Deconstructing The Supreme Court's Climate Change
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The Supreme Court's recent climate change decision has been characterized by legal observers as "seismic" "transformational" and "a bombshell." All of those descriptions are apt.

The Court's 6-3 ruling holds that the U.S. Environmental Protection Agency lacks authority under the federal Clean Air Act to transition existing American power plants from fossil fuels to natural gas and, especially, to renewable energy sources. The decision will not have an immediate, dramatic effect. But long-term, the Court's ruling in West Virginia v. EPA, June 30, 2022 Daily Journal D.A.R. 6892, will severely cripple the federal government's ability to reduce America's greenhouse gas emissions and fulfill President Joe Biden's 2021 pledge to the world community that the U.S. will meet aggressive GHG reduction goals. And the new, radical constitutional doctrine the Court majority announces in rejecting EPA's GHG emission regulations promises to severely hamstring a wide array of federal regulatory agencies beyond EPA, and effectively to transfer considerable authority from the Executive Branch to the federal courts.

The West Virginia case has its origins in efforts by the Obama Administration to curb GHG emissions from "stationary sources" such as power plants. President Barack Obama's EPA promulgated its "Clean Power Plan" (PP) in 2015 to reduce substantially GHG emissions from American power plants the second largest contributor to the nation's overall GHG emissions output (behind only the transportation sector). Invoking CAA section 111(d), EPA proposed a complex set of regulatory mandates: some designed to improve pollution control technology of individual power plants and, far more controversially, industrywide reforms "beyond the fence line" to incentivize transition of coal-fired power plants to natural gas and ultimately, renewable energy sources.

EPA's CPP never took effect. The power industry, coal companies and a coalition of 27 "red" states immediately sued to halt its implementation. Remarkably - and in an unprecedented action - the U.S. Supreme Court in 2016 issued a "Shadow Docket" order preventing the CP

from taking effect, before the lower federal courts even had an opportunity to consider its legality after full briefing and oral argument.

At that point, politics intervened. After the Trump Administration took office in 2017, it asked and the D.C. Circuit Court of Appeals agreed to hold the litigation in abeyance while the Trump EPA reconsidered the CPP. In 2019, the Trump Administration ultimately repealed the CPP, declaring that it exceeded EPA's legal authority under the CAA. In doing so, Trump's EPA advanced a novel constitutional doctrine long advocated by conservative scholars and law firms such as the Pacific Legal Foundation: the so-called "major questions doctrine." Under that theory, the Trump Administration argued, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." The CPP, adopting an industry-wide approach to wean the power industry off its historic reliance on coal and natural gas in favor of renewable energy sources, presents such a "major question," asserted the Trump Administration. And, it maintained, in enacting CAA section 111(d) in 1970 Congress had not "spoken clearly" to delegate to EPA the regulation of GHG emissions in such a sweeping manner.

"Blue" states, including California, and environmental organizations promptly sued to challenge the Trump Administration's revocation of the CPP. Of critical importance, the red states that had previously challenged the Obama Administration's CPP intervened in the new lawsuit to help defend the Trump EPA's recission of the CPP. In early 2021 - on the last full day of Trump's term in office - the D.C. Circuit invalidated the Trump EPA's revocation of the CPP. It is from that ruling that the intervenor red states successfully sought review in the Supreme Court.

On the final day of the Court's just-concluded term, the Court ruled that the CPP was not authorized under the CAA. Chief Justice John Roberts majority opinion on behalf of the Court's 6-member conservative bloc first summarily rejected the Biden Administration's argument that certiorari had been improvidently granted: Biden's Solicitor General had advised the Court that it had no intention of restoring the CPP, and instead planned to develop its own regulatory program to reduce GHG emissions from U.S. power plants.

Turning to the merits, Chief Justice Roberts began by embracing the "major questions doctrine" that the former Trump Administration and its red state allies had advocated. West Virginia is, in fact, the first formal decision in Supreme Court history to explicitly adopt that principle. (The Court had alluded to the doctrine in a couple of earlier, per curiam orders issued in cases striking down the Biden Administration's COVID- prompted eviction moratorium and vaccination mandate for federal employees.)

