

*Of Coal, Climate and Carp: Reconsidering the
Common Law of Interstate Nuisance*

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

Justice Oliver Wendell Holmes in *Georgia v. Tennessee Copper Co.*²

For more than a century states have used the common law of nuisance to seek redress for transboundary pollution problems.³ Initially these disputes were heard by the U.S. Supreme Court exercising its original jurisdiction over disputes between states. Eventually the Court wearied of using its original jurisdiction and relegated the cases to the lower federal courts.⁴ Later the Court embraced the federal Clean Water Act's comprehensive regulatory programs to displace federal,⁵ but not state,⁶ common law. Most recently, when states sought to use public nuisance law to redress climate change, industry groups urged the Court to bar such actions on constitutional grounds. Instead in June 2011 the Court held in *American Electric Power v. Connecticut* that the Clean Air Act displaced federal nuisance law in the context of climate change, while reserving the question of its impact on state common law.⁷

The Court's decision in *American Electric Power* and other interstate nuisance cases recently decided by the U.S. Circuit Courts of Appeal⁸ make this a propitious time to reconsider the use of public nuisance law to redress transboundary environmental problems. This paper focuses on what I call the common law of interstate nuisance – a body of law developed in cases in which states, acting in a *parens patriae* capacity, have sought to protect their citizens from environmental harm originating in other states by bringing public nuisance

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² *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

³ *Missouri v. Illinois*, 200 U.S. 496 (1906); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

⁴ *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91 (1972).

⁵ *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*) (holding that the Clean Water Act displaced the federal common law of interstate nuisance).

⁶ *International Paper Company v. Ouellette*, 479 U.S. 481 (1987) (holding that state law is not preempted as long as the law of the source state is applied).

⁷ *American Electric Power Co. v. Connecticut*, 131 S.Ct. 2527 (2011).

⁸ *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010), cert. dismissed, 2011 WL 380926 (2011); *Michigan v. U.S. Army Corps of Engineers*, 2011 WL 3836457 (7th Cir. 2011).

actions under either federal or state common law. State attorneys general also have sought to use public nuisance actions to recover damages from the manufacturers of tobacco products, firearms, or lead-based paint,⁹ but these mass products liability cases are beyond the scope of this paper.¹⁰

This paper argues that the common law of interstate nuisance remains an essential tool despite the rise of the modern regulatory state. In the rare cases when existing regulatory authorities fail to address emerging environmental problems, federal common law can serve as a backstop. When federal regulatory authorities are capable of addressing transboundary problems, but fail to do so, common law actions based on the law of source states remain a viable means of redress for states suffering significant harm from such pollution. Reconnecting the law of interstate nuisance to its historical roots, the paper concludes that the common law has been more effective as a “prod”¹¹ to the development and implementation of new pollution control technology and to stimulate regulatory action to require its use, rather than as a vehicle for the judiciary to impose its own comprehensive solutions for transboundary environmental problems.

Part I reviews the history of the common law of interstate nuisance from the early twentieth century through the rise of the modern regulatory state.¹² Part II focuses on three contemporary interstate nuisance disputes – North Carolina’s effort to reduce transboundary pollution from power plants operated by the Tennessee Valley Authority, Connecticut’s efforts to reduce greenhouse gas emissions from utilities operating Midwestern coal-fired power plants, and efforts by Michigan and other states to stop invasive species of Asian carp from reaching the Great Lakes. Part III then reevaluates the common law of interstate nuisance in

⁹ See, e.g., Master Settlement Agreement, Nat’l Ass’n of Attorneys General, <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf> (settlement of tobacco litigation); *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633 (D.C. 2005) (firearms); *City of Philadelphia v. Lead Indus. Ass’n*, 994 F.2d 112 (3d Cir. 1993) (lead-based paint).

¹⁰ The paper also does not consider private nuisance litigation, including recent cases brought by private parties to redress harm allegedly caused by climate change. See *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp. 2d 863 (N.D. Cal. 2009) (dismissing on political question and lack of standing grounds action against energy, oil and utility companies by residents of Alaskan village seeking \$400 million to relocate due to rising sea levels; plaintiffs allege that civil conspiracy and concert of action claims to promote the deliberate misrepresentation of climate change science); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir 2009) (rejecting political question and lack of standing as grounds for dismissing lawsuit against oil companies for their contribution to climate change by victims of Hurricane Katrina who allege that climate change made the hurricane more severe), vacated upon grant of rehearing en banc, 598 F.3d 208 (5th Cir. 2010), rehearing en banc dismissed for lack of quorum to transact judicial business due to recusal of eight judges, 607 F.3d 1049 (5th Cir. 2010), 131 S.Ct. 902 (2011) (denying petition for writ of mandamus).

¹¹ See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 Yale L. J., 100 (2011).

¹² The author previously has reviewed in detail the history of the federal common law of nuisance for interstate water pollution disputes. See Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 Ala. L. Rev. 717 (2004). This paper draws upon that work.

light of these precedents, finding that it still can be an effective catalyst for executive or legislative action to redress transboundary environmental harm.

I. INTERSTATE NUISANCE LAW IN HISTORICAL CONTEXT

Although *Erie R. Co. v. Tompkins* held that there “is no federal general common law,”¹³ both before and after *Erie* the Supreme Court recognized that when dealing “with air and water in their ambient or interstate aspects, there is a federal common law.”¹⁴ Beginning in 1901 the Court recognized the right of states to bring common law nuisance actions to redress interstate pollution.¹⁵ These cases were brought directly to the U.S. Supreme Court under its original jurisdiction conferred by Article III, Sec. 2 of the Constitution over disputes between states.¹⁶

In a series of decisions between 1901 and 1931 the Court issued injunctions limiting air pollution from copper smelters,¹⁷ requiring New York City to stop dumping its garbage at sea,¹⁸ and directing Chicago to construct its first sewage treatment plant.¹⁹ In other cases the Court denied relief because it found that plaintiff states had failed to prove sufficient causal injury and/or were themselves engaged in similar polluting activities.²⁰ At times the Court expressed discomfort umpiring interstate pollution disputes,²¹ but it acknowledged its unique authority to vindicate the interests of states in protecting their citizens from transboundary pollution.

Concerned about the fact-intensive character of such litigation, the Supreme Court eventually relegated interstate nuisance actions to the federal district courts.²² After efforts to persuade states to adopt effective regulatory programs failed, in the early 1970s Congress adopted comprehensive national regulatory legislation to protect air and water quality. The Court embraced the Clean Water Act as preemptive of the federal common law of interstate nuisance, while still allowing state common law actions using the law of the source state in light of the new regulatory programs.

A. *Protecting State Sovereignty: Missouri v. Illinois & Georgia v. Tennessee Copper*

¹³ 304 U.S. 64, 78 (1938).

¹⁴ *Milwaukee I*, 406 U.S. at 103.

¹⁵ *Missouri v. Illinois*, 180 U.S. 208, 241-243 (1901).

¹⁶ The framers of the Constitution clearly contemplated that the Court would play an important role in resolving more than just boundary disputes between states. As Alexander Hamilton explained: “there are other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among members of the union. . . . Whatever practices may have a tendency to disturb the harmony of the states, are proper objects of federal superintendence and control.” *The Federalist* No. 80, at 407-08 (M. Beloff ed. 1948).

¹⁷ *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1915).

¹⁸ *New Jersey v. City of New York*, 284 U.S. 585 (1931).

¹⁹ *Wisconsin v. Illinois*, 281 U.S. 696 (1930).

²⁰ *Missouri v. Illinois*, 200 U.S. 496 (1906); *New York v. New Jersey*, 256 U.S. 296 (1921).

²¹ *New York v. New Jersey*, 256 U.S. 296, 313 (1921).

²² *Milwaukee I*, 406 U.S. 91 (1972).

In the late nineteenth century, most cities disposed of their sewage simply by dumping it untreated into nearby lakes or streams.²³ Health problems created by Chicago's use of this practice spawned the first major interstate pollution dispute to reach the U.S. Supreme Court.

Chicago disposed of its raw sewage by dumping it into the Chicago River, which flowed into Lake Michigan, the source of the city's drinking water. As a result the city suffered numerous health problems linked to contaminated drinking water including cholera epidemics and high death rates from typhoid fever. To resolve the city's sewage disposal problem, the state of Illinois approved construction of a canal to reverse the flow of the Chicago River to take the sewage away from Lake Michigan. By 1900 the Sanitary and Shipping Canal was opened and Chicago's sewage was flowing down the Chicago River to the Des Plaines River, which drained into the Mississippi River. Because Missouri cities used the Mississippi as their source of drinking water, Missouri residents were alarmed.

The Supreme Court allowed Missouri's attorney general file a common law nuisance action against Illinois to enjoin Illinois and the Sanitary District of Chicago from discharging sewage through the canal. Justice Shiras and five other justices²⁴ emphasized that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them,"²⁵ and "that an adequate remedy can only be found in this court at the suit of the State of Missouri."²⁶ Justice Shiras dismissed Illinois's claim that individual private nuisance actions could be an adequate remedy for the harm Missouri alleged.²⁷

After five years of fact-gathering before a special commissioner, a unanimous Court denied the relief sought by Missouri in February 1906. Writing for the Court, Justice Oliver Wendell Holmes stated, "Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."²⁸ Holmes recognized that advances in scientific knowledge, such as acceptance of the germ theory of diseases, meant that nuisances could include even things that cannot "be detected by the unassisted senses".²⁹ The Court held that Missouri had failed to prove sufficient causal injury because the experts for both sides were sharply split on whether Chicago sewage was capable of causing typhoid fever in St. Louis and that there had been no increase in typhoid cases in cities between St. Louis and Chicago, and it noted that Missouri cities dispose of their raw sewage in the same river.³⁰

²³ See *Newark v. Sayre Co.*, 60 N.J. Eq. 361, 45 A. 985 (1900) ("from time immemorial the right to connect [sewers] with navigable streams has been regarded as part of the *jus publicum*").

²⁴ Justices Gray, Brewer, Brown, Peckham and McKenna joined the majority opinion of Justice Shiras. *Missouri v. Illinois*, 180 U.S. 208 (1901).

²⁵ *Id.*

²⁶ *Id.* at 241.

²⁷ *Id.*

²⁸ *Missouri v. Illinois*, 200 U.S. 496, 521 (1906).

²⁹ *Id.* at 522-23.

³⁰ *Id.* at 523-26

A year after it decided *Missouri v. Illinois*, the Supreme Court decided another prominent interstate pollution dispute. This time the controversy involved Georgia's claim that sulphur dioxide emissions from two copper smelters located just across the border in Tennessee had destroyed crops and other vegetation in northern Georgia.³¹ In October 1905 Georgia filed suit against the smelters in the U.S. Supreme Court. Citing their economic importance to the region and their construction of taller smokestacks and more modern furnaces, the smelters successfully convinced the Court not to grant preliminary relief to the state of Georgia.³² But the Court ordered that the case be tried on an expedited basis, so more than 2,000 affidavits were submitted for the record.³³ While the smelter companies argued that no pollution control technology had been successfully demonstrated for copper smelters,³⁴ Georgia insisted that technology could be developed to capture sulphur to make sulphuric acid.³⁵ After hearing two days of oral argument in February 1907, the Supreme Court released its decision on May 13, 1907.

In an opinion by Justice Holmes the Court declared that Georgia had established its right to obtain an injunction requiring abatement of emissions from the smelters.³⁶ Holmes emphasized that this was not a lawsuit between private parties, but instead "a suit by a State for an injury to it in its capacity of quasi-sovereign."³⁷ Thus, he found it unnecessary for Georgia to establish that state-owned property had suffered significant harm³⁸ because "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."³⁹

Damages were not adequate to compensate Georgia, Holmes declared, because a state's quasi-sovereign rights cannot be bought.⁴⁰ Because a state's sovereign right to protect its citizens against transboundary pollution was at stake, Holmes declared that the Court should be less inclined to give weight to the traditional factors relevant to the exercise of equitable discretion.⁴¹ Holmes declared that: "It is a fair and reasonable demand on the part of a

³¹ Three years before, in 1904, the Tennessee Supreme Court had heard a private nuisance action brought against the same smelters by nearby landowners. It had awarded modest damages to the plaintiffs, but it emphatically rejected the plaintiffs' demands to require the smelters to abate their emissions in light of the great economic value of the enterprises. *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn.331, 83 S.W. 658 (1904).

³² *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907).

³³ *Id.*

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³⁶ *Id.* at 239.

³⁷ *Id.* at 237.

³⁸ In an effort to show that state-owned property had been damaged, Georgia argued that erosion from private lands denuded of vegetation due to the smelter emissions had caused the gulying of state-owned roads.

³⁹ *Id.* at 237.

⁴⁰ 206 U.S., at 237-238.

⁴¹ Balancing of the traditional factors to be considered before granting equitable relief had been a focal point of the parties' oral arguments. These factors included "a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendants' business, the question of

sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.”⁴²

Reviewing the evidence, Holmes found it clear that the vast quantities of pollution from the smelters “cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case within the requirements of *Missouri v. Illinois*.”⁴³ Having upheld Georgia’s right to an injunction, Justice Holmes left it up to the state to decide if that was truly its preferred remedy.⁴⁴ He concluded his opinion by stating: “If the State of Georgia adheres to its determination, there is no alternative to issuing an injunction.”⁴⁵ Rather than immediately issuing an injunction, the Court decided to allow “a reasonable time to the defendants to complete the structures that they now are building, and the efforts that they are making, to stop the fumes.”⁴⁶

While more than a reasonable time passed, a settlement was finally reached in February 1911 between the Tennessee Copper Company and the state of Georgia.⁴⁷ However, the operator of the second smelter, the Ducktown Sulphur, Copper & Iron Corporation, refused to settle. Eventually after more hearings in the Supreme Court, the Court in May 1914 held that the Ducktown Company had not met its burden of proving that its emissions no longer were causing harm in Georgia.⁴⁸ On June 1, 1915, the Court issued a decree directing the Ducktown Company to limit sulphur emissions to 20 tons per day from April 1-October 1 and 40 tons per day during the rest of year.⁴⁹

B. Sewage, Garbage & Water Diversion Conflicts Decided in the 1920s and 1930s

In 1908 sewage disposal problems precipitated another interstate nuisance dispute filed in the U.S. Supreme Court. The state of New York sued New Jersey in an effort to block construction of a tunnel that would channel New Jersey sewage discharges away from the heavily polluted Passaic River and into Upper New York Bay.⁵⁰ New York claimed that the additional discharge of 120 million gallons of sewage per day would cause a public nuisance,

health, the character of the forests as a first or second growth, the commercial possibility of reducing the fumes to sulphuric acid, the special adaption of the business to the place.” 206 U.S., at 238.

