cerns for "[o]rderly trial management" and instead inserted his own opinion about the date the evidentiary presentation should have concluded.[82] He also characterized as "a fundamental and dangerous error" the majority's deference to the lower court's factual findings in light of the broad empirical questions at hand, noting that the politically charged issues are "very different from a classic finding of fact and [are] not entitled to the same degree of deference on appeal."[83] This argument baldly accuses lower court judges of abdicating their objective role and gives short shrift to the notion that trial court judges "play a special role in managing ongoing litigation."[84] And the more stringent review the dissent advocated "merely adds the discretion of appellate judges to the discretion of the district judge."[85]

It is possible that affording different levels of deference to the text, state, or three-judge court would not have ultimately changed any Justice's opinion on the appropriate outcome in the case.[86] But a recognition that the majority's circumscribed approach yielded what may otherwise be perceived as a "radical" result suggests that interpretive methods alone cannot be blamed for potentially untenable outcomes. To the contrary, unwieldy laws, intransigent legislatures, and unforeseeable events may place courts in the uncomfortable position of determining the appropriate — even if pragmatically worrisome — interpretation of the law.

F. Separation of Powers

Displacement of Federal Common Law. — Although "[t]here is no federal general common law,"[1] Article III courts have long asserted their prerogative to fashion federal common law in certain circumstances,[2] such as when it is deemed necessary "to effectuate congres-

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[82] *Plata*, 131 S. Ct. at 1961 (Alito, J., dissenting).

[83] *Id.* at 1966.

[84] Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 605 (2009) (citation omitted) (internal quotation marks omitted).

[85] Fletcher, *supra* note 69, at 662.

[86] *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1182 (2008) (observing in the agency context that the application of a particular level of deference does not often make an empirical "difference in how the Justices decide actual cases"); Young, *supra* note 1, at 1141 (arguing that scholars and political commentators "generally use 'judicial activism' as a convenient shorthand for judicial decisions they do not like").

[1] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[2] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("[A]bsent some congressional authorization . . . , federal common law exists only in such narrow areas as those . . . [where] either . . . the authority and duties of the United States as sovereign are intimately involved or . . . the interstate or international nature of the controversy makes it inappropriate for state law to control.").

sional policy"[3] or "to protect . . . federal interests."[4] One example is environmental pollution.[5] As the scientific consensus over the causes and effects of climate change has solidified in recent decades,[6] several states, political subdivisions, and private parties have sought to invoke this federal jurisdiction to reduce the levels of greenhouse gases that companies emit into the atmosphere.[7] Last Term, in *American Electric Power Co. v. Connecticut*,[8] the Supreme Court held that federal legislation empowering the Environmental Protection Agency (EPA) to regulate carbon dioxide emissions displaced any federal common law right to seek abatement of such emissions from power plants.[9] *American Electric* clarified the Court's incoherent displacement precedent in favor of agency decisionmaking by concluding that Congress displaces federal common law simply by delegating authority to an agency. But in reasoning that agencies are better positioned than the judiciary to analyze and enforce public policy, the Court failed to consider substantial theoretical and practical limitations on agency action, thereby setting unrealistic expectations for agencies going forward.

On July 21, 2004, several states, the City of New York, and two nonprofit land trusts sued five electric power companies in federal district court.[10] The plaintiffs proceeded under both state tort law and federal common law on a "public nuisance" theory, alleging that the companies' carbon dioxide emissions had contributed to global warming and would irreparably harm the health and safety of millions of Americans.[11] The defendant companies moved to dismiss the federal common law claims on the pleadings for three reasons. First, the defendants asserted that the case presented nonjusticiable political questions best left to the judgment of Congress and the President.[12]

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[3] United States v. Kimbell Foods, Inc., 440 U.S. 715, 738 (1979).

[4] *Id.* at 718.

[5] *See* Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . . .").

[6] *See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 37, *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf ("Changes in the atmospheric concentrations of [greenhouse gases] and aerosols . . . are drivers of climate change.").

