

# The Sweet Taste of Defeat: *American Electric Power Co. v.* *Connecticut* and Federal Greenhouse Gas Regulation

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## I.

### INTRODUCTION

Despite increasingly dire warnings from scientists, the United States Congress has been unable to pass comprehensive legislation to reduce climate altering greenhouse gases. In the absence of new federal legislation, states, cities, and nonprofits have petitioned and sued administrative agencies to regulate pursuant to existing environmental laws. Under former President Bush, executive agencies largely rebuffed these efforts, prompting litigation by environmental plaintiffs. In response to judicial determinations and citizen petitions, as well as by virtue of its own policies,

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the Environmental Protection Agency under President Obama began regulating greenhouse gases pursuant to the Clean Air Act. Political and legal attacks followed swiftly, with opponents charging that the Agency had exceeded its mandate and politicians proposing legislation to incapacitate the Agency.

Meanwhile, plaintiffs have also sued power producers in state and federal common law tort actions characterizing greenhouse gas emissions as a public nuisance. This cause of action—which creates liability for an “unreasonable interference with a right common to the general public”<sup>1</sup>—was used to abate pollution long before the advent of the administrative state.<sup>2</sup> Although public nuisance lawsuits are often viewed as a distinct predecessor to regulation under modern federal environmental statutes, this article argues that these common law actions can significantly influence development of a federal regulatory regime for greenhouse gases.

In the midst of the battle over climate change regulation, the Supreme Court issued its 2011 decision in *American Electric Power v. Connecticut (AEP)*<sup>3</sup> holding that the federal common law public nuisance cause of action relied upon by the plaintiffs had been displaced by the Clean Air Act. Many headlines touted the decision as a win for utilities, highlighting the Court’s rejection of states’ and environmentalists’ claims against the five largest electricity generators in the United States.<sup>4</sup>

Yet, such attention to the formal outcome missed the real import of the case. By strongly reaffirming the Court’s 2007 decision in *Massachusetts v. EPA*, Justice Ginsburg’s brief opinion strengthened the Environmental Protection Agency’s (EPA’s) authority to regulate greenhouse gases under the Clean Air Act. Moreover, because the Court held that displacement of public nuisance claims under federal common law hinges on EPA’s authority to regulate greenhouse gases, the decision impedes con-

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1. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

2. See, e.g., *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (suit to address interstate air pollution).

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

4. See, e.g., Steve Milloy, *Supremes Retreat from Climate Panic*, WASH. TIMES, June 21, 2011, <http://www.washingtontimes.com/news/2011/jun/21/supremes-retreat-from-climate-panic>; David Savage, *Supreme Court Kills Global Warming Suit*, L.A. TIMES, June 21, 2011, <http://articles.latimes.com/2011/jun/21/nation/la-na-court-global-warming-20110621>; Mark Sherman, *High Court Blocks States’ Climate Change Lawsuit*, SEATTLE TIMES, June 20, 2011, [http://seattletimes.nwsourc.com/html/nationworld/2015374368\\_apussupremecourtclimatechange.html](http://seattletimes.nwsourc.com/html/nationworld/2015374368_apussupremecourtclimatechange.html).

gressional Republicans' efforts to obstruct EPA's climate change efforts by amending the Act. Meanwhile, the Court did not decide whether or not the Clean Air Act preempts public nuisance actions brought under *state* law, leaving intact another possible tort avenue for plaintiffs. By bolstering EPA's nascent efforts to regulate greenhouse gases, the decision appreciably advances the development of a federal regulatory regime to address climate change.

Other aspects of the case—less a focus of this discussion—support environmental plaintiffs more broadly. By affirming the Second Circuit on jurisdictional questions, the *American Electric Power* opinion solidified the Court's 2007 holding in *Massachusetts v. EPA* that the injuries caused by climate change and their incremental redress provide an appropriate basis for standing to sue. In addition, the affirmance undermined claims (beginning to gain traction in some courts) that the political question doctrine prevents courts from reaching the merits of climate change suits. All in all, this was not a shabby outcome for states and environmentalists.

The decision could not have come at a better time for EPA. Since shouldering the task of greenhouse gas regulation, EPA had been under attack, on a largely (though not entirely) partisan basis. Members of Congress had introduced numerous bills to strip EPA of power to address climate change and every one of its final rules has been met with litigation.<sup>5</sup> Critics argue that EPA exceeded its authority under the Clean Air Act when it turned to greenhouse gas regulations because the statute was not designed to address climate change. The *AEP* decision, however, underscored the Court's prior holding in *Massachusetts v. EPA* that greenhouse gases fit squarely within the Clean Air Act's purview as does the Agency's power to regulate electric utilities.

Thus, this article argues that the formal loss on states' and environmentalists' federal public nuisance action against the five largest power producers bolsters the development of federal regulations that apply nationwide. Further, assuming they survive preemption challenges, public nuisance actions under state law could advance federal greenhouse gas regulation in both tangible

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5. See, e.g., Dave Michaels, *Texas Leads States' Attack on EPA's Climate Change Rules*, DALLAS MORNING NEWS, Jan. 11, 2011, at D1 (quoting Lauren Bean, spokeswoman for Texas Attorney General Greg Abbot, describing EPA's actions as an "unprecedented and unlawful overreach by the federal government" but noting that only Texas had pressed legal challenges to all four of EPA's adopted regulations).

and intangible ways by serving as highly visible fora for discussing climate change impacts, generating political pressure, and prompting data collection, among other things.

