



## How Will *West Virginia v. EPA* Impact the Future of Climate Policy?

In a landmark decision at the end of the last term, the Supreme Court ruled that EPA overstepped its authority in designing an Obama-era climate policy to regulate greenhouse gas emissions from the power sector. The majority opinion for *West Virginia v. EPA* featured the court's first explicit mention of the major questions doctrine, which (in the Court's opinion) states that agencies cannot regulate issues of "major economic or political significance"—in this case, "a nationwide transition away from the use of coal to generate electricity"—without congressional authorization.

*West Virginia* only targeted EPA's authority under one provision of the Clean Air Act. But the issue remains whether

other policies, for climate and beyond, could also become "major questions," potentially restricting future agency action. That is an important issue, given the congressional gridlock on environmental law over the last few decades.

We ask a panel of experts: What will legal review of climate and other environmental policies look like under the major questions doctrine?

What threshold of economic or political significance might courts apply? How might this doctrine be applied by courts at the federal, state, and local levels? And, perhaps most importantly, how should agencies, industry, advocates—and other groups looking to pursue climate policy and other litigation—move forward?



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# Agencies Can Avoid Major Questions Risks

By Bethany Davis Noll

**T**HE decision in *West Virginia v. EPA* required the Supreme Court to take two analytical steps that pose threats to future environmental regulation—but they should not be insurmountable.

In the case, the court decided the legality of the Clean Power Plan, an Obama-era regulation under section 111(d) of the Clean Air Act, designed by EPA to cut greenhouse gas emissions at existing power plants. EPA had set targets based on “generation-shifting” measures, meaning investing in renewable energy or shifting a plant’s fuel source to cleaner sources. But the Court held that EPA was not authorized to use generation shifting to set those targets.

To get there, the Court had to jettison traditional doctrines that demand deference for agencies when they are interpreting statutes that are ambiguous. It held instead that the issue was a “major questions case” that required a clear statement from Congress authorizing the agency to adopt that particular provision. According to the Court, the clear statement doctrine applied for two reasons: (1) EPA had intended to and claimed the power to remake the energy market, and (2) EPA had invoked this power under the “vague language of an ‘ancillary provision’” of the Clean Air Act.

The question everyone is asking is whether and how this doctrine will apply to the next climate-focused regulation.

The first step to answering that question is: What is the agency’s intent? That intent analysis may encompass literally anything that the agency heads have said. To find that

EPA intended to remake the electricity system rather than simply cut pollution, the Court relied on snippets of evidence that were outside of the final agency rule—including a quote from an oversight hearing that was held a year before the rule was finalized and a funding request from EPA. Though the Clean Power Plan very carefully explained the agency’s intent to limit greenhouse gas emissions, there were enough quotes in the broader public record to support *West Virginia’s* reframing of the regulation as one that sought to phase out coal as an energy source. Lesson learned.

The second step is to look at the statutory authority the agency invoked. In *West Virginia*, the Court demoted section 111(d) to “ancillary” status because it had not been used very often by the agency and was a “gap filler.” Of course, as the dissent explained, just because a provision is a “backstop” does not make it a “backwater.” But EPA had another problem: Congress had debated and had been unable to pass laws that would have achieved something similar to generation shifting.

What are the lessons here? One might be that agencies should blitz the Federal Register with regulations, so as not to leave any provision in a state of disuse. Another obvious one (though obviously difficult) is to reenergize Congress. For example, the Inflation Reduction Act may help clarify regulations under the Clean Air Act. The new statute added a definition for greenhouse gas to the Clean Air Act, defining it as “the air pollutants carbon dioxide, 16 hydrofluorocarbons, methane, nitrous oxide, 17 perfluorocarbons, and sulfur hexafluoride.”

At the end of the day, each of these two analytical steps is likely to be malleable for a results-oriented court. The Court has opened the door to arguments that reframe and reimagine what an agency is doing. And Kevin Poloncarz is right to foretell that many big and important

questions are likely to be subject to a major questions challenge. An attorneys general coalition recently argued that EPA’s proposal to ban chrysotile asbestos under the Toxic Substances Control Act triggered the doctrine. The Heritage Foundation cited the doctrine in relation to a Commodity Futures Trading Commission proceeding about climate-related financial risk. And AGs opposing a Securities and Exchange Commission rule that would clarify climate disclosures have argued that the major questions doctrine applies to that rule too.

