Table of Contents

Introduction

Over the past 25 years, the role of the state attorney general has evolved from that of a limited state law enforcement official to a national agenda-setting entity. The state attorneys general have utilized their power to tackle increasingly complex social problems from tobacco[1] to gun control.[2] Most recently, eight state attorneys general have responded to the Bush administration's environmental complacency by filing a global warming suit against the five largest emitters of carbon dioxide in the country. While some view the actions of these attorneys general as purely politically motivated[3], others see the suit as a creative response to federal inaction on a pending crisis.[4] Regardless of one's position, the global warming suit embodies many of the policy concerns that face state attorneys general as they try to expand their role from purely passive to responsive. To what extent do state attorneys general have standing to seek legal redress for their constituencies? How should courts respond to state causes of action that seek to prevent serious injury rather than stop it? Do "activist" suits such as this inappropriately force the judiciary into a policy-making function? This paper seeks to address these questions and others through an analysis of the central issues in State of Connecticut v. American Electric Power Company[5].

The paper will begin with a background discussion of the global warming problem. It will then proceed to give a basic overview of the suit itself. Following this overview, the paper will address three issues which will be central to how the court decides defendants' pending motion to dismiss. These issues are: (1) whether plaintiffs have Article III standing to sue defendants; (2) whether the plaintiffs have successfully plead a claim upon which relief can be

[1] *A New Tobacco Deal*, N.Y. TIMES, Nov. 22, 1998, 4, at 2.
[2] American Shooting Sports Council, Inc. v. Attorney General, 711 N.E.2d 899 (Mass. 1999).
[3] Robert J. Samuelson, *Attorney Generals' Hot Air*, THE WASHINGTON POST, Aug. 10, 2004 at Editorial.
[4] *A Novel Tactic on Warming*, THE NEW YORK TIMES, July 28, 2004 at Editorial.
[5] State of Connecticut v. American Electric Power, Inc., No. 04 CV 05669 (LAP)(DFE) (S.D.N.Y. Nov. 19, 2004).

granted; and (3) whether the suit is preempted by federal domestic or foreign policy. The bulk of the paper will go towards addressing the relative merits of the parties' respective positions on these three issues, and how general policy considerations play into each position. Finally, this paper will evaluate the suit's potential outcomes. In considering these outcomes, the paper will consider what impact the result will have on the goals of the plaintiffs and the future activities of state attorneys general.

The Global Warming Problem

The earth's atmosphere is composed of a delicate balance of gases which control the climate so that the planet can sustain life. Earth is made livable largely by the presence of "greenhouse gases," such as carbon dioxide, methane, and nitrous oxide.[6] The greater the concentration of these gases in the atmosphere, the more the sun's heat energy is trapped, and the warmer the planet will be.

Scientists who measure climate change have gradually reached a growing consensus that Earth has been getting warmer, in some cases very rapidly. The 20th century has seen the greatest warming in at least a thousand years, and scientists have concluded that natural forces alone cannot account for this drastic change.[7] Most experts believe that the cause of this warming has been human activity.[8] Over the past century, society has become increasingly industrialized and dependent on the burning of fossil fuels as an energy source. One consequence of this has been the release of gases, namely carbon dioxide, into the atmosphere which lead to a greater warming effect. As society produces more carbon dioxide, the atmosphere's ability to capture heat increases. The end result is a global climate change.

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[6] Daniel Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 Pace Envtl. L. Rev. 53, 57 (2003).
[7] Daniel Glick, *Global Warming: Bulletins from a Warmer World*, NATIONAL GEOGRAPHIC, Sept. 2004, at 20.
[8] Id. at 14.

