The EPA, Federal Power, and the Future of Climate Regulations – Part 2

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[00:00:00] Jeffrey Rosen: Hello friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit chartered by Congress to increase awareness and understanding of the constitution among the American people. On February 28th, the Supreme Court heard oral arguments in West Virginia versus EPA, that's the Environmental Protection Agency. The case involves the agency's authority to regulate greenhouse gas emissions. And some say that it has the potential to shape the future of the regulatory state.

Joining us to examine the arguments on all sides of this important case are Jonathan Adler, inaugural Johan Verheij Memorial Professor of Law and Founding Director of the Coleman P. Burke Center for Environmental Law at the Case Western Reserve University

[00:01:00] School of Law. His most recent book is Marijuana Federalism: Uncle Sam and Mary Jane, and he's a regular contributor to the legal blog, The Volokh Conspiracy. Jonathan, welcome back to We the People.

[00:01:11] Jonathan Adler: Always great to be here, Jeff. Thanks for having me.

[00:01:13] Jeffrey Rosen: And Lisa Heinzerling is the Justice William J. Brennan, Jr. Professor of Law at the Georgetown University Law Center. Among other books, she's written a case book called Environmental Law & Policy: Nature, Law & Society. She was also the lead author of the winning briefs in Massachusetts versus EPA, in which the Supreme Court held that the Clean Air Act gives the EPA the authority to regulate greenhouse gases. Lisa, thank you so much for joining, and it's wonderful to welcome you to the show.

[00:01:42] Lisa Heinzerling: It's great to be here. Thanks.

[00:01:43] Jeffrey Rosen: Jonathan, let me begin with an important and obvious question. What are the stakes in this case?

[00:01:50] Jonathan Adler: Sure. Um, so first thanks again for having me, Jeff, and it's, it's always great to be in conversation with Lisa on these questions. Um, as an immediate matter, what's at stake

[00:02:00] is how broad the EPA's authority is to regulate greenhouse gases from the power sector. And that's important because, uh, power generation is responsible for close to one third of greenhouse gas emissions domestically. Uh, so they're a, a big chunk of the gases that contribute to climate change.

More broadly, uh, what might be at stake is, uh, how much federal agencies can fill the gap when Congress is slow to update statutes or modify statutes to deal with more contemporary problems. Uh, and what the court says here, you could well, uh, have effects for how, not just the Supreme Court, but other lower federal courts interpret regulatory statutes going forward.

[00:02:42] Jeffrey Rosen: Thank you so much for that. Lisa, what would you say to We the People listeners are the stakes in this case?

[00:02:48] Lisa Heinzerling: Well, I, I basically agree with Jonathan about the stakes. I think that the Clean Air Act has been the Environmental Protection Agency's primary, um, vehicle [00:03:00] for regulating greenhouse gases. And so any statement from the Supreme Court limiting authority under the Clean Air Act is bound to have repercussions not only for this important source of greenhouse gas emissions, that is coal-fired power plants, but for also, potentially for other sources. And in a context where the United States has rejoined the international community and promised admission reductions, I think our Supreme Court opinion limiting EPA's power to produce those reductions, uh, would be significant.

[00:03:36] Jeffrey Rosen: Thank you so much for that. Let's now talk about the first question that you both identified as central, can the EPA regulate greenhouse gas? Jonathan, in arguing against the power to regulate, one of the sides here is saying that regulation by the EPA would violate the major questions doctrine. Tell us what the major questions doctrine is and whether or not you

[00:04:00] think that it's violated in this case.

[00:04:01] **Jonathan Adler**: Sure. And I guess just to, to give some context on that, um, it's worth saying a little bit about the, the statutory, uh, authority. That's an issue here. So, uh, Section 111 of the Clean Air Act au-authorizes the EPA to impose regulations first on, uh, new sources of emissions and then on existing sources. And what's an issue here is the authority to use that to regulate power plants. And the, the kind of big question is whether or not in applying that statutory authority to power plants, the EPA is constrained to apply it in effect as a traditional pollution control measure, where you require source-specific or facility-specific pollution control technologies or efficiency improvements, uh, heat rate improvements, uh, at power plants, and the like. Or whether or not given the nature of greenhouse gas emissions, EPA can look more broadly, uh, uh, systemwide at the power

[00:05:00] sector. So always to encourage, uh, shifts in what fuels are used, what sorts of facilities are used when, uh, and perh-, and, and perhaps even whether or not, um, fuel consumption can be, uh, displaced by, uh, things like wind and, and solar power.

And the, the thrust of the arguments by the states and coal companies that are challenging the broad interpretation of EPA's authority here is that, uh, what EPA is trying to do is to take what

has historically been understood as a n-narrow authority to adopt source-specific controls based on specific categories of, of emitters. And instead use that as a means of regulating power generation as a system, regulating the broader electricity generation system. While that may be a more efficient or effective way to deal with greenhouse gas emissions from the power sector, it represents a, a change from, or an expansion of the sort of authority

[00:06:00] that EPA has traditionally had. And that sort of big shift, that sort of major move is something that Congress has to explicitly authorize.

And to kind of conclude on, on, on the question about how that's a major question doctrine. The idea is that when Congress means to authorize broad new authority, it says so, and that we shouldn't find such broad authority in, uh, narrow, perhaps even obscure provisions of a large statute or the phrase that, that gets repeated all the time is we should not presume that Congress hides elephants in mouse holes.

[00:06:38] Jeffrey Rosen: Lisa, tell us about what happened at the argument about this, uh, distinction between, uh, source-specific and systemwide regulation. Um, Justice Breyer quoted the statute and said, he said the word system was in there, and Justice Kagan rejected the distinction between what she called inside and outside the fence

[00:07:00] regulation, 'cause she said either could have big effects on, uh, the economy. So t-, so t-tell us how, uh, Justices Breyer and Kagan were, were responding to this, this profound distinction and, and tell us what you think the major stakes in the major questions doctrine are.

