

AMERICAN ELECTRIC POWER CO. V. CONNECTICUT

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On June 20, 2011, the Supreme Court issued a unanimous and straightforward decision that the Clean Air Act displaces federal common law public nuisance claims against greenhouse gas emitters.¹ The decision solidifies the Environmental Protection Agency (“EPA”)’s primacy, established in *Massachusetts v. EPA*,² as the climate change regulator. In *American Electric Power Co. v. Connecticut* (“AEP”), the Court ruled that displacement occurs when a statute “speaks directly to the question at issue.”³ This Comment dissects the Court’s decision, analyzes its impact on environmental actions under federal common law, and discusses how it builds on *Massachusetts*.

I. THE COURT’S DECISION

A. Procedural History

In July 2004, eight states,⁴ New York City, and three nonprofit land trusts⁵ sued to enjoin carbon dioxide emissions from five electric power utilities.⁶ These utilities are the five largest emitters of carbon dioxide in the United States, emitting 650 million tons annually.⁷ This accounts for 25 percent of domestic electric power emissions, 10 percent of domestic anthropogenic emissions, and 2.5 percent of global anthropogenic emissions.⁸ The plaintiffs (respondents at the Supreme Court) claimed that this contribution to global warming “created a ‘substantial and unreasonable interference with public rights,’ in violation of the federal common law of interstate nuisance,

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¹ *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011). The decision was 8-0 with a concurrence by Justices Alito and Thomas. Justice Sotomayor did not participate in the case, *id.* at 2540, because she was originally on the Second Circuit panel that heard the case, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 314 n.* (2d Cir. 2009).

² 549 U.S. 497 (2007).

³ *Am. Elec. Power Co.*, 131 S. Ct. at 2537 (internal quotation marks and brackets omitted).

⁴ California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin. *Id.* at 2533 & n.3. New Jersey and Wisconsin subsequently dropped out of the litigation. *Id.* at 2533 n.3.

⁵ Open Space Institute, Inc., Open Space Conservancy, Inc., and Audobon Society of New Hampshire. *Id.* at 2534 & n.4.

⁶ American Electric Power Company, Inc., Southern Company, Xcel Energy, Inc., Cinergy Corporation, and the Tennessee Valley Authority (“TVA”). All except for the TVA are private companies. *Id.* at 2534 & n.5.

⁷ *Id.* at 2534.

⁸ *Id.*

or, in the alternative, of state tort law.”⁹ They sought a judicially mandated cap and trade system to abate this threat to public health and welfare.¹⁰

The District Court dismissed the suits under the political question doctrine,¹¹ but the Court of Appeals for the Second Circuit reversed.¹² The Second Circuit found no political question problem,¹³ valid standing,¹⁴ and a valid claim under the federal common law of nuisance.¹⁵ The Court of Appeals ruled that since EPA had not yet issued any rules on greenhouse gas emissions, the Clean Air Act did not displace the claims at that time.¹⁶

The Supreme Court granted certiorari.¹⁷ The question presented to the Court was “whether the plaintiffs . . . can maintain federal common law public nuisance claims against carbon-dioxide emitters.”¹⁸ Justice Ginsburg delivered an 8-0 opinion that they could not. Justice Sotomayor recused herself¹⁹ because she was originally on the Second Circuit panel.²⁰

B. Deferring on Standing

In one short paragraph, the Court began its analysis with a stalemate on standing. At issue was whether the respondents could sue based on injuries caused by greenhouse gas emissions and whether the political question doctrine blocked suit. Four justices would hold that Article III standing exists for some respondents under the majority opinion in *Massachusetts*. Four others would side with Chief Justice Roberts’ dissent in that case and find that the respondents lacked standing. Because the Court was equally divided, it affirmed the Second Circuit’s holding that at least some plaintiffs had valid standing.²¹

The opinion does not reveal which justices were on which side of the standing issue. However, given their ideological positions and how most of them sided in *Massachusetts*, it is reasonable to speculate that the “liberal” justices (Breyer, Ginsburg, and Kagan) and Justice Kennedy sided with the

⁹ *Id.* (citing App. to Pet. for Cert. 103–05, 145–47).

