

IS THE SCOTUS CLIMATE CHANGE CASE A “CONSERVATIVE INTUITION IN SEARCH OF A CONSTITUTIONAL CLAUSE”?

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On the Divided Argument podcast last month, Will Baude previewed *Suncor Energy (U.S.A.) Inc. v. County Commissioners of Boulder County*, the climate-tort case the Court will hear in October. He wondered whether Suncor’s position—that federal law precludes state-law claims for harms from worldwide greenhouse-gas emissions—is “one of these conservative intuitions in search of a constitutional clause questions.”¹

The search should be called off. Baude is asking the wrong question. And his own brilliant scholarship and that of other leading originalists explain why.

Let’s begin with the scope of Boulder County’s suit. It alleges that Suncor and Exxon contributed to climate change by producing, selling, and promoting fossil fuels “globally and historically.” And it seeks damages for past and future harms in Boulder it attributes to global warming, as well as a share of the defendants’ profits. Nearly all of the allegedly tortious conduct occurred outside Colorado—much of it outside the United States—and the complained-of emissions were released by billions of people, mostly abroad.² Liability under Colorado law would thus turn almost entirely on what the defendants did in other States and, for the most part, other countries: Texas, Alberta, Angola, Qatar, and beyond.

Boulder’s quarrel, it turns out, is with a rule older than the Constitution: that no State can legislate for another. The Constitution left that rule in place, took from the States every means of altering it, and made it subject only to Congress’s exercise of its enumerated powers. Thus, Colorado’s power to regulate interstate and international greenhouse-gas emissions has not been, and cannot be, “preempted.” It never existed.

I. BACKDROPS

Baude’s question assumes that a rule binding the States must be found in a clause. But he and frequent coauthor Stephen Sachs have shown that this isn’t so. Some rules “aren’t derivable from the Constitution’s text, but instead are left unaltered by the text, and in fact are protected by the text from various kinds

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¹ DIVIDED ARGUMENT: *A Thriving Atrocities Practice*, at 16:03 (Spotify, Aug. 19, 2026).

² Brief for the United States as Amicus Curiae Supporting Petitioners at 15–17, *Suncor Energy (U.S.A.) Inc. v. Cnty. Comm’rs of Boulder Cnty.*, No. 25-170 (U.S. May 21, 2026) (quoting Joint Appendix at 21–22, 98, 102, 113–23, *Suncor*, No. 25-170 (U.S. May 14, 2026)).

of legal change.”³ Sachs calls them “constitutional ‘backdrops.’”⁴ They are neither inferences from the text nor judicial inventions, but rather preexisting law that the Constitution left in place.

A constitutional backdrop, Baude and Sachs have explained, “governs of its own force until something else abrogates it.”⁵ It binds the States without a clause that says so. And while “[w]ritten and unwritten rules might have different sources or might change in different ways,” the point is that, “while they’re in effect, they’re just as binding.”⁶

But not every old rule qualifies as a constitutional backdrop, and Sachs’s test for the ones that do is strict: “If states have authority to alter a rule, then it can’t be a backdrop; it’s just ordinary law. Rather, a general law backdrop would only be binding on the states . . . because something else, something actually in the Constitution, bars their interference with it.”⁷

Consider interstate borders. Where one State ends and the next begins is fixed by law older than the Constitution. No State can move its border by statute, Congress cannot change the rules by which existing borders are determined, and the Court “has refused to defer to state law on border questions.”⁸ The “something actually in the Constitution” that insulates the pre-constitutional law of state borders is *not* a provision about state borders. Rather, it is Article IV’s requirement of consent before one State’s territory is joined to another’s, together with Article I’s ban on States making war, since annexing a neighbor’s land “would be a prohibited act of war.”⁹

Consider also the rule against legislative entrenchment—a lawmaking body’s attempt to pass a statute that its successors cannot repeal. This ancient prohibition¹⁰ appears nowhere in the Constitution, yet hardly anyone doubts that it binds Congress. (Indeed, as recently as the Biden years, it frustrated minority-protective efforts by Senate Republicans to prevent future changes to the filibuster and the “blue slip.”) It binds because it is insulated from change precisely by the absence of any power to lift it. Congress “can’t abrogate it by statute, because it lacks enumerated power to do so.”¹¹

As if in anticipation of *Suncor*, Sachs writes that this “backdrops” approach “could illuminate atextual constraints on state powers, including constraints arising from general law or the law of nations.”¹² For instance:

if the general law at one time restricted states’ exercise of jurisdiction beyond their borders, are those limits still binding today? Can a state repeal those limits, either as to the jurisdiction of its courts or the reach of its legislation? And if it does, must that

³ Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816 (2012) [hereinafter Sachs (2012)].

⁴ *Id.*

⁵ William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1099 (2017) [hereinafter Baude & Sachs (2017)].

⁶ *Id.* at 1104.

⁷ Sachs (2012), *supra* note 3, at 1883.

⁸ *Id.* at 1829.

⁹ *Id.* at 1828–29.

