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# The Major Questions Doctrine and Agency Rulemaking

August 15, 2022

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In ***West Virginia v. EPA***, the US Supreme Court struck down an Obama-era regulation known as the Clean Power Plan, which sought to mandate the construction of wind and solar plants by limiting the amount of electricity that could be generated from coal and natural gas.

In doing so, the court embraced the "major questions doctrine," holding that, if a federal agency wants to adopt an "extraordinary" regulation like this one, it must show that Congress clearly authorized it to do so. In cases involving major questions, the court held, it is not enough for an agency to show that its regulation is based on a "textually plausible" interpretation of an underlying statute like the Clean Air Act.

The decision — and the extent to which it will curtail the regulatory ambitions of agencies and cabinet departments across the federal government — has been much debated. While it is intriguing to speculate about how the decision will apply "beyond the fence line" (to borrow a phrase) of the Environmental Protection Agency, perhaps the most immediate question is what it will mean for the EPA's efforts to regulate greenhouse gas emissions under the Clean Air Act.

## National Ambient Air Quality Standards

Some in the activist community have argued that the EPA would have better luck in court if it established "national ambient air quality standards" (NAAQS) for greenhouse gases. And shortly after *West Virginia*, a group of state attorneys general sent a letter urging the EPA administrator to do just that, arguing that adopting "NAAQS would allow the EPA to comprehensively address the issue of greenhouse gas emissions and, we believe, would likely withstand court challenges."

To be sure, proponents of this approach set forth a textually plausible reading of the Clean Air Act that would allow the EPA to set NAAQS for greenhouse cases. But the Supreme Court has cautioned against finding "new wine in old bottles" when it comes to regulatory authority, and one can hardly think of any Clean Air Act bottle older than the NAAQS program, which has been at the heart of the act since its enactment in 1970.

As understood and implemented for more than 50 years, it is intended to deal with local or regional concentrations of air pollution (like ozone or fine particles) that exceed acceptable levels—concentrations that states, with support from the EPA, can reduce to safe levels by

regulating sources of air pollution under their jurisdictions.

But greenhouse gases represent a global problem that is fundamentally different from the localized air quality problems addressed by the NAAQS. On a per-ton basis, greenhouse gases emitted in China or Brazil have the same climactic impacts in the US as greenhouse gases emitted in New York or Houston. And ambient concentrations of greenhouse gases are essentially the same throughout the world.

If the EPA were to establish NAAQS for greenhouse gases, the whole world, in Clean Air Act parlance, would be in "nonattainment." There is nothing that states individually or collectively, even with support from the EPA, can do to reduce greenhouse gases to any particular level within their states. One can easily see that courts applying *West Virginia* would see this use of the NAAQS as precisely the type of extraordinary regulatory program that attempts to address a major question without clear congressional authorization.

## Mandating a Transition to Electric Vehicles

The EPA has not yet given any indication that it intends to establish NAAQS for greenhouse gases, but what about its efforts to regulate greenhouse gas emissions from cars and trucks?

In *West Virginia,* the court struck down an EPA regulation that attempted to limit the amount of US electricity generation that could come from coal-fired power plants, saying that this is a major question that must be addressed by Congress. How will it view the EPA's effort to limit the number of cars and trucks sold in the US that run on gasoline or diesel fuel?

Federal officials have been clear about their desire to promote electric vehicles, and the EPA's greenhouse gas tailpipe standards are designed to advance electrification of the motor vehicle fleet at the expense of internal combustion engines.

The EPA's recent endorsement of a Clean Air Act "waiver" that allows California, under federal law, to have even more aggressive electric vehicle mandates may be especially problematic, given that this waiver authority was intended to address localized air pollution unique to California, as opposed to a global environmental problem. These steps could certainly be viewed as extraordinary regulatory actions that require clear congressional authorization.

## Impact on Other Agencies

There are other rulemaking efforts that would seem to implicate the major questions doctrine, including the Securities and Exchange Commission's proposal to mandate extensive greenhouse gas disclosures and a proposal that would allow the Federal Energy Regulatory Commission to reject applications for natural gas pipelines based on climate change concerns. If these agencies do finalize their proposals, we will eventually see whether they pass muster under the *West Virginia* major questions doctrine.

Long before then, however, we will likely get a chance to see whether and how the courts will apply this doctrine to the EPA's efforts to mandate a transition to electric vehicles. The court may well believe that an attempt by a regulatory agency to phase out the fuels and

technologies that have powered transportation in the US for more than 100 years is the sort of major question that necessitates explicit authority from Congress.

**Originally published in Bloomberg Law.*