This article proceeds as follows: Section II reviews *Massachusetts v. EPA* and the regulatory actions that it prompted; Section III describes how *AEP v. Connecticut* reinforces EPA's underlying regulatory authority and undermines efforts to amend away this power'; Section IV addresses the questions left open by *AEP v. Connecticut* and proposes how state public nuisance actions could contribute to the development of federal climate change law. Section V briefly concludes.

## II.

### MASSACHUSETTS V. EPA AND ITS AFTERMATH

#### A. *The 2007 Opinion*

The Court's decision in *American Electric Power v. Connecticut* came down amidst controversy over EPA's initial efforts to regulate greenhouse gases (GHGs) under the Clean Air Act (CAA or Act) pursuant to the Court's 2007 decision in *Massachusetts v. EPA*.<sup>6</sup> While many readers of this symposium issue will be quite familiar with *Massachusetts v. EPA*, a brief review of the decision and its aftermath provides a useful backdrop for highlighting *AEP*'s implications.

In 2003, EPA denied a petition to regulate vehicular GHG emissions under CAA section 202.<sup>7</sup> The section provides that the EPA Administrator "shall by regulation prescribe" emission standard for "any air pollutant" from new motor vehicles . . . "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>8</sup> EPA claimed that it lacked authority under the Act to regulate GHG emissions because they did not meet the statute's definition of an "air pollutant."<sup>9</sup> The Agency further stated that even if GHGs fell within the Act's purview, EPA would decline to regulate for policy reasons.<sup>10</sup> Among other things, EPA argued that regulating GHGs under section 202 represented an

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6. *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438 (2007).

7. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (petition for rulemaking denied Sept. 8, 2003).

8. Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2006).

9. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,928.

10. *Id.* at 52,930.

“inefficient, piecemeal approach” that would undermine the Bush administration’s “comprehensive” climate change policy.<sup>11</sup> Claiming that EPA had abdicated its statutory duties, Massachusetts sued, along twenty-nine other parties, including states, local governments, and environmental groups.

In *Massachusetts v. EPA*, the Court rejected EPA’s claim that it lacked authority to regulate GHG emissions from motor vehicles and underscored that a recalcitrant executive branch could not ignore the text of the Clean Air Act. The Court held that GHGs fit squarely within the Act’s definition of “air pollutant.”<sup>12</sup> As a result, EPA could not avoid regulating GHG emissions on the theory that it would exceed the Agency’s statutory authority. The Court also rejected EPA’s policy bases for refusing to regulate, finding that the Agency’s discretion to deny the petition was limited to rationales provided within the text of the Act.<sup>13</sup>

Although the Court remanded to EPA to reconsider, the decision left little room for the Agency to deny the petition again. The Court charged the Administrator with making the determinations required by CAA section 202: deciding if, “in his judgment,” pollution from greenhouse gases “may reasonably be anticipated to endanger public health or welfare” and whether emissions from new motor vehicles “cause or contribute to this air pollution.”<sup>14</sup> EPA could only decline to assess endangerment if it provided a “reasoned justification” grounded in the science of climate change.<sup>15</sup> As EPA’s original rulemaking denying the petition had already acknowledged the risks from climate change, it had no scientific basis for refusing to find endangerment and to commence standard setting.<sup>16</sup>

### B. *Regulatory Aftermath*

This section describes the regulatory aftermath of *Massachusetts v. EPA*, which by the CAA’s terms inevitably extended beyond just setting motor vehicle standards. The endangerment criteria that trigger standard setting for mobile source under section 202 are virtually identical to language elsewhere in the Act

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11. *Id.* at 52,931.

12. *Massachusetts v. Env’tl. Prot. Agency*, 127 S. Ct. 1438, 1459–60.

13. *Id.* at 1462–63.

14. *Id.* at 1462.

15. *Id.* at 1444.

16. See Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (petition for rulemaking denied Sept. 8, 2003).

that triggers regulation of stationary sources, such as power plants.<sup>17</sup> Moreover, certain permitting requirements apply to major stationary facilities for “each pollutant subject to regulation” under the Act,<sup>18</sup> meaning that creation of mobile source greenhouse gas standards would trigger these provisions as well. Indeed, one critic of proposals to regulate GHGs under the Act acknowledged in a case comment that the decision “gives the Agency little option but to regulate, and not just emissions from new motor vehicles.”<sup>19</sup> Under President Obama the Agency has promulgated greenhouse gas rules that include the Reporting Rule, Endangerment Finding, PSD Rule, Tailpipe Rule, and the Tailoring Rule described below.