¹⁰ *Id.* (citing App. to Pet. for Cert. 88–93, 110, 153).

¹¹ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 265 (S.D.N.Y. 2005).

¹² *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009). Originally there were two parallel lawsuits, one brought by the states and New York City, the other brought by the land trusts. The suits were later consolidated. For a discussion of the Second Circuit’s decision, see Nikhil V. Gore & Jennifer E. Tarr, *Connecticut v. American Electric Power Co.*, 34 HARV. ENVTL. L. REV. 577 (2010).

¹³ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d at 332.

¹⁴ *Id.* at 349.

¹⁵ *Id.* at 358, 371.

¹⁶ *Id.* at 380. The Second Circuit issued its decision in 2009. In December of that year, EPA issued its endangerment finding for greenhouse gases and began its rulemaking process. See *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009).

¹⁷ *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 813 (2010).

¹⁸ *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2532 (2011).

¹⁹ *Id.* at 2540.

²⁰ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d at 314 n.*.

²¹ *Am. Elec. Power Co.*, 131 S. Ct. at 2535. While not addressing the issue directly, the Court also implied a similar split on the political question doctrine.

Massachusetts majority opinion, while the “conservative” justices (Alito, Roberts, Scalia, and Thomas) sided with Roberts’ dissent in *Massachusetts*.²² This split demonstrates that *Massachusetts*’s theory of “special solicitude” is still controversial.²³ Functionally, the split allows the Court to address displacement unanimously without forcing any justice to compromise on standing doctrine.

C. *Displacement of Federal Common Law*

After beginning with the obligatory quote from the *Erie* doctrine,²⁴ the Court examines displacement of federal common law. “[F]ederal common law addresses ‘subjects within national legislative power where Congress has so directed’ or where the basic scheme of the Constitution so demands.”²⁵ The Court states that environmental protection in particular “is undoubtedly an area . . . in which federal courts may fill in ‘statutory interstices,’ and, if necessary, even ‘fashion federal law.’”²⁶ While federal common law can play a role in environmental law,²⁷ “[that] does not necessarily mean that federal courts should create controlling law.”²⁸

The Court briefly notes that the law is unclear as to whether private citizens or political subdivisions can bring a federal common law nuisance claim against an out-of-state polluter.²⁹ Typically these actions are reserved for states; however, the issue is moot because the Court found the federal common law displaced.³⁰

Legislative displacement of federal common law does not have the same high standard as preemption of state law.³¹ “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.”³²

²² Justices Breyer, Ginsburg, and Kennedy joined the Stevens majority opinion, *Massachusetts v. EPA*, 549 U.S. 497, 501 (2007), while Justices Alito, Scalia, and Thomas joined Chief Justice Roberts’s dissenting opinion, *id.* at 535 (Roberts, C.J., dissenting).

²³ The “special solicitude” theory of standing holds that when states join the Union, they give up a measure of their sovereignty to the federal government. As such, they are not independently able to protect certain aspects of their formerly sovereign territory, such as air and water quality. Therefore, in some instances the states should have standing to compel the federal government to properly look out for the state’s quasi-sovereign prerogatives. *See id.* at 518–20.

²⁴ *Am. Elec. Power Co.*, 131 S. Ct. at 2535 (“‘There is no federal general common law.’” (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938))). Even I cannot resist including it; quoting *Erie* is a jurisprudential addiction that is difficult to kick.

²⁵ *Am. Elec. Power Co.*, 131 S. Ct. at 2535 (quoting Henry J. Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.119, 421–22 (1964)).

²⁶ *Am. Elec. Power Co.*, 131 S. Ct. at 2535.

²⁷ “When we deal with air and water in their ambient or interstate aspects, there is a federal common law.” *Id.* (quoting *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 103 (1972)).

²⁸ *Am. Elec. Power Co.*, 131 S. Ct. at 2536.

²⁹ *See id.*

³⁰ *Id.* at 2537.

