

*Winter 2012*

# Civil Litigation as a Tool for Regulating Climate Change: An Introduction

James R. May

---

## Recommended Citation

James R. May, *Civil Litigation as a Tool for Regulating Climate Change: An Introduction*, 46 Val. U. L. Rev. 357 (2012).  
Available at: <http://scholar.valpo.edu/vulr/vol46/iss2/1>

This Monsanto Lecture is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



# 25th Annual Monsanto Symposium: Civil Litigation as a Tool for Regulating Climate Change

## CIVIL LITIGATION AS A TOOL FOR REGULATING CLIMATE CHANGE: AN INTRODUCTION

James R. May\*

It is an honor to write the introduction for this special issue of the law review. Every now and again there is a case that subjects the U.S. Supreme Court to a kind of stress-test. A case that reveals the Court's willingness to engage in tough social issues, or instead kick the can to coordinate branches of government, or to the states. On occasion, an environmental case will push the Court mightily over constitutional issues of standing, political question doctrine, separation of powers, and federalism. The recently decided *American Electric Power Co. v. Connecticut* ("AEP") is just such a case.<sup>1</sup>

This issue of the law review takes a hard look at the implications of AEP. It features one of the amicus briefs filed in the case, and offers three divergent commentaries. In *Law Professors' Brief on Behalf of Respondents*, Stuart Banner and I argue that the Court has never held, or even suggested, that constitutional doctrine forecloses judicial review of common law claims like the one in this case.<sup>2</sup> And even if the political question doctrine limited judicial consideration of common law claims, we conclude that the public nuisance claims in AEP are not non-

---

\* James R. May is Professor of Law and Graduate Engineering (adjunct) at Widener University where he teaches constitutional and environmental law and co-directs the Environmental Law Center. He was Counsel of Record for the Brief of Law Professors on Behalf of Respondents in *AEP v. Connecticut*. He wrote this essay in conjunction with remarks delivered to Valparaiso University School of Law's 25th Annual Monsanto Symposium, entitled *Civil Litigation as a Tool for Regulating Climate Change* on February 18, 2011. He may be reached at: jrmay@widener.edu.

<sup>1</sup> *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011). For a summary of the decision, see James May, *Supreme Court Decides that Clean Air Act Displaces Federal Common Law Claims for Climate Change*, TRENDS (ABA), Sept.-Oct. 2011 [hereinafter May, *Supreme Court Decides*].

<sup>2</sup> See also James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919 (2008) (arguing that common law claims respecting GHGs are justiciable).

justiciable political questions. In *Litigation's Role in the Path of U.S. Federal Climate Change Regulation: Implications of AEP v. Connecticut*, Hari M. Osofsky explores the significance of AEP for U.S. federal legal approaches to regulating climate change. Professor Osofsky concludes that AEP leaves most greenhouse gas ("GHG") cases unaffected.<sup>3</sup> In *Does the Judiciary Have the Tools for Regulating Greenhouse Gas Emissions?*, Victor E. Schwartz, Phil Goldberg, and Christopher E. Appel answer the question in the negative. They conclude that regulation of GHG emissions is best left to the elected federal branches.<sup>4</sup> In *On Thin Air: Standing, Climate Change and the National Environmental Policy Act*, Kevin Haroff concludes that causes of action concerning GHGs rooted in federal statutory laws other than the Clean Air Act ("CAA"), e.g., the National Environmental Policy Act ("NEPA"), are unlikely to reduce GHG emissions.<sup>5</sup>

This Essay contains a summary of AEP and discusses its implications. It concludes that AEP has had a profound impact on GHG litigation and policymaking. It will be the case of threshold reference on issues of displacement, constitutional and prudential standing, the political question doctrine, and the role of common and statutory law in addressing GHG emissions.

#### I. OVERVIEW OF AEP

In AEP, a combination of states, the City of New York, and several land trust organizations sued the nation's five largest fossil-fuel-burning electric utility companies to force them to reduce their GHG emissions. The plaintiffs argued that GHG emissions from the utilities contributed to a public nuisance under the federal common law. The Supreme Court ultimately rejected this claim, reasoning that the U.S. Environmental Protection Agency ("EPA") had taken sufficient action as authorized by the CAA to regulate GHG emissions so as to displace associated federal common law nuisance causes of action for injunctive action.