The projected impact of global warming within the U.S. is serious and widespread. Coastal states could face rising sea levels, increased storms, and increased salinity in water sources. Mountain snowcaps, glaciers and sea ice will shrink or disappear, slowing ocean currents and adversely affecting forestry and agricultural interests. Increased disease from heat stress, as well as the reappearance of certain disease vectors (e.g. malaria carrying mosquitoes), could put strain on public health resources. Precipitation changes will likely cause increased flooding, more profound drought, and the increase in extreme weather events.[9]

Legislative Responses

While President Bush has acknowledged that global warming is a problem, his administration has yet to take any firm stance on regulating carbon dioxide emissions. In 2001, Bush rejected the Kyoto Protocol[10] that mandated signatories to meet individual legally-binding green house gas emissions targets, with the goal of reducing emissions levels by at least 5 percent below 1990 emissions levels.[11] The administration then introduced legislation in 2003 to implement various aspects of the "Clear Skies" initiative, which includes amongst other goals, a voluntary program for reducing green house gas emissions. This program, however, conspicuously omits any mandate to reduce emissions of carbon dioxide.[12] At present, the federal government does not have a mandatory regulatory regime for carbon dioxide emissions. This state of affairs is further supported by the EPA's memorandum in August 2003 that stated

[9] Hodas, *State Law Responses to Global Warming*, 61-62.
[10] Remarks Announcing the Clear Skies and Global Climate Change Initiatives in Silver Springs, Maryland, 38 WEEKLY COMP. PRES. DOC. 234 (Feb. 14, 2002).
[11] *Kyoto Protocol*, FCCC/CP/1997/7/Add. 1, 18 March 1998 *available at* http://unfccc.int/essential_background/kyoto_protocol/items/2830.php
[12] Clear Skies Act of 2003, S. 485, 108th Cong. (2003), H.R. 999, 108th Cong. (2003).

that the agency does not have the authority under the Clean Air Act to regulate carbon dioxide or other greenhouse gases.[13]

In the midst of a federal vacuum, many states and municipalities have proposed initiatives to address global warming. These programs include the establishment of mandatory caps on emissions levels, the creation of greenhouse gas inventories and reporting registries, and state incentives for meeting greater energy efficiency and the use of renewable resources.[14] For example, Salt Lake City and Austin have adopted greenhouse gas emissions targets; and California has adopted greenhouse gas tailpipe requirements.[15] While these efforts are admirable, the cumulative result has been a hodge podge of inconsistent and contradictory regulations across states.

State of Connecticut v. American Electric Power

In the summer of 2004, eight states and New York City sued five power companies who collectively represent the largest emitters of carbon dioxide in the United States. Joined as plaintiffs in the suit are: Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin and New York City. The defendants are: American Electric Power Company, Inc.; American Electric Power Service Corporation; the Southern Company; the Tennessee Valley Authority (TVA); Xcel Energy Inc.; and Cinergy Corporation. In their initial complaint, the plaintiffs allege injuries to: state public health interests, coastal resources, water supplies, the Great Lakes, agriculture in Iowa and Wisconsin, ecosystems, California wildfire prevention, economic interests, emergency prevention, and ecological integrity.[16] Plaintiffs have asked the court to hold defendants responsible for these present and future injuries because their

[13] Jennifer Lee, *E.P.A. Says It Lacks Power to Regulate Some Gases*, N.Y. Times, Aug. 29, 2003, at A17.
[14] Pew Center on Global Climate Change, *Climate Change Activities in the United States* 3 (June 2002)
[15] Id.
[16] States' Complaint, 30-42.

carbon dioxide emissions contribute to the problem of global warming. Plaintiffs base their federal cause of action on the federal common law of public nuisance, and they additionally allege causes of action under state laws governing public nuisance.[17] The relief sought by plaintiffs is:

> (a) holding each defendant jointly and severally liable for creating, contributing to, and/or maintaining a public nuisance; (b) permanently enjoining each defendant to abate its contribution to the nuisance by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade; and (c) granting such other relief as th[e] Court deems just and proper.[18]

Defendants have responded to plaintiffs' initial complaint by motioning for the dismissal of all claims on the grounds that there is no subject matter jurisdiction and plaintiffs have failed to state a claim upon which relief can be granted.[19]

Central Issues to Resolve

Although the defendants have based their motion to dismiss on a variety of interrelated legal arguments, for the purposes of evaluating the suit in relation to the evolving role of state attorneys general more broadly, this paper will only address three of the larger issues that will be central to the court's eventual decision. For this reason, the discussion will not delve too deeply into the procedural aspects of the suit. Nor will it entertain the relationship between the federal and state claims, or the states' claims and the claims of private land trusts whose concurrent action has been consolidated with the present case.[20] The three questions that loom large over

