

Speaker 1 ([00:05](#)):

Welcome to the Bill Walton Show, featuring conversations with leaders, entrepreneurs, artists and thinkers. Fresh perspectives on money, culture, politics and human flourishing. Interesting people, interesting things.

Bill Walton ([00:25](#)):

Welcome to the Bill Walton Show, I'm Bill Walton. I thought I'd entertain us with an opening from a recent page one story in the, my favorite, New York Times. Here's what they say. The Supreme Court moved relentlessly to the right in its first full term with a six justice conservative majority issuing far-reaching decisions that will transform American life. It eliminated the constitutional right to abortion, recognized the second amendment right to carry guns outside the home, made it harder to address climate change and expanded the role of religion in public life. But those blockbusters, significant though they are, the Times tells us, only begin to tell the story of the conservative juggernaut the court has become. The Supreme Court that ended Thursday was the most conservative since 1931.

Well, what's horrible for the New York Times is wonderful news for the vast majority of Americans. And among the most significant rulings, even if it doesn't capture all the headlines, is the ruling about the EPA, West Virginia versus EPA. That ruling not only stops environmental extremism in the EPA but it also could stop major power grabs by bureaucrats at other agencies that have become like a fourth branch of government. This so-called administrative state has become an enormous and growing threat to every American's constitutional freedoms. Joining me to talk about this are two experts in this with a group I just love, the nonprofit New Civil Liberties Alliance founded by Phil Hamburger, and they're following the EPA and all the other administrative rulings and legal rulings throughout government.

Rejoining John Vecchione, a great guy, returning guest, senior litigation counsel focuses on strategic litigation in the federal district and appellate courts including the Supreme Court of the United States. And Casey Norman, a recent joined staff member at NCLA who, prior to NCLA, worked in the private sector as a restructuring and bankruptcy associate at Dechert LLP. And we're joking before the show, I think our restructuring and bankruptcy skills may come in handy when we think about what's going to happen with our federal government, especially its debt.

So, anyway, with that gratuitous remark, John, welcome. Casey, welcome. John, why don't you kick it off? What about this ruling and what about your real personal interest in how this has evolved?

John Vecchione ([03:15](#)):

Well, you opened up with the New York Times article, right? New York Times says, "Oh, it's doom, it's horror." What the-

Bill Walton ([03:20](#)):

Whenever they're unhappy, I'm unhappy.

John Vecchione ([03:21](#)):

But almost everything, except for the second amendment case in New York Rifle, all they did was say that legislators should be doing this. For instance, on the case we're going to discuss, they didn't say this couldn't be done, you couldn't regulate greenhouse gasses this way, they said that Congress has to say you can. So, it's not gloom and doom, just have your representatives do it. And the same on the Dobbs case, the [inaudible 00:03:51], they said, "Look, whatever the legislators want to do, we, the people go

and do that. We're not going to be the referees anymore." And on the second amendment, there they said you can't stop people from exercising their second amendment rights but they went out of their way to say, "You could do background checks, we haven't said anything about what type of weapons you can have," these were all moderate decisions based on representative government.

And I do think, though, there is one thing that's bothering them that, I think, everyone should be very happy about. I started my legal career, I went to Georgetown so I was in DC, and I went to the Bork hearings. When Robert Bork was appointed by President Reagan to be on the Supreme Court, Ted Kennedy came to Georgetown, gave big speech about all the horrible things that were going to happen if Judge Bork got put on the bench. And I was president of Federal Society then, and I wasn't a lawyer, but I wanted to go see it. And in those days, you could go to the Supreme Court and watch the ... Excuse me, the Senate. You could go to the Senate and watch the hearings but you couldn't stay. You got a half hour in your seat and then you had to go out and go to the back of the line.

And I went to the back of the line about three or four times and watched those hearings in person and I watched them on TV. And all of the Bork hearing, all that fight was about what we're talking about now. Why do you write down law? If you write down the laws, don't those words mean something and can they mean anything? And I think the fight here is over whether or not the administrative state, the agencies with experts are just going to be able to take broad, unspecific language to change the whole society for that.

Bill Walton (05:35):

So, the law they were referring to that Congress sent the EPA had nothing in it about what they've chosen to do to regulate?

John Vecchione (05:43):

So, I'll ask-

Bill Walton (05:44):

Will they have found penumbras and emanations there?

John Vecchione (05:47):

Well, no. I think it's Section 111, Casey?

Casey Norman (05:47):

211.

Bill Walton (05:47):

211.

Casey Norman (05:47):

Yeah.

John Vecchione (05:51):

So, there was a section that said that you could use the best systems, right? They're using the best systems, the EPA, in this section of the Clean Air Act. But what the court said was this was a tiny part of

the Clean Air Act, it was an ancillary to the main focus of the Clean Air Act. So, what is the court doing here? I mean, what was EPA trying to do? What EPA was trying to do is, instead of saying, "This power plant is putting off this many CO2 gasses so you have to put this scrubber on that point source," part of what the Clean Air Act does is say that the states give you a program and then the EPA approves it and then sets certain levels for those point sources.

