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Supreme Court Stages a Coup Against Government Regulation

And they endanger the planet in the process.

BY MILES MOGULESCU JULY 1, 2022

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Aaron Petykowski, an activist with the Climate Action Campaign, protests outside the Supreme Court, June 30, 2022.

While the January 6th Committee is exposing an attempted coup by Donald Trump and his backers, the Supreme Court has been busy staging a coup of its own, with six Republican justices rewriting the laws and the Constitution to satisfy their extreme right-wing political and financial backers.

Yesterday, in what may be the most consequential awful decision in a term of awful decisions, the Court issued a ruling in *West Virginia v. EPA* that not only will cripple the EPA's power to regulate greenhouse gasses in a meaningful way. It could essentially prevent government agencies from regulating just about anything important.

And more is on the way. On the same day, the Court agreed to hear *Moore v. Harper* next term, in which it could affirm the radical "independent state legislature" doctrine, which holds that only gerrymandered state legislatures—not state courts, governors, or election boards—have any authority over elections, including, potentially, the authority to nullify the popular votes and assign electors to the losing candidate, as Trump tried to do in the 2020 election.

Dismantling the "Administrative State"

Extremist Republican justices were so anxious to kneecap government regulation of business that the Court took up *West Virginia v. EPA* despite the fact that

there's no current rule regulating greenhouse gas emissions from power plants; the Trump administration repealed it in 2019, and the Biden administration has not yet replaced it. In other words, SCOTUS ruled on a regulation that does not currently exist.

Their goal appears to be to advance the Trumpian Republican agenda of, in the words of Steve Bannon, the "deconstruction of the administrative state."

The administrative state is an alphabet soup of agencies like the Securities and Exchange Commission (SEC), the Environmental Protection Agency (EPA), the Immigration and Naturalization Service (INS), the Internal Revenue Service (IRS), and many others. They are staffed by career experts with decades of experience in the technical subject matter they regulate. Congress often passes broad mandates into law and leaves it to these agencies to make and enforce regulations within those guidelines. It is impossible for Congress (or, for that matter, the courts) to have the technical expertise to keep regulations up to date. Corporations generally hate the administrative state, since it often regulates their destructive behavior against the public welfare.

More from Miles Mogulescu

While the Republican Party, the Federalist Society, and their donors have packed the federal judiciary and the Supreme Court with anti-abortion and pro-gun radicals to fire up their base, their real motivation was to eventually undermine government regulation of business, much as SCOTUS overruled New Deal legislation in the 1930s until FDR's "switch in time to save the nine" led to a new direction, which has survived, tenuously, until today.

As *The New York Times* recently reported, *West Virginia v. EPA* "is the product of a coordinated, multiyear strategy

by Republican attorneys general, conservative legal activists *and their funders*, several with ties to the oil and coal industries, to use the judicial system to rewrite environmental law, weakening the executive branch's ability to tackle global warming [emphasis added]."

The plaintiffs in the case are funded by the same interests that handpicked the conservative-majority justices. As former senior Justice Department official Lisa Graves states, "It's a pincer move. They are teeing up the attorneys to bring litigation before the same judges they handpicked."

The "Major Questions" Doctrine

Under the Supreme Court's 1984 precedent in *Chevron v. National Resources Defense Council*, courts have deferred to the expertise of administrative agencies under the so-called "Chevron deference" doctrine. It generally requires courts to defer to an agency's interpretation of federal law when Congress was general or vague about the scope of an agency's power. Based on this standard, courts generally uphold agency regulations. This is necessary for a modern government to function in a complex society and economy.

As recently as 2007 in *Massachusetts v. EPA*, SCOTUS ruled that greenhouse gases are an "air pollutant" under the definition in Section 111 of the Clean Air Act and the EPA has the right, indeed the duty, to regulate them.

Chief Justice John Roberts's 6-3 majority opinion doesn't even mention the Chevron doctrine, but it guts it all the same. It does so by greatly expanding the so-called "major questions" doctrine, which, until recently, was a fringe right-wing academic theory with no real-world judicial impact except in a very limited subset of cases. There's nothing "originalist" or "textualist" about it. (Trump's EPA teed this up by citing the major

questions doctrine when repealing the rule three years ago.)