[17] Id. 43-49.
[18] Id. at 49.
[19] Defendants' Memo in Support of Motion to Dismiss.
[20] Open Space Institute, Inc. v. American Electric Power Company, Inc., No. 04 CV 05670 (S.D.N.Y. 2004). Defendants in the private case have challenged the land trust plaintiffs' ability to bring a public nuisance claim because they have not been specially injured. As a matter of traditional common law, private plaintiffs seeking to make a public nuisance claim must demonstrate that they suffered injuries beyond those of the general public. Although the land trusts argue that the special injury requirement is waived in cases seeking injunction, and in the

the present action are: (1) whether plaintiffs have Article III standing to sue defendants; (2) whether the plaintiffs have successfully plead a claim upon which relief can be granted; and (3) whether the suit is preempted by Congressional action. In answering these three questions, the court will have to engage ideological questions on the role of the state attorneys general and their relative position within a federalist system of government.

Do plaintiffs have standing to sue in federal court?

One of the first issues which must be resolved in this controversy is whether or not the state attorneys general plaintiffs have standing to sue defendants. A fundamental preqrequisite for all federal litigation is that plaintiffs have standing to sue defendants.[21] The requirements for standing are that plaintiffs suffered an "injury-in-fact," that there is a causal connection between the injury and the conduct complained of, and that it be likely that the injury be redressed by a favorable decision.[22] Although defendants have attacked plaintiffs' ability to meet Article III's requirements for standing, plaintiffs assert that they meet standing through their *parens patriae* power and their injuries themselves.

In their motion to dismiss, defendants have taken the position that plaintiffs lack standing because their injury fails to meet the requirements of Article III. Defendants first argue that the *parens patriae* power does not absolve plaintiffs from standing requirements.[23] Defendants then argue in the alternative that even if *parens patriae* absolves the plaintiffs from meeting standing

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alternative that they have been specially injured, because they do not have the *parens patriae* power of the state plaintiffs they are more prone to defendants' standing attacks based on lack of injury.

[21] Warth v. Seidin, 422 U.S. 490, 498 (1975)(holding that the threshold question in every case is "the power of the court to entertain the suit").

[22] Lujan, 50 U.S. at 560-61.

[23] Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc., 256 F.3d 879, 885 (9th Cir. 2001)(holding that sovereign still must allege injury-in-fact to the citizens they purport to represent as *parens patriae*); Maryland People's Counsel v. FERC, 760 F.2d 318, 322 (D.C. Cir. 1985)(holding that a state agency has standing when *parens patriae* criteria are met and "the citizen interests represented are concrete interests which the citizens would have standing to protect"); New York v. Microsoft Corp., 209 F. Supp. 2d 132, 149-50 (D.D.C. 2002)(holding that a state suing in *parens patriae* must establish Article III standing).

requirements, they are still required to show standing as regards their injuries. Since defendants claim that plaintiffs have failed to demonstrate even this minimal amount of standing, they argue that *parens patriae* is not dispositive on the issue. Once it has been determined that *parens patriae* is not dispositive, it becomes necessary to engage in a traditional standing analysis. In undergoing such an analysis, defendants argue that plaintiffs' complaint entirely fails to meet the traditional standing requirements.[24] Defendants' argument in this regard is based on the fact that global warming is not caused by the defendants' actions alone, and that plaintiffs have yet to suffer the bulk of the injuries which they allege. Defendants argue that the real issue is that defendants' emissions contribute to an increased risk of future harm, but that this increased risk is not sufficient to meet the injury requirement of standing. Defendants take the stance that, even if the increased risk of harm can be considered an injury, plaintiffs have failed to show that defendants' actions have substantially increased the risk of that future harm.[25] Defendants distinguish the present action from water pollution cases relied upon by plaintiffs.[26] Carbon dioxide is a legal emission which is not noxious in and of itself. The defendants' emissions are not a nuisance on their own, and a reduction of defendants' emissions will not relieve plaintiffs of their injury. Defendants thus conclude that the fact that their emissions contribute to an increased threat of global warming is not enough legal grounds on which to base standing.