³¹ *See id.*

³² *Id.* (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

The Court explains that, when examining a statute, “the relevant question . . . is ‘whether the field has been occupied, not whether it has been occupied in a particular manner.’”³³

Turning to the situation at hand, the Court holds that displacement occurred the moment when Congress delegated to EPA the authority to regulate greenhouse gases under the Clean Air Act. After *Massachusetts*, the Act gives EPA the power to decide whether and how to address greenhouse gas emissions. It is the delegation of authority, not its exercise, which displaces federal common law.³⁴ Because greenhouse gas emissions are air pollutants, the Clean Air Act speaks directly to the polluting nuisance the respondents allege; the Act’s delegation to EPA occupies the regulatory field.

Furthermore, the Court held that even had EPA decided not to regulate greenhouse gas emissions, the displacement analysis does not change.³⁵ This reverses the Second Circuit’s opinion, which stated that displacement could not occur until EPA regulated.³⁶ The Court notes that if EPA does not satisfactorily regulate greenhouse gases, the respondents can sue for judicial review of the agency’s actions in accordance with administrative law.³⁷

Finally, the opinion includes the usual dicta on the institutional roles of the courts and agencies. The Court notes that expert administrative agencies are more capable of setting intelligent emissions regulations than a “judicial decree.”³⁸ The administrative process has the ability to account for myriad interests and factors, whereas the adversarial and ad hoc judicial process would produce less comprehensive results.³⁹ “Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.”⁴⁰

The Court held that the Clean Air Act’s delegation of regulatory authority to EPA displaced the federal common law upon which the respondents’ claims of interstate public nuisance relied.

D. Remand of State Nuisance Claims

The respondents also sought relief under state common law of public nuisance. The Second Circuit did not address these claims “because it held that federal common law governed.”⁴¹ Because the Supreme Court held displacement occurred, a lower court needs to examine the state law claims.

³³ *Am. Elec. Power Co.*, 131 S. Ct. at 2538 (quoting *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 324 (1980)).

³⁴ *Am. Elec. Power Co.*, 131 S. Ct. at 2538.

³⁵ *Id.* at 2537.

³⁶ *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 381 (2d Cir. 2009). The Second Circuit “express[ed] no opinion . . . as to whether the actual regulation of greenhouse gas emissions under the CAA by EPA . . . would displace Plaintiffs’ cause of action under the federal common law.” *Id.*

³⁷ *Am. Elec. Power Co.*, 131 S. Ct. at 2539.

³⁸ *Id.* at 2539–40.

³⁹ *See id.* at 2539.

⁴⁰ *Id.* at 2539–40.

⁴¹ *Id.* at 2540.

The Clean Air Act may preempt the state law claims, but the parties had not briefed the issue.⁴² The Court therefore remanded the state law claims for further consideration.⁴³ Though it seems likely that the Act does preempt the claims, further consideration is beyond the scope of this Comment.

E. Concurrence

Justice Alito, joined by Justice Thomas, wrote a one-sentence concurrence noting that the displacement analysis relies on the assumption that *Massachusetts* correctly interpreted the Clean Air Act to allow for the regulation of greenhouse gas emissions.⁴⁴ This concurrence demonstrates that *Massachusetts* continues to be a point of conflict for the ideologically polarized Court.

II. ANALYSIS

A. *The Future of Environmental Federal Common Law*

From *AEP*, we can conclude several things. First, environmental protection is generally a proper arena for federal common law.⁴⁵ Second, the Court reiterated that a statute displaces federal common law when it “speaks directly” to the issue.⁴⁶ And third, when determining whether a statute speaks directly to the issue, courts will consider “whether the field has been occupied.”⁴⁷

1. *What Does It Mean to “Occupy the Field”?*

The field is occupied if a statute provides for the same remedy that one would seek under federal common law.⁴⁸ In *AEP*, the Court said that the Clean Air Act authorized the limits on carbon dioxide emissions sought by the respondents and therefore there was “no room for a parallel track.”⁴⁹ Conversely, the field is not occupied if no statute is close to the issue.⁵⁰ But where is the line? *Milwaukee II*, the first case to ask “whether the field has been occupied,” provides some insight. In a footnote, the *Milwaukee II* Court stated that “filling a gap” is a proper place for federal common law, but providing a parallel regulatory regime is not.⁵¹ Thus, if a federal statute

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 2540–41 (Alito, J., concurring).

