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West Virginia v. EPA: Behind the Supreme Court's Principled Decision

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INTRODUCTION

Amongst the US Supreme Court's more controversial decisions this past term was one which, by most accounts, garnered equal amounts of approbation and dismay. In the June 30, 2022 *West Virginia v. Environmental Protection Agency* ("*West VA*") ruling,[1] a staunch majority of the High Court ruled that the Environmental Protection Agency (EPA) lacked the statutory authority to impose radical changes upon the electricity generation industry. Some applauded the decision as a much-needed check on unbridled administrative power. Others disapproved of thwarting the regulators from compelling a much-needed shift in energy production away from fossil fuels and toward renewable energy generation sources.

In either case, the high bench's decision generated as much an emotional response as an intellectual one, at

[1] 597 U.S. ___ (2022). Retrieved from https://bit.ly/3CvFukL.

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least from some quarters of the industry. This article seeks to avoid the distractions of such unhelpful melodrama, instead confining the discussion to a neutral analysis of the constitutional law maxims relied upon by the supreme tribunal in rendering this significant holding. This author shall then conclude with a few thoughts as to how *West VA* provides a catalyst for calm and thoughtful debate of the underlying crisis in the appropriate political forum—a vital step if we are to remain faithful to our principles of self-government while pursing the common good.

SUMMARIZING THE PRELIMINARIES

Notwithstanding that the text of *West VA* consumed some 15 pages merely to set forth the controversy's extensive history, by now that background is so widely known and so often discussed that we think it preferable to simply condense the case's essentials to their irreducible minimum.[2]

At the eye of this storm, we find the EPA's Clean Power Plan (CPP), first promulgated by the agency in late 2015 pursuant to a complex and oft-amended statute. The CPP was intended to reduce, among other things, carbon dioxide (CO_2) emissions, by compelling "generation shifting" (i.e., transferring electricity production from coal and natural gas-fired sources to wind, solar, and other clean energy technologies). Existing generation operators would essentially be limited to three choices: (1) curtail output derived from fossil fuels; (2) build their own new zero-carbon plants or invest in someone else's facilities; or (3) purchase emission credits in a "cap-and-trade" scheme.

In promoting the CPP, the agency did not hesitate in the least in proclaiming that its twofold intent was to force a tectonic shift in electricity generation, eschewing fossil fuels while embracing renewables, *and* to attain this new paradigm on a schedule and to a degree dictated by the regulators alone. Not to mention that the EPA was all candor in forecasting that the costs of compliance with its mandates would be in the billions of dollars, energy prices would increase substantially, tens of thousands of industry jobs would disappear, and fossil fuel-fired plants would have to be retired. Left unsaid was whether such plant closures might throw the regional electricity grids into disarray. Little wonder, then, that byzantine and exhaustive litigation ensued.

While the arrival of new national leadership provided a brief respite from this internecine conflict, the EPA utilized the interregnum to announce potential modifications to the proposed regulations, which gave rise to fresh legal challenges. When administrations changed once more, and it appeared that a resuscitated CPP would be implemented, the controversy finally arrived at the Supreme Court for adjudication.

THE CONSTITUTIONAL LIMITS ON AGENCY POWER

After first briefly disposing of a threshold question of whether the petitioners have the requisite standing to seek review by the high tribunal—they did, since bringing the CPP into effect would arguably injure the States—the *West VA* Court postulated the central inquiry: did the relevant statutory regime truly grant the EPA the authority it claimed? The high bench was thus tasked with ascertaining "whether Congress in fact meant to confer the power the agency has asserted." Fortunately, the Justices had a wealth of precedent emanating "from all corners of the administrative state" to assist them in answering that paramount query.

The majority looked to a foursquare of landmarks. Senior among them was *FDA v. Brown & Williamson Tobacco Corp.*,[3] a rather notorious case wherein the Supreme Court overturned an activist Food and Drug Administration (FDA) Commissioner's proclamation that cigarettes qualified as "food" or "drugs," and could therefore be banned by regulatory dictate. Restating that ruling here in the most prosaic of terms—if Congress wanted the agency to regulate, let alone outlaw, tobacco, it would have unequivocally legislated such.

The second touchstone was the 2014 *Utility Air Group v. EPA* ruling,[4] wherein an earlier iteration of the

[2] My journal colleague Rick Smead wrote an excellent overview of the case in the September issue. See Smead, R. G. (2022). West Virginia v. Environmental Protection Agency: The case and what it means. *Climate and Energy*, 39, 29–32. https://doi.org/10.1002/gas.22307.

