AEP v. Connecticut—Global Warming Litigation and Beyond

by Monty Cooper

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On June 21, 2011, the U.S. Supreme Court in *American Electric Power (AEP) v. Connecticut*[1] held that the Clean Air Act (CAA),[2] and the U.S. Environmental Protection Agency (EPA) actions it authorized, displaced any federal common-law right to seek abatement of carbon dioxide (CO_2) emissions from fossil fuel-fired power plants. The widely anticipated decision was important, because it clarified the court's approach to legislative displacement and dismissed federal common-law public nuisance claims.

This decision also affirmed the CAA's decisionmaking process in creating public policy: the Act (1) authorizes EPA to use its expertise in promulgating rules, but (2) allows stakeholders to challenge those rules in federal court if they believe that EPA failed to act, was too stringent in its rulemaking, or was not stringent enough.

This affirmation of the Act's process is important, as over the last two decades, plaintiffs have sought to bypass the regulatory process and expand public nuisance claims to almost any entity that engages in annoying activity that could qualify under *Webster's* definition of nuisance.[3] Such an expansive definition can greatly impact public policy, as it can alter how whole industries conduct and operate their businesses. Thus, companies such as product manufacturers, e.g., gun or lead paint makers, and companies in highly regulated industries, e.g., electric utilities, have sought to dismiss these claims. In doing so, defense attorneys have argued, among other things, that (1) the political branches have more expertise and are better equipped to make public policy in these areas, or (2) the judiciary is incapable of adjudicating the claims without first making a policy determination that is beyond the scope of the judiciary's authority to make.[4] Attempts to regulate industries via nuisance litigation effectively subvert the regulatory process and weaken our democratic process in the long run.[5]

The proper roles of each branch in the lawmaking process were central to the discussion in *AEP*. Lower courts addressed them primarily in response to the industry's use of the political question doctrine. The U.S. District Court for the Southern District of New York ruled that plaintiffs' federal common-law nuisance claims were nonjusticiable political questions that required an initial nonjudicial policy determination. The U.S. Court of Appeals for the Second Circuit reversed the decision, opining that the suit was an ordinary tort claim that the judiciary had authority to handle.[6]

Here, instead of a political question, the Supreme Court addressed these issues in the context of the displacement doctrine, which bars application of federal common law when a congressional enactment has already addressed a subject.[7] But regardless of doctrine, the Court's strong language in support of the CAA's process of relying on the judgment of expert agencies over federal judges when creating public policy is precedent that the defense bar can rely upon when defending companies against public nuisance claims in other industries, and reasoning that academics and policymakers can use to promote better public policy in the future.

I. *AEP* Litigation

A. *Procedural History*

Originally filed in July 2004 in the Southern District of New York, plaintiffs included six states (California, Connecticut, Iowa, New York, Rhode Island, and Vermont),

1. 131 S. Ct. 2527, 41 ELR 20210 (2011).
2. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
3. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 552 (2006).
4. *See* North Carolina v. TVA, 615 F.3d 291, 304, 40 ELR 20194 (4th Cir. 2010); Native Village of Kivalina v. Exxon Mobil Corp., 663 F. Supp. 2d 863, 876-77, 39 ELR 20236 (N.D. Cal. 2009).
5. Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22; *see also* Laurence H. Tribe, op-ed., *Take It to Climate Court? Global Warming Lawsuits Are a Misuse of the Judiciary Branch*, Boston Globe, Apr. 16, 2011, *available at* http://articles.boston.com/2011-04-16/bostonglobe/29425932_1_climate-change-global-warming-greenhouse-gases.
6. *AEP*, 180 L. Ed. 2d at 444-45.
7. Milwaukee v. Illinois, 451 U.S. 304, 440, 11 ELR 20406 (1981).

New York City, and three nonprofit land trusts (Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire). Defendants included four private companies (American Electric Power Company, Inc., and its wholly owned subsidiary, Southern Company, along with Xcel Energy Inc., and Cinergy Corporation) and a federally owned corporation, the Tennessee Valley Authority. Plaintiffs described defendants as "the five largest emitters of carbon dioxide in the United States," with collective annual emissions of 650 million tons constituting 25% of emissions from the domestic electric power sector.[8]

Before the district court, plaintiffs asserted that by contributing to global warming, defendants' CO_2 emissions created a "substantial and unreasonable interference with public rights," which violated the federal common law of interstate nuisance, or, in the alternative, state tort law.[9] Plaintiffs sought injunctive relief that required each defendant "to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade."[10]

The district court dismissed the suit as presenting nonjusticiable political questions. To arrive at this decision, the court relied on the third factor in *Baker v. Carr*'s[11] six-factor test for a nonjusticiable question: may the claim be resolved without requiring the court to make a preliminary policy determination of the kind courts are not intended to make. This factor counseled dismissal, since deciding the issue would require balancing "interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs" against "interests advancing the economic concern that strict schemes [will] retard industrial development with attendant social costs."[12] Balancing such interests required an initial policy determination by the elected branches.