In the wake of the 2007 decision, and pursuant to an executive order, EPA and the Department of Transportation began collaborating on motor vehicle GHG emission standards in May 2007.<sup>20</sup> Although the Bush EPA initially appeared to be moving forward with GHG regulation of motor vehicle emissions, it failed to rule on the endangerment question and instead issued an Advanced Notice of Proposed Rulemaking for Regulating GHG Emissions under the Act (ANPR) on July 30, 2008.<sup>21</sup> The ANPR provided extensive staff analysis of the interactions between various portions of the Act, including the broad implications of a mobile source endangerment for triggering stationary source regulation under other sections of the Act.<sup>22</sup> It also included an introduction by EPA then-Administrator Stephen L. Johnson referring to the Act as an “outdated law [that is] ill-suited to the task of regulating global greenhouse gases,”<sup>23</sup> thus rearguing issues presumably settled in *Massachusetts v. EPA*.<sup>24</sup>

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17. See, e.g., Clean Air Act §§ 108(a), 111, 202, 213, 231, 42 U.S.C. §§ 7408, 7411, 7521, 7547, 7571 (2006).

18. § 165(a)(4), 42 U.S.C. § 7475(a)(4) (2006).

19. Jonathan 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. 32, 33 (2007).

20. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,353, 44,443 (July 30, 2008) (to be codified at 40 C.F.R. ch.1).

21. *Id.* at 44,354.

22. *Id.* at 44,355.

23. *Id.*

24. Shortly before this, in April 2008, EPA had rejected claims that it must promulgate New Source Performance Standards for GHG emissions from petroleum refineries during its mandated review of that program. EPA argued that the Act did not require regulation of GHGs because they differ markedly from other pollutants; it further claimed that it had discretion to employ a more deliberate process, as already commenced with the initiation of the ANPR, to set any performance stan-

It was not until the Obama administration took office that EPA began moving forward with GHG regulation. EPA first issued a final Mandatory Greenhouse Gases Reporting Rule (Reporting Rule) in October 2009 designed “to gather greenhouse gases information to assist EPA in assessing how to address greenhouse gas emissions and climate change under the Act.”<sup>25</sup>

In December 2009, the EPA Administrator made the findings requisite to trigger regulation of motor vehicles under CAA section 202, concluding that GHG emissions from motor vehicles “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>26</sup> While this “Endangerment Finding” formally applied only to vehicle emissions under section 202, the relationship to language triggering stationary source regulation made it inevitable that EPA’s reach would extend beyond mobile sources.

EPA began regulating stationary sources with the Act’s provisions for prevention of significant deterioration (PSD) of air quality in regions that already meet national ambient standards. Among other things, PSD requires pre-construction review of new stationary sources for emissions of pollutants “subject to regulation” under the Act.<sup>27</sup> On March 29, 2010, EPA finalized a rule amending provisions of the PSD requirements<sup>28</sup> to formalize the definition of pollutants “subject to regulation” under the CAA. EPA adopted the approach of a 2008 memorandum by then-Administrator Stephen L. Johnson<sup>29</sup> that defined a pollutant “subject to regulation” as any

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dards. Standards of Performance for Petroleum Refineries, 73 Fed. Reg. 35,838, 35,858–59 (June 24, 2008) (to be codified at 40 C.F.R. pt. 60).

25. Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,260, 56,265 (Oct. 30, 2009) (to be codified at 40 C.F.R. pts. 86, 87, 89, 90, 94, 98, 1033, 1039, 1042, 1045, 1048, 1051, 1065).

26. Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2006); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 1).

27. § 165(a)(4), 42 U.S.C. § 7475(a)(4) (2006).

28. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (April 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71).

29. Memorandum from Stephen L. Johnson, EPA Administrator, on EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program to the EPA Regional Administrators (Dec. 18, 2008), available at [http://www.epa.gov/NSR/documents/psd\\_interpretive\\_memo\\_12.18.08.pdf](http://www.epa.gov/NSR/documents/psd_interpretive_memo_12.18.08.pdf).

air pollutant . . . subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator . . . that requires actual control of the quantity of emissions of that pollutant, and that such control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity.<sup>30</sup>

The Obama EPA later construed regulations to “take effect” only when “actual compliance” was required.<sup>31</sup>

At the time EPA finalized the PSD rule, a nationally applicable regulation requiring actual control of the quantity of GHG emissions did not yet exist, leaving GHG emissions outside of PSD controls. But that was about to change. EPA issued its Light-Duty Vehicle Rule in May 2010 establishing GHG emissions standards for vehicles beginning with model year 2012.<sup>32</sup> This “Tailpipe Rule” would soon take effect, requiring actual control of the quantity of emissions from vehicles, thus triggering the PSD pre-construction permitting (as well as Title V operating permit<sup>33</sup>) requirements for new or modified major stationary sources.

EPA recognized that if the permitting requirements took effect as written on January 2, 2011 without a limiting measure in place, a large number of small emitters would be newly classified as “major sources” in need of permits; because GHGs are emitted in exponentially larger quantities than most pollutants covered by the Act, the 100 and 250 ton permitting thresholds,<sup>34</sup> would capture many more sources than previously covered by the Act. To avoid the costs and administrative burden of imposing PSD

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30. 40 C.F.R. § 51.166(b)(48) (2011); *see also* 40 C.F.R. § 52.21(b)(49) (2011).

31. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71).

32. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. 85, 86, 600).

