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This Town Ain't Big Enough for the Two of Us: Interstate Pollution and Federalism under *Milwaukee I* and *Milwaukee II*

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The Supreme Court has handed us a curiously shifting regime to govern public nuisance lawsuits over interstate pollution. In the first instance, the courts and parties are to start with the presumption that federal common law governs interstate pollution cases. As long as the pollution at issue is sufficiently interstate or otherwise implicates uniquely federal interests, federal common law governs *ab initio*. Call this the rule of *Milwaukee I*. The Court has been clear, moreover, that this federal common law doctrine preempts whatever state common law would otherwise have applied to the case. So far so good. If, however, there is federal regulation of the pollution at issue under a federal statute that provides the plaintiff with an administrative remedy, then the plaintiff's federal common law claim becomes preempted, at least with respect to injunctive relief. Call this the rule of *Milwaukee II*. At this point the plaintiff still has common law rights because, as the Court has held, the federal environmental statutes expressly preserve state common law claims. Thus, the existence of a generally preemptive *federal* statutory remedy for interstate pollution has the counter-intuitive effect of reviving otherwise dormant *state* common law rights. This is the regime that today governs public nuisance suits addressing global warming - an inherently interstate pollution problem. This regime raises substantial constitutional questions of federalism. Fundamentally, while practitioners and the courts can apply these straightforward rules, this regime lacks constitutional coherence. Ultimately, *Milwaukee I* or *Milwaukee II* must go if we are to achieve such coherence. Under principles of federalism that safeguard the dignity of the states as sovereigns, *Milwaukee II* must someday yield.

Backdrop: The Trilogy

The framework governing public nuisance claims for interstate pollution was set forth in three Supreme Court cases: *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"), *City of Milwaukee v. Illinois*, 451 U.S. 304, 319 n.14 (1981) ("*Milwaukee II*"), and *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). Under this framework, a plaintiff injured by *interstate* pollution that is *unregulated* by the federal EPA may bring a claim under the federal common law of public nuisance.

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[1] The author is counsel for the plaintiffs in the global warming tort cases *Open Space Institute v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *appeal pending*, No. 05-5119-cv (2d Cir.), and *Native Village of Kivalina v. ExxonMobil Corp., et al.*, No.C 08-cv-01138 SBA (N.D. Cal.).

In *Milwaukee I*, Illinois filed a case under the Supreme Court's original jurisdiction against polluters from out of state. The defendants were Wisconsin municipalities discharging inadequately-treated sewage into Lake Michigan, which contributed to bacterial contamination along the Illinois shoreline. In a unanimous decision, the Supreme Court held that the federal common law of public nuisance governs such a claim: "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Milwaukee I* at 103; *see also id*. at 107 (discussing federal "public nuisance"). The Court drew heavily upon its historic decision in *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907), an air pollution case in which the Court, in an opinion by Justice Holmes, allowed an interstate nuisance claim for what is now recognized as acid rain. *See also Georgia v. Tennessee Cooper*, 237 U.S. 474 (1915) (setting emissions limits on remaining defendant).

The Court observed in *Milwaukee I* that there were important federal interests at stake in light of federal clean water statutes and that those federal interests called for application of federal law. 406 U.S. at 101-02 (noting "a complex of laws recently enacted" relating to water pollution). It held that "[w]hile the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning [federal common law] rules of decision." *Id*. at 103 n.5. The Court observed that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance" but "until that comes to pass, federal courts will be empowered" to hear interstate pollution cases. *Id*. at 107. *Milwaukee I* also held that a claim under the federal common law gives rise to proper federal question jurisdiction. *Id*. at 100. The Court thus declined to exercise its original jurisdiction and held that Illinois could re-file the case in federal district court. *Id*. at 108.[2]

Illinois thus proceeded to re-file its case in federal district court in Illinois under the federal common law of public nuisance, joined now by Michigan as a co-plaintiff. Although Michigan's shoreline was too far from Wisconsin to be affected by the pathogens from Wisconsin-borne sewage, Michigan alleged that the sewage pollution was the largest source of nutrients that were contributing to eutrophication of the entire lake.[3] The plaintiffs prevailed after a bench trial, *Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973), and the Seventh Circuit affirmed most of the relief ordered by the district court, *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979).

