



CleanLaw 68

Jody Freeman, Richard Lazarus, and Carrie Jenks on West Virginia v. EPA Decision – June 30, 2022

To return to our website [click here](#).

- Hannah Perls: Welcome to Clean Law from the Environmental & Energy Law Program at Harvard Law School. In this episode, professors Jody Freeman and Richard Lazarus, and EELP Executive Director Carrie Jenks discuss the Supreme Court's decision in West Virginia versus EPA. They break down the majority decision, concurrence, and dissent, and discuss how the major questions doctrine could affect EPA regulations addressing greenhouse gases and other key regulatory priorities for the Biden administration. We hope you enjoy this podcast.
- Jody Freeman: Welcome to Clean Law. I'm Jody Freeman, Professor of Law at Harvard Law School, and I'm joined today to discuss the Supreme Court decision in West Virginia versus EPA by my wonderful colleague, Richard Lazarus, and my other wonderful colleague, Carrie Jenks. Welcome, Richard, and welcome, Carrie.
- Richard Lazarus: Thanks a lot, Jody. Always a pleasure.
- Carrie Jenks: Thanks, Jody. I'm really looking forward to it.
- Jody: So the Supreme Court decided the biggest climate case in the last 15 years. The name of the case is West Virginia versus EPA. We have done a prior podcast leading up to the decision. But we thought we'd meet today and talk about what the court decided and discuss its implications. So the only thing I'll mention by way of introduction, then I'll ask Richard to summarize the case and what the court held for us, the only thing I'll say by way of introduction is, the decision's important for two reasons, and we'll get into both today.
- Jody: One is that it affects the EPA's ability to regulate greenhouse gases, and we'll talk about how. And the second is that the decision has farther reaching implications for federal agency regulation across the board because of the nature of the court's reasoning in the case. So, without further delay, we will get started. Richard, would you summarize for us, briefly, the case background and then tell us essentially what the court ruled?
- Richard: Sure. Thanks, Jody. Now, the shocker of this case was that the court even agreed to hear it. They granted review last October. The court's ruling was actually a week ago from where we're recording this, on June 30th, and it really was the bad result we all expected. So we were shocked the court granted the case, the actual



result was pretty much preordained, especially after we heard all the arguments, which you talked about last time.

Richard: So the background is, the Obama administration was all in on climate regulation. They didn't have any Congress because Congress didn't legislate any new climate legislation. They first went after autos, which Jody worked on a lot, and then they needed to go after the other second large source of greenhouse gas in the United States, and that's coal-fired existing power plants. And the Obama administration did this through a rule called the Clean Power Plan, promulgated in October 2015, and the key to the Clean Power Plan, trying to reduce coal-fired power plants' emissions through greenhouse gases, was what's called generation shifting.

Richard: And that was to have a rule which based the amount that coal-fired plants could put out on their potential to shift their provision of electricity away from coal-fire power plants to other sources and facilities on the grid which produce much lower greenhouse gas emissions, in particular, natural gas, wind, and solar. The EPA claimed it had the authority to do this under a provision of the Clean Air Act called Section 111(d), which said EPA could promulgate an emissions limitation on stationary sources like coal-fired power plants based on what EPA determined to be the best system of emission reduction. The EPA said, "Well, the best system is generation shifting." Now, the Clean Power Plan came out, it actually was very successful in the first few weeks because it led to the Paris Climate Accord in December 2015. But, as a practical matter, it never got off the ground.

Richard: The Supreme Court stayed it while it was being challenged in litigation. They stayed it in February of 2016. The Trump administration then formerly repealed it while it was being stayed. They said it was unlawful. The Clean Power Plan was not authorized by the Clean Air Act. And then in January 19th, 2021, actually just one day before Biden took office, the CEC struck down the repeal, as itself unlawful. That ruling promised, and I would say this Lazarus-like, to bring back the Clean Power Plan to life.

Richard: The Biden administration said, "No way, we want to rebury it." They wanted to rebury it, not because they didn't like the Clean Power Plan, because they didn't want that Supreme Court to take the case, review the DC Circuit, because they were aware what the court would do. But then even they tried to bury it, the court did so anyway. The court granted, they reversed the DC's Circuit and they upheld the Trump repeal. There were six justice in the majority opinion, which was authored by the Chief Justice John Roberts. And what Roberts did in that opinion was relied on what so-called major questions doctrine, which we'll talk a lot about it length. They said, "If an agency regulation is addressing a major question, then it's unlawful, in the absence of clear congressional authorization."

Richard: He said, "The Clean Power Plan addressed a major question. It's an extraordinary assertion of agency authority and I don't see anywhere in the statute that clears congressional authorization." Justice Gorsuch filed a concurring opinion. He joined the majority with a concurring opinion, which justice Alito joined, which



we'll talk about. And three justices dissented. Justice Kagan authored dissent. It was a really blistering dissent. She accused the majority of abandoning a pretense of adherence textualism and says she thought the Clean Power Plan was absolutely in the EPA's wheelhouse and the majority was completely wrong. Jody?

