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Displacement and Preemption of Climate Nuisance Claims

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INTRODUCTION

New York City is concerned about the threat of climate change.[1] Rising temperatures, hotter summers, and potential sea-level rise are all anticipated to impose significant costs on the city, prompting investments in adaptive measures.[2] Like many other municipalities faced with climate risks, New York has sought recompense from those who produce and market fossil fuels, which are the primary contributor to anthropogenic climate change.[3]

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1 *See* City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 469 (S.D. N.Y. 2018) (City of New York) (noting the conclusions of the New York City Panel on Climate Change that "climate change is already affecting New York City and will have a significant impact in the future"). The New York City Mayor's Office of Climate and Environmental Justice has an Office of Climate Resiliency tasked with developing plans to address the consequences of climate change within the city. *See About,* CITY OF NEW YORK, https://www1.nyc.gov/site/orr/about/about.page (last visited June 14, 2022) This office is advised by the New York City Panel on Climate Change, which has published several reports on the expected consequences of climate change within the city; *New York City Panel on Climate Change,* CITY OF NEW YORK, https://www1.nyc.gov/site/orr/challenges/nyc-panel-on-climate-change.page (last visited June 14, 2022).

2 *City of New York*, 325 F. Supp. 3d at 469 (noting "New York City is exceptionally vulnerable to sea-level rise due to its long coastline" and that "the City has been forced to take proactive steps to protect itself and its residents from the dangers and impacts of global warming.").

3 *See* William Neuman, *To Fight Climate Change, New York City Takes on Oil Companies*, N.Y. TIMES, Jan. 10, 2018, https://www.nytimes.com/2018/01/10/nyregion/new-york-city-fossil-fuel-divestment.html; *see also* Michael A. Livermore, *Why Cities Are Suing Oil Giants*, U.S. NEWS & WORLD REP. (June 26, 2018), https://www.usnews.com/news/national-news/articles/2018-06-26/why-cities-are-suing-oil-giants ("The cities that have joined these lawsuits will face a host of climate change-related costs, [and] . . . are looking to the major oil companies . . .to compensate the taxpayers who are currently holding the tab."); Rachel Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENVTL. L.J. 412, 414 (2019) ("[E]ach of these lawsuits is seeking monetary damages to deal with the costs of adapting to environmental change and coping with disaster events").

In January 2018, NYC filed suit in federal court against several multinational oil companies alleging trespass, private nuisance, and public nuisance by producing, promoting and selling products (fossil fuels) that contribute to global warming.[4] According to NYC, fossil fuel companies have long known of the potential consequences of producing and marketing fossil fuels, and therefore bear some responsibility for the abatement and other costs imposed on the city due to climate change.[5] Specifically, NYC filed suit for compensatory damages for both past and future costs incurred by the city to protect its property and infrastructure, as well as the health, safety, and property of city residents.[6]

Although NYC filed its case in federal court, it sought to press its claims under state law. Federal common law claims would be displaced under existing Supreme Court doctrine.[7] State law-based claims, alleging an interstate nuisance or product liability-based nuisance claims would not be precluded by Supreme Court precedent.[8] At least that is how NYC thought to frame its case. On April 1, 2021, the U.S. Court of Appeals for the Second Circuit dismissed NYC's claims, becoming the first federal appellate court to conclude that state law-based climate nuisance claims were preempted by federal law.[9]

This was not the first climate change nuisance case to reach the Second Circuit. In 2004, NYC and several like-minded states brought claims against several of the nation's largest power producers, alleging their greenhouse gas emissions contributed to the public nuisance of global warming under federal

4 *See* Complaint, City of New York v. BP P.L.C., No. 1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018).

5 *Id.*

6 *See City of New York*, 325 F. Supp. 3d at 470.

7 *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423-29 (2011).

8 Federal preemption of state-law-based nuisance claims is rare in the environmental law context. *See* Jason J. Czarnecki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 8-11 (2007). Among other things, courts have rejected preemption claims in cases alleging the marketing and sale of fuel additives contributed to a public nuisance, even though the additive was used to comply with federal environmental regulations. *See, e.g.*, In re Methyl Tertiary Butyl Ether Products Liability Litigation (MTBE), 725 F.3d 65, 96 (2nd Cir. 2013).

9 City of New York v. Chevron Corp., 993 F.3d 81, 95-98 (2d Cir. 2021) [herewithin *City of New York II*]. Most other courts to consider this question, to date, have focused on whether federal law is sufficiently preemptive to justify removal of climate-based nuisance claims filed in state court. *See, e.g.*, City of Oakland v. BP PLC, 969 F.3d. 895, 906-08 (9th Cir. 2020) (concluding cities' state-law nuisance claims against fossil fuel producers did not raise a substantial federal question); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1267-71 (10th Cir. 2022) (affirming district court's remand over due to lack of federal jurisdiction); Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022) (same); Cnty. of San Mateo v Chevron Corp., 32 F.4th 733 (9th Cir. 2022) (same); Rhode Island v. Shell Oil Prods. Co., 2022 WL 1617206 (1st Cir. 2022) (same). An intermediate appellate court in Hawaii also recently rejected preemption claims raised by oil company defendants. *See* City and Cnty. of Honolulu v. Sunoco LP, No. 1CCV-20-0000380 (Haw. Cir. Ct. Mar. 29, 2022) (order denying defendant's motion for failure to state a claim).

common law.[10] The Second Circuit had looked favorably on those claims, rejecting the corporate defendants' arguments that such federal common law claims were displaced by federal law.[11]

This victory was short-lived. In 2011, in *American Electric Power Co. v. Connecticut* (AEP), a unanimous Supreme Court held that the Clean Air Act (CAA) displaced federal common law nuisance claims for interstate air pollution—in this case, greenhouse gases.[12] Because the CAA authorizes federal regulation of greenhouse gases, and federal common law is generally disfavored, the justices concluded that federal common law public nuisance claims against greenhouse gas emitters were precluded by the CAA.[13]

The *AEP* decision put a quick end to suits alleging climate change constituted an interstate nuisance under federal common law. Efforts to distinguish *AEP*, in which the plaintiffs sought injunctions from claims seeking damages, were unavailing.[14] Yet in closing off one avenue of climate change litigation, the Court left open others, including claims that activities contributing to climate change could constitute a nuisance or otherwise actionable tort under state law.[15] It was on this basis that NYC and other local governments filed suit in 2017 and 2018 against fossil fuel producers seeking to recover for the cost of adapting to climate change under state law.[16]

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10 *See* Connecticut, et al. v. Am. Elec. Power, No. 04 Civ. 5669, 2004 WL 1685122 (S.D.N.Y. filed July 21, 2004).

11 Connecticut v. Am. Elec. Power, 582 F.3d 309, 374-81 (2nd Cir. 2009). The court also rejected claims that the plaintiffs lacked standing, that their claims were barred by the political question doctrine, or that they had failed to state a claim under the federal common law of public nuisance.

12 American Electric Power Co. v. Connecticut (AEP), 564 U.S. 410 (2011).

13 *Id.* at 415 ("The Clean Air Act and the Environmental Protection Agency action the Act authorizes, we hold, displace the claims the plaintiffs seek to pursue.").

14 *See* Native Vill. Of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012) ("The Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief.").

15 *AEP*, 564 U.S. at 429 ("None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand."). The opportunity to file climate-based claims was also facilitated by continuing improvements in the science of climate attribution. *See* Michael Burger, Jessica Wentz, & Radley Horton, *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENVTL. L. 57, 191-216 (2020).

16 *See, e.g.*, Complaint, City of New York v. BP P.L.C., No. 1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018); Complaint, City of Imperial Beach v. Chevron Corp., No. C17-01227 (Cal. App. Dep't Super. Ct. Jul. 17, 2017) ; Complaint for Public Nuisance, City of Oakland v. BP P.L.C., No. RG17875889 (Cal. App. Dep't Super. Ct. Sep. 19, 2017); Complaint, City of Santa Cruz v. Chevron Corp., No. 17CV03243 (Cal. App. Dep't Super. Ct. Dec. 20, 2017); Complaint, Cty. of Marin v. Chevron Corp., No. CIV1702586 (Cal. App. Dep't Super. Ct. Jul. 17, 2017); Complaint, Cty. of San Mateo v. Chevron Corp., No. 17CIV03222 (Cal. App. Dep't Super. Ct. Jul. 17, 2017); Complaint, Cty. of Santa Cruz v. Chevron Corp., No. 17CV03242 (Cal. App. Dep't Super. Ct. Jul. 17, 2017); Complaint for Public Nuisance, City of San Francisco v. BP P.L.C., No. CGC-17-561370 (Cal. App. Dep't Super. Ct. Sep. 19, 2017); Complaint, City of New York v. BP P.L.C., No. 1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018); Complaint, City of Richmond v. Chevron Corp., No. C18-00055 (Cal. App. Dep't Super. Ct. Jan. 22, 2018); Complaint and Jury

While the Congressional enactment of environmental regulatory statutes displaces federal common law actions for interstate pollution, such enactments do not necessarily preempt state common law actions, even where pollution crosses state boundaries.[17] Under longstanding precedent, it is more difficult to preempt state common law than it is to displace federal common law. And in the years since *AEP*, lower courts have largely recognized this distinction, generally rejecting claims that federal law preempts state-law based nuisance claims, even for interstate nuisances, so long as claims are based upon the law of the state in which the nuisance originated.[18]

Having accepted that claims based on federal common law are displaced, plaintiff municipalities are grounding their claims in state law, forcing courts to consider whether federal law should be interpreted to preclude state law claims the way it has displaced federal common law claims.[19] As most of these cases have been filed in state courts, carbon industry defendants have first sought to have cases removed to federal court before pressing their preemption claims. These efforts have been largely unsuccessful on both counts.[20] New York City, however filed its claim in federal court, prompting a direct adverse holding on preemption.

In *City of New York v. Chevron Corp.*, the U.S. Court of Appeals for the Second Circuit concluded the government plaintiffs may not "utilize state tort law to hold multinational oil companies liable for the damages caused by

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Demand, Bd. of Cnty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.), No. 2018CV030349 (Colo. Dist. Ct. Apr. 17, 2018); Complaint, Rhode Island v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. Providence Cty. July 2, 2018); Complaint, King County v. BP P.L.C., No. 18-2-11859-0 (Wash. Super. Ct. May 9, 2018); Plaintiff's Complaint, Mayor & City of Baltimore v. BP P.L.C., No. 24-C-18-004219 (Md. Cir. Ct. Jul. 20, 2018).

17 *AEP*, 564 U.S. at 423 ("Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law.") (cleaned up).

18 *See, e.g.*, Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685, 695 (6th Cir. 2015); Bell v. Cheswick Generating Station, 734 F.3d 188 (3rd Cir. 2013); Freeman v. Grain Processing Corp., 848 N.W. 2d 58 (Iowa 2014). *See also* Matthew Morrison & Bryan Stockton, *What's Old Is New Again: State Common-Law Tort Actions Elude Clean Air Act Preemption*, 45 ENVTL. L. REP. 10282, 10284 (2015); Ben Snowden, *Clean Air Act Preemption of State-Law Tort Claims since* AEP v. Connecticut, 16 No. 4 ABA ENVTL. LITIG. & TOXIC TORTS COMMITTEE NEWSL.16, 17-18 (2015).

19 *See* Tracy Hester, *Climate Tort Federalism*, 13 FIU L. REV. 79, 85 (2019) (noting the new wave of climate suits "reflect a conscious strategic choice" to utilize state law in state courts).

20 *See, e.g.*, City of Oakland v. BP P.L.C, 969 F.3d 8895, 906-08 (9th Cir. 2020) (rejecting claim state-law claims raised substantial federal question justifying removal); City of Hoboken v. Exxon Mobil Corp., 2021 WL 4077541 (D.N.J. 2021) (remanding nuisance claims); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022) (affirming district court's remand over due to lack of federal jurisdiction); Mayor & City of Baltimore, 31 F.4th 178 (4th Cir. 2022)(same); Rhode Island v. Chevron Corp., 393 F.Supp.3d 142 (D.R.I. 2019) (nuisance claims not completely preempted by Clean Air Act); County of San Mateo v. Chevron Corp., 294 F.Supp.3d 934 (N.D. Cal. 2018 (state law nuisance claims not preempted by Clean Air Act). Courts have also considered other bases for removal, including the federal officer doctrine. *See, e.g.,* BP P.L.C. v. Mayor and City of Baltimore, 141 S.Ct. 1532, 1536-37 (2021).

global greenhouse gas emissions."[21] Echoing the arguments of a prior district court opinion in a parallel suit filed in California,[22] the Second Circuit concluded that any such claims necessarily arise under federal common law, that federal common law for such claims is displaced by the Clean Air Act, and that the claims are therefore precluded.[23] In effect, the Court held that state law claims against fossil fuel companies are preempted, despite the lack of any preemptive legislative action, implicit or otherwise.

There are strong policy arguments for the adoption of broad nationwide (if not also international) policies to limit greenhouse gas emissions and mitigate climate change.[24] The combination of a carbon tax and targeted policies to spur and facilitate climate-related innovations, for example, would be superior to a polyglot of state-based lawsuits and monetary settlements.[25] Yet this would hardly justify the imposition of such a regime by judicial fiat, nor does it justify judicial refusal to hear such claims in the absence of actual legislative preemption. Whether state law nuisance actions are to be preempted is a choice for Congress to make, and is a choice Congress has not yet made.[26] Accepting that the EPA has regulatory authority over greenhouse gases,[27] there is no legislation preempting state efforts to address the

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21 *City of New York II*, 993 F.3d at 85..

22 *See* City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018).

23 The court also concluded that insofar as the suit implicated activities that cause greenhouse gas emissions overseas, such claims must also fail. *City of New York II*, 993 F.3d at 85-86.

24 *See, e.g.*, Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961 (2007) (explaining why national climate policies are preferable to state or local policies).

25 *See, e.g.*, David A. Dana, *The Mismatch between Public Nuisance Law and Global Warming*, 18 SUP. CT. ECON. REV. 9 (2010) (arguing that treating the global climate as a common-pool resource is likely to be more effective than nuisance litigation); Joni Hersch & W. Kip Viscusi, *Allocating Responsibility for the Failure of Global Warming Policies*, 133 U. PENN. L. REV. 1657, 1659 (2007) ("Regulation through litigation is a less desirable climate change policy approach than a sound regulatory policy that reflects society's broad interests."); SHI-LING HSU, A CASE FOR THE CARBON TAX: GETTING PAST OUR HANG-UPS TO EFFECTIVE CLIMATE POLICY (2011) (making the case for a carbon tax); Jonathan H. Adler, *Eyes on a Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization*, 35 HARV. ENVTL. L. REV. 1 (2011) (discussing measures to facilitate innovation). *But see* Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827 (2008) (arguing that successful climate nuisance claims against fossil fuel companies could result in the imposition of a *de facto* carbon tax).

