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INTRODUCTION

The federal courtroom has become a prominent forum for addressing the issue of global warming in the United States.[1] In the face of federal inaction on the issue, states have banded together to become plaintiffs, winning several major global warming victories in the courtroom. The most significant state sponsored victory to date on the issue was in 2007 in *Massachusetts v. EPA*,[2] where twelve states succeeded in getting the court to force the Environmental Protection Agency ("EPA") to regulate carbon dioxide and other greenhouse gases as pollutants. More recently, eight states won a major interim victory in the Second Circuit in a case filed against several large fossil fuel-burning power plants located in approximately twenty other states. The case, *Connecticut v. American Electric Power Co.*,[3] was allowed to go forward on a federal common law public nuisance theory of global warming.[4] This state sponsored litigation approach to tackling global warming is the byproduct of the United States' system of federalism, in which individual states have the Constitutional authority to fill in the gaps of a lagging

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[1] *See* Climate Change Litigation in the U.S., http://www.climatecasechart.com (last visited Sept. 5, 2010).

[2] 549 U.S. 497 (2007).

[3] 582 F.3d 309 (2d Cir. 2009), *cert. pending*, Docket No. 10-174.

[4] The lawsuit was brought by, *inter alia*, Connecticut, New York, Iowa, New Jersey, Rhode Island, Vermont and Wisconsin against power plants in at least 18 different states. *Id.* at 316. The complaint sought "an order requiring defendants to reduce their emissions of carbon dioxide, thereby abating their contribution to global warming, a public nuisance." Complaint at ¶ 1, Connecticut v. Am. Elec. Power Co., 406 F. Supp.2d 265 (S.D.N.Y. 2005) (No. 104CV05669), 2004 WL 5614397 [hereinafter *Connecticut* Complaint]. It cited damages caused by global warming that particularly affect the residents of their state including, increased heat deaths due to more heat waves, beach erosion, more ground level smog, salinization of drinking water due to higher sea levels, reduction of the snowpack in California which provides critical drinking water and the lowering sea levels of the Great Lakes which impedes commercial shipping. *Id.* at ¶ 3. The case was initially dismissed by the district court as non-justiciable under the political question doctrine but this ruling was vacated by the Second Circuit which found that the case did not present a non-justiciable political question, the parties had standing to bring the suit, the plaintiffs had stated a claim under federal common law of nuisance and the claims were not displaced by federal legislation. *Connecticut*, 582 F.3d at 392. The case was then remanded back to district court. *Id.* at 393.

federal government. In certain circumstances, states may even offer alternative approaches to the same problems that the federal government are addressing.[5] Litigation has been a prominent pathway for states to utilize their distinct sovereignty.[6] Within the past few decades, litigation has been a powerful tool that has been used by the states to influence public policy on a national level.[7] From addressing the health risks of big tobacco to implementing securities regulation, the states have made their voices heard on a number of important issues through state sponsored litigation.[8] Therefore, it is not surprising that in the face of inaction and disappointing results on the global warming issue from the federal authorities,[9] the states have tried to prod the national government into action

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[5] Subject, of course, to the Supremacy Clause. U.S. CONST., art. VI, § 1, cl. 2.

[6] The primary mechanism used for a state to achieve standing in these suits is *parens patriae*, an ancient common law doctrine which is "inherent in the supreme power of every state . . . [and is] often necessary to be exercised in the interests of humanity." *Connecticut*, 582 F.3d at 334 (quoting *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States,* 136 U.S. 1, 57 (1890)).

[7] There is a trend among state attorneys generals to influence public policy and promulgate "regulation by litigation." Jonathan H. Adler, *Business, The Environment, and The Roberts Court: A Preliminary Assessment,* 49 SANTA CLARA L. REV. 943, 966 (2009); *see also* Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1503-04 (2009).

[8] More than forty states commenced litigation against tobacco product manufacturers and were able to enter into a huge settlement with the tobacco companies that significantly changed the entire industry. *See* Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, The Tobacco Litigation and The Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859, 1859 (2000); CAL. OFFICE OF THE ATTORNEY GEN., MASTER SETTLEMENT AGREEMENT (1992), http://www.ag.ca.gov/tobacco/pdf/1msa.pdf. More recently, state attorneys general have been taking an active role in securities litigation. *See* David Wasick & Joseph J. Tabacco Jr., *Navigating the Waters of Securities Litigation* 12 NEV. LAW., Sept. 2004, at 18, 18.

[9] The most explicit example of this is the U.S. refusal to join the Kyoto Protocol, which was joined by almost all other industrialized nations. Jeff Civins et al., *Environmental Due Diligence – Counting Carbon,* 24 NAT. RESOURCES & ENV'T 37, 37 (2009). Generally, it has been the states and not the federal government whom have been most active in addressing Global Warming. *See* Michael C. Davis & David L. Feinberg, *State Little NEPA Statutes and the Effort to Forestall Climate Change*, 565 PRACTISING L. INST. 413, 419 (2009); Symposium, *Global Warming Panel, Part II*, 30 COLUM. J. ENVTL. L. 351, 366 ("It is fair to say that there is not much happening on a federal level in dealing with climate change."); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1617-18 (2007)

with litigation[10] and are now in the process of unilaterally addressing the issue with *Connecticut.*

State sponsored global warming litigation raises significant federalism issues because it both positions states against each other[11] and arguably trespasses on a public policy realm that should be left to the federal government.[12] The primary issue to be addressed in this Article is whether *Connecticut* represents a beneficial use of our federalist system. The article will not focus on the details of *Connecticut* itself, or whether it was rightly decided (*i.e.*, issues surrounding the requirements of parens patriae, the federal common law, the political question doctrine, et cetera).[13] Rather, the primary focus will be on whether the lawsuit actually embodies the values of our federal structure and uses them to effectively address global warming and to achieve the goals our duel sovereignty system has been designed to address. The issue as framed relies on the assumption that federalism should be used "to maximize the benefits of regulation at many levels of government."[14] Ideally, when there are multiple ways of approaching an issue, one should determine "[w]hich approach does a better job of finding the appropriate balance between state and federal authority in today's world."[15] This admittedly functionalist approach assumes that our federalist structure should be utilized in a way that maximizes the aggregate social benefit to our

("the actual federal track record has been one of backpedaling and half measures, while some states and local governments have taken a leading role").

[10] Massachusetts v. EPA, 549 U.S. 497, 505 (2007).

[11] The eight states in *Connecticut v. American Electric Power* are suing power plants located in *other* states. 582 F.3d 309, 316 (2d Cir. 2009). Thus, the suit represents the power of one state to directly attack economic actors located in another state.

[12] For example, the suit might impede the federal government with its foreign affairs policy. *See* Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 319-20 (2005). It also might lead to a lack of consistency and uniformity among states which can lead to many problems and complications. *See* Robert B. McKinstry Jr. & Thomas D. Peterson, *The Implications of the New "Old" Federalism in Climate-Change Litigation: How to Function in a Global Marketplace When States Take the Lead*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 61, 89-92 (2007). This issue will be discussed more thoroughly *infra*, Part II.

[13] For a comprehensive discussion of these issues, see Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 294 (2005).

[14] Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 321 (1997).

[15] Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1503 (1994).

citizenry as a whole.[16] Here, that benefit can be thought of as both the end result of the *Connecticut* litigation (*i.e.*, the environmental and economic outcome) and the means of litigation in itself (*i.e.*, the values perpetuated and reinforced by the state-sponsored suit). The analysis will proceed with a discussion of whether *Connecticut* fulfills the goals and values of federalism.

When analyzed with this framework, *Connecticut* can be characterized as an abuse of the federalist structure because it fails to advance the values underlying federalism and it represents an inefficient solution to global warming. Federalism cannot be used to justify this radical approach, since most of the federalist values (as articulated below) are not served by *Connecticut.* Additionally, federalism is not served since the case fails to advance a truly substantive solution to global warming and represents a deleterious use of our federal structure.

Part I will lay the environmental and federalism foundations for this Article and put the lawsuit in a broader context. It will articulate a concrete set of the values of federalism and will look at previous state sponsored litigation in the interstate pollution context. Part II will then apply the goals and values of federalism to *Connecticut* to illustrate that the case is *not* actually an appropriate means of achieving these goals and ultimately addressing global warming. Part III will revisit the federalist values as applied to *Connecticut* and then briefly discuss the general role of federalism in the global warming context.

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[16] The goal is to give a "real effort to understand the tangible benefits of [our] federal system, [and] to take account of when governmental power sensibly is exercised at one level or another." Friedman, *supra* note 14, at 317. The courts and politicians have invoked the perceived benefits of federalism numerous times, but they are often at a very high level of abstraction and have been characterized by numerous commentators as merely politics-driven rhetoric. Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 330-32 (2003). Nevertheless, "Courts and politicians alike . . . need a strong normative sense of how our federal system of government ought to function." *Id.* It is with this normative and benefits-driven emphasis that this article proceeds to adopt and apply the values of federalism to the *Connecticut* case.

PART I: FEDERALISM VALUES IN GENERAL AND IN THE ENVIRONMENTAL LITIGATION CONTEXT

Federalism, which is the unique system of dual sovereignty embedded in our government, is a concept found in the structure of the Constitution itself and has formed the foundation of our government.[17] The Framers "split the atom of sovereignty" creating "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people."[18] Over the years, courts and commentators have fleshed out certain goals and values that justify and are served by federalism.[19] A non-exhaustive list of these values will be discussed below. A brief overview of state-sponsored environmental litigation and associated federalism concerns will follow.

