

JAMES R. MAY

AEP v. Connecticut and the Future of the Political Question Doctrine

Whether and how to apply the political question doctrine were among the issues for which the Supreme Court granted *certiorari* in *American Electric Power Co. v. Connecticut* (*AEP*).¹ This doctrine holds that federal courts should not resolve certain kinds of claims better left to other branches. Here, the question was whether the doctrine barred review of plaintiffs' federal common law claims for climate change. The Court, however, declined to engage the issue. Nonetheless, this Essay argues that the doctrine is still very relevant in the context of common law causes of action for climate change, and does so in three parts. Part I briefly explains the doctrine's historical backdrop, observing the limited extent to which it has been applied. Part II explains the role that the doctrine played in *AEP* and that the Court declined to address the issue directly. Part III discusses the implications that *AEP* may have on the doctrine going forward.

I. A SHORT HISTORY OF THE DOCTRINE

The political question doctrine is a judicial construct that stands for the proposition that there are or may be certain types of issues that are committed to an elected branch of government and thus should not be heard in federal court. Climate change litigation has recently entered this mix.²

-
1. 131 S. Ct. 2527 (2011); *see also* Petition for Writ of Certiorari at i, *AEP*, 131 S. Ct. 2527 (2011) (No. 10-174).
 2. *See generally* James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 958 (2008) (discussing the development of the doctrine in the context of climate litigation).

The Constitution does not expressly recognize a field of “political questions”—including for environmental issues—beyond the reach of the federal judiciary.³ Nonetheless, the Supreme Court has observed that there are certain “formulations” of matters that are textually or prudentially committed to an elected branch of government, or otherwise imprudent for judicial evaluation.⁴ A “textual” commitment occurs when, for example, the Constitution specifically delegates an issue to an elected branch, say, with the impeachment process. A “prudential” commitment occurs when, for example, there is a lack of judicially discernible standards to apply in the case.

The political question doctrine’s philosophy is “essentially a function of the separation of powers,”⁵ rooted in Jeffersonian notions of constitutional theory that democracy is best served by having coordinate elected branches resolve political questions rather than politically unaccountable federal judges.⁶ The Court expressed the modern manifestation of the doctrine in the landmark case *Baker v. Carr*.⁷ To coin a phrase, the doctrine applies to disable federal courts from reviewing matters when they “ought not . . . enter [the] political thicket.”⁸

The political question doctrine has been one of “limited application.”⁹ It has applied rarely and idiosyncratically to “political questions” devoted to the elected branches, not simply in cases that involve political issues.¹⁰ Accordingly, the Supreme Court has seldom invoked the doctrine, limiting its application to an extraordinarily small array of cases including political apportionment and gerrymandering,¹¹ foreign relations,¹² impeachment,¹³ and constitutional amendments.¹⁴

3. See generally James R. May, *The Political Question Doctrine in Environmental Law*, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 124, 146 (James R. May, ed., 2011) (describing the evolution of the doctrine in general and as applied to environmental law).

4. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

5. *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 456 (1992) (quoting *Baker*, 369 U.S. at 217).

6. See *id.*

7. 369 U.S. 186.

8. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

9. See *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 681 (E.D. La. 2006).

10. *Id.* (quoting *Baker*, 369 U.S. at 217).

11. *Colegrove*, 328 U.S. at 556.

12. *Goldwater v. Carter*, 444 U.S. 996 (1979).

13. *Nixon v. United States*, 506 U.S. 224 (1993).

14. *Coleman v. Miller*, 307 U.S. 433, 450 (1939).

Some lower courts have recently applied the doctrine to public nuisance suits seeking abatement or damages for the effects of climate change.¹⁵ To be sure, *AEP* rose to prominence on the back of the political question doctrine. Early on, the case had nothing to do with displacement. In 2005, the U.S. District Court for the Southern District of New York dismissed the case as a nonjusticiable political question.¹⁶ The court concluded that it was impossible for it to make the “initial policy determinations that must be made by the elected branches before a non-elected court can properly adjudicate a global warming nuisance claim.”¹⁷ It concluded that plaintiffs’ allegations were “extraordinary,”¹⁸ “patently political,”¹⁹ and “transcendently legislative.”²⁰ The Second Circuit reversed, finding that no aspect of the political question doctrine applied to enjoin judicial review. It held that climate change is neither constitutionally consigned to the elected branches nor prudentially left to them.²¹ The Supreme Court then agreed to consider whether the doctrine precludes judicial review altogether. As discussed elsewhere in this issue,²² the Supreme Court reversed again, holding that there is a critical mass of federal activity so as to displace federal common law in this arena.