[00:07:17] Lisa Heinzerling: Yeah. So I think the way that the, um, people who are challenging EPA's authority here framed it is that they said, "Well, if you go to these measures that aren't just at the physical source, the physical fo-, uh, power plant, then that creates a major question because it has economic and political significance and it goes beyond what EPA has usually done." And what, I think, uh, Justice Kagan and Justice Breyer's reasoning went to, and I think s-, there were some other justices in play on this point as well, was the, the idea that, well, actually you could have a really tiny rule that looked beyond the physical source, and you could have a

[00:08:00] really quite, quite significant rule that just tried to adjust the operations at the source. And so that the, the, um, kind of distinction between different kinds of EPA rules, that the people challenging EPA's authority are making, doesn't have anything to do with how important the question is, that you can have a big question under what they're saying is actually the appropriate level of authority. You can have a tiny question under what they're saying is not the appropriate level of authority.

And so what I think that line of questioning really revealed is the weakness of using that kind of beyond the source formulation to put a thumb on the scales really against EPA's power, that it just doesn't fit this situation. And, um, it [laughs] also emerged that it may be that they, people could end up, sources and the states could end up

[00:09:00] with a more consequential, uh, regulatory system for power plants, even if you just looked at the source. So-sort of I'm not even sure exactly at the end of the day where that leaves

us, but it did kind of disrupt the argument that had been made, uh, throughout the litigation, that we know which of these are the big rules, and they're all on the, outside the source area.

[00:09:28] Jeffrey Rosen: Jonathan, Justice Thomas's first question at the oral argument was, uh, "Is this a major question or is it a clear statement?" Um, so tell us what the, what the clear statement doctrine is, its relation to the major question doctrine, and, and, and then tell our listeners whether you think in fact, uh, the court should hold that this is a major question, or that lacks a clear statement from Congress, and therefore the EPA lacks the ability to regulate in this way.

[00:09:54] Jonathan Adler: Yeah. What, uh, what Justice Thomas's question indicated, and, and questions from quite a few justices indicated, is

[00:10:00] that there isn't a consensus on precisely what the interpretive method here is in terms of, uh, figuring out, uh, when Congress has appropriately delegated authority to the agency and when it hasn't. And I think throughout the argument we heard justices trying to get a clear understanding of what the, the theory was.

Now I should say, I, you know, I have my own articulation of how major questions might work. Um, uh, I'm not sure it's shared by, um, uh, that many of the justices, and I'm not sure the justices agree with each other. And so what Justice Thomas's question was getting at was trying to understand kind of what's doing the work. So one idea would be, um, that there are just certain sorts of questions that are big in terms of magnitude. Um, a-as Lisa was mentioning, you know, a lot of zeros, uh, before the decimal point. A lot of money on the table, and that's the sort of thing.

Other formulations seem to be more about maybe qualitatively, not quantitatively, right? Is this a shift

[00:11:00] in the, the application of the agency's authority? Is this pouring new wine out of an old bottle? Uh, and then still others, uh, might be seen as, um, applications of, of clear statement rules that are designed to, um, you know, require Congress to be explicit about certain sorts of things. And so, um, an analog that, that we've seen quite a bit over the last decade or two at the Supreme Court would be in the federalism context. Um, when a federal statute could be interpreted, uh, either to intrude on the traditional balance between the federal government and the state government, or not to so intrude, the court often adopts a clear statement rule saying, "We are going to err on the side of keeping the federal government on the federal side of things and away from areas of traditional state concern," like say perhaps land use. Or we might think in the CDC eviction moratorium case perhaps, landlord tenant relationships. Um, and on the one hand, we might think that's a description of the way

[00:12:00] Congress actually legislates, that Congress knows it has to be explicit when it crosses those sorts of lines. Um, that's one theory that's out there. Uh, you know, it, it's certainly contested. Uh, another theory would be, well, there are these constitutional problems lurking in the background, in the federalism context, the scope of enumerated powers. In this context, perhaps it limits on how much power Congress is allowed to delegate. You know, could

Congress just simply enact a law saying, "EPA, solve climate change," and let EPA do whatever it wants, or would that be an unconstitutional delegation of legislative power?

And under that theory, the work that something like a clear statement rule or the major questions doctrine is doing is interpreting a statute to keep it as far away from such constitutional questions as possible. And for at least some of the justices, Justice Gorsuch perhaps in particular, we know that that's, that's the way they conceive of the major questions doctrine, as this clear

[00:13:00] statement rule that is motivated by a desire to push statutes as far away from creating a delegation problem as possible. For some of the other justices that are, seems sympathetic to this general approach, uh, I'm not sure we have as clear an idea, uh, of, of what their underlying theory is.

[00:13:18] Jeffrey Rosen: Thank you so much for that. Uh, there was a lot of helpful analysis in that answer, including your distinction between, uh, these clear statement or major questions, rules, and what you call the nondelegation doctrine. And We the People listeners, uh, remember that Justice Gorsuch in the Gundy case wanted to resurrect of the so-called nondelegation doctrine, which has been dormant since the new deal, and, and prevents Congress from delegating certain authority to the agencies. Uh, Justice Kagan said that that would mean the end of the regulatory state. So d-, um, Lisa, do you agree with Jonathan's analysis of the relation between those, uh, clear statement and major questions statutory rules in the nondelegation

[00:14:00] doctrine and, uh, de-descriptively, how do you see the justices balancing those various considerations?

[00:14:06] Lisa Heinzerling: I do largely. I, I think that the, it has become clearer in recent years that some of the justices, as Jonathan said, do think a-almost that they're the same thing. I mean, Justice Gorsuch, in my opinion, has gone, come close to saying, "Whether I apply major questions or nondelegation principles, I come out the same way." The clearest example of this is the separate opinion in the case invalidating OSHA's shotter test, um, mandate in workplaces.

And so there's very much become a, a kind of, I think, trend among the justices to see what might otherwise be ar-argued a, is a, is an ordinary question of statutory interpretation in constitutional terms. And I think that's the power that this almost merging of the two doctrines

[00:15:00] has, that a person can then say, a justice let's say, can then say, "Not only do we think you strayed beyond your statutory bounds, but we think there are constitutional implications to that." And I do think that that has large resonance out in the world with the public, that the public, I think, tends to see a statutory problem. They might [laughs] not even know what that exactly is, you know, i-in fairness. And th-they might see that differently, less bad, less illegitimate, less power hungry. Then if they see the Supreme Court saying, "We are interpreting this, this statute this way because we think you have a constitutional problem," that just suddenly makes the, um, the whole stakes seem higher and the agency's positions seem less legitimate.