⁴⁵ *Id.* at 2535.

⁴⁶ *Id.* at 2537.

⁴⁷ *Id.* at 2538.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Various aspects of admiralty law may provide good examples of vibrant federal common law.

⁵¹ *Milwaukee II*, 451 U.S. at 324 n.18.

touches the issue, a court must first examine the nature of the relief sought. If the statute does not provide for the relief sought (a “gap” to be “filled”), then the field has not been occupied, and the court may fashion a federal common law remedy. However, if the relief sought is merely a more extreme version of the relief available under the statute, employing federal common law is inappropriate.

Furthermore, the bar for displacement should be fairly low. If a federal statute touches on the issue in one way or another and lacks any glaring holes, it will occupy the field. Federal common law is a way to refine the rough edges of a statutory regime. Like any common law, it can evolve over time to create novel causes of action; however, this should only occur in exceptional circumstances. The Court echoes this point in its discussion of institutional competencies.⁵² For most issues, especially complicated policy questions like global climate change, Congress and administrative agencies are more capable of creating comprehensive regulatory regimes than the judiciary.⁵³ As the Court notes, federal district judges cannot even bind their colleagues to follow their decisions.⁵⁴ Leave the policy-making to Congress and let the judiciary focus on patching legislative potholes.

2. *Environmental Claims Under Federal Common Law Are Mostly Dead*

Technically, *AEP* only displaces federal common law public nuisance claims related to greenhouse gas emissions. However, claims related to other types of nuisances and environmental torts will be similarly displaced. While environmental protection is a proper application of federal common law, nearly every field is occupied. Between the Clean Air Act,⁵⁵ Clean Water Act,⁵⁶ Endangered Species Act,⁵⁷ Toxic Substances Control Act,⁵⁸ Resource Conservation and Recovery Act,⁵⁹ Comprehensive Environmental Response, Compensation and Liability Act,⁶⁰ and the Oil Pollution Act,⁶¹ few major areas of environmental law remain unlegislated. Only in rare circumstances will an interstate nuisance present itself where a federal statute does not occupy the field.

⁵² See *Am. Elec. Power Co.*, 131 S. Ct. at 2539–40.

⁵³ See *id.* at 2539 (“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.”).

⁵⁴ *Id.* at 2540 (“Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.”).

⁵⁵ 42 U.S.C. §§ 7401–7671 (2006).

⁵⁶ 33 U.S.C. §§ 1251–1387 (2006).

⁵⁷ 16 U.S.C. §§ 1531–1544 (2006).

⁵⁸ 15 U.S.C. §§ 2601–2697 (2006).

⁵⁹ 42 U.S.C. §§ 6901–6992(k) (2006).

⁶⁰ 42 U.S.C. §§ 9601–9675 (2006).

⁶¹ 33 U.S.C. §§ 2701–2762 (2006).

Other environmental torts brought under federal common law, not just nuisance claims, will also face high burdens to overcome displacement by existing statutes. In order to be viable, the claim must show that a) an interstate tort occurred; b) no statute occupies the field; and c) the judiciary has the expertise to craft a proper remedy.⁶²

B. Revisiting Massachusetts

AEP worked its way through the judicial system at the same time as *Massachusetts*. Given that the former sought judicially mandated cap and trade regime and the latter sought Clean Air Act emissions controls, it seems clear that the two remedies are incompatible. Moreover, given the institutional competencies of the judiciary and EPA, it makes sense to give the authority to EPA. One could even interpret the Court's reliance on displacement doctrine in *AEP* as a crutch to allow the Court to avoid having to muddle with the *Massachusetts* regulatory regime.

