

Supreme Court Conservatives May Slash EPA's Authority on Climate

A decision limiting the federal agency's power to combat the climate crisis could potentially have wider, catastrophic effects across a broader range of health and safety issues.

BY NOAH SACHS FEBRUARY 23, 2022

After the Supreme Court's decision last month rejecting the Biden vaccine mandate for large employers, it wasn't just the public-health community that was asking "where do we go from here?" Environmental activists and attorneys immediately recognized that the Court's reasoning in the vaccine case, *National Federation of Independent Business v. Department of Labor*, will likely lead to a win for the fossil fuel industry in the biggest environmental case of this term, *West Virginia v. EPA*.

On the surface, the vaccine case and *West Virginia* appear to involve totally different issues. *NFIB* was a challenge to an emergency regulation from the Occupational Safety and Health Administration (OSHA) that required large employers to either verify COVID-19 vaccinations or compel their employees to wear masks and get tested. In a 6-3 decision, with the three liberals dissenting, the Court stayed the regulation as beyond OSHA's authority, in part because OSHA had never addressed viruses in the workplace before.

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West Virginia, which the Court will hear on February 28, is a blockbuster case. At stake is whether EPA can use the Clean Air Act to address greenhouse gas emissions from the electric power industry, which represent about a quarter of all U.S. emissions. Given how they ruled last month in *NFIB*, the Court's conservatives are likely to use the case to gut EPA's authority. And in the process, they might strengthen legal doctrine that would curb federal agencies' power

on a broad range of other issues, like health care, financial regulation, and consumer protection.

The link between *West Virginia* and the January decision in *NFIB* is the “major questions doctrine,” an anti-regulatory device that the conservative wing of the Court has embraced with a bear hug. The major questions doctrine says that when Congress chooses to delegate authority to a regulatory agency like OSHA or EPA, it must “speak clearly” if it wishes to “assign to an agency decisions of vast economic and political significance.”

Under the doctrine, the Court will block an agency’s significant regulations if it finds that Congress failed to write a clear and precise authorizing statute. The court’s decision in *NFIB* staying the OSHA vaccine mandate was influenced by this doctrine, with Justice Neil Gorsuch lauding it as a “vital check on expansive and aggressive assertions of executive authority.” If the court deploys the doctrine in *West Virginia*, it would likely limit EPA’s authority on climate change because Congress did not “speak clearly” enough to grant power to the agency on that issue.

For decades, the Court has given federal agencies leeway to interpret the broadly written laws that they implement, but the major questions doctrine takes that flexibility back, aggrandizing the power of the judiciary. The doctrine has no clear grounding in the Constitution or in any statute, however. It was invented by the Court about 20 years ago, and it is becoming a favored tool of conservative justices to nullify important federal regulations in their broader agenda to rein in the administrative state.

Because the Court has never defined “major” or “vast economic and political significance,” the Court leaves

the public and Congress in the dark about where the doctrine will be applied. The doctrine applies retroactively to laws passed decades ago, and it allows justices to lean heavily on their own policy preferences to determine which regulatory actions are “major” enough to review with heightened skepticism.

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Worse yet, the doctrine erodes the ability of federal agencies to address new and unforeseen problems. Hundreds of old statutes in areas like banking, health care, aviation, and the environment confer broad authority on agencies to act as new issues arise. As long as the text of the statute fairly confers authority on the agency to act, why should it matter that the agency is addressing a new problem that Congress may not have contemplated? Just because an agency’s action is novel doesn’t make it unlawful. Congress legislates for the long term. It often does not know in advance how a particular statute will be deployed—and this traditional regulatory system makes sense because agencies have the flexibility to act when they identify new dangers.

The Court is now turning this system on its head, and the recent *NFIB* vaccine case is a prime example. That case centered on the Occupational Safety and Health Act of 1970, in which Congress gave OSHA the power to issue workplace safety standards, on an emergency

basis, when “employees are exposed to great danger from exposure to substances or agents determined to be toxic or physically harmful, or from new hazards.”

Take a look at that language. It was *purposely* expansive. The statute could cover common problems in the 1970s, like workplace exposure to asbestos. And today, the statute surely seems to cover the problem of workplace exposure to COVID-19, as Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor explained in a sharp dissent. Yet the Court’s conservatives, who claim to be textualists, nonetheless overrode OSHA’s sensible interpretation of the statute.

