

PREEMPTION AT MIDFIELD: WHY THE CURRENT GENERATION OF STATE-LAW-BASED CLIMATE CHANGE LITIGATION VIOLATES THE SUPREMACY CLAUSE

BY

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In American Electric Power Co. v. Connecticut, the United States Supreme Court ruled that the federal Clean Air Act displaces any otherwise available federal common law cause of action seeking remedies for harms derived from coal-fired power plants' contribution to climate change. The Court expressly declined, however, to address whether the Clean Air Act preempts analogous state-law-based causes of action. Hoping that it does not, several state and local governments and environmental organizations have over the last few years filed state-law-based actions throughout the country, seeking abatement against the nation's largest energy producers.

This latest round of climate litigation is preempted. In International Paper Co. v. Ouellette, the Supreme Court ruled that the Clean Water Act preempts state-law-based causes of action against alleged water polluters, unless those actions are founded on the law of the state whence the water pollution originates. Based on the textual and structural similarities between the Clean Water Act and Clean Air Act, the lower courts have consistently interpreted Ouellette to dictate the preemptive scope of both statutes.

Applying the rule of Ouellette to the current generation of state-law-based climate litigation yields a clear answer of preemption. To be sure, consumers' use of energy company defendants' legal products results in greenhouse gas emissions in the states in which the defendants have been sued. But that quantum of emissions is insufficient to establish a causal link between the companies' activities and any harm derivable from climate change. In fact, the climate litigation plaintiffs can make out a plausible cause of action to support their state-law-based tort theories only if they rely upon worldwide emissions attributable to the defendants' production and

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marketing of their products. But such reliance effectively projects one jurisdiction's air pollution law onto others, precisely what Ouellette says is forbidden.

This application of Ouellette's preemption rule makes good policy sense. Courts are poorly equipped to address the technical and scientific debates surrounding climate science and the pinning of liability for contributions to global warming. Moreover, the formulation of any governmental response to climate change entails significant trade-offs and non-legal judgment. This policy development is best left to the politically responsible branches of government. Deemphasizing litigation as a tool to obtain remedies to climate change especially makes sense given that the judiciary is institutionally limited to a case-by-case mode of operation, which is ill-suited to producing the comprehensive solution that climate activists demand.

I.	INTRODUCTION	854
II.	HISTORIC AND CURRENT EFFORTS TO ADDRESS CLIMATE CHANGE THROUGH LITIGATION.....	857
III.	PREEMPTION PRINCIPLES BAR STATE-LAW-BASED CLIMATE SUITS	864
	A. <i>Overview of Supremacy Clause Jurisprudence</i>	864
	B. <i>Ascertaining the Preemptive Effect of the Clean Air Act through Clean Water Act Jurisprudence—International Paper Co. v. Ouellette</i>	866
	C. <i>The Lower Courts' Application of Ouellette to the Clean Air Act</i>	871
	D. <i>Under the Rule of Ouellette, the State-Law-Based Climate Suits Are Preempted</i>	874
IV.	PREEMPTION OF STATE-LAW-BASED CLIMATE SUITS CONSTITUTES SOUND POLICY	880
V.	CONCLUSION	883

I. INTRODUCTION

For many, global warming is the preeminent environmental issue of our time.¹ The debate over climate change—in particular, its causes and the efforts that should be undertaken to combat its effects—has roiled

¹ For a good overview from a right-of-center perspective, see Jonathan H. Adler, *A Conservative's Approach to Combating Climate Change*, ATLANTIC (May 30, 2012), <https://perma.cc/N4VR-5EH2>. For an interesting and atypical left-of-center perspective, see Ted Nordhaus & Alex Trembath, *Is Climate Change like Diabetes or an Asteroid*, BREAKTHROUGH INST., <https://perma.cc/435Z-4AS5> (last visited Nov. 2, 2019).

the political branches of government for decades.² Yet not much has been accomplished by Congress or administrative agencies.³ For that reason, climate change advocates⁴ have over the last decade or so shifted their efforts to the judiciary to obtain what they believe is the needed response to climate change.

In this Article, we argue that the Constitution's Supremacy Clause⁵ precludes this latest effort. Specifically, we contend that the dozen or so lawsuits that have been filed over the last few years in courts throughout the country by various state and local governments and environmental organizations against the nation's top fossil fuel producers and marketers, aimed at remedying the alleged localized harms of climate change, are preempted by the Clean Air Act.⁶

Our analysis begins with a review of green-advocacy efforts over the last twenty years to address climate change through litigation. These "first generation" lawsuits focused, with limited success, on the federal Clean Air Act and federal common law theories.⁷ This period ended with the United States Supreme Court's ruling in *American Electric Power Co. v. Connecticut*⁸ (*American Electric Power*) that the Clean Air Act displaces at least some federal common law causes of action directed against greenhouse gas emissions.⁹ After that decision, climate change advocates looked to state law. The ensuing "second generation" of lawsuits has focused on *state-law-based* claims against energy companies. The recent explosion of such suits in California exemplifies

² A fair point to label as the beginning of the political controversy is the United States Senate's unanimous rejection of the Kyoto protocol in 1997. See *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 509 (2007).

³ Perhaps the most ambitious effort to date was the Obama Administration's Clean Power Plan, which the Trump Administration repealed. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019).

⁴ Although we recognize that the term is somewhat ungainly, we think that it accurately portrays those groups that 1) believe that addressing climate change should be a top priority of society, and 2) government should take the leading role in responding to the threats of climate change. In our view, however, position 2 does not follow necessarily from position 1, even if position 1 is a justified belief. See Jonathan H. Adler, *Taking Property Rights Seriously: The Case of Climate Change*, SOC. PHIL. & POL'Y, Summer 2009, at 296, 296 ("The existence of an anthropogenic contribution to global warming does not, in itself, recommend (let alone mandate) a set policy response.").

⁵ U.S. CONST. art. VI, cl. 2.

⁶ Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012). For an excellent overview of the various merits-based obstacles to such suits, see Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135 (2011).

⁷ See, e.g., *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011); *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010); *Massachusetts v. U.S. Envtl. Prot. Agency*, 549 U.S. 497 (2007).

⁸ 564 U.S. 410, 424 (2011).

⁹ *Id.*

this updated litigation strategy directed toward responding to climate change.¹⁰

Following an overview of this ongoing litigation, our Article proceeds to a discussion of preemption principles, then addresses the United States Supreme Court's application of those principles to ascertain the preemptive scope of the Federal Water Pollution Control Act,¹¹ more commonly known as the Clean Water Act. Following that, the Article explains why the Supreme Court's rule governing the preemptive scope of the Clean Water Act should apply to the Clean Air Act (an issue that the High Court has yet to address), and in turn shows why, given that rule, the state-law-based climate cases are preempted. Although our Article acknowledges that the Clean Air Act may not preempt *all* forms of state-law-based climate change claims,¹² it concludes that any such non-preempted causes of action would fail to afford any meaningful remedy for the existing state-law-based plaintiffs. The Article ends with a discussion of several reasons as to why preemption of the state-law-based climate suits is not just the right legal outcome, but is good policy too.¹³

¹⁰ A list of all "common law" suits can be found at Sabin Center for Climate Change Law, *U.S. Climate Change Litigation: Common Law Claims*, COLUMBIA LAW SCH., <https://perma.cc/H3DP-9G78> (last visited Nov. 2, 2019). The site is maintained by the Sabin Center for Climate Change Law, with the collaboration of Arnold & Porter Kaye Scholer L.L.P. The database of cases is regularly updated to reflect the latest litigation events.

¹¹ 33 U.S.C. §§ 1251–1388 (2012).

¹² The United States Supreme Court has not spoken to whether the Clean Air Act preempts all state-law-based climate change claims. As discussed in greater detail in the Article, the Court in *American Electric Power* held that the Act displaces all federal common law climate change claims aimed at emissions subject to the Act, because determinations about what amount of greenhouse gas emissions is unreasonable, and what reductions should be made, are issues that Congress has committed to the Executive Branch. *Am. Elec. Power Co.*, 564 U.S. at 428–29; *cf. Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) (ruling that state-law-based greenhouse gas claims are preempted). Although the Court did not resolve whether the Act also preempts all state-law-based climate change claims, the reasoning in *American Electric Power* arguably applies with equal force to such claims. Just like their federal common law analogues, the state-law-based claims implicate quintessentially federal concerns that the Act undeniably addresses and therefore should be barred. *See id.* at 865. But whatever the merit of that particular argument, this Article focuses on a different, independent reason why most such state-law-based claims are preempted: pollution abatement actions based on the law of any jurisdiction other than the source state are preempted.

¹³ As we discuss in the Article, the principal defense of the energy companies to the state-law-based climate change lawsuits has been that they are mislabeled—and unmeritorious—federal common law claims. That defense has allowed the defendants both to remove the state cases to federal court as well as to argue for their dismissal on the merits. *See City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1028–29 (N.D. Cal. 2018). This Article offers an analysis for how these cases should be resolved on the merits *if* they are not properly characterized as federal common law claims.

II. HISTORIC AND CURRENT EFFORTS TO ADDRESS CLIMATE CHANGE THROUGH LITIGATION

Since the start of the climate change movement some four decades ago,¹⁴ those concerned with climate change have sought national and global solutions from the political branches of government. But those efforts have produced only frustration. Given the enormous economic and political costs entailed by substantial reduction in greenhouse gas emissions, at least the *federal* government has been slow to respond.¹⁵ Consequently, non-federal government entities, nonprofits, and individuals concerned about climate change have looked to the courts for a “solution”—first, by getting courts to require federal regulation of greenhouse gas emissions, then by suing to stop or punish companies considered to be major emitters.¹⁶

The seminal climate-change decision is *Massachusetts v. U.S. Environmental Protection Agency*.¹⁷ In that case, a group of private organizations filed a rulemaking petition asking the United States Environmental Protection Agency (EPA) to regulate greenhouse gas emissions from new motor vehicles as “air pollutants” under Section 202 of the Clean Air Act.¹⁸ EPA denied the petition.¹⁹ Joined by several intervening states (including Massachusetts) and municipalities, petitioners sought review of the EPA’s order in the U.S. Court of Appeals for the D.C. Circuit.²⁰ A split panel denied the petition, holding that even if the EPA had the statutory authority to regulate greenhouse gas emissions from new motor vehicles, EPA properly declined to exercise that authority.²¹ The United States Supreme Court thereafter granted a petition for writ of certiorari.²²

¹⁴ Given the extent to which the terms “climate change” and “global warming” are used interchangeably in the relevant literature and case law, we employ the same interchangeable usage.