The Supreme Court granted *certiorari* to determine whether new federal legislation enacted after its decision in *Milwaukee I*, i.e. – the Clean Water Act – had now preempted the federal common law claim. The Court re-affirmed that federal common law applies when the courts are "compelled to consider federal questions which cannot be answered from federal statutes alone." *Milwaukee II*, 451 U.S. at 314 (quotation omitted); *see also id*. at 319 n.14 (federal common law applies where "problems requiring federal answers are not addressed by federal statutory law."). The Court held the plaintiffs' federal common law nuisance claim to be preempted, however, because the new statute regulated the very sewage discharges at issue,

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[2] The same day as it decided *Milwaukee I*, the Court issued another opinion written by Justice Douglas, *Washington v. General Motors Corp.*, 406 U.S. 109, 114 (1972), in which it declared that "[a]ir pollution is, of course, one of the most notorious types of public nuisance in modern experience."

[3] Eutrophication is the process of overloading a freshwater body with nutrients, causing algal blooms that deplete the water of oxygen and lead to a dead lake.

imposed numerical limits on them and provided the plaintiffs with a remedy. *Id*. at 320. It construed the express preservation of common law in the statute to mean state common law only. *Id*. at 328. The Court thus vacated the lower court decision. *Id*. at 332. *Milwaukee II* did not reverse *Milwaukee I*; the Supreme Court and lower courts have continued to rely upon *Milwaukee I* as good law. *See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 n.13 (1981); *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) ("we have long recognized that interstate water pollution is controlled by federal law."); *Nat'l Audubon Soc'y v. California*, 869 F.2d 1196, 1203 (9th Cir. 1988).

Justice Blackmun, joined by Justices Marshall and Stevens, dissented. Justice Blackmun emphasized the interstate nature of the controversy and that "when such disputes arise, it is clear under our federal system that laws of one state cannot impose upon the sovereign rights and interest of another." *Milwaukee II*, 451 U.S at 335 (Blackmun, J. dissenting). Further, for Justice Blackmun, the existence of new federal legislation on the matter was an additional factor weighing in favor, not against, application of federal common law, because it demonstrated the important federal interests at stake. *Id*. at 336-37. He pointed out that the new federal water effluent permits did not establish a defense to legal requirements for more stringent standards since the law expressly allowed states and federal officers and agencies to establish and enforce more stringent standards. *Id*. at 341. He would have held the express preservation of "common law" in the statute to encompass federal common law given Congress' presumed knowledge of *Milwaukee I* at the time it enacted the new statute. Justice Blackmun noted that the Justice Department and the EPA, which had pursued their own federal common law actions against polluters, shared this understanding of the statute and that every lower federal court had so ruled. *See id.* at 346-47 & nn. 21, 22, 339-40 & n.9. Based upon the demonstration of serious threatened harm to public health, he would have upheld the lower court's judgment restricting sewage effluent under the federal common law of public nuisance notwithstanding that the defendants were in compliance with permits issued by their state under the new federal law. *See id.* at 347-53. He concluded that since "both the Court [in *Milwaukee I*] and Congress fully expected that neighboring states might differ in their approaches to the regulation of the discharge of pollutants into their navigable waters, it is odd, to say the least, that federal courts should now be deprived of the common-law power to effect a reconciliation of these differences." *Id.* at 351.

The third chapter in the trilogy, *Ouellette*, arose when Vermont citizens invoked *state* common law in a suit against a New York paper pulp mill that was polluting the air and water of Vermont. The plaintiffs sought injunctive relief and damages. The Supreme Court, reviewing only the water claim, re-affirmed that "the control of interstate pollution is primarily a matter of federal law." *Ouellette*, 479 U.S. at 492. It held, however, that while the federal common law was unavailable to the plaintiffs under *Milwaukee II*, they could sue under the state public nuisance law of the source state (there, New York), because the savings clauses of the Clean Water Act expressly preserve "common law" claims. *Id*. at 497 ("nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source state"). It further held that the statute preempts application of more than one state's common law and thus the law of the state where the harm occurs may not be applied. On remand, the district court reached the same conclusion with respect to the interstate air pollution claim. *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58, 62 (D. Vt. 1987) (public nuisance law of source state preserved; savings clauses of Clean Air Act virtually identical to those of Clean Water Act).