A. *The Values of Federalism*

1. States as Laboratories

Justice Brandeis argued that our federalist system encourages innovation by giving the states the power to use experimentation to remold "our economic practices and institutions to meet changing social and economic needs."[20] The basic argument that states can act as laboratories of experimentation to test new policy ideas is an important value served by the federal structure of government. When used by state governments, experimentation with various policy approaches can catalyze innovation and creates the opportunity to implement novel ideas on a smaller scale to test their feasibility.[21] Therefore, federalism can be utilized to encourage

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[17] *See generally* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (discussing the foundational roots of our federal structure).

[18] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[19] The Court has never attempted to delineate an exhaustive or hierarchal list of federalism values and I will not attempt to do so here.

[20] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[21] Justice O'Connor stated, "One of federalism's chief virtues . . . is that it promotes innovation by allowing for the possibility that a 'single courageous State may, if the

and facilitate states as laboratories. There are many examples where this state-experimentation rationale has been used to advocate or justify state authority in certain areas of law. These examples include solutions to predatory lending,[22] mine safety regulation,[23] cybercrime,[24] and health care.[25]

2. Liberty

Additional federalism values flow from the fact that dual sovereignty creates a decentralized system where power is not concentrated in a single entity. This decentralization of power protects individual liberty by creating a healthy balance of power and preventing the threat of tyranny.[26] The tension between the state and the federal government leads to the promise of liberty for the individual.[27] In the Federalist Papers, Alexander Hamilton promised the following:

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The

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citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."' Gonzales v. Raich, 545 U.S. 1, 45 (2005); *see also* United States v. Lopez, 514, U.S. 549, 581 (1995) (Kennedy J., concurring) ("States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

[22] *See* Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 FLA. L. REV. 295, 302 (2005).

[23] *See* Lesley Manley, *Should States Serve as Laboratories for Mine Safety Regulation?*, 41 ARIZ. ST. L.J. 379, 379 (2009).

[24] *See* Peter Swire, *No Cop on the Beat: Underenforcement in E-commerce and Cybercrime*, 7 J. TELECOMM. & HIGH TECH. L. 107, 122 (2009).

[25] *See* Darren Abernethy, *Of State Laboratories and Legislative Alloys: How "Fair Share" Laws Can Be Written to Avoid ERISA Preemption and Influence Private Sector Health Care Reform in America*, 49 WM. & MARY L. REV. 1859, 1861 (2008).

[26] *See, e.g.*, Printz v. United States, 521 U.S. 898, 921 (1997) ("[t]his separation of the two spheres is one of the Constitution's structural protections of liberty"); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front").

[27] *Gregory*, 501 U.S. at 459.

> people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.[28]

Consequently, at least theoretically, each individual state has the right to resist national intervention in certain areas of public life.[29] Although this resistance may ultimately be trumped by the Supremacy Clause in tandem with the all powerful Commerce Clause, such resistance might act as a friction and a drag on the ability of federal government to pass laws, thus checking any of the potential tyrannical impulses that the national government might have.[30]

This idea is very appealing in theory, yet its applicability to our post-New Deal federal government is highly questionable. "In order for federalism to have some meaning and to protect individual liberty, Congress's Commerce power must be limited."[31] With perhaps the exception of guns in school zones[32] and violence against women statutes,[33] the federal government has the power to regulate in practically any area of activity due to the expanded role of the Commerce Clause.[34] For better or

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[28] THE FEDERALIST NO. 28, at 140 (Alexander Hamilton) (Ian Shapiro ed. 2009).

[29] Note, *Defending Federalism: Realizing Publius's Vision*, 122 HARV. L. REV. 745, 747-48 (2008).

[30] *Id.* at 748-49.

[31] Talene Nicole Megerian, Comment, *Federal Regulation of Isolated Wetlands: To Be or Not to Be*, 13 VILL. ENVTL. L.J. 157, 184 n.202 (2002) (citing Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 4 (1999)).

[32] *See* United States v. Lopez, 514 U.S. 549 (1995).

[33] *See* United States v. Morrison, 529 U.S. 598 (2000).

[34] This liberal interpretation of the Commerce Clause creates essentially a federal government of unlimited scope. *See* Arthur B. Mark, III, Note, United States v. Morrison, *The Commerce Clause and the Substantial Effects Test: No Substantial Limit on Federal Power*, 34 CREIGHTON L. REV. 675, 675 n.4 (2001) ("[T]he substantial effects test [for the Commerce Clause] created by the New Deal Court and continuing through *United States v. Lopez* allows Congress to regulate all manner of social and economic conduct well beyond what the Framers' intended."); *see also* Arthur B. Mark, III, *Currents in Commerce Clause Scholarship Since Lopez: A Survey*, 32 CAP. U. L. REV. 671, 691 (2004) ("Because the Commerce Clause is the predominant base of the modern regulatory state . . . [its] interpretation necessarily dictates the scope of federal power.").

worse, this means that any balance of power between the federal and state governments may no longer exist as a practical matter and the federalist check on tyranny (at least from a concentration of power perspective) seems very weak. Since there are essentially no limits on federal power due to the fact that the Commerce Clause operates as essentially a "blank check" of power to the federal Congress, states may not act as any meaningful check on the potential for the federal government to abuse its unconstrained power. Although arguments have been made that state governments can still protect individual liberty in other ways, by for example serving as rallying points for opposition to national policy,[35] the actual liberty-protecting force of that role is highly questionable.[36] Consequently, the liberty value of federalism has been diluted over time.

3. Efficiency

Efficiency and flexibility are also additional benefits that flow from a system that has two distinct sovereigns. "[S]ometimes it is more efficient to have action at the national level and sometimes at the local."[37] Certain issues might be more appropriately addressed at the state level whereas others might require and deserve exclusively national attention. For example, national control might be more appropriate when there is a risk of a "race to the bottom" among the states or when regulation at the

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[35] *See* Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 885 (2006) ("[S]tate governments check the power of the center by serving as rallying points for opposition to national policy; by providing the seedbeds of political change at the national level by facilitating competition between political parties; and by articulating alternative (and often broader) understandings of federal rights."); *see also* Ernest A. Young, *Welcome to the Dark Side*, 69 BROOK. L. REV. 1277, 1284-90 (2004).

[36] Some scholars have even argued that federalism has been used to limit individual liberty. *See* Erwin Chemerinsky, *Does Federalism Advance Liberty?*, 47 WAYNE L. REV. 911, 914 (2001) ("[C]onservatives have used federalism as a rhetorical tool to argue for results that were clearly 'rights regressive.'") Others have argued that there is very little authentic restraining power in court-enforced federalism since it is selectively invoked only when ideologically convenient. *See* Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1306 (1999).

[37] Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1790 (2006).

state level might create externalities that negatively affect other states.[38] Federal control is also beneficial when national uniformity simply makes sense.[39]

4. Diversity

Issues that involve local and cultural diversity should be addressed on the state level.[40] The U.S. population is very heterogeneous and has a diverse set of needs that should, in certain circumstances, be addressed by the state government. Federalism is a refuge for multiculturalism and it "ensures that 'government . . . will be more sensitive to the diverse needs of a heterogeneous society.' By enabling local majorities to pursue distinctive policymaking preferences, it is hoped that federalism will produce greater citizen satisfaction than can be accomplished by a unitary, 'one-size-fits-all' government."[41] The unique regional diversity of our nation is a national value that federalism promotes and preserves.

5. Public Participation and Political Accountability

An additional point to consider is the fact that state and local governments are simply closer and more accessible to the population. Consequently, when there is real power held by state governments, the people are closer to concrete, substantive authority and there is a greater opportunity for the people to be involved in meaningful self-governance.[42] Participation in the political process is a valuable aspect of democracy, and our federalist system should be structured in a way that encourages useful participation by the population. With increasing public participation rights, one should expect more direct information and

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[38] Friedman, *supra* note 14, at 406-08.
[39] *Id.* at 408-09.
[40] *Id.* at 401-02.
[41] Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balances in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 612 (2007) (alteration in original) (quoting Gregory v. United States, 501 U.S. 452, 458 (1991)).
[42] Friedman, *supra* note 14, at 389. Federalism can function as a mechanism for promoting democracy and increasing public participation in government. *Id.*

pressure to flow straight to policy-makers.[43] When there are more access points to policy-makers, the cost of participation is reduced and interested parties can more directly influence government officials.[44] Since a potential participant can engage the government on a federal, state, or local level, there are simply more opportunities to be involved. More opportunities mean that a greater percentage of the population can participate and that there are more avenues for an individual to petition the government for policy change. The creation of participation opportunities is an important goal served by the federalist structure of our government.