[7] For example, states, local governments, and environmental organizations sued the Environmental Protection Agency (EPA) for denying their petition for a greenhouse gas rulemaking. *See* Massachusetts v. EPA, 549 U.S. 497 (2007).

[8] 131 S. Ct. 2527 (2011).

[9] *Id.* at 2532.

[10] Complaint at 1, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 04-cv-05669), 2004 WL 5614397; Complaint at 1–2, Open Space Inst. v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 04-cv-05670), 2004 WL 5614409.

[11] *Am. Elec.*, 406 F. Supp. 2d at 267–68.

[12] *See* Memorandum of Law in Support of Defendants' Motions to Dismiss the Complaints for Lack of Subject Matter Jurisdiction and for Failure to State a Claim upon Which Relief Can Be

Second, the defendants claimed that the complaint failed to adequately allege facts necessary to satisfy each of the requirements for Article III standing: injury-in-fact, causation, and redressability.[13] Third, in the defendants' view, the plaintiffs had no federal common law cause of action because the Clean Air Act[14] had displaced any such right.[15]

The district court dismissed the plaintiffs' claims, holding that it lacked jurisdiction on political question grounds.[16] The court relied upon the Supreme Court's guidance in *Baker v. Carr*,[17] which categorized six types of issues as nonjusticiable, including those that were "impossib[le to] decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion."[18] Applying this *Baker* factor to the instant case, the court labeled the plaintiffs' claims as "transcendently legislative" as they "touched on so many areas of national and international policy,"[19] including economic costs, national security, and foreign policy.[20] Having disposed of the case on political question grounds, the court declined to consider whether the plaintiffs had standing.[21]

The Second Circuit vacated and remanded,[22] determining that the plaintiffs' claims could proceed. Noting that "*Baker* set a high bar for

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Granted at 11–17, *Am. Elec.*, 406 F. Supp. 2d 265 (Nos. 04-cv-05669 & 04-cv-05670), 2004 WL 5614410 [hereinafter Memorandum of Law].

[13] *Id.* at 28–38.

[14] 42 U.S.C. §§ 7401–7671 (2006 & Supp. III 2009). The Clean Air Act authorizes the EPA to promulgate various regulatory standards with the ultimate goal of protecting the nation's air, water, land, and other natural resources. *See How the Clean Air Act Is Working*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/air/caa/peg/working.html (last updated Aug. 29, 2008). The Act authorizes — and in some cases requires — the EPA to regulate emissions that are deemed harmful to the environment. *See id.* If the EPA chooses not to regulate a particular pollutant, the Act also permits states and private parties to petition the EPA to do so, *see* 42 U.S.C. § 7412(b)(3), as well as to seek review of the EPA's response in federal court, *see id.* § 7607(a)–(b).

[15] *See* Memorandum of Law, *supra* note 12, at 21–26.

[16] *Am. Elec.*, 406 F. Supp. 2d at 267.

[17] 369 U.S. 186 (1962).

[18] *Id.* at 217. The other five categories were:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; . . . or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

[19] *Am. Elec.*, 406 F. Supp. 2d at 272.

[20] *Id.* at 273.

[21] *Id.* at 271 n.6.

[22] Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 393 (2d Cir. 2009). The panel deciding the case consisted only of Judges McLaughlin and Hall. Then-Judge Sotomayor was originally a member of the panel but was elevated to the Supreme Court prior to the decision of this case. *Id.* at 314 n.*.

nonjusticiability,"[23] the Second Circuit rejected the district court's political question analysis as simplistic and analyzed all six *Baker* factors, finding that none barred the plaintiffs' claims.[24] The court next addressed, de novo, whether the plaintiffs had standing. Accepting the factual allegations in the pleadings as true, the panel concluded that the defendants' carbon dioxide emissions had damaged the environment and would lead to further harm in the future.[25] Moreover, these injuries were judicially redressable because a court order requiring the defendants to reduce their emissions would likely "provide some measure of relief."[26]

