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## Beware of Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in the Context of Global Warming

*In Prods and Pleas, Benjamin Ewing and Douglas Kysar claim that the American legal system needs to adopt novel solutions to deal with the question of global warming. In this Essay, I start from the premise that some form of legal response to global warming is appropriate, but then conclude that the traditional allocation of responsibility between private rights of action (for large concentrated harms) and direct government administrative action (for diffuse harms) remains the proper approach. In light of the worldwide nature of the problem, the only domestic responses to this issue should be through coordinated action at the federal level. Accordingly, I agree with the Supreme Court's decision in American Electric Power Co. v. Connecticut and conclude further that the comprehensive powers lodged in the Environmental Protection Agency should not only block private rights of action under federal law, but under state law as well.*

### INTRODUCTION: A CONFLICT OF VISIONS

Benjamin Ewing and Douglas Kysar's article in *The Yale Law Journal*<sup>1</sup> represents a distillation of modern views on how the American legal and social system writ large should respond to the notable challenge of global warming. In dealing with this issue, the authors propose a mechanism for allowing various government institutions to engage in a complex game, which they describe as "prods and pleas." At its core, the authors claim that the essence of

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1. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011).

modern litigation in such high-stakes games as global warming requires all government officials, including judges, to rethink their traditional roles.<sup>2</sup> Thus Ewing and Kysar urge that these officers will do well “by performing their official roles with a self-conscious appreciation for the ways in which they can signal to *other* institutional actors that a given problem demands attention and action.”<sup>3</sup> As a variation on the traditional account of checks and balances, Ewing and Kysar insist that “one branch may ‘prod’ another by taking action that makes further avoidance of the issue unpleasant or infeasible or, alternatively, it may ‘plead’ with the other branch simply by calling attention to a problem of social need and asking for its resolution.”<sup>4</sup>

In advocating for this approach to litigation, they envision that courts can aid in a form of democratic deliberation, in a world in which “merits adjudication of tort suits promotes consideration of the underlying visions of right, responsibility, and social order that are adopted (or implied) by judicial decisions.”<sup>5</sup> While, on the one hand, these two authors are of the view that actions of this sort fit well into traditional classical liberal visions of limited government,<sup>6</sup> they recognize that others could easily disagree with them when they refer to their own proposals as a form of “state civil disobedience”<sup>7</sup> that “forces confrontation” with other branches of government.<sup>8</sup>

In putting forward this proposal on climate change, Ewing and Kysar implicate both substantive issues of tort and nuisance law and the institutional arrangements needed for their implementation. In dealing with these substantive issues, they do not attempt to build their case by appealing to the venerable theories of the common law of torts. Indeed, at one point they insist that—following the work of Ronald Coase on the issue of causation<sup>9</sup>—public nuisance bears only scant resemblance to the common law torts of trespass, which involve the direct application of force by one person against another.<sup>10</sup> Notwithstanding the evident difficulties in applying various tort arguments to global warming, Ewing and Kysar think that the high-stakes issues in an era of

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2. *Id.*

3. *Id.* at 354 (emphasis added).

4. *Id.* at 361 (footnotes omitted).

5. *Id.* at 356.

6. *Id.* at 357.

7. *Id.* at 355.

8. *Id.* at 366.

9. See, for example, R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), discussed in Ewing & Kysar, *supra* note 1, at 369.

10. Ewing & Kysar, *supra* note 1, at 369-70.

“unlimited harm” make it imperative to let the courts have a crack at these issues, if only to force the other branches of government to respond in proper fashion to their challenge.<sup>11</sup> In so doing, theirs is an odd amalgam of an appeal to the older virtues of limited government and to the rule of law. Yet, in practice, they take the opposite view and believe that it is best to disregard traditional conceptions of both tort and administrative law to achieve a set of outcomes to their liking. In urging this novel course of action, they draw some hope from the recent Supreme Court decision in *American Electric Power Co. v. Connecticut (AEP)*.<sup>12</sup> In *AEP*, the Court rejected the claim that a federal common law nuisance claim should be allowed, but only in the face of the extensive activity of the Environmental Protection Agency (EPA) in the wake of *Massachusetts v. EPA*.<sup>13</sup> The Court explicitly deferred any consideration of whether either the EPA legislation or administrative action has a similar effect on the effort to invoke state law actions for public nuisance.<sup>14</sup> In a somewhat less radical move, Ewing and Kysar explore at length why the traditional avoidance doctrines in American constitutional law should not impose barriers to this litigation, whether under the rubric of standing, political question, or preemption.<sup>15</sup>

