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Global Warming as a Public Nuisance

Thomas W. Merrill*

INTRODUCTION

On July 21, 2004, eight State Attorneys General and the City of New York brought suit in federal district court in the Southern District of New York, seeking to adjudicate the issue of global warming as a public nuisance. Six large electric power producers were named as defendants. The complaint filed in Connecticut v. American Electric Power Co.,¹ as the action is styled, alleges that emissions of greenhouse gases from the defendants’ plants, in particular carbon dioxide (CO2), are contributing to global warming. Count I claims that these greenhouse gas emissions are

* Charles Keller Beekman Professor, Columbia Law School. An earlier version of this article was presented at the symposium, The Role of State Attorneys General in National Environmental Policy, at Columbia Law School, September 20, 2004, 30 COLUM. J. ENVTL. L. 351. The article could not have been brought to fruition without the able assistance of Thomas Richardson and Vivian Mills, or without the gentle but persistent prodding of all three of us by Kevin Meier Kertesz.

an actionable public nuisance governed by federal common law. This count, if it states a cause of action, should establish subject matter jurisdiction in the federal district court, based on the presence of a federal question. Count II pleads, apparently in the alternative, that the emissions are an actionable public nuisance under state nuisance law. Subject matter jurisdiction over this count is based on supplemental federal jurisdiction. Under both counts, the plaintiffs seek injunctive relief directing the defendants to abate their emissions of greenhouse gases; there is no demand for damages.

The use of litigation to establish environmental policy is not new. It has featured prominently in the history of American public law, and has produced results that are mixed, or at least controversial. I leave for another day the question whether, as a policy matter, it is a good idea to ask the courts to resolve issues like global climate change. Rather, my focus here is on some of the challenging legal questions raised by the suit. In particular, I will discuss four questions: (1) whether State AGs have standing to bring such a suit; (2) whether such a suit is in fact governed by federal common law, as opposed to state common law; (3) whether the suit is impliedly preempted by the commitment of foreign policy to the political branches of the federal government; and (4) what substantive legal standard of nuisance liability should govern the suit. I will discuss some of the factors that either will or should bear on the resolution of these questions, and speculate a bit on the likely response by the courts.

I. STANDING

A critical threshold question raised by the suit is standing. There are some fairly ordinary standing issues here, as well as some more esoteric ones. I am more interested in the esoteric issues, but in order to get to those we must pass first through the more ordinary

2. Id. at 164.
5. Id at 36.
A. Ordinary Standing Principles

Let us begin by assuming that ordinary standing principles – as developed by the Supreme Court in the context of civil litigation filed by private citizens – are fully applicable to this case. That is, assume the suit was brought not by state AGs, but by private citizens concerned about global warming, against the same six electric utility defendants. Such a suit would undoubtedly encounter a motion to dismiss on standing grounds. The motion would likely cite four reasons why such citizen-plaintiffs do not have standing to challenge the emission of greenhouse gases as a public nuisance: the citizens cannot establish that they have suffered injury in fact; they cannot show that any injury they have suffered has been caused by the defendants' emissions; the relief they seek would not redress the injury of which they complain; and their suit asserts generalized grievances shared by all citizens.

Consider first injury in fact. The complaint cites a number of injuries – to public health, coastal resources, water supplies, the Great Lakes, agriculture, ecosystems, forests, fisheries and wildlife, from wildfires, from catastrophic storms. Nearly all of these are injuries that the complaint alleges "will be caused," "are threatened," "will increase," or are "likely to result" as a result of global warming. They are, in short, injuries that might happen in the future. There is, of course, no reason to ignore a problem, especially one that might be very serious, just because it might happen in the future. But the Supreme Court has held that federal courts can adjudicate only actual injuries," and concluded in Lujan v. Defenders of Wildlife that this means injuries that are either presently existing or "imminent." Specifically, the Court in that case held that animal biologists could not challenge the destruction of habitats of animals they had studied in the past, because they could not show that they had plans to resume their studies in the

8. Id. at 116, 133, 134.
9. Id. at 106, 111, 113, 119, 120, 130, 131, 140, 141.
10. Id. at 122.
13. Id. at 560.
near future.\textsuperscript{14}

The utility defendants in my hypothesized citizens' suit would almost certainly argue that the injuries apprehended to come about because of global warming are likewise insufficiently imminent to allow an Article III court to adjudicate the legality of global climate change. Those injuries have not yet materialized, may not materialize for many decades, and conceivably will not materialize at all.\textsuperscript{15} The Supreme Court has been far from consistent in its treatment of allegations of future injury.\textsuperscript{16} But there is a good chance the defendants would prevail on this point.

The citizens in my hypothesized suit would undoubtedly try to take solace from a post-\textit{Lujan} decision, \textit{Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc.},\textsuperscript{17} in which the Court upheld the standing of citizen plaintiffs who had a "reasonable" apprehension that they might suffer injury from certain discharges of pollution.\textsuperscript{18} The "apprehension" in \textit{Friends of Earth}, however, was of injuries that would directly flow from exposure to existing discharges that were plainly illegal under the permitting system of the Clean Water
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Act. Such an "apprehension" has an objective basis in law and fact. Here, in contrast, the claim is of apprehension of future injury from discharges of CO2, the effects of which remain uncertain, and which are lawful under current regulatory law. Courts are unlikely to find actual or imminent injury quite so easily in this context.

Causation poses a second standing problem. The Supreme Court has said that citizen-plaintiffs lack standing if they cannot show that the alleged injury of which they complain was caused by the illegality they seek redress. The defendants will argue that they are responsible for a small portion of the world's greenhouse gas emissions, so small that it cannot fairly be said that they are "the cause" of global climate change. According to the data in the complaint, the power plants operated by the six defendants produce 10% of total U.S. CO2 emissions. It is estimated that the U.S. produces 25% of global greenhouse gases. So the entire operations of all six defendants are responsible at most for 2.5% of the world's greenhouse gases. This makes it difficult to say that they are in any sense the cause of the problem.

The citizens might respond that even if the defendants are only fractionally responsible for an indivisible harm that others are also creating, this should not insulate the defendants from accountability for the portion of harm that is in fact attributable to their conduct. For example, consider a suit by a group of insurance companies to recover the costs they have incurred from paying the medical expenses of smokers. Should the action be dismissed against a small tobacco company, such as Liggett & Meyers, because its products comprise only 2.5% of the market? At least in a suit for damages, where liability for an indivisible harm might be apportioned among multiple actors based on some formula (like market share), it is doubtful that a court would

20. In fact, the Bush Administration has taken the position that EPA has no legal authority under the Clean Air Act to regulation emissions of greenhouse gases. See infra note 111.
23. See, e.g., City of Philadelphia v. Lead Indus. Ass'n, Inc., 994 F.2d 112, 125–24 (3d Cir. 1993) ("Under the theory of market share liability, tortious manufacturers who produce a
dismiss the action for want of standing simply because of the defendant's small market share. Perhaps in a suit seeking an injunction, relief would be denied in such a case on grounds of equity. But this goes to the conditions for awarding relief, not standing. So perhaps the citizens would escape dismissal of their suit on causation grounds.

The third ground for objecting to standing – redressability – is related to but distinct from causation. The redressability requirement asks whether the relief sought by the plaintiffs is likely to cure the injury of which they complain.24 Here, I think the objection based on the defendant's small share of global greenhouse gases poses a more serious problem, precisely because it focuses on the nexus between injury and relief rather than injury and conduct. Even if the defendants' CO2 discharges were declared illegal and completely enjoined, it is most doubtful that this would end the injuries threatened to flow from global warming. Granting the injunction the plaintiffs seek – which would phase out the defendants' emissions over time – would not even put a dent in the inexorable rise in world temperatures caused by the long-term accumulation of greenhouse gases. It would thus appear that the defendants would have a better chance of winning on redressability.

A fourth standing problem in my hypothesized citizen suit would be that the plaintiffs are asserting a generalized grievance shared by all citizens.25 It is currently unclear whether the rule that generalized grievances do not confer standing is a part of the understanding of what "injury in fact" means, or whether it is simply a prudential limitation which can be waived by Congress.26 But even if this is a prudential limitation, a suit grounded in federal common law, almost by definition, is not one that benefits from a special statutory right of action enacted by Congress. So the generalized grievance limitation is fully applicable here.

