



IMPLICATIONS of *WEST VIRGINIA V. EPA*

A Position Statement on the U.S. Supreme Court's Recent Decision by the Cape Cod Climate Change Collaborative (Climate Collaborative), July 2022

Background and Analysis

The Supreme Court Decision

On the last day of its term, the Supreme Court issued its decision in *West Virginia v. EPA*. At issue was the limit of EPA's authority to develop regulations limiting greenhouse gas emissions under the Clean Air Act. Instead of adopting its traditional approach of regulating pollution at its source, the Clean Power Plan (the Obama administration's proposed plan for cutting power plant emissions) effectively forced a shift in how utilities generate power by mandating they swap coal for gas and renewables.

The Court held that the Clean Power Plan amounted to regulating the power system as a whole, rather than regulating individual power plants. Writing for the majority, Chief Justice Roberts criticized the EPA for finding "newfound power in the vague language" of the Clean Air Act. He said, "Congress did not grant EPA...the authority to devise emissions caps based on the generation shifting approach the Agency took in the Clean Power Plan. A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."

Justice Roberts noted that while forcing a nationwide "transition away from the use of coal to generate electricity may be a sensible solution to the crisis of the day, [b]ut it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme." He concluded that "there is little reason" to believe Congress implicitly tasked EPA with the authority to regulate "how Americans get their energy."

In a stinging dissent, Justice Elena Kagan skewered the majority's logic, writing that Congress gives broad delegation to federal agencies "so an agency can respond, appropriately and commensurately, to new and big problems." Justice Kagan wrote that "[t]he Court appoints itself — instead of Congress or the expert agency — the decision maker on climate policy."

The Major Question Doctrine

In reaching its conclusion that EPA had acted beyond the scope of its authority, the Court applied the "Major Questions Doctrine" to interpret the Clean Air Act narrowly. The doctrine, a relatively recent invention of judicial interpretation, holds that the Supreme Court may strike down any regulatory action deemed to have "vast economic and political significance" if Congress did not clearly and explicitly delegate that authority to the agency.

No reference to this doctrine exists in the Constitution or in any federal legislation. The Court has provided no definition for it and no standards for how it is to be applied, leaving it a powerful cudgel that can (and is) be used to beat back federal agencies that have, in the conservative justices' view, taken on too much authority. Over the past decade the doctrine has been carefully developed by conservative justices to become an effective means to block agency regulations opposed by the conservative majority.

Implications for Climate Regulation

The *West Virginia* decision clearly means that only Congress has authority to act on “major questions” such as climate change. There is an obvious, and urgent, need for comprehensive federal legislation to address the multi faceted threat of climate change. That, however, remains an unlikely outcome due to the pervasive obstacle posed by continued use of the Senate filibuster rule. Without legislative action, the only way that climate change can be addressed is through action by the EPA.

While the *West Virginia* decision clearly hamstrings EPA’s ability to develop a comprehensive approach to the climate crisis, the court did not remove EPA’s authority to deal with climate change. It eliminated only its’ ability to issue regulations that compel utilities to switch to cleaner forms of energy generation. It’s noteworthy that the Court did not address, so did not criticize or limit is prior decision in *Massachusetts v. EPA* where it definitively ruled that EPA’s authority under the Clean Air Act includes the ability to regulate the emissions that contribute to climate change. The EPA Administrator declared that EPA is “not out of the game,” and expects to propose a new power plant rule early next year.

However, given the scope of the Court’s ruling, EPA is unlikely to attempt any comprehensive plan. Instead, it may limit emissions “at the source” and use existing authorities to impose tighter emissions standards on emissions components common to fossil fuel run utilities. This approach, regulating individual plant restrictions on operations or technology, would certainly be less effective than a generation shifting approach. In any case, the fate of such approaches in future litigation before this Supreme Court remains unclear.

