The Supreme Court Strikes Down Common Sense

After three months, the murky implications of "West Virginia" begin to unfold.

By Michael H. Levin | October 05, 2022

In a flight of judicial activism historically decried by conservatives, the Supreme Court's conservative majority reached out on the last day of its 2021 term to decide a rule that was not before it, sidestepped the reasoning of the court below, and "stripped the [Environmental Protection Agency] of the power Congress gave it to respond to 'the most pressing environmental challenge of our time'" (*West Virginia v. EPA*, 597 U.S. __ (June 30, 2022) (dissent)).

The pertinent challenge was how to cost-effectively reduce billions of tons of greenhouse gases emitted each year by U.S. coal-fired electric power plants. The rule was the 2015 Clean Power Plan, which sought to place statewide caps on such emissions but allowed electric utilities to meet those caps by acquiring emission-reduction credits from lower-emitting gas-fired or renewable generating facilities. The vehicle the majority deployed to strike down that rule was a legal fiction which surfaced in the environmental sphere less than a decade ago (*UARG v. EPA*, 573 U.S. 302 (2014)), what the lower court called "the so-called 'major questions' [MQ] doctrine." MQ, derived from the principle that Congress cannot delegate pure legislative (as opposed to implementation) authority to the executive branch, asserts that "in extraordinary circumstances," where an agency such as the EPA "suddenly discovers" power to address "questions of vast social or economic importance," Congress must specifically have delegated it such regulatory authority.

Despite the lower court's conclusion that CPP was not only "in [the] EPA's [authorized] wheelhouse" but virtually mandated by the court (*Massachusetts v. EPA*, 549 U.S. 497 (2007)), the majority enshrined MQ as black-letter law. It declared that because the Clean Air Act did not expressly authorize the EPA to impose statewide GHG emissions caps which "shift generation" from coal plants to lower emitters, and CPP was big and novel, that rule could not stand.

Since CPP's judicial debut, when the court for the first time in American history suspended a rule before lower courts even could rule on it, nothing about this case has been legally "normal." That departure from precedent foreshadowed the majority's decision process. For example:

● There was no Article III "case or controversy"—let alone a rule—before the court. The Trump EPA had revoked CPP. The D.C. Circuit reversed this revocation along with the rest of the superseding Trump rule. By that time CPP was a dead letter: its reduction goals had been achieved 10 years early through displacement of coal by cheaper natural gas and renewables, making CPP's deadlines for state compliance meaningless. Because reversal might have sprung those deadlines back to life, the EPA asked the lower court to suspend that part of its decision, pending development of a new rule whose contours were unclear.

Petitioning coal states were not "harmed" by any live CPP obligation. Moreover, the solicitor general formally represented that the government would not enforce CPP against them. Yet the majority seized on one word in the government's briefs to find those states had Article III standing and the case was "not moot," as "no one disputes [the] EPA will issue some such rule" in the future. For the first time in memory, it dismissed an explicit commitment of the solicitor general—the "tenth Justice."

It disregarded its precedents that "Hypothetical jurisdiction produces nothing more than … an advisory opinion, disapproved by [us] since the beginning" (e.g., *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 101 (1998)). And it turned on its head the court's seminal holding that states have special standing to challenge the government's refusal to address harms to them caused by global warming

(*Massachusetts v. EPA*, above), instead finding that states have special standing to challenge alleged harms caused by prospective efforts to mitigate those harms. As the dissenters noted, "normal procedure" would wait till a lower court reviewed whatever new rule the EPA produced. Nevertheless, the majority chose to decide the case "because they could."

● The majority also appeared to discard, without mentioning, the court's four-decade precedent that where a statute is ambiguous, the implementing agency's reasonable reading controls (*Chevron v. NRDC*, 467 U.S. 837 (1984)). Instead, it substituted a new approach: within MQ's potentially broad scope, where a statute is ambiguous, the agency is presumed to lack regulatory authority, and its interpretation is not entitled to judicial deference, unless Congress has granted it specific authority. Justice Neil Gorsuch's concurrence seemed to go further: by expressly invoking "non-delegation" in addition to MQ, he apparently would require not merely a congressional "clear statement" of EPA authority, but that Congress provide a detailed regulatory road map for addressing an issue it could not have foreseen when the CAA was adopted.

