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## American Electric Power v. Connecticut, 131 S. Ct. 2527 (2011)

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# *American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011)

Sarah E. Rust\*

## *I. Background*

In the landmark 2007 case of *Massachusetts v. EPA*,<sup>1</sup> several States, local governments, and private organizations alleged that the Environmental Protection Agency (EPA) “abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide.”<sup>2</sup> This action arose out of the EPA’s denial of a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles.<sup>3</sup> In particular, the petitioners argued that the EPA has been given the authority to regulate greenhouse gas emissions, and that as a result, its stated reasons for refusing to regulate are inconsistent with the statute.<sup>4</sup> The Supreme Court held that the Clean Air Act (CAA) authorizes federal regulation of such emissions, and that the EPA improperly interpreted the CAA “when [the EPA] denied a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles.”<sup>5</sup>

In response to *Massachusetts*, the EPA “undertook greenhouse gas regulation,”<sup>6</sup> concluding that “the combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas air pollution that endangers public health and welfare under CAA section 202(a).”<sup>7</sup> This triggered the EPA’s ability to regulate under the CAA.<sup>8</sup> The agency then commenced rulemaking under § 111 of the Act,<sup>9</sup> aimed at setting limits on greenhouse gas emissions from new,

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1. *Massachusetts v. EPA*, 549 U.S. 497 (2007).
2. *Id.* at 505.
3. *See id.* (explaining the basis of the petitioners’ claims).
4. *See id.* (outlining the questions raised by petitioners’ on appeal).
5. *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2532 (2011) (citing *Massachusetts v. EPA*, 549 U.S. 497, 510–11 (2007)).
6. *Id.* at 2533.
7. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496-01 (Dec. 15, 2009).
8. *See American Elec. Power Co.*, 131 S. Ct. at 2533 (“In December 2009, the agency concluded that greenhouse gas emissions from motor vehicles ‘cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,’ the Act’s regulatory trigger.”).
9. 42 U.S.C. § 7411 (2012).

modified, or existing fossil fuel fired power plants.<sup>10</sup> The EPA committed to complete this rulemaking by May 2012.<sup>11</sup>

Well before the ruling in *Massachusetts* and the subsequent commencement of EPA rulemaking, two separate groups of plaintiffs brought actions in the Southern District of New York against five major electric power companies.<sup>12</sup> The first group of plaintiffs included California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin, and New York City.<sup>13</sup> The second group consisted of three non-profit land trusts: Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire.<sup>14</sup> The plaintiffs asserted that these particular defendants—the Tennessee Valley Authority,<sup>15</sup> American Electric Power Company, Inc. (and a wholly owned subsidiary), Southern Company, Xcel Energy Inc., and Cinergy Corporation—were the largest emitters of carbon dioxide in the nation.<sup>16</sup> In both cases, the plaintiffs argued that the defendants’ emissions “created a ‘substantial and unreasonable interference with public rights,’”<sup>17</sup> in violation of federal common law of interstate nuisance, or in the alternative, state tort law,<sup>18</sup> and sought injunctive relief in the form of a judicial decree giving to each defendant an initial cap on carbon dioxide, and a specified percentage by which the cap would be reduced annually.<sup>19</sup>

The District Court never ruled on the merits of either case, finding both presented non-justiciable political questions.<sup>20</sup> But the Second Circuit reversed.<sup>21</sup> On the issue of standing, the Second Circuit held that the case was not barred by political question doctrine,<sup>22</sup> and that the plaintiffs

10. *See American Elec. Power Co.*, 131 S. Ct. at 2533 (describing the rulemaking).

11. *See American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2533 (2011) (“EPA has committed to issuing . . . a final rule by May 2012.”).

12. *See id.* (describing the origin of the present case before the Court).

13. *See id.* at 2533–34 (describing the two distinct plaintiff groups).

14. *Id.* at 2534.

15. The Tennessee Valley Authority is a “federally owned corporation that operates fossil-fuel fired power plants in several States.” *Id.*

16. *See id.* (“According to the complaints, the defendants ‘are the five largest emitters of carbon dioxide in the United States.’”).

17. *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2534 (2011).

18. *See id.* (explaining the plaintiffs’ arguments).

19. *See id.* (“All plaintiffs sought injunctive relief requiring each defendant ‘to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.’”).

20. *See id.* (“The District Court dismissed both suits as presenting non-justiciable political questions.”).

