

Carbon Emissions Litigation: Analysis of the  
U.S. Supreme Court's Decision in *AEP v.  
Connecticut* and the Fourth Circuit's Decision  
in *NC v. TVA*

Presented by:  
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# Overview

- Why Is This Important?
- Analysis of *AEP v. CT*
- Analysis of *NC v. TVA*
- Implications of These Decisions
- Questions?

# The Truth

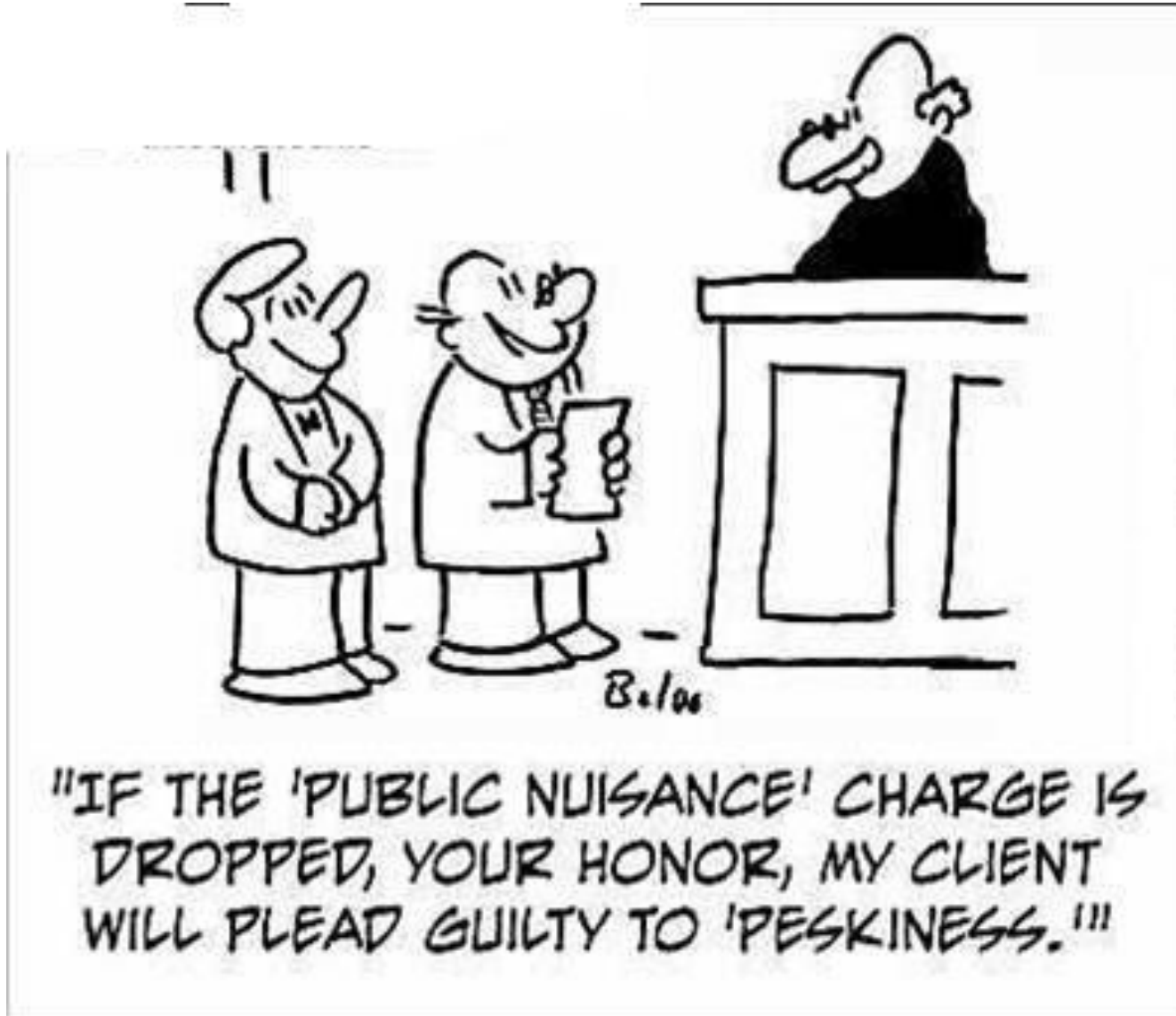


# Why Should I Care?





# Public Nuisance



# Public Nuisance

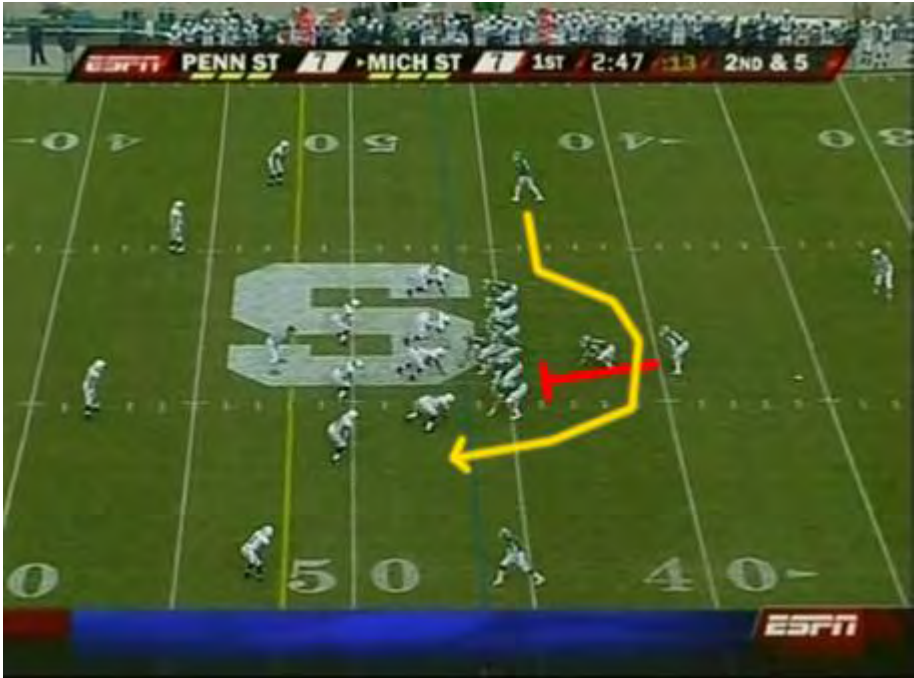
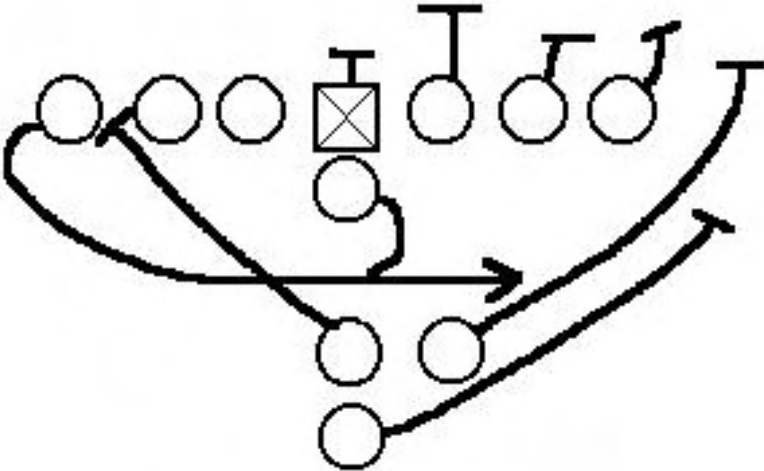


# Possibility of Big Money



# End-Around

## End-Around Play



# *AEP v. Connecticut*



# CT v. AEP

## Procedural History

- In 2004, eight states (CA, CT, IA, NJ, NY, RI, VT, and WI) and New York City sued five electric utility companies in federal district court in NY
- Plaintiffs sued on own behalf to protect state-owned property (such as hardwood forests in NY state)
- Also sued as *parens patriae* on behalf of their citizens and residents to protect public health and well-being

# Overview of *AEP v. CT*

- Paragraph 3 of AEP Complaint: “The threatened injuries to the plaintiffs [] from continued global warming include:
  - ***increased heat deaths*** due to intensified heat waves;
  - increased smog leading to ***increases in asthma***;
  - beach erosion and ***salinization of water supplies***;
  - ***accelerated sea level rise***;
  - Reduction of snowpacks in CA (critical source of water)
  - ***Lowered Great Lakes water levels***;
  - ***More droughts and floods***
  - Widespread loss of species and biodiversity, including ***the disappearance of forests*** from the northern U.S.



