Global-Warming Litigation Gets Frosty Reception at the Supreme Court

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It is often difficult to predict the outcome of Supreme Court cases. This is not because the individual justices are particularly fickle or inscrutable. The reason is quite simple: The cases that make it all the way to the Supreme Court are hard. The court does not usually intervene in a dispute unless at least two lower courts, each composed of smart jurists, answered the same legal question differently. Thus, almost any case that the court reviews has strong arguments on either side of the issue.

Sometimes, though, amateur soothsayers catch a break. The justices can make it pretty easy to guess the outcome of even a hard case through their questioning of the parties at oral argument. One such case this year is *American Electric Power Co. Inc. v. Connecticut* , a case in which the 2nd U.S. Circuit Court of Appeals held that a common-law nuisance claim provided a mechanism by which judges could impose limits on greenhouse gas emissions. In light of the oral argument in this case, the question seems not so much whether the court will reverse the 2nd Circuit, but rather how it will do so.

The plaintiffs in this case sought a limited remedy to chip away at a global epidemic. These plaintiffs — eight states, a municipality and three nonprofit groups — sought injunctive relief against the five largest U.S.-based emitters of carbon dioxide, the primary greenhouse gas. Together, these companies are responsible for about 10 percent of U.S. emissions annually. These five defendants are major energy companies that provide electricity to millions of people and businesses in 20 states. The plaintiffs alleged that the defendants' emissions constituted a public nuisance justifying equitable intervention by a court. In particular, the plaintiffs asked the district court to abate the nuisance by establishing reasonable, prospective limits on the defendants' emissions.

Lower court judges took different views of the lawsuit. The district court dismissed the claim by noting the plaintiffs' admission that climate change was caused by greenhouse gas emissions from around the entire world. Indeed, it is "global" warming, not "regional" warming. The district judge held that only the political branches of government could properly balance the competing interests (and the resulting effects) involved in assessing whether the defendants' emissions were unreasonable in light of the country's energy needs, potential economic and foreign policy impacts of emission caps, and the fairness of forcing only the five defendants before the court to bear the burden of any such caps.

A two-judge panel of the 2nd Circuit reversed and reinstated the plaintiffs' lawsuit. (Justice Sonia Sotomayor was a member of the original three-judge panel, but she did not participate in the matter following her nomination to the Supreme Court.) The appellate court held that this was nothing more than an "ordinary tort suit" — simply an application of venerable old law to new facts. Addressing standing, the court held that the plaintiffs' allegation that the defendants "contributed" to climate change satisfied constitutional requirements. Finally, the court blithely stated that the district judge could steer clear of broad policy issues by focusing only on the defendants at bar when applying the traditional test of reasonableness in the context of nuisance law: weighing the gravity of the harm against the utility of the conduct.

The Supreme Court appears poised to reverse the 2nd Circuit, and the only question seems to be which among several doctrines the court will apply in reaching this result.

The justices' unsparing questioning at oral argument must have left the plaintiffs feeling punch-drunk. The following passage sums up the plaintiffs' day in court:

"JUSTICE ALITO: In setting these standards, there would [be] difficult trade-offs, wouldn't there? Could you just explain in

concrete terms how a district judge would deal with those? ... It's just – what is it, just what's reasonable?

"MS. UNDERWOOD: Well, reasonableness is the beginning. I — I've suggested already first that we've alleged that this can be done without increasing the cost to the consumers. That may seem – that – that is a subject for proof.

"JUSTICE SCALIA: Implausible — implausible is the word you're looking for.

"(Laughter.)"

Ouch.

It was not only the "conservative" justices who expressed discomfort with the plaintiffs' lawsuit. At one point, Justice Elena Kagan seemed exasperated with the breadth of the scope of requested relief: "I mean, even just reading that part of your complaint, it sounds like the paradigmatic thing that administrative agencies do rather than courts." Justice Ruth Bader Ginsburg even piled on: "[T]he relief that you're seeking, asking a court to set standards for emissions, sounds like the kind of thing that EPA does. I mean, Congress set up the EPA to promulgate standards for emissions, and now what — the relief you're seeking seems to me to set up a district judge, who does not have the resources, the expertise, as a kind of 'super-EPA.'"

The justices spent the majority of the oral argument testing various theories by which they could reject the plaintiffs' lawsuit. Those theories fall into three broad categories:

1) Plaintiffs' lawsuit will not solve the problem.

The justices seemed receptive to the argument that the plaintiffs' lawsuit was inherently flawed because it sought to remedy a global problem by enjoining only a small portion of the responsible parties. Justice Anthony Kennedy noted the maxim of equity jurisprudence that "equity does not require an idle act" — in other words, even if the plaintiffs satisfied all of the "technical" requirements entitling them to bring their lawsuit, their claims would not be entitled to equitable relief unless they could demonstrate that the requested relief would abate the targeted nuisance.

