Judgment Day for Climate Change
Litigation: The U.S. Supreme Court
Reverses in AEP v. Connecticut

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Decision

On June 20, 2011, the U.S Supreme Court handed down its decision in the case of American Electric Power Inc. v. State of Connecticut, No. 10-174. The Court reversed, by a vote of 8-0, the Second Circuit’s ruling allowing the plaintiffs’ lawsuit against five electric utility companies to reduce greenhouse gas emissions to proceed under a federal common law public nuisance theory. In addition, and just as significant, the Court affirmed, by an equally divided vote of 4-4, the Second Circuit’s decision holding that the plaintiffs had standing to sue.

A. Displacement

The chief focus of the Court’s decision was the arcane and rarely-invoked doctrine of displacement. The defendants urged reversal of the Second Circuit’s ruling on this ground, arguing that the Clean Air Act “displaced” the federal common law of public nuisance. It is, of course, axiomatic that there is no federal general common law, but in certain areas of national concern, such as environmental protection, federal courts have the power to fill in “statutory interstices” and if necessary, even “fashion federal law.” This specialized federal common law has been invoked – albeit rarely – by federal courts in the past in lawsuits brought by one state to abate pollution emanating from another state.

Justice Ginsburg, writing for the Court, authored a detailed and clear exegesis on displacement that for all practical purposes shut the door to any further federal common law claims involving environmental contamination. She wrote: “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-fueled fired power plants.” She noted that the requirements for invoking the displacement doctrine are less stringent than those for invoking preemption: “The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute ‘speak[s] directly to [the] question’ at issue.” The Court found that this test was clearly met: “[The case of] Massachusetts [v. EPA] 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 seemed to be sensitive to arguments that taking away the federal common law avenue of relief might leave plaintiffs without redress. Justice Ginsburg rejected this, stating that “[t]he Act provides multiple avenues of enforcement.” She noted that “If States (or EPA) fail to enforce emissions limits against regulated sources, the Act permits ‘any person’ to bring a civil enforcement action in federal court.” She further noted that “If the EPA does not set emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA’s response will be reviewable in federal court.” She concluded by stating: “The 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.”

The Court next dealt with the question of whether displacement should take place before EPA has finalized standards governing emissions from the defendants’ plants. The plaintiffs had argued, and the Second Circuit panel had agreed, that displacement should not occur until EPA had actually exercised its regulatory authority. The Court disagreed. It held: “The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law.” The Court went on to say that even
if EPA did not set emissions limits, displacement should still occur: “Indeed, were EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its ongoing § 7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency’s expert determination.” This is a critical point, and seems to shut the door even tighter to future federal common law suits. The Court did note, however, that a decision by the EPA to not regulate “would not escape judicial review.” The Court stated: “EPA may not decline to regulate carbon-dioxide emissions from power plants if refusal to act would be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”

Justice Ginsburg concluded the displacement analysis with a discussion empowering the EPA. She noted: “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.” She also highlighted the fact that EPA can set a unified standard as opposed to a federal district judge, who cannot: “Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decision binding other judges, even members of the same court.”

B. Standing

One of the questions presented to the Court was whether the plaintiffs had Article III standing to bring suit in the first place. The Second Circuit had held that the plaintiffs did have standing. How the Court would answer this question was highly anticipated, and in many ways, it was this issue that many observers considered most important in the case. Some thought the Court would revisit and perhaps even reverse or sharply limit its landmark 2007 decision in Massachusetts v. EPA.

The Court, however, ended up affirming the Second Circuit’s ruling that the plaintiffs had standing by the closest of margins: “Four members of the Court would hold that at least some plaintiffs have Article III standing under Massachusetts, which permitted a State to challenge EPA’s refusal to regulate greenhouse gas emissions, and further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in Massachusetts or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit’s exercise of jurisdiction and proceed to the merits.”

C. State Law Claims

In the last section of the decision, the Court notes that the plaintiffs also sought relief under state law and that the Second Circuit did not reach the state law claims because it held that federal common law governed. The Court stated: “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 Act. None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law.” Therefore, the Court stated that it would “leave the matter open for consideration on remand.”