Rather than respond with a point-by-point examination of their provocative thesis, I shall offer an alternative account of how best to think about the challenges that global warming presents to the legal system. In so doing, I shall take a more sympathetic view toward the traditional legal responses to vexing issues. I start with the substantive question of how to think about the common law action for public nuisance, after which I deal with the variety of institutional adjustments that Ewing and Kysar think appropriate to address these troublesome issues. In order to discharge this task, I shall proceed in two stages. In the first, I shall discuss the question of how to deal with public nuisances as a common law and institutional matter. In the second, I shall comment on how to understand the implications that a proper understanding of public nuisance law has for the many weighty issues of government structure that they raise, including those which relate to the role of Article III courts. In the end, I think that Ewing and Kysar fail insofar as they urge a novel version of the “changed conditions” theory to justify a departure from traditional views of limited government. There is no need to pull this

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11. *Id.* at 353.

12. 131 S. Ct. 2527 (2011).

13. 549 U.S. 497 (2007).

14. *AEP*, 131 S. Ct. at 2540.

15. Ewing & Kysar, *supra* note 1, at 378-409.

institutional rabbit out of the hat because the traditional analysis of public nuisance cases applies well to the challenges posed by air pollution. In making these arguments, I am not making any claims in support of or against global warming or climate change, nor am I advocating any exclusive market approach to these issues. The key questions are these: do we rely on administrative action, tort remedies, or both? And are these remedial choices made at the federal or state level? In my view, the only workable solution requires (alas) a federal administrative agency—here the EPA—to orchestrate the effort. Let us hope that it is led by a superb conductor.

#### I. PUBLIC NUISANCE: AT THE INTERSECTION OF TORT AND ADMINISTRATIVE LAW

One of the most striking features of Ewing and Kysar's article is that it spends little or no time working through either the basic theory of tort law or the mechanics of public nuisance law, except to say that it might offer a useful vehicle for bringing federal or state tort actions. Let me take up the two points in order. This examination then allows us to understand why the federal common law nuisance claim in *AEP* was properly dismissed.

##### A. *How General Tort Theory Applies to Nuisance Law*

In their initial foray into the tort law issues, Ewing and Kysar accept the view that the traditional notions of tort law do not capture well the law of nuisance precisely because nuisance claims deviate from the “he hit me” paradigm of tort law<sup>16</sup> on which I have based my strict liability approach.<sup>17</sup> In my view, the authors are far too dismissive of the use of tort law precisely because they follow the Coasean view on causation.<sup>18</sup> This view of causation has, to my knowledge, never been applied in ordinary nuisance cases, whose viability dates back to the early common law.<sup>19</sup> In fact, the common law approach to causation does not, as Ewing and Kysar urge, reflect the view that Coase correctly substituted “neutral concepts of reciprocal harm and resource conflict for the moralized terms of victim and polluter.”<sup>20</sup>

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16. *Id.* at 369.

17. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

18. Ewing & Kysar, *supra* note 1, at 369.

19. See generally Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974) (tracing the origins of public nuisance law).

20. Ewing & Kysar, *supra* note 1, at 369.

Instead, the common law approach—which is far closer to the ordinary instincts on causation—can only be understood against a well-articulated background norm of property rights.<sup>21</sup> In the ordinary case between two strangers, the principle of individual autonomy on the one hand and the exclusive possession of property on the other—neither of which receives a passing nod from Ewing and Kysar—define the initial set of property rights accorded to persons and property. At this point, the standard definition of what counts as a violation of these property rights between strangers is not some generalized notion of harm, but the far more specific notion of a physical invasion across a particular line. The trespass cases, which involve the direct application of force, offer the most unambiguous application of these rules.