Jody: That is a wonderful summary in such a short time. And now we're going to dig into the details and give you sort of our takeaways from the decision and talk about implications. I thought I'd start and just offer a few observations. As we were waiting for this decision, people were projecting sort of degrees of how bad it would be. There was no expectation that the court would really approve the Clean Power Plan or decide that the EPA has flexibility to use that strategy.

Jody: But the question was, how far would the court go? And my observation would just be that, in fact, the opinion by the chief justice is actually a pretty soft landing, all things considered. I think, given our starting assumption, which is that they were going to take the Clean Power Plan strategy off the table and say that it was beyond EPA's authority to decide what the best system of emission reduction is, that one thing they couldn't do was set a standard based on a projection about substituting in cleaner sources of energy for dirtier sources, assuming that starting place.

Jody: The court didn't go much farther than that. And what struck me was, number one, the court did not overrule Massachusetts versus EPA, the 2007 decision that held that EPA possesses the authority to regulate greenhouse gases under the act. In fact, this case only reaffirms that EPA possesses that authority. That's a good thing. Number two, it is clear in this decision that the court says EPA possesses the authority to decide what the best system of a mission reduction is. There was some dispute earlier about whether states would have that authority or whether one 111(d) really gave EPA that power. Well, that seems settled now and that's a good result.

Jody: The third thing I'd observed that the majority opinion doesn't do is it didn't go further to rule other strategies out for the agency, as it now goes to think about how to set these standards. EPA already knew it was never going to use the Clean Power Plan approach, generation shifting was never going to get by this newly constituted Supreme Court with its six to three conservative super majority. And they're already thinking, okay, what are the strategies we know power plants can use to reduce emissions?

Jody: And we'll talk more about those strategies. We're going to ask Carrie in particular to comment on what might be down the road. But my only point really is there's a sort of a silver lining here, which is the court stopped short of ruling other things out. The only other thing I'll mention, and then see if Richard agrees with this basic characterization, is that the major questions doctrine reasoning, the court used is pretty ominous. It really is a flip of the normal presumption that, when a statute gives a broad delegation to an agency, it uses broad language like "Decide



the best system of emission reduction to control this pollution," and when there's some ambiguity in that delegation, that generally speaking, the agency can expect some deference.

Jody: That's of course the famous Chevron doctrine. The court never once cited Chevron. It seemed to completely displace that traditional approach with this new doctrine that is now called the major questions doctrine, that had been articulated to some extent in the cases before several cases used this doctrine, but never announced it, embraced it, and invoked it quite the way the court did here. And I think that is quite ominous because the court doesn't tell us how to know whether a question is major. And we don't know if there are limiting principles around what it will consider too important to leave to the agency using a broad delegation. So we'll talk more about that and how that might affect both EPA and other agencies. But Richard, what struck me, and Carrie, what struck me was really the sort of limitlessness of the major question doctrine.

Richard: Yeah, I agree. I think I read the case the same way you do, Jody, but I don't think I would ultimately characterize this as a soft landing. I think it's still a hard landing. It's not a catastrophic landing, which is what we really worried about, as you suggested, but I think it's pretty hard. And the reason it's hard is the court could have ruled against the Biden EPA based on the notion that, if you look just at the language of the statute, the plain meaning of the statute, it didn't allow generation shifting.

Richard: And that's actually one way that the Biden administration actually sort of hoped to lose the case, but they didn't. As forecasted during the oral argument, when the Solicitor General Prelogar tried to push them to do statutory language first, the chief justice responded by saying, "Don't I first have to address major questions?" That's what his opinion does. So his opinion goes at length to discuss the major question doctrine, which as you, I think, appropriately say, is very ominous, and then only secondarily actually looks at the language very closely. It's that first part of the opinion, the ominous part, which makes this a hard landing, I think for me, because of the portent of it, but I agree, there were-

Jody: Before I let you go on there, I want us each to come to agreement on this. I think what I was saying was softer in the sense that it leaves doors open that could have been closed for the agency, but I'm with you completely in the sense that it's a pretty tough landing if you're worried about the reasoning. So say a little more about how the court didn't wrestle with the text, because I think that point you're making is really important.

Richard: Oh, it's fascinating. The actually opinion by the chief spends a lot of time talking to the major question doctrine, spends actually very little time talking about the text of the statute. And that's actually part of, as you put it, the silver lining of the case. Because the court doesn't buy into a lot of sort of narrow readings of language, which I think the petitioners' case were pushing. They did say that



anything outside the fence line would trigger the major question doctrine, actually acknowledge they weren't saying that.

Richard: As you suggest, they made clear the EPA retains primary regulatory authority in section 111(d), that they come up with the emission limitation. It's not just a mere guidelines provision. But after that, it didn't say a whole lot, other than generation shifting is a really big deal, that it was something which is like cap and trade and therefore Congress had rejected it before, but they don't really parse the language at all. And the briefs in this case really parsed the language.

Richard: So it's a loss in generation shifting, which is what we all expected, very little parsing of the statutory language. And then this ominous raising the major question doctrine, which I think is sort of longer term half life of the opinion. But here's the one limiting thing I would say about that. If you look at the concurrent opinions by Justice Gorsuch, joined by Justice Alito, it's fascinating. That had to be a separate concurrent opinion.