II. THE DOCTRINE’S ROLE IN THE SUPREME COURT DECISION IN *AEP*

Surprisingly, the Court chose not to engage the political question issue explicitly. The closest the Court came to addressing the doctrine is a brief paragraph in Justice Ginsburg’s opinion:

-
15. See, e.g., *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009) (dismissing action against oil and gas industries); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing suit for damages against U.S. auto manufacturers); *Comer v. Murphy Oil, USA, Inc.*, No. 1:05-cv-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (denying action against oil and gas companies), *rev’d*, 585 F.3d 855 (5th Cir. 2009), *vacated*, 607 F.3d 1049 (5th Cir. 2010) (en banc), *mandamus denied*, *In re Comer*, 131 S. Ct. 902 (2011) (mem.).
 16. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).
 17. *Id.* at 273 (alterations and internal quotation marks omitted).
 18. *Id.* at 271 n.6.
 19. *Id.*
 20. *Id.* at 272.
 21. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 331-32 (2d Cir. 2009).
 22. See Hari M. Osofsky, *AEP v. Connecticut’s Implications for the Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101 (2011), <http://yalelawjournal.org/2011/09/13/osofsky.html>.

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.²³

This would seem to mean that at least four members of the Court—Justices Ginsburg, Breyer, Kagan, and Kennedy—held that the political question doctrine does not bar review of the plaintiffs' federal common law claims in the case.

The other four justices were silent about the role of the political question doctrine. Chief Justice Roberts and Justice Scalia joined Justice Ginsburg's unanimous opinion without comment on whether the doctrine applied to bar review. This could suggest that they do not disagree with its holding that the doctrine does not bar review. Justice Alito, joined by Justice Thomas, issued a brief concurrence about *Massachusetts v. EPA*.²⁴ The concurrence was silent about the role of the doctrine, again suggesting that neither believed that the doctrine barred review.²⁵

Thus, while it is not entirely clear, it is safe to make four observations about how the Court addressed the political question doctrine in *AEP*. First, four justices held that the doctrine did not bar review. Second, four other justices did not contest that holding. Third, none of the eight justices contended that the doctrine barred review in the case. Moreover, there is nothing to suggest that Justice Sotomayor—who recused herself—believed that the doctrine barred review. This suggests that none of the nine justices on the Court believe that the doctrine bars review.²⁶ Last, at the very least, a majority

23. *AEP*, 131 S. Ct. 2527, 2535 (2011) (emphasis added) (footnote omitted) (citations omitted).

24. 549 U.S. 497 (2007).

25. Justice Alito (joined by Justice Thomas) wrote: "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 Clean Air Act, adopted by the majority in *Massachusetts v. EPA*, is correct." *AEP*, 131 S. Ct. at 2540-41 (Alito, J., concurring in part and concurring in judgment) (citations omitted).

26. One might construe four Justices' silence about the applicability of the doctrine to mean nothing at all, akin to when the Court declines to grant a writ of certiorari or decides that certiorari has been improvidently granted. Yet the presumption here goes the other way because the Court agreed to review both the case and the political question issue, which could suggest that each Justice considered and had the opportunity to weigh in regarding the question.

of the Supreme Court has broader views of the justiciability of federal common law claims for climate change than did the district court in *AEP*.

III. WHAT *AEP* MEANS TO THE DOCTRINE GOING FORWARD

The political question doctrine is a spectral structural-based limit, arguably derived from Articles I, II and III of the Constitution. In this way, it is perhaps the most intuitive limit on judicial authority. Yet that makes discerning implications a challenge. Whether one views climate change cases as means to a political or personal (or state) end may help to explain its implications. Is tort law a regulatory device that aims to control pollution, in which case it is a quasi-public law matter with implications for the political branches? Or does it provide a traditional venue for airing civil grievances and pursuing remedies, in which case it is a purely private law matter between discrete parties, largely insulated from control by political branches? The former suggests resolution in the political branches, whereas the latter is a better fit for judicial involvement.