Plaintiffs argue in response to defendants' allegations that the case law supports the exact opposite position. Plaintiffs also argue, not only that the *parens patriae* power grants them standing, but that they independently meet the Article III standing requirements. Regarding *parens patriae*, plaintiffs argue that states have a quasi-sovereign interest in the health and well-

[24] Lujan, 504 U.S. 555 at 560-61.
[25] Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 665, 669 (D.C. Cir. 1996)(holding that defendants' conduct must be "substantially likely" to cause a "demonstrable increase in an existing risk.")
[26] Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990)(case concerning the contribution of one of several industrial sources to a polluted waterway).

being of their citizens and that this power establishes an "actual controversy" for the purposes of meeting Article III standing.[27] Plaintiffs further argue that, aside from the states' *parens patriae* power, they have established standing under the traditional Valley Forge test.[28] Plaintiffs take the position that they have suffered an injury-in-fact because their injury is both present and imminent, and the fact that defendants have not been alone in contributing to global warming is irrelevant, since their complaint relies upon a theory of joint and several liability. Plaintiffs further argue that their injuries are redressable because any incremental reduction in overall emissions reduces their harm. Defendants' emissions reductions are a necessary component of a general decrease in global warming, and plaintiffs argue that they meet the redressability requirement on these grounds. For all these reasons, plaintiffs contend that they have standing under both *parens patriae* principles and the traditional conception of standing.

In examining defendants' and plaintiffs' respective arguments on the issue, one finds that the *parens patriae* power satisfies plaintiffs' standing requirements. The state case law on *parens patriae* suggests that plaintiffs' interpretation of this unique power is on the mark.[29] States have an indisputable interest in the economic and health impact that global warming will have, and the state attorneys general are in the position of being able to act on that interest. Additionally, nuisance litigation parallels criminal litigation in respect to its purpose of

[27] Connecticut v. Cahill, 217 F.3d 93, 97 (2d Cir. 2000)(holding that plaintiff States' quasi-sovereign interest in the "health and well-being" of their residents establishes an "actual controversy," for purposes of Article III, between the States and the defendants); Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 602-04 (1982)(holding that "quasi-sovereign interests…consist of a set of interests that the State has in the well-being of its populace"); Maryland People's Counsel v. FERC, 760 F.2d at 321.

[28] Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982)(holding that to establish standing plaintiffs must: (1) have alleged an injury-in-fact, (2) have an injury that is "fairly traceable" to defendant's actions, (3) have an injury which is redressable).

[29] Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977)(holding that the Massachusetts Attorney General is acting within his authority under Massachusetts law in prosecuting an appeal to the United States Supreme Court, against State officers whom he represented in lower court proceedings); People v. Brown, 624 P.2d 1206 (Cal. 1981)(holding that the Attorney General has the obligation to present what he deems to be in the public interest in the face of potential conflicts with state agencies whom he nominally represents); Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003)(holding that Attorney General had authority to petition the Supreme Court to enjoin Secretary of State from conducting elections under a state bill).

punishing bad actors. Just as the state is assumed to have standing in criminal litigation, policy reasons would seem to suggest that standing should be assumed in public nuisance litigation as well. Although defendants' arguments as to why plaintiffs have failed to meet the traditional standing requirements have significant merit, plaintiffs should still defeat the motion to dismiss on standing grounds because of their *parens patriae* power. The strength of defendants' argument in terms of whether plaintiffs have suffered an injury-in-fact, however, will lead to a decision in their favor on whether plaintiffs have plead a federal claim upon which relief can be granted.

Have plaintiffs plead a claim upon which relief can be granted?

If plaintiffs are able to demonstrate that they meet standing requirements, the court will next have to evaluate the central question of whether plaintiffs have properly plead a claim upon which relief can be granted. Defendants argue that there is no federal common law on plaintiffs' claim[30], and furthermore, that separation of powers prevents the court from recognizing defendants' actions as a public nuisance.[31] Plaintiffs respond, but since it is difficult for them to establish an injury attributable to defendants, their arguments here are tenuous at best.