A final twist is that the Clean Water Act and the Clean Air Act differ in a key respect. The Clean Water Act prohibits all discharges into navigable waters in the absence of a federal permit. Thus, under *Milwaukee II*, the Clean Water Act leaves no room for federal common law.

Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 21-22 (1981). The Clean Air Act, however, only regulates certain pollutants and categories of sources. In particular, an ambient air pollutant is only subject to regulatory control under the CAA after the EPA Administrator makes a finding that it poses a danger to human health or welfare. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1447 (2007). This pollutant-by-pollutant regulatory structure of the CAA leaves gaps to be filled by federal common law. *See New England Legal Foundation v. Costle*, 666 F.2d 30, 32 n.2 (1981) ("the Clean Air Act differs substantially from the Water Pollution Control Act in areas which the majority of the Court in [*Milwaukee II*] found were especially significant").[4] The upshot is that federal common law is available for interstate air pollution but not interstate water pollution.[5]

The *Milwaukee I*, *Milwaukee II*, *Ouellette* trilogy thus establishes a straightforward, if counter-intuitive, framework involving vertical and horizontal choices of law for an interstate air pollution case.[6] Where such pollution is unregulated by the federal EPA, the federal common law of public nuisance applies. This federal common law is mutually exclusive with state common law. *Ouellette*, 479 U.S. at 488 ("the implicit corollary of [*Milwaukee I*] was that state common law was preempted"); *Milwaukee II*, 451 U.S. at 314 n.7 ("If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used."). If EPA commences regulating the pollutant, then under *Milwaukee II* federal common law becomes preempted but state common law applies (vertical choice of law rule). The state law applied must be the law of the source state rather than the affected state (horizontal choice of law rule).

The foregoing rules have the blessing, at least, of creating fairly clear lines. Some cases may require difficult decisions about whether the pollution at issue is sufficiently interstate, or whether it sufficiently implicates a matter of uniquely federal interest, to trigger federal common law. Nonetheless the overall regime enjoys the virtue of clarity. Lawyers and the courts can live with the counter-intuitive revival of state common law by a generally preemptive federal statute. But it raises fundamental issues of state sovereignty that cannot be resolved – if we are ultimately to have a constitutionally coherent regime – without the Court reversing either *Milwaukee I* or *Milwaukee II*.

Application to Global Warming

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[4] *See also National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1988) (Reinhardt, dissenting); Kenneth M. Murchison, *Interstate Pollution: The Need for Federal Common Law*, 6:1 *Va. J. Nat. Res. L.* 1, 36 (1986) ("Federal common law should continue to provide the rule of decision in cases falling within [federal regulatory] gaps."). The majority opinion in *Audubon* found that the pollution at issue there was too localized to trigger federal common law and thus had no occasion to address preemption. The portion of the dissenting opinion in *Audubon* addressing preemption was thus the only opinion in that case to do so. Two district courts have found that the CAA preempts federal common law causes of action for local, intrastate pollution that is regulated by EPA. *See Reeger v. Mill Serv., Inc.*, 593 F. Supp. 360, 363 (W.D. Pa. 1984) (local emissions from a hazardous waste facility); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982) (local air pollution from a landfill).

[5] The Clean Water Act does not preempt federal maritime cases seeking compensatory and punitive damages, however. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008).

[6] Vertical choice of law refers to the choice between state and federal law. *See Empire HealthChoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691 (2006).

