American Electric Power v. Connecticut: Assessing the Values and Drawbacks of the Supreme Court's Approach to Climate Change Litigation

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Introduction

There is broad scientific consensus that our planet is experiencing a gradual increase in climate temperature.[1] Global warming is no longer a hypothesis or theory, but a very real danger with threatening consequences. Rising climate temperatures are directly attributable to human activity, primarily through the emission of greenhouse gases (GHGs).[2] The most harmful of these GHGs are carbon dioxide (CO_2), methane (CH_4), and nitrous oxide (N_2O) due to their abundance and persistence in the atmosphere.[3] These harmful gasses are a particular problem because they are emitted into the atmosphere en masse by large energy producers. Energy policy debates focus on two main goals: providing an inexpensive supply of energy and attempting to slow the rate of global warming.

As a result of these competing interests, courts have increasingly become the battleground for those seeking to curb climate change by placing restrictions on major GHG emitters. Today, there have been over 200 climate change related claims in the federal system.[4] The ability of interested parties to hold energy producers accountable not only for air pollution, but its effect on global climate, is a relatively new development, however. The Supreme Court

[1] "The evidence is incontrovertible: Global warming is occurring. If no mitigating actions are taken, significant disruptions in the Earth's physical and ecological systems, social systems, security and human health are likely to occur. We must reduce emissions of greenhouse gases beginning now." American Physical Society, 07.1 Climate Change in *National Policy* (adopted on November 18, 2007), *available at* http://www.ucsusa.org/assets/documents/ssi/american-physical-society.pdf.

[2] Susan Solomon et al., *Technical Summary* 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 23 (Susan Solomon, et al. eds., 2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-ts.pdf.

[3] *Id*. at 23-24.

[4] James R. May, *Recent Developments in Climate Change Litigation: Oral Arguments In AEP v. Connecticut and Related Cases*, 42 ENV'T REP. CUR. DEV. (BNA) 1307, 1307 (2011).

first addressed the issue of greenhouse gasses and their effect on climate as recently as 2007 in *Massachusetts v. EPA*.[5] The Court handed down an environmentally progressive decision that forced the Environmental Protection Agency (EPA) to categorize CO_2 as an "air pollutant" under the meaning of the Clean Air Act (CAA), and to federally regulate this GHG.[6] The Court's ruling in *Massachusetts* was a true victory for the environment.

This summer, the Court again addressed GHG emissions by major power companies in *American Electric Power Co. v. Connecticut*,[7] the first climate change tort suit to reach the Supreme Court.[8] Applying their decision in *Massachusetts*, the Court reasoned that EPA's mandate to regulate GHGs displaced the states' federal common law claims against power companies: "We hold that the CAA 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."[9] The Court's ruling in *AEP* has significant implications for the future of GHG regulation. By favoring an agency regulatory framework for addressing climate change, the Court outlined an effective means for reducing climate change holistically. What the Court failed to do, however, is to provide a means of compensation for those affected by climate change that energy corporations and other major GHG emitters have accelerated.

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[5] Massachusetts v. EPA, 549 U.S. 497 (2007).
[6] "Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change . . . . EPA has refused to comply with this clear statutory command." *Id*. at 533.
[7] American Electric Power Co. v. Connecticut, 131 S. Ct. 2527 (West 2011).
[8] Christina M. Carroll, Lawrence S. Ebner, & J. Randolph Evans, *The Supreme Court's AEP Decision On Legislative Displacement of Federal Common Law Nuisance Claims and Its Implications For Climate Change Tort Litigation*, 42 ENV'T REP. CUR. DEV. (BNA) 1475, 1787 (2011).
[9] *AEP,* 131 S. Ct. at 2537.

