



By Richard Lazarus

Consider Requiring Cost-Benefit Test?

If recent past is prologue, much of the nation will be fixated this June on the Supreme Court's anticipated rulings in two high profile cases. The fate of the Affordable Care Act in *King v. Burwell*. And, whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex in *Obergefell v. Hodges*. I expect no less than a CNN "countdown clock" clicking off the final seconds before the opinion announcement, accompanied by a circus-like atmosphere on the Court's plaza complete with demonstrators wearing t-shirts and carrying placards announcing their respective allegiances.

No doubt missing from the hoopla, however, will be any recognition of *Michigan v. EPA*, a major environmental law case to be argued in late March and also likely not to be decided until those same closing days of the Court's term. No t-shirts declaring "Mercury Kills" or "End the War on Coal." No competing placards admonishing "Consider the Costs!" or "Human Health Is Priceless!"

Michigan v. EPA was an unlikely cert grant, but not because the underlying stakes are insignificant: billions in potential costs and benefits. The case concerns the validity of EPA's regulation under the Clean Air Act of hazardous air pollutants (HAPs) emitted from electric utility steam generating units (EGUs). First launched in the

Clinton administration's final weeks in December 2000, derailed by the Bush II administration in 2005, and then resurrected by Obama EPA Administrator Lisa Jackson in 2012, the EPA rules require dramatic reductions by EGUs of their emissions of mercury and other HAPs.

Supreme Court review of the D.C. Circuit ruling upholding EPA's rules had seemed unlikely only because the underlying legal issue raised before the Court was quite narrow. It turned on the meaning of a single word ("appropriate") in a provision of the Clean Air Act, Section 112(n), that has no obvious relevance beyond this one rule. But perhaps because 21 states joined industry in favor of certiorari (with 16 states and the District of Columbia joining environmental groups and EPA in opposition) the Court granted review.

As of the time of this column's writing, the merits briefing is still ongoing. But a few things are already clear. First, whoever on the Court drafted the "question" granted must not have been very sympathetic to EPA: "Whether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities." "Refused"? Ouch. Wouldn't "declined" have been sufficient?

Second, both sides appear to be masking their actual positions. Consistent with the Court's proffered question, EPA states that it has declined to consider costs in determining whether it is appropriate to regulate HAPs emitted by electric utilities. But that agency claim is misleading. EPA's threshold inquiry whether it was "appropriate" to regulate EGU emissions of HAPs did in fact include inquiry into the availability of technology to control those emissions, which includes some consideration of the economic feasibility of such technology. The actual question presented

should be whether EPA reasonably declined to consider costs any further than the agency did rather than not to consider costs at all. Yet, for some reason, EPA is characterizing its legal position as purer than it actually is.

The petitioners, however, are no more candid. Their actual claim is not that the agency must merely *consider* costs. What they seek is to *require* EPA to engage in cost-benefit analysis, which is an entirely different kettle of fish. Environmental statutes that require cost consideration routinely decline to further require cost-benefit analysis because of the concerns that the latter requires a balancing that will be unfairly skewed against environmental protections designed to be risk-averse and not susceptible to monetization. Yet, although petitioners loudly condemn EPA for not considering costs, what they seek is far more than that: allowing the agency to regulate only if the benefits exceed the costs.

Finally, Justice Stephen Breyer is likely the key vote in this case. And he may be a hard sell for EPA. Breyer is

Justice Breyer, a cost-benefit proponent, likely the key vote as the Court rules on air regulation

this Court's champion of cost-benefit analysis. He has repeatedly made clear his view that rational agency decisions require some kind of cost-benefit test. He even pub-

lished a book on the topic before joining the Court.

Can EPA possibly win? Within reach, but not a sure thing. Fortunately for EPA, Breyer is generally sympathetic to the agency and a good listener. If EPA can persuade Breyer of the reasonableness of its position about the limited role of cost-benefit analysis in HAP regulation of EGUs, the agency might well prevail. Otherwise, EPA will need a sufficiently soft landing to allow for a rehabilitation of its regulation on remand.

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