26 *See* ARNOLD W. REITZE, JR. AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 419 (2001) (noting that Congress never enacted measures to control the emissions of greenhouse gases); *see also* Arnold W. Reitze, Jr., *Federal Control of Carbon Dioxide Emissions: What Are the Options?*, 36 B.C. ENVTL. AFF. L. REV. 1, 1 (2009) ("From 1999 to [2007], more than 200 bills were introduced in Congress to regulate [greenhouse gases], but none were enacted.").

27 The Supreme Court concluded that the EPA has such authority in *Massachusetts v. EPA*, 549 U.S. 497, 527-29 (2007). For a critique of that decision, see Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 3 VA. L. REV. IN BRIEF 61 (2007).

consequences of greenhouse gas emissions themselves.[28] While other legal doctrines may constrain or complicate state common law climate nuisance claims, federal preemption should not be among them.[29]

Before discussing displacement and preemption, it is worth detailing what it is that would be displaced or preempted. Accordingly, Part I begins with a brief sketch of the common law environmental protection that preceded and matured alongside the development of environmental regulation, including the rise of federal common law actions for interstate pollution. With an eye toward preemption, and its role within our federalist system, Part II sketches the system of state and local environmental regulation that served as the background for the adoption of federal environmental law. While federal environmental laws are quite comprehensive and far-reaching, they operate alongside state and local efforts, often in collaborative fashion, and rarely preempt state regulation or litigation.[30] The result is a system of "cooperative federalism" under which state governments retain the laboring oar in environmental policy, even if denied the helm. Federal law routinely imposes a prescriptive floor of regulatory stringency, but rarely imposes a prohibitory ceiling. Federal environmental law largely leaves questions of institutional choice to state policy makers as well, including the choice between adopting administrative regulations and relying upon common law causes of action to police potentially polluting behavior.

Parts III and IV discuss displacement and preemption respectively, in the context of environmental law. Under current doctrine, displacement and preemption are distinct doctrines with distinct rationales and divergent standards. Displacement concerns which branch of the federal government is responsible for the development of legal standards. Preemption concerns the effect of federal law on the laws of the several states. As federal common law is disfavored under the *Erie* doctrine,[31] the requirements for displacement

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28 Many of the recent suits seek damages to compensate plaintiff jurisdictions for the costs of climate change and the need to adapt to such changes. These suits do not seek to impose emission reduction obligations on any fossil fuel companies directly. It is certainly possible, however, that when faced with the costs of compensating jurisdictions harmed by climate change, some companies may opt to change their behavior so as to reduce their liability.

29 Depending on how a given climate nuisance claim is pled, it could raise Dormant Commerce Clause or Due Process issues insofar as it targets or affects wholly out-of-state conduct. Such questions, however, are wholly distinct from the preemption question addressed in this article. Whether a given climate nuisance claim is viable under the law of a given state is also a question beyond the scope of this article. For an overview of some of the issues involved, see Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135 (2011).

30 *See* Denise Antolini, *Attacking Bananas and Defending Environmental Common Law*, 58 CASE WSTRN L. REV. 663, 665 (2008) (noting the range of environmental nuisance actions that are filed despite the existence of state and federal environmental regulation).

31 As the Court declared in *Erie* (in a bit of overstatement), "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). As the Court noted in *AEP*, since *Erie* "a keener understanding developed," 564 U.S. at 421, albeit one that has been subject to substantial criticism. *See,*

are rather meek, and satisfied by the mere presence of a legislative enactment. In this context, legislative action is understood to reflect the legislature's preference for some alternative to leaving a question for judicial resolution.

As discussed in Part IV, preemption is quite different from displacement. Unlike federal common law, state law is quite favored, as befits a system in which federal powers are defined and limited while state police powers are plenary.[32] Establishing preemption requires a heavier lift, grounded in federal supremacy and legislative intent. So, while the enactment of federal environmental statutes may have broadly displaced the federal common law of interstate nuisances, little state common law of nuisance (or other state environmental law, for that matter) is preempted by federal environmental regulation. The foregoing suggests a rather straightforward application to the problem of climate change: Federal common law actions are displaced but state law actions are not preempted. Whatever legal obstacles such suits may face, federal preemption is not (yet) among them.[33]

Whether to rely upon federal or state law to address a given environmental concern is a vertical separation of powers question. As Part V explains, climate change presents a different set of incentives and constraints on state policymaking than states may face in other areas. Such incentives and constraints might serve as a policy justification for federal climate legislation and the preemption of alternative state approaches. Yet not only has Congress not enacted climate-specific regulatory measures, the provisions of federal environmental law under which greenhouse gases may be controlled are the same provisions that are applied to traditional air pollutants.

In the absence of preemptive federal legislation, state-law based climate nuisance claims should not be preempted, even if federal common law actions should be displaced. This would seem to be evident from the doctrine, but not every federal court has recognized it. As discussed in Part VI, the U.S. Court of Appeals for the Second Circuit misapplied current doctrine in holding that New York's nuisance claims were first, preempted by federal common law, and then displaced by the Clean Air Act. Other circuits to have faced related questions (albeit in the context of removal) have not made the same mistake.[34] As discussed in Part VI, the Second Circuit's opinion misapplied existing law, relying on mistaken assumptions about the

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e.g., Robert R. Gasaway & Ashley C. Parrish, *In Praise of* Erie*—And Its Eventual Demise*, 10 J. L., ECON. & POL'Y 225 (2013). For a defense of *Erie*, see Ernest A. Young, *A General Defense of* Erie Railroad v. Tompkins, 10 J.L., ECON & POL'Y 17 (2013).

32 *See* Ernest A. Young, *Federal Preemption and State Autonomy*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249-70 (Richard A. Epstein & Michael S. Greve eds. 2007). For a broader argument against federal preemption, see Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).

33 Should Congress enact new legislation focusing on greenhouse gas emissions or the threat of climate change, this could well affect the analysis and alter this Article's conclusion.

34 *See, supra* note 9 and cases cited therein.

nature of our federal system. Other legal arguments for preemption of state-law-based nuisance claims for climate-related damages are equally unavailing. While there may be grounds to dismiss state-law-based nuisance claims filed by local governments against fossil fuel producers, displacement and preemption are not among them.

To close, the paper offers some concluding thoughts and poses questions for further consideration as to the proper relationship between federal environmental law and litigation over interstate air pollution generally, and climate change in particular.

I. COMMON LAW ENVIRONMENTAL PROTECTION

Before there was federal environmental regulation, many environmental problems were handled through common law protections of private property from interference by others.[35] For centuries, the common law doctrines of nuisance and trespass aided landowners who sought to protect their property—and, by extension, their persons—from interferences caused by the activities of others. Nuisance law, in particular, was a means through which landowners could protect against environmental harms.[36]

The underlying principle of nuisance in Anglo-American law dates back to at least the mid-thirteenth century, when the noted jurist Henry of Bracton wrote that "no one may do in his own estate any thing whereby damage or nuisance may happen to his neighbor."[37] So, for example, it was not

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35 *See generally*, Steven J. Eagle, *The Common Law and the Environment*, 58 CASE WEST. RES. L. REV. 583 (2008). *See also* J.B. Ruhl, *Making Nuisance Ecological*, 58 CASE WEST. RES. L. REV. 753, 753 (2008) ("Common law nuisance doctrine has the reputation of having provided much of the strength and content of environmental law prior to the rise of federal statutory regimes in the 1970s."); Morrison & Stockton, *supra* note 18, at 10282 ("Until the 1970s, individuals and states frequently used state common-law torts such as nuisance to protect the environment and individual property rights"); CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT (Clifford L. Rechtschaffen & Denise E. Antolini eds. 2007).

36 *See* Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 ENVTL. L. REP. 10292, 10293 (1986))("The public nuisance action is particularly useful to remedy environmental hazards."); G. Nelson Smith III, *Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion*, 36 SANTA CLARA L. REV. 39, 40 (1995) ("Since the early seventeenth century, courts have recognized nuisance and trespass theories in environmental matters.); *see also* WILLIAM H. RODGERS JR., HANDBOOK ON ENVIRONMENTAL LAW §2.1, at 100 (2d ed. 1977) ("[T]he deepest roots of modern environmental law are found in the principles of nuisance. . . . [N]uisance theory and case law is the common law backbone of environmental and energy law.").

37 *See* Elizabeth Brubaker, *The Common Law and the Environment: The Canadian Experience*, *in* WHO OWNS THE ENVIRONMENT? 88-89 (Peter J. Hill and Roger E. Meiners eds., 1997). By some accounts, the origins of nuisance may be traced back to the writ of novel disseisin and 1166. *See* Julian Morris, *Climbing Out of the Hole: Sunsets, Subjective Value, the Environment, and the English Common Law*, 14 FORDHAM ENVTL L.J. 343, 347-48 (2003); *see also* Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment*, 64 CORNELL L. REV. 761, 765-72 (1979).

permissible for one landowner to emit noxious odors or fumes onto the land of another or to cause a neighbor's land to be flooded.[38] This principle became embodied in the Latin maxim s*ic utere tuo ut alienum non laedas*, or "Use your own property so as not to harm another's," which was famously embraced in *William Aldred's Case* in 1611.[39]

William Aldred's case may be ancient history, but the underlying dispute should resonate today. A businessman built a hog sty in a residential neighborhood, allegedly fouling the air for local residents. When suit was brought, the defendant claimed the plaintiffs were oversensitive—"one ought not to have so delicate a nose, that he cannot bear the smell of hogs"[40]—and any inconvenience or intrusion was outweighed by the public benefit of hog production. After all, "the building of the house for hogs was necessary for the sustenance of man."[41] The court rejected this defense, however, on the grounds that no landowner has the right to use his or her property in manner that will prevent the quiet enjoyment of other nearby properties. Otherwise "good and profitable" uses of property may be enjoined as nuisances where they cause pollution that prevents others from enjoying the property of their own.[42] As Blackstone would describe the rule:

> [I]f one erects a smelting-house for lead so near the land of another that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance. . . . [I]f one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of ' 'another's property, it is a nuisance: for it is incumbent on him to find some other place to do that act where it will be less offensive.'[43]

Grounded in the *sic utere* principle, the law of nuisance operated as a powerful constraint on potentially noxious land uses for many centuries, at least where the harms were readily observable and traceable, and the numbers of properties involved were sufficiently small to avoid coordination problems and excessive transaction costs.[44]

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38 *See* Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 NW. U. L. REV. 551, 555 (2008) ("It has long been understood that the discharge of noxious substances into the air or the water lay at the core of the law of nuisance."); Sanford v. Univ. of Utah, 488 P.2d 741 (1971) (recognizing flooding caused by diversion of flow of surface waters may constitute a nuisance).

39 *See* 9 Coke 57b, 77 Eng. Rep. 816 (K.B. 1610). This case, involving a dispute between a landowner and the owner of a neighboring pig sty, is the first known reported case to expressly rely upon this rule for its decision. For more background on the case, see Coquillette, *supra* note 37, at 772–77.

40 9 Coke 58a, 77 Eng. Rep. at 817.

41 *Id.* According to Coquillette, "[n]ever before had a defendant so clearly claimed social utility as a defense to a nuisance action." Coquiellete, *supra* note 37, at 775.

42 9 Coke 58b-59a, 77 Eng. Rep. at 821.

43 3 WILLIAM BLACKSTONE, COMMENTARIES *217-218.

44 *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 661 (1986) ("Land is such a fundamental natural resource that most environmental threats, whether directed at natural resources or

During the 19th century, however, many courts were more willing to engage in the sort of balancing the court in *Aldred's Case* eschewed.[45] Nonetheless, nuisance law remained a powerful means of constraining polluting activities, as well as encouraging the siting of potentially polluting activities away from where they might cause harm. During the Progressive Era, for instance, anti-smoke activists targeted individual facilities, raising complaints and occasionally filing nuisance suits.[46] Such suits were often successful, and they created powerful incentives.[47] The threat of nuisance liability, and a court order that could force a facility to clean up or close, encouraged firms to locate potentially polluting facilities farther away from residential communities to avoid complaints and litigation.

The law of private nuisance focused on those activities that interfered with the use or enjoyment of private land. By contrast, the doctrine of public nuisance developed to address those activities which interfered with the rights of the public at large, such as by obstructing a highway, disrupting a public market, or fouling the air of the town square.[48] Because public nuisance actions are filed to protect rights common to the public, they are most often filed by public authorities, acting on behalf of the state in its sovereign capacity.[49] Those activities subject to suit as public nuisances are also subject to regulation under the sovereign police power.[50]

The *Restatement (Second) of Torts* defines a public nuisance as "an unreasonable interference with a right common to the general public."[51] Though it does not provide a precise definition of what would constitute an "unreasonable" interference, the *Restatement* notes that public nuisances are typically characterized by one or more of the following characteristics: 1) the offending conduct creates a "significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience"; 2) the conduct is "proscribed by statute, ordinance or administrative regulation"; and 3) the conduct is "of a continuing nature or

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public health, can easily be read as interfering with the land's use and enjoyment, and thereby potentially raising private nuisance claims."); *see also* WILLIAM H. RODGERS, ENVIRONMENTAL LAW, §2.1 at 112-13 (2d. ed. 1994) ("Nuisance actions reach pollution of all physical media—air, water, land, groundwater—by a wide variety of means. Nuisance actions have challenged virtually every major industrial and municipal activity that today is the subject of comprehensive environmental regulation.").

45 *See* Paul M. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions – Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 656 (1976).

46 DAVID STRADLING, SMOKESTACKS AND PROGRESSIVES: ENVIRONMENTALISTS, ENGINEERS, AND AIR QUALITY IN AMERICA, 1881-1951 3 (1999).

47 *Id.* at 41.

48 *See* William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998-999 (1966); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 328–29 (2005).

49 Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 ALB. L. REV. 359, 362, 364–65 (1990).

50 Private parties may also file suits alleging public nuisances, but only if they are able to demonstrate that they have suffered a "special injury" to distinguish their interest from that of the public at large. *See id.* at 364.

51 Restatement (Second) of Torts § 821B (1977).

has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."[52] As Professor Thomas Merrill observes, this only provides the most general guidance for resolving nuisance claims as it does not, for instance, make clear whether courts should balance the degree of harm against the utility of the defendant's conduct or adopt something closer to a strict liability rule.[53]

Although public nuisance claims in federal court are not particularly common, states have repaired to the federal common law of interstate nuisance in seeking to reduce or eliminate pollution emanating from other jurisdictions. In the noted case of *Georgia v. Tennessee Copper Company*, for example, the state of Georgia sought relief from the "noxious gas" emitted by copper companies in an adjoining state.[54] These emissions, Georgia claimed, caused the "wholesale destruction of forests orchards and crops" within its territory.[55] In an opinion by Justice Oliver Wendell Holmes, the Supreme Court agreed that Georgia was entitled to relief, explaining:

> It is a fair and reasonable demand on the part of a 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.[56]

In other cases, the Supreme Court recognized public nuisance claims against upstream discharges of untreated sewage and ocean dumping of waste, among other things.[57]

The gradual adoption of environmental regulations at the local, state, and federal levels did not put an end to nuisance litigation. Far from it. The number of environmental nuisance cases continued to rise through the late 20th century, even as environmental regulations proliferated at all levels of government.[58] Rather than eliminate nuisance litigation, environmental regulations served as a complement. Both regulation and litigation appear to

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52 Restatement (Second) of Torts § 821B (1977).