Most of the injuries alleged in the complaint – including threats from new diseases, violent storms, wildfires, and injury to ecosystems – implicate all members of society. The defendants

fungible identifiable product that injures the plaintiff are held liable in proportion to their respective market shares.").

would surely claim that these grievances are not particularized to individual plaintiffs, and hence run afoul of the prohibition on generalized grievances. Whether the defendants would prevail on this claim is uncertain. Dictum in a recent Supreme Court decision suggests that "a widespread mass tort" would not run afoul of the generalized grievances rule, and this arguably characterizes global warming. Moreover, the plaintiffs could argue that some of the injuries of which they complain, such as injuries to agriculture or coastal properties, apply to subsets of the population, and hence do not qualify as generalized grievances. So the argument based on generalized grievances would be less clearly a barrier to standing than the arguments based on injury in fact and redressability. Still, it would be a nontrivial problem for the hypothetical citizen plaintiffs, and might provide an independent basis for dismissing at least the majority of their claims.

In short, if this were a citizens' suit, the defendants would mount a substantial threshold defense based on standing. The ultimate resolution of this defense is uncertain, and would turn in significant part on the evidentiary support that the parties could muster through supporting affidavits or other testimony. But it is safe to say that the defense would be a serious one, with significant support in existing authority.

B. Parens Patriae Standing

The more interesting question raised by Connecticut v. American Electric Power is whether these general standing limitations should apply in a parens patriae suit brought by state AGs based on public nuisance law. The Supreme Court's restrictive standing law has been developed almost entirely in the context of citizen suits. The AGs will want to argue that these restrictions do not apply to actions brought by public officials seeking to vindicate the general public interest. Whether they are right is a complicated question that leads us into largely uncharted territory.

Let us start with some basic propositions. The Court has never held that the body of standing rules developed in the context of

27. See id. at 24.

28. See, for example, the Court's discussion of constitutional and prudential requirements of standing and the specific cases cited illustrating each requirement in Valley Forge Christian Coll. v. Americans United for Separation of Church and State, 454 U.S. 464, 471-82 (1982).
private actions applies *ex proprio vigore* to actions brought by public officials. Consider in this regard a criminal prosecution. In what sense can it be said that the government, in prosecuting a crime, is seeking to vindicate some injury in fact, or that a conviction will redress that injury, or that a crime (some crime at least, like victimless crime) is not a generalized grievance of all members of society? One could attempt to squeeze criminal prosecutions into the Court’s standing doctrine by declaring that the injury is to the government’s “sovereign interest” in enforcement of the law. But it is far more straightforward to revert to first principles, and just say that criminal trials brought by the government were a familiar part of the “judicial power” exercised by courts when the Constitution was established. In other words, criminal prosecutions fall squarely within the class of “cases and controversies of the sort traditionally amenable to and resolved by the judicial process.”

The example of criminal prosecutions suggests that the “cases” and “controversies” that make up the judicial power conferred by Article III include not just private actions seeking vindication of private rights—which must satisfy the Court’s elaborate standing doctrine and other limits on justiciability—but also certain public actions brought by public authorities, which have never been thought to be restricted by such doctrines. The prosecution of crime is the paradigmatic example of such a public action by public officials. A U.S. Attorney authorized by law to bring a federal

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32. As Justice Frankfurter once put it, the question should be whether “judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.” Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (concurring opinion).

criminal prosecution has never been, nor should be, required to demonstrate that the United States has suffered injury in fact, or that the crime caused this injury, or that a conviction will redress such an injury, or that the crime is not a generalized grievance.

Public nuisance suits brought by government officials are the civil analogue of criminal prosecutions. Public nuisance actions often apply to conduct that is also subject criminal prosecution, like maintaining a house of prostitution, or a gambling den, or blocking a public street or poisoning the public water supply. If the judicial power includes the ability to hear criminal actions brought by public officials without regard to whether standing requirements are satisfied, then there would seem to be little reason why the judicial power should not also extend to public nuisance actions brought by public officials seeking to vindicate public rights without regard to whether standing requirements are satisfied. The AGs therefore can argue that public nuisance actions brought by public officials, like public prosecutions of crimes, fall outside the area of concern about private citizen standing that has given rise to the Court's restrictive standing jurisprudence.

Here, however, two further complications potentially enter. One is the longstanding understanding that the Constitution prohibits federal courts from entertaining prosecutions based on common law crimes. This authority renders it doubtful that the U.S. Attorney General or any other federal officer can be said to have authority to bring an action in federal court based on the federal common law of public nuisance. The same considerations of separation of powers and federalism that counsel against recognition of federal common law crimes would also counsel against recognition of a federal common law of nuisance. This objection, however, arguably goes more to the legitimacy of the

35. This helps explain why public nuisance suits brought by public officials, unlike such suits brought by private individuals, do not require any demonstration of "special injury." See David R. Hodas, Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm, 16 Ecology L. Q. 883 (1989). The special injury requirement is the common law's version of the modern law of standing for citizen suits.
federal common law of nuisance (the topic of the next Part) than to the standing of federal officers to bring such actions in federal court. If federal common law crimes were permitted, there can be little doubt that federal officers would have standing to prosecute such crimes—without regard to whether the ordinary standing limitations developed in private action could be said to be satisfied.38

The second complication is whether the officers of one political sovereign can bring an action like a public nuisance suit in the courts of another sovereign. Historically speaking, it was understood that "the courts of no country will execute the penal laws of another."39 This carried over to American federalism, in the form of the understanding that public actions brought by public officers must be brought in the courts of the sovereign in whose name the action is brought.40 Thus, federal criminal prosecutions are brought in federal courts, state criminal prosecutions are brought in state court; federal civil enforcement actions—forfeitures and the like—are brought in federal court, state civil enforcement actions in state court. Indeed, as a matter of historical practice, nearly all public nuisance actions brought by state officials like AGs have been brought in state court.41

Various functional justifications can be advanced in support of a general design principle requiring executive officials to assert their sovereign authority in their own court system, rather than in the courts of another sovereign. Accountability is one. Courts exercise broad discretionary powers in public actions like criminal prosecutions and public nuisance suits, and public officials, often elected, serve as gatekeepers in deciding whether to bring such actions. If public officials could bring these actions in the courts of another sovereign, the lines of accountability would be blurred. Expertise is another. Having one court system hear all public actions brought by the sovereign brings a measure of expertise and

41. See, e.g., Denise E. Antolini, Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 Ecology L.Q. 755, 889 n.664 ("typical public nuisance cases will be brought in state court"); Gwyn Goodson Timms, Statutorily Awarding Attorneys' Fees in Environmental Nuisance Suits: Jump Starting the Public Watch Dog, 65 S. Cal. L. Rev. 1733, 1756 (1992) ("Public nuisance suits are usually brought in state court").
stability that would be lacking if public officials were allowed to switch back and forth among court systems in bringing public actions.\textsuperscript{42}

For better or worse, however, it is almost certainly too late in the day to advance any general rule that public nuisance actions, like criminal actions, must always be brought in the courts of the sovereign that institutes the action. Beginning with \textit{Missouri v Illinois}\textsuperscript{43} in 1901, the Supreme Court has on numerous occasions permitted state AGs to bring public nuisance actions directly in the Supreme Court under its original jurisdiction. These cases have typically involved public nuisances with transboundary effects, often some form of pollution emanating in State A that is alleged to cause harm in State B.\textsuperscript{44} The Court has analogized these suits to disputes between independent sovereign nations.\textsuperscript{45} Independent sovereign nations faced with such a transboundary public nuisance would have recourse to diplomacy or perhaps war to resolve their dispute. These remedies being foreclosed under the Constitution, the Court has said, the alternative is an original suit in the Supreme Court.\textsuperscript{46}

The Court has more recently sought to restate the principle of the transboundary nuisance cases by referring to the standing of states to sue as \textit{parens patriae} in federal court.\textsuperscript{47} \textit{Parens patriae}, the

\textsuperscript{42} This is similar to a justification given for having all cases of a specific type brought before specialized courts set up to deal with those cases. See Richard B. Saphire, \textit{Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era}, 68 B.U.L. Rev. 85, 123 n.237 (1988) ("Congress has created specialized article III tribunals, like the Court of Claims, the Court of Customs and Patent Appeals, and the Court of International Trade, in part because of its concern for expertise.").

\textsuperscript{43} 180 U.S. 208 (1901).