But there are substantial risks for any regulations that EPA may issue. Based on the court’s logic in the *West Virginia* case, it may find that any other regulation issued by the EPA to limit carbon emissions violates its major question doctrine without clear, explicit instruction from Congress. And with Congress hopelessly polarized on whether to even respond to climate change, let alone how, the court has implicitly eliminated any avenue for effective climate regulation.

Given the many obstacles and doubts about any meaningful federal climate action, hopes turn instead to supporting and accelerating the ongoing and potential climate action at the state and local levels.

The Climate Collaborative’s Commitment to Strategic Climate Action

The Climate Collaborative’s mission is to reduce the Cape & Islands’ contributions to climate change and to protect our region from its potentially devastating impacts. Our goals are to broaden understanding, deepen partnerships, accelerate programs, and inspire individual and collective action to counter the climate crisis.

Consistent with our mission, the Climate Collaborative believes that the most effective response to the challenges posed by the *West Virginia* decision is to deepen our focus on supporting and empowering the individuals, local communities, policy makers, business leaders, and other advocates with the information, resources, and networks they need to move the needle on climate change and effectively and equitably serve our towns and entire region. We do this through our core activities of communication, collaboration, advocacy and activism.

Communicate and Collaborate

The Climate Collaborative will continue to use its communications platforms and channels, primarily its newsletter and website, to provide important, timely and science-based information and resources to individuals, organizations, municipalities, and policymakers to enable them to develop and shape climate solutions.

Advocate and Activate

While the Climate Collaborative believes that there will be a substantial shift from federal action to state, regional and local climate action, there is still a need for federal level advocacy. Climate advocacy at the federal level could focus on the need, now greater than ever before, for comprehensive federal climate legislation. However, the Climate Collaborative also recognizes that such legislation is extremely unlikely to pass unless and until the obstacle posed by the Senate filibuster rule is repealed by the Senate. Therefore, the Collaborative will support efforts to repeal the filibuster rule, to enable passage of a national climate change bill. In addition, the Climate Collaborative will support regulatory actions taken by the EPA to address and reduce the emissions that are causing climate change.

The Climate Collaborative will continue to support action where state, regional and local entities and municipalities address and regulate climate-affecting emission and develop and adopt measures to increase resiliency. In addition, the Climate Collaborative will continue to support and empower its Network constituents to support Massachusetts Clean Energy & Climate Plan and plan, develop and implement effective climate actions at regional and local levels.

The ability of the United States to meet its global commitments to reduce global warming emissions has been severely limited and slowly by the *West Virginia* decision just as the earth veers toward more extreme weather conditions with devastating human and economic consequences. It must be met with strong climate leadership, effective and comprehensive legislation and public engagement that demonstrates the broad public consensus on the urgency of the climate crisis.

Climate Collaborative-Supported Actions

1. In 2020 with strong support from local Climate Action Networks in each town, 14 towns passed Climate Emergency Declarations. The Climate Collaborative will join efforts urging President Biden to declare a “climate emergency” under the National Emergency Act to unlock a number of presidential powers and executive branch actions to address climate change.
2. Write, call, speak with and urge federal, state and local elected officials to enact comprehensive Climate Legislation that clearly and forcefully empowers actions to combat climate change. Massachusetts is already among the state climate leaders and can serve as a model for encouraging similar action in other states, so spread the word. And note that California, the 6th biggest economy in the world, has adopted stringent climate measures which have now helped its economy to flourish to record levels.
3. Write, call, and speak with our Congressional delegation about leading a direct response to the Supreme Court by amending the Clean Air Act, S-111 to give EPA explicit authority to move power plants to use renewables in order to meet federally mandated emissions reductions.
4. Perhaps most important — and requiring action from each of us — is to ensure a massive “climate vote” at every election, in every jurisdiction, every year; but especially in the upcoming November midterms. We view the upcoming 2022 and 2024 elections as a referendum on climate and will continue to urge our friends, allies, and supporters to get involved to ensure that the climate perspective drives the election outcome.

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