Opening Theme 0:08

Welcome to a Hard Look, the Administrative Law Review podcast from the Washington College of Law. We'll discuss how administrative law impacts your daily life from regulatory actions by agencies and the litigation over them to the balance of power among branches of the government. This is a hard look.

Host - Alexander Naum 0:38

Hello, and welcome. I hope you're enjoying your day to day we're currently recording on a partly cloudy fall day. My name is Alexander Nam and Anil, our Senior Technology editor and curator at this podcast. Joining me and hosting this episode is ALR is technology editor.

Guest Host - Eva Bogdewic 0:56

Hi everyone, its Eva.

Host - Alexander Naum 0:58

This episode touches on an important topic affecting both environmental and administrative law, initially enacted in 1967. The Clean Air Act is a federal statute that regulates all sources of air emissions within the United States, specifically allowing the Environmental Protection Agency also known as the EPA, to set national ambient air quality standards in order to protect the public health of the nation. In 2015, the Obama Administration released the Clean Power Plan, which included what are known as generation ships to steadily ship the US as energy production from coal natural gas to renewable sources of energy production, which include wind and solar power. This rule, however, never went into effect, as several states and plaintiffs challenged the rule in court. In 2019, the Trump administration rescinded the rule entirely and replaced it with a more lenient rule, also known as the affordable clean energy rule. This led to additional litigation leading to the DC Circuit vacating both the Trump administration's pull back of the Clean Power Plan and the replacement affordable clean energy rule. However, in the later administration, the Biden administration announced that it would not reinstate the Clean Power Plan and pursue other environmental policies. But the litigation did not end there, as West Virginia and other plaintiffs challenged the DC Circuit's decision in the Supreme Court, which will be the topic of today's discussion. The case also known as my surgeon at EPA was a monumental decision with implications affecting environmental policy in the broader power of federal agencies. Interestingly enough, one of our journals published works titled “Preference and administrative law”, written by D.A. Candeub, was cited in the court's opinion. To help us better understand this case and its implications. We are honored to have Professor William Snape joining us Professor William Snape graduated magna cum laude of the Honors College at the University of California Los Angeles in 1986, and received his law degree from the George Washington University Three years later, along with teaching, serving as the Director of the program on environmental energy

law, and serving as the assistant dean of adjunct faculty affairs at American University Washington College of Law. Professor Snape has an extensive background in environmental advocacy, including litigating many environmentally related cases in federal court, notably a case in the DC Circuit, where he rejected a controversial plan by the federal government to drill for oil and gas off the coast of Alaska. His environmental advocacy doesn't end there as he serves as board general counsel to the United States Climate Action Network. In his free time, Professor Snape is a master swimmer and water polo athlete and has coached division one and division three college swimming teams. He was named the world Swim Coach of the Year by the International Committee of sports for the deaf and 2011. And in 2017, he successfully petitioned the NCAA to change the swimming competition rules to accommodate for both visual and audio starting cues as a disclosure to really scenarios these are the personal views of William Snape and are not a reflection of his employers, clients, organizations or other individuals in which these opinions can be imputed. Professor Snape Wow, you have such an incredible resume and loads of experience. I mean, especially even with coaching, like that's such an incredible honor to be named the International Coach of the Year by the International Committee of sports for the deaf and 2011. That's just amazing.

Guest - William Snape, III 4:35

Well, swimming and swim coaching has been a huge part of my life. It actually is related to teaching. I've taught at the high school, college and now law school level and it's something I enjoy and as they say, if you like your job, you never work a day in your life. So I've tried to live that motto.

Host - Alexander Naum 4:53

That's just incredible. Let's start from the top. Can you describe to us what the Clean Air Act is? And the history that led to the statutes enactment?

Guest - William Snape, III 5:03

Absolutely. Well, the Clean Air Act was one of the very first not the first, but the first handful of major environmental statutes that Congress passed in the early 1970s. You had like Cuyahoga burning on fire that led to the Clean Water Act, you had people in Pennsylvania, dying because of a huge pollution epidemics, and Congress decided that they needed to take action. And over the course of its 50 year history, it has been remarkably successful, it has reduced all of the major pollutants it has taken aim at. It has done so in a cost effective manner. repeated studies by EPA have shown that, and I will say I guess on the other side, it's a long statute, and it's complicated. And any law student who has dug into the Clean Air Act, any lawyer who was dug into the Clean Air Act, at some point is scratching their head trying to figure out exactly what it might mean, but But overall, really an impressive creation by Congress.