\textsuperscript{44} North Dakota v. Minnesota, 263 U.S. 365 (1923) (flooding); New York v. New Jersey, 256 U.S. 296 (1921) (water pollution); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (air pollution in Georgia caused by discharge of noxious gases from the defendant's plant in Tennessee); Kansas v. Colorado, 185 U.S. 125 (1902) (diversion of water), Missouri v. Illinois, 180 U.S. 208 (1901) (sought to enjoin defendants from discharging sewage in such a way as to pollute the Mississippi river in Missouri).\textsuperscript{45}

\textsuperscript{45} Missouri v. Illinois, 180 U.S. 208, 241 (1901).

\textsuperscript{46} \textit{Id.} at 241 ("If Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.").

The Court has admitted, "is a judicial construct that does not lend itself to a simple or exact definition." It does not refer to a State's purely sovereign interests, such as the "power to create and enforce a legal code, both civil and criminal" or to demand "recognition from other sovereigns." Nor does it refer to a State's action as the legal representative of persons who are incapable of representing themselves. Nor does it refer to the State's pursuit of "proprietary interests," such as the ownership of property or the pursuit of business interests. Rather, it refers to the State's assertion of "quasi-sovereign" interests. The Court has declined to give this vague term a precise definition, but has made clear that the State's interest in protecting the health and wellbeing of its citizens from transboundary nuisances is the paradigm case of a quasi-sovereign interest that will support parens patriae standing.

What the Court has not made clear is whether State AGs who bring parens patriae public nuisance suits in federal court are subject to the same standing rules as apply to citizen suits, or whether they are exempt from such limitations by analogy to public actions filed by public officers in the courts of their own sovereign. The Court's leading decision on parens patriae standing seems to assume that such suits are subject to ordinary rules of standing, cautioning that such suits "must be sufficiently concrete to create an actual controversy between the State and the defendant" and must "survive the standing requirements of Article III." But the issue has never been squarely decided.

I suggest resolving the confusion over the standing requirements for parens patriae actions by adopting the following rule: Parens patriae suits should be exempt from the standing limitations that apply to citizen suits when public officers sue in the courts of their own sovereign, by analogy to the implied exemption from standing requirements for criminal prosecutions filed by public officers in their own courts. But when public officers bring parens patriae suits, they should be subject to the standing rules that govern private citizen suits.

49. Id.
50. As the Court has acknowledged, this was the common law definition of parens patriae. Id. at 600.
51. Id. at 601-02.
52. Id.
53. Id. at 602. Justice Brennan wrote a concurring opinion in Snapp in which he argued that "[a]t the very least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations." Id. at 611. Private organizations, of course, are subject to the standing rules that govern private citizen suits.
actions in the courts of some other sovereign, they should be subject to the same Article III and prudential standing limitations that apply to suits by aggrieved citizens. This rule would seek to accommodate two principles otherwise in some tension with one another: first, the general design principle that public officers should ordinarily bring public actions in their own courts, and second, the widespread practice of allowing State AGs to sue as parens patriae in the federal courts, particularly when necessary to vindicate a State’s interest in protecting its citizens against transboundary pollution. The accommodation would mean, insofar as Article III is concerned, that the “judicial power” would be understood to extend to all public actions brought by authorized officers of the federal government, without regard to whether traditional standing limits are met. But the “judicial power” would extend to actions brought in federal court by state officials only if they satisfy the ordinary standing limitations that would apply to citizen suits. State officials could satisfy these limitations either by showing that the State itself has suffered some injury in fact from the challenged action, or by suing in a representational capacity and showing that the State’s citizens have suffered some injury in fact from the challenged action.

This reconciliation has a neat and tidy quality to it, but encounters one rather substantial historical problem: There is no suggestion from the Supreme Court’s original jurisdiction cases adjudicating transboundary nuisance disputes—the paradigm for the modern parens patriae action—that the States bringing these suits were required to meet any particular standing burden in order to maintain the action. One could attempt to distinguish these cases on the grounds that today’s elaborate standing doctrine, requiring injury in fact, causation, redressability and so forth, is a

54. Missouri v. Illinois, 180 U.S. 208, 232 (1901) (“The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties.”).


relatively recent development that postdates the decisions in these transboundary cases. Moreover, it is quite likely that if in fact one were to apply modern standing requirements to these transboundary suits, the States would have been able to establish standing in each of these cases. Still, the absence of any discussion in these cases that even sounds like the Court was considering a standing requirement\(^5\) makes it substantially more difficult to maintain that traditional standing notions should be turned on or off depending on whether public officers are suing in the courts of their own sovereign.

If my reconciliation of the cases is nevertheless accepted, it would mean that the State AGs bringing *Connecticut v. American Electric Power Co.* would be subject to the same standing limitations that apply to private citizens suing in federal court. As the prior discussion suggests, that would mean their action runs a high degree of risk of being dismissed on standing grounds.

### II. FEDERAL COMMON LAW

The second question I will consider is whether the AGs' public nuisance claims can be brought under the federal common law of nuisance. Let me explain preliminarily why this issue is critical. The suit contains two counts, the first based on federal common law, the second on state common law. Federal common law and state common law are not cumulative causes of action, like pleading breach of contract and negligence in suit against a contractor. They are mutually exclusive. The public nuisance action is either governed by federal common law or by state common law, but not both. The Supreme Court said this explicitly in *Milwaukee II*, the leading case. The Court chastised Illinois (the plaintiff State) and the district court for saying that both federal and state nuisance law applied to the case and said: "If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used."\(^5\)

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\(^5\) Although the labels used in contemporary standing disputes is of recent origin, the concept that cases must be fit for judicial resolution is anything but new. *See* Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 John Marshall L. Rev. 481, 489-92 (2004) (arguing that the first section of the Court's opinion in *Marbury v. Madison* is devoted to what today we would call standing); Woolhander & Nelson, *supra* note 33.

\(^5\) City of Milwaukee v. Illinois, 451 U.S. 304, 314 n.7 (1981). This proposition is
The logic behind this is straightforward. "Federal common law" on any conception, applies when important federal interests would be frustrated by the application of state law. Federal common law is in effect a type of preemption of state law. When a court holds that a matter is governed by federal common law, state law is automatically preempted, and a federal rule of decision applies instead. Consequently, if the AG's suit is governed by federal common law, their state law count is a nullity.

However, if federal common law does not apply, because the federal common law has been displaced by the Clean Air Act, then the suit must be dismissed for want of jurisdiction. Jurisdiction over the federal common law count is based on the presence of a federal question – the federal common law. Jurisdiction over the state public nuisance count is based on supplemental jurisdiction. If the federal common law count is dismissed before trial, then there would no longer be any basis for jurisdiction over the state count. Both the Supreme Court and the Second Circuit have indicated that in these circumstances, the claim based on supplemental jurisdiction should be dismissed.

Before getting into the details of the federal common law question, a little history is necessary to put this issue in context. As already noted, the Supreme Court from the turn of the twentieth century has adjudicated as part of its original jurisdiction suits brought by States challenging transboundary pollution. The first such case involved a suit by Missouri against Illinois for reversing consistent with the later decision in International Paper Co. v. Ouellette, 479 U.S. 481 (1987), where the Court held that state nuisance law could be applied to transboundary water pollution. The action in International Paper was not brought by a sovereign state. Hence it would not fall within the original jurisdiction of the Supreme Court and would not have been subject to federal common law in the first place. Moreover, the holding that state nuisance law survives in the transboundary context was based on saving clauses in the Clean Water Act, preserving state nuisance actions from preemption. In effect, Congress, legislating in an area of exclusive federal competence, determined that the preservation of state common law was consistent with federal interests. The preservation of state common law here is thus analogous to a congressional determination overriding the dormant commerce clause and permitting state regulation of interstate commerce. See Prudential Ins Co. v. Benjamin, 328 U.S. 408, 426-27 (1946); Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 3-10, 15-16 (1975).