In support of their contention that plaintiffs have failed to state a federal claim upon which relief can be granted, defendants take the position that the federal common law is not meant to capture cases like the present one. Defendants argue that since Erie v. Tompkins, the federal courts are limited to specialty areas in their authority to formulate federal common law.[32] According to defendants, federal common law post-Erie is only meant to dictate in the traditional

[30] Defendants distinguish the present action from public nuisance cases cited by plaintiffs: Georgia v. Tennessee Copper Co., 206 U.S. 474 (1915)(involving plumes of sulphurous acid which caused direct harms to Georgia); Missouri v. Illinois, 200 U.S. 496 (1906)(involving noxious materials discharged into interstate waterway).

[31] Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004)(rejecting the theory that an existing federal common law "enclave" evolves and expands with changes in the underlying substantive law).

[32] Erie v. Tompkins, 304 U.S. 64 (1938)(holding that "there is no federal general common law" and that state common law applies in cases where the federal court has jurisdiction through diversity).

nuisance cases involving localized harms that are directly traceable to out-of-state sources. Defendants further argue that the present case is not the type of "simple nuisance" in which federal common law is meant to apply.[33] Carbon dioxide is neither an illegal or noxious substance, and the harms suffered by plaintiffs as a result of global warming are not directly traceable to any out-of-state source. Additionally defendants argue that there is no way for plaintiffs to trace their injuries to defendants' specific actions because global warming is caused collectively by emitters across the globe. For these reasons, the defendants argue that there is no cause of action under federal common law for plaintiffs' complaint. Defendants' final argument is that it would be inappropriate for the court to recognize a new public nuisance because, to do so in this case, would result in a violation of separation of powers. The separation of powers doctrine dictates that the court should not take upon itself policy making, and defendants argue that to recognize carbon dioxide emissions as a public nuisance would be to do just that.[34]

Plaintiffs counter defendants by arguing that this type of harm is exactly the type in which federal common law should apply, and there are no political questions at hand because this is a case and controversy for which the Constitution vests authority in the judicial branch. Unlike defendants, plaintiffs see this case as falling squarely in the traditional realm of public nuisance. Plaintiffs argue that the current situation meets all the elements of a federal common law nuisance.[35] Defendants are engaging in an activity that is causing an injury to a cognizable interest of plaintiffs, and plaintiffs see this as a matter of interstate pollution that should be

[33] Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)(holding that the Supreme Court has recognized some "limited areas" in which federal common law should apply); Sosa, 124 S. Ct. at 2762, 2764.

[34] O'Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994)(holding that the function of weighing and appraising policy considerations is more appropriately for those who write the laws, rather than for those who interpret them); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)(holding that decisions affecting national security are a "kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion.")

[35] In re Oswego Barge Corp., 664 F.2d 327, 332, n.5 (2d Cir. 1981)(holding that a public nuisance is an unreasonable interference with a right common the general public).

resolved in the courts. Plaintiffs find the fact that their injuries cannot be traced specifically back to defendants irrelevant because they argue that defendants are not exclusively liable, but jointly and severally liable. They argue that a polluter who contributes to a public nuisance may be enjoined regardless of the number of co-contributors.[36] Finally, plaintiffs contest defendants' allegation that applying federal common law would disrupt the separation of powers principle. Plaintiffs argue that this is a specific controversy between the parties, and in the absence of congressional legislation that states otherwise, the Constitution assigns authority over such controversies to the Judicial Branch.[37]

Given the amorphous nature of global warming, the court will likely side with defendants in finding that plaintiffs have not successfully plead their claim. Plaintiffs have valiantly tried to equate their case with traditional forms of interstate pollution, but defendants are correct that the facts here can be distinguished in a number of critical ways. Defendants have not engaged in any illegal activity, and unlike traditional forms of noxious abatement, enjoining defendants' behavior will not in and of itself lessen the injury. In fact, even if plaintiffs were to obtain the exact remedy they seek, the global warming threat would likely remain the same over time. The nature of the injury in this case departs from traditional pollution, and a judicial remedy would appear to lead in the extreme burdening of a few actors. For all of these reasons, the court is most likely to dismiss plaintiffs' federal cause of action for failure to state a claim upon which relief can be granted.

