Supreme Court makes ‘major’ improvement to administrative law in West Virginia v. EPA

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July 6th, 2022

By a 6–3 vote, the Supreme Court in *West Virginia v. Environmental Protection Agency* took an important step toward restoring constitutional balance to federal policymaking. Though *Washington Post* columnist George Will probably overstates the case in calling it the “term’s most momentous decision,” he is right that this is a big deal. As I discuss below, the Cato Institute perhaps played a role in this welcome result.

So, what happened? Setting aside the case’s backstory (explained here), the immediate result is that the EPA doesn’t have the power to impose a nationwide cap-and-trade climate policy based on an “ancillary” part of the law that no one had heard of before the Obama administration. The Biden administration is working on a significant climate rule based on the very statutory provision at issue in *West Virginia v. EPA*, so the court’s holding provides guidance as to what the EPA cannot do.

But it’s how the court reached this result that will have lasting consequences. In ruling against the government, Chief Justice Roberts’s majority opinion “announces the arrival of the ‘major questions doctrine,’" as put in a dissent by Justice Elena Kagan.

And what is the “major questions doctrine”? It is, the chief justice explains, no more than “common sense” regarding how Congress works. Basically, it’s the court’s belief that Congress will be clear when it assigns major policymaking authority to regulatory agencies. In practice, this means that “major” domestic policy must emanate from the votes of elected lawmakers rather than from expansive legal interpretations devised by unelected bureaucrats. Again, this is commonsense stuff. Under our Constitution, lawmakers are supposed to pass laws to make major policy.

Prior to last week, in a handful of decisions over the past 25 years, the Supreme Court had relied on reasoning that resembled what scholars came to call the “major questions doctrine.” But it was all circumspect and indirect. Indeed, no majority opinion even used the term “major questions doctrine.” As a result, this interpretive principle was inchoate. Regulated parties often invoked the concept in challenging agency rules, but lower courts had no idea how to identify a “major question.”

All of that changed yesterday. Roberts didn’t just recognize and rely on the major questions doctrine to check the EPA’s (ludicrous) statutory interpretation, but he also provided lower courts with guidance on how to identify major questions. Of course, an agency’s rule must be economically and politically significant to trigger the doctrine. Also, the rule would have to be

based on an expansive interpretation of ambiguous statutory text. Other red flags include whether the agency is doing something unprecedented, if the agency is attempting to do something that Congress failed to do, or if the "nature" of the law doesn't comport with the agency's claims to power. Still another red flag is when the agency is operating outside its expertise. All these boxes were checked with the EPA's climate rule at issue in *West Virginia v. EPA*.

Many commentators are up in arms about the decision. They claim it will take a wrecking ball to the administrative state. They are wrong. Just because the EPA can't impose a nationwide cap-and-trade for climate change doesn't mean the agency is "gutted." As the chief justice noted, the EPA retains broad authority to regulate greenhouse gases. More generally, as noted by Roberts, the major questions doctrine will come into play only for those "extraordinary" regulations that evince the circumstances identified in the prior paragraph. In the past, agencies issued these sorts of "major" policies only a handful of times per presidential administration. Anyone who claims this decision would undermine the administrative state simply doesn't know what they're talking about.

That's not to discount the decision's effects! Even though there haven't been many regulations that would run afoul of the major questions doctrine, it doesn't mean those instances weren't highly deleterious. After all, Congress only passes, at most, a handful of major laws during any given presidential administration. The practical problem with the executive branch interpreting vague old laws to make "major" policy is that there's no permanency. What any one presidential administration can do, the next can undo. We saw this with the EPA's climate rule at issue in *West Virginia v. EPA*. Barack Obama ordered the EPA to issue the rule, Donald Trump ordered the EPA to replace Obama's rule, and then, President Joe Biden ordered the EPA to replace Trump's rule. The electricity sector — a very important industry! — was caught in the spin cycle. Roberts just put a stop to the chaos engendered by the worst excesses of executive lawmaking.

Unlike regulations, laws endure. If Congress directs an agency to take on a major question, the agency will perform that role regardless of the president's political orientation. From now on, when it comes to "major" policymaking, the ball is in Congress's court, as the Constitution intended.

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