[00:15:52] Jeffrey Rosen: Well, well, s-since it's on the table, Jonathan, tell us about Justice Gorsuch's argument that the nondelegation doctrine

[00:16:00] should be resurrected. What exactly is the doctrine? What would happen if it were resurrected, both in this case and in other cases, um, and what would it mean for the future of the regulatory state?

[00:16:10] Jonathan Adler: Sure. So, so the idea about behind the nondelegation doctrine is that, uh, the constitution in allocating power among the, the branches, um, meant that certain branches can, can exercise their own sort of power, but not others. So article one says that all legislative powers herein granted are vested in a legislature. And the idea is that those fundamentally legislative powers are the legislatures to exercise and can't be given away. Um, and the idea is, is that at some point when Congress enacts a law that gives policy-making discretion to the executive branch, at some point that, uh, shifts from being the mere execution or administration of a legislatively enacted law, to making the sorts of policy judgements that are inherently legislative in

[00:17:00] nature. I phrased it that way, uh-uh, to highlight the fact that the problem for advocates of the nondelegation doctrine has always been identifying where that line is, uh, how much delegation is too much. The Supreme Court has only invalidated two laws in one ye-, in the same year under, uh, this rationale. And since then, one, ei-either one believes that Congress has learned to draft statutes more narrowly, uh, or that the court has, um, uh, decided that it would give, give the legislature, uh, uh, relatively free reign. Um, and so the current doctrine is that as long as Congress articulates an intelligible principle, um, for the agency action, the nondelegation doctrine is not violated.

Justice Gorsuch has argued that, uh, both that, uh, that test intelligible principle can't be rooted in the legislative text. And that secondly, it is too

[00:18:00] lenient. That, um, at least some statutes give to agencies the sort of power that can only be exercised, uh, properly by a legislature. And the sorts of distinctions he has drawn is that there's a difference between kind of deciding what will be legal versus illegal as a policy matter on the one hand, versus, um, determining whether, uh, uh, a legislatively-determined factual predicate has been met.

So it's one thing for, perhaps in this context, for Congress to say, "You know, EPA, uh, regulate things that are dangerous, defined as follows," and then EPA determines the scientific questions of, "Well, what substances meet that threshold?" That's different from giving EPA broad authority to determine what's harmful, uh, in the first place. Um, and beginning in the Gundy dissent, and, and again, in, in the O-OSHA case, he's expressed the view that this, um, is what the court should do.

[00:19:00] Um, and as, as Lisa noted, he's also said that in a case like this, or at least what he said in the OSHA case was, um, either the agency is exercising too much autho-, you know, more authority than Congress granted, or the agency is exercising unconstitutional authority because Congress couldn't delegate that much.

Um, and so that's what he's been arguing for. And certainly if that were adopted, um, uh, agencies would have a harder time, um, justifying some of the sorts of regulations that agencies

issue. And one would hope that would result in Congress becoming more proactive about, um, legislating more regularly and more specifically, a-although the empirical evidence on whether Congress would respond that way is, is definitely mixed.

[00:19:49] Jeffrey Rosen: Lisa, Johnson mentioned it was only, uh, two cases that the Supreme Court invoked the nondelegation doctrine in, and that was in

[00:20:00] 1935, uh, with the Schechter Poultry case. And that's why, uh, critics of Justice Gorsuch's efforts have said that this would resurrect a doctrine that's been dormant since the new deal and the entire new deal constitutional revolution was thought to repudiate this doctrine. Uh, do you agree with that analysis? Do you think the nondelegation doctrine should be resurrected or do you agree with Justice Kagan, that it would mean the end of the regulatory state?

[00:20:26] Lisa Heinzerling: Yeah. I think it would be huge if the Supreme Court starts to enforce the nondelegation doctrine with the kind of rigor Justice Gorsuch suggested in Gundy. And actually, five conservative justices have signaled that they are prepared to start doing that. And we should, we should realize, when the justices start down the road, they don't have to do it all at once. I'm just gonna compare one other area of constitutional law relevant to agencies where the Supreme Court over the years

[00:21:00] has become, uh, more and more aggressive about striking down the basic structures of administrative agencies, requiring that their personnel be closer to the president, even some of their previously career personnel, be closer to the political apparatus. And they've done that in a series of cases, sort of incrementally, s-, each time saying, "We're not ... We're only doing this case based on these facts." But right now it think there's a good case to be made that the Supreme Court is prepared really to remake the structure of government in the sense of who is in charge? Are they political appointees accountable to the president, or can Congress make different choices about independence? I think that's the road we're on with respect to nondelegation. As I say, five justices have said they are dissatisfied with the current state of the nondelegation doctrine. They don't like the fact that the nondelegation doctrine has been wielded to invalidate a statute only

[00:22:00] twice in the court's history, almost 100 years ago. Uh, they don't like the power that administrative agencies have. They've made that clear over and over again. And the problem, the fear I have about this new boldness, is that most of the agencies operate under quite broad directions, often vague directions from Congress. That's partly by design, because one reason Congress gives authority to agencies like the, uh, EPA, and the FDA, and the Occupational Safety and Health Administration, is that it can't solve all of those q-quite technical, scientifically complicated issues itself. And it hands over authority to an administrative agency. It also can't know the time it acts, what kinds of problems are gonna arise? Is climate change gonna become a big deal, right? Is there gonna be a pandemic in 2020 and 2022? That

[00:23:00] means that we're worried about evictions that lead, um, to more, uh, COVID infections. And so the stakes are enormous for any policy that Congress wants to design that takes on big problems, but that is sort of humble about whether Congress knows about which problems will arise and what the solutions will be. And if the Supreme Court starts to enforce the

nondelegation doctrine in the way that some of the justices have su-suggested, it will be, and I think this is just perverse, it will be the important problems that Congress can't take on. The important problems that Congress is constitutionally obliged to speak to in unambiguous terms. Those are the very problems that sort of we want, would like Congress to take on more. And they're also the very problems that sometimes, uh, uh, the kind of, kind of crystal and text that the, that the court

[00:24:00] seems to be looking for, is really hard to achieve by Congress.