A strong, decentralized federal system should be set up to foster accountability. Ideally, the government should be directly responsible to the people for their actions. Although both state and federal officials are elected by their constituents and thus are politically accountable to the people, states are arguably more accountable, as they are simply closer to the citizenry. As one commentator has put it, "[o]fficials, elected and appointed, should be available for public comment, anger, approval, suggestions, and ideas about the course of public affairs. They should be accessible, by phone, by fax, by e-mail. Of course, the fewer layers of staff one has to go through, the better."[45] States are better positioned to be held accountable due to their close proximity to the people, and federalism should be tailored to favor this heightened accountability. Additionally, the division between state and federal actions and responsibilities should be made clear in order to ensure that the people know who to hold responsible for a particular problem or policy.[46] "[C]onfusion over the lines of political responsibility is unacceptable in a republican government; in order to fulfill the ideal of popular control, the citizens

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[43] Andrew J. Green, *Public Participation, Federalism and Environmental Law,* 6 BUFF. ENVTL. L.J. 169, 170 (1999).

[44] *See id.* at 177, 179; Multiple points of access are particularly valuable for participants when each respective access point is controlled by a separate party. *Id.* Where one channel might be blocked, another might be more receptive to a particular participant's ideas.

[45] Friedman, *supra* note 14, at 395.

[46] *See* New York v. United States, 505 U.S. 144, 168 (1992) ("Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people. By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.").

must know which officials are responsible for unpopular legislation."[47] Federalism should be tailored to facilitate clear accountability.

6. Competing Sovereigns

On two separate levels, federalism facilitates the competition of sovereigns for the attention and respect of the people. Such competition leads to a more optimal solution for the constituents of the nation as a whole, similar to the context of neo-classical economics, where competition in the free market leads to an optimal equilibrium that benefits consumers.[48] On one level, states compete against each other for a mobile populace. In this "horizontal competition model," individuals can "vote with their feet" by choosing to move to the state they find has the most favorable laws and spends its resources in an optimal way.[49] As a result, federalism incentivizes states to create laws and services that are attractive to the people with the ultimate beneficiary of this behavior being citizens and consumers.[50] States compete with each other for citizens by passing certain laws that are more responsive to the needs of the citizenry.[51]

On a second level, states compete with the federal government itself for the attention of the people. This has been labeled the "vertical

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[47] Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 62 (1988).

[48] In the context of antitrust law, the Supreme Court has said, "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[49] Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1534 (2009) (citing Charles Tiebout, *A Pure Theory of Local Expenditures,* 64 J. POL. ECON. 416 (1956) (discussing the inter-jurisdictional competition between states)).

[50] Jan K. Brueckner & Luz A. Saavedra, *Do Local Governments Engage in Strategic Property-Tax Competition?*, 54 NAT'L TAX J. 203, 205 (2001) ("[A] long line of research has shown that intergovernmental competition benefits consumers by generating a variety of public-good choices within a metropolitan area. This variety, which emerges as local governments compete to attract residents, leads to an equilibrium in which consumers self-select into different communities according to their demand for public goods.").

[51] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

competition model" where regulatory power is distributed as a result of competition between the federal government and the states for the "people's affection."[52] This notion of vertical competition is very eloquently expressed in an article by Todd Pettys, who states the following:

> Each time a government acts or refuses to act, it further develops its reputation among its constituents. If a government satisfactorily regulates a given matter, it can expect to earn an added measure of its citizens' affection . . . . The more areas that a government regulates satisfactorily, the greater the affection it can expect to earn and thus the greater the responsibilities it can expect citizens to confer upon it. Because there are many areas in which the state and federal governments' legislative powers overlap, however, if one government regulates an activity in an unsatisfactory manner, the people may be able to shift responsibility to the other sovereign.[53]

Consequently, the notions of both vertical and horizontal competition serve as valuable objectives of the federalist system. Competition leads to a better solution for the population as a whole and should be encouraged wherever possible.

In sum, a non-exhaustive list of important federalism goals and values are as follows: i) states as laboratories of experimentation; ii) protection of individual liberties; iii) the fostering of local diversity; iv) facilitation of efficiency; v) enhanced political participation and accountability; and vi) the optimal equilibrium resulting from competing sovereigns. These values are ideals in themselves that should be preserved by our federal system, but they also serve as a means to better policy solutions that are optimally designed to serve the needs of the people. In Part II, these federalism values will be applied to *Connecticut* with particular attention paid to whether such state-sponsored litigation

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[52] Note, *Defending Federalism: Realizing Publius's Vision*, 122 HARV. L. REV. 745, 749 (2008).

[53] Pettys, *supra* note 16, at 333.

accomplishes two related goals. The first goal is to fulfill the population's desire to effectively address global warming. The second goal is to perpetuate a federalist structure that serves the aforementioned values and actualizes the Framers' conception of true dual sovereignty.

First, however, it is beneficial to frame *Connecticut* in its historical context and derive some additional federalist values from the federal common law of nuisance. This is not the first time states have used litigation to tackle environmental issues.

7. Federalism in the Context of Environmental Litigation: Protecting Against Bias and Accommodating the Limited Sovereignty of States

A state's right to protect its natural resources has been widely accepted as a legitimate exercise of state sovereignty.[54] Historically, the theory of public nuisance has been an important means by which states have used litigation to address environmental problems.[55] Suits have been brought by states both against in-state polluters (using state common law) and against out-of-state polluters (using federal common law). Since *Connecticut* involves interstate pollution, this Article will primarily focus on the federal common law. Within the past century there have been several cases involving the federal common law of public nuisance and interstate pollution – most involving air or water pollution created in one state flowing across state lines and negatively affecting the citizens in another state.[56] Using the federal common law of public nuisance, states

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[54] *See* Gloria Sefton, *California's Not Dreamin': Federal Inaction on Greenhouse Gas Regulation Provides an Opening for the State to Regulate*, 30 WHITTIER L. REV. 101, 110 (2008).

[55] *See* Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy,* 7 GEO. MASON L. REV. 923, 926-27 (1999). A public nuisance is "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1). Conduct that unreasonably interferes with the public health or safety may constitute a public nuisance. *Id.* § 821(B)(2). Usually, only government officials may sue on a public nuisance theory. Meiners & Yandle, *supra*, at 927.

[56] *See, e.g.*, Georgia v. Tennessee Copper Co. 206 U.S. 230 (1907) (case involving Tennessee copper manufacturers emitting noxious gas which entered Georgia); Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (Illinois allegedly damaged by water pollution in Lake Michigan which originated in cities in Wisconsin).

can protect their citizens from environmental harm caused by other states without having to petition the federal government for redress.

Federal common law is used in situations where there is "an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism."[57] One reason to apply federal common law to situations involving interstate pollution is the fear that a litigant from one state will not be able to get a fair, impartial trial under the laws of another state.[58] The primary concern is that the plaintiff-state would adjust its own laws to ensure victory against the interests in the other state.[59] The fear of bias against out-of-state environmental and industrial interests can be used as a justification for the existence of the federal common law in the field of interstate pollution. Federalism should be utilized in such a way that minimizes interstate bias.

Another justification for the existence of federal common law in this context is the fact that a federal court might be the only place for one state to bring its grievances against another state peacefully. When states' interests conflict which each other, the avenues of war and diplomacy are not readily available as means of dispute resolution between states. Since the Constitution of the United States forecloses these options, the alternative is a lawsuit in federal court.[60] "When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, [and] it cannot negotiate an emissions treaty with China or India."[61] This general explanation for the necessity of a federal remedy was used in the earlier

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[57] *City of Milwaukee*, 406 U.S. at 105 n.6 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27 (1964)).

[58] Adopting the law of one of the states "would empower one the litigants to manipulate the rule of decision and so defeat the goal of impartial adjudication. Therefore, out of necessity, the Court was forced to apply federal common law." Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 310 (2005).

[59] *See* Jonathan Zasloff, *The Judicial Carbon Tax: Restructuring Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827, 1845-46 (2008) (providing an explanation and critique of this theory).

[60] *Id.* at 1846.

[61] Massachussets v. EPA, 549 U.S. 497, 518 (2007).

interstate pollution cases.[62] By joining the Union, states have intrinsically accepted limitations on their sovereignty[63] and the federal common law has developed in order to accommodate this limitation.

The concerns of interstate bias and limited state sovereignty might serve as additional justifications for suits brought under the federal common law on a public nuisance theory, like *Connecticut*.[64] They are not values *served by* federalism, but rather values *serving* federalism and may consequently be used to justify certain actions as necessary for the preservation of our federalist system. Application of these federalist concerns to *Connecticut* will take place in Part II of this Article where all federalism values articulated above will be used as a framework to assess the potential benefits and detriments of the global warming suit.

PART II: AN IMPERFECT FIT: FEDERALISM VALUES APPLIED TO THE STATE USE OF LITIGATION IN THE GLOBAL WARMING CONTEXT AS EMBODIED IN *CONNECTICUT*

This section will apply the goals, values, and concerns of federalism, as laid out in Part I of this Article, to the global warming lawsuit, *Connecticut v. American Electric Power Co.*[65] The goal of this section is not to assess whether *Connecticut* was rightly decided as a matter of law. Rather, it seeks to suggest that *Connecticut* does *not* serve the values federalism was designed to protect and is in fact incongruent with the various rationales used to justify and reinforce federalism and state action. It will also suggest why, through these federalism failures, state-sponsored litigation is a poor means of addressing global warming.

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[62] *See* Missouri v. Illinois, 180 U.S. 208, 241 (1901) ("If Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering.").

[63] *See Massachussets*, 549 U.S. at 519.

