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Climate Change in the Supreme Court

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Introduction

US climate law has witnessed important developments in the courts and at the regulatory level in the past year and a half. In the courts, the most significant recent decision came out in June 2011, when the US Supreme Court held that federal *Clean Air Act* displaced federal common law.[1] The case at issue, *American Electric Power Co., Inc. vs. Connecticut* (*AEP*), involved a lawsuit brought by several states and three private land trusts against several electric utilities that rely heavily on coal-fired power plants for electricity production.[2] Although the case foreclosed the use of federal tort law to mitigate climate change,[3] it left open several questions regarding state common law authority over major sources of greenhouse gases (GHGs) and citizen standing to sue regarding climate change. It also raised broader questions regarding the Environmental Protection Agency's (EPA) authority to regulate GHG emissions under the Clean Air Act. This report will discuss the Supreme Court's ruling in *AEP* and explore its implications for US climate law more generally.

American Electric Power Co., Inc. vs. Connecticut

The Supreme Court's decision in *AEP* arose from a public nuisance action filed in 2004. At that time, the EPA had consistently refused to regulate GHG emissions under the federal *Clean Air Act* or any other federal law. Indeed, the President at that

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[1] *Am. Elec. Power Co. Inc. vs Connecticut*, 131 S. Ct. 2527 (2011) (*AEP*).
[2] Ibid, 2533-34.
[3] Ibid, 2537.

time had expressed doubts about the severity and causes of climate change and had made it clear that his administration would not make climate change mitigation a regulatory or legislative priority. By the time *AEP* had reached the Supreme Court in 2010, the regulatory landscape had changed. The Supreme Court had ruled in 2007, over EPA's objection, that the *Clean Air Act* gave the agency power to regulate GHG emissions and that EPA had a mandatory obligation to respond to a petition requesting regulation of emissions from motor vehicles.[4] When the Obama Administration took office in January 2009, it embarked on a number of regulatory actions to regulate GHGs under the *Clean Air Act*.[5] This regulatory context likely influenced the Supreme Court's decision in *AEP*. Accordingly, this part of the report begins with background discussions of the lower courts' rulings and the Obama Administration's efforts to regulate GHGs under the *Clean Air Act*. It then describes the Supreme Court's decision in *AEP* and its direct implications for US climate change law. Part 3 of the report will explore the questions *AEP* left unanswered and discuss the broader implications of the decision.

The Lower Courts' Decisions

In July 2004, several states, New York City and three private land trusts filed suit against five US electric utilities.[6] Their complaints alleged that the utilities were the five largest GHG emitters in the US, emitting an estimated 650 million tons of carbon dioxide annually, which amounted to 25 percent of the electric industry's emissions, 10 percent of US human-caused emissions, and 2.5 percent of global anthropogenic carbon dioxide emissions.[7] They further alleged that these emissions caused a public nuisance - 'a substantial and unreasonable interference with public rights' - and asked the federal district court to issue an injunction requiring the utilities to cap and then reduce their emissions from coal-fired power plants pursuant to a schedule created by the court.[8]

The district court never ruled on the merits of the plaintiffs' claims. Instead, acting in response to motions to dismiss, the court declared the plaintiffs' case non-justiciable

[4] *Massachusetts vs. EPA*, 549 U.S. 497 (2007).
[5] See, for example: M. Powers, 'United States Country Report: Developments in Climate Change Law', (2010) 1 *IUCNAEL eJournal*.
[6] *AEP* (supra note 1) 2533.
[7] Ibid, 2533-34.
[8] Ibid, 2534.

under the 'political question doctrine,'[9] a judge-made doctrine that allows federal courts to reject cases under a narrow set of circumstances that make it clear that elected officials, rather than appointed judges, should resolve particular disputes.[10] The Court of Appeals for the Second Circuit, however, reversed.[11] It held that federal courts had jurisdiction both because the case did not present non-justiciable political questions[12] and because the plaintiffs had demonstrated they had standing under Article III of the *US Constitution*.[13] The Second Circuit also addressed other arguments raised in the appeal; most importantly, the court ruled that plaintiffs had adequately alleged a cause of action under public nuisance and held that the federal *Clean Air Act* did not displace the federal public nuisance claims.[14]

The Regulatory Landscape Since Massachusetts v EPA

While *AEP* was making its way through the lower courts, the regulatory framework governing GHG emissions underwent remarkable changes. At the point the Supreme Court issued its decision in *Massachusetts*, the EPA had staunchly refused to regulate GHG emissions under the *Clean Air Act*. Even after the Supreme Court remanded the case directing EPA to respond to the petition seeking regulation, EPA did whatever it could to delay regulation of GHGs.