59. See Merrill, supra note 37 (discussing conditions that legitimately justify creation of federal common law).


the flow of the Chicago River and sending sewage down the Mississippi toward St. Louis. Other suits have involved air pollution along the Tennessee-Georgia border and garbage dumping and sewage dumping disputes between New York and New Jersey. The Supreme Court had to adopt some rule of decision to decide these cases. The Court presumed that it was inappropriate to adopt the law of either the source state or the affected state, since that would allow one of the litigants to adjust the rules so as to win the case. So the Court drew on the general law of nuisance without referring to the law of either state. Although the Court did not use the term federal common law, this was effectively what the Court fashioned and applied. In 1970, Illinois filed an original suit against Milwaukee, Wisconsin in the Supreme Court. Attorney General Scott sought an injunction against sewage overflows in Milwaukee, which were allegedly polluting the beaches and water supplies in Illinois. In a decision known as Milwaukee I, the Court confirmed that federal common law would govern such a suit. However, since this was not a State v. State suit where original jurisdiction is exclusive, but rather a State v. City suit where Supreme Court original jurisdiction is concurrent, the Court also decided that it would be better to have the action tried in the federal district court. So the Court remanded the case to be tried under the federal common law of nuisance. After an elaborate trial that imposed additional limits on

66. The creation of federal common law in this context can be justified on the grounds of necessity. See Steven Smith, Courts, Creativity, and the Duty to Decide a Case, 1985 U. Ill. L. Rev. 573. The court has jurisdiction and must decide the dispute; Congress has supplied no cause of action; it would be improper to adopt the law of either of the litigating parties as a rule of decision; hence the court must make up a rule of decision for the case on its own.
68. Id. at 93.
69. Id. at 99-100.
70. Id. at 93-98.
71. Id. at 108.
Milwaukee sewage overflows, the case returned to the Supreme Court in 1981 and was reviewed again in a case called Milwaukee II. This time around, the Court held that the federal common law of water pollution had been displaced by comprehensive amendments to the Clean Water Act, adopted after the original suit was filed.

In light of this history, three questions have to be resolved in deciding whether a federal common law cause of action exists in Connecticut v. American Electric Power: (1) Is a suit by States against sources in other States challenging the emission of greenhouse gases into the atmosphere the type of action that would be covered by federal common law, absent the Clean Air Act? (2) What is the standard for determining whether the Clean Air Act displaces federal common law? (3) Under this standard, would the federal common law be displaced in a suit challenging the emission of greenhouse gases?

A. Does Federal Common Law Apply?

As to the first question — would the suit be governed by federal common law absent the Clean Air Act — I think the best answer is probably yes. Various arguments can be advanced for applying federal common law in transboundary pollution cases. The narrowest possible conception of the scope of federal common law in this context is what can be called the "original jurisdiction" theory. This theory posits that if the controversy is one that the Supreme Court could hear under its original jurisdiction, and if the Supreme Court would apply federal common law in such a case, then the action should be governed by federal common law whether it is adjudicated by the Supreme Court or by any other court, state or federal.

The Supreme Court, as we have seen, applied a body of law we would now call federal common law in original actions brought by States challenging transboundary pollution. Once the Court determined that the cases were proper subjects for adjudication under its original jurisdiction, it had to apply some law. Congress presumably could legislate a standard to apply in such cases, but it

72. Illinois v. City of Milwaukee, 599 F.2d 151, 154-55 (7th Cir. 1979) (affirming in part the relief granted by the district court).
74. Id. 316-32.
75. See supra note 44.
had not acted. The Court conceivably could adopt the law of one of the contesting States, but this would empower one the litigants to manipulate the rule of decision and so defeat the goal of impartial adjudication. Therefore, out of necessity, the Court was forced to apply federal common law. If the Supreme Court would apply federal common law in resolving such a case under its original jurisdiction, the argument would go, then the lower courts should also apply federal common law when asked to resolve such a case. This is to avoid the injustice (not to mention temptation to forum shopping) of allowing the law that applies to the controversy to vary in accordance with the forum that decides it. Federal common law should therefore apply whether the Court declines to exercise original jurisdiction and remands to a district court, or the parties do not ask the Court to exercise jurisdiction and go straight to district court.

Under this original jurisdiction theory, if the Clean Air Act had never been adopted, federal common law would apply to the global warming suit. The Supreme Court has original but not exclusive jurisdiction over suits between a State and citizens of another State. Thus, if the Clean Air Act had never been enacted, Connecticut et al. could have sought leave to file their action as an original suit in the Supreme Court. Had they done so, federal common law would presumably apply. Given that federal common law would have applied to such a suit, the same law should apply to the action when brought in federal district court.

There are other, broader conceptions of when federal common law of nuisance should apply. Some have argued that it should apply to any action where the source of pollution is in one state and the affected party in another. Others have argued that it should apply to any pollution of a resource that has important interstate or federal implications. These conceptions of the scope of the federal common law of nuisance are more problematic than the original jurisdiction theory. But it is unnecessary to consider them, since the instant dispute appears to qualify as one that would

76. On the need to apply the same law in private suits as in original jurisdiction suits, see Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938); Cissna v. Tennessee, 246 U.S. 289, 295 (1918).
78. See, e.g., Committee for Consideration of Jones Falls Sewage System v. Train 539 F.2d 1006 (4th Cir. 1976).
79. See, e.g., Illinois v. Outboard Marine Corp., 680 F.2d 473 (7th Cir. 1982).
be governed by federal common law under the narrowest conception of the scope of that law.

B. The Standard for Determining Displacement of Federal Common Law

The Supreme Court has never addressed the question whether the federal common law of nuisance has been displaced in the context of interstate air pollution. The lower court decisions that have considered the question fairly uniformly conclude that the federal common law has been displaced in this context. Nevertheless, the issue is not foreclosed. The Second Circuit has held that the federal common law is displaced to the extent the Clean Air Act imposes a regulatory standard on a particular source and the plaintiff seeks to apply a more stringent standard. But the Second Circuit has left open the question whether the federal common law might survive with respect to a type of pollution not regulated under the Act.

Unfortunately, Milwaukee II is ambiguous as to what the standard for displacement of federal common law should be. The dispute boils down to two different interpretations of that decision: did it adopt a "field displacement" theory, or did it adopt a "conflict displacement" theory? The defendants will argue that Milwaukee II adopts a theory of field displacement. On this reading, the question is whether Congress has legislated comprehensively on the subject of air pollution, with the result that it can be said that the federal legislation "occupies the field." The AGs will want to argue that Milwaukee II endorses a conflict displacement theory. Here the relevant question would be whether Congress has provided an effective regulatory mechanism for dealing with greenhouse gas emissions, which mechanism provides a distinctly different remedy than would be available under the federal

82. Id. at 32.
83. These of course are alternative standards for determining when federal law preempts state law. I draw upon them here by analogy, in seeking to determine the standard for determining when federal statutory law displaces federal common law.
There is language in *Milwaukee II* to support either reading. On the one hand, the Court repeatedly stressed the comprehensive nature of the Clean Water Act amendments adopted after *Milwaukee I*, and suggested that this new, more comprehensive version of the Act occupied the field of federal regulation of interstate pollution, to the exclusion of the common law. On the other hand, there are passages that stress that the new legislation specifically addressed the problem that the federal common law remedy adopted by the lower courts was designed to rectify—sewage overflows from a point source of water pollution subject to the federal permitting process—implying that the federal common law remedy was displaced because it conflicted with these statutory mechanisms.

A third approach, which straddles or obfuscates the distinction between field and conflict displacement, would be to ask whether Congress has "spoken to" to the specific subject of global climate change. Through diligent research one can discover that Congress has from time to time authorized the gathering of information about climate change, or studies of climate change. See, e.g., 42 U.S.C. § 7405(g) (authorizing EPA to develop "nonregulatory strategies" for several substances including CO2); 15 U.S.C. § 2901 (establishing "national climate program" to improve understanding of global warming); 15 U.S.C. §§ 2931-38 (establishing 10-year research program for global climate issues). These nonregulatory responses, in my view, neither establish that Congress has occupied the field nor that Congress has provided an alternative remedial mechanism for dealing with global warming. They are arguably relevant in determining whether Congress has an "intent" to permit CO2 to be regulated as a criteria pollutant under the Clean Air Act. Cf. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (reviewing multiple nonregulatory enactments and information disclosure requirements to determine whether Congress intended to give FDA authority to regulate tobacco products as a "drug" or "device"). But they should not be used as a basis for determining whether federal common law has been displaced.

For example: "Congress ... has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981). "Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation.... The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois v. Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." Id. at 318-19.