Finally, the Second Circuit determined that federal legislation had not displaced the plaintiffs' federal common law public nuisance claim.[27] After acknowledging the federal common law's complete subjection to the will of Congress,[28] the court found that the Clean Air Act had not displaced the public nuisance claim because the Act did not "speak[] directly"[29] to the issue of regulating carbon dioxide. Although the Act undisputedly *authorizes* the EPA to regulate such emissions,[30] it *requires* that the EPA do so only if the EPA determines that the emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[31] At the time the Second Circuit issued its decision, the EPA had not yet voluntarily regulated the emissions and had only *proposed* to make the threshold findings that would have required such regulation.[32] Therefore, because the EPA had not yet exercised the authority granted to it by Congress, the court concluded that Congress had not yet "thoroughly addressed" the conduct complained of by the plaintiffs.[33] Thus, the court held that the plaintiffs' claims were judicially cognizable.

The Supreme Court reversed and remanded.[34] Writing for a unanimous Court,[35] Justice Ginsburg began with two general and in-

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[23] *Id.* at 321.

[24] *Id.* at 321–32.

[25] *Id.* at 340–47.

[26] *Id.* at 348.

[27] *Id.* at 381.

[28] *Id.* at 371.

[29] *Id.* at 379 (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 319–24 (1981)) (internal quotation marks omitted).

[30] *Id.* at 378 (citing Massachusetts v. EPA, 549 U.S. 497, 532 (2007)).

[31] *Id.* at 379 (quoting 42 U.S.C. § 7521(a)(1) (2006)).

[32] *Id.*

[33] *Id.* at 381 (quoting *Milwaukee*, 451 U.S. at 320) (internal quotation mark omitted).

[34] *Am. Elec.*, 131 S. Ct. at 2540.

[35] Because four members of the Court would have affirmed the Second Circuit's standing ruling, and four would have reversed, the Court let the Second Circuit's decision on that issue stand and directly proceeded to the displacement analysis. *Id.* at 2535. Justice Sotomayor did not participate in the case.

terrelated observations. First, she wrote that the federal judiciary may fashion federal common law with respect to "subjects within national legislative power where Congress has so directed."[36] Second, in light of Congress's primacy in "prescrib[ing] national policy in areas of special federal interest,"[37] the judiciary's power is relinquished in every instance where Congress "'speak[s] directly to [the] question' at issue."[38] Thus, the dispositive issue before the Court was whether the Clean Air Act had "spoken directly" to the regulation of greenhouse gas emissions complained of by the plaintiffs.

In determining whether the Clean Air Act spoke directly to the question at issue, the Court broke with the Second Circuit's displacement analysis, rejecting the lower court's requirement that the EPA actually regulate carbon dioxide and instead favoring a more displacement-friendly test.[39] When assessing whether a federal common law cause of action has been displaced, "the relevant question . . . is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'"[40] Under such a standard, the extent to which the EPA has implemented regulations, if at all, is irrelevant — what matters is only that Congress has delegated regulatory power to the EPA.[41] The Court bolstered its conclusion by noting that the Act explicitly allowed for judicial review of an EPA decision not to regulate: the plaintiffs could have petitioned the EPA to promulgate a rule and, upon a negative response, sought redress in federal court.[42] In the Court's view, such a regime indicated a congressional desire that the EPA serve as primary policymaker, with the Court reviewing the agency's decisions only for abuse of discretion.[43]

The Court concluded its opinion with a discussion of the relative institutional competencies of agencies and courts. In its view, "[i]t is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions"[44] for three reasons: First, agency employees are more likely to have expertise directly relevant to the fields they are entrusted to

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[36] *Id.* (quoting Henry J. Friendly, *In Praise of* Erie — *And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964)) (internal quotation marks omitted).

[37] *Id.* at 2537.

[38] *Id.* (alterations in original) (quoting Mobil Oil Corp. v. Higginbotham, 486 U.S. 618, 625 (1978)).

[39] *See id.* at 2538.

[40] *Id.* (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 324 (1981)).

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

[42] *See id.* at 2539; *see also supra* note 14.

[43] *Am. Elec.*, 131 S. Ct. at 2539.