21. *See Connecticut v. American Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

22. *See id.* at 332 (holding that the district court erred in dismissing the complaints on the ground that they presented non-justiciable political questions)

adequately alleged Article III standing.<sup>23</sup> On the merits, the Second Circuit relied on a series of Supreme Court “decisions holding that States may maintain suits to abate air and water pollution produced by other States or by out-of-state industry,”<sup>24</sup> and found that the plaintiffs sufficiently stated a claim of federal common law nuisance.<sup>25</sup> Namely, the Second Circuit relied upon *Illinois v. Milwaukee*,<sup>26</sup> (*Milwaukee I*) which recognized a common law right of “Illinois to sue in federal district court to abate discharge of sewage into Lake Michigan.”<sup>27</sup>

Furthermore, the Second Circuit “determined that the Clean Air Act did not ‘displace’ federal common law.”<sup>28</sup> This finding heavily relied on contrasting the facts of *Milwaukee v. Illinois*<sup>29</sup> (*Milwaukee II*), in which the Supreme Court “held that Congress had displaced the federal common law right of action recognized in *Milwaukee I* by adopting amendments to the Clean Water Act.”<sup>30</sup> While the legislation in question in *Milwaukee II* spoke directly to the discharge of pollutants in water in the context of interstate water pollution, the EPA had not yet promulgated regulation of greenhouse gases at the time of the Second Circuit’s decision.<sup>31</sup> The Second Circuit refused to “speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact ‘speak[] directly’ to the ‘particular issue’ raised here by Plaintiffs.”<sup>32</sup> The Supreme Court granted the power plants’ petition for certiorari.<sup>33</sup>

## II. Analysis

Justice Sotomayor recused herself from the case,<sup>34</sup> and the remaining eight justices split on the issue of standing.<sup>35</sup> “Four members of

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23. *See id.* at 349 (holding that the plaintiffs have standing to maintain their actions).

24. *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2534 (2011).

25. *Id.*

26. *Illinois v. Milwaukee*, 406 U.S. 91 (1972).

27. *American Elec. Power Co.*, 131 S. Ct. at 2534 (citing *Illinois v. Milwaukee*, 406 U.S. 91 (1972)).

28. *Id.*

29. *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

30. *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2534 (2011).

31. *See id.* at 2535 (“At the time of the Second Circuit’s decision, by contrast, EPA had not yet promulgated any rule regulating greenhouse gases, a fact the court thought dispositive.”) (citing *Connecticut v. American Elec. Power Co.*, 582 F.3d 309, 379–81 (2d Cir. 2009)).

32. *Connecticut v. American Elec. Power Co.*, 582 F.3d 309, 380 (2d Cir. 2009) (quoting *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236–37 (1985)) (internal citations omitted).

33. *See American Elec. Power Co.*, 131 S. Ct. at 2534 (identifying the petitioners in the case).

34. *Id.* at 2531.

the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions . . .<sup>36</sup> The remaining four members of the Court would find that none of the plaintiffs have Article III standing, consistent with the dissent in *Massachusetts*.<sup>37</sup> Citing *Nye v. United States*,<sup>38</sup> the Court affirmed the Second Circuit's exercise of jurisdiction and turned to the merits.<sup>39</sup>

On the merits, the Court stated that "federal common law addresses 'subjects within national legislative power where Congress has so directed,'"<sup>40</sup> and that "[e]nvironmental protection is undoubtedly an area 'within national legislative power[]' . . . in which federal courts may . . . 'fashion federal law.'"<sup>41</sup> But the Court asserted that it need not address the issue of "whether . . . the plaintiffs could state a federal common law claim for curtailment of greenhouse gas emissions because of their contribution to global warming,"<sup>42</sup> because "[a]ny such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions."<sup>43</sup> The Court reasoned that the CAA displaced any potential federal common law right to seek abatement of carbon dioxide emissions because the Act already provides for a means of obtaining the specific relief sought.<sup>44</sup>

Specifically, the Court explained that "Section 111 of the Act directs the EPA Administrator to list 'categories of stationary sources' that 'in [her] judgment . . . caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.'"<sup>45</sup> Once a category is listed, the EPA must establish performance

35. *See id.* at 2535 ("We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits.") (citations omitted).

36. *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011) (citing *Massachusetts v. EPA*, 549 U.S. 497, 520–26 (2007)).

37. *See id.* ("Four members of the Court, adhering to a dissenting opinion in *Massachusetts*, . . . or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing.")

