"Deconstructing the Environmental State: Administrative Law's Challenge for Climate Justice in the U.S."

The United States Supreme Court is doing some very strange things in the wonky area of administrative law, and legal geographers should pay attention. The Court's conservative majority is currently floating major changes to how courts evaluate the power that Congress and the executive branch have to engage in environmental regulation, particularly through the so-called major questions doctrine. In short, this doctrine says that federal courts should be extra suspicious when administrative agencies resolve questions that involve issues of "deep economic and political significance" (*King v. Burwell*). Absent clear or express delegation from Congress, the major questions doctrine teaches, administrative agencies may lack the power to promulgate important regulations—for example, to impose vaccine mandates, pause evictions during a viral pandemic, or make the national electric power grid cleaner. The major questions doctrine is now appearing with alarming regularity in cases before the Court. Just a few weeks ago, for example, the Court invoked the doctrine in the oral argument of the student loan forgiveness cases. The outcomes in those cases will have important consequences for many of us in higher education—for instructors with student debt, and for the next generation of students whom we hope to teach.

But for now, let's return to *West Virginia v. EPA* so I can tell you the story of the Clean Power Plan and how the major questions doctrine came to matter in this case. The Clean Power Plan dates back to 2015 when the Obama-era EPA promulgated a rule aimed at reducing carbon dioxide emissions from existing (that is,

already built) coal- and natural-gas-fired power plants. The EPA issued this rule according to authority granted to it by Congress in § 111 of the Clean Air Act, which authorizes the EPA to regulate power plants by setting a "standard of performance" for covered pollutants—a standard that must reflect the "best system of emission reduction" that has been "adequately demonstrated" for a particular category of pollutants. For nearly half a century, the EPA has used its authority under § 111 to reduce emissions by making power plants run cleaner, for example, through the use of scrubbers. In 2015, however, the Clean Power Plan took a different approach: it said that the best system of emission reduction for existing coal-fired power plants included a requirement to reduce electricity production or subsidize production by alternative energy sourses, such as natural gas, wind, and solar energy, a practice called "generation shifting." EPA's authority to order existing coal-fired power plants to reduce production or generation shift is the core issue in this case.

The parties who sued the EPA in this case claimed that the Clean Power Plan exceeded EPA's authority under the Clean Air Act. In a 6-3 opinion written by the Chief Justice, the Supreme Court agreed with the plaintiffs. But before discussing substance, it's worth dwelling on the odd procedural posture of the case—odd in a way that reflects a desire on the part of the Court's conservative majority to reach out, take cases, and make law that essentially reflects Republican policy positions. When I first mentioned the Clean Power Plan, you may have been thinking, what Clean Power plan? Didn't that never even happen? Your skepticism is correct: the Trump-era EPA repealed the Clean Power Plan in 2019 and abandoned the agency's own prior legal analysis of the best system of emission reduction and the whole idea of generation shifting. Trump's EPA essentially rejected grid-level solutions as

outside the scope of § 111; instead, Trump's EPA issued the Affordable Clean Energy (or ACE) rule, which was widely understood to amount to a rollback of environmental gains achieved during the Obama years. A federal appeals court struck down the ACE rule in early 2021, the day before President Biden's inauguration, effectively returning the EPA to the status quo ante, that is, the EPA could enforce the Clean Power Plan if it chose to do so.

But it didn't. In fact, the Biden Administration said that it would engage in an entirely new rulemaking to address carbon dioxide emissions. This is the point at which states and power companies sued the EPA and sought review of its authority under § 111 of the Clean Air Act. Despite the fact that there was essentially no live, legal dispute about the Clean Power Plan, which had never been implemented and which the new administration said it had no intention of implementing—facts that go to the heart of what lawyers call "standing," or the ability of an entity to bring suit in a court—the Supreme Court decided to hear the case. Invoking the major questions doctrine, the Court concluded that the EPA did not, in fact, have the power to enforce the Clean Power Plan (never mind that no such plan existed).