Richard: It lays out in much more detail the major question doctrine, much more separation of powers and non-delegation roots. A much sort of more discreet test is announced when it applies, and that's not in the majority opinion. So everything you see in that separate concurrent opinion is stuff the chief wouldn't put in his, in the majority. So that's good news that it doesn't do more. The opinion, for all of it, says, I think it's ominous, it doesn't lay it out in as full-throated a fashion as it might. I do want to add, though, that Gorsuch's concurrent opinion, for me, it's really annoying to read. He is so pompous that I find it just unbelievably off putting.

Jody: Let me stop you there just for the moment. I want to get Carrie into this. We'll come back to what's going on in the concurrence. We'll talk a little bit about the dissent. I'll ask you about that, Richard, but let me get Carrie's thoughts here because I think Richard and I are agreeing that it could have gone much further to rule things out for the agency and that's at least something positive. Carrie, do you agree with that? Can you help us understand what's left for EPA here as it goes to set these standards?

Carrie: Sure. So putting aside and not to minimize the points you both are making about major questions doctrine, I don't see the decision as terrible in terms of what EPA can do for greenhouse gases under section 111. I agree the Biden administration never thought it would do a rule based on generation shifting, which is the only tool the court has now said can't be used. Rather, I think EPA and stakeholders have been and will continue to think about what options exist other than generation shifting to reduce emissions.

Carrie: I see generally there's three buckets of issues or ways that they could do that. They could look at ways to run plants more efficiently, they could coal-fire with natural gas or lower carbon fuels, or they could look at carbon capture. And for each, EPA's going to need to evaluate whether these options meet the statutory



criteria of being adequately demonstrated. And then they'll also need to consider the other factors that Congress laid out in section 111, costs, for example. And going back to what you both are saying, EPA will also now need to ensure the final rule doesn't cross this major questions threshold.

Jody: Carrie, are we actually saying here that it's not a big loss that the Clean Power Plan is off the table as a strategy? Or is it just that we've become so accustomed to the idea that this won't pass muster with this court, that we were so prepared for it that anything that doesn't go even further is just good news. It's funny how your reaction to this case depends on the baseline you started with.

Carrie: Yes, exactly. If you saw the DC Circuit opinion as allowing the Biden administration to proceed with the Clean Power Plan, then this decision's a loss, but I think most saw the DC Circuit's opinion in the context of the new Supreme Court that we have. This Clean Power Plan was going to be a challenge under the court we had under the Obama administration and the current court is clearly different and created the need to create a new approach even without the decision in West Virginia.

Carrie: So as I mentioned earlier, I don't think the Biden EPA thought they could just reinstate the Clean Power Plan with new deadlines. But I think it's equally important to note the Clean Power Plan targets were achieved a decade in advance, nationwide. So I would argue the decision's not a loss in taking generation shifting off the table, as we already knew this was off the table. The major questions doctrine, though, will be a challenge, as you've both discussed.

Carrie: One final point, though, that I think is important to keep in mind that I'm sure we can discuss further is that the power sector is in a transition. So the baseline you mentioned, Jody, has shifted the starting point of where the sector is and where EPA will now start for a new rule. And I think that matters. When the Obama administration finalized the Clean Power Plan, it was characterized as driving significant emission reductions, but the sector got there without a regulation. So the debate's really no longer whether the power sector will reduce emissions, but really about how fast. What is the trajectory, what's the slope of that trajectory? And the debate will be about that slope and that timing, but that's a very different debate than whether EPA should regulate greenhouse gases.

Carrie: I also think the sector will look at this rule in the context of all the other rules, from EPA, FERC, and states, as well as incentives, tax incentives, DOE funding, and how all of those mixed together affect the investment decisions plants are making. Where this sector is, what's the technology option, and then the composition of the court, given this new major questions doctrine, all of that's going to matter for EPA going forward, what EPA can include, which still will need to be grounded in the text of the statute.

Jody: It's also interesting, too, and Richard, I wonder what you think, and maybe this will bring us back to get into the majority opinion, just a little bit in of the detail.



Interesting to talk about the absence of traditional textualism in that opinion, and interesting to note that the chief justice points out in his characterization of what EPA was doing here and why it was sort of out of its lane and beyond its authority and beyond its remit was, in his view, the agency was capping carbon pollution from coal, capping coal plants, capping the amount of coal generation in the electricity system.

Jody: And that characterization of EPA decided how much coal generation there would be. And that's not okay. That's about controlling the energy mix in this country. That's not EPA's job. I found that kind of an interesting characterization. It was critical to his analysis. It's also ironic that he characterizes the cap as capping coal generation that would drive it from, I think it was 38% of electricity, down to 27% by 2030. That's what the Clean Power Plan did. It's interesting that actually now, in 2022, I think it's already down to 21%. So the market's been moving there, right, Richard?

Richard: Right. Yeah. And he knew that. It was throughout the briefing. There's some extent to which he's being a little disingenuous. He wants to characterize his cap so he can then point out that Congress rejected a cap and trade program. So he's sort of setting it up that way. He wants to set it up. But he does that, he goes at length to say, over and over again, section 111(d), this little miscellaneous ancillary provision, which didn't mean very much. Those are really the two prongs of his argument.