⁴² *Id.*

⁴³ 206 U.S., at 238-239.

⁴⁴ *Id.* at 239.

⁴⁵ *Id.*

⁴⁶ *Id.* at 238-39.

⁴⁷ The company agreed to cut back on sulphur emissions from the smelter during the growing season from May 20 to September 1. Additionally two years later a compensation fund was created for victims in Northern Georgia.

⁴⁸ *Georgia v. Tennessee Copper Co.*, 237 U.S. 678, 679 (1915).

⁴⁹ *Id.*

⁵⁰ *New York v. New Jersey*, 256 U.S. 296, 300 (1921).

harm users of the Bay and poison oysters and fish.⁵¹ The federal government intervened and came to a settlement with New Jersey.⁵² However despite the settlement, New York pressed on with its lawsuit. While testimony was originally taken over a two-year period beginning in 1911, the case was then put on hold due to U.S. involvement in World War I and so more testimony had to be taken before the case was finally decided in May 1921.⁵³

Justice John H. Clarke authored a unanimous decision holding that New York had not presented sufficient evidence to warrant issuance of an injunction.⁵⁴ The Court acknowledged New York's right to sue New Jersey, but it held that New York had not satisfied its burden of establishing a serious invasion of its rights "by clear and convincing evidence."⁵⁵ It emphasized that 900 million gallons of untreated sewage already was being discharged into the Bay each day by New York from 450 sewers and that the annual growth of New York's population added more new sewage each year than the entire capacity of the New Jersey tunnel.⁵⁶ The Court also noted that the federal government had the right to stop New Jersey's sewage discharges if they subsequently caused harm, as a result of the settlement agreement, which Hughes described as the reason for his defeat.⁵⁷ In an unusual aside, Justice Clarke opined that such settlements were likely to effect better solutions to such disputes than any lawsuits.⁵⁸

In 1929 New Jersey turned the tables on New York by suing New York City for dumping its garbage in the ocean where it eventually would wash up on New Jersey beaches. This time the Court appointed a special master to hear testimony in the case.⁵⁹ The special master found that New York City had caused enough garbage to wash upon New Jersey shores to fill 50 trucks, damaging fish nets and making swimming impracticable.⁶⁰

The Court rejected New York City's claim that because the ocean dumping occurred beyond what then was the 3-mile limit of the nation's territorial waters it was beyond the Court's jurisdiction.⁶¹ The Court noted that the "situs of the acts creating the nuisance, whether within or without the United States, is of no importance" because the harm occurred in the United States and the defendant was properly before the Court and subject to its jurisdiction.⁶²

⁵¹ *Id.*

⁵² *Id.* at 306.

⁵³ *Id.* at 308.

⁵⁴ *Id.* at 309-10

⁵⁵ *Id.* The Court emphasized that New York had failed to prove that there were visible suspended particles, odors, or a reduction in the dissolved oxygen content of the Bay sufficient to interfere with aquatic life. Cite.

⁵⁶ *Id.* at 312.

⁵⁷ The Autobiographical Notes of Charles Evan Hughes at 194-95.

⁵⁸ "We cannot withhold the suggestion," that problems like the present case are "more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of...the States so vitally interested in it than by proceedings in any court." 256 U.S. 296, 313 (1921).

⁵⁹ *New Jersey v. New York City*, 283 U.S. 473, 477 (1931).

⁶⁰ *Id.* at 478.

⁶¹ *Id.* at 482-83.

⁶² *Id.* at 482.

In December 1931 the Court issued an injunction barring New York City from dumping garbage into the ocean effective June 1, 1933, the date recommended by the special master in order to enable the city to build new incinerators.⁶³ The Court also ordered the city to use its existing incinerators at full capacity to reduce the amount of garbage dumped into the ocean and to report to the Court every six months concerning its progress in building new incinerators.⁶⁴ After it became clear that New York City would not meet the deadline for ending ocean dumping, contempt proceedings were held. In December 1933 the Court extended the deadline to July 1, 1934, while imposing a \$5,000 per day fine on the City if it missed this new deadline.⁶⁵ The construction of two new incinerators ultimately enabled the City to meet the new deadline.

Chicago's sewage disposal problems, discussed above, ultimately became a water diversion problem because Chicago had to divert growing volumes of water from Lake Michigan to flush growing volumes of sewage through the Sanitary and Shipping Canal. After the District ignored its permit limits by tripling the flow, the federal government then sued in federal district court to enforce the permit limits. It took nearly seven years before a decision was issued, perhaps due to World War I, but the district court ultimately ruled in favor of the federal government. In January 1925 the Supreme Court upheld the judgment against the Sanitary District.⁶⁶ Recognizing that the city could not immediately reduce the size of its diversion without causing major public health problems, the Court permitted the U.S. Army Corps of Engineers to increase temporarily the size of the permitted diversion from 4,167 to 8,500 cubic feet/second, the amount the District had been diverting. This decision was conditioned on Chicago's agreement to build sewage treatment capacity for at least one third of its citizens by the end of 1929.⁶⁷

Meanwhile Illinois and the Sanitary District also were facing a lawsuit filed by the upper Great Lakes states in the U.S. Supreme Court in 1924. Wisconsin, Michigan, and New York had sued Illinois and the Sanitary District for allegedly diverting so much water from Lake Michigan that it had reduced the level of the Great Lakes by five to six inches, causing serious injury to people and property.⁶⁸ Missouri and four other downstream states intervened to join Illinois as a defendant because of their interest in keeping as much water as possible flowing through the drainage canal to the Mississippi River.

The Court accepted jurisdiction and appointed former Justice Charles Evans Hughes to serve as a special master. After taking extensive testimony, Hughes reported in November 1927 that the allegations by the upper Great Lake states were correct.⁶⁹ In January 1929 the Court accepted Hughes's recommendations and ruled in favor of the upstream states. In an opinion by Chief Justice William Howard Taft the Court rejected the notion that the federal permit relieved Illinois and the Sanitary District from liability for harm caused to upstream

⁶³ *New Jersey v. New York City*, 284 U.S. 585 (1931).

⁶⁴ *Id.*

⁶⁵ 290 U.S. 237 (1933).

⁶⁶ *Sanitary District of Chicago v. United States*, 266 U.S. 405, 432 (1925).

⁶⁷ *Wisconsin v. Illinois*, 278 U.S. 367, 417-418 (1929).

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⁶⁹ *Id.* at 407-09.

states. The Court concluded that the upstream states were entitled to equitable relief,⁷⁰ and it ultimately issued an injunction requiring Chicago to build sewage treatment plants to reduce its need to divert water from Lake Michigan.⁷¹

C. In the 1970s the Supreme Court Sours on Exercising its Original Jurisdiction

The U.S. Supreme Court's long-time frustration with using its original jurisdiction to hear fact-intensive interstate nuisance suits and its difficulty fashioning effective remedies for them ultimately led it to relegate such cases to the lower federal courts. On three occasions in 1971 and 1972, the Court declined requests to hear interstate nuisance cases in the exercise of its original jurisdiction. In a fourth case in which it had appointed a special master, the Court refused to accept continuing responsibility for monitoring the implementation of a settlement agreement.

In 1970 the state of Ohio sought to bring an original action in the Court against the Wyandotte Chemical Corporation and Dow Chemical of Canada to stop and remediate mercury pollution of Lake Erie. After scheduling an unusual oral argument on the question of whether to accept jurisdiction, the Court declined to hear the case.⁷² In an opinion by Justice Harlan the Court explained that even though it could exercise its original jurisdiction to hear the case "no necessity impels" the Court to be the "principal forum for resolving such controversies."⁷³ Harlan lamented the Court's difficulty in resolving disputes of interstate air and water pollution. Noting the decisions in *Missouri v. Illinois* and *New York v. New Jersey*, Harlan felt the Court's attempts to resolve the conflicts were futile because of the complex technical and political matters that were inherent in these cases and were becoming worse because of the novel scientific questions that have no clear answer.⁷⁴ Acknowledging the intense public concern for the environment that then prevailed, Justice Harlan conceded that stopping pollution "is manifestly a matter of fundamental import and utmost urgency."⁷⁵ But he described the Court's refusal to hear the case as reflecting "that our competence is necessarily limited, not that our concern should be kept within narrow bounds."⁷⁶

Only Justice William O. Douglas dissented. He too acknowledged the complexity of the issues presented by the case, but he argued that they were no more difficult than the complex issues that arise in water rights disputes between states that the Court routinely hears.⁷⁷

⁷⁰ *Wisconsin v. Illinois*, 278 U.S. 367 (1929).

⁷¹ *Wisconsin v. Illinois*, 281 U.S. 179 (1930) and 281 U.S. 696 (1930).

⁷² *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 494 (1971).

⁷³ *Id.* at 495-496.

⁷⁴ *Id.* at 501-03. The papers of the late Justice Thurgood Marshall reveal that on the morning of oral argument, Chief Justice Burger distributed an unusual memo strongly cautioning his colleagues about the implications of a decision to hear the case. The Chief Justice cited the vast range of pollution problems facing the 50 states and the complexity of the issues. "If we do grant leave to file, I believe we should consider appointing not one but three Special Masters, at least one of whom should be a scientist with background in the subject matter and without conflicting attachments or published positions on the subject matter." Memorandum from Chief Justice Warren E. Burger to the Conference, Jan. 18, 1971.

⁷⁵ *Wyandotte Chemicals Corp.*, 401 U.S. at 505.

⁷⁶ *Id.*

⁷⁷ *Id.* at 511 (Douglas, J., dissenting).

Douglas cited the long-running dispute between Wisconsin and Illinois over the diversion of waters from Lake Michigan as well as disputes between Arizona and California over the Colorado River and disputes between Colorado, Wyoming and Nebraska over the waters of the North Platte River.⁷⁸

In *Illinois v. City of Milwaukee (Milwaukee I)* Illinois sought permission from the Court to bring an original action against four Wisconsin cities for polluting Lake Michigan by discharging 200 million gallons of raw or poorly treated sewage each day.⁷⁹ While the existing Federal Water Pollution Control Act had created a cumbersome, and ultimately futile, interstate conference procedure to encourage states to settle interstate water pollution disputes, the Court rejected the notion that this preempted Illinois's action. Writing for a unanimous Court, Justice William O. Douglas noted that it "may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution."⁸⁰ The Court recognized that "this original suit normally might be the appropriate vehicle for resolving this controversy," but it chose instead to exercise its "discretion to remit the parties to an appropriate district court whose powers are adequate to resolve the issues."⁸¹

The Court held that states could bring federal common law nuisance actions in the district courts because they arise under federal law within the meaning of 28 U.S.C. §1331.⁸² The Court cited with approval the Tenth Circuit's holding in *Texas v. Pankey*⁸³ as proof that federal district courts could hear interstate nuisance actions.⁸⁴ Quoting from *Pankey* in a footnote the Court stated that "[u]ntil the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights."⁸⁵ But it also explained that "consideration of state standards may be relevant" because "a State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor."⁸⁶ The Court explained that when lower federal courts hear interstate nuisance actions "[t]here are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern."⁸⁷

In April 1972 the Court did agree to hear an interstate pollution dispute in exercise of its original jurisdiction because it involved a lawsuit between two states. In *Vermont v. New York* the Court appointed a special master, who was able to negotiate a settlement between the

⁷⁸ *Id.*

⁷⁹ 406 U.S. 91, 93 (1972).

⁸⁰ *Id.* at 107-08.

⁸¹ *Id.* at 108.

⁸² *Id.* at 98-99

⁸³ 441 F.2d 236 (10th Cir. 1971).

⁸⁴ *Id.* at 99-101.

⁸⁵ 406 U.S. 91, 108 n.9 (1972) (quoting *Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir. 1971).

⁸⁶ *Illinois*, 406 U.S. at 107.

⁸⁷ *Id.* at 107-08.

parties involving a paper mill in New York. However, the Court stunned the parties in June 1974 by refusing to approve a proposed consent decree.⁸⁸ The Court explained that it did not want to assume continuing responsibility for supervising implementation of a consent decree in the absence of any law to apply.⁸⁹ This “would materially change the function of the Court in these interstate contests” to one of performing arbitral rather than judicial functions.⁹⁰

D. Displacement of Federal Common Law, but Not Source State Common Law

After failing to convince the U.S. Supreme Court to hear its nuisance action against the City of Milwaukee as an original action, Illinois refiled its lawsuit in federal district court in Illinois. Less than five months later Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) over President Nixon’s veto,⁹¹ setting up a showdown over whether common law had been preempted because Illinois maintained that the permits issued to Milwaukee’s plants still allowed levels of pollutant discharges that would constitute public nuisances.⁹²

After a six-month trial, in July 1977 the Illinois federal district court upheld the state’s claim that Milwaukee’s discharge constituted a public nuisance under federal common law and rejected the argument that the new Clean Water Act permit program preempted the federal common law of nuisance.⁹³ It ordered the city to meet more stringent effluent limits and to construct facilities to eliminate combined sewer overflows by 1989.⁹⁴

On appeal the Seven Circuit recognized the comprehensiveness of the Act’s new regulatory program for controlling pollution; however, it still affirmed the district court’s holding that federal common law was not preempted.⁹⁵ The court noted that §510 of the Act⁹⁶ preserves the authority of states to adopt more stringent standards than required by the Act, and it cited §511’s directive that the Act not be construed to limit the federal authority under any other law, which it construed to include federal common law. The court also noted that the savings clause in the citizen suit provision of the Act⁹⁷ expressly preserved any common law claims, which it interpreted to include both state and federal common law.⁹⁸ While concluding that the district court had failed to justify imposing more stringent effluent limits for certain pollutants, the Seventh Circuit affirmed the district court’s order to eliminate combined sewer overflows and to impose a new limit on phosphorus discharges.⁹⁹

⁸⁸ Vermont v. New York, 417 U.S. 270, 278 (1974).

⁸⁹ *Id.* at 277.

⁹⁰ *Id.* at 277.

⁹¹ Pub. L. 92-500, 86 Stat. 816.

⁹² Milwaukee v. Illinois, 451 U.S. 304, 310 (1981).

⁹³ *Id.* at 311.

⁹⁴ *Id.*

⁹⁵ *Id.* at 312.

⁹⁶ 33 U.S.C. §1370

⁹⁷ Clean Water Act §505, 33 U.S.C. 1365.

⁹⁸ People of State of Illinois v. Milwaukee, 599 F.2d 151, 157 (7th Cir. 1979).

