In a Friday post, I sketched some thoughts about how the Supreme Court's vaccine mandate rulings might impact EPA's power to control carbon emissions. I think it's worth unpacking both the Court's opinions a little more and the issues at stake in a pending climate change case, West Virginia v. EPA.

The Court ruled in both cases on the principle that an agency can take action of "vast economic and political significance" only it Congress has plainly authorized it to do so. A majority held that OSHA did not have sufficiently clear authority for an economy-wide mandate , while a different majority held that HHS did have such authority in terms of healthcare workers.

The Court has never what factors control whether an action will be deemed to have vast economic and political significance. That leaves the Court a troubling amount of discretion over when to apply the doctrine. The sheer amount of money involved seems to be one factor. The political prominence of an issue seems to be another, although the Court hasn't articulated how it determines political prominence. It also seems to be relevant whether the agency has used the statutory power in question to take similar actions in the past, and whether those actions were significant. As to what constitutes "vast political significance," no one knows what that means, although you wouldn't go far wrong basing it on how strongly a rule has been denounced on Fox News.

The vaccine mandate cases, like an early case dealing with a CDC eviction moratorium, seem to rely on another factor that the Court hasn't really articulated: whether the action fits closely with the agency's basic mission or is trying to do something quite different. The Court clearly thought the CDC eviction moratorium was as much aimed at hardship to tenants as to public health. It also thought that the breadth of the OSHA vaccine mandate made it look like more of a public health measure than a workplace safety one.

The idea that agencies need especially clear authority for really important regulations is one that the Court's conservatives invented. There are some precursors in earlier opinions, but It has only recently emerged in its modern form. The Court dresses it up as an effort to return power to elected officials in Congress rather than unelected bureaucrats. That's something of a red herring, since normally major regulations only happen when the President wants them, as was true of the vaccine mandates. The Court has gestured toward some possible justifications for the rule but has never given anything like a coherent argument for it — which might be hard to do, given that the contours of the rule itself are so

unclear. In any event, the OSHA case in particular show the Court's willingness to use the rule even when the language of the statutory provision used by the agency seems clear on its face.

That brings us to the West Virginia case. Obama's Clean Power Plan required states to plan reductions to carbon emissions from power plants. EPA pollution rules nearly always require pollution control measures of one kind or another to be implemented at the polluting facility. The Clean Power Plan, however, also required states to shift generation away from facilities emitting large amounts of carbon toward lower-carbon or zero-carbon sources. The DC Circuit held that the statute does not preclude EPA from imposing such requirements. The core challenge to the Obama rule is that it involves a matter of "vast economic and political significance" and therefor required clear authorization from Congress. A key part of that argument is that the Plan steps outside the area of emissions regulation into regulation of sourcing for electricity. Electricity regulation isn't part of EPA's mission, and the choice between different types of generation is generally a matter for state rather than federal energy regulators. Thus, the argument continues, EPA has left the realm of emissions regulation for the realm of energy regulation.

The conventional wisdom is that Court will buy this argument, thereby killing off the Clean Power Plan. Normally, the Court wouldn't even review a case like this one, because EPA has yet to say what kind of rule it would propose to replace the Clean Power Plan. The eagerness of the Court to hear the case suggests that the conservative majority is chomping on the bit to strike down the Plan. For reasons I discuss in my previous post, I think the healthcare vaccination case improves EPA's odds a bit, but it still seems very unlikely EPA will be able to get the votes it needs from Chief Justice Roberts and Justice Kavanaugh, the two swing voters.

The real question at this point is probably not whether EPA would lose but how badly it will lose. The coal interests challenging EPA's power would also like the Court to restrict EPA to issuing guidelines rather than clear mandates to states, and they would like to keep EPA from considering cap-and-trade as an option. The Trump Administration argued on similar grounds that it could not consider emissions trading or even changes in the fuel mix at coal fired plants. What EPA and its supporters hope is that the Court's opinion only wipes out provisions requiring a shift of generation from an individual fossil fuel plant to cleaner power generators.

This matters because EPA has some other decent options even if the Clean Power Plans itself is struck down. Researchers at the environmental economics thinktank

Resources for the Future have delved into one such option. Their report considers the possibility of that coal-fired powerplants could switch to using a combination of coal and natural case ("co-firing"). They model possible variations on the rule. The simplest requirement would be that coal generators either use 20% natural gas with their coal or achieve equivalent results otherwise. That requirement would cut carbon emissions from the power sector by about half in 2030. The researches project that this could be done at a very modest cost ($13 per ton of carbon reduction). Hopefully, the low cost would persuade the Court not to consider such a requirement to present a question of vast economic and political significance. It might also strike the Court as more germane to the agency's core mission of emission regulation.

A really sweeping Supreme Court ruling in the West Virginia case might wipe out EPA's power to do anything at all to reduce emissions from the power sector — or even, in a worst-case scenario, limit its ability to regulation conventional pollutants. I think the Court's ruling in the West Virginia case makes the worst case scenario much less likely and improves the odds for a narrow enough ruling to allow EPA to impose co-firing. We may know more about this after the oral argument in the West Virginia case in a few weeks.