The theory of causation in ordinary physical injury cases has never been limited to these simple trespass cases. More concretely, it is possible to identify two viable areas of extension. The first deals with the recognition of indirect forms of harm, such as pouring water into a reservoir, which then escapes when its weight is sufficient to burst through its foundations.<sup>22</sup> Though the notion of physical invasion is not relaxed, the chain of causation is expanded, but never to the point where the chain of indirect causes is allowed to stretch to infinity. If the water is stable in a reservoir, the defendant will not be responsible if a third person wrecks its foundations so that the water can escape.<sup>23</sup>

The second extension of the theory of causation, which is a direct answer to the Coasean vision and which plays—as we shall see—a critical role in dealing with public nuisance, alters the doctrine of causation to take into account the creation of rights of way, as on a public highway. While it is absurd for an ordinary person to claim that the plaintiff's face blocked the fist of the defendant, it is quite a different matter when on a public highway: if the defendant hits the plaintiff only because the plaintiff has blocked his right of way, as by entering an intersection against a red light, the plaintiff has played a vital role in causing the injury. Every system of causation recognizes that blockage is a form of causation and has to grapple with some difficult cases where both parties may be at fault, as commonly happens, for instance, when a plaintiff is speeding (against yet another statutory landmark) at the time of the collision. The mistake of the Coasean worldview is that it ignores these prior

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21. For my early criticism of Coase, see Epstein, *supra* note 17, at 167.

22. See *Rylands v. Fletcher*, [1868] 3 L.R.E. & I. App. 330 (H.L.).

23. See, e.g., *Rickards v. Lothian*, [1913] A.C. 263 (P.C.) (appeal taken from Austl.).

property rights arrangements, which from time immemorial have set the baseline against which causal arguments are adjudicated.<sup>24</sup>

The situation with nuisance law rests on an amalgamation of these twin notions of causation, which *conceptually* apply quite nicely to these cases. Thus, in the simple case where the defendant emits particles that directly shoot across the boundary line into the plaintiff's land, courts can debate whether these invasions count as a nuisance or a trespass—for example, in determining the applicable statute of limitations.<sup>25</sup> But by no stretch of the imagination can the harm be regarded as too remote to allow any form of recovery. In many cases, however, some of these pollution particles linger in the air until they are carried by wind to the plaintiff's land, which on every known theory of causation does not count as an unforeseen or intervening cause that severs causal connection. All that is distinctive about the law of nuisance, therefore, is that it combines two different causal modalities acting at the molecular theory into a larger undifferentiated whole.

Once this basic relationship is understood, it becomes clear that the law of nuisance cannot be confined to these simple one-on-one “he hit me” cases but has to move beyond them.<sup>26</sup> The theory of causation that works for a furnace also works for a tailpipe. That notion of causation also works if the emissions from A's tailpipe clog B's lungs when the emissions from B's tailpipes hurt A's lungs as well. If the only issue is the theory of tort causation, the reason why the common law of nuisance occupies such a venerable position is that it uses the traditional notions of causation that have been with us for well over a thousand years. Indeed the entire attractiveness of a judicial remedy for global warming lies in the way in which it tracks, without any fancy footwork, traditional notions of physical invasion, which include situations where the defendant's emissions raise the temperature of the plaintiff's property.

On this view, the move to public nuisance is made to cover that property which is not owned by any private individuals, such as rivers, oceans, and beaches.<sup>27</sup> At this point, the real difficulties are institutional, because ordinary litigation is not easily scalable. What works for a dispute between two neighboring landowners may not work with the constant interaction of traditional pollutants, let alone for carbon dioxide, which is anything but a

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24. See Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 52-53 (1979).

25. See, e.g., *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959).

26. For a discussion, see Epstein, *supra* note 24, at 75.

27. A public nuisance is “an unreasonable interference with a right common to the general public.” *Phila. Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 315 (3d Cir. 1985) (quoting RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979)).

traditional pollutant. To see where ordinary litigation breaks down, it is necessary now to address the common law of public nuisance.

*B. The Evolution of Public Nuisance Law*

One of the striking features about Ewing and Kysar is that, although they often reference the common law rules on public nuisance, they do little to describe its key features. The history of this doctrine, however, offers little support for their view that tort remedies could be adapted to the case of global warming. Starting with the early case of *Anon* in 1536,<sup>28</sup> the courts have held to an unswerving course that both private rights of action and administrative interventions are proper responses for public nuisances.<sup>29</sup> The key issue in the *Anon* case was the distribution of responsibility between these two activities. In dealing with this question, the old English court drew a distinction between general and special damages—a distinction that continues to dominate this branch of law today. Thus, in that particular case, it was held that when a defendant commits a public nuisance by blocking a right of way, the private right of action is given only to those people who suffer “special” damages, which are those above and beyond the general damages suffered by the population at large.<sup>30</sup> In this particular context, it meant that private rights of action were allowed only to those individuals who suffered personal injuries—for example, as when their carriages were forced off the road by the obstacle that the defendant placed in their path, or as when they were denied access to their lands lying adjacent to the public highway. All other persons whose (real) losses were the delay in completing their journey were not allowed to have a private right of action. In making this categorical rule, the English court did not countenance any case-by-case claim that this or that individual suffered special damages because his delay was more costly than others. In order to keep the rules administrable, all these cases were dismissed on categorical grounds.