Public nuisance cases addressing global warming raise the *Milwaukee I* and *II* issues head on. While the Supreme Court has held that EPA has authority to regulate greenhouse gases, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), EPA has not done so. In fact, EPA has pointedly criticized the very idea of using its Clean Air Act authority to regulate greenhouse gases. *See* EPA, Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008) ("I believe the ANPR demonstrates the Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global greenhouse gases.") (statement of EPA Administrator). Global warming is thus a matter of federal common law under *Milwaukee I*. But injunctive claims seeking to restrain greenhouse gas emissions could potentially shift to become a matter of state law if EPA commences regulating greenhouse gases under the Clean Air Act.

In *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), ("*AEP*"), *appeals pending*, Nos. 05-5104-cv; 05-5119-cv (2d Cir.), eight states, a municipality and three land trusts seek injunctive relief against electric power companies that emit large quantities of greenhouse gases. In *California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) ("*GM*"), *appeal pending*, No. 07-1698 (9th Cir.), and *Native Village of Kivalina v. ExxonMobil Corp., et al.*, C 08-cv-01138 SBA (N.D. Cal.), an Inupiat Eskimo tribe seeks monetary damages for global warming injuries. No court has yet addressed the question whether greenhouse gas emissions are controlled by state or federal law under *Milwaukee I* and *II*. In *Connecticut v. AEP* and *California v. GM*, the courts dismissed the cases on the basis of the political question doctrine, thus averting the need to determine the underlying source of law. Motions to dismiss are pending in *Kivalina*. Due to the inherently interstate nature of greenhouse gas emissions and the important federal interests at stake in global warming, the courts inevitably will be required to address this question.

The Federalism Problem of *Milwaukee II*

It is hard to overstate the importance of *Milwaukee I*. Just one year before the decision, the Court had taken the diametrically opposite approach in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971). In *Wyandotte* the Court declined to exercise its original jurisdiction in a case filed by a state against out-of-state (and out-of-country) water polluters and indicated the plaintiff should pursue its case in state court under state law. The lone dissenter in *Wyandotte* was Justice Douglas. Yet in *Milwaukee I* he convinced his colleagues to join him in a unanimous opinion for the Court holding that interstate pollution gives rise to a federal question governed by a federal common law that incorporates the doctrine of public nuisance.

Milwaukee I is fundamentally rooted in a federalism-based need for neutrality as between the competing laws of two or more states. It provides a neutral federal forum for the adjudication of disputes that implicate the differing interests of two or more states when the Supreme Court either cannot or will not exercise its original jurisdiction. When State A (or citizens from State A) sues a polluter from State B, under *Milwaukee I* neither of the two states may use their domestic law as a trump card. Nor, in the event of a personal jurisdiction problem in the state courts of state A over the polluter, may the polluter force State A to litigate in the state courts of State B. It is hard to imagine a more direct assault on the dignity and sovereignty of a state than to force it (or its citizenry) into the position of a supplicant in the courts of a sister state seeking redress for injuries to its people's health or its natural resources. And particularly so where the defendant is a large industry that substantially contributes to the taxes paying the judicial salaries in the sister state. Indeed, even where the polluter can be haled into the state courts where the harm occurs, as is often the case, there is nothing to stop the polluter's state from changing the

law legislatively (or, perhaps, judicially, for example in a declaratory judgment action) so that "emissions of pollutant X shall not be considered a public nuisance," thus terminating the plaintiff state's case. Simply reversing *Ouellette* so as to allow application of the plaintiff state's law will not solve the federalism problem: the polluter state would be subjected to the law of the plaintiff state and perhaps to the laws of several plaintiff states.

This is exactly the problem that *Milwaukee I* resolves. Yet it is exactly the problem that *Milwaukee II* and *Ouellette* have revived in spades. A state seeking injunctive relief against interstate pollution, even if it threatens its most fundamental interests - think of the interstate pollution causing widespread damage to crops and forests as in *Tennessee Copper* – must now invoke the public nuisance law of the polluter's state anytime there is a federal regulation of the pollutant.

Even putting aside the insult to state sovereignty and dignity, consider some of the serious practical problems raised by the *Milwaukee II*/*Ouellette* regime.