⁹⁹ *Id.* at 164.

When Milwaukee sought review of the Seventh Circuit’s decision by the U.S. Supreme Court, the Court initially voted to deny review. However, after Justice White drafted a dissent from denial of certiorari questioning the competence of courts to impose effluent limits stricter than those required in existing permits,¹⁰⁰ the Court agreed to hear the case. At oral argument the Solicitor General appeared as an amicus supporting Illinois’s position that the Clean Water Act did not preempt the federal common law of nuisance. In April 1981 the Court held that the Act had preempted federal common law when it decided *City of Milwaukee v. Illinois (Milwaukee II)*.¹⁰¹

In an opinion by Justice Rehnquist the Court noted that legislative preemption of *federal* common law did not implicate the same federalism concerns that require clear expressions of congressional intent before *state* law may be preempted.¹⁰² Justice Rehnquist interpreted the language of section 505(e) narrowly to mean “that nothing *in* §505, the citizen-suit provision, should be read as limiting any other remedies which might exist. . . . [I]t means only that the provision of such suit does not revoke other remedies. It most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common-law actions but only that the particular section authorizing citizen suits does not do so.”¹⁰³ Citing the comprehensive nature of the Clean Water Act’s regulatory scheme and the technical complexities courts would have to confront to formulate pollution control standards, Justice Rehnquist concluded that Congress implicitly had supplanted federal common law by adopting a comprehensive regulatory scheme for water pollution control.¹⁰⁴ Justice Rehnquist concluded that “[t]he 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.”¹⁰⁵ He went on to note that application of federal common law would be “peculiarly inappropriate in areas as complex as water pollution control. . . . Not only are the technical problems difficult—doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise—but the general area is particularly unsuited to the approach inevitable under a regime of federal common law. Congress criticized past approaches to water pollution control as being ‘sporadic’ and ‘ad hoc,’ apt characterizations of any judicial approach applying federal common law.”¹⁰⁶

¹⁰⁰ In his draft dissent Justice White noted that he did “not necessarily disagree with the decision below,” but “that there is substantial doubt as to whether Congress intended that inexperienced federal courts, guided by principles of common law nuisance and maxims of equity jurisprudence, could impose environmental duties stricter than those adopted through democratic processes and developed by supposedly expert federal and state agencies.” Justice White expressed the fear that “many interstate bodies of water . . . could become the subject of federal common law nuisance actions.” Memorandum from Justice Byron R. White circulating Draft Dissent from Denial of Certiorari, March 3, 1980.

¹⁰¹ 451 U.S. 304 (1981).

¹⁰² *Id.* at 316-17.

¹⁰³ *Id.* at 328-329 (emphasis in original).

¹⁰⁴ *Id.* at 317-19.

¹⁰⁵ *Milwaukee II*, 451 U.S. at 318-319 (emphasis in original).

¹⁰⁶ *Id.* at 325 (citations omitted).

Justice Rehnquist noted that Illinois was free to pursue its case for more stringent controls on Milwaukee's discharges before the Wisconsin state agency responsible for issuing Milwaukee a permit under the Clean Water Act.¹⁰⁷ But he maintained that "[i]t would be quite inconsistent with this scheme if federal courts were in effect to 'write their own ticket' under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them."¹⁰⁸

In dissent Justice Blackmun, joined by two other Justices, argued that the savings clause and legislative history of the Act clearly expressed an intent by Congress not to preempt federal common law.¹⁰⁹ While conceding that interstate nuisance cases often are complex and require difficult judgments, Blackmun argued "they do not require courts to perform functions beyond their traditional capacities or experience."¹¹⁰ He concluded that the Court's decision was particularly unfortunate because it would undermine efforts to promote "a more uniform federal approach to the problem of alleviating interstate pollution."¹¹¹

Two months after deciding *Milwaukee II* the Court extended preemption of federal common law to cover ocean waters. The Court concluded that the Ocean Dumping Act's comprehensive permit scheme regulating discharges to such waters¹¹² preempted the federal common law of nuisance because it "is no less comprehensive, with respect to ocean dumping, than are analogous provisions" in the Clean Water Act.¹¹³ Two decades later, when it rejected Exxon's claim that the Clean Water Act preempted private claims for punitive damages for pollution caused by the Exxon Valdez spill, the Court distinguished *Milwaukee II* and *National Sea Clammers*.¹¹⁴ The Court described these as cases "where plaintiffs' common law nuisance claims amounted to arguments for effluent discharge standards different from those provided by the CWA."¹¹⁵ The "private claims for economic injury" in the Exxon Valdez litigation "do not threaten similar interference with federal regulatory goals," the Court explained.¹¹⁶

Left unresolved by *Milwaukee II* was the question whether the Clean Water Act preempts *state* common law actions. In *International Paper Company v. Ouellette*,¹¹⁷ the Court held that the Clean Water Act did not preempt state common law so long as the law of the source state was applied.¹¹⁸ *Ouellette* involved a private nuisance action brought by 150 lakeshore property owners in Vermont state court against the same paper mill that had spawned *Vermont*

¹⁰⁷ *Id.* at 326.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 338-39.

¹¹⁰ *Id.* at 349.

¹¹¹ *Id.* at 353.

¹¹² The Marine Protection Research and Sanctuaries Act of 1972, Pub.L. 92-532, 86 Stat. 1052.

¹¹³ *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981)

¹¹⁴ *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

¹¹⁵ *Id.* at 489 n.7.

¹¹⁶ *Id.*

¹¹⁷ 479 U.S. 481 (1987)

¹¹⁸ *Id.* at 498-500.

v. New York.¹¹⁹ The defendant removed the action to federal court, where it maintained that the Clean Water Act preempted state common law in light of the *Milwaukee II* decision.

In *Ouellette* the Solicitor General again appeared as an amicus to support the plaintiffs' position that the Clean Water Act did not preempt state common law actions. The Court agreed, but five Justices insisted that in transboundary nuisance cases only the common law of the *source* state could apply.¹²⁰ The papers of the late Justice Thurgood Marshall indicate that these Justices struggled mightily to come up with a legal justification for this conclusion, which was largely a product of what they thought would represent good policy.¹²¹

Justice Powell's majority opinion ultimately rested preemption of the receiving state's common law on the fear that downstream states could interfere with the goals of the Act by dictating unreasonably stringent and potentially conflicting standards on upstream sources.¹²² But he concluded that "nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source state," citing the express preservation of the right of states to impose more stringent standards on their own point sources in the Act's savings clause.¹²³ The four dissenters criticized any preemption of state common law and argued that federal courts should apply normal choice-of-law principles when hearing state common law actions over interstate pollution.¹²⁴

II. 21ST CENTURY INTERSTATE NUISANCE LITIGATION

At the dawn of the 21st century, the Supreme Court no longer was in the business of using its original jurisdiction to hear interstate pollution disputes between states. Such disputes were relegated to the lower federal courts three decades ago in *Milwaukee I*. As a result of *Milwaukee II* and *National Sea Clammers* the federal common law of nuisance for water pollution had been entirely displaced by the Clean Water Act and the Ocean Dumping Act. It was widely assumed that the Clean Air Act Amendments of 1990, which added a comprehensive federal permit program to the Act, also would preempt federal common law nuisance actions for interstate air pollution whenever a court was forced squarely to confront

¹¹⁹ *Id.* at 484.

¹²⁰ *Id.* at 498-500.

¹²¹ Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 *Env'tl. L. Rep.* 10606, 10618 (1993). Justice Powell, who had been assigned the task of drafting the majority opinion, had sent the other Justices an unusual memo asking for ideas concerning how to reach this result. Memorandum to the Conference from Justice Powell, November 17, 1986. Justice Scalia proposed the idea of interpreting *Milwaukee I* as implicitly preempting state common law by recognizing that the federal courts could apply federal common law in interstate nuisance disputes. He proposed that the Court then declare that Congress by adopting the Clean Water Act had resuscitated state common law, but only when the law of source states was applied. Memorandum to the Conference from Justice Scalia, November 18, 1986.

¹²² *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987).

¹²³ *Id.* at 497.

¹²⁴ 479 U.S. 491, 501 (Brennan, J., dissenting).

such a case.¹²⁵ Yet due to the *Ouellette* decision state common law nuisance actions for transboundary pollution remained alive so long as the law of the source state was applied.¹²⁶

Since 2004 three significant public nuisance actions have been filed by states to redress transboundary environmental problems. One, founded on state common law, sought to require aging, coal-fired power plants with inadequate pollution controls to reduce their transboundary emissions. The other two invoked federal common law to address problems that at the time were not specifically addressed by existing regulatory legislation. These cases, which will be reviewed below, offer some insights on the present state and future evolution of the common law of interstate nuisance.

A. *Coal*: North Carolina v. TVA

In an effort to deal with significant air quality problems in its state the North Carolina General Assembly in 2002 adopted the Clean Smokestacks Act. The legislation tightened emissions standards on in-state sources of air pollution and required state authorities to use “all available resources and means” (including the filing of lawsuits) to achieve comparable reductions from out-of-state sources.¹²⁷ Pursuant to this legislation, North Carolina petitioned the U.S. Environmental Protection Agency (EPA) to require upwind states to control their emissions of sulfur dioxide (SO₂) and nitrogen oxide (NO_x).¹²⁸ The petition was filed to

¹²⁵ The Ninth Circuit in *National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1989), held that the Clean Water Act preempts a federal common law nuisance action against the Los Angeles Department of Water and Power for damage it caused by diverting water from Mono Lake, but it reserved judgment on the question whether the federal Clean Air Act would preempt a federal common law nuisance action against the Department for air pollution. The Ninth Circuit held that a federal common law action was not available under the facts of the case because, unlike the situation in *Georgia v. Tennessee Copper Co.*, there was no interstate dispute involved. A dissenting judge argued that there is a uniquely federal interest in preserving air quality even in intrastate disputes. Even before the 1990 Clean Air Act Amendments were adopted, some lower federal courts had suggested that the Act could preempt federal common law nuisance actions for interstate air pollution. See *U.S. v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.C.N.J. 1982); *New England Legal Foundation v. Costle*, 666 F.2d 30, 32 n.2 (2d Cir. 1981).

¹²⁶ Professor Daniel Farber has described the significance of *Ouellette* for the vitality of common law nuisance actions in the following terms: “after hanging by its fingernails from a cliff in *Milwaukee II*, the common law came roaring back in the final episode.” Farber, *The Story of Boomer*, *Environmental Law Stories* 40 (2005). The requirement that the state common law of the source state be applied did not significantly disadvantage the plaintiffs in *Ouellette*. On remand, New York nuisance law proved no more favorable to the paper company than Vermont’s would have been. The company ultimately settled with the plaintiffs for \$5 million, including the establishment of a trust fund for environmental projects in the Lake Champlain area. The colorful story of this litigation is recounted by Peter Langrock, the plaintiffs’ lawyer, in P. Langrock, *Addison County Justice: Tales from a Vermont Courthouse* (1997).

¹²⁷ An Act to Improve Air Quality in the State (Clean Smokestacks Act), 2002 N.C. Sess. Laws 4, codified at N.C. Gen.Stat. §§ 62-133.6, 143-215.107 to 143-215.114B.

¹²⁸ See Rulemaking on Section 126 Petition from North Carolina to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 71 Fed.Reg. 25,328 (Env’tl. Prot. Agency Apr. 28, 2006).

reduce interstate transport of fine particulate matter and ozone pursuant to §126 of the Clean Air Act.¹²⁹

Frustrated by its inability to control transboundary pollution entering its state from aging, coal-fired power plants located in upwind states, North Carolina on January 30, 2006, filed a public nuisance action in federal district court against the Tennessee Valley Authority (TVA).¹³⁰ The lawsuit claimed that emissions from eleven TVA power plants in Tennessee, Alabama, and Kentucky harmed residents of North Carolina by causing premature deaths, hospitalizations for respiratory and cardiovascular complications, exacerbations of asthma attacks, and harm to the environment.¹³¹ The state sought an order requiring the TVA to abate the interstate pollution by installing pollution controls at an estimated cost of \$3 billion.¹³²

While conceding that some emissions from its power plants contribute to pollution in North Carolina, the TVA maintained that its plants did not cause an unreasonable amount of transboundary pollution and that any harm to health and the environment was largely due to North Carolina's own in-state sources of pollution.¹³³

As a preliminary matter TVA argued that it could not be sued for various reasons including sovereign immunity which the district court rejected. On an interlocutory appeal the U.S. Court of Appeals for the Fourth Circuit affirmed.¹³⁴ The Court held that the provisions of §118(a) of the Clean Air Act¹³⁵ subjecting federal facilities to all state requirements included state common law nuisance actions, thus waiving any sovereign immunity.¹³⁶

The district court also rejected TVA's claim that compliance with federal statutes and regulations insulated the power plants from public nuisance liability.¹³⁷ Judge Lacy H. Thornburg stated that *Ouellette* "speaks conclusively to the current dispute. TVA is open to suit despite its alleged compliance with its permits, based on the 'additional authority' of the source states' nuisance laws. In return, however, TVA is protected from being sued under the nuisance laws of those states -- such as North Carolina -- who claim to be affected by its pollution."¹³⁸ The trial judge also noted that the laws of Alabama, Kentucky and Tennessee all provided that "otherwise lawful actions may be the subject of nuisance lawsuits."¹³⁹

¹²⁹ Section 126(b) of the Clean Air Act, 42 U.S.C. §7426(b), allows states to petition EPA for a finding that a major source or group of stationary sources is significantly contributing to levels of air pollution in excess of national ambient air quality standards in other states.

¹³⁰North Carolina ex rel. Cooper v. Tennessee Valley Authority, 593 F.Supp. 2d 812, 815 (W.D.N.C. 2009), rev'd 615 F.3d 291 (4th Cir. 2010).

¹³¹ *Id.*

¹³² *Id.* TVA's experts estimated that installation of the pollution controls sought by North Carolina would cost \$5 billion. *Id.*

¹³³ *Id.*

¹³⁴ North Carolina ex rel. Cooper v. Tennessee Valley Authority, 515 F.3d 344 (4th Cir. 2008)

¹³⁵ 42 U.S.C. §7418(a).

¹³⁶ *Id.* at 347

¹³⁷ 549 F.Supp. 2d at 731.