[3] 529 U.S. 120 (2000). Retrieved from https://bit.ly/3pE7uuZ.

[4] 573 U.S. 302 (2014). Retrieved from https://bit.ly/3Kj4HRe.

environmental agency had asserted sweeping power to regulate greenhouse gases (GHGs) emanating from millions of previously unsupervised sources. Declaring that the EPA was *sans* the clear-cut statutory grant necessary to claim pervasive authority over such a vast portion of the American economy, the high bench resolutely placed the regulators in check.

Completing this axiomatic quartet were two fresh landmarks. The first was the 20121 *Alabama Association of Realtors v. HHS* ruling,[5] an abbreviated opinion finding that the Centers for Disease Control (CDC) abysmally lacked any statutory basis for ordering an unprecedented nationwide moratorium on evictions during the pandemic. The second, issued less than 6 months later in 2022, was the *National Federation of Independent Business v. OSHA* ruling,[6] wherein the High Court found that the agency's statutory remit over occupational hazards could not possibly encompass the right to force some 84 million Americans to submit to either vaccinations or weekly testing as conditions for returning to work.

These diverse precedents were bound by certain commonalities; in each, the agencies had asserted authority pursuant to a "colorable textual basis" in statute.

These diverse precedents were bound by certain commonalities; in each, the agencies had asserted authority pursuant to a "colorable textual basis" in statute. Yet, after subjecting the provisos relied upon by the regulators to no more than a commonsense reading, each time the supreme tribunal concluded that it was "very unlikely" that Congress had afforded these bureaucracies the powers they claimed.

From these landmarks, the *West VA* majority postulated the following trio of maxims. First, agencies are relegated to exercising only whatever authority elected lawmakers bestow upon them by means of explicit legislation. Second, the Constitution grants Congress and only Congress the right (indeed, the obligation) to make major policy choices, while concomitantly denying regulators any such capacity. And third, only "clear congressional authorization" can justify any expansion of administrative jurisdiction. Said another way, "[e]xtraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices," and the Legislative Branch does not employ "oblique or elliptical language to empower an agency."

Writing for the majority, Chief Justice Roberts then explained how these principles, among others, coalesced into the "major questions" doctrine, a dogma which assures that significant policy decisions are cognizable by Congress alone, and not unelected regulators. Indeed, this body of precedents came into being in order to address a "particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." The High Court now demonstrated how readily the case at bar came within the ambit of said doctrine.

"MAJOR QUESTIONS"—THE DOMAIN OF CONGRESS, NOT AGENCIES

In the case at bar, the High Court had no difficulty whatsoever in finding that, by propagating the CPP, the environmental agency would be "deciding how Americans will get their energy," when and by how much electricity generation must irrevocably transmute from fossil fuels to renewables, and how high the cost of power would be permitted to rise to achieve such ends. Yet where was the explicit legislative grant empowering the EPA to arbitrate such prodigious questions?

Surely not within the text of the statute invoked by the regulators to support their claims. The *West VA* Court variously critiqued that proviso as, among other things, longstanding, rarely used, vague, ancillary, and gap filling. The high bench was frankly skeptical that Congress would entrust such immense choices of social and economic policy to the agency via an obscure law that heretofore had never been relied upon in such a manner.

Yet another indication that the Legislative Branch had not unequivocally handed off such colossal questions to the EPA was the fact that

[5] 594 U.S. ___ (August 26, 2021). Retrieved from https://bit.ly/3KiNd7v.
[6] 595 U.S. ___ (January 13, 2022). Retrieved from https://bit.ly/3An7QLb.

"Congress had conspicuously and repeatedly declined" to order the very restructuring of the electricity generation sector which the CPP now demanded. The supreme tribunal was equally wary that the regulators' new claim of power "conveniently enabled" them to impose the very transformation to the energy space which the lawmakers themselves had scrupulously avoided enacting.

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Giving the High Court further pause were the agency's own pronouncements, one being that the objective of the clean power mandate was not merely to reduce pollution, but to foster significant investments in clean energy. The majority not only found this novel but forecast that its acceptance would enlarge the EPA's regulatory purview well beyond its existing statutory writ.

Similarly troubling to the Justices was that the CPP, which the agency qualified as broader and forward-thinking, ranged far beyond traditional norms of administration as it dictated systemic change, a tack inapposite to the EPA's traditional focus on promoting cleaner operations.