The Shifting Source of Law Problem.

Milwaukee II means that, as the regulatory winds blow, so blows the source of law. If EPA starts regulating a pollutant, federal common law drops away, at least for injunctive claims, and state common law applies. If EPA then stops regulating the pollutant, federal common law suddenly applies again. The same would be true anytime Congress might amend an environmental statute to eliminate EPA's jurisdiction over a source or a pollutant that EPA had been regulating. This is not unimaginable: industry managed to convince a handful of states to enact statutes undermining the ability of agencies to adopt regulation of carbon dioxide. *See* Ala. Code § 22-28A-3 (2008); Ill. Comp. Stat. 140/15 (2009); Ky. Rev. Stat. Ann. § 224.20-125 (2008); Okla. Stat. tit. 27A, § 1-1-207 (2008); W. Va. Code § 22-23-2 (2008); Wyo. Stat. Ann. § 35-11-213 (2008). Industry could similarly prevail upon a sympathetic future Congress to narrow EPA regulatory authority. And industry has been known to wield significant influence over EPA - influence that easily could be used to effect repeal of regulation. Under *Milwaukee II*, state and federal common law will control the same problem at different times as the regulatory ground shifts.

The Multiple State Law Problem.

In cases where there are multiple sources of interstate pollution and these sources are spread across several states, under *Milwaukee II* and *Ouellette* the laws of each of the source states must be applied to regulated, interstate pollution. Multi-state pollution is a common fact pattern. For example, acid rain, smog and mercury pollution are all multi-state pollution issues. In *Connecticut v. AEP*, the plaintiffs have invoked the laws of a score of states where the five defendants maintain their operations.[7] Rivers and other water bodies commonly suffer from interstate pollution. The current regime requires the court to apply several states' laws at once, potentially resulting in inconsistent adjudications for different defendants engaged in the exact same behavior. Inconsistent adjudications could mean that some defendants are entirely exonerated while others are held liable. Or it could mean that more stringent injunctive relief is imposed upon some defendants than others. While most states follow a fairly uniform body of public nuisance law, there are notable differences among the state laws of joint and several

[7] In *Connecticut v. AEP* the plaintiffs primarily relied upon federal common law and pled state law claims in the alternative as required by *Ouellette*.

liability. Many states have enacted tort reform statutes that restrict liability to the defendant's share of the harm or that only allow joint and several liability where for a defendant that exceeds some threshold level of fault, such as fifty percent. This patchwork of liability rules would make it unnecessarily complex for a court to apportion liability among defendants located in multiple states.

The Federal Subject Matter Jurisdiction Problem

Under *Milwaukee II*, the federal courts may become unavailable to states in common law public nuisance cases. Unlike citizens, states cannot avail themselves of diversity jurisdiction. *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973). Thus, a state seeking to hold an out-of-state polluter liable must turn to state court, either its own or those of the polluter's state(s). To be sure, since *Milwaukee II* and *Ouellette* only apply where there is active federal regulation of the pollutant, a plaintiff state may be able to plead a violation of the federal statute, thereby invoking federal question jurisdiction. It could then append its state law common law claims under supplemental jurisdiction. But if the defendant has shut down the facility in question and thus there is no need for injunctive relief but only damages, or if the defendant is in compliance with its federal permits (as were the defendants in *Milwaukee II*), the state may well have no federal statutory claim. The state must then turn to state courts.

While citizens may avail themselves of federal court in diversity cases sounding in state common law, the presence of a non-diverse defendant, i.e., a single in-state polluter, would defeat diversity. In such a case the plaintiff citizens would have to either forego a federal forum or file separate cases against the in-state and out-of-state polluters.