D. Concurrence

Of note is Justice Alito’s concurrence, which Justice Thomas joined. He stated that he agreed 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 Clean Air Act adopted by the majority in Massachusetts v. EPA is correct.” It is no
surprise that Justices Alito and Thomas do not agree with the outcome in *Massachusetts v. EPA* because they both dissented in that case. What is interesting is that neither Chief Justice Roberts nor Justice Scalia joined in this concurrence.

**Analysis**

There are seven significant implications as a result of this decision.

**A. Narrow Ruling: A Disappointment for Corporate Defendants**

Many corporate defendants, especially in the energy industry, hoped that this decision would drive a stake through the heart of not only climate change litigation but public nuisance litigation more generally. It failed to do so. Though the result is considered a win for the defendants, it has to be considered a bit of a disappointment for them as well. The case was decided on the narrowest possible grounds -- on the arcane and rarely-invoked doctrine of displacement. In fact, environmental groups and the plaintiff’s bar are calling this result “as good as could have been hoped for” and stating that they “can breathe a sigh of relief that the justices didn’t adopt a more sweeping ruling.”

**B. Decision Leaves the Door Open for More Climate Change Litigation**

One of the reasons this decision is disappointing to the defendants is that it leaves the door open for more climate change litigation. While the decision barred recovery under the federal common law of nuisance, it made no ruling on whether a climate change suit could proceed under state common law.

In fact, the Court remanded the case to the Second Circuit on this issue. Much of the commentary on the decision in this case in the mainstream media has incorrectly stated that the AEP suit was dismissed or “tossed out.” It was not. The plaintiffs in the suit sued under state common law in the alternative, and will now be given an opportunity to litigate those claims. Most likely, the case will be briefed and re-heard on the issue of whether the state law claims are preempted by the Clean Air Act by the same two-judge panel on the Second Circuit that issued the original decision. Considering that panel rejected displacement, it is unlikely that it would perform an about-face and embrace a preemption argument, which is generally considered to be more difficult to invoke than displacement. Thus, it is possible that this case could be back in front of the U.S. Supreme Court on the preemption issues at some point in the next couple of years, or even perhaps back at the trial court level. Indeed, it is within the realm of possibility that this case could even proceed to the discovery phase at the trial court level if the Second Circuit panel rejects a preemption defense, and the U.S. Supreme Court declines to review it, thus putting the plaintiffs over the 12(b)(6) hurdle.

In addition, this decision leaves the door open to other climate change litigation as long as it is based on state common law rather than federal common law. Two defenses typically utilized by defendants to dismiss similar suits – lack of standing and political question – have been weakened, rather than strengthened, by this decision. Ironically, this decision - which at first glance looks to be a clear victory for the defendants - could end up leading to more, not less, climate change cases, at least in the short term.
C. **Weakening of Standing and Political Question Defenses**

As mentioned above, another significant implication of this decision is that the standing and political question defenses that corporate defendants have utilized to great effect thus far in climate change litigation may have been weakened by this decision. The Court affirmed the Second Circuit’s ruling, by an equally divided Court, on the issue of whether the plaintiffs had Article III standing. Though this ruling is not precedential, except in the Second Circuit, it is likely to influence lower courts who must decide this issue in the future. This is especially true given that had Justice Sotomayor not recused herself, then there almost certainly would have been a 5-4 majority affirming the Second Circuit’s position on standing.

In addition, the Court curiously failed to mention the political question doctrine other than noting that “no other threshold obstacle bars review.” This could be for a variety of reasons, not the least of which may be that the political question doctrine in many ways overlaps with displacement. Nevertheless, a fair reading of the decision is that the Court, while affirming the Second Circuit’s decision on standing, similarly affirmed the Second Circuit’s decision rejecting the political question doctrine. Thus, while not precedential, the decision will likely undermine the political question doctrine defense for defendants in other similar litigation.

More than anything, the defendants will likely view the Court’s decision on standing and political question as a missed opportunity. Environmentalists and the plaintiff’s bar recognized that an adverse decision on standing or political question grounds would have been far more detrimental to them than the displacement ruling was.

D. **Empowerment of the EPA**

The Court’s decision spent a not-insignificant amount of time extolling the expertise of the EPA and its role as the “primary regulator of greenhouse gas emissions.” It also explained how it believes the regulatory process should work. This discussion is significant for several reasons. First, the role of the EPA has been under heavy attack by conservatives in recent years, and the Court’s praise for the agency and its expertise may act to bolster the legitimacy of the agency. This is especially true given that the conservative wing of the Court signed onto the decision and endorsed the language praising the EPA.

