



'Payoff for 40 Years of Dark Money': Supreme Court Delivers for Corporate America

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Over the past several decades, corporate lawyers, right-wing activists, Republican officials, and dark money groups with deep pockets have been laying the groundwork for a far-reaching legal assault on the federal government's ability to regulate U.S. industry—including the oil and gas sector threatening the planet.

On Thursday, their investments bore major fruit.

In a 6-3 **decision** along ideological lines, a Supreme Court packed with right-wing judges **handpicked and boosted** by some of the same forces leading the yearslong crusade against the power of regulatory agencies—which conservatives often dub the "administrative state"—dramatically restricted the Environmental Protection Agency's authority to rein in greenhouse gas pollution from power plants.

On its face, the ruling in *West Virginia v. EPA* appears limited in scope, pertaining to a specific section of the 1970 Clean Air Act and zeroing in on the reach of a single government agency.

But experts saw in the decision, authored by Chief Justice John Roberts, an ominous warning that the Supreme Court is ramping up its assault on the federal government's capacity to act on matters ranging from environmental protection to workplace safety to public health to consumer protection.

Lawrence Gostin, a professor at Georgetown Law, argued that the high court's right-wing majority wasn't really concerned with the Clean Power Plan, an Obama-era zombie regulation at the center of *West Virginia* that **never even took effect**.

"It was the conservative court's larger agenda to gut the regulatory state and decimate executive powers to protect Americans' health and safety," **wrote** Gostin, who contended that "the ripple effects of *West Virginia v. EPA* are profound" and could hinder other key federal agencies such as the Centers for Disease Control and Prevention, the Food and Drug Administration, and the Occupational Safety and Health Administration.

"Congress doesn't have a magic crystal ball that can predict every future health hazard," Gostin added. "Nor does Congress have the expertise. That's why Congress has delegated wide powers to health and safety agencies. They have the expertise and flexibility to safeguard the public from major threats."

William Boyd, an environmental law professor at the University of California Los Angeles, agreed with Gostin's analysis, **telling** *Vox* that he believes the *West Virginia* ruling "can be seen as part of a larger trend directed at restricting the ability of EPA and other agencies to protect health, safety, and the environment."

"This starts at the top with the Supreme Court," he noted, "but it will ripple through the federal judiciary as decisions accumulate and the jurisprudence that has taken over the last half-century to accommodate the regulatory state is diminished and hollowed out."

The *West Virginia* ruling was a long time in the making, the product of **coordinated efforts** by GOP attorneys general, the fossil fuel industry, and shadowy organizations such as the Federalist Society.

For years, the **industry-backed** legal group has been building up a pipeline of far-right judges that Republican politicians have dutifully attached to the nation's judiciary, pumping young, often under-qualified, and business-friendly judges into district courts, appeals courts, and the highest court in the land. (All six sitting conservative Supreme Court justices have ties to the Federalist Society.)

Among the organization's **donors** is Koch Industries, the multinational oil and gas behemoth whose current billionaire leader, Charles Koch, and his late brother David have financed a vast apparatus of think tanks and advocacy organizations that've grown so influential that they frequently write **entire laws** for GOP legislatures to rubber stamp.

As *The Lever's* Andrew Perez **reported** earlier this year, groups linked to the Koch network took a serious interest in the *West Virginia* case, which was led by a group of Republican attorneys general and major coal companies. The Supreme Court agreed to take up the case last October.

"Koch's Americans for Prosperity Foundation **filed** an amicus brief in the case arguing that the EPA should not be permitted to 'impose its will on the nation through regulatory diktat,'" Perez observed. "Several more Koch-funded dark money groups have filed similar amicus briefs in the case. That includes the **Cato Institute**, the **New Civil Liberties Alliance**, the **Competitive Enterprise Institute**, and the **Mountain States Legal Foundation**."

"The New Civil Liberties Alliance **also received \$1 million** from the 85 Fund, a charitable foundation **steered** by Trump judicial adviser Leonard Leo," Perez added. "A longtime executive at the Federalist Society, a conservative lawyers group, Leo also helps direct the Judicial Crisis Network, a dark money group that spent tens of millions **leading the confirmation campaigns** for Gorsuch, Kavanaugh, and Barrett."

As Jane Mayer, the award-winning investigative journalist and author of *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right*, put it Thursday, the *West Virginia* decision is "payoff for 40 years of dark money from some of the planet's biggest polluters."