[44] *Id.*

oversee.[45] Moreover, while judges are primarily limited to the materials presented by the litigants before them, agencies may commission studies and seek comment from the public at large.[46] Finally, agencies are better able to implement broad policy decisions instead of proceeding, as courts do, by piecemeal adjudication.[47]

Justice Alito concurred in part and concurred in the judgment.[48] He wrote simply to note that he agreed with the Court's displacement reasoning only insofar as the Court's conclusion in *Massachusetts v. EPA*[49] — that the Clean Air Act granted the EPA authority to regulate greenhouse gas emissions in the first instance — was correct.[50]

In an era when litigation has been perceived as a valuable and viable avenue to slow the pace of climate change,[51] *American Electric* provided needed guidance on the proper scope of such litigation, clarifying that Congress displaces federal common law simply by delegating authority to an agency to act in a relevant field, even when that authority is unutilized. However, in so doing, the Court demonstrated overly sanguine expectations of agency capability to promote federal interests effectively relative to the institutional capabilities of the courts.

The displacement framework set forth in previous Supreme Court decisions provided unclear instruction to the judiciary. As *American Electric* stated, the Court had held that "the test is simply whether the statute 'speak[s] directly to [the] question' at issue."[52] The test is deceptively straightforward. As one commentator rightly observed, displacement "is a situation where the law professes to provide a 'strict test,' yet gives us instead variously ambiguous criteria upon which to base a decision."[53] For example, separation of powers considerations militate against judicial intervention when the legislative and execu-

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[45] *Id.* at 2539–40.

[46] *Id.* at 2540.

[47] *Id.* at 2539–40.

[48] Justice Alito was joined by Justice Thomas.

[49] 549 U.S. 497 (2007).

[50] *Am. Elec.*, 131 S. Ct. at 2540–41 (Alito, J., concurring in part and concurring in the judgment). Both Justice Thomas and Justice Alito joined Justice Scalia's dissent from the Court's holding in *Massachusetts v. EPA* that the Clean Air Act "authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change." *Massachusetts*, 549 U.S. at 528; *see id.* at 555–60 (Scalia, J., dissenting).

[51] *See, e.g.*, Randall S. Abate, *Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States*, 15 CORNELL J.L. & PUB. POL'Y 369, 392 (2006) ("Litigation may be the most effective means of forcing the federal government to respond to climate change.").

[52] *Am. Elec.*, 131 S. Ct. at 2537 (alterations in original) (quoting Mobil Oil Corp. v. Higginbotham, 486 U.S. 618, 625 (1978)).

[53] John Wood, *Easier Said than Done: Displacing Public Nuisance When States Sue for Climate Change Damages*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10316, 10318 (2011) (footnote omitted).

tive branches have duly exercised their constitutionally granted authority.[54] But at the same time, the Court has signaled that Congress must make a very clear statutory statement before the Court will find a congressional intent to abrogate the common law.[55] And although the "speaks directly" language finds support in the case law, it competes with other dicta that muddy the analytical waters. For example, in *City of Milwaukee v. Illinois*[56] — a Court decision cited approvingly in *American Electric*[57] — the Court arguably suggested three different formulations for a displacement test, including one that implied that judges may "supplement" a statute, even if Congress has "spoken directly."[58] Given the lack of a precise standard, particularly in light of the continuing vagaries of the Court's statutory interpretation jurisprudence,[59] one could forgive lower courts — including the Second Circuit here — for bungling the displacement analysis.

Of course, ambiguity remains. Though the Court made progress in clarifying one way in which Congress may displace federal common law — by delegating authority in a relevant field to an agency — it remains to be seen how lower courts will apply the displacement analysis in situations where the delegation of authority is not as clear. As Justice Alito's concurrence intimates, the precise scope of Congress's authorization is often not as "plain"[60] as was the case here.[61] That

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[54] *See, e.g.*, Kassel v. Consol. Freightways Corp., 450 U.S. 662, 682 n.3 (1981) (Brennan, J., concurring in the judgment) ("The principle of separation of powers requires . . . that we defer to the elected lawmakers' judgment as to the appropriate means to accomplish an end."); *In re* Oswego Barge Corp., 664 F.2d 327, 335 (2d Cir. 1981) ("[S]eparation of powers concerns create a presumption in favor of [displacement] whenever it can be said that Congress has legislated on the subject.").