Roberts proceeded to conclude that the federal government's efforts to comprehensively regulate GHG emissions from U.S. power plants have "vast economic and political significance;" that Congress, in enacting section 111(d) of the CAA, had not clearly indicated its intent to apply its delegated statutory authority to encompass industrywide power plant GHG reduction efforts by EPA; and that the relevant provisions of the CP therefore exceed EPA's statutory authority under the CAA and the majority's newly-minted major questions doctrine.

Justice Gorsuch penned a noteworthy concurring opinion, applauding the Court's support of the major questions doctrine and urging federal courts to apply it prospectively in a muscular fashion to curb perceived excesses of the federal administrative state." It will be interesting to see how many other members of the Court's conservative wing similarly embrace such an expansive application of the doctrine prospectively.

Justice Elena Kagan (joined by Justices Stephen Breyer and Sonia Sotomayor) issued a lengthy, pointed and to this observer - persuasive dissent. She castigated the majority's adoption of the major questions doctrine as an unprincipled creation by conservative justices who profess their belief in judicial restraint and a textual application of the Constitution. Kagan's dissent went on to analyze in considerable detail how and why EPA's interpretation of CAA section 111(d) is fully consonant with Congress' intent and delegated authority to EPA.

So, what are the short- and long-term implications of the Supreme Court's West Virginia v. EPA decision?

In the short term, it's back to the climate change drawing board for the Biden Administration. EPA was already exploring how to regulate GHG emissions from stationary sources under the CAA before last week's Supreme Court decision. President Biden has directed his EPA and Justice Department to confer on West Virginia's impact and return to the Oval Office with recommendations as to how to proceed. (One intriguing potential option is to utilize section 115 of the CAA; that provision allows EPA to regulate pollution emitted from U.S. sources that endangers public health and welfare in foreign nations. GG emissions would certainly seem to qualify.)

But let's be clear: West Virginia severely constrains the Biden Administration's regulatory options: the decision makes clear that EPA lacks the authority under CAA section 111(d) to regulate the power industry's GHG emissions on an industrywide, "outside the fence line" basis.

That leads to the related but important question: what about pursuing new climate change legislation from Congress? The short answer is that that's not going to happen in the foreseeable future. Climate change is only one of many issues on which Congress is hopelessly deadlocked and deeply factionalized. The justices, of course, know this as well as anyone. So the majority's suggestion that Congress can simply resolve the issue by clarifying the CAA or enacting new climate change litigation is disingenuous.

Leaving aside the CAA and climate change, the majority's formal articulation and embrace of the major questions doctrine has profound, long-term implications for American constitutional and administrative law. It seems inevitable that the doctrine will be invoked in virtually every major litigation challenge to future federal regulatory initiatives - not just environmental programs, but also in public health, financial, civil rights, election, taxation and numerous other regulatory contexts. Among the biggest ambiguities created by West Virginia is what, exactly, makes a particular federal regulation sufficiently important, or "major," so as to trigger

application of the doctrine? As Justice Kagan's dissent observes, the majority's option does not provide any real guidance.

Moreover, and especially in light of Congressional gridlock and political stalemate, the West Virginia decision significantly enhances the power of the federal judiciary at the expense of the Executive Branch. Without explicitly saying so, the case severely erodes separation of powers principles that the Constitutional framers considered so essential to the success of American democracy.

Finally, and ultimately most significantly, the West Virginia decision seriously undermines America's ability to reduce its disproportionately large share of global GHG emissions. As a result of the Court's decision, it's highly unlikely that the United States will be able to meet the ambitious GHG reduction goals President Biden pledged to meet at last year's global climate summit in Glasgow. That, in turn, greatly diminishes America's future ability to play a leadership role in the greatest environmental challenge of our time. And, worse still, it undermines the ability of the global community as a whole to prevent a climate catastrophe.