33. Clean Air Act § 502(a), 42 U.S.C. § 7661(a) (1990) (requiring operating permits for any source subject to PSD pre-construction permitting requirements).

34. *See* § 169(1), 42 U.S.C. § 7479(1) (proposed May 26, 2011); *see also* 40 C.F.R. §§ 51.166(b)(1)(i)(a), 52.21(b)(1)(i)(a) (2011) (defining “Major Stationary Sources” as a discrete set of sources which emit or have the potential to emit 100 tons per year of a regulated pollutant); 40 C.F.R. §§ 51.166(b)(1)(b), 52.21 (b)(1)(b) (2011) (noting all stationary sources which emit or have the potential to emit 250 tons per year of a regulated pollutant).

and Title V permitting protocols on small entities,<sup>35</sup> EPA issued its PSD and Title V Greenhouse Gas Tailoring Rule (“Tailoring Rule”) in June 2010 implementing a phased-in approach.<sup>36</sup> The first phase applied only to sources already subject to permitting for non-GHG pollutants with a subsequent phase reaching new and existing sources with high emission levels.<sup>37</sup> The Tailoring Rule initially exempted all sources with emissions below 50,000 tons per year (tpy) of CO<sub>2</sub>e<sup>38</sup> and all modified sources whose modifications resulted in net increases of less than 50,000 tpy CO<sub>2</sub>e from PSD or Title V permitting requirements until at least April 30, 2016.<sup>39</sup> The Tailoring Rule, however, established an “enforceable commitment” to study PSD and Title V permitting for smaller sources and to engage in further rulemaking by April 2016.<sup>40</sup>

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35. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71).

36. The first phase of the Tailoring Rule, which took effect January 2, 2011, required only those new and existing stationary sources already subject to the PSD and Title V permitting requirements for non-greenhouse gas pollutants to acquire permits for the greenhouse gas emissions. 40 C.F.R. § 51.166(b)(48)(iv)(a-b) (2010). The second phase, taking effect July 1, 2011, expanded the scope of sources to new sources “that will emit or have the potential to emit 100,000 tpy CO<sub>2</sub>e or existing stationary sources that emit or have the potential to emit 100,000 tpy CO<sub>2</sub>e” and “undertakes a physical change or change in method of operation that will result in an emissions increase of 75,000 tpy CO<sub>2</sub>e or more.” *Id.*

37. *Id.*

38. In the rule, EPA used an emissions threshold based on the sum of emissions of CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, HFCs, PFCs, and SF<sub>6</sub>, employing a common metric for all six well-mixed greenhouse gases. Because each GHG has different global warming potentials, the metric measures each gas in comparison to the warming effect of carbon dioxide. Thus, the sum can be expressed as the “carbon dioxide equivalent” or “CO<sub>2</sub>e.” See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516–19.

39. *Id.* at 31,514, 31,516. EPA justified the initial exemption for small sources on the grounds that:

[T]he administrative burdens that would accompany permitting sources below this level will be so great that even the streamlining actions that EPA may be able to develop and implement in the next several years, and even with the increases in permitting resources that we can reasonably expect the permitting authorities to acquire, it will be impossible to administer the permit programs for these sources until at least 2016. [EPA further found that] the costs to sources and administrative burdens to permitting authorities [ ] that would result from application of the PSD and title V programs for GHG at the statutory levels as of January 2, 2011, are so severe that they bring the judicial doctrines of “absurd results,” “administrative necessity,” and “one-step-at-a-time” into the Chevron two-step analytical framework for statutes administered by agencies.

*Id.* at 31,517.

40. *Id.* at 31,525.

As noted above, EPA's rulemaking process has met substantial opposition. Republicans in the House of Representatives attacked EPA on multiple occasions, offering amendments to strip its authority to regulate GHGs and attempting to defund the agency.<sup>41</sup> Representative Mike Simpson referred to EPA as the "scariest agency in the federal government" and promised legislative measures to limit EPA, reining in its "excesses."<sup>42</sup> On February 9, 2011, the House Committee on Energy and Commerce Subcommittee on Energy and Power held hearings on amendments to the CAA, pithily entitled "The Energy Tax Prevention Act of 2011," designed to eliminate EPA authority to address climate change.<sup>43</sup> The New York Times described the hearings as a "formal assault on the [EPA's] authority to regulate greenhouse gases, raising doubts about the legal, scientific, and economic basis of rules proposed by the agency."<sup>44</sup>

Critics claimed that EPA exceeded its authority, misunderstood *Massachusetts v. EPA*, and that its GHG regulations would undermine the U.S. economy. In his testimony on his Energy Tax Prevention Act of 2011, for example, Senator Inhofe stated:

EPA claims the Supreme Court forced it to act. Not so; the Supreme Court ruled that EPA possessed the discretion under the Clean Air Act to decide whether greenhouse gases endanger public health and welfare. EPA was given a choice, and it made the wrong choice. The Energy Tax Prevention Act is the right choice for jobs, for consumers, for a growing economy, and for the future of America.<sup>45</sup>

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41. See, e.g., *House Panel Moves to Strip EPA Authority Over Greenhouse Gases, Other Pollutants*, BLOOMBERG BNA, (July 12, 2011), <http://www.uslawwatch.com/2011/07/15/environment/house-panel-moves-strip-epa-authority-greenhouse-gases-pollutants>.