38. *Nye v. United States*, 313 U.S. 33, 44 (1941).

39. *See American Elec. Power Co.*, 131 S. Ct. at 2535 (affirming the Second Circuit's exercise of jurisdiction).

40. *Id.* 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)).

41. *Id.*

42. *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

43. *Id.*

44. *See id.* at 2538 ("The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.")

45. *Id.* at 2537 (quoting Standards of Performance for New Stationary Sources, 42 U.S.C. § 7411(b)(1)(A)) (2012).

standards of emissions from new or modified sources in that category,<sup>46</sup> as well as regulate those existing categories.<sup>47</sup> The EPA issues guidelines for existing sources, “and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction.”<sup>48</sup>

As for enforcement of these standards, the Court explained that the Act provides that the EPA may delegate enforcement to the States, “but the agency retains the power to inspect and monitor regulated sources, to impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court.”<sup>49</sup> Importantly, the Act does provide for private enforcement should the States or EPA fail to enforce set limits.<sup>50</sup> The Court also stated that private parties may petition for a rulemaking should the EPA not set emissions limits for a particular pollutant<sup>51</sup> and that, as stated in *Massachusetts*, the “EPA’s response will be reviewable in federal court.”<sup>52</sup> Because the EPA is engaged in rulemaking to set standards for greenhouse gas emissions from fossil fuel fired power plants,<sup>53</sup> the Court reasoned that the Act “provides a means to seek limits on emissions of carbon dioxide from domestic power plants,” and any remedy that may have been available under common law has accordingly been displaced.<sup>54</sup>

The plaintiffs put forth the argument that, because the EPA had yet to set standards for regulating the emissions, an action under federal common law is not displaced.<sup>55</sup> In response, the Court reinforced *Milwaukee II*, stating “the relevant question for purposes of displacement is ‘whether the field has been occupied, not whether it has been occupied in a

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46. *See id.* at 2537 (explaining the EPA’s requirements for establishing standards of performance under the Clean Air Act) (citing 42 U.S.C. §§ 7411(a)(2), (b)(1)(B)).

47. *See id.* (“And, most relevant here, § 7411(d) then requires regulation of existing sources within the same category.”) (citing 42 U.S.C. § 7411(d)).

48. *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537–38 (2011) (citing 42 U.S.C. § 7411(d)(1)).

49. *Id.* at 2538 (citing 42 U.S.C. §§ 7411(c)(2), (d)(2), 7413, 7414).

50. *See id.* (“And the Act provides for private enforcement. If States (or EPA) fail to enforce emissions limits against regulated sources, the Act permits ‘any person’ to bring a civil enforcement action in federal court.”) (citing 42 U.S.C. § 7604(a)).

51. *See id.* (“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.”) (citations omitted).

52. *Id.*

53. *See id.* (emphasizing that the EPA is engaged in a rulemaking to set standards for fossil-fuel fired power plants).

54. *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011).

55. *See id.* (“The plaintiffs argue, as the Second Circuit held, that federal common law is not displaced until EPA actually exercises its regulatory authority, *i.e.*, until it sets standards governing emissions from the defendants’ plants.”).

particular manner.”<sup>56</sup> Congress, the Court demonstrated, has selected a regulatory regime to address the particular problem at hand<sup>57</sup>—one that “permits emissions *until* EPA acts.”<sup>58</sup> The delegation alone is the critical point in considering the issue of displacement.<sup>59</sup>

Finally, the Court addressed the plaintiffs’ alternative theory for relief based in State nuisance law.<sup>60</sup> Availability of relief under such a theory depends on the preemptive effect of the CAA.<sup>61</sup> Because no party briefed this issue, the Court reversed the Second Circuit, leaving the State nuisance law matter open for consideration on remand.<sup>62</sup>

Justice Alito, with whom Justice Thomas joined, wrote briefly to concur with the judgment and displacement analysis of federal common law on the assumption “that the interpretation of the Clean Air Act . . . adopted by the majority in *Massachusetts v. EPA* . . . is correct.”<sup>63</sup>

### III. Future Implications

By rejecting the remedy the plaintiffs sought—that is, a judicial decree giving to each defendant an initial cap on carbon dioxide, and a specified percentage by which the cap would be reduced annually—the Supreme Court explained that its decision avoided an undermining of the political process. The Court noted that Congress delegated the primary authority to regulate greenhouse gas emissions to the EPA, and that the agency is better equipped to set a unified standard than the federal judges, who would “issu[e] ad hoc, case-by-case injunctions.”<sup>64</sup> Requiring federal

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56. *Id.* (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 324 (1981)).