Second, some lawmakers have threatened to limit some of the EPA’s powers. Indeed, the U.S. House of Representatives even passed H.R. 910, the Energy Tax Prevention Act of 2011, on April 7, 2011, to amend the Clean Air Act to prohibit the EPA from regulating greenhouse gas emissions. However, in light of this decision, if such legislation ever became law, the Court makes clear that the displacement doctrine would not be applicable, and the federal common law cause of action in this case, apparently, would be able to move forward. Thus, this decision could act as a deterrent to legislation stripping the EPA of its authority to regulate.

Third, the Court’s discussion of the EPA and its role also encourages, and gently nudges, the EPA to move forward with regulation of greenhouse gas emissions. The Court notes that “[i]f EPA does not set emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA’s response will be reviewable in federal court.” The Court also noted that while the EPA theoretically has the power to decline to regulate carbon-dioxide emissions from power plants, such a judgment “would not escape judicial review,” that the EPA does not have a “roving license to ignore the statutory text,” and that the EPA can only
decline to regulate if refusal to act would not be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.”

Finally, this unanimous decision relied heavily on the 2007 decision *Massachusetts v. EPA*. Though some on the Court clearly continue to disagree with the outcome in that case, the fact is that it survived perhaps the first significant opportunity the Court had to limit or overturn it. *Massachusetts v. EPA* is thus even more firmly entrenched as precedent, and future attempts to limit its impact or overturn it will be more difficult.

**E. The Death of Federal Common Law in Environmental Litigation**

Not everything about this decision is bad for corporate defendants. The good news is that federal common law actions related to environmental pollution (at least with regard to injunctive relief) are all but dead. Though historically federal common law suits have been the province of academicians specializing in federal courts, in recent years, such suits have become a significant concern for corporate America with the rise of climate change litigation. The Court’s decision effectively kills federal common law suits seeking equitable relief in the areas of air and water pollution, leaving virtually no exceptions or loopholes. One remaining question, however, is whether a federal common law action seeking damages rather than an injunction is similarly displaced. This will no doubt be litigated in the near future and should be watched closely.

**F. Strengthening of the Preemption Defense**

Perhaps the most positive aspect of the decision for corporate defendants is that it appeared to strengthen the preemption defense. Displacement and preemption are closely related concepts. Though the Court did not consider the preemption defense (which the Second Circuit will likely consider on remand, as discussed above) and did note that the displacement defense is easier to apply than the preemption defense, the language in the decision is so thoroughly one-sided on the displacement issue that it cannot help but strengthen the preemption defense as well. Thus, while the Court did leave the door open to more climate change litigation, that door may not be open for long. Trial courts are likely to be very receptive to an argument that state common law claims in other climate change litigation suits are preempted by the Clean Air Act.

In addition, this could be applied outside the climate change litigation context as well. Given the strong language on displacement in this decision, corporate defendants may be able to use a preemption defense more successfully in other environmental contamination litigation as well. In fact, this decision has the potential to significantly rewrite environmental law. An undercurrent in environmental litigation for years has been this fundamental question: To what extent should any environmental common law tort claims, state or federal, be permitted in today’s world where there are federal and state statutes as well as regulations regarding every conceivable subject matter? With the decision in *AEP v. Connecticut*, the balance of power on this issue shifts firmly in favor of those asserting the preemption defense.

**G. Prelude to Future Fight?**

One of the most interesting aspects of the decision is that despite the fact that profound differences clearly exist amongst the Court’s members not only on issues such as standing, the political question doctrine, and the role of the EPA, but also on whether climate change even exists (see, for instance, footnote 2), the Court still came to a unanimous result. In essence, both sides agreed to keep their powder dry and fight another day. The displacement issue in this case was an easy out for the Court to take, but future cases may not be as easy. Justices Alito and Thomas are clearly itching to
revisit the *Massachusetts v. EPA* decision, but they may have to wait until the current makeup of the Court changes. Justice Kennedy has shown no willingness to change his mind on the central issues in *Massachusetts*, including standing. But there is no doubt that there will come a time when the conservative and liberal wings of the Court do battle on these issues again.