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[36] Cox v. City of Dallas, 256 F.3d 281, 292 n.19 (5th Cir. 2001)(noting that "nuisance liability at common law has been based on actions which 'contribute' to the creation of a nuisance).

[37] Plaut v. Spendthrift Farm, 514 U.S. 211, 218-19 (1995)(holding that "Article III establishes a 'judicial department' with the 'province and duty…to say what the law is' in particular cases and controversies."(quoting Marbury v. Madison, 5 U.S. (1 Cranch) 135, 177 (1803)).

Has Congress preempted a federal common law claim?

The third issue central to a resolution of the present controversy is whether Congress preempted judicial action through legislation. Defendants argue that any federal common law claim has been preempted by legislative activity in the air pollution context, while plaintiffs argue that the claim is not preempted because Congress has yet to speak specifically on carbon dioxide.[38]

Defendants base their preemption argument on the fact that Congress refrained from regulating carbon dioxide emissions even when it had the opportunity to through other interstate air emissions legislation. Applying the principles last articulated in Milwaukee II, defendants argue that the present case involves a question to which a legislative scheme "spoke directly."[39] Defendants point to congressional activity which speaks to research and further investigation on climate control[40], as well as, the Clear Air Act[41] which creates strict regulations for other types of emissions. Defendants first line of argument is that the Clean Air Act provides a comprehensive legislative scheme on air pollution, and that it effectively creates a prohibition against federal common law nuisance actions like the one advocated for by plaintiffs.[42] Defendants further argue that the National Climate Program Act and the Global Climate Protection Act, which speak more specifically to climate change and greenhouse gas emissions, solidify their claim that Congress has decided against regulating carbon dioxide emissions. Given Congress' clear

[38] City of Milwaukee v. Illinois, 451 U.S. 304 (1981)(holding that federal common law is displaced whenever a legislative scheme speaks directly to the problem addressed)[hereinafter Milwaukee II].
[39] Id. at 305.
[40] 15 U.S.C. §§ 2902, 2904(a), (b)(1), (d)(1), (9); S. Rep. No. 95-740, at 13, 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1386, 1398-99; H.R. Conf. Rep. No. 95-1489, at 7, 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1402, 1403, 1405; Pub. L. No. 100-204, tit. XI, §§ 1102(3), 1103(a)(3), 101 Stat. 1407, 1408 (1987)
[41] 42 U.S.C. §§ 7403.
[42] Illinois v. Outboard Marine Corp., 680 F.2d 473, 478 (7th Cir. 1982)(holding that "The lesson of Milwaukee II is that once Congress has addressed a national concern, our fundamental commitment to separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution.").

intention, defendants argue that plaintiffs' claims are preempted in the face of this legislative activity.

Plaintiffs counter defendants' position by arguing that Congress has yet to demonstrate its legislative intent with regards to greenhouse gas emissions, and that their federal common law claim is therefore not preempted. In contrast to defendants, plaintiffs see Congress' silence on greenhouse gases as simply silence rather than an intention to prohibit regulation.[43] Plaintiffs view the legislation cited by defendants as not speaking directly to carbon dioxide regulation. Countering defendants, plaintiffs argue that the fact that Congress has articulated its support for research and further investigation does not indicate that the legislature disfavors regulation. If anything, plaintiffs see Congress' explicit concern for the dangers of carbon dioxide as providing support for their position that regulation is needed.[44] Furthermore, plaintiffs regard the Clean Air Act as a specific piece of legislation meant to regulate one area – not as a comprehensive directive on interstate air pollution. Plaintiffs final argument is that, should Congress wish to speak directly to carbon dioxide emissions in the future, "it knows how."[45] Plaintiffs argue that, in the event that Congress did intend for their legislation to be interpreted in the manner advocated for by defendants, Congress maintains the ability to enact legislation in response to the court's remedy.

