

On Friday, the Second Circuit issued an important decision in a lawsuit against the oil industry. New York City had sued the oil companies for harms relating to climate change. The appeals court ordered the case dismissed, on the ground that any harm relating to fossil fuel is exclusively regulated by the Clean Air Act. The ruling is a setback for the plaintiffs in similar cases — how much of a setback remains to be seen.

The court's analysis is very complicated and involves some fairly esoteric legal arguments. I'll try to avoid the fine points. In the end, the court's argument comes down to two points. The first point relates to fuels used in the United States. The court argues that by authorizing EPA to regulate carbon emissions, the Clean Air Act indirectly eliminates all lawsuits based on harm due to those emissions — even when the lawsuit is based on activities that the Clean Air Act doesn't regulate at all. The second point relates to fuels burned outside the U.S. The court argues that lawsuits based on state law are indirectly eliminated by a rule against applying federal statutes outside of the United States, given that doing so might interfere with foreign relations.

The word "indirectly" is important here and accounts for the complexity of the court's opinion. The upshot of the opinion is that climate change lawsuits against oil companies are barred by the Clean Air Act and by foreign policy concerns. Normally, such an argument would be based on doctrines relating to statutory and foreign affairs preemption. The court's problem is that those doctrines pretty clearly don't apply here. So the court gets to the same result *indirectly*, by first setting up and then knocking down the application of what's called federal common law. There's a bit of legerdemain by the court in bypassing any concerns about state prerogatives — in fact, it uses the word "federalism" only to refer to the need for decisions to be made at the national level.

How much will this rule impact other cases? The most immediate issue relates to a pending case at the Supreme Court. Oil companies made somewhat similar arguments in that case, but the immediate issue before the court is a procedural one. The oil companies tried to use this argument as a basis for moving cases from state to federal court, but most trial courts held that the argument didn't supply a basis for switching courts. The issue before the Supreme Court is whether those trial court rulings were appealable. The Second Circuit opinion isn't directly relevant. It's not inconceivable that the Supreme Court might ignore the fact that it granted review only on the procedural issue, but that doesn't seem likely.

I have my doubts about whether other courts will find the Second Circuit's analysis persuasive. Establishing the existence of the federal common law one page only to abolish it on the next page seems awfully contrived. Moreover, the Second Circuit's opinion seems to apply only to claims that producing and selling fossil fuels is a basis for liability. Many of

the other lawsuits accused the oil companies of misconduct that goes well beyond simply producing fossil fuels. They involve other claims based on deliberate misrepresentation by the oil companies, including fraud and violation of consumer protection laws. Even in cases where federal regulation clearly precludes state regulation, the Supreme Court has been chary of eliminating liability for misrepresentation.

New York City has the option of seeking Supreme Court review of the Second Circuit decision. No doubt the city will be under pressure from the plaintiffs in other cases to forego this effort. If the city does seek review, some of the conservatives on the Court may be eager to use the case to quash all litigation against the oil companies. Let's hope it doesn't come to that.