53 *See* Merrill, *supra* note 48 at 329; *see also* International Paper Co. v. Ouellette, 479 U.S. 481, 496 (1987) ("[N]uisance standards often are vague and indeterminate"); North Carolina ex rel Cooper v. Tennessee Valley Auth., 615 F.3d 291, 302 (4th Cir. 2010) ("[W]hile public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application.").

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

55 *Id.*

56 *Id.* at 238.

57 *See, e.g.*, Missouri v. Illinois, 180 U.S. 208 (1901); New Jersey v. City of New York, 283 U.S. 473 (1931).

58 *See* Karol Boudreaux & Bruce Yandle, *Public Bads and Public Nuisance: Common Law Remedies of Environmental Decline*, 14 FORDHAM ENVTL. L.J. 55, 64 (2002) (documenting a dramatic increase in environmental public nuisance cases in both state and federal courts between the 1960s and 1990s).

have been responses to the same underlying concerns and an increased demand for action to control the environmental consequences of industrial and other activity. Accordingly, where environmental regulations are absent or inadequate, the filing of nuisance suits should be no surprise.[59]

II. COOPERATIVE FEDERALISM IN ENVIRONMENTAL LAW

While not as old as nuisance law, state and local regulation of pollution-generating activities and other environmental concerns long predate the enactment of major federal environmental laws. Such regulations were often not only concerned with locally undesirable land uses or activities that could be considered nuisances but also addressed some resource conservation concerns. By the time of the post-World War II environmental awakening, state and local governments had been active in various forms of environmental regulation for decades. The groundswell of public support that induced federal legislative action encouraged the adoption of more aggressive policies at the state and local level as well.[60]

At the same time as Progressive Era anti-smoke activists sought to harness nuisance law, local governments began adopting smoke-control ordinances to improve local air quality. As environmental historian David Stradling recounts, "the late 1800s and the early 1900s contain abundant examples of urban and suburban environmental activism, much of it successful."[61] Philadelphia, for example, enacted a smoke-control ordinance in 1905, which quickly reduced smoke levels in the heart of the city.[62] The City of Brotherly Love was not alone. By 1920, some forty cities had local smoke control ordinances in place.[63] By 1960, the number had more than doubled, and by 1970, when the Clean Air Act was enacted, it topped 100.[64] County-level air pollution control efforts likewise increased dramatically in the post-war period, rising from 2 in 1950 to 81 in 1970.[65] State regulations also followed in much of the country, beginning with Oregon in 1951.[66] By

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59 *See* Sam Kalen, *Policing Federal Supremacy: Preemption and Common Law Damage Claims as a Ceiling Regulatory Floor*, 68 FLA. L. REV. 1597, 1600 (2016) ("Environmental statutory schemes often lack mechanisms for addressing damages to individuals or their property, forcing litigants to explore the utility of environmental claims."). In this fashion, nuisance law continues to operate as a "backstop to pollution statutes." *See* Daniel A. Farber, *The Story of* Boomer*: Pollution and the Common Law*, 32 ECOL. L.Q. 113, 147 (2005).

60 *See generally* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995).

61 STRADLING, *supra* note 46, at 4.

62 *Id.* at 76.

63 *See* Arthur C. Stern, *History of Air Pollution Legislation in the United States*, 32 J. AIR POLLUTION CONTROL ASS'N 44, 44 (1982).

64 *Id.*

65 *Id.*

66 *Id.* at 47.

1970, every state had an air pollution control program of some sort, albeit of varying stringency.

A similar story could be told with water pollution. Throughout the country, "local public indignation over the filth of local waters" triggered state legislative responses.[67] By 1966, every state had adopted water pollution legislation of some sort.[68] Just as Cleveland residents took the lead at the beginning to clean the Cuyahoga River before its infamous (and often misunderstood) 1969 fire,[69] other communities made strides to protect local resources well before meaningful federal regulation was adopted. As would be expected, some states' efforts were clearly more comprehensive and more successful than others. Then, as now, the adopted measures were imperfect, and environmental goals were often balanced against other concerns. Nonetheless, as the nation's environmental consciousness blossomed in the post-war period, state and local governments began to act.

Those federal environmental statutes enacted prior to 1970 were rather limited, largely focusing on the conduct of the federal government itself, rather than private industry.[70] Yet beginning in 1969, Congress began to erect a broad environmental regulatory architecture, including the Clean Air Act in 1970[71] and the Clean Water Act in 1972.[72] These laws, and others adopted during the same time period,[73] were adopted against the background of state and local environmental measures.

Congress's environmental lawmaking did not seek to supplant pre-existing state and local efforts. Rather, the express purpose of many federal statutes was to supplement incomplete or insufficiently protective state and

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67 *See, e.g.*, N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality; Part I: State Pollution Control Programs*, 52 IOWA L. REV. 186, 234 (1966).

68 *See id.* at 215.

69 *See* Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 105–13 (2002).

70 *See* Percival, *supra* note 60, at 1158 ("To the extent that federal law was regulatory in character prior to 1970, the primary targets of environmental regulation were federal agencies rather than private industry.").

71 42 U.S.C. §§ 7401-7661f (2000). It is worth noting that the first federal clean air legislation was enacted in 1955 (Pub. L. No. 80-159), and amended in 1963, 1965, 1966, and 1967. With a few exceptions, such as the creation of federal emission standards for new automobiles mandated in 1967, the pre-1970 statutes were largely non-regulatory in nature. Although the 1970 Act was itself, technically, a series of amendments to the prior statutes, it is commonly referred to as *the* Clean Air Act, as it provides the foundation for the contemporary regulatory structure.

72 33 U.S.C. §§ 1252-1385 (2000). The Clean Water Act is formally known as the Federal Water Pollution Control Act.

73 Other major federal environmental laws enacted during this time period include the National Environmental Policy Act (1969), 42 U.S.C. §§ 4321-4347, the Endangered Species Act (1973), 16 U.S.C. §§ 1531-1544, the Federal Environmental Pesticide Act (aka, the Federal Insecticide Fungicide, and Rodenticide Act 1972), 7 U.S.C. §§ 136-136y, the Safe Drinking Water Act (1974), 42 U.S.C. §§ 300f-before th300j, the Resource Conservation and Recovery Act (1976), 42 U.S.C. §§6901-6992k, and the Toxic Substances Control Act (1976), 15 U.S.C. §§ 2601-2671.

local efforts.[74] As made clear in the findings of the major federal environmental statutes, states were to retain their primary role. The congressional findings in the Clean Air Act, for example, declare that "air pollution control at its source is the primary responsibility of States and local governments."[75] Major pollution control laws like the CAA and CWA also contained broad savings clauses expressly preserving state authority to enact and enforce laws controlling pollution.[76] Outside of the regulation of vehicles and consumer products sold in interstate markets, states largely retained the ability to adopt more stringent standards of their own.[77]

While federal environmental laws grant expansive regulatory authority to federal agencies, most environmental statutes are implemented following a "cooperative federalism" model.[78] Under this model, the federal government outlines the contours of a given regulatory program, typically

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74 The history of these statutes generally supports the same conclusion. *See* Kalen, *supra* note 59, at 1597.

75 42 U.S.C. §7401(a)(3). Even more emphatically, the Clean Water provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. §1251(b).

76 42 U.S.C. §7416 (providing that, "[e]xcept as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.") and 33 U.S.C. §1370 (providing that, "[e]xcept as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

77 *See* Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory and Default Rules*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 178 (Richard A. Epstein & Michael S. Greve eds. 2007) (observing that federal environmental laws "aim to eliminate state regulation where it would undermine the efficient scope of markets for particular commercial commodities").

78 *See* New York v. United States, 505 U.S. 144, 167 (1992) ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. . . . This arrangement . . . has been termed cooperative federalism." (internal citations and quotations omitted)). Statutes that employ the cooperative federalism model include the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, portions of the Safe Drinking Water Act, and the Surface Mining Control and Reclamation Act.

through statutory mandates elaborated upon by regulatory measures.[79] States are then encouraged to implement the program in lieu of the federal government, in accordance with federal guidelines. Provided these standards are met, states are free to tailor the details of their individual programs to accommodate local conditions and concerns. In most cases the federal standards operate as a floor – albeit sometimes a highly prescriptive one – and states remain free to adopt more stringent measures.[80] State programs that meet federal standards are typically eligible for federal financial assistance.[81] States that fail to adopt adequate programs are not only denied the relevant federal funding—they can also be subject to various sanctions and federal preemption of their programs.[82]

This cooperative model was explicitly adopted so as to ensure continued state involvement in environmental protection.[83] Though federal policymakers wish to call the shots and set major environmental policy priorities, the major environmental laws are structured so as to continue to rely upon the ability of state policymakers to identify, implement and enforce environmental requirements.[84] The geographic and economic diversity of the nation requires local knowledge and expertise that is often unavailable at the federal level.[85] Environmental problems, and their solutions, will vary from

79 *See* John Dwyer, *The Practice of Federalism under the Clean Air Act*, 54 MD. L. REV. 1183, 1184 (1995); *see also* DENISE SCHEBERLE, FEDERALISM AND ENVIRONMENTAL POLICY: TRUST AND THE POLITICS OF IMPLEMENTATION (1997).

80 Whether federal intervention discourages greater state or local regulation by altering the incentives faced by state and local policymakers is a separate question, explored in Jonathan H. Adler, *When Is Two a Crowd: The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67 (2007).

81 *See, e.g.*, 33 U.S.C. § 1256 (2000) (authorizing financial support for state water pollution control programs that adopt desired pollution control policies); *see also* Percival, *supra* note 60, at 1173 (noting the use of federal funding to encourage land-use planning and solid waste management).

82 *See, e.g.*, 42 U.S.C. §7509 (2000) (detailing sanctions for failure to attain National Ambient Air Quality Standards under Clean Air Act); *see also* Percival, *supra* note 60, at 1174 (noting under most environmental laws, the federal government will adopt and enforce a federal regulatory program in the absence of a sufficient state program). For a discussion of whether these conditions transgress constitutional bounds, see Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism, and Conditional Spending after* NFIB v. Sebelius*,* 43 ECOLOGY L.Q. 671 (2016).

83 Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1534 (1995) ("The essence of cooperative federalism is that states take primary responsibility for implementing federal standards, while retaining the freedom to apply their own, more stringent standards.").

84 *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1196 (1977) (noting that the federal government "is dependent upon state and local authorities to implement [environmental] policies because of the nation's size and geographic diversity, the close interrelation between environmental controls and local land use decisions, and federal officials' limited implementation and enforcement resources.").

85 *See* Dwyer, *supra* note 79, at 1218 (noting that "the knowledge necessary to administer any air pollution control program . . . can be found only at the local level."). *See also* HENRY N. BUTLER &

place to place, limiting the federal government's ability to adopt nationwide solutions to environmental concerns that are equally applicable to multiple parts of the country.[86]

As a general matter, federal preemption of state environmental law is the exception. Congress was quite explicit in those few instances in which it sought to preempt state environmental law-making, whether by state legislatures, agencies, or courts.[87] The Clean Air Act, for instance, makes explicit that various emission control requirements for stationary sources and planning requirements for local governments only establish federal floors, leaving states with the discretion to pursue more aggressive measures of their own. When it comes to the regulation of motor vehicles, however, the Clean Air Act explicitly provides that only the federal government and California may impose emission control requirements on cars and trucks.[88] Likewise, when the Clean Air Act seeks to preempt state and local regulation of emissions from various consumer products, so as to prevent the balkanization of relevant product markets, it is also quite explicit about it.[89]

JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 27 (1996) ("Federal regulators never have been and never will be able to acquire and assimilate the enormous amount of information necessary to make optimal regulatory judgments that reflect the technical requirements of particular locations and pollution sources."). This observation is based on the insights of Nobel Laureate economist F.A. Hayek, who observed "[t]he knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess." F. A. Hayek, *The Use of Knowledge in Society*, 35 AMER. ECON. REV. 519, 519-20 (1945).

86 Stewart, *supra* note 84, at 1266 (noting the "sobering fact" that "environmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington").

87 *See, e.g.*, Clean Air Act, 42 U.S.C. 7543, 7573 (prohibiting states from adopting or enforcing emission control standards for aircrafts or new motor vehicles); Price-Anderson Act, 42 U.S.C. 2210(n)(2) (2000) (granting original jurisdiction to federal district courts for any public liability action arising out of or resulting from a nuclear incident). Rather than completely preempting state environmental law in a particular area, Congress commonly includes preemptive federal requirements for product design or engineering specifications. *See* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1561–64 (2007).

88 *See* E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON & ORG. 313, 330 (1985); *see also* Motor & Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1101 n.1 (D.C. Cir. 1979) (noting that Congress intended California to "act as a kind of laboratory for innovation" with regard to the Stale's "pioneering efforts at adopting and enforcing motor vehicle emission standards"). *See, e.g.*, 42 U.S.C. § 7543(a) (2000) (preemption of state automobile emission standards); 42 U.S.C. § 7545(c)(4)(A) (2000) (preemption of state fuel standards). EPA may waive preemption of emission standards adopted by California, subject to certain conditions. *See* 42 U.S.C. § 7543(b) California's ability to adopt its own standards was a consequence of California adopting vehicle emission controls prior to the adoption of federal standards.

89 Perhaps paradoxically, other aspects of the Clean Air Act, such as its fuel regulations, facilitate if not actually require the balkanization of interstate markets. *See generally* Andrew P. Morriss & Nathaniel Stewart, *Market Fragmenting Regulation Why Gasoline Costs So Much (and Why It's Going to Cost More)*, 72 BROOK. L. REV. 939 (2007).

Federal intervention is probably most needed to address interstate spillover concerns. Yet only a small portion of current federal regulations can be justified on these grounds.[90] Over the past half-century, federal regulation of intrastate air and water pollution has been more extensive than federal regulation of interstate spillovers, making it more difficult to argue that such provisions have the purpose or effect of preempting state-law-based protections. Moreover, the few provisions of federal environmental law targeted at interstate spillovers were rarely invoked in the first three decades after the major federal pollution control statutes were adopted.