Assuming that the court reaches the question of preemption, it is likely to find for defendants. The fundamental disagreement between the parties is how legislative silence should be interpreted. Defendants advocate for a reading that interprets silence to mean a desire not to

[43] County of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, 236-37 (1985)(holding that "in determining whether a federal stature pre-empts common-law causes of action, the relevant inquiry is whether the state '[speaks] directly to the question' otherwise answered by federal common law.")

[44] "Nothing in this subchapter shall be construed, interpreted, or applied to preclude or delay the planning or implementation of any Federal action designed, in whole or in part, to address the threats of stratospheric ozone depletion or global climate change." 15 U.S.C. § 2398(c).

[45] States' Reply at 31.

regulate, while plaintiffs see silence as simply the absence of any legislative intent. Post-Milwaukee II courts have sided more with defendants, giving great deference to the legislature and interpreting silence to imply a disapproval of regulation.[46] Especially given the decisions in regards to acid rain and ozone depletion, it is likely that the court will interpret the Clean Air Act as a legislative scheme meant to capture the types of emissions here.[47] Although plaintiffs are correct that the court could judicially impose the type of regulation sought, with the knowledge that Congress would act retroactively if it disagreed, recent judicial decisions make it seem unlikely that the court will side with the defendants on the issue of whether a federal common law claim has been preempted by Congressional activity.

Looking Ahead

After considering the central questions that loom large in the present action, the next step of analysis is to consider the potential outcomes of the litigation. The first obstacle facing plaintiffs is defendants' motion to dismiss the federal claim. From a procedural standpoint, for all of the claims to remain in federal court, the court must deny the motion to dismiss the federal claim. The district court has supplemental jurisdiction over the state law claims, but this is contingent on the federal claim remaining viable.[48] If defendants' motion to dismiss the federal claim is granted in its entirety, then the district court no longer has supplemental jurisdiction.[49] For these reasons, the survival of both federal and state claims in the district court rests on the federal claim remaining valid.

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[46] Oswego Barge Corp, 664 F.2d 327; Illinois v. Outboard Marine Corp., 680 F.2d 473; New England Legal Found. V. Costle, 666 F.2d 30, 33 (2d Cir. 1981)(holding that "Congress has indicated that regulation may be better achieved through a comprehensive statutory approach than through ad hoc legal remedies").

[47] Thomas Merrill, Address at Symposium on the Role of State Attorneys General in National Environmental Law Policy (Sept. 20, 2004).

[48] 28 U.S.C. § 1367.

[49] Plaintiffs make the argument that the state claims could still survive if the claims against government defendant TVA remain valid. Should the court find though that plaintiffs have failed to state a claim upon which relief can be granted, it is most likely that the claims against defendant TVA will be dismissed.

As was discussed in earlier sections of this paper, the federal claim is likely to be dismissed for failure to state a cause of action upon which relief can be granted. Given this likely outcome, plaintiffs next step is to reevaluate their alternative courses of action. Although plaintiffs will have a variety of options before them, political exigencies will likely eventually terminate the litigation should the federal claim be dismissed.

In the event that the claims are dismissed from the district court, the states have two courses of action. First, plaintiffs could collectively choose to appeal. This path could eventually lead plaintiffs to the Supreme Court. Although this course of action is feasible from a cost perspective (the additional cost of filing additional briefs is fairly manageable), the state attorneys general would probably find it difficult to gain the political support needed to wage such a lengthy legal battle. The second option facing the state attorneys general would be to pursue legal remedies in their individual state courts. The downside of such an approach would be a strain on state resources. If the states are forced into their individual state courts, they will individually have to bear the resource burden. Such a cost would likely be prohibitive towards the majority of the states in the present suit and would put an end to future litigation. Faced with these two undesirable alternatives, it is unlikely that the states will choose to continue to pursue litigation if the court grants defendants' motion to dismiss for failure to state a claim.

