The Supreme Court's *AEP* Decision: Snatching Climate Change Solutions Victory From the Jaws of Defeat

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In today's politically polarized environment, legislative and judicial actions tend to be characterized as either stunning victories or crushing defeats. The next-day media reporting and hyperbolic press releases on the U.S. Supreme Court's *American Electric Power et al. v. Connecticut et al.* (*AEP*)[1] decision involving actions to reduce greenhouse gas pollution reflect this trend. Certainly, the U.S. Chamber of Commerce was correct in declaring victory on the Court's holding that the Clean Air Act[2] displaces federal common-law claims asserted by states and other plaintiffs seeking to limit carbon dioxide pollution from coal plants. The Court's decision and its future impacts, however, are much more nuanced and hopeful for environmental progress. For environmental and public health advocates, there is much victory to be snatched from the jaws of the generally expected defeat on the federal common-law displacement issue.

First, the Supreme Court reaffirmed its landmark *Massachusetts v. U.S. Environmental Protection Agency*[3] decision by an 8-0 vote, or at least 6-2 even after reading the peculiar "assuming" controlling precedent concurrence of Justices Samuel Alito and Clarence Thomas. Justice Ruth Bader Ginsburg's opinion for the full Court provides stability and further legitimacy, and it makes certiorari petitions to reexamine *Massachusetts* almost frivolous. Chief Justice John Roberts and Justice Antonin Scalia joined with the Justices who formed the majority in *Massachusetts* in following *stare decisis* principles (which, of course, apply to other 5-4 decisions that they favor as well).

The Court has embraced stability amidst Congress' politically supercharged debate on climate change solutions: "*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the [Clean Air Act]. And we think it equally plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants' [coal] plants."[4]

The clear message to critics seeking to reverse or undermine *Massachusetts* through a post-*Roe v. Wade*[5] type of destabilizing approach: move forward, we've decided the core issue of the U.S. Environmental Protection Agency's (EPA's) Clean Air Act (CAA) authority to set greenhouse gas (GHG) pollution reduction standards. The Supreme Court is not a friendly forum to reverse *Massachusetts*. Forget about trying to get Justice Anthony Kennedy's vote—and, probably, Justices Roberts' and Scalia's votes as well—for challenges that would undermine the integrity and legitimacy of the Court's substantive ruling in *Massachusetts*. Justice Sonia Sotomayor, who recused herself from this particular case, would very likely vote with the *Massachusetts* majority in future cases.

Second, the Court sent a strong message to the U.S. Court of Appeals for the District of Columbia Circuit where polluters and trade associations have filed multiple appeals of EPA's GHG standards: courts should accord *Chevron*[6] deference to Congress' "designated expert agency, here, EPA," which is applying its "scientific, economic and technological" expertise to decisionmaking.

The fates of businesses' appeals of EPA's science-based finding that GHG pollution "endangers" public health are sealed—courts should defer to EPA's scientific and technical expertise. Likewise, the prospects appear dim for appeals of EPA's "tailpipe rule" addressing pollution from cars and trucks.

Appeals of EPA's "tailoring rule," which phases in GHG standards by starting first with the very largest polluters, e.g., coal plants, oil refineries, and then moving next to

1. 564 U.S.__ (2011), No. 10-174, 41 ELR 20210 (June 20, 2011).
2. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
3. 549 U.S. 497, 37 ELR 20075 (2007).
4. *AEP* slip op. at 10 (citation omitted).
5. 410 U.S. 113 (1973).
6. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984).

mid-sized polluters, are weakened by the *AEP* decision. The Court's expressed standard of *Chevron* deference to EPA's decisionmaking expertise provides strong support for EPA's administrative practicality and necessity approach of phasing in CAA implementation for GHG pollution reduction by sensibly starting with the "biggest dogs" first. The Court specifically recognizes that, under §7411(b)(2) of the Act, "EPA may 'distinguish among classes, types, and sizes' of stationary sources in apportioning responsibility for emissions reductions." Finally, even though the Court's decision does not directly touch the "timing" issue raised in another appeal, it is hardly promising for the appellants.

In short, the *AEP* decision puts a heavy brick on these appeals and speeds up EPA's regulatory implementation process by making the business appellants' inevitable certiorari petitions and stay and delay requests pending appeal less persuasive. The Court has not shut the door on challenges to EPA's standards, but has clearly made appeals more difficult. Message to all: We've made up our minds on EPA's authority to regulate this pollution under the CAA—there are not five votes upstairs to overturn or fundamentally undermine *Massachusetts*.