It hardly followed, however, that the state was indifferent to the residual harms, which cumulated over large numbers of individuals and could easily be more extensive than the special damages inflicted on one or two persons. In order to deal with those harms, the court noted that the defendant was subject

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28. Y.B. 27 Hen. 8, fol. 27, Mich. pl. 10 (1536) (Eng.), *reprinted and translated in* RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 639 (9th ed. 2008).

29. For the Restatement treatment of this subject, see RESTATEMENT (SECOND) OF TORTS §§ 821B-821E (1979). For the history of public nuisance, see J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 *CAMBRIDGE L.J.* 55 (1989). For one modern statutory definition, see S.C. CODE ANN. § 49-1-10 (2010).

30. *Anon*, Y.B. 27 Hen. 8, fol. 27, Mich. pl. 10.

to the jurisdiction of an administrative body known as the Court Leet that could impose an appropriate fine.<sup>31</sup> The overall reaction to this arrangement is that some monetary fine might do some good, for the defendant will be induced to take greater precautions even in the absence of private rights of action. For this to happen, the fines imposed need not be large enough to capture the entire social loss; they need only exceed the costs of the wrongdoer's precautions that—if taken—would have avoided the blockage. In addition, it was clear that public officials could also remove the blockage in their administrative capacity, so as to reduce the inconvenience caused to the public at large, wholly without resort to legal actions.

This basic solution remains the law today. The only question of disagreement arises in dealing with background risks: it is well understood that there are all sorts of operations on public roads and waterways. For those operations that are sufficiently low risk, the best course of action is to let them ride without special interference. Among these background and often reciprocal risks are the minor inconveniences that arise when the government blocks streets for some period of time in order to do repair work and the like. In these cases, the standard response is to knock out the tort remedy entirely, and indeed to deny claims of compensation brought by adjacent landowners in the work area under the Takings Clause,<sup>32</sup> usually on the somewhat tenuous ground that the inconveniences that come around go around.<sup>33</sup> What is striking about these decisions is that they look askance not only on individual law suits but also on class actions that aggregate many claims together, and that they do so in dealing both with damages on the one hand and with injunctive relief on the other. It is therefore reasonably clear that using these common law notions, no plaintiff could bring a private action to redress those harms caused by global warming, even if the causal issues were as clear as they are in the typical case involving the blocking of a public road.

### C. *The AEP Case Under the Law of Public Nuisance*

It is now time to apply this historical learning to *AEP*.<sup>34</sup> To retrace its major allegations, eight states—two of which, New Jersey and Wisconsin,

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31. *Id.*

32. U.S. CONST. amend. V.

33. *Cf., e.g.,* 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097 (N.Y. 2001) (denying a private right of action to New York City businesses for losses caused by street closures after an explosion).

34. 131 S. Ct. 2527 (2011).



subsequently withdrew after the election of Republican governors—and the City of New York, along with three private land trusts, sued five major power companies on the grounds that the companies' levels of carbon dioxide emissions contributed to global warming. The numbers involved were these: total collective annual emissions of 650 million tons, which translates into 25% of the emissions attributable to domestic electric power—or 10% of all domestic human emissions, and 2.5% of all emissions from human sources worldwide.<sup>35</sup> The magnitude of these emissions raised, in the view of the plaintiffs, the resulting harm above the background levels that are normally ignored.

There is no question that the magnitude of these emissions is large, but in order to deal with the injunction under traditional terms, one would have to show that the harms in question were imminent and irreparable. The hard point about global warming is that even though there is much—but by no means universal—agreement on its potential harm, it cannot be shoehorned into the usual public nuisance cases in which, for example, the emissions of sulfur dioxide can be linked to a wide range of serious respiratory illnesses.<sup>36</sup> The time frame in which carbon dioxide will exert its harmful effects, if any, is indeterminate, as is the effect that will ensue from any reduction in the level of carbon dioxide at these facilities. It is therefore difficult to establish any causal connection between the domestic emissions and the domestic harms. Even if this obstacle can be overcome, the diffuse nature of the harm undercuts the viability of any set of private actions, whether brought by individuals or classes.