The drawbacks of pursuing individual state remedies in this case bring to focus some of the central characteristics of multi-state litigation for state attorneys general. The benefit of federal action, is not only that plaintiffs fight potential coordination problems, but also that plaintiffs wield a much bigger stick to enact policy change. As Tom Miller, Attorney General of Iowa, has said "by coming together, the dynamics of the cases change…When a corporation discovered it had to face 30 states, instead of one, it suddenly became much more serious about

dealing with the issue."[50] Although some have criticized the multi-state actions as misplaced regulatory attempts by ill informed actors[51], others view them as a way to sidestep legislative deadlock on key matters of public interest.[52] Viewed as a whole, the benefits of the multi-state suit outweigh the potential harms. Multi-state actions allow the state attorneys general to protect their constituencies from the types of modern harms that go beyond what their traditional powers are capable of combating. Today's state attorneys general face public dangers that straddle state lines. Multi-state litigation allows these public advocates to rally the resources and man power necessary to properly perform their function. Concerns related to a usurping of national power by renegade state actors are largely overstated, as the state attorneys general are held accountable both by the judicial and political process. While they can do much to raise awareness and concern on a particular issue, the state attorneys general are still enforcement officials who cannot legislate on their own. They are bound by the power of the courts, and both the federal and state judiciary prevent them from exercising any undue influence. Furthermore, the majority of state attorneys general are elected officials who are made accountable to the electorate through the political process. If the public feels that their state attorney general has wrongly appropriated power, it will respond by displacing that individual from office. Multi-state actions should thus be viewed not with apprehension, as any potential harms are largely diminished through judicial oversight and political accountability, but with enthusiasm. Through these suits, state attorneys general can turn the spotlight onto issues of public concern that may otherwise be stymied by legislative stalemate.

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[50] Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2005-06 (2001).

[51] Harry First, *Pyrrhic Victories? Reexamining the Effectiveness of Antitrust Remedies in Restoring Competition and Deterring Misconduct*, 69 GEO. WASH. L. REV. 1004, 1026 (2001)(citing Posner).

[52] Sally Peacock, *How the Household Settlement Uncorked a Law Enforcement Bottleneck*.

Looking at the present case with this understanding of the multi-state suit, one finds that State of Connecticut v. American Electric may still be considered a victory for the attorneys general, even if the suit is eventually dropped. One of the goals of the global warming litigation was to draw public attention and reignite legislative activity on environmental issues. The Director of the National Resource Defense Counsel's Air and Energy Program, David Hawkins, has said that the goals of this suit are four tiered: creating a binding limit on emissions, initiating a general reduction in emissions, initiating the notion of liability in global warming, and kick starting political action in this area.[53] The present case has certainly garnered much local and national media attention, and more importantly, it has focused public scrutiny on the executive branch's failure to address the environmental arena. Even if the case is dismissed and litigation ceases, the state attorneys general have met the goal of establishing a notion of accountability and reigniting political action. Looking into the future, corporate actors and legislators will likely pay closer heed to the effect that their actions will have on climate change, knowing that they may draw public ire.[54] State of Connecticut v. American Electric is thus the perfect example of how the state attorneys general can use their collective enforcement power to fill policy gaps in our federalist system of government.

Conclusion

Although State of Connecticut v. American Electric is still at an early stage of the litigation, the issues it brings up are those that have faced state attorneys general for over twenty years. State attorneys general find themselves in a unique position to enact national change. Although traditional notions of litigation and preemption may limit the state attorneys general

[53] David Hawkins, Remarks at Symposium on the Role of State Attorneys General Conference in National Environmental Law Policy (Sept. 20, 2004).

[54] J. Kevin Healy and Jeffrey M. Tapick, *Climate Change: It's Not Just a Policy Issue for Corporate Counsel—it's a Legal Problem*, 29 COLUMBIA J. ENVT'L. L. 92, 102 (2004).

somewhat in their ability to fully exercise their *parens partiae* authority, the media-dependent nature of modern policy-setting leads them to success even when they fail in the courtroom. Overall, the global warming case is a shining example of how state attorneys general can engage strictly legal issues in a way that brings policy to the forefront. Regardless of how one feels on the motivating factors behind it, one must recognize that this case is an example of how state attorneys general can shape the national policy scene for the better.