On appeal to the U.S. Court of Appeals for the Second Circuit, the parties appeared before a three-judge panel that included then-Judge Sonia Sotomayor.[13] By the time the panel reached its decision, Justice Sotomayor had been elevated to the Supreme Court.[14] The remaining two-judge panel followed the *Baker* test, but disagreed with the district court's determination that carbon caps raise a political question because it found that the *Baker* test factors were not met. Contrary to defendants' allegations, the court determined there were judicially discoverable and manageable standards for resolving the case, and the case appeared to be "an ordinary tort suit" such that it did not require an initial nonjudicial policy determination.[15]

The Second Circuit also found that plaintiffs satisfied Article III's standing requirements and that federal common law of nuisance applied. Federal common law applied because the court determined that EPA had not yet exercised its regulatory authority under the CAA to regulate the area in question by, for instance, setting a carbon emission cap.[16] Thus, the Second Circuit remanded the case to the district court for further proceedings.

B. Supreme Court Weighs In

Defendants appealed the case to the Supreme Court and, after granting certiorari, the Court heard argument in April 2011. Two months later, it affirmed and reversed the Second Circuit's decision. Eight Justices participated in the decision; now-Justice Sotomayor recused herself.

In a 4-4 split decision, the Court affirmed the Second Circuit's standing decision and held that no other threshold question, like the political-question doctrine, barred the claims. On the merits, however, the Court held unanimously, 8-0, that the CAA displaced the federal common-law nuisance claims. Relying on its precedent from *Milwaukee v. Illinois,*[17] the Court stated that "when Congress addresses a question previously governed by a decision rested on federal common law . . . the need for such an unusual exercise of law-making by federal courts disappears."[18]

Legislative displacement of federal common law, according to the Court, did not require the "same sort of evidence of a clear and manifest [congressional] purpose" demanded by preemption of state law.[19] Rather, the test was simply whether the statute "speak[s] directly to [the] question" at issue.[20] The Court reminded the parties that *Massachusetts v. EPA*[21] held that CO_2 emissions qualified as air pollution subject to regulation under the CAA. And, according to the Court, it was clear that the Act "speaks directly" to emissions of CO_2 from the defendants' plants via its provisions, among other things, that direct EPA to establish emissions standards for categories of stationary sources that in the EPA Administrator's judgment cause or contribute significantly to air pollution.[22]

The Court also specifically objected to the Second Circuit's holding regarding displacement, which stated that federal common law was not displaced until EPA exercises its authority under the Act. Not so, said the Court. The rel-

8. *Id.* at 444.
9. *Id.*
10. *Id.*
11. 369 U.S. 186 (1962).
12. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d. 265, 272, 35 ELR 20186 (S.D.N.Y. 2005) (quoting Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 847, 14 ELR 20507 (1984) (internal quotation marks omitted)).
13. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 313, 39 ELR 20215 (2d Cir. 2009).
14. *Id.*
15. *Id.* at 329-31.
16. *Id* at 381.
17. 451 U.S. 304, 11 ELR 20406 (1981).
18. *Id.* at 440.
19. *Id.*
20. *Id.*
21. 549 U.S. 497, 37 ELR 20075 (2007).
22. 451 U.S. at 440-41.

evant question for displacement purposes was "whether the field has been occupied, not whether it has been occupied in a particular manner."[23] The critical point for the Court was that, when it created the CAA, the U.S. Congress delegated to EPA the power to decide whether and how to regulate CO_2 emissions from power plants. Thus, Congress' delegation displaced federal common law, regardless of EPA's actions.

Finally, the Court did not decide whether the CAA preempted state public nuisance law. It remanded the case to the lower court for consideration of that issue.

II. Expert Agencies, Not Federal Courts, Are Best at Creating Public Policy

The most prominent results of the Court's decision were dismissal of the federal common-law nuisance claim and remand of the state nuisance issue. The reasoning behind the federal common-law nuisance claim's dismissal clarified the role of the political branches compared to the judiciary, settling a long-standing debate in the realm of public nuisance claims.