But what the EPA says is, "We are going to set the CO2 levels such that the coal plants can no longer operate," all right? They want to put the coal plants out of business completely. And the court said, "Well, that's a pretty big decision. You're doing this through Section 211? You can't use a tiny section."

Bill Walton ([07:03](#)):

Section 211 of what act?

Casey Norman ([07:04](#)):

Of the Clean Air Act.

Bill Walton ([07:06](#)):

Clean Air Act, okay.

John Vecchione ([07:07](#)):

And so, this was all done in the 1970s.

Bill Walton ([07:10](#)):

Yeah.

John Vecchione ([07:10](#)):

And I was just talking about Bork, who was the left wing maniac president who signed all this legislation? Richard Nixon, right? So, Nixon signed the Clean Air Act-

Bill Walton ([07:26](#)):

In many ways, he was as bad as Lyndon Johnson.

John Vecchione ([07:30](#)):

Yeah, but this was the height of the administrative state. The '70s, on, I think, both the court and in the Congress and Kagan points, is that they were making big law, as you say. They knew what they were doing. They were creating the EPA and they said, "These are the problems, we hand them to you forever," is how they look at it. And so, if they can find any little bit of a word that they can then base this program they want, because they want to get rid of coal, and they said, if we want to get rid of natural gas, we can get rid of that, too, right?

Casey Norman ([08:02](#)):

Right.

John Vecchione ([08:02](#)):

I'm not wrong about that.

Casey Norman ([08:03](#)):

All renewables.

John Vecchione ([08:05](#)):

Yeah, we can switch to all renewables if we want. So, this really disturbed the court in this case. And West Virginia versus Environmental Protection Agency is big because they've actually taken from a course of law, a bunch of law that they've been forming over the last, 20 years?

Casey Norman ([08:25](#)):

About that, yeah.

John Vecchione ([08:25](#)):

Fifteen, 20 years, at least. Although Gorsuch would tell you John Marshall was doing it and I think there's something to that. Just-

Bill Walton ([08:32](#)):

John Marshall, our first Supreme Court justice?

John Vecchione ([08:34](#)):

Third.

Bill Walton ([08:34](#)):

Third, okay.

John Vecchione ([08:35](#)):

The greatest.

Bill Walton ([08:35](#)):

The biggest one, yeah, and most important. Okay.

Casey Norman ([08:38](#)):

Right.

John Vecchione ([08:38](#)):

So, what they're doing here is saying, "Look, if an administrative agency wants to do something big that affects huge amounts of people, huge parts of the economy, they got to show us clearly why that is," it's called the major questions doctrine. And we've been calling it the major questions doctrine for some time meaning, we in the profession and the people who scribble about this stuff in the law reviews, they've been saying, "This is the major questions doctrine," but they never used it in a court case before. They never said that-

Bill Walton ([09:12](#)):

Yeah, I've never heard of the major questions doctrine until the last week or two.

John Vecchione ([09:17](#)):

Could you, Casey?

Casey Norman ([09:17](#)):

Yeah.

Bill Walton ([09:19](#)):

Casey, what's the major questions doctrine?

Casey Norman ([09:21](#)):

So, it is-

Bill Walton ([09:22](#)):

Since this is the big thing that seems to ...

Casey Norman ([09:25](#)):

Basically, they described it in this case, I think Gorsuch lays it out pretty clearly. But what it is, when you have a question like this where an executive agency is going to be making decisions and taking on authority that's going to majorly impact the nation in political and economic ways, if there's no clear, explicit authorization from Congress in the text of the statute, they cannot do that. And the court should meet that with skepticism and this law should not, it should be rendered or deemed unconstitutional.

Bill Walton ([09:56](#)):

So, the gist of it is we're going to delegate to the bureaucrats small things, you can do tweaks and things like that but you can't change it so that you really change the major policy questions, major questions?

Casey Norman ([10:09](#)):

Yeah, and I think not even limiting it to just tweaks but I think, here, they're looking at ... For instance, in this situation, if you allowed the EPA to do what it wants to do here, basically they're saying these coal fired plants have to shut down and convert completely into different kinds of factories whether it's wind farms or solar or fuel, other kinds that are not the way they're functioning currently and this costs billions of dollars.

Bill Walton ([10:34](#)):

BlackRock thinks, what is it, Chevron can get out of the oil and gas business and go into wind and solar.

Casey Norman ([10:39](#)):

Right.

Bill Walton ([10:40](#)):

So, it's that kind of thing?

Casey Norman ([10:40](#)):

Right.

Bill Walton ([10:42](#)):

It's called magical thinking.

Casey Norman ([10:44](#)):

Right. Yeah, exactly. And they hadn't explicitly, the court, in its majority opinions, I think Kagan points it out, they hadn't explicitly called it this. Though there are some cases within the last 15, 20 years where it's this same reoccurring issue where an executive agency is just seeing where it's not there in the text of the statute, this immense power and trying to move forward with it through this implied power that they claim is there.

Bill Walton ([11:08](#)):

So, just so everybody understands there, you can find these decisions and opinions on the Supreme Court website and there's one main decision then there's corsages ... What do we call that? It's a-

John Vecchione ([11:23](#)):

It's a concurring opinion.