42. *Id.*

43. *Hearing on H.R. \_\_, The Energy Tax Prevention Act of 2011 Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 112th Cong. 1 (2011), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112\\_house\\_hearings&docid=f:65734.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_house_hearings&docid=f:65734.pdf); See also *Energy Tax Prevention Act of 2011*, H.R. 910, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112-hr910ih/pdf/BILLS-112hr910ih.pdf>.

44. John M. Broder, *House Republicans Take E.P.A. Chief to Task*, N.Y. TIMES, Feb. 9, 2011, <http://www.nytimes.com/2011/02/10/science/earth/10emissions.html>.

45. *Hearing on H.R. \_\_, The Energy Tax Prevention Act of 2011 Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 112th Cong. 14 (2011) (statement of Sen. James M. Inhofe, Ranking Member, S. Comm. on Env't & Pub. Works), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112\\_house\\_hearingsonclusion&docid=F:65734.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_house_hearingsonclusion&docid=F:65734.pdf).

Other members of Congress introduced alternative measures to hamstring EPA; Senator Murkowski, for example, introduced a joint resolution to invalidate the Endangerment Finding.<sup>46</sup> Opponents of GHG regulation have also sued to prevent implementation of the regulations. Texas, for example, has pressed legal challenges to the Endangerment Finding, the Tailoring Rule, and even the Tailpipe Rule.<sup>47</sup>

### III.

#### *AMERICAN ELECTRIC POWER V. CONNECTICUT*

##### A. *Impact on EPA's Clean Air Act Authority*

The Supreme Court decision in *American Electric Power v. Connecticut*, handed down on June 20, 2011, offered the embattled agency some needed support. Although Justice Ginsburg's opinion formally answered only the question of Clean Air Act displacement of federal common law, it endorses EPA's broad regulatory role under the Act.<sup>48</sup>

The Court held that the Act displaced federal common law claims against power companies for contributing to the public nuisance of global warming.<sup>49</sup> The decision reversed a Second Circuit case holding that state, local, and nonprofit plaintiffs had successfully stated a claim for public nuisance against the fossil fuel-fired power companies under federal common law.<sup>50</sup> The Second Circuit's opinion included lengthy discussions supporting its conclusion that plaintiffs had standing<sup>51</sup> and that the trial court erred in finding that climate change presented a nonjusticiable political question.<sup>52</sup> The Supreme Court affirmed these aspects of the Second Circuit's decision without analysis, simply noting that the Court was equally divided, leaving the decision intact.<sup>53</sup>

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46. S.J. Res. 26, 111th Cong. (2010) ("Disapproving a rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act."), available at <http://www.govtrack.us/congress/billtext.xpd?bill=SJ111-26>.

47. See Michaels, *supra* note 5.

48. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2532, 2537–38.

49. *Am. Elec. Power Co.*, 131 S. Ct. at 2532.

50. *Id.* at 2540.

51. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 332–349 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

52. *Id.* at 321–332.

53. *Am. Elec. Power Co.*, 131 S. Ct. at 2535. By supporting certiorari, a much criticized move, the Obama administration apparently gambled that the Court would decide the case not on constitutional grounds (which would have struck a

Given the Court's prior five-four split on standing to raise a climate change challenge in *Massachusetts v. EPA* and the retirement of that opinion's author, Justice Stevens, *AEP* seemed like potentially fertile ground for a retrenchment on standing. Yet conservative justices did not get enough votes to decide the case on standing grounds. Nor did the defendants succeed in luring the Court into expanding the narrow political question doctrine into a jurisdictional bar to climate change litigation. Given her former seat on the Second Circuit panel, Justice Sotomayor did not participate in the Supreme Court decision, leaving eight members to split evenly. The opinion noted without elaboration that its four-four division on jurisdictional questions left intact the Second Circuit holding that plaintiffs had standing to bring suit and that the action did not present a nonjusticiable political question.<sup>54</sup> Justice Ginsburg managed to speak for an undivided court, likely by crafting an opinion that avoided lengthy exegesis on standing or the political question doctrine that could have provoked a dissent.

What could have been a fatal blow to standing for climate change plaintiffs turned instead into an endorsement of EPA's authority and obligation to address GHG emissions via the Clean Air Act. Notably, the opinion opened by reiterating the holding of *Massachusetts v. EPA*:

In *Massachusetts v. EPA*, this Court held the Clean Air Act authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases . . . . *Massachusetts* held that the Environmental Protection Agency (EPA) had misread the Clean Air Act when it denied a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles. Greenhouse gases, we determined, qualify as "air pollutant[s]" within the meaning of the governing Clean Air Act provision.<sup>55</sup>

Because GHGs meet the Act's definition of a pollutant, as held in *Massachusetts v. EPA*, EPA's regulation of GHGs falls precisely "within EPA's regulatory ken."<sup>56</sup>

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major blow to environmentalists on many issues) but rather on the relatively narrow grounds that EPA's Clean Air Act authority to regulate greenhouse gas emissions from power plants displaces federal common law nuisance actions (leaving those who seek to reduce power plant emissions via federal law to first petition EPA rather than the courts). However, the administration's gamble seems to have paid off—at least as far as the basis for this decision goes.

