No. 45 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

STATE OF WASHINGTON, ET AL.,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION, ET AL.,
Defendants.

DEFENDANTS' MEMORANDUM ON SOURCE OF LAW

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DEFENDANTS' MEMORANDUM ON SOURCE OF LAW

On January 18, 1972, this Court by telegram directed the parties in Nos. 45, 49 and 50 Original to file memoranda on the following issue:

> "Would federal or state law govern the substantive issue sought to be presented for decision in original actions such as this one?"

This memorandum is submitted in answer on behalf of defendants.[1]

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[1] The parties and *amici* in this proposed action have previously filed a number of briefs supporting or opposing filing of the complaint. On August 5, 1970, plaintiffs filed their Motion for Leave to File Complaint and Brief in Support ("Br. In Supp."). Defendants' Brief in Opposition ("Br. In Opp.") was filed on October 6, 1970. Plaintiffs thereafter filed a Reply Brief ("Reply Br.") on November 2, 1970, and a Supplemental Memorandum of Law ("Supp. Mem. of Law") on February 12, 1971. On August 31, 1971, an *amicus* brief was filed by sixteen States and the City of New

Plaintiffs' proposed complaint in this Court consists of three counts, alleging a violation of the federal antitrust laws (Count I), a "common law" conspiracy to restrain trade (Count II), and creation or maintenance of a public nuisance (Count III). Plaintiffs have consistently urged that Counts I and II present federal claims, and in their Supplemental Memorandum of Law (at 3-5) apparently contend that Count III does so as well. As our earlier briefs herein have indicated, the antitrust claim stated in Count I is governed by federal law, but Counts II and III—which we believe to be merely make-weight attempts to induce the Court to accept jurisdiction—are necessarily governed by state law. Regardless of the source of law applicable to Counts II and III, however, defendants submit that lower federal and state courts are available as forums to try these claims, and consequently this Court should decline to accept original jurisdiction over them.

In the first part of this memorandum we develop more fully our view of the source of law governing each of the counts of plaintiffs' complaint. In the second part we examine the bearing of the source of law question on the availability of lower federal and state court forums and the issue as to whether this Court should accept jurisdiction in this case.

A. Source of Law

Count I

Plaintiffs allege in their complaint that Count I is brought under Section 16 of the Clayton Act, 15 U.S.C. § 26, to restrain the defendants from violating Section 1

York. On December 23, 1971, defendants filed a Supplemental Memorandum in Opposition ("Supp. Mem."). Although none of these briefs was directed principally to the question of source of law, both plaintiffs and defendants have discussed that question previously, and reference to these prior discussions will be made in this memorandum where appropriate.

of the Sherman Act, 15 U.S.C. § 1 and to obtain certain mandatory injunctive relief. Complaint, Count I, para. 2. The claim is clearly a federal one.[2]

Count II

According to plaintiffs, Count II of their proposed complaint alleging a "common law conspiracy" was

> "brought under this Court's general equitable powers granted by Article III, Section 2, of the United States Constitution, independent of the Sherman and Clayton Acts, to eliminate and remedy conspiracies in restraint of trade . . . ." Complaint, Count II, para. 2.

Plaintiffs evidently attempt in Count II to state a federal common law claim cognizable in the federal courts.[3] Count II apparently invokes a body of judge-made law of trade restraints, totally separate from the Sherman and Clayton Acts and establishing both primary and remedial rights and duties. But if such a body of non-statutory antitrust law exists at all, it is clearly not federal law.

When Congress enacted the Sherman Act in 1890 and condemned "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade," 15 U.S.C. § 1, it "left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' "

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[2] Although federal law governs Count I, defendants believe that numerous questions involving the effect of various state emissions control laws and regulatory actions will be raised both in determining whether defendants' cooperative program violated the antitrust laws and in considering whether or what equitable relief can appropriately be granted. *Cf. Parker* v. *Brown,* 317 U.S. 341 (1943); *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963).

[3] The two virtually identical district court complaints filed on behalf of eight of the plaintiffs here allege that the jurisdictional basis of this claim is 28 U.S.C. § 1331. See Defendants' Supp. Mem., p. 34 n.44.

United States v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945), quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940). From that point on, judicial development of the federal law of trade restraints has necessarily been a matter of statutory interpretation, not of common law. Any common law of conspiracy in restraint of trade that is "independent of the Sherman and Clayton Acts" must therefore be state law. As we will now show, the general presumption against federal common law reinforces this conclusion.