The issues in AEP developed in a peculiar way. The plaintiffs asked the court for injunctive relief to "cap" defendants' emissions, develop a schedule for reducing defendants' emissions on a percentage basis over time, assess and measure available alternative energy resources, and

---

<sup>3</sup> Hari M. Osofsky, *Litigation's Role in the Path of U.S. Federal Climate Change Regulation: Implications of AEP v. Connecticut*, 46 VAL. U. L. REV. 447, 453-54 (2012).

<sup>4</sup> Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Does the Judiciary Have the Tools for Regulating Greenhouse Gas Emissions?*, 46 VAL. U. L. REV. 369, 371 (2012).

<sup>5</sup> Kevin T. Haroff, *On Thin Air – Standing, Climate Change, and the National Environmental Policy Act*, 46 VAL. U. L. REV. 411, 446 (2012).

reconcile its relief with U.S. foreign and domestic policy. The utility defendants argued that the plaintiffs lacked standing.

The U.S. District Court for the Southern District of New York dismissed the case on a ground that the defendants had not originally briefed: the political question doctrine.<sup>6</sup> The doctrine holds that federal courts should not consider certain matters consigned to the representative branches. The court concluded that it was impossible for it to make the “initial policy determination . . . that must be made by the elected branches before a non-elected court can properly adjudicate a global warming nuisance claim.”<sup>7</sup> It concluded that plaintiffs’ allegations were “extraordinary,” “patently political,” and “transcendently legislative.”<sup>8</sup> Thus, the district court ruled that the doctrine applied to divest federal courts from hearing the plaintiffs’ federal common law claims.

The case idled on appeal at the Second Circuit for more than four years. In 2009, a two judge panel of the U.S. Court of Appeals—that had originally included Judge and now Supreme Court Associate Justice Sotomayor—for the Second Circuit reversed, finding climate claims in tort law to be justiciable.<sup>9</sup> The court held that no aspect of the political question doctrine applied to enjoin judicial review. In particular, the circuit court found that climate change is neither constitutionally consigned to the elected branches, nor prudentially left to them.

The U.S. Supreme Court then granted American Electric Power and the other utility defendants’ petition for certiorari on three issues, whether: (1) the states and other plaintiffs lacked standing; (2) federal law displaced plaintiffs’ claims; and (3) the case raised nonjusticiable political questions. Justice Sotomayor recused herself from the case, leaving it before the eight remaining justices.

The Obama administration filed a brief on behalf of defendant Tennessee Valley Authority—on the same side as the utility defendants—arguing that plaintiffs lack prudential standing and federal law displaces the need for common law causes of action for climate change. In particular, the solicitor general argued that various EPA activities displace the need for federal common law causes of action.

Oral argument harbored a few surprises. None of the justices seriously questioned that climate change is occurring, that human activity is playing a role in that dynamic, that the CAA bestows upon EPA the authority to regulate GHGs as a “pollutant” under *Massachusetts*

---

<sup>6</sup> Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005).

<sup>7</sup> *Id.* at 272–73.

<sup>8</sup> *Id.* at 271 n.6, 272.

<sup>9</sup> Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 393 (2d Cir. 2009).

360 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

*v. EPA*, that at least the states possess both constitutional and prudential standing, or that federal courts have authority to consider cases concerning climate change.

Yet the Court was clearly uncomfortable with elevating the judgment of a district judge about GHGs over that of other coordinate branches.

[S]everal Justices expressed skepticism about the propriety of using federal common law in this context, including the more “liberal” wing of the [C]ourt—Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan. For example, Justice Breyer asked, “if the courts can set emission standards, why can’t they also set carbon taxes, which are likely to be more effective? What’s the end of it?” Justice Kagan inquired, “this sounds like the paradigmatic thing that administrative agencies do rather than courts.” Justice Ginsburg remarked to the respondents’ attorney: “Congress set up the EPA to promulgate standards for emissions, and . . . the relief you’re seeking seems to me to set up a district judge, who does not have the resources, the expertise, as a kind of super EPA.”<sup>10</sup>

Many in attendance (including me) saw the writing on the wall, an 8-0 finish, details to be announced.

Sure enough, the Court reversed the Second Circuit 8-0 (Justice Sotomayor, recused), deciding that federal public law displaces the federal common law before it. In so doing, the Court hardly engaged two-thirds of the issues before it. Moreover, four Justices, including Justice Kennedy, accepted without analysis that the states possess constitutional standing under *Massachusetts v. EPA*.<sup>11</sup> This suggests that five members of the Court, including Justice Sotomayor, still accept that position. None of the justices seriously questioned that climate change is occurring and that human activity is playing a role in that dynamic,<sup>12</sup> or that the CAA bestows upon EPA the authority to regulate GHGs as a

---

<sup>10</sup> May, *Supreme Court Decides*, *supra* note 1, at 1, 15.