[64] See Zasloff, *supra* note 59, at 1845-47, for a critical view on the use of these arguments to justify the use of the federal common law.

[65] 582 F.3d 309 (2d Cir. 2009).

A. *States as Laboratories*

The U.S. system of federalism creates political sub-units at the regional level that can try out unique and novel policies which, if successful, can be readily implemented by other states or by the national government.[66] It is tempting to apply this experimentation rationale to *Connecticut* by arguing that the states are "experimenting" with a novel approach to tackling global warming. That "experiment" is the use of litigation as a mechanism used to reduce greenhouse gas ("GHG") emissions. If successful, this approach could be repeated by other state attorneys general against additional GHG emitters. In this sense, the eight states in *Connecticut* are "experimenting" with a novel policy tool (*i.e.*, litigation) that might lead to an "innovative" solution to global warming.

While the lawsuit is certainly a novel and unique approach to the problem, it does not easily fit into Brandeis' notion of "states as laboratories."[67] The laboratories idea rests on the assumption that the policy ramifications of the experiment (whether good or bad) will be confined to the experimenting states—*i.e.*, that the experiment would be implemented "without risk to the rest of the country."[68] This clearly is not the case in *Connecticut,* since the ultimate potential effect of the litigation (*i.e.*, nuisance abatement)[69] would be primarily felt by actors outside of the experimenting states.[70] The plaintiff-states in *Connecticut* have created an experiment that expands far beyond their borders by suing power plants located in twenty other states. Therefore the experiment is not self-contained and certain outside interests are essentially being

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[66] *See supra* notes 19-25 and accompanying text.

[67] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[68] *Id.*

[69] The complaint requests the following relief against the out-of-state defendants: "Permanently enjoining each defendant to abate its contribution to the nuisance by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade." *Connecticut* Complaint, *supra* note 4, at Prayer for Relief.

[70] The plaintiff-states (California, Connecticut, New York, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin) are suing firms with power plants located all across the country in various states other than those bringing the lawsuit (e.g., Arkansas, Ohio, Kentucky, West Virginia, Texas, Tennessee, Michigan, and Louisiana and Florida). *Id.* at ¶¶ 17-34.

commandeered to take part in an experiment in which they had no part in creating.[71] Additionally, it is hard to categorize litigation as an "experiment" at all. Litigation is a pressure tool, designed here, to force power companies into action. It is not a program or solution fashioned as a novel approach to tackling global warming; rather, it is an effort by states to coerce others into action and to shift responsibility.

This litigation "experiment" is best contrasted with another regional global warming experiment by a separate group of states, the RGGI. [72] RGGI is "a cooperative effort . . . to limit greenhouse gas emissions. RGGI is the first mandatory, market-based CO_2 emissions reduction program in the United States."[73] This experimental cap and trade system will require a ten percent reduction in CO_2 emissions by 2018.[74] This is a good example of states functioning as "laboratories of innovation" due to the fact that states are implementing an innovative policy and the effects of that policy are mostly self-contained. The system only applies to CO_2 emitters located within the participating states and therefore, the primary brunt of the potential negative risks and ramifications of the experiment are contained within the region that has chosen to undertake the experiment.[75] One of the risks that has the

[71] The analysis would be somewhat different if the plaintiff-states only sued GHG emitters in their own states. In that case no out-of-state firms would be *directly* affected and the experiment would arguably be contained to the experimenting states.

[72] The states are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. REGIONAL GREENHOUSE GAS INITIATIVE, http://www.rggi.org/home (last visited Sept. 21, 2010).

[73] *Id.*

[74] *Id.*

[75] It could be argued that RGGI has extraterritorial effects because the in-state regulated firms might have significant connections to out-of-state actors (e.g. if the firm sells electricity to out-of-state consumers or is headquartered out-of-state). Yet in today's interconnected economy, practically *every* in-state regulation could arguably have extraterritorial effects given the fact that a regulation probably alters an entity's business behavior by definition and that most entities business behavior affects out-of-state actors to at least some extent. The repercussions of any state experiment can never be perfectly confined to in-state actors as there will always be some externalities affecting out-of-staters. However, it does not follow that there is no benefit in attempting to draw distinctions between state experiments with minimal, *incidental* effects on out-of-staters (like RGGI) and experiments where the primary effects are *intended* to be felt by out-of-state actors (like *Connecticut*).

potential to devastate in-state electricity producers is "leakage." This phenomenon occurs when out-of-state electricity is imported into RGGI states, taking away business from in-state producers who must comply with the costly CO_2 regulations.[76] The potential deleterious effects of leakage are felt by firms and their employees who are in the states that have chosen to implement CO_2 regulations.[77] Consequently, one of the biggest risks of RGGI is self-contained within the laboratory states.

If the RGGI cap and trade system proves successful in the global warming context, other states — or even the federal government — may be enticed into implementing a similar system when regulating their own industries. This is federalism in action: some states implement a novel, risky policy with the other states on the sidelines watching and observing. Observer states benefit because they have the opportunity to learn from the experiences of the experimenting-states without being directly involved in the experimental policy. This is not the case with the litigation in *Connecticut* because polluters in other states are key actors in the "experiment" whether they want to be or not. Consequently, the "states as laboratories" rationale is not the best way to justify the *Connecticut* global warming litigation.

B. *Liberty*

With the decentralization of power in our federalist system comes the protection of individual liberty.[78] When power is divided, the potential threat of tyranny is reduced, thus protecting the individual. Even assuming the federalism value of liberty still exists with the current massive federal government and the rise of the Commerce Clause, this value cannot be used to justify *Connecticut*. Liberty is protected by *limiting* the government's power to act in certain areas.[79] Indeed, Black's Law Dictionary defines individual liberty as "[o]ne's freedom to do as one pleases, limited only by the government's right to regulate the public

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[76] Eleanor Stein, *Regional Initiatives to Reduce Greenhouse Emissions*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW 319 (Michael B. Gerrard ed., 2007).

[77] Any attempt by RGGI states to impose costs or conditions on out-of-state electricity producers would likely be challenged on Dormant Commerce Clause grounds. *Id.*

[78] *See supra* notes 26-30 and accompanying text.

[79] *Id.*

health, safety, and welfare."[80] A good example of this value being served is found in cases like *Morrison*[81] and *Lopez*[82] where the court is *limiting* the federal government's ability to regulate under the Commerce Clause. *Connecticut* is doing the exact opposite – by allowing the case to go forward it is actually *expanding* the government's power to regulate and thus *infringing* upon individuals' rights. By providing states with the opportunity to use public nuisance theory as an additional means for the state to control the activities of private actors, the court is *expanding* the government's power at the expense of individual liberty. Granted, we might very well want the government to be able to regulate GHG emissions and "infringe" on a power plant's liberty right to pollute, but the point is that creating this litigation route to regulation does NOT protect individual liberty; rather, it expands the government's opportunity to *limit* individual liberty. The arguments surrounding whether *Connecticut* makes sense as a policy matter will be further explored in the Efficiency and Competing Sovereigns sections of this Article.[83]

C. *Efficiency*

Our federalist structure facilitates specialization. Sometimes it just makes sense to regulate a particular area of activity at the state level or at the federal level.[84] The state and the federal government are positioned differently with respect to the people and each might be in a better place to tackle a particular issue. From this perspective, each government should specialize in tasks that it is most suited to tackle.[85] The analysis will proceed first with a discussion of the potential efficiency gains associated with addressing global warming at the federal level as opposed to the state level and then with a discussion of the benefits and detriments of the

[80] BLACK'S LAW DICTIONARY 1002 (9th ed. 2009).
[81] 514 U.S. 549, 602 (1995).
[82] 529 U.S. 598, 627 (2000).
[83] *See* discussion *infra* Parts (II)(C), (II)(F).
[84] *See supra* notes 29-30 and accompanying text.
[85] For example, one commentator has argued that the national government is more suited to tackle issues that need uniformity, require the supply of public goods at a national level, or address interstate externalities or a race to the bottom. Friedman, *supra* note 14, at 407-08. On the other hand, state governments are suited to protect cultural and local diversity, protect citizens' health, safety and welfare, etc. *Id.* at 400-02.

states' chosen tool, litigation. It is important to note that states have many tools to address global warming, some of which may prove to be very useful, but the analysis of this Article is confined to the tool used by the states in *Connecticut*, which is the litigation tool.

1. State-by-State vs. a Federal Solution to Global Warming

GHGs are not localized pollutants. Once emitted into the atmosphere, they travel around the planet; "thus a ton of CO_2 that is emitted over New York has the same effect on global warming as a ton emitted over Paris, Shanghai, or Honolulu."[86] No matter where the GHGs are released, they equally affect the entire U.S. and for that matter, the world; therefore, it makes sense to have a larger government entity to address the issue, or at least one that has the capacity to address climate change on a global scale.

The nature of global warming makes a *federal* (as opposed to a state) solution the most efficient and appropriate choice of government to regulate in this area due to the global nature of GHGs and the international pervasiveness of the problem.[87] All countries and continents are feeling the effects of global warming.[88] All regions are also contributing to the emission of GHGs and thereby contributing to the exacerbation of the

[86] Michael B. Gerrard, *Introduction and Overview*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 76, at 5-6.