Third, *AEP* upholds Article III standing for "at least some plaintiffs," which include several states, New York City, and private land trusts. The four votes for standing in *Massachusetts* held strong in *AEP*, and Justice Sotomayor is almost certain to agree in future cases. The Court declined to follow the "prudential standing" limitations advocated by the U.S. Department of Justice. The *AEP* decision reaffirms the *Massachusetts* ruling on standing for states, and it explicitly leaves open the door for municipalities, private land trusts, environmental groups, and other parties to assert standing. That issue will now be adjudicated before lower courts, and litigants will structure their cases most favorably to support standing claims and develop the case law.

Fourth, *AEP* explicitly leaves open state common-law nuisance actions and remedies: "None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand."[7] The Court cites helpful precedent stating that "the federal Clean Water Act does not preclude aggrieved individuals" from bringing a state common-law nuisance claim.[8] Whether state common-law tort damage actions are preempted or not by the CAA may next be adjudicated by the U.S. Court of Appeals for the Ninth Circuit in the pending *Native Village of Kivilina v. ExxonMobil Corp.*[9] case and, perhaps, on remand in the *AEP* case if the plaintiffs decide to advance state-law claims included in the original lawsuit.

The U.S. Court of Appeals for the Fourth Circuit found preemption in reversing a district court's ruling that state nuisance law could compel the Tennessee Valley Authority to clean up specific power plants to specific levels by specific times, but that decision is not controlling in other circuits or state courts.[10] There are complex constitutional issues if the CAA is construed to preempt and abrogate state common-law nuisance and other tort damages remedies without providing a corresponding quid pro quo economic value.

In *Duke Power Co. v. Carolina Environmental Study Group,*[11] the Supreme Court upheld the federal Price-Anderson Act, which limits state common-law tort damage actions following a nuclear power plant accident, because the Act included a "reasonably just substitute" remedy. Absent that quid pro quo, the Court's opinion raises, but reserves and leaves open, the question of whether the statute would violate the Due Process Clause:

> The remaining due process objection to the liability limitation provision is that it fails to provide those injured by a nuclear accident with a satisfactory *quid pro quo* for the common law rights of recovery which the Act abrogates. Initially, it is not at all clear that the Due Process Clause, in fact, requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here, since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common law or state tort law remedies it replaces. *Cf. New York Central R. Co. v. White,* 243 U.S. 188 (1917); *Crowell v. Benson,* 285 U.S. 22 (1932) (footnotes omitted).[12]

Subsequent Supreme Court decisions generally supporting states' rights and limiting perceived federal intrusion in areas of traditional state authority do tend to disfavor federal abrogation of state common-law remedies. This jurisprudence points in the direction of retaining state common-law damage actions for GHG and other harmful air pollution, especially in light of the *AEP* decision's specific reference to federal Clean Water Act[13] precedent as not preempting state common-law nuisance actions.

Fifth, the *AEP* decision should provide strong caution to some in Congress who are seeking to take away EPA's jurisdiction to set carbon dioxide pollution reduction standards under the CAA. If that withdrawal of EPA jurisdiction were to become law, then, under *AEP*'s logic, federal common-law claims would be reinvigorated. Congress could seek to both abrogate federal common-law remedies and withdraw EPA jurisdiction, but Congress would have to be very specific and explicit on both counts.[14] Even

7. *AEP* slip op. at 16 (citation omitted).
8. *AEP* slip op. at 15-16 (citation omitted).
9. U.S. Court of Appeals for the Ninth Circuit, Case No. 09-17490 (appeal filed Nov. 5, 2009), appeal of Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 39 ELR 20236 (N.D. Cal. 2009).
10. North Carolina v. Tennessee Valley Authority, 615 F.3d 291, 40 ELR 20914 (4th Cir. 2010)
11. 438 U.S. 59, 87-93, 8 ELR 20545 (1978).
12. *Id.* at 88. *New York Central R. Co. v. White*, 243 U.S. 188 (1917), is a state case involving the constitutionality of a workmen's compensation law. While denying any person's vested interest in the continuation of any particular right to sue (*id.* at 198), the Court twice suggested that abrogation without a reasonable substitute would raise constitutional due process problems. *Id.* at 201.
13. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
14. *E.g.*, United States v. Texas, 507 U.S. 529, 534 (1993).

so, that might raise constitutional issues as preliminarily explored above. In short, opponents of climate change solutions can't easily have it both ways.

As the post-decision spin control and headlines are behind us, the Court's *AEP* decision will likely allow more solutions than impose obstacles and problems in advancing overall public policy support for progress on climate change solutions. The Court has reinforced the legitimacy of *Massachusetts*, stabilized it, and emphasized judicial deference to EPA's scientific, economic, and technological expertise and judgment in ways that deter sidetracking appeals and create room to advance important solutions. The Court has left more doors open than closed on issues for lower courts to decide. The Court has sent green lights, not red lights, to plaintiffs to craft their pleadings, shape issues, and choose cases and forums wisely.