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

55. *Id.* at 2532–33 (internal citations omitted).

56. *Id.* at 2533.

The Court's displacement finding turned on analysis of the scope of EPA authority under the Act. Thus, the Court stated that the statute "and the Environmental Protection Agency action the Act authorizes" displace plaintiffs' claims.<sup>57</sup> The Court rejected the plaintiffs' argument that displacement depended upon the promulgation of regulations.<sup>58</sup> The Second Circuit had ruled that it could not discern whether EPA regulations would satisfy the test for displacement by "speak[ing] directly to the particular issue raised here by Plaintiffs" until they were actually promulgated.<sup>59</sup> Instead, the Court held that the federal legislation "authorizing" EPA to regulate carbon dioxide emissions (rather than the promulgation of regulations themselves) affected the displacement.<sup>60</sup> The critical test is "simply whether the statute 'speaks directly to the question' at issue."<sup>61</sup> According to the Court: "*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. And we think it equally plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants."<sup>62</sup>

This simple statement and the Court's subsequent description of how section 111 (which establishes New Source Performance Standards for stationary sources) governs GHG emissions from both new and existing power plants reinforces the appropriateness of EPA efforts to address these emitters. (It also likely renders frivolous any potential legal challenge to EPA's authority to regulate GHG emissions from power plants under section 111.) As part of its displacement analysis, the Court also stated that "if EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court. . . . The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants. . . ."<sup>63</sup>

Critically, the court reiterated the strong language in *Massachusetts v. EPA* regarding the limits of agency discretion to avoid regulating GHGs:

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57. *Id.* at 2532.

58. *Id.* at 2538.

59. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 380 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011) (internal citations omitted).

60. *Am. Elec. Power Co.*, 131 S. Ct. at 2537.

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

62. *Id.* (internal citations omitted).

63. *Id.* at 2530.

[T]he Clean Air Act directs EPA to establish emissions standards for categories of stationary sources that, “in [the Administrator’s] judgment,” “caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” “The use of the word ‘judgment,’” we explained in *Massachusetts*, “is not a roving license to ignore the statutory text.” “It is but a direction to exercise discretion within defined statutory limits.”<sup>64</sup>

So where does the *AEP* leave us? First, it underscores EPA’s role in setting standards for GHGs by defining such action as firmly within EPA’s regulatory “ken.” It also offers the Supreme Court’s imprimatur on EPA’s interpretation of *Massachusetts v. EPA* and its authority to transition from regulation of mobile sources to stationary sources. Finally, it reminds EPA (and any future executive that might be less inclined to address climate change) of the limits of agency discretion to avoid regulating GHGs.

#### B. *Potential Impact on Proposals to Amend Away EPA Authority*

The *AEP* decision also creates something of a conundrum for members of Congress who have introduced bills to eviscerate EPA’s authority to regulate GHGs by amending the CAA. Success on such legislative measures could revive the type of action that *AEP* put to rest. As the Court explicitly held: “The Second Circuit erred . . . in ruling that federal judges may set limits on greenhouse gas emissions in face of a law empowering EPA to set the same limits. . . .”<sup>65</sup> Thus, removing EPA’s power to set greenhouse gas emission limits on power plants would negate the displacement obstacle to federal common law nuisance claims found by the Court.

Among the numerous bills introduced to change EPA authority, Senator Inhofe’s proposed “Energy Tax Prevention Act of 2011” serves as a particularly prominent and illustrative example. These CAA amendments would eliminate the precise portions of the Act responsible for the displacement finding by prohibiting the EPA from “promulgat[ing] any regulation concerning, take action relating to, or take into consideration the emission of a

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64. *Id.* at 2539 (alteration in original) (citations omitted).

65. *Id.* at 2540.

greenhouse gas to address climate change.”<sup>66</sup> In addition, the amendments would revise the Act’s definition of “air pollutant” to exclude GHGs except when regulated for some purpose other than climate change.<sup>67</sup>

While the proposed amendments spared fuel economy and GHG emission standards promulgated in 2010 pursuant to Congressional action,<sup>68</sup> the Inhofe amendments would have repealed almost all EPA regulations that had been adopted at that time, including the Endangerment Finding, the Johnson memo and its reinterpretation, the Tailoring Rule, the SIP call, and even the mandatory reporting requirements.<sup>69</sup>

While the bill’s introduction may have offered political payoff, these amendments, if enacted, would now eliminate the basis for displacement found in *AEP*. Should these or similar amendments become law, the rationale for displacement would evaporate, reviving the possibility of a federal public nuisance claim.<sup>70</sup> Although many industries have opposed GHG regulation in general, they may hesitate to encourage uncertainty about future litigation that could then result.

#### IV.

#### WHAT NEXT? REDUCING GREENHOUSE GASES THROUGH STATE PUBLIC NUISANCE ACTIONS

The Court’s decision in *AEP* left unanswered the question of whether or not the Clean Air Act preempts public nuisance suits under state law, an issue explicitly left to the lower courts on remand. As preemption of state law must satisfy a much more

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66. Energy Tax Prevention Act of 2011, H.R. 910, 112th Cong. sec. 2, § 330(b)(1)(A) (2011).