[00:24:05] Jeffrey Rosen: Well, we've gotten to the heart of the matter, and I can't imagine two people better suited to debate whether or not the nondelegation doctrine should be resurrected. So Jonathan, Lisa has just given some arguments for why she thinks it shouldn't. Uh, please, tell our listeners, uh, whether and if you think it should.

[00:24:22] Jonathan Adler: Well, I mean, I think, I think the, the last point that Lisa noted, I think is an argument for, um, enforcing some constraint on the ability of agencies to, as I put it, pour new wine out of old bottles. You know, issues like climate change are the big questions. Uh, climate change is an incredibly important question. It's a problem we should be addressing more proactively than we are. Uh, I also think that given that it's that sort of problem, it's the sort of problem that Congress needs to speak to. Um, you know, they, they get, they get the fancy offices and the cute little la-lapel pins because they're legislators and it's their

[00:25:00] obligation to legislate. And I think the problem with the combination of broad delegation wi-, and broad deference to agencies, has meant that members of Congress get to not do their job. They get to, um, take credit for things that go right and cast blame for things that go wrong without ever having to do the work themselves.

I think there's an argument in the context of short fuse emergencies that sometimes, uh, authority has to be delegated, um, where agencies can work quickly. And we see emergency statutes that authorize that sort of thing. Um, IEEPA is being used right now to, um, deal with sanctions, uh, against, uh, Russia for what's o-occurring in Ukraine, for example, and perhaps Congress doesn't have the time to act this week in response to Russia's invasion of Ukraine. Um, but climate change is not something on that sort of a fuse. And even in the context of something like COVID, we saw with the CDC eviction moratorium. Congress did have time to act. It temp-, it at one point in time did,

[00:26:00] uh, extend a moratorium on some evictions through legislation. It did have time to authorize special funding to deal with dislocation as a result of, of COVID. It did have time to take other measures and it didn't do the things that the CDC wanted to do, or that OSHA wanted to do.

I think that climate change, it's reasonable to raise a similar sort of concern. You know, where are members of Congress? Why aren't they forced to legislate on this? And I'll say, you know, I, I take seriously the notion that, um, we are at an age of legislative dysfunction. Um, I've, I've done some work with Chris Walker at Ohio State trying to explore ways to incentivize Congress to be a more active legislator. Um, but I think that, you know, the same thing that motivates

exploring how to get Congress to be more proactive about problems is also a reason why we should be wary of saying the big problems get to be made by folks who aren't elected, um, uh, themselves, um, who don't have to justify their actions in the same ways, um, because these are

[00:27:00] important problems that as a, as a democratic nation, we should resolve democratically.

[00:27:05] Jeffrey Rosen: All right. Well, let's talk, uh, in particular about the effect of resurrecting the nondelegation doctrine on environmental law. Would be, Lisa, you were the lead author of the winning briefs in Massachusetts versus EPA, where the Supreme Court held that the Clean Air Act does give the EPA the authority to regulate greenhouse gases. If the court rules against the EPA here, what would the consequences be for the future of the EPA's ability to regulate the greenhouse gas emissions and the environment more generally?

[00:27:35] Lisa Heinzerling: Well, the EPA has decided that Section 111 of the Clean Air Act is the best platform for regulating greenhouse gases, from not only power plants, but, uh, from other stationary sources as well. And, um, and power plants, as we've talked about, are a major source of the climate change problem in the United States.

[00:28:00] And so a limitation on that authority would, um, would be a very big deal. If that limitation came through the nondelegation doctrine, if the court said, uh, what the s-, again, a majority of the conservative justices seem to embrace, which is that Congress needs to speak clearly on major questions, then the sky's the limit really, as far as forwarding, uh, not only regulation under the Clean Air Act, but under e-environmental regulation under other statutes. And I will say beyond the environmental context as well, because the nondelegation doctrine is a kind of all purpose cro-crosscutting device for undoing Congress' statutes, if the Supreme Court thinks Congress gave up too much of its power.

And I, I will say as well, one thing that we haven't talked about in this context is that it's not just a matter of

[00:29:00] saying, "Well, Congress, you should make the call." I think everybody thinks that's proba-, would probably be a good thing. We'd like Congress to be more active, sure. As a matter of policy. Great. But the stakes here are, is Congress gonna make, uh, the calls on environmental policy and decide who makes environmental policy, or is it the Supreme Court? As far as democratic accountability is earned, I'd rather go with the combination of Congress and the agencies than with the Supreme Court. And with the Supreme Court making constitutional judgements about the regulatory state based on nothing more substantial than the Justice's own views of what issues are important.

And we saw that in the oral argument yesterday, I was so struck by this. I mean, I, I have thought that the justices' proposals to wield the nondelegation principle on the basis

[00:30:00] of the importance of the issues was entirely subjective and could give vent to the justices' political views rather than to any kind of legal principle. But I was even more struck, uh, yesterday's arguments when the justices couldn't even agree, it seemed, whether the issue before them was important or not. That the more liberal justices, and certainly the United States, uh,

pointed out that the Obama era rule on this point, the Clean Power Plan, uh, never took effect. And yet its limits were satisfied a decade early without, it appears, anybody breaking a sweat.

And so did that, did that rule address a major question? Not if you look at, at the coms-, the factors that the Supreme Court has previously looked at. And so I think it's, it's just a very dangerous,

[00:31:00] uh, power for the court to wield, to say, "Not only do we disagree with your statutory judgment, y-, but you can't even make that judgment if we think the issue is important enough."

[00:31:11] Jeffrey Rosen: Jonathan, what's your response to Lisa's argument first, that ruling against the EPA on nondelegation grounds would really hamper its ability to regulate the environment in the future, and that it would shift power from, uh, Congress and the agencies to the court to decide what's important, and the justices are not well equipped to make those decisions?

[00:31:35] Jonathan Adler: So I, I, I think I'm not ... I agree with, with Lisa that if the court were to say that Congress could not delegate anything remotely like this power to the EPA, that that would, uh, compromise the EPA's ability to deal with environmental issues, and in particular, Congress as well, right? Because if that was the basis of the court's decision, then it wouldn't be clear what Congress could do to fix it. Um, in

[00:32:00] this case, I don't think that that's where the court's gonna go. I, I, I, I, I'm not sure that even Justice Gorsuch is gonna go, uh, in that direction in this case. I think what we're more likely to see in, in an outcome that I would defend if the court gets to the merits, uh, um, is that Congress didn't authorize this type of regulation, and this is the type of regulation that Congress has to authorize, um, because it's different in type than what Congress, uh, had in fact authorized.