The Interstate Commerce Issue

Under *Milwaukee II* and *Ouellette*, anytime a plaintiff in an interstate pollution case attempts to invoke state court jurisdiction over an out-of-state polluter, the defendant will object on Commerce Clause grounds. Their objection will be that the Commerce Clause forbids states to use their tort law to exercise extra-territorial jurisdiction over commerce in other states. *See, e.g., Healy v Beer Inst., Inc*. 491 U.S. 324, 336 (1989). By relegating interstate pollution cases to state law, *Milwaukee II* and *Ouellette* thus have resolved a Separation of Powers issue by creating a Supremacy Clause issue. The issue cannot be solved in a satisfactory manner by relegating the plaintiff to the courts of the defendant's state - for there may very well be multiple defendants located in multiple states. Must the plaintiff file separate suits in each state? And is this not exactly why we have federal courts? Even in a case where the defendants are all located in the same state we are back to the core problem - the indignity of forcing a sovereign state to litigate in the courts of a sister state or of having one state decide the claims or defenses of another state's citizens on matter that is likely to raise fundamental questions for both states. Even where the plaintiffs and defendants are citizens and not states, the interests of the states are clearly implicated in an interstate pollution case given the need to resolve legal issues involving harm to human health or natural resources or involving an important state industry.

In global warming cases defendants have cynically tried to take advantage of this issue by simultaneously arguing that *Milwaukee I* is insufficient to extend federal common law to greenhouse gas emissions and that state law also cannot be applied, even by a federal court, due

to alleged commerce clause problems.[8] Indeed, they have contended there is not even federal court jurisdiction due to what they contend is the total absence of federal common law applicable in cases addressing greenhouse gas emissions while at the same time they have sought dismissal of alternative state law claims on the ground that global warming raises matters of uniquely federal interest.[9] The Commerce Clause objection is likely baseless, but *Milwaukee II* and *Ouellette* needlessly invite defendants to make this constitutional objection by making interstate pollution a matter of state common law.

The Illogical Lack of Remedy Problem.

Consider the following scenario. Polluters in state A are emitting a new kind of unregulated air pollution, call it TX3, that crosses into States B and C, thereby causing harm to human health and natural resources. State B sues the polluters in federal court under the federal common law of public nuisance seeking both injunctive relief and damages. State C does not sue because of the political inclinations of the attorney general or the lack of resources to litigate. However, a group of citizens from State C join State B in filing suit and they seek damages for personal injuries and property damage caused by TX3. Under the present regime, federal common law clearly applies to the public nuisance claim by State B. However, the polluter moves for an order that State B cannot obtain damages and to dismiss the claims of the State C citizens on the ground that federal common law preempts state common law (a non-debatable proposition, *see supra*) and that federal common law neither affords a damages remedy nor authorizes suits by private plaintiffs.

- If the court grants the motion, federal common law has just become a barrier to damages cases by states and to all relief for private plaintiffs who otherwise would have been fully entitled to pursue their traditional state common law claims for damages. And, bizarrely, if EPA starts regulating TX3, under *Milwaukee II* and *Ouellette* the state would regain its right to damages and the private plaintiffs would regain their rights to sue - under the state common law of State A.

- If the court denies the motion on the ground that federal common controls only the claim by State B and does not apply at all to the claims by the citizens – thus leaving them free to pursue their state law claims – then the court will be simultaneously adjudicating two public nuisances cases against the same defendants for the same conduct under two different sets of laws: federal law in the case by State B and state law in the case by the citizens of State C. Moreover, the law of State C would very likely apply to the

[8] Brief for defendants-appellees American Electric Power Company, Inc., American Electric Power Service Corporation and Southern Company in *Open Space Institute, Inc. v. American Electric Power Co., Inc.*, No. 05-5119-cv (2d Cir.) at 22, available at http://www.pawalaw.com/assets/docs/aep_service_and_southern_co_appellees_brief.pdf; Utility Defendants' Motion to Dismiss in Native Village of Kivalina v. ExxonMobil Corporation, et al., No. 08-cv-1138 (N.D. Cal.) at 21, 34 n.19, available at http://www.pawalaw.com/assets/docs/motion-to-dismiss-by-electric-utilities.pdf.

[9] Utility Defendants' Motion to Dismiss in *Native Village of Kivalina v. ExxonMobil Corporation, et al.*, No. 08-cv-1138 (N.D. Cal.) at 32-33, available at http://www.pawalaw.com/assets/docs/motion-to-dismiss-by-electric-utilities.pdf.

