

How Justices' EPA Ruling Thwarts The Will Of The People

By **Jonathan Martel** (July 26, 2022)

West Virginia, with 0.5% of the U.S. population, is having an outsize impact in thwarting federal government efforts supported by most Americans to address climate change.

On June 30, in *West Virginia v. U.S. Environmental Protection Agency*, the U.S. Supreme Court struck down the Obama administration's carbon dioxide standards for power plants. Then, earlier this month, Sen. Joe Manchin, D-W.Va., declined to support further legislative action on climate change in this Congress.



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The veto held by Manchin, as a senator from a small coal-producing state, exemplifies the political gridlock that the Supreme Court's *West Virginia v. EPA* decision and its conception of democracy worsened.

In *West Virginia v. EPA*, the court faulted the EPA for adopting "transformative" regulations without a clear statement of congressional authorization. The decision is remarkable, because it announces a "major questions doctrine" that reorders the relationship between Congress and the executive branch.

Demanding that Congress "speak clearly" in assigning the EPA authority to make decisions of "vast economic and political significance," the court's decision alters the previously long-standing presumption in favor of executive branch interpretations of ambiguous statutory authority. Such executive branch interpretations generally tend to be more responsive to the will of the popular majority that elects the president.

This is especially so when the regulation is major, guaranteeing that the White House pays close attention. The major questions doctrine imposes a presumption against executive action instead. Applying that negative presumption on major questions adds to the systemic bias in Congress, empowering minority objections to legislative action.

It thereby threatens to exacerbate the dysfunction of our political system to pursue popular solutions to large societal problems like climate change. The history of Clean Air Act cases demonstrates why this is so.

West Virginia v. EPA

The question in *West Virginia v. EPA* concerned Congress' command in the Clean Air Act that the EPA establish standards for pollutants from existing power plants not regulated under other Clean Air Act requirements. The statute directs the EPA to base the standards on the "best system of emission reduction" that the agency determines has been demonstrated.

Under the Obama administration's proposed Clean Power Plan, the EPA set carbon dioxide standards for coal-fired power plants that first assumed efficiency improvements — to squeeze the most electricity out of each ton of coal and its associated carbon emissions.

The agency then went further, setting standards that coal plants could only meet by reducing their own operations and buying emissions credits from natural gas-fired plants and wind and solar generators. The EPA thereby effectively required shifting generation

from coal plants to lower-emitting natural gas, wind and solar facilities.

The court found the Clean Power Plan to raise a "major question," and thus determined that Congress had to authorize the EPA's approach in clear and explicit terms. The court found that the Clean Air Act lacked a clear statutory statement authorizing the EPA to set standards that coal plants could not achieve except by buying credits from other types of plants, and so invalidated the EPA standards.

According to the court, the question was "major" due to the breadth of the EPA's asserted control over the industry. Specifically, the court considered the agency's "generation shifting" approach to be "transformative" because it imposed standards coal plants could not meet except by reducing generation or buying credits.

The court reached this conclusion even though the power sector met the required carbon dioxide reductions well ahead of time without the rules ever being implemented. The court also noted that the EPA was relying on an "unheralded" statutory provision that it has utilized only a few times since 1970.

Finally, the court emphasized that Congress had considered legislation to adopt similar carbon dioxide trading regimes, but had failed to enact it.

All of these bases for finding a major question — the broad economic impacts, the role of the specific statutory provision, and subsequent congressional inaction — were case-specific. As a result, it is difficult to discern what other EPA rules might be deemed sufficiently transformative to raise a major question triggering "clear statement" scrutiny.

Clean Air Act History

Transformational Cases

It is no accident that this case involved the Clean Air Act and climate change. A brief history reveals just how potentially transformative the announcement, in *West Virginia v. EPA*, of a clear statement rule that applies in "major" cases is.

Since its enactment in 1970, the statute has been no stranger to major litigation over the meaning of short phrases relied upon by the EPA to issue major regulations — regulations later heralded for their effectiveness in protecting public health.

Air pollution — including ozone smog, airborne particulates, acid rain, hazardous pollutants and now greenhouse gases — has long carried the most significant impacts on human health and welfare in environmental law. Polluted air and greenhouse gases cannot be cleaned up after the fact, like water and soil.

Rather, air pollution control requires transformation of the industries that cause it, using ever-evolving technologies like catalysts, scrubbers, computerized controls, and radically changed products and industrial methods. These circumstances have created public support for action.

But the necessary transformation of industry also has led to intensely focused regional and economic objections that Congress has only occasionally overcome to enact legislative solutions. Two early cases are instructive.

In 1973, in *International Harvester v. Ruckelshaus*, the U.S. Court of Appeals for the D.C.

Circuit addressed whether Congress' command that the EPA determine whether catalytic converter technology for cars was "available" allowed the agency to set standards based on a projection of when it would be available.

The court explicitly acknowledged the vast economic and public health stakes. The court emphasized that 28% of jobs in the U.S. at the time depended in some way on the automobile industry, but also described the "devastating impact" automobiles had on the environment, explaining that they accounted for 80% of air pollutants in urban areas.

Similarly, in *Sierra Club v. Costle*, the same court in 1981 recognized the vast economic and environmental stakes in whether the EPA could set variable power plant standards for sulfur dioxide, which affected whether the plants could comply by switching to low-sulfur western coal instead of installing scrubbers for high-sulfur eastern coal.

