American Electric Power Co. v. Connecticut: How One Less Legal Theory Available in the Effort To Curb Emissions Is Actually One Step Forward for the Cause

I. OVERVIEW OF THE CASE

In the last few years, absent a comprehensive national strategy to combat the causes of climate change, states, environmentalists, and others seeking to curb carbon dioxide and other greenhouse gas (GHG) emissions have increasingly sought change through litigation and have taken their fight to the courts.[1] One such suit was initiated in 2004 when eight states, the City of New York, and three land trusts filed two separate claims in the United States District Court for the Southern District of New York against the same five electric power companies in an effort to force the reduction of those companies' carbon dioxide emissions.[2] The plaintiffs alleged that the defendants' carbon dioxide emissions contributed to global warming and put the public and environment at risk.[3] This, they asserted, constituted a public nuisance in violation of federal common law, or in the alternative, state tort law, and the plaintiffs sought injunctive relief requiring each defendant to reduce their carbon dioxide emissions.[4]

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1. *See* Michael B. Gerrard & J. Cullen Howe, *Climate Change Litigation in the U.S.*, ARNOLDPORTER.COM, http://www.climatecasechart.com (last updated Oct. 28, 2011).

2. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2533-34 (2011). The states included California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin. *Id.* at 2533 n.3. The land trusts were Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire. *Id.* at 2534 n.4. The energy companies included American Electric Power Company, Inc. (and a wholly owned subsidiary), Southern Company, Xcel Energy Inc., Cinergy Corporation, and the Tennessee Valley Authority. *Id.* at 2534 & n.5. According to the plaintiffs, these five companies are responsible for twenty-five percent of all domestic electric power emissions and ten percent of emissions from all domestic human activities. *Id.* at 2534 (citing Complaint, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated and remanded*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011) (Nos. 04 Civ. 5569 (LAP), 04 Civ. 5670 (LAP)), 2004 WL 5614409).

3. *Id.* at 2534.

4. *Id.*

The district court concluded that both suits turned on nonjusticiable political questions and dismissed both actions.[5] In 2009, the United States Court of Appeals for the Second Circuit reversed, finding that the nuisance claim was not barred by the political question doctrine and that the plaintiffs had standing.[6] On the merits, the Second Circuit found that the plaintiffs' federal common law claim of nuisance was not displaced by federal statute.[7] On appeal, the United States Supreme Court *held* that the Clean Air Act (CAA), which authorized the United States Environmental Protection Agency (EPA) to regulate carbon dioxide emissions, displaced the federal common law of nuisance for claims of injuries allegedly caused by GHG emissions from electric power companies. American Electric Power Co. v. Connecticut, 131 S. Ct. 2527, 2532, 2535 (2011).

II. BACKGROUND

Though it is well established that federal courts do not have the authority to develop federal general common law,[8] the Supreme Court has determined that the remedies enacted by Congress "are not necessarily the only federal remedies available."[9] The Court has found it necessary at times to develop federal common law when Congress has been silent on an issue of national concern.[10] Applying this exception, the Supreme Court has long recognized a federal common law of nuisance for suits brought by a state to abate pollution.[11] For example, in *Illinois v. City of Milwaukee* (*Milwaukee I*), the Court upheld a lawsuit brought by Illinois under federal common law seeking to curtail sewage discharges into Lake Michigan because the discharge constituted a public

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5. *Id.*

6. *Connecticut*, 582 F.3d at 332, 349.

7. *Id.* at 379-81. In determining that the claim fit within the federal common law of nuisance, the Second Circuit relied on Supreme Court precedent allowing states to sue other states or industry that contribute to air and water pollution. *Id.* at 350-51 (citing Georgia v. Tenn. Copper Co., 206 U.S. 230, 236, 238 (1907); Missouri v. Illinois, 180 U.S. 208, 243 (1901)). In determining that the claim was not displaced, the Second Circuit was influenced by the fact that the Environmental Protection Agency had not yet acted on its authority to regulate GHGs under the Clean Air Act. *Id.* at 379-81.

8. City of Milwaukee v. Illinois & Michigan (*Milwaukee II*), 451 U.S. 304, 312 (1981) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812)).

9. Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91, 103 (1972).

10. *Milwaukee II*, 451 U.S. at 313 (citing *Erie R.R. Co.*, 304 U.S. at 68; Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943)).

