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## LITIGATION'S ROLE IN THE PATH OF U.S. FEDERAL CLIMATE CHANGE REGULATION: IMPLICATIONS OF *AEP V. CONNECTICUT*

Hari M. Osofsky\*

This symposium analyzes the role of litigation in climate change regulation, with a particular focus on the U.S. Supreme Court's June 2011 decision in *American Electric Power Co. v. Connecticut* ("*AEP*").<sup>1</sup> This Essay adds to that conversation by exploring the significance of *AEP* for U.S. federal legal approaches to regulating climate change.

The United States has yet to pass comprehensive climate change legislation, and it looks unlikely to do so in the near future. In fact, the recent legislative crisis over raising the debt limit is resulting in budget cuts for the federal agencies that focus on environmental protection and energy.<sup>2</sup> However, despite congressional inaction, the United States has an emerging federal-level climate change regulatory regime, due in large part to the Supreme Court's decisions on climate change.

The Court's 2007 decision in *Massachusetts v. EPA* held that the Environmental Protection Agency ("*EPA*") has the authority to regulate greenhouse gas emissions under the Clean Air Act and that the EPA had abused its discretion in failing to exercise that authority without adequate justification.<sup>3</sup> Under the Obama administration, the EPA relies on *Massachusetts* to regulate emissions from motor vehicles and power plants in collaboration with other agencies, major corporate emitters, and leader states.<sup>4</sup> In June 2011, the Supreme Court decided another case

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\* Associate Professor, University of Minnesota Law School; Associate Director of Law, Geography & Environment, Consortium on Law and Values in Health, Environment & the Life Sciences; Affiliated Faculty, Geography and Conservation Biology. This piece, though it has a different focus, is in part an edited version of Hari M. Osofsky, *AEP v. Connecticut's Implications for the Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101 (2011), <http://yalelawjournal.org/2011/09/13/osofsky.html>. I appreciate the excellent work of Associate Dean JoEllen Lind in organizing the symposium, and the helpful editorial assistance of Paul Ghem, Dustin Klein, Katie Patrick, Jonathan Sichtermann, and Anne Zygodlo of the *Valparaiso University Law Review*. As always, I thank Josh, Oz, and Scarlet Gitelson for their love, support, and patience.

<sup>1</sup> 131 S. Ct. 2527 (2011).

<sup>2</sup> See Elana Schor, *Debt Deal Set to Crater Energy, Enviro Spending for Years to Come*, N.Y. TIMES, July 28, 2011, <http://www.nytimes.com/gwire/2011/07/28/28greenwire-debt-deal-set-to-crater-energy-enviro-spending-66673.html?pagewanted=all>.

<sup>3</sup> 549 U.S. 497 (2007).

<sup>4</sup> See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pt. 85, 86, and 600 and 49 C.F.R. pt. 531, 533, 536, 537, and 538); see also Remarks on Fuel Efficiency Standards, 2009 DAILY COMP. PRES. DOC. 00377 (May 19, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900377.pdf>.

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involving climate change and, in the process, reinforced the country's current regulatory path. In *AEP*, the Supreme Court closed the door to federal common law nuisance actions involving climate change, but did so in a manner that gives additional protection to the federal regulatory approach under *Massachusetts*.<sup>5</sup>

This Essay begins in Section I with an analysis of the complex barriers to effective U.S. action on climate change. Then, Section II explains the role that the Supreme Court decisions in *Massachusetts* and *AEP* play in shaping federal regulatory approaches. The Essay concludes in Section III by considering the decisions' impact in the broader context of climate change litigation taking place in the lower courts within the United States and in domestic and international tribunals around the world. It argues that litigation is serving a constructive role in assessing regulatory decisions at multiple levels, but that critical justice problems will remain unless concerned citizens and climate change victims have adequate mechanisms for addressing emissions and impacts.

