

West Virginia v. EPA and Climate Reform Stalemate in America

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Leading up to June 30, 2022, climate activists and administrative environmental agencies alike feared the worst. The *WV v. EPA* decision was expected to cover administrative ability to enforce environmental reform efforts and the constitutionality of clean air policies. When the Supreme Court finally issued its decision, a small sigh of relief was let out. However, after a moment of solace, concern began to grow. Though it was not an end-all-be-all, the decision is something that will continue to pose challenges to clean air reform efforts. It will also pose challenges to environmental reform efforts, more broadly. While the decision will doubtlessly be impactful, it was not necessarily surprising if the conservative makeup of the court and the United State's inability to pass significant climate reform legislation are considered. *WV v. EPA*, which overturned many legal precedents, will be crucial to the field of environmental law in the years to come.

A story from mid-twentieth century London, illustrated by Julia Martinez in *Great Smog of London* (2022), can help examine the significance of clean air reform efforts.¹ At the time, polluted, grimy air was no stranger to Londoners. They were used to trekking through smoky haze on the way to work or school. Great amounts of pollution, visible as smog, accumulated in the city as a result of the Industrial Revolution and the city's reliance historically on coal-fired power plants for energy. Normally, winds would blow the smog away from the city and freshen its air in time. However, in December 1952, unusual atmospheric conditions caused giant cloud of smog to cover the city for five entire days, bringing the city to a near standstill and resulting in

¹Martinez, Julia. *Great Smog of London* (2022), <https://www.britannica.com/event/Great-Smog-of-London>

thousands of casualties over time. This weather and public health catastrophe came to be known as the Great Smog of London. The seriousness of London's air pollution quickly became undeniable. Eventually, the British government was influenced to pass the world's first Clean Air Act out of concern for the health of London's inhabitants.² Davis, Bell, and Fletcher assert in *A Look Back at the London Smog of 1952 and the Half Century Since* (2002) that "these tragic public events in London half a century ago spurred the realization that polluted air could not only cause an immediate increase in deaths and illness but could also result in longer-term and more subtle effects."³ Air pollution has long lasting health effects. A great quantity of deaths that occurred as a result of The Great Smog of London that were left unrealized until years later is proof of this.

Though the Clean Air Act of 1956 has since been repealed in the U.K., its importance on global environmental reform efforts was significant. It was pioneering—the first legislation of its kind that recognized air pollution as a serious problem, and a problem that governments have the responsibility to rectify. In the following decades, other countries, such as the United States, began to follow suit and pass air quality laws of their own. In the United States, the Clean Air Act of 1963 is the preeminent air quality law in the nation to this day.

In addition, clean air is not merely an environmental concern—it is also, equally importantly, a public health concern. The fate of the planet and the health of Americans rests on the EPA's ability to enforce progressive clean air regulations. *WW v. EPA* challenges the ability of the EPA to enforce such regulations.

²*Id.*

³Davis et al., *A Look Back at the London Smog of 1952 and the Half Century Since*, Environmental Health Perspectives 2-3 (2002), <https://www.jstor.org/stable/3455737>

There are a number of background environmental policies integral to understanding the case. *WV v. EPA* deals with an Obama-era administrative policy proposal called the Clean Power Plan, which is described in the EPA’s Factsheet titled *Overview of the Clean Power Plan: Cutting Carbon Pollution From Power Plants*. While never passed into law, this proposal followed one interpretation of section 111(d) of the Clean Air Act. It created a partnership between the EPA and states, tribes, and territories of the United States. The goal of the partnership was to limit carbon dioxide pollution from power plants— “the first-ever national standard” to do so.⁴ For reference, power plants are the United State’s biggest emitter of carbon dioxide. Section 111(d) of the Clean Air Act directs emission standards for new and existing sources of air pollution. According to Richard K. Lattanzio in *Clean Air Act: A Summary of the Act and Its Major Requirements* (last updated Sept. 13, 2022), the authority “has rarely been used, because most pollutants and sources are subject to regulation under other sections of the act.”⁵ Though, admittedly, if the Clean Power Plan were passed, it may have put the authority outlined in section 111(d) to use more often.