¹⁵ See, e.g., *Regulating Green House Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354, 44,355 (July 30, 2008) (codified at 40 C.F.R. pt. 1) (“[I]t has become clear that if EPA were to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act, then regulation of smaller stationary sources that also emit [greenhouse gases]—such as apartment buildings, large homes, schools, and hospitals—could also be triggered. One point is clear: The potential regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.”).

¹⁶ James Flynn, *Climate of Confusion: Climate Change Litigation in the Wake of American Electric Power v. Connecticut*, 29 GA. ST. U. L. REV. 823, 827–28 (2013) (“Tired of waiting for federal action, individual states, advocacy groups, and private parties sought new channels to combat anthropogenic climate change.”).

¹⁷ 549 U.S. 497 (2007).

¹⁸ *Id.* at 510.

¹⁹ *Id.* at 511.

²⁰ *Id.* at 514.

²¹ *Id.*

²² *Id.* at 506.

In a 5–4 decision, the Court ruled in favor of the petitioners.²³ The Court first held that, given their unique status and interests as sovereign entities, the state petitioners had standing to challenge EPA’s decision.²⁴ Next, the Court held that “greenhouse gases fit well within the Clean Air Act’s capacious definition of ‘air pollutant’” and, as a consequence, “EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.”²⁵ The Court noted that if, in response to the rulemaking petition, “EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions of the deleterious pollutant from new motor vehicles.”²⁶ Importantly, “EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”²⁷

The decision in *Massachusetts v. EPA* led to a significant change in the federal regulatory landscape. In December, 2009, the Obama Administration’s EPA responded to the ruling by determining that greenhouse gas emissions endanger the public health and welfare of current and future generations.²⁸ On the basis of that finding, EPA and the Department of Transportation issued joint rules regulating mobile-source emissions.²⁹ Although *Massachusetts v. EPA* delivered an important victory to those searching for a regulatory response to climate change at the federal level, they could not have predicted that the decision would be used in a later Supreme Court case to limit their ability to bring another kind of climate-change claim—one brought against greenhouse-gas emitters on a theory of federal common law nuisance (discussed below).

As *Massachusetts* was being litigated, climate change litigants also set their sights on greenhouse-gas-emitting private companies. They alleged novel federal and state common law nuisance theories either to enjoin industry emissions or to make energy companies pay damages for alleged harms caused by the global warming associated with their emissions.³⁰ To date, and as exemplified by key cases discussed below, all such claims have failed for a variety of reasons.

²³ *Id.* at 535.

²⁴ *Id.* at 520, 526.

²⁵ *Id.* at 532.

²⁶ *Id.* at 533.

²⁷ *Id.*

²⁸ Endangerment and Cause or Contribution Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009) (codified at 40 C.F.R. pt. 1).

²⁹ See, e.g., Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,324 (May 7, 2010); Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 75 Fed. Reg. 74,152, 74,152 (Nov. 30, 2010).

³⁰ *Am. Elec. Power Co.*, 564 U.S. 410, 410 (2010).

In *California v. General Motors Corp.*³¹ the State of California sought damages against a number of automakers for, among other reasons, contributing to the alleged public nuisance of global warming.³² The Restatement (Second) of Torts defines a “public nuisance” as an “unreasonable interference with a right common to the general public.”³³ To succeed, a public nuisance claimant generally must prove that a defendant’s conduct or activity unreasonably interfered with the use or enjoyment of a public right and thereby caused the general public substantial and widespread harm.³⁴

The district court in *General Motors* dismissed California’s claims on the ground that they were not justiciable under the political question doctrine.³⁵ Adjudicating such claims would require a court to “make[] an initial policy determination” about the reasonableness of defendants’ emissions in light of the alleged harms, and would entangle the judiciary in matters of “interstate commerce and foreign policy” (given that climate change is a phenomenon that knows no borders).³⁶ Because it dismissed the case as non-justiciable, the court did not reach the issue of whether California’s federal and state common law nuisance claims were otherwise viable.³⁷

Just a few years later, the United States Supreme Court provided guidance. In *American Electric Power*,³⁸ a coalition of states, the City of New York, and private land trusts sued a number of large CO₂ emitters (private power companies and the federal Tennessee Valley Authority) on claims of federal and state common law public nuisance.³⁹ The plaintiffs sought abatement of the alleged nuisance—specifically, “a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually.”⁴⁰ The plaintiffs did not seek damages.

³¹ No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

³² *Id.* at *1.

³³ RESTATEMENT (SECOND) OF TORTS § 821(B)(1) (AM. LAW INST. 1977).

³⁴ See *Missouri v. Illinois*, 200 U.S. 496, 518, 521 (1906).

³⁵ *Gen. Motors Corp.*, 2007 WL 2726871, at *13; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (representing the origin of the political question doctrine); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (discussing the six circumstances in which an issue might raise a political question—namely, 1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department”; 2) “a lack of judicially discoverable and manageable standards for resolving it”; 3) “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”; 4) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government”; 5) “an unusual need for unquestioning adherence to a political decision already made”; or 6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question”).

³⁶ *Gen. Motors Corp.*, 2007 WL 2726871, at *14.

³⁷ *Id.* at *16.

³⁸ 564 U.S. 410 (2011).

³⁹ *Id.* at 415.

⁴⁰ *Id.*

The Court concluded that the plaintiffs had no claim under federal common law. The Court held that “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 powerplants.”⁴¹ The linchpin of the Court’s holding was its decision in *Massachusetts*, which, as explained above, held that carbon-dioxide emissions can be regulated under the Clean Air Act.⁴² As a consequence, the Court in *American Electric Power* concluded that “the Act ‘speaks directly’ to emissions of carbon dioxide from the defendants’ plants,” which satisfies the test for displacement.⁴³

The Court rejected the plaintiffs’ argument that the “federal common law is not displaced until EPA actually exercises its regulatory authority, i.e., until it sets standards governing emissions from the defendants’ plants.”⁴⁴ The relevant question for displacement is “whether the field has been occupied, not whether it has been occupied in a particular manner.”⁴⁵ Ultimately, “[w]hen Congress addresses a question previously governed by a decision [that] rested on federal common law . . . the need for such an unusual exercise of law-making by federal courts disappears.”⁴⁶ Further, the Court noted, EPA was best suited to serve as the primary regulator of greenhouse gas emissions.⁴⁷

The plaintiffs also sought relief under state law.⁴⁸ The Court observed that, because the Clean Air Act displaces federal common law, the viability of plaintiffs’ *state* common law nuisance claim depended on the Act’s *preemptive* effect.⁴⁹ But the Court declined to resolve the question, given that the parties had not addressed it in their briefs.⁵⁰

Although *American Electric Power* addressed federal claims for equitable relief, greenhouse-gas plaintiffs fared no better in seeking monetary relief. In *Native Village of Kivalina v. ExxonMobil Corp.*⁵¹ (*Kivalina*), the Ninth Circuit Court of Appeals invoked *American Electric Power* to affirm the dismissal of a federal common law nuisance claim for *damages*.⁵² The case was brought by local Alaskan public

⁴¹ *Id.* at 424. With Justice Sotomayor not taking part in the case, the Court was equally divided on the question whether the respondents had standing to sue. *Id.* at 413, 420. Four Justices concluded that at least some of the respondents (namely, the state parties) had standing under *Massachusetts*. *Id.* at 420. As a consequence, the Court affirmed the Second Circuit’s exercise of jurisdiction. *Id.*

⁴² *Id.* at 424.

⁴³ *Id.* at 411, 424 (“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.”) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

⁴⁴ *Id.* at 425–26.

⁴⁵ *Id.* at 426 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 324 (1981)).

⁴⁶ *Id.* at 423 (quoting *City of Milwaukee v. Illinois*, 451 U.S. at 314).

⁴⁷ *Id.* at 428–29.

⁴⁸ *Id.* at 429.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 696 F.3d 849 (9th Cir. 2012).

⁵² *Id.* at 853, 855, 857.

entities alleging that the greenhouse gas emissions of a number of energy companies resulted in global warming, and that these emissions in turn caused erosion in and around the entities' jurisdictions.⁵³ The plaintiffs attempted to distinguish *American Electric Power* on the ground that it dealt only with claims for *abatement*, not damages.⁵⁴ The Ninth Circuit disagreed, holding that "the Supreme Court has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement."⁵⁵

Finally, in 2012, a federal district court took up the question of whether, after *American Electric Power*, *state* common law nuisance claims are preempted by the Clean Air Act. In *Comer v. Murphy Oil USA, Inc.*,⁵⁶ property owners sued oil companies for greenhouse gas emissions which, they contended, helped cause Hurricane Katrina.⁵⁷ The plaintiffs advanced several theories of recovery, among them federal and state common law nuisance.⁵⁸

The district court nevertheless dismissed the federal and state common law nuisance claims, based on preemption.⁵⁹ Consistent with the Ninth Circuit's decision in *Kivalina*, the *Comer* court determined that, under *American Electric Power*, the Clean Air Act displaces *all* federal common law nuisance claims—not just federal common law nuisance claims for injunctive relief, as plaintiffs had argued.⁶⁰ Moreover, the court held that *American Electric Power*'s rationale also reaches *state* common law nuisance claims, which are preempted by the Clean Air Act.⁶¹ As the court explained, whether a plaintiff brings a federal or state common law claim, and whether a plaintiff seeks equitable relief or damages, the gravamen of the complaint is the same: plaintiff is asking the court "to make similar determinations regarding the reasonableness of the defendants' emissions," which is a task, according to *American Electric Power*, that the Clean Air Act clearly assigns to EPA.⁶²

Since *Comer*, there has been a wave of climate change litigation based on common law public nuisance theories. In 2017, a number of California cities and counties filed state common law public nuisance claims, in state court, against major fossil fuel companies.⁶³ The municipal plaintiffs seek massive abatement funds to pay for infrastructure they say is, and will be, necessary to adapt to climate-

⁵³ *Id.* at 853–54.

⁵⁴ *Id.* at 857.

⁵⁵ *Id.* at 857.

⁵⁶ 839 F. Supp. 2d 849 (S.D. Miss. 2012).

⁵⁷ *Id.* at 852–53.

⁵⁸ *Id.* at 854.