## I. COMPLEXITY OF U.S. EFFORTS TO ADDRESS CLIMATE CHANGE

Climate change poses a multidimensional regulatory problem because addressing it involves many levels of government and a wide range of governmental and nongovernmental actors. This problem cannot be solved at just one level of government or through one type of law.<sup>6</sup> Moreover, this governance complexity involves: (1) scientific, technical, and legal uncertainty; (2) simultaneously overlapping and fragmented legal regimes; (3) difficulties of balancing inclusion and efficiency; and (4) inequality and resulting injustice.<sup>7</sup> A myriad of simultaneous strategies must be employed to address both mitigation and adaptation to impacts fairly and effectively.

The United States' struggles to regulate climate change at a federal level reflect these complexities. While extremely strong scientific consensus exists, internationally and in the United States, that anthropogenic greenhouse gas emissions cause climate change, greater

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<sup>5</sup> See 131 S. Ct. 2527 (2011).

<sup>6</sup> For an in depth analysis of these issues, see Hari M. Osofsky, *Diagonal Federalism and Climate Change Implications for the Obama Administration*, 62 ALA. L. REV. 237, 267-83 (2011) [hereinafter Osofsky, *Diagonal Federalism and Climate Change*]; Hari M. Osofsky, *Is Climate Change "International"?* *Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585, 631-49 (2009) [hereinafter Osofsky, *Is Climate Change "International"?*].

<sup>7</sup> For an in depth analysis of each of these aspects of governance complexity in the context of the BP *Deepwater Horizon* oil spill, see Hari M. Osofsky, *Multidimensional Governance and the BP Deepwater Horizon Oil Spill*, 63 FLA. L. REV. 1077 (2011).

uncertainty persists (and will continue to do so due to the nature of the science) about whether particular emissions result in some types of specific harms like Hurricane Katrina or 2011's severe snowstorms, heat, and flooding; other harms, like sea level rise, are more certain.<sup>8</sup> These uncertainties, together with recent scandals over climate change science and a handful of vocal climate change skeptics reaching the public through blogging, conservative programming, and politicians, have resulted in the U.S. public becoming more skeptical of climate change science.<sup>9</sup> This public skepticism, especially paired with political divisions between the Senate and the House, and between Congress and the Executive Branch following the 2010 midterm elections, limits the viability of new climate change legislation. As a result, long-standing environmental statutes, recent "clean energy" and economic recovery legislation, and executive orders provide the primary pathways for federal efforts to address climate change mitigation.<sup>10</sup> Federal adaptation policy is at an even more nascent stage, guided by an interagency task force created through executive order by President Obama in October 2009.<sup>11</sup>

The difficulties of framing legal mechanisms to respond to complex and evolving science, amid partisan battles, are exacerbated by the substantive breadth of climate change. Federal environmental, energy, mining, tax, transportation, and economic recovery legislation and regulation represent just some of the areas of law that impact U.S. greenhouse gas emissions and the need to participate in adaptation planning. Moreover, these regimes function largely separately and are assigned to different agencies. The Obama administration's decision to bring together fuel efficiency and tailpipe emissions standards, for

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<sup>8</sup> See Patrick J. Bartlein, Professor, Dep't of Geography, Univ. of Or., Remarks at Seminar on Reading the Fourth IPCC Assessment Report 2007 (Oct. 17, 2007) (author's notes) (on file with author); NAT'L RESEARCH COUNCIL, EVALUATING PROGRESS OF THE U.S. CLIMATE CHANGE SCIENCE PROGRAM: METHODS AND PRELIMINARY RESULTS 5 (2007), available at <http://books.nap.edu/openbook.php?isbn=0309108268>. For a discussion of this scale-uncertainty problem, see Osofsky, *Is Climate Change "International"?*, *supra* note 6, at 597-98 n.43 and accompanying text.

<sup>9</sup> See Yale Project on Climate Change Communication & George Mason University Center for Climate Change Communication, *Climate Change in the American Mind: Americans' Global Warming Beliefs and Attitudes in May 2011*, <http://environment.yale.edu/climate/files/ClimateBeliefsMay2011.pdf>.

<sup>10</sup> See Osofsky, *Diagonal Federalism and Climate Change*, *supra* note 6, at 243-58 (providing a summary of the Obama administration's efforts on climate change).

<sup>11</sup> See Council on Env'tl. Quality, *Climate Change Adaptation Task Force*, WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/ceq/initiatives/adaptation> (last visited Jan. 17, 2011).