Richard: One is, this is a meaningless little provision that no one ever thought about. And two, this is the very cap and trade program that Congress didn't pass by legislation, neither of which is actually true, of course. So we get an opinion by the chief, which is to that extent, kind of loosely worded and a little less persuasive. On the other hand, I'm glad the chief wrote it and he didn't give this opinion to Gorsuch or Alito. They would've written a much more sweeping opinion with a much more sort of firm grounding in constitutional law, with a much more rigorous test. So maybe we can take advantage a little bit of the vagueness of the majority's test.

Jody: Yeah. And let's talk about that concurrence a little more. It's quite interesting how Gorsuch's view of the major questions doctrine is linked to Gorsuch's view of the non-delegation doctrine. And now we're into heavy administrative law and readers who thought they were readers, listen to me, listeners who were tuning in for the environmental implications, may think, "Why do I have to learn all this administrative law stuff?" Well, they're linked. And I think this is important for folks to understand. So let's just spend a couple minutes on it.

Jody: Richard, do you agree that the Gorsuch point of view in that concurrence says something like this: The reason agencies can't do big, important things of social and economic consequence under broadly-worded statutes that aren't really specific, is because we need to protect a constitutional value and we need to ensure the separation of powers is maintained. Which really means we don't



want to see broad delegations from Congress handing off legislative authority to the agencies. And the way we prevent that is to make sure agencies don't exercise powers that let them overreach. Does that resonate, Richard? Is that how you read that concurrence?

Richard: It exactly does, which is why I found it so off putting. In the past, the major question doctrine was sort of implicated when you had an important rule based upon an agency's interpretation, ambiguous language. Gorsuch says, "No, no, no, no. This isn't about ambiguous language. This is about capacious language. And this is one of the judiciary's," he says, "most solemn duties to avoid a ruling class of largely unaccountable ministers." So it's got much more sort of force and solemnity to the whole thing that we can't have agencies, in the language it's clear, capacious. We can't have agencies doing this sort of thing. It's undemocratic. Only the legislature can do it.

Jody: Yeah. And there is this theme throughout, and then I'll come back to Carrie on the topic of EPA having to be cautious moving forward. There is this theme throughout this opinion, and you see it in other Gorsuch opinions. You also see the chief justice with this point of view often, which is that the bureaucracy is a behemoth. It's dangerous to liberty. Bureaucrats get out of control and we're here to stop them.

Jody: And I think the framing of this case as the EPA took, as you characterized it, Richard, the agency took this little ancillary provision that nobody's ever heard of and they found a huge elephant in that mouse hole. They found big authority to transform the nation's electricity system. That way of characterizing it sort of plays into this theme of bureaucratic overreach. We, the court, are here to stop it.

Jody: Carrie, help us here because you are really knowledgeable about the electricity sector and the companies and the trade associations and the way that the utilities see this case. Can you put it in perspective from their perspective, this decision? How would they interpret it? How do they see what the court did?

Carrie: As I mentioned, the sector's really different than what we had when the Clean Power Plan was finalized. While there's a lot of uncertainty about what the court will say for any new rule from EPA, the sector continues to make investments, and lower-emitting and zero-emitting resources. Companies are announcing retirements due to a mix of factors. And at the end, companies want to know what's required and when. That requires them to think through their investment strategy, whether they're constructing a new plant, what kind of plant and how does that fit into the strategy of what investment decisions they want to make to maintain, improve existing plants.

Carrie: Most companies have a diverse fleet. They're not coal companies. They're not gas companies. They're not renewable companies. Rather, they're companies that own some coal, some gas, some renewables, some nuclear, and some



combination of that. And they try to think through what's the most economic way they want to run these different plants, and that's a business decision.

Carrie: And to keep making those business decisions, they need to understand the timing for making pollution control decisions, whether that to be compliant with the 111 rule, another Clean Air Act or a water rule. So companies see the West Virginia decision by the court as consistent with what they're expecting, given this court. I don't think they were surprised at EPA can't rely on generation shifting. I think they now need to understand what are the different pollution control measures EPA can use to meet the statutory criteria.

Carrie: EPA released a white paper just before the decision came out, looking for comments on emission reduction opportunities from new gas plants, but many of the comments that actually got submitted applied broadly to new and existing. So EPA is now looking at all those comments to see what's possible, and I think they'll continue to get input from industry and stakeholders on those options.

Jody: So Richard, I wanted to talk a little bit about the dissent. Walk us through what Kagan says in the dissent and how she responds to the chief justice and the majority's approach to the case.

Richard: Well, this is classic Kagan. She comes out all barrels blasting, and she's the master of the one-line zinger. She begins the opinion by saying the majority has stripped EPA of its authority to regulate greenhouse gas and address climate change. That's, of course, actually not true, but it's a nice zinger. But beyond that, she says, look, look at the language, look at the word system, best system of mission reduction. She says that clearly covers the electricity grid. She says, "Rarely has a statutory term so clearly applied. And does the EPA have the authority over this kind of thing, of trying to figure out what the right electricity mix is, of sorts?" She says, "Absolutely. This is smack dab in EPA's wheelhouse." Again, a quote from her.