[87] The analysis in this section is directed solely at the question of which level of government is best equipped and situated to address the Global Warming issue. It is not intended as commentary on any potential benefits derived from *Connecticut* which are unrelated to efficiency, such as prodding the federal government into action, or certain participation or accountability values, which will be addressed in other sections of the article. Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009). This section is intended to determine which level of government is more institutionally equipped to address Global Warming, without looking at whether respective governments are actually doing something related to the issue.

[88] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007 SYNTHESIS REPORT, *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf. [hereinafter 2007 IPCC SYNTHESIS REPORT]. Global Warming includes not only a steady rise in the average temperatures around the world since around 1900, but also wind patterns and temperature extremes. *Id* at 40.

problem, although some nations are contributing more than others.[89] Addressing global warming on an international level is absolutely essential, especially since any attempt to unilaterally address the problem would likely prove futile because even a significant reduction in GHG emissions by a single country alone would do little to stop the overall trend toward higher global average temperatures.[90] Additionally, global action is needed to coerce participation in reducing GHG emissions since independent action by single countries seems highly unlikely not only because global warming represents the standard "tragedy of the commons"

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[89] The U.S. and Canada contribute around 19% of total GHG emissions, Europe around 11% and East Asia around 17%. *Id.* at 37 (giving regional distribution of GHG emissions by population and by GDP). For a discussion linking human activity and GHG emissions to Global Warming see *id.* at 35-41. *See also* Myles R. Allen et al., *Warming Caused by Cumulative Carbon Emissions Towards the Trillionth Tonne*, 2009 NATURE 458; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Solomon, S.D. Qin et al. eds., Cambridge Univ. Press 2007) ("Most of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations . . . Discernible human influences now extend to other aspects of climate, including ocean warming, continental-average temperatures, temperature extremes and wind patterns.").

[90] Even a large country acting unilaterally, would not be able to adequately mitigate Global Warming. For example, even if Global CO2 emissions were reduced by 30% by 2050 (which would be a bigger cut in emissions than a scenario where the United States stopped emitting ALL of its CO2), the global average temperature will potentially have increased to 3.2 degrees Celsius above pre-industrial levels. 2007 IPCC SYNTHESIS REPORT, *supra* note 88, at 67. This number is large, especially when compared to the 2.0 degrees Celsius possibility where global emissions are reduced on a much larger scale. *Id.*; *see also* Jennifer S. Bales, *Transnational Responsibility and Recourse for Ozone Depletion*, 19 B.C. INT'L & COMP. L. REV. 259, 264 (1996) ("'[o]zone depletion clearly affects all members of the international community,' and the unilateral actions taken by one country cannot protect it from the potential harms"). It has been estimated that worldwide CO2 emissions must reduce to 80% of the current level in order to stabilize the climate. Eleanor Stein, *Regional Initiatives to Reduce Greenhouse Gas Emissions*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 76, at 323. The U.S. cannot reach this level alone as it produces approximately 21% of the world's GHG and it is unrealistic to think it possible that any country could reduce their emissions entirely. Michael B. Gerrard, *Introduction and Overview*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 76, at 6. Therefore international cooperation on the matter is essential, since even the world's largest GHG emitter cannot solve the problem unilaterally.

scenario,[91] but also because any unilateral action would be politically unpopular and extremely detrimental to the domestic economy. Unilateral action puts the regulating nation at a significant competitive disadvantage with respect to other unregulated countries due to the fact that reducing GHG emissions is economically costly.[92] Consequently, concerted international effort is needed to find a truly global, effective solution.[93] "Such an international solution will require strenuous diplomatic efforts—the negotiation of treaties, creation of multilateral institutions, [and the] development of enforcement mechanisms."[94] This is why the federal government's exclusive constitutional authority over foreign affairs is a crucial factor to consider when determining which level of government is best positioned to address global warming.[95]

The international scope of the problem and the need for an international solution call for action by the federal government since it alone has the exclusive authority to enter into agreements with foreign powers.[96] States are constitutionally forbidden to deal directly with foreign authorities and so their hands are tied in any effort to

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[91] *Compare* Garrett Hardin, *Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968), *and* James K. Sebenius, *Designing Negotiations Toward a New Regime: The Case of Global Warming*, 15 INT'L SECURITY 110, 119 (1991) (contending that Global Warming is a prime example of the 'tragedy of the commons' since the "full costs of efforts to mitigate harmful emissions by one state will often be borne fully by that state, while the benefits of such actions are diffused throughout the global community."), *with* Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L. J. 54, 55 (2005) (discussing why, empirically, despite economic logic, "small subglobal jurisdictions, such as state and local governments in the United States" are doing things to "mitigate their comparatively minor contribution to a global environmental phenomenon.").

[92] Alternatives to burning fossil fuels are simply more expensive and therefore, at least at the current level of technology, if a country wants to cut GHG emissions it must either produce less or take on a more costly energy input.

[93] Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 319 (2005).

[94] *Id.*

[95] Although important, this factor alone is not dispositive and should be considered along with all the other factors surrounding state action when determining whether a particular state global warming initiative is appropriate.

[96] See U.S. CONST. art. I, § 10, cl. 3 (forbidding states from entering "into any Agreement or Compact . . . with a foreign Power.").

comprehensively address global warming.[97] Certainly, states have the ability to unilaterally address GHG emissions in their own jurisdictions, but they do not have the capability, as the federal government does, to unite with other countries to forge a comprehensive solution to the global warming problem. Remember, the issue addressed in this section is not whether states can regulate global warming, but whether the state or the federal government is *better* equipped to more *efficiently and effectively* solve the problem. The federal government's ability to interact with foreign nations is an additional tool it can utilize in the fight against global warming. States simply do not have this tool in their repertoire. A recent example of this federal tool in action in the global warming context is President Obama's December 2009 visit to the United Nations Climate Change Conference in Copenhagen. At that conference, President Obama worked with key leaders from over twenty nations — including China, India, and Brazil — in an attempt to solidify commitments to emissions cuts that would be open to international review.[98] Although the results of the conference in Copenhagen are somewhat disappointing, the conference itself illustrates the rather obvious point that the federal government is better positioned than the states to forge an international solution relating to global warming.

Another related point that seems to favor leaving the regulation of GHG emissions to the federal government is that "piecemeal integration of state-level climate change policies might be challenged as interfering with a purported federal government policy of withholding domestic legal action on GHG emissions in order to maximize the bargaining chips available for international climate negotiations."[99] Under this "bargaining

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[97] *Id.*

[98] Darren Samuelsohn, *Obama Negotiates 'Copenhagen Accord' With Senate Climate Fight in Mind*, N.Y. TIMES, Dec. 21, 2009, *available at* http://www.nytimes.com/cwire/2009/12/21/21climatewire-obama-negotiates-copenhagen-accord-with-senat-6121.html. One key player praised Obama's work at the conference calling it a "[h]ome run." *Id.* He also said that Obama "[s]atisfied the Europeans. Made China into a major world player, but made them accountable. Elevated India, Brazil and South Africa to world stage. Cut an important side deal with Russians on arms control." *Id.*

[99] Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1625 (2008).

chip theory," the federal government should be allowed to control all of the GHG emission regulations domestically in order to have the ability to coerce other nations into regulating GHG emissions.[100] Global warming requires action at an international level; in order for the United States to effectively facilitate a global solution, the federal government must have exclusive control of climate change policy within the country (at least under this theory).

Even ignoring the global dimension of global warming, a nationally uniform solution would be more desirable than a state-by-state patchwork solution for several reasons. First, every single state in the union is both affected by and contributes to the problem. Such a large, pervasive national problem is best addressed by the federal government which, due to its size and scope, is more institutionally equipped to remedy the problem quickly and thoroughly. Second, national uniformity in the regulation of GHG emissions gives industries the ability to operate their businesses under a single standard instead of having to comply with fifty separate, distinct state regulations. One national standard would create predictability and business certainty. It would also allow businesses to more smoothly expand across state lines, which ultimately benefits both consumers and state residents.[101] Finally, regulation at the federal level would prevent industry forum shopping or any possible "race to the bottom" between states. The fear would be that states would compete with each other over jobs created by business by promulgating more and more lax GHG emissions standards. This "chaotic federalism" creates a complex, multilayered quilt of policies with no necessary connections, consistency, coherence or compatibility.[102] A single unitary approach

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[100] "[T]he federal government can, as a matter of its foreign affairs expertise, determine that it is better to withhold domestic, legally enforced reductions in order to threaten more effectively China, India, Brazil, and other large emitters with the prospect of mutually assured destruction, should those nations fail to agree to binding multilateral reductions." *Id.* at 1640.

[101] It is cheaper for firms to comply with one national standard as opposed to attempting to adjust their products and practices to fifty separate standards. Assuming a competitive market, these costs savings would be passed along to consumers.

[102] David Hodas, *State Initiatives*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW, supra note 76, at 344.

facilitated by the national government simply makes more sense than an unconnected, incoherent state-by-state approach.

The federalist structure of our government is designed to provide two different levels of government, each distinctly positioned to serve the needs of the people. Through specialization, the population can be better served. As discussed above, the nature of global warming itself, along with both foreign and domestic concerns, point to a federal solution to the problem. Efficiency, as a value of federalism, cannot be used to justify the state-led approach sustained in *Connecticut*.

