In American Electric Power Co. v. Connecticut, 564 U.S. ___, No. 10-174, 2011 WL 2437011 (June 20, 2011) ("AEP"), the U.S. Supreme Court, in an 8-0 opinion, held that federal courts have no authority to apply the federal common law of nuisance to control greenhouse gas emissions ("GHGs"). In this case, the Court considered whether the plaintiffs (several states, the city of New York, and three private land trusts) could maintain federal common law public nuisance claims against carbon-dioxide ("CO\(_2\)"") emitters (four private power companies and the federal Tennessee Valley Authority). The Court held that the Clean Air Act ("CAA") and the Environmental Protection Agency’s ("EPA") regulations promulgated thereunder displace federal common law claims.

The Supreme Court's decision is predicated on the important role that EPA will play in regulating GHGs. If EPA retains its authority to regulate GHGs, the AEP decision means that federal common law nuisance claims to control GHGs are almost certainly dead. However, if Congress removes EPA's authority to regulate GHGs, which is a real possibility, such claims could be revived.

The Supreme Court based its AEP conclusion on the Court's earlier holding in Massachusetts v. EPA, 549 U. S. 497 (2007), that the CAA authorizes the federal regulation of emissions of CO\(_2\) and other GHGs. After Massachusetts, EPA undertook regulation of GHGs, beginning in December of 2009, when the agency concluded that GHGs from motor vehicles “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” This endangerment finding led to a final rule to control emissions from light-duty vehicles and to other significant rule-makings that were directed toward controlling GHG emissions from stationary sources.

The AEP lawsuit began in 2004 before EPA had initiated these regulatory efforts. Plaintiffs alleged that the defendants are the five largest emitters of CO\(_2\) in the United States and that, by contributing to global warming, defendants' CO\(_2\) emissions violated the federal common law of interstate nuisance, or, in the alternative, state tort law. Plaintiffs sought injunctive relief from the district court to require each defendant to cap its CO\(_2\) emissions and then reduce them by a specified percentage each year.

The district court dismissed the lawsuits on the ground that they presented non-justiciable political questions—issues reserved for the elected branches. The Second Circuit reversed, holding that the suits were not barred by the political question doctrine, that plaintiffs had standing to bring their claims, that plaintiffs had stated a claim under the federal common law of nuisance, and that the CAA had not displaced federal common law.

The Supreme Court disagreed on the last of these points, holding “that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. Massachusetts made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. And we think it equally plain that the Act ‘speaks directly’ to emissions of carbon dioxide from the defendants’ plants.” The Court supported its reasoning, stating, “[t]he Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.”

As a basis for its decision, the Supreme Court emphasized the important role of an expert agency (the EPA) in GHG regulation, as opposed to the judiciary:

It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.

The Court continued,

[the judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decisionmaking scheme Congress enacted. The Second Circuit erred, we hold, in ruling that federal judges may set limits on greenhouse gas emissions in [the] face of a law empowering EPA to set the same limits ....]

On the issue of standing, the Supreme Court split, as it did in Massachusetts. Four members held that at least some plaintiffs had standing to bring their claims. By contrast, four members—though unnamed, it is clear that they were the same four who had dissented from the grant of standing in Massachusetts—believed that none of the plaintiffs had standing. This 4-4 tie affirmed the Second Circuit's grant of standing.
In closing, the Supreme Court acknowledged that the plaintiffs also sought relief under the law of each state where the defendants operate power plants. The Second Circuit did not examine these state law claims so the Supreme Court remanded the issue to the Second Circuit to consider, among other things, whether the CAA preempted the state law claims.

It seems unlikely that the CAA will be held to preempt state common law. The CAA almost always allows states to regulate air pollution more strictly than federal minimum requirements. However, the Court’s opinion can be cited against any effort by state courts acting alone to regulate GHG, since the Court did emphasize that federal judges (and, by inference, state judges) lack the scientific, economic and technological resources to cope with the kinds of issues raised in AEP.

1 Justice Ginsburg delivered the opinion and Chief Justice Roberts, Scalia, Kennedy, Breyer, and Kagan joined. Justice Alito filed an opinion concurring in part and concurring in the judgment and Justice Thomas joined. Justice Sotomayor took no part in the consideration or decision of the case.

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