Roberts's opinion states, "The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38 percent coal to 27 percent coal by 2030, can be the 'best system of emission reduction' within the meaning of Section 111." The EPA had found that this is the best such system.

He then asserts that the EPA's assertion of authority to regulate greenhouse gases on a system-wide basis is "an extraordinary case" because it has "economic and political significance," requiring a different interpretive standard based on the major questions doctrine. "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,'" the ruling states. "But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme."

In Roberts's view, if a regulation to limit greenhouse emissions is small and largely ineffective, it probably passes muster. But if it's actually big enough to significantly impact climate change, it's then a "major question" that requires specific authorizing language in the statute, rather than a broad mandate to control pollutants.

In her dissent, Justice Elena Kagan responded, "The Court appoints itself—instead of Congress or the expert agency—the decisionmaker on climate policy. *I cannot think of anything more frightening* [emphasis added]." She took issue with Roberts's claim that the emissions regulation is "just too new and too big a deal for Congress to have authorized it." As she points out, "A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and

commensurately, to new and big problems … The majority today overrides that legislative choice."

The right-wing SCOTUS majority is now effectively saying that climate change is such a "major question" that if the EPA wants to regulate it in an effective and systematic way, Congress has to pass a new law giving them the specific authority. And, of course, the Court must know that there's no possibility of that happening in the foreseeable future, given our gridlocked political system, caused in part by a string of Roberts Court decisions permitting partisan gerrymandering, unlimited corporate political contributions, and undermining the Voting Rights Act, plus the Senate filibuster.

So the extreme right-wing SCOTUS majority has knowingly given polluting industries exactly what they want—the ability to keep producing greenhouse gases that could destroy the planet without effective federal regulation.

The End of the Administrative State?

The Court's ruling is really scary. It almost guarantees that the U.S. will not fulfill its Paris Agreement commitments to reduce greenhouse gases, and makes it more likely that substantial portions of the Earth will become unlivable.

And it's scary for another reason, too. By ignoring Chevron deference and invoking a new and expanded "major questions doctrine," the Court goes a long way toward crippling the federal government from doing just about anything.

There are no standards for determining what's a major question. Roberts seems to imply that it could be just about any regulation that has a big impact. And

certainly, anything that passed into law under the old standard is unlikely to have the specificity that Roberts now suddenly demands from legislation. The only way to have these laws—which encompass health care, the environment, financial regulation, retirement security, workplace safety, and just about everything else the government is involved with—pass the major questions hurdle is to rewrite them and pass them again, an impossible task in our gridlocked environment.

So courts—stocked with Trump appointees—now have the weapon they need to strike down any regulations they don't like. And this will likely intimidate agencies from promulgating meaningful regulations. This is a recipe for grinding the gears of government to a halt, with major negative implications for vulnerable people of all kinds, not to mention a windfall for plutocrats.

Taking On the Court

By overturning *Roe*, restricting the EPA's authority to fight climate change, expanding the Second Amendment, eviscerating the separation of church and state, and undermining the Fourth Amendment, the radical Supreme Court has effectively implemented key sections of the Republican platform.

And they've done so with novel and badly reasoned legal rationales. They have shown that they are effectively politicians in black robes who have turned the Supreme Court into little more than a super-legislature that feels free to make up the law to fit the Republican agenda.

Public support for the Court is at an all-time low. According to a Gallup poll taken before the decision overturning *Roe*, only 25 percent of the public has high confidence in the Court. Confidence in the Court is underwater by double digits among both independents (down from 40 percent to 25 percent) and Democrats

(30 percent to 13 percent) and essentially unchanged for Republicans, among whom only a minority has confidence in the Court (37 percent to 39 percent).

If there was ever a time to challenge this Court's radical rulings, whether through passing laws overturning wrongful statutory interpretations, expanding the number of justices, proposing a supermajority to overturn laws, or limiting judicial review, now would be the time. Otherwise, expect more extreme rulings like this.

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