¹⁰ See 1 WILLIAM BLACKSTONE, COMMENTARIES *90 (“Acts of parliament derogatory from the power of subsequent parliaments bind not.”).

¹¹ Sachs (2012), *supra* note 3, at 1848, 1853.

¹² *Id.* at 1876.

repeal be recognized as valid in federal courts or in the courts of other states?¹³

Sachs poses the questions rather than answering them. But he seems to show his hand by invoking John Marshall’s axiom, pronounced in *United States v. Bevens*, that “the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power.”¹⁴

Viewed in that light, *Suncor* presents three (maybe four) questions. Not one of them is: “Which clause forbids Colorado to make a tort of global climate change?” Rather, they are: (1) What was the original rule from the corpus juris about the reach of a State’s law? (2) Could anyone validly change that rule? (3) Was it validly changed? (4) If it was, what is the rule today? In brief, the original rule limited each State’s law to its own territory, only Congress could change it, and it has not. So, the rule today is the rule at the beginning.

II. WHAT THE GENERAL LAW SAID

Interstate relations, Baude has written, “were once governed not primarily by constitutional law but by the shared, unwritten, ‘general law.’”¹⁵ Citing Caleb Nelson, another originalist thought leader, Sachs explains why the general law rather than any State’s governs an interstate dispute: “[T]he structure of our federal system is thought to keep state law from applying of its own force, but the Constitution has not specified the substantive rules that apply instead.”¹⁶

According to Joseph Story, the general law provides that “no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein.”¹⁷ A contrary rule, he wrote, “would be equivalent to a declaration, that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations; that each could legislate for all, and none for itself; and that all might establish rules, which none were bound to obey.”¹⁸

The Court applied the maxim to the States as a matter of course. In *Bonaparte v. Tax Court*:¹⁹ “No State can legislate except with reference to its own jurisdiction.” And in the Arkansas River case, as the “cardinal rule, underlying all the relations of the States to each other”: “Neither State can legislate for or impose its own policy upon the other.”²⁰ “Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.”²¹

As *Strassheim v. Daily* noted, the general law rule had an exception. “Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect.”²² The exception has two elements: (1) The act must

¹³ *Id.*

¹⁴ *Id.* at 1876 n.374 (quoting *United States v. Bevens*, 16 U.S. (3 Wheat.) 336, 386–87 (1818)).

¹⁵ William Baude, *Constitutionalizing Interstate Relations: The Temptation of the Dark Side*, 44 HARV. J.L. & PUB. POL’Y 57, 65 (2021).

¹⁶ Sachs (2012), *supra* note 3, at 1834 (quoting Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 507 (2006)).

¹⁷ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 20 (Boston, Hilliard, Gray, & Co. 1834).

¹⁸ *Id.*

¹⁹ 104 U.S. 592, 594 (1881).

²⁰ *Kansas v. Colorado*, 206 U.S. 46, 95 (1907).

²¹ *Id.* at 97.

²² *Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

be directed at the forum State (*Strassheim* itself involved a fraud directed at Michigan's treasury), and (2) it must produce a detrimental effect there that is, in the words of *Suncor* and the United States, "direct, traceable, and particularized."²³ A shot fired across a border qualifies on both counts. So does a dam that floods the neighbor's fields.

Boulder's theory fails both requirements. It does not allege that any defendant aimed emissions at Colorado. Greenhouse gases, in EPA's words quoted by the Court, "become well mixed in the atmosphere"; as the Court observed in *American Electric Power Co. v. Connecticut* (AEP), describing the defendants' point, "emissions in New Jersey may contribute no more to flooding in New York than emissions in China."²⁴ There is no act directed at Colorado, and there is no effect in Colorado distinguishable from the effect everywhere else on earth. What Colorado experiences is its share of a global condition to which every emission in every jurisdiction would contribute identically. If that satisfies "intended to produce and producing detrimental effects within it," then every sovereign on earth has legislative jurisdiction over every emission anywhere, which is not an exception to Story's maxim but its negation: "Each could legislate for all, and none for itself."

A. *What the States Had, and What They Kept*

On his podcast, Baude wondered whether Jonathan Adler's amicus brief on Boulder's side is correct.²⁵ As Adler's article (the basis of his brief) shows, States and localities controlled pollution long before Congress did.²⁶ The Clean Air Act itself declares that "air pollution control at its source is the primary responsibility of States and local governments," and, as Adler adds, that power "is not the federal government's to grant."²⁷

But the police power that each State retained when it entered the Union was authority only over what lies within it.²⁸ In 1776, the "Free and Independent States" claimed the powers of nations toward one another ("full Power to levy War, conclude Peace, contract Alliances"), not a power to legislate for one another.²⁹ Likewise, under the Articles of Confederation, the States reserved "every power, jurisdiction, and right" not delegated and submitted their disputes to Congress as "the last resort on appeal."³⁰ The Constitution largely maintained the division, and it did so as an act of the People rather than a compact among States. The People took away the outward-looking powers of independent nations (war, reprisal, and treaty) and some inward ones too: coining money, emitting bills of credit, and impairing contracts.³¹ Still, the shape of the States' (internal) police powers stayed mostly the same, as John Marshall explained in *Bevans*.³²

²³ Brief for the United States, *supra* note 2, at 22; Reply Brief for the Petitioners at 14, *Suncor Energy (U.S.A.) Inc. v. Cnty. Comm'rs of Boulder Cnty.*, No. 25-170 (U.S. May 21, 2026).