2. The Litigation Tool

This point is further amplified by the fact that courts are hardly the most ideal place to form global warming regulation. In efficiency terms, the judiciary is the institution in our government that is most ill-equipped to attempt to cap GHG emissions and monitor continued compliance for years (which is exactly what the state Attorneys General are asking the court to do in *Connecticut*).[103] "[C]ourts are not well-equipped to generate and implement long-term resource management plans,"[104] and the issue of global warming is precisely that: a resource management plan. This is because "global warming is an issue of how to manage a common natural resource (the atmosphere) so that the human 'load' on the resource is or will not push the resource beyond a 'tipping point.'"[105] Even if, as a matter of law, the suit should survive political question doctrine scrutiny, from an efficiency perspective, the judiciary is not the branch of government we want making the difficult policy questions surrounding global warming. The district court in *Connecticut* raised a host of these policy questions, including "whether the power industry or its consumers

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[103] *Connecticut* Complaint, *supra* note 4, at Prayer for Relief (requesting the court "[p]ermanently enjoin[] . . . each defendant to abate its contribution to the nuisance by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.").

[104] David A. Dana, *The Mismatch between Public Nuisance Law and Global Warming* 3 (Nw. Univ. Sch. of Law Pub. Law & Legal Theory Series, Paper No. 08-16, Law & Econ., Paper No. 08-05, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1129838.

[105] *Id.*

should bear the costs of emission reductions, . . what the economic implications of abatement would be, and what the implications would be for the nation's energy independence, and by extension, it's national security."[106] The legislature, not the judiciary, is best equipped to investigate and answer these tough questions, and therefore litigation is not the most optimal avenue to approach global warming.

Proponents of so-called "common-law environmentalism" have strongly advocated for the judicial creation of environmental law pointing to the rigidity of command-and-control regulation,[107] the absence of federal action on the issue,[108] the policy-framing and media coverage benefits of litigation itself,[109] and the generation of policy relevant information.[110] These are all valid points and should be given due consideration. Nevertheless, these factors are greatly out-weighed by the benefits of addressing the issue in the other branches of government. The legislature is the best venue to address the complex scientific, normative, and ethical questions raised by the issue of global warming,[111] both because it is institutionally equipped to investigate the multifarious matters surrounding the issue and because it is more directly in tune to the

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[106] *Id.* at 7.

[107] Henry N. Butler, *A Defense of Common Law Environmentalism*, 58 CASE W. RES. L. REV. 705, 706 (2008).

[108] Kirsten H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change, Mitigation: Incorporating Tradable Emissions Offsets Into Common Law Remedies*, 155 U. PA. L. REV. 1563 (2007); *see also* Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policymaking: Evaluating Climate Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1869 (2008) ("In an ideal world, a democratic legislative process to control climate-change would be preferable to the decisions of individual judges. But when the legislative process has failed to produce results, the political argument for allowing common law actions, that the legislative process may be paralyzed or captured, provides a compelling justification for allowing the courts to hear the common law actions that have been brought to date. . . . The existing common law can fill the vacuum.").

[109] Lytton, *supra* note 108, at 1868 ("[P]laintiffs' claims have framed climate change in terms of dramatic narratives linking greenhouse-gas emitters to environmental changes that have imposed specific harms on identifiable victims. . . . These narratives, suggests Hunter, make "climate change more tangible and more immediate, which significantly changes the tone of the climate debate.").

[110] *Id.* at 1870.

[111] *See* Dana, *supra* note 104, at 13.

will of the people. Additionally, litigation is inappropriate because "claims for climate change-related damages could become crushingly expensive and cause high transaction costs."[112] Other factors include that the damages associated with global warming involve largely "prospective" harm that has not yet fully come to fruition[113] and that because litigation is highly unlikely to actually hold a significant number of polluters liable, it will hardly make a dent in reducing GHG emissions.[114] Additional considerations flow from criticisms of public law litigation generally: fewer interested stakeholders may participate in adjudication as compared to legislation,[115] judges are generalists who do not have the capacity to fully analyze specialized information,[116] judges must focus on the facts of the unique case before them and therefore are ill-equipped to make more general policy decisions which require analysis of the big picture,[117] potential judicial remedies are not flexible across time or in the form they take,[118] et cetera.[119] When one aggregates these factors against the use of

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[112] Reimund Schwarze, *Liability for Climate Change: The Benefits, the Costs, and the Transaction Costs*, 155 U. PA. L. REV. 1947, 1947 (2007).

[113] Joni Hersch & W. Kip Viscusi, *Allocating Responsibility for the Failure of Global Warming Policies*, 155 U. PA. L. REV. 1657, 1692-93 (2007).

[114] Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701, 701-02 (2008) ("[E]ven with a strong plaintiff--the Inuit people of the Arctic region--and vulnerable defendants--U.S. electricity generating companies--the prospects of a successful lawsuit for climate change related damages are mixed. Current law seems to suggest that liability is slightly less probable than not, but certainly not inconceivable. However, the tenuous bases for liability in this hypothetical lawsuit, and the rarity of the characteristics of this plaintiff and these defendants that make this lawsuit plausible, suggests that climate change litigation is unlikely to play a significant role in arresting global climate change. In the end, the bulk of the work in reducing greenhouse gases must be undertaken by nation-states and international agreements.").

[115] DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 23 (1977).

[116] *See id.* at 25-30. "On most important social policy issues that come to them, judges are bound to be novices." *Id.* at 30.

[117] *Id.* at 33-35. Adjudication is piecemeal: "[r]elated issues, not raised by the instant dispute, must generally await later litigation." *Id.* at 35.

[118] *Id.* at 34-35 ("[T]he courts have only the option of issuing coercive orders: injunctions. . . . Legislators and administrators, on the other hand, have a wider range of tools in their kit. They may resort to the same kinds of sanctions judges invoke or they may use taxation, incentives and subsidies . . . interventions in the marketplace, the establishment of new organizations . . . .").

litigation and weighs them against the potential benefits of climate change litigation, it is hard to argue that litigation is the most efficient means of address global warming.

It is important to note that these criticisms of litigation do not generally apply to cases like *Massachusetts v. EPA*, where the remedy involved merely prodding a federal government agency into action on the issue of global warming. The court realized its proper role when it concluded the case by saying the following:

> [t]his is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.[120]

Unlike in *Connecticut*, the *Massachusetts* court did not contemplate the implementation of a court-created long term resource management plan or set off the possibility for huge unrestrained liability. It decided a question of administrative law and left the details surrounding the facts and solutions to a well-equipped administrative body that Congress created for the job.

For the above-mentioned reasons, the federalism value of efficiency cannot be used to justify *Connecticut*. This is because the federal government is in a much better position to address the problem and the tool used by the states, litigation, is not the best means to achieve a solution.

D. *Diversity*

An additional federalism value related to the decentralized nature of our government involves the perpetuation and preservation of regional diversity.[121] This value is primarily concerned with preserving the already

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[119] *See generally*, HOROWITZ, *supra* note 115.
[120] Massachusetts v. EPA, 549 U.S. 497, 560 (2007).
[121] *See supra* text accompanying note 41.

fast eroding cultural heterogeneity of our nation[122] and allowing citizens to choose how to regulate themselves on important issues such as marriage, euthanasia, and property taxes.[123] It is hard to see how *Connecticut* advances the promotion of regional diversity since it is involves an attempt by states from across the nation to impose their policy choices on other states spread across the South and Midwest. As noble as those policy choices may be, the lawsuit cannot be portrayed as justified using this value since, if anything, it seeks to inhibit regional choice and autonomy, and to ensure that other regions acquiesce to the plaintiff states' particular environmental tastes. Since *Connecticut* involves the imposition of policy on one state by the actions of another, it cannot be considered protective of regional diversity in any sense.

E. *Participation and Accountability*

Federalism has been lauded because it increases public participation in government and facilitates accountability by creating state and local governments that are closer to the populace than the federal government.[124] Accountability is much more than merely electoral accountability; "[a]ccountability in a democracy means responsiveness on the part of those petitioned."[125] Therefore, the reasoning goes, since state governments are closer to the people (*i.e.*, they have fewer constituents to serve and are consequently more directly accessible to those they represent), giving states broad control allows the people to be more directly involved and the government to be held more directly accountable. In some situations accountability is blurred, for example when the federal government "commandeers" a state agency or apparatus[126] and the people are unsure as to which level of government to

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[122] Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez,* 94 MICH. L. REV. 554, 558 (1995) ("Our national culture is already too homogenized to expect great differences between the states, but what cultural differences still remain should not be further eroded by central legislation without good reason.").

[123] Ryan, *supra* note 41, at 613.

[124] *See supra* notes 42-44 and accompanying text.

[125] Friedman, *supra* note 14, at 394.

[126] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

hold accountable for the behavior of the state government.[127] Accountability is also blurred when the federal government regulates in areas traditionally reserved for the state governments.[128] Consequently, state or federal control over a particular issue can be said to foster accountability only to the extent that such control does not blur the lines of accountability itself. Indeed, "[f]ederalism serves to assign political responsibility, not to obscure it."[129]

On its face, *Connecticut* might appear to foster accountability and participation not only because the action is being instigated by actors on the state level (and therefore is happening closer to the populace) but because the Attorneys General ("AGs") of each plaintiff-state are directly elected and therefore directly accountable to the people. This analysis may prove to be somewhat simplistic for two reasons. First, the lawsuit does not involve a single government entity and this fact has the potential to blur the lines of accountability. Second, there are serious problems with allowing a few state AGs to create national policy. Each issue will be addressed in turn below.