But the Court did characterize *West Virginia* as “extraordinary.” It will likely be difficult to recharacterize too many statutory provisions as “ancillary,” and too many questions as “major.” In addition, it is possible that overuse of the doctrine is not in anyone’s long-term interest. Presidents on both sides of the political divide have used agencies to make policy—especially politically important policy—for some time. When he was in office, President Trump attempted to aggressively reimagine what agencies were authorized to do. For example, after Congress refused to appropriate money to build a wall along the southern border, the Department of Defense appropriated funds to construct the wall anyway. It is still too early to know where the guardrails are, but not all authority has been lost for agencies regulating in their lane.

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## “Extraordinary” Cannot Become Ordinary

By Jay Duffy

CONGRESS designed the Clean Air Act as a remedy to the serious and unchecked problem of air pollution. It intended the Act’s implementation to have major consequences. Like many environmental laws, the Clean Air Act’s central provisions for stationary source pollution directs the expert agency to study chronic and developing pollution problems—and curb them with the best pollution control systems. The law does not predetermine the best systems, leaving that to the agency’s career scientists and engineers. Congress equipped EPA with the authority to regularly review and revise standards to control and prevent pollution, protect public health, and safeguard welfare. No “mousehole,” the Act is (and was always understood and intended to be) one of Congress’s most ambitious and successful achievements. Despite *West Virginia’s* looming, ill-defined major questions doctrine, the public and EPA should not allow for the Act to be denigrated or weakened.

As Justice Scalia and others currently sitting on the Supreme Court have explained over the years, Congress knows that problems and solutions will evolve over time. It therefore intentionally drafts legislation and delegates authority to agencies using vague or general—not to be confused with ambiguous—language “to cover a multitude of situations that cannot practicably be spelled out in detail or even foreseen,” as Justice Scalia and Bryan Garner write in *Reading Law*. In these cases, courts have historically deferred to an agency’s reasonable application of the broad language Congress passed.

The Court took a stark turn from this consistent understanding in *West Virginia*, explaining that “in the extraordinary case,” general terms of a statute are insufficient to support a rule. Instead, the agency must point to clear authorization rather than mere “textual plausibility” to “regulate in that manner.” The case is excused from normal canons of textual analysis if the claimed authority is too “major,” according to a grab-bag of fuzzy and indeterminate factors. Yet many of these same Justices rejected that position in their dissent in *Massachusetts v. EPA*, maintaining that “[n]o matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.”

*West Virginia* seems to require a level of specificity in these extraordinary cases that simply does not exist in many statutes. Unlike in prior major questions cases like *Gonzales v. Oregon*, where *Skidmore* deference was applied instead of *Chevron* deference, or in *King v. Burwell*, where no deference to the agency was granted but the rule was upheld in accordance with the Court’s best reading of the statute, *West Virginia* demands specific authorization for a particular rule where the Court has deemed it major—or the rule fails.

The stakes are high, and no one knows where the edge of the cliff is. Honest litigants, agencies, and lower courts will be groping around in the dark for principled factors to divine whether a regulation is subject to the clear statement rule instead of normal statutory interpretation. Meanwhile, activists will be able to hide behind “the utter flabbiness of the Court’s criterion,” in the words of Justice Scalia, to reach their preferred outcome.

Consider, however, that the *West Virginia* majority repeatedly insisted that its major questions framework should apply only in “extraordinary” cases. And even its strongest defend-

ers admitted that the Clean Power Plan raised novel and legitimate statutory questions—particularly in its reliance on credits obtained from zero-emitting generators that were not part of the regulated source category. But if this aspect of the rule was not authorized by statute, the Court should have said so, rather than invoking a highly abstract doctrine that seems to authorize what Adrian Vermeule has called the “extraordinary override of ordinary statutory meaning.” It remains to be seen whether the Court will adhere to its assurances that the doctrine is meant only for rare cases. Certainly, the Court’s characterizations of the Clean Power Plan provide room for distinguishing future rules that rely on less novel applications of the statute.

