

✘ I agree with [Rick's take](#) on the oral argument in *Connecticut v. AEP* — in fact, so much so that [I predicted it three years ago!](#) But if the Supreme Court overturns the Second Circuit on the viability of a *federal* common law claim, that actually makes the viability of *state* common law claims stronger.

Merely because the Clean Air Act displaces federal common law hardly implies that it pre-empts state common law. Indeed, the absence of a federal common law claim now opens the door to state claims. And whereas the Clean Air Act says nothing about federal common law, it is quite specific and clear when it wants to pre-empt state law. For example, it very explicitly bans state regulation of automobile emissions with the exception of California. This implies, in turn, that state claims based on state law against power producers can move ahead even if, as Rick and I expect, the Court will rule federal common law displaced.

One important wrinkle is the choice-of-law question. Say New York State sues power producers for carbon emission damages to New York: would New York law apply? That's the best and most logical response, but in [Ouellette v. International Paper Company](#), a 1987 Supreme Court decision on the Clean Water Act, the Court held that the proper state common law to use was the *polluting* state's law. *Ouelette* is a remarkably unpersuasive decision on this score ([Section 505\(c\) of the Clean Water Act said that it preserved all state common law rights](#)), but more to the point, it involves the Clean Water Act, and there is no reason to analogize between the two acts.

So essentially, if the Court rules as expected, states will sue power producers based on their own state laws, and the issues will be determined by the various state supreme courts. This actually makes sense for a lot of good political reasons that scholars on federalism have long advocated: if the Alabama Supreme Court doesn't want its citizens to be compensated for damages from carbon emissions ([which would be the appropriate remedy](#)), then that's its choice.

You can see the entire argument and framework [here](#).