



West Virginia v. EPA: The Supreme Court Casts a Shadow Over the Fight Against Climate Change (and So Much More)

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Agenda



The Decision in *West Virginia v. EPA*

Implications for Climate Regulation by EPA

Implications for Climate Regulation by Other Agencies

Implications for Other Regulations by Other Agencies

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The Decision

- Struck down EPA's 2015 Clean Power Plan (CPP), which was designed to reduce GHG emissions by shifting electricity generation from coal to gas and renewables through a cap-and-trade system
- But little practical effect
 - Shift to gas and renewables was already occurring
 - Biden Administration was already revisiting CPP
- Real impact will be on any federal regulation that addresses a “major question.”

The Majority's Reasoning

- Roberts + 5 other Justices used the so-called **“major question doctrine”** to hold that the CPP exceeded the authority Congress delegated to EPA in the Clean Air Act.



The Majority's Reasoning



- Under the doctrine, courts are to be skeptical of regulations that would have “vast economic and political significance.”
- In those instances, the courts should be “reluctant to read into ambiguous statutory text the delegation claimed to be lurking there.”
- “To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.”

The Majority's Reasoning



- Court concluded that the CPP addressed a major question because a GHG cap-and-trade system would substantially restructured the American energy market.
- “It is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in [Clean Air Act] Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”

The Gorsuch Concurrence



- Describes the major question doctrine as a “clear statement rule” based on the Constitution's Vesting Clause, Art. 1, Sec 1:
 - “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”
- Factors to determine if doctrine applies:
 - Matter of great political significance
 - Regulation would affect a significant portion of the US economy
 - Intrusion on state law

The Gorsuch Concurrence



- To determine whether Congress has spoken clearly enough, Gorsuch would look to:
 - Place in statutory scheme
 - Age and focus of statute
 - Agency's past interpretation of statute
 - Match between agency's action and its expertise

The Dissent

- Kagan, joined by Breyer and Sotomayer, argued that CAA Section 111 directs EPA to regulate stationary sources of any substance that “causes... air pollution” that “may reasonably be anticipated to endanger public health or welfare.”
- To address this public health danger, Section 111 authorizes EPA to select the “*best system* of emission reduction which ... the [EPA] Administrator determines has been *adequately demonstrated*.” 42 U.S.C. § 7411(a)(1).



The Dissent

- Dictionary definition of “system” is very broad, and the EPA’s acid rain program shows that cap and trade is “adequately demonstrated.”
- Questions existence of major questions doctrine, and accuses majority of trying to “[p]revent agencies from doing important work, even though that is what Congress directed.”
- “The Court appoints itself—instead of Congress or the expert agency—the decisionmaker on climate policy. I cannot think of many things more frightening.”

The Bottom Line

If at least 5 Justices conclude that a regulation would have vast economic and political significance, and that Congress hasn't spoken clearly enough in authorizing the agency, the regulation falls.



Implications for Climate Regulation by EPA

- EPA probably could tighten GHG emission standards “within the fence” of coal-fired facilities, or could tighten other air pollution standards
- How much difference, given the falling cost of renewables, particularly after the IRA?
- Regulation of methane from oil and gas not in jeopardy because of IRA.

Where are the replacement rules?

- EPA now plans to propose new GHG standards by April, and finalize them by June 2024.
- Delay could be due to EPA lawyers struggling with how to circumvent *West Virginia v. EPA*.
- If new rules aren't final by early summer 2024, they could be overturned by the next Congress under the Congressional Review Act.

Implications for other Federal Agencies fighting Climate Change

- The doctrine will be invoked against any federal regulation addressing climate change.
- Outcome will turn on courts' assessment of:
 - the economic and political impact of the regulation; and
 - the clarity with which Congress has authorized it.
- The doctrine will be invoked against the SEC's proposed regulation requiring climate change-related disclosures

Implications for the ability of any Federal Agency to address any Big Problem

- The major questions doctrine will likely be raised in all major federal rulemakings.
- Where Congress is deadlocked, the judicial branch will often be left with the final word as to whether existing statutory authority is sufficiently clear.
- The end of *Chevron*?

Questions?



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