Surely the fact that a rule is highly consequential is not a basis for special judicial skepticism. The Clean Air Act was intended to do big things. It is, by design, going to result in consequential regulations involving many people, industries, and expenditures. It affects the health of everyone who breathes, and places the burden of cleaning up pollution on the industries everyone relies on. These factors do not make a rule extraordinary. Rather, they are the ordinary consequences of following congressional instruction. The question is simply whether the agency has stayed within the bounds of its authority. If it has not, the regulation is unlawful.

Is the agency acting in a way that is consistent with the statutory instructions from Congress? If so, the major consequences of regulation may just be what Congress intended.

Jay Duffy is an attorney with the Clean Air Task Force. He represented several public health and environmental non-profit organizations in *West Virginia v. EPA* and argued a portion of the case in the D.C. Circuit Court of Appeals.

# The Supreme Court's Presumption

By Lisa Heinzerling

IN three recent cases, the Supreme Court rejected the efforts of administrative agencies to take on “major questions” of public policy because it concluded that Congress had not clearly authorized the agencies to do so. “We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance,” explained the Court, as it turned aside the Biden administration’s efforts to slow the spread of COVID-19 through rules imposing a national moratorium on evictions, and requiring vaccination or testing of employees in large workplaces. “We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies,” said the Court, as it scrapped the Obama administration’s rule governing greenhouse gas emissions from power plants.

Notice the double meaning of two pivotal words in the quotations above, describing the mental activity the Court was engaged in: “expect” and “presume.” Each can precede a statement of probable fact; to expect or presume Congress to speak clearly on important questions might reflect a factual judgment that Congress does indeed speak clearly on important questions. “Expect” and “presume” can also reflect an attitude of hierarchical supremacy; to expect or presume Congress to speak clearly on important questions might be a command from the Court to Congress to speak clearly on these matters.

The difference in these two frames of mind is important. If the Court expects Congress to speak clearly on important issues because Congress always or usually does so,

then its search for clarity might actually be a genuine search for legislative intent. If, however, the Court expects Congress to speak clearly because it believes that its own institutional position makes it appropriate for the Court to issue legislative drafting instructions to Congress and to make executive power turn on Congress’s compliance with those instructions, then we need to ask why the Supreme Court thinks it is the boss of the rest of government.

By choosing the ambiguous words of “expect” and “presume,” the Court—consciously or not—obscured the power dynamics underlying its interpretive principle. The same is true of this central passage in *West Virginia v. EPA*: “In certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there.” The Court seemed to signal that Congress does speak clearly on important questions, and that the Court has a legitimate role in commanding Congress to do so where it has not.

The truth is, the Court doesn’t really mean the part about legislative intent. Conservative members of the Court have long told us that legislative intent is a fantasy, and the only reliable meaning of a statute lies in its words alone. Even if the Court did believe in legislative intent, the Court in *West Virginia* told us—but did not show us—that Congress does indeed speak clearly on questions of great economic and political significance. The Court cited no statutory examples, no empirical studies of legislative drafting—nothing that would bolster a claim that Congress always or mostly speaks with crystalline clarity in tackling major questions of public policy.

Indeed, the Court’s own precedents tell a different story. During the heyday of judicial deference to agencies’ legal interpretations of ambiguous statutes, the Court

found ambiguity on such important questions as the application of an air pollution permitting program to stationary sources like power plants, the preemption of state consumer protection laws by federal banking law, the imposition of common-carrier regulation on broadband internet services, and more. During this period, the Court developed a massive body of evidence that Congress often does not speak clearly when it addresses important problems.

If there is no evidence that Congress generally speaks clearly on major questions of public policy, then the only remaining support for the Court’s embrace of the major questions doctrine must come from the “separation of powers principles” alluded to in *West Virginia*. Chief Justice John Roberts’s majority opinion does not elaborate on these principles, but Justice Neil Gorsuch’s concurring opinion does, as do prior opinions by conservative justices. These writings make clear that the constitutional idea at the heart of the major questions doctrine is the notion that Congress may not delegate legislative power to any other person or entity. Thus, the driving force behind the major questions doctrine is the long-dormant non-delegation principle.