For example: "[T]he problem of effluent limitations has been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress. This being so there is no basis for a federal court to impose more stringent limitations than those imposed under the regulatory regime by reference to federal common law, as the District Court did in this case.... [The sewage overflows] are point source discharges and, under the Act, are prohibited unless subject to a duly issued permit." Id. at 320. See also id. at 326 (stating that Federal Courts may not use federal common law to impose more stringent standards "after permits have already been issued and permittees have been planning and
Each of the two theories has a plausible rationale. The rationale for field displacement might be that when Congress legislates comprehensively, its silence on an issue should be construed to mean that it left no gap to be filled with federal common law. Silence in the midst of comprehensiveness instead means that Congress intended to leave a subject unregulated, at least for the time being. Thus, absent some affirmative signal from Congress that courts should fill gaps with federal common law, comprehensive legislation should not be supplemented by federal common law.

The rationale for the conflict displacement theory might be that when Congress legislates against the background understanding that federal common law applies to certain kinds of disputes, and if Congress does not specifically address that kind of dispute, it should be presumed that Congress intended the federal common law remedy to remain available. Public nuisance suits brought by AGs challenging transboundary air pollution were understood to be subject to federal common law before the Clean Air Act was adopted. Hence, the failure to regulate a particular type of transboundary pollution in the Air Act should be construed to mean Congress would have wanted federal common law to continue to apply.

Which reading of *Milwaukee II* is better – field displacement or conflict displacement? This is a tough call, but for three reasons I would incline toward the field displacement reading being the one that courts are more likely to adopt.

First, *Milwaukee II* emphasized that the presumption against preemption that applies when a court confronts a question about whether state law is preempted does not apply when the question is whether federal common law has been displaced by congressional legislation. Instead, something of the opposite presumption is appropriate: “[W]e start with the assumption’ that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.” This shift in the default rule is justified by the fact that preemption of state law raises an issue of federalism: whether any branch of the federal

operating in reliance on them.”).

87. See cases cited supra note 44.
89. Id. at 317.
government is justified in supplanting state authority in a particular area. Displacement of federal common law raises the same issues of federalism, but also a separation of powers question, namely, whether the Article III courts are permitted to establish rules of decision in a particular area when Congress has not acted. Displacement therefore presents issues of constitutional structure that go beyond the issues implicated by preemption, and warrant a special presumption against judicial lawmaking. The field displacement theory is more consistent with this presumption against judicial lawmaking than is conflict displacement.

Second, shortly after Milwaukee II, in the Sea Clammers decision, the Court restated its holding as follows: 

"[T]he federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of the [Federal Water Pollution Control Act]."  This is just a line in a Supreme Court opinion. But lower courts are likely to pay attention to it. It sounds more like field displacement than conflict displacement to me.

Third, the recent history of the Clean Air Act suggests that, insofar as multi-jurisdictional air pollution problems are concerned, some type of decisive congressional intervention is required before effective regulatory action will be taken against the problem. In other words, congressional silence means, as a practical matter, that the problem remains unregulated. Three episodes in particular are consistent with this generalization.

The first involves acid rain. Acid rain was the great transboundary pollution controversy of the 1970s. Northeastern states were pitted against Midwestern states. Efforts were made to get EPA to list acid rain as a criteria pollutant, and to restrict emissions of precursor gases under the transboundary provisions of the Clean Air Act. All these efforts failed, largely because of EPA's
Global Warming As A Public Nuisance reluctance to take on an issue that intensely divided the States without clear congressional guidance. Congress finally addressed the problem with a comprehensive new regulatory program in the 1990 Amendments – a program that was superimposed on top of the existing Clean Air Act mechanisms.

The second episode involves depletion of the ozone layer of the atmosphere by CFCs and halogen gases. This was a truly global issue, since all agreed that the ozone layer was being attacked by gases emitted from sources all around the world. As with acid rain, the solution was not found by employing the existing provisions of the Clean Air Act. Instead, the United States entered into the Montreal Protocols, which called for rapid phaseout of CFCs and halogens, and Congress implemented the agreement by enacting a new regulatory program, again superimposed on the existing Clean Air Act mechanisms, to achieve this phaseout among domestic American sources.

The third involves ground level ozone. A number of States along the eastern seaboard have complained bitterly for years that their ability to comply with National Ambient Air Quality Standards has been comprised by ground level ozone wafting in from upwind states to the west. Traditional mechanisms designed to provide for consultation over interstate effects in drafting State Implementations Plans did no good. Then, in the 1990 amendments, Congress specifically ordered that an interstate ozone transport region among the affected states be

93. See J. Wallace Malley, Acid Rain: A Decade of Footdragging May Be coming to an End, 91 W. Va. L. Rev. 817, 823-37 (1989) (discussing EPA reluctance to act on acid rain issue and efforts to use Clean Air Act to control acid rain).


98. See New York v. EPA, 852 F.2d 574, 577-79 (approving EPA denial of eastern states' Clean Air Act §126(b) petitions which claimed that out of state pollution sources were preventing NAAQS attainment; also approving EPA’s narrow construction of §126(b)). See also Geoffrey Wilcox, New England and the Challenge of Interstate Ozone Pollution under the Clean Air Act of 1990, 24 B. C. Envtl. Aff. L. Rev. 1, 13-26 (discussing the failure to control interstate ozone pollution under the 1970 and 1977 Clean Air Acts).
established, and set deadlines for action. Only then did we begin to see some movement toward tackling the problem of transboundary ozone.

In short, the recent historical experience is that nothing is likely to get done about significant multijurisdictional air pollution problems until Congress directs that something be done about it. It does not follow, of course, that prior congressional action is a normative precondition of such action. One cannot simply derive an “ought” from an “is.” But my guess is that courts will be strongly motivated by pragmatics in trying to determine whether they should assume the role of first mover in the campaign against global warming. Recent history suggests that a congressional blessing is required before effective regulation of multijurisdictional pollution occurs. If courts understand this, they will naturally be drawn to the field displacement theory, which requires that Congress, rather than the courts, play the role of first mover in controversial multijurisdictional disputes.

C. Application of the Displacement Standard to Climate Change

How should the displacement question be decided under these competing readings of Milwaukee II? If the field displacement theory is the better reading, as I have tentatively argued that it is, then I think the federal common law count in the instant suit is displaced. There is some suggestion in the case law that the Clean Air Act is less “comprehensive” than the Clean Water Act. Specifically, Judge Reinhardt, in a dissenting opinion in the Ninth Circuit, has opined that the Clean Air Act does not comprehensively regulate air pollution the same way the Clean Water Act does, because the Air Act does not impose federal emissions controls on all stationary sources of air pollution. Judge Reinhardt sometimes gets it right, but not this time. It is impossible to say that the Clean Air Act is less comprehensive than

the Water Act based on pages of legislation or volumes of regulations or economic activity affected or dollars of compliance costs. To be sure, the two acts have different regulatory strategies – the Clean Air Act focusing on air quality and the Clean Water Act on point sources – but I fail to see how this makes one “comprehensive” and the other not.

Moreover, even if we grant the dubious premise that federal regulation of point sources is required for comprehensiveness, the Clean Air Act would have to be regarded as comprehensive, at least as applied to the sources operated by the defendants in the case under consideration. Under the 1970 version of the Clean Air Act, all these sources operate under permits issued by state agencies under federal guidelines, and the state plans are reviewed and approved by EPA. After the 1977 amendments, these sources must comply with federal new source review standards if they qualify as new or modified sources, and existing plants must comply with Reasonably Available Control Technology standards if they operate in areas out of compliance with National Ambient Air Standards. After the 1990 amendments, these sources must obtain federal permits authorizing emissions of SO2 and NOx if they are regulated under the Acid Rain title of the Act. So if field displacement is the test, the Clean Air Act occupies the field.

On the other hand, if the conflict displacement reading of Milwaukee II is correct, then I think the federal common law count in the instant case is most likely not displaced. The superficial way of looking at the displacement question from this perspective would be as follows: The Clean Air Act does not mandate regulation of greenhouse gases; EPA has not elected to regulate greenhouse gases; therefore, there is no conflict between the Act and a federal district court judgment applying the federal common

105. 42 U.S.C. § 7502(c).
106. 42 U.S.C. § 7651g.
law of nuisance to order abatement of greenhouse gases.

