Well over a century ago, the Supreme Court ruled that it had that power to remedy interstate water pollution. That was in 1901. Six years later, the Court decided its first air pollution case. Notably, these cases came during the conservative *Lochner* era when the Court was hardly known for its liberalism. Quite the contrary. Yet the Court didn't hesitate to address pollution issues.

The water pollution case was *Missouri v. Illinois*. In a feat of engineering prowess or incredible hubris, depending on how you look at it, Illinois had built a canal to reverse the flow of a river from Lake Michigan to the Mississippi. The canal then became a dumping place for the city's raw sewage. Missouri claimed that the sewage was befouling the water as far away as St. Louis. The Court had long heard other law suits between states, but this was apparently the first one to involve pollution.

The Court's decision was written by Justice Shiras. You wouldn't be alone if you've never heard of him. Fame is fleeting. Suffice it to say that he was a conservative member of a conservative Court — perhaps the most conservative Court in history until now.

Almost all of the opinion consists of quotations from the parties and a recitation of past lawsuits between states decided by the Court. It's tedious reading. Then, near the end, Shiras gets down to business. Describing the case, he said:

> "The bill in this case does not assail the drainage canal as an unlawful structure, nor aim to prevent its use as a waterway. What is sought is relief against the pouring of sewage and filth through it, by artificial arrangements, into the Mississippi River, to the detriment of the State of Missouri and her inhabitants. . . . ."

In the Court's view, that was enough to give it jurisdiction. In a later round of the litigation, the Court held that Missouri had not sufficiently proved its case that the cause of contamination was sewage from Illinois rather than sewage from Missouri.

The air pollution, *Georgia v. Tennessee Copper Co.* , involved horrendous sulfur dioxide coming from a copper smelter. The result was massive destruction of Georgia land by carbon dioxide. This time the decision was by a famous judge, Justice Oliver Wendell Holmes. Here's what he said:

> "It is a fair and reasonable demand on the part of a sovereign that the air over

> its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source."

Citing the Missouri case, Holmes said that state sovereignty was at the core of the case:

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

These two cases are little known today, but they have cast long shadows. Very briefly, here were some of their longterm impacts:

1. **International law.** This line of precedent got the attention of an international tribunal in the *Trail Smelter* case, which involving a Canadian smelter polluting across the U.S. border. The tribunal held that a country has a duty to prevent its inhabitants from inflicting serious harm within another country. Thus, Canada had to take responsibility for the pollution. This principle is now famous in international law as the *Smelter Trail* rule. In turn, that principle of international law was taken up in international concords such as the 1992 Rio Declaration on Environment and Development.
2. **Water pollution.** Use of federal common law to pursue water pollution cases enjoyed a big revival in the 1960s and early 1970s. It was ended by the Supreme Court, which held that the then-new Clean Water Act took over the field of interstate water pollution in lieu of court-made rules.
3. **Climate change.** In a groundbreaking climate decision, *Massachusetts v. EPA*, Justice Stevens invoked this line of cases to emphasize the special interest that states have in access to the Court to protect their interests as sovereigns. The upshot was to give states standing to sue EPA for failing to take action against carbon emissions. Also, this line of cases was repurposed early in this century in order to bring lawsuits against major carbon emitters in federal court. The Supreme Court ultimately said that since the Clean Air Act covered climate change, lawsuits based on judge-made federal rules were no longer needed. It left open the possibility of lawsuits based on state law, and

state lawsuits against oil companies are now underway.

As it has turned out, the Supreme Court has been happy to cede these pollution issues to Congress. But Justice Shiras’s imprint lives on in international law and perhaps in standing law.

Shiras, who was born in 1832, retired from the Court just after the decision. Unlike some current Justices, apparently didn’t think life tenure meant that he *had* to stay on the Court the rest of his life. He retired just after the Missouri case was decided and lived another two decades, dying in 1924.