Host - Alexander Naum 6:09

And from what you've seen, has the Clean Air Act and enforcement of the statute changed over time?

Guest - William Snape, III 6:15

Yes, although the mechanics of the Act have have stayed virtually the same over its 50 year history. One thing that happened in the very last amendments to the Clean Air Act in 1990, when Congress last comprehensively looked at the Act, was they put into place operating permits up until 1990, you needed to get a permit for construction activity to create a polluting facility. But then once you complied with that pre construction permit, you didn't have to comply on an operational level Congress fix that loophole in 1990. I would also say that as Congress, and EPA particularly has looked at things like smog pollution in certain air basins like Los Angeles and Denver, it has made progress on smog, lower level ozone, but it has sometimes had to push back enforcement deadlines. Just because Los Angeles is an example of a an area that despite its best efforts sometimes is over the limit.

Host - Alexander Naum 7:11

Yeah, that's super, super interesting. And I know like a lot of talk around this case, is the idea of generation shifting. And do you know if it's been used in other areas of environmental policy, or just like the relative history of the idea of generation shifting? Well,

Guest - William Snape, III 7:28

so generation shifting is the term that the Supreme Court used? And that has been in parlance with the recent West Virginia versus EPA case? I would say no, that this idea of generation shifting is relatively new, but I'm not so sure. I agree with the court's characterization of what is generation shifting, we can perhaps get more into that when we talk about that case. But I think one of the interesting things about the Clean Air Act is that Congress was very prescient. They included the word climate as an impact to public welfare and defining what is an air pollutant back in 1970, they may not have known as much as we now know about global warming, but they understood that air pollutants could have a climate impact, they put it into the statute. And so as global warming climate change, interchangeable terms has risen, both as a threat and then importance to policymakers, EPA has looked to the Clean Air Act to solve some of these greenhouse gas problems. And I think that collision, that intersection between climate change, and the Clean Air Act is really what's leading to some of these very interesting and a little bit technical and complicated Supreme Court decisions. But in general, if you think about it, greenhouse pollutants are polluted into the air, they degrade the air quality, they harm humans

just as much as lead or carbon monoxide or lower lower ozone. There really isn't that big a difference. I think the biggest difference is the climate change is a global phenomenon, so that we can't go it alone. We do need other countries to pitch in. And that complicates among other complications. I think that has made the the intersection between climate change and the Clean Air Act at some times seemingly awkward.

Host - Alexander Naum 9:14

And you touched a little bit on it, which I briefly talked about before, but the West Virginia the EP case and you the Clean Power Plan, can you dive deeper into the Clean Power Plan and just what it was.

Guest - William Snape, III 9:28

So the Clean Power Plan was, in many ways the Obama administration's chief achievement with regard to climate change, they did a lot of other things. And I don't want to put one thing up on a pedestal but if I had to it would be the Clean Power Plan. And what the administration the Obama administration decided, is that they would use section 111 of the Clean Air Act source performance standards as a way of dealing with particularly electricity and utility generated greenhouse gas pollution. And so under section one, a lead When of the Clean Air Act, the administration created a relatively I was gonna say complicated again. But it really wasn't its foundations were relatively simple where they were going to assign to each of the 50 states and the District of Columbia, a certain amount of utility greenhouse gas pollution reduction that that state needed to achieve in large part based upon how much electricity generation was occurring in those in that particular jurisdiction. And to do that, EPA, because they were giving the states a hard target that they needed to meet with regard to greenhouse gas reduction, they gave the states a menu of options, the Supreme Court calls them building blocks that the Administration called them that as well. Some of the building blocks. Some of the provisions were more traditional provisions, like cleaning up coal burning power plants, making sure they're more efficient, making sure that they don't, that they're using the best available technology to not pollute as much, but others. And this is where we get into that term generation shifting, shifting of the generation of energy. There were incentives for power companies to either or both switch from coal to natural gas, because many power plants can use coal and natural gas somewhat interchangeably. And then also from natural gas to renewable solar, wind, battery, ocean wave, whatever renewable energy technology we were talking about. And it wasn't a mandate, the states did not have to go in that direction. But the states were offered that as an option. If they found that easier to meet their targets. There was also a cap and trade program built into it, where there could be a little bit of trading. And so the Obama administration thought he did come up with the sweet spot, they had looked at the cost benefits, they were taking into account existing economic realities and electric generation realities. They did not go down the road of creating national ambient air quality standards, more on that later, but the national ambient air quality standards would not have allowed them to consider cost benefit the way that they did. So you