Upholding the EPA's variable standards approach, the court was keenly aware of the dramatic stakes for the coal industry. The court explained that coal was the dominant fuel used to generate electricity in the U.S., with the coal mining industry producing 850 million tons of it per year.

Despite the transformational stakes and unclear statutory language, no major question doctrine or clear statement rule was applied in these cases. Rather, the early Clean Air Act cases culminated in the seminal 1984 case about the meaning of the phrase "stationary source," *Chevron USA Inc. v. Natural Resources Defense Council*.

It is in that case that the Supreme Court articulated the two-step approach that has since controlled judicial interpretations of agencies' statutory authority.

Step 1 requires the court to determine whether Congress' meaning is clear from the text, context, history and purpose. If the court finds that the meaning is ambiguous, then in step 2, the court will defer to the agency's interpretation, as long as it is reasonable.

In *Chevron*, the high court recognized the Clean Air Act to be addressing a "major social issue." Even so, the court found that Congress "did not actually have an intent" regarding the question, so the only question for the court was whether the EPA's view was reasonable.

As former Justice Antonin Scalia described it during a speech at Duke Law School in 1989,^[1] the Supreme Court's *Chevron* decision "more accurately reflects the reality of government, and thus more adequately serves its needs." The court adopted this approach — as in the *Chevron* case itself — even to questions that the justices specifically believed Congress did not consider at all.

In *Chevron*, the court explained the political context for how executive policymaking under broad congressional directives worked productively. When the country was unable to meet the ambient air quality goals of the Clean Air Act, "the legislative struggle" was between those seeking to, as the *Chevron* decision put it, "reduce pollution rapidly to eliminate its social costs" and "interests advancing economic concern" about the impact on "industrial development."

Congress was unable to agree on what to do in 1976. This led the EPA to lead the way, fashioning gap-filling solutions relying on general statutory authority, and seeking to balance environmental and economic interests.

That then led Congress to enact the 1977 amendments to the Clean Air Act as a

"comprehensive response to a major social issue," as stated in *Chevron*, largely following the EPA solution.

As courts in Clean Air Act cases have emphasized, the EPA's Clean Air Act regulations have tackled a major social problem with enormous stakes for the economy and public health. The EPA has done so over the course of 50 years, even with only two statutory revisions, in 1977 and 1990.

As but one important example, there can be little question that EPA regulation has vastly altered the automotive industry over the last 50 years under general Clean Air Act authority — with the industry now poised to eliminate internal combustion engines entirely. And the reality is that the EPA, at least as much as Congress, acted with a broad popular mandate reflecting the democratic will of voters.

This is especially true for the most consequential EPA decisions during this period — including the power sector climate rule invalidated in *West Virginia v. EPA*. Presidential administrations responsive to a broadly majoritarian electoral system have played an important role in fleshing out congressional directives with popular support.

The Significance of the Court's Decision

West Virginia v. EPA upends *Chevron* by resolving ambiguity against agency action on "major questions." The decision alters Justice Scalia's vision of deference to agencies' reasonable interpretation of ambiguous statutes as grounded in political reality.

The court in *West Virginia v. EPA* counted against agency authority that the EPA regulations could have a large impact, and that members of Congress introduced bills to adopt similar regulatory programs that failed to pass. The case replaces the *Chevron* vision with distrust of agency decision making.

In his concurrence, Justice Neil Gorsuch asserts that the outcome puts faith in "the people's representatives" in Congress as "the decision makers here," who "prescribe general rules for the government of society."

Justice Gorsuch, and the court's decision, underweight the role of executive agencies in carrying out the will of the people as articulated in statutory directives.

Especially transformative rules, like the carbon dioxide regulations at issue in this case, garner the close oversight of an elected presidential administration carrying out a popular mandate, in the face of Congress' inability to enact more specific legislation.

Aggressive greenhouse gas reductions within the regulatory framework of the power plant rule were a core element of the climate change agenda endorsed by President Joe Biden, who garnered a 7-million-vote margin of victory in the 2020 election. *West Virginia v. EPA* thus inverts the political reality of policymaking in our system.

As the 50-year history of the Clean Air Act amply demonstrates, the people have only rarely mustered the supermajority necessary to overcome minority objections in Congress. Especially in a U.S. Senate subject to a 60-vote requirement to defeat a filibuster, 40 senators hold veto power — indeed, fewer than it takes to block a Supreme Court appointment.

Under the Constitution, those 40 senators may represent as few as 11% of the population.

Congress has been unable to find supermajority support to address climate change, despite findings in 2019 and 2020 by the Pew Research Center that a large majority of the public wants the federal government to do more.

In the face of legislative inaction, the EPA — backed by a president with a popular mandate — resorted to an interpretation of general authority to fashion policy solutions. But the Supreme Court, in effect, now gives more weight in interpreting ambiguous statutory authority to the minority that blocks clarifying action in Congress than to a popularly elected presidential administration.

West Virginia v. EPA thereby puts a thumb on the scales against executive branch authority, by requiring a clear legislative statement whenever the issue is deemed "major." This doctrine extends Congress' bias against action to solve major problems to the executive branch and the courts. It thus doubles down on the counter-majoritarian tendency designed into our constitutional system.

We already face a deficit in trust in government to address problems, such as the COVID-19 pandemic, immigration, gun violence, health care and climate change. The West Virginia v. EPA decision risks adding to this deficit, further tilting the scales by empowering those who wish to stymie government action.

Ironically, this decision, made in the name of the people, actually thwarts the will of the people — and threatens to worsen political gridlock.

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[1] Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 521 (1989).