[55] *See* United States v. Texas, 507 U.S. 529, 534 (1993) ("'[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.' In such cases, Congress does not write upon a clean slate." (alteration in original) (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952))).

[56] 451 U.S. 304 (1981).

[57] *See Am. Elec.*, 131 S. Ct. at 2537.

[58] *Compare Milwaukee*, 451 U.S. at 315 ("[W]hen [legislation] does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the [legislation] becomes meaningless." (quoting *Higginbotham*, 486 U.S. at 625)), *with id.* at 319 ("The establishment of . . . a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law."), *and id.* at 320 (noting that a regulatory scheme that has "thoroughly addressed" a problem functions as a remedial ceiling for plaintiffs).

[59] *See, e.g.*, *supra* notes 55–56 and accompanying text; *see generally* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950) (presenting numerous examples of inconsistent or conflicting canons of statutory construction).

[60] *Am. Elec.*, 131 S. Ct. at 2540–41 (Alito, J., concurring in part and concurring in the judgment).

[61] *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 488–91 (1996); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 860–62 (1984); *see also* Lisa Schultz Bressman, Chevron's

said, the Court unquestionably made clear that delegation alone may entirely displace federal common law — whatever "delegation" may mean.

This decision in favor of agency authority is consistent with an increasingly strong judicial tendency to defer to the legislative and executive branches,[62] intervening only in cases perceived as particularly grievous.[63] In *American Electric*, the Court based its conclusion in part on its understanding of the institutional competency of agencies vis-à-vis the judiciary: specifically, their comparative expertise, access to resources, and ability to promulgate nationally uniform standards.[64]

However, the Court's brief discussion of the relative advantages of enforcement via regulation fails to present an evenhanded analysis of the strengths and weaknesses of the executive and judicial branches in effecting Congress's will. At least in some respects, courts may be better positioned than agencies to implement a given set of policy preferences. For instance, suits by private parties can help check an agency that has effectively shirked its regulatory responsibilities in light of industry pressures.[65] And while Congress can always clarify its mandate in response to agency inaction, it seems unrealistic in most in-

Mistake, 58 DUKE L.J. 549, 549 (2009) ("[*Chevron*] asks courts to determine whether Congress has delegated to administrative agencies the authority to resolve questions about the meaning of statutes that those agencies implement, but the decision does not give courts the tools for providing a proper answer."); Reza Dibadj, *Four Key Elements to Successful Financial Regulatory Reform*, 6 HASTINGS BUS. L.J. 377, 386–87 (2010) (noting disagreements with respect to the scope of congressional delegation to various administrative agencies in the context of new and pending financial regulation).

[62] *See, e.g.*, Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1764 (2007) ("Administrative law reflects the presidential control model by increasing judicial deference to agency decisions."); Steven M. Johnson, *Bringing Deference Back (But for How Long?): Justice Alito,* Chevron*,* Auer*, and* Chenery *in the Supreme Court's 2006 Term*, 57 CATH. U. L. REV. 1, 6 (2007) (describing the administrative law–related opinions of the Court's 2006 Term as indicating a "general trend toward increased deference for administrative agencies"); R. Andrew Schwentker, *Mandating Unfunded Mandates? Agency Discretion in Rulemaking After* Massachusetts v. EPA, 76 GEO. WASH. L. REV. 1444, 1450 (2008) ("[A] court is very likely to affirm an agency's exercise of discretion where its decision involves practical considerations such as lack of funding and the allocation of scarce resources.").

[63] *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (listing four factors whereby an agency's action may be considered "arbitrary and capricious" and thereby in violation of the Administrative Procedure Act where applicable); *see also* CRAssociates, Inc. v. United States, 95 Fed. Cl. 357, 368 (2010) (noting that the arbitrary and capricious standard focuses "more on the reasonableness of the agency's result than its correctness"); *id.* at 369–90 (awarding plaintiff contractor injunctive relief for defendant agency's failure to consider factors that it had agreed to take into account in its decisionmaking process).

