Supreme Court Decides Global Warming Case

June 24, 2011 by Sean Wajert

In the third of our trilogy this week, let's take a look at the Supreme Court's decision in American Electric Power Co. v. Connecticut, No. 10-174 (U.S. 6/20/11).

Readers may recall from our previous posts that in 2004, two groups of plaintiffs, one consisting of eight states and New York City, and the other consisting of three land trusts, sued six electric power corporations that own and operate fossil-fuel-fired power plants, seeking abatement of defendants' alleged ongoing contributions to the "public nuisance of global warming." Plaintiffs claimed that global warming, to which the defendants allegedly contributed as large emitters of carbon dioxide, is causing, and will continue to cause serious harm affecting human health and natural resources.

Plaintiffs brought these actions under the federal common law of nuisance to force defendants to cap and then reduce their carbon dioxide emissions. The district court held that plaintiffs' claims presented a non-justiciable political question and dismissed the complaints. On appeal, plaintiffs argued that the political question doctrine does not bar adjudication of their claims; that they had standing to assert their claims; that they had properly stated claims under the federal common law of nuisance; and that their claims were not displaced by any federal statutes.

In a lengthy opinion, the Second Circuit held that the district court erred in dismissing the complaints on political question grounds; that all of plaintiffs had standing; that the federal common law of nuisance governs their claims; that plaintiffs had stated claims under the federal common law of nuisance; that their claims were not displaced. In a very minimalist interpretation of what is needed for standing, the Second Circuit distinguished multiple precedents of the Supreme Court which held that to have standing a plaintiff must allege an injury that is concrete, direct, real, and palpable -- not abstract. Injury must be particularized, personal, individual, distinct, and differentiated -- not generalized or undifferentiated.

An equally divided Court affirmed the Second Circuit's exercise of jurisdiction. (Justice Sotomayor took no part in the consideration or decision of this case because of her participation in the 2d Circuit.). But the Court then held that the Clean Air Act displaces any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. It was an academic question whether, in the absence of the Clean Air Act and the EPA actions the Act authorizes, the plaintiffs could state a federal common law claim for curtailment of greenhouse gas emissions because of their alleged contribution to global warming -- because any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.

When Congress addresses a question previously governed by a decision rested on federal common law, the Court explained, the need for such an unusual exercise of law making by federal courts disappears. Legislative displacement of federal common law does not require

the same sort of evidence of a clear and manifest Congressional purpose demanded for preemption of state law. The Court thus 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. Precedent made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act, and it was equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants.

If EPA did not set emissions limits for a particular pollutant or source of pollution, States and private parties could always petition for a rulemaking on the matter, and EPA's response would be reviewable in federal court. The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs were seeking by invoking federal common law. The Court saw no room for "a parallel track."

The plaintiffs argued that federal common law should not be displaced until EPA actually exercises its regulatory authority, i.e., until it sets standards governing emissions from the defendants' plants. The Court disagreed. The critical point was 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.

Interestingly, although the split-court did not change the jurisdictional ruling, the Court did note that 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. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance. The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators. It was "altogether fitting" that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. "The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." A statement that sounds alot like defendant's jurisdictional argument.

The Court went on: federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges.

Notwithstanding these disabilities, the plaintiffs proposed that individual federal judges determine, in the first instance, what amount of carbon-dioxide emissions is "unreasonable," and then decide what level of reduction is "practical, feasible and economically viable." These determinations would be made for the defendants named in the litigation, and then similar suits could be mounted against thousands of other defendants fitting the plaintiffs' description "large contributors" to carbon-dioxide emissions.

Thus, since the decision turned on the displacement by Congressional designation of EPA as the prime decision-maker on regulation of emissions, if efforts underway in Congress to take away EPA's authority succeed, this may affect future global warming cases. The Court also declined to decide the plaintiffs' state-law claims, leaving that battle for another day. Nevertheless, the issues of judicial competence and discretion highlighted by the Court may serve to deter federal judges from making environmental policy under any substantive law. Also left open is whether a State may sue to abate any and all manner of pollution originating *outside* its borders.