Richard: Every pollution control requirement affects the energy mix. This is no different at all. So it's a really hard-hitting dissent in that way. And I think she, effectively, too, goes right at the conservative majority, sort of exposing their heart. She says, you've always claimed to be textualists. I bought into that. We're all textualists now. You've embedded this cannon of this major questions doctrine, which as far as I can tell, along with your other canons, operates as a "Get-out-of-text-free card."

Jody: I love that line. I thought that line was really calling them on not doing textualism, even though they're all self-declared textualist.

Richard: Right. And she says, look, this isn't an ambiguous provision. This is a clear provision. And maybe you have some major question, so-called Chevron issues with ambiguous statutory language. This isn't it. You're trying to ignore the text. And the text is absolutely directly on point. And you're saying that you know best



how law should be made. She says, "I think that's wrong. Congress knows about how government works in ways courts don't." And the court now won't allow the Clean Act to work as Congress intended. The court, rather than Congress, highlights regulations too much. So she really hits them hard in that way, and I thought, very effectively.

Jody: Yeah. I think it's a good dissent. It sort of doesn't let the majority get away with sort of waving this quite vague major questions principle, and saying, you can just decide that something's too important to leave to agency discretion. And I think it's powerful, but nevertheless, it's a dissent. Let me ask you a little bit about where we go from here. Obviously, there will be implications for EPA exercising its authority under the Clean Air Act. How do you see that unfolding? Because in this instance, we're talking about standards for power plants, but of course, EPA has the authority to regulate other sectors. Do you see the decision spilling over to affect that authority?

Richard: Well, I worry about it. I actually do think there are lots of things that EPA can do and avoid the major question doctrine. But one thing in that Kagan dissent, which I thought just put her finger on it. She said, look, if this case hadn't involved, "the boogiemer of environmental regulation," I don't think the court would've done this. She actually singles out the fact that she thinks that this group actually has a target, a bullseye on environmental regulation and that they actually treat differently.

Richard: Do I think EPA has plenty of other authorities they can use to address climate change or the major source of greenhouse gases without implicating the major question doctrine? Absolutely. Wholly apart from the Clean Air Act, apart from that, EPA can identify the major source of greenhouse gas emissions, like coal-fired power plants. It has significant authorities under the Clean Water Act.

Richard: It has significant authorities under federal hazardous waste laws where it can apply very strict requirements against those coal-fired plants based on their coal ash storage, their coal ash discharge into the navigable of the United States. They don't have to engage in any kind of statutory interpretation gymnastics like in the West Virginia case, just good old-fashioned science and technological evaluation. And they can change the market position of the coal-fired power plants pretty quickly. We already know they're going down the drain anyway, because they can't compete with natural gas, wind and solar. EPA has the ability, without even implicating the major question doctrine, under other laws to push that over the edge.

Jody: Let me make a comment building on that, Richard, then I'll ask Carrie for her insight into this. I would just say sometimes when we say coal's already losing market share and natural gas is displacing it and the market's already working to drive toward cleaner energy. Sometimes I think people mistake that comment and think, well wait, why do you need the government then? Why do you need EPA standards if the market's doing it? So I just want to add here the reason. And



the reason is that when you have a federal rule, it kind of level sets the industry. It creates a floor of emissions reduction that is some minimum across the industry and allows things to continue to improve even when the market might be volatile.

Jody: Even if natural gas prices, for example, went up and coal prices dropped, you would at least have a regulatory environment with stability in it that sort of signals, "No, we're going to continue to march to clean energy." So I do think it's important to have federal regulation even though, though you're quite right in what you say that coal's losing market share, for sure. Let me ask Carrie a little bit about the other things EPA can do to address greenhouse gases using other programs and even programs that aren't specifically about greenhouse gases themselves. Carrie?

Carrie: So yes, as Richard just mentioned, there's a lot of other regulations EPA is working on that are not just about greenhouse gases, but are affecting companies' business decisions about their plants. A few to mention, in addition to the ones Richard mentioned, we've got regulations to address air transport, known as the Good Neighbor Provision. EPA's already proposed this rule and now they're reviewing comments that were submitted on that. EPA also indicated it's looking at the mercury standards for power plants and whether to potentially revise those. That would be proposed potentially around February of 2023.

Carrie: Richard, as you mentioned, we've got coal ash and effluent limitation guidelines under the Clean Water Act. They're also thinking through updating standards for PM and potentially ozone. All of those aren't directed at greenhouse gases, but does affect the mix of plants and how they're operated. And Richard, as I think you were noting, these are all traditional regulatory actions that have upheld by the courts as actions EPA should be taking and have been taking in the past.

Carrie: But as a final point that I think is important to keep in mind, I still think EPA will do a 111 rule. I think the power sector's expecting EPA to do so. So the challenge for industry, even with the other rules that I mentioned, is the back and forth that often happens, especially as we've seen for 111. We've gone from a rule being final, then it goes to litigation, then we have a new administration come in and we go back and forth, and that uncertainty is really a challenge for the sector.

Jody: So Richard, do you agree with the idea that progress can be made by EPA carrying out its traditional mission to address conventional pollution and all the programs Carrie talked about?

