule of law principles<sup>125</sup>, is the “check and balance” and “prod and plea” that more appropriately preserves limited government in this and every age.

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<sup>123</sup>See *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring).

<sup>124</sup>*AEP*, 131 S. Ct. at 2539.

<sup>125</sup>*Id.* (“Federal courts...can review agency action ...to ensure compliance with the statute Congress enacted....EPA may not decline to regulate carbon-dioxide emissions...if refusal to act would be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”) (internal citations omitted).