There is a possible response to this. The States might have a remedy against greenhouse gases under the Clean Air Act. They could petition EPA for a rulemaking to list CO2 as an air pollutant that causes or contributes “to air pollution which may reasonably be anticipated to endanger public health or welfare” under Section 108 of the Act.107 If EPA agrees, and lists CO2 under Section 108, then EPA would have a nondiscretionary duty to issue national ambient air quality standards for CO2 under Section 109.108 This in turn would require all 50 States and the federal government to revise their implementation plans to force sources to reduce emissions of CO2.109 Among the sources so affected would be the plants operated by the defendants in this case. So it would appear that the Act contains a mechanism that addresses greenhouse gases after all – at least potentially.110

Unfortunately for the defendants – and happily for the AGs – EPA may have foreclosed this line of argument. A legal opinion issued by EPA General Counsel Robert E. Fabricant on August 28, 2003, concludes that EPA does not have authority to regulate CO2 under the Clean Air Act because CO2 does not fall within the Act’s definition of an air pollutant.111 This legal opinion may be wrong.112 The Act is written so broadly that just about anything, including water vapor, is an air pollutant.113 But, the Fabricant Memo obviously allows the AGs to argue that any attempt to petition EPA

107. 42 U.S.C. § 7408.
112. See Nicholle Winters, Note, Carbon Dioxide: A Pollutant in the Air, But is the EPA Correct that it is Not an “Air Pollutant”?, 104 Colum. L. Rev. 1996 (2004).
113. See 42 U.S.C. § 7602 (defining “air pollutant” in part to mean any “substance or matter which is emitted into or otherwise enters the ambient air.”).
to list CO2 as a criteria pollutant would be futile, because the agency would be obliged to reject such a petition, given the opinion of its general counsel that CO2 is not an air pollutant. With the listing option blocked, the AGs truly have no remedy under the Clean Air Act. Hence there is no conflict between a federal common law judgment and the Air Act. Hence the federal common law is not displaced under a conflict displacement theory.

But let us backtrack and summarize. I have suggested three principle conclusions: (1) federal common law would govern this suit but for the Clean Air Act; (2) the most likely standard for determining whether the Clean Air Act has displaced the federal common law is whether it occupies the field of air pollution regulation; (3) under this standard the Air Act is sufficiently comprehensive that a public nuisance suit based on emissions of gases from regulated stationary sources should be deemed to be displaced. So, as to my second question — whether the federal common law of nuisance applies in Connecticut v. American Electric Power Co.—the answer most likely is that it does not. If I am right, then the current suit should be dismissed, remitting the AGs to file their action in one or more state courts under state public nuisance law. Where, by the way, Supreme Court authority suggests they will have to apply the public nuisance law of the source state — not their own public nuisance law.114

III. FOREIGN POLICY PREEMPTION

Global warming is a phenomenon that potentially affects all nations. It will undoubtedly require concerted international effort if an effective solution is to be found. Such an international solution will require strenuous diplomatic efforts — the negotiation of treaties, creation of multilateral institutions, development of enforcement mechanisms. The third major issue raised by the AGs’ public nuisance action is whether such litigation will interfere with efforts by the federal government to forge a diplomatic solution to global warming, requiring that the suit be dismissed as inconsistent with the exclusive assignment of foreign policy functions to the political branches of the federal government.

114. International Paper Co. v. Ouellette, 479 U.S. 481, 497-98 (1987) (finding that, while Clean Water Act precluded Vermont from bringing suit under Vermont nuisance law, the CWA saving clause preserves claims pursuant to the nuisance law of the source state).
No claim can be made that global warming litigation is prohibited by any treaty to which the United States is a party. Nor can it be claimed that the suit is barred by an executive agreement or even a statute of the United States. Instead, the claim must be that the suit is precluded by the theory of "dormant foreign affairs preemption" — the notion that certain types of litigation are foreclosed because they interfere with the conduct of foreign policy by the President of the United States.

The argument, in capsule form, proceeds as follows. The United States has ratified the United Nations Framework Convention on Climate Change, in which it has committed to cooperate with other nations in seeking to develop collective solutions to global climate change. The United States subsequently helped negotiate, but then withdrew from, the Kyoto Protocol to this Convention. The principal ground for the withdrawal was concern that the Kyoto Protocol called for disproportionate reductions in greenhouse gas emissions from developed countries such as the United States, while demanding little or no sacrifice by developing countries. The stated foreign policy of the President, in the wake of the withdrawal from the Kyoto Protocol, is that the United States is seeking to develop alternative collective solutions to global warming that will distribute the burdens of collective action in a manner that is more equitable than Kyoto.

119. Text of March 13, 2001 Letter from President Bush to Senators Hagel, Helms, Craig, and Roberts available at http://www.whitehouse.gov/news/releases/2001/03/20010314.html (last visited Mar. 30, 2005) ("I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy.").
120. See generally, President Bush Discusses Global Climate Change June 11, 2001 available at http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html (last visited Mar. 30, 2001) ("I am today committing the United States of America to work within the United Nations framework and elsewhere to develop with our friends and allies and nations throughout the world an effective and science-based response to the issue of global
In this context, the argument would run, any judgment by a United States court requiring that American firms reduce emissions of greenhouse gases would interfere with ongoing efforts by the President to negotiate a more equitable international framework for dealing with global warming. Such a judgment would require a unilateral reduction in emissions by the United States, and would therefore eliminate a "bargaining chip" that the United States can employ in negotiations with other nations. Moreover, such a judgment could embarrass the President by calling into question his position that the emissions reductions required by Kyoto represent a disproportionate burden that is unacceptable to the people of the United States.

The argument that litigation can be preempted if it would undermine the position of the United States in international negotiations is not far-fetched. There are some sweeping statements in Supreme Court opinions to the effect that the federal government has exclusive authority to determine the foreign policy of the United States, and that the President "is the sole organ of the nation in its external relations." This exclusivity unquestionably creates a zone of dormant foreign policy preemption that limits the range of activity of States AGs. There is no question, for example, that the State AGs would be prohibited from directly entering into negotiations with foreign nations in an attempt to establish reciprocal greenhouse gas emissions limitations.

The leading decision that establishes the idea of dormant foreign affairs preemption is Zschernig v. Miller. The case involved an Oregon statute that conditioned the right of an alien to inherit property upon a finding by Oregon courts that the alien's own
country would grant equivalent rights to American citizens. The Court concluded that the statute had been applied so as to affect international relations "in a persistent and subtle way." Specifically, Oregon courts had engaged in wide ranging factual inquiries into the behavior of government in foreign nations, including whether aliens under their law have enforceable rights, whether the so-called 'rights' are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.

The Court concluded that the purpose of these inquiries was to serve as an inducement to foreign nations to change their policies to conform more closely to a particular model of government. In effect, the Oregon courts were engaging in the conduct of foreign policy, which was entrusted solely to the federal government, and hence was preempted.

The forbidden judicial inquiry in Zschernig is distinguishable from alleged interference posed by the global warming suit in terms of whose behavior the court is being asked to scrutinize. In Zschernig, state courts scrutinized the behavior of foreign actors, hoping to influence the behavior of foreign regimes. In the global warming suit, in contrast, the court is being asked to scrutinize the behavior of domestic American power generators. There is no attempt to affect the behavior of foreign regimes.

The defendants will argue, however, that this is a distinction without a difference, because the global warming suit, if successful, would take away bargaining chips from the President in any future negotiation with foreign regimes over global warming. The notion that States may not impair foreign policy bargaining chips has been endorsed by the Supreme Court in two recent cases. In Crosby v. National Foreign Trade Council, the Court held that a Massachusetts statute which sought to cut off state purchases from firms doing business in Burma was preempted. Among the reasons cited in support of this conclusion was that the Massachusetts statute

124. Id. at 430.
125. Id. at 440.
126. Id. at 434.
Reduced the value of the "bargaining chip[s]" the President had to offer in dealing with Burma under a federal program of economic sanctions.\textsuperscript{128} The fact that the state statute and the federal program shared the same goal did not preserve the state law from preemption, because the state statute interfered with the federal calibration "about the right degree of pressure to deploy."\textsuperscript{129} As the Court observed, "the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics."\textsuperscript{130}

More recently, in \textit{American Insurance Assn. v. Garamendi},\textsuperscript{131} the Court again turned to the theme of interference with foreign policy bargaining chips. At issue was a California statute that required insurance companies doing business in that State to disclose a list of policies previously issued by affiliated companies to holocaust survivors.\textsuperscript{132} The executive branch objected to the statute as interfering with its efforts under executive agreements with European governments to establish special funds for payment of insurance claims to holocaust survivors.\textsuperscript{133} The Court held that the California statute was preempted, noting that under that law, "the President has less to offer and less economic and diplomatic leverage as a consequence."\textsuperscript{134} As in \textit{Crosby}, the statute was "an obstacle to the success of the National government's chosen 'calibration of force' in dealing with the Europeans using a voluntary approach."\textsuperscript{135}

\textit{Crosby} and \textit{Garamendi} provide the defendants with significant ammunition for a dormant foreign affairs preemption argument. Read for all they are worth, these decisions seem to say that when a matter is under active negotiation between the United States and one or more foreign nations, actions by individual States that would have the effect of reducing the bargaining leverage of the United States are preempted, because they interfere with the ability of the Nation to speak with one voice in matters of foreign affairs.