# CT v. AEP

## Trial court decision

- Trial court dismissed on **political question** grounds
- One situation judicially recognized as pointing to a political question, hence dismissal of the action, is “the impossibility of deciding [the case] without an initial policy determination of a kind clearly for nonjudicial discretion.” *Baker*, 369 U.S. at 217.
- Court said this situation perfectly fit the CT v. AEP case because it touched on so many areas of national and international policy.
- **As a political question, the court believed the climate change issue to be for the legislature, not the courts, to resolve.**

# *CT v. AEP*

## Second Circuit decision

- 139 page decision reversing trial court
- Rejected application of political question doctrine
- Found that Plaintiffs did have standing
- Found that Plaintiffs did state viable claims under federal common law of nuisance
- Found that Plaintiffs' claims were not displaced or preempted at this time



# The Supreme Court Decision



# The Result



# Misperception

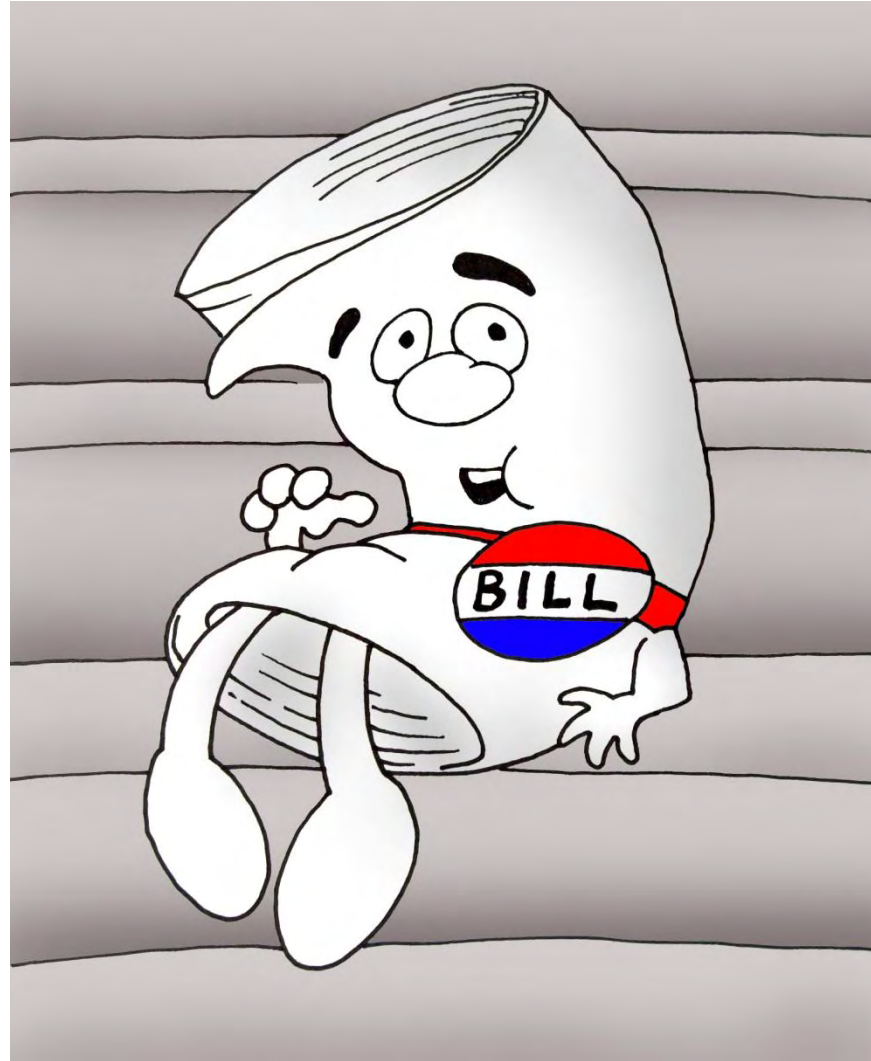




# Misperception

- WSJ: “**Yet this is a fundamentally political question**, one the Constitution reserves to Congress and the executive, as Justice Ruth Ginsburg wrote for the 8-0 majority.”
- WSJ: “**The Court dismissed the case under the ‘political question doctrine’ . . . .**”
- WSJ: “The Supreme Court blocked six states from suing power-plant operators over GHG emissions, ruling unanimously Monday that pending federal regulation under the Clean Air Act **pre-empts** the case.”
- WSJ: “But the justices split 4-4 on related legal questions, **leaving open the possibility that states could revive their action if the Obama administration fails to issue a final emissions rule by May 2012.**”

# Displacement



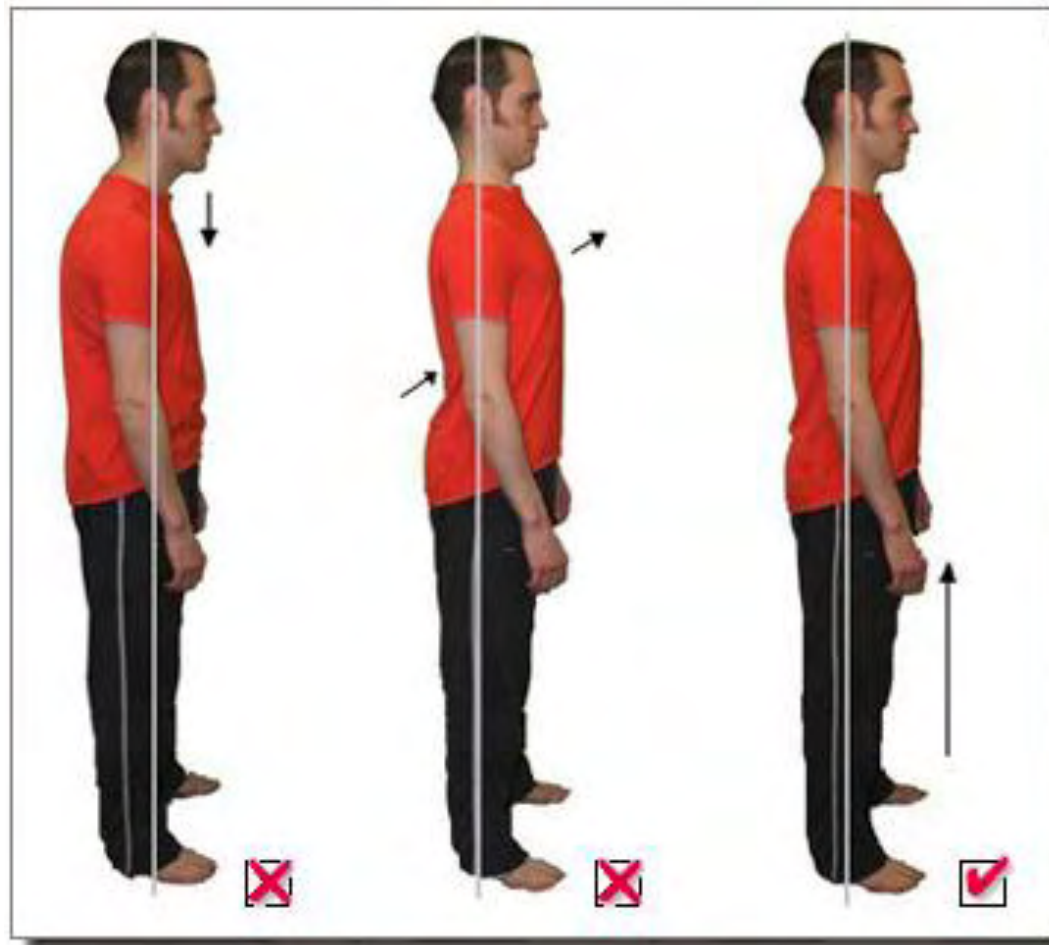
# Displacement - Holding

- “We hold 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-fueled fired power plants.”