⁵⁹ *Id.* at 865.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Sabin Center for Climate Change Law, *supra* note 10.

change-related injuries to private and public property within their jurisdictions.⁶⁴

One set of lawsuits, filed by the City of San Francisco and the City of Oakland, is *City of Oakland v. BP P.L.C.*⁶⁵ The defendants removed the cases to the federal district court for the Northern District of California, and that court denied the plaintiffs' motion to remand.⁶⁶ The court held that, although the claims were all framed as state-law-based, they were still governed by federal common law.⁶⁷ In some limited areas, the court explained, a federal rule of decision is necessary to protect "uniquely federal" interests⁶⁸—including, for example, when "the interstate or international nature of the controversy makes it inappropriate for state law to control."⁶⁹ Given the global nature and scale of the plaintiffs' claims, they implicated uniquely federal interests.⁷⁰

Shortly after the denial of the motion to remand, the *City of Oakland* district court granted the defendants' motion to dismiss but, unlike the district court in *Comer*, did not rely on *American Electric Power*.⁷¹ To be sure, the defendants did argue that the Clean Air Act displaced the nuisance claims under *American Electric Power* and *Kivalina*.⁷² But the plaintiffs countered that, in contrast to earlier transboundary pollution cases like *American Electric Power* and *Kivalina*, their nuisance claims targeted the *sellers* of a product whose combustion by third parties in and outside the U.S. resulted in greenhouse gas emissions—not the direct *dischargers* of those emissions.⁷³ That distinction was enough for the court to conclude that *American Electric Power* and *Kivalina* did not require preemption by the

⁶⁴ See, e.g., Complaint for Public Nuisance at 34, *California v. BP P.L.C.*, RG17875889 (Alameda Cty. Super. Ct., Sept. 19, 2017).

⁶⁵ 325 F. Supp. 3d 1017 (N.D. Cal. 2018).

⁶⁶ Order Denying Motion to Remand, *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018).

⁶⁷ *Id.* at *5.

⁶⁸ *Id.*; see *Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) ("[T]he Court has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law.' These instances are few and restricted, and fall into essentially two categories: those in which a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law.") (internal citations omitted).

⁶⁹ *Tex. Indus.*, 451 U.S. at 641.

⁷⁰ *City of Oakland v. BP P.L.C.*, 2018 WL 1064293, at *2. The United States, by amicus brief filed in the appeal from the decision, takes no position on the propriety of removal jurisdiction for the current generation of state-law-based climate change claims, except to disavow the theory that harm to waters regulated under the Clean Water Act would justify such jurisdiction. Brief of the United States as Amicus Curiae in Support of Appellees and Affirmance at 9, *City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir. May 17, 2019) (No. 97).

⁷¹ *City of Oakland*, 325 F. Supp. 3d 1017, 1019, 1028 (N.D. Cal. 2018).

⁷² *Id.* at 1024.

⁷³ *Id.*

Clean Air Act.⁷⁴ As the court put it, “because plaintiffs’ nuisance claims centered on defendants’ placement of fossil fuels into the flow of international commerce, and because foreign emissions are out of the EPA and Clean Air Act’s reach, the Clean Air Act did not necessarily displace plaintiffs’ federal common law claims.”⁷⁵

Although the court found no displacement, it nevertheless concluded that the claims, which the court considered to be “breathtaking,” were “foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems.”⁷⁶ Not gainsaying the seriousness of the plaintiffs’ allegations concerning climate change, the court remained firm in its conviction that “[t]he problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case.”⁷⁷

Interestingly, another set of lawsuits filed by other California local governments reached a rather different outcome. In *County of San Mateo v. Chevron Corp.*,⁷⁸ the defendants removed the plaintiffs’ claims to federal district court, also for the Northern District of California.⁷⁹ In contrast to the judge assigned to the Oakland and San Francisco cases, the judge in *County of San Mateo* granted the plaintiffs’ motion to remand.⁸⁰ In the court’s view, *American Electric Power* and *Kivalina* stand for the proposition that *all* federal common law nuisance claims alleging harm from greenhouse gas emissions are displaced by the Clean Air Act—*regardless of the particular sources of emissions*.⁸¹ The court concluded: “Because federal common law does not govern the plaintiffs’ claims, it also does not preclude them from asserting the state law claims in these lawsuits. Simply put, these cases should not have been removed to federal court on the basis of federal common law that no longer exists.”⁸² In reaching that result, the court did not address whether the Clean Air Act preempts state common law public nuisance claims.

On the other side of the country, the City of New York filed a state-law-based climate change action in the Southern District of New York against the usual suspects of energy companies. In *City of New York v. BP P.L.C.*,⁸³ New York alleged state-law public nuisance, private

⁷⁴ *Id.*

⁷⁵ *Id.*; cf. Michael Burger et al., *Legal Pathways to Reducing Greenhouse Gas Emissions Under Section 115 of the Clean Air Act*, 28 GEO. ENVTL. L. REV. 359, 361 (2016) (discussing how the Clean Air Act authorizes EPA to regulate domestically so as to combat international air pollution).

⁷⁶ *City of Oakland*, 325 F. Supp. 3d at 1022, 1024.

⁷⁷ *Id.* at 1029.

⁷⁸ 294 F. Supp. 3d 934 (N.D. Cal. 2018).

⁷⁹ *Id.*

⁸⁰ *Id.* at 937.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 325 F. Supp. 3d 466 (S.D.N.Y. 2018).

nuisance, and trespass claims.⁸⁴ The city sought damages and equitable relief for injuries sustained from rising sea levels allegedly caused by greenhouse gas emissions from fuels sold by those companies.⁸⁵

Following the path of *City of Oakland*, the court granted the defendants' motion to dismiss.⁸⁶ First, the court held that New York's nuisance and trespass claims were governed by federal common law.⁸⁷ Second, the court held that, "[t]o the extent that the City brings nuisance and trespass claims against Defendants for domestic greenhouse gas emissions, the Clean Air Act displaces such federal common law claims" under *American Electric Power* and *Kivalina*.⁸⁸ Finally, the court held that, "to the extent that the City seeks to hold Defendants liable for damages stemming from foreign greenhouse gas emissions, the City's claims are barred by the presumption against extraterritoriality and the need for judicial caution in the face of 'serious foreign policy consequences.'"⁸⁹

As the preceding discussion reveals, the record for maintaining state common law nuisance claims, as a means of holding private companies liable for greenhouse gas emissions, is poor. No climate change litigant has yet prevailed on the merits of such a claim.⁹⁰ The balance of the Article argues that, based on the precedents and important public policy considerations, state common law nuisance claims are preempted and should *not* be entertained.

III. PREEMPTION PRINCIPLES BAR STATE-LAW-BASED CLIMATE SUITS

A. Overview of Supremacy Clause Jurisprudence

The Supremacy Clause of the United States Constitution provides that the Constitution, treaties, and federal laws "shall be the supreme Law of the Land," which shall bind "the Judges in every State . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁹¹ As Professor Nelson argued in his highly regarded article on preemption, the clause establishes three closely related rules.⁹² First, federal law is as much a part of a state's law as the state's

⁸⁴ *Id.* at 470.

⁸⁵ *Id.*

⁸⁶ *Id.* at 468. Because the lawsuit was initiated in federal court on diversity jurisdiction, the removal jurisdiction question raised in *City of Oakland* and *County of San Mateo* was not presented.

⁸⁷ *Id.* at 471.

⁸⁸ *Id.* at 472–73.

⁸⁹ *Id.* at 475 (quoting *Jesner v. Arab Bank, P.L.C.*, 584 U.S. 1, 27 (2018)). As of this writing, *City of Oakland* and *County of San Mateo* are pending before the Ninth Circuit Court of Appeals, and *City of New York* is pending before the Second Circuit Court of Appeals.

⁹⁰ *City of Oakland*, 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018).

⁹¹ U.S. CONST. art. VI, cl. 2.

⁹² Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

own enactments.⁹³ Second, federal law takes precedence over state law regardless of the order of enactment of federal and state statutes.⁹⁴ And third, federal law universally supersedes any contrary state law.⁹⁵ Our analysis in this Article is principally concerned with the third rule—namely, when federal law overrides state law.

To implement that third aspect of the Supremacy Clause, the Supreme Court has developed an elaborate (and not particularly clear)⁹⁶ taxonomy of preemption, based upon preemptive intent and effect.⁹⁷ The overarching division is between “express” preemption, when a federal law expressly overrides state law,⁹⁸ and “implied” preemption.⁹⁹ The latter is subdivided into “field” preemption, when Congress occupies an entire area of law such that no state law is permissible,¹⁰⁰ and “conflict” preemption, when state law is overridden if it conflicts with federal law.¹⁰¹ Conflict preemption is in turn subdivided into “impossibility” preemption, when a state law renders physically impossible the observance of a federal mandate or prohibition,¹⁰² and “obstacle” preemption, when a state law imposes an intolerable burden on the achievement of federal policy.¹⁰³

⁹³ *Id.* at 246–49.

⁹⁴ *Id.* at 250–54.

⁹⁵ *Id.* at 254–60.

⁹⁶ “Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle.” *Id.* at 232. Even the High Court has acknowledged that its “categories of preemption are not ‘rigidly distinct.’” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)).

⁹⁷ *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (“Accordingly, ‘[t]he purpose of Congress is the ultimate touchstone’ of pre-emption analysis.”) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

⁹⁸ See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663–64 (1993) (“It is petitioner’s contention that the Secretary’s speed and grade crossing regulations ‘cove[r] the subject matter’ of, and therefore pre-empt, the state law on which respondent relies.”).

⁹⁹ See *Altria Group, Inc. v. Good*, 555 U.S. 70, 76–77 (2008) (“Congress may indicate pre-emptive intent through a statute’s . . . structure and purpose.”). Dividing preemption into “express” and “implied” categories can, however, create confusion, because it incorrectly implies that the types of preemption typically categorized under “implied preemption”—field and conflict preemption—cannot be expressly effected by Congress. Nelson, *supra* note 92, at 262–64.

¹⁰⁰ *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015). Proof of field preemption is found in either a federal framework of regulation so extensive that no room for state supplementation is left, or in a federal interest so substantial as to preclude state involvement therein. *Arizona v. United States*, 567 U.S. 387, 399 (2012). There is also “complete preemption,” a type of field preemption that converts a state-law claim into a (removable) federal one. *Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009). It is this type of preemption for which the defendants in the state-law-based climate litigation have argued.

¹⁰¹ *Hillman v. Maretta*, 569 U.S. 483, 490 (2013).

¹⁰² *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013). The Supreme Court has conceded, however, that field preemption can also be conceived of as a type of conflict preemption. *English*, 496 U.S. 72, 79 n.5 (1990).