While the Clean Air Act contains a few provisions that specifically address interstate pollution concerns, the EPA largely ignored these measures for many years. Indeed, where states sought to invoke the Act to obtain relief for upwind contributions to local air pollution, the EPA refused to act and federal courts largely validated the federal government's desire to ignore interstate air pollution.[91] Only since the turn of the last century has the EPA meaningfully responded to states seeking to control emissions from upwind states that contribute to downwind nonattainment of federal air quality standards.[92] The Clean Water Act also authorizes the EPA to address transboundary pollution, but here again the federal government has been largely absent, rarely invoking the relevant provisions.[93]

III. DISPLACEMENT

For over a century, states brought interstate pollution disputes to the Supreme Court, often under the Court's original jurisdiction.[94] While the total number of cases was not particularly significant, the Court considered common-law-based interstate pollution claims and, where appropriate, provided relief.[95] If the Court concluded that upstream or upwind jurisdictions failed to respect the territory of their downstream or downwind

90 *See* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1998); *see also* Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 NYU ENVTL L.J. 130 (2005).

91 *See* Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 959 (1997); DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE 126 (2005).

92 *See* Michigan *v.* EPA, 213 F.3d 663 (D.C. Cir. 2000)*;* Appalachian Power Co. v. EPA, 249 F.3d 1032 (D.C. Cir. 2001).

93 *See* Merrill, *supra* note 91, at 960-61.

94 The Supreme Court first took jurisdiction over an interstate pollution dispute in *Missouri v. Illinois*. *See* Missouri v. Illinois, 180 U.S. 208 (1901); Missouri v. Illinois, 200 U.S. 496 (1906). For a thorough discussion of this history, see Robert Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717 (2004). For a fuller exploration of the Court's use of original jurisdiction in environmental cases, see Robert D. Cheren, *Environmental Controversies "Between Two or More States*,*"* 31 PACE ENVTL. L. REV. 105 (2014).

95 *See* Rothschild, *supra* note 3, at 424 (noting that the Supreme Court had allowed cases concerning interstate pollution to proceed under both state and federal common law).

neighbors, the Court issued injunctions against pollution sources[96] and, in some cases, even ordered states to construct necessary facilities for adequate waste management.[97] Upon the adoption of federal environmental regulatory statutes, however, this practice came to an end. Resting on the assumption that federal common law should be no more than a gap-filler of last resort, the Court concluded that the enactment of federal environmental laws eliminated any need for a court-crafted federal common law of interstate nuisance. Whereas demonstrating preemption of state law may be difficult, as discussed in the next section, the Court concluded that demonstrating displacement of federal common law should be easy.

The Court's change of heart came about in its consideration of a long-running water pollution dispute between the state of Illinois and the City of Milwaukee.[98] Prior to the enactment of the Clean Water Act, Illinois filed a bill of complaint with the Supreme Court alleging that several Wisconsin localities, including the sewage commissions of Milwaukee city and county, were discharging pollution into Lake Michigan.[99] Illinois claimed "some 200 million gallons of raw or inadequately treated sewage and other waste materials are discharged daily into the lake in the Milwaukee area alone," creating a public nuisance.[100] As it had in prior cases, the Court recognized that Illinois' claims arose under federal common law.[101] Although Congress had enacted laws "touching interstate waters" and urging their protection, the Court did not find that these enactments had displaced its responsibility to adjudicate the dispute between Illinois and Milwaukee, even though federal

96 *See, e.g.*, Georgia v. Tennessee Copper Co., 206 U.S. 230, 239 (1907) (issuing an injunction against the discharge of noxious gasses that crossed state lines and harmed Georgian land); Wisconsin v. Illinois, 278 U.S. 367, 420–21 (1929) (enjoining the defendants from excessively diverting waters from the Great Lakes to the Chicago Drainage Canal for the purpose of sewage disposal); New Jersey v. City of New York, 283 U.S. 473, 476, 482–83 (1931) (issuing an injunction restraining New York City from dumping garbage into the ocean).

97 *See, e.g.*, Wisconsin v. Illinois, 278 U.S. 367, 420–21 (1930) (requiring the Sanitary District of Chicago to construct and operate suitable sewage plants); New Jersey v. New York, 283 U.S. 805 (1930) (requiring New York to build a sewage treatment plant at Port Jervis before diverting water from the Delaware River to the New York City water supplies).

98 *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (Milwaukee I); Illinois v. City of Milwaukee, 451 U.S. 308 (1981) (Milwaukee II); *see also* Percival, *supra* note 94, at 758-65.

99 The jurisdictions included four Wisconsin cities, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee. *Milwaukee I*, 406 U.S. at 93.

100 *Id.*

101 *Id.* at 103 ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law."). Interestingly enough, when Illinois first sought to bring its claims before the Supreme Court, some of the justices were skeptical of the claims. Justice Harry Blackmun, in particular, cautioned that hearing such claims "will be a big headache for the Court." *See* Zasloff, *supra* note 25, at 1844 (quoting Memorandum from Harry A. Blackmun to the United States Conference (Sept. 16, 1971)).

law authorized suits by the Attorney General for the abatement of pollution.[102]

Relying upon *Georgia v. Tennessee Copper*,[103] and recognizing the "federal interest in a uniform rule of decision,"[104] the Court accepted the responsibility of adjudicating the dispute and considering whether to enjoin the nuisance of which Illinois complained. The Court noted the need for a uniform, federal standard, as opposed to the "varying common law of the individual States."[105] At the same time, the Court also acknowledged that the passage of "new federal laws and new federal regulations" could make this role obsolete.[106] "But until that comes to pass," wrote Justice Douglas for the Court, "federal courts will be empowered to appraise the equities of the suits alleging the creation of a public nuisance by water pollution."[107]

What Justice Douglas suggested might come to pass did—and right quick. *Milwaukee I* was decided in April 1972. The Federal Water Pollution Control Act Amendments of 1972, what we commonly refer to as the "Clean Water Act," was passed over President Richard Nixon's veto only six months later.[108] With this enactment Congress dramatically expanded the federal role in water pollution regulation, even if it did not do much to address the particular concern of interstate water pollution.

In 1980, the *Milwaukee I* defendants returned to the Supreme Court seeking relief from judicially imposed orders to abate their pollution of Lake Michigan.[109] This gave the Court an opportunity to consider the implications of the Clean Water Act's passage and to extricate itself from continuing involvement in interstate pollution disputes. It was an opportunity the Court would not pass up.

While acknowledging the need to provide a federal rule of decision under federal common law in a "few and restricted" instances, the Court rejected the idea that resolving interstate disputes—and fashioning and

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102 *Milwaukee I,* 406 U.S. at 103-04. Indeed, while the authority for the Attorney General to act was longstanding, it had rarely been invoked prior to the 1960s. *See* Adler, *supra* note 69, at 134; *see also* William H. Rodgers, Jr.*, Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 772–74 (1971) (discussing how federal authority had previously been understood).

103 *Tennessee Copper Co.*, 206 U.S. at 230.

104 *Milwaukee I*, 406 U.S. at 105 n.6.

105 *Id.* at 107 n.9.

106 *Id.* at 107. While stressing the need for a uniform rule of decision, the Court also acknowledged that equitable concerns could justify the consideration of state-specific concerns, including whether one state had voluntarily adopted more "strict standards" than did its neighbors.

107 *Id.*

108 The Clean Water Act, Pub. L. No. 92-500 (1972) was enacted in October 1972 following a veto by President Nixon. *See Clean Water: Congress Overrides Presidential Veto*, *in* CQ ALMANAC 1972, at 11-17 (28th ed. 1973)

109 *See* Illinois v. City of Milwaukee (Milwaukee II), 451 U.S. 308, 311–12 (1981).

enforcing standards under federal common law—was its responsibility.[110] Instead, the Court explained, resolution of such disputes should be guided by legislative action.[111] And although nothing in the text or history of the Clean Water Act indicated Congress's intent to displace the Court's role in adjudicating interstate pollution disputes, the majority of the Court concluded that the enactment of a comprehensive federal regulatory regime for water pollution obviated any need for judicial intervention.[112]

Leaning heavily on the idea that federal common law is disfavored,[113] the Court explained it need not wait for Congress to enact a law expressly depriving the judiciary of the power to act. Rather, the mere presence of a federal statute occupying the relevant space and assigning primary responsibility for pollution control to the executive branch would be sufficient.[114] As the Court explained, "the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law preempts state law.[115] Whereas the latter requires due regard for state prerogatives, "[s]uch concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required."[116] To the contrary, Justice Rehnquist explained, the Court should "'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," and thus the presumption is that federal common law should be displaced.[117]

The Court would not affirm that this conclusion applied equally to interstate air pollution until deciding *AEP* in 2011, but the logic of the Court's displacement doctrine was clear. Few doubted the principle underlying *Milwaukee II* would dictate an equivalent result in an air pollution case, even one involving greenhouse gases. Thus, in *AEP*, the Obama Administration

110 *Id.* at 313 ("Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable").

111 *Id.* ("The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.").

112 *Id.* at 314 ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law, the need for such an unusual exercise of lawmaking by federal courts disappears").

113 *See id.* at 312 ("Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision.").

114 Though, as noted above, the field of water pollution control was not entirely free of federal involvement when *Milwaukee I* was litigated. *See supra* note 102 and accompanying text.

115 *Milwaukee II*, 451 U.S. at 316.

116 *Id.*

117 *Id.* at 317.

did not even try to argue against displacement, its commitment to an aggressive climate policy notwithstanding.[118]

The state plaintiffs in *AEP* brought a federal common law claim of interstate nuisance against the nation's largest emitters of carbon dioxide seeking broad injunctive relief. Although litigated in tandem with the suit that would become *Massachusetts v. EPA*,[119] the *AEP* case languished in the lower courts long after *Massachusetts* was decided.[120] Once it reached One First Street, however, the case was quickly and easily resolved in a unanimous opinion by Justice Ruth Bader Ginsburg.[121]

Reaffirming the rationale of *Milwaukee II*, Justice Ginsburg explained that whether a federal regulatory program displaces preexisting federal common law claims turns on the action taken by Congress. The enactment of regulatory legislation, in particular, is the basis of displacement, not any other indicia of legislative intent, nor not any judicial assessment of whether such legislation is effective or sufficient to address the downstream or downwind state's concerns. How (or even whether) such legislation has or would be implemented by federal regulatory agencies was not the Court's concern: "The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue."[122]

Given that the Court had decided four years earlier that the CAA applied to greenhouse gases,[123] it was rather obvious that federal common law claims against GHG emitters would have to be displaced under this test. "As *Milwaukee II* made clear," Justice Ginsburg wrote, "the relevant question for purposes of displacement is 'whether the field has been occupied, not

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118 The Solicitor General's merits brief urged the Supreme Court to reverse the lower court's conclusion that plaintiffs had standing on prudential, rather than constitutional, grounds, and recommended remand so the Second Circuit could reconsider its displacement holding in light of subsequent regulatory events. *See* Steven Mufson, *Obama Administration Sides with Utilities in Supreme Court Case about Climate Change*, WASH. POST (Aug. 26, 2010) available at http://www.washingtonpost.com/wp-dyn/content/article/2010/08/26/AR2010082606632.html.

119 It is worth noting that the underlying legal theories in the *Massachusetts* litigation and *AEP* litigation operated in tandem to place the federal government in a difficult position. Insofar as the federal government argued that the EPA lacked authority to regulate greenhouse gases under the Clean Air Act, this undermined the arguments that nuisance claims were displaced. At the same time, if the EPA lacked the authority to regulate greenhouse gases, it would be more difficult to argue that nuisance suits were displaced. *See* Jonathan H. Adler, *The Supreme Court Disposes of a Nuisance Suit:* American Electric Power v. Connecticut, 2010-11 CATO SUP. CT. REV. 295, 301–02 (2011).

120 Indeed, *AEP* sat at the U.S. Court of Appeals for the Second Circuit for an extraordinarily long time after oral argument. *See* Marcia Coyle, *Questions Arise About Long Delay by Sotomayor-Led Panel in Climate Case*, NAT'L L. J., (May 29, 2009), https://www.law.com/almID/1202431051311/. The court's decision was eventually issued over three years after oral argument with only two of the original panel members participating. The third, Sonia Sotomayor, was by then a justice on the Supreme Court. *See* Connecticut v. Amer. Elec. Power, 582 F.3d 309 (2d Cir. 2009).

121 564 U.S. 410 (2011).

122 *Id.* at 424 (cleaned up).

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

whether it has been occupied in a particular manner.'"[124] And because greenhouse gases were air pollutants subject to regulation under the CAA, displacement followed. As Justice Ginsburg explained:

> the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. Massachusetts made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act . . . And we think it equally plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants.[125]

The "critical point" was that "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants,"[126] not whether the resulting regulations were effective or desirable.[127] Indeed, Justice Ginsburg noted, were EPA to adopt inadequate regulations, or even to "decline to regulate carbon-dioxide emissions altogether," it would not matter for displacement purposes.[128] Even if the Clean Water Act could be said to impose a more comprehensive system of effluent controls than the CAA, this too was irrelevant, for "[o]f necessity, Congress selects different regulatory regimes to address different problems."[129]

In enacting the CAA, as interpreted in *Massachusetts v. EPA*, Congress made the scope and stringency of GHG emission controls something for the EPA to determine in the first instance. Should states or private groups disagree with the EPA's policy conclusions, or believe that the EPA's regulations are insufficiently stringent, they would retain the ability to petition the agency or file suit in federal court, much as the states and environmentalist groups did in *Massachusetts*. What they could not do is seek to transfer authority over emission controls from the political branches to the courts through the use of federal common law.

The Court's opinion emphasized that federal common law is disfavored. "There is no federal general common law," the opinion noted, quoting *Erie Railroad v. Tompkins*.[130] Rather, most questions governed by the common

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124 American Electric Power Co. v. Connecticut (AEP), 564 U.S. 410, 426 (2011) (*quoting* Illinois v. City of Milwaukee (Milwaukee II), 451 U.S. 308, 324 (1981)).

125 *AEP*, 564 U.S. at 426..

126 *Id.* at 426. To this, Justice Ginsburg added, somewhat cheekily, "Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit. After all, we each emit carbon dioxide merely by breathing." *Id.*

127 There are plenty of reasons to believe EPA regulation of greenhouse gases under the Clean Air Act is not desirable. *See* Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation under the Obama Administration*, 34 HARV. J. L. & PUB. POL'Y 421 (2011). Nor is such regulation likely to be a particularly efficient way to reduce GHG emissions. *See* Jonathan H. Adler, *The Legal and Administrative Risks of Climate Regulation*, 51 ENVTL. L. REP. 10485 (2021).

128 *AEP*, 564 U.S. at 426 ("As *Milwaukee II* made clear, however, the relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" (citation omitted)).