[64] *Am. Elec.*, 131 S. Ct. at 2539–40.

[65] *See* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 107–10 (2005) ("First, . . . private lawsuits can be a substitute for agency prosecutions in areas where the agency is excessively lax. Second, private enforcement suits can prod an agency into action." *Id.* at 110.).

stances to expect Congress to do so.[66] Moreover, the "parallel track[s]"[67] approach (having both agency and judicial enforcement of the same regime) that the Court rejected may serve a useful signaling function to the other branches of government that a given problem needs attention.[68]

But even assuming that the *American Electric* Court's paean to agency prowess makes sense as a matter of policy, practical considerations should temper any reading of this decision as a victory for society vis-à-vis the modern administrative state. While *American Electric* is a clear boon to agency power, current political and administrative realities augur poorly for agencies in their roles as the loci of public protection. In particular, perennial downward pressures on agency budgets suggest that agencies are practically incapable of fully implementing their legislative mandates.

It is a fact of administrative life that there often exists a substantial gap between the resources that agency officials wish to command and what they actually find at their disposal.[69] This gap certainly is not an inherent flaw from a general welfare perspective: all else being equal, limited budgets conceivably encourage efficient use of taxpayer resources. However, at a certain point, prudent economizing becomes an unworkable dearth of manpower.[70] It is not uncommon for agencies to fail to comply with statutorily imposed deadlines in light "of the disproportionate relationship between . . . assigned responsibilities and the resources made available."[71] If an agency's resources are so limited that it is unreasonable to expect it to meet the basic procedural

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66 David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2209 (2010) ("Even when administrative policy has sparked wide congressional interest, a legislative fix is rare. Many of the forces conspiring toward congressional delegation at the front end of the process obstruct a corrective response on the back end." (footnote omitted)).

67 *Am. Elec.*, 131 S. Ct. at 2538.

68 *See* Benjamin Ewing & Douglas A. Kysar, *Climate Change, Courts, and the Common Law*, 121 YALE L.J. (forthcoming 2011). Indeed, irrespective of the normative appropriateness of the "parallel tracks," statutes and the common law often build on and respond to one another as "complementary regimes" rather than "alternative" ones. *See* Stephen M. Johnson, *From Climate Change and Hurricanes to Ecological Nuisances: Common Law Remedies for Public Law Failures?*, 27 GA. ST. U. L. REV. 565, 571 (2011).

69 *See, e.g.*, Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 804 (2010) ("Almost all agencies face meaningful resource constraints.").

70 *See, e.g.*, Salameda v. INS, 70 F.3d 447, 449 (7th Cir. 1995) (mentioning in the context of an immigration case spanning two decades that "the Board of Immigration Appeals had an effective membership of only four . . . to handle the 14,000 appeals lodged" in 1994).

71 Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 80–82 (1997) (noting that the EPA has met less than twenty percent of decisional deadlines imposed by the Clean Air Act and that the D.C. Circuit vacated a district court order requiring the FBI to comply with Freedom of Information Act deadlines in light of the "unrealistic expectations," *id.* at 80, such a requirement would impose).

requirements imposed by Congress, expecting that agency to implement a wide-ranging policy scheme — one of the arguable advantages of regulators over judges[72] — seems to willfully ignore reality.

Indeed, consideration of recent congressional enactments suggests that resource concerns will remain relevant — and become increasingly salient — in coming years.[73] For example, agencies are already struggling under the weight of underfunded congressional mandates enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[74] Congress passed the Dodd-Frank Act in response to regulatory failings that contributed to the recent economic crisis.[75] However, just over a year later, agencies charged with implementing rules under the Dodd-Frank Act are already complaining of substantially heightened responsibilities without a commensurate increase in appropriations.[76] Taking these severe resource constraints as a given, courts should arguably play a greater role in enforcing compliance with federal laws. By shifting the costs of enforcing compliance from society as a whole to a narrower set of plaintiffs with a more immediate interest in relief, the government may see its policy choices implemented even when insufficient agency funding would otherwise prevent action.