# Displacement

- “The critical point is 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.”

# Standing and Political Question



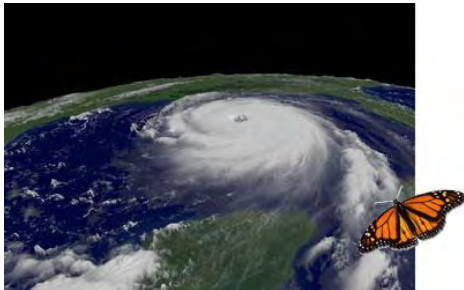
# Standing and Political Question

- “Four members of the Court would hold that at least some plaintiffs have Article III standing under Massachusetts, which permitted a State to challenge EPA’s refusal to regulate greenhouse gas emissions, 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 hold that none of the plaintiffs have Article III standing. ***We therefore affirm, by an equally divided Court, the Second Circuit’s exercise of jurisdiction and proceed to the merits.***”

# CT v. AEP

## Standing

- Second Circuit found that future injury allegations such as ***rising sea levels*** are proper because they are ***“imminent” threats***
- Court agreed that effects alleged by Plaintiffs are ***“certain to occur”*** and are ***“certainly impending”***
- ***“The risk of catastrophic harm though remote is nevertheless real.”***
- Court also found that Plaintiffs have sufficiently alleged that their injuries are ***“fairly traceable”*** to the actions of Defendants and that there is a ***substantial likelihood*** that Defendants’ conduct caused Plaintiffs’ harm



# CT v. AEP

## Political Question

- Second Circuit stated that “the Pltfs do not ask [us] to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches.”
- It concluded that the fact that “Plaintiffs’ injuries are part of a worldwide problem does not mean Defendants’ contribution to that problem cannot be addressed through principled adjudication.”

# State of North Carolina v. TVA



# Trial Court Decision

- *State of North Carolina v. TVA*, 593 F. Supp.2d 812 (W.D. N.C. 2009)
  - Finding that power plant emissions contributed to:
    - significant negative impacts on human health, including premature mortality and increased asthma;
    - Numerous social and economic harms;
    - Harm to the environment;
    - Significant effects on visibility.



# Trial Court Decision

- Declared air emissions to be a public nuisance despite compliance with all applicable state and federal regulations and ordered TVA to install enhanced pollution controls at a cost of \$1 billion
- Held that TVA's power had a high social utility but that it was outweighed by "the vast extent of the harms caused in North Carolina by the secondary pollutants emitted by these plants . . . ."

# Significance: Extremely attenuated causation links to establish standing

- Causation link in *State of NC v. TVA*:
  - pollutants at issue were secondary pollutants. These secondary pollutants were not emitted by the TVA but were formed when the primary pollutants underwent chemical changes.
  - These secondary pollutants in turn then allegedly contributed to acid deposition,
  - Which in turn made the soil more acidic,
  - Which in turn made naturally-occurring toxic aluminum more prevalent in the environment,
  - Which in turn damaged local vegetation.

# Significance: End-Run

- “Although the administrative route has certainly borne some interesting fruit, it has not thus far resulted in the reduction of emissions from upwind, out-of-state sources that NC is ultimately seeking.”