129 *Id.*

130 *Id.* at 420 (quoting Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).

law are left to the states. Federal common law is reserved for "'subjects within national legislative power where Congress has so directed,'" such as in the case of antitrust law, or "where the basic scheme of the Constitution so demands," such as where it is necessary to resolve interstate disputes and Congress has not addressed the concern through legislation.[131] Interstate air and water pollution could be governed by federal common law, but only in the absence of regulatory legislation. The federal common law of interstate nuisance is thus a contingent backstop—a means of filling interstices insofar as is necessary to enable states to safeguard their sovereign interests in their own territory. Yet as the Court had held in *Milwaukee II*, "when Congress addresses a question previously governed by a decision rested on federal common law, the need for such an unusual exercise of law-making by federal courts disappears."[132]

Whereas the Court has adopted (though not always applied) a presumption against the preemption of state law causes of action, no such presumption applies with displacement. If anything the constitutional structure would warrant a "special presumption" *against* the use of federal common law.[133] Preemption of state law must be clearly shown so as to protect the states' sovereign interests within the federal system of dual sovereignty.[134] No such interest protects the policymaking power of the federal courts. "[I]t is primarily for the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest," Justice Ginsburg explained for the Court.[135] Thus, whereas the justices routinely disagree and divide over the preemptive effect of various federal laws, they were of one mind on the question of displacement, unanimously rejecting the use of federal common law to control emissions already subject to administrative control under federal law,[136] while leaving the question of CAA preemption of state law based suits to another day.[137]

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131 *Id.* (citation omitted).

132 Illinois v. City of Milwaukee (Milwaukee II), 451 U.S. 308, 314 (1981)).

133 *See* Merrill, *supra* note 48 at 314.

134 *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009) ("In all pre-emption cases ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (cleaned up).

135 *AEP,* 564 U.S. at 423–24.

136 It is certainly possible that Justice Sotomayor disagreed with her colleagues on this point, as she was recused from the case due to her participation in the panel that heard arguments in *AEP* on the Second Circuit. The case had been argued years prior to her nomination, but was only issued later, with both participating judges on the panel rejecting the arguments for displacement. *See* Connecticut v. Amer. Elec. Power, 582 F.3d 309 (2nd Cir. 2009). There is no way to know whether then-Judge or Justice Sotomayor agreed with that opinion.

137 *Id*. at 429; *see also* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 866 (9th Cir. 2012) (Pro, J., concurring) ("Displacement of the federal common law does not leave those injured without a remedy. Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law.").

IV. PREEMPTION

The enactment of a federal statute that "speaks directly" to the issue at hand may be sufficient to displace federal common law. Far more is required to preempt state law.[138] Federal common law may be disfavored, but so too is the federal preemption of state law. The displacement of federal common law implicates a different legal standard than does the preemption of state-law-based claims.[139]

As a constitutional matter, Congress has the power to preempt state law, as federal law is supreme.[140] The question in preemption cases is whether Congress has, in fact, preempted state law.[141] This is not to be presumed, as the preemption of state laws is always "a serious intrusion into state sovereignty."[142] As a general matter, preemption will not be found unless the Court concludes preemption "was the clear and manifest purpose of Congress"[143] or that "a scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[144] This more stringent standard protects the states' sovereign interests in maintaining their police powers free of federal interference.[145]

Federal preemption comes in two forms, express and implied. Express preemption is straightforward. Where Congress, or a federal agency, explicitly preempts state laws on a given subject, states are barred from adopting and enforcing their own regulations.[146] Yet Congress need not be so explicit for courts to find preemption. Preemption may be implied either "where the scheme of federal regulation is so persuasive as to make reasonable the inference that Congress left no room for the states to

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138 *See* Zasloff, *supra* note 25, at 1852 ("displacement of federal common law hardly implies the preemption of state common law."); Epstein, *supra* note 38, at 553 ("the presumption on preemption differs from the federal-federal to the federal-state context. On matters of federal-state regulation, the basic presumption is one against preemption, subject to some key exceptions.").

139 *See* Merrill, *supra* note 48 at 314.

140 *See* U.S. CONST. art. VI, cl. 2 (providing federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). Pursuant to the Supremacy Clause, "Congress has the power to preempt state law." Arizona v. United States, 567 U.S. 387, 399 (2012).

141 *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009) ("[T]he purpose of Congress is the ultimate touchstone.").

142 Medtronic, Inc., v. Lohr, 518 U.S. 470, 488 (1996) (plurality opinion) ([P]reemption is "a serious intrusion into state sovereignty").

143 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

144 Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm., 461 U.S. 190, 203-04 (1983).

145 *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts.").

146 *See Pacific Gas & Elec. Co.*, 461 U.S. at 220 ("It is well established that within Constitutional limits Congress may preempt state authority by so stating in express terms.").

supplement it,"[147] (so-called "field preemption") or where state and federal law conflict or compliance with state law would obstruct, if not preclude, compliance with federal law (so-called "conflict preemption").[148] In all such instances, Congressional intent is "the ultimate touchstone" of preemption analysis.[149]

Although courts may find federal preemption where Congress has not made its intent to preempt state law explicit, they are generally reluctant to do so.[150] Explicit statutory language will do the trick, but other sources of statutory meaning may require a heavier lift. Likewise, there is no question that federal law must trump when state and federal requirements directly conflict, but mere difference in policy or purpose is unlikely to demonstrate a legislative intent to preempt state lawmaking.

Preemption operates to prevent state regulatory activity, whether through state-level administrative regulations or the state's common law. The net effect of federal preemption is for there to be less regulation than there would have been otherwise.[151] Federal laws precluding state regulation of automobile design mean that manufacturers need only comply with one regulatory standard. Federal regulations in such cases serve as a regulatory "floor" and a regulatory "ceiling" at the same time. In other cases, preemption may serve to ensure that there is no regulation of a given type or governing particular subject matter, as where federal law precludes states from adopting particular rules, but the federal government does not adopt rules of its own.[152] Where implied preemption is found, this will typically

147 Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

148 *Id.*

149 Medtronic v. Lohr, 518 U.S. 470, 485 (1996); Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150, 162–63 (2016) (same); *see also* CSX Transp. v. Easterwood, 507 U.S. 658, 664 (1993) (explaining that courts should "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent").

150 *See, e.g.*, Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894 (2019) (holding the Atomic Energy Act does not preempt state laws prohibiting uranium mining).

151 *See* PAUL TESKE, REGULATION IN THE STATES 15 (2004) (noting federal preemption has often been "designed to facilitate greater total *de*regulation" (emphasis in original)). In some cases, the purpose of federal preemption is to replace one type of regulation with another. This still results in less regulation than if the federal regulation was adopted *in addition to* the state regulation. The effects of preemption across states may not be uniform, however. A federal statute that imposes a federal standard when only a handful of states have regulated will increase regulation in some jurisdictions at the same time that it reduces regulation by preempting preexisting rules elsewhere. For more on the effects of federal environmental regulation on the ability of states to pursue their own environmental regulatory policies, see Adler, *supra* note 80.

152 The most obvious example, albeit a case of constitutional rather than statutory preemption, occurs under the "dormant commerce clause." States are precluded from adopting measures that discriminate against out-of-state trade not because it is assumed that such regulations will be adopted by Congress. Rather, there is a constitutional presumption against the adoption of such rules by *any* level of government, though Congress does retain the authority to adopt laws limiting the flow of interstate commerce or even delegating authority to the states to adopt such measures themselves. This division of authority "creates

preclude any state or local regulation whatsoever.[153] Where Congress explicitly preempts state regulation, however, the scope of the preemption usually will be limited to the extent provided for in the statutory text.

Given that preemption generally operates to reduce aggregate regulatory burdens, it should be no surprise that federal preemption of state environmental regulatory standards is often sought by business interests seeking to establish regulatory uniformity, a "ceiling" on regulatory stringency, or both.[154] Federal preemption of state automotive emission regulations, for example, resulted from lobbying by U.S. automakers fearing the potential for different emissions standards to be adopted in different states—and believing that federal standards would be less stringent than those developed in the states.[155] This is not to say that there are not sometimes economic justifications for preempting variable state standards with a single federal standard, only to note that this pressure for federalization often comes from industry.[156]

The mere adoption of a federal regulatory standard that operates as a regulatory "floor" does not necessarily preempt state regulation as a legal matter (though it may well have that practical effect).[157] For example, a federal regulation imposing emission limitations on an industrial facility will not necessarily preempt a less stringent or differently structured state regulation governing emissions from the same facility. As a practical matter, regulated facilities are required to meet the more stringent standard, but the existence of two standards does not mean the two conflict. In most cases, meeting the more demanding requirement will satisfy the less stringent one

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obstacles to states' enacting laws that are more protective of the environment." RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 38 (2004). For more on the potential consequences of the Dormant Commerce Clause on state-level environmental regulation, and climate regulation in particular, see Brannon P. Denning, *Environmental Federalism and State Renewable Portfolio Standards*, 64 CASE. WEST. RES. L. REV. 1519 (2014).

153 *See* Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 258-59 (2000).

154 *Id.* at 242 ("By creating a ceiling, environmental laws may allow the private sector to operate within a predictable and uniform environment"). Similar arguments have been used to support federal preemption of state regulations and tort suits in other areas as well. *See, e.g.*, Caroline E. Mayer, *Rules Would Limit Lawsuits*, WASH. POST, Feb. 16, 2006 at D01 (preemption by Consumer Product Safety Commission); Gary Young, *FDA Strategy Would Preempt Tort Suits*, NAT'L L.J., Mar. 1, 2004 (preemption by food & Drug Administration).

155 *See* Elliott et al., *supra* note 88.

156 *See, e.g.*, ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (Michael S. Greve & Fred L. Smith, Jr. eds. 1992) (documenting examples of interest group rent-seeking in environmental policy); POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN (Terry L. Anderson, ed. 2000) (same).

157 For a more in-depth discussion of how regulatory floors may place downward pressure on state regulatory standards, see Adler, *supra* note 80, at 94–106.

as well.[158] If permits are required from both federal and state agencies for facility operation, then both permits are required even if compliance with one should make compliance with the other a foregone conclusion, unless the less stringent standards are explicitly or otherwise preempted by the federal regulation.[159] Conflict preemption only occurs if, for some reason, compliance with both permits is impossible, such as would occur if state law required the installation of a type of pollution control that federal law prohibited, or that could not be installed in a manner that would allow for compliance with federal law as well.

As noted above, most preemption in environmental law occurs with the regulation of products that are manufactured for sale in interstate commerce.[160] For example, section 209(b) of the Clean Air Act prohibits states from adopting "any standard relating to the control of emissions from new motor vehicles."[161] The Energy Policy Conservation Act preempts any state regulation of automotive fuel economy.[162] Other preemption provisions can be found in the Federal Insecticide, Fungicide, and Rodenticide Act,[163] and the Toxic Substances Control Act,[164] among other statutes.

As also noted, the structure of most federal pollution control laws is to establish a prescriptive federal floor, invite state participation in the administration and enforcement of federal standards, while also leaving room for states to adopt more stringent requirements where state policymakers conclude local conditions or preferences warrant.[165] This is particularly true

158 An exception to this will be if the standards are defined in terms that require the adoption of particular control technologies or methods, in which case compliance with one standard might well preclude and conflict with compliance with the other.

159 *See, e.g.*, 42 U.S.C. § 7416 (preempting state enforcement of emission standards less stringent than existing federal standards).

160 *See* Ann Carlson, *Federalism, Preemption and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 306 (2003) ("environmental regulation – in which both the states and the federal government play an active role – frequently raises preemption questions").

161 *See* 42 U.S.C. § 7543(a). There are exceptions to this rule. The EPA may waive preemption of emission standards adopted by California, subject to certain conditions. 42 U.S.C. § 7543(b). Where the EPA has approved a waiver for California, other states may adopt the California rule. In all cases, however, the other 49 states may not adopt a "third" standard. The Clean Air Act contains similar provisions governing standards for gasoline. 42 U.S.C. § 7545(c)(4).

162 *See* 49 U.S.C. § 32919(a). Unlike with emission standards, there is no conditional exemption for California. At the time of this writing there is also litigation concerning whether another provision of EPCA, 42 U.S.C. §6297, preempts local ordinances that ban new natural gas hookups. *See* Cal. Rest. Ass'n v. Berkeley, 2021 WL 2808975 (July 7, 2021).

163 *See* 7 U.S.C. § 136v(b). There has been a significant amount of litigation about the scope of preemption under this provision, in part because FIFRA also contains a savings clause at 7 U.S.C. § 136v(a). *See generally* Alexandra B. Klass, *Pesticides, Children's Health Policy, and Common Law Tort Claims*, 7 MINN. J. L. SCIENCE & TECH. 89 (2005).

164 *See* 15 U.S.C. § 2617.

165 *See supra* Part II.

of the CAA which, in important respects, is less prescriptive than the CWA.[166] These laws both contain broad (if not overly specific) savings clauses, and include no language presuming to dictate the form or nature of state regulatory measures. Just as the CWA and CAA leave room for states to adopt more stringent controls on air and water pollution through legislation and regulation, they also leave room for states to impose more stringent requirements on facilities through the state common law of both public and private nuisance.[167] In the absence of a preemptive legislation, instrument choice is also left to state policy makers.

The recent case of *Merrick v. Diageo Americas Supply, Inc.* is illustrative.[168] In *Merrick*, local landowners complained that ethanol emissions from a whiskey distillery caused the growth of "whiskey fungus" on their properties.[169] Although it was undisputed that the plant's emissions were within the limits set by relevant federal, state, and local regulations,[170] the U.S. Court of Appeals readily concluded that the Clean Air Act did not preclude the plaintiffs from pursuing nuisance claims against the plant, any more than the satisfaction of federal emission standards would preclude the state from adopting more stringent regulations. "State courts are arms of the 'State,' and the common law standards they adopt are 'requirement[s] respecting control or abatement of air pollution," the court explained, rejecting any claim that the CAA would preempt state common law nuisance suits while not preempting state regulations.[171] This conclusion was

166 The CWA prohibits all discharges of pollutants from point without a permit, which is often obtained from s state agency exercising delegated authority to administer the CWA. Under the CAA, by contrast, the baseline default is the opposite: Emissions are presumptively allowed unless subject to a relevant state or federal regulatory standard.

167 Some courts have held that common law nuisance actions are preempted by state environmental regulations as a matter of state law, but this presents a separate question from whether such actions are preempted by federal law. *See, e.g.*, Fricke v. Guntersville, 36 So. 2d 321 (Ala. 1948) ("there can be no abatable nuisance for doing in a proper manner what is authorized by law"); City of Birmingham v. City of Fairfield, 375 So.2d 438, 441 (Ala.1979) (same). In some cases, preemption is justified because the permitting process considers those factors that would cause a facility to be considered a nuisance. *See, e.g.*, Fey v. Nashville Gas & Heating Co., 16 Tenn.App. 234, 64 S.W.2d 61, 62 (1933). *See also* New England Legal Found. v. Costle, 666 F.2d 30, 33 (2d Cir.1981) ("Courts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government."); North Carolina, ex rel. Cooper v. Tenn. Valley Auth, 615 F. 3d 291, 309-10 (4th Cir. 2010) (concluding facilities permitted under state law cannot constitute nuisances within those states). Some states also have so-called "no more stringent" laws which bar the imposition of pollution controls more stringent than are required by federal law. Such laws may also preempt state law nuisance actions. *See* Morrison & Stockton, *supra* note 18, at 10286.