67. H.R. 910 § 330(b)(1)(B).

68. H.R. 910 § 330(b)(2).

69. H.R. 910 § 330 (b)(4).

70. Congressional opponents of GHG regulation have also sought to simply reduce agency funding, an approach much less likely to reinvigorate federal common law. See Paige Winfield Cunningham, *EPA’s Funding Facing Rollback*, WASH. TIMES, July 25, 2011, <http://www.washingtontimes.com/news/2011/jul/25/epa-s-funding-facing-rollback>. However, unlike an amendment to the Clean Air Act, funding reductions lack the same long-term impact to EPA’s power because they can easily be reversed by future budgetary decisions. Moreover, funding reductions are much less likely to offer the same political impact as amending the Act. Nonetheless, this potential tactic shows the limits of the benefit *AEP* conferred on the Agency; while it gave EPA some protection from an outright removal of its authority, it did not preclude more indirect attacks.

demanding test than displacement of federal common law, it remains to be seen how courts will answer this question.

This author concurs with commentators who argue that the Clean Air Act should not be found to preempt climate change damage suits for public nuisance against power plants and other stationary sources under the law of the source state (particularly when plaintiffs seek only damages).<sup>71</sup> Briefly, the statutory text demonstrates that Congress knew how to limit state authority when it so intended, as evidenced by its explicit preemption of state regulation of mobile sources.<sup>72</sup> The one exception—the Act’s waiver of mobile source preemption for California—further shows that Congress explicitly and specifically framed the scope of state authority,<sup>73</sup> leaving little to interpretation.

While the Court in *AEP* did not rule on preemption, dicta supports plaintiffs’ ability to proceed under state tort law. Justice Ginsburg underscored the distinction between displacement and preemption analysis, stating: “Legislative displacement of federal

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71. See, e.g., Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827, 1852–58 (2008).

72. The statutory text states:

Prohibition. No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Clean Air Act § 209(a), 42 U.S.C. § 7543(a) (2006).

73. The statutory text describes the exception:

Waiver. (1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that— (A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521 (a) of this title.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

§ 209(b), 42 U.S.C. § 7543(b) (2006).

common law does not require the ‘same sort of evidence of clear and manifest [congressional] purpose’ demanded for preemption of state law.”<sup>74</sup> The opinion went on to remind its readers that the higher burden for preemption stems from “[d]ue regard for the presuppositions of our embracing federal system . . . as a promoter of democracy.”<sup>75</sup> Further, the Court quoted *International Paper Company v. Oullette*<sup>76</sup> for its holding that the Clean Water Act did not “preclude aggrieved individuals from bringing a ‘nuisance claim pursuant to the law of the *source* [emphasis in original] State.”<sup>77</sup> Finally, the *AEP* Court focused its displacement analysis on plaintiffs’ request for injunctive relief in a form of emission caps and mandatory reductions. It stressed the multiple objectives EPA must balance in creating a comprehensive regulatory regime and commented that “the expert agency is surely better equipped to the job than individual district judges issuing ad hoc, case-by-case injunctions.”<sup>78</sup> Because the decision emphasized the regulatory nature of the injunctive remedy sought by plaintiffs, it gave no hint that the Clean Air Act would be troubled by a state court suit for damages.

The preemption question certainly warrants (and surely will receive elsewhere) a lengthy analysis, but assuming state nuisance actions are not found to be preempted, how could they contribute to the development of federal climate change law? As Jonathan Zasloff has argued, state common law nuisance actions for damages would offer two oft-recognized benefits of state authority over environmental issues.<sup>79</sup> First, state public nuisance suits could provide laboratories for developing models of damage assessment. Second, regulated industries may be much more inclined to support imposition of uniform federal standards when faced with the prospect of multiple and diverse state law requirements.<sup>80</sup>

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74. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (quoting *City of Milwaukee v. Illinois & Michigan*, 101 S. Ct. 1784, 1792 (1981)).

75. *Id.* (quoting *City of Milwaukee v. Illinois & Michigan*, 101 S. Ct. 1784, 1792 (1981)).

76. 479 U.S. 481 (1987).

77. *Am. Elec. Power Co.*, 131 S. Ct. at 2540 (quoting *Int’l Paper Co. v. Oullette*, 479 U.S. 481, 497 (1987)).

78. *Id.* at 2539.

79. *See Zasloff, supra* note 71.

80. *See id.* at 1843–45; *see also* Michaels, *supra* note 5 (quoting utility company attorney Kevin P. Holeywinski as stating that regulatory ambiguity and uncertainty created by litigation over EPA’s greenhouse gas permitting requirements would be a “train wreck”).

