

No Longer a Major Question About the Court's New Direction

THIS past term, the Supreme Court had a chance to remake environmental law—and it took that opportunity. In *West Virginia v. EPA*, the Court decided whether a rule that the agency had promulgated during the Obama administration—aimed at reducing greenhouse gas emissions from power plants—was legal.

There were many twists and turns that got us to this point. The Clean Power Plan had used “generation shifting”—a common practice companies use to meet emissions standards—shifting generation from coal to gas, or gas to renewables. The Trump administration repealed and replaced the Obama-era regulation with the Affordable Clean Energy rule, in so doing asserting that generation shifting was unambiguously illegal.

But a day before Biden's inauguration, the D.C. Circuit struck that Trump-era rule down, holding that this assertion was wrong. Rather than do anything to repeal the ACE Rule, EPA asked the D.C. Circuit to stay the mandate instead—a tactic that made sure that the Clean Power Plan did not spring back into life. Now under Democratic control, the agency did not appeal the loss, but intervenor states, led by West Virginia, did.

EPA's decision not to propose and finalize a new rulemaking left the Supreme Court with an opportunity to grant that cert petition. On June 30, the last day of the term, the Supreme Court held that EPA did not have the authority to set the Clean Power Plan's standards based on generation shifting.

It could have been much worse. The Court could have used the opportunity to tell EPA exactly how

to interpret the statute to regulate greenhouse gas emissions—undermining the executive's authority to make decisions and interpret statutes. It could have told EPA that regulating greenhouse gas emissions at all requires specific authorization from Congress—undermining a number of other greenhouse gas emissions rules. It could have said that Congress had not delegated that authority to EPA at all—threatening all of the regulatory state. The Court avoided this parade of horrors.

What it did instead was to explicitly adopt the *major questions doctrine* to hold that EPA lacked authority to use generation shifting. In other words, the Court determined the rule's limits. It first adopted West Virginia's characterization of the Clean Power Plan: as a rule that intended to remake the power sector by shifting states away from coal. It then held that any rule that sought to do something that ambitious was subject to the doctrine, which requires the agency to point to a clear statement granting it the authority to answer that question.

That doctrine has been percolating for some time, but this decision marks a new era. There is no real standard governing what constitutes a major question. It isn't just that any new rule has to cost a lot. It could be that the policy is ambitious, the statute little-used, or the regulatory strategy new-ish or novel.

The doctrine is bound to come up in pretty much every regulatory and environmental case to come. An attorney general coalition, led by Texas AG Ken Paxton, has already argued in comments that a new policy banning asbestos is subject to the major questions doctrine. In writing for the majority, Justice Roberts describes

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the *West Virginia* petition as an extraordinary case. But it is hard to see that this doctrine will be at all limited.

There are two cases on the docket for the 2022-23 term that could bring about even more seismic changes. In *Sackett v. EPA*, petitioners are challenging a decision that wetlands on their property are subject to regulation under the Clean Water Act. The Sacketts hope to use the opportunity to convince the Court to restrict EPA's jurisdiction severely under the Clean Water Act. They have argued that EPA's jurisdiction extends only “to traditional navigable waters and intrastate navigable waters that link with other modes of transport to form interstate channels of commerce.”

In *National Pork Producers Council v. Ross*, petitioners are challenging a California proposition that requires pork products sold in the state to have been raised under certain conditions judged to be humane and healthier by the state. The producers have argued that California is improperly reaching beyond its borders to regulate pork production in other states, because only a small proportion of the country's pork production is in California. But many states regulate the quality of products that can be consumed in state, from energy to food and beyond.

States' rights doctrines and environmental law are here in conflict, and both changing in response, right before our eyes.