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AEP v. Connecticut's Implications for the Future of Climate Change Litigation

In *American Electric Power Co. v. Connecticut* (*AEP*), the Supreme Court held 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.”¹ This set of commentaries explores several of the interesting and controversial issues that the opinion addresses (or largely sidesteps). These essays analyze the complexities of the context in which the core displacement holding takes place, the opinion’s environmental justice implications, its interaction with current standing doctrine, the political question doctrine issues briefed in the case but not addressed in detail by the decision, and common law nuisance actions as an approach to addressing climate change. My commentary situates these essays in relation to one another and adds to this dialogue by considering the decision’s implications for the future of climate change litigation in the United States.

AEP, the second case in which the Supreme Court has confronted the problem of climate change, builds from the Court’s decision four years earlier in *Massachusetts v. EPA*.² But *AEP* also takes place in a broader context, in which numerous state and federal courts in this country and others, as well as international tribunals, face an increasing number of cases involving climate change. The vast majority of those cases are not common law nuisance cases like *AEP*, but rather regulatory actions interacting with local land use planning

1. 131 S. Ct. 2527, 2537 (2011).

2. 549 U.S. 497 (2007).

and with state and federal environmental law.³ In *AEP*, the Court shapes the path of climate change litigation by reinforcing the appropriateness of regulatory actions while limiting federal common law public nuisance ones. This commentary considers: (1) the framework for climate change litigation created by the combination of *AEP* and *Massachusetts*; (2) the pathways the Court endorses, shuts down, and leaves open; (3) the Court's view of the limited role that courts, as opposed to the Environmental Protection Agency (EPA), should play in assessing climate change science under the current regulatory scheme; and (4) the benefits and limitations of the path forward from *AEP*.

The Court's approach to climate change litigation in *AEP* flows from its analysis of both threshold and substantive issues in *Massachusetts*. The four-Justice plurality in *AEP* upheld *Massachusetts*'s rationale for finding standing, and Professor Daniel Farber's commentary analyzes that issue in depth.⁴ Moreover, as Professor Jonathan Adler discusses, *AEP* bases its displacement decision on *Massachusetts*'s finding that greenhouse gas emissions qualify as air pollutants under the Clean Air Act.⁵ *AEP* interprets that finding as establishing Congress's delegation to the EPA of "whether and how to regulate carbon-dioxide emissions from power plants; the delegation displaces federal common law."⁶

In the process of explaining its displacement holding, the Court in *AEP* made two interrelated points that will shape the possibilities for U.S. climate change litigation. It precluded federal common law nuisance actions as a mechanism for challenging the EPA's approach to climate change regulation—even if the EPA declines to regulate—so long as the EPA has regulatory authority.⁷ At the same time, the Court reinforced the appropriateness of regulatory suits challenging the EPA: "If the plaintiffs in this case are

3. I have analyzed more broadly the role of litigation in climate change regulation in previous scholarship. See, e.g., Hari M. Osofsky, *The Continuing Importance of Climate Change Litigation*, 1 CLIMATE L. 3 (2010); Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789 (2005); Hari M. Osofsky, *The Geography of Climate Change Litigation Part II: Narratives of Massachusetts v EPA*, 8 CHI. J. INT'L L. 573 (2008); Hari M. Osofsky, *Is Climate Change "International"? Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585 (2009).
4. See Daniel A. Farber, *Standing on Hot Air: American Electric Power and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121 (2011), <http://yalelawjournal.org/2011/09/13/farber.html>.
5. See Jonathan H. Adler, *A Tale of Two Climate Cases*, 121 YALE L.J. ONLINE 109 (2011), <http://yalelawjournal.org/2011/09/13/adler.html>.
6. 131 S. Ct. at 2538.
7. *Id.* at 2538-39.

dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition for certiorari."⁸ That combination suggests that the Court remains open to the value of climate change litigation but is pushing the litigation along a regulatory-focused course.

While this simultaneous preclusion of the common law nuisance pathway and endorsement of administrative challenges reinforces the dominance of regulatory-focused climate change litigation, the opinion also leaves open significant questions that future cases likely will address. First, *AEP* leaves untouched the large number of cases, generally brought in state courts by individuals and nongovernmental organizations, challenging power plants (especially coal-fired ones) based on their greenhouse gas emissions. Most significantly, the plurality's affirmation of *Massachusetts's* approach to standing,⁹ which focuses heavily on the governmental status of some of the petitioners, does not resolve whether it would find standing in a suit with only nongovernmental petitioners. This issue is currently being litigated, and, subsequent to the *AEP* decision, a federal district court found that a coalition of several citizen environmental groups lacked standing in a challenge to oil and gas leases based on climate change.¹⁰ Second, as discussed in depth in Professor Jim May's commentary, the Court's cursory treatment of the political question doctrine provides no guidance regarding whether and when such concerns could arise.¹¹ The four Justices who found standing held that "no other threshold obstacle bars review," and the other four Justices did not address additional prudential issues.¹² The divide leaves ambiguity about the Court's position on the political question doctrine. Third, the opinion explicitly did not reach whether a federal common law nuisance action would be allowed if Congress decided that the EPA could no longer regulate greenhouse gas emissions or whether state law nuisance actions are preempted. The opinion thus limits federal common law as a "parallel track" for challenging the EPA's regulatory decisions, but maintains future possibilities for courts to be involved

8. *Id.* at 2539.