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example, represents a rare moment of merging regulatory standards from different legal regimes.<sup>12</sup>

This simultaneous overlap and fragmentation among the federal regimes creates difficult questions about who should be included in interagency collaboration. Both mitigation and adaptation interact with a wide range of U.S. federal governmental entities. For instance, the Interagency Climate Change Adaptation Task Force has three co-chairing entities—the Council on Environmental Quality, the National Oceanic and Atmospheric Administration, and the Office of Science and Technology Policy—as well as representatives from six additional agencies on its steering committee, and members from seven entities within the Executive Office of the President, twelve departments, and five independent agencies.<sup>13</sup> Having a large number of key entities involved helps to prevent parallel, uncoordinated action, but can make decision-making more cumbersome. Moreover, these federal-level collaborations also take place in the broader context of international, regional, state, and local efforts, but often without meaningful coordination among them.<sup>14</sup>

Justice concerns run through all of these governance complexities. While a primary focus of climate justice is often at a global level, where the benefits and burdens of climate change are distributed unequally, these concerns arise at a national level as well. Existing law helps ensure the profitability of major corporate emitters—such as in the royalty scheme that supports deepwater drilling—and those emitters in turn contribute to campaigns and fund lobbyists in Washington.<sup>15</sup> Low-income communities, communities of color, and indigenous peoples often bear the brunt of those industries' externalities; they also have less capacity to adapt to climate change or to compete for the resources that assist transition to cleaner, cheaper energy. Although the Obama administration has made a significant commitment to environmental

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<sup>12</sup> See Osofsky, *Diagonal Federalism and Climate Change*, *supra* note 6.

<sup>13</sup> WHITE HOUSE COUNCIL ON ENVTL. QUALITY, PROGRESS REPORT OF THE INTERAGENCY CLIMATE CHANGE ADAPTATION TASK FORCE: RECOMMENDED ACTIONS IN SUPPORT OF A NATIONAL CLIMATE CHANGE ADAPTATION STRATEGY, app. A (Oct. 5, 2010), *available at* <http://www.whitehouse.gov/sites/default/files/microsites/ceq/Interagency-Climate-Change-Adaptation-Progress-Report.pdf>.

<sup>14</sup> See Osofsky, *Diagonal Federalism and Climate Change*, *supra* note 6.

<sup>15</sup> See Outer Continental Shelf Deep Water Royalty Relief Act (DWRRA), 43 U.S.C. § 1337(a)(1), (a)(3)(C) (2006); Melanie Mason, *Drilling Support, Donations Big for Texas Congressional Delegation*, DALLAS MORNING NEWS, June 3, 2010, <http://www.dallasnews.com/news/politics/state-politics/20100603-Drilling-support-donations-big-for-7856.ece>.

justice concerns, vulnerable populations find it harder to navigate the above-described complexities of climate change law and policy.<sup>16</sup>

## II. THE U.S. SUPREME COURT'S ROLE IN SHAPING THE FEDERAL REGULATORY PATH

The U.S. Supreme Court has entered this federal-level regulatory dialogue through lawsuits attempting to force agency regulation under federal environmental statutes and to change corporate behavior directly through federal common law. In the United States, which has struggled to develop a coherent federal policy, *Massachusetts* and *AEP* powerfully shape U.S. federal-level efforts to regulate climate change due to Congress' failure to pass comprehensive climate change legislation, which could have supplanted both cases. This Section explores the ways in which *AEP* builds on *Massachusetts* to reinforce the current federal regulatory pathway.

The Supreme Court's approach to climate change litigation in *AEP* flows from its analysis of both threshold and substantive issues in *Massachusetts*. The most important jurisprudential issues raised in the *AEP* appeal are standing (whether petitioners have the particularized interest in the case that allows them to bring the action) and the political question doctrine (whether the case raises a nonjusticiable political question). A four justice plurality in *AEP* found standing based on *Massachusetts*' reasoning, while four justices opposed standing.<sup>17</sup> Assuming that Justice Sotomayor, who did not participate in *AEP* because she had heard the case while sitting on the Second Circuit, either joins the group supporting standing or abstains from the issue—which seems far more likely than her joining the group in opposition—*AEP* reinforces that the Court will continue to view governmental petitioners