The doctrine could come into play again soon, especially if the EPA loses the authority to regulate greenhouse gases. The 112th Congress and several presidential candidates have made blocking EPA action on climate change a priority. If, for example, Congress suspends or terminates the EPA's authority to regulate greenhouse gases, then the displacement issue discussed above would seem once again to be on the table. This returns us to the future of the political question doctrine in climate cases. The doctrine could also find its way back before the Court in another case involving similar issues, as in *Native Village of Kivalina v. ExxonMobil*, pending in the Ninth Circuit.²⁷

The implications of *AEP* for the role of the doctrine in the future are difficult to gauge. As it stands, the doctrine is such a mixed, new, odd bag; there is little yes or no about it. In our amicus brief on behalf of law professors on behalf of the plaintiffs-respondents,²⁸ Stuart Banner and I maintain that the doctrine was designed solely to check federal judicial powers in constitutional cases. Indeed, we demonstrate that the Court has only applied the doctrine to constitutional claims that would have satisfied the well-pleaded complaint rule as being an inexorable component of the plaintiff's case. Yet when deciding certain constitutional claims are not justiciable, the Court has nonetheless held non-constitutional claims embedded within the case to be justiciable.

27. 663 F. Supp. 2d 863, 873-76 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

28. Brief of Law Professors as Amici Curiae in Support of Respondents, *AEP*, 131 S. Ct. 2527 (2011) (No. 10-174), 2011 WL 970338.

Therefore, we conclude that the doctrine was not intended to apply to non-constitutional claims such as those pressed in *AEP*. In the alternative, we argue that the doctrine, if it applies, does not preclude review as applied to common law.

Yet the Court's reasoning in finding plaintiffs' federal common law claims to be displaced might apply with congruent force to the political question doctrine. To be sure, all eight participating justices were skeptical about the propriety of using federal common law in this context: "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."²⁹ The Court was unconvinced that federal courts in common law nuisance suits should play a role in competing with EPA's regulatory authority, maintaining that "[t]he expert agency is surely better equipped to do the job [of regulating greenhouse gas emissions] than individual district judges issuing ad hoc, case-by-case injunctions."³⁰

It also remains to be seen how the doctrine might apply to *state* common law claims regarding climate change, which were not before the Court.³¹ Simply, the doctrine was never intended to apply to actions invoking state (as opposed to federal) laws. In particular, state common law claims for climate change invoke federalism, not separation of powers. This would seem especially so regarding a state claim based on common law employed and developed by state judges. There is nothing Article I-II-III about that, something *Erie* and its progeny teach.

Thus, the doctrine should not apply to state actions, regardless of the forum. While states may borrow the doctrine's structural limits in construing their own state constitutions – as with standing doctrine – the political question doctrine ought not serve as precedent in state actions. That said, the policies behind the doctrine would seem to have some salience both at the state level and when federal courts hear state claims in diversity jurisdiction. Wanting discernible standards under nuisance law would, as a general matter, apply to both federal and state common law causes of action.

I tend to agree with the position Maxine Burkett advocates in this series.³² Tort law is not the best or only means for addressing climate change by anyone's account. But a means to an end it is. And, despite their general silence

29. *AEP*, 131 S. Ct. at 2540.

30. *Id.* at 2539.

31. *Id.* at 2540.

32. 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>.

in *AEP*, the Supreme Court appeared to endorse the view that courts should not hide from these issues behind the veil of the political question doctrine.

James R. May is a Professor of Law and Graduate Engineering (Adjunct) at Widener University where he teaches constitutional and environmental law and co-directs the Environmental Law Center. May was the counsel of record and co-author (with Stuart Banner) of the Law Professors' Amicus Brief on Behalf of Respondents in this case. He may be reached at jrmay@widener.edu.

Preferred Citation: James R. 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>.