²⁴ 564 U.S. 410, 422 (2011).

²⁵ See DIVIDED ARGUMENT, *supra* note 1, at 16:56; see also Brief for Jonathan H. Adler as Amicus Curiae Supporting Respondents and Affirmance, *Suncor*, No. 25-170 (U.S. Aug. 3, 2026).

²⁶ See Jonathan H. Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J.L. ECON. & POL'Y 217, 228-33 (2022).

²⁷ *Id.* at 230, 256.

²⁸ See, e.g., STORY, *supra* note 17, at § 18 ("[T]he laws of every state affect, and bind directly all property, whether real or personal, within its territory; and all persons, who are resident within it, whether natural born subjects, or aliens; and also all contracts made, and acts done within it.").

²⁹ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

³⁰ ARTICLES OF CONFEDERATION of 1781, arts. II, IX.

³¹ U.S. CONST. art. I, § 10.

³² See *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 389 (1818) ("[T]he general jurisdiction over the place . . . adheres to the territory as a portion of sovereignty not yet given away. The residuary

This is why Adler’s history proves less than his brief asserts. Every example in the article of State environmental regulation is a State’s regulating sources within its borders.³³ Such regulation is an exercise of the residuary power the Tenth Amendment reserves and *Bevans* describes. (The Tenth Amendment, in the words of Boulder’s own authority, “confirms” that reservation; it does not enlarge it.³⁴) The brief adds a few cross-border nuisance cases,³⁵ but each is a source-State suit, a criminal case about a Maine dam that flooded a New Hampshire road at the state line, or dictum the Court withdrew the next Term.³⁶

A century of regulating one’s own smokestacks is hardly evidence of a power to regulate one’s neighbor’s—let alone those of every state and nation on earth. When pollution crossed a border, the dispute went to the Supreme Court as a controversy between sovereigns, not to the downwind State’s courts under the downwind State’s law. Adler says so himself: “For over a century, states brought interstate pollution disputes to the Supreme Court, often under the Court’s original jurisdiction.”³⁷

III. CHRONOLOGY OF THE CORPUS JURIS

It is worth taking a quick march through the corpus juris over time, asking the questions Baude and Sachs say a legal interpreter must ask. Here is the overview.

When	What Happened	Who Supplied the Federal Rule of Decision	Reach of a State’s Law
1776	Independent states under the law of nations; disputes settled by treaty or force.	No one; self-help.	Territorial: “co-extensive with its territory” (<i>Bevans</i>). No State legislates for another.
1788–89	Constitution bars war, reprisal, and treaty; ³⁸ sends interstate controversies to federal courts; ³⁹ gives Congress the commerce power. ⁴⁰	Federal courts under Article III applying the general law (not yet called “federal common law”).	Unchanged, and now insulated from alteration by any State.
1906–07	<i>Missouri v. Illinois</i> ; <i>Georgia v. Tennessee Copper Co.</i> ; <i>Kansas v. Colorado</i> .	The Court applying pre-existing rules, “even if legislation of one or both of the states seems to stand in the way”	Unchanged: “Neither State can legislate for or impose its own policy upon the other” (<i>Kansas</i>).

powers of legislation are still in [the States].”); *see also* *Kansas v. Colorado*, 206 U.S. 46, 95 (1907) (Colorado and Kansas admitted to the Union “with the full powers of local sovereignty which belonged to other States”).

³³ Adler, *supra* note 26, at 228–29.

³⁴ *Murphy v. NCAA*, 584 U.S. 453, 471 (2018); *see also* Brief for Respondents at 23, *Suncor Energy (U.S.A.) Inc. v. Cnty. Comm’rs of Boulder Cnty.*, No. 25-170 (U.S. May 21, 2026).

³⁵ *See* Brief for Jonathan H. Adler, *supra* note 25, at 6.

³⁶ *See Illinois v. Milwaukee (Milwaukee I)*, 406 U.S. 91, 102 n.3 (1972); Reply Brief for the Petitioners, *supra* note 23, at 15.

³⁷ Adler, *supra* note 26, at 233.

³⁸ U.S. CONST. art. I, § 10.

³⁹ *Id.* art. III, § 2.

⁴⁰ *Id.* art. I, § 8.