Bill Walton ([11:24](#)):

... concurring opinion and then we've got Kagan dissenting and Kagan, of course, thinks that only Elena Kagan understands how these things should be decided.

John Vecchione ([11:34](#)):

And I will confess this. So, I think that steel sharpens steel in the law and that means that you have to have the best against the best to hone the arguments. And the one thing about Kagan, when she was at Harvard, she put a lot of textualists and constitutionalists on the ... The reason Harvard isn't Yale, partly because of her.

Bill Walton ([11:55](#)):

Quick explain textualists and constitutionalist.

John Vecchione ([12:00](#)):

Okay. So, a textualist and an originalist, I should say,

Bill Walton ([12:03](#)):

Okay, originalist.

John Vecchione ([12:04](#)):

... is that the first thing you have is the words of the statute. You don't look at the intent of the legislature out in the air somewhere. They use certain words, so use those. And if the meaning of words has changed, the originalist part of it is you use ... This is the best type. There's huge disputes about this but the best type of originalism is you use the common sense of the words as understood by normal

people at the time. All right, that's the originalist part. So, this is very controversial among certain professors because they want the courts to say what the modern sense of the world is rather than the legislature.

And so, this textualism and originalism was very controversial when I was in school. Brennan gave a whole speech against the Attorney General, Ed Meese, had given an originalist textualist argument and they went back and forth in in both law review articles on whether or not this was good or bad. And the originalists and textualists believe it's the only way that democracy can work. Because, if the people can't fix what they want the law by having their legislators write it and then those words not changing until they come back again, it's a legitimacy question, you don't really have a democracy or representative government.

And Kagan understands these arguments. I'm not sure all of the other left wing judges of the courts really understand them, she understands them and I think that's why her arguments ... The reason Gorsuch writes his concurrence isn't because anything Robert said, he didn't agree with, he said it because I got to get back at Kagan because she's scoring some points here.

Bill Walton ([13:48](#)):

So, he wrote his after she submitted her dissent? That's interesting.

John Vecchione ([13:51](#)):

I believe so.

Bill Walton ([13:52](#)):

The power [inaudible 00:13:53], okay.

John Vecchione ([13:53](#)):

I believe so because they're talking, they crosstalk in them. Right?

Casey Norman ([13:56](#)):

Yeah, I think they all read each other as they respond.

John Vecchione ([13:57](#)):

And they mention each other so they're really going at it. And in fact, if I may, I'm just going to put on my glasses for a second because, for your listeners and your viewers, really, this fight about who's the real originalist and who's the textualist, Kagan says, "I'm the textualist, not you guys." But I want to bring up, Gorsuch says, "Wait a minute. This isn't brand new, these major questions that Casey was telling us about, we didn't use the word." But if you look at FDA versus Brown and Williamson Tobacco, well that was the case where the FDA wanted to eliminate cigarettes. And the Supreme Court said, "Well, you're allowed to do a lot of things but they didn't give you the right to eliminate tobacco because they would've said, that's a big deal." But they didn't use the term major questions.

And then Gonzalez versus Oregon. Attorney General Gonzalez, under Bush, wanted to use the ability to license doctors to prescribe drugs, to criminalize that when Oregon allowed assisted suicide. So, he set up a rule that, if you used your prescriptions for assisted suicide, it would be violating the act that allowed your license. And they said, "No way. You can't do that, that's not what that's for." And so, again, they would've said that in the drug laws if that's what they meant. And then Utility Air Regulatory

Group v EPA was another EPA question, they keep going on. Each of these cases, our favorites because NCLA did this, we put in amicus briefs in these two cases that-

Bill Walton ([15:40](#)):

New Civil Liberties Alliance?

John Vecchione ([15:42](#)):

Yes.

Bill Walton ([15:42](#)):

Okay.

John Vecchione ([15:42](#)):

We put in amicus briefs and we're very happy. God knows I did tons of CDC litigation. Alabama [inaudible 00:15:50]-

Bill Walton ([15:50](#)):

While you're checking that, let me just say it. This Bill Walton show and I'm here with John Vecchione and Casey Norman, NCLA, and we're wandering deep into the meaning of originalism and textualism and the meaning of words.

John Vecchione ([16:04](#)):

Yeah. Because of the COVID emergency, two big cases have come out of the Supreme Court in the last two years. Alabama Association of Realtors v Department of Health and Human Services and National Federation of Independent Business v OSHA. And the first one says the CDC knows nothing about whether or not you should have evictions in states or not to stop COVID, that's not their bailiwick, they don't know anything about that. They said you can't do that and they threw out the eviction moratorium. And in the NFIB case versus OSHA, they said, "Look, you're supposed to regulate health and safety, you can't mandate vaccines to every company in the world."

Bill Walton ([16:43](#)):

We got to talk about the term Chevron deference. And I know enough to be dangerous but wasn't there a ruling that said that, when the Congress passes things, there's a sense that the agencies are experts and they know what they're doing and so we're going to defer to their expertise? And hadn't that been governing a lot of this for a long time? And we think it's bad law but there it is.

John Vecchione ([17:12](#)):

Look, why don't you let Casey say what Chevron deference is.