57. *See id.* (“Of necessity, Congress selects different regulatory regimes to address different problems. Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit.”).

58. *Id.* (citing *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 22 n.32 (1981)).

59. *See id.* at 2538 (“The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law.”).

60. *See American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011) (addressing the plaintiffs’ state law claims).

61. *See id.* (“In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act.”) (citations omitted).

62. *See id.* (leaving the issue of the availability of a state law nuisance claim open for consideration on remand).

63. *Id.* at 2540–41 (2011) (citations omitted).

64. *See id.* at 2539–40 (“The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues

district judges to set such limits, as the plaintiffs requested, “cannot be reconciled with the decision-making scheme Congress enacted.”<sup>65</sup> Plainly, the Court found that regulation is not the role of the judiciary.<sup>66</sup>

The Court also suggested that deference to the EPA’s expertise is likely to reach a more desirable regulation than the adversarial system. In support of the EPA’s superior abilities, the Court pointed to the agency’s unique ability to “commission scientific studies, [] convene groups of experts for advice, . . . [and] seek the counsel of regulators in the States where the defendants are located.”<sup>67</sup> In contrast, the Court expressed that district court judges are “confined by a record comprising the evidence the parties present.” Had the Court allowed standards to be set by the adversarial system, opposing parties’ experts presenting their own basis of what amount of carbon dioxide emissions is “unreasonable” would result in sporadic standards from a case-by-case basis. Compounding this problem, district court judges “lack authority to render precedential decisions binding other judges, even members of the same court.”<sup>68</sup> Moreover, had the Court granted relief, the decision could have overwhelmed the judiciary with similar future litigation and added significantly to industry costs. Because the plaintiffs concede that “‘thousands or hundreds of tens’ of other defendants [exist] fitting the description of ‘large contributors’ to carbon dioxide emissions,” similar suits could suddenly be mounted against numerous other industry defendants.<sup>69</sup>

Because the Supreme Court affirmed the Second Circuit’s finding of jurisdiction, “at least four justices agreed with the Second Circuit that the political question doctrine was no bar.”<sup>70</sup> Further, the Court noted that “four justices . . . would hold that ‘at least some plaintiffs have Article III standing under *Massachusetts*.’”<sup>71</sup> This language implies that at least one of the four justices supporting standing would hold that only states—not

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of this order.”) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865–66 (1984)).

65. *See id.* at 2540 (explaining that the plaintiff’s proposal is not compatible with Congress’s intended scheme).

66. *See American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011) (“The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: . . . informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation’s energy needs and the possibility of economic disruption must weigh in the balance.”).

67. *Id.* at 2540.

68. *Id.*

69. *Id.*

70. J. Cullen Howe & Michael B. Gerrard, *Global Climate Change: Legal Summary*, American Law Institute - American Bar Association Continuing Legal Education Environmental Law, ST038 ALI-ABA 831 at \*24 (Feb. 1–3, 2012).

71. *Id.* (quoting *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011)).



private parties—have standing.<sup>72</sup> This further suggests that “in future greenhouse gas litigation, at least five justices might reject standing for non-state plaintiffs.”<sup>73</sup>

Additionally, the opinion states that in the event the EPA declines to regulate carbon-dioxide emissions “at the conclusion of its ongoing § 7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency’s expert determination.”<sup>74</sup> This is consistent with the Administrative Procedure Act, defining “agency action”<sup>75</sup> as including a “failure to act.”<sup>76</sup> But the Court’s language suggests that, should the EPA decline to regulate these emissions from power plants, plaintiffs may succeed in challenging this failure to act under the arbitrary and capricious standard of review.<sup>77</sup>

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72. *See id.* (“The ‘at least some’ reference suggests that at least one justice of the four supporting standing would not hold that private plaintiffs have standing, but that only the states do.”).

73. *Id.*

74. *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011).

75. 5 U.S.C. § 551(13) (2012).

76. *Id.*

77. *See American Elec. Power Co.*, 131 S. Ct. at 2539 (“EPA may not decline to regulate . . . if refusal to act would be ‘arbitrary, capricious, [or] an abuse of discretion.’ . . . If the plaintiffs in this case are dissatisfied with the outcome of EPA’s forthcoming rulemaking, their recourse under federal law is to seek . . . review.”) (quoting 42 U.S.C. § 7607(d)(9)(A)).