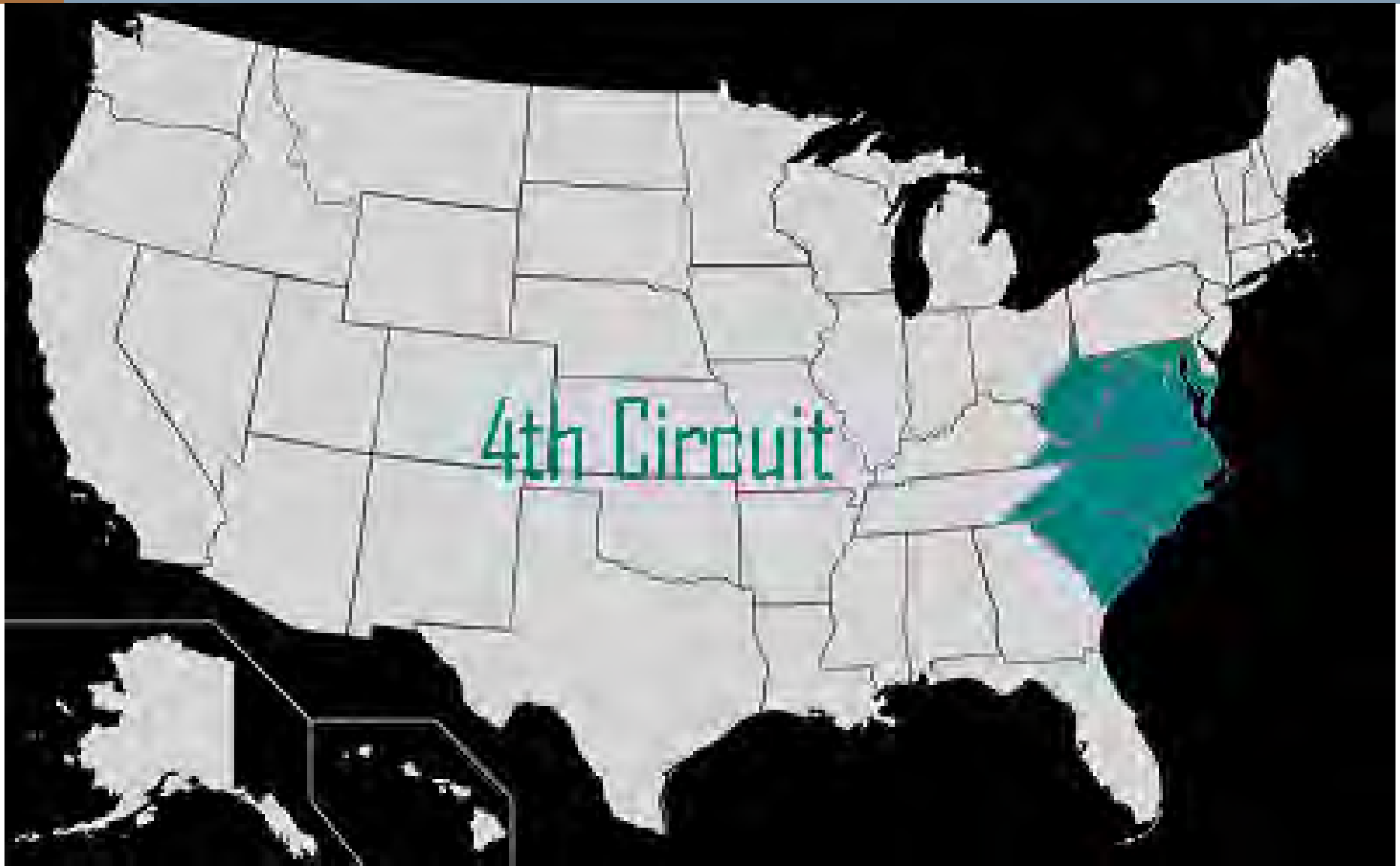
# Significance: Quick Results

- State of NC in that suit was able to achieve its goal of reducing emissions a lot quicker and more efficiently by filing a public nuisance suit than it would have been able to accomplish anything through lobbying.
- Time it took *State of NC v. TVA* from end of MTD stage to final judgment: **Less than a year.**

# Significance: Expansion of Public Nuisance

- Distance
  - Public nuisance has traditionally been measured distance-wise in yards; TVA in *State of NC* case was held liable for emissions 100 miles away
  - Defendants in *CT v. AEP* are being sued for emissions much further away than that.
- Contribution
  - TVA in *State of NC* was held liable for a very small percentage of total amount of pollutants in state
  - Defendants in *CT v. AEP* are only responsible for 2.5% of global GHG emissions at most