Bill Walton ([17:12](#)):

Is that a fair assumption?

Casey Norman ([17:12](#)):

Yeah.

Bill Walton ([17:16](#)):

You're making too many faces, John. For people listening, I'll-

Casey Norman ([17:19](#)):

Yeah, I think-

John Vecchione ([17:19](#)):

Go ahead.

Casey Norman ([17:19](#)):

I think what gets forgotten or maybe glossed over by the courts a lot is that there are two steps to Chevron and the first one is looking at the text and seeing if there's ambiguity. And if there is not and you can tell what the statute is saying, you stop there.

Bill Walton ([17:34](#)):

When was Chevron decided?

Casey Norman ([17:37](#)):

Do you know, John?

John Vecchione ([17:38](#)):

'87 or '86.

Bill Walton ([17:38](#)):

'87?

John Vecchione ([17:38](#)):

It's a Scalia opinion.

Casey Norman ([17:38](#)):

They all are.

Bill Walton ([17:38](#)):

It's a Scalia opinion? Oh, my. That's why.

Casey Norman ([17:44](#)):

All the key cases are. So, if you go beyond that and you say, "Okay, there's ambiguity here, we're not really sure what the words mean," then you're supposed to defer to the agency's interpretation because, presumably, they're the experts in whatever it's talking about so long as it's reasonable and not absolutely insane and doesn't fit at all with what the text says. But in practice, you see courts deferring a lot to the agencies, maybe even when the text isn't ambiguous.

John Vecchione ([18:14](#)):

And in this case, this was appealed from the DC Circuit.

Bill Walton ([18:18](#)):

Yeah.

John Vecchione ([18:19](#)):

The DC Circuit approved this regulation based on Chevron deference. They said, "You know? This Section 211, it gives them something and it creates an ambiguity and we think EPA can go ahead and do that." They use Chevron and the majority doesn't mention Chevron, we were all shocked. I think everyone looking at this was like, "Are they going to cut back Chevron some more? Chevron deference?"

Bill Walton ([18:42](#)):

And only Kagan mentioned it.

John Vecchione ([18:44](#)):

And Kagan mentions it, she's the only one. And she says, "This isn't the type of thing. This is not a Chevron case in any event." And she's the only one who mentions it and nobody knows because there's tons of cases where they could have mentioned Chevron this year which they didn't. So, something's going on that's a mystery to all of us.

Bill Walton ([19:03](#)):

Let me get way into the theoretical here. You're more recently graduated from ... You went to Georgetown as well?

Casey Norman ([19:11](#)):

Yeah.

Bill Walton ([19:11](#)):

Good law schools, good law school. But the world's changing and I'm in a words mean what they mean mode, but with deconstructionism and critical race theory and woke and all these ideas about what things really are, has all that deconstructionism collided with what the law schools are teaching now?

Casey Norman ([19:35](#)):

I think when I was there, it was before the real storm hits. I graduated in 2019 and I didn't see so much of it. I think the craziest thing we saw was Trump getting elected and that obviously stirred up a lot of emotion on both sides. But I think I escaped or maybe I turned a blind eye to it and avoided it. But it seems as though, most recently, within the past couple years, things have really kind of ...

Bill Walton ([19:56](#)):

But law schools are even now teaching that if you've got an unpopular opinion, they don't need to represent you. So, the whole advocacy system and we're wandering way off the EPA topic here but it's-

John Vecchione ([20:07](#)):

No, but that's why I said steel sharpens steel. I never thought it'd get to the law schools because I thought, because you had to represent people, you had to know what the other side was. And one of the exercises we always had, I think when you went there too, you had to take the side you didn't like and argue it.

Casey Norman ([20:22](#)):

All the time. That's part of being a lawyer, I think. You have to be able to see perspectives.

Bill Walton ([20:26](#)):

That is the way it works.

John Vecchione ([20:28](#)):

It has to but, apparently now, maybe not. And you look at the big law firms in DC, the fellow consovoy who argued and won the national-

Bill Walton ([20:38](#)):

Had to resign.

John Vecchione ([20:39](#)):

Yeah, because they said we're not going to take those cases anymore, you got to go. And they had approved him having those, it's great. There is a certain lack of professionalism in that for the law, I think, but it is a different topic. For this, for West Virginia versus EPA, I think it's an important case because it is saying we are not going to let you do huge things that would have huge political and economic consequences unless Congress has really done it. And the thing that they do here, to show that the New York Times is not correct, they said, "Acid rain." They had a cap in trade for acid rain. Congress passed the law and said, "This acid rain problem is really. UEPA can do this, that and the other thing." And Roberts says, "Look, we approve that, we said that was fine, that was part of the law." You're allowed to do it if you've got the right legislative action, so go do it.

Bill Walton ([21:35](#)):

Well, didn't Congress though, in this case, try to pass something Waxman-Markey that would've given a legislative seal of approval but it couldn't pass? And then the Democrats had big majorities at the time. So, I think the EPA knows they're the only people that have had the power to do it.

John Vecchione ([21:54](#)):

Right. This is a fight and so they also have a fight over this.

Bill Walton ([21:54](#)):

Yeah.