had Obama being Obama, a mindful centrist as EPA created this rule. But in West Virginia, for reasons we'll get into the supreme court threw it out. And if I were to summarize the West Virginia case in one sentence or less, and I know we'll get into the major questions, doctor, but I'll put that to the side, basically, and Straight Street English. The Supreme Court said, When Congress passed the Clean Air Act, and as amended over the several times over the last decades, it was not clear to the Supreme Court that Congress intended EPA to create this type of program that it was that was outside the scope of what Congress had delegated to the agency under the Clean Air Act and found it unlawful and throw it out.

Host - Alexander Naum 12:47

Wow. And I know from the changing administration's from the Obama administration to the Trump administration, there was almost a replacement or an attempted a replacement rule known as the affordable clean energy rule. Do you know more about that rule?

Guest - William Snape, III 13:05

Yeah. So the Trump administration was actually the his EPA was actually relatively widely on this one, in that they knew they had to do something Massachusetts versus EPA had told EPA, they couldn't just ignore climate pollutants. And we'll talk more about mass versus EPA maybe a little bit later. So they knew they had to act on some level. What the Trump administration did was the absolute de minimis, they essentially took only the portion of the Obama role that related to coal burning power plants, and weakened what Obama did. There was no urging to go to natural gas, there was no menu of options for renewable energy, it was a very narrow de minimis rule that was thrown out by the DC Circuit, because it was shown to have negligible impact in terms of dealing with these pollutants. So the Trump rule was pretty lame. But what they were wildly about was in their rejection of the Obama rule, because they rescinded as any new administration can This is the nature of administrative law, they repealed rescinded the Obama Clean Power Plan rule. And when they put the ace in their place, in describing the Obama role, they called into question the major questions doctrine. The major questions doctrine hadn't been raised at all in a court setting until the Trump administration did so that may be the most enduring legacy of that horrible rule. Is that it it caught fire and I recognize the major questions doctrine has been bubbling, gurgling, percolating, particularly among conservative legal thinkers for a good part of the century, certainly a good part of the last decade. But Massachusetts versus EPA is really the first major time and we can talk about what's first and what second, but in my view, it's the first major time on a matter a substantive legal issue before the Supreme Court. The Supreme Court uses this term As your questions doctrine to throw out the Obama Clean Power Plan, because up until that point in time, you've had the major questions doctrine has been mentioned twice by the Roberts Court and 2021. And both procedural injunctive related relief questions one had to do with mandatory testing by big businesses for COVID. The CDC eviction moratorium that was the second case where basically, the court stayed. The Biden Administration's efforts, talked about the major questions doctrine, but really didn't get into any

detail. It's really in West Virginia, that for the first time ever, the Supreme Court really lays out what the test is for the major questions, doctrine and dissent. Justice Kagan says you're making this up, you're making this up as you go along. But that's what happens when you have six justices, I think the major questions doctrine, at least for the foreseeable future is here to stay.

Guest Host - Eva Bogdewic 15:53

Right. So let's talk about this case, West Virginia versus Environmental Protection Agency. What was the case about I know, we just talked about the Clean Air Act and generation shifting, but ultimately, what did the Supreme Court decide?

