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Supreme Court decides that Clean Air Act displaces federal common law claims for climate change

BY JAMES MAY

On June 20, 2011, the U.S. Supreme Court decided the closely watched case of *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (*AEP*), in which eight states, the City of New York, and several land trust organizations sued the nation's five largest fossil-fuel-burning electric utility companies to reduce their emissions of greenhouse gases, arguing that these emissions constitute a public nuisance under federal common law. The Supreme Court rejected this claim, reasoning that the Clean Air Act (CAA), when coupled with the Environmental Protection Agency's (EPA's) authority and the actions EPA has taken in the last two years to regulate greenhouse gas (GHG) emissions, displaces federal common law nuisance causes of action for injunctive action addressing climate change.

Background to the Court's decision

The action in *AEP* commenced in 2004 in an entirely different judicial, administrative, and legislative landscape. In *Connecticut v. AEP*, a collection of states representing 77 million citizens and private conservation organizations sued the nation's five largest emitters of carbon dioxide in the United States under federal common and state public nuisance law. Plaintiffs asked the court for injunctive relief to "cap" defendants' emissions, develop a schedule for reducing defendants' emissions on a percentage basis over time, assess and measure available alternative energy resources, and reconcile its relief with U.S. foreign and domestic policy.

The utility defendants argued that the political question doctrine, which holds that federal courts should not consider certain matters reserved for the representative branches, prevented federal courts from hearing the plaintiffs' federal common law for public nuisance based on climate change.

The U.S. District Court for the Southern District of New York agreed with the defendants and dismissed the case as a nonjusticiable political question. The court concluded that it was impossible for it to make the "initial policy determination" "that must be made by the elected branches before a non-elected court can properly adjudicate a global warming nuisance claim." It concluded that plaintiffs' allegations were "extraordinary," "patently political," and "transcendently legislative." *Connecticut v. AEP*, 406 F. Supp. 265, 274 (S.D.N.Y. 2005).

In 2009, the U.S. Court of Appeals for the Second Circuit reversed, finding climate claims in tort law to be justiciable. The Second Circuit held that no aspect of the political question doctrine applied to enjoin judicial review. In particular, the circuit court found that climate change is neither constitutionally consigned to the elected branches, nor prudentially left to them. *Connecticut v. AEP*, 582 F.3d 309 (2d Cir. 2009).

In December 2010, the U.S. Supreme Court granted *American Electric Power* and the other utility defendants' petition for certiorari on the issues of whether (1) the states and other plaintiffs lack standing, (2) federal law displaces the plaintiffs' claims, and (3) the case raises nonjusticiable political questions. Justice Sotomayor, who was a member of the Second Circuit panel in the case below, recused herself.

The Obama administration filed a brief on behalf of defendant Tennessee Valley Authority—on the same side as the

utility defendants—arguing that the plaintiffs lack prudential standing, and that federal law displaces the need for common law causes of action for climate change. In particular, the Solicitor General argued that various EPA activities displace the need for federal common law causes of action under the standards set in the Court's decisions in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n* and *Milwaukee v. Illinois*.

Oral argument was held on April 19, 2011. During oral argument, none of the justices seriously questioned that climate change is occurring, that human activity is playing a role in that dynamic, that the CAA bestows upon EPA the authority to regulate GHGs as a "pollutant" under *Massachusetts v. EPA*, that at least the states possess both constitutional and prudential standing, or that federal courts have authority to consider cases concerning climate change.

Nonetheless, several Justices expressed skepticism about the propriety of using federal common law in this context, including the more "liberal" wing of the Court—Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan. For example, Justice Breyer asked, "if the courts can set emission standards, why can't they also set carbon taxes, which are likely to be more effective? What's the end of it?" Justice Kagan inquired, "this sounds like the paradigmatic thing that administrative agencies do rather than courts." Justice Ginsburg remarked to the respondents' attorney: "Congress set up the EPA to promulgate standards for emissions, and . . . the relief you're seeking seems to me to set up a district judge, who does not have the resources, the expertise, as a kind of super EPA."