168 Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685 (6th Cir. 2015).

169 *See* Merrick v. Diageo America's Supply, Inc., 5 F. Supp. 3d 865, 867–68 (W.D. Ky. 2014).

170 *Id.* at 868.

171 *Merrick*, 805 F.3d at 690.

supported by both the CAA's text and its purpose.[172] It is also the approach most lower federal courts have taken.[173]

That the federal pollution control laws do not preempt *intrastate* nuisance claims does not necessarily mean that interstate pollution claims are not preempted. After all, prior to *Milwaukee II*, any such claims would have been brought under the federal common law, and now such federal common law claims are displaced.

The Supreme Court addressed this question shortly after *Milwaukee II* in *International Paper Co. v. Ouellette*, concluding that while federal common law claims for interstate water pollution are displaced under *Milwaukee II*, this did not leave downstream states without nuisance-based remedies.[174] Even though the Court had held previously (in *Milwaukee I*) that nuisance claims for interstate pollution arose under federal common law, and (in *Milwaukee II*) that the CWA displaced such federal common law, *Ouellette* held that state common law actions remained insofar as they were not preempted by the Act. Turning to the question of preemption, the Court recognized that state law claims based upon the law of the plaintiff-state were preempted, as conflicting with the CWA, but state law claims based upon the law of the source state were not.[175]

Recognizing that the CWA allowed states to impose more stringent standards on pollution sources within their jurisdiction, and that common law could be the source of such standards, the Court saw nothing in the act that would preclude downstream states from seeking to take advantage of whatever standards apply to sources of pollution in other states.[176] "Because the Act specifically allows source States to impose stricter standards," the *Ouellette* Court explained, "the imposition of source-state law does not disrupt the regulatory partnership established by the permit system."[177]

The principle underlying *Ouellette* is that states may not seek to extraterritorialize their environmental preferences through nuisance litigation, but they may seek protection from an upstream state's failure to

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172 *Id.* at 691 ("Allowing states to apply their common law to emissions advances the Act's stated purposed by empowering states to address and curtail air pollution at its source.").

173 *See, e.g.*, Bell v. Cheswick Generating Station, 734 F.3d 188 (3rd Cir. 2013) (CAA does not preempt class action nuisance claims for air pollution); Her Majesty v. City of Detroit, 874 F.2d 332, 342 (6th Cir. 1989) ("nothing in the [Clean Air] Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* state"). *See also* Freeman v. Grain Processing Corp., 848 N.W. 2d 58 (Iowa 2014) (rejecting Clean Air Act preemption claim); Morrison & Stockton, *supra* note 18.

174 *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 489 (1987).

175 *Id.* at 497 ("The CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act. The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State.").

176 *Id.*

177 *Id.* at 499.

enforce its own environmental standards to sources of interstate pollution.[178] This means that a state can adopt an environmental standard internally for the benefit of its own citizens without also committing to provide the same degree of protection to those in downstream states. Thus, insofar as federal environmental regulation fails to account adequately for the interests of downstream states, *Ouellette* preserves a limited means of protecting their interests, by preventing upstream states from acting opportunistically at the expense of those downstream.

As the CAA contains a savings clause that is quite similar to that contained in the Clean Water Act,[179] there is no reason the principle articulated in *Ouellette* should not apply equally in the air pollution context. If anything, the CWA is more prescriptive than the CAA, and the CAA's savings clause is, if anything, more expansive. There is also no statutory basis to think this principle would not also apply to climate change. Greenhouse gas emissions are subject to regulation under the CAA, but to no greater extent than other pollutant emissions for which nuisance actions are not preempted. There may be sound policy reasons to treat greenhouse gases differently, as discussed in the next section, but this is a determination that should be made by legislators, not judges. Congress has yet to enact legislation distinguishing greenhouse gas emissions for the purposes of federal regulation, so there is no basis for courts inventing or embracing such a distinction on their own.

Some have suggested that all interstate pollution claims should be preempted so as to prevent opportunistic behavior.[180] After all, states have every incentive to capture benefits for themselves and export costs onto other jurisdictions, and whichever state's law controls an interstate dispute may seek to revise its law accordingly. If a downstream state can sue an upstream neighbor under the downstream state's laws, the downstream state has an incentive to adopt more stringent requirements and export the costs of pollution control onto its upstream neighbor. Conversely, if the upstream state's law controls, there is an incentive to relax its standards, so as to capture the benefit of polluting activity, while exporting the costs downstream. This may be accomplished by adopting lax nuisance standards or, perhaps, by adopting a permit-based pollution control law that preempts state law nuisance claims.[181] A well-designed uniform federal rule can restrain such opportunistic behavior.

Even if one were to accept this assessment of the relevant incentives, it does not establish that the preemption of all interstate nuisance claims would be preferable to the *Ouellette* rule. Under complete preemption, downstream

178 For a thorough exploration of cross-boundary pollution concerns, see generally Merrill, *supra* note 91.

179 *Compare* 33 U.S.C. § 1365(e), with 42 U.S.C. § 7604(a)(1).

180 *See* Merrill, *supra* note 77 at 180-81.

181 *See, e.g.*, North Carolina *ex rel.* Cooper v. TVA., 615 F.3d 291, 309-10 (4th Cir. 2010) (concluding that Alabama and Tennessee law preclude nuisance suits against permitted facilities).

(and downwind) states would be left at the mercy of upstream (and upwind) jurisdictions and federal regulators. In practice, this has meant that the interests of downstream jurisdictions have been under-protected, and often ignored. Under the *Ouellette* rule, by contrast, the downstream jurisdiction has an added opportunity to protect its interests, even if only by limiting the ability of upstream jurisdictions to expose downstream jurisdictions to levels of pollution the upstream jurisdictions would not accept for themselves.[182] In short, the *Ouellette* rule increases the protection of downstream and downwind jurisdictions without magnifying the risk of opportunistic behavior by those same jurisdictions, as they cannot impose standards on upstream jurisdictions that are more constraining than the upstream jurisdictions would impose upon themselves for the benefit of their own residents.[183] Much like the intrastate nuisance actions that have not been preempted, nuisance actions for interstate pollution would reinforce the purpose of federal pollution control laws without exposing sources to the risk of potentially conflicting regulatory requirements.

V. CLIMATE CHANGE

Global climate change presents a unique and particularly difficult environmental challenge. It has been called a "super wicked problem," because it is the sort of public policy challenge that "defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution," that also becomes more difficult to address over time and lacks a ready governance framework through which to pursue policy solutions.[184] Because climate change presents distinct challenges, it may require distinct policy responses. One relevant question this raises is whether the distinct nature of the climate challenge justifies a departure from traditional legal doctrines, such as preemption. Another is whether Congress has enacted legislation that would justify courts taking a different approach.

Global climate change is anything but a local or regional problem. To the contrary, global climate change is just that – a *global* environmental

182 Note that there is also the potential for opportunism in the enforcement of standards, such as would occur if an upstream state enforced its own laws less stringently against in-state polluters that predominantly cause pollution in downstream jurisdictions. *See* Daniel L. Millimet, *Environmental Federalism: A Survey of the Empirical Literature*, 64 CASE WEST. RES. L. REV. 1669, 1710-12 (2014) (surveying empirical literature on state-level enforcement of environmental laws where interstate spillovers are implicated).

183 *See* Catskill Mts Chapter of Trout Unlimited v. EPA, 846 F.3d 492, 517 (2d Cir. 2017) (noting CWA does not preclude states from pursuing nuisance-based remedies, but that such remedies may be "less robust" than regulations could provide).

184 *See* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159–61 (2009) (explaining why climate change may be understood as a "super wicked" problem).

concern. As a consequence, the traditional arguments for allowing state and local governments a relatively free hand to protect their own backyards may not apply with equivalent force. Under principles of subsidiarity, the global nature of climate change would counsel greater centralization of policy decisions into national, if not international, hands, and *less* authority for state and local governments.

State or local jurisdictions wishing to combat global climate change are confronted with an archetypal "commons" problem.[185] The global climate is a vast global commons to which everyone contributes greenhouse gas emissions. Emissions anywhere on the globe contribute to the increase in atmospheric concentrations of greenhouse gases and the eventual warming of the atmosphere. Any state that reduces emissions within its jurisdiction will bear the costs of such reductions, but not reap equivalent benefits. Whatever benefits accrue from greenhouse gas emission controls accrue globally.[186] As a consequence, states have every incentive to "free ride" on the efforts of their neighbors, rather than suffer costs that will yield few internal benefits. Absent cooperation or the imposition of federal (or international) requirements, state and local efforts are unlikely to provide anything approaching the optimal level of greenhouse mitigation measures.[187]

The disincentive for states to take meaningful action to address climate change are even greater than in the typical commons context, however. No state, acting alone, is even capable of adopting emission controls capable of making a dent in global emissions, let alone global atmospheric concentrations, of greenhouse gases.[188] Even working together, states are not capable of reducing projected climate change and its anticipated effects to any meaningful degree. This may help explain why outside of California, most state-level climate change policies until relatively recently have been largely symbolic or structured so as to advantage in-state interests. Few imposed meaningful and enforceable emission targets in the short term,[189] though this has started to change as the need for climate action has increased.

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185 *See generally*, Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968) (describing the commons problem); *see also* Dana, *supra* note 25 (suggesting climate change should be understood as a commons problem).

186 *See* Wiener, *supra* note 24, at 1965 (2007) ("[L]ocal abatement actions pose local costs, yet deliver essentially no local climate benefits.").

187 *Id.* at 1962 ("[L]ocal action is not well suited to regulating mobile global conduct yielding a global externality.").

188 *Id.* at 1966 ("[N]o state could effectively control its own ambient level of carbon dioxide or other GHGs, because that ambient level is determined by the worldwide concentration of GHGs in the atmosphere."); Kirsten H. Engel & Barak Y. Orbach, *Micro-Motives and State and Local Climate Change Initiatives*, 2 HARV. L. & POL'Y REV. 119, 120 (2008) ("[R]eductions in greenhouse gas emissions at the…state level are generally too small to affect global concentrations.").

189 *See* J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1522 (2007) ("Few states have set clear emissions reduction targets, and fewer still have designed policies to achieve them.").

In the case of a nationally or globally dispersed pollutant, state regulation will often be less efficient than available alternatives. Localized measures are also likely to be more costly, and less cost-effective, than national measures. A local cap-and-trade system, for example, will cover a more limited set of sources, and fewer savings opportunities, than a national system with a broader base.[190] Subjecting businesses to a variety of state standards may also be less efficient than a standardized federal regulatory regime.[191]

States are more likely to adopt meaningful emission reductions if they can externalize the costs of such measures on other jurisdictions. Such regional rent-seeking has been well-documented in environmental law,[192] and almost certainly occurs in the climate context as well.[193] In the context of public nuisance suits, it is reasonable to fear that state officials who file such suits get the political benefits of appearing to take action against climate change, without having to bear the costs of imposing economic burdens on in-state firms.

Allowing individual states to act as environmental "laboratories" can produce useful information about the relative cost-effectiveness of various mitigation measures.[194] If states are free to experiment with competing policy designs, other states and the federal government can learn from state policy

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190 Wiener, *supra* note 24, at 1967 (noting a national emissions control regime "forfeits the greater cost savings obtainable in a larger allowance trading market encompassing more countries.").

191 DeShazo & Freeman, *supra* note 189, at 1531 ("Firms operating in multiple states may well find that the states are adopting different approaches to achieve the same objective, making compliance confusing and potentially costly."); Robert B. McKinstry, Jr. & Thomas D. Peterson, *The Implications of the New "Old" Federalism in Climate-Change Legislation: How to Function in a Global Marketplace when States Take the Lead*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 61, 89 (2007) ("A multiplicity of contrasting state programs can pose particular difficulties for the regulated community, which operates in markets throughout the United States and the world."); Wiener, *supra* note 24, at 1974.

192 *See, e.g.*, BRUCE ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL, DIRTY AIR (1981) (chronicling regional rent-seeking another special interest influence on Clean Air Act Amendments); B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?*, 23 ECON. INQUIRY 551 (1985).

193 *See* Bruce Yandle & Stuart Buck, *Bootleggers, Baptists, and the Global Warming Battle*, 26 HARV. ENVTL. L. REV. 177, 207 (2002)

194 Some scholars have questioned the value of such experimentation. *See, e.g.*, Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636 (2017); Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, (January 29, 2022). GWU Law School Public Law Research Paper No. 2021-46, Available at SSRN: https://ssrn.com/abstract=3902092 or http://dx.doi.org/10.2139/ssrn.3902092. Interestingly enough, these critiques do not engage much with the empirical literature on state experimentation. *See, e.g.*, TESKE, *supra* note 151. For a review of the literature in the context of environmental policy, see Millimet, *supra* note 182; *see also* Bruce G. Carruthers & Naomi R. Lamoreaux, *Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards*, 54 J. ECON. LIT. 52 (2016); Wallace E. Oates, *A Reconsideration of Environmental Federalism*, *in* RECENT ADVANCES IN ENVIRONMENTAL ECONOMICS 1, 11-17 (John A. List & Aart de Zeeuw eds., 2002) (summarizing empirical literature).

successes.[195] Several federal environmental statutes are modeled, at least in part, on state programs.[196] Even where such experiments fail, useful information will result.[197] Experience in other contexts has shown that interjurisdictional competition can encourage policy innovation as policymakers seek to meet the economic, environmental and other demands of their constituents.[198] In this way, state experimentation in the climate context could improve federal climate policies.

Some advocates of more aggressive climate policy measures note that the adoption of state environmental measures has often prompted the enactment of federal policies. If a state initiative is particularly successful, it may encourage federal regulation. Even if state measures are not so successful, they may still create incentives for federal action, even if only to preempt state rules with a uniform federal standard.[199] As has occurred in the past, state greenhouse gas regulations could prompt industry support for national standards that would preempt variable state controls.[200] Indeed, the prospect of nuisance suits themselves may prompt support for federal legislative action.

The above suggests that there are serious arguments for centering climate change policy at the federal level, but these are policy arguments, not legal ones. While federal climate legislation that constrains state-level regulation and common law litigation may be desirable, no such legislation has been adopted. To the contrary, Congress has studiously avoided adopting meaningful federal climate legislation.[201] The only reason federal greenhouse gas regulation exists is because the Supreme Court concluded the CAA's language was capacious enough to reach such emissions[202]—a conclusion the

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195 *See* Ann E. Carlson, *Regulatory Capacity and State Environmental Leadership: California's Climate Policy*, 24 FORDHAM ENVTL L. REV. 63 (2013).

196 *See* Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN ST. ENVTL. L. REV. 15, 16 (2004) (citing examples of federal environmental laws modeled on state predecessors).

