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A Tale of Two Climate Cases

In July 2004, eight states, the City of New York, and a number of conservation organizations filed suit against several of the nation's largest electric power producers, alleging that the power companies' greenhouse gas (GHG) emissions contributed to the public nuisance of global warming under federal common law.¹ Simultaneously, several of the same states sued the U.S. Environmental Protection Agency (EPA), alleging that GHG emissions constituted "pollutants" subject to regulation under the Clean Air Act (CAA).² Both cases sought to impose GHG emission controls, and both were a reaction to the federal government's steadfast refusal to adopt such policies on its own.

Although the cases raised different legal arguments, their fates were intertwined. It was well understood that prevailing in one case would likely preclude victory in the other. Indeed, the point of parallel litigation was to make it more difficult for industry and the EPA to stave off action.³ The EPA had determined GHGs were not subject to regulation under the CAA.⁴ If that

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1. See Complaint, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 04 Civ. 5669), 2004 WL 1685122, *vacated and remanded*, 582 F.3d 309 (2d Cir. 2006), *rev'd and remanded*, 131 S. Ct. 2527 (2011).
 2. See *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007). A large number of nonprofit advocacy organizations were also involved in this suit. See, e.g., Brief of Amici Curiae Wildlife Conservation Interests in Support of Petitioners, *Massachusetts*, 549 U.S. 497 (No. 05-1120), 2006 WL 2563382; Brief of Amici Curiae Ocean and Coastal Conservation Interests in Support of Petitioners, *Massachusetts*, 549 U.S. 497 (No. 05-1120), 2006 WL 2570986.
 3. See *State Climate Plan Critics Face Paradox Over Preemption Arguments*, CLEAN AIR REP., Nov. 3, 2005, 2005 WLNR 17696134.
 4. See *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922 (Sept. 8, 2003).

were so, the states argued, the CAA could not preclude common law-based claims against GHG emissions.⁵ Thus, when the states 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,’”⁶ the outcome of *American Electric Power Co. v. Connecticut* (*AEP*) was all but assured.

It just took a while for this message to be heard. When *Massachusetts* was decided in April 2007, the *AEP* case had been pending in the U.S. Court of Appeals for the Second Circuit for some time,⁷ and there it would sit for over two more years. When the Second Circuit finally issued its decision, it held, among other things, that the CAA did not displace or otherwise disturb lawsuits alleging that GHG emissions contributed to a public nuisance under federal common law.⁸

This conclusion was easily the weakest and least convincing portion of the panel’s lengthy opinion, largely because it failed to apply the very formula for displacement it cited from the relevant precedents. The Supreme Court had long held that whether federal environmental regulations displace federal common law actions for interstate pollution turns on *legislative* action. As the Second Circuit explained, citing the Supreme Court’s decision in *Milwaukee v. Illinois* (*Milwaukee II*), “[b]ecause ‘federal common law is subject to the paramount authority of Congress,’ federal courts may resort to it only ‘in absence of an applicable Act of Congress.’”⁹ Therefore, if the CAA’s expansive

5. See, e.g., Brief for Respondents Connecticut, New York, California, Iowa, Rhode Island, Vermont, and the City of New York at 1-2, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (No. 10-174), 2011 WL 915093 at *1-2 (noting that the state suit was filed in response to the EPA taking the position that it lacked the authority to regulate greenhouse gases under the Clean Air Act).

6. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

7. The Second Circuit heard oral argument in *AEP* in June 2006. See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 310 (2d Cir. 2009).

8. *Id.* at 393-94.

9. *Id.* at 371 (quoting *Milwaukee II*, 451 U.S. 304, 314 (1981)). The Second Circuit also cited *Milwaukee II*’s instructions that “when Congress addresses a question previously governed by a decision rested on federal common law the need for . . . lawmaking by federal courts disappears” and the question of “whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law.” *Id.* (quoting *Milwaukee II*, 451 U.S. at 314, 315 n.8).

statutory scheme was to apply to GHGs, it would follow that federal common law nuisance claims would be displaced.¹⁰

Despite the clear language of *Milwaukee II*, the Second Circuit rejected the displacement claim. It focused not on the CAA, but on its implementation by the EPA, and concluded that since the EPA had not yet begun to exercise its authority to regulate GHGs, the states' nuisance claims had yet to be displaced.¹¹ This approach shifted the locus of displacement authority from Congress to the EPA, making displacement hinge upon particular policy choices that could change from one administration to the next.