		(<i>Missouri</i>), and “building up . . . interstate common law” (<i>Kansas</i>).	
1938	<i>Erie</i> and <i>Hinderlider</i> the same day.	The Court. The rules are now classified as “federal common law,” which state courts must follow in interstate disputes: “[N]either the statutes nor the decisions of either State can be conclusive” (<i>Hinderlider</i>).	Unchanged.
1972	<i>Milwaukee I</i> : “[T]here is a federal common law” of interstate air and water.	The Court, in equity, “because state law cannot be used” (<i>Milwaukee II</i>).	Unchanged.
1972–81	Clean Water Act amendments (1972), paralleling the Clean Air Act (1970); <i>Milwaukee II</i> (1981).	Congress and EPA replace the courts for water under a statute paralleling the Clean Air Act.	Unchanged: Displacement asks only “which branch of the Federal Government is the source of federal law, not whether that law pre-empts state law” (<i>Milwaukee II</i>).
1987	<i>International Paper Co. v. Ouellette</i> .	Congress’s saving clauses preserve source-State law and no other.	Unchanged: Affected States may not “do indirectly what they could not do directly” (<i>Ouellette</i>).
2007	<i>Massachusetts v. EPA</i> : Greenhouse gases “fit well within the Clean Air Act’s capacious definition of ‘air pollutant.’”	Congress and EPA for greenhouse gases too.	Unchanged.
2011	<i>American Electric Power Co. v. Connecticut</i> (<i>AEP</i>).	Clean Air Act and EPA replace the courts for carbon dioxide emissions. State law question sent to the Act’s preemptive effect under <i>Ouellette</i> ’s source-State rule.	Unchanged.

A. 1788: *What the Constitution Changed, and What It Left Alone*

Change is not presumed; it has to be shown. Not only that, but the normal presumption is that law does *not* change. “Whenever a legislature enacts a new

statute, it changes certain rules, but it leaves most of the law alone.”⁴¹ The same presumption against implied repeal governs the Constitution itself, including its amendments.⁴² New enactments “take their place in an existing *corpus juris*, as new threads in a seamless web.”⁴³

To be sure, an argument over State powers cannot rest on the absence of a grant, because “unlike federal powers, state powers don’t have to be conferred by the Constitution.”⁴⁴ Limits would need to be found in what was already law. And since the States never had legislative jurisdiction over one another’s territory, the only question is whether the Constitution removed that limit or allowed a State to remove it for itself.

The Constitution did neither. To the contrary, it denied States external powers,⁴⁵ committed interstate controversies to federal court,⁴⁶ and left Congress the power to write a different rule for interstate commerce, with the Supremacy Clause (not strictly necessary, as Marshall observed in *McCulloch v. Maryland*⁴⁷) to make it stick. These provisions are the “something actually in the Constitution” that keeps a State from changing the preexisting rule that a State’s law stops at its border.

The Court described interstate dispute resolution in two opinions issued on the same day in 1907. Entertaining Georgia’s suit against Tennessee’s copper smelters, the Court explained:

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.⁴⁸

Similarly, adjudicating a Kansas suit over the Arkansas River, the Court held, “Force under our system of Government is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes.”⁴⁹

Sachs describes *how* the Constitution handled interstate disputes. For borders, it “created a neutral forum to hear such disputes without prescribing any particular rules for that forum to apply.”⁵⁰ “[T]he court simply applies the existing rules, reserving for the political branches the decision of whether to keep those rules in place or to alter them.”⁵¹ He generalizes:

If a certain set of general common law or international law doctrines governed a particular field at the Founding, and if the states lack power to change them, then those doctrines continue to operate of their own

⁴¹ William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 618 (2021) [hereinafter Baude & Sachs (2021)].

⁴² Sachs (2012), *supra* note 3, at 1848.

⁴³ Baude & Sachs (2017), *supra* note 5, at 1098.

⁴⁴ Baude & Sachs (2021), *supra* note 41, at 621.

⁴⁵ See U.S. CONST. art. I, § 10.

⁴⁶ See *id.* art. III, § 2.

⁴⁷ 17 U.S. (4 Wheat.) 316, 405–06 (1819).

⁴⁸ *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

⁴⁹ *Kansas v. Colorado*, 206 U.S. 46, 97 (1907); see also *id.* at 98 (“If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.”).

⁵⁰ Sachs (2012), *supra* note 3, at 1832.

⁵¹ *Id.*

force—until the political branches intervene, in the exercise of some enumerated power.⁵²

State courts are bound by those rules no less than federal ones: “Although the Constitution is not itself the source of the particular rules,” Sachs writes (quoting Bradford Clark), its allocation of power “arguably requires state and federal courts to apply such rules in the absence of positive federal law.”⁵³ And an old rule keeps its force, “warts and all,” for the simplest reason: “that it was law at the Founding, and that it has never since been changed.”⁵⁴

So, the corpus juris on the morning after ratification contained three things: the territorial limit, unchanged; no self-help; and a federal forum that would decide interstate controversies by the general law, since the text supplied no rule of its own. Boulder complains that Suncor “point[s] to no ‘constitutional text,’”⁵⁵ but the text need not state the rule. It insulates the rule, which is all that a backdrop requires.

B. 1906 to 1972: The Court Supplies a Rule of Decision

The interstate pollution cases began with *Missouri v. Illinois*,⁵⁶ a suit by the Show-Me State to stop Chicago’s sewage from flowing into its borders via the Illinois River. Without the benefit of an act of Congress addressing the discharge, Justice Holmes said the Court “must be governed by rules explicitly or implicitly recognized,” and “must follow and apply those rules . . . even if legislation of one or both of the States seems to stand in the way.”⁵⁷ Importantly, although the Court was only beginning to supply a federal common law of interstate pollution, State legislation was already inapplicable.