11. *See Tenn. Copper*, 206 U.S. 230.

nuisance and the Clean Water Act (CWA) did not provide a remedy.[12] The Court determined, "When we deal with air and water in their ambient or interstate aspects, there is a federal common law."[13]

Federal common law no longer applies to a federal issue, however, when Congress passes comprehensive legislation that directly addresses and speaks to that federal issue.[14] The courts have no authority to supplement a federal statute to the point of substituting its views for those provided by the legislature.[15] The Supreme Court has acknowledged, "There is a basic difference between filling a gap left by Congress's silence and rewriting rules that Congress has affirmatively and specifically enacted."[16] For example, in *City of Milwaukee v. Illinois & Michigan* (*Milwaukee II*), the Court held that the CWA, since amended after *Milwaukee I* and restructured into a comprehensive regulatory scheme, displaced interstate nuisance claims for water pollution brought under federal common law.[17]

In an attempt to address another issue of national importance and "protect and enhance the quality of the Nation's air resources," Congress passed the CAA in 1970.[18] The Act requires, inter alia, the EPA to establish standards governing the emissions of hazardous pollutants.[19] As such, and according to the EPA, the CAA is the comprehensive federal law that regulates air emissions.[20]

In the 2007 landmark decision, *Massachusetts v. EPA*, the Supreme Court found that GHGs fit within the CAA's definition of air pollutants and that the EPA has the authority to regulate the sources of their emissions.[21] As a result of *Massachusetts*, the EPA is required to establish emission standards for sources of GHGs if the EPA

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12. 406 U.S. at 93, 103.

13. *Id.* at 103 (citing Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971)).

14. *Milwaukee II*, 451 U.S. at 314 (citing *Milwaukee I*, 406 U.S. at 107).

15. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26 (1978).

16. *Id.* at 625. *Compare id.* (noting that when a congressional act speaks directly to an issue, the courts are not free to "substitute" for Congress's answer), *with* United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973) ("[At times,] the federal courts [need] to declare, as a matter of common law . . . rules . . . to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress.").

17. *Milwaukee II*, 451 U.S. at 319-20. Federal common law is no longer available when Congress has addressed the problem, regardless of the "extent to which the problem[has] been addressed." *Id.* at 323. The test is "whether the field has been occupied, not whether it has been occupied in a particular manner." *Id.* at 324.

18. Clean Air Act, 42 U.S.C. § 7401(b)(1) (2006).

19. *Summary of the Clean Air Act*, EPA, http://www.epa.gov/lawsregs/laws/caa.html (last updated Aug. 11, 2011).

20. *Id.*

21. 549 U.S. 497, 532 (2007).

administrator determines the source "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[22] If such a finding is made, the CAA directs the EPA to establish performance standards for GHG emissions from new, modified, and existing sources of the GHGs.[23] In the event that the EPA fails to do so, states and private parties are permitted to petition for judicial review of the EPA's decision.[24]

In December 2009, the EPA issued an endangerment finding declaring that in the Administrator's judgment, GHGs cause harm to the public.[25] By issuing this finding, the EPA was now required to promulgate standards for GHG emissions. Accordingly, the EPA began to issue rules regulating GHG emissions from mobile sources[26] and new and modified stationary sources.[27] In December 2010, the EPA announced its schedule for establishing standards for existing stationary sources.[28]

III. THE COURT'S DECISION

In the noted case, the Supreme Court reversed the Second Circuit's decision and found that the plaintiffs' claim was displaced by federal legislation.[29] Though equally split on the threshold issues, the court relied on its own precedent to affirm the lower court's exercise of jurisdiction and was able to reach the merits of the case.[30] The Court next acknowledged the existence of the federal common law of nuisance, but declined to determine if it applied to GHG emissions.[31] Rather, the Court applied its recent decision in *Massachusetts* to its long-standing

22. 42 U.S.C. § 7411(b)(1)(A).
23. *Id.* § 7411(b)(1)(B), (d).
24. *Id.* § 7607(b)(1).
25. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).
26. 40 C.F.R. §§ 85-86 (2011).
27. *Id.* §§ 51-52, 70-71.
28. Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 Fed. Reg. 82,392 (Dec. 30, 2010). This schedule is a result of a settlement agreement stemming from a lawsuit filed by environmental groups and various states, including many of the plaintiffs in the noted case, against the EPA for an alleged failure to update emission standards for power plants and petroleum refineries. *Id.* In the settlement, the EPA agreed to propose standards for power plants by July 2011 and to issue final standards in May 2012. *Id.* The EPA missed the July 2011 deadline and was granted an extension, which it also failed to meet. Kyle Danish et al., *Climate, Energy, & Air Weekly Update—September 12-16, 2011*, VANNESS FELDMAN, http://www.vnf.com/news-policyupdates-634.html (last visited Nov. 5, 2011).
29. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2540 (2011).
30. *Id.* at 2535.
31. *Id.* at 2536-37.