Count III

In Count III of their complaint, captioned "Public Nuisance," plaintiffs allege that emissions from motor vehicles manufactured by defendants "cause severe damage to the flora and fauna of Plaintiff States" (Complaint, Count III, para. 9), and that the manufacture and sale of motor vehicles "as presently engineered and designed . . . constitute a public nuisance contrary to the public policy of the Plaintiff States, as well as the federal government."[4] Plaintiffs do not allege in Count III that defendants have violated the provisions of any federal law or regulation, and in their briefs they urge that "Count III does not involve a federal question for purposes of giving jurisdiction to any federal district court . . . ." Plaintiffs' Br. in Supp., p. 16; and see Plaintiffs' Reply Br., pp. 10 & n.4, 12.[5]

On the other hand, while plaintiffs have made no allegation in their complaint that "the air that lies within their domain" (Complaint, Count III, para. 3) is polluted

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[4] As a statutory reference to the federal policy, plaintiffs cite "42 U.S.C., § 1857(4)(8)." Although we can find no statute with this number, the reference is apparently to general congressional findings and purposes of the Clean Air Act, which we discuss *infra* pp. 10-11.

[5] In their virtually identical district court complaints, eight of the present plaintiffs allege pendent jurisdiction over Count III. Defendants' Supp. Mem., pp. 7-8, 34 n.44.

During the district court pretrial hearing of February 17, 1972 (see note 12 on page 12), Fredric C. Tausend, Special Assistant

by emissions from motor vehicles operated outside of, or across, their respective state borders, they nonetheless assert in their Supplemental Memorandum of Law that the emissions from motor vehicles manufactured by the defendants constitute a "national nuisance" and that Count III is therefore governed by "an interstate or national common law." Plaintiffs' Supp. Mem. of Law, pp. 3-5. In urging that Count III states a claim under "interstate common law," plaintiffs rely on the fact that this Court has from time to time fashioned and applied a federal common law in original actions between States. *Id.*, p. 3. They further assert that this Court applied federal common law in at least one suit by a State against the citizens of another State, namely, *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907). *Id.*, p. 4.

Plaintiffs' line of argument entirely misapprehends the principles established by this Court to determine whether "federal common law" or state law is applicable in actions brought in the Supreme Court and other federal courts. This Court's decisions demonstrate that under the regime of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), any common law applied in actions in the federal courts must be state common law, unless it can be demonstrated that the effectuation of a federal constitutional or statutory policy requires that one or more of the issues in the action be determined exclusively by federal common law. Moreover, the basic constitutional presumption in favor of State competence elucidated in the *Erie* decision [6] is rein-

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Attorney General for the State of Washington, counsel of record for plaintiff States here and for eight States in their district court complaints, stated as follows:

> "We don't think this is a nuisance action, as Mr. Verleger suggests. We are now convinced and think that it is an antitrust action, and so we have now stricken Count Three." Transcript, p. 116.

[6] The presumption in favor of the application of State law, and against the application of federal common law, is expressed in the Rules of Decision Act, 28 U.S.C. § 1652. The constitutional sources of the presumption are ably explored in Hart, *The Relations*

forced here by the only federal policy implicated by Count III of plaintiffs' Complaint—Congressional declaration in the Clean Air Amendments of 1970 that the problem of emissions from vehicles already in use should be dealt with by the States, and not by the federal government. This policy obviously strengthens, rather than rebuts, the *Erie* presumption in favor of the application of state law to plaintiffs' "nuisance" claim.

A correct analysis of the question of what law applies to Count III must begin with the recognition that it is the nature of the interests involved—State or federal—and not the identity of the parties—United States, State or private—that primarily determines the source of applicable law. "[E]nclaves of federal judge-made law which bind the States" have been created where "necessary to protect uniquely federal interests," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964), and these federal interests may be present, along with State interests, in actions involving a variety of parties. Thus issues both of "federal common law" and of state law have arisen in actions between private parties (*e.g.*, *Bank of America* v. *Parnell*, 352 U.S. 29 (1956)), in actions between States (compare *Texas* v. *New Jersey*, 379 U.S. 674 (1965), with *Arkansas* v. *Texas*, 346 U.S. 368 (1953)) and in actions involving the United States (compare *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), with *United States* v. *Yazell*, 382 U.S. 341 (1966)). None of the few post-*Erie* decisions of this Court involving an action between a State and a citizen of another State has involved the application of "federal common law." And last Term in *Ohio* v. *Wyandotte*

Between State and Federal Law, 54 Colum. L. Rev. 489, 497-98, 525-39 (1954); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 544-45 (1954); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 810-14 (1957).

