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Supreme Court Blocks Federal Common Law Public Nuisance Claims for Greenhouse Gas Emissions

A. Bryan Endres

Department of Agricultural and Consumer Economics
University of Illinois

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The U.S. Supreme Court rarely hears a case with a direct impact on agricultural production. Other than the [Monsanto v. Geertson Seed Co.](#) case from last year that resolved a procedural issue related to evidentiary hearings for injunctions, the most recent decision with a direct and substantial influence was the [J.E.M. Ag Supply v. Pioneer Hi-Bred International](#) case from 2001. That case affirmed the right of seed breeders to hold both utility patents and plant variety protection certificates on seeds. 534 U.S. 124 (2001). Other cases have had an indirect effect on agriculture, such as takings or water regulation. For example, in [Kelo v. City of New London](#), the Court confirmed the government's ability to use eminent domain to transfer land from one private owner to another in the interest of economic development. 545 U.S. 469 (2005). In [Rapanos v. United States](#), 547 U.S. 715 (2006), the Court limited the federal government's jurisdiction under the Clean Water Act. Both of these cases provide rough outlines to the extent of government interaction on privately held lands—including farmland.

On June 20th, the Supreme Court issued another important decision with potential implications on agricultural production. In [American Electric Power Company \(AEP\) v. Connecticut, et al.](#), the Court addressed whether a group of eight states (and other entities) could make federal common law public nuisance claims against five of the largest emitters (all electric power companies) that contribute 10 percent of the carbon dioxide emissions in the US and 2.5 percent of all anthropogenic emissions worldwide. By contributing to climate change, the plaintiffs asserted that the defendants' activities would destroy public lands, infrastructure and public health in the respective states. Accordingly, the plaintiffs asked the court to order a cap on defendants' emissions and subsequent reductions on an annual basis.

The federal trial court in New York dismissed this case, but the Second Circuit Court of Appeals reversed and reinstated the plaintiffs' claims. The appeals court held that federal regulatory schemes, such as the Clean Air Act, did not displace federal common law claims for nuisance from greenhouse gas emissions. A unanimous Supreme Court (8-0; Justice Sotomayor recused herself from the case because she served on the Second Circuit panel) reversed the Court of Appeals, and remanded the case for further proceedings.

In sum, the Court held that because Congress, via the Clean Air Act, had delegated to the Environmental Protection Agency (EPA) the authority to regulate greenhouse gases, including carbon dioxide, there is

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no federal common law right to enjoin others from emitting carbon dioxide. Rather, as a matter of federal law, the states (or other prospective plaintiffs) must wait for the EPA to regulate greenhouse gases under the Clean Air Act—rules the agency under the Obama Administration is in the process of implementing.

The impact on production agriculture is a reprieve from potential federal public nuisance litigation over greenhouse gas emissions. Agriculture is responsible for approximately [7 percent of domestic greenhouse gas emissions](#), with [animal production responsible for approximately 40% of total methane emissions and fertilizer from cropping systems responsible for almost 69 percent of total domestic nitrous oxide emissions](#). Although still relatively small in comparison to the electric power industry, a successful claim in the AEP case could have exposed agriculture to similar private party litigation, regardless of EPA's pledge to exempt agriculture from greenhouse gas regulation.

But the AEP case is not the end of the line for this type of litigation. The Supreme Court specifically did not address whether state public nuisance law would apply to greenhouse gas emissions—or whether the Clean Air Act would preempt state-law claims. This issue will be addressed in the next phase of the AEP litigation and warrants careful monitoring.