precedent of congressional statutes trumping federal common law, and found that the plaintiffs' federal nuisance claim alleging injury caused by the defendants' GHG emissions was displaced by the CAA and its authorization for the EPA to regulate GHG emissions.[32] Finally, because the parties did not address the availability of a claim based on state law, the Court left the matter open for consideration on remand.[33]

The Court began its decision by noting it was equally divided on whether federal courts had authority to adjudicate the case.[34] The Court, however, did not discuss or attempt to resolve the political question doctrine and standing issues.[35] Instead, relying on established precedent requiring a superior court to affirm a lower court's exercise of jurisdiction when the superior court is evenly split, the Court affirmed the Second Circuit's threshold ruling and proceeded directly to the merits.[36]

Turning to the substance of the plaintiffs' claim, the Court first acknowledged that federal common law does exist and that it has been applied to abate interstate pollution in suits brought by States.[37] The Court, however, cautioned that it "ha[s] not yet decided whether private citizens" may bring similar claims.[38] Furthermore, the Court was quick to remind that Congress is the branch best suited to create national legislation and that court-fashioned federal common law should be limited.[39] Though the plaintiffs contended that the defendants' unchecked emission of GHGs constituted a nuisance recognized under federal common law and redressable by a court injunction, the Court recently determined in *Massachusetts* that Congress intended GHGs to be regulated under the CAA.[40] In light of this, the Court concluded that the plaintiffs' claim was displaced by the Act, and therefore did not have to

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32. *Id.* at 2537.
33. *Id.* at 2540.
34. *Id.* at 2535.
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> Four members of the Court would [have held] that at least some plaintiffs have Article III standing under *Massachusetts* . . . and, further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would [have held] that none of the plaintiffs have Article III standing.

Id. (footnotes omitted) (citing Massachusetts v. EPA, 549 U.S. 497, 520-26, 535 (2007)).

36. *Id.* (citing Nye v. United States, 313 U.S. 33, 44 (1941)).
37. *Id.* at 2535-36 (citations omitted).
38. *Id.*
39. *Id.*
40. *Id.* at 2532-33 (citing *Massachusetts*, 549 U.S. at 528-29).

address the "academic question" of whether it could be brought under federal common law.[41]

Next, expounding on its finding of displacement, the Court reiterated that the test for whether a federal statute displaces federal common law is whether the statute "speak[s] directly to [the] question at issue."[42] Because *Massachusetts* qualified GHGs as pollutants subject to the CAA,[43] the Court was satisfied that the Act specifically addressed the issue of the defendants' GHG emissions.[44] The Court was further persuaded by the courses of action the CAA made available to the plaintiffs should the EPA decline to set emission limits for a pollutant it had declared as a public danger.[45] One such recourse, litigation seeking the EPA to finalize its emission standards, had already been set in motion in a separate proceeding.[46] The Court noted that the CAA now provided the same check on emissions that plaintiffs sought through an injunction.[47] As a result, the Court reasoned, there was no longer a need for a common law approach and "no room for [this] parallel track."[48]

Once it had determined that the CAA displaced federal common law, the Court next turned to the question of when displacement occurred. Unlike the Second Circuit, the Court did not accord any weight to the distinction between the CAA's grant of authority to regulate GHGs and the EPA's actual exercise of that authority.[49] Relying on the test outlined in *Milwaukee II*, the Court reiterated that the question of displacement turns on occupation of a field, not on how the field is occupied.[50] In this case, the federal common law cause of action to limit the amount of GHGs the defendants could emit was displaced as soon as Congress—through the CAA—delegated the authority to regulate GHGs to the EPA.[51]

The Court then turned to the role of the judiciary in the GHG regulatory scheme. The delegation of GHG regulation to an expert

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41. *Id.* at 2536-37.

42. *Id.* at 2537 (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)) (citing *Milwaukee II*, 451 U.S. 304, 315 (1981); County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 236-37 (1985)).

43. *Id.* (citing *Massachusetts*, 549 U.S. at 528-29).

44. *Id.*

45. *Id.* at 2538.

46. *See* Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 Fed. Reg. 82,392 (Dec. 30, 2010).

47. *Am. Elec. Power*, 131 S. Ct. at 2538.