¹³⁸ North Carolina ex rel. Cooper v. Tennessee Valley Authority, 549 F.Supp. 2d 725, 732 (W.D.N.C. 2008)

¹³⁹ 549 F.Supp. 2d at 732 (citing *Russell Corp. v. Sullivan*, 790 So.2d 940, 951 (Ala.2001) (holding that

In July 2008 the district court held a 12-day bench trial. District Judge Thornburg noted that under the Supreme Court's *Ouellette* decision it must apply the common law of public nuisance of the source states but also noted that "the public nuisance laws of these states do not differ significantly from those of their sister states across the country."¹⁴⁰ The judge ultimately decided that North Carolina had established that emissions from three TVA plants located within 100 miles of the North Carolina border (one in Alabama and two in Tennessee) constituted a public nuisance under the law of the source states.¹⁴¹ But the judge concluded that the seven other plants were "too remote to significantly impact air quality in North Carolina."¹⁴² On January 13, 2009, Judge Thornburg issued an injunction setting an emissions cap for each of the three TVA plants located within 100 miles of the North Carolina border.¹⁴³ The judge required the plants to install and continuously operate scrubbers and selective catalytic reduction plants (SCRs) at an estimated cost of more than \$1 billion.¹⁴⁴

In July 2010 the U.S. Court of Appeals for the Fourth Circuit reversed Judge Thornburg's decision. In an opinion by Judge J. Harvie Wilkinson, the court ruled that so long as the TVA's power plants were in compliance with existing Clean Air Act regulations they could not be nuisances at common law.¹⁴⁵ Despite evidence that the pollution was causing harm in North Carolina, the Fourth Circuit stated that the ruling should be reversed because it "would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike."¹⁴⁶

By holding that compliance with federal Clean Air Act regulations automatically insulates a source from nuisance liability, the Fourth Circuit essentially preempted state common law in defiance of the Supreme Court's *Ouellette* decision. Recognizing this, Judge Wilkinson stated that the court "need not hold flatly that Congress has entirely preempted the field of emissions regulation," that "we cannot state categorically that the *Ouellette* Court intended a flat-out preemption of each and every conceivable suit under nuisance law," and that he "cannot anticipate every circumstance that may arise in every future nuisance action."¹⁴⁷ But

even actions taken in "accordance with state and federal regulations" and "permissible under various permits" may still support a claim for nuisance if the plaintiff "can prove the elements of nuisance"); *Louisville and Jefferson County Air Bd. v. Porter*, 397 S.W.2d 146, 151 (Ky.1965) ("We have departed from the notion that the non-negligent operation of a lawful business cannot be a nuisance."); *Sherrod v. Dutton*, 635 S.W.2d 117, 121 (Tenn.App.1982) (authorizing the "sparing" use of injunctions to abate lawful enterprises causing a public nuisance); see also Ala. Code § 6-5-120 (providing that the "fact that the act done may otherwise be lawful does not keep it from being a nuisance").

¹⁴⁰ North Carolina ex rel. Cooper v. Tennessee Valley Authority, 549 F.Supp. 2d 725, 730 (W.D.N.C. 2008).

¹⁴¹ 593 F. Supp. 2d 812 at 830.

¹⁴² North Carolina, ex rel. Cooper v. Tenn. Valley Auth., 593 F. Supp. 2d 812, 830 (D. W.D.N.C. 2009).

¹⁴³ *Id.* at 830.

¹⁴⁴ 593 F. Supp. 2d at 832–34.

¹⁴⁵ North Carolina ex rel. Cooper v. Tennessee Valley Authority, 615 F.3d 291 (4th Cir. 2010).

¹⁴⁶ *Id.* at 293.

¹⁴⁷ *Id.* at 302, 303.

he relied on *Ouellette* for the proposition that any common law action that interferes with or undermines the regulatory scheme established by statute should be preempted, concluding that *Ouellette* “created the strongest cautionary presumption against” nuisance actions seeking to establish different emissions standards.¹⁴⁸

Judge Wilkinson also launched an assault on public nuisance as “an ill-defined omnibus tort of last resort” that “encompasses environmental concerns . . . at such a level of generality as to provide almost no standard of application.”¹⁴⁹ He questioned “whether expert witnesses in bench trials can replicate the sources that EPA can bring to bear” and expressed serious doubt “that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider.”¹⁵⁰

In his opinion for the panel Judge Wilkinson later shifts gears and accuses the trial court of applying North Carolina law rather than the law of the source states as required by *Ouellette*.¹⁵¹ But the court appears confused by the fact that North Carolina essentially codified the nuisance law of the source states when it adopted new legislation requiring North Carolina’s own powerplants to adopt emission controls that would be required to prevent significant harm from transboundary pollution. The court interprets the trial court as applying the law of the receiving state -- North Carolina -- when in fact there is no indication that the common law of source states Alabama or Tennessee is any more forgiving of the plants’ pollution.

North Carolina’s litigation ultimately came to a surprising end. On February 2, 2011 North Carolina filed a petition for a writ of certiorari asking the U.S. Supreme Court to review the Fourth Circuit’s decision.¹⁵² Although the TVA generally has independent litigating authority, when Supreme Court review is sought in a case involving a federal agency the Office of the Solicitor General becomes involved and it may consult with other federal agencies, such as EPA, about the case. After the Court granted two extensions of time for the filing of TVA’s response, on April 14, 2011, a stunning settlement was announced. The U.S. Department of Justice announced that TVA had agreed to close 18 old coal-fired electrical generating units (EGUs) at three power plants in settlement of litigation by states and environmental groups charging the TVA with violations of the Clean Air Act’s new source review (NSR) provisions.

The EGUs that TVA agreed to close were located at the very plants that had been the subject of the district court’s injunction in North Carolina’s litigation.¹⁵³ They were more than 50 years old and had operated for decades without modern pollution control equipment because they were grandfathered-in when the 1970 Clean Air Act (CAA) was adopted.¹⁵⁴ Although Congress contemplated that they eventually would be replaced by generating units that with modern pollution control technology required by the Act for new sources, the TVA had

¹⁴⁸ *Id.* at 303.

¹⁴⁹ *Id.* at 315.

¹⁵⁰ *Id.* at 304, 305.

¹⁵¹ *Id.* at 306.

¹⁵² No. 10-997, North Carolina, ex rel. Cooper v. Tennessee Valley Authority.

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continued to renovate them to take advantage of the CAA's failure to control existing sources.¹⁵⁵ Eight of the EGUs that will be shut down had been subject to the district court's order to install new pollution control equipment due to North Carolina's lawsuit.¹⁵⁶ The settlement will reduce TVA's emissions of sulfur dioxide by 97 percent below 1977 levels and nitrogen oxides by 95 percent.¹⁵⁷ TVA also will spend between \$3 and 5 billion to upgrade pollution controls at plants that it will continue to operate.¹⁵⁸ Due to the settlement, North Carolina stipulated to dismissal of its cert petition, which was dismissed on July 22, 2011 pursuant to Rule 46 of the Supreme Court.¹⁵⁹

B. Climate: American Electric Power v. Connecticut

In July 2004 eight states¹⁶⁰ and the City of New York filed a federal and state common law nuisance action against six of the largest electric utilities in the United States. The suit alleged that power plants operated by the defendant utilities contribute 10 percent of U.S. emissions of carbon dioxide (CO₂), a greenhouse gas that contributes to global warming and climate change.¹⁶¹ The plaintiff states claimed that global warming already had begun to alter the climate of the United States and that it was causing significant harm to them.¹⁶² They sought an order holding the defendants jointly and severally liable for contributing to global warming and an injunction ordering the companies to cap their emissions of CO₂ and then to reduce them by a specified percentage each year for at least a decade.¹⁶³

The case raised the question whether the Clean Air Act preempts the federal common law of nuisance for interstate air pollution. While the Act was amended in 1990 to add a comprehensive permit program like that of the Clean Water Act, at the time the lawsuit was filed it had not been used to regulate emissions of CO₂. During the George W. Bush administration EPA's general counsel took the position that the agency has no authority to regulate CO₂ emissions under the Clean Air Act.

On September 15, 2005, federal district judge Loretta Preska dismissed the states' lawsuit without reaching the preemption issue.¹⁶⁴ Judge Preska held that the case presented nonjusticiable political questions.¹⁶⁵ She distinguished previous interstate nuisance cases like *Georgia v. Tennessee Copper* and *New Jersey v. New York City*, by noting that none "has touched on so many areas of national and international policy" as the climate change

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¹⁵⁸ Bruce Henderson, "TVA settlement resolves N.C. bad air claims," *Charlotte Observer*. April 14, 2011.

¹⁵⁹ 132 S.Ct. 46 (2011).

¹⁶⁰ Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin

¹⁶¹ *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265, 267-68 (S.D.N.Y. 2005).

¹⁶² *Id.*

¹⁶³ *Id.* at 270.

¹⁶⁴ *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), rev'd

¹⁶⁵ *id.* at 274.

litigation.¹⁶⁶ Judge Preska concluded that the “explicit statements of Congress and the Executive on the issue of global climate change in general and their specific refusal to impose the limits on carbon dioxide emissions Plaintiffs now seek to impose by judicial fiat confirm that making the ‘initial policy determination[s]’ addressing global climate change is an undertaking for the political branches.”¹⁶⁷ Judge Preska stated that: “[b]ecause resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests,” the case “presents non-justiciable political questions that are consigned to the political branches, not the Judiciary.”¹⁶⁸

Judge Preska’s decision was appealed to the U.S. Court of Appeals for the Second Circuit, which heard oral argument in June 2006. The court then put the case on hold while waiting for the U.S. Supreme Court to decide *Massachusetts v. EPA*, a case that challenged EPA’s refusal to regulate emissions of greenhouse gases (GHGs) under the Clean Air Act. In April 2007 the Court in a 5-4 decision held that climate change sufficiently affected the state of Massachusetts to give it standing to challenge EPA’s failure to regulate emissions of GHGs.¹⁶⁹ On the merits the Court held that EPA did have the authority to regulate emissions of GHGs under the Clean Air Act if it found that they “endanger” public health or welfare by contributing to global warming and climate change. The Court remanded the case to EPA to consider whether to make an “endangerment finding.”

A key aspect of the Court’s decision narrowly upholding the plaintiffs’ standing was the majority opinion’s reliance on *Georgia v. Tennessee Copper Co.*, a case that had not been cited in any of the many briefs filed with the Court.¹⁷⁰ Citing the *Tennessee Copper* decision, Justice Stevens’s majority opinion stated, “Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.” It then noted that “[j]ust as Georgia’s ‘independent interest . . . in all the earth and air within its domain’ supported jurisdiction a century ago, so too does Massachusetts’ well-founded desire to preserve its sovereign territory today.”¹⁷¹

After a round of supplemental briefing on the impact of *Massachusetts v. EPA*, two years elapsed before the Second Circuit panel released its decision. The decision was released on September 21, 2009, just six weeks after one of the panel’s members, Judge Sonia Sotomayor, had been elevated to the U.S. Supreme Court. The remaining two judges on the panel, Judge Hall, joined by Judge McLaughlin, issued a 90-page opinion that reversed Judge Preska’s decision and held that climate change was not a nonjusticiable “political question.”¹⁷²

¹⁶⁶ 406 F. Supp. 2d at 272.

¹⁶⁷ *Id.* at 274.

¹⁶⁸ *Id.*

¹⁶⁹ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

¹⁷⁰ The first mention of the *Georgia v. Tennessee Copper* precedent occurred at oral argument. Justice Kennedy suggested the case when counsel for Massachusetts was struggling to respond to a question concerning what his “best case” was supporting the state’s standing. See Oyez Project, audiotope of oral argument in *Massachusetts v. EPA* at 14:42 (http://www.oyez.org/cases/2000-2009/2006/2006_05_1120).

¹⁷¹ *Id.* at 519.

¹⁷² *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2nd Cir. 2009), rev’d.

The court held that the states had *parens patriae* and Article III standing, and that New York City and the land trusts who had joined the litigation had Article II standing.¹⁷³ The court also found that the Clean Air Act did not displace the plaintiffs' common law nuisance claim, allowing the case to go forward to trial.¹⁷⁴ The court noted that *Massachusetts v. EPA* made it "clear that EPA has statutory authority to regulate greenhouse gases as a 'pollutant' under the Clean Air Act."¹⁷⁵ But although EPA had issued a proposed endangerment finding in April 2009 the court concluded that "until EPA makes the requisite findings, for the purposes of our displacement analysis the CAA does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources." Thus, it concluded that the problem has not been "thoroughly addressed" by the CAA, unlike the situation in *Milwaukee II*.¹⁷⁶ The court held that "neither Congress nor EPA has regulated greenhouse gas emissions from stationary sources in such a way as to 'speak directly' to the 'particular issue' raised by Plaintiffs."¹⁷⁷ Thus, it concluded that Connecticut's lawsuit had not been displaced by the Clean Air Act.

The Supreme Court then agreed to review the Second Circuit's decision. Numerous industry groups implored the Court to hold that climate change litigation raised nonjusticiable political questions or to reject the lawsuit on the grounds that the effects of climate change were too diffuse or uncertain to give rise to Article III standing.¹⁷⁸ Some private nuisance actions had been filed against oil companies seeking damages for their contribution to climate change¹⁷⁹ and many defendants hoped the Supreme Court would preclude all such litigation on constitutional grounds. The Solicitor General, representing the Tennessee Valley Authority, argued that the Court should dismiss the case not for lack of Article III standing, but for lack of prudential standing because the global nature of climate change makes it a generalized grievance best addressed by the political branches of government.¹⁸⁰ Due to the recusal of Justice Sonia Sotomayor only eight Justices heard the case.¹⁸¹

¹⁷³ *Id.* at 338.

¹⁷⁴ The panel usefully explained the difference between displacement and preemption in the following terms: "the concept of 'displacement' refers to a situation in which 'federal statutory law governs a question previously the subject of federal common law.' *Milwaukee II*, 451 U.S. 304, 316 (1981). The term 'pre-emption,' in contrast, generally addresses a circumstance in which a federal statute supersedes state law, but courts have also frequently used the word "pre-emption" when discussing whether a statute displaces federal common law. We further note that the "appropriate analysis" in determining whether displacement of the federal common law has occurred "is not the same as that employed in deciding if federal law pre-empts state law." *Milwaukee II*, 451 U.S. at 316.

¹⁷⁵ *Id.* at 379.

¹⁷⁶ *Id.* at 381.

¹⁷⁷ *Id.* at 387-88.

¹⁷⁸ A total of 20 amicus briefs supporting the utility defendants were filed by various groups, including trade associations representing the utility, oil, auto, chemical and construction industries.

¹⁷⁹ See cases cited in note 10, *supra*.

¹⁸⁰ See Brief for Tennessee Valley Authority 14–24.