In light of these circumstances, the success of any American initiatives depends crucially on the responses by the powers-that-be in China and India, whose total carbon dioxide emissions are large and rising. If they were to decide to increase their carbon dioxide output by the amount of any reduction in the emissions from American sources, the efforts done in this country would do much to inconvenience American consumers and little to combat the risk of global warming at home or abroad.<sup>37</sup> In sum, it takes little imagination to realize that the common law approach that rejects private rights of action for cases of generalized harms would negate any private rights of action for carbon dioxide emissions under the public nuisance theory. To be sure, Ewing and Kysar urge courts “to fulfill their responsibility to uphold and apply the

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35. *Id.* at 2534.

36. For my views on this relationship, see Richard A. Epstein, *Carbon Dioxide: Our Newest Pollutant*, 43 SUFFOLK U. L. REV. 797 (2010).

37. *Id.* at 802-03.

principles of the common law of tort” in the climate change context.<sup>38</sup> Nonetheless, those common law principles clearly cut against allowing private rights of actions for public nuisance of the sort that the *AEP* plaintiffs present.

## II. THE NEW INSTITUTIONAL FRAMEWORK

The key question that remains is whether there is anything distinctive about the law of global warming that should lead us to jettison the traditional view that public nuisances with diffuse harms are rightly the exclusive province of administrative agencies. That traditional view rejects the causal relativism of Coase and seeks to find better institutional ways to deal with these diffuse harms. In my view, Ewing and Kysar do not do anything to respond to the hard questions of institutional design. In order to show why this is the case, I shall address two separate points, the first of which deals with their new vision of limited government that they think requires a reexamination of our basic administrative structure. The second deals with the specific doctrines of standing, political question, and preemption, which they discuss at some length.<sup>39</sup> In the Conclusion, I venture to explain how their arguments break down, by advancing some modest and incomplete thoughts as to the proper administrative approach to the global warming issue. I advocate the use of sound regulatory techniques to handle a major problem.

### A. *Limited Government, Then and Now*

One sympathetic way to read Ewing and Kysar is to interpret them as insisting that the old ways of doing business will not function now that we are faced with a challenge the likes of which the world has never seen.<sup>40</sup> In a sense, this claim is an updated version of the older legal principle that ordinary property rights are suspended in times of public necessity, so that the government has extra powers to deal with community threats such as fire or flood, without the government having to worry about the duty to compensate individual property owners for their loss.<sup>41</sup> To be sure, the traditional necessities to which the older doctrines responded were the destruction of a

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38. Ewing & Kysar, *supra* note 1, at 380.

39. *Id.* at 378-409.

40. For the expression of similar skepticism about Ewing and Kysar’s institutional arguments, see Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE (forthcoming 2012), available at <http://ssrn.com/abstract=1937963>.

41. See, e.g., *Mayor of New York v. Lord*, 18 Wend. 126, 129-30 (N.Y. 1837).

city by fire or flood, and not the slow burn of the earth through global warming—whose dire consequences are likely to be discovered only when it is too late to do something about them.

Let us assume, for the sake of argument, that global warming presents exactly that contour. It still does not follow that we should deviate from earlier rules that give governments greater powers in times of public necessity. Just to be crystal clear on this point, the version of separation of powers and checks and balances that marks the key divides under the Federal Constitution is worlds apart from the institutional arrangements that Ewing and Kysar embrace. In the traditional vision, liberty and dispatch are preserved by an astute design of the relevant institutions. The legislature—divided in two halves—is responsible for the articulation of general rules, which the executive enforces, subject to the ability of ordinary individuals to protest the imposition of the laws against them before the courts. In principle, the divisions are thought to be hard-edged, such that there is no muddiness between the functions.<sup>42</sup> The modern law of the administrative state with its “quasi” functions may have impressed Justice Sutherland writing in *Humphrey’s Executor v. United States*,<sup>43</sup> but to the traditionalists, the best defense of natural liberty did not lie in an institutional free-for-all, but in the explicit systems of checks and balances that are outlined in the Constitution.<sup>44</sup>