Massachusetts v. EPA

The Supreme Court's holding in *AEP v. Connecticut* requires an understanding of the seminal climate change suit decided by the Court. In 2004, eight states, the City of New York, and several conservation organizations brought suit against a number of large electric power companies, alleging that GHG emissions from these power companies "contributed to the public nuisance of global warming under federal common law."[10] In order to prevent administrative stalwart, these same plaintiffs simultaneously petitioned EPA to regulate greenhouse gas emissions, demanding that GHG emissions should be categorized as an air pollutant subject to regulation under the CAA.[11] The plaintiffs engineered such a litigation strategy to ensure the regulation of GHGs one way or another. All that was left for the courts to decide was the proper method of regulation – judicial oversight through common law nuisance claims, or agency regulation conducted by the EPA.[12] The method by which we regulate greenhouse gasses today was effectively determined when the Supreme Court ruled on the second of these two suits in *Massachusetts v. EPA*.

The CAA requires the EPA Administrator to establish standards for emissions from new motor vehicles that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[13] At the onset of the states' petition, EPA declined to regulate GHGs as an "air pollutant" under the theory that the CAA did not authorize EPA to "issue mandatory regulations to address global climate change"[14] because GHGs were not "air pollutants" by definition.[15] EPA further instructed that even if the CAA permitted GHG

[10] Jonathan H. Adler, *A Tale of Two Climate Cases*, 121 YALE L.J. ONLINE 109 (2011), http://yalelawjournal.org/2011/09/13/adler.html.
[11] *Id*. at 109
[12] *Id*. at 109-110.
[13] 42 U.S.C. § 7521(a)(1). (Rule 12)
[14] *Massachusetts*, 549 U.S. at 511.
[15] *Id*. at 528.

regulation, "it would unwise to do so at this time."[16] If a causal link between greenhouse gasses and global warming was established, EPA still refused to set emissions standards for GHGs, calling this approach to climate change regulation "piece-meal," and deferring to the President's more "comprehensive approach" of technological innovation, private-sector incentives, and continued research.[17]

The Court rejected the argument that GHGs could not be classified as an "air pollutant." Writing for the Court, Justice Stevens eliminated all doubt of the ill-effects of GHGs, saying:

> [a] well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat.[18]

Acknowledging the effects of GHGs, the Court concluded that climate change endangers public health and welfare. Without a doubt, "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant.'"[19] The *Massachusetts* decision was deemed an environmental victory for requiring EPA to regulate emissions of GHGs. The Court's position in *Massachusetts* proved to be just the beginning of climate change adjudication and affected only some of the issues involved with climate change regulation. *American Electric Power* is a prime example of the continuing climate change issues the Court faces.

American Electric Power Co. v. Connecticut

Well before the decision in *Massachusetts*, two groups of plaintiffs—eight states and New York City, and three nonprofit land trusts—filed separate complaints against five major

[16] *Id*.
[17] *Id*. at 513.
[18] *Id*. at 504-505.
[19] *Id*. at 532.

power companies.[20] Like the plaintiffs of *Massachusetts*, these parties sought to specifically limit CO_2 emission. In their complaint, the plaintiffs reported that these five companies were responsible for "25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities . . . and 2.5 percent of all anthropogenic emissions worldwide."[21] Whereas the Court in *Massachusetts* faced a petition by plaintiffs to require an agency to regulate GHGs, it now was faced with a federal common law nuisance claim against major emitters seeking injunctive relief.[22]

As one scholar notes, "when the state prevailed in *Massachusetts v. EPA* and the Supreme Court declared that GHG emissions 'fit well within the Clean Air Act's capacious definition of "air pollutant,"' the outcome of *American Electric Power Co. v. Connecticut* (*AEP*) was all but assured."[23] In a unanimous decision, the Supreme Court held that federal common law nuisance claims are "displaced" by the CAA.[24] The Court explained that when Congress addresses a question that was previously resolved by federal common law, the need for such an avenue of lawmaking by the federal courts disappears and is left for legislative determination.[25] Because *Massachusetts* held that the CAA regulates GHG emissions, federal common law suits seeking to regulate GHG emissions are displaced by agency standards under the CAA. Not only does the CAA provide for agency regulation, but it also provides avenues of enforcement other than common law nuisance claims. Any person may privately enforce emissions limits of