¹⁸¹ Justice Sonia Sotomayor recused herself because she had been on the Second Circuit panel that initially heard oral argument in the case, although she was elevated to the Supreme Court before the Second Circuit released its decision with the two remaining judges on the panel agreeing to reverse the district court.

By a 4-4 vote the Court first affirmed the Second Circuit’s rejection of arguments that the plaintiffs lacked standing and that the case raised a non-justiciable political question.¹⁸² The Court stated that four of its members “would hold that at least some plaintiffs have Article III standing under *Massachusetts [v. EPA]*, which permitted a State to challenge EPA’s refusal to regulate greenhouse gas emissions, and, further, that no other threshold obstacle bars review” including the political question doctrine or the Solicitor General’s argument that the case should be dismissed because of a prudential bar to adjudicating generalized grievances.¹⁸³ Four other Justices, likely the dissenters in *Massachusetts v. EPA*, “would hold that none of the plaintiffs have Article III standing.”¹⁸⁴

In her opinion for the unanimous Court, Justice Ginsburg then endorsed the propriety of federal courts fashioning federal common law in the area of environmental protection.¹⁸⁵ Citing *Erie r. Co. v. Tompkins*, she explained: “The ‘new’ federal common law addresses ‘subjects within national legislative power where Congress has so directed’ or where the basic scheme of the Constitution so demands.”¹⁸⁶ Justice Ginsburg declared that “[e]nvironmental protection is undoubtedly an area ‘within national legislative power,’ one in which federal courts may fill in “statutory interstices,” and, if necessary, even “fashion federal law.”¹⁸⁷ She quoted the statement in *Milwaukee I* that: “When we deal with air and water in their ambient or interstate aspects, there is a federal common law.”¹⁸⁸

Justice Ginsburg then noted that the Court had never decided whether private citizens, such as the plaintiff land trusts in the case, or political subdivisions of states such as New York City could invoke the federal common law of nuisance to seek redress for interstate pollution.¹⁸⁹ “Nor have we ever held that a State may sue to abate any and all manner of pollution originating outside its borders.”¹⁹⁰ Justice Ginsburg noted that the defendants sought to distinguish this case from previous interstate nuisance cases because of the “scale and complexity” of climate change. But, citing Justice Holmes’ recognition of the germ theory of disease in *Missouri v. Illinois*, she observed that “public nuisance law, like common law generally, adapts to changing scientific and factual circumstances.”¹⁹¹ Justice Ginsburg concluded that it was not necessary to address these issues because the Clean Air Act’s authorization to EPA to regulate greenhouse gas emissions displaced federal common law nuisance claims.¹⁹²

On the displacement issue the Court was unanimous in its holding.¹⁹³ “We hold that the

¹⁸² *American Electric Power Co. v. Connecticut*, 131 S.Ct. 2527, 2535 (2011).

¹⁸³ *Id.* at 2535 & n.6.

¹⁸⁴ *Id.* at 2535.

¹⁸⁵ *Id.* at 2535-37.

¹⁸⁶ *Id.* at 2535.

¹⁸⁷ *Id.*

¹⁸⁸ *Milwaukee I*, 406 U.S. at 103.

¹⁸⁹ *AEP*, at 2536.

¹⁹⁰ *American Electric Power Co. v. Connecticut*, 131 S.Ct. 2527, 2536 (2011).

¹⁹¹ *Id.* at 2536.

¹⁹² *Id.* at 2537.

¹⁹³ *Id.*

Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”¹⁹⁴ The test for displacement “is simply whether the statute ‘speaks[s] directly to [the] question’ at issue,” the Court declared, and the Clean Air “Act ‘speaks directly’ to emissions of carbon dioxide” from power plants.¹⁹⁵ The Court rejected the plaintiffs’ argument that federal common law is not displaced until EPA actually exercises its authority to regulate greenhouse gas emissions.¹⁹⁶ Justice Ginsburg’s opinion for the Court explained that the “critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law.”¹⁹⁷ Justice Ginsburg stated that “were EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its ongoing § 7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency’s expert determination.”¹⁹⁸ But she emphasized that a decision not to regulate “would not escape judicial review” and that “EPA may not decline to regulate carbon-dioxide emissions from power plants if refusal to act would be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’.”¹⁹⁹

Justice Ginsburg emphasizes that EPA, as the expert administrative agency entrusted by Congress with the task of controlling air pollution, “is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.”²⁰⁰ EPA can utilize scientific, economic and technological expertise and resources that judges lack.²⁰¹ The order of decisionmaking prescribed by Congress – “the first decided under the Act is the expert administrative agency, the second federal judges” – is fitting because the “appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum.”²⁰² Competing interests including the nation’s energy needs and the effects of regulation on the economy must be weighed.²⁰³

Justice Ginsburg reserved judgment on the question whether state common law nuisance actions are preempted by the Clean Air Act, noting that it was a question that had not been briefed or argued.²⁰⁴ But she cited *Ouellette*’s holding that the Clean Water Act did not preempt such suits when the law of the source state was applied. Justice Alito, joined by Justice Thomas, filed a one-sentence concurrence stating that they agreed with the Court’s displacement analysis on the assumption, which had not been challenged in the case, that *Massachusetts v. EPA* had correctly interpreted the Clean Air Act to cover emissions of greenhouse gases.²⁰⁵ The two were among the four dissenters to this holding in *Massachusetts*.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *id.* at 2538.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 2538-39.

¹⁹⁹ *Id.* at 2539

²⁰⁰ *Id.*

²⁰¹ *id.*

²⁰² *id.*

²⁰³ *Id.*

²⁰⁴ *id.* at 2540.

²⁰⁵ 131 S.Ct. at 2540-41 (Alito, J., concurring in part and concurring in the judgment).

The Supreme Court's decision in *American Electric Power* confirms that the Clean Air Act broadly preempts the federal common law of nuisance for interstate air pollution, while leaving open the use of state common law actions to redress such problems. The Court properly rejects efforts to erect constitutional obstacles to climate litigation even as it blocks the use of federal common law in such actions. Because the Court founds displacement of federal common law on the Clean Air Act's delegation of authority to EPA, were a future Congress to strip EPA of such authority, federal common law actions could come back into play.

C. *Carp*: Michigan v. U.S. Army Corps of Engineers

Even though the federal common law of nuisance has been displaced for interstate disputes over air and water pollutants by the Clean Air Act and Clean Water Act, respectively, it still can be used to address transboundary environmental problems. Most recently states have invoked it in an effort to stop the spread of two invasive species of Asian carp (bighead carp and silver carp) into the Great Lakes. The route of the carp's invasion is the very canal – the Chicago Sanitary and Ship Canal – that gave rise to the first major interstate pollution dispute heard by the U.S. Supreme Court – *Missouri v. Illinois*.

Initially imported into the U.S. by fish farms in Arkansas,²⁰⁶ the carp escaped to the Mississippi River and are working their way upstream to the canal from which it is feared they will enter Lake Michigan and spread throughout the Great Lakes. The carp, which can grow to 60 pounds or more, “are voracious eaters that consume small organisms on which the entire food chain relies; they crowd out native species as they enter new environments; they reproduce at a high rate; they travel quickly and adapt readily; and they have a dangerous habit of jumping out of the water and harming people and property.”²⁰⁷

The U.S. Army Corps of Engineers initially employed an “electric fence” in the water to deter the invasive carp from moving further upstream. But on November 20, 2009 Asian carp DNA was found in a water sample upstream of the fence. In December 2009 the Chicago Sanitary and Ship Canal was closed temporarily while a poison was employed to try to kill the Asian carp. A massive fish kill ensued, but only a single dead carp was found.

On December 21, 2009, the state of Michigan asked the U.S. Supreme Court to reopen previous litigation over the canal and to issue a preliminary injunction requiring the U.S. Army Corps of Engineers and Chicago's Municipal Water Reclamation District to close the locks on the Chicago Area Waterway System (CAWS) to block the carp from reaching Lake Michigan.²⁰⁸ Joined as plaintiffs by the states of Wisconsin, Minnesota, New York, Ohio and Pennsylvania, Michigan also sought a permanent injunction requiring eradication of the Asian carp from the CAWS. These states argue that the potential economic damage to commercial

²⁰⁶ The U.S. Fish and Wildlife Service has designated one species of Asian carp – the silver carp -- as an injurious species, 50 C.F.R. §16.13(a)(2)(v), making it a federal crime under the Lacey Act, 18 U.S.C. §4, to transport them into or around the United States. 72 Fed. Reg. 37459 (July 10, 2007). A similar listing for bighead carp remains under review.

²⁰⁷ Michigan v. U.S. Army Corps of Engineers, 2011 WL 3836457 (7th Cir. 2011), at 1.

²⁰⁸ Michigan v. U.S. Army Corps of Engineers, 2010 WL 5018559 at *12 (N.D. Ill. 2010).

and recreational fishing and tourism from an Asian carp invasion of the Great Lakes would be far greater than the losses to Illinois caused by halting shipping on the canal.²⁰⁹ The U.S. Solicitor General urged the Supreme Court not to hear the case as an original action, but rather to allow the states to file suit in the federal district court.²¹⁰ In January 2010 and again in March 2010 the U.S. Supreme Court refused to exercise its original jurisdiction to hear the case.²¹¹

After failing to persuade the U.S. Supreme Court to act, five states (all of the previous plaintiffs except for the state of New York) on July 19, 2010 filed a federal public nuisance action in federal district court in Illinois.²¹² The suit alleged that the U.S. Army Corps of Engineers had created a public nuisance by managing the CAWS in a manner that would allow the Asian carp to reach the Great Lakes.²¹³ The states asked the court to issue an injunction requiring the closing of the CAWS locks and requiring the Corps to develop a plan to permanently separate the carp-infested Chicago River from Lake Michigan.²¹⁴ The Corps opposed the lawsuit by arguing that it did not have the legal authority to separate physically the Mississippi and Great Lakes basins and that Congress would have to amend existing law directing that the CAWS be used for navigation.²¹⁵ The Corps noted that to date Congress had directed the Corps only to study options for preventing the transfer of invasive aquatic species between the two basins.²¹⁶

On December 2, 2010, federal district Judge Robert M. Dow, Jr. denied the states their request for a preliminary injunction.²¹⁷ Judge Dow upheld the right of the states to bring a federal common law nuisance action after concluding that Congress had not displaced it with legislation addressing the invasive species problem.²¹⁸

Judge Dow first addressed the proper legal standard for finding displacement of federal common law. “Apparent comprehensiveness of Congressional legislation is only one indication of displacement. While there appeared to be comprehensive legislation on the subject of water pollution in *Milwaukee I*, for there to be displacement, the comprehensive legislation also must address the problem at issue and do so specifically to displace the common law.”²¹⁹ He then rejected the defendants’ argument that such displacement had occurred. “The federal statutes cited by Defendants and the City as having purportedly displaced federal common law do not comprehensively and specifically address the threat of an Asian carp invasion of Lake Michigan through the CAWS to the degree found in *Milwaukee II*,

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²¹⁷ Michigan v. U.S. Army Corps of Engineers, No. 10-VC-4457 (E.D. Ill. Dec. 2, 2010).

²¹⁸ Michigan v. U.S. Army Corps of Engineers, 2010 WL 5018559 at *19-20 (N.D. Ill. 2010).

²¹⁹ *Id.* at *19.

nor do they provide a specific mandate or methods for adequately addressing the threat.”²²⁰ He noted that “the only specific statutory provision relating to aquatic nuisance species in the CAWS” was a 1996 authorization in 16 U.S.C. § 4722(i)(3) for a “dispersal barrier demonstration” project to stop invasive species such as zebra mussels and round goby from reaching the Mississippi River basin from the Great Lakes through the CAWS.²²¹ While noting that bills had been introduced in Congress specifically to address the Asian carp problem, Judge Dow concluded that existing federal statutes “do not approach the level of comprehensiveness, specificity, and all-inclusiveness found by the Supreme Court to have displaced the common law nuisance action, as in *Milwaukee II*.”²²²

Despite upholding the right of the Great Lakes states to bring a federal nuisance action, Judge Dow denied their request for a preliminary injunction.²²³ He concluded that while the potential damage to the Great Lakes was high, the level of certainty that any damage will occur is low.²²⁴ He also noted that judicial restraint was in order because “multiple federal and state agencies are expending significant effort carrying out their statutory and regulatory duties to maintain and operate the CAWS, study and address the threat of Asian carp, and take whatever emergency measures they deem appropriate to prevent Asian carp ‘from dispersing into the Great Lakes’.”²²⁵ Balancing the potential for increased flooding and economic hardships associated with closing the canal against “the more remote harm associated with the possibility that Asian carp will breach the electronic barriers in significant numbers, swim through the sluice gates and locks, and establish a sustainable population in Lake Michigan,” he determined that plaintiffs were not entitled to relief.²²⁶

The plaintiff States appealed Judge Dow’s ruling to the U.S. Court of Appeals for the Seventh Circuit. In July 2011, while the appeal was pending, the Corps of Engineers released a list of 40 aquatic invasive species that it believes pose the greatest risk of migrating through the CAWS. On this list were thirty species, including zebra mussels, that pose a significant risk to the Mississippi River Basin and ten, including the Asian carp, that threaten the Great Lakes. This study helped mobilize a bipartisan coalition of state attorneys general to lobby Congress to require permanent ecological separation between the Great Lakes and Mississippi River basins.²²⁷

In August 2011 the U.S. Army Corps of Engineers indicated that it would consider a proposal to re-reverse the flow of the Chicago River as a means for dealing with the invasive

²²⁰ *Id.* at *20.

²²¹ *Id.*

²²² *Id.*

²²³ *id.* at *34.

²²⁴ *Id.*

²²⁵ *Id.* at *30.

²²⁶ *id.* at *33.

²²⁷ See “Schuette Building National Coalition Against Aquatic Invasive Species,” Aug. 31, 2011 (<http://www.michigan.gov/ag/0,4534,7-164-46849-261562--,00.html>).

species problem.²²⁸ The Asian carp are now believed to be within 25 miles of Lake Michigan and Asian carp DNA has been found within six miles of the lake.

On August 24, 2011, the U.S. Court of Appeals for the Seventh Circuit upheld the district court decision refusing to require the Corps to take additional action to control Asian carp.²²⁹ Although it denied the states the relief they requested, the court affirmed their right to use the federal common law of nuisance to address the threat posed by the Asian carp, while reserving the question whether a state can bring a public nuisance claim against a federal agency.²³⁰ The court became the first U.S. Court of Appeals to assess the impact of the Supreme Court's *American Electric Power* decision on the federal common law of nuisance.