<sup>11</sup> 549 U.S. 497 (2007).

<sup>12</sup> One curious aspect of the decision is that notwithstanding the extent to which the Court seemed to rely on *Massachusetts v. EPA*, Justice Ginsburg noted: “The Court, we caution, endorses no particular view of the complicated issues related to carbon dioxide emissions and climate change.” *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2533 n.2 (2011).

“pollutant” under the CAA.<sup>13</sup> None of the justices saw fit to discuss either the political question or prudential standing arguments. This could suggest that eight justices do not believe that these issues are salient in the climate context under federal common law.

Instead, the Court honed in on the displacement issue. Justice Ginsburg’s reluctance to convert district courts into “super” EPAs proved a harbinger. Writing for an 8-0 majority of the Court, Justice Ginsburg held that the authority that the CAA grants to the EPA to regulate GHGs, when coupled with what EPA had done, displaces federal common law in the matter. In light of developments in the first branch, the Court was simply unwilling to vest federal judges with the task of performing what it viewed to be primarily regulatory roles subject to democratic processes:

The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decision making scheme Congress enacted. The Second Circuit erred, we hold, in ruling that federal judges may set limits on [GHG] emissions in face of a law empowering EPA to set the same limits, subject to judicial review only to ensure against action “arbitrary, capricious, . . . or otherwise not in accordance with law.”<sup>14</sup>

Indeed, the regulatory goalposts have shifted significantly since the initial case was filed in 2004. Since then, EPA has, among other climate regulatory activities: determined that GHGs “endanger” public health and welfare and are thus a “pollutant” subject to regulation under the CAA; issued rules requiring utilities and others to report their GHG emissions; said that new or modified major sources of GHGs may be subject to new source review; and said that other new sources may be subject to new source performance standards for GHG emissions.

The Court’s ruling in *Massachusetts v. EPA* that the CAA provides EPA with discretionary authority to regulate GHGs as “air pollutants” loomed large:

---

<sup>13</sup> Notably, however, Justice Alito (joined by Justice Thomas) issued a brief concurrence that seems to question *Massachusetts v. EPA*. As Justice Alito wrote in somewhat stilted prose, “I agree with the Court’s displacement analysis on the assumption (which I make for the sake of argument because no party contends otherwise) that the interpretation of the [CAA] adopted by the majority in *Massachusetts v. EPA*, is correct.” *Id.* at 2540–41 (Alito, J., with whom Thomas, J., joins, concurring) (citation omitted).

<sup>14</sup> *Id.* at 2540 (second alteration in original).

362 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

We hold that the [CAA] and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. *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>15</sup>

Moreover, the Court was unconvinced that federal courts in common law nuisance suits should play a role in competing with EPA’s regulatory authority:

It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of [GHG] emissions. 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 of this order.<sup>16</sup>

In sum, the Court held that the federal common law claims for injunctive relief are displaced because they are already within EPA’s regulatory grasp under the CAA.

## II. DISCUSSION

So where does this leave common law and the regulation of GHGs? Professor Osofsky concludes in this issue that *AEP* leaves most causes of action to address GHG emissions intact.<sup>17</sup> She observes that *AEP* “leaves alone most pending litigation except for the limited set of cases claiming federal common law nuisance, and even then it indicates that its ruling depends on the current context of EPA authority.”<sup>18</sup> Schwartz, Goldberg, and Appel, however, disagree, concluding here:

that federal and state judiciaries, given their institutional constraints, do not have the capabilities to establish GHG emission limits in an effective, consistent, and

---

<sup>15</sup> *Id.* at 2537 (citations omitted).

<sup>16</sup> *Id.* at 2539–40.

<sup>17</sup> See Osofsky, *supra* note 3, at 454–55.