John Vecchione ([21:58](#)):

So, the majority and the dissent have a big fight over this because what do you do when Congress doesn't do anything because Congress is not supposed to do anything, right? Under the constitutional system, it's supposed to be slow and it's supposed to be hard to do. So, Kagan says, "Well, wait a minute. You can't use the fact that something failed to say what the law was at the time," which is

intellectually true but there is a big problem and I think Gorsuch ... Does Gorsuch use the pen in the phone here or was that another case?

Bill Walton ([22:31](#)):

Pen in the phone's in his opinion.

John Vecchione ([22:33](#)):

Right, exactly.

Bill Walton ([22:34](#)):

And his concurrence.

John Vecchione ([22:34](#)):

Right. So, he is directly talking about, "Well, wait a minute. You guys tried to do this, you didn't do it and then, suddenly, the agency pops up and says, 'We found this part of the law.'" What they're saying is not that that completely invalidates it, what they're saying it raises judicial suspicion for it.

Bill Walton ([22:57](#)):

So, what does this mean for the rest of the EPAs agenda? Can you now take this and apply this to other things they're doing and say, "Well, look at this, this other thing, you shouldn't also be doing that."?

Casey Norman ([23:10](#)):

I feel like that's a big part of the whole doom and gloom and all the people saying how radical this was because I don't know, and I think John touched on this already, that this didn't do that much. It didn't shut down the EPAs ability to function and they point out their-

Bill Walton ([23:23](#)):

That's too bad.

Casey Norman ([23:26](#)):

Yeah, maybe that's a shame but, yeah, they really just said that the manner that they went about this and they had an agency ... And actually going back a little bit, it's useful to know the background on this. Congress had already addressed this issue of carbon dioxide emissions, I think it was during the Obama administration, and the House passed legislation that was along these lines, granting authority to do these kinds of extreme things and the Senate did not. And I think Obama was quoted saying, "Well, if we're not going to be able to do it in Congress, we're going to do it in the executive," and that's actually, I think, where the CPP or the Clean Power Plan actually came about because they acknowledged Congress declines to do this specifically.

Bill Walton ([24:05](#)):

Well, initially the EPA did a lot of good. The clean air, clean water, we really have made a lot of progress and all that but this is just a clear case of mission creep.

John Vecchione ([24:13](#)):

And here is what this case just does that's important. If you come in with an ambitious legislative, if you want to transform the country and you get elected and you don't have majorities in the House and the Senate, you're not going to be able to implement a vast program, new program through the administrative state if *West Virginia v EPA* holds up. Because what they said was, "You didn't do this for 40 years, for 40 years you never used it this way." If they had been using it before, if they had showed that this was a continuous course of conduct, I think it would've held up.

Casey Norman ([24:52](#)):

Right.

John Vecchione ([24:52](#)):

And so, what they're saying is you can't do something brand new through the administrative agencies. When you want to do something brand new, go to Congress. And I think I was pointing out that, in point of fact, the Clean Power Act, the Clean Power Regulation, Clean Power Plan here, this regulation, never went into effect and Kagan complains about that. The Supreme Court said, "We are staying this act, this regulation until it gets up to us," never went into effect. Trump gets in, his administration withdrew it saying, "This is a major question and it's not in the statute." So, the EPA said that, at that time, under that group, under that administration. Then Biden got in and they didn't reinstall it, they said, "We're working on it. It doesn't exist right now so why are you taking this case?"

And I think it's Kagan's strongest point and she's really using it against Roberts. Because Roberts is always saying how he's the judicial minimalist and he always calls balls and strikes but he took this case even though the regulation had been withdrawn, he didn't wait for the next regulation. So, I do think that the question here is, if you have an ambitious plan and there's not a clear basis of it in the law, you got to get Congress to go along.

Bill Walton ([26:07](#)):

Well, the Biden administration's got a whole of government approach to climate. And so, you look, for example, what the SEC's doing with their climate disclosure. Does this affect that and does that make that more challengeable?

John Vecchione ([26:24](#)):

I'm going to go out on a limb, I think it definitely does. Do you know, today, Texas, I just was reading the paper, DACA, the program that the immigration service has that was implemented under Obama but stayed in place because of judicial rulings to under Trump which allows illegal undocumented immigrants in the country to stay in the country because they don't have the resources to throw them all out but it's 11 million and they're not going to do anything about it. They've basically given them a pass even though the law doesn't give them a pass. Texas is saying that that is such a major question. That Immigration and Naturalization service can't do it anymore using this case and you're going to see it for the SEC, [inaudible 00:27:13].

Bill Walton ([27:13](#)):

Okay, so that affects immigration but this will also, hopefully, affect what the SEC is trying to do with the climate dis disclosures?

Casey Norman ([27:22](#)):

I would think so because you have the economic impact that that would have if you're thinking about all these different companies that are going to be-

Bill Walton ([27:28](#)):

Oh, yeah, that's a major question.

Casey Norman ([27:28](#)):

Yeah.

Bill Walton ([27:29](#)):

This is a real blow to the markets.

Casey Norman ([27:32](#)):

That's the biggest one I've actually heard most likely wanting to be affected by this case and this the major questions doctrine.