● MQ licensed the majority to ignore pertinent facts. As the dissent made clear, those facts included the CAA's intent to authorize future EPA regulation addressing "large unforeseen health problems." They included the EPA's 50-year history of deploying "cap-and-trade" or its precursors to mitigate major environmental hazards, steps ratified or tacitly affirmed by Congress. They included the EPA's emission-reduction directives for State Implementation Plans under the National Ambient Air Quality Standards program, which have long been recognized as analogous to the more flexible "little SIPs" required under the CAA provision being reviewed.

Instead, the majority assumed that a CPP "costing billions of dollars" and "requiring that generation be shifted from coal-fired to cleaner sources" would "transform electricity generation" and was inherently "major." This ignored that electric utilities routinely shift generation around the grid; many national EPA rules entail similar costs; associated health benefits typically swamp such costs; CPP's estimated $32 billion total compliance costs to 2030 were dwarfed by its $600 billion projected total benefits; and $32 billion is under 1% of America's $23 trillion GDP.

Indeed, a clutch of electric utilities supported the CPP, unfazed by its projected "shift" of 11% from coal units to cleaner sources, a shift that already had occurred. The majority never explained why $32 billion or an 11% "shift" were "major" in this context. Nor did it address the lower court's conclusion that CPP was "broad" only because electric-utility emissions are "ubiquitous."

What now?

The majority's bark may have been worse than its bite. Despite sweeping language, it held only that the EPA lacks authority to impose statewide GHG caps that expressly mandate "generation shifting." Unlike the Trump EPA, it did not find the EPA limited to GHG reduction measures at "an individual source." It acknowledged the EPA's authority to set NAAQS implemented by flexible SIPs for any air pollutant that "endangers public health or welfare."

States not constrained by *West Virginia* may have far broader choices. Still, the EPA has options which could include: requiring carbon capture or gas co-firing at existing utility units; adopting a carbon NAAQS; addressing GHG emissions under the CAA's transborder emissions-transport provisions; or expanding the EPA's NSPS Compliance Bubble Policy (52 FR 28946, 28954 (1987)), which allowed even the most stringently regulated utility units to meet "technology-based limits" by securing equivalent reductions from other sources, in ways that mobilize market forces without mandating generation shifts or statewide emission caps.

The EPA also may build on the $370 billion carrots-not-sticks approach of the Inflation Reduction Act (IRA; Aug. 16, 2022), which declared GHGs to be statutory "air pollutants" and appropriated $90 million for an EPA Low Emissions Electricity Program to "ensure that reductions in GHGs are achieved through use of the [act's] existing authorities." The IRA's massive infusion of tax credits, grants to states, and other support for renewable energy is expected to reduce current U.S. GHG emissions by about 40% from 2005 levels by 2030. By making clean energy even cheaper, it will accelerate market shifts from fossil-fired electricity, and tilt cost/benefit analyses further in that direction.

Each of these options has practical limits; none offers a guaranteed shield against MQ attacks. Nor do the new IRA Air Act sections, which affirm *Massachusetts v. EPA* but are funding (not regulatory) provisions which contain no congressional "road map" for how "existing EPA authorities" may be used.

A flood of recent MQ challenges questions federal agencies' traditional powers to adopt not merely vehicle tailpipe standards, but emergency abortion access, immigration, environmental, social and governance disclosure, banking, insurance, nuclear plant licensing, agricultural market restructuring, internet privacy, minimum wage, and communication rules. Their outcomes may turn more on whether a conservative court majority whose credibility has been shaken by backlash to its results-oriented approaches keeps pressing forward than on the merits of these challenges.

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