Lastly, the environmental regulators failed miserably in an attempt to erase any notion that their clean power mandate exemplified unrestrained agency power. Not only was the *West VA Court* wholly unpersuaded but the majority went so far as to opine that the EPA's arguments do "not so much *limit* the breadth of the Government's claimed authority as *reveal* it" (emphasis in the original). To this, the Chief Justice added an arch parenthetical: "[n]o one has ever thought that the Clean Power Plan was just business as usual."

Having thus applied the major questions doctrine, the Supreme Court ultimately decreed that the EPA lacked the authority to promulgate its regulatory scheme. Given the distinct absence of an unequivocal enabling statute, the fact that the lawmakers had themselves declined to take such bold action, and considering the bureau's lack of specific expertise in overseeing energy production, the majority found it had "little reason to think Congress assigned such decisions to the [a]gency," let alone empowered these regulators to impose their will upon the entire electricity generation sector.

Having thus applied the major questions doctrine, the Supreme Court ultimately decreed that the EPA lacked the authority to promulgate its regulatory scheme.

To be certain, the Supreme Court candidly admitted that the EPA's proposal may indeed present a sensible solution to existing difficulties. Nonetheless, the majority proclaimed, "a decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."

GORSUCH CONCURS ON SEPARATION OF POWERS

Notwithstanding *West VA's* clarity, any cogent analysis must include some discussion of the concurring opinion filed by Justice Gorsuch. And for a joinder which purports to merely "offer some additional observations," it articulated a number of memorable precepts, commencing with "[o]ne of the Judiciary's most solemn duties" is to take care that "acts of Congress are applied in accordance with the Constitution." As faithful agents of the Founding Document, the courts must always presume that "Congress means for its laws to operate in congruence with the Constitution rather than test its bounds," a maxim that flows naturally from the Founders' essential belief that elected lawmakers "reflect the diversity of the people they represent," and are therefore "more likely to enact just laws than a regime administered by a ruling class of largely unaccountable ministers."

Surely, the Constitution's checks and balances can make lawmaking difficult at times. "But that is nothing particular to our time nor any accident."

Justice Gorsuch cautions that the power to legislate "poses a serious threat to individual liberty," which is why republican forms of government prioritize open debate and consensus. "The need for compromise inherent in this design… protect[s] minorities by ensuring that their votes would often decide the fate of proposed legislation—allowing them to wield real power alongside the majority." Here the concurrence appends an illustrative footnote concerning Woodrow Wilson, rightfully considered by some to be the true father of the so-called Administrative State and describing in detail Wilson's history of intolerance for popular sovereignty (as well as racial minorities and immigrants), and his overwhelming preference for government by bureaucracies populated by "experts."

Surely, the Constitution's checks and balances can make lawmaking difficult at times.

Echoing recent High Court pronouncements declaring that the Chief Executive's accountability to the People is preserved, in part, by the power to appoint and remove principal officers at will,[7] Justice Gorsuch opines that the Legislative Branch's accountability to the electorate is irreparably harmed if the lawmaking power devolves to agencies. When Congress shirks its constitutional obligation to legislate, regulators are inspired to "churn out new laws more or less at whim," infringements upon liberty change from difficult and rare to "easy and profuse," the cycle of change in administrations portends instability and unpredictability in the law, and special interests are encouraged to exert influence.

That parade of horribles is forestalled by the major questions doctrine, and its close cousins, the clear-statement rules, all devised "to ensure that the government does not inadvertently cross constitutional lines." These interpretative tools instill confidence that "when agencies seek to resolve major questions, they at least act with clear congressional authorization," not on the basis of statutory ambiguities or interstices.

A TEST OF HIS OWN INVENTION

Placing his own gloss upon the majority's exposition of the major questions standard, Justice Gorsuch contends that the doctrine provokes three fundamental inquiries. First, does the agency seek to intervene in a matter of great political significance? What efforts, if any, has Congress made to legislate in the area? The presence of such indicia typically leads to the conclusion that such a controversy is better left for Congress, instead of unelected administrators.

Second, will these regulations impact a substantial segment of the American economy or otherwise compel the expenditure of billions of dollars by individuals or businesses as the cost of compliance? If so, then only unambiguous congressional authorization can justify rulemaking of such magnitude.

Third, will the agency be imposing federal authority over a domain traditionally left to the States? This inquiry derives legitimacy from the fact that "the major questions doctrine and the federalism canon often travel together," sharing the dual goals of preserving the appropriate balance between federal and state government and cabining the federal power to regulate interstate commerce solely to areas where it can be reasonably ascertained that Congress intended to pre-empt local authority. "When an agency claims the power to regulate vast swaths of American life," Justice Gorsuch cautions, "it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States."