In *Connecticut*, if the plaintiff-states are successful in enjoining the defendants and the court orders a complex policy that caps the emission of GHGs and oversees systematic reductions (which is what the plaintiff-states have requested),[130] it will be unclear as to which level and which branch of government the populace should hold accountable should they want to adjust or abandon the policy implemented by the judiciary. The federal judiciary would be essentially creating a regulation promulgated by some states for the implementation in other states. If voters do not like the result of this judicial GHG scheme, they do not know "which bums to

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[127] Ryan, *supra* note 41, at 606 ("[F]ederalism is often championed as a means of ensuring that government remains accountable to the electorate by enabling citizens to recognize which elected officials are responsible for which policies (and to reward or punish policy choices accordingly.)").

[128] United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.").

[129] FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992).

[130] *See Connecticut* Complaint, *supra* note 4, at Prayer for Relief.

throw out."[131] Should they vote-out and/or lobby against the state AGs that initiated the litigation to express disapproval of the litigation? If so, in which state? Should the voters lobby their federal Congressmen or Representatives to pass legislation that would displace the lawsuit? Or is there some pathway in the states in which the defendants reside to express discontentment and adjust the system set in place? Or maybe one should intervene in the course of the judicial enforcement (which the plaintiff-states would like to continue for at least a decade).[132] The bottom-line is that once a judicial remedy is initiated, it is extremely unclear for the average citizen who to hold accountable. A dissatisfied constituent could easily think to turn against the plaintiff-state AGs, the defendant-states themselves, the federal government, or even the judiciary. Any judicial remedy in this circumstance would obscure political responsibility and leave citizens guessing as to whom to hold accountable for the GHG policy implemented by the court. "Federalism serves to assign political responsibility, not to obscure it"[133] and this lawsuit fails to serve this goal.

Additional accountability concerns flow from the scenario created in *Connecticut* where, in the absence of federal regulations in a field, state AGs can pursue their own regulatory agendas, even when those agendas have significant national ramifications.[134] The result of this situation is as follows:

> First, [it] . . . denies the citizens of other states the opportunity to influence the regulatory process . . . . Second, regulation accomplished through litigation is more difficult to overturn than regulation accomplished through legislative or administrative channels, making it less responsive to political changes. Thus, [state] AG regulation can be less politically accountable over time, as well as across states.[135]

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[131] *See* Ryan, *supra* note 41, at 606.
[132] *Connecticut* Complaint, *supra* note 4, at ¶ 6.
[133] *Ticor Title Ins. Co.*, 504 U.S. at 636.
[134] Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CAL. L. REV. 885, 886 (2007).
[135] *Id.* at 887.

For example, if a voter in Mississippi does not like the fact that the power plant he works for is at risk of potentially very costly liability from a lawsuit instigated by a state AG from California, the Mississippian is practically powerless in making his voice heard as he cannot use his vote to dissuade the California AG from pursuing the litigation. Electoral accountability is greatly diminished when one state AG can influence and indeed define national policy, which is exactly the situation in *Connecticut* where AGs from a few states are influencing global warming policy in as many as twenty other states.

A closely related point flows from the fact that the office of the state AG itself is very autonomous and the policy choices an AG makes (including which lawsuits to pursue) cannot easily be controlled by the governor, the legislature, or any other state institution.[136] When this extreme autonomy is coupled with the fact that the AG is permitted to act in a politically entrepreneurial fashion, and is usually a self-interested politician seeking to advance his or her political career, there is a serious danger that the Attorney General may stray significantly from the AG's core function of law enforcement.[137] The institution of the state AG's office is a very powerful and active one. The fact that one state AG can take dramatic action to boldly affect national policy has the potential to be very progressive, but it also has the potential to steer the country in a reckless direction that is not easily corrected by a discontented populace. While aggressively addressing global warming is arguably a very progressive goal for which state AGs should be applauded, one should also consider how much say the people bearing the brunt of the policy have in determining the means and remedy employed by the AGs. When state AGs act on a national stage, their accountability is greatly diminished and their influence is greatly expanded. This is exactly the situation in *Connecticut* where several state AGs, accountable only to the constituents in their own states, are pushing policy (through litigation) which will greatly affect the residents in twenty other states, all of whom are unable

[136] *Id.* at 890.

[137] *Id.* at 895-96 ("[A]n attorney general who aspires to higher office, such as governor or U.S. Senator, has an incentive to raise his profile in policy areas beyond that of law enforcement . . . in seeking to raise money and build support in a bid for higher office, the attorney general must try to reach out to interest groups that may not have a direct interest in the attorney general's core function of law enforcement.").

to use their political strength to express an opinion about the regulation[138] forced upon them. With respect to participation in government, it is difficult for a citizen to participate in government when the primary force driving policy on such an important issue as global warming is located in a distant state AG office.

The federalism values of accountability and participation are not served by the global warming lawsuit brought by state AGs in the *Connecticut* case. Not only does the lawsuit dramatically increase the risk that the lines of political accountability will be blurred, but it unduly concentrates power in small, driven, state institutions that are not accountable to a vast majority of the people affected by those institutions. For these reasons, any federalism justification for the lawsuit grounded on the values of accountability and participation seems highly suspect.

F. *Competing Sovereigns*

Federalism maximizes social benefits to U.S. residents by facilitating competition between sovereigns. There are two dimensions to the idea of competing sovereigns: horizontal (states competing against other states) and vertical (states competing against the federal government).[139]

Horizontal competition happens when a mobile citizenry "competes with their feet" and moves to the state with the most desirable social policies. This concept does not fit perfectly onto *Connecticut* because the lawsuit does not confer concrete benefits on its citizenry. At least theoretically, people will move to a state to reap the benefits of the policies implemented by that state. For example, a gay couple might decide to move to New Hampshire in order to take advantage of the recently passed legislation legalizing same-sex marriage.[140] The competing sovereign theory makes the most sense where concrete policy benefits are conferred to the moving resident upon arrival. This is not the

[138] I have been using the term "regulation" when characterizing the judicial remedy sought by the plaintiff-states because the relief sought (a cap on GHG emissions, followed by a guided reduction) functions exactly like a top-down regulation.

[139] *See* Ryan, *supra* note 41, at 614.

[140] Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A19.

case in *Connecticut* since, arguably, every resident of the U.S. reaps the same benefit from any GHG abatement ordered by the lawsuit, regardless of where they are living. One does not need to move from California to Mississippi in order to take advantage of the reduced GHG emissions in Mississippi caused by the litigation. The benefits and detriments of global climate change are not localized; there is no safe haven from global warming in areas that emit only a very small amount of GHG emissions.[141] In fact, this is the very premise of the *Connecticut* lawsuit, where the GHG emissions of a fuel-fired electric generating facility located in Kentucky arguably contribute to the increased salinization of marshes and tidelands in the San Francisco Bay Area.[142]

One could argue that individuals would move to the plaintiff-states in order to show support for environmentally progressive lawsuits. Residents would then be moving to states that appealed to their environmental policy tastes. While this migration is conceivable, it seems highly unlikely that a citizen would move solely to show support for state-sponsored litigation. Even if residents did in fact move, it would ironically lead to a weakened national position toward global warming. If all the like-minded advocates of aggressively attacking global warming concentrated themselves in a few single states, then their power to affect national change would be reduced.[143]

The concept of vertical competition between the federal government and the states makes much more sense in this context. The federal government has failed to act on global warming despite the cries of the people, and therefore the states have had to act instead by taking such steps as filing lawsuits like *Connecticut* in order to get the ball rolling on

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[141] This is one of the reasons why there is a tension between the worlds developed nations and developing nations. The developed nations are by far the primary emitters of GHGs, yet the developing countries must bear a substantial amount of the deleterious effects of Global Warming, even though their contribution to the problem has, to date, been very minimal.

[142] The rise in salt levels of the marshes would be due to the accelerated sea-level rise from unrestrained global warming. It threatens vital breeding grounds for numerous species of fish and shellfish. *Connecticut* Complaint, *supra* note 4, at ¶¶ 95, 173.

[143] This situation would be somewhat analogous to gerrymandering where all the members of one party are highly concentrated in a few districts, leaving the rest of the districts, along with the entire victory, to the other party.

the issue. *Connecticut* can be viewed as prodding the federal government into action by instigating an incredibly imperfect solution to global warming that only involves a small percentage of GHG emitters in the U.S. and taps the institutionally ill-equipped judiciary to make the complex decisions and oversee the monitoring of a GHG reduction scheme. From this perspective, the lawsuit can be seen as merely an attempt to prod the federal government into action on the issue by creating the possibility of a courtroom remedy that leaves few interests truly happy. Industry is not happy because *Connecticut* exposes them to huge liability and gives them little say in the solution; environmentalists are not happy because it is at best an incomplete remedy; and the general public is left wondering why it took a lawsuit to address global warming. Inevitably, the federal government will heed the will of the people and cross swords with the states on this issue by taking steps to concretely address global warming and thereby displacing the unpopular *Connecticut* decision. The states drew their *Connecticut* sword not necessarily with the intention of actually producing a tangible judicial remedy, but with the intention of provoking the federal government into action and achieving a national approach to global warming by ultimately having their *Connecticut* lawsuit displaced.