Chemicals Corp., 401 U.S. 493 (1971), the applicability of federal law was expressly rejected.[7]

In *Erie* the Court laid down the basic principle for determining the source of applicable law in all kinds of actions in the federal courts:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law." 304 U.S. at 78.

In *Hinderlider* v. *La Plata River Co.*, 304 U.S. 92 (1938), decided the same day as *Erie*, and in subsequent decisions, the Court has frequently been required to develop or approve "federal judge-made law." But unlike "the free-wheeling days antedating *Erie*," *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963), the instances where federal common law is created have been restricted to situations in which federal interests, as expressed in the Constitution or in federal statutes, have required that a uniform federal rule displace state law as the basis of decision.

Thus, because the logic of the Constitution excludes state competence in these areas, federal judge-made law has been held to govern such matters of potential conflict between States as the construction of interstate compacts, *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951), interstate boundary disputes, and the apportionment of interstate waters. *Hinderlider* v. *La Plata River Co.*, *supra*. Similarly, since States have no foreign relations responsibility under the Constitution, federal common law governs determinations of the validity of acts of a foreign government. *Banco National de Cuba* v. *Sabbatino*, *supra*. Federal interests expressed in acts of Congress have likewise from time to time necessitated the

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[7] Because *Georgia* v. *Tennessee Copper Co.*, *supra*, antedates *Erie*, the source of law problem was not perceived as an important constitutional question, and there is little point in examining the decision for indications as to what law the Court thought it was applying. For what it is worth, however, passages such as the

formulation of a "federal common law" to displace state law. See, *e.g.*, *Clearfield Trust Co.* v. *United States*, *supra*; *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Hanna* v. *Plumer*, 380 U.S. 460 (1965).

Conversely, the *Erie* mandate of respect for State interests has dictated a conservative approach to parties' assertions that a federal interest is present requiring the application of federal common law. As this Court noted in *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966):

> "In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing [such] transactions . . . ."

Moreover, even where a federal interest has been shown, there are "other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern," and "the feasibility of creating a judicial substitute." *Id.* *See also United States* v. *Brosnan*, 363 U.S. 237 (1960); *Klaxon Co.* v. *Stentor Mfg. Co.*, 313 U.S. 487 (1941).

The Court's approach of keeping the application of federal common law confined to situations which are relatively "few and restricted," *Wheeldin* v. *Wheeler*, *supra*, 373 U.S. at 651, rests on several practical consid-

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following suggest strongly that it was Georgia's laws which condemned the copper company's activities:

> "[Georgia] has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power." 206 U.S. 237.

erations of federalism, as well as on the requirements of the Constitution. Manifestly, it is desirable in most areas of substantive law that the States be permitted, where possible, to experiment with different legal rules and to tailor those rules to meet their own local needs. Rules of federal common law, however, must be uniform throughout the federal union, and under the Supremacy Clause they displace state laws inconsistent with them, in state courts as well as in federal courts. See *Hinderlider* v. *La Plata River Co.*, *supra*; *Banco Nacional de Cuba* v. *Sabbatino*, *supra*. Moreover, the development of a workable mutually consistent body of common law rules in a given field is a burden that can best be carried by the courts before which cases in that field are regularly heard. See Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512, 1519 (1969). Thus, for example, the "application of state laws concerning taxes, *motor vehicles*, decedents' estates, business torts, government contracts, and so forth," *Ohio* v. *Wyandotte Chemicals Corp.*, *supra*, 401 U.S. at 497 (emphasis supplied), typically occurs in state courts, and it is the state courts which therefore should normally develop and apply such common law rules as are required in these fields. *Id.*

In light of these principles, the conclusion is inescapable that Count III should be adjudicated under state law (specifically, under the laws of each of the States seeking to abate the alleged "nuisance" created by motor vehicles manufactured by defendants), subject, of course, to any defenses available to the manufacturers based on the preemptive effect of federal air pollution legislation.[8] No provision of the Constitution or any federal statute requires this Court to develop a federal common law of motor vehicle emissions to override the police power of