During the oral arguments in *NFIB*, a skeptical Chief Justice John Roberts explained that this 1970 law was “closer to the Spanish flu than it is to today’s problem.” But laws are not like cheeses—they don’t spoil just because they’ve been around a long time. The court’s hostility to OSHA’s reliance on this old statute is significant because the Clean Air Act, at issue in *West Virginia*, was also enacted in 1970.

What might the six conservatives do next in *West Virginia*? The case is about a 2017 regulation from the Trump EPA called the Affordable Clean Energy (ACE) rule, which contained weak climate regulations for power plants. The ACE rule propped up the coal industry and incentivized power plant technologies that would only marginally reduce heat-trapping emissions.

Notably, the Trump ACE rule disclaimed that EPA had any authority under a key paragraph of the Clean Air Act to enact bold regulations for heat-trapping gases from power plants, such as the 2015 rule from the Obama EPA called the Clean Power Plan. The Trump ACE rule consequently repealed the Clean Power Plan,

which had never gotten off the ground before Trump took office.

Early last year, however, the D.C. Circuit Court of Appeals struck down the ACE rule, holding that it “hinged on a fundamental misconstruction” of the Clean Air Act. The D.C. Circuit explained that the Obama administration’s broader interpretation of that paragraph was viable and should have been considered in the Trump EPA rulemaking. The failure to do so was arbitrary and capricious, the court said. West Virginia, 18 other red states, and two coal companies then appealed to the Supreme Court.

The stakes are high because how the Court interprets this important paragraph of the Clean Air Act will affect whether President Biden (or a future president) can implement ambitious plans to limit greenhouse gas emissions from existing power plants. As part of the Paris Agreement process, President Biden committed last fall to a 50 to 52 percent reduction in U.S. emissions below 2005 levels by 2030, and tackling power plant emissions is crucial to achieving that goal.

Given the balance on the Court, the best outcome is a “soft landing” where the Court preserves some EPA authority on this issue, though perhaps not as broad in scope as the Obama administration’s Clean Power Plan.

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In the wake of the *NFIB* decision, however, it’s more

likely the Court will use the major questions doctrine to kneecap EPA's authority over heat-trapping gases, holding that Congress didn't "speak clearly" enough in the 1970 Clean Air Act. The Court might hold that the paragraph's text just can't support a sweeping EPA climate agenda for the power sector, and instead only supports EPA regulations that tinker at the margins of power plant efficiency to achieve a 1 percent reduction in emissions, like Trump's ACE rule. The Court could conceivably rule, through the major questions doctrine, that EPA has no authority whatsoever over heat-trapping emissions from power plants. If these dismal scenarios unfold at the Court this spring, it could be an eternity before a polarized Congress acts on climate change by either amending the Clean Air Act or passing a new climate bill.

The Court's decision to hear this case was surprising because the Biden administration currently has no plan to reinstate either the ACE rule or the Clean Power Plan (it has said it is working on its own plan). In effect, there's no binding greenhouse gas regulation on the books to review. Given that the Court could have waited to see if the Biden EPA puts a new rule in place, its decision to hear this case now could be a sign that it is ready to smack down EPA's authority (it takes four justices to vote to review a case).

What makes *West Virginia* even more remarkable is that Supreme Court decisions from 2011 and 2014 (including one penned by Justice Antonin Scalia), *presumed* that EPA would use this part of the Clean Air Act to regulate power plant greenhouse gas emissions. But now we have a very different Court, with three Trump appointees and an even larger conservative majority.

If EPA loses in *West Virginia* based on the major

questions doctrine, the case could have disastrous ripple effects across all the federal agencies that protect our health and safety. It would be the third time in less than a year that the Court has relied on the doctrine to reject agency regulations (it applied the doctrine in *NFIB* in January and also in an August 2021 decision rejecting the eviction moratorium imposed by the Centers for Disease Control).

In the hands of this Court, the major questions doctrine could shift from an obscure, rarely used doctrine of administrative law to a frequently used weapon to beat back regulations that the Court deems too excessive, too costly, too controversial, or simply too “vast.” In the crosshairs could be a wide array of important federal regulations—financial protections, chemical risk disclosures, hospital and nursing home care requirements—that federal agencies have crafted using authorizing legislation from Congress. *West Virginia* should not become a template that the judiciary uses to usurp legislative and executive powers designed to protect the American people.

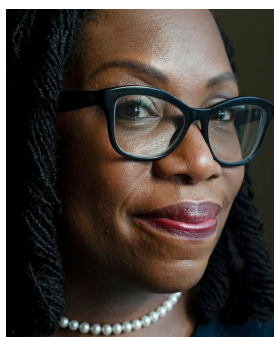
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