48. *Id.*

49. *Id.*

50. *Id.* (citing *Milwaukee II*, 451 U.S. 304, 324 (1981)).

51. *Id.*

agency, the Court noted, was preferable to an ad hoc approach by the courts and in line with long standing principles of agency deference.[52] The Court expressed its concern with a system that called for federal judges—who have no scientific, economic, or technical resources at their disposal—to regulate an area in which the EPA is also authorized, and better equipped, to regulate.[53] The Court recognized that Congress created a decision-making scheme within the CAA and concluded that its proper place in this scheme was not as a regulator in the first instance, but as a reviewer of agency action.[54]

Finally, the Court turned to the plaintiffs' alternative claim that the defendants' carbon dioxide emissions violated the tort laws of the states where the power plants operated.[55] The Court noted that relief under this theory would depend, inter alia, on the preemptive effect of the CAA.[56] Because none of the parties addressed preemption, the Court left the matter to be considered on remand.[57]

IV. ANALYSIS

The Supreme Court's decision in the noted case has significant implications for parties concerned with climate change. First and foremost, the reasoning that supported the Court's finding of displacement also reaffirmed the EPA's authority to regulate GHG emissions.[58] Additionally, the Court reinforced the availability of judicial review to challenge the EPA's regulatory initiatives.[59] Taken together, these points provide a clearer framework for parties involved in climate change litigation to work within.

On the other hand, what the Court left out of its decision leaves some issues unresolved. First, the Court's equal split on jurisdictional threshold issues contributed nothing new to the question of whether federal courts are a proper forum for litigants alleging injury due to climate change. Second, the decision did not address state nuisance claims.[60] Lastly, because the decision turned on displacement, the Court

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52. *Id.* at 2539-40 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984)).

53. *Id.*

54. *Id.* at 2540.

55. *Id.*

56. *Id.* (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 489, 491, 497 (1987)).

57. *Id.*

58. *See id.* at 2537 (citing Massachusetts v. EPA, 549 U.S. 497, 528-29 (2007)).

59. *See id.* at 2538 (citing 42 U.S.C. § 7607(b)(1); *Massachusetts*, 549 U.S. at 516-17, 529) ("If the EPA does not set emission limits . . . private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court.").

60. *Id.* at 2540.

did not resolve whether a federal common law remedy exists for parties seeking to curb GHG emissions. The Court's finding was built entirely on the decision in *Massachusetts* that GHGs are within the purview of the CAA.[61] Should this change, lower courts will have to answer the "academic question" the Supreme Court declined to consider.[62]

The Court's decision in the noted case affirmed the Second Circuit's exercise of jurisdiction, but only because the Court was equally split on the threshold issues.[63] The Court, therefore, did not alter the current rule that litigants with injuries allegedly caused by climate change can have their claims adjudicated in federal court, but also did little to expound on it. What type of litigants? What type of claims? For example, the Court acknowledged that states could sue to "challenge activity harmful to their citizens" but was careful to point out it has not yet ruled on whether private citizens could utilize federal common law suits to abate out-of-state pollution or if states were allowed to sue "to abate any and all manner of pollution."[64] Does this imply that only states have standing? And would states have standing in a climate change case under a theory other than nuisance? On these and other jurisdictional issues, the Court was silent. For instance, does the Court's decision preclude all federal nuisance claims or only suits seeking injunctive relief? On this issue, it is noteworthy that the Court found support for its displacement holding in the fact that the CAA contains measures that can provide the same relief sought by the plaintiffs: a limit on emissions.[65] What if a plaintiff sought monetary damages instead? The CAA provides no recourse for this type of plaintiff.[66] Is this the sort of gap the courts are authorized to fill?[67]

Perhaps the most immediate question raised by the Supreme Court's decision in the noted case is whether parties seeking to curb GHG emissions can do so through state law nuisance claims. The Second Circuit will have to answer this question on remand and its decision is likely to turn on whether the CAA preempts state nuisance claims. In *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, the United

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61. *Id.* at 2537 (citing *Massachusetts*, 549 U.S. at 528-29).
62. *Id.*
63. *Id.* at 2535.
64. *Id.* at 2536.
65. *Id.* at 2538.
66. *See* 42 U.S.C. § 7604 (2006). At least one case, *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), currently on appeal to the Ninth Circuit, may soon resolve this issue. For further analysis, see Michael B. Gerrard, *"*American Electric Power*" Leaves Open Many Questions for Climate Litigation*, N.Y. L.J., July 14, 2011, *available at* http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=59345.
67. *See* cases cited *supra* note 16.