What is this major question doctrine anyway? To answer that question, it's useful to step back and consider judicial review of administrative regulations generally. In our system of government, Congress makes the law, primarily by writing statutes. Contemporary statutes often involve delegation, in which Congress gives some of its powers to administrative agencies, exactly as Congress did in § 111 of the Clean Air Act, which directs the EPA administrator to set performance standards for existing emissions sources. If a party challenges a regulation like the Clean Power Plan, then a court will review the agency's interpretation of the statute to determine

whether its action falls within the power Congress delegated to it. Since 1984—for nearly four decades—courts have applied a framework called the *Chevron* test in cases like this. *Chevron* counsels judicial deference to agency interpretations. It has two steps. In the first step, the court asks if the statute is "ambiguous." If not, then the court—and the agency—must give effect to the statute's plain meaning. If the statute is ambiguous, then we go to the second step: the court asks if the agency's interpretation is "reasonable." If it is, then the agency wins; if it's not reasonable, then the agency loses. "Reasonableness" is a low bar that puts a thumb on the scales of the agency's own interpretation of its power under authorizing statutes. But in 2015 the Supreme Court upended this deferential framework in a case called *King v. Burwell*, in which the Court held that in certain "extraordinary" cases involving "question[s] of deep economic and political significance," so-called major questions, courts should conduct more probing, less deferential review of agencies' interpretations of statutes.

Flash forward to *West Virginia v. EPA*, and the Court invoked the major questions doctrine to conduct searching review of the EPA's authority to enact the Clean Power Plan, essentially requiring a "clear congressional authorization" for its actions. Using this new interpretive paradigm, the Court concluded that there's no way to square § 111's language of "the best system of emission reduction . . . adequately demonstrated" with the Clean Power Plan's generation-shifting scheme, that is, generation shifting cannot be a "system" within the meaning of the statute. "A decision of such magnitude and consequences rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body," the Court said.

To summarize, the Court invoked the major questions doctrine to sidestep its usually deferential standard of review for agency interpretations of statutes, to make clear that the EPA lacks power under the Clean Air Act to force existing coal-fired power plants to reduce capacity or shift to cleaner sources. Generation shifting, according to the Court, involves a question of such deep economic and political significance that if Congress wants to authorize agencies to regulate in that space, it must do so with a clear authorization. In doing so, the Court added environmental regulations to the major questions enemies list and sent the EPA back to the drawing board for national policy on decarbonizing the energy grid.

Why should legal geographers care about this admittedly wonky case and the major questions doctrine? There are at least two reasons. First, at a high level of abstraction, the Supreme Court is making it clear that regulatory agencies will have a harder time making impactful, national environmental policy. Now that the U.S. has cycled back to divided government, it is even less likely that Congress will be able to pass any controversial bills; no new laws will be written to provide "clear congressional authorization" for the kind of sweeping regulatory action required to meet climate goals under the Paris Agreement and other relevant targets. As a result, federal climate policy will shift to the Executive Branch and administrative agency action. Those actions—especially actions that "go big," like attempts to modernize and decarbonize our energy grid—will immediately be challenged under the major questions doctrine in federal court. If those cases wind up before the Supreme Court, they will be heard by a six-member conservative majority that is not only anti-regulatory and pro-business, but several members of which are actively pursuing the

wholesale deconstruction of the administrative state developed during the New Deal.

Second, it has become increasingly clear that the Supreme Court itself is a problem—one that legal geographers should attend to. Along the scalar spectrum, our subdiscipline sometimes tends to focus on the small over the big, the everyday over the exceptional, and process over structure. What's going on right now at the Supreme Court potentially falls into a subdisciplinary blind spot: the major questions doctrine is developing at the nation's highest-visibility legal institution in such a way that even ardent institutionalists are asking whether the Court should be packed, have its jurisdiction stripped in certain cases, or otherwise be reformed to give it less power than the current conservative supermajority is wielding. Legal geographers should be involved in these debates, both on their own terms and in the ways that Supreme Court culture trickles down to the scales and issues that we normally work at. One crystal clear lesson from the abortion case last year, *Dobbs*, is that if you think the Court isn't coming for whatever progressive "right" you support—reproductive justice, same-sex marriage, affirmative action—think again. The conservative majority is empowered, activist, emboldened, and unapologetic.

Thank you for your time, and I look forward to your comments, questions, and the other presentations.