9. *Id.* at 2535.

10. *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 6:09-cv-00037, 2011 U.S. Dist. LEXIS 95717 (D.N.M. Aug. 3, 2011). For additional examples of these cases, see Michael B. Gerrard & J. Cullen Howe, *Climate Change Litigation in the U.S.*, ARNOLD & PORTER LLP, <http://www.climatecasechart.com> (last updated July 22, 2011).

11. Jim May, *AEP v. Connecticut and the Future of the Political Question Doctrine*, 121 YALE L.J. ONLINE 127 (2011), <http://yalelawjournal.org/2011/09/13/may.html>.

12. 131 S. Ct. at 2535.

in common law nuisance actions.¹³ That approach arguably puts pressure on Congress as it considers curtailing the EPA's ability to regulate greenhouse gases under the Clean Air Act.

Finally, *AEP* continues an ongoing conversation about the role of federal courts in assessing climate change science. Professor Maxine Burkett and Professor Douglas Kysar have raised concerns about the Court's increasing skepticism in *AEP* about the science, especially as compared with *Massachusetts*.¹⁴ That shift parallels the one in U.S. public opinion over the past several years.¹⁵ However, *AEP* does not simply focus on the substance of climate science, but also explicitly claims that the EPA is better situated than courts to assess climate change science. The Court explains that "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order" and then elaborates on specific mechanisms that agencies have and that courts lack.¹⁶ This discussion reinforces both the skepticism that Justice Scalia expressed in the *Massachusetts* oral argument about his capacity to evaluate climate change science¹⁷ and the Court's emphasis throughout *AEP* of the dominance of an agency rulemaking rather than common law approach to this area. In so doing, the Court fails to acknowledge the many contexts in which courts have processed complex science in tort cases, which Professor Wendy Wagner has lauded as "lowering information-related barriers to regulating risky products,"¹⁸ or the individual justice concerns that tort litigation can at times address more effectively than

13. *Id.* at 2538.

14. See Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 YALE L.J. ONLINE 115 (2011), <http://yalelawjournal.org/2011/09/13/burkett.html>; Douglas Kysar, *Supreme Court Ruling Is Good, Bad and Ugly*, 474 NATURE 421 (2011), <http://www.nature.com/news/2011/110621/full/474421a.html>.

15. See, e.g., Ben Geman, *Polls Clash over Public Support for Making Emissions Reductions*, HILL E² WIRE BLOG (Dec. 23, 2009, 1:30 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/73473-polls-clash-over-support-for-emissions-limits>; Gerald F. Seib, *WSJ/NBC Poll: Divided on Warming Threat, Clear on Man's Role*, WALL ST. J. CAPITAL J. BLOG (Dec. 18, 2009, 7:59 AM), <http://blogs.wsj.com/capitaljournal/2009/12/18/wsjnbc-poll-divided-on-warming-threat-clear-on-mans-role/tab/article>.

16. 131 S. Ct. at 2539-40.

17. Transcript of Oral Argument at 22-23, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 3431932 at *22-23; see also Hari M. Osofsky, *The Intersection of Scale, Science, and Law in Massachusetts v. EPA*, 9 OR. REV. INT'L L. 233 (2007) (analyzing the ways in which debates over the appropriate scale of climate change regulation and the science of climate change interacted in that case).

18. Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 696 (2007).

agencies.¹⁹ The Court simply cites *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁰ a case that, according to Professor Holly Doremus, plays a critical role in judicial deference to agencies' scientific determinations, without engaging—other than noting in its federal common law analysis that public nuisance law, like the rest of common law, evolves with science—the non-agency-related ways in which courts might appropriately be involved in climate change science.²¹

Overall, the Court's view of climate change litigation in *AEP* seems likely to have a mixed impact. On the one hand, the opinion ensures that courts will continue to be an important regulatory battleground in debates over the most appropriate regulatory approach to climate change. The Court not only endorses the appropriateness of suits over the EPA's approach to regulating greenhouse gases under the Clean Air Act, but also allows this exploding area of litigation to continue—for the most part—along its current trajectory. The increasing investment by law firms, governmental entities, and nongovernmental organizations in climate change litigation practice likely will proceed apace after *AEP*. In my view, that aspect of the outcome is good news. As displayed in *Massachusetts, AEP*, and the myriad of cases before lower courts, regulatory litigation provides a means for individuals, nongovernmental organizations, governments, and corporations to address conflicts over the way forward. Numerous cases under the Clean Air Act, Endangered Species Act, Marine Mammal Protection Act, Clean Water Act, Freedom of Information Act, Energy Policy Act, Energy Independence and Security Act, and National Environmental Policy Act have sought to force government action or stop new fossil fuel projects. Some of them have changed governmental behavior.²² Those cases also put pressure on major carbon emitters to take measures to address their emissions and prepare for a changing regulatory environment.