<sup>18</sup> *Id.* at 455.

nondiscriminatory manner. It also shows that the Supreme Court, in [AEP], provided a blueprint and broad mandate for state and federal courts to reject any claim that would regulate GHG emissions.<sup>19</sup>

The kind of cases that AEP leaves open is most likely limited to public nuisance under state common law, public nuisance under federal common law for damages, and an ever increasing canon of cases under federal environmental statutes, including the NEPA. First, the Court explained that its ruling does not affect *state* common law causes of action: “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.”<sup>20</sup> The Court noted that any such action would warrant examination under the Supremacy Clause: “In light of our holding that the [CAA] displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the Federal [CCA].”<sup>21</sup>

Second, AEP did not address federal common law causes of action for damages. Chief among these cases is *Native Village of Kivalina v. ExxonMobil Corp.*, an action against the oil and gas industry under federal common law for \$440 million in damages. The district court dismissed that action as a nonjusticiable political question, holding that “neither [p]laintiffs nor AEP offers any guidance as to precisely what judicially discoverable and manageable standards are to be employed in resolving the claims at issue. . . . [Furthermore,] cases do not provide guidance that would enable the Court to reach a resolution of this case in any ‘reasoned’ manner.”<sup>22</sup> *Native Village of Kivalina* is currently before the U.S. Court of Appeals for the Ninth Circuit.<sup>23</sup>

Third, AEP does not rule out federal common law actions for public nuisance for injunctive relief entirely if EPA either loses or does not exercise its regulatory authority over GHGs. The 112th Congress and several presidential candidates have made blocking EPA action on climate change a priority, after all. Suspending or terminating EPA’s authority to regulate GHGs could stretch the displacement defense to the breaking point. Yet as Professor Osofsky observes here, regulatory suits “provide limited opportunities for victims to obtain redress.”<sup>24</sup>

<sup>19</sup> Schwartz, et al., *supra* note 4, at 371.

<sup>20</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2540.

<sup>21</sup> *Id.*

<sup>22</sup> *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009).

<sup>23</sup> Appellant’s Opening Brief, *Native Vill. of Kivalina v. ExxonMobile Corp.*, No. 09-17490 (filed Mar. 10, 2010).

<sup>24</sup> See Osofsky, *supra* note 3, at 456.



Any examination of federal common law would likely warrant reanimation of the political question doctrine. The Supreme Court has noted that there are certain “formulations” of cases that raise so-called “political questions.” These include matters that are demonstrably committed to a coordinate branch of government, require an initial policy determination, lack ascertainable standards, or could otherwise result in judicial embarrassment—such matters are nonjusticiable.<sup>25</sup> For example, the Court has recognized executive power over foreign affairs, impeachment, and treaty abrogation as political questions into which courts ought to decline jurisdiction, finding them to be consigned to the elected federal branches of government under the “political question doctrine.”<sup>26</sup>

That none of the justices engaged the political question doctrine head on could suggest a number of things. At least eight justices do not believe that the political question doctrine is a salient issue in the climate context under federal common law. Indeed, the Court seemed to suggest that the doctrine did not call into question *Massachusetts v. EPA*:

We hold that the [CAA] and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. *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>27</sup>

On the other hand, the Court’s reasoning in finding plaintiffs’ federal common law claims to be displaced might apply with congruent force to the political question doctrine. But whether and how the political question doctrine applies in cases involving federal common law and climate remains to be seen.

All eight participating justices were skeptical about the propriety of using federal common law in this context: “The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decisionmaking scheme

---

<sup>25</sup> Baker v. Carr, 369 U.S. 186, 217 (1962); see, James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, *supra* note 2, at 958.

<sup>26</sup> See generally James R. May, *The Political Question Doctrine in Environmental Law*, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 217, 220 (James R. May ed., 2011). Climate change litigation has now entered this mix.

<sup>27</sup> Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2537 (2011) (citations omitted).

Congress enacted.”<sup>28</sup> Yet the Court has never applied the doctrine to foreclose review of common law claims.

In fact, as Stuart Banner and I maintain in our brief, under the political question doctrine, certain *constitutional* issues are reserved to the political branches for decision. The doctrine has no application to common law claims like the one in *AEP*. The Court should reject invitations to extend the doctrine far beyond its traditional limits.

In *every* case in which the Court has found federal jurisdiction lacking because of the political question doctrine, the plaintiff’s claim has been founded on the Constitution. Meanwhile, the Court has addressed a great many common law issues over the years, without ever suggesting, much less holding, that any of them might be political questions. This sharp distinction is not a mere matter of labeling. It is a fundamental divide necessitated by the very nature of the political question doctrine, which is rooted in the Constitution’s separation of powers. The six formulations established in *Baker v. Carr*,<sup>29</sup> are tools for dividing constitutional claims between the competence of the courts and the political branches. They have never had any bearing on common law claims, which are always within the competence of courts.