Aside from clarifying a narrow but important point of law, *American Electric* — viewed in the context of Supreme Court precedent and the modern administrative state — indicates another instance in which the judiciary is increasingly disinclined to encroach on the domain of administrative agencies. While it is not obvious that the current allocation of authority is optimal from a policy perspective, agencies certainly may bring several comparative advantages to bear on the issues of the day. But if courts continue to defer to agencies at the expense of private rights of action, Congress must allocate sufficient funding to

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[72] *See, e.g.*, Edge v. State Farm Mut. Auto. Ins. Co., 623 S.E.2d 387, 391–92 (S.C. 2005) (observing that judicial intervention may have the deleterious effect of "undermin[ing a] regulatory scheme," *id.* at 391, of rates fixed by agencies).

[73] *See* Jennifer Steinhauer, *Obama Signs Bill Lifting Debt Ceiling; Measure Clears Senate, 74 to 26, Hours Before the Budgetary Deadline*, INT'L HERALD TRIB., Aug. 3, 2011, at 5 ("Enactment of the [debt ceiling] legislation signals a pronounced shift in fiscal policy . . . to a regime of steep spending cuts aimed at reducing the deficits — so far, without new revenues sought by the White House.").

[74] Pub. L. No. 111-203, 124 Stat. 1376–2223 (2010) (codified in scattered sections of the U.S. Code).

[75] *See, e.g.*, FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT, at xviii (2011), *available at* www.gpoaccess.gov/fcic/fcic.pdf ("We conclude widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets."); Stephen Labaton, *S.E.C. Concedes Oversight Flaws Fueled Collapse*, N.Y. TIMES, Sept. 26, 2008, at A1.

[76] Jean Eaglesham, *Atlas Shrugged. Will Regulators?*, WALL ST. J., July 20, 2011, at C1.

ensure the adequacy of the regulatory regime. To paraphrase an oft-quoted scripture, faith without funds is dead.[77]

II. FEDERAL JURISDICTION AND PROCEDURE

A. Federal Preemption of State Law

1. Agency Deference. — Arguably the greatest development in public law in the last quarter-century has been the increased willingness of courts to allow an administrative agency "to say what the law is."[1] The increased complexity of government has induced courts to cede some of their interpretive authority to those who better understand the intricacies of the programs that the state administers.[2] But the expertise argument in favor of delegation to agencies raises special concerns when a legal question implicates structural constitutional values such as the division of power between the states and the federal government. Preemption questions raise precisely these concerns.

Last Term, in *Williamson v. Mazda Motor of America, Inc.*,[3] the Supreme Court held that a federal regulation that gave manufacturers a choice of installing, on certain rear seats, either lap-only seatbelts or lap-and-shoulder seatbelts, did not preempt state tort suits against the manufacturer for failing to install a lap-and-shoulder seatbelt.[4] The Court's result was grounded, at least in part, in the promulgating agency's opinion of the regulation's preemptive effect. Deference to an agency's current views on preemption, expressed in the course of litigation, is misplaced — it threatens federalism interests and raises concerns of legitimacy, accountability, transparency, and fairness. Removing this factor from the Court's analysis would alleviate some of these concerns.

In 2002, the Williamson family was in an auto accident while riding in a 1993 Mazda minivan.[5] The vehicle was manufactured at a time when Federal Motor Vehicle Safety Standard (FMVSS) 208[6] left auto manufacturers the choice of whether to install lap-only seatbelts or lap-and-shoulder seatbelts at certain rear seating positions such as a

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[77] *See James* 2:17.

[1] *See* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2580 (2006). *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in which the Court set out the modern doctrine of deference to agencies, has become "the most cited case in modern public law." Sunstein*, supra,* at 2580.

[2] *See* Sunstein, *supra* note 1, at 2582–83.

[3] 131 S. Ct. 1131 (2011).

[4] *Id.* at 1134.

[5] *Id.*

[6] Occupant Crash Protection, 49 C.F.R. § 571.208 S4.1.2.1(b) (1993) (promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (codified at 49 U.S.C. §§ 30101–30170 (2006))).