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<sup>16</sup> For the Obama administration's latest efforts on environmental justice, see Memorandum of Understanding on Environmental Justice and Executive Order 12898, Aug. 4, 2011, <http://epa.gov/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf> (last visited Aug. 5, 2011). For a discussion of potential U.S. approaches to climate justice, see Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 *BUFF. L. REV.* 169 (2008); Alice Kaswan, *Greening the Grid and Climate Justice*, 9 *ENVTL. L.* 1143 (2009). For an analysis of climate justice concerns at a global level and possible remedies, see Maxine Burkett, *Climate Reparations*, 10 *MELBOURNE J. INT'L L.* 509 (2009); Ruth Gordon, *Climate Change and the Poorest Nations: Further Reflections on Global Inequality*, 78 *U. COLO. L. REV.* 1559 (2007).

<sup>17</sup> For analysis of these standing issues, see Daniel A. Farber, *Standing on Hot Air: American Electric Power and the Bankruptcy of Standing Doctrine*, 121 *YALE L.J. ONLINE* 121, 121–22 (2011), <http://yalelawjournal.org/2011/09/13/farber.html>; Kevin T. Haroff, *On Thin Air: Standing, Climate Change, and the National Environmental Policy Act*, 46 *VAL. U. L. REV.* 411, 424 (2012).

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as having the particularized interest necessary to make regulatory challenges and thus continue to influence the path of federal regulation.

However, the plurality's affirmation of *Massachusetts's* approach to standing, which focuses heavily on the governmental status of some of the petitioners, does not resolve the question of whether it would find standing in a suit with only nongovernmental petitioners. This issue is currently being litigated in challenges to projects that have a large carbon footprint, such as coal-fired power plants. Some of these cases involve federal law and, in the months following the *AEP* decision, lower courts have split on this issue. The U.S. District Court for the District of New Mexico found that six citizen environmental groups lacked standing in a challenge to oil and gas leases based on climate change,<sup>18</sup> while the U.S. District Court for the District of Colorado held that nongovernmental organization, WildEarth Guardians, had standing to challenge leases that allow the venting of methane from a coal mine, including on climate change grounds.<sup>19</sup> Although these district courts' opinions only have precedential weight within their own districts, they will influence the ongoing dialogue about whether standing is appropriate in cases without governmental petitioners, cases that currently serve as one of the few ways in which citizens can attempt to shape the energy choices of major corporations.

In contrast to its explicit language on standing, the Supreme Court's cursory treatment of the political question doctrine challenges provides no guidance regarding whether and when such concerns could arise. The decisions in the lower courts in *AEP* and in other climate change federal common law public nuisance cases include extensive discussion of whether a public nuisance claim would require an initial policy determination that would be more appropriate for the political branches to make.<sup>20</sup> However, the words "political question" do not appear explicitly in the Supreme Court's opinion in *AEP*. Four justices held "that no other threshold obstacle bars review," and the other four justices, who were opposed to finding standing, did not address additional prudential issues, which leaves ambiguity about their position on the political question doctrine.<sup>21</sup> This lack of analysis of a threshold issue at the core of the lower court decisions is curious, but seems

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<sup>18</sup> *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 2011 WL 3924489 (D.N.M. Aug. 3, 2011). For examples of similar cases, see Arnold & Porter LLP, *Climate Change Litigation in the U.S.*, CLIMATE CASE CHART (Dec. 8, 2011), <http://www.climatecasechart.com/>.

<sup>19</sup> *WildEarth Guardians v. U.S. Forest Service*, Civil Action No. 08-cv-02167-MSK, Oct. 31, 2011.

<sup>20</sup> James R. May, *AEP v. Connecticut and the Future of the Political Question Doctrine*, 121 YALE L.J. ONLINE 127 (2011), <http://yalelawjournal.org/2011/09/13/may.html>.

<sup>21</sup> *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011).

unlikely to impact the course of federal statutorily-based regulation significantly. Cases challenging regulatory policy do not involve political question problems since they are brought through a statutory regime and administrative law; therefore, this issue will continue to arise, mostly, in common law challenges not precluded by *AEP*.

