Last Thursday, the Supreme Court struck down the CDC eviction moratorium in the *Alabama Association of Realtors* case. The case may seem far removed from environmental law, but it has some troubling implications for future EPA regulatory initiatives.

The process used by the Supreme Court to intervene is as significant as the ruling itself. This ruling is an example of what Court watchers call the shadow docket. It used to be that the Supreme Court's most important rulings were decided after full briefing, oral argument in open court, and thorough deliberation by the Justices. Today, however, the Court often reaches out to decide major issues when one of the parties requests "emergency" relief from a lower court ruling. These rulings are issued quickly, without oral argument, and without significant deliberation by the Justices.

The Court has never explained its shift in procedure. One possible reason for short-cutting the normal litigation process could be that the Court is more homogenous, leaving less reason for dialogue. Another reason may be a desire to seize greater control over the lower courts, which are less homogenous and therefore distrusted by the Court's majority. In a highly polarized world, there may seem to be fewer gray areas requiring serious analysis, and less reason to allow important issues to grind their way through the litigation process. The shadow docket allows the Court to intervene in governance on a larger scale and more rapid pace, keeping it relevant to the daily headlines.

Cases involving major regulations by EPA or other agencies are complex, requiring immersion in complex statutes and voluminous regulatory records. The Court can only give a few of those cases full consideration. Because of the shadow docket, however, it can intervene far more frequently. With a conservative majority, that will often mean snap judgments to block "overreaching" environmental regulations. With EPA and other agencies poised to embark on major regulatory programs, the shadow docket is a looming threat.

The Court's reasoning in the moratorium case is also noteworthy. In issuing the moratorium, the government relied on broad statutory language, which authorized "such regulations are necessary" to prevent communicable disease from spreading across state lines. The Court argued that this authority had never been used for anything nearly as sweeping as the eviction moratorium, and that the following sentence in the statute seemed to contemplate much more traditional public health measures.

Moreover, the Court said, “even if the text were ambiguous, the sheer scope of the CDC’s claimed authority under §361(a) would counsel against the Government’s interpretation.” An ambiguous statute would not be enough basis for such sweeping authority, the Court said. “We expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’” The Court closes by saying that “if a federally imposed eviction moratorium is to continue, Congress must specifically authorize it.” This is a rather striking affirmation of what has been called the major questions doctrine.

What is a question of “vast economic and political significance”? The answer seems to be somewhat in the eyes of the beholder. Opponents of environmental regulations such as Obama’s Clean Power Plan have been quick to invoke this doctrine and will now undoubtedly cite *Alabama Realtors* as authority.

It’s not surprising that the Court struck down the eviction moratorium. The Court had already signaled its views earlier in the litigation. The public health rationale for the regulation may have been legitimate, but the regulation seemed as much aimed at the perilous economic plight of renters as at their health risks. And the Court is right that the moratorium went far beyond any previous use of the statute. In extending the moratorium, President Biden as much as admitted that its legal basis was dicey, and his own lawyers seemed to have been unwilling to bless the effort.

Still, the tenor of the Court’s decision is disquieting. Whatever its fears about allowing agencies to decide matters of “vast economic and political significance,” the current majority certainly feel no hesitation about resolving those issues itself based on perfunctory consideration. What is worrisome is that it now has become routine for the Court to decide cases of enormous societal significance on the spur of the moment. In assessing the equities of the case, the burden on landlords weighed heavily on the majority, while risks to public health got only perfunctory mention. This is not a good sign for future environmental regulations, nor for the public interest.