\textsuperscript{128} Id. at 377.
\textsuperscript{129} Id. at 380.
\textsuperscript{130} Id. at 381.
\textsuperscript{131} 539 U.S. 396 (2003).
\textsuperscript{132} Id. at 401.
\textsuperscript{133} Id. at 405-06.
\textsuperscript{134} Id. at 424 (internal quotation marks and citation omitted).
\textsuperscript{135} Id. at 425.
The question then is whether there is any basis to conclude that the bargaining chip theory should not apply in the context of the global warming dispute. Three bases for distinction are likely to be advanced.

First, the AGs can argue that the bargaining chip theory of Crosby and Garamendi rests on traditional preemption principles rather than dormant foreign policy preemption ala Zschernig. With respect to Crosby, this is clearly correct. Crosby rests on traditional statutory preemption grounds. Congress had enacted a statute providing for federal economic sanctions against Burma shortly after Massachusetts passed its legislation, and the Court held that the Massachusetts statute was preempted by this express federal enactment. The Court therefore did not reach the Zschernig question. In Garamendi, there was no federal legislation on which to hang a traditional preemption argument. Probably for this reason, the Court did invoke Zschernig as a source of authority for its decision. Nevertheless, the opinion shied away from characterizing its decision as resting on dormant foreign affairs preemption. Instead, it focused on the perceived conflicts between the state statute and specific federal executive agreements, suggesting that the state law was preempted by the executive agreements, not because of Zschernig's dormant preemption thesis. The AGs can therefore argue that the bargaining chip argument applies only to cases involving traditional conflict

137. Id. at 374 ("the state Act presents a sufficient obstacle to the full accomplishment of Congress's objectives under the federal Act to find it preempted.").
138. Id. at 374 ("Because our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgment below, we decline to speak to field preemption as a separate issue . . . or the dormant Foreign Commerce Clause.").
140. Id. at 413 ("The principal argument for preemption made by petitioners and the United States as amicus curiae is that HVIRA interferes with foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France.").
141. Id. at 416 ("valid executive agreements are fit to preempt state law"); Id. at 417 ("claim of preemption [left] to rest on asserted interference with the foreign policy those [executive] agreements embody.").
142. Id. at 419–20 ("It is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the Zschernig opinions, but the question requires no answer here. For even on Justice Harlan's view, the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law.").
preemption by specific federal legislation, treaties, or executive orders, and does not extend to pure Zschernig preemption.

Although the argument is technically consistent with the Court's decisions, it is doubtful whether it will succeed. The Court's recent foreign policy preemption cases seem less concerned with the specific legal authority for preemption than with the general proposition that States should not interfere with federal bargaining chips. The Court has preferred to avoid relying on Zschernig in developing this theory, because that case lacks a firm foundation in positive law, rendering its legitimacy somewhat suspect. But as Garamendi suggests, the Court is probably willing to invoke Zschernig if there is no better source of authority to support a finding of preemption, provided it is convinced such an outcome is otherwise warranted to keep the States from meddling with federal negotiations.

A second possible basis for distinction is the absence of a claim based on state law. The Zschernig doctrine is framed in terms of foreign policy being reserved uniquely to the federal government rather than the States. The AGs assert that their suit is grounded in a species of federal law—federal common law—not state law. If they prevail in their claim, the suit will proceed in federal court, not state court. Hence, the AGs can argue, there is no basis for concern with state court interference with federal foreign policy prerogatives.

The defendants might argue in rebuttal that the focus on state law and state courts is something of an accident of history. The doctrine could have been framed more broadly—in terms of foreign policy being reserved to the political branches of the federal government, thereby precluding meddling with foreign policy bargaining chips by either federal or state courts. This alternative

143. Garamendi, 539 U.S. at 439-43 (Ginsburg, J., dissenting) (discussing reasons not to apply the Zschernig doctrine and noting that "courts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds.").

144. Garamendi, 539 U.S. at 416-17 ("If the agreements here had expressly preempted laws like HVIRA, the issue would be straightforward... But... the agreements include no preemption clause, and so leave their claim of preemption to rest on asserted interference with the foreign policy those agreements embody. Reliance is placed on our decision in Zschernig.").

145. Zschernig, 389 U.S. at 436 (referring to "foreign affairs and international relations" as "matters which the Constitution entrusts solely to the Federal Government"); id. at 441 ("If there are to be such restraints, they must be provided by the Federal Government.").
characterization makes sense, they could argue, given the Constitution's explicit commitment of nearly all foreign policy issues either to the President or Congress, and the long tradition that speaks of the President as the "sole organ" of the Nation in dealing with foreign controversies.

But the equation of federal and state courts for purposes of Zschernig preemption is not quite right. Article III of the Constitution contemplates that federal courts will exercise authority to decide cases "affecting ambassadors, other public ministers and consuls," and controversies "between a State, or the citizens thereof, and foreign states, citizens or subjects." So evidently the Framers envisioned the federal courts functioning as appropriate tribunals resolving certain disputes involving the Nation and foreign officials or nations. Even with respect to judicial examination and characterization of the behavior of foreign regimes - the type of inquiry Zschernig saw as being inappropriate for state courts - federal courts play a different role. The Act of State doctrine, which calls for courts to refrain from questioning official acts of foreign governments, is applied by federal courts with a significant degree of deference to the views of the State Department. But the Supreme Court has declined to give exclusive weight to executive views about when the doctrine should or should not apply, reserving to federal courts a significant degree of authority in exercising this delicate function.

Moreover, who is going to decide questions about preemption in

146. See e.g., Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government").


150. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory").

151. Republic of Austria v. Altmann, 541 U.S. 677, 124 S.Ct. 2240, 2255 ("should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy."); id. at 2255 n.23 ("the Executive's views on questions within its area of expertise merit greater deference").

the foreign policy context – whether under the dormant foreign affairs doctrine or otherwise – if the federal courts are not available to make these judgments? We need federal courts to serve as umpires, deciding where the boundaries are between traditional state functions and exclusive federal foreign policy authority. If we decide that federal courts themselves lack decisional authority in matters that implicate foreign affairs, this could circle back and call into question their very authority to act as umpires. To be sure, there is a theoretical difference between deciding a case on the merits, under federal common law, and deciding whether state law is preempted. But as we saw in Part II, federal common law itself rests on a judgment about the need to preempt state law, so in practice the two are inter-tangled. Thus, although the matter is not entirely clear cut, there appears to be a sound basis for limiting Zschernig – at least in its full blown form – to judicial applications of state law.

A third possible distinction is grounded in intuitions about territoriality. In each of the three decisions we have considered – Zschernig, Crosby, and Garamendi – some State was taking action designed to influence behavior outside the territorial sovereignty of the United States. This sort of undertaking is far afield from the traditional authority of the States. The AGs’ global warming suit, in contrast, seeks to influence behavior by electric utility companies inside the territorial sovereignty of the United States—an undertaking close to the core of the States’ traditional police powers. It is true that the AGs’ suit, if successful, would have some effect on the bargaining leverage of the President in negotiating with other nations over global warming. But if this were to become a ground for preempting traditional exercises of state police power within the territorial sovereignty of the United States, it is difficult to see what the limiting principle would be. Virtually any traditional police power concern could conceivably become the subject of negotiations over an international treaty. If the mere appearance of an issue on the international agenda would result in

automatic preemption of state authority under the dormant foreign affairs preemption, a good deal of the police powers of the States would become at risk.

In sum, I think the dormant foreign policy preemption argument should fail. A suit brought by legal officers of American States against American defendants in an American court under a cause of action based on American common law is not preempted simply because a favorable outcome in the action might have reverberations or ramifications for the conduct of American foreign policy. The preemption argument should fail as long as the case remains grounded in federal common law, because the Zschernig doctrine is probably best understood as preempting only applications of state law. If the federal common law claim is displaced for the reasons given in Part II, and the case is not dismissed for want of subject matter jurisdiction, then the dormant foreign affairs preemption claim should still fail. This is because the suit seeks only to adjudicate action within the territorial sovereignty of the United States, and extending the dormant foreign affairs preemption to claims that fall in this context would have no obvious stopping point.