Top Republican officials and lawmakers responded enthusiastically to Thursday's ruling, which is likely to have global consequences given the United States' status as the largest historical emitter of carbon dioxide.

"Today, the court made the correct decision to rein in the EPA, an unelected bureaucracy," West Virginia Attorney General Patrick Morrisey, who spearheaded the case.

"And we're not done," he added. "My office will continue to fight for the rights of West Virginians when those in Washington try to go too far in asserting broad powers without the people's support."

Senate Minority Leader Mitch McConnell (R-Ky.), who is hoping to take back the upper chamber's gavel in the upcoming midterms, **hailed** the majority's opinion and warned "other overeager bureaucrats" to "take notice."

In the decision itself, the court's conservatives defined *West Virginia v. EPA* as a "major questions case," invoking an obscure and novel legal doctrine that insists federal agencies must have explicit and specific congressional authorization to act on matters deemed politically or economically significant.

As *Bloomberg's* Noah Feldman **explains**, "the major questions doctrine appears to take a very large bite out of" the so-called Chevron doctrine, which states that "the courts must defer to agencies' reasonable interpretation of laws passed by Congress."

The implications of the major questions doctrine's emergence as a guiding principle for the court are vast. In her dissent in *West Virginia*, liberal Justice Elena Kagan observed that "the court has never even used the term 'major questions doctrine' before."

"Let's say the obvious: The stakes here are high," Kagan wrote. "Yet the court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The court appoints itself—instead of Congress or the expert agency—the decisionmaker on climate policy. I cannot think of many things more frightening."

Jenny Breen, associate professor at the Syracuse University College of Law, similarly argued in an email to *Common Dreams* that the court's *West Virginia* ruling "relies on judicial overreaching to undermine public policy and the legitimacy of government more broadly."

"The majority did not like the agency's approach to regulating power plants," Breen wrote. "But only in this new universe of governance-by-judicial-fiat should any of us care what John Roberts thinks is the best approach to regulating power plants. Congress gave that job to the EPA, not the Supreme Court."

"In taking that decision for itself," Breen added, "the court deals yet another blow to the ability of the United States to democratically govern in the face of severe public policy crises."

While the conservative-dominated court may not have overtly wielded the major questions doctrine against the federal government's regulatory powers in previous cases, Mekela Panditharatne and Martha Kinsella of the Brennan Center for Justice **note** that it has "obliquely" relied on the doctrine to "**strike down** the Centers for Disease Control and Prevention's eviction moratorium and **block** the Occupational Health and Safety Administration's mandate that large employers ensure their workers are vaccinated or frequently tested for Covid-19."

"In Thursday's case, the court embraced the doctrine in a full-blown way, making clear that it views a wide range of agency protections as potential targets for abolition," they warned. "By gutting regulatory agencies' ability to use existing statutory authority to respond to contemporary societal needs, the court places the onus on Congress to amend countless laws to expressly authorize agencies to 'make decisions of vast economic and political significance,' whatever that means."

"The suggestion that Congress just needs to pass more explicit instructions to agencies in order for the government to perform core functions is easier said than done," Panditharatne and a Kinsella added. "For his part, Justice Gorsuch in **concurrency**, alarmingly, raises the specter that agency action without express congressional authorization could be deemed to violate the Constitution, a position the **dissent** vehemently rejects."

The institutional obstacles for Congress to step into the void created by the court's ruling are enormous, including but not limited to the Senate's 60-vote legislative **filibuster**. Corporate-friendly Democrats and the Republican Party—made up of industry-funded lawmakers wedded to **mass deregulation**—are also sure to stonewall any congressional attempts to make regulatory agencies' statutory authority to fight the climate emergency and other crises more explicit.

The ultimate result, observers fear, could be the sweeping defanging of the federal government that corporate America and the conservative movement have sought for decades.

"These politicians in black robes know full well that, with Mitch McConnell in a leadership position doing the bidding of Koch and the oil and gas industry, this Congress will not pass any substantial climate change mitigation legislation," Lisa Graves, the executive director of True North Research, **told** *The Intercept*.

In a **series of tweets** on Thursday, the Green New Deal Network asked Americans to "imagine a future where the USDA can't regulate what chemicals are in your food."

"Imagine a reality where the FDIC can't protect your money from greedy bankers and investors. And imagine a world where the FDA can't prevent pharmacies from stocking up with literal poisons," the group added. "This is the endgame."