[8] For reasons to be stated shortly, p. 10 & n.11, *infra*, the applicability of state law to the vehicle manufacturers is limited, so far as vehicle emissions are concerned, by the existence of federal statutory and administrative regulation of emissions from newly-manufactured cars.

the States in this field. No interstate conflict is suggested, and no reason appears for totally denying State power over motor vehicle emissions. Indeed, since the effect of vehicle emissions varies widely from State to State, and within each State as well, depending on local air conditions, population density and other variables,[9] this is a perfect example of a field in which local solutions and local experimentation ought not to be displaced by federal judge-made law.[10]

Any doubt on this score is dispelled by the fact that Congress has reached the same conclusion. As we have noted both in our original Brief In Opposition, pp. 22-24, and in our Supplemental Memorandum, pp. 26-28, Congress has made the States responsible for bringing local air into compliance with regional air quality standards, 42 U.S.C. §§ 1857c-2, -5 (1970), and as part of this regulatory scheme, it has expressly reserved to the States the power to regulate vehicle emissions (except for emission

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[9] See Defendants' Supp. Mem., pp. 28-29 and n.37.

[10] The decision of the Tenth Circuit Court of Appeals in *Texas* v. *Pankey*, 441 F.2d 236 (10th Cir. 1971), deserves only brief comment. In *Pankey* a federal district court dismissed for lack of diversity or other jurisdiction a suit by the State of Texas to enjoin New Mexico citizens from using pesticides which allegedly polluted the water supplies of Texas municipalities. The Court of Appeals reversed and authorized the district court to commence the creation of an entire body of federal judge-made law.

In light of the general principles discussed above, defendants believe that the *Pankey* decision is clearly wrong in holding that the claim pleaded arose under federal common law. Indeed, in the *Wyandotte* case—handed down a month after *Pankey*—this Court held that a claim essentially identical to that in *Pankey*, "if otherwise cognizable in federal district court, would have to be adjudicated under state law" and that there would be no "federal question jurisdiction . . . under 28 U.S.C. § 1331." 401 U.S. at 498-99 n.3. In any event, the *Pankey* court's holding on source of law is distinguishable from the instant case where, as we will show presently, Congress has now imposed federal emission control regulation on manufacturers of new vehicles and has expressly left to the States—and not federal judiciary—the making of law applicable to emissions from motor vehicles currently in use.

controls on newly-manufactured vehicles[11]). 42 U.S.C. § 1857f-6a(c) (1970); S. Rep. No. 403, 90th Cong., 1st Sess. 34 (1967). The Congressional decision to leave used car emissions to State control is buttressed by a finding that the problem is not manageable at the federal level. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 13-14 (1970). Since Congress has declined to exercise its legislative power over vehicles already in use and has left the matter to the States, it would be most inappropriate for this Court to regulate emissions from vehicles in use by invoking judge-made federal common law.

B. *Availability of Alternative Forums*

Irrespective of the applicable source of law, lower federal and state courts are available as forums to hear all of plaintiffs' claims, and consequently no reason exists for this Court to accept original jurisdiction in this case.

With regard to Count I, the availability of alternative forums is obvious. As defendants have pointed out previously, there are numerous federal district court forums in which plaintiffs can maintain this claim, forums which these same plaintiffs and other States have previously found adequate in other cases States have brought under the federal antitrust laws. Indeed all the plaintiffs in

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[11] Emissions from *new* vehicles have been subjected to direct federal control since 1965. Act of October 20, 1965, Public Law No. 89-272, 79 Stat. 992. See discussion in Defendants' Supp. Mem., pp. 18-20. State regulation of emissions from new vehicles before they are sold and become "used" is expressly preempted, 42 U.S.C. § 1857f-6a(a), as to all States except California, for which waivers of preemption may be granted under specified circumstances. 42 U.S.C. § 1857f-6a(b). Accordingly, plaintiff States cannot assert any "nuisance" claim, state or federal, against manufacturers for selling new vehicles that were subject to the federal emissions standards, since such a claim amounts to nothing more than an effort by the States retroactively to regulate emissions from newly-manufactured vehicles.

this proposed action have filed complaints against defendants in federal district courts containing the same antitrust claims and including the same prayers for relief as the complaint sought to be filed herein (as well as a prayer for damages), and alleging that the district courts have jurisdiction over these claims (as well as over Counts II and III). See Defendants' Supp. Mem., pp. 33-35. These complaints have all been consolidated by the Multidistrict Litigation Panel for pretrial proceedings in the Central District of California.[12]