Uh, and the idea here, whether justified on nondelegation doctrine grounds or not would be that when an agency, uh, expands its authority into a new area, an area that hadn't been anticipated, or that operates in a different way, in this case, shifting from facility specific, uh, pollution control measures, or efficiency improvements to systemwide regulation of electricity production as a system, that's the sort of qualitative change that we expect the

[00:33:00] legislature to weigh in upon, and to ensure that it, it has a-a proper democratic warrant. And then if it, the court gives a ruling on it like that, well, then there is clear direction to Congress, right? That Congress can expressly authorize that sort of measure, as it has in some other context, right? So Congress has, for example, authorized the use of things like cap and trade, uh, in the context of acid rate emissions and the like. It has authorized, uh, regulation for cross-state air pollution in ways that allow, uh, for trading and things like that.

So Congress has done that, uh, has, uh, knows how to do it, and has been able to do it. And I think that's sort of ruling while perhaps motivated by nondelegation concerns, uh, can also be justified just in terms of, um, statutory interpretation, given a constitutional baseline of agencies only having that power which Congress gave them. So, you know, and this is the way that, that I've written about this issue. Um, you know, uh, the executive branch, at least for domestic matters,

[00:34:00] uh, has those powers that result from legislation that gives the executive branch legal authority to execute. And so an agency like the EPA only has that authority that Congress gave.

And while on the one hand we recognize that no delegation of power is free of ambiguity, or fully complete, or, or fully, um, informed by what will happen in the future, we also recognize that no delegation is infinitely elastic and that there are qualitative changes in the nature of regulatory authority that do require the delegatee, in this case, the agency, going back to the source of authority and saying, "Please, may we do this as well?" Um, you know, that's how we understand fiduciary and agent, and principal agent relationships in a wide range of legal contexts. A-and I've suggested that we should understand something similar here and that this case is the sort of case that raises, uh, that sort of concern. Um, but that, I don't think there's an,

[00:35:00] inherently a constitutional problem with the idea of Congress giving E-EPA the authority to, um, uh, adopt these sorts of rules, uh, to deal with greenhouse gas emissions.

[00:35:11] Jeffrey Rosen: Lisa, what's your response to Jonathan's claim that resurrecting the nondelegation doctrine wouldn't be a blank check to make decisions about what the court thinks are important? Um, and what did you make of Justice Alito's comment in the oral argument? He questioned whether the Clean Air Act gives you the authority to set industrial policy and balance jobs, economic impact, and the potentially catastrophic effects of climate change. And then he added, which some people believe is a matter of civilizational survival, some commentators thought that that was sort of expressing climate change skepticism. And what is it about resurrecting nondelegation that you, you think would empower justices to basically consult their own beliefs about what issues are important or not?

[00:35:53] Lisa Heinzerling: I find something, and I, I understand Jonathan is saying, well, if, if they rule on this on

[00:36:00] statutory grounds, if they say, "You don't have the authority to do this," even if they're sort of inspired in part by constitutional ideas, then that leaves it with Congress. It's the-, it's then in their court, so to speak, and they can, they can decide that they will regulate. But just think about what that puts the court in the position of. The court is basically saying, "Look, unless you speak so that we can hear you, speak loudly, Congress, speak in specific words, speak the way you did over there and not here," that is a very disrespectful position, in my view, for the court to be in with respect to Congress. And so it strikes me that even if what the court does is say, well, for example, "Because of the nature of the problem we see the agency solving here, we need to have a statement that satisfies our requirements for clarity before we'll allow that."Uh, that is to say the court isn't actually gonna

[00:37:00] bother to read the statute entirely carefully before it makes that judgment. It'll sort of have an impulse, almost a kind of, um, of a physical reaction to what the agency did. And then that physical reaction will, will color its whole interpretation. And that just strikes me as exactly backwards that Congress makes judgements about what problems are important to take on, not the Supreme Court, and that the, the Supreme Court's doing that just allows them, again, to just give vent to all of their political priors.

So yesterday we had the chief justice even saying, "Well, um, what we ask is, is it surprising? Is it surprising [laughs] that CDC is limiting evictions? Is it surprising that EPA is regulating, uh, beyond the physical source?" Well, I don't know if it's surprising to you Chief

[00:38:00] Justice Roberts, but it wasn't entirely surprising to me in a pandemic, or in the era of climate change, that e-, these agencies would look at their statutory authority, again, given by Congress, could be taken away from, by Congress. Look at their statutory authorities and let's say, say, "Let's see what we can do about this right now." So I think surprising is maybe even more jolting as a clearly subjective test than importance, but I think they'll both lead to the same place with these, the justices. Um, basically determining the limits are of important policies.

On Justice Alito's questioning, uh, I, on the one hand I found it kind of horrifying. On the other hand, I found it kind of hilarious. And he seemed to be sort of taken aback that the EPA was acting under a statute that required them to wait, what he called, incommensurables. Right?

[00:39:00] You have to look at climate, you have to look at costs, and that, there was something really sort of untethered about that, that the, it'd mean the agency would have so much ability to weigh those values. Well, welcome to statutes. I mean, I, I don't understand what's different about that than a thousand other statutes the Supreme Court itself has weighed in on in the last, um, uh, the last years. And so I was surprised that Justice Alito had that, uh, response.

I also took, I wasn't sure, you know, one looks at these, um, transcripts and listens to these arguments with such a fine ear and, and can be so defensive and kind of ready to criticize. I wasn't sure what I was doing, but when I heard Justice Alito, you know, said some thing, like, "Assuming that what they say about climate change is correct," something like that, it did feel a little off to me. Uh, and so I, I did, uh, I did wonder a little

[00:40:00] bit about that. He also then went on to say, "Well, with climate change, it's so catastrophic that the agency will do anything to deal with it." Again, sort of getting it backwards in the sense, sort of almost faulting the agency prospectively for wanting to do everything it can against, uh, global crisis.