¹⁰³ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992). Obstacle preemption thereby seems to require judges to inquire into a statute’s purposes, Nelson, *supra* note 92,

Obstacle preemption applies “where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹⁰⁴ That occurs when “state law . . . interferes with the *methods* by which the federal statute was designed to reach [its] goal.”¹⁰⁵ Significantly, “[o]bstacle preemption can apply not only to positive enactments of state law but also to state tort claims alleging violation of a common law duty.”¹⁰⁶

B. Ascertaining the Preemptive Effect of the Clean Air Act through Clean Water Act Jurisprudence—International Paper Co. v. Ouellette

As a question of legislative intent,¹⁰⁷ the preemption analysis of the Clean Air Act begins with the statute’s text.¹⁰⁸ That text contains only one express preemption provision,¹⁰⁹ which generally prohibits the states from adopting emission standards for new mobile emission sources (principally, motor vehicles).¹¹⁰ Thus, to the extent that the state-law-based climate suits depend on emissions from motor vehicles

at 279–81, generally a tricky endeavor fraught with danger, *see* Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582, 607 (2011) (“Implied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives’; such an endeavor ‘would undercut the principle that it is Congress rather than the courts that preempts state law.’”) (Kennedy, J., concurring in part and concurring in judgment) (quoting *Gade*, 505 U.S. at 111). *See generally* Damien M. Schiff, *Purposivism and the “Reasonable Legislator”: A Review Essay of Justice Stephen Breyer’s Active Liberty*, 33 WM. MITCHELL L. REV. 1081, 1091–92 (2007) (explaining how a purposivist approach leads to “interpretive creep,” i.e., “the process of interpreting particular provisions of a statute in light of the statute’s supposed purpose such that, after a series of interpretations, the statute as a whole, as judicially interpreted, falls decidedly more to one side of the policy balance than would have been possible given the ideological make-up of the enacting legislature.”). *But see* John David Ohlendorf, *Textualism and Obstacle Preemption*, 47 GA. L. REV. 369, 442 (2013) (“[O]bstacle preemption is justifiable as a form of negative inference from the statutory text.”).

¹⁰⁴ *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁰⁵ *Gade*, 505 U.S. at 103 (emphasis added) (citations omitted).

¹⁰⁶ *Columbia Venture, L.L.C. v. Dewberry & Davis, L.L.C.*, 604 F.3d 824, 830 (4th Cir. 2010) (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 866 (2000)).

¹⁰⁷ *See, e.g.*, *Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 487 (11th Cir. 2015) (“Preemption fundamentally is a question of congressional intent,” which requires statutory interpretation.”) (quoting *English*, 496 U.S. 72, 78–79 (1990)).

¹⁰⁸ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (“[A]nalysis of the scope of the preemption statute must begin with its text . . .”).

¹⁰⁹ *See* Gabrielle Cuskelly, *Factors to Consider in Applying a Presumption Against Preemption to State Environmental Regulations*, 39 ECOLOGY L.Q. 283, 297 (2012) (“Although the states are given a prominent role in the [Clean Air Act], the statute also contains an express preemption clause [precluding] states from regulating emission standards from new motor vehicles . . .”).

¹¹⁰ 42 U.S.C. § 7543(a) (2012); *see* *Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1174 (E.D. Cal. 2006).

subject to Clean Air Act's new mobile-source requirements, such suits likely would be preempted.¹¹¹

With respect to stationary-source emissions, the preemption analysis is more nuanced. The Clean Air Act contains no express preemption provision for stationary-source emissions,¹¹² and the Supreme Court has never addressed the Act's implied preemptive effect.¹¹³ But, in *International Paper Co. v. Ouellette*,¹¹⁴ the High Court construed the preemptive effect of the Clean Water Act, which establishes a very similar regulatory regime.¹¹⁵

In *Ouellette*, Vermont landowners brought a nuisance action under Vermont common law in Vermont state court against a New York pulp and paper mill.¹¹⁶ The landowners objected to, among other things, the company's pollutant discharges into Lake Champlain, which divides Vermont and New York.¹¹⁷ After removing the action to federal court, the mill argued that the suit, and all such state-law-based actions, were preempted by the Clean Water Act, which directly regulated the pollutant discharges in question.¹¹⁸ The lower courts sided with the landowners, but the Supreme Court ruled that the action was preempted.¹¹⁹

Acknowledging that the Clean Water Act contains various indications that not all state-law-based claims are preempted,¹²⁰ the Court nevertheless declined to accept the landowners' invitation to declare that all such claims are preserved.¹²¹

The Court began its preemption analysis by acknowledging that the Clean Water Act has savings clauses in provisions addressing "State

¹¹¹ J.J. England, *Saving Preemption in the Clean Air Act: Climate Change, State Common Law, and Plaintiffs Without a Remedy*, 43 ENVTL. L. 701, 732 (2013) ("There is no question that any common law claim against a mobile source that is in compliance with federal standards is fully preempted by the [Clean Air Act]."); see *Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Prot.*, 163 F.3d 74, 83 (1st Cir. 1998) (stating that Massachusetts's attempt to enforce a zero-emission-vehicle quota was "presumptively preempted" by the Clean Air Act). We address later on in the Article the flawed argument of the state-law-based climate change plaintiffs that the Clean Air Act is irrelevant because they are not challenging defendants' emissions but rather defendants' creation and sale of a product.

¹¹² Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 635 (2008) ("[T]here is no express preemption provision applicable to stationary sources . . .").

¹¹³ See *Am. Elec. Power Co.*, 564 U.S. 410, 429 (2011) (remanding for consideration of that question and citing *Ouellette*).

¹¹⁴ 479 U.S. 481 (1987).

¹¹⁵ England, *supra* note 111, at 732 ("*Ouellette* provides a helpful guide for interpreting the [Clean Air Act]'s preemptive effect in light of its savings clauses.").

¹¹⁶ *Ouellette*, 479 U.S. at 484.

¹¹⁷ *Id.* at 483–84.

¹¹⁸ See *id.* at 484–85.

¹¹⁹ See *id.* at 500.

¹²⁰ *Id.* at 492.

¹²¹ *Id.* at 492–93.

Authority” as well as “Citizen Suits.”¹²² Its “State Authority” section provides that nothing in the Act is to 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.”¹²³ By contrast, the “Citizen Suits” section provides that nothing “in this section” (i.e., the “Citizen Suits” section) is to be construed either to authorize redress for pollution injuries under “any statute or common law,” or to “restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief.”¹²⁴ The inference is that other sections of the Act *can* restrict those rights—including the statutes and common law rules under which redress may be pursued.

That is precisely what the *Ouellette* Court concluded. The Court rejected the landowners’ argument that the phrase, “any statute or common law,” means that an injured party can sue the polluter in the pollution’s source state, New York, under the law of the affected state, Vermont.¹²⁵ As the Court bluntly responded, “[w]e cannot accept this reading of the Act.”¹²⁶ The Court emphasized that the savings clause expressly says that “[n]othing in this section” (i.e., the citizen suits section) shall affect an injured party’s right to seek relief under state law.¹²⁷ But, as the Court explained, the savings clause “does not purport to preclude preemption of state law by other provisions of the Act.”¹²⁸ The Court concluded that other sections of the Act “arguably limit[] the effect of the [savings] clause to discharges flowing *directly* into a State’s own water, *i.e.*, discharges from within the State.”¹²⁹ In other words, an injured party (e.g., a citizen-suit plaintiff) can sue, under any of the affected state’s statutes or common law, for injuries resulting from discharges from within that state and into that state’s own waters. The savings clause was not, however, intended to give that party carte blanche to sue, under the affected state’s laws, for injuries caused by discharges originating in another state.¹³⁰

The Court next observed that allowing an injured party in an affected state to impose liability for pollution discharges originating in another state would result in “a serious interference with the achievement of the ‘full purposes and objectives of Congress.’”¹³¹ Therefore, consistent with obstacle preemption principles, the Clean

¹²² *Id.* at 492.

¹²³ 33 U.S.C. § 1370 (2012).

¹²⁴ *Id.* § 1365(e).

¹²⁵ *Ouellette*, 479 U.S. at 492–93.

¹²⁶ *Id.* at 493.

¹²⁷ *Id.* at 485 (quoting 33 U.S.C. § 1365(e) (2012)).

¹²⁸ *Id.* at 493.

¹²⁹ *Id.*

¹³⁰ *Id.* at 493–494.

¹³¹ *Id.* (quoting *Hillsborough Cty. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985)).

Water Act must be construed so as to preserve “the methods by which [it] was designed to reach th[e] goal” of eliminating water pollution.¹³² Allowing the Vermont nuisance case to proceed would frustrate the Clean Water Act’s permitting system.¹³³ That system represents a partnership between the federal government and individual states’ water quality goals.¹³⁴ Such a partnership necessarily would be upset if any affected state or one of its citizens could impose through litigation or otherwise its preferred standards on an out-of-state discharger, which standards might well be inconsistent with the standards of the state where the pollution originated.¹³⁵ Thus, the Court concluded, state-law-based claims must be preempted to the extent that they rely on non-source-state law.¹³⁶

The Court was careful to note that its holding would not leave the Vermont landowners and others similarly situated without a remedy.¹³⁷ The Court explained that, consistent with the Clean Water Act’s savings clauses, lawsuits based on the rules of the source state would not be preempted.¹³⁸ Allowing such suits to go forward would not frustrate the Act’s federal-state balance because the Act expressly allows states to adopt pollution standards that are stricter than the Act’s.¹³⁹ Moreover, industry’s fear of being subject to multiple and conflicting rules would, the Court assured, prove to be unwarranted because a discharger would only be required to look to the law of the federal government and the source state.¹⁴⁰

Thus, the rule of *Ouellette*, stated negatively, is: pollution abatement actions based on the law of any jurisdiction other than the source state are preempted.¹⁴¹ This rule is based on a reasonable reading of the savings clause in the Clean Water Act’s citizen-suits section. But of course that clause has no direct application to air pollution issues raised by the state-law-based climate cases. To what extent, then, does *Ouellette*’s reasoning apply *mutatis mutandis* to the Clean Air Act?

Even without instructive case law, which we discuss below, a comparison of the statutes would lead one to expect the *Ouellette* rule to apply to the Clean Air Act. As discussed above, the Clean Water Act

¹³² *Id.* at 494.

¹³³ *Id.*

¹³⁴ See *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (“The Clean Water Act anticipates a partnership between the States and the Federal Government . . .”).

¹³⁵ *Ouellette*, 479 U.S. at 494–95.

¹³⁶ See *id.* at 497.

¹³⁷ *Id.*

¹³⁸ *Id.* Even source-state actions, depending on the remedy sought, could be preempted; cf. *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 85 (Iowa 2014) (suggesting that a “sweeping injunction” issued under source-state law may be preempted); see also *supra* note 12 and accompanying text.

¹³⁹ *Ouellette*, 479 U.S. at 498–99.

¹⁴⁰ *Id.* at 499.