Guest - William Snape, III 16:07

So first of all, on West Virginia versus EPA, I think an initial oddity needs to be discussed, which is the Biden administration had also repealed the Obama Clean Power Plan and told the court explicitly, it was not going to use the Obama Clean Power Plan. And so it is sort of weird that the Supreme Court on a rule that was dead, decided to still litigate that some might call that an advisory opinion. Chief Justice Roberts goes to great lengths to say no, this was an issue that could reappear, the agencies could have a new form of it. But it's a pretty questionable standing decision. I think it's a fairly questionable mootness decision. But when all is said and done, I'm a plaintiff's attorney. So more standing is always good. You know, I think, you know, they clearly I think the point is, they clearly wanted to get to the merits of this case. And so they, I think, ran roughshod over some should disability issues that probably should have ended the case right then and there. But what the Chief Justice Roberts and I've already introduced, introduced this a little bit, but in essence, what he says is, hey, look, what Congress created the Clean Air Act and gave EPA all this power. It was on environmental matters, it was on issues of whether that power plant is producing too much pollution or not. It was not to get into electricity generation, that's the job of the Federal Energy Regulatory Commission FERC. It was not to force or even incentivize different fuels being used. That's the Department of Energy, that that EPA, in its creativity under Section 111 had created something that Congress never could have imagined never intended. And so therefore, EPA was way out of its lane, and can't do it. But one last oddity about the case is, in reality, the Obama administration had made it very clear that carbon capture and sequestration, which is a technology still very much debated, still very much untested, certainly at any commercial level. But yet the oil and gas industry loves it because it means they can continue business as usual. The Obama administration had CCS carbon capture sequestration as one of the options. And Chief Justice Roberts, he glosses over that. Like it seems to me the carbon capture part of this made it traditional air pollution regulation, not of the type that he was trying to cast us.

Guest Host - Eva Bogdewic 18:42

Right. So that was going to be my next question. I mean, how would you rebut that claim? And you could get into the dissent also, and how they chose to rebut the claim that this isn't what Congress intended.

Guest - William Snape, III 18:54

So I have two things to say about that on the aisle where Justice Kagan's had in dissent and explained what her criticism of was that the underlying legal standard under Section 111 Is that the agency has to come up with the best system of emissions reduction. BSER, there are a lot of acronyms with the Clean Air Act, best system of emissions reduction, to deal with pollution from identifiable industry sectors, like the utility sector, Kagan said, system a system that's that's what this building blocks is all about, you know, we're, we're going to clean up coal plants. When we can't do that, we're going to encourage them to use gas, we're eventually going to encourage all of them to use renewable energy as an option. And they'll always have carbon capture and sequestration, if they can do it as a backup option. Oh, and also will allow some training, that's a system and the Chief Justice rebuts that by saying that's not how the word system has been used and interpreted in the past by the agency in this context, and he goes through the previous section 111 rulemakings, that were all based on best systems that were within the fence line of the actual plant or facility that was in question, not having a state, take the best system and count credits from Kentucky when you're in Alabama that's far beyond what how the agency had used section 111. Before and Kagan responds, but life changes this is a system systems are not identical. So they're I, you know, I that's what you get when you have six conservative justices, you know, they they just, they have a fundamental subjective difference of opinion as to what system means. The six had the votes, and you know, they get to win. What I'd like to focus on with the Chief Justice, though, is that maybe he was right. But for the wrong reason. And I want to I want to explain that by saying, I recognize this decision came down days, weeks after the overturning of Roe vs. Wade. This is a supreme court, I think that is very much making large portions of American society nervous, it has shown an inclination to overturn precedent and overturn sort of the way things have been done for a long time. So this decision, where the Supreme Court is, in essence, saying EPA, you can't help with climate change, you can't do it that way. On a certain level can be viewed in that light. This is just an out of control Supreme Court or overturning everything you don't like, and oh, my goodness, gracious, the sky is falling. I don't dismiss that view. But I'm not sure that what that was exactly what was happening in West Virginia. I think that she even though I think I probably come down more with where Justice Kagan came down. The reality was Chief Justice was making some very interesting, and I think, powerful points. The biggest point is that EPA had never done this type of electricity, fuel shifting type of role before and it was new enough and scary enough in terms of its potential impact, that I think the Chief Justice was sort of right to say I'm not I'm not sure section 111 fits what it is the agency is trying to solve here. And on a certain level, I agree with him. Because I think the best tool under the Clean Air Act is the National Ambient Air Quality Standard provision. That's the provision, where instead of worrying about what's coming out of the tailpipe, which is essentially what section 111 is, ultimately are perceived to be about ambient air quality standards, what is the

quality of the air around us how much lead is in the air, how much carbon monoxide is in the air, how much smog is in the air? How many greenhouse gas particulate matter, molecules are in the air? What's interesting is that if EPA used the net what we'll call next, again, more acronyms, sorry about that the nada que es, they're not allowed to do cost benefit with that they've got to come up with greenhouse standards that are according to the best available science. Many of us in the environmental community thought the Obama Clean Power Plan, while better than nothing. And while a step in the right direction, was a little bit of weak tea. To be honest, not everyone felt that, but a lot did.