In dealing with these issues, Ewing and Kysar are correct to note that members of the various bodies can take steps for strategic reasons, even though they know that their view will not prevail. The President can veto legislation that can be overridden by two houses. Yet it is important for him to signal that the law was passed over his objection, because it allows him to stake out constitutional positions on the one hand or his strong substantive opposition to legislation on the other. These “signal[s],”<sup>45</sup> to use the Ewing and Kysar term, are vital functions in a democracy. But I think that Ewing and Kysar go overboard to the extent that they claim, following Martin Flaherty, that the entire structure was so amorphous that it did not impose a real check on

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42. See generally *INS v. Chadha*, 462 U.S. 919, 951-52, 959 (1983) (emphasizing the need for strict division of power between the branches of government).

43. 295 U.S. 602, 628-29 (1935).

44. See, e.g., THE FEDERALIST NO. 48, at 251 (James Madison) (Ian Shapiro ed., 2004) (“It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers.”).

45. Ewing & Kysar, *supra* note 1, at 354.

government at all.<sup>46</sup> There may be real questions as to whether the Congress or the President gets to determine the location of a particular post office in a particular town. But it is equally clear that if there is no appropriation of funds for any post office, the President cannot just march off and build these offices wherever and whenever he wants.<sup>47</sup> In broad outlines, the constitutional rules are choreographed so that it becomes clear which moves fall within the rules of the game and which rules fall outside their scope.

The type of game that Ewing and Kysar envision is played by different rules. In their world, it is quite possible for courts to take these cases knowing that they do not fit within accepted legal principles, hoping that other branches of government will take up the environmental or other cause that is highlighted by these actions. Yet these are noncooperative games that are just as likely to have degenerative outcomes as favorable ones. It would have been easy for Congress to go into a rage that the Supreme Court had exceeded its powers in *Massachusetts v. EPA* and to revise the statute accordingly. Alternatively, a Republican President could easily have complied with the ruling in the most minimal fashion possible, i.e., without necessarily engaging in carbon dioxide emissions control in the fashion that the Obama Administration is prepared to do.<sup>48</sup> It is not likely that all courts will deal with these issues in a singular fashion, so the signals they send will be crossed and garbled as they reach not only Congress but also the various state legislatures, which will also prove sharply divided on these questions. Nor does this look like a situation where state laboratories can come up with novel solutions, given that the location of the carbon dioxide emission has nothing to do with its effect on global warming. State solutions seem, at this point, not to work for a problem in which spillovers between states cast doubt on the suggestion of Ewing and Kysar that “multiplicative experimentation in governance” may generate viable responses to global warming.<sup>49</sup>

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46. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1807-10 (1996).

47. For a discussion, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FIRST CONGRESS 1789-1791* (1994). For a much more accurate and balanced view of this subject than either Flaherty or Ewing and Kysar offer, see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888* (1985).

48. See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009), available at [http://epa.gov/climatechange/endangerment/downloads/Federal\\_Register-EPA-HQ-OAR-2009-0171-Dec.15-09.pdf](http://epa.gov/climatechange/endangerment/downloads/Federal_Register-EPA-HQ-OAR-2009-0171-Dec.15-09.pdf).

49. Ewing & Kysar, *supra* note 1, at 365 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Against this background, it is hard to see why the set of crosscurrents that Ewing and Kysar wish to unleash will yield the kind of coordinated actions that seem desirable for handling the global warming question. The Supreme Court in *AEP* decided to say that the matter is now in the hands of Congress—there is no reason to allow for common law actions now that the legislature and the administrative agency have addressed the problem. Note that at no point do Ewing and Kysar try to take on Justice Ruth Bader Ginsburg for the way in which she outlined the debate. She was willing to think about these federal causes of action for public nuisances when there was no administrative action.<sup>50</sup> But she pulled back once “Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law.”<sup>51</sup> That point strikes me as exactly correct. There is extensive discussion on how to deal with global warming right now, so the issue can hardly be said to be concealed in some remote location. Given that high level of public deliberation and engagement, it does not seem plausible that any ill-conceived lawsuit will add sense to the mix.