> citizens' claims since the predicate of *Ouellette* - a pollutant covered by a federal environmental statute that preempts all states' laws except that of the source state - is absent. This raises the issue of fairness to State A, which, although not a litigant, surely has an interest in the matter and may not wish to see its industry subjected to the laws of other states.

The only solution to this dilemma is to interpret *Milwaukee I* as recognizing a federal common law doctrine applicable to private parties and conferring a damages remedy. There is authority for both points. *See, e.g.*, *Milwaukee I*, 406 U.S. at 105 ("it is not only the character of the parties that requires us to apply federal law"); *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1017-19 (7th Cir. 1979) (permitting damages case under federal common law by municipality); *Comm. for the Consideration of the Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1009 (4th Cir. 1976) (en banc) ("It is not essential that one or more states be formal parties if the interests of the state are sufficiently implicated."). The underlying rationale of *Milwaukee I* is that the interests of states are implicated by interstate pollution - a proposition that is true even if a state declines to file a case.

Time to Overrule *Milwaukee II*

The *Milwaukee I*, *Milwaukee II* and *Ouellette* trilogy can be boiled down to the following syllogism:

- interstate pollution is a matter of uniquely federal interest (*Milwaukee I*)
- where there is a matter of uniquely federal interest, it is inappropriate for state law to apply and the courts must use federal common law (*Milwaukee I*)
- where the federal political branches have recognized the importance of this same interstate pollution problem by regulating the pollution, federal common law should no longer apply because it is preempted (*Milwaukee II*)
- where the federal common law of interstate pollution is preempted, state common law still applies and it must be the law of the source state so that polluters do not have to abide by the laws of multiple states (*Ouellette*).

So summarized, the defect in *Milwaukee II* is obvious. Points three and four in this syllogism directly contradict points one and two. If there is a matter that calls for application of federal common law due to its interstate nature or the implication of uniquely federal interests, how can it simultaneously be *inappropriate* to apply federal common law as *Milwaukee II* holds? And why does *federal* action by Congress and EPA make it *less* appropriate for the application of federal law? As *Milwaukee I* itself held, the existence of federal statutory law justifies, not undercuts, the application of federal common law. *See Milwaukee I*, 406 U.S. at 101-03 & n.5; *see also* Alexandra B. Klass, Common Law and Federalism in the Age of the Regulatory State, 92 Iowa L. Rev. 545, 559-62 (Feb. 2007). How can it possibly be appropriate in such a situation to apply state law as *Ouellette* holds? *Milwaukee II* and its corollary, *Ouellette*, patently make no sense.

It is true that reversing *Milwaukee II* will place courts in the position of devising common law standards in situations where there already exists a federal standard under a statute. But *Milwaukee II* does nothing to avoid this process - it just shifts it to state law and, in some

situations, state court. Federal courts are the proper venue for such interstate disputes and federal courts are fully equipped to resolve the scientific issues and determine whether the plaintiff has established an unreasonable interference with rights common to the general public. *See Milwaukee II*, 451 U.S. at 34 (Blackmun, J., dissenting) ("The judgments at times are difficult, but they do not require courts to perform functions beyond their traditional capacities or experience.").

Interstate pollution, by definition, implicates the rights of more than one state. Interstate pollution is unlike the typical case presenting the question of whether to apply federal common law where the contest is between application of a single state's law and federal law. *See, e.g., O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) (state common law applies to claims by the Federal Deposit Insurance Corporation against third parties who provide services to federally insured banks). In such a situation, application of federal common law comes at the expense of a state interest in having state law apply. By contrast, in an interstate pollution case, applying one state's law comes at the expense of another state's law. It is thus impossible in interstate pollution cases to accord the states the dignity their status demands by curbing the power of the federal courts to fashion federal common law. A neutral federal forum to resolve the conflicting interests of the states in interstate pollution cases is the only solution that comports with the dignity owed by the federal government to the states. It is time to overrule *Milwaukee II*.