Professor Hester was quoted in an article posted to the website of the *Connecticut Mirror*, remarking on the impact the recent US Supreme Court global warming decision could have on the upcoming election cycle as well as the development of other legal approaches.

The following article was posted to the website of the *Connecticut Mirror* on Tuesday, June 21, 2011 (available online at [http://www.ctmirror.org/story/13022/ctglobalwarmingcase](http://www.ctmirror.org/story/13022/ctglobalwarmingcase)):

**States review options after high court ruling on global warming lawsuit**
Deirdre Shesgreen

WASHINGTON--Connecticut and other states on the losing side of Monday's Supreme Court ruling limiting their ability to force reductions in greenhouse gas emissions now face a strategic dilemma.

Do they count on Washington regulators, working on a high-stakes environmental issue in a politically-charged climate, to push ahead with federal rules requiring power plants to cut carbon dioxide emissions? Or do they file a fresh legal claim in state court, a path clearly left open by Monday's high court decision?

"We're not going to make any decisions or choices until we talk to the other states," Connecticut Attorney General George Jepsen said in an interview Tuesday. But Jepsen said he saw at least a partial victory in Monday's Supreme Court's decision.

That ruling said Connecticut and five other states, which filed suit along with New York City and three private land trusts, could not use federal common law to compel coal-burning electric utilities to curb their emissions of greenhouse gases. The states had argued that greenhouse gases were a public nuisance under federal law, and that power plant emissions were causing grave environmental damage--jeopardizing the health of hardwood forests in Connecticut and reducing crop and livestock yields in Iowa, for example.

The defendants in the case, utilities such as American Electric Power and Cinergy Corp., said the states were trying to get the courts to act as legislators and regulators. They said allowing that lawsuit to go forward would spark a cascade of other legal claims against energy producers, resulting in price spikes and other societal costs.

The Supreme Court, in an opinion written by Ruth Bader Ginsburg, said the federal Environmental Protection Agency was the proper forum for regulating greenhouse gases, which contribute to global warming. The court reaffirmed a 2007 decision that EPA officials have the power, under the Clean Air Act, to regulate carbon dioxide emissions.

The Clean Air Act "provides a means to seek limits on emissions of carbon dioxide from domestic power plants," Ginsburg wrote. "We see no room for a parallel track."

Jepsen said the fact that EPA is now pursuing such regulation is a victory in itself.

When Connecticut and the other plaintiffs first filed the case in 2004, during the Bush Administration, the EPA didn't have the authority to wade into this environmental thicket. Now, under the Obama Administration's stewardship, EPA is moving forward--albeit in halting steps--on a rule that would limit emissions from power plants and other greenhouse-gas polluters.

Even though the court closed off one legal avenue for the states, the justices did so because they concluded that "the CO2 emissions and global warming issue is preempted because of the EPA's change of heart from when this lawsuit began," Jepsen said. "Sometimes you win by losing."

But while the court emphasized EPA's power in this arena, top officials at that agency have embraced a take-it-slow approach. Less than two weeks ago, the EPA announced it was delaying its proposed rule on greenhouse gas emissions, amid fierce industry lobbying and vocal Republican criticism.
The agency was supposed to issue a draft greenhouse gas rule at the end of July; now that's been pushed back to late September. After public comments and review, the rule would be finalized in May 2012—about six months ahead of Election Day.

"Politics are the stage upon which all this drama gets played out," said Tracy Hester, a visiting assistant law professor at director of the Environment, Energy & Natural Resources Center at the University of Houston. He said climate change in general, and the EPA rule in particular, could easily become a high-profile election issue.

Electric utilities and other critics have said the EPA regulation could have devastating economic repercussions, jacking up energy prices and slowing job growth. Environmentalists, meanwhile, are worried that the rule could be watered down amid political pressure, which will only increase as the process drags out and the election heats up.

Given the political uncertainty surrounding climate change, states could opt to pursue their public-nuisance claims under state law.

"As usual with U.S. Supreme Court decisions, some of the most interesting aspects of the ruling lie in what the Court did not decide," Hester wrote in an analysis of the case. For one thing, the justices "pointedly noted that this conclusion did not apply to public nuisance lawsuits under state law."

Hester noted that plaintiffs in Mississippi and elsewhere are already pursuing that route, trying to recoup damages under state laws for environmental problems they say were caused or made worse by global warming. He said Monday's ruling may "open the door to a broader and more complicated arena."

Others echoed that assessment, saying that this decision will do little to limit global warming lawsuits.

"The six states have a tough strategic choice to make," said Patrick Parenteau, a professor at Vermont Law School. "Do they want to press forward with a state common-law based effort... or should they declare victory because they've prodded EPA forward and not try their luck at a second round?" he said.

Parenteau said he saw Monday's opinion as a nudge from the high court to the EPA. "I think Ginsburg was sending a not-so-subtle message to EPA that 'You promised to do these things, we're taking you at your word, if you don't there are repercussions,'" he said.

Jepsen said he wants to "let the dust settle" on Monday's ruling before he figures out Connecticut's next move. He conceded there are "risks" in counting on the regulatory process in Washington, "but the fact that EPA is actively pursuing this is very heartening."