The Second Circuit's failure to follow the very precedents upon which it purported to rely made it easy for the Court to coalesce in what could otherwise have been a divisive case. The participating Justices may have split 4-4 over standing, but they were in complete agreement that *Milwaukee II* required displacement here. As Justice Ginsburg explained for a unanimous Court, whether a federal regulatory program displaces preexisting federal common law claims is dependent upon what legislation Congress has enacted. Congress's adoption of a statute governing GHG emissions displaces federal common law actions concerning GHG emissions without regard to the nature of the resulting regulatory regime. "As *Milwaukee II* made clear . . . the relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'"¹² The "critical point," Justice Ginsburg explained, was that "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants,"¹³ not whether the resulting regulations were effective or desirable.¹⁴ Indeed, Justice Ginsburg noted, were the EPA to adopt inadequate regulations, or even to "decline to regulate carbon-dioxide emissions altogether," it would be immaterial to displacement.¹⁵ In enacting the CAA, as interpreted in

10. Before *Massachusetts v. EPA* was decided, I had heard more than one attorney involved in both cases concede this point. Strangely, once *Massachusetts* had been decided, this concession was forgotten.

11. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d at 380 ("Until EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact speak directly to the particular issue raised here by Plaintiffs.") (alterations and internal quotation marks omitted).

12. *AEP*, 131 S. Ct. 2527, 2538 (2011) (quoting *Milwaukee II*, 451 U.S. at 324).

13. *Id.*

14. There are plenty of reasons to believe EPA regulation of greenhouse gases under the Clean Air Act is not desirable. See Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421 (2011).

15. *AEP*, 131 S. Ct. at 2538-39.

Massachusetts, Congress made the scope and stringency of federal GHG emissions something for the EPA to determine in the first instance.¹⁶

That the CAA displaces public nuisance suits under federal common law does not mean the states and conservation groups are left without legal remedy. The Court did not consider whether public nuisance lawsuits under state law would be similarly precluded. This subject was not briefed and implicates a different legal standard.¹⁷ Federal 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.

AEP could chill state-law-based nuisance actions nonetheless. While not addressing preemption, Justice Ginsburg's opinion explained why courts are particularly ill-suited to addressing climate change claims. Identifying and setting appropriate GHG emission targets requires the consideration of numerous economic, environmental, and other tradeoffs. Deciding how to balance such competing considerations is the sort of legislative policy judgment Congress either delegates to an administrative agency or reserves for itself. As Justice Ginsburg explained, the EPA "is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions."¹⁸ There is no reason to think that state judges, or even federal judges applying state law, would fare any better. If anything, the application of variable state standards to matters of a global, interjurisdictional concern could further frustrate the development of a coherent climate change policy.

Whether or not state-law-based tort claims proceed, controls on GHG emissions will proliferate. *Massachusetts* made sure of that.¹⁹ The state and conservation group plaintiffs may have lost in *AEP*, but they do not have a lost

16. This conclusion is dependent upon the assumption that *Massachusetts v. EPA* was correctly decided. See 131 S. Ct. at 2540-41 (Alito, J., concurring in part and concurring in judgment); see also Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63 (2007), <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf> (maintaining that *Massachusetts* was wrongly decided).

17. See Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 313-14 (2005).

18. *AEP*, 131 S. Ct. at 2539.

19. Although there is language in *Massachusetts v. EPA* suggesting that the EPA could opt not to regulate GHGs under the Clean Air Act, see Jonathan H. Adler, *Massachusetts v. EPA Heats Up Climate Policy No Less Than Administrative Law: A Comment on Professors Watts and Wildermuth*, 102 NW. U. L. REV. COLLOQUY 32, 37-40 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/20>, for an explanation of why *Massachusetts v. EPA* made regulation of GHGs under the Clean Air Act a near-certainty.

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cause. The die for this case was cast in *Massachusetts*. The reason the states lost this particular climate battle was because they had already won the war.

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