[00:40:22] Jeffrey Rosen: Jonathan, lots of, uh, uh-uh, important points Lisa just made, including it would be great if Congress would regulate more specifically, but they don't, and empowering justices to decide what's important will allow them to give their own political priors, uh, the first impulse, and that will lead to lots of, uh, subjectivity, uh, your response.

[00:40:41] Jonathan Adler: Well, so th-there's, there's certainly a risk that justices will allow their own priors to influence, uh, their judging and no one's gonna claim that that doesn't happen. Um, and, uh, I, I, while I've supported the decisions in some of the recent cases where major questions ideas were clearly in-influential,

[00:41:00] I would also agree with a lot of the criticisms that have been made on the opinions that issued in say the CDC eviction moratorium case, and, and the OSHA case, that the decisions left something to be desired in terms of justifying the outcomes. So, you know, I don't, I don't wanna, not knowing what the, the court yet is going to do, I'm not gonna defend precisely the way they do it.

M-m-, but my point is is that if we, if we view this question as one, first and foremost, as one of statutory interpretation, of against a baseline in which the agencies don't have power and have only been given power by Congress, that just like we in the context of a principal agent relationship would interpret the contract to figure out to what extent did the principal authorize the agent to act on his or her behalf and with what sorts of authority, we interpret statutes in light of that as well. And we do expect the principal, uh, to speak clearly, and we hold the principal, or at least should hold the principal accountable, uh, for failing to update or revise the

[00:42:00] instructions, um, when circumstances warrant.

And, and I think that's the approach we should, uh, uh, take here. I don't think that approach is the court usurping the legislature's role or the agency's role. And I don't think that approach requires inserting, uh, the justices political priors. I think that approach focuses on things that courts generally are good at, which is interpreting statutes, um, and figuring out what sort of authority, uh, they do or do not convey. And, uh, I don't think that that's authority that should be lightly transferred to, uh, agencies. And in a case like this, I think there is a strong argument that the sort of authority that the EPA asserted in the Clean Power Plan, um, that the Biden administration would like to exercise here, while I think it makes sense as a policy matter, um, was not in fact what Congress authorized 22 years ago, the last time it bothered to meaningfully revise the Clean Air Act. And that if we're

[00:43:00] going to have this new wine, we need to come from a new bottle, um, not an old bottle that was tailored to, uh, something else.

[00:43:08] Jeffrey Rosen: Lisa, your response to Jonathan's claim that the court might resurrect the nondelegation doctrine more incrementally. And another beat about the history of this debate, it really wasn't all that many years that the regulatory state was up and running before the Supreme Court started to strike it down under the nondelegation doctrine. And it provoked a constitutional revolution and, uh, threats of court packing and a, a, a backtracking by, by the, the court. What response might we see this time around if the court were to resurrect the nondelegation doctrine and begin to put serious limits on the regulatory state that have been dormant since the 1930s?

[00:43:46] Lisa Heinzerling: Well, I think it's also worth mentioning, just if we're talking about history, that at the time of the, of the kind of constitutional crisis, if you will, in the 1930s, when the Supreme Court was striking down all of the new deal

[00:44:00] legislation, and one of the grounds were this, this doctrine of nondelegation that we talked about, that it was in a period where the Supreme Court was deeply suspicious of, uh, legislative du-, judgements about how to deal with social problems. And there, of course, the main doctrine that was deployed was the doctrine of su-substantive due process, or Lochner, after the case, um, that's most famous in the area. And the idea was that the Supreme Court was, was, was very suspicious of state or federal laws that, um, purported to go beyond judge-made common law in regulating the workplace and, and other problems, um, that were facing the country, um, in those days.

There is a some, I-I've said this in print and I'll stick by it, I think there's some, uh, similarities between that historical period and that doctrine of substantive due

[00:45:00] process, and what the conservative justices have proposed to begin as their demolition project, um, today, which is that their view about regulation, uh, um, and the constitution, is that the principles that they espouse about Congress not giving legislative authority and about Congress deciding, uh, important questions, those seem to cut only in one direction. They seem to cut only against when an agency is regulating and not when it's deregulating. And that has a very Lochnerian feel to me.

So just to begin, you talked, uh, Jeff, about history. And so I think the history is even more revealing than we might think, that this feels like a moment, like that moment where the court is in a period where it is really quite, quite, uh, resistant to large forces, I think, underway in the, in the country as a whole. What might happen if the court sets down this, uh,

[00:46:00] path? I, I, actually my best answer is, I don't know. I think it's a very bleak place to be in, uh, for people who are worried about our major problems, because we've been talking a lot about old statutes and new wine in old bottles. Although if it's an old bottle, it might have really, really good old wine in it, and nevertheless-

[00:46:24] Jeffrey Rosen: [laughs]

[00:46:24] Lisa Heinzerling: ... be serviceable today. Isn't that sort of the best? So I don't quite get the metaphor, Jonathan, but the, but they, I don't know what will happen, but it is a very bleak scenario because of this. It's not just about old statutes. It's about new statutes too. Remember the Affordable Care Act, remember how Chief Justice Roberts supposedly saved the Affordable Ca-Care Act by holding that federal subsidies were available, um, even on federal exchanges, despite four words in the statute that suggested otherwise, right?

That, that, that [00:47:00] was a brand new statute. That wasn't an old statute. That wasn't new authority under an old statute. That was a brand new consequential hard one statute, and they applied the same doctrine to it. So my worry is not only about the Clean Air Act and all the other laws that might get narrowed because of the Supreme Court's, um, aggressiveness, but about the new statutes going, coming down the road. If the Supreme Court is gonna suggest that statutory ambiguity on important questions is either unconstitutional or means that the agency doesn't have power to address them, the new statutes are gonna fall by the boards too, and that worries me.

[00:47:37] Jeffrey Rosen: Jonathan, in addition to defending your oenophilic analogy, I've just looked up that word, and its pronunciation, um, tell us what you think of Lisa's powerful historical claim that this would represent a historic shift in the court's attitude toward regulation. And just to put the thesis on the table, um, which Lisa and others have made, there have been a series of

[00:48:00] attitudes toward federal power over the history of America, the, the founding Republic, the reconstruction Republic. Ever since the new deal, we've had the new deal Republic where the court has been generous about regulatory power. And the claim is that this would

represent a similarly historic shift in imposing a deregulatory attitude, um, limits of Congress's regulatory power, um, that we really haven't seen since, uh, before the progressive era.