The next year, in *Kansas v. Colorado*, the Court described itself as “practically building up what may not improperly be called interstate common law.”⁵⁸ *Tennessee Copper*, decided the same day as *Kansas*, granted Georgia relief on the structural ground quoted above.⁵⁹ And when Missouri tried in 1914 to apply its statutes to a contract made in New York, the Court called it out for “throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority,” calling this principle “so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound.”⁶⁰

The next test came in 1938. Although the curtailment of federal common law in the absence of a federal question in *Erie Railroad Co. v. Tompkins*⁶¹ might on first blush seem to favor Boulder’s view of things, the Justice who wrote *Erie* said otherwise the same day. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,⁶² Justice Brandeis wrote the majority opinion reversing the Colorado Supreme Court’s enforcement of a Colorado water decree against an interstate compact. Whether an interstate stream must be apportioned between two States, he reasoned, “is a question of ‘federal common

⁵² *Id.* at 1835.

⁵³ *Id.* at 1836.

⁵⁴ *Id.* at 1837.

⁵⁵ Brief for Respondents, *supra* note 34, at 23.

⁵⁶ 200 U.S. 496 (1906).

⁵⁷ *Id.* at 519–20.

⁵⁸ 206 U.S. 46, 98 (1907).

⁵⁹ *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238–39 (1907).

⁶⁰ *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

⁶¹ 304 U.S. 64 (1938).

⁶² 304 U.S. 92 (1938).

law’ upon which neither the statutes nor the decisions of either State can be conclusive.”⁶³

Hinderlider is when the old rules acquired their modern label. As Nelson puts it: “In our post-*Erie* world, those rules are classified as matters of ‘federal common law,’ meaning that even state judges are supposed to follow the federal Supreme Court’s view of their substance.”⁶⁴ Judge Henry Friendly, in the 1964 lecture that the Court would draw upon in *AEP*, dated the new federal common law from the same day.⁶⁵

Sachs, for his part, explains why *Erie* is no problem. Because a backdrop binds the States only through “something actually in the Constitution,” “*Erie*’s concern that federal courts were running roughshod over the rights of states has no application here.” “So long as the courts stick to the law the Constitution left in place, they’re not stepping on anyone’s toes.”⁶⁶ His illustration is Toledo: “Michigan ‘can’ pass a statute claiming universal jurisdiction, just like it can claim ownership of Toledo. The question is whether anyone else will listen.”⁶⁷ Substitute “Colorado” for Michigan and “the world” for Toledo, and you have *Suncor*.

By 1972, the rule had a name. Illinois asked the Court to hear, in its original jurisdiction, a suit against Milwaukee and other Wisconsin municipalities over sewage in Lake Michigan. The Court sent Illinois to federal district court instead, holding that the claim arose under federal law: “When we deal with air and water in their ambient or interstate aspects, there is a federal common law.”⁶⁸ The Court drew that law from *Tennessee Copper*, *Hinderlider*, and the “interstate common law” of *Kansas v. Colorado*.⁶⁹

Friendly’s account of how such a rule works fits this case exactly. Writing about *Clearfield Trust Co. v. United States*,⁷⁰ which held that federal law governs the government’s rights on the checks it issues, he observed that the decision “decided not one issue but two.”⁷¹ First, was the matter federal at all, “so that the courts of the United States may formulate a rule of decision”?⁷² Second, should the rule be “a uniform nation-wide rule” or borrowed state law? That choice, in turn, depends on “what heed Congress intended to have paid to state law in an area where no heed need constitutionally be paid.”⁷³

In an interstate-emissions dispute, the territorial rule settles the first question. Because no State’s law can reach the conduct, the rule of decision has to come from federal courts or from Congress. And until Congress spoke, the Court had to provide a rule of decision provisionally, with a nuisance remedy that filled the space no State’s law could occupy. That remedy, in other words, was the Court’s handiwork, and Congress could take it away. The territorial rule was not judicially crafted, and it stayed in place.

⁶³ *Id.* at 110.

⁶⁴ Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 508 (2006).

⁶⁵ Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.119 (1964).

⁶⁶ Sachs (2012), *supra* note 3, at 1883.

⁶⁷ Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1269 (2017) [hereinafter Sachs (2017)].

⁶⁸ *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 103 (1972).

⁶⁹ *Id.* at 104–06, 107 n.9.

⁷⁰ 318 U.S. 363 (1943).

⁷¹ Friendly, *supra* note 65, at 410.

⁷² *Id.*

⁷³ *Id.*

C. 1981: *Milwaukee II* Says Why the Rule Existed

The Clean Air Act of 1970 and the 1972 amendments to the Clean Water Act—which largely paralleled each other—were the most significant congressional interventions. *City of Milwaukee v. Illinois* held that the Clean Water Act displaced the federal common law of interstate water pollution.⁷⁴ Its reasoning was about the federal courts’ authority, not the States’. “Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.”⁷⁵ Federal common law is a “necessary expedient,” and “when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.”⁷⁶ Then the footnote oft-quoted in *Suncor* briefing: “[I]f federal common law exists, it is because state law cannot be used.”⁷⁷ Displacement removed the federal rule. It said nothing about why state law had been unavailable, and it could not restore an availability that was never there.