State nuisance suits may advance federal regulation in other less tangible ways as well regardless of their success or failure on the merits. Benjamin Ewing and Doug Kysar argue that state tort suits could facilitate institutional evolution, making governance structures more nimble in responding to twenty-first century threats such as climate change and terrorism.<sup>81</sup> Ewing and Kysar envision tort suits as opportunities for courts to exhort other branches with “prods and pleas”—“signal[ing] to other institutional actors that a given problem demands attention and action.”<sup>82</sup> Other scholars have described the role lawsuits can play in changing social norms by “highlight[ing] impacts and inequities”<sup>83</sup> and building political support by “link[ing] climate change with the lives of ordinary people.”<sup>84</sup> As David Hunter explains, abstractions such as average global temperature increases or even sea level rise may mean little to most people; however, when cases link these effects to detailed impacts on specific victims whose homes and livelihoods are damaged, climate change takes on more urgency.<sup>85</sup>

State nuisance cases could also offer a tangible handle for understanding the context for agency actions. While EPA’s activities are remote from the general public, which knows little about notice and comment rulemaking and how it shapes environmental law, courts provide highly visible fora for informing the public about climate change. Damage suits would be much more likely to garner media and public attention than the ongoing and presumably boring (except to lawyers and legal scholars) activities of a federal agency. Moreover, public nuisance suits will be articulated in language that is more familiar to the general public, using such concepts as harm and language of “reasonableness,” “rights,” “public health” and “long lasting effects”<sup>86</sup> rather than

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81. See, Benjamin Ewing & Douglas Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 354 (2011).

82. *Id.*

83. Hari M. Osofsky, *Adjudicating Climate Change Across Scales*, in ADJUDICATING CLIMATE CHANGE: STATE NATIONAL, AND INTERNATIONAL APPROACHES 375, 380–81 (William C.G. Burns & Hari M. Osofsky eds., 2009).

84. David B. Hunter, *The Implications of Climate Change Litigation: Litigation for International Environmental Law Making*, in ADJUDICATING CLIMATE CHANGE: STATE NATIONAL, AND INTERNATIONAL APPROACHES 357, 360 (William C.G. Burns & Hari M. Osofsky eds., 2009).

85. *Id.*

86. The Restatement defines a public nuisance as “an unreasonable interference with a right common to the general public.” RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979). It further provides:

the more abstract and technical language of regulatory standard setting. Indeed, the types of harms alleged by the parties in *AEP*—risks to public lands, infrastructure, and health, as well as habitat destruction on land privately held by land trusts—are relatively easy to envision. The tangible demonstration of harm in public nuisance suits may render the technical agency regulatory process more accessible (and perhaps more interesting) to the general public.

Public nuisance suits under state law could also contribute to the development of federal regulation in a very practical manner by informing EPA's data gathering process. The collection of extensive evidence on regional impacts and localized harms to plaintiffs for state tort suits could ultimately advance development of detailed records for EPA's regulatory analysis. An information transfer would be facilitated in cases where repeat players—such as national nonprofits or coalitions of governmental and nongovernmental plaintiffs—bring state nuisance actions—a not unlikely scenario. These repeat players would be likely to submit public comments in federal regulatory proceedings, drawing upon critical information about local impacts developed for specific public nuisance lawsuits. Assuming these parties proffered the evidence in public comments on proposed regulations or in rulemaking petitions, this information could serve as an inexpensive source of data about local conditions and concerns that might otherwise escape EPA's awareness.

Moreover, because portions of the Clean Air Act require EPA to consider costs and benefits of regulations, the record developed in these cases would provide information on regulatory benefits that might otherwise prove too costly and time-consuming for the Agency to gather. Indeed, some of the data might even be inaccessible to the Agency absent this process.

In sum, lawsuits under state public nuisance law could advance the development of federal greenhouse gas regulation regardless of the resolution on the merits. Successful cases would provide laboratories for damage assessment and motivation for industry support of a federalized regime. Both successful and unsuccessful

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Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or . . . (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

*Id.* at § 821B(2).

cases may serve educational, political, and institutional prodding functions. Given the highly politicized nature of greenhouse gas regulation, increased awareness about the potential impacts from climate change could prove critical to ensuring the continuing existence of federal regulation. Lawsuits also stand to serve a data gathering and transfer function that directly facilitates the regulatory process. Thus, the seemingly disparate approaches to effectuating emission reductions—federal regulation and old-fashioned common law tort actions—may ultimately interact much more than one would initially suspect.

## V.

### CONCLUSION

In the midst of the highly politicized debate over climate change regulation, the Supreme Court's decision in *AEP* provides much more potential environmental benefit than its formal outcome suggests. Justice Ginsburg's opinion showed her to be the kind of savvy liberal leader on the Court thought to be lost when Justice Stevens retired. She managed to write a unanimous opinion on a contentious issue that had closely divided the Court just four years earlier while bolstering EPA's authority and reinforcing the Court's prior opinion in *Massachusetts v. EPA*. By repeatedly reiterating the Court's holding in *Massachusetts v. EPA*, she strengthened its continuing power. Moreover, by penning a simple statement that a divided court affirmed the Second Circuit's holding, she avoided a battle over standing that might have ensued from a lengthy analysis of the topic. In doing so, she provided the second Supreme Court opinion in four years recognizing plaintiffs' standing to pursue climate change litigation. Finally, the ruling left open the possibility of future state nuisance actions that could benefit not only the plaintiffs in those cases, but also the development of federal regulatory regime to address climate change.