*B. Prudential Doctrines and the Law of Public Nuisances*

A huge portion of Ewing and Kysar’s intellectual energy is directed toward the question of whether the various prudential doctrines that allow courts to avoid constitutional litigation should be applied in the case of global warming. With respect to standing and the political question doctrine, Ewing and Kysar are right to claim that these should not present serious obstacles to bringing the lawsuit. The point seems painfully clear with the political question doctrine, on the grounds that no political question—e.g., the recognition of a foreign state<sup>52</sup>—is involved in these rather technical discussions of public nuisance law. As to standing, my oft-expressed view is that the effort to read a rigorous standing limitation into Article III represents at most a fanciful interpretation of a clause whose opening phrase is, “[t]he Judicial Power shall

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50. See *AEP*, 131 S. Ct. 2527, 2538 (2011) (“If EPA does not set emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA’s response will be reviewable in federal court.”). Note that Justice Ginsburg previously joined Justice Stevens’s majority opinion in *Massachusetts v. EPA*, which concluded that the EPA’s refusal to promulgate rules restricting carbon dioxide emissions was “susceptible to judicial review.” 549 U.S. 497, 527 (2007).

51. *AEP*, 131 S. Ct. at 2538.

52. E.g., *Goldwater v. Carter*, 444 U.S. 996 (1979).

extend to all Cases, in Law and Equity.”<sup>53</sup> The key words in this context are “and Equity,” which are intended to capture the case where equitable remedies are most needed—that is, in those situations where no one single person suffers a distinct harm. This is exactly the case we have with global warming.

But just because there should be standing in equity for these cases does not mean that the federal courts sitting in equity should entertain these lawsuits. The principles of equitable jurisdiction were well developed in 1536, when the *Anon* court did not think that equitable injunctions afforded sensible relief<sup>54</sup>: quite simply, in those contexts, there was insufficient advance warning to make their use effective. The same general conclusion holds here, albeit for somewhat different reasons. Equitable jurisdiction is discretionary with the court, and the questions of whether the proper parties are joined and whether the harm is redressable in court should not be constitutional questions going to standing. However, these questions invoke principles that courts everywhere in the common law world use to decide whether to take up equitable jurisdiction.<sup>55</sup> Given that the administrative state has been called into action, the proper response is to use the traditional equitable grounds for refusing to take jurisdiction, which are as good in ordinary state courts as they are in Article III courts. The constitutional arguments of Ewing and Kysar are therefore a sideshow to the main issue.

The last of the three grounds worthy of some consideration is preemption. In *AEP*, the Supreme Court took a pass on the question, after contenting itself that the threshold that has to be satisfied before a federal statute preempts a state private right of action is far higher than it is when a federal statute is said to preclude a federal cause of action.<sup>56</sup> There is no question that this position is right as a matter of traditional doctrine, given the effort on the part of the Supreme Court to recognize the legitimate scope of state police power after the enormous New Deal expansion of federal power under broad readings of the

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53. U.S. CONST. art. III, § 2, cl. 1. See, for these views, Richard A. Epstein, *Standing in Law & Equity: A Defense of Citizen and Taxpayer Suits*, 6 GREEN BAG 2d 17 (2002); and Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1 (2001).

54. Y.B. 27 Hen. 8, fol. 27, Mich. pl. 10 (1536) (Eng.), reprinted and translated in RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 639 (9th ed. 2008).

55. See, e.g., *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008).

56. *AEP*, 131 S. Ct. at 2537.

commerce power.<sup>57</sup> Yet in this particular case, the pervasive involvement of the federal government makes these judicial actions unwise.

Note first that the various states did not seek damages, but only an injunction, which puts the states on a collision course with the federal version of oversight, not to mention the many state laws that could be applicable in these cases. The key point again is what it was before. The occupation of the field by systems of direct regulation leaves no place for judicial use of injunctive relief, and probably no place for damages as well. It is wholly unthinkable to allow for American Electric Power Company to be subject to a multitude of state public nuisance cases, which will differ arguably for each state in which the emissions take place. If the federal courts should not use injunctions within the context of a unitary system, piecemeal injunctions by a series of state courts would only make matters worse.

In making this claim, I recognize that on other occasions I have taken the position that compliance with a statutory scheme should not insulate a defendant in stranger cases from tort liability.<sup>58</sup> I have no reason to cut back on that position today. The great danger in conventional pollution cases is that the applicable regulatory standard will be too lax, at which point excessive harms will arise. The strict liability rule that stops these difficulties does not raise any serious problems when the statutory standard is set too high, because at that point the liability rule does not matter. Only administrative sanctions control, except in the highly improbable setting where the statute is unconstitutional.