Guest Host - Eva Bogdewic 23:09

That's a really interesting sort of alternative approach using the ambient air provision, because almost the entire global population is breathing air that the World Health Organization deems poor quality or having pollution that exceeds healthy limits. And so that's a very interesting approach. Many critics are viewing the decision, this decision as a setback for the EPA, does this decision go beyond the Clean Power Plan as far as impacting their authority? Is there something that Congress can do to help them out?

Guest - William Snape, III 23:42

Well, the answer to your first question is we just don't know. We don't know how big a beast this major questions doctrine is. There's been some secondary literature in the last over the summer. That's made a compelling point that The Sky might be falling that this is a Supreme Court that wants to look at every agency rule it doesn't like and it's going to apply the major questions doctrine, time will tell whether that really plays out this way. But you mentioned something that is fascinating. And I know you know this, because we've talked about it. But the inflation Reduction Act, which was just passed by Congress last month and signed by the president last month in August 2022, doesn't overturn West Virginia doesn't overturn the concept of the major questions doctrine. But no less than 12 times in the inflation Reduction Act was this essentially a spending bill, it was giving agencies money to combat climate change. In fact, there's a provision directing EPA to update its knacks its National Ambient Air Quality System Monitoring system gives a lot of money to do that explicitly says that it wants the agency to work on multi pollutants, multi pollutant problems at the same time, and at the end of that section, defines air pollutants to explicitly include every single greenhouse gas we now know to exist. Does that overturn West Virginia? No. But does that set up EPA? Well, if they want to do ANACS rulemaking on climate? I think the answer is yes, I think I think the EPA would have a lot more to point to because Congress now for the first time, has said, climate change is a real concern, both from a regulatory point of view and a financial point of view. And we Congress want the agents and not only EPA, all the agencies to do something about it that really hadn't existed as law before the inflation Reduction Act. So who knows how that will play out. But I'm cautiously optimistic that that could be a card on behalf of EPA to make a play and come back with a new rule a natural. And so that almost introduces another kind of factor in the uncertainty as to how,

you know, there's a new definition, basically, of the major questions doctrine that was delineated in the case how future EPA rules will shake out against that it does. And I think that's true for every agency, every agency has these regulatory issues that are, you know, sort of on the bubble, trying to do and that's what agencies are supposed to do is come up with creative ways to implement laws. And I think now, everyone's got to be conscious. There's a supreme court there lurking to second guess it if you're not crystal clear that Congress has given you clear authority or agency to do what you're proposing to do.

Host - Alexander Naum 26:27

Yeah, we've touched a lot on the major questions doctrine. But how does this affect the use of Chevron deference? And for listeners who may not know, can you briefly describe the Court's decision in Chevron USA v Natural Resources Defense Council?

Guest - William Snape, III 26:43

Yeah, well, I this is a good time as a non sequitur, to say I love the Administrative Law Review slogan, we defer to no one is my favorite law students slogans of all time, and it's a good thing, Chevron, as both of you know, but for the listeners is another Clean Air Act case from the 1970s. whereby if Congress essentially creates a two part test, if Congress has specifically and explicitly talked about an issue or or lay down what the law is, that's what the agency needs to do. But if Congress like with the Clean Air Act, has delegated to the agency broad powers to protect the air, which the Clean Air Act clearly delegates EPA, very broad powers, and Congress is silent on an issue that the agency or it's ambiguous what Congress meant, the agency has discretion, the agencies got some deference to create rules Congress gave them that rule now can't be Congress can't just give the law to EPA, that would be a violation of the delegation, the non delegation doctrine. But in those cases where Congress is silent or ambiguous, the agency can act. I think the major question is doctrines. Absolutely. I taking a bite out of Chevron? It's coming at it. I mean, I think that's one of the sort of weirdest things about about the West Virginia case is the majority casts it as some sort of huge constitutional separation of powers issue, when in reality, it was a pretty simple, maybe factually complex, but still legally simple question of What did Congress's language mean, and did the agency do or not do what Congress had laid out? i It still confounds me a little bit and concerns me that the that the court wanted to go to the constitutional level right level right away, I think that the court could have come to the same conclusion using Chevron and it's fascinating, that they chose not to, maybe they chose not to, because the systemic I just gave you are the, you know, the test on Chevron. Maybe they'd concluded that was a weaker case for them. Maybe they were worried if they applied Chevron here. Somehow the agency would have gotten that deference. I don't know. But yes, I think this this, this creates us Separate parallel playing field. So, in addition to the normal administrative and statutory questions, courts will ask us agencies to major questions doctrine seems to be a very massive, extra cherry on top that needs to be analyzed. That's how I'm reading it right now.