However, when the Obama Administration took office, the *Clean Air Act* regulatory framework rapidly changed.[15] First, EPA announced its plans to reconsider a decision that prohibited California from regulating GHG emissions from motor vehicles. A few months later, EPA granted California the authority to establish its own vehicle emissions standards.[16] Second, EPA took steps to establish federal vehicle standards, by issuing a finding that GHG emissions from motor vehicles cause or

[9] Ibid.
[10] See *Baker vs. Carr*, 369 U.S. 186 (1962) (listing six factors a court should consider when deciding whether a case presents non-justiciable political questions).
[11] *Connecticut vv Am. Elec. Power Co. Inc*., 582 F.3d 309 (2009).
[12] Ibid, 332.
[13] Ibid, 349.
[14] Ibid, 379-81.
[15] For a more detailed description of these actions, see: Powers (supra note 5).
[16] *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 74 Fed. Reg. 32744 (July 8, 2009).

contribute to an endangerment of public health and welfare[17] and then by releasing its own vehicle emissions and fuel economy standards.[18] Third, EPA developed a rule requiring very large stationary sources - including coal-fired power plants and large industrial emitters - of GHGs to obtain permits and implement technology controls to limit GHG emissions whenever they undergo modification or are newly built.[19] Last, EPA embarked upon rulemakings that should, when finalized, establish national emissions standards for GHG emissions from many other new and modified stationary sources.[20] Although opponents of climate change regulation have challenged all of these decisions, most of which are still pending in the courts, the regulatory landscape has undergone a remarkable change since the plaintiffs in *AEP* first sought to use the common law to restrict electric utilities' emissions.

The Supreme Court's Decision

The Supreme Court had three primary issues before it when it agreed to review the Second Circuit's decision. It disposed of two of these - Article III standing and the political question doctrine - in a paragraph.[21] Under Supreme Court rules, where the judges evenly divide regarding an issue, the lower court's decision will stand and the Supreme Court's affirmation of the lower court's decision has no precedent.[22] Thus, while many observers hoped the Supreme Court would shine light on these hotly disputed issues, the Court only definitely resolved the third issue regarding the viability of federal common law claims to abate GHG emissions.

In a unanimous ruling, the Supreme Court held that the *Clean Air Act* completely displaces federal common law actions seeking to reduce GHG emissions.[23] Relying in part on sections of the statute that allow EPA to establish emissions limitations for categories of emitting sources, including coal-fired power plants, the Supreme Court declared that there was no room in the statutory structure to allow federal nuisance

[17] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009).
[18] *EPA and National Highway Transportation Safety Admin., Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards* (pre-publication final rule issued Apr. 1, 2010), (available at http://www.epa.gov/otaq/climate/regulations/ldv-ghg-final-rule.pdf) (to be codified at 40 C.F.R. Parts 85, 86, and 600 and 49 C.F.R. Parts 531, 533, 537 and 538) (Vehicle Emissions and Economy Standards).
[19] Environmental Protection Agency, P*revention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31514 (June 3, 2010).
[20] See 75 Fed.Reg. 82392.
[21] See *AEP*, 131 S. Ct. 2527, 2535.
[22] Ibid.
[23] Ibid, 2537.

actions, or other common law actions, to proceed.[24] Moreover, the Court declared that the *Clean Air Act* displaces federal common law whether or not EPA has in fact developed regulations to reduce GHG emissions.[25] If litigants are unhappy with any regulations EPA has developed or with EPA's refusal to regulate at all, their remedy is under the *Clean Air Act* and not through the common law.[26] The Court's ruling thus established a clear rule barring plaintiffs from relying on the federal common law as an alternative strategy to using the *Clean Air Act* to control GHG emissions.