Bill Walton ([27:39](#)):

We got so much to cover in such short a time. How does this affect, my favorite, the Massachusetts versus EPA where they decided CO2 was a toxic substance even though it keeps most of plant life alive.

John Vecchione ([27:53](#)):

They didn't say it was toxic, they said it was a pollutant.

Bill Walton ([27:54](#)):

Okay, well, it's my word now there.

John Vecchione ([27:56](#)):

Well, no, because it's important because, in this case, they said, "If it's toxic, EPA can do a lot more," all right?

Casey Norman ([28:01](#)):

Right.

John Vecchione ([28:01](#)):

This case does say, "Look, if we" ... Here's what's happened here. The Supreme Court decided CO2 was a quote, unquote pollutant, right? Alito hates that. Alito didn't like it then, he doesn't like it now so he says it's not a pollutant. Could they regulate us all? All of us right now because we're exhaling CO2? Are we all point sources? This is his problem.

Bill Walton ([28:23](#)):

You say Alito didn't like it, you don't like it either.

John Vecchione ([28:25](#)):

I think-

Bill Walton ([28:26](#)):

What do we-

John Vecchione ([28:27](#)):

I think that Congress had to say so and I think that the theory of the global warming is different from the pollutant idea that I think the Clean Air Act was passed with. It was particles, it was things that could harm you directly. This is a bank shot but I don't think the Supreme Court's going to go back and change it because it's been around now for quite a while and Congress hasn't said boo and it's a statutory interpretation. I don't believe that the court's going to change that ruling on the CO2. All the judicial canons, I think, say, "Eh, maybe we were wrong but they could fix at any time."

Casey Norman ([29:04](#)):

I think Roberts explicitly says something along those lines. He said, "If this issue had come up where Congress had said, 'You coal powered companies, you're going to decarbonize within this period,'" and actually said it in the words of the text, of the statute said something along those lines, he leaves that open. But he says, "If it had come along to us that way instead of just having this very open-ended end of the statute catchall provision without the actual language in there from Congress," there are two different scenarios and he implied that that could be a route but it's the more proper route, at least, under constitutional principles.

Bill Walton ([29:39](#)):

How do you think Congress is going to respond to this ruling?

John Vecchione ([29:44](#)):

I'll tell you November 15th.

Bill Walton ([29:48](#)):

Okay, okay. That's a fair ... Does this increase the likelihood of court packing?

John Vecchione ([29:59](#)):

Oh, it makes a new constituency for court packing because the environmental movement-

Bill Walton ([30:08](#)):

Court packing means basically adding four more-

John Vecchione ([30:10](#)):

Right.

Bill Walton ([30:11](#)):

... to change the balance of power.

John Vecchione ([30:13](#)):

Now there's a new idea where they'd set up a statute that would have term limits like 18 years and, if the current justices did not abide by the 18, because they don't have to because they got lifetime

appointments, they'd appoint new judges, it's a fallback provision. It's a theory, it's a law professor theory but it's in stages. I just think that it's a bad time ... I just think, politically, they're going to have a hard time because what I just said about November. If they had the power to court pack, they'd have the power to change the EPA rules.

Bill Walton ([30:49](#)):

Yeah.

John Vecchione ([30:49](#)):

Right? Why not? And I will say this, a carbon tax is an idea that has ... People got up in arms about it, they went against it but Congress has never put in the carbon tax because of the tax problem. They don't want to be taxing everybody especially with high gasoline prices. But if there was political will to pack the court, I think there'd be political will to do whatever they want with the EPA. Why would you pack the court when you could actually change the law the way you want? And all these judges, certainly Roberts and Kavanaugh, say, "If Congress passes this, we're upholding up. We're not going to strike it down."

Casey Norman ([31:28](#)):

It's a really short term vision, those you want to do this. And I think there are enough Democrats who see, if we do this and pack the court, what stops the other side from doing the same thing and it's this infinite problem that never actually gets resolved in the court because of various-

Bill Walton ([31:42](#)):

[inaudible 00:31:42] court the size of the House of Representative or something.

Casey Norman ([31:45](#)):

Yeah.

Bill Walton ([31:45](#)):

Just make it go away.

Casey Norman ([31:45](#)):

Just how does it stop?

Bill Walton ([31:48](#)):

I'll see you four, I'll raise you 10.

Casey Norman ([31:48](#)):

Yeah, exactly.

John Vecchione ([31:50](#)):

And that's another thing. Well the other thing is they say, oh, this is all because there's this Senate and there's disproportion in the electoral college. Well, they stopped in expanding the House in 1912, that was the last time we expanded the House. They could expand the House and all the electoral votes

would change and the big states would get more electoral votes, percentage wise, and it's a legislative fix, you don't have to amend the constitution. And they're coming up with all these ways to amend the constitution. I don't understand it, but to answer your question, yes, it increases the constituency for doing something with the courts because a powerful group ... I think you raised Blackstone, right?

Bill Walton ([32:27](#)):

Yes. Larry Fink is all in favor.

John Vecchione ([32:31](#)):

All the regulated parties put in a brief in support of the EPA in this case. And I think with Blackstone, they're going to want to change this because, I don't know, maybe they got an arbitrage, somehow they think they can make money from it.