The Court said as much in explaining why displacement is not preemption. In preemption cases, “we start with the assumption that the historic police powers of the States were not to be superseded”; in displacement cases, “we start with the assumption” that it is for Congress, not federal courts, “to articulate the appropriate standards to be applied as a matter of federal law.”⁷⁸ “When Congress has spoken its decision controls, even in the context of interstate disputes.”⁷⁹ And then the payoff: “[W]e are considering which branch of the Federal Government is the source of federal law, not whether that law pre-empts state law.”⁸⁰

D. 1987: Congress Speaks to State Law, and *Ouellette* Interprets

Congress had also spoken to state law. It did so in the Clean Water Act’s saving clauses, again paralleled in the Clean Air Act.⁸¹

Construing the Clean Water Act clauses in *International Paper Co. v. Ouellette*, the Court began from *Milwaukee I*’s premise that “the control of interstate pollution is primarily a matter of federal law.”⁸² The only question, then, was which state suits the Act “specifically preserved.”⁸³ And the answer was claims “pursuant to the law of the *source* State.”⁸⁴ Yet, “[n]othing in the Act gives each affected State this power to regulate discharges,”⁸⁵ and affected States may not “do indirectly what they could not do directly—regulate the conduct of out-of-state sources.”⁸⁶

The Court did not need the backdrop to get there, but Sachs and Baude’s methodology leads to the same conclusion. “Could not do directly” presupposes a disability the Act did not create. The affected State’s law did not reach out-of-state conduct, and the source State’s law, which governs conduct within its

⁷⁴ See *City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304, 317 (1981).

⁷⁵ *Id.* at 312.

⁷⁶ *Id.* at 314.

⁷⁷ *Id.* at 313 n.7.

⁷⁸ *Id.* at 316–17.

⁷⁹ *Id.* at 315 n.8.

⁸⁰ *Id.* at 319 n.14.

⁸¹ See Brief for the Petitioners at 33–34, *Suncor Energy (U.S.A.) Inc. v. Cnty. Comm’rs of Boulder Cnty.*, No. 25-170 (U.S. May 21, 2026).

⁸² 479 U.S. 481, 492 (1987).

⁸³ *Id.*

⁸⁴ *Id.* at 497.

⁸⁵ *Id.*

⁸⁶ *Id.* at 495.

own territory, survived. The rest of that Act rests on the same premise. Its finding that “air pollution control at its source is the primary responsibility of States and local governments”⁸⁷ is the territorial principle in statutory dress. Its Good Neighbor Provision and downwind-State petition process⁸⁸ send interstate pollution to a federal regulatory process because States “lack authority to control” “out-of-state pollution.”⁸⁹ Nothing in the Act lets an affected State apply its law to sources in another State.

So, when Congress spoke, it spoke as the pre-existing law would predict. It preserved the power of the State where the source sits, which that State always had, and conferred nothing on the State downstream or downwind, which never had it. Colorado may regulate the refinery in Commerce City, but Boulder’s suit seeks to regulate the rest of the world.

E. 2011: AEP Displaces the Remedy

*Massachusetts v. EPA*⁹⁰ had held four years earlier that greenhouse gases “fit well within the . . . capacious definition of ‘air pollutant,’”⁹¹ so EPA had authority to regulate them. *AEP* began by restating *Milwaukee I* and, through Friendly, the source of the “new” federal common law: It “addresses ‘subjects within national legislative power where Congress has so directed’ or where the basic scheme of the Constitution so demands,” and “[e]nvironmental protection is undoubtedly an area ‘within national legislative power.’”⁹² It then held that the Clean Air Act “and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants,” because the Act “speaks directly” to those emissions.⁹³

The test was easy to satisfy. After all, displacement “does not require the ‘same sort of evidence of a clear and manifest [congressional] purpose’ demanded for preemption of state law.”⁹⁴ That is because the solicitude for state prerogatives that shapes preemption analysis “does not enter the calculus, for it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest.”⁹⁵ “The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants; the delegation is what displaces federal common law.”⁹⁶

Boulder reads “displaced” to mean that the federal common law left the field, and its preemptive force with it, so that “ordinary statutory preemption analysis applies.”⁹⁷ That’s wrong. Displacement is strictly horizontal. It is a contest between two federal actors over who writes the federal rule to resolve the federal dispute, and, as *AEP* shows, Congress wins it whenever it speaks. What the Act displaced was the rule of decision—addressed in Friendly’s second question—which formerly belonged to the courts but now may be supplied only by the Clean Air Act and EPA.

⁸⁷ 42 U.S.C. § 7401(a)(3).

⁸⁸ *Id.* §§ 7410(a)(2)(D)(i)(I), 7426(b).