The core of the *AEP* decision focuses on the relationship between federal regulatory authority under the Clean Air Act and common law public nuisance. The Supreme Court held that “the Clean Air Act 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.”<sup>22</sup> *AEP* bases its unanimous displacement decision on *Massachusetts’s* finding that carbon dioxide emissions qualify as air pollution under the Clean Air Act.<sup>23</sup> *AEP* interprets that finding as establishing Congress’s delegation to the EPA of “whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law.”<sup>24</sup>

In the process of explaining its displacement holding, the Court in *AEP* makes two interrelated points that will shape the path of efforts to address climate change at the federal level in the United States. First, it precludes federal common law nuisance actions as a mechanism for challenging the EPA’s approach to climate change regulation—even if the EPA declines to regulate—so long as the EPA has regulatory authority.<sup>25</sup> Second, the Court simultaneously reinforces the appropriateness of regulatory suits challenging the EPA: “If the plaintiffs in this case are dissatisfied with the outcome of the EPA’s forthcoming rulemaking, their recourse under federal law is to seek [c]ourt of [a]ppeals review, and, ultimately, to petition for certiorari in this Court.”<sup>26</sup> This combination suggests that the Court remains open to climate change litigation’s continuing role in determining the course of federal regulation, so long as that litigation has a statutory focus.

In addition to reinforcing the appropriateness of litigation over federal regulatory approaches, *AEP* puts pressure on Congress to leave the current regime under the Clean Air Act in place. The opinion explicitly does not reach whether a federal common law nuisance action would be allowed if Congress decided that the EPA could no longer regulate greenhouse gas emissions. The opinion thus limits federal

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<sup>22</sup> *Id.* at 2537.

<sup>23</sup> See Jonathan H. Adler, *A Tale of Two Climate Cases*, 121 YALE L.J. ONLINE 109 (2011), <http://yalelawjournal.org/2011/09/13/adler.html>.

<sup>24</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2538.

<sup>25</sup> *Id.* at 2539.

<sup>26</sup> *Id.*



common law as a “parallel track” for challenging the EPA’s regulatory decisions, but leaves that track potentially open if Congress passes legislation that overrides *Massachusetts*.<sup>27</sup>

Finally, *AEP* continues an ongoing conversation about the role of federal courts in assessing climate change science. Professors Kysar and Burkett have raised concerns regarding the Court’s increasing skepticism about the science in *AEP*, especially as compared to the discussion of science in *Massachusetts*.<sup>28</sup> This shift parallels the public opinion shift described above. However, *AEP* does not simply focus on the substance of climate science, but also explicitly claims that the EPA is better situated than courts to assess climate change science. The Court explains that “[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order” and then elaborates on specific mechanisms that agencies have, but courts lack.<sup>29</sup> This discussion reinforces both Justice Scalia’s statement during the *Massachusetts* oral argument that he is “not a scientist,”<sup>30</sup> and the Court’s emphasis throughout *AEP* of the dominance of an agency rulemaking, rather than a common law, approach to federal action in this area.

The decision in *AEP*, then, represents another step in a path that the Supreme Court began in *Massachusetts*. In the process of focusing in on one particular type of action—federal common law public nuisance claims that include governmental petitioners—the Court presents a vision of its future role as an arbiter of regulatory disputes, rather than as a forum for debating climate change science or for directly addressing harms to the victims of climate change outside of a legislative framework.

### III. CLIMATE CHANGE LITIGATION IN THE AFTERMATH OF *AEP*

These Supreme Court cases represent only a small fraction of the cases involving climate change in U.S. courts and other tribunals around the world. Parties have brought cases in state and national courts and international tribunals under a wide range of legal theories. While most cases—including *Massachusetts*—focus on forcing or limiting government regulation of major emitters, other cases—such as *AEP*—attempt to

<sup>27</sup> *Id.* at 2531, 2538.

<sup>28</sup> See Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 YALE L.J. ONLINE 115 (2011), <http://yalelawjournal.org/2011/09/13/burkett.html>.

<sup>29</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2539–40.