In the oral arguments leading up to *WV v. EPA*, the correct interpretation of section 111(d) of the Clean Air Act was disputed. The court ultimately decided that since section 111(d) did not specifically delegate the EPA the authority to regulate carbon dioxide the way the Clean Power Plan sought to, the EPA did not have the authority to regulate it this way.⁶ Congress did not explicitly give the EPA this authority in the Clean Air Act, so the Clean Power Plan was ruled to be unconstitutional. Article I of the Constitution, which delegates power to the legislative branch of the United States Federal Government, and the nondelegation doctrine, which is a principle

⁴US EPA Factsheet— *Overview of the Clean Power Plan: Cutting Carbon Pollution From Power Plants* <https://archive.epa.gov/epa/sites/production/files/2015-08/documents/fs-cpp-overview.pdf> (last visited Dec. 23, 2022).

⁵Richard K. Lattanzio, *Clean Air Act: A Summary of the Act and Its Major Requirements* 12-13 (last updated Sept. 13, 2022), <https://crsreports.congress.gov/product/pdf/RL/RL30853>

⁶*West Virginia v. Environmental Protection Agency*, 597 U. S. 8-12, 16 (2022).

forbidding Congress to transfer its power to executive agencies, were central concepts to this case.⁷ West Virginia argued that in the Clean Air Act, Congress imposed “inside the fence line” versus “outside the fence line” as a boundary and a basis for administrative regulatory action in terms of air pollution, and they argued that the Clean Power Plan goes beyond this boundary and is therefore unlawful.

Some legal precedents and concepts important to this case include *MA v. EPA*, which, to the relief of climate activists, was not outrightly overturned in *WV v. EPA*.⁸ *MA v. EPA* established that the EPA has a responsibility to regulate carbon dioxide emissions.⁹ Additionally, the court’s decision in *WV v. EPA* was largely based on something called the “major questions doctrine.” Under this doctrine, a “clear statement is necessary for a court to conclude that Congress intended to delegate [such extreme] authority,” according to *Nondelegation Doctrine* from Cornell’s Legal Information Institute.¹⁰ Another important legal precedent is *Chevron v. NRDC*. This case established the Chevron deference, which Cornell’s Legal Information Institute describes in its webpage titled *Chevron deference* by stating “a court may not substitute its own interpretation of [a] statute for a reasonable interpretation made by [an] administrative agency.”¹¹ In the case of ambiguously worded statutes, administrations can take, to an extent, any action they deem necessary so long as it follows the statute. *WV v. EPA*, however, challenges this precedent in administrative law.

More generally, *WV v. EPA* challenges broad administrative action, period. The court basing their decision on the major questions doctrine may usher in a new era of federal

⁷*Nondelegation Doctrine*, Cornell’s Legal Information Institute, https://www.law.cornell.edu/wex/nondelegation_doctrine#:~:text=The%20non%2Ddelegation%20doctrine%20is,agencies%20or%20to%20private%20organizations (last visited Dec. 23, 2022).

⁸*West Virginia v. Environmental Protection Agency*, 597 U. S. 8-12, 16 (2022).

⁹*Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

¹⁰*West Virginia v. Environmental Protection Agency*, 597 U. S. 8-12, 16 (2022).

¹¹*Chevron deference*, Cornell’s Legal Information Institute, https://www.law.cornell.edu/wex/chevron_deference (last visited Dec. 23, 2022).

administrative ineffectiveness. *WV v. EPA* goes beyond the scope of environmental administrative ineptitude— it also challenges administrations that regulate labor, transportation, food and drugs, and more. Essentially, any federal executive agency is now up for scrutiny in the future, which may limit federal administrative power.

On a separate note, the makeup of the Supreme Court preceded this shift in attitude towards executive administrations. Conservative packing of the court now means that more of its right-leaning members are skeptical of federal administrative power. Over the past few decades, conservatives have grown more distrustful of federal administrative power. They perceive political power to be concentrated in these administrations and agencies, which they dislike. In light of this, it makes sense that they decided *WV v. EPA* as they did, as right-leaning justices would make any attempt to limit federal administrative power.

