Supreme Court ruling is good, bad and ugly

Monday's key US legal decision on emissions regulation was influenced by the unjustified attacks on climate science, says **Douglas Kysar.**

The US Supreme Court this week gave its opinion on *American Electric Power* v. *Connecticut*, a closely watched lawsuit that seeks to force some of the nation's largest electricity generators to cut their greenhouse-gas emissions because they contribute to climate change, which is a public nuisance.

In its second major encounter with climate change, the court held that federal judges have no authority to order emissions reductions using nuisance law, because Congress has delegated this authority to the Environmental Protection Agency (EPA) under the Clean Air Act.

The court's ruling has some good, bad and downright ugly implications for US climate policy.

Here are the good. The opinion solidified the court's landmark 2007 conclusion that the EPA has the power to regulate carbon dioxide as a pollutant. This is the basis of the EPA's beleaguered efforts to use the Clean Air Act to address emissions.

In addition, the court turned down the opportunity to block climate-change nuisance suits on broad grounds, involving the legal doctrines of standing and political question. Such a move would have had serious negative effects for any lawsuit that challenges environmental, health and safety threats, whether related to climate change or not.

Next, because the court used the EPA's authority under the Clean Air Act as the basis to block federal nuisance lawsuits, any effort by Congress to repeal that authority could see the suits reinstated. Heavy emitters emphatically do not want to face such cases, so they may reduce their attempts to get Congress to neuter the EPA in this way. (They could instead push for legislation that would strip the EPA and the courts of authority, but that would constitute such an obvious plea for climate anarchy that, one hopes, it would have to fail.)

Finally, this week's decision left open the possibility that greenhouse-gas emissions might be challenged as nuisances under state common law. During oral argument in the case, Justice Antonin Scalia rather brazenly sought out legal theories that would block climate-change lawsuits in both federal and state courts. Such a result would have been premature — none of the parties was looking for such a broad ruling. Thus, the court reserved judgment on the issue. Plaintiffs in climate-change nuisance cases will still face obstacles under state common law, including the possibility that the Clean Air Act will be interpreted to block their actions, but for now their suits may proceed.

On to the bad. The court went out of its way to emphasize that federal common-law actions would be barred, even if the EPA decides not to regulate greenhouse-gas emissions. In other words, the fact that the agency has authority under the Clean Air Act — even if it chooses not to exercise it — was enough, in the court's view, to cut the judiciary out of the equation, stating, "We see no room for a parallel track."

The problem with this is that the US system of limited and divided government is a web of interconnected nodes, not a row of parallel tracks. The courts should understand that part of judges' role is to prod and plea with other government branches, which may be better placed to address an area of societal need, but are less disposed to try.

Federal judges are not well positioned to devise rules for greenhouse-gas emissions, given the complexity of the problem and its deep interrelation with other policy issues. But unless and until a comprehensive regulatory scheme is put into operation, the threat of common-law actions should remain part of the balance of powers that will shape whatever regime does eventually emerge. That is why it was essential for the court to leave open the possibility of state common-law claims. The threat of such suits adds legal, financial and public-relations pressure to the mixture of forces that drives policy outcomes.

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I have saved the ugly for last. It is hard not to conclude that the judges were influenced by climate-science controversies of the past few years, however contrived and overstated they have been.

Although the Supreme Court's 2007 opinion referenced what "respected scientists believe" about climate change and relied on the findings of the Intergovernmental Panel on Climate Change (IPCC), the latest opinion stated pointedly, "The court, we caution, endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change." Worse, the court suggested that readers explore "views opposing the EPA's" by consulting "Dawidoff, The Civil Heretic, N. Y. Times Magazine 32 (March 29, 2009)".

Climate cognoscenti will recognize this reference as a profile of Freeman Dyson, the theoretical physicist whose controversial views on climate change have been widely promoted by the climate-sceptic community. The court also repeated a prominent sceptical refrain about the ubiquity and supposed banality of greenhouse-gas emissions — "after all, we each emit carbon dioxide merely by breathing" — that serves only to downplay the severity and significance of industrial emissions.

That the nation's highest court would repeat this misleading refrain, and seemingly endorse Dyson's views as equal to those of the IPCC and the EPA, simply takes the breath away. ■

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Douglas Kysar *is Joseph M. Field '55 Professor of Law at Yale Law School in New Haven, Connecticut, and the author of* Regulating from Nowhere: Environmental Law and the Search for Objectivity *(Yale University Press, 2010).*
e-mail: douglas.kysar@yale.edu