One of those "technical" requirements is Article III standing, which requires the plaintiffs to demonstrate both the ability to trace the claimed injury to the defendants and the ability to redress the claimed injury. The court seemed especially skeptical on the redressability prong. Interestingly, though, questions from Justice Antonin Scalia revealed a reason that the court might eschew deciding the case on this ground — namely, fear that the ruling would only bar plaintiffs in such cases from suing in federal court, thereby sending plaintiffs into a multitude of state courts (often before judges who stand for popular election): "I would frankly rather have federal judges do it," he candidly admitted at the oral argument.

This fear of simply re-routing climate-change cases into state courts could lead the court to offer stronger-than-usual dicta on the underlying merits of such cases. Kennedy, in particular, seemed especially eager to "peek," as he put it, at the merits in the course of the threshold inquiries. At the core of those merits is the concept of proximate cause — can the plaintiffs prove that the defendants in this case proximately caused the plaintiffs' alleged injuries? The justices (like the district judge) appeared highly skeptical of the plaintiffs' ability to prove that fact. That skepticism could form the core of the court's ruling on a threshold issue, like standing, or the court could apply that same reasoning to opine on the ultimate merits of the case. Either way, it's probably not good for the plaintiffs in this case.

2. Global warming is not a problem for courts to resolve.

The court might hold that the plaintiffs' request for equitable relief is a "political question" that only the representative branches of government can resolve. Through this doctrine, the court has attempted to enforce fidelity to Alexander Bickel's characterization of the judiciary as the "least dangerous branch." There is a reduced risk of an unelected judiciary running amok if certain, broad questions are resolved only by accountable, elected officials.

Here, the judiciary is not equipped with any standards or regulatory guideposts by which to assess the ultimate question in the case: whether the emissions by the defendants are "reasonable" in light of the respective harms and benefits flowing from their conduct. For example, in order to determine the permissible volume of emissions for each defendant, a court would need to determine everyone else's appropriate share of emissions. These present some of the most open-ended and wide-ranging policy debates gripping the nation today. In addition to the question of how a trial judge should balance the competing interests, how could an appellate court conduct any meaningful review of that balancing?

3. Federal regulation has displaced federal common-law nuisance claims.

In this case, the plaintiffs' nuisance claim arose under federal common law — a fluid body of law that is not codified in any statute and whose bounds are defined over time by the courts. Many long-standing equitable claims, like nuisance claims, exist in this legal ether because the task of codifying the numerous wrinkles of law recognized over centuries of judicial decisions would be too unwieldy. Nonetheless, if Congress does legislate in an area, this body of uncodified law can be "displaced" so that the common-law equity claims cannot serve as a de facto tool for the courts to undermine or augment specific regulation on point.

The doctrine of displacement, drawing upon the animating principle of the political-question doctrine, would allow the court to hold that courts should stay out of this fray because the appropriate political branches have already moved to address the problem. In the context of global warming, Congress amended the Clean Air Act to define carbon dioxide as a "pollutant" subject to regulation under the act. As a result, the EPA issued a regulation governing the application of air-quality standards to sources including the defendant energy companies in this case. Finally, in a settlement finalized in March 2011, the EPA committed to soliciting commentary and deciding by May 2012 whether and to what extent industrial sources (like defendants) should be subject to limitations on their greenhouse-gas emissions.

There might be two unforeseen consequences to holding that the plaintiffs' federal common-law claim is displaced. On one hand, a strongly worded holding on displacement would discourage creative lawyers from using a nuisance theory to inject courts into other highly charged political debates. For instance, it is possible that border states and municipalities could seek judicial intervention to regulate illegal immigration as a "public nuisance" by claiming that particular businesses or social-service organizations encouraged such immigration, which caused specific injuries to the plaintiffs — crime, resource scarcity, etc. In *American Electric* , the court may take the opportunity to signal its displeasure with widespread use of common-law nuisance claims for such purposes.

On the other hand, the court may be better served to leave open the displacement question. So long as federal common law remains alive in an area, the individual states' (potentially divergent) common laws are held in abeyance. If the court were to hold that federal common law was displaced, each state's common law of nuisance would be resuscitated. In other words, displacement might only disperse such claims rather than eliminate them altogether. Faced with this option, the court may be better served to resolve the case on other grounds — particularly where the justices seemed to suggest at oral argument that the plaintiffs' claim could be rejected on any of several other grounds.

Choice of Approach

Whichever approach the court takes, the result does not much seem in doubt. The court's choice of approach, however, could have significant consequences in future cases — not simply in climate-change litigation, but in all cases in which plaintiffs aggressively and creatively invoke common-law nuisance claims to compel change. •

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