The Seventh Circuit panel, in an opinion by Judge Diane Wood, rejected the defendants' arguments that nuisance actions must be confined to traditional pollutants.²³¹ "While it may be true that the introduction of an invasive species of fish into a new ecosystem does not fit the concept of nuisance as neatly as a spill of toxic chemicals into a stream, we do not think the Supreme Court has limited the concept of public nuisance as much as the defendants suggest."²³² The court declared that "[I]t would be arbitrary to conclude that this type of action extends to the harm caused by industrial pollution but not to the environmental and economic destruction caused by the introduction of an invasive, non-native organism into a new ecosystem."²³³

Relying on the statement in *American Electric Power* that "the delegation is what displaces," the Corps of Engineers and the City of Chicago argued that the Supreme Court had created a new and more expansive test for displacement: federal common law is displaced once Congress indicates its intention to delegate a particular problem to an executive agency.²³⁴ The Seventh Circuit panel rejected this argument.²³⁵ It concluded that "the Court did not establish a new test based solely on Congress's delegation of regulatory power; it simply pointed out that delegation is one type of congressional action that is evidence of displacement."²³⁶ The court noted that numerous laws had been enacted that governed interstate waters at the time of the *Milwaukee I* case, but it was not until the Clean Water Act's comprehensive permit scheme was adopted that federal common law was held to be displaced in *Milwaukee II*.²³⁷ It stressed that in *American Electric Power* the Supreme Court had emphasized the comprehensive nature of the Clean Air Act even with respect to regulation of greenhouse gas emissions and the multiple

²²⁸ Tammy Webber, Carp Spur Call to Reverse Chicago River, Again, Daily Chronicle, Aug. 19, 2011 (<http://www.daily-chronicle.com/2011/08/18/carp-spur-call-to-reverse-chicago-river-again/arlc8wu/>)

²²⁹ *Michigan v. U.S. Army Corps of Engineers*, __ F.3d __, 2011 WL 3836457, *2 (7th Cir. 2011).

²³⁰ *Id.*

²³¹ *Id.* at *4.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at *11.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

avenues for public and private enforcement as well as the right of the public to seek judicial review of denials of petitions for rulemakings.²³⁸

In contrast to the Clean Air Act’s provisions, “congressional efforts to curb the migration of invasive species, and of invasive carp in particular, have yet to reach the level of detail one sees in the air or water pollution schemes.”²³⁹ The court surveyed existing federal legislation on invasive species.²⁴⁰ The Aquatic Nuisance Prevention and Control Act was enacted by Congress in 1990 to stop the spread of zebra mussels and other nuisance species.²⁴¹ This legislation establishes an Aquatic Nuisance Species Task Force to study and to implement measures “to prevent introduction and dispersal of aquatic nuisance species.”²⁴² This legislation was amended in 1996 by the National Invasive Species Act that inspired the Corps to employ an electronic barrier in the Chicago Sanitary and Ship Canal. In 2007 Congress enacted the Water Resources Development Act that authorized the Corps to build a second barrier²⁴³ and the Corps was given money in the American Reinvestment and Recovery Act of 2009 to complete a third barrier.

The Seventh Circuit panel concluded that “[a]lthough this legislation demonstrates that Congress is aware of the problem of invasive species generally, and carp in particular, it falls far short” of the provisions of the Clean Air Act or Clean Water Act that were found to displace federal common law.²⁴⁴ The court noted that “neither the Corps nor any other agency has been empowered actively to regulate the problem of invasive carp, and Congress has not required any agency to establish a single standard to deal with the problem or to take any other action.”²⁴⁵ It also emphasized that no enforcement mechanism has been created by Congress that would give parties adversely affected by the carp recourse to the courts.²⁴⁶ Thus, the court concluded that federal common law had not been displaced.

Nevertheless, the court upheld the district court’s decision not to issue a preliminary injunction.²⁴⁷ While finding that it was not an abuse of discretion, the court took issue with Judge Dow’s assessment of the risks posed by the carp.²⁴⁸ The court believed that plaintiffs demonstrated “a good or perhaps even a substantial likelihood of harm – that is a non-trivial chance that the carp will invade Lake Michigan in numbers great enough to constitute a public nuisance.”²⁴⁹ But the court was persuaded that the defendants already “have mounted a full-scale effort to stop the carp from reaching the Great Lakes,” and “has promised that additional

²³⁸ *id.* at *12.

²³⁹ *Id.*

²⁴⁰ *id.*

²⁴¹ 16 U.S.C. §§ 4701 et seq.

²⁴² 16 U.S.C. § 4722.

²⁴³ Pub. L. 110-114, §3061(b)(1), 121 Stat. 1121.

²⁴⁴ *Michigan v. U.S. Army Corps of Engineers*, ___ F.3d ___, 2011 WL 3836457, *13 (7th Cir. 2011).

²⁴⁵ *Id.*

²⁴⁶ *id.*

²⁴⁷ *id.* at *16.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 2.

steps will be taken in the near future.”²⁵⁰ Thus, it concluded that in light of the Corps ongoing active efforts a preliminary injunction “would only get in the way.” The panel emphasized, however, “that if the agencies slip into somnolence or if the record reveals new information at the permanent injunction stage, this conclusion can be revisited.”²⁵¹

The Seventh Circuit’s decision indicates that, even after the Supreme Court’s *American Electric Power* decision, the federal common law of nuisance retains some relevance for addressing a very narrow class of transboundary environmental problems. Yet the court’s denial of relief also reflects the reality that agencies are far better equipped than the judiciary to formulate solutions to these problems. This reality should help shape a reconsideration of the role of interstate nuisance law.

III. RECONSIDERING THE COMMON LAW OF INTERSTATE NUISANCE

After the Supreme Court’s recent *American Electric Power* decision, common law of interstate nuisance risks being dismissed as but a historic curiosity. After all, comprehensive federal regulatory programs have now displaced the *federal* common law of interstate nuisance for air and water pollution, though *state* common law actions may be used to address such problems if the law of the source state is applied. Federal common law may continue to be used to address other transboundary environmental problems, such as the spread of invasive species, but these are likely to remain fairly rare.

This section of the paper considers how to reconceptualize the role of the common law of interstate nuisance in light of these developments. First it considers the circumstances that now govern the displacement of federal common law and why they could provide a useful backstop against current efforts in Congress to roll back federal regulatory programs. It then explores the continued viability of interstate nuisance actions under state common law in light of North Carolina’s state nuisance action against coal-fired power plants operated by the Tennessee Valley Authority in other states. The paper then reviews the effects of interstate nuisance litigation in historical context and concludes that despite the inherent limitations of judicially-fashioned relief, the common law has been a catalyst for change, initially spurring the development and implementation of new pollution control technology, and now encouraging executive and legislative action to address emerging or long-neglected environmental problems. Direct judicial intervention to stop interstate pollution remains rare, but the common law of interstate nuisance still retains vitality as a backstop that could return to prominence if regulatory authorities are barred from acting in the future.

A. Displacement of Federal Common Law

Although the Supreme Court unanimously decided in *American Electric Power v. Connecticut* that the federal common law of interest nuisance for climate change was displaced by the Clean Air Act,²⁵² the Justices (by a 4-4 vote) rejected pleas that they permanently bury

²⁵⁰ Id.

²⁵¹ Id.

²⁵² 131 S.Ct. 2527 (2009)

such litigation on constitutional (political question or standing) grounds.²⁵³ Despite finding displacement, all of the other seven Justices participating in the decision agreed, somewhat surprisingly, with Justice Ginsburg’s ringing endorsement of the concept of “the new federal common law” to protect the environment.²⁵⁴ Relying on the late Judge Henry Friendly’s 1964 Benjamin Cardozo Lecture on “In Praise of *Erie* – and of the New Federal Common Law,”²⁵⁵ Justice Ginsburg boldly declares that environmental protection is “an area ‘within national legislative power,’ one in which federal courts may fill in ‘statutory interstices,’ and, if necessary, even ‘fashion federal law.’”²⁵⁶

Citing many of the cases discussed in Part I of this paper (*Missouri v. Illinois*, *New Jersey v. City of New York*, *Georgia v. Tennessee Copper*, and *Milwaukee I*) Justice Ginsburg notes that the Court often has entertained “federal common law suits brought by one State to abate pollution emanating from another State.”²⁵⁷ She appropriately describes these cases as instances in which “States were permitted to sue to challenge activity harmful to their citizens’ health and welfare.”²⁵⁸ Thus, the *American Electric Power* Court actually endorses the notion that protection against interstate air and water pollution is an area where “specialized federal common law” makes sense.

Justice Ginsburg’s opinion then sheds some light on the criteria the Court will use in determining whether regulatory legislation has displaced the federal common law of interstate nuisance. Prior to the Court’s decision there had been considerable debate over the appropriate standard for finding displacement. Justice Rehnquist’s majority opinion in *Milwaukee II* had emphasized the comprehensive nature of the Clean Water Act’s prohibition of unpermitted discharges of water pollution.²⁵⁹ In *American Electric Power* Justice Ginsburg frames the test as involving whether the regulatory statute “speaks directly” to the emissions the plaintiffs seek to control.²⁶⁰ In light of the Court’s decision in *Massachusetts v. EPA* that greenhouse gas (GHG) emissions could be regulated under the Clean Air Act, EPA’s subsequent “endangerment finding,” and regulatory initiatives to control GHG emissions, the *American Electric Power* Court has no trouble finding displacement of the federal common law.²⁶¹

The Court does not specify precisely how courts are to determine whether a statute “speaks directly” to the transboundary emissions targeted by the interstate nuisance action. Arguable coverage is probably not enough, but a Supreme Court decision like *Massachusetts v. EPA* that expressly confirms such regulatory authority and requires EPA to determine whether or not to exercise it, clearly seems to qualify. But what is particularly interesting about Justice Ginsburg’s decision is her emphasis on the importance of courts exercising judicial review over

²⁵³ *Id.* at 2535.

²⁵⁴ *See id.* at 2535-36.

²⁵⁵ 39 N.Y.U. L. Rev. 383 (1964).

²⁵⁶ 131 S.Ct. at 2535.

²⁵⁷ *Id.* at 2535-36.

²⁵⁸ *Id.* at 2536.

²⁵⁹ *Milwaukee v. Illinois*, 451 U.S. 304, 317-19 (1981).

²⁶⁰ 131 S.Ct. at 2537.

²⁶¹ *Id.*

whether and how the EPA exercises this authority.²⁶² She notes that “[i]f EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA’s response will be reviewable in federal court.”²⁶³ Justice Ginsburg also notes the availability of citizen suits to enforce emissions limits against regulated sources.²⁶⁴ This suggests that the judiciary should continue to play an important oversight role. If federal common law is to be displaced, then the judiciary should at least be able to police subsequent decisions by regulatory authorities to eschew regulation. Moreover, if efforts by Republicans in Congress to amend the Clean Air Act to deprive EPA of authority to regulate GHG emissions ever are successful, the rationale for displacement of federal common law will disappear

Consistent with the Second Circuit’s decision in the case, the plaintiffs had argued that federal common law was not displaced until EPA actually exercises the regulatory authority over GHG emissions that had been confirmed in *Massachusetts v. EPA*. But the *American Electric Power* Court unanimously rejected this view. Citing *Milwaukee II*, Justice Ginsburg concludes that “the relevant question for purposes of displacement is ‘whether the field has been occupied, not whether it has been occupied in a particular manner’.”²⁶⁵ Because major regulations often take agencies years to promulgate, it makes some sense for courts to defer to agencies who commit to regulate pollutants that otherwise would be the subject of interstate nuisance actions, particularly when the agencies work for an administration that supports such regulations. But the *American Electric Power* decision indicates that such a commitment is not necessary for displacement to be found, so long as it is clear that the statute gives the agency regulatory authority and that a decision not to exercise it can be subjected to judicial review.

The Administrative Procedure Act grants the public the right to petition agencies for the issuance of rules.²⁶⁶ While agencies have an obligation to respond to these petitions, in practice they often are ignored for many years and it is extremely difficult to establish that a failure to respond is agency action “unreasonably delayed” that can be redressed by judicial review.²⁶⁷ Indeed, the *Massachusetts v. EPA* litigation never would have made it through the courthouse doors except for the fact that the Bush administration wanted to trumpet its new policy decision that EPA did not have the authority to regulate GHG emissions under the Clean Air Act. It thus seized upon a petition from an obscure NGO asking EPA to conduct a rulemaking on GHG emissions from mobile sources and denied it to emphasize the new policy. Had that not happened, the petition probably could still be sitting at EPA unanswered and *Massachusetts v. EPA* never would have made it to court. Thus, Justice Ginsburg may be overly optimistic about the availability of judicial review to address inaction by an administrative agency. But the fact that she emphasizes this and the Clean Air Act’s judicial review provisions suggests that her rationale for displacement of federal common law actions is founded in part on the notion that

²⁶² *id.* at 2536

²⁶³ *Id.*

²⁶⁴ *id.* 2538

²⁶⁵ *Id.* at 2538.

²⁶⁶ 5 U.S.C. §553(E) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”).

²⁶⁷ See *Tellicommunications Research and Action Center v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984).

the judiciary will be available to police irrational inaction by the expert executive agency charged by law with protecting the public against interstate air pollution.

The purpose of the federal common law of interstate nuisance was ably articulated by Justice Harlan in his opinion for the Court in a case it declined to hear – *Ohio v. Wyandotte Chemicals Corp.*²⁶⁸ Justice Harlan argued that prior decisions by U.S. Supreme Court to exercise its original jurisdiction to hear such cases were founded on “the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partially to one’s own.”²⁶⁹ Yet in *Milwaukee II* the Court’s decision that federal common law had been displaced left the state of Illinois in the unenviable position of trying to convince a Wisconsin state agency that it should not permit the sewage discharges it challenged in its nuisance action. Though Illinois could ask EPA to veto permits issued by Wisconsin, this is an authority that EPA exercises only rarely.