Other forums than this Court are readily available to hear Count II of plaintiffs' complaint as well. Plaintiffs have incorporated into Count II all of the factual allegations of Count I and have stated that "[t]he evidence which would be introduced to prove Count II is identical to that needed to prove Count I." Plaintiffs' Supp. Mem. of Law, p. 2. If this is so, plaintiffs' common law conspiracy claim can be heard not only in the plaintiffs' own state courts (which, as this Court held in *Ohio* v. *Wyandotte Chemicals Corp.*, *supra*, provide an adequate forum for trying state common law claims) but also in a federal district court. Having jurisdiction over the federal statutory antitrust claim, the district court would also have pendent jurisdiction over the state common law claim of Count II under the criteria laid down in *United*

[12] The plaintiff States have now joined with other public body plaintiffs below in a proposal to the district court that they would amend their complaints to drop their damage cliams if the court would set a trial date of December 1972 for the remaining equitable claims of the public body plaintiffs. At a pretrial hearing on February 17, 1972, the court deferred final action on this proposal, pending further consideration after the issuance of notices to the members of the governmental classes pleaded by the plaintiff States and other public bodies in the district court complaints, notifying them of the class action proceedings and informing them of the proposal. The court has scheduled a further pretrial conference for March 7, 1972, to consider the form of the proposed notices.

Mine Workers v. *Gibbs*, 383 U.S. 715 (1966). See Defendants' Supp. Mem., p. 8 n.5.[13]

Lower federal and state courts also provide available forums in which plaintiffs can bring suit on the theory embodied in Count III of their present complaint regardless of the applicable source of law.

If this Court agrees with defendants that Count III presents a state claim, then plaintiffs will be able either to raise it in federal district court as ancillary to Counts I and II or to bring a separate action upon it in their own State courts. If the factual basis of Count III is sufficiently similar to Counts I and II that the plaintiffs should "be expected to try them all in one judicial proceeding," *United Mine Workers* v. *Gibbs*, *supra*, 383 U.S. at 725, the district court could properly exercise its pendent jurisdiction over Count III. See Defendants' Supp. Mem., pp. 7-8. On the other hand, if the claims in Count III are so different that pendent jurisdiction would not exist, there is no reason why this Court should make itself available as a tribunal simply to enable plaintiffs to join the antitrust and nuisance claims in one action, and plaintiffs should be required to bring their antitrust claim in the federal courts and their "nuisance" claims in their own State courts.

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[13] In their most recent brief that defendants have seen, plaintiffs have described Count II as

> "a contingent or supportive claim, included as a hedge against an argument . . . that the equitable relief available under Section 16 of the Clayton Act is less broad than the powers of an equity court at common law." Plaintiffs' Supp. Mem. of Law, p. 2.

To the extent plaintiffs' claim can be read as requesting a private, non-statutory remedy for violation of substantive rights under the federal antitrust statutes, then it presents a federal question cognizable in the district courts under 28 U.S.C. § 1331. *Cf. J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). The question of whether such a remedy exists can and should be answered in the first instance by the federal district courts in the pending lower court actions.

Should this Court accept plaintiffs' argument that Count III presents a federal claim, then a federal district court should have jurisdiction to hear it under 28 U.S.C. § 1331 (a). See, *e.g.*, *Texas* v. *Pankey*, 441 F.2d 236 (10th Cir. 1971); *Ivy Broadcasting Co.* v. *American Telephone & Telegraph Co.*, 391 F.2d 486, 492-93 (2d Cir. 1968); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (opinion of Brennan, J.); C. Wright, Law of Federal Courts § 60, at 250 (2d ed. 1970). Moreover, even if a claim based entirely on "federal common law" could be held not to "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331(a), such a claim, if presented in Count III, still might well be joined in the district court with Count I as a pendent claim. In such a situation the issue presented would be "so essentially one 'of federal policy that the argument for exercise of pendent jurisdiction is particularly strong.'" *Rosado* v. *Wyman*, 397 U.S. 397, 404 (1970).

In sum, regardless of the source of law applicable to the three counts of plaintiffs' complaint, lower federal and state courts afford available forums in which plaintiffs can bring their suit. Accordingly, the source of

law issue is no reason for this Court to accept original jurisdiction in this case.

Respectfully submitted,

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