IV. THE STANDARD OF NUISANCE LIABILITY

Suppose we get by all these threshold issues about standing, which law applies, and foreign affairs preemption. How is the court actually going to decide this case? I am not concerned here so much with how the court is going to resolve the daunting scientific disputes about the probable magnitude of global warming, the probable welfare effects of climate change (some bad, some good), or the costs of different strategies to mitigate the welfare effects. These difficulties are Herculean, so much so that these they should be obvious to anyone. I am, rather, concerned with a more basic question: What is the legal standard that the court should apply in order to determine whether or not greenhouse gases emanating from one State create an actionable public nuisance in another State?

The standard legal research techniques do not get us very far in answering this question. The Restatement (Second) of Torts defines a public nuisance as “an unreasonable interference with a right
common to the general public. The key word here, obviously, is "unreasonable." In circumstances where the defendants' conduct is not "proscribed by a statute, ordinance or administrative regulation" - that is, in the circumstances presented by the AGs' public nuisance suit - the Restatement says that conduct is unreasonable if it involves a "significant interference" with public health, safety, or convenience. This is not very helpful, since it is unclear how severe an interference must be to qualify as "significant," and we are not told whether only harms are to be considered in determining significance or harms net of benefits. The comments cross reference to the discussion of unreasonableness in the context of a private nuisance. Here, the Restatement sets forth two tests. The primary test is a kind of judicial cost-benefit analysis that asks whether "the gravity of the harm outweighs the utility of the actor's conduct." A secondary test reflects a kind of strict liability, deeming conduct unreasonable when it causes harm that is "serious" or "severe" and compensation of all victims of the harm would be feasible. Again, "serious" and "severe" are not defined, and we are not told whether they are to be measured in isolation or net of benefits.

In the end, the Restatement only frames the debate, rather than providing any guidance in resolving it. Nuisance law generally - of which public nuisance is a subpart - has long oscillated between a "trespass" mode of analysis and a "cost-benefit" mode of analysis. Under the trespass mode, courts assume that invasions of a certain type or degree of severity are automatically nuisances. Under the cost benefit mode, courts attempt to weigh the harm to the plaintiff against the benefits of the defendant's conduct, in order to determine whether the challenged conduct should be deemed a nuisance.

In Connecticut v. American Electric Power Co., it is predictable that the AGs will rely on cases and commentary from the trespass mode, while the defendants will invoke cases and commentary from the cost-benefit mode. This is not because the trespass mode inevitably
produces pro-plaintiff results; under this approach, some invasions are deemed de minimus and result in no liability. Nor is it because the cost-benefit mode is inevitably pro-defendant; obviously, any conduct that creates external harms in excess of external benefits can be a nuisance under this approach. Rather, it is because the trespass approach assumes that nuisance law is about enforcing "rights," which frames the inquiry in a way generally favorable to plaintiffs. The cost-benefit approach, in contrast, makes nuisance law seem more like a legislative or regulatory proceeding, which calls into question whether nuisance disputes should properly resolved by courts at all. In addition, the trespass model proceeds rapidly from the complaint to liability to relief, which is in the plaintiff's interest, while the cost-benefit approach is likely to get bogged down in time-consuming discovery and evidentiary presentations, which may favor the defendant.

Transboundary nuisance disputes offer a better way of determining the applicable standard of liability, which I have called the "golden rules" approach. Under this approach, the court would determine the standard of liability by drawing upon a unique feature of transboundary cases, which is that the contesting parties are not only plaintiff and defendant, but are also members of different political jurisdictions, each of which also functions as a regulator of pollution controversies. This feature allows a court to determine the applicable standard of liability by applying two golden rules: do unto other States as you do to your own citizens, and do not ask of other States what you do not ask of your own citizens. In effect, the AGs could invoke either the regulatory law of the States in which the defendant utilities operate or of their own jurisdictions as a source of standards for holding the defendants liable for greenhouse gas emissions. Similarly, the utility defendants could cite either the internal practices of the AGs States or of their own States as defenses to liability.

There are a variety of justifications for using these golden rules to establish the standard of care for transboundary public nuisance disputes. I will mention only two. First, the golden rules cast the

161. See Merrill, supra note 65.
162. Id. at 998.
163. For a more complete discussion, see Merrill, supra note 65 at 1011-13.
court in a role it should be more comfortable playing. The court is asked to investigate existing legal norms and practices of the contesting parties and their home States in order to discover the most closely applicable rule of decision. In contrast, under the Restatement or either the trespass or cost-benefit model, the court is required in effect to "legislate" a rule, based on its subjective assessment of what is "reasonable," or its perceptions of the parties' "rights," or its measurement of costs and benefits.

The discovery mode of decisionmaking should be especially attractive to courts in highly controversial cases like the dispute over global warming. If the court has to legislate a rule, based on its own assessment of what is reasonable, or right, or consistent with the balance of benefits and costs, it risks being accused of activism and taking sides in a partisan controversy. But if the court can decide the case by invoking one or more norms that the contesting parties have agreed to impose on themselves, in their capacity as domestic regulators, then it seems as if the court is doing nothing more than requiring that States apply a principle of equal treatment or nondiscrimination in their treatment of other States.

Second, the golden rules minimize the potential for using public nuisance suits for strategic cost-exporting. Transboundary pollution entails cost-exporting behavior. The source of the pollution internalizes most of the benefits from the pollution-generating activity, and exports some of the costs of the pollution to the affected jurisdiction. But the regulation of transboundary pollution can also entail cost-exporting behavior. If the pollution is abated, the source of the pollution incurs most of the costs of abatement, and the affected jurisdiction enjoys many of the benefits. This danger of engaging in cost-exporting can be minimized by adopting the decisional rules the contesting parties and their States have adopted for domestic pollution disputes. When faced with a pollution problem as a matter of internal governance, a State must consider both the benefits and the costs of abating the pollution. Thus, the norms the State has imposed on its own sources will reflect a more candid appraisal of the costs and benefits of regulation than can be obtained by litigating under a norm of reasonableness, rights, or cost-benefit analysis.

The danger of cost-exporting behavior through litigation is also nontrivial concern in the context of AGs global warming suit. There is very little overlap between the plaintiff States and the
States in which the defendant utilities operate. The AGs are therefore in the position of asking electric utilities in other States to bear steep abatement costs that will produce benefits, in the form of reduced risk of future global warming, which will be enjoyed in large measure by plaintiffs' citizens. The golden rules approach would head this off, by requiring that the AGs show that their own States impose similar abatement duties on their own utilities to minimize the risk of global warming, before they can demand that such measures be taken by utilities in other States.

Under the golden rules approach to determine the standard of public nuisance liability, it seems relatively clear that the AGs would lose. Although a number of States have begun to take measures to encourage reductions in CO2 emissions, no State, as far as I am aware, has imposed mandatory reductions of CO2 emissions on its domestic electric utility industry, either as a matter of regulatory law or public nuisance liability, in order to reduce the risk of global climate change. Connecticut and the other plaintiff States are thus guilty of asking of other States what they do not ask of their own citizens. This is not a proper basis for establishing liability for transboundary pollution.

CONCLUSION

The attempt to litigate global warming as a public nuisance in Connecticut v. American Electric Power Co. presents a host of challenging legal issues, only some of which have been explored here. As with many suits that seek to achieve wide-ranging social and economic change, the plaintiffs must prevail against a variety of defenses in order to obtain relief; if the defendants succeed on only one, the plaintiffs are out of luck. My assessment of the issues suggests that, however novel or difficult each one may be when considered individually, the defendants are likely to find at least one winning defense somewhere along the line. Global warming is not going to be solved by public nuisance litigation. This only

164. Apparently, the overlap consists of only one power plant operated in Wisconsin, one of the plaintiff States.
165. See Hodas, supra note 115 for examples.
166. Some of the other issues include whether the defendants are subject to personal jurisdiction in the Southern District of New York, the standards for determining the admissibility of scientific evidence, the standards for determining proof of causation, and the type of relief that should appropriately be awarded if liability is established.
makes it more important to redouble our efforts to consider what form a realistic solution should take.