After finding that the Act directly addressed the federal common-law claims, the Court reckoned that the Act's order of decisionmaking—first by the expert agency, and then by federal judges—was yet another reason to resist setting emissions standards by judicial decree under federal tort law.

For example, when setting environmental standards for stationary sources, the Act directed the EPA Administrator to identify categories of stationary sources that, in her judgment, contributed to air pollution that might reasonably be anticipated to endanger public health.[24] Once EPA listed a category, the agency was required to establish emission standards for that pollutant that applied to all new or modified sources within that category; the Act required regulation of existing sources within the same category as well.

Determining the appropriate amount of regulation in any particular greenhouse gas-producing industry is not an easy task, and it doesn't happen in a vacuum. As with other questions of national or international policy, the Court noted, informed assessment of competing interests is required. And any potential environmental benefit must also be weighed, along with the country's energy needs and the possibility of economic hardship if the emissions limits are enacted.

The Court noted that the Act entrusts this complex balancing of interests to EPA in combination with state regulators. Each performance standard must take into account the cost of achieving emissions reduction and any non-air quality health and environmental impact and energy requirements.[25] In setting the performance standards, the Act envisions extensive cooperation between federal and state authorities,[26] generally permitting each state to make the first attempt at achieving compliance with emission standards within its jurisdiction.[27]

Given the complex balancing of interests and intricate sharing of responsibility for setting standards between federal and state authorities, the Court stated that "[i]t is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions."[28] The expert agency, as the Court noted, was surely better equipped to balance these interests and set standards than individual district judges "issuing ad hoc, case-by-case injunctions."[29] Federal district judges lack authority to render precedential decisions that are binding on other judges, even within the same court.

In addition to the problems with piecemeal regulation by district judges, the Court added that federal judges lack the scientific, economic, and technological resources available to an agency like EPA. Simply put, the judiciary's structure prevents it from creating sound public policy. Judges may not (1) commission scientific studies or convene groups of experts for advice, or (2) issue rules under notice-and-comment procedures inviting input by any interested person, or (3) seek the counsel of regulators in the states where the defendants are located.[30] Rather, judges' inquiries are limited to the evidentiary record presented by the parties.

While promoting the expertise of EPA, the Court was quick to note that EPA's judgment was still subject to review by federal courts. If a party is dissatisfied with the outcome of EPA's rulemaking, it has an opportunity to challenge the rulemaking before an arbiter.

Thus, according to the Court, the CAA offered an ideal regulatory scheme that relied on EPA's rulemaking expertise, while using the federal courts as a check on EPA's rulemaking.

III. *AEP* Serves as Precedent for Defendants and Policymakers in Future Public Nuisance Cases

Plaintiffs have raised public nuisance claims against product manufacturers and regulated industries for years. Several courts have dismissed the claims, based in part on issues regarding the proper role of the branches in creating public policy. For example, courts have held that extending public nuisance liability to lawfully manufactured products required the courts to venture into "policymaking," a task best suited for the political branches. Likewise, the U.S. Court of Appeals for the Fourth Circuit in *North Carolina v. TVA*[31] dismissed a public nuisance claim to limit air emissions from electric-generating plants, in part because allowing individual district court judges to issue nuisance

23. *Id.* at 441.
24. 42 U.S.C. §7411(b)(1)(A) (West 2011).
25. *See* 42 U.S.C. §§7411(a)(1), (b)(1)(B), (d)(1).
26. *See* 42 U.S.C. §§7411(a)-(b).
27. *See also* 42 U.S.C. §§7411(c)(1), (d)(1)-(2).
28. *AEP*, 180 L. Ed. 2d at 450.
29. *Id.*
30. *Id.*
31. 615 F.3d 291, 302, 305, 40 ELR 20194 (4th Cir. 2010).

injunctions would create public policy that resulted in an unsustainable patchwork approach to air regulation.

Despite these rulings, plaintiffs' attorneys have succeeded in bringing public nuisance claims against whole industries, such as the lead paint industry. Thus, it is likely that the plaintiffs' bar will seek to sue based on public nuisance on more products or other highly regulated areas in the future. Likewise, some activists and litigants, upset with the slow pace of the political process to address perceived wrongs from industry, will likely support the use of the public nuisance doctrine in other areas as well.

The Court's rejection of the federal common-law claim in *AEP* significantly affects global warming litigation in particular and public nuisance litigation generally. The language and reasoning used in support of the CAA will serve as useful fodder for defendants—and policymakers supportive of the existing regulatory process—in the public nuisance cases of tomorrow.