Moreover, as for making headway with restorative climate policy, America's current system of government does not allow progress to happen very easily. This is largely due to something George Tsebelis coined the "veto player" theory in *Veto Players: How Political Institutions Work* (2002).¹² The more players that exist in a system of government, the harder it is to pass legislation in that government. In the United States, on the federal level, there are three main veto players: the executive branch, the legislative branch, and the judicial branch. Within those branches, there are even more individual veto players such as individual legislators. Thus, it is hard to progress, and the status quo is largely maintained under the American system of government.¹³ The founding fathers of the United States intentionally designed our system of government to over-represent the minority. Small, rural states have a disproportionate amount of power on the federal level. Their goal, centuries ago, was ensuring that all voices are heard

¹²George Tsebelis, *Veto Players: How Political Institutions Work*, 37 (2002).

¹³*Id.*

(so-called) “equally” and the result today is a lack of progress. Climate legislation, in particular, faces such a predicament.

Some far-left progressives argue that we must look past our existing systems of government to get any significant climate legislation passed, as discussed in the Drilled podcast episode titled *West Virginia v EPA: Worst-Case Scenario and What Comes Next*.¹⁴ The impact of *WV v. EPA* certainly seems to support this viewpoint. This case demonstrates how veto players check each other’s power and inhibit real progress. As a result of *WV v. EPA*, administrative power overall is weakened. Progressive climate reform faces a standstill. The status quo is maintained. As discussed in Dorothy Grace Guerro’s chapter within *The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives*, progressive climate reform is not welcomed warmly in a capitalist nation such as America. A capitalist society, which is built on profit maximization and exploitation, may be entirely incapable of passing significant climate reform legislation. The free market is valued much more highly than environmental concerns. As such, systemic change may be the only way to successfully address climate change in America.¹⁵ Perhaps hopes of environmental reform are futile in the U.S. without a complete dissolution of our current economic and political systems. Again, in light of this, the *WV v. EPA* decision is dismaying—yet unsurprising.

Finally, it is important to note how clean air reform is inextricable from social justice reform. Dorothy Grace Guerro asserts that “climate change is linked to social inequalities between the global North and the global South, as well as to inequalities within the global North and South.”¹⁶ There is overwhelming evidence that systemically disadvantaged neighborhoods

¹⁴Drilled Podcast, *West Virginia v EPA: Worst-Case Scenario and What Comes Next*, (2022).

¹⁵Dorothy Grace Guerrero, *The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives*, *Wits University Press* 5, 13 (2018), <https://www.jstor.org/stable/10.18772/22018020541.7>

¹⁶*Id.*

and communities in America face the worst effects of air pollution. These communities largely consist of poor individuals and people of color. As such, clean air reform is essential to social justice as well, so that these communities are no longer subjected to high levels of air pollution and the negative health consequences that follow.

To summarize, in the face of a conservative court and the power of veto players, *WV v. EPA* is, while disheartening and impactful to the field of environmental law, unsurprising. In the wake of this decision, climate reform in America faces a stalemate. This case may set new precedents for environmental and administrative law. Unfortunately, climate reform took quite a few steps backward. This is alarming, especially when considering the environmental, public health, and social justice implications of climate change and air pollution. As countries like the United States struggle to enact policies and regulations in the environmental sector, the lessons of mid-century London remain pertinent. Alessandra Potenza from The Verge interviews Kate Dawson regarding her book *Death in the Air*, a story about the Great Smog of London. Dawson argues that the Great Smog of London “should be a cautionary tale. And [I think] that very few people in power are listening.”¹⁷ *WV v. EPA* corroborates her concern.

¹⁷Alessandra Potenza, *In 1952 London, 12,000 people died from smog — here's why that matters now / Clean air regulations save lives*, The Verge (2017), <https://www.theverge.com/2017/12/16/16778604/london-great-smog-1952-death-in-the-air-pollution-book-review-john-reginald-christie>