197 *See* TESKE, *supra* note 151, at 240 (noting that even when state experiments "fail, they provide important information for other states and for national policy."); McKinstry & Peterson, *supra* note 191, at 88 ("An innovation in a particular state that fails will have less of an impact on the national economy than a federal experiment that fails. Innovative state programs can provide examples of what to do or what not to do.").

198 *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POL. ECON. 416 (1956).

199 *See* Elliott et al., *supra* note 88.

200 *See* DeShazo & Freeman, *supra* note 189, at 1533–38. California's adoption of emission standards for new motor vehicles in the 1960s prompted the U.S. auto industry to support federal emission standards that would preempt state rules. *See* Elliott, et al., *supra* note 88.

201 *See* Arnold W. Reitze Jr., *Federal Control of Carbon Dioxide Emissions: What Are the Options?*, 36 B.C. ENVTL. AFF. L. REV. 1, 1 (2009), ("From 1999 to [2007], more than 200 bills were introduced in Congress to regulate [greenhouse gases], but none were enacted.").

202 Massachusetts v. EPA, 549 U.S. 497, 532 (2007) (holding greenhouse gases constitute air pollutants subject to regulation under the Clean Air Act).

Court has seemed to back away from in subsequent cases.[203] Given the standards of federal preemption, this is a thin reed upon which to find that state common law climate nuisance cases cannot proceed in court.

VI. PREEMPTION OF CLIMATE NUISANCE CLAIMS

Whether or not nuisance suits represent the most appropriate or effective approach to climate change, the lack of meaningful federal action and prospect of substantial climate change-induced costs prompted a resurgence of climate change litigation by local governments. Because suits under federal common law were foreclosed by the Supreme Court's *AEP* decision,[204] these suits rely upon state-law causes of action, including public and private nuisance. And unlike the claims rejected in *AEP*, these suits generally seek compensatory damages for current and expected costs of climate change and climate adaptation measures.[205]

Much of the litigation in these cases to date has focused on procedural and jurisdictional wrangling, focused in particular on whether these cases belong in state or federal court. The defendant fossil fuel companies would like to see these cases dismissed on federal preemption or other grounds,[206] and have sought to remove cases to federal court where they expect such arguments to receive a more sympathetic hearing. One such case, *BP P.L.C. v. Mayor and City of Baltimore*, reached the Supreme Court, but did not produce an opinion that touched on any of the substantive claims.[207]

Unlike most of the municipal plaintiffs filing state law-based nuisance claims, New York City filed its case in federal court. Without the need for wrangling over removal, the district court proceeded to consider (and grant)

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203 *See, e.g.*, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014) (limiting the EPA's authority to regulate greenhouse gas emissions under the Prevention of Significant Deterioration provisions of the Clean Air Act); West Virginia v. EPA, 577 U.S. 1126, 1126 (2016) (granting a stay of the EPA's Clean Power Plan regulating greenhouse gas emissions from power plants).

204 American Elec. Power Co., Inc. v. Connecticut (AEP), 564 U.S. 410, 424 (2011).

205 In the wake of the *AEP* decision, the U.S. Court of Appeals for the Ninth Circuit concluded that federal common law claims for money damages due to the interstate nuisance of climate change were also displaced by the Clean Air Act. *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012) ("[T]he Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief.").

206 Other grounds for dismissal pressed by defendants have included lack of personal jurisdiction and the political question doctrine, among others. *See, e.g.*, City of N.Y. v. BP P.L.C., 325 F. Supp. 3d 466, 470 n. 1 (S.D.N.Y. 2018) (noting defendants moved to dismiss due to lack of personal jurisdiction and political question doctrine); City of Oakland v. BP P.L.C., No. C 17-06011 WHA, 2018 U.S. Dist. LEXIS 126258, at *8 (N.D. Cal. July 27, 2018) ("BP, ConocoPhillips, Exxon, and Royal Dutch Shell moved to dismiss for lack of personal jurisdiction.").

207 *See* BP PLC v. Mayor and City Council of Baltimore, 141 S.Ct. 1532, 1543 (2021) (concluding appellate court has jurisdiction under 28 U.S.C. §1447(d) to consider all grounds for removal raised by defendant).

the defendants' motions to dismiss on the grounds that global warming tort claims may only be pursued under federal law, and that any such claims under federal law are displaced by the Clean Air Act.[208] Allowing New York City to bring state law claims would be "illogical," Judge John Keenan concluded, given the inherently "interstate nature" of the claims.[209] Further, to the extent the City's claims sought to hold defendants liable for foreign emissions, allowing them to proceed would potentially implicate questions of foreign policy beyond the ken of federal courts.[210]

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed, citing the "nature of the harm and the existence of a complex web of federal and international law" regulating greenhouse gas emissions.[211] Although, at the time of the case, only a fraction of domestic greenhouse gas emissions were subject to federal regulation, and no international agreement imposed any binding limits on such emissions at all, the court concluded that allowing New York City's claims to proceed would threaten replacing the "carefully crafted frameworks" of federal and international climate regulation with "a patchwork of claims under state nuisance law."[212] Accordingly, the Second Circuit ordered the claims dismissed.[213]

City of New York v. Chevron was the first federal appellate decision to directly consider the viability of state law-based nuisance claims. In *City of Oakland v. BP PLC*, the U.S. Court of Appeals for the Ninth Circuit considered whether similar state-law claims should be removed to federal court on the grounds that they arise under federal law for purposes of 28 U.S.C. §1331.[214] In the process of considering this question, the Ninth Circuit considered and rejected the defendant fossil fuel companies' arguments that Oakland's climate tort claims should be considered to raise substantial federal questions[215] or were completely preempted by the Clean Air Act.[216] On this basis, the Ninth Circuit concluded that the district court had been wrong to remove and dismiss the cities' claims.[217] More recently, the U.S. Courts of Appeals for the Tenth Circuit, Fourth Circuit, and First Circuit

208 BP P.L.C., 325 F. Supp. 3d at 466.
209 *Id.* at 474.
210 *Id.* at 475.
211 *City of New York II*, 993 F.3d at 85.
212 *Id.* at 86.
213 *Id*.
214 City of Oakland v. BP PLC, 969 F.3d 895 (2020).
215 *Id*. at 907.
216 *Id.* at 907-08. It should be noted that "Complete preemption" as a basis for removal to federal court presents a slightly different question from whether federal law preempts an applicable state law or cause of action. Complete preemption is jurisdictional, as it precludes any state-law claim in the regulated area, and thus serves as a basis for removal. *See* Rhode Island v. Shell Oil Products Co., 2022 WL 1617206, *2 n.4 (1st Cir. 2022) (providing a "cheat sheet" on complete preemption). Under current law, courts should be "reluctant" to find complete preemption. *See* Metro. Life Ins. v. Taylor, 481 UY.S. 58, 65 (1987).
217 *See also* County of San Mateo v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022) (rejecting multiple arguments in favor of removal, including complete preemption).

reached the same conclusion.[218] While these decisions focused on complete preemption, which would have justified removal to federal court, and not on regular preemption as a defense, the analyses adopted by these courts conflict with that of the Second Circuit.[219] Among other things, they rejected the defendants' claim that there was any conflict between the state law claims and meaningful federal interests.[220]

The Second Circuit did not have to consider the question of removal, however, and could focus directly on the question of whether federal law allows a municipality to pursue nuisance claims against fossil fuel producers for the marketing and sale of fossil fuels and the climate change damages that result.[221] From the outset, the Second Circuit's opinion dismissing NYC's claims makes clear that the court did not consider climate change-related claims to be fit for federal judicial resolution.[222] In reaching its ultimate conclusion, the court stretched existing doctrine and distorted the broader legal context by, among other things, misconstruing the relationship between the federal and state governments in environmental law, exaggerating the extent to which climate change is subject to regulation under "carefully drafted frameworks" adopted through the "political process"[223] and largely ignoring the lessons of *Milwaukee II* and *Ouellette*.

Although NYC brought its claims under state law, the Second Circuit's analysis of the claims begins with federal common law, and a strained reading of *Milwaukee II.* After noting that there is no general federal common law post *Erie*, the Court pointed out that "*specialized* federal common law" continued to exist in which it continues to "pre-empt and replace" state law where distinct federal interests or legislative instruction so require.[224] Yet such federal common law only exists in "few and restricted" areas in which federal courts are required to answer inherently federal questions that are not controlled by existing federal statutes.[225] In this fashion, the court noted, "federal common law functions much like legal duct tape – it is a 'necessary expedient' that permits federal courts to address issued of national concern until Congress provides a more permanent solution."[226]

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218 *See supra* note 9 and cases cited therein.

219 As the U.S. Court of Appeals for the First Circuit noted, the Second Circuit had "considered the fossil fuel producers' 'preemption defense on its own terms, not under the heightened standard unique to the removability inquiry.'" Rhode Island v. Shell Oil Products Co., 2022 WL 1617206 *5 (1st Cir. 2022).

220 *See id.* at *4 ("even assuming (without granting) that these concerns constitute 'uniquely federal interests,' we — like the Fourth Circuit in *BP P.L.C.* — find that the Energy Companies (despite being the burden-bearer on the removal issue) never adequately describe how 'any significant conflict exists between' these 'federal interests' and the state-law claims." (cleaned up)).

221 *City of New York II*, 993 F.3d at 93-94.

222 *Id.* at 85-86.

223 *Id.* at 86.

224 *City of New York II*, 993 F.3d at 89.

225 *Id.* at 93-94.

226 *Id.* at 89-90.

Claims based on climate change, the Court concluded, necessarily fall into the category of matters subject to federal common law. This is due to the cross-boundary nature of the alleged harms and the resulting "overriding . . . need for a uniform rule of decision," as well as the "basic interests of federalism."[227] In other words, while disclaiming federal common law, the court relied upon federal common law to conclude state-law-based claims were preempted, so as to set the stage for a displacement analysis. In the process, it ignored the lesson of *Milwaukee II* that federal common law concerning interstate pollution no longer exists because it has been displaced,[228] and omitted consideration of *Ouelette*'s implicit conclusion that a uniform *federal* rule is unnecessary for the resolution of pollution problems that implicate more than one state.

To buttress its conclusion that New York City's claims implicated federal interests, the Court referenced irrelevant considerations—such as the fact that multiple states filed amicus briefs in the case[229]—and claimed that allowing litigation over fossil fuel production would "upset[] the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other."[230] This is a fine list of policy considerations that might inform legislative policy on climate change, but such a policy has never been enacted—at least not by Congress—so there is no "careful balance" to be preserved. Contrary to the Second Circuit's claim, Congress has never enacted or ratified any "carefully crafted frameworks" to govern greenhouse gas emissions.[231] Even assuming the Supreme Court was correct in *Massachusetts v. EPA* to conclude that the greenhouse gases are air pollutants subject to regulation under the Clean Air Act,[232] none of the relevant statutory provisions were written with greenhouse gases in mind, let alone were crafted to strike a "careful balance" between economic and environmental concerns.[233] Yet under the Second Circuit's logic, Congress's inaction—specifically its failure to enact climate change legislation of any sort—somehow represents the sort of "careful balance" between economic

227 *Id.* at 91-82 (*quoting* Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972)).

228 *Cf.* Mayor and City Council of Baltimore v. BP P.L.C., 31 F.4th 178, 204 (4th Cir. 2022) ("We cannot conclude that any federal common law controls Baltimore's state-law claims because federal common law in this area ceases to exist due to statutory displacement[.]").

229 Among other things, if states (or any other litigants) could alter a court's consideration of substantive questions merely by filing amicus curiae briefs, this would create significant incentives and opportunities for strategic behavior to manipulate case outcomes.

230 *City of New York II*, 993 F.3d at93.

231 *Id*. at 86.

232 For a critique of this holding, see Adler, *supra* note 27.

233 *See* Richard Lazarus, *Environmental Law Without Congress*, 30 J. LAND USE & ENVTL. L. 15, 30 (2014) ("Climate change is perhaps the quintessential example of a new environmental problem that the Clean Air Act did not contemplate.").

and environmental interests that federal courts are obliged to respect by turning away state-law-based tort claims.

While noting that "the necessary conflict need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the [s]tates have traditionally occupied," then the Court acknowledged that "conflict there must be."[234] The "mere existence of a federal interest," without more, "does not intrinsically call for a corresponding federal rule."[235] Yet as noted by the First and Fourth Circuits, the Court identified no meaningful conflict between federal and state law at all (let alone with the degree of specificity necessary for complete preemption to justify removal).[236]

Having concluded that NYC's claims could only proceed under federal common law, the Second Circuit easily reached the conclusion that any such claims are displaced by the Clean Air Act. As the Second Circuit saw it, this case was simply *AEP* round two, despite NYC's attempt to plead state law claims, and because (as the Second Circuit framed the case) the Clean Air Act had not authorized NYC's suit, it was preempted.

The Second Circuit's analysis is difficult to square with *Ouellette*. At issue in *Ouellette* was an interstate conflict over water pollution, precisely the sort of conflict the Supreme Court had held was the proper subject of federal common law in *Milwaukee I*. Under the logic of the Second Circuit's opinion, the proper approach to the *Ouellette* claims would have been to first, note that the claim was of the sort that should properly arise under federal common law, and then second, hold that any such claim is displaced under *Milwaukee II*. Yet that is not at all what the Supreme Court did in *Oullette*. Instead, in recognizing the federal common law was displaced, the Court allowed the downstream plaintiffs' claims to proceed, albeit under the law of the source state.[237] As it happened, this did not result in the application of a less stringent standard, and the defendant polluter, International Paper, agreed to a substantial settlement after trial.[238]

Under *Ouellette,* the displacement of federal common law does *not* mean that claims of an interstate or cross-boundary character are to be dismissed as beyond the province of the courts. Rather, displacement means that federal common law is unavailable, either to resolve or preempt the downstream or downwind plaintiffs' claims. Accordingly, state law claims may proceed, so long as they rely upon the law of the source state (to which the defendants have presumably acceded).

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234 *City of New York II*, 993 F.3d at 90 (alteration in original) (citation omitted) (quotation marks omitted).

235 *Id.*

236 Rhode Island v. Shell Oil Prods. Co., 2022 WL 1617206, *4–5 (1st Cir. 2022); Mayor and City Council of Baltimore v. BP P.L.C., 31 F. 4th 178, 204 (4th Cir. 2022).

237 *Rhode Island*, 2022 WL at *4-5; *Mayor of Baltimore*, 31 F. 4th at 204.

238 *See* Percival, *supra* note 94, at 768 (summarizing the proceedings on remand and eventual settlement).