States Court of Appeals for the Fourth Circuit recently ruled on a similar issue and concluded that the CAA preempts state common law nuisance claims for conventional pollutants.[68] Though the Fourth Circuit declined to hold "that Congress has entirely preempted the field of emissions regulation,"[69] the court recognized "the considerable potential mischief in . . . nuisance actions seeking to establish emissions standards different from federal and state regulatory law" and the strong "cautionary presumption against them."[70] The Fourth Circuit, concerned with the practical effects of multiple—and possibly conflicting—emission standards that would result from tort litigation, was inclined to defer to the "scientific expertise" put forth by Congress in the CAA's regulatory scheme.[71] *Tennessee Valley Authority*, considered alongside the observation in the noted case that "judges lack the scientific, economic, and technological resources" to regulate GHG emissions, indicates a preference towards preemption. The Second Circuit will likely consider the reasoning in both of these cases in its upcoming decision.

Lastly, the holding in the noted case that federal law displaces the plaintiffs' nuisance claim is in large part built on the back of *Massachusetts*, in which the Court held that GHGs fit within the CAA's definition of air pollutants and that the EPA has the authority to regulate them.[72] Though the noted case was decided eight-zero, *Massachusetts* was decided five-four.[73] Of particular interest is Justice Alito's concurrence in the noted case that only *assumes* the Court correctly interpreted the CAA in *Massachusetts*.[74] No party in the noted case argued otherwise, but others may in the future.[75] It can be argued that because GHGs are not explicitly mentioned in the CAA, Congress did not "speak directly" to GHG emissions. If so, it follows that the Court's reading of the CAA to include GHGs was actually a substitution of its views for that of the legislature.[76] Of course, the Court's eight-zero

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68. 615 F.3d 291, 303 (4th Cir. 2010).

69. *Id.* at 302 (citing Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983)).

70. *Id.* at 303 (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987)).

71. *Tenn. Valley Auth.*, 615 F.3d at 301.

72. Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

73. *Id.* at 501.

74. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2540-41 (2011) (Alito, J., concurring).

75. Though not specifically addressing *Massachusetts*, there are two suits currently pending in the United States Court of Appeals for the District of Columbia Circuit specifically challenging GHG regulation. *See* Gerrard, *supra* note 66.

76. *See* cases cited *supra* notes 14-16. For further analysis of the Court's interpretation of the CAA to include GHGs, see Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93

decision does more to confirm the EPA's authority to regulate GHGs than to undercut it, but consider also the possibility that Congress explicitly declares GHGs outside the scope of the CAA.[77] Regardless of how, if the EPA is stripped of its authority, the question of whether a state or private individual could bring suit against a GHG emitter under a theory of either federal or state nuisance law will have to be settled.

Though questions remain on threshold issues, state-based nuisance claims, and whether federal common law remedies exist outside of nuisance claims or in the absence of EPA authority to regulate GHGs, the decision in the noted case has positive implications for those concerned with climate change. The Court reaffirmed the EPA's authority to regulate GHG emissions under the CAA and provided guidance for climate change litigation going forward. Given Congress's failure to pass a comprehensive law specifically addressing climate change and the emergence of the courts as a new battlefield for those seeking to combat the effects of GHG emissions, this guidance is significant.

V. CONCLUSION

The holding in the noted case, despite denying the plaintiffs' claim, is still a step forward for those seeking to curb GHG emissions. It not only reaffirmed the EPA's authority to regulate GHGs, but proclaimed the EPA as the "expert agency" best suited for the job.[78] This designation may carry significant weight as challenges to the EPA's authority continue to be found in both federal courthouses and on the floor of Congress. Though this decision left some questions unanswered, it also took steps to clarify the proper procedure for climate change litigation within a regulatory scheme. In doing so, the Court provided the interested parties—States, environmental organizations, power companies, federal agencies, and Congress—a framework to work within in the present and improve upon in the future.

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VA. L. REV. IN BRIEF 63, 69-72 (2007), *available at* http://virginialawreview.org/inbrief/2007/05/21/adler.pdf.

77. *See* Darryl Fears, *House GOP Readies Bill To Prohibit EPA from Regulating Carbon Emissions*, WASH. POST, Feb. 3, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/02/02/AR2011020206575.html (discussing proposed legislation which "strip[s] the [EPA] of its power to regulate GHGs under the Clean Air Act").

78. *Am. Elec. Power*, 131 S. Ct. at 2539.

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