The Court's ruling

Justice Ginsburg's concern about implicitly designating district judges as "a kind of super EPA" proved a harbinger of the Court's final opinion. Writing for an 8–0 majority of the Court (Justice Sotomayor, recused), Justice Ginsburg was unwilling to vest federal judges with the task of performing what it viewed to be primarily regulatory roles subject to democratic processes:

"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 face of a law empowering EPA to set the same limits, subject to judicial review only to ensure against action 'arbitrary, capricious, . . . or otherwise not in accordance with law.'"

The Court's ruling in *Massachusetts v. EPA*, 549 U.S. 497 (2007) that the Clean Air Act provides EPA with discretionary authority to regulate greenhouse gases as "air pollutants" loomed large: "We hold 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." *AEP*, 131 S. Ct. at 2537.

The Court was unconvinced that federal courts in

common law nuisance suits should play a role in competing with EPA's regulatory authority: "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." 131 S. Ct. at 2539–40.

Indeed, the regulatory goalposts have shifted significantly since the initial case was filed in 2004. Since then, EPA has, among other climate regulatory activities, determined that GHGs "endanger" public health and welfare and are thus a "pollutant" subject to regulation under the CAA, issued rules requiring utilities and others to report their GHG emissions, said that new or modified major sources of GHGs may be subject to new source review, and said that other new sources may be subject to new source performance standards for GHG emissions.

The Court's reasoning may boil down to a certain imperfect syllogistic zeitgeist:

(1) Federal common law claims are displaced by federal statutory authority, whether exercised or not; and, (2) the CAA, as the Supreme Court has held, provides EPA with the discretionary authority to regulate greenhouse gases; (3) therefore, the CAA displaces the respondents' federal common law claims.

On the other hand, the picture could change if EPA loses the authority to regulate GHGs. The 112th Congress and several presidential candidates have made blocking EPA action on climate change a priority, which informs the cases and actions above. If, for example, Congress suspends or terminates EPA's authority to regulate GHGs, then the displacement issue discussed above would seem once again to be on the table.

Moreover, the common law is still alive for addressing climate change claims. The Court explained that its ruling does not affect state common law causes of action. To be sure, state common law actions would be subject to a more exacting demonstration of congressional intent to preempt such claims under the CAA (or other federal legislation). As Justice Ginsburg put it for the Court, "In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal [Clean Air] Act." 131 S.

Ct. at 2540. The Court clearly left the preemption issue as to state nuisance claims to another day: "None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand." *Id.*

Justices Alito (joined by Justice Thomas) issued a brief concurrence that seems to question *Massachusetts v. EPA*. As Justice Alito wrote in somewhat stilted prose: "I agree with the Court's displacement analysis on the assumption (which I make for the sake of argument because no party contends otherwise) that the interpretation of the CAA, adopted by the majority in *Massachusetts v. EPA*, is correct." *Id.* at 2540–41 (Alito, JJ., with whom Thomas, JJ. joins, concurring).

In *AEP*, the Court was receptive to the notion that the federal common law claims raised by the plaintiffs involve items already within EPA's regulatory grasp under the CAA, and that's that. Four Justices—including Justice Kennedy—accepted that the states possess constitutional standing under *Massachusetts v. EPA*. Justice Sotomayor, who recused herself from the *AEP* case, has never questioned whether states have standing to sue concerning climate change. This suggests that five members of the Court (including Justice Sotomayor) accept that states possess constitutional standing in this context. No Justices engaged either the political question or prudential standing arguments. This suggests that eight Justices do not believe that these issues are salient in the climate context under federal common law.

AEP is an important decision in the field of environmental law: It stands astride several junctures: public and private law; environmental, constitutional, and international law; injunctive and legal relief; state and federal action; and judicially, legislatively, and administratively fashioned responses. With its cornucopian issues extraordinaire—separation of powers, federalism, standing, displacement, political question, tort, and prudence—it has something for nearly all legal tastes, temperaments, and talent.

AEP is sure to rock the foundation of climate law and policy for many years, perhaps generations, to come.

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