

# Showdown at the EPA Corral



By Paul Engel

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- Does the Clean Air Act empower the EPA to regulate the national power grid?
- What standard should a court use when interpreting the laws of the United States?
- Will *West Virginia v. EPA* change the powers of executive agencies?

Did you ever imagine that a question about air pollution could end up changing the way governments work? That may be exactly what happened with the Supreme Court's opinion in *West Virginia v. Environmental Protection Agency*. What started as a question of whether or not the EPA's plan to reduce carbon-dioxide emissions from the electric grid was constitutional turned into a statement about the limits of discretion granted to executive agencies.

The question before the court in *West Virginia v. EPA* seemed quite simple:

*Since passage of the [Clean Air] Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural*

*gas, wind, or solar sources.*

*The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.*

### [West Virginia Et Al. V. Environmental Protection Agency](#)

What was the EPA trying to do with their new rule to reduce emissions?

*The point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar. The White House stated that the Clean Power Plan would "drive a[n] . . . aggressive transformation in the domestic energy industry."*

### [West Virginia Et Al. V. Environmental Protection Agency](#)

The EPA claimed the authority to transform electrical generation throughout the country. Was this a power Congress had delegated to the EPA under the Clean Air Act? According to the majority of the court, no.

*Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." ... It located that newfound power in the vague language of an "ancillary provision[]" of the Act, ... one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. ... Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d).*

## [West Virginia Et Al. V. Environmental Protection Agency](#)

Not surprisingly, some of the justices disagreed with this assessment. Compare the majority's statement to how the dissent views the situation:

*As I have already explained, nothing in the Clean Air Act (or, for that matter, any other statute) conflicts with EPA's reading of Section 111. Notably, the majority does not dispute that point. Of course, it views Section 111 (if for unexplained reasons) as less clear than I do.*

## [West Virginia Et Al. V. Environmental Protection Agency](#) – **Kagan Dissent**

This is the true crux of this case. Who decides what a law means, Congress who writes the law or the executive agencies that enforce it? Justice Gorsuch points out how the court goes about deciding this in his concurrence.

*One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain "clear-statement" rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts "act as faithful agents of the Constitution."*

## [West Virginia Et Al. V. Environmental Protection Agency](#) – **Gorsuch Concurrence**

In other words, unless there is a clear statement in the law to the contrary, Congress means for its laws to be enforced following the Constitution, not testing the boundaries of it.

Since the question revolves around how the EPA interpreted the Clean Air Act, let's start there.

## The Agency View

*But, the Agency explained, in order to “control[ ] CO2 from affected [plants] at levels . . . necessary to mitigate the dangers presented by climate change,” it could not base the emissions limit on “measures that improve efficiency at the power plants.” ... “The quantity of emissions reductions resulting from the application of these measures” would have been “too small.” ... Instead, to attain the necessary “critical CO2 reductions,” EPA adopted what it called a “broader, forward-thinking approach to the design” of Section 111 regulations. ... Rather than focus on improving the performance of individual sources, it would “improve the overall power system by lowering the carbon intensity of power generation.” ... (emphasis added). And it would do that by forcing a shift throughout the power grid from one type of energy source to another. In the words of the then-EPA Administrator, the rule was “not about pollution control” so much as it was “an investment opportunity” for States, especially “investments in renewables and clean energy.” ...*

*This view of EPA’s authority was not only unprecedented; it also effected a “fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation” into an entirely different kind.*

### [West Virginia Et Al. V. Environmental Protection Agency](#)

It appears, in the mind of the EPA Administrator, when Congress said they were to “improve efficiency at power plants”, they really meant protect us all from “climate change”. Furthermore, when Congress said to improve performance of the individual sources of electricity, it really meant to regulate the entire electrical grid. As the EPA administrator was quoted in the opinion, the Clean Air Act wasn’t about pollution control, but investing in renewable energy. But is that what Congress included in the Clean Air Act?

*On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. EPA decides, for instance, how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably "exorbitant." ...*

*There is little reason to think Congress assigned such decisions to the Agency. ...*

*We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal-based generation there should be over the coming decades. ...("We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").*

### [West Virginia Et Al. V. Environmental Protection Agency](#)

It appears the majority of the court does not agree with the EPA Administrator's assessment. They seem to think it is highly unlikely that Congress would give an agency discretion to determine how much coal-based electrical power there should be over the decades, and I agree. Especially since Congress has repeatedly rejected the "cap and trade" theory in the past.