On the other hand, some of the unanswered questions and closed pathways after *AEP* raise further questions about the extent to which citizens will be able to use litigation to challenge corporate decisionmaking and to achieve redress for those harmed by climate change. Professor Burkett argues that the Court's decision to narrow possibilities for federal common law nuisance actions raises serious justice concerns because it eliminates an option for those injured by

19. See Burkett, *supra* note 14, at 116-17.

20. 467 U.S. 837 (1984).

21. See Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1631 (2008).

22. See Gerrard & Howe, *supra* note 10; sources cited *supra* note 3.

climate change to obtain corrective justice from major emitters.²³ Although regulatory suits, if they result in greater restrictions on greenhouse gas emissions, help to lessen the impacts of climate change, they provide limited opportunities for victims to obtain redress. Notwithstanding the many procedural and substantive concerns raised by climate change nuisance suits that Professor Michael Gerrard has highlighted (issues that have not yet been addressed for the most part because of the barriers these cases have faced at early stages),²⁴ these common law actions focus on the victims in a way that regulatory suits generally do not.

Unless the Court's decision in *AEP* is accompanied by greater assistance for climate change victims in the regulatory framework, the Court's emphasis on the agency pathway risks exacerbating the climate justice problem by providing fewer ways for victims to obtain redress. Moreover, addressing climate justice within a federal regulatory framework (even assuming adequate political support for such an approach) raises a host of complex concerns. For example, what should the relationship be between the responsibility of major emitters in mitigation schemes and the efforts to help victims in adaptation ones? How should climate justice fit within nascent federal adaptation efforts, as well as state and local ones?²⁵ In what way should compensation for harm that goes beyond adaptation assistance (e.g., the inability of the Inuit to use their ancestral lands in line with their traditional practices²⁶) be integrated into a

23. See Burkett, *supra* note 14, at 117.

24. See Michael B. Gerrard, *What Litigation of a Climate Change Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135 (2011), <http://yalelawjournal.org/2011/09/13/gerrard.html>.

25. For the current U.S. federal approach to adaptation, see White House Council on Env'tl. Quality, *Climate Change Adaptation Task Force*, WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/ceq/initiatives/adaptation> (last visited Sept. 13, 2011). For U.S. state and local approaches, see TERRI L. CRUCE, PEW CTR. ON GLOBAL CLIMATE CHANGE, ADAPTATION PLANNING—WHAT U.S. STATES AND LOCALITIES ARE DOING (2009), <http://www.pewclimate.org/docUploads/state-adaptation-planning-august-2009.pdf>. For an analysis of federalism dilemmas in U.S. adaptation planning, see Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 40 ENVTL. L. 1159 (2010).

26. U.S. and Canadian Inuit filed a petition in 2005 with the Inter-American Commission on Human Rights claiming that U.S. climate change policy violated their rights. Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005), available at http://earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf. The petition was rejected by the Commission, but the Commission agreed to hold a broader hearing on climate change and human rights. See Letter from Ariel E. Dulitzky, Assistant Exec. Sec'y, Org. of Am. States, to Paul Crowley, Petitioner's Legal

regulatory scheme, and how should such compensation be funded? As our three branches of government continue to craft a regulatory framework for climate change following *AEP*, they need to grapple with those fundamental fairness concerns.

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Representative (Nov. 16, 2006), available at <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>; Letter from Sheila Watt-Cloutier, Martin Wagner & Daniel Magraw to Santiago Cantón, Exec. Sec'y, Inter-Am. Comm'n on Human Rights (Jan. 15, 2007), available at http://www.ciel.org/Publications/IACHR_Letter_15Jano7.pdf; Letter from Ariel E. Dulitzky, Assistant Exec. Sec'y, Org. of Am. States, to Sheila Watt-Cloutier, Martin Wagner & Daniel Magraw (Feb. 1, 2007), available at http://www.ciel.org/Publications/IACHR_Response_1Febo7.pdf; see also Jane George, *ICC Climate Change Petition Rejected*, NUNATSIAQ NEWS, Dec. 15, 2006, http://www.nunatsiaqonline.ca/archives/61215/news/nunavut/61215_02.html; Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 AM. INDIAN L. REV. 675 (2007); Jonathan Spicer, *Hearing To Probe Climate Change and Inuit Rights*, REUTERS (Feb. 21, 2007 5:14 PM), <http://www.reuters.com/article/2007/02/23/dcbrights-globalwarming-arctic-rights-dc-idUSN204267120070223>. In the U.S. Court of Appeals for the Ninth Circuit, a pending climate change federal common law nuisance case involving indigenous peoples' rights is currently on appeal, after the district court dismissed the case on justiciability grounds. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 873-76 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 5, 2009). This appeal will be affected by the *AEP* decision.