⁸⁹ *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 495 (2014) (quoted in Brief for the Petitioners, *supra* note 81, at 33).

⁹⁰ 549 U.S. 497 (2007).

⁹¹ *Id.* at 532.

⁹² *Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 421 (2011) (quoting Friendly, *supra* note 65, at 408 n.119, 421–22).

⁹³ *Id.* at 424.

⁹⁴ *Id.* at 423.

⁹⁵ *Id.* at 423–24.

⁹⁶ *Id.* at 426.

⁹⁷ *See id.* at 427–29; Brief for Respondents, *supra* note 34, at 45.

AEP did speculate in dicta about what displacement might mean for state law (if anything). It said that the availability “*vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act,”⁹⁸ and it cited the pages of *Ouellette* that preserve the source State’s *intraterritorial* law. But *AEP* made clear that statutory preemption is just one of the things that availability depends on—hence “*inter alia*.” Also relevant is what the pre-Act law of State authority over interstate and global greenhouse gases was. And by now we know the answer: States had none.

IV. WHAT CHANGED, AND WHAT DID NOT

The territorial rule was never validly changed; it is law today. Adler’s argument, the most careful statement of Boulder’s position, assumes otherwise. It runs: Displacement of federal common law is easy, “satisfied by the mere presence of a legislative enactment”;⁹⁹ preemption of state law is hard, requiring “[f]ar more”;¹⁰⁰ and, so, once the Clean Air Act displaced the federal common law of interstate nuisance, state nuisance law stood exposed, protected by the ordinary presumption against preemption and by the Act’s saving clauses. States “do not need—and have never needed—federal permission to enact and enforce their own environmental laws.”¹⁰¹

Adler might say that, in Baude and Sachs’s layered picture, a question the superior law fails to answer “is answered by some other type of law, lower down.”¹⁰² And Adler might further say that the law lower down from the Clean Air Act is Colorado’s, so that wherever the Act is silent, Colorado tort law governs.

For conduct in Texas or Alberta, though, Colorado’s law was *never* lower down. It was not in the stack at all. The judge-made law at issue in *AEP* existed precisely because State law could not be used. Removing the judge-made law does not make Colorado’s law usable because it never was. As Judge Sullivan correctly recognized in *City of New York v. Chevron Corp.*,¹⁰³ the notion that a statute like the Clean Air Act could “give birth to new state-law claims—claims that could not have existed in the absence of Congress’s intervention”—is an outcome “too strange to seriously contemplate.”

Baude and Sachs zero in on the same kind of error when they explain why the Eleventh Amendment “neither codified nor repealed” the general law of State sovereign immunity that preceded it.¹⁰⁴ The contrary view “may seem strange to those who see common-law rules as resembling administrative agency regulations,” on which view the Amendment’s words “occupied the field” and left courts without “authority . . . to craft additional law on the same question,” “like agencies foreclosed from regulating pollutants that Congress had already addressed.”¹⁰⁵ But the Amendment’s adopters “saw the preexisting rules . . . as *law*, not as a vague delegation to the courts to *go make law*.”¹⁰⁶

Adler’s framework treats the pre-statutory law of interstate pollution the way a lawyer treats an agency’s rules: as an exercise of delegated authority that

⁹⁸ *AEP*, *supra* note 92, at 429.

⁹⁹ Adler, *supra* note 26, at 223.

¹⁰⁰ *Id.* at 240.

¹⁰¹ *Id.* at 257.

¹⁰² Baude & Sachs (2021), *supra* note 41, at 618.

¹⁰³ *City of N.Y. v. Chevron*, 993 F.3d 81, 98–99 (2d Cir. 2021) (quoted in Brief of Petitioners, *supra* note 81, at 31).

¹⁰⁴ Baude & Sachs (2021), *supra* note 41, at 618.

¹⁰⁵ *Id.* at 618–19.

¹⁰⁶ *Id.*

lapses when the delegating body speaks. That is why, on his view, once the Clean Air Act displaced the federal common law, the States’ own laws—including those of Colorado—were all that remained in the field. But the rule that no State legislates for another was not something the federal courts made and could be told to stop making. It was law before there were federal courts, and law of that kind “simply continue[s] to govern, unless and until some *other* source of law interrupt[s]” it.¹⁰⁷ The Clean Air Act interrupted the judge-made remedy. It said nothing about the rule.

Caleb Nelson explains that in a field made “the exclusive province of federal law,” “the local law of individual states cannot apply of its own force”— “[e]ven if written federal law fails to suggest any answers to one or more questions in the defined field.”¹⁰⁸ Federal law can control a question without answering it, and the effect of federal control without a federal answer is that the claim fails. That is what happened in *United States v. Standard Oil Co.*: Federal law governed whether the government could recover for injury to a soldier, and the Court declined to create the liability absent action by Congress, so there was no recovery under anyone’s law.¹⁰⁹

A. Congress Can; Colorado Cannot

Boulder calls Suncor’s position incoherent. If no State’s law may govern interstate emissions, how could Congress authorize it? Surely, it says, “Congress could not authorize Nevada to violate California’s equal sovereignty by allowing it to subject California to private suit in Nevada courts.”¹¹⁰ Suncor acknowledges that Congress could admit affected-State law by clear statement,¹¹¹ and Boulder treats the acknowledgment as a contradiction.