Whenever a constitutional issue that is non-justiciable under the political question doctrine has arisen *within* a lawsuit under the common law, the Court has deferred to the political branches’ resolution of the constitutional issue, but has nevertheless always retained jurisdiction over the common law case and decided it on the merits. In such cases, the Court has never decided that the common law claim itself is non-justiciable.

To be sure, there is no reason to accept petitioners’ invitation to expand the political question doctrine far beyond its traditional confines. A legal issue is not converted into a political question simply because one might have policy grounds for preferring that it be resolved by another branch of government. Even if this nuisance suit will be as novel and complex as petitioners allege, their concerns can be addressed the way such concerns have always been addressed, through the courts’ interpretation of the common law of nuisance.

And even if the political question doctrine applied to non-constitutional issues, this nuisance claim would not be a political question. None of the six *Baker* formulations is inextricable from this case. The authority to resolve common law nuisance claims is neither textually nor implicitly committed to either Congress or the President.

---

<sup>28</sup> *Id.* at 2540.

<sup>29</sup> 369 U.S. 186 (1962).

Nuisance claims are not textually committed to the political branches. The Constitution does not commit to the political branches the exclusive power to resolve nuisance claims, to adjudicate environmental disputes, or to address the question of climate change. If there is any constitutional text authorizing one of the branches to decide this case, it is Article III, which explicitly provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity . . . .”<sup>30</sup>

Nuisance claims are governed by judicially discoverable and manageable standards. Petitioners argue that because the law of nuisance incorporates a broad reasonableness standard rather than a set of precise rules, there will be no “right” or “wrong” answers in this case. But that is an argument that would make political questions out of all nuisance cases, not just this one. Indeed, all of the Court’s prior nuisance cases were governed by the very same standards that petitioners claim are undiscoverable in this case.

An issue does not become non-justiciable merely because it is governed by a broad standard like reasonableness. An issue is non-justiciable when it is governed by no standard at all. When the applicable standard is merely broadly worded or incapable of being reduced to bright line rules, the Court has consistently refused to hold that an issue is a political question.

Nuisance claims can be decided without an initial policy determination of the kind clearly for nonjudicial discretion. This *Baker* formulation prevents courts from making only those policy determinations that are clearly within the exclusive power of the executive branch, involving matters like which nation has sovereignty over disputed territory, and it proscribes only decisions explicitly setting forth the policy of the United States on a particular matter. It does not bar courts from making the implicit policy judgments they traditionally make in common law cases.

None of the remaining *Baker* formulations is inextricable from a common law case respecting GHGs. A court applying the common law would not express any lack of the respect due to the political branches. The common law of nuisance cannot override any decisions already made by the political branches. And there is no possibility of inconsistent pronouncements by the judiciary and another branch, because the other branches can always displace the common law of nuisance.

Last, *AEP* does not affect efforts to invoke federal statutory laws to address GHG emissions, such as NEPA. Kevin Haroff concludes in these

---

<sup>30</sup> U.S. CONST. art. III, § 2, cl. 1.

pages, however, that such actions will not reduce actual emissions of GHGs:

Nevertheless, courts should be careful to recognize that using NEPA as a litigation strategy may have limited value as a weapon in any war on global warming. After more than a quarter century of judicial development, the rules governing standing under NEPA and other federal environmental laws are well established, and they necessarily focus on relatively localized impacts from domestic projects, which have a substantial federal connection with the United States. Those rules are not intended to apply to highly-generalized impacts associated with a global phenomenon like climate change, caused by activities diffusely spread across the planet. In the case of agency actions, like those considered in *Watson*, a requirement to prepare detailed environmental impact studies under NEPA will not reduce global warming in any appreciable way.<sup>31</sup>

This, combined with the shortcomings in common and existing statutory law and international treaties, seems to invite the question of just how legally to address GHG emissions, short of a new, specially crafted piece of legislation to do so, something akin to a “Greenhouse Gas Act.”

### III. CONCLUSION

*AEP* is an important decision in the field of environmental law. It stands astride several junctures: public and private law; environmental, constitutional, and international law; injunctive and legal relief; state and federal action; and judicially, legislatively, and administratively fashioned responses. With its cornucopian issues extraordinaire—separation of powers, federalism, standing, displacement, political question, tort, and prudence—it has something for nearly all legal tastes, temperaments, and talents. *AEP* will continue to have profound and uncertain impacts on GHG related litigation and regulation, especially concerning jurisprudential notions of displacement, constitutional and prudential standing, the political question doctrine, and the role of common and statutory law.

---

<sup>31</sup> Haroff, *supra* note 5, at 446.