This is a very unconventional analysis of "vertical competition," since from this perspective, states *want* to lose to the federal government and have power over the issue shifted to Washington. The states' purpose for filing the lawsuit was to entice the federal government into addressing the issue and not an attempt to grab the global warming issue for themselves. The more traditional concept of vertical competition usually entails a particular level of government winning the hearts of the people by showing that they can more competently regulate a particular issue.[144] Under this analysis, the states would be rewarded when the people, on that particular issue, give them more responsibility and thereby reduce the role of the federal government. From this perspective, if *Connecticut* is displaced by federal regulation, the states will have lost the battle, since any displacement will represent the people's choice that the federal government deserves to regulate the issue of global warming, not the states. Using this analysis, the states are competing for the trust of the

[144] Pettys, *supra* note 16, at 333.

people by supplying a novel, aggressive remedy to global warming. The federal government has failed to provide a solution that adequately satisfies the needs of the people, and consequently the states have intervened to fill the void, in order to win the people. Therefore, vertical competition can be interpreted in two entirely separate ways. Either the state is intentionally offering an imperfect solution in an attempt to prod the federal government into action, or the state is attempting to offer a superior solution in the hopes of gaining the peoples trust on the issue.

While the horizontal competition analysis falls far short of providing any sort of federalist justification for the *Connecticut* lawsuit, the vertical competition analysis may be considered a valid federalism value that could be seen as justifying the lawsuit. Any justification for the suit based on horizontal competition is baseless as the global warming policy underlying *Connecticut* fails to motivate people to "vote with their feet" due to the diffusive nature of climate change and the structure of the lawsuit. Justifications founded on vertical competition, however, are much more persuasive as the lawsuit can be thought of as satisfying the needs of the people by either prodding the federal government into action on the issue or by filling a federal void on global warming. Whether the vertical competition value served by *Connecticut* is alone sufficient to prove that federalism justifies such lawsuits is, however, a separate matter.

G. *Interstate Pollution and the Federal Common Law of Nuisance: Federalist Concerns Involving Bias and Limited State Sovereignty*

The claim in *Connecticut* rests on the federal common law of nuisance.[145] The federal common law of nuisance creates a claim of action whereby one state can obtain a remedy for the deleterious effects caused by pollution originating in another state without a) having to declare war or get into the game of carrots and sticks; or b) face the potential legal biases of filing suit in the polluting state's court. Thus the federal common law is designed to provide a remedy to states that minimizes biases and addresses the fact that states are limited sovereigns and cannot use all the tools of sovereignty (such as war and diplomacy). The federal common law of nuisance is generally used in a situation where

[145] *See supra* note 4 and accompanying text.

state A pollutes, thereby harming state B.[146] This is not the situation in *Connecticut*, where every single state and nation is emitting carbon dioxide, and therefore collectively harming state B. GHGs are not localized pollutants and consequently a pollutant emitted in one nation or state amplifies the effect of global warming as a whole and is felt by all parts of the globe equally. [147] The previously mentioned two justifications for the federal common law do not easily fit this scenario. Each will be addressed below.

The states' limited sovereignty prevents states from using war or diplomacy to address the wrongs committed against them by other states. The federal common law of nuisance was designed to take the place of these tools and act as a useful mechanism for interstate disputes regarding pollution. However, due to the nature of global warming, it is hard to characterize the problem as merely an interstate dispute where state A pollutes, thereby harming state B. "Global warming . . . is not best conceived as a binary pollution dispute between producers and recipients of 'pollution'; rather, global warming is an issue of how to manage a common natural resource (the atmosphere)."[148] Without clear, coherent lines of causation running between polluter and the victim of pollution,[149] the interstate dispute resolution justifications for the federal common law breaks down. As one commentator has noted, "climate change is best conceptualized as an overexploitation-of-a-commons problem . . . and public nuisance law has never been touted as, or served to effectively address, the tragedy of the commons."[150]

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[146] *See supra* notes 54-62 and accompanying text.

[147] Michael B. Gerrard, *Introduction and Overview*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 76, at 5-6.

[148] Dana, *supra* note 104, at 3.

[149] "Unless the suit brings in all the major greenhouse gas emitters in the world, it will be impossible for the plaintiff to show (or even really allege) that it is more likely than not that the defendants' emissions, and in of themselves, caused the warming that allegedly caused or will cause the harm to the state. Greenhouse gas emissions, individually, do not translate into warming or indeed any identifiable harm at all. Moreover, it will be impossible to show that the defendants' emissions were even part of the total emissions that caused the alleged harm, since even in the absence of the defendants' emissions, it will be plausible to suppose that the same degree of warming would have occurred or will occur." *Id.* at 10.

[150] *Id.* at 11-12.

Although the interstate dispute resolution justification (*i.e.*, the limited state sovereign argument) for the federal common law fails in the global warming context, there is still the argument that some sort of federal common law should exist, since the laws of a particular state may well be biased toward protecting its own interests against the interests of other states. The fear presumably is that courts and legislatures in states with many GHG emitters might be more hesitant to adopt global warming regulations and could systematically be biased against out-of-state pollution victims. This logic, however, supports a nationally uniform legislative policy on the issue much more than it supports the use of the piecemeal use of federal common law. State courts and legislatures may very well be biased in favor of their own interests over the interests of out-of-staters, but the same goes for state AGs who have vigorously advocated for the rights of their own citizens. Courts, at least, are obligated to apply the impartial blind hand of justice, whereas state AGs can flagrantly advance the interests of their own state at the expense of others. Therefore, if federalism requires that a state be protected from the threat of bias from other state courts, it also (and even more forcefully so) requires a state to be protected from the biases that come from a few state AGs attempting to create national policy. In the context of global warming, the federal common law of nuisance does in fact eliminate potentially biased state courts and legislatures. A state injured by global warming will not have to present its claim in the courts of a heavily industrial state. Nevertheless, the federal common law of nuisance fails to address the threat of self-interested AGs pursuing their states' own agenda at the expense of other states' interests. A nationally uniform policy that fully addresses all states' interests would be far less biased than a system where a small number of states concentrated in the Northeast are allowed to impose their agenda on a great number of states throughout the country. Although the goal of addressing global warming is wonderful and should be pursued to the fullest extent, an approach controlled by a small number of state AGs cannot be characterized as unbiased.

The protection from interstate bias and the accommodation of the inherent limited sovereignty of U.S. states are important values that are meant to protect and fortify the federalist structure of our government. Although these values do not flow directly *from* federalism, they are necessary safeguards designed *for* federalism and can consequently be key

justifications for actions taken by states and the federal government. As explained above, neither justification fully supports the *Connecticut* litigation.

PART III: CONCLUSION

Within the past year, EPA has issued regulatory actions designed to address issues relating to climate change.[151] Certain thresholds for GHG emissions have already been set for stationary sources[152] and a national program designed to reduce GHG emissions from vehicles has been initiated.[153] These are important steps by the federal government in the fight against climate change. Regardless of whether these federal regulations or other future legislation actually displaces *Connecticut*, this Article presents an important framework for analyzing state sponsored litigation by looking at whether such activity is justified by, or at least congruent with, the goals and values of federalism.

In the case of *Connecticut*, the various rationales underlying the federalist structure of our government fail to adequately justify the use of state sponsored litigation to address global warming. The states are not acting as "laboratories of innovation" since they fail to contain their experiment within state borders. Liberty is not being protected because government power is in no way being curbed by the lawsuit. Additionally, the suit is a rather inefficient way to address global warming, both because the issue is international in character and because litigation is not the best tool to address it. No regional diversity interests are being satisfied. The lines of accountability are obscured and a nationally unaccountable institution is left to set national policy. Although vertical sovereign competition is served, as the states are arguably filling a regulatory void and prodding the federal government into action, horizontal competition is in no way applicable. Finally, the federal common law of nuisance seems inappropriate since it would be simplistic to characterize global warming

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[151] *See* EPA, Climate Change Regulatory Initiatives, http://www.epa.gov/climatechange/initiatives/index.html (last visited Nov. 4, 2010).

[152] *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

[153] *See* EPA, Transportation and Climate Regulations, http://epa.gov/otaq/climate/regulations.htm (last visited Nov. 4, 2010)

as an interstate dispute. Any potential state bias remedied by the federal common law is small compared to the state bias that would be remedied by nationally uniform regulation. By applying the various federalism values to the lawsuit and aggregating their weights, it becomes clear that *Connecticut* abuses rather than utilizes our federalist system.

It is important to note that the ultimate conclusion of this Article, which is skeptical of a certain type of state action on climate change, does not necessarily apply to various other state attempts to address global warming. As one commentator has noted, "[t]he GHG challenge involves a multiplicity of sources, varied risks and harms in different locations, changing science and engineering, and an array of scale challenges. No one regulator can effectively regulate at all levels."[154] A diversity of approaches to global warming is in fact a valuable consequence of federalism that should be utilized — just not with interstate litigation like *Connecticut*.

[154] William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1617 (2007).