[20] The power companies were: American Electric Power Co. and its subsidiary American Electric Power Service Corp., Southern Co., Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corp. *See* Carroll et al., *supra* note 8, at 1477. *See also AEP,* 131 S. Ct. at 2533-34.
[21] *AEP,* 131 S. Ct. at 2534.
[22] Petitioners sought to cap "carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade." *Id*.
[23] Adler, *supra* note 10, at 109.
[24] *AEP*, 131 S. Ct. at 2532 ("The Clean Air Act and the Environmental Protection Agency action the Act authorizes, we hold, displace the claims the plaintiffs seek to pursue.").
[25] *Id*. at 2537.

regulated sources by bringing a civil enforcement action in federal court.[26] Because the CAA "provides a means to seek . . . the same relief the plaintiffs seek,"[27] the Court reasoned that federal common law claims are altogether unnecessary.

The Supreme Court forced greenhouse gas regulation along a regulatory course for many reasons.[28] For one, expert agencies are better equipped to understand the complex science of greenhouse gasses and their effect on global warming.[29] An agency has a far greater amount of resources to conduct scientific research than an individual judge making *ad hoc* determinations on acceptable emissions levels.[30] In addition, allowing common law claims for damages from GHG emissions would create a host of problems. It is questionable whether these disputes could even be resolved by the court system as we know it. Could we legally hold corporations liable for climate-related harms if a specific injury cannot be attributed to them?[31] Could a state court have jurisdiction over a GHG emitter located hundreds of miles away?[32] If a company has facilities operating in 20 different states, which state law would the court apply?[33] How could victims of catastrophic weather events prove that their injuries were specifically caused by climate change?[34]

Common sense would indicate that the Court got it right in *Massachusetts* and *AEP*. Climate change and greenhouse gas emissions are best regulated by the federal government to

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[26] 42 U.S.C. § 7604(a).
[27] *AEP,* 131 S. Ct. at 2538.
[28] Hari M. Osofsky, *AEP v. Connecticut's Implications For The Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101, 103 (2011), http://yalelawjournal.org/2011/09/13/osofsky.html.
[29] *AEP*, 131 S. Ct. at 2539-2540 ("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.").
[30] *Id*.
[31] Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135, 136 (2011), http://yalelawjournal.org/2011/09/13/gerrard.html.
[32] *Id*.
[33] *Id*. at 138.
[34] *Id*. at 139.

establish uniform standards that bind emitters nationwide. However, pursuing a regulatory approach to the exclusion of common law nuisance actions has some significant drawbacks.

Potential Problems of Agency Regulation

The regulatory track the Supreme Court encouraged in *AEP* establishes a means for limiting greenhouse gas emissions, but there is no opportunity for redress in such an agency regulatory pathway. Under the CAA, states and private parties may still petition for a rulemaking if EPA fails to set emissions limits for a particular pollutant.[35] In addition, private citizens may bring suit against the EPA if the agency fails to enforce these limits.[36] However, the ability of states or private parties to obtain relief for injuries caused by unlawful GHG emission is nonexistent under the current method of agency regulation. *AEP* "raise[s] further questions about the extent to which citizens will be able to use litigation to challenge corporate decision-making and to achieve redress for those harmed by climate change."[37]

It is a fundamental principle of tort law to provide compensation for a plaintiff where a defendant has inflicted harm.[38] This basic principle of justice "remain[s] elusive due to the Court's restricted view of tort law's relevance to climate change."[39] The current policy of greenhouse gas regulation prevents individuals, communities, and states from seeking compensatory damages from the worst GHG emitters: energy corporations. Agency regulation may provide for a more effective means of attacking the complex problem of climate change, but