Richard: I do. I have no doubt EPA has authority. That doesn't make this case, not a setback and a major disappointment, but I think EPA has lots of residual authority. And when it comes to climate, Jody, and you know this better than most anybody, it's not a question of sort of whether coal-fired power plants are destined to sort of get a decreasing share of electricity supply over time, they are. It's a question of when it happens, how quickly it happens. Because when it



comes to climate change, it's not just whether it happens, it's how quickly it happens. Time is not fungible when it comes to climate change.

Jody: Isn't that one of the setbacks, Richard, that you and I have talked about a lot, that all these gyrations, from administration to administration, I mean, let's put this in context. Let's you and I make sure we put this in context for people. The rule that the court was adjudicating, determining whether it was lawful or not, is a rule that is seven years old, from the Obama days, that never went into effect.

Jody: And since then, the Trump administration had, as you pointed out at the top, rescinded it and replaced it with a very weak rule. Then we shift back to Biden and they have yet to put out a rule and all this litigation happens before they even put out a rule to regulate power plants. And it's fair enough to think, if you're just a person, a regular person, why is this taking so long? Why can't the government do something about climate change?

Richard: Absolutely. And seven years of delay when it comes to climate is huge. Seven years' delay doesn't mean it just happens seven years later. If it takes you seven more years to sort of reduce the accumulating greenhouse gas in our atmosphere, it may take you 20 to 30 more years to reduce those greenhouse gases than it otherwise would. It becomes exponentially harder. So time is our enemy when it comes to climate change.

Richard: It's just not sort of a linear delay. It's an exponential delay. And at some point, if you don't stop climate change soon enough, if you don't stop those greenhouse gases from accumulating in the atmosphere, to some extent, you can't get them down. It becomes incredibly much harder to get them down. That's the problem we have here is we're losing a lot of time. EPA has authority to get things done. We've lost time. We lost four years during the Trump administration. We're losing time now.

Jody: So let's turn now to some of the broader implications of the court's reasoning and the embrace of this major questions doctrine, which, again, just to remind people, what it basically establishes is it flips the old Chevron presumption. Instead of saying broad delegation, ambiguity in the law, gives the agencies some flexibility, room to maneuver. They're going to get some deference. Instead, if the court deems something important enough, Richard, if they deem it to be something of real consequence, the agency's doing something big, the court's going to approach that with skepticism, unless there is explicit textual language authorizing the agency to do it.

Jody: And we don't see that kind of explicit authority in all that many statutes. Right, Richard? Because it would require Congress to be prescient. They'd have to anticipate that, for example, we would face a global pandemic one day so we better equip OSHA to require masks, say, in workplaces. And Congress typically rather says something like protect the public health and prevent communicable



diseases using whatever means in your judgment are necessary. That's the typical way these statues go. Right, Richard?

Richard: Absolutely. And that was basically the partnership that Congress developed with the executive branch post new-deal, we're talking 80 years ago, was they would pass language with broad capacious language, called capacious statute language, so that the agencies could do what Congress knew it couldn't do. And that is on a realtime basis as problems arise, and big problems arise, that the agencies would have the tools necessary to address them. And that if Congress thought that the agency would do something wrong, they could come in and do some correction.

Richard: But not that the agent had to run back to Congress every time. It was a partnership which has worked well for 80 years, the idea of delegating with broad capacious language. Not always ambiguous language, but clear, deliberately capacious language. And the court has now said, that's not good enough, that Congress has to later on pass the language which provides clear congressional authorization.

Richard: Well, in theory, that might sound, "Well, that kind of makes sense," but as a practical matter, congress can't do that. They've never had the resources to do it. Jody, you know because you wrote a wonderful article on this issue. When it comes to environmental law, we know they can't do it. The last time they passed amendments of Clean Air Act was 1990. The language that was an issue in the West Virginia Case was passed in 1970. Congress has shut down environmental law making. So this court's insistence on it representing our solemn judicial duties to make sure that a bunch of unaccountable ministers don't do this, that Congress does, it's a recipe for disaster, especially with the climate issue, but not just the climate issue.

Jody: Yeah. Richard, let's do shameless plugging of each other's stuff. You had some terrific quotes in New York Times about how there used to be a dialogue between the court and the agencies in Congress. The court would sometimes say, "Oh, well we don't read the statute that way," and Congress would then amend the environmental statute and give the agency fresh instructions. The agency would implement and on it would go. You made these really salient points that dialogue seemed to have broken down.

Jody: Congress doesn't pass mass legislation, doesn't update environmental law. And the courts really, then, become the linchpin. The courts become the decider of what can the agencies do. And in this instance, limiting the president and future presidents' flexibility to use the laws on the books, broadly phrased, broadly worded delegations on the books, to do things like protect the public health, to make things safe and effective, to protect the public interest. Those grants of authority may prove not enough with this court to do big things, and a modern society and economy sometimes requires you to do big things.



Jody: And I wanted to mention one thing and get your view on this, Richard. As we know, the Biden administration has taken what it calls a whole-of-government approach to climate. I think that sort of bothers the court because I think it feeds the narrative that the Biden administration is ready to ask the agencies to sort of get beyond their normal remit, to move beyond their traditional areas of expertise and overreach.

