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The Role of the Courts in Resolving Climate Change Issues

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The issue of whether courts should be able to entertain claims relating to companies' contributions to global warming fundamentally boils down to a separation of powers question: should the other branches of government – political branches with rulemaking and enforcement power – exclusively have the capacity to address such claims or should the judiciary also have some decision-making power? The Supreme Court's decision last June in *American Electric Power Co. v. Connecticut* ("AEP") has dueling implications on this issue. On one hand, the direct holding of the decision removed the federal common law, in whole or in substantial part, from the quivers of plaintiffs with climate change related claims. On the other hand, because the case was not disposed of on justiciability grounds, plaintiffs with such claims lived to fight another day. This means that the plaintiffs in the AEP case have surviving state tort claims, and it also means that plaintiffs in other climate change lawsuits are not necessarily foreclosed from maintaining their actions.

At issue in AEP was whether a consortium of states and private land trusts could sue the nation's largest emitters of greenhouse gases ("GHGs") under federal common law and state tort law based on the emitters' contributions to global warming. The case ping-ponged up the judicial highway mainly on political question and standing grounds. After the district court dismissed the case as a non-justiciable political question, the Second Circuit reversed, holding not only that the political question doctrine did not apply, but that the plaintiffs had standing to pursue their claims. Although the Supreme Court's opinion did not analyze justiciability issues, the Second Circuit's exercise of jurisdiction was affirmed by an equally divided Court (with Justice Sotomayor sitting out). This result means that the most important jurisdictional questions, such as standing and the political question doctrine, were staved off for another day, allowing these issues to percolate throughout the lower courts.

The High Court decision only gave full treatment to the issue of whether the Clean Air Act displaces the federal common law claim of interstate nuisance. The Court discussed the limited ambit of federal common law and restated that the “test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to [the question] at issue.” After the Court’s decision in *Massachusetts v. EPA* – which held that carbon dioxide is a pollutant under the Clean Air Act – it was manifest that the Clean Air Act “spoke directly” to the regulation of GHGs. The Court found that the EPA’s various rulemakings on GHGs supported this notion, but even without those rulemakings, the fact that the Clean Air Act authorizes such regulations displaced any overlapping federal common law. As the Court said: the Clean Air Act “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.”

Although the Court’s decision did not result in a majority holding relating to justiciability issues, in reaching its decision, the Court made some potentially prophetic musings regarding whether courts are appropriate arbiters of global warming claims. The Court advised that the more sensible approach to resolving climate change issues is for the EPA to prescribe rules and the federal judiciary to assure that the Clean Air Act is not being abused. Along these lines, the Court said the following: “The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required.” Later in the decision, the Court opined that the EPA is “best suited to serve as primary regulator of greenhouse gas emissions” and “is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.”

The Court’s decision is also notable for another issue it did not address: whether the Clean Air Act preempts state tort claims relating to global warming. This issue was not briefed by the litigants, and, as the Court acknowledged, the displacement of federal common law does not require the “same sort of evidence of a clean and manifest [congressional] purpose demanded for preemption of state law.” Accordingly, state claims alleging global warming injuries were remanded in *AEP* and will continue as potential legal vehicles in other cases.

In the end, the Court did not address fundamental questions relating to GHG claims, such as whether there are judicially manageable standards that can be imposed on companies, whether such claims are merely generalized grievances, whether a court can redress global warming injuries, and whether federal law has taken power from the states to address global warming. However, the Court’s displacement ruling and its musings relating to use of the political process to effect global warming regulation reflect the Court’s implicit understanding of the limits of its own power.