Professor Thomas Merrill accurately predicted that the Supreme Court in *American Electric Power* would opt for “field displacement” rather than “conflict displacement” as the test for displacement of federal common law.²⁷⁰ Merrill notes that *Milwaukee II* was ambiguous on the test that should be used to find displacement of federal common law and has language that could support either standard.²⁷¹ Ultimately the issue is a question of congressional intent and most federal environmental laws have savings clauses that disavow any intent to displace common law remedies. Yet Merrill argues that the greater competency of the executive branch to resolve complex environmental disputes should support a “special presumption” by Congress against “judicial lawmaking.”²⁷²

American Electric Power did not entirely displace the use of federal common law to address transboundary environmental problems. As noted in Part II, two months after *American Electric Power (AEP)* was decided, the U.S. Court of Appeals for the Seventh Circuit rejected claims that *AEP* had created a new test for displacement of federal common law. The court upheld use of the federal common law of interstate nuisance to address the threat to the Great Lakes posed by invasive species of Asian carp. After holding that the concept of interstate nuisance was sufficiently broad to embrace the spread of invasive species, the court rejected claims that *AEP* had relaxed the test for finding displacement. It is not enough that Congress indicates its intention to delegate a particular problem to an executive agency, the Seventh Circuit panel stated.²⁷³ Rather delegation is only “one type of congressional action that is evidence of displacement.”²⁷⁴ Even though Congress had mentioned the invasive carp and directed that the problem be studied, the court concluded that congressional awareness of a problem “falls far short” of the kind of displacement for interstate nuisances previously found in the Clean Water and Clean Air Act.²⁷⁵

²⁶⁸ 401 U.S. 493 (1971).

²⁶⁹ *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971).

²⁷⁰ Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Env’tl L. 293 (2005).

²⁷¹ *Id.* at 312.

²⁷² *Id.* at 314.

²⁷³ *Michigan v. U.S. Army Corps of Engineers*, 2011 WL 3836457, *11 (7th Cir. 2011)

²⁷⁴ *Id.*

²⁷⁵ *id.* at *12.

The Seventh Circuit's decision suggests that displacement of federal common law may require a directive from Congress to regulate as well as provisions giving parties adversely affected by the transboundary problem recourse to judicial remedies.²⁷⁶ This represents a fair reading of the *AEP* decision, particularly in the context of an emerging environmental controversy not directly addressed by existing legislation.

B. Federalism, Preemption and the State Common Law of Interstate Nuisance

One of the great ironies of federal environmental law is that transboundary pollution problems, which served as a principal justification for federalizing U.S. environmental protection law, have until recently been so poorly addressed by federal regulatory programs.²⁷⁷ Despite agencies' greater expertise in determining appropriate levels of pollution control, political forces often have stymied agency action. The Clean Air Act long has had provisions authorizing EPA to regulate transboundary air pollution,²⁷⁸ but the agency refused to use these authorities until the waning days of the Clinton administration. This history convinces Professor Merrill 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."²⁷⁹

During the long legislative gridlock over problems of acid rain and interstate ozone transport, environmental groups tried mightily to convince the federal judiciary to require EPA to exercise its Clean Air Act authority to regulate transboundary pollution. Plaintiffs repeatedly were rebuffed. Courts cited the difficulty of proving interstate interference with attainment and maintenance of national air quality standards given the difficulty of tracing the transport of pollutants over long distances. At times they candidly admitted their preference for greater direction from Congress concerning how to resolve what were perceived as fierce regional conflicts.²⁸⁰ Yet the very political factors that made agency officials reluctant to act, including

²⁷⁶ *See id.* at *11-*13.

²⁷⁷ See Thomas W. Merrill, "Golden Rules for Transboundary Pollution," 46 *Duke L. J.* 931, 932 (1997). ("Notwithstanding the broad general trend toward centralized regulatory authority in environmental law, and the widespread invocation of transboundary pollution as a justification for that trend, little meaningful regulation of transboundary pollution actually exists.").

²⁷⁸ See §110(a)(2)(D) of the Clean Air Act, 42 U.S.C. §7410(a)(2)(D), which requires state implementation plans (SIPs) to contain measures to ensure that in-state emissions will not "prevent attainment or maintenance by any other State" of any national ambient air quality standard (NAAQS). A downwind state may petition EPA under §126(b), 42 U.S.C. 7426, for a finding that a major stationary source or group of sources is interfering with the state's air quality in violation of §110. If such a finding is made, the source may not operate after three months unless it complies with an EPA order to come into compliance within three years.

²⁷⁹ Thomas W. Merrill, "Golden Rules for Transboundary Pollution," 46 *Duke L. J.* 931, 932 (1997).

²⁸⁰ In one such case, then-Circuit Judge Ruth Bader Ginsburg explained, in a remarkably candid concurring opinion, why she had refused to require EPA to act:

"As counsel for the EPA acknowledged at oral argument, the EPA has taken *no* action against sources of interstate air pollution under either Section 126(b) or Section 110(a)(2)(E) in the decade-plus since those provisions were enacted. Congress, when it is so minded, is fully

differential impacts on source and victim states also made it difficult for Congress to legislate to resolve transboundary pollution problems.²⁸¹

In *American Electric Power* the Supreme Court expressly reserved judgment on the question whether the Clean Air Act preempts the application of *state* common law in lawsuits involving interstate nuisance claims. Citing *Ouellette*, Justice Ginsburg noted that “the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act.”²⁸² Because the issue had not been briefed or argued in the *AEP* litigation, the court deferred judgment on this issue.²⁸³ Yet *Ouellette* made it clear that the Clean Water Act’s displacement of the federal common law of interstate nuisance did not displace state common law so long as the law of the source state, rather than the law of the downwind state, was used.²⁸⁴

Mindful of the teachings of *Milwaukee II* and *Ouellette*, the attorney general of North Carolina did not invoke federal common law when he brought a public nuisance suit against the Tennessee Valley Authority (TVA). The suit alleged that transboundary air pollution from the 59 electrical generating units (EGUs) at TVA’s eleven coal-fired power plants in Tennessee, Alabama and Kentucky were causing significant harm to residents of North Carolina in violation of state common law.²⁸⁵ But in light of *Ouellette*’s rule that the law of the source state must be applied, North Carolina argued that the emissions were public nuisances under the common law of Tennessee, Alabama and Kentucky, where the plants were located, rather than under North Carolina common law.

As described in Part II, the district judge hearing North Carolina’s lawsuit determined that only emissions from the four power plants located within 100 miles of North Carolina’s western border (three in Tennessee and one in Alabama) had been shown to be interfering unreasonably with the health and safety of residents of North Carolina.²⁸⁶ The judge found that the other 37 EGUs at seven other TVA power plants were “too remote to significantly impact air quality in North Carolina to the extent necessary to prove public nuisance.”²⁸⁷ While finding that “TVA’s generation of power at low cost to the consuming public has a high social utility,” Judge Thornburg concluded that “the vast extent of the harms caused in North Carolina by the secondary pollutants emitted by these plants outweighs any utility that may exist from leaving

capable of instructing the EPA to address particular matters promptly. . . Congress did not supply such direction in this instance; instead, it allowed and has left unchecked the EPA’s current approach to interstate air pollution. The judiciary, therefore, is not the proper place in which to urge alteration of the Agency’s course.” *New York v. EPA*, 852 F.2d 574, 581 (1988) (R. Ginsburg, concurring).

²⁸¹ See Richard B. Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts*, 6 *Harv. Env’tl L. Rev.* 241, 243 (1982).

²⁸² *American Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct 2527, 2540 (2011).

²⁸³ *Id.*

²⁸⁴ *International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987)

²⁸⁵ See *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 593 F.Supp. 2d 812, 815-18 (W.D.N.C. 2009).

²⁸⁶ *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 593 F.Supp. 2d 812 (W.D.N.C. 2009).

²⁸⁷ 593 F.Supp. 2d at 830.

their pollution untreated.”²⁸⁸ He also concluded that “TVA’s failure to speedily install readily available pollution control technology is not, and has not been, reasonable conduct under the circumstances.”²⁸⁹ Thus, Judge Thornburg ruled that emissions from these TVA plants would constitute public nuisances under the common law of Tennessee and Alabama.²⁹⁰

Expressing fear that Judge Thornburg’s ruling and the relief he ordered “would encourage courts to use vague public nuisance standards to scuttle the nation’s carefully created system for accommodating the need for energy production and the need for clean air,” the Fourth Circuit reversed on appeal.²⁹¹ Although it purported to be applying *Ouellette*, the Fourth Circuit’s decision strongly implies that the Clean Air Act preempts state nuisance law. It does so by emphasizing that the plants subject to Judge Thornburg’s order already are regulated extensively by federal and state law and are in compliance with these regulations. After accusing Judge Thornburg of applying North Carolina common law, the Fourth Circuit concludes that even if it could be said that the district court had applied source state law as opposed to North Carolina law, TVA’s operations would not have constituted a nuisance because its plants were in compliance with state issued permits.²⁹² Writing for the Fourth Circuit panel, Judge Wilkinson is in effect saying that compliance with existing regulations is a complete defense to a common law nuisance action, even though the trial judge found that this is not the case under Tennessee and Alabama nuisance law.²⁹³ This would remove the ability of state common law to serve its traditional role as a backstop to redress harm that is not adequately prevented by regulation.

In *Ouellette* the Supreme Court explained that the application of the common law of the source state would alleviate concerns that state common law actions would interfere with the federal regulatory infrastructure. Thus, the Fourth Circuit’s distrust of *any* state tort action that seeks to impose “different” standards than the regulatory scheme is misplaced.²⁹⁴ In *Ouellette* the Supreme Court explained that only affected states have the “potential to undermine [the] regulatory structure” of federal law by ascribing to them a greater role than Congress envisioned.²⁹⁵ The Court noted that if any affected state could apply its own common law to

²⁸⁸ *Id.* at 831.

²⁸⁹ *Id.*

²⁹⁰ *id.* at 831-32.

²⁹¹ North Carolina ex rel. Cooper v. Tennessee Valley Authority, 615 F.3d 291 (4th Cir. 2010).

²⁹² 615 F.3d at 310-11.

²⁹³ The general view of English common law courts since 1862 when *Bamford v. Turnley*, 122 Eng. Rep. 27 (1862), overruled the 1858 decision in *Hole v. Barlow*, 4 C.B.N.S. 334 (1858), has been that even activities that comply with all applicable regulations can be held actionable as nuisances if they cause foreseeable, significant harm that is unreasonable under the circumstances, a proposition the Fourth Circuit appears to reject.

²⁹⁴ *International Paper Co. v. Ouellette*, 479 U.S. 481, 495-96 (1987). (“An action brought against IPC under New York [source state] nuisance law would not frustrate the goals of the CWA as would a suit governed by Vermont [affected state] law.”) *Id.* at 498.

²⁹⁵ *Id.* The Court noted that Congress intended for affected states to occupy a “subordinate position” to source states within the Clean Water Act, serving “only...an advisory role in regulating pollution that originates beyond its borders.” *Id.*

emissions from a source state a single point source could be subjected to multiple standards.²⁹⁶ It was within this context that the Court stated, “it is unlikely... that Congress intended to establish such a chaotic structure.”²⁹⁷

Application of source state law common law, on the other hand, was endorsed by the Supreme Court in *Ouellette* precisely because these concerns did not apply when source state law was used.²⁹⁸ The Court recognized a “regulatory partnership” between the federal government and the source state due to the role envisioned for the source state within the Clean Water Act.²⁹⁹ Like the Clean Air Act, the Clean Water Act establishes source state permitting systems and allows states to impose stricter standards than those required by federal law without undermining the federal-state regulatory partnership.³⁰⁰ Thus, the Court held an action brought under source state law “would not frustrate the goals of the CWA” because it did not upset the balance among the interests of the federal government, the source state, and the affected state, and because it restricted the number of “indeterminate... potential regulations” to only a single additional authority.³⁰¹ The Fourth Circuit correctly noted that *Ouellette* did not *foreclose* all state tort actions,³⁰² yet it failed to recognize the Court’s nuanced distinction between affected and source state actions when it concluded that *Ouellette* supported its contention that due to their “considerable potential mischief... the strongest cautionary presumption” should apply against state nuisance actions.³⁰³

²⁹⁶ *Id.* at 495. See *Illinois v. Milwaukee*, 731 F.2d 403, 414 (1984) (“For a number of *different* states to have independent and plenary authority over a single discharge would lead to a chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water) (emphasis added).

²⁹⁷ 479 U.S. at 497. As a practical matter, there is little variation in the content of public nuisance law from state to state, see William Buzbee, William Funk, Thomas McGarity, Sidney Shapiro, James Goodwin & Matthew Shultz, “‘Fifty FDAs’: An Argument for Federal Preemption That Is Less Than Meets the Eye, Center for Progressive Reform White Paper #911 (Oct. 2009) (arguing that both in content and application state tort law is remarkably uniform and predictable due in part to the influence of the Restatements). Moreover, outside of the context of climate change, the difficulty of proving causal injury from transboundary pollution over distances greater than 100 miles limits the number of affected states that could win nuisance actions brought for transboundary air and water pollutant.

²⁹⁸ *Id.* at 498–99.

²⁹⁹ *Id.* at 490–91.

³⁰⁰ The Court pointed to its earlier decisions holding that when imposing stricter limitation standards authorized under the Clean Water Act, a source state may do so by either state statute *or nuisance law*. *Id.* at 497.

³⁰¹ *Id.* at 499.

³⁰² See 615 F.3d at 303. (“The *Ouellette* Court itself explicitly refrained from categorically preempting every nuisance action brought under source state law.”).

³⁰³ *Id.* Although *Ouellette* dealt only with the Clean Water Act, and not the Clean Air Act, many lower courts have indicated that this would not make a difference. See, e.g., *Technical Rubber Co. v. Buckeye Egg Farm*, 2000 U.S. Dist. LEXIS 8602, 15–16 (S.D. Ohio 2000) (holding the Clean Air Act did not preempt plaintiff’s source state nuisance claims, citing *Ouellette* and explaining, “there is no reason to think that the result with regard to air pollution” and the Clean Air Act should be any different); *Gutierrez v. Mobil Corp.*, 798 F. Supp. 1280, 1283 (W.D. Tex. 1992) (similar holding and finding that “Congress did not intend to preempt state authority” with respect to the Clean Air Act). See also *People*

When it declared that any state tort action seeking to establish standards “different” from the state or federal scheme deserves the “strongest cautionary presumption” against it,³⁰⁴ the Fourth Circuit ignored the Supreme Court’s directive in *Ouellette* not to lightly infer preemption.³⁰⁵ Although the Fourth Circuit was careful not to “state categorically” a flat-out preemption rule, its “strongest cautionary presumption” language encourages trial courts to characterize *all* state tort actions involving air pollution, regardless of whether applying the common law of an affected or source state, as inherently suspect. This imposes a much higher burden on plaintiffs than the Supreme Court ever intended.