But Justice Kagan asks, your question says this is chaos. It's not at all clear how this is gonna work, because you're making stuff up.

Guest Host - Eva Bogdewic 29:16

Right, and the Chevron and the major questions doctrine, they're almost, you know, logical inverses of each other one's affirmative and one's negative. And so they present different standards and burdens of proof to one might be more, you know, agency different, as a practical matter, and the other might not.

Guest - William Snape, III 29:38

Right, that's a good point.

Guest Host - Eva Bogdewic 29:39

I would be remiss if we didn't discuss that Justice Gorsuch cited one of HLRs own publications in the concurrence, where the author argued that delegation is a matter of degree. And that degree can be measured by economic impact. How do you think that UPS actions here and in historically and in the future might shake out against this sort of standard

Guest - William Snape, III 30:04

Well that's the preference and administrative law article from the Administrative Law Review, article cited in a Supreme Court decision, which was very exciting. What's interesting about the Law review article is that the the author says several times he's seeking a middle of the road solution, and certainly does not like out a Clean Air Act or climate motif by which the software he's the article is that a bit more of a theoretical level. But I agree, when you read the article, that it definitely is looking at dollars of economic impact. That seemed to be what that authors are. And I think that's what Gorsuch is talking about. I think, I think Gorsuch I think that's why he writes the separate opinion, because he agrees with the Chief Justice, but he wants to take it a step further. And it's not. It's interesting that both he and Alito, I think are chomping more at the bit on what did Congress say and exactly what authority did it give where chief the Chief Justice, and Kavanaugh and Barrett were willing to go that far, even Thomas, not willing to go that far right away. But I wanted to read one interesting, if I can find it quickly. Footnotes that the Chief Justice says, and I, as you maybe can already tell, I disagree with him frequently. But I actually really respect the Chief Justice. I, I think he does try within his own bounds. Well, I'm not going to find the footnote. But he has a footnote, where he's responding to a criticism by Justice Kagan saying, well, on the one hand, you're going to, you're going to decide this rule that the Biden administration has has, has taken away, you know, it doesn't even exist anymore. But the Senate shines us for not telling us what would be good under the Clean Air Act. And I want to just say

the Chief Justice, well, they should be charging you for that, because you just made an advisory opinion, on a provision you didn't like, maybe you could have made an advisory opinion on the provisions that you would like, because now EPA is left not knowing exactly what to do. I mean, if you're an EPA lawyer right now, your head spinning, at least with regard to Section 111. I think there is language in the opinion by Roberts, he doesn't go out and say it, but he seems to imply in a few places, that knacks is different, and certainly would be treated differently and might be a slightly better option doesn't say it the way I'm saying it, but he certainly certainly puts that on the table. It's a very odd case, from a standing a judicial committee point of view. That's probably the weirdest thing about the case that the substance of it very much like utility air group from 2014. By the way, that was a Scalia authored opinion, where they looked at the permitting requirements of the Clean Air Act. And basically without using the major questions doctrine, using more traditional Chevron administrative law, Scalia, and a decision joined by the Chief Justice said, You're you're creating permits for greenhouse gases that Congress clearly never envisioned because the permit levels are at a different numeric level than what Congress laid out because carbon dioxide is polluted in such huge quantities. Again, I didn't agree with utility air group, but I at least understood the rationale that Congress had laid out some numbers, the agency had changed those numbers in terms of what the permits would look like. I can accept on a certain level that those two things don't match. So I think many ways West Virginia, this is one way to tell my climate change in the law class this semester. What a fun semester, we'll be teaching that, that if you put the major questions doctrine in the standing weirdness aside, West Virginia is very much just building on what utility airgroup had already decided is really if you want to look at West Virginia narrowly, and you want to have hope that the Supreme Court is not on some sort of rampage. I think that's that's the thought pattern you ought to have because I think West Virginia is consistent with utility or group. And I think in both instances, the majority was making good points about what Congress had said and what the agency then later did.

Guest Host - Eva Bogdewic 33:54

Do you think that the Environmental Protection Agency will continue to struggle to find that balance between, you know, interpreting sort of the vagueness of what Congress is telling them to do and not going too far and developing these scientific and technical standards?

