Court Constrains EPA's Authority in Applying the Major Questions Doctrine

Sep 30, 2022

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***West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (June 30, 2022)**

In *West Virginia v. Environmental Protection Agency*, the Supreme Court ruled 6 to 3 that the Environmental Protection Agency (EPA) does not have authority under the Clean Air Act (CAA) to shift electricity generation away from coal toward renewable energy sources as part of a regulatory approach to climate change. Because the EPA's regulatory plan constituted a "major question" of great "magnitude and consequence," Congress must clearly and expressly authorize such a plan; the Court found such a clear statement lacking in the CAA. Moving forward, *West Virginia* will not only significantly constrain the EPA's power to regulate carbon emissions but will also have far-reaching implications for federal agency action generally.

Pursuant to the CAA, 42 U.S.C. § 7711(d), the EPA is tasked with establishing a "magnitude and consequence" for power plants and other sources of air pollution, and the standard must reflect the best system of emission reduction (BSER). In 2015 the EPA promulgated the Clean Power Plan (CPP), which sought to establish the BSER for existing power plants using three building blocks:

- improving heat rates at coal plants to help coal burn more cleanly;
- requiring by specified target years that power plants in each state move away from coal to natural gas; and
- then to move to wind and solar power.

The latter two building blocks were based on a "generation-shifting approach" – that is, the EPA capped emissions at a level that would essentially "force a nationwide transition away from the use of coal to generate electricity." The EPA explained that the generation shift could also be obtained by purchasing emissions allowances or

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credits as part of a cap-and-trade regime.

The CPP was stayed by the Supreme Court in 2016, and when President Donald Trump took office, the EPA repealed it and replaced it with the Affordable Clean Energy (ACE) rule. The D.C. Circuit vacated the CPP repeal and the ACE rule in 2021, and West Virginia and other states and energy entities appealed.

In a 6 to 3 majority opinion by Chief Justice John Roberts, the Supreme Court invalidated the CPP's "generation-shifting" rule. First, the Court held that the petitioners had standing, despite the Biden administration's contention that the EPA had no intention to enforce the CPP. The Court reasoned, "[a]t least one group of petitioners—the state petitioners—are injured" by the D.C. Circuit's ruling because they are the object of the CPP's requirement that they more stringently regulate power plant emissions. The Supreme Court also addressed mootness, explaining that the government had not met its burden to show the allegedly wrongful behavior – i.e., generation-shifting requirements – "could not reasonably be expected to recur."

Second, the majority ruled on the merits that the generation-shifting approach exceeded the EPA's authority under the Clean Air Act. The Court explained that the CPP's "benchmarks" constituted "major questions" of public policy with significant "economic and political" ramifications. Under the "major questions doctrine," the authority to regulate on such an extraordinary scale rests with Congress or an agency acting pursuant to clear delegation from Congress.

The Supreme Court found no such clear delegation in the CAA. To effectuate a shift from one form of energy generation to another, the EPA could act only on the basis of an explicit and "[e]xtraordinary grant[]" of regulatory authority, not "vague terms," "modest words," or "subtle devices." But the EPA's basis for implementing the CPP—Section 111(d) of the CAA—had been used only "a handful of times" since its enactment. The text of that statutory provision lacked the necessary specificity: rather, it was a "vague statutory grant" that is "not close to the sort of clear authorization required." The Court also expressed "skepticism" of the EPA's claim that Section 111(d) allowed it to devise carbon

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emission caps when such a regime has been repeatedly rejected by Congress.

The Court offered the following as examples of similar agency overreach in the past: the FDA's assertion of authority to regulate tobacco products (*FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)); OSHA's mandate that 84 million Americans obtain a COVID-19 vaccine or undergo weekly testing (*National Federation of Independent Business v. OSHA*, 142 S. Ct. 661, 665 (2022)); the Attorney General's assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide (*Gonzales v. Oregon*, 546 U.S. 243 (2006)); and the CDC's moratorium on evictions during the COVID-19 pandemic (*Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 141 S . Ct. 2485, 2488–2489 (2021)). In each case, Congress had not spoken with requisite clarity to justify such agency action. In the majority's view, the same was true here.

Justice Neil Gorsuch wrote a concurring opinion, joined by Justice Samuel Alito, which offered more background and observations on the major questions doctrine. Justice Elena Kagan wrote a dissenting opinion, which Justices Stephen Breyer and Sonia Sotomayor joined. The dissent accused the majority of stripping the EPA of "the power Congress gave it to respond to the most pressing environmental challenge of our time." (Internal quotation marks omitted). It explained that by its broad terms, Section 111 authorized the EPA to do precisely what it did in promulgating the CPP, particularly when Section 111 was contained in the Clean Air Act, a major piece of environmental legislation. The dissent also questioned why the majority reached the issue in the first place, considering the CPP "had become, as a practical matter, obsolete."

Key Takeaways:

- While the Supreme Court characterized the specific issue in *West Virginia v. Environmental Protection Agency* as "narrow," the broad implications for future federal agency action cannot be overstated. Any agency regulation raising a "major question" of public policy, but promulgated without explicit congressional authority, is in danger of being invalidated. *West*

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Virginia could serve as a basis for legal challenges to future regulatory efforts that are politically charged and economically significant.

- *West Virginia* also provides an expansive view of the standing doctrine, allowing a claim against an administrative agency even though the agency itself stated it would not enforce the challenged rule.
- *West Virginia* should also be viewed for what it lacks – any deferential, *Chevron*-style review of the EPA's promulgation of the CPP. This feature of the majority opinion also demonstrates the waning deference and leeway the Supreme Court is likely to afford to federal agencies.

Explore the full wrap-up and analysis from Frost Brown Todd's Appellate practice group on the most consequential rulings during the 2021 U.S. Supreme Court term for businesses and industries.

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