¹⁴¹ *Id.* at 500.

contains two preemption savings clauses, one pertaining to state regulatory prerogatives and one to citizen suits.¹⁴² The former provides that nothing in the Act is to 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.”¹⁴³ The latter provides that nothing “in this section” (i.e., the citizen suit provision) is to be construed to “restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief.”¹⁴⁴

Similarly, the Clean Air Act’s preemption savings clause pertaining to state regulatory prerogatives provides that nothing in the Act is to be construed to “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.”¹⁴⁵ The Act’s “citizen suits” section provides a savings clause guaranteeing that nothing “in this section” is to be construed “to prohibit, exclude, or restrict any State, local, or interstate authority from . . . (1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court,” or “(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality.”¹⁴⁶ A comparison of the foregoing quoted material reveals that there is no meaningful difference between the pertinent provisions of the two Acts.¹⁴⁷ That fact suggests that their preemptive effect should be construed in the same manner.¹⁴⁸

Beyond the similarities in their savings clauses, the statutes evince a common regulatory policy of cooperative federalism.¹⁴⁹ The Clean Water Act is a comprehensive federal regulation of water pollution that relies on a federal–state partnership and an intricate permitting system

¹⁴² See *id.* at 492.

¹⁴³ 33 U.S.C. § 1370 (2012).

¹⁴⁴ *Id.* § 1365(e).

¹⁴⁵ 42 U.S.C. § 7416 (2012).

¹⁴⁶ *Id.* § 7604(e).

¹⁴⁷ Scott Gallisdorfer, Note, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After AEP v. Connecticut*, 99 VA. L. REV. 131, 150 (2013) (“After all, at least in terms of the *Ouellette* Court’s concerns, there is little basis for distinguishing the Clean Air Act from the Clean Water Act—the two statutes feature nearly identical savings clauses and employ similar ‘cooperative federalism’ structures.”).

¹⁴⁸ See *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315–16 (2006) (“[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read ‘as if they were one law.’”) (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)).

¹⁴⁹ England, *supra* note 111, at 725–26 (cooperative federalism is a regulatory policy according to which one level of government, as an exercise of discretion, uses other levels of government to achieve a shared regulatory goal); accord Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal—Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 WM. & MARY ENVTL. L. & POL’Y REV. 447, 456 (2018).

to achieve its goals.¹⁵⁰ In the same way, the Clean Air Act is a comprehensive federal regulation of air pollution that also uses a cooperative federalism framework combined with a complicated permitting regime to achieve its goals.¹⁵¹ This parallel regulatory approach, along with the above-discussed parallel text, supports the application of the rule of *Ouellette*—preemption of water pollution abatement actions based on the law of any jurisdiction other than that of the source state—to the Clean Air Act. All of the lower appellate courts presented with the issue¹⁵² have agreed that the *Ouellette* rule applies to the Clean Air Act.

C. The Lower Courts' Application of Ouellette to the Clean Air Act

The first to address *Ouellette*'s impact to air pollution claims was the Sixth Circuit in *Her Majesty The Queen in Right of the Province of Ontario v. City of Detroit*¹⁵³ (*Ontario*). There, the Canadian government and several environmental groups challenged Detroit's proposed construction of a municipal solid waste combustion facility—and its emission of ash residue—under the Michigan Environmental Protection Act.¹⁵⁴ Thus, the plaintiffs' claims were based on the *source* state's statute. Nevertheless, Detroit defended on, among other grounds, preemption under the Clean Air Act.¹⁵⁵

Citing *Ouellette*, the Sixth Circuit rejected the preemption argument on the grounds that “nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* state.”¹⁵⁶ It explained that there is no good reason to limit *Ouellette* to the context of the Clean Water Act.¹⁵⁷ Indeed, the court noted that, on remand, the district court in *Ouellette* also allowed the plaintiffs' state air pollution claims to proceed.¹⁵⁸ And, unlike in *Ouellette*, the fact that the *Ontario* plaintiffs did not also allege a federal violation further supported allowing the latter's state claims to proceed.¹⁵⁹

¹⁵⁰ Charles W. Smith, *Highlights of the Federal Water Pollution Control Act of 1972*, 77 DICK. L. REV. 459, 460 (1972–1973).

¹⁵¹ Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 816–17 (2008).

¹⁵² See England, *supra* note 111, at 742–45 (discussing the leading district court rulings—some of which were reviewed by the appellate court decisions discussed in the text).

¹⁵³ 874 F.2d 332, 332–43 (6th Cir. 1989).

¹⁵⁴ *Id.* at 333–35.

¹⁵⁵ See *id.* at 335.

¹⁵⁶ *Id.* at 342–44 (quoting *Ouellette*, 479 U.S. 481, 497 (1987)).

¹⁵⁷ *Id.* at 343.

¹⁵⁸ *Id.* (citing *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58, 62 (D. Vt. 1987)).

¹⁵⁹ *Id.* at 343.

Next, the Fourth Circuit decided *North Carolina ex rel. Cooper v. Tennessee Valley Authority*¹⁶⁰ (*Cooper*). In that case, the state of North Carolina brought a public nuisance action, under North Carolina law, against TVA for the latter's coal-fired power plant emissions, including the emissions from TVA plants in Tennessee and Alabama.¹⁶¹ After a lengthy discussion of the Clean Air Act's regulation of power plant emissions, the Fourth Circuit concluded, relying on *Ouellette*, that allowing North Carolina to assert its public nuisance law to regulate emissions from other states would thwart the federal regulatory structure designed to address the harm from such emissions.¹⁶² Although not willing to hold that Congress has preempted the entire field of air pollution regulation,¹⁶³ the court still could "state . . . with assurance that *Ouellette* recognized the considerable potential mischief in those nuisance actions seeking to establish emissions standards different from federal and state regulatory law and created the strongest cautionary presumption against them."¹⁶⁴ Such frustration would be the direct result of subjecting "a hapless source" to a potential "patchwork of nuisance injunctions," while providing "no standard of application."¹⁶⁵ These considerations confirmed the Fourth Circuit in its conclusion that the Clean Air Act preempted North Carolina's public nuisance action.¹⁶⁶

Shortly after the Fourth Circuit decided *Cooper*, the Third Circuit addressed the preemption question in *Bell v. Cheswick Generating Station*.¹⁶⁷ This was a state tort class action brought against the defendant power plant by neighboring property owners complaining of the plant's emission of ash and other contaminants.¹⁶⁸ The district court dismissed the action, holding that submitting the power plant to tort liability would frustrate the extensive federal and state permitting requirements to which it was already subject.¹⁶⁹ On appeal, the Third Circuit reversed, reasoning that there was no significant distinction between the relevant preemption texts of the Clean Water Act and the Clean Air Act.¹⁷⁰ As the court observed, "the citizen suit savings clause of the Clean Water Act is 'virtually identical' to its counterpart in the Clean Air Act."¹⁷¹ And the "only meaningful difference," according to the Third Circuit, between the two Act's states-rights savings clauses is that

¹⁶⁰ 615 F.3d 291 (4th Cir. 2010).

¹⁶¹ *Id.* at 296.

¹⁶² *Id.* at 301, 303.

¹⁶³ Nevertheless, the court found it plausible. *See id.* at 304–06.

¹⁶⁴ *Id.* at 303.

¹⁶⁵ *Id.* at 302.

¹⁶⁶ *See id.* at 311–12.

¹⁶⁷ 734 F.3d 188 (3d Cir. 2013).

¹⁶⁸ *Id.* at 189–90.

¹⁶⁹ *See id.* at 193.

¹⁷⁰ *See id.* at 194–95.

¹⁷¹ *Id.* at 195 (quoting *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 328–29 (1981)).

the Clean Water Act refers to “boundary waters,” whereas the Clean Air Act contains no such reference.¹⁷² That distinction did not matter. “If anything, the absence of any language regarding state boundaries in the states’ rights savings clause of the Clean Air Act indicates that Congress intended to preserve more rights for the states, rather than less.”¹⁷³ Therefore, “the Supreme Court’s decision in *Ouellette* controls this case, and thus, the Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located.”¹⁷⁴

About a year later, the Iowa Supreme Court addressed the issue in *Freeman v. Grain Processing Corp.*¹⁷⁵ As in *Bell*, the property owner plaintiffs in *Freeman* had brought a state-law tort class action claim against the neighboring defendant emitter (which in *Freeman* was a corn wet milling facility).¹⁷⁶ As in *Bell*, the trial court in *Freeman* ruled that the Clean Air Act preempted the plaintiffs’ tort claims.¹⁷⁷ And as in *Bell*, the appellate court reversed. In so doing, the Iowa Supreme Court rejected two key arguments from the defendant power plant as to why *Ouellette* should not apply to the Clean Air Act: the extensive amendments to the Clean Air Act passed in 1990 and the United States Supreme Court’s decision in *American Electric Power*.¹⁷⁸ The Iowa Supreme Court began its preemption analysis by observing that the Clean Air Act does not preempt the field of air emission regulation, underscoring “the distinction in *Ouellette* and [*City of Milwaukee v. Illinois*]¹⁷⁹ between preemption of the law of a *source* state from the preemption of the law of the *pollution-affected* state.”¹⁸⁰ Nothing in the increasing complexity of the Clean Air Act changed that conclusion.¹⁸¹ Reliance on *American Electric Power* also was misplaced, the court emphasized, because that decision concerns the unrelated question of displacement of federal common law, not preemption of state common law.¹⁸² Finally, the court highlighted a critical distinction between state-law-based litigation efforts to obtain limited relief for individual citizens and broad-ranging efforts to establish emission standards, suggesting that the latter, not the former, would be the better target of preemption.¹⁸³

¹⁷² *Bell*, 734 F.3d at 195.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 196–97.

¹⁷⁵ 848 N.W.2d 58 (Iowa 2014).

¹⁷⁶ *Id.* at 63–64.

¹⁷⁷ *See id.* at 64–65.

¹⁷⁸ *See id.* at 73.

¹⁷⁹ 451 U.S. 304, 306 (1981).

¹⁸⁰ *Freeman*, 848 N.W.2d at 83.

¹⁸¹ *Id.* at 84 (“Notwithstanding the increased complexity, the cooperative federalism framework and the notion that states may more stringently regulate remains a hallmark of the [Clean Air Act].”).

¹⁸² *Id.* at 83.

¹⁸³ *Id.* at 84–85.

