

Let's begin with the bad news. The plaintiffs lost, eliminating one possible tool in combating climate change. That doesn't seem like a big loss to me, because I've always thought that the defendants' best argument was that the federal common law is displaced by the Clean Air Act. It's an easy argument to make based on precedent, although there are also some counter-arguments. So it's not at all surprising that the case came out that way. The other bad news is footnote 2, which expresses agnosticism about "the complicated issues related to carbon-dioxide emissions and climate change." But that's also not too surprising: EPA's findings are under review in other cases, so it would have been improper for the Court to express a view on that matter.

So much for the bad news. There's also quite a bit of good news. First, on the standing issue, four Justices voted to find standing, which almost certainly makes a majority if you add Justice Sotomayor (who recused herself in this case). Moreover, the dissenters are said to either be "adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable." The ground of distinction urged by the government was between statutory and non-statutory cases, which suggests that there might be as many as seven votes to uphold standing in a climate change case brought under the Clean Air Act (especially if brought by a state).

Second, the Court vigorously reaffirmed the holding in *Massachusetts v. EPA*, saying that the Clean Air Act "speaks directly; to emissions of carbon dioxide from the defendants' plants." This is good news, because it seemed possible that Justice Kennedy (the swing voter in *Mass v. EPA*) might retreat given the industry's complaints about applying the statute to stationary sources. In fact, two additional Justices (Roberts and Scalia) now endorse the coverage argument.

Third, although this doesn't break new ground, the Court stressed EPA's expertise and its role in deciding on tradeoffs. In setting standards for "any particular greenhouse gas-producing sector", the Court says, energy needs and economic disruption must be balanced against environmental benefits. "The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators." Also, "It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gases." This language should serve as a reminder to lower court judges reviewing EPA's regulations that their role is limited.

Finally, the Court left open the possibility that suit could be brought under state law,

presumably the law of the state where the emissions took place. The Clean Air is pretty explicit about allowing states to go beyond federal regulations in dealing with stationary sources. So it's even possible that these cases will continue to move forward.

Maybe I'm just an incurable optimist (or maybe my expectations are just really low), but I think *AEP* was actually a pretty positive outcome, all things considered.