It is the opposite. A rule the States cannot alter but Congress can is a kind of backdrop, and it is what the Baude-Sachs framework predicts. General law is “in theory abrogable by statute, just like any other rule of common law or equity.”¹¹² Whether Congress has that power in a given field is “a standard enumerated-powers question, one that must be dealt with through ordinary interpretation,”¹¹³ and Boulder’s hypothetical picks the one field where the answer is doubtful: Forcing States into court may be a “great substantive and independent” power that Article I simply does not confer, so there Congress’s power is “quite limited.”¹¹⁴ No such doubt attends the commerce power: “[I]f a dispute implicates ‘Commerce . . . among the several States’ Congress is authorized to enact the substantive federal law governing the dispute.”¹¹⁵

Baude is right that this is not a case about a clause. It is a case about a rule older than the clauses that the clauses were written to protect: No State legislates for another.

Sachs asked in 2012 whether that limit is still binding, whether a State can repeal it, and whether anyone else must recognize the repeal. The answers are yes, no, and no. Colorado cannot alter the territorial rule. Congress can

¹⁰⁷ *Id.* at 618.

¹⁰⁸ Nelson, *supra* note 64, at 560.

¹⁰⁹ *United States v. Standard Oil Co.*, 332 U.S. 301, 308, 314 (1947); *see also* *American Electric Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 422 (2011) (citing the same).

¹¹⁰ Brief for Respondents, *supra* note 34, at 30.

¹¹¹ Brief for the Petitioners, *supra* note 81, at 30.

¹¹² Baude & Sachs (2021), *supra* note 41, at 621.

¹¹³ Sachs (2012), *supra* note 3, at 1874.

¹¹⁴ Baude & Sachs (2021), *supra* note 41, at 621.

¹¹⁵ *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 315 n.8 (1981).

(pursuant to an enumerated power), and when it spoke it preserved the source State's law and no one else's.

The argument does not resurrect the federal common law of interstate pollution: Congress displaced that remedy, and nothing here depends on its return. So too, the argument does not ask the Court to weigh a presumption against preemption: Where State law never reached the conduct, there is nothing to preempt and nothing to save. That is not a conservative intuition in search of a constitutional clause. It is a description of what the corpus juris has been—and no one has changed it.

V. CODA: IS ANY AMERICAN COURT OPEN TO CLAIMS OF THIS KIND?

If the territorial rule is law and federal common law is displaced, is there any hope for a claim about the effects of global climate change other than (1) a petition to the EPA, (2) a suit to enforce the Clean Air Act, or (3) a suit against an in-State source under that State's law?

The answer is no—but with an important caveat. Federal displacement may not survive if the Court overrules *Massachusetts v. EPA*. *AEP*'s holding, after all, runs through § 111 of the Clean Air Act—and § 111 reaches carbon dioxide because “*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act.”¹¹⁶ Justice Alito, joined by Justice Thomas, accepted *AEP*'s displacement analysis only “on the assumption (which I make for the sake of argument because no party contends otherwise) that the interpretation of the Clean Air Act . . . adopted by the majority in *Massachusetts v. EPA* . . . is correct.”¹¹⁷

Suppose it were not. Suppose the Court followed Justice Scalia's lead and read the Act's “air pollution” not to “encompass global climate change.”¹¹⁸ Whether the Act would still displace federal common law in the area of interstate greenhouse gas emissions would then be an open question.¹¹⁹

If *Massachusetts v. EPA* were to fall (no one asks for its overruling in *Suncor*), then perhaps *AEP* would need to fall, too. That would presumably cause the pre-Act legal regime to spring back into place. Federal courts would again be asked to fill, with federal common law, the space that Colorado's law could not occupy.¹²⁰ And whether the judges would fill it for global warming, a question *AEP* had no need to reach,¹²¹ would be theirs to answer. If they answered no, the result would be *Standard Oil*'s: no recovery under anyone's law.

What no branch of the scenario yields is application of Colorado law. Colorado's law was excluded before there was a federal remedy, and it stays excluded whether the federal remedy is statutory, judge-made, or withheld.

¹¹⁶ *American Electric Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 424 (2011) (citing *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007)); see also *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 319 n.5 (2014) (noting that the displacing authorization was § 111's, “a part of the Act . . . that no party in *American Electric Power* argued was ill suited to accommodating greenhouse gases”).

¹¹⁷ *AEP*, 564 U.S. at 430.

¹¹⁸ *Massachusetts*, 549 U.S. at 558–60 (Scalia, J., dissenting).

¹¹⁹ Compare Reply Brief for the Petitioners, *supra* note 23, at 19–20, with Brief for Respondents, *supra* note 34, at 46.

¹²⁰ See *Illinois v. Milwaukee (Milwaukee I)*, 406 U.S. 91, 107 (1972).

¹²¹ See *AEP*, 564 U.S. at 422–23.