AEP provides some insights about how the Court sees *Massachusetts*. First, there could be another battle over standing doctrine in the near future. The one paragraph, 4-4 split that affirmed the Second Circuit conveniently allowed the case to move forward, but left lingering doubts. Let us assume that Justices Breyer, Ginsburg, Kagan, and Kennedy voted in favor of standing, and that Justices Alito, Scalia, Thomas, and Chief Justice Roberts voted in opposition. Justice Sotomayor would likely vote in favor of special solicitude standing as well, reaffirming the Stevens majority opinion in *Massachusetts*. But this split shows that the conservative justices are unwilling to accept *Massachusetts* as valid precedent. Given the opportunity, they would probably disregard *stare decisis* and endorse Chief Justice Roberts's dissent in *Massachusetts*. The question remains whether the right circumstances could arise to persuade Justice Kennedy to join the conservative view.⁶³

⁶² One example of a statute with gaps to fill is the Oil Pollution Act, which provides remedies for damages from oil spills. 33 U.S.C.A. §§ 2701–2720 (West 2011). The Act's definition of "oil" does not include natural gas. *Id.* § 2701(23). Consequently, there is no liability for maritime natural gas discharges. *See id.* § 2702(a) (establishing liability solely for unlawful discharges of oil). For situations such as the Deepwater Horizon explosion, liability limited to oil discharges can be especially problematic. The Woods Hole Oceanographic Institution recently estimated that natural gas accounted for twenty-two percent of the Macondo well fluid. Press Release, Woods Hole Oceanographic Inst., WHOI-Led Study Sharpens Picture of How Much Oil and Gas Flowed in Deepwater Horizon Spill (Sept. 5, 2011), available at <http://www.whoi.edu/page.do?pid=7545&tid=282&cid=112889&ct=162>. The nature and causes of environmental damages from the spill can be unclear. If any damages can be attributed solely to this large natural gas discharge, they are potentially free from liability. Furthermore, if BP could show that natural gas and oil are equally damaging, then their liability could be reduced proportional to the natural gas' share of the injury. Can federal common law fill this gap? On a preliminary analysis, it seems it can: an interstate tort allegedly occurred, the statute does not occupy the field, and the judiciary is certainly competent to determine natural resource damages.

⁶³ Speculating on Justice Kennedy's views on standing is beyond the scope of this article. That topic could easily fill an article on its own.

On a more positive note, only two justices balked about the decision in *Massachusetts* that greenhouse gases are air pollutants under the Clean Air Act. Justices Alito and Thomas conditioned their votes in *AEP* on the unexamined assumption that the interpretation of the Clean Air Act in *Massachusetts* is correct, thereby implying that it is not.⁶⁴ But this is good news! Apparently Chief Justice Roberts and Justice Scalia have accepted that greenhouse gases are indeed air pollutants (frisbees and flatulence be damned!).⁶⁵ The Court unanimously declared that “[g]reenhouse gases . . . qualify as ‘air pollutant[s]’ within the meaning of the governing Clean Air Act provision . . . [and] are therefore within EPA’s regulatory ken.”⁶⁶ This reaffirms that *Massachusetts* is the proper law of the land and not a mistake. Yes, greenhouse gases are air pollutants. Yes, they are causing global climate change. Yes, EPA does have the authority to regulate their emission contingent upon its endangerment finding. Unless Congress decides to step in, EPA’s regulatory regime is here to stay.

III. CONCLUSION

What can we take away from this short, unanimous Supreme Court decision? First, the test for displacement of federal common law remains a) does a statute speak directly to the issue, and b) does that statute occupy the field? The judiciary consequently should be using federal common law to fill gaps, not create new substantive law. Second, environmental federal common law claims are, in most cases, dead on arrival. Nuisance claims will have an especially hard time avoiding displacement, given that existing environmental statutes occupy a very large field. Third, while the special solicitude standing doctrine from *Massachusetts* remains controversial, the Court seems to have accepted and reaffirmed that decision’s ruling on greenhouse gases. The dissenters in *Massachusetts*, Roberts and Scalia, now accept that EPA has authority under the Clean Air Act to regulate greenhouse gas emissions.

⁶⁴ *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540–41 (2011) (Alito, J., concurring).

⁶⁵ *See Massachusetts v. EPA*, 549 U.S. 497, 558 n.2 (2007) (Scalia, J., dissenting) (arguing that if greenhouse gas emissions are air pollutants under the Clean Air Act that “it follows that *everything* airborne, from Frisbees to flatulence, qualifies as an ‘air pollutant’”).

⁶⁶ *Am. Elec. Power Co.*, 131 S. Ct. at 2532–33 (citation omitted).