The most recent Clean Air Act preemption appellate decision in the federal courts of appeals comes from the Sixth Circuit. In *Merrick v. Diageo Americas Supply, Inc.*,¹⁸⁴ the plaintiff property owners brought a state nuisance class action against the defendant whiskey distillery, arguing that the latter's ethanol emissions produced a noxious fungus on their properties.¹⁸⁵ The defendant distillery argued that applying state common law standards to regulate its emissions would conflict with the Clean Air Act's approach to regulating the same, and therefore should be preempted.¹⁸⁶ The Sixth Circuit rejected the argument, relying on *Ouellette* for the proposition that the word "State" in the Clean Air Act's savings clause should be read to include state courts and thus state common law liability.¹⁸⁷ The court also cited *Ouellette* and *Cooper* for the proposition that the competing concerns of environmental protection and cooperative federalism produced the special preemption compromise embodied in the savings clauses of the Clean Water Act and Clean Air Act—state common law actions based on source-state law are permissible, whereas those based on the law of an affected jurisdiction are not.¹⁸⁸ And the court also rejected the distillery's reliance on *American Electric Power*, concluding, consistent with *Bell* and *Freeman*, that that Supreme Court decision says nothing about preemption of state-law-based claims.¹⁸⁹

D. Under the Rule of Ouellette, the State-Law-Based Climate Suits Are Preempted

The foregoing exposition of the relevant case law illustrates several points critical to the issue of whether the state-law-based climate cases are preempted by the Clean Air Act. First, the Clean Water Act and the Clean Air Act are, with respect to their preemptive operation and effect, the same. Second, the statutes' similar preemptive effect is arguably unaffected by the Supreme Court's decision in *American Electric Power*, which principally addresses displacement of federal common law, not preemption of state common law. Third, the rule of *Ouellette* applies with equal force to the Clean Air Act, such that state-law-based emission claims based on the law of the source state are not categorically preempted, while those based on the law of a non-source jurisdiction are categorically preempted.

¹⁸⁴ 805 F.3d 685 (6th Cir. 2015).

¹⁸⁵ *Id.* at 686–87.

¹⁸⁶ *Id.* at 690.

¹⁸⁷ *Id.* at 691.

¹⁸⁸ *Id.* at 691–93.

¹⁸⁹ *Id.* at 693–94. *Accord Brown-Forman Corp. v. Miller*, 528 S.W.3d 886, 891–94 (Ky. 2017) (adopting *Merrick's* analysis and holding that the Clean Air Act did not preempt state-law-based torts claims, seeking damages, premised on ethanol emissions from a bourbon distillery).

To be sure, there is tension in the case law as to the preservative extent of the Clean Air Act's preemption savings clauses. *Cooper*, for example, appears to suggest that some claims based on source-state law may still be preempted because the burdens they might place on emitters would conflict with Congress's regulatory intent as expressed by the Clean Air Act's permitting regime.¹⁹⁰ In contrast, the Third Circuit in *Bell* seemed to support, if not a categorical rule of non-preemption for source-state causes of action, at least a heavy presumption in favor of no preemption.¹⁹¹ The Sixth Circuit also seems friendly to such a strong presumption, but appears impliedly to have left open an as-applied preemption defense.¹⁹² And more than impliedly, the Iowa Supreme Court has expressly allowed for an as-applied preemption challenge, while holding that traditional source-state damages actions are categorically not preempted.¹⁹³

With these principles in mind, we turn now to the central question of this Article: are the state-law-based climate cases preempted?

We answer yes. Under *Ouellette*, the Clean Air Act preempts the state-law-based climate cases. The claims are preempted notwithstanding that the cases are ostensibly pled under source-state law.¹⁹⁴ Regardless of pleading, an essential element of these cases is causation—showing that the defendants' actions contributed meaningfully to global climate change and thus to the plaintiffs' climate-related injuries.¹⁹⁵ To establish a plausible showing of causation, it is

¹⁹⁰ See *Cooper*, 615 F.3d 291, 302–03 (4th Cir. 2010); cf. *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 101 (2d Cir. 2013) (“One can imagine a case in which a state law imposes such enormous costs on a party that compliance with a related federal mandate is effectively impossible.”).

¹⁹¹ See *Bell*, 734 F.3d 188, 197 (3d Cir. 2013) (“[T]he Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located.”).

¹⁹² See *Merrick*, 805 F.3d at 695 (“The bare fact that [source-state] law may impose more stringent requirements than the Clean Air Act does not mean that the Act preempts [state] law.”). But see Nate Bishop, Case Comment, *Merrick v. Diageo Americas Supply, Inc.*, 40 HARV. ENVTL. L. REV. 383, 384 (2016) (criticizing *Merrick* for its “wholesale allowance of common law remedies”).

¹⁹³ *Freeman*, 848 N.W.2d 58, 85 (Iowa 2014) (holding that “conflict preemption with the [Clean Air Act] does not apply to a private lawsuit seeking damages anchored in ownership of real property,” but finding unripe “the question of whether injunctive relief would conflict with the [Clean Air Act].”); cf. Bishop, *supra* note 192, at 396 (arguing for preemption of source-state actions that would result in new emission standards); Ingrid Pfister, Note, Bell v. Cheswick: *The Era of Court-Regulated Power Plants*, 42 ECOLOGY L.Q. 437, 448 (2015) (arguing that “state common law tort claims [that] interfere with national air quality issues, including both global warming and greenhouse gas emissions,” are likely preempted).

¹⁹⁴ See, e.g., *City of Oakland*, 325 F. Supp. 3d 1017, 1021 (N.D. Cal. 2018); *Cty. of San Mateo*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018).

¹⁹⁵ See, e.g., *Citizens for Odor Nuisance Abatement v. City of San Diego*, 213 Cal. Rptr. 3d 538, 545–46 (Ct. App. 2017) (“Causation is an essential element of a public nuisance claim. A plaintiff must establish a ‘connecting element’ or a ‘causative link’ between the defendant’s conduct and the threatened harm.”) (quoting *In re Firearm Cases*, 24 Cal. Rptr. 3d 659, 680 (Ct. App. 2005)).

not enough for the plaintiffs to rely on in-state emissions attributable to the defendants.¹⁹⁶ Such emissions are simply not large enough to have any measurable effect on global climate, which is the causal linchpin for all of the claims.¹⁹⁷ Yet, by relying on out-of-state emissions to make

¹⁹⁶ See *City of Oakland v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 3609055, at *3 (N.D. Cal. July 27, 2018) (“[A]lthough plaintiffs list significant fossil-fuel-related activities that defendants have allegedly conducted in California—plaintiffs fail to sufficiently explain how these ‘slices’ of global-warming-inducing conduct causally relate to the worldwide activities alleged in the amended complaints.”); see also Raymond B. Ludwiszewski & Charles H. Haake, *Cars, Carbon, and Climate Change*, 102 NW. U. L. REV. 665, 680–81 (2008) (“California recognizes that the greenhouse gas regulations the State has enacted will not by themselves have any meaningful impact on ambient temperature or on the climate.”); Jonathan H. Adler, *The Supreme Court Disposes of a Nuisance Suit: American Electric Power v. Connecticut*, 2011 CATO SUP. CT. REV. 295, 317 (“Reducing emissions from the 5, 50, or 500 largest [greenhouse gas] emitters within the United States will have no appreciable effect on the accumulation of [greenhouse gases] in the broader atmosphere.”). Of course, reliance on out-of-source-state emissions does not eliminate the causation obstacle. *E.g.*, R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 337 (2017) (“The focus on the global dimensions of climate change—its breathtaking scale and severity—may undermine the plaintiff’s case at the causation stage. Complexity and numerosity, already troublesome for establishing duty, return with even greater force when the plaintiff attempts to single out individual defendants’ contributions to global warming.”); Martin Olsynski et al., *From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability*, 30 GEO. ENVTL. L. REV. 1, 22 (2017) (“The emissions from one entity, even a single or group of large industrial [greenhouse gas] emitters, cannot on their own be said to ‘cause’ climate change. As a result, proving a causal link between climate change related harm and the cause and effect of the defendants’ actions remains challenging.”); Bruce Ledewitz & Robert D. Taylor, *Law and the Coming Environmental Catastrophe*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 599, 615 (1997) (“[N]o one defendant, or group of defendants, could be shown to be directly and uniquely responsible for the condition of the earth’s environment, and no plaintiff is blameless.”).

¹⁹⁷ Perhaps recognizing the difficulty that traditional but-for causation presents, proponents of state-law-based tort suits often call upon alternative causation theories, such as market share liability, to support the cases. See, e.g., Daniel J. Grimm, Note, *Global Warming and Market Share Liability: A Proposed Model for Allocating Tort Damages Among CO₂ Producers*, 32 COLUM. J. ENVTL. L. 209, 210–11 (2007) (advancing the concept of market share liability to resolve global warming-based torts). But such non-traditional theories of causation were developed to address concerns quite different from those asserted in global warming tort litigation. See *Sindell v. Abbot Labs.*, 607 P.2d 924 (Cal. 1980). In *Sindell*, the locus classicus of market share liability theory, all of the defendant pharmaceutical companies were responsible for producing the type of generic drug that had harmed the plaintiff, and thus all were guilty of having acted tortiously. See *id.* at 936–37. The challenge was simply in determining who among the defendants produced the particular pill that harmed the plaintiff, *id.*, a difficulty that the California Supreme Court resolved by assigning liability according to each defendant’s share of the drug market. *Id.* at 937–38. In contrast, the mere emission of greenhouse gases is not in itself harmful, tortious, or illegal. Rather, the emissions’ alleged harm and resulting alleged illegality are a function of the *quantity* of the emissions. And given that none of the defendants in the climate change cases has by itself the responsibility for such a climate-affecting quantity, it necessarily follows that none is guilty of tortious conduct; thus, *Sindell* and similar theories are inapposite.

their claim of liability,¹⁹⁸ the plaintiffs are effectively projecting a state's emissions law onto those out-of-state emissions.¹⁹⁹ That effort is squarely precluded by the *Ouellette* rule.²⁰⁰

To conclude otherwise would frustrate the cooperative federalism policy underlying *Ouellette*,²⁰¹ as well as raise significant concerns about extraterritorial regulation should a party be liable under the law of one state because of actions (emissions) occurring outside the state.²⁰² As *Ouellette* made clear, allowing non-source-state claims “would disrupt th[e] balance of interests” between pollution control and regulatory costs.²⁰³ Such an unbalancing would be effected by the non-source state's

¹⁹⁸ *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 1064293, at *3 n.2 (“Plaintiffs’ claims here, by contrast, are not localized to California and instead concern fossil fuel consumption worldwide.”); *City of New York*, 325 F. Supp. 3d 466, 474 (S.D.N.Y. 2018) (“As Defendants note, [the City]’s alleged injuries arise (if at all) only because third-party users of fossil fuels—located in all 50 states and around the world—emit greenhouse gases.”) (internal quotation marks omitted).

¹⁹⁹ This is an aspect of the state-law-based climate litigation that other commentators appear to have overlooked. *See, e.g.*, Gallisdorfer, *supra* note 147, at 158–59 (source-state-based litigation would avoid preemption under *Ouellette*); Howard A. Learner, Comment, *Emerging Clarity on Climate Change Law: EPA Empowered and State Common Law Remedies Enabled*, 44 *Envtl. L. Rep. News & Analysis* (Envtl. Law Inst.) 10,744, 10,750 (2014); England, *supra* note 111, at 733–39 (same); Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 *FORDHAM ENVTL. L. REV.* 407, 444–45 (2005) (same).