Jody: One example, I think, of that, that the industry will say fits that bill, and what I think the Republican-led states will say fits that bill, is the Security and Exchange Commission, the SEC's new proposal to require companies to disclose their climate-related financial risk. And I just wonder, Richard, how this lands with you. I think they're going to argue the SEC's a financial regulator. What's it doing in the business of climate change, asking companies to disclose climate-related risk? Do you see that kind of litigation coming? How do you see the litigation that we're the agenda of the Republican-led states, the AGs and industry?

Richard: I think we're going to see the major question document being raised in just every possible context, especially under the Gorsuch separate opinion. If it's something which seemed to be out of the agency's norm, then it is a major question. If they're saying it would cost billions of dollars, which a lot of rules do, then it's a major question. If the language is important, then it's a major question. And you're right, the SEC rule, which is a really sensible rule, to now recognize the fact that the climate risks associated with the company's operations are relevant in deciding the value of the company for people who want to buy and sell securities.

Richard: That's a market correction to take into account climate risk, which was missing for 50 years. But without a doubt, the argument's going to be just what you said. They're going to say, "What, SEC? They're not an environmental agency. They're a securities agency." And in fact, if I remember correctly, one of the commissioners who dissented from these proposed regulations actually said, "It's the Securities and Exchange Commission. It's not the Securities Environmental Protection Commission."

Richard: So just as you say, every single thing that the Biden administration's trying to get done, whole-of-government, if it's not EPA, they're going to say, "Sorry, you can't do it." We have to hope that the Supreme Court will retreat from some of this, because these issues are too important to have a strict application of at least the Gorsuch approach in West Virginia.

Jody: Richard, I think the difficulty for those of us who watch these cases is that we've yet to see a test or a set of principles or a limiting factor on the major question doctrine. I think we're concerned that the agency can run afoul of it, not just by doing a new thing that it's never done before, but by using its traditional authority just to do an impactful thing. So we're sort of worried that we don't really understand if there are any limits on the doctrine. So Richard, I wanted to ask you about how the major questions doctrine affects other cases beyond the



climate area, the Clean Water context, the Sackett case we're anticipating, how do you see it playing in those cases?

Richard: Well, I see it, I think, the way Justice Kagan's dissent sees it. And that is, it's what you referred to, I mentioned before, the environmental boogeyman of environmental regulation. And I think the Sackett case you mentioned a moment ago, the Clean Water case, is just going to be Exhibit A. So this is a case which is as important to water pollution control as West Virginia has been to climate change and air pollution control.

Richard: At issue in the Sackett case is the geographic scope of the Clean Water Act. And that is, to what extent can EPA interpret, broadly, the term "waters of the United States." And about, well I guess now it's about 2006, so about 16 years ago, Justice Alito wrote an opinion for the court, but not the court plurality, which was going to significantly cut back on the definition of "waters of the United States." He wanted a very narrowed definition of it, but he didn't get enough votes, as Justice Kennedy abandoned them.

Richard: So it was just plurality, but it major cutback on it. Well, the court in January took a new Clean Water Act case, called Sackett versus United States. They took it, it's scheduled for argument the first Monday of October, so just a couple months from now. And there's no question they took it because, while there weren't five votes for it in 2006, it's a new court right now. And three people who dissented, who joined Justice Scalia and the plurality are still there. And that is Justice Alito, Chief Justice Roberts, and Justice Thomas. And now you have three more Trump appointees that are there. And so it's quite clear which way they're going to go and it's quite clear, they're going to rely on the major question doctrine to do it. And we don't have to speculate about that, Jody, because in that separate Gorsuch and Alito opinion, they give a shout out to the Sackett case. Ugh.

Jody: Yeah, yeah. I think what we're saying, and what I think we're all coming to appreciate, is there's no question the direction the court's going, to narrow EPA authority in particular. They seem to have a bee in their bonnet, as you said, Richard, about environmental regulation, as if the EPA is sort of the poster child for the overreaching agency. And it looks, in these cases, like they're just determined to keep the EPA in bounds.

Jody: Now, having said that, I think we've also spent some time on the show today, on the podcast today, pointing out that they have not eliminated the agency's authority to regulate greenhouse gas. That's just really important to remember that. Because there are these other avenues you've pointed out, Carrie's pointed them out, too. So there's can continue to be incremental progress but I think we're frustrated because it's going to be a collection of incremental steps that we hope add up to substantive reductions, substantive and substantial reductions in greenhouse gases, if you add up all the programs that the agencies can use to cut emissions. But the sort of farthest reaching strategies, would you say Richard, are just going to be harder to get by the court, right?