While the plaintiffs in *AEP* allege (in their complaint) that the optimal standard was too lax,<sup>59</sup> they do so in a context far removed from the traditional cases. These cases only asked whether a plaintiff who was burned by sparks from the defendant's railroad should be held liable for the loss even if it complied with the statutory standard.<sup>60</sup> The ordinary common law tort suit

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57. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); cf. *United States v. Lopez*, 514 U.S. 549 (1995) (finding that the commerce power does not entitle Congress to regulate gun possession in a local school zone).

58. See Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 NW. U. L. REV. 551, 561 (2008).

59. See Complaint, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 04 Civ. 5669), 2004 WL 1685122, *vacated and remanded*, 582 F.3d 309 (2d Cir. 2006), *rev'd and remanded*, 131 S. Ct. 2527 (2011).

60. Compare *Vaughan v. Taff Vale Ry. Co.*, (1860) 157 Eng. Rep. 1351. (Exch.); 5 H. & N. 678 (accepting the statutory compliance defense), with *Powell v. Fall*, [1880] 5 Q.B. 597 (Eng.) (disapproving *Taff Vale* and rejecting the statutory compliance defense in railroad cases). Note that the tougher view toward railroad liability was taken by Lord Justice Bramwell, who was the most consistent small government libertarian on the English bench. For my

gives conclusive evidence of the discrete harm, which is easily compensable in damages by a simple tort action. In the *AEP*-type cases, however, the supposed laxity of the statutory remedy generates a diffuse set of harms for which the plaintiffs do not seek common law damages at all. Instead they seek injunctive relief, which cannot be a simple judicial order to stop all operations but which must request complex and continuous adjustments in the regulation of the defendant's operations, thus working at cross-purposes with the EPA's general authority. At this point the institutional conflict between the judicial and administrative management of global warming is acute. It is thus most unwise to launch into nonstop judicial management of carbon dioxide emissions when the EPA is hard at work on the same issue.

### CONCLUSION: WHAT SHOULD BE DONE

In the end, I think that the enormous difficulties of dealing with the environmental issues of global warming cannot be solved by any combination of prods and pleas. What is needed is some clear substantive vision of how the entire system of pollution control should work. At this point in time, I cannot repeat in full my own views as to why the entire Clean Air apparatus is ill-suited to deal with global warming questions. But it is not inappropriate to mention a few key points about the issue that should give us pause.

First, the current structure of the Clean Air Act is ill-suited to deal with this problem. That 1970 statute was designed to deal with smog in Los Angeles, not with carbon dioxide around the world. It had what is surely irrelevant here, which is a strong federalism bias that allowed for the creation of state implementation plans that could only under limited circumstances be overridden by federal implementation plans.<sup>61</sup> But there is no local dimension to carbon dioxide, such that only a national—or better, international—program can deal with the problem.

Second, once that is done, it is equally critical to remove the current fixation with the control of pollution from “new” sources,<sup>62</sup> be they stationary plants or automobile tailpipes. The key difficulty with that approach is that it reduces the willingness of various plant and vehicle operators to junk older plants and cars in favor of newer ones. On an issue this important, there is no

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account of his work, see Richard A. Epstein, *For a Bramwell Revival*, 38 AM. J. LEGAL HIST. 246 (1994).

61. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1680 (codified as amended at 42 U.S.C. § 7410(a) (2006)).

62. *E.g.*, 42 U.S.C. § 7411(a)(2) (defining “new source”); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 846 (1984) (discussing regulation of “new sources”).



reason to privilege emissions from established sites relative to those from new ones. The central task is to control the total level of pollutants. Whether we deal with methane or carbon dioxide, the current statute should be pushed to one side—lest it do more harm than good—by delaying the introduction of newer technology that is safer for any given level of output than the older technology that it displaces. A tax system on methane or carbon dioxide based on output would do far better to control emissions; the same would be true of any cap and trade system if the mechanics could be made to work (which would be far more difficult with carbon dioxide than with sulfur dioxide).

The exact particulars are of no concern here. What is needed is the clear recognition that no level of prods and pleas in the tradition of Ewing and Kysar can displace a coherent set of legal institutions and legal norms in dealing with the inescapable issue of global warming.

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