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*allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.*

### West Virginia Et Al. V. Environmental Protection Agency

So the court asked the EPA to show the clear congressional authorization to enact their new plan.

*Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to “clear congressional authorization” to regulate in that manner. Utility Air, 573 U. S., at 324.*

*All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting “the application of the best system of emission reduction . . . adequately demonstrated.” 42 U. S. C. §7411(a)(1).*

### West Virginia Et Al. V. Environmental Protection Agency

The EPA could not show a clear authorization from Congress to implement a policy to force a nationwide change in how we generate electricity. For that reason, the court found for West Virginia, overturned the decision of the Court of Appeals, and sent the case back that court for further proceedings.

*Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible “solution to the crisis of the day.” ... But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. The judgment of the Court of Appeals for the District of Columbia Circuit*

*is reversed, and the cases are remanded for further proceedings consistent with this opinion.*

## [West Virginia Et Al. V. Environmental Protection Agency](#)

### **Dissent**

Three members of the court, justices Kagan, Breyer, and Sotomayor disagreed with the majority.

*Today, the Court strips the Environmental Protection Agency (EPA) of the power Congress gave it to respond to “the most pressing environmental challenge of our time.”*

## [West Virginia Et Al. V. Environmental Protection Agency](#) – **Kagan Dissent**

Interesting, how three justices claim that the court stripped the EPA of a power Congress had not only not specifically given it, but had repeatedly declined to implement themselves.

*Climate change’s causes and dangers are no longer subject to serious doubt. Modern science is “unequivocal that human influence”—in particular, the emission of greenhouse gases like carbon dioxide—“has warmed the atmosphere, ocean and land.”*

## [West Virginia Et Al. V. Environmental Protection Agency](#) – **Kagan Dissent**

It’s a good thing these justices are not scientists. There is plenty of scientific debate, not only about the severity of “climate change”, but how large a role humans play in it. And what does the severity of greenhouse gases have to do with what Congress has passed into law? The answer is, absolutely nothing. What we see here are members of the court not only changing the subject, but claiming that the executive branch can enact laws not passed by Congress, simply because the court believes there is a serious problem.



*The Clean Air Act was major legislation, designed to deal with a major public policy issue. As Congress explained, its goal was to “speed up, expand, and intensify the war against air pollution” in all its forms.*

## **West Virginia Et Al. V. Environmental Protection Agency – Kagan Dissent**

But did Congress give the EPA the authority for investment into certain technologies in an attempt to move electrical generation in America from coal to other sources? Not even the dissent provided evidence that they did.

### **Conclusion**

The one question that I didn't see asked in this case was, did the Constitution delegate to the United States the power to control pollution, carbon-dioxide, or regulate power generation? The answer to that question is a definite no. While the court said that Congress had not delegated to the EPA the power to create a cap and trade system, or to regulate how electricity is generated in this country, no one seemed to ask this more basic question: Was this a power deleted to the United States in the first place? However, a fundamental statement was made by this opinion. Executive agencies cannot enact rules beyond the powers specifically delegated to them by legislation. It appears the EPA, along with most if not all of the executive agencies, believe they have the power to run the country. Not a very republican way to do things.

*A commonwealth; a state in which the exercise of the sovereign power is lodged in representatives elected by the people.*

## **Republic – Webster's 1828 Dictionary**

To me, that is the biggest takeaway from this opinion. Who decides what the laws are, and by extension, what they mean. Is it We the People, through our elected representatives, or is it the unelected bureaucracy that decides our laws?



According to the Constitution, the President is to be sure that the laws created by Congress are faithfully executed within the confines of the Constitution. While it has been many years since the courts have followed that structure, I'm glad to see they have in this case.

West Virginia v EPA is one of three cases this year where the court has placed the language of the Constitution and laws of the United States above precedent, tradition, and perceived need. While the three justices who dissented in these cases seem more interested in seeing the government rule rather than following the supreme law of the land, I don't expect that to change much with the appointment of Justice Ketanji Brown Jackson. I can only hope that the court will continue this fidelity to their oaths to support the Constitution of the United States. It would certainly help decide if America is to rise again to be a republic, or continue to devolve into an oligarchy.

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