²⁰⁰ F. William Brownell, *State Common Law of Public Nuisance in the Modern Administrative State*, NAT. RESOURCES & ENV’T, Spring 2010, at 34, 35 (“[A]n environmental savings clause that preserves state authority to implement or to enforce more stringent state laws cannot . . . authorize an affected state to impose its common law on sources in a foreign state.”). In amicus briefs in support of the industry defendants in the ongoing state-law-based greenhouse gas litigation, the United States advocates the positions that 1) *Ouellette* preempts state-law-based greenhouse gas claims that attack U.S.-based emissions outside of the source state, Brief of the United States as Amicus Curiae in Support of Appellees at 10, *City of New York v. BP P.L.C., et al.*, Doc. No. 210, No. 18-2188 (2d Cir. filed March 7, 2019), and 2) the Constitution’s foreign affairs powers preempt such claims to the extent that they attack foreign emissions, Brief of the United States as Amicus Curiae in Support of Appellees and Affirmance at 15, *City of Oakland v. B.P. P.L.C.*, Doc. No. 97, No. 18-16663 (9th Cir. filed May 17, 2019). Unlike us, the United States takes no position on whether any state-law-based claim that attacks solely source-state emissions would be preempted. *See, e.g., id.* at 13 n.*. And although we do not disagree that state regulation of foreign emissions would be impermissible under the Constitution’s allocation of foreign affairs powers to the federal government, we think it not implausible that, given the Clean Air Act’s provision governing international air pollution, 42 U.S.C. § 7415 (2012), the same result could be reached under normal obstacle-preemption analysis.

²⁰¹ *See Ouellette*, 479 U.S. 481, 497 (1987) (allowing non-source state litigation would “undermine” how the statute “carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA.”).

²⁰² *See id.* at 495 (“The inevitable result of such [non-source-state] suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources.”).

²⁰³ *Id.* at 495–96. Professors Glicksman and Levy argue that preemption of state-law-based greenhouse gas rules “is not supported by most of the principal justifications for

imposition of liability,²⁰⁴ which in turn “would compel the source to adopt different control standards and a different compliance schedule approved by the EPA, even though the affected state had not engaged in the same weighing of costs and benefits.”²⁰⁵

It is easy to see how this unbalancing would carry over to the Clean Air Act. Imposition of liability for directly emitting or contributing to the emission of greenhouse gases otherwise regulated by that Act would, contrary to Congress’s design, require the state-law-based climate defendants to conform their activities (or to be punished for not having conformed their activities) to multiple and varying greenhouse gas standards.²⁰⁶ Such an untenable result would follow notwithstanding that source states for many of those emissions would have no objection to those emissions (and indeed may even encourage them).²⁰⁷ Liability also would raise a concern about extraterritorial regulation, which is generally forbidden under the Dormant Commerce Clause.²⁰⁸ Thus,

federal environmental regulation,” and that the “desire to achieve uniformity in regulation in order to avoid burdening entities with excessive transactions costs” provides no justification for preemption of state programs regulating stationary sources. Glicksman & Levy, *supra* note 112, at 648. Their analysis does not, however, appear to distinguish between source-state and non-source-state regulation, and does not discuss *Ouellette*.

²⁰⁴ To be sure, that unbalancing could be avoided if one jurisdiction were to apply, when pertinent, the law of all source states, or if one plaintiff were to sue all emitters in their emitting jurisdictions. (That seems to be a possibility that the federal government itself recognizes, see Brief of the United States as Amicus Curiae in Support of Appellees at 10, *City of New York v. BP P.L.C., et al.*, Doc. No. 151, No. 18-2188 (2d Cir. Mar. 7, 2019)). Although such a course would comply with *Ouellette*, it would not provide any relief to the current generation of state-law-based climate change plaintiffs. We are aware of no jurisdiction that authorizes tort liability in the absence of causation; indeed, such an arbitrary regime likely would violate due process. *Cf. United States v. Apollo Energies, Inc.*, 611 F.3d 679, 687 (10th Cir. 2010) (“[C]riminalizing acts which the defendant does not cause is unconstitutional . . .”). Moreover, as explained above, no single jurisdiction has direct regulatory control over a sufficient quantity of emissions to satisfy the causation component of any cause of action based on contributions to and impacts from climate change.

²⁰⁵ *Ouellette*, 479 U.S. at 495.

²⁰⁶ See *Motor & Equip. Mfrs. Ass’n, Inc. v. U.S. Env’tl. Prot. Agency*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) (in discussing the legislative rationale for preempting state mobile-source regulation, observing that “Congress’ entry into the field and the heightened state activity after 1965 raised the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers.”).

²⁰⁷ See Gallisdorfer, *supra* note 147, at 167 & n.220 (observing that Utah and Texas have enacted laws that “functionally eliminate climate-change-related nuisance liability altogether.”).

²⁰⁸ See *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 581–83 (1986) (holding that New York law regulating out-of-state liquor prices violates the Commerce Clause). For a discussion of the impact of the Dormant Commerce Clause on state efforts to combat climate change, see Jonathan H. Adler, *Climate Balkanization: Dormant Commerce Clause and the Limits of State Energy Policy*, 3 *LSU J. ENERGY L. & RESOURCES* 153, 170–78 (2014). Naturally, the extra-territorial concern is magnified to the extent that liability would be triggered by foreign emissions. See *City of New York*, 325 F. Supp. 3d 466, 475–76 (S.D.N.Y. 2018) (dismissing City’s claims for damages from global

assertion of one state's emission law to an out-of-state emitter would, as *Cooper* observed, lie "in direct contradiction to the Supreme Court's decision in . . . *Ouellette*."²⁰⁹

Application of the *Ouellette* rule does not, however, mean that all state-law-based climate lawsuits are necessarily preempted.²¹⁰ A claim based solely on in-state stationary-source emissions—such as a violation of a cap-and-trade regulation—likely would not be preempted under *Ouellette*, especially if it sought only monetary relief.²¹¹ And even a state-law-based action for injunctive relief might be available, particularly if the injunction would not operate as a de facto emission standard.²¹² But these relatively modest litigation options are quite different from the ongoing state-law-based climate change suits, which seek massive monetary settlements for alleged localized harms caused by worldwide climate change, to be brokered by arbitrarily selected trial court judges employing state laws to punish activity in other jurisdictions. The disastrous effects of such a haphazard, lawsuit-driven response to global warming are precisely those that the rule of *Ouellette* was meant to avoid.

No doubt recognizing the strength of the preemption argument, the current generation of climate change plaintiffs has re-characterized its lawsuits as not challenging the defendants' emissions per se, but instead solely their marketing and sale of fossil fuels.²¹³ For that reason, plaintiffs argue, the Clean Air Act, *Ouellette*, and the failures of the first generation of climate change plaintiffs (such as in *Kivalina*) are irrelevant.²¹⁴ Yet, there is no meaningful distinction between

greenhouse gas emissions caused by the sale of fossil fuels by multinational oil and gas companies).

²⁰⁹ *Cooper*, 615 F.3d 291, 296 (4th Cir. 2010).

²¹⁰ This is the point that the opening clause of our Article's title is meant to convey, but it is not one universally shared by skeptics of state-law-based climate litigation. See Brownell, *supra* note 200, at 35–36 (arguing that the Clean Air Act preempts all state common law public nuisance actions).

²¹¹ See Bishop, *supra* note 192, at 383–84. Thus, our analysis does not implicate the so-called "one-percent" problem that global warming regulatory advocates believe to be present in efforts to resist climate-change regulation. See, e.g., Corey Moffat, *Establishing Causation in Private Party Climate Change Suits: Correcting the Mistakes of Washington Environmental Council v. Bellon*, 44 ENVTL. L. 959, 978–80 (2014) (discussing Kenneth M. Stack & Michael P. Vandenbergh, *The One Percent Problem*, 111 COLUM. L. REV. 1385, 1393 (2011)). These advocates' concern is that allowing a de minimis exception to greenhouse gas regulation will be self-defeating, because all greenhouse gas emitters are, viewed individually with respect to climate change, de minimis contributors. We do not argue here for a de minimis exception to a general regulatory rule. Rather, as explained in the text, the defendant energy companies are simply not guilty of any tortious conduct, according to the existing rules of tort law. In other words, the dangers of de minimis exceptions are simply beside the point.

²¹² Cf. Bishop, *supra* note 192, at 390–96 (arguing that injunctive relief under the Clean Air Act's citizen suit provision should not be used to set state pollution control standards).

²¹³ See *California v. BP P.L.C.*, No. C 17-06011, 06012 WHA, 2018 WL 1064293, at *4 (N.D. Cal. Feb. 27, 2018).

²¹⁴ See *id.* at *3–4; *City of New York*, 325 F. Supp. 3d 466, 474 (S.D.N.Y. 2018).

challenging a defendant's emission of greenhouse gases and challenging its marketing and sale of fuel.²¹⁵ When consumed, that fuel will result in the emission of greenhouse gases, and it is the alleged harm from that emission which putatively gives rise to the injuries and claims of the state-law-based climate change plaintiffs.²¹⁶ Put another way, had the fuel that defendants marketed and sold never been consumed (that is, had it never been converted into emissions), plaintiffs would, under their own theories, have no injury. Hence, plaintiffs' causes of action still seek to hold defendants liable for the emission aspect of their activity. There is simply no good reason why Congress would want to preempt actions against emitters but not preempt actions against those who made possible the same emissions through their energy development activities. That is especially so given that both types of actions are based on or linked to the same emission-related activity and harm.²¹⁷

An analogous conclusion was reached by the Ninth Circuit in *Kivalina*.²¹⁸ As recounted above, the *Kivalina* panel majority held that the Clean Air Act displaces all federal common law nuisance actions based on greenhouse gas emissions, regardless of the relief (damages or injunction) sought.²¹⁹ To hold otherwise would, in the Ninth Circuit's view, ascribe to Congress the "incongruous" intent to displace a federal common law cause of action but then "to allow it to be revived in another form."²²⁰ In the same manner, it would be incongruous to assign to Congress the desire to preempt state tort actions seeking relief against greenhouse gas emitters, but not against those targeting entities further removed from the emissions—such as, for example, the producers of the products that end-users willingly purchase and combust.

IV. PREEMPTION OF STATE-LAW-BASED CLIMATE SUITS CONSTITUTES SOUND POLICY

The foregoing analysis establishes that the Clean Air Act generally preempts any state-law-based attempt to regulate (or to seek a remedy

²¹⁵ See *California*, 2018 WL 1064293, at *4; *City of New York*, 325 F. Supp. 3d at 474. That is, in fact, a theme of the California lawsuits filed in 2017, employed as a way to avoid *American Electric Power* and *Kivalina*.

²¹⁶ David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 27 (2003) (setting forth the "causal chain in climate change tort suits," beginning with fuel production and then consumption and "carbon dioxide emissions," which in turn lead to the "greenhouse effect," "warming," and then to changing climate and ensuing "damage to plaintiffs' property").