<sup>30</sup> Transcript of Oral Argument at 13, *Massachusetts v. EPA*, 549 U.S. 497 (2007), 2006 WL 3431932, at \*12–13; see also Hari M. Osofsky, *The Intersection of Scale, Science, and Law in Massachusetts v. EPA*, 9 OR. REV. INT’L L. 233, 234 (2007).

change corporate behavior through tort or rights theories. As discussed in my previous scholarship, these cases impact efforts to regulate climate change directly by altering the regulatory landscape both in terms of who can regulate and what regulation they engage in, and also more indirectly by putting pressure on the government and corporations and raising public awareness of the problem.<sup>31</sup>

The Supreme Court's recent decision in *AEP* evinces an understanding of that broader litigation context by how it frames its decision and in what it declines to decide. It 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 the EPA's authority.<sup>32</sup> The Court does not decide whether state court nuisance cases are preempted and does not even mention the many state court regulatory actions regarding coal-fired power plants and other carbon-intensive projects (cases well beyond the direct scope of *AEP*).<sup>33</sup>

The Court's view of climate change litigation in *AEP* ensures that courts will remain an important regulatory battleground in the United States. The Court not only endorses the appropriateness of suits over the EPA's approach to regulating greenhouse gases under the Clean Air Act, but also allows this exploding area of litigation to continue—for the most part—along its current trajectory. The increasing investment by law firms, governmental entities, and nongovernmental organizations in climate change litigation practice likely will proceed apace after *AEP*. In my view, this aspect of the outcome is good news. As displayed in *Massachusetts*, *AEP*, and the myriad of cases before lower courts, litigation provides a way for key stakeholders to address conflicts over how to move forward.<sup>34</sup>

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<sup>31</sup> For an in depth discussion of these dynamics, see Hari M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, 26A STAN. ENVTL. L.J. 181 & 43A STAN. J. INT'L L. 181 (2007); Osofsky, *Is Climate Change "International"?*, *supra* note 6; Hari M. Osofsky, *The Continuing Importance of Climate Change Litigation*, 1 CLIMATE L. 3 (2010); Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789 (2005); Hari M. Osofsky, *The Geography of Climate Change Litigation Part II: Narratives of Massachusetts v. EPA*, 8 CHL. J. INT'L L. 573 (2008). For an interesting comparative analysis of U.S. and Australian approaches to climate change litigation and of why national-level regulation is also critically important to effective mitigation, see Jacqueline Peel, *The Role of Climate Change Litigation in Australia's Response to Global Warming*, 24 ENVTL. & PLAN. L.J. 90 (2007). For an interesting socio-legal analysis of the goals and regulatory role of climate change litigation, see Jolene Lin, *Climate Change and the Courts 4-5* (unpublished manuscript) (on file with the author).

<sup>32</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2538-39.

<sup>33</sup> Lin, *supra* note 31, at 6.

<sup>34</sup> See *supra* note 31 and accompanying text. For an opposing view regarding the value of climate change litigation in this symposium issue, see Victor E. Schwartz, Phil Goldberg,

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However, some of the unanswered questions and closed pathways after *AEP* raise questions about the extent to which citizens will be able to use litigation to challenge corporate decision-making and to achieve redress for those harmed by climate change. Professor Burkett argues that the Court's decision to narrow possibilities for federal common law nuisance actions raises serious justice concerns because it eliminates an option for those injured by climate change to obtain corrective justice from major emitters.<sup>35</sup> While regulatory suits, if they result in greater restrictions on greenhouse gas emissions, help to constrain the impacts of climate change, they provide limited opportunities for victims to obtain redress. Notwithstanding the many procedural and substantive concerns about climate change nuisance suits highlighted by Professor Gerrard (issues that have not yet been addressed for the most part because of the barriers that these cases have faced at early stages),<sup>36</sup> these suits do focus on the connection between emitters and victims in a way that regulatory suits generally do not.