[35] 42 U.S.C. § 7607(b)(1); *AEP*, 131 S. Ct. at 2538.
[36] 42 U.S.C. § 7604(a); *AEP*, 131 S. Ct. at 2538.
[37] Osofsky, *supra* note 28, at 105.
[38] Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 YALE L.J. ONLINE 115, 115 (2011), http://yalelawjournal.org/2011/09/13/burkett.html.
[39] *Id*.

some scholars argue such effectiveness should not supplant "the ability to confront major emitters and gain redress for . . . particular . . . injuries."[40]

Recent litigation may foreshadow the necessity of common law climate change suits in the future. In *Native Village of Kivalina v. ExxonMobil Corp.*, a village of Inupiat Inuit brought suit against ExxonMobil seeking damages under federal common law.[41] The villagers of Kivalina alleged that defendant's contribution to climate change resulted in the erosion of sea ice protecting the coastline of their village. Such jarring climate and topographical alteration forced the villagers to relocate.[42] Although it is important to note *Kivalina* was dismissed for lack of subject matter jurisdiction, *AEP* ensured that greenhouse gas emitters may *never* be held accountable through federal common law nuisance claims. The authority to resolve a dispute between those harmed by climate change, and those causing its acceleration, is displaced by the CAA. As our planet continues to warm, minor environmental changes such as those suffered by a remote Inuit village in Alaska are sure to exacerbate. Severe flooding,[43] increase in disease,[44] loss of agriculture,[45] and severe drought[46] are all potential effects of global warming. Should we not be able to hold energy companies accountable for the costs associated with these harms?

Conclusion

These recent decisions by the Supreme Court indicate that the federal judiciary is not responsible for the difficult task of establishing regulations for GHGs, nor is it capable of awarding compensation to those harmed by such emission. These are tasks best left for Congress

[40] *Id*. at 116.
[41] Native Village of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863 (N.D. Cal. 2009).
[42] *Id*. at 868.
[43] Global Climate Change Impacts in the United States 109 (Thomas R. Karl, Jerry M. Melillo, and Thomas C. Peterson eds., 2009), *available at* http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf.
[44] *Id*. at 108.
[45] *Id*. at 133-134.
[46] *Id*. at 113.

and the executive. *AEP* may even be considered a separation-of-powers decision, favoring Congressional oversight as opposed to judicial mandate.[47] How this strong preference for an agency regulatory framework will play out remains unclear.

AEP reinforces that the CAA displaces federal common law nuisance actions. However, a survey of climate change litigation in the U.S. reveals that "[t]he vast majority of [climate change] cases are not common law nuisance cases like *AEP*, but rather regulatory actions interacting with local land use planning and with state and federal environmental law."[48] Thus, while the Court excluded this one area of climate change litigation, it simultaneously guaranteed specific avenues to resolve issues of greenhouse gas and climate change regulation. In *AEP* the Court was explicitly clear that GHG regulation may still be sought by individuals and nongovernmental organizations challenging power plants that exceed acceptable emissions standards.[49] In addition, the Court did not address the displacement of *state* common law nuisance claims. Such a pathway for climate change litigation likely will remain. As one scholar notes, "[f]ederal common law is disfavored, but so too is preemption of state-law-based claims. Whereas enactment of a relevant statute is sufficient to displace federal common law actions, much more is required to preempt state law."[50] Instead of bringing common law actions, current litigation will likely continue through regulatory actions and thus attempt to change industry and governmental behavior.[51]

One thing is sure – as long as GHGs are defined as an air pollutant within the CAA, federal common law nuisance actions seeking GHG regulation are categorically excluded from

[47] Gerrard, *supra* note 31, at 141.
[48] Osofsky, *supra* note 28, at 101-102.
[49] *AEP,* 131 S. Ct. at 2538.
[50] Adler, *supra* note 10, at 112.
[51] Osofsky, *supra* note 28, at 105.

the courts. As climate change continues, how adequate redress from energy corporations may be achieved will continue to be a serious concern.