The implications for climate and environmental policy going forward are disquieting. The Court has taken aim not only at executive action but also at congressional power, and in doing so has quietly revived a far-reaching constitutional idea that has lain dormant for almost a century. We are entering uncharted constitutional territory, just when the need for decisive regulatory action has never been greater.

Lisa Heinzerling is the Justice William J. Brennan, Jr., Professor of Law at the Georgetown University Law Center. Her primary specialties are environmental and administrative law.

## Reaching an Inflection Point: What's at Stake?

By Kevin Poloncarz

**L**IKE many, I started raising chickens during the pandemic. My father grew up on a chicken farm outside Buffalo, so it's probably in my blood. For nearly two and a half years, my flock thrived. Over the halcyon days of that first summer, I'd spend a couple hours every afternoon letting them "free range" in my garden, under my watchful eye against the hawks who decimated neighbors' flocks, while I prepared for oral argument in the D.C. Circuit.

In October 2020, I argued the main statutory point upon which the D.C. Circuit vacated the Trump EPA's repeal of the Clean Power Plan in *American Lung Association v. EPA*. My clients included major power companies, which the Supreme Court would ultimately order to appear alongside federal respondents to defend the scope of EPA's authority in last term's blockbuster climate case, *West Virginia v. EPA*. I never imagined that the case I practiced with my chickens would get decided on the last day of the term.

Spending this past summer telling literally thousands via Zoom about the biggest loss of your career is not fun; I can attest. Yet, through all of this, my flock continued to thrive, producing dozens of white, azure-green, and pale brown eggs each week.

On Labor Day, I left my flock here in Napa in the early afternoon, when it was already 109 degrees. I said goodbye to all of them, including Elizabeth, a Speckled Sussex, who was always the first to greet me and demand attention. I returned 50 hours later and Elizabeth was dead, having succumbed to the punishing heat. During that time,

California experienced an unprecedented heat wave, with temperatures exceeding 100 degrees for several days in a row and reaching 115 on the day she died. The electricity grid barely scraped by, with demand peaking at an all-time high that day. Somehow, through the planning and diligence of the governor's team and creative use of the Amber Alert system, blackouts were avoided.

My grief upon losing Elizabeth was and remains immense. It's rooted in my overwhelming sense that unprecedented heat waves lasting several days can now be expected, and can't be characterized as aberrations. Thousand-year storms shouldn't happen five weeks in a row as they did this summer. When I started working on climate issues over 15 years ago, I never imagined impacts like this would occur until I was either retired or dead.

My grief comes from a place of privilege; the loss of a beloved hen pales in comparison to the impacts suffered by frontline communities who can barely afford to feed their families. Yet the depths of my sorrow are likely rooted in the unavoidable admission that my generation failed miserably at taking action to avoid these brutal heat waves and natural disasters.

Passage of the Inflation Reduction Act was cause for celebration, as was a legislative package California passed in September, which codified the state's goals to achieve net-zero emissions no later than 2045 and an 85 percent reduction in anthropogenic emissions by the same date. I had a small hand in both and know how hard it was to get them done. I also know that such monumental accomplishments are few and far between, demanding political will and compromises that are hard to muster.

And so we still need federal agencies to do the heavy lifting when it comes to hard problems like climate change. But that's exactly what the majority's decision in *West Virginia*

denies them the ability to do. If an issue is too big or too important, it will almost certainly be subject to a major questions challenge. As earlier cases from this last term concerning the eviction moratorium or vaccine mandates foretold, this Court will not hesitate to clip the wings of agencies attempting to exercise broad delegations of authority to address large problems.

The Clean Power Plan ultimately proved irrelevant; its goals were achieved a decade in advance, although it never went into effect. So what, then, were we fighting for?

I'm increasingly prone to questions like this, as a childless man who turns 50 next year and whose goats and chickens can't outlast him. Here's my take on what the next generation of climate advocates should learn from *West Virginia*:

First, you're playing a long game. Having your biggest loss end up as just an inflection point on a longer trajectory toward the ultimate goal might be okay; you'll survive.

Second, don't let anyone ever make you think that just because you're the son of a chicken farmer-cum-steelworker, you're not entitled to argue hard questions about the quasi-constitutional dimensions of statutory interpretation that the Court had not previously confronted in a majority opinion.

Third, don't give up, back down, or let my queen Elizabeth's death be in vain.

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