Bill Walton ([32:45](#)):

This is the Bill Walton Show, I'm here with John Vecchione and Casey Norman and we're talking about all the implications of the recent EPA ruling that, I guess, reined in the EPA. Now, it seems to me this is an agency that needs some reining in. As I understand it, they were about to roll out something where they're going to regulate how much we could heat or cool our houses and set limits on that in order to cut back on energy use. Have you heard about that?

John Vecchione ([33:20](#)):

I had not. The one I heard was gas generation. All these cities and the EPA are stopping gas stoves and things and I think that's insane because, I don't know if you have ever cooked on an electric stove, it's not-

Bill Walton ([33:35](#)):

Not so great.

John Vecchione ([33:35](#)):

Right, exactly. But I do think that because this is a six-three majority, because Roberts and Kavanaugh and Barrett and the folks who aren't Clarence Thomas are on board with this, and even Kagan says in her dissent she had to talk about all the time she joined with the majority striking down administrative laws as going too far. Don't forget, she was Obama appointee who struck down part of the Obamacare as going too much against the states. So, some of these cases they mentioned, Kagan was in the majority. So, I think that this has some legs, certainly Breyer. We don't know how Jackson's going to come out but Breyer also would sometimes rein in the administrative agencies a little bit when he thought they hadn't gone there even though he's a big administrative state guy. So, I do think that this is going to have legs.

Bill Walton ([34:33](#)):

By one count, there are 432 agencies. You're the administrative law person, how many of those agencies have administrative law judges and how pervasive is this problem?

Casey Norman ([34:50](#)):

I don't know how many they have, I know some of them don't.

John Vecchione ([34:53](#)):

The last time I was here, you asked me that.

Bill Walton ([34:55](#)):

I did.

John Vecchione ([34:55](#)):

So, I-

Casey Norman ([34:58](#)):

[inaudible 00:34:58]

Bill Walton ([34:58](#)):

I'm in search of a ...

John Vecchione ([34:59](#)):

So, I looked it up.

Bill Walton ([35:00](#)):

Look, I used to teach accounting and so I want to get this very precise as to what we're up against.

John Vecchione ([35:07](#)):

So, I had people look it up and we found a chart, and I did not bring the chart with me, but it is something like, of those agencies, something like 40. I had thought it was somewhere in the number of 10 or 12 but it's something like 40. It's a large number but the ALJs, the big ones are Social Security, Medicare. They have tons of them because they have to make tons of rulings about whether you get your benefits or not all the day, those are the big ones.

The EPA does not because it brings you to federal court when it sues you. And the SEC obviously does, and the FTC obviously does. I will bring my chart the next time you ask me here and I will give you the full answer. It was an interesting question but the real problem here, I think, for the EPA is that they have big projects. We used to call it the conservation move. As you said, I remember going to New York City as a boy and, when I came home, I had to wash my hands and face and the soot just came off. This is in the early '70, it was amazing.

Bill Walton ([36:14](#)):

We had massive problems in the '70s-

John Vecchione ([36:15](#)):

Massive problems.

Bill Walton ([36:16](#)):

... with air and water. It was massive.

John Vecchione ([36:17](#)):

And so-

Bill Walton (36:18):

Cleveland River really did catch on fire.

John Vecchione (36:20):

Exactly. And there are all these externalities and this was created and it's done some good. Certainly in the heavy metals area, it's still doing some good. But this idea that everything's connected to everything else so that the EPA gets to regulate everything. Bill, if there was an agency, if Congress just wanted to have the do good agency and they say this agency-

Bill Walton (36:42):

Don't give them any ideas.

Casey Norman (36:44):

[inaudible 00:36:44]

John Vecchione (36:46):

This agency will do everything good and nothing bad and we give this agency all the powers to do good that we have here in Congress, okay, and then don't bother us.

Bill Walton (36:55):

And then here's the ball.

John Vecchione (36:57):

Yeah. And so, then, they have the do good agency and then the agency says, "Wow, we've got authority over all the problems and we're doing good here." And then we use Chevron and, "Well, there's an ambiguity in the law and we say we're doing good so who are you to say anything else?" That's not law.

Bill Walton (37:13):

Right, right.

Casey Norman (37:15):

Let it run free.

Bill Walton (37:17):

Well, yeah, don't give them any ideas. So, what other aspects of this that we ought to be the takeaways? My cause is your cause which is to bring back our constitutional rights, due process, an understandable legal framework that treats everybody the same and we can get equal justice. Does this advance that? Is this a big step, a little step in that cause?

Casey Norman (37:51):

I think it's part of a big step in some of the other cases that you noted like Dobbs, Bruen. I think a large part of these rulings is just emphasizing how the constitution works and how the republic works and just

remembering why we have three branches of government that fulfill separate roles. You don't want one branch that can, on its own, do everything and take on whatever power it wants. And just considering also we are in a federalist republic and the state involvement is a factor that I think a lot of people forget. And I think the agencies thing, they're just so pervasive now that people don't realize how much power they are actually accumulating.