[00:48:26] Jonathan Adler: Well, I think whether or not it, it produces a deregulatory shift, I think, is in part a f-function of what statutes we're talking about. So let's just take the Affordable Care Act case that Lisa mentioned, King versus Burwell. In that case, the chief justice invoked the major questions doctrine to say that the decision about whether or not tax credits would be available in federal exchanges is not a question Congress gave to the IRS to decide. That it was incongruous to think that Congress wanted the IRS to have that broad authority over the future of health insurance policy. And rather the court would have to

[00:49:00] do the best it could to interpret the, the statutory language to decide what did, uh, Congress authorize or not authorize. And while that wasn't a question about delegation of agency power, it was an equally momentous question about drawing money from the treasury because the, the tax credits in question were refundable.

So it was a question of had Congress authorized, uh, money from the federal fisc, which only Congress can authorize. And the court concluded, yes, it did. Um, and you know, the sort of inquiry in any sorts of cases is the same sort of thing. Only Congress can authorize agencies to exercise regulatory power in the domestic sphere. We can have an interesting debate about whether or not this same principle applies in the national security or foreign affairs context, but we, we know in the domestic context, federal agencies, whether it's the EPA or FDA or whatever else, only have that authority that Congress gave them. And while that certainly means that our baseline is they don't have authority, if Congress enacts clear statutes authorizing powers to address

[00:50:00] particular sorts of problems, those agencies can act to address those problems. They can get old wine out of old bottles and they can continue to get old wine out of old bottles, and it may be very good wine.

Uh, but if we want that new wine, if we want the regulatory equivalent of Beaujolais Nouveau or something, uh, Congress has to say, "Yes, we recognize this as a problem, and we're gonna authorize, uh, that too." I don't think that's anything like what we've seen advocated by some, and what we've seen in our history of saying legislatures can't act. It's rather saying that the people that are elected must legislate first, because that is their job. And I, I share the concerns that many people have that our current legislators have perhaps forgotten how to do that. Uh, but I'm very wary of the idea that that failure should excuse us from imposing constitutional constraints on the authority of other branches. And I should say, you know, this is not just about environmental policy. It's about a wide range of policies that cut

[00:51:00] in a wide range of ideological directions.

Think about immigration. There we've seen administrations, the, the former presidents, uh, presidential administration is one of them, that tried to assert really broad authority to just remake immigration policy at will without Congress speaking. Um, I think the same sorts of concerns that I have about what, what's occurring in this case can equally apply in a context like

that where the political valence cuts in the other direction. Um, you know, I think the, the, the underlying view that at least I would defend is that we sh-, we can, should, and indeed must expect our legislators to do the hard job of legislating. Uh, and when it's a big problem, like climate change, that's when we particularly need them to step up to the plate. And, you know, allowing broad delegations combined with deference to let agencies invent new approaches to, to emerging problems, lets legislators off the hook. Um, it lets them, um, evade, accountability and responsibility, uh, for what we elect them to do. And, and,

[00:52:00] and we should be concerned about that, whatever the policy specifics and whether the policies are ones we would support or oppose.

[00:52:07] Jeffrey Rosen: Uh, Lisa, both of you have mentioned that resurrecting the nondelegation doctrine would, would sweep more broadly than environmental policy. Jonathan just mentioned immigration. Uh, tell us your vision of the kinds of regulatory action that will be called into question, if, if you're right, that there are five justices willing to go down this path.

[00:52:26] Lisa Heinzerling: Well, if, as I suspect will happen, uh, the conservative justices, uh, align, um, in an understanding of nondelegation, that at least makes Congress make the important questions. Then I guess I, I, anytime there's a situation in which there is what the court regards as an important question and Congress hasn't explicitly, and specifically, those are Justice Kavanaugh's words in a separate opinion after the Gundy case,

[00:53:00] explicitly and specifically decided that question, then that power would be invalidated. And as I say, that would be under old statutes and under news statutes. And so that would cut across, um, uh, environmental health and safety, financial regulation, uh, all sorts of different areas could be affected by that. And here's the justices kind of acing the hole on this point. I don't think it's as kind of, um, uh, uh-uh, in a sense bipartisan as Jonathan was suggesting, in the sense, I don't think that it will cut equally against democratic and Republican administrations.

Our democratic re-, administrations in recent years have shown greater willingness to take on big problems like climate change, like the, the, um, what should be done in the aftermath of the financial crisis of 2008, for example. And, uh, and they are the ones who will be hampered by this

[00:54:00] kind of decision making by the Supreme Court, because the Supreme Court clearly has its eyes, as, uh, I said before, on agencies wielding regulatory power. When they step back from exercising regulatory power, the justices go quiet.

To give you just one example of this, if I may, but I think it's a telling one, is the difference between the conservative justices' approach in Massachusetts versus EPA, and their approach in, uh, both o-other decided climate cases and, and maybe their approach in the case argued yesterday, which is in Massachusetts versus EPA. The conservative justices dissented from the idea that EPA had the regulatory authority to address greenhouse gases under the Clean Air Act.

And what they said is EPA, at that point under the George W. Bush administration, had said, "We don't have the authority and we wouldn't **exercise it if we did." And Justice Scalia wrote for four justices and said,**

[00:55:00] "Well, that should get deference. They, they are the expert agency. They were saying that this doesn't cover greenhouse gases. And so they should have actually not only won, but actually gotten deference for their viewpoint." Comes around to the Obama administration. The Obama administration decides to regulate, uh, greenhouse gases from particular sources, and the Supreme Court, Justice Scalia writing for the majority, says, "Oh no, you, we, we don't, we don't think that you answering a question of this significance, uh, gives you ... Y-y-you don't have the authority to answer a question of this same significance." And the difference between those two, of course, is that in one case, EPA wanted to do something about climate change, and the other, it didn't wanna do something. And so that, this doctrine has this asymmetry to it, uh, that is, that is quite dangerous.