Guest - William Snape, III 34:10

Great question!

Guest Host - Eva Bogdewic 34:11

You know, how might it still achieve some of the goals that it has within the within the parameters that it has as an administrative agency? That's

Guest - William Snape, III 34:18

A really good question. Well, first of all, just as context before I really answer it, during the Bush years, the Obama years, the Trump years, and now the Biden years, there isn't one climate rule, EPA issues that isn't litigated by someone, nothing goes on litigated anymore, and I think EPA has become used to that. And so no matter what they do, someone's going to sue and someone's going to test, you know, the limits of how far that rule goes, or does not go so that, you know, it will be litigated. I think that EPA is going to have to act. And I think they're gonna have to take a calculated chance that that they can come up with a rule come up with a plan that was stands muster. And the reason I think they have to act is I think the President's already laid that on the table. He claimed that the inflation Reduction Act is like 70% of his Climate Commitment goals. There's 20 to 30%, that he admits that the inflation Reduction Act doesn't even under his optimistic modeling of the inflation Reduction Act doesn't cover. So the President has already said there needs to be executive action to make up that last 20 to 30%. That could be a lot of different things, it could be stopped drilling for fossil fuels on Department of Interior public lands, it could be Department of Energy, come up with all these fuel efficiency standards. But ultimately, you get think EPA is gonna have to do something under the Clean Air Act. There are some methane rules that EPA has already sent over to OMB at the White House in a Wairoa that I think would help. But methane rolls by themselves are not going to cause you're not going to cure the climate change problem. methane is released during the natural gas exploration and burning process. Methane is anywhere depending upon the longevity of it 20 to 80 times more powerful than carbon dioxide. So I want the Biden administration to pass its methane rule, but they're gonna, it's gonna have to be more than just methane, they're gonna have to come up with a way to deal with industrial carbon dioxide, and come up with some sort of regulatory or policy framework where we bring that down. And the reason not only because the science dictates and we're seeing fires and climate disasters, is because we actually have the technological capacity to do so. Unlike in 2007, when Massachusetts versus EPA was decided by the Supreme Court, or solar power, wind power, was operating at a very de minimis level, we didn't have the type of battery storage we have now. Like, people like Mark Jacobson at Stanford have shown we could go onto percent renewable, clean renewable within the next couple of years if we really wanted to. And I think the point is that oil and gas industry doesn't want us to. And I think the second dairy point is West Virginia shows us the legal roadmap to get to that technological feasibility is not certain. But I think I think EPA is going to have to do something. And I think they will.

Host - Alexander Naum 37:06

I definitely hope so. This was a very informative conversation. And we clearly have a very uncertain future ahead of us. But before we go, do you have any parting words you'd like to leave our listeners?

Guest - William Snape, III 37:20

I do, which is, and it was supposed to be part of my introduction, but you got me so excited with other questions. I didn't read my normal intro. But I think it's a it is a great way to close, which is, the Clean Air Act, in addition to being successful, as I mentioned, at the beginning of the show, also was known for embodying the concept that we call cooperative federalism. And it's the idea where the federal government, usually through EPA will create the federal standards, but under the Clean Air Act, it's the states who issue the permits. It's the states who have the state implementation plans to to actually implement things on the ground. And I'm hopeful that not only will the Feds find a way to act, but that the states, even the red states, will find a way to say with regard to renewable energy, we want this mean, there's a lot of wind power in Texas and Oklahoma. There's a lot of solar power and Arizona and Nevada, I mean, Florida so we can make this work. And I'm hoping that the states themselves begin to realize the economic opportunity, and the health opportunity of making the change from dirty fossil fuels to clean renewable energy. It could be not only great for our future generations and kids with climate change, it could create a heck of a lot of jobs and recreate our economy. So maybe I can't believe I'm saying this because as a young law student, I was a little skeptical, but maybe cooperative federalism is part of the answer here. I certainly hope so.

Host - Alexander Naum 38:46

Thank you so much. I would like to thank our guest for his substantial contributions to our discussion today. The American Bar Association's administrative law section, the Administrative Law Review, and of course, the podcast's own, Eva Bogdewic for her assistance and support in creating this episode. If you're new to our show and enjoyed this episode, give the episode a like and be sure to follow and share our podcast with your colleagues, friends and family. Thank you and you'll hear from us soon as we discuss other topics impacting administrative law