In *Milwaukee II* the Court explained that the standard for inferring displacement of “federal common law is not the same as that employed in deciding if federal law preempts state law.”³⁰⁶ The latter, because it involves superseding the “historic police powers of the States” should not be inferred without a determination that it “was the clear and manifest purpose of Congress” to do so.³⁰⁷ Federalism concerns are not implicated in assessing displacement of *federal* common law, the Court explained, because in such cases “we 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.”³⁰⁸ Thus, despite the concerns, expressed in *American Electric Power*, about judicial competence to decide complex transboundary nuisance cases, it should be difficult to find preemption of source state common law, particularly in light of the savings clauses contained in the federal environmental statutes.³⁰⁹

ex rel. Madigan v. PSI Energy, Inc., 364 Ill. App. 3d 1041 (Ill. 2006) (rejecting plaintiff’s nuisance claims because they were brought under the law of Illinois, as opposed to the source state law of Indiana). *Cf. Her Majesty the Queen in Right of Province of Ontario v. Detroit*, 874 F.2d 332 (6th Cir. 1989) (finding the Clean Air Act did not preempt plaintiff’s suit under state statutory law, the Michigan Environmental Protection Act). *But see Clean Air Markets Group v. Pataki*, 338 F.3d 82 (2d Cir. 2003) (finding New York’s cap and trade emissions program preempted by the Clean Air Act because its placement of restrictions on upwind transfers directly contradicted Congress’ mandate that this type of state program could not restrict allowance trading). These courts recognize that *Ouellette* distinguished between state common law actions that remained viable because they applied the law of the source state and those that did not. *See, e.g. Bravman v. Baxter Healthcare Corp.*, 842 F. Supp. 747 (S.D.N.Y. 1994) (citing *Ouellette* in concluding that “although the Clean Water Act preempts nuisance actions under state law against out-of-state sources, it does not preempt such actions against in-state polluters.”); *Technical Rubber Co. v. Buckeye Egg Farm, L.P.*, 2000 U.S. Dist. LEXIS 8602 (S.D. Ohio 2000) (recognizing that *Ouellette* preempted only affected state tort actions, but permitted source state tort actions).

³⁰⁴ 615 F.3d at 303.

³⁰⁵ 479 U.S. at 491.

³⁰⁶ 451 U.S. 304, 316 (1981):

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 317.

³⁰⁹ One must be cautious about making predictions concerning preemption particularly in light of the tug-of-war over preemption in state products liability cases involving pharmaceuticals (*Wyeth v. Levine*), medical devices (*Riegel v. Medtronic*, 552 U.S. 312 (2008)) and highway safety standards (*Geier v. American Honda Motor Co.*). *See Lisa Heinzerling, Federalism and Climate Change: The Role of the States in a Future Federal Regime*, 50 *Ariz. L. Rev.* 925 (2008) (questioning whether federal preemption will be invoked in the future to block more stringent state laws to control emissions of greenhouse gases).

C. The Common Law as a Catalyst for Change

The historical record demonstrates that states invoking the common law of interstate nuisance have rarely succeeding in getting the judiciary to solve transboundary pollution problems. As discussed in Part I, the Supreme Court did stop New York City, at least for awhile, from dumping its garbage at sea, which required the city to build more garbage incinerators. And the Court eventually forced Chicago to build its first sewage treatment plant in order to curb its excessive water diversions that were lowering the level of the Great Lakes. Even the air pollution injunction issued by the Supreme Court to protect Georgia from further damage from polluting copper smelters in Tennessee only required intermittent controls – production cutbacks during the growing season – that later were abandoned.³¹⁰

But the historical record also suggests that interstate nuisance actions have been a significant catalyst for change quite beyond the immediate impact of any judicially awarded relief. Fear that the Court might eventually order the smelters in *Georgia v. Tennessee Copper* to shut down helped spur the development of new technology – the lead-acid chamber method – to control pollution from copper smelters. Although the Fourth Circuit reversed the order North Carolina had obtained to require TVA’s power plants to install new pollution control equipment, the litigation ultimately culminated in a settlement that achieved the kind of relief the state initially sought. Despite being dismissed in the U.S. Supreme Court, the *American Electric Power* litigation for seven years placed the contribution of coal-fired power plants to climate change in the national spotlight. The Seventh Circuit’s recent decision refusing for now to order the U.S. Army Corps of Engineers to close the Chicago Sanitary and Ship Canal to block the spread of invasive species of carp was coupled with the admonition that the court could intervene in the future if the threat continues to grow.

But the common law of interstate nuisance has other virtues even apart from the well known deterrent impact of tort law. Benjamin Ewing and Douglas Kysar describe the role of the modern common law of nuisance as part of a complex mosaic of “overlapping governance mechanisms” that “help to span jurisdictions and to marshal different fact-finding competencies, remedial powers, and value orientations.”³¹¹ Such mechanisms help to “ensure a fuller and more inclusive characterization of emerging threats to social and environmental well-being.”³¹² They are part of what Ewing and Kysar describe as “prods and pleas,” a kind of check against institutions who fail to perform their assigned roles to meet societal needs.³¹³

Few people expected that an interstate nuisance action to address climate change ultimately would be successful,³¹⁴ but the litigation was deemed useful by many as a means for

³¹⁰ See Robert V. Percival, Law, Society and the Environment, in *Law, Society and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman* 215 (Robert W. Gordon & Morton J. Horowitz, eds., Cambridge University Press 2011).

³¹¹ Ewing & Kysar, *supra* note 11, at 100.

³¹² *Id.*

³¹³

³¹⁴ See, e.g., Michael B. Gerrard, What Litigation of a Climate Nuisance Suit Might Look Like, 121 *Yale L. J. Online* 135 (2011)

putting greater pressure on companies and Congress to support comprehensive legislation regulating emissions of greenhouse gases.³¹⁵ For now it seems certain that Congress will not adopt such legislation in the wake of the 2010 mid-term elections that gave the Republican party control of the U.S. House of Representatives, but escalating evidence of harm caused by climate change eventually may alter this political dynamic.

A century ago the Supreme Court used its original jurisdiction to hear interstate nuisance actions to redress transboundary air and water pollution. Even in the absence of comprehensive federal regulatory programs to protect the environment, the Court recognized the importance of leveraging the impact of its equitable powers on other institutional actors. In *Georgia v. Tennessee Copper* the Court deliberately withheld for several years the issuance of an injunction limiting smelter emissions in order to give the state of Georgia and the smelter companies time to negotiate a settlement that balanced environmental and economic concerns. Faced with the threat of an injunction, the Tennessee Copper Company eventually settled with the state of Georgia by establishing an administrative compensation fund while agreeing to restrict its operations during the growing season. The Court then issued an injunction against the non-settling Ducktown Copper, Sulphur and Iron Company,³¹⁶ which was modified a year later to permit a 25 percent increase in smelter emissions.³¹⁷ The Ducktown Company eventually agreed to a settlement with terms similar to that previously agreed to by Tennessee Copper with both companies participating in the administrative compensation scheme.³¹⁸

When the Supreme Court denied relief to New York City in its lawsuit to block New Jersey's construction of a sewage tunnel to New York Bay, the Court cited a settlement that New Jersey had reached with the federal government. This settlement helped ensure that the environmental consequences of the additional sewage discharge into New York Bay would be policed by another branch of government.³¹⁹

The states that today are trying to use the common law of interstate nuisance to prevent invasive carp from reaching the Great Lakes view such litigation as only one part of a much larger strategy for persuading government actors to intervene.³²⁰ They realize that preliminary

³¹⁵ Cf. Douglas NeJaime, *Winning through Losing*, 96 Iowa L. Rev. 941 (2011) (noting how losing litigation can be used by social movements to appeal to other actors to effect change and to mobilize public opinion).

³¹⁶ *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1915).

³¹⁷ 240 U.S. 650 (1916).

³¹⁸ Between 1921 and 1928 the board of arbitrators established by the settlement approved 140 out of 203 claims brought before it for property damage (approximately 69 percent), but it awarded only an average of \$189 per year in damages, approximately 10 percent of the total amount of damage claims made annually. Robert V. Percival, *Resolucion de Conflictos Ambientales: Lecciones Aprendidas de la Historia de la Contaminacion de las Fundiciones de Minerales*, in *Prevencion y Solucion de Conflictos Ambientales: Vias Administrativas, Jurisdiccionales y Alternativas* 399 (Lexis Nexis 2004).

³¹⁹ Cf. Alexandra V. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 Iowa L. Rev. 545 (2007) (arguing that statutes, regulations and the data they generate should be used to inform and develop state common law rather than overshadowing and displacing it).

³²⁰ In response to the district court's decision denying a preliminary injunction, Nick Schroeck of the Great Lakes Environmental Law Center stated: "This fight, however, is worth having. And to the extent that Plaintiffs can increase the federal and state response to the crisis and expedite the completion of the

defeats in litigation can lay the groundwork for future success in court.³²¹ The converse also can be true, as North Carolina’s litigation against the TVA demonstrates, but such common law actions now engage the federal courts and Congress “as partners in an ongoing colloquy over the interpretation and lawfulness of statutes” with common law judgments functioning as “an integral part of this colloquy.”³²²

When the regulatory and political processes fail to prevent significant harm from transboundary pollution, the threat of litigation under the common law of interstate nuisance remains a useful prod to action by other branches of government. This action can include not only new laws or regulatory action to address emerging or neglected problems, but also laws to restrict the scope of state common law. In 2011 both the Texas and Utah state legislatures passed laws insulating permitted discharges from nuisance liability premised on climate change.³²³

IV. CONCLUSION

Congress first enacted comprehensive federal regulatory programs to protect the environment in the early 1970s. Prior to the enactment of such programs, a primary legal vehicle for redressing pollution problems was the common law of nuisance. Early in the twentieth century, states invoked the federal common law of nuisance to seek intervention by the U.S. Supreme Court in disputes over transboundary air and water pollution. The Court, exercising its original jurisdiction over disputes between states, heard several interstate nuisance cases and used its equitable powers to stop environmentally destructive actions.

After more than a century of evolution, the federal common law of interstate nuisance has been largely eclipsed by the rise of the regulatory state. Yet reports concerning its demise

hydrological separation study (which is the real solution to Asian carp and the next invasive species, whatever it may be) this case continues to have importance. For the rest of us who care about the Great Lakes, we must continue to press for action from the White House and Congress. As the legal battle over injunctions and common law public nuisance demonstrates, the current law is, at best, inadequate and we need comprehensive federal legislation attacking aquatic invasive species from all vectors.” Noah Hall, Another Setback in the Legal Fight to Keep Asian Carp Out of the Great Lakes, *Great Lakes Law*, Dec. 6, 2010 (<http://www.greatlakeslaw.org/blog/2010/12/another-setback-in-the-legal-fight-to-keep-asian-carp-out-of-the-great-lakes.html>).

³²¹ Thom Cmar of the Natural Resources Defense Council states: “Judge Dow is correct that there are federal and state agencies working on this... most notably the Army Corps of Engineers. The problem is that the Army Corps is working on this far too slowly, and in the wrong way. Rather than lasering in on bold, effective action to prevent the Asian carp from establishing a population in Lake Michigan, the Corps is conducting a study that they think will take over 5 years and cost over \$25 million – and even then, they have not committed to deciding on an option that will fully prevent Asian carp from moving through the CAWS, but only one that will ‘reduce the risk’ of carp getting into the Lake. That’s far from an adequate response, and if the White House or Congress doesn’t step in and provide the Corps with some adult supervision, the Asian carp saga could end up back in court – this time on a legal issue that the Corps is less likely to win.” <http://www.greatlakeslaw.org/blog/2010/12/another-setback-in-the-legal-fight-to-keep-asian-carp-out-of-the-great-lakes.html>

³²² Ewing & Kysar, *supra* note 11, at 154.

³²³ Utah Code Annotated 1953 §78B-4-515; *See also* Utah Code Annotated 1953 § 78B-4-515: § 78B-4-515.

appear to be premature. The long-time failure of regulatory authorities to deal effectively with transboundary pollution from aging coal-fired power plants and emerging problems of climate change and invasive species have inspired new 21st century lawsuits by states invoking the common law of interstate nuisance. Trial and appellate courts hearing such lawsuits have been badly split.

After a lengthy trial a North Carolina federal district court ordered coal-fired power plants in Tennessee and Alabama to control their emissions of sulfur dioxide and nitrogen oxide, only to be reversed on appeal. A New York district court dismissed a lawsuit seeking controls on emissions of greenhouse gases by Midwestern coal-fired power plants on the ground that it was a political question, only to be reversed on appeal to the Second Circuit. When the U.S. Supreme Court agreed to review the latter decision, industry groups relished an opportunity to kill all climate litigation on standing or political question grounds. But they ultimately were disappointed in June 2011 when the U.S. Supreme Court decided *American Electric Power v. Connecticut*.

Although the Court in *American Electric Power* held that *federal* common law nuisance actions to redress climate change had been displaced by the Clean Air Act and EPA's efforts to regulate greenhouse gas emissions, it affirmed the standing of states to sue, rejected the notion such lawsuits raise nonjusticiable political questions, and left open the door to *state* common law nuisance actions to redress climate change. Principles of federalism and the extensive savings clauses in the federal environmental laws will make it difficult to preempt the state common law of nuisance. Thus, if a state can show that its residents are suffering significant injury that federal regulatory authorities have failed to prevent and for which an express decision to preempt state law has not been made, state common law actions founded on the law of the source state will remain available.

In *American Electric Power*, the Court reaffirmed that environmental protection was a proper subject for the development of federal common law. It also emphasized that expert administrative agencies generally are more capable than the judiciary at fashioning solutions for complex environmental problems. Yet the judiciary has played an important role as a “prod” and catalyst for action by the other branches of government when activities causing significant harm otherwise have escaped regulation. Direct judicial intervention to stop interstate pollution is rare today, but when regulation fails, common law remedies remain an important backstop whose importance may increase at a time of audacious efforts by some members of Congress to roll back federal environmental regulations. *American Electric Power* forestalls federal common law nuisance litigation over climate change, but it does so only by insisting that the problem is being addressed by existing federal regulatory authorities.

In December 2011 the minority staff of the House Energy and Commerce Committee reported that in 2011 the U.S. House of Representatives took 191 votes to weaken federal environmental law.³²⁴ Displacement of federal common law in *American Electric Power* and other cases has been premised on federal law “directly speaking” to problems such as climate

³²⁴ Minority Staff, Comm. On Energy & Commerce, The Anti-Environment Record of the U.S. House of Representatives 112th Cong., 1st Sess. 2 (Dec. 15, 2011)

change and interstate air and water pollution. If Congress succeeds in rolling back federal environmental law addressing these problems, federal common law remedies could spring into action once again.