While the Second Circuit was convinced there needed to be a uniform federal law to guide resolution of the interstate dispute, *Ouellette* reached the opposite conclusion. Due to displacement, there is no "neutral" federal rule to be had beyond that provided by any applicable federal statute, so states must instead press their claims under the source state's law (law, it should be repeated, which has not been preempted by the relevant federal statutes). Little in the Second Circuit's opinion is responsive to this point, other than a brief suggestion that a bilateral water pollution dispute of the sort at issue in *Ouellete* was "more bounded," and thus less threatening to what the Second Circuit imagined was a detailed and carefully balanced federal regulatory regime. The dispute in *Oulette* may well have been "more bounded" in that it concerned a dispute concerning pollution within a discrete water body, and not the global atmosphere. There is also little question that the transaction costs involved in bilateral pollution disputes are lower than when more entities are involved.[239] Yet there is nothing in the applicable Supreme Court precedent to make this fact remotely relevant to the question of preemption. As a doctrinal matter, this basis for distinguishing *Oullette* is invented from whole cloth. Further, as noted above, however carefully balanced one believes the Clean Air Act may be in its approach to conventional air pollutants, there is nothing in the Act representing any sort of conscious legislative balance of the interests implicated by greenhouse gas emissions and climate change. Those CAA provisions applicable to greenhouse gases were not drafted with an eye toward the control of globally dispersed pollutants, and they have never been held to preempt state law.

The Second Circuit compounded the error by suggesting that whether NYC could press state law claims was dependent upon what powers federal law "granted" or "permits" states to exercise in environmental law.[240] This characterization betrays a fundamental misunderstanding of the underlying cooperative federalism framework. Under federal environmental laws, states are not "granted" power or discretion to control pollution. Such power is not the federal government's to grant. Such power preexisted the adoption of federal pollution control statutes and, on accord of the broad savings clauses, is generally preserved, whether such power is exercised through state statutes, regulations, or common law. Likewise, the Clean Air Act does not "permit" or "authorize[]"[241] states to adopt their own, more stringent air

239 *See* Ronald. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (discussing how rights holders may bargain to resolve pollution-related disputes); Christopher H. Schroeder, *Lost in the Translation: What Environmental Regulation Does that Tort Law Cannot Duplicate*, 41 WASH. L.J. 583, 599 (2002) (noting how such solutions become more difficult as the number of parties increases); *see also* Jonathan H. Adler, *Is the Common Law the Free Market Solution to Pollution?* CRITICAL REVIEW, vol. 24, no. 1 (2012).

240 *City of New York II*, 993 F.3d at 99.

241 *Id.* at 100.

pollution controls, as the Second Circuit claims.[242] It rather leaves such preexisting police power authority undisturbed. Yet by inverting the structure of federal environmental law—suggesting that state actions must be authorized or permitted by the federal government—the Second Circuit effectively flipped the presumption, enabling it to dispatch NYC's claims as if they were subject to displacement, instead of conducting a more serious and subtle preemption analysis. In the process, the Court embraced a degree of phantom federal hegemony that devalues the federalism concerns protected by the Supreme Court in *Ouellette*.

More broadly, the Second Circuit's language represents a view of state authority that is wholly at odds with the Supreme Court's federalism jurisprudence of the past thirty years. States are not units of the federal government, limited to adopting those environmental measures the federal government delegates to them. States do not need—and have never needed—federal permission to enact and enforce their own environmental laws or to enforce state common law limitations on polluting activity. As discussed earlier, states have been engaged in such efforts far longer than has the federal government.[243]

Interestingly enough, the Second Circuit had previously rejected preemption defenses against litigation New York City and other jurisdictions filed against producers of methyl tertiary butyl ether (MTBE).[244] As in the climate litigation, the municipal plaintiffs maintained that MTBE's producers had produced, distributed and sold a product with knowledge of the environmental harms it could cause.[245] And as in the climate cases, the defendants sought to argue that such state law claims were preempted by federal law. It is not clear why claims against producers of fossil fuels should have been treated differently. While there may be sound policy reasons for treating climate change differently from other sorts of pollution problems, that is a choice left to the political branches.

Some have argued that allowing states to impose liability on emitters or producers of fossil fuels would frustrate "Congress's design," as it would induce defendants to alter their behavior beyond that which is required by federal law.[246] It is certainly true that the imposition of liability for emissions might have the same effect as the imposition of more stringent state-level

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242 Other supporters of federal preemption of state-law-based claims have also adopted this erroneous formulation. *See* Damien M. Schiff & Paul Beard II, *Preemption at Midfield: Why the Current Generation of State-Law-Based Climate Change Litigation Violates the Supremacy Clause*, 49 ENVTL. L. 853, 881 (2019) ("Congress can *authorize* rather than preclude the states to regulate, as it has done on a cooperative basis to address a hose of environmental issues.") (emphasis added).

243 *See supra* Part II.

244 *See* In re M.T.B.E. Products Liability Litigation, 725 F.3d 65 (2nd Cir. 2013).

245 *Id.* at 82.

246 *See* Schiff & Beard, *supra* note 242, at 878 ("Imposition of liability for directly emitting or contributing to the emission of greenhouse gases otherwise regulated by the Act would, contrary to Congress's design, require the state-law-based climate defendants to conform their activities (or be punished for not having conformed their activities) to multiple and varying greenhouse gas standards.").

emission standards on defendants, but this is insufficient to make the point. The CAA does not preempt the imposition of more stringent state air pollution controls. To the contrary, consistent with most federal environmental laws, the CAA allows states to impose more stringent environmental controls on federally regulated facilities, as well as to regulate emissions not subject to CAA limitations. Under the "cooperative federalism" model, state authority to use the police power to control pollution is left undisturbed, as this was Congress's express intent. As discussed earlier, if a given facility is subject to both federal and state standards, the more stringent standard controls (save in those rare instance in which compliance with one standard would affirmatively preclude compliance with the other). Failure to enact climate-specific legislation is hardly evidence of any legislative "design." Failure to enact legislation is just that: A failure to enact legislation.[247]

Some might argue that it should be easier to preempt state tort law than state-level administrative regulation, but such a principle cannot be derived from existing doctrine, the history of federal preemption, or the history of environmental protection. Given that states are allowed to adopt more stringent pollution controls on federally regulated facilities, the state's choice of regulatory instrument should make little difference. Whether a state wants to adopt technology mandates through administrative regulation, pollution fees or taxes through legislation, or some form of liability to be adjudicated in court should have no bearing on the preemption question. Nothing in the Clean Air Act indicates Congress sought to prevent states from complementing administrative regulation with common law or other litigation. As a policy matter, some may believe that the preemption inquiry should track that for displacement.[248] But this is not the doctrine, nor has Congress legislated such a choice.

As a legal matter, the lack of preemption of state-law suits concerning conventional air pollutants should settle the question. As noted above, the relevant provisions of the Clean Air Act were not written to address greenhouse gases. Instead, they were written to address conventional air pollutants. Given the centrality of legislative intent in the preemption analysis, if none of these provisions preempts preempt state-law-based nuisance claims concerning the sorts of pollution for which these provisions were crafted, it is hard to see how they could preempt other types of pollution which were scarcely on the legislature's radar.

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247 *Cf.* American Bus Ass'n v. Slater, 231 F.3d 1, 8 (D.C. Cir. 2000) (Sentelle, J., concurring) ("Congress's failure to grant an agency a given power is not an ambiguity as to whether that power has, in fact, been granted. On the contrary, and as this Court persistently has recognized, a statutory silence on the granting of a power is a denial of that power to the agency.").

248 *See* Richard Epstein, *The Private Law Connections to Public Nuisance Law: Some Realism About Today's Intellectual Nominalism* 17 J.L. ECON. & POL'Y 66 (2022).

Broader doctrinal currents, including the canon disfavoring statutory interpretations the intrude upon state prerogatives[249] as well as the Supreme Court's apparent embrace of a "major questions" doctrine, under which Congress is presumed not to have remained silent when resolving significant policy questions reinforce this conclusion.[250] Preempting longstanding state authority to protect state citizens from air and water pollution is not something one would expect Congress to do without being explicit about it.[251] Such preemption would be the proverbial "elephant" that is not to be hidden in a mousehole.[252] Congress undoubtedly has the power to preempt state laws concerning such questions, but it is a power that should actually be exercised before such preemption can be found.

The outcome of the Second Circuit's decision may be desirable as a policy matter. A carefully constructed and balanced federal regulatory regime may well be preferable to a bevy of state-law-based suits brought by various jurisdictions around the country.[253] Yet under existing preemption doctrine, not to mention the structure of the Constitution, this choice is to be made by the legislature, not the courts.[254] The Second Circuit's blithe characterizations notwithstanding, that is not a choice Congress has yet made in the context of climate change.

CONCLUSION

Under existing doctrine, federal common law claims alleging climate-related harms are displaced, but state law claims are not preempted. Suits alleging that various activities cause or contribute to climate nuisances

249 *See* Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (requiring a "clear statement" of Congressional intent to preempt state authority); *see also* United States v Bass, 404 US 336, 349 (1971) (stating that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").

250 *See* Natl Fed. Indep. Bus. v. Dept. of Labor, 142 S.Ct. 661, 665 (2022) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."); Ala. Assn. of Realtors v. Dept. of Health and Human Servs., 141 S.Ct. 2485, 2489 (2021) (same).

251 *See* Kalen, *supra* note 59, at 1604 ("Because health and the environment are areas where states traditionally exercised either common law or statutory jurisdiction to protect their citizens, judges are hesitant to upset that balance.").

252 *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). *See also* MCI Telecom. Corp. v. AT&T., 512 U.S. 218, 231 (1994); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000); Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612, 1626–27 (2018).

253 *See supra* note 25 and sources cited therein.

254 *See* Virginia Uranium, Inc. v. Warren, 139 S.Ct. 1894, 1901 (2019) ("Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to a 'constitutional text or a federal statute' that does the displacing or conflicts with state law.").

should rise and fall on other questions and, as noted at the outset, there are many concerns that can be raised about such claims under state law. It is also possible that the prospect of ongoing climate litigation, if not the threat of climate change itself, will eventually prompt the enactment of federal climate legislation that preempts such suits in the course of enacting a federal climate policy. But in the meantime, courts should adhere to the choices Congress has made, and not find creative ways to displace or preempt state-law-based nuisance claims that Congress has not yet seen fit to prevent.

Much of the Second Circuit's analysis seems to be driven by the well-founded intuition that interstate pollution conflicts, like interstate water disputes, should be governed by a federal standard, such as could be provided by federal common law. After all, only a federal rule is capable of providing a uniform and neutral rule for the resolution of such interstate disputes. This was the approach once embraced by the Supreme Court. Since *Milwaukee II*, however, the option of using federal common law for the provision of such a rule has been taken off of the table.

With that most appropriate judicial means of addressing interstate common law claims is unavailable, litigants are forced to rely upon state law, with all of the attendant limitations and potential biases. This may be a problem, but the answer is not for courts to declare unilaterally that such remedies are preempted. The law of preemption is not the source of the anomaly, however, nor has Congress sought to address it. Congress *could* eventually choose to enact comprehensive measures for the control of greenhouse gas emissions, and preempt all state law claims. It could also, if it so chose, reopen federal courts to claims based on federal common law. To date, Congress has done neither, and courts should respect that choice.

This is not to say there are not steps courts could take to facilitate more effective means of accounting for transboundary environmental harms. The Court's rush to displace federal common law nuisance claims in *Milwaukee II* was not dictated by legislative enactment nor grounded in any principled concern for the inherent unworkability of federal common law. The Court had adjudicated dozens of interstate environmental claims going back over a century and did so without much difficulty.[255] There is also no problem with allowing continued nuisance litigation against the backdrop of environmental regulation. This has been the norm under state law the whole time. Sometimes state environmental laws preempt common law claims for nuisance or trespass, and sometimes they do not.[256] In such cases it is a question of what sorts of environmental measures the state legislature enacted and whether such measures leave room for the common law. There is no reason the same approach could not be adopted at the federal level.

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255 *See* Cheren, *supra* note 94.

256 And sometimes such preemption creates takings concerns. *See, e.g.*, Bormann v. Bd. of Sup'rs In and For Kossuth County, 584 N.W. 2d 309 (Iowa 1998) (state law providing immunity from nuisance suits constituted an uncompensated taking of property).

The only barrier to such an approach was the Court's distaste for federal common law. As the Court has at times acknowledged, in the absence of applicable legislation, interstate disputes properly arise under federal common law, and not the law of either state. This is what the Court recognized in the first interstate pollution cases. Since *Erie*, however, the Court has resisted relying on federal common law, even where that means disarming states from the ability to protect themselves from upstream or upwind harms.[257] This may be driven by an understandable impulse. Yet as some commentators have noted, some resort to federal common law is inevitable.[258] (Indeed, the Second Circuit relied upon the very federal common law it claims is displaced to conclude New York's state law claims were preempted.) Unless and until Congress has actively and explicitly displaced federal common law, it is questionable whether the Court should do so on its own accord. Relaxing its antipathy for federal common law would further allow the Court to adopt parallel standards for preemption and displacement of interstate nuisance actions, and apply a consistent principle to interjurisdictional harms. Climate change would be as good a context as any in which to take this step.

Unless and until the Supreme Court or Congress approves such an approach, and precludes further state-law-based litigation, there is no warrant for lower courts to dismiss cases on the grounds that they must be displaced or preempted by federal environmental statutes that have never been understood to displace or preempt properly pled state common law claims.[259] Whatever the policy merits of clearing the field for federal regulation, neither current doctrine nor existing federal statutes support such an approach. While there may be other bases upon which to challenge the viability of state common law claims, statutory preemption or displacement are not among them.[260] Under current doctrine, there is nothing in the law of preemption or displacement to stop such claims from proceeding.

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257 As Richard Epstein notes "it is hard to see why any comprehensive statute that is passed to control pollution should leave states more vulnerable than they were before the passage of the statute." Epstein, *supra* note 38, at 570. Yet that is the precise effect of the Court's displacement jurisprudence.

258 It should be noted that reliance upon federal common law need not entail judges "making" as opposed to "finding" law. *See* Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1 (2015); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019).

259 It is of course perfectly appropriate for courts to dismiss claims that are not properly grounded in relevant state law, or that face other jurisdictional defects. So, for example, it may have been perfectly appropriate for a federal district court in California to dismiss climate-based claims for lack of personal jurisdiction. *See* City of Oakland v. BP P.L.C., 2018 WL 3609055 (N.D. Cal. 2018).

260 There are various doctrines, other than preemption, that seek to prevent states from extra territorializing their policy preferences. *See generally*, Cassandra Burke Robertson, *The United States Experience*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW (Austen Parrish and Cedric Ryngaert, eds. 2022) (on file with author) ("[I]t is no surprise that the scope of state power remains unclear. At one end of the spectrum, one can reliably predict that state regulation clearly at odds with federal policy will be struck down. It is much less clear, however, whether states are empowered to engage in extraterritorial regulation when such action seeks merely to supplement or complement federal policy.").

Should policymakers conclude state-law-based tort suits are a poor way to make climate policy, they remain free to enact some alternative. Indeed, the proliferation of state-common-law suits may well encourage such a step.[261] But unless and until they do, claims like those brought by New York City and other municipalities should not be dismissed on preemption grounds.

261 *See* Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605, 1649 (2007) ("Realistically, the greatest function of litigation may be to prod legislative action.").