An important precedent has been overlooked in the coverage of the Trump EPA's repeal of the 2009 Endangerment Finding. The 2009 finding was based on *Massachusetts v. EPA*, in which the Court had held that the Clean Air Act covers air pollution and directed EPA to determine whether greenhouse gases are harmful. One reason to worry about the forthcoming litigation over the repeal is that the conservative Justices all dissented from *Massachusetts v. EPA*. But there's another equally important precedent: *American Electric Power v. Connecticut (AEP)*. That ruling was joined by Chief Justice Roberts and Justice Scalia, so it may carry more weight.

The issue in the *AEP* case was whether the Clean Air Act precludes federal lawsuits against carbon emitters. The Court answered yes. Trump's repeal of the Endangerment Finding would undermine this holding, which is why industry is not enthusiastic about the repeal. What is just as important is the language in the *AEP* opinion, which Roberts and Scalia joined without reservation. Since Scalia was the one who argued against EPA jurisdiction over greenhouse gases in his dissent in *Massachusetts*, it is especially significant that he gave up the fight.

Here is some key language that Roberts and Scalia signed onto in *AEP*:

> *"**Massachusetts** **made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act.** And we think it equally plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants."
>
> "… **Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator** of greenhouse gas emissions."
>
> "The judgments the plaintiffs would commit to federal judges… cannot be reconciled with the decisionmaking scheme Congress enacted. The Second Circuit erred, we hold, in ruling that federal judges may set limits on greenhouse gas emissions **in face of a law empowering EPA** to set the same limits …"

Justices Alito and Thomas wrote separately to say that they agreed with the outcome given that none of the parties in *AEP* had raised the issue of overruling *Massachusetts v. EPA.* They clearly wanted to leave the door open to reconsidering

Massachusetts. Roberts and Scalia did not join this separate statement, although they could easily have done so. Their failure to do so shows that they had accepted *Massachusetts* as valid precedent, rather than reserving the right to vote to overrule it later as Alito and Thomas had done.

Alito made a serious argument for overruling *Massachusetts* in a 2014 case, again joined only by Justice Thomas. Justice Scalia's majority opinion struck down part of an EPA climate regulation but upheld another part. By the time of the most recent Supreme Court climate case, even Alito and Thomas had stopped arguing for overruling *Massachusetts v. EPA.*

The bottom line is clear. In the last ten years, no one on the Supreme Court has continued arguing to overrule *Massachusetts v. EPA*. And important conservative Justices joined a later decision that endorsed the case as valid precedent, even though they had initially disagreed with it. All of this attests to the status of *Massachusetts v. EPA as settled law.*