- Richard: That's right. Ironically, if not perversely, the more ambitious, the more important, the more far reaching, the more creative the program is, and that way, the more promising, the less likely it will be lawful for this court. The Clean Power Plan, no one doubted that it actually was the best system for emission reduction. It made an amazing amount of sense from a policy perspective, an economic efficiency perspective, a distributional and fairness perspective.
- Richard: It was the best system, but for this court, that's not good enough. And I think we're going to see that across the board. And that's what's very frustrating, as you said, for us in this area, because there's no question that climate change is a very dire problem. We have to address it quickly, but we're stuck with a dysfunctional Congress. And now we're stuck with a court, at least for the foreseeable future, which won't let an agency rely on the statutory language we have in place.
- Jody: And Carrie, just some final words from you on this. I don't want us to just characterize all of industry in every sector as if they are totally unhelpful on this issue. I mean, we see some utilities and part of the industry was really behind the government's position in this case. Can you give us a sense of what you think the power sector is looking for, going forward?
- Jody: Certainly the auto sector has made pledges about producing more electric vehicles on a rapid timeline. And some in the electric power sector have said they're moving full steam ahead with the transition to clean energy. Can you give us a sense of what those companies are thinking and why they're sort of on the side of the government, or they were in this case, in wanting to preserve EPA's authority?
- Carrie: Yes, there were 10 power companies in the litigation supporting EPA and the trade association, EEI, submitted an amicus brief making clear to the court what would happen if EPA didn't have the authority under section 111. For the companies that they were in the parties to the case, they were generally involved to oppose the Trump administration's narrow read of the Clean Air Act about what EPA can consider.
- Carrie: The Trump administration took an intentional position that was designed to constrain a future administration that would've resulted in little to no emission reductions. And those companies argued EPA should have the authority to design a rule to reflect the investments they and others are making to reduce emissions. So while there'll be a disagreement, as I mentioned, about the exact timing, I expect EPA to hear from all companies about what technologies and opportunities exist to reduce emissions. And that's the record EPA will need to rely on for a new rule that's critical for legal durability. That durability depends on the regulation reinforcing changing business practices that are happening already, as well as the market dynamics for the power sector.



- Jody: So Richard and Carrie, I'm not sure where we've landed in terms of softness, hardness, mediumness, in evaluating the upshot of the case. My only closing thought is, we will see. There is a lot left to unfold. We will see how the Biden administration pursues regulation. We will see how far the court goes in applying the major questions doctrine. Seems to me, Chevron is quite dead in the Supreme Court. There's no interest in deferring to the agencies. I think these justices think they know how to read statutes and then if they don't want to read them they just invoke the major question doctrine. But either way, they're quite uninterested in what the agencies think. But a lot of this will unfold. Richard, does that sound about right?
- Richard: It does. The fascinating thing about Chevron, here was one of the most cited cases in the court's history, a case which was originally championed, among others, Justice Scalia. And now it's become like the Darth Vader in the Supreme Court. It's the case that should not be named. People don't refer to it in their briefs. The court doesn't refer to it. It's an opinion. It's a stunning turnaround, which really, to me, makes no sense.
- Richard: The saving grace here is this. You're right, they didn't overrule Mass versus EPA. Do we have any doubt that if this court, the makeup of the court right now, if they were to address, in the first instance, whether greenhouse gas air pollutes, do we have any doubt how they would rule? No. It would say, of course it doesn't. Major question doctrine. But what saves us here is this: this is a court which we know does not shy away from overruling precedent, but the court does have a tradition, and hopefully this is a norm they won't break.
- Richard: When they overrule their precedent, they overrule precedent involving questions of constitutional law. They don't overrule questions involving issues of statutory interpretation. And a lot of justices made this point, including Justice Kavanaugh. If they feel that the court in the past made a mistake on the meaning of a statute, they feel Congress's job is to fix that, not theirs. We have hope they do that, because if not, imagine the cases that they would revisit, Mass versus EPA, the meaning of the word "take" of the Endangered Species Act, the scope of NEPA. It's sort of nonstop. But I'm hopeful that they'll keep their overruling as they have in the past, the question of constitutional law, and at least they'll rely on their past precedent like Massachusetts versus EPA.
- Jody: Well, here's where I am, uncharacteristically more negative, I think, than you. I think in this instance, I wouldn't put it past them. I think there's a specific reason they don't want to overrule Mass versus EPA, which is that it would unleash all of the common law public nuisance suits, in federal court. And having the EPA as the acknowledged regulator under the Clean Air Act, just displaces the common law cases from federal court.
- Jody: You're the expert on this, but I'm skeptical that it's because they don't want to disrupt Mass versus EPA. I think what they're able to do is cabin Mass versus EPA, cut back on what it really could have led to by limiting, over and over again. They



did it in UARG and now they're doing it here, limiting what EPA can do, even if they have authority to regulate GHGs. So I'm a little less optimistic.

Richard: Yeah. Well, these days, there's good reason to be a little less optimistic.

Jody: Well, let me leave it there. I hate to leave it on that kind of note, but let me leave it there. I hope this has been sort of an interesting thing for listeners to hear, kind of deep dive into the case. Richard, as usual, thank you for your excellent insightful expert remarks. You wrote a terrific op-ed in the Washington Post and did a whole bunch of excellent media on this. I also wrote an op-ed and did some media, and Carrie certainly has been working very hard on these issues with us and commenting and helping us understand the implications for EPA and the industry. So I thank both of you for joining me on CleanLaw and I look forward to our next podcast together.

Richard: Thanks, Jody. Always a pleasure to participate with you and also to hear from Carrie.

Carrie: Same. Thank you to you both.

Jody: Thanks, everyone.

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