One must wonder, though, whether the Court would have issued the same categorical holding absent EPA's regulatory efforts. In previous cases finding that a federal statute displaces federal common law, the Court considered the scope of regulatory power provided under the Act as well as the actual regulatory actions taken by the agency.[27] Likewise in *AEP*, the Supreme Court noted the actions EPA had already initiated to regulate GHG emissions from the very coal-fired power plants at issue in the public nuisance dispute.[28] Perhaps the Court would have reached a different conclusion if the Obama Administration had pursued the same strategy of non-regulation as its predecessor. Regardless, the Supreme Court issued a sweeping decision barring plaintiffs from using federal common law to regulate GHG emissions. Yet, as categorical as the Court's decision may appear, it leaves many unanswered questions.

The Implications of *AEP*

Notwithstanding the Supreme Court's decision in *AEP*, many questions remain unanswered following the case. The Supreme Court squarely faced some of these questions in *AEP*, but failed to resolve them. More broadly, the Court's decision raises interesting and important implications regarding the scope of EPA's authority to regulate GHGs and the regulatory actions it has taken to date.

As noted above, the Supreme Court failed to decide whether the plaintiffs in *AEP* had Article III standing to sue and whether the political question doctrine barred the action.[29] Lower courts have reached different conclusions regarding these issues,[30]

[24] Ibid, 2537-38.
[25] Ibid, 2538-40.
[26] Ibid, 2539-40.
[27] See, for example: *Milwaukee vs. Illinois,* 451 U.S. 304, 316–319 (1981).
[28] *AEP*, 131 S. Ct. 2527, 2533.
[29] Ibid, 2535.

and it seems likely that the Supreme Court will need to resolve these questions in an upcoming case. Until then, however, it will remain unclear whether private citizens have Article III standing to sue for injuries related to climate change and whether courts should declare climate change a political question exempt from judicial review.

The Supreme Court also did not address whether the *Clean Air Act* preempts state common law actions seeking to reduce GHG emissions. The plaintiffs in *AEP* also alleged that the electric utilities' emissions caused a public nuisance under state common law, but the lower court found the state common law claims preempted by federal nuisance law.[31] Once the Supreme Court found federal law displaced, the viability of state common law claims again arose.[32] The Court thus remanded the issue for the lower courts to consider.[33] If the lower courts find state common law claims viable, then courts will need to decide whether defendants have behaved unreasonably by emitting large amounts of GHGs into the atmosphere. Courts have demonstrated great resistance to getting involved in these issues, but the availability of state common law actions may force them to finally shed light on what a 'reasonable' GHG emitter must do.

Finally, the Supreme Court's decision, and its emphasis on EPA's regulatory authority under the Clean Air Act, makes the content of EPA's regulations particularly important. Industry groups have challenged every action EPA has taken under the Clean Air Act to reduce GHG emissions. In February 2012, the DC Circuit will hear oral arguments in several of these challenges and it will likely issue decisions in the upcoming year. Now that the Supreme Court has made it clear that the Clean Air Act will serve as the dominant federal climate change mitigation law,[34] the outcome of these regulatory challenges is more important than ever.

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[30] Compare *Connecticut vs. American Electric Power Co. Inc*., 582 F.3d 309 (2d Cir. 2009), with *Native Village of Kivalina vs. ExxonMobil Corp.*, 663 F. Supp.2d 863 (N.D. Cal. 2009) and *Center for Biological Diversity vs. U.S. Dept. of the Interior*, 563 F.3d 466 (D.C. Cir. 2009).
[31] *AEP*, 131 S. Ct. 2527, 2540.
[32] Ibid.
[33] Ibid.
[34] Congress could presumably intervene and pass its own comprehensive climate change law, but most observers consider this possibility highly unlikely. See E. Rosenthal, 'Where Did Global Warming Go?' *NY Times* (New York, 16 October 2011) SR1.