Bill Walton ([38:31](#)):

Yeah, we don't want to talk about Dobbs, it's too complicated. But just the idea that the Supreme Court didn't end abortion, it just said it's up to the states, basically, to decide.

Casey Norman ([38:42](#)):

Right.

Bill Walton ([38:42](#)):

And that's going to be a very interesting discussion. One we should have had a long time ago.

John Vecchione ([38:47](#)):

Yeah. We don't do that kind of law but what I'm trying to get, get a yes question but it is better. The real question is where are they going to go with this major questions doctrine because Gorsuch doesn't agree. First of all, he cites Phil Hamburger quite a bit so we liked his opinion, right? We put in both Phil Hamburger and Mark Chenoweth and Rich Samp, they all put in an amicus brief for New Civil Liberties and Gorsuch took it about this. How much can you give to the agency? My do good theory? But he has an interesting thing on the major questions and the majority hasn't adopted it but Kagan says, "Well, it can't really be a major question if the agency is doing stuff Congress knew it was going to do." It's the EPA and it's dealing with the environment, it's not like that CDC case where they were dealing with evictions and they don't know anything about evictions. She was basically saying, if Congress makes a administrative agency and says this is its area, if it does anything in that area, it's okay.

Bill Walton ([39:54](#)):

Well, she also said the EPA experts know things that the Supreme Court doesn't know.

John Vecchione ([39:59](#)):

Yes.

Bill Walton ([39:59](#)):

So, the Supreme Court does stay out of it.

John Vecchione ([40:03](#)):

There's no question. And she says it-

Bill Walton ([40:05](#)):

I think she says that flat out.

Casey Norman ([40:06](#)):

Yeah.

John Vecchione ([40:06](#)):

Oh, she does. She says, "And let's say the obvious, the stakes here are high yet the court today prevents congressionally authorized agency action to curb power plants carbon dioxide emissions. The court appoints itself, instead of Congress or the expert agency, the decision maker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent."

Bill Walton ([40:30](#)):

Respectfully.

John Vecchione ([40:31](#)):

Yeah, exactly.

Bill Walton ([40:31](#)):

You guys are all hideous.

John Vecchione ([40:31](#)):

Exactly. No offense.

Bill Walton ([40:40](#)):

I'm sure none was taken. How's the new Justice influence all this? Because where Breyer was, is this just more the same or is it going to be ...

Casey Norman ([40:52](#)):

We'll see. She made a lot of remarks before starting that were originalists leaning and we'll see if she's a textualist and adhering those-

Bill Walton ([41:02](#)):

Wouldn't that be a-

Casey Norman ([41:02](#)):

That'd be interesting.

John Vecchione ([41:05](#)):

Well, I will say this. So, I've been before her in the district court, I've never been before her in the appellate court and I did a little thumbnail for New Civil Liberties on her rulings. She hasn't said anything about Chevron that she thinks it's bad, she applies it as a district court judge. What I think is interesting is that she has not always rubber stamped what the agency has done. And the other thing she's done that we like as litigators, but maybe as an originalist, is she keeps ... The agencies always want to say only their ALJs, they have unique jurisdiction for certain things that don't go in the district court. And when she's been reversed, she's been reversed because she said, "No, district courts have jurisdiction. You get article three judges, not these ALJs," and she's been reversed.

And Alito was reversed years ago in Casey, he was reversed because one of the things was that a wife had to tell her husband before she got the abortion. He said that was not an undue burden and he upheld that and the Supreme Court reversed it and he specifically wrote about it in Dobb. I wonder if she's not going to do some jurisdictional stuff because she was a district court judge, she doesn't think they should be stripped of jurisdiction without really clear language from Congress that might help. You never know how they're going to come out, I think.

Bill Walton ([41:05](#)):

Yeah.

John Vecchione ([42:21](#)):

I think Breyer was a little different than they thought. Certainly, Gorsuch on Indian rights is much different than some of his compatriots on the other side. Each of them has their own experience, I'm happy to talk about it but I don't like prejudging till I see. Because when you're a district court, I too am a man under authority.

Bill Walton ([42:43](#)):

Well, also, you may have to argue in front of the Supreme Court.

John Vecchione ([42:45](#)):

That is true.

Casey Norman ([42:45](#)):

That's true.

Bill Walton ([42:47](#)):

So, we're not going to pin you down on what you really think. Well, we need to wrap up here. It's great having you back on and these are issues that keep on giving, there's going to be a lot to talk about going forward. Casey Norman, welcome.

Casey Norman ([43:02](#)):

Thank you.

Bill Walton ([43:02](#)):

Glad you're here with New Civil Liberties Alliance. John Vecchione, you're a senior litigator?

John Vecchione ([43:09](#)):

Yeah.

Bill Walton ([43:10](#)):

And it shows. I bet you're good at it. Anyway, this has been the Bill Walton Show and we've been talking about EPA and other scope of government issues here. And I think I've learned a lot, I hope you have as well. As always, you can find the show on YouTube Rumble. We're now publishing also on Substack and all the major podcast platforms including Apple and Spotify. And hope you enjoyed it and you can catch

us with video or audio and let us know what you think about the show, we like your ideas for shows going forward. So, anyway, thanks for joining. Great.

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