The decision by the Court to constrain this avenue for potential justice has implications for the federal regulatory approach. Namely, unless the Court's decision in *AEP* is accompanied by greater assistance for climate change victims in the regulatory framework, its emphasis on the agency pathway risks exacerbating the climate justice problem by providing fewer ways for victims to obtain redress. But addressing climate justice within a federal regulatory framework, even assuming there is adequate political support for such an approach, raises a host of complex concerns. To the extent that climate justice involves helping people with few resources adapt to climate change, the federal adaptation program in collaboration with smaller scale adaptation efforts provides relatively uncontroversial mechanisms for addressing inequality.<sup>37</sup>

However, if a vision of climate justice also includes compensation for harm that goes beyond adaptation assistance (e.g., the Inuit being unable

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and Christopher E. Appel, *Does the Judiciary Have the Tools for Regulating Greenhouse Gas Emissions?*, 46 VAL. U. L. REV. 369, 400-01 (2012).

<sup>35</sup> See Burkett, *supra* note 28.

<sup>36</sup> See Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135 (2011), <http://yalelawjournal.org/2011/09/13/gerrard.html>.

<sup>37</sup> For the current U.S. federal approach to adaptation, see sources *supra* notes 11 & 13. For U.S. state and local approaches, see *Adaptation Planning – What U.S. States and Localities are Doing*, PEW CENTER ON GLOBAL CLIMATE CHANGE, [http://www.pewclimate.org/docUploads/State\\_Adapation\\_Planning\\_04\\_23\\_08%20\\_2\\_.pdf](http://www.pewclimate.org/docUploads/State_Adapation_Planning_04_23_08%20_2_.pdf) (last visited Jan. 17, 2011). For an analysis of federalism dilemmas in U.S. adaptation planning, see Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 40 ENVTL. L. 1159, 1167-71 (2010).

to use their ancestral lands in line with their traditional practices),<sup>38</sup> integrating such compensation into a regulatory scheme, particularly if it includes a corrective justice component of funding or other assistance from major emitters,<sup>39</sup> will likely be far more complex and politically contentious. As litigation continues to shape the federal regulatory path, important questions remain about how to help those most vulnerable to climate change through domestic law. Major emitters' choices are intertwined with those of climate change victims, but these linkages are hard to address directly through either mitigation or adaptation programs. Whether courts or legislatures create a regulatory framework for climate change, the United States needs to find better ways to address these fundamental fairness concerns.

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<sup>38</sup> See *supra* note 16 and accompanying text. U.S. and Canadian Inuit filed a petition with the Inter-American Commission, which was rejected, claiming that U.S. climate change policy violated their rights. See Letter from the Org. of Am. States to Sheila Watt-Cloutier, et al. regarding Petition No. P-1413-05, (Feb. 1, 2007) (on file with the author); Letter from the Org. of Am. States to Sheila Watt-Cloutier, et al. regarding Petition No. P-1413-05 (Nov. 16, 2006) (on file with the author); Letter from Sheila Watt-Cloutier, Martin Wagner, and Daniel Magraw to Santiago Cantón, Exec. Sec'y, Inter-American Comm'n on Human Rights (Jan. 15, 2007) (on file with the author); see also Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 AM. INDIAN L. REV. 675 (2007); Sheila Watt-Cloutier, Chair, Presentation at the Inuit Circumpolar Conference Eleventh Conference of Parties to the UN Framework Convention on Climate Change Montreal, (Dec. 7, 2005), [www.inuitcircumpolar.com/index.php?ID=318&Lang=En](http://www.inuitcircumpolar.com/index.php?ID=318&Lang=En); Jane George, *ICC Climate Change Petition Rejected*, NUNATSIAQ NEWS (Dec. 15, 2006), [http://www.nunatsiaqonline.ca/archives/61215/news/nunavut/61215\\_02.html](http://www.nunatsiaqonline.ca/archives/61215/news/nunavut/61215_02.html); Jonathan Spicer, *Hearing to Probe Climate Change and Inuit Rights*, REUTERS UK (Feb. 21, 2007, 10:14 PM), <http://uk.reuters.com/article/idUKN204267120070221>. In the Ninth Circuit Court of Appeals, a pending climate change federal common law nuisance case involving indigenous peoples' rights is on appeal after the district court dismissed the case on justiciability grounds. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 873-76 (N.D. Cal. 2009). This appeal will be impacted by the *AEP* decision.

<sup>39</sup> See Burkett, *supra* note 28.