# Fourth Circuit Decision



# Fourth Circuit Decision



# Fourth Circuit Decision



# Fourth Circuit Decision



# Fourth Circuit Decision

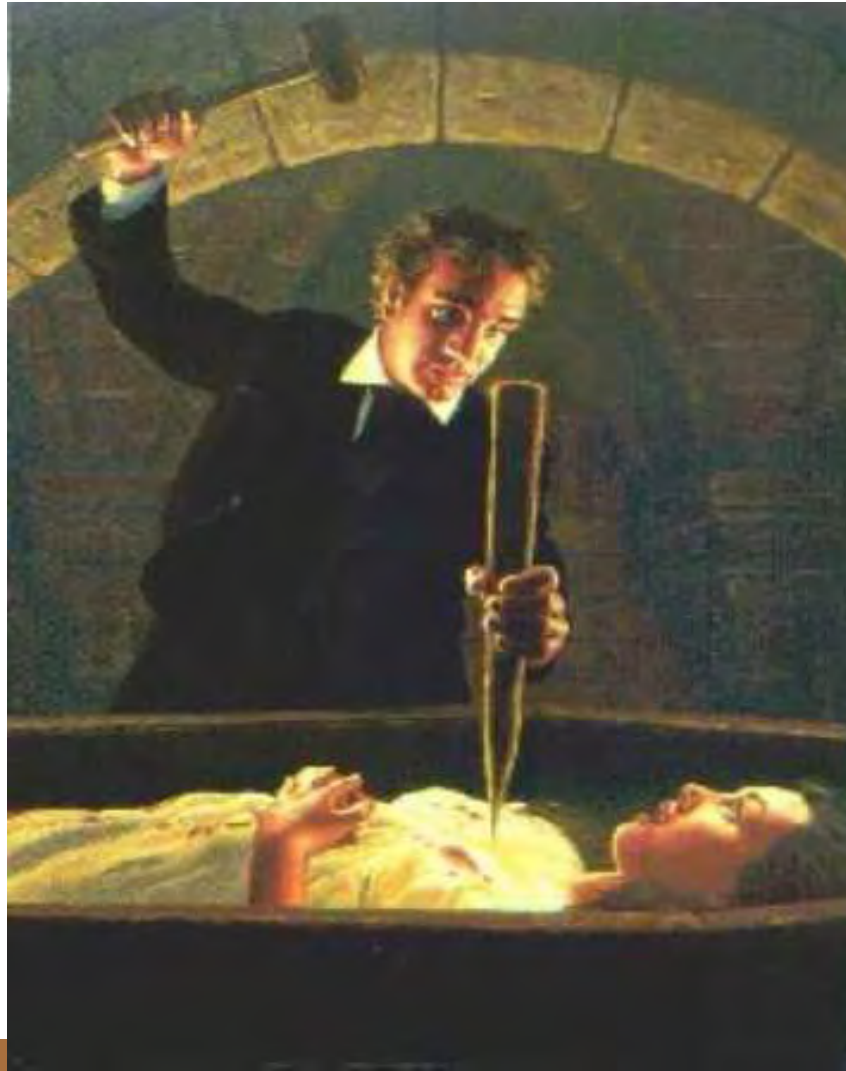


# What Are the Implications of These Decisions?



# #1

- **Narrow Ruling A Disappointment for Corporate Defendants**



## # 1 (cont.)

- “In light of our holding that the Clean Air Act displaces federal common law, the availability vel non of a state lawsuit depends, inter alia, on the preemptive effect of the federal Act. None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law.” Therefore, the Court stated that it would “**leave the matter open for consideration on remand.**”

## # 2

- **Decision Leaves The Door Open for More Climate Change Litigation**



# # 3

- **Strengthening of the Preemption Defense**



# # 4

- **Weakening of Standing and Political Question Defenses**



# # 5

- **Empowerment of the EPA**



## #5 (cont.)

- “It is 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.”**
- “Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.”

# # 6

- **The Death of Federal Common Law in Environmental Litigation**



# 7

- **No More End-Arounds The Legislative and Executive Branches**



# # 8

- **Severe Blow to Public Nuisance Tort**



# # 8 (cont.)



# # 9

- **Boost for Legislative Authorization Defense**



# # 10

- **Prelude to Future Fight?**



# The Future



Questions or Comments?

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