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The Major Questions Doctrine: The US Supreme Court Blunts the EPA

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The US Supreme Court has been frantically busy of late, striking down law and legislation with an almost crazed, ideological enthusiasm. Gun laws have been invalidated; Roe v Wade and constitutional abortion rights, confined to history. And now, the Environmental Protection Agency has been clipped of its powers in a 6-3 decision.

The June 30 decision of *West Virginia v Environmental Protection Agency* was something of a shadow boxing act. The Clean Power Plan, which was the target of the bench, never came into effect. In 2016, the Supreme Court effectively blocked the plan, which was announced by President Barack Obama in August 2015. It has been originally promulgated under the Clean Air Act.

In 2019, the Trump administration repealed the CPP, replacing it with the Affordable Clean Energy Rule. It argued that the EPA's authority under Section 7411 of the Clean Air Act only extended to measures pertinent to the plant's premises, rather than industry-wide measures suggested by the CPP. The ACER vested states with the discretion to set standards and grant power plants much latitude in complying with them. In their decision, the DC Circuit vacated the repeal of the CPP by the Trump administration, and the ACER, sending it back to the EPA. In effect, the EPA's powers of regulation were held to be intact.

The Clean Power Plan was intended as a mechanism by which targets for each state could be set for each state vis-à-vis reducing carbon dioxide emissions stemming from power plants. At the time the EPA touted it as laying "the first-ever national standards that address carbon pollution from power plants" which would cut "significant amounts of power plant carbon pollution and the pollutants that cause the soot and smog that harm health, while advancing clean energy innovation, development and deployment". And the plan would also lay the basis "for the long-term strategy needed to tackle the threat of climate

change."

A vital aspect of the Plan was also using "generation shifting", creating more power from renewable energy sources and natural gas while improving the efficiency of current coal-fired power plants. Such a shift through the entire sector to cleaner resources constituted, in language drawn from the 1970 Clean Air Act, a "best system of emission reduction" (BSER). Amongst its predictions, the Agency projected that coal could provide 27% of national electricity generation by 2030, down from the 2014 level of 38%.

Coal companies and various Republican-governed states litigated on the matter, arguing before the Supreme Court that the US Court of Appeals for the District of Columbia Circuit had erred in accepting the EPA's reading of the Clean Air Act as granting the agency vast powers to regulate carbon emissions.

This entire process struck an odd note, precisely because the CPP had not been reinstated by a Biden administration which intends to pass new rules on power plant carbon emissions. This did not stop the **Chief Justice John Roberts** and his fellow judges from readying for judicial battle. Merely because a government had ceased conduct central to the case did not stay the court's intervention. This would only happen if it was "absolutely clear that the allegedly wrongful behaviour could not be reasonably expected to recur." With the Biden administration defending the methods used by the EPA under the Obama administration, one could not be sure.

Enter, then, the looming, and brooding question of US constitutional law: the "major questions doctrine". According to the doctrine, one that was prominently used in 2000 to invalidate attempts by the Food and Drug Administration to regulate tobacco, questions of "vast economic or political significance" cannot be regulated without clear approval for such measures from Congress.

The EPA argued that under the doctrine, a clear statement was required to conclude that Congress had intended to delegate authority "of its breath to regulate a fundamental sector of the economy". Having found none, the agency even went so far as to say that Congress had taken measures to preclude such policies as generation shifting.

For the majority, there was little doubt that this constituted a "major questions case". The question that exercised the majority, according to Chief Justice Roberts, was "whether the 'best system of emission reduction' identified by EPA in the Clean Power Plan was within the authority" of section 111(d) of the Clean Air Act. The EPA's own words – that it had discovered "in long-extant statute an unheralded power" which represented a "transformative expansion in [its] regulatory authority", clearly troubled the majority. The Agency's discovery of this power was then used "to adopt a regulatory program that Congress had conspicuously and repeatedly declined to act itself."

To this, the majority took clear umbrage. Section 111(d) of the Clean Air Act had never formed the basis for rules of such transformative magnitude as that implied by the Clean Power Plan. While Justice Roberts accepted that, "Capping carbon dioxide emissions at a level that will force nationwide transition away from the use of coal to generate may be a sensible 'solution to the crisis of the day'," but only Congress could adopt "a decision of such magnitude and consequence."

Justice Neil Gorsuch, in a concurring opinion joined by **Justice Samuel Alito**, also gave

the major questions doctrine heft by claiming it shielded against "unintentional, oblique, or otherwise unlikely' intrusions" upon such questions as "self-government, equality, fair notice, federalism, and the separation of powers."

In her dissenting ruling, **Justice Elena Kagan**, accompanied by **Justices Stephen Breyer** and **Sonia Sotomayor**, found that the EPA's interpretation and position could be contextually and logically justified. Resorting to the "major questions doctrine" was fanciful here, given that previous decisions had simply used the old, ordinary method of statutory interpretation. The decision of an agency had been struck down because it had operated "far outside its traditional lane, so that it had no viable claim of expertise or experience." Had such decisions been also allowed, they would have "conflicted, or even wreaked havoc on, Congress's broader design."

In this case, the Clean Power Plan clearly fell "within the EPA's wheelhouse, and it fits perfectly [...] with all the Clean Air Act's provisions." The Plan, despite being ambitious and consequential in the field of public policy, did not fail because of it. Congress had wanted the EPA to discharge such functions.

What is available to the EPA has been dramatically pared back. The Agency can still mandate coal-fire plants to operate more efficiently by adopting various technological measures, such as carbon capture and storage technology. Apart from being prohibitive, this will have the effect of extending the operating lives of such climate change agents.

Justice Kagan's words, in conclusion, are caustic and suitable for the occasion. The Roberts majority had not only overstepped by usurping a critical domain of expertise and policy. "The Court appoints itself – instead of Congress or the expert agency – the decisionmaker on climate policy. I cannot think of many things more frightening." Across the US, regulatory regimes – except those approved by Republican and conservative groups – are being readied for a judicial felling by the sword of the major questions doctrine. Federal Agencies, if they have not already done so, will be girding their loins and readying for battle.

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