²¹⁷ See *City of New York*, 325 F. Supp. 3d at 471–72 (rejecting the distinction between 1) the production and sale of fossil fuels and 2) the emissions resulting from the fuels' use, for an action that seeks relief "for global-warming related injuries resulting from greenhouse gas emissions, and not only the production of Defendants' fossil fuels").

²¹⁸ *Kivalina*, 696 F.3d 849, 850 (9th Cir. 2012).

²¹⁹ *Id.* at 856–57.

²²⁰ *Id.* at 857.

for the harms derived from) greenhouse gas emissions, because such efforts cannot succeed based solely on the emissions within a particular jurisdiction (and *Ouellette* will not allow regulation of out-of-state emissions).²²¹ But preemption is a prerogative of, not a limitation on, Congress. That is, Congress can authorize rather than preclude the states to regulate, as it has done on a cooperative basis to address a host of environmental issues.²²² In this section, we briefly set forth several reasons why a cooperative regulatory approach—at least one that relies in substantial part on the federal and state judiciaries—does not make sense as part of a national policy response to global warming.

First, courts are ill-suited to adjudicating liability and relief for climate-change-related harms.²²³ “Unlike the expert scientists responsible for setting emissions limits at the EPA, judges are unlikely to have much experience with the ‘specialized knowledge in chemistry, medicine, meteorology, biology, engineering, and other relevant fields’ necessary for determining an appropriate level for [greenhouse gas] emissions.”²²⁴ To be sure, courts are no strangers to reviewing often arcane material that is regularly presented in, for example, administrative agency records.²²⁵ But the complexities of the technical

²²¹ In addition, a plausible case may be made that many such efforts would be precluded by the Dormant Commerce Clause. *See* Adler, *supra* note 208, at 193 (“Strict enforcement of the doctrine as it stands could trim the protectionist trappings from many a state’s [Renewable Portfolio Standard] program and limit California’s aggressive experimentation with regulation of fuels. . . . The fates of state climate change policies and the Dormant Commerce Clause are tied together.”).

²²² Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 187–89 (2005).

²²³ *See* California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *15 (N.D. Cal. Sept. 17, 2007) (“The Court is left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth’s atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly result from multiple sources around the globe.”).

²²⁴ Gallisdorfer, *supra* note 147, at 159 (quoting North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 305 (4th Cir. 2010)). One might argue that such expertise is unnecessary to arrive at an economically efficient standard for greenhouse gas emissions: why not let the courts award damages and allow Coase-like bargaining to set the most efficient standard? Presumably the incredibly high transaction costs involved in such bargaining (given the number of potential plaintiffs and defendants) would render the Coase Theorem’s guarantee of efficient allocation inapplicable. *Cf.* Jeremy Kidd, *Kindergarten Coase*, 17 GREEN BAG 2D 141, 148 (2014) (“[I]f people will bargain when there are opportunities for improvement in their situation, and if bargaining requires no effort or cost, then how the bargaining table is set initially is irrelevant to what individuals will achieve through bargaining.”) (emphasis added).

²²⁵ The courts’ lack of technical expertise in such review is reflected in the “super deference” the courts afford agency scientific determinations. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983) (“When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.”). For a criticism of such super deference, see Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 784 (2011) (arguing that super deference “fails to consider that agency science is a policy-infused construct,” “rewards agencies for amassing impenetrable records,” and “risks compounding scientific errors”).

and scientific issues raised in climate change disputes “rise to a higher order of magnitude”²²⁶ that “lie far beyond the capability of common-law courts” to resolve.²²⁷ In fact, one commentator has argued that the degree of complexity and uncertainty is so great that “testimony stemming from climate models should not be admissible pursuant to the governing standard for the admissibility of expert testimony.”²²⁸

Second, whether and how to respond to climate change are political questions that should be resolved by the politically responsive branches of government.²²⁹ “Were courts to expand theories related to products liability, public nuisance, or other common law claims to address risks associated with natural resources [such as fossil fuels], they would effectively be regulating how these resources can be extracted and used.”²³⁰ Such an expansion would “supplant the administrative and legislative branches of government,”²³¹ even if those branches choose *not* to regulate. As the Supreme Court explained in an analogous context in *American Electric Power*, the question is not

²²⁶ Gallisdorfer, *supra* note 147, at 160.

²²⁷ Adler, *supra* note 196, at 317.

²²⁸ Alvaro Hasani, *Forecasting the End of Climate Litigation: Why Expert Testimony Based on Climate Models Should Not Be Admissible*, 32 MISS. C. L. REV. 83, 84 (2013); accord Brooks E. Harlow & Roy W. Spencer, *An Inconvenient Burden of Proof? CO₂ Nuisance Plaintiffs Will Face Challenges in Meeting the Daubert Standard*, 32 ENERGY L.J. 459, 496 (2011) (“While the theory of [anthropogenic global warming] may be sufficient for policy makers to make policy decisions (based on an abundance of caution or furtherance of other legitimate public policy goals, such as reduced dependence on foreign oil), it has not been proven yet via the scientific method and therefore cannot—or at least should not—provide the basis for civil liability for damages in a tort case.”). Even if science were eventually able to assign liability for a particular climate harm to a particular emitter, that undoubtedly slim possibility would not save the state-law-based climate litigation from preemption. Cases must be decided on the law and facts as they stand, not as they may be at some future point. Cf. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.) (“[T]he court must decide according to existing laws”).

²²⁹ *City of Oakland*, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018) (“Everyone has contributed to the problem of global warming and everyone will suffer the consequences—the classic scenario for a legislative or international solution.”); accord Brief of the United States as Amicus Curiae in Support of Appellees and Affirmance at 28–29, Doc. No. 97, No. 18-16663 (9th Cir. May 17, 2009). In fact, the state-law-based climate change plaintiffs’ resort to the courts is a result of the plaintiffs’ and the larger environmental community’s inability to achieve their environmental policy goals through democratic means. See Megan L. Brown, *Are Nuisance Lawsuits to Address Climate Change Justifiable in the Federal Courts? Global Warming at the Supreme Court*, 12 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 82, 85 (2011) (“The plaintiffs in [*American Electric Power Co.*], like those in the other global warming nuisance suits, aim to achieve through judicial decree what advocates, commentators, and academics are increasingly convinced may be unachievable through the political process: transformative regulatory mandates concerning the nation’s economic, environmental, and industrial policy to slow or stop global warming.”).

²³⁰ Phil Goldberg et al., *The Liability Engine That Could Not: Why the Decades-Long Litigation Pursuit of Natural Resource Suppliers Should Grind to a Halt*, 12 J.L. ECON. & POL’Y 47, 74 (2016).

²³¹ *Id.*

whether a power has been exercised, but rather to whom that power has been assigned.²³² If the power in question is essentially political, then it can be exercised—if at all—only by the political branches, not the judiciary.

Third, and related to the preceding point, allowing national emissions policy to be established through tort litigation will inevitably result in “America’s energy policy [being] haphazardly set on a case-by-case basis.”²³³ Put another way, any appropriate and effective response to climate change must acknowledge that climate change is a *global* phenomenon requiring a global remedial approach—a task that a court cannot even effectively supervise, much less effectuate.²³⁴ In fact, “the application of variable state standards to a global, interjurisdictional concern could further frustrate the development of a coherent climate change policy.”²³⁵ Such a course would also increase the risk of cost-externalization, whereby “[s]tate residents obtain the benefits of regulation while exporting the costs.”²³⁶ That risk may be particularly acute with state-law-based climate litigation.²³⁷

V. CONCLUSION

Whatever one’s views of the pros and cons of particular remedial measures to combat the commonly anticipated effects of climate change, this Article has aimed to demonstrate that one such measure—suing

²³² *Am. Elec. Power Co.*, 564 U.S. 410, 425–26 (2011).

²³³ Goldberg et al., *supra* note 230, at 65. To be sure, a federalist system like America’s will necessarily have to tolerate a certain degree of haphazardness, in that each state within certain limits can set its own standards governing such diverse topics as education, family law, and labor law. Yet the problems raised in these areas are not global in nature: one can reasonably decide what the standard for negligence should be in Montana without having to consider what the standard should be in Indiana. But with climate change, an effective remedial policy demands a consistent *international* application. See Jonathan H. Adler, *Eyes on the Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization*, 35 HARV. ENVTL. L. REV. 1, 2 (2011) (“Without concerted efforts by nearly all industrialized and industrializing nations to drastically reduce net greenhouse gas . . . emissions, atmospheric concentrations will likely grow to double those of pre-industrial levels before century’s end.”).

²³⁴ See *City of Oakland*, 325 F. Supp. 3d at 1029 (“The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case.”).

²³⁵ Adler, *supra* note 196, at 315.

²³⁶ Brian T. Burgess, Note, *Limiting Preemption in Environmental Law: An Analysis of the Cost-Externalization Argument and California Assembly Bill 1493*, 84 N.Y.U. L. REV. 258, 274 (2009).

²³⁷ See Jonathan H. Adler, *Hothouse Flowers: The Vices and Virtues of Climate Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 443, 449 (2008) (“States are more likely to adopt meaningful emission reductions if they can externalize the costs of such measures on other jurisdictions Consider the various public nuisance lawsuits filed by state attorneys general against out-of-state firms. 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” (footnote omitted)).

fossil fuel producers on state-law-based tort theories—is precluded by the combination of the Supremacy Clause, the Clean Air Act, and the Supreme Court’s decision in *Ouellette*. The first part of this trio establishes the principle that federal law trumps state law. The second part certifies that “federal law” includes regulation of greenhouse gases. And the third part provides the rule to determine when state law conflicts with, and is thus superseded by, the federal greenhouse-gas regulatory framework.

According to that rule, articulated first in *Ouellette*, the current generation of climate change litigation is preempted. Even if the energy company defendants were somehow “responsible” for greenhouse gas emissions in the states in which they have been sued, that quantum of emissions is insufficient to establish a causal link between the companies’ activities and any harm derivable from climate change. The climate change litigation plaintiffs can only make out a plausible cause of action to support their state-law-based tort theories if they rely upon out-of-state emissions attributable to the defendants. But such reliance effectively projects one jurisdiction’s air pollution law onto other jurisdictions, which is forbidden under *Ouellette*.

Whether any non-preempted state litigation means are available to the climate change plaintiffs is an open legal question. But what is not open to debate, in our view, is the imprudence of such means. Given the technological and scientific complexities of crafting appropriate remedies to climate-change-related harms, the undeniable controversy that such remedies would inflame, and the need for any remedy to be far more comprehensive than a single court could craft or enforce, the resolution to the climate-change challenge (if any such resolution is required) should come from the politically responsive branches of government, not the judiciary.