[00:55:53] Jeffrey Rosen: Many thanks for that. Uh, Jonathan, your response to Lisa's claim, both that, uh, resurrecting the nondelegation [00:56:00] doctrine would sweep broadly across, uh, environmental health and safety and, uh, other regulations. And that it has a political valence that the court is willing to defer to agencies refusal to regulate, but **not to agencies decisions to regulate, and this would hurt Democrats and help Republicans.**

[00:56:19] Jonathan Adler: So, t-to start, I'd say, I, I don't think that the doctrine needs to have that valance at all. And I think Massachusetts versus EPA illustrates the point in, in this regard. Um, while I have my differences about that opinion, which Lisa and I have debated in the long past, uh, I think the court was correct not to defer to the agency on that point, because it was the sort of major question that was for Congress to make and not the agency to make. And so then the question was could the, the Clean Air Act, or should the Clean Air Act be interpreted to apply to greenhouse gases, and, and Lisa wrote a very compelling brief that convinced five justices it should be.

But I think on the question of, is this the agency's choice? I think on that point, the court was exactly correct.

[00:57:00] It was the sort of question that we expect the legislature to have answered. And again, we can agree or disagree about whether, uh, the court correctly interpreted the act, but that's what it should have done in that case. And I think that should, like King versus Burwell shows that the doctrine need not have that valence. Whether individual justices are pure in their ability to apply the doctrine neutrally, is, is a separate question. And I have no problem saying, um, that on that point and on some other parts of his dissent, um, you know, Scalia's Massachusetts versus EPA dissent was far from, uh, his most persuasive opinion.

Um, in terms of what I think this sort of approach would mean going forward, I think, and I use the old wine in, from new bottles, uh, line, because I think that illustrates the sort of context where we would expect this to have the most bite. So for example, uh, Brett Kavanaugh, when he was a judge on the DC circuit, wrote a dissent along these lines, uh, in the case involving the FCC's open internet order, what we often refer to as net neutrality. And the point he made was

[00:58:00] the statutory language was written at a time when no one could even have conceived of an internet, let alone whether companies might throttle Netflix or whatever else was at issue. Um, and the idea that this sort of authority was delegated was just not conceivable. And the mismatch there was a statute written at a given time with a given understanding about the nature of the world and what sorts of problems needed to be addressed, and a new problem.

I think that's parallel to, to at least the petitioner's argument here in West Virginia versus EPA. And I think we can see that in some other cases, contexts where the court has, frankly, struggled with how, what to do with old statutes and new problems. Uh, we see this a lot in cases that involve, uh, cell phone technology, uh, that involve the fact that we don't bank anymore by walking into a bank and giving an envelope. We do it on our phone and maybe it's with Bitcoin or whatever else. I think it's fair to say in those sorts of new contexts, um, applying old statutes, um, literally in those contexts, can be

[00:59:00] incongruous, and allowing the agencies to effectively update or rewrite those statutes divests the legislature of its core responsibility of ensuring that our statutes are sufficiently up to date to address contemporary problems in a way that's consistent with our values.

And I think done properly, that's where this sort of doctrine would have the greatest bite. And hopefully it would encourage legislators to take laws that haven't been updated in 20, 30, 40, 50 years, and recognize that they need to be my modified to address the fact that the world is different than it was when we had six telephone channels, uh, and, and, and, um, you know, had to bank on paper as opposed to, uh, with our phones.

[00:59:43] Jeffrey Rosen: Well, it is time for closing thoughts in this wonderful discussion. Both of you have, uh, achieved a difficult task, which is to take this highly technical case and help our listeners understand the significant and important constitutional stakes. Uh, so I'll just ask you to [01:00:00] sum up in a few words, uh, what those stakes are and, uh, Lisa, the first, uh, thoughts are to you, why is the EPA case important and why should our listeners care about it?

[01:00:12] Lisa Heinzerling: Climate change is an enormous threat to all of us, and the EPA is trying to do something [laughs] about it. And the Supreme Court is considering a case that might severely limit its authority. The best section it thinks it has, the best law it has to do something about climate change. And so I worry from the perspective of climate change. And then as we've talked about, if the court rules quite broadly about these other issues, about statutory interpretation and constitutional law, then that could be, pave the way for undoing a lot of other important work by agencies.

[01:00:53] Jeffrey Rosen: Jonathan, the last word is to you, why is the West Virginia versus EPA case important and why should our listeners care about it?

[01:01:00] Jonathan Adler: [01:01:00] Well, I, I agree with Lisa in part. Uh, climate change is an important problem. It is something that we need to address more effectively and proactively and productively, uh, than we have thus far. Uh, but the legal question in this case is really whether or not that's the authority that Congress has given to the EPA, or whether or not we need

legislation that more directly focuses, uh, on the nature of this problem. And I think when one looks at the statute, uh, there's a strong argument that the sorts of measures that would be most effective to deal with climate change are not the sorts of measures that Congress has authorized. And that in a constitutional Republic, we should be able to expect that the legislature will give agencies the proper tools to deal with particular problems. And so while we have a po-, a serious policy concern of issue in this case, we also have a serious legal concern that relates to the structure of our government and the fact that the core legislative power sits in the legislature, not in the hands of agencies.

[01:01:57] Jeffrey Rosen: Thank you so much, Lisa Heinzerling and [01:02:00] Jonathan Adler, for, uh, substantive, civil and, uh, riveting debate about a technical but deeply important issue of constitutional law. You've spread a lot of light and helped educate We the People listeners. And on behalf of all of them, I'm so grateful. Lisa, Jonathan, thank you so much for joining.

[01:02:18] Jonathan Adler: Great to be here.

[01:02:18] Lisa Heinzerling: Thanks for having us.

[01:02:25] Jeffrey Rosen: Today's show was engineer by Melody Rowell and engineered by Greg Scheckler. Research was provided by Kevin Closs, Ruben Aguirre, Sam Desai, and Lana Ulrich. Please rate, review, and subscribe to We the People on Apple Podcasts and recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional illumination and debate. And always remember, friends, that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the dedication, and lifelong learning of people like you from across the country who are inspired by [01:03:00] our nonpartisan mission of constitutional education and debate. To show your support of the mission, please consider a gift of $5, $10, or more. Please go to constitutioncenter.org/wethepeople, that's constitutioncenter.org/wethepeople, and donate what you can. Thanks so much for engaging with us, and thank you for educating yourself about the constitution. On behalf of the National Constitution Center, I'm Jeffrey Rosen.