West VA presented a "relatively easy case" for invoking these non-exclusive "triggers," as Justice Gorsuch categorized them. First, the CPP was indisputably of great political significance, was subject to fierce differences of opinion, and Congress had yet to squarely address the matter.

Second, the regulators' edict would affect not only one of the largest sectors of the US economy, but one inextricably intertwined with all the others, with attendant and astronomical compliance costs. Lastly, the agency sought dominion over a space

[7] See Lucia v. S.E.C., 585 U.S. ___ (2018). Retrieved from https://bit.ly/3pJ8C09. See also *Michael A. Sabino, "Liberty Requires Accountability": The Appointments Clause, Lucia v. SEC, and the Next Constitutional Controversy, 11 Wm. & Mary Bus. L. Rev. 173 (2019).* https://scholarship.law.wm.edu/wmblr/vol11/iss1/5.

traditionally left to the States, gravely implicating federalism.[8] Justice Gorsuch further emphasized the obvious "mismatch" between the clean power mandate and the EPA's statutory authority, as well as the last mentioned's irrefutable lack of technical or policy expertise in energy regulation.

Notably, Justice Gorsuch thoughtfully ameliorated the High Court's holding, observing that the majority had not opined that the regulators' goals were unwise or should not be pursued. Rather, the ruling was delimited to a finding that "the agency seeks to resolve for itself the sort of question normally reserved for Congress," a violation of separation of powers, given the irredeemable absence of a clear legislative mandate. The Supreme Court acted solely to "safeguard that foundational constitutional promise" of government via the People's elected representatives, and make certain that, no matter how dire the circumstances are alleged to be, administrative rulemaking can never supplant *bona fide* lawmaking.

CONCLUSION

As promised, our closing words shall be limited to summarizing *West VA's* pronouncements of constitutional law, while assiduously avoiding any comment upon the rights and wrongs (if any) of the debate which prompted the proceedings below. After all, such profound issues can only be rightly decided by the will of the People, as reflected in legislation enacted by Congress, and then only after calm and thoughtful deliberation (or at least we aspire to that ideal).

But is that not the entire point of *West VA*? Is it not so, as the Chief Justice postulated, that the singular question before the Supreme Court was whether or not the EPA acted within its statutory authority, as bestowed by Congress, in propounding the CPP? Is the truth of the last not verified by the majority's circumspection in not interjecting itself into the underlying debate?

It must be remembered that, in finding the regulators lacked an appropriate congressional mandate, the *West VA* bench relied upon the very pillars of our system of ordered liberty: separation of powers, the exclusive vesting of the lawmaking function in the Legislative Branch, and the accountability of that elected body to the citizenry. Here the supreme tribunal gifted us with a pithy reminder that, even more than two and a half centuries since the Nation's founding, the firmest guardians of individual freedom remain our tripartite system, which confounds governmental excess, maintains immutable boundaries between the three branches which exercise the essential roles of government, and, highly pertinent in the instant matter, reserves to the People's chosen representatives the power to decide major questions of social and economic policy, while concomitantly denying any such authority to unaccountable bureaucracies.

Forgive the brash oversimplification but, simply put, *West VA* embodies the foundational precepts that our guarantees of liberty do not permit any governmental body other than Congress to make the law, and that administrative agencies—which are, after all, no more than designees of the Executive Branch assigned to carry out, but not make, statutes—are wholly reliant upon the Legislative Branch for every ounce of authority they possess—or, conversely, lack.

The Supreme Court masterfully and correctly applied those timeless principles (and more) in *West VA*, citing precedents both longstanding and contemporary. And the four notable landmarks relied upon by the majority featured scenarios remarkably similar to the case at bar—each an example of administrators venturing beyond the pale of their statutory boundaries, only to be brought to heel, with a sharp reminder that agencies may only regulate within the confines ordained by elected lawmakers.

In closing, it is virtually assured that *West VA* is not the last word in this far-reaching controversy. But it does affirm that such monumental issues shall be resolved in the halls of Congress, and not by unelected, unaccountable agencies. In this way, liberty is preserved.

[8] See also *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150 (2016) (Ginsburg, J.) unanimously confirming that energy generation remains largely a local concern. Analyzed in Sabino, A. M. (2016). Supremes affirm supremacy clause but point out alternatives for States. *Natural Gas & Electricity*, 32, 1–6. https://doi.org/10.1002/gas.21914.