The Economist

Coal states v Uncle Sam

March 26, 2015

CONGRESS passed the Clean Air Act to reduce harmful air pollution. The Environmental Protection Agency (EPA) issues regulations to enforce that law. But 21 states are asking the Supreme Court to rule that the EPA has overstepped its authority.

The case of Michigan v EPA, which was argued on March 25th, concerns the agency's plan to regulate mercury, arsenic and other toxins emitted by power plants. Both sides agree that the new rule would cost about $9.6 billion a year to implement. The EPA estimates that reduced mercury emissions would bring health benefits of up to $6m a year—a tiny sum it reached only after assuming that lots of pregnant "women in subsistence fishing populations" will eat vast amounts of mercury-tainted fish and thereby reduce their children's IQs by an undetectable 0.002 points each.

If that were all, the rule would clearly be a huge waste of money. But the EPA wants to curb mercury in a way that would also reduce particulate emissions, generating "co-benefits" which it estimates at a massive $37 billion-90 billion. (Particulate pollution causes bronchitis, asthma and heart attacks, among other things.) This is where it gets knotty.

Particulate emissions are regulated under a different part of the Clean Air Act, which sets standards but lets the states decide how to curb emissions. An amicus brief by the Cato Institute, a libertarian think-tank, argues that the EPA is using the mercury rule as a Trojan horse. Its real aim, says Cato, is to wrest control of particulate regulation from the states, some of which are friendlier to the coal industry (see article) than Barack Obama is. That would be an illegal power grab, the EPA's critics argue.

The EPA retorts that Congress instructed it to issue rules when they are "appropriate and necessary" to protect public health—and so the rule is justified. Craig Oren of Rutgers University estimates that the overall benefit-to-cost ratio of the rule is "at least" three to one.

Oral argument before the Supreme Court focused on the question of when the EPA must take account of costs. The states pressing the suit say the law requires the calculation to take place right off the bat, when the agency is deciding whether to develop standards. Donald Verrilli, the solicitor-general (backed by some other states and power firms), said that taking account of costs could wait until the stage when regulatory standards were spelled out—allowing the EPA to include those "co-benefits".

For Justice Antonin Scalia, however, that is "a silly way to read" the law. His three fellow conservatives seem to concur. The court's four liberals appear to accept the EPA's reading. That

leaves Justice Anthony Kennedy as the swing vote, as usual. Mr Kennedy grilled both sides, but he may have tipped his hand. When Mr Verrilli argued that the agency need not analyse costs and benefits before deciding to curb a pollutant, Mr Kennedy raised an eyebrow. “But at that point,” he said, “the game is over.” A decision is expected by summer.