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The "Major Questions" Doctrine Sinks the Clean Power Plan and Marks a Major Milestone in Administrative Law

by Robert L. Brubaker and Eric B. Gallon

This is the fourth in a series of articles that we have written regarding the Obama administration's greenhouse gas emission rules for existing power plants—the Clean Power Plan—which the U.S. Environmental Protection Agency (EPA) issued in October 2015.[1] In our first article, *Part One: The Clean Power Plan: Legal Challenges and Prospects*, published in the Fall 2016 issue of *Infrastructure,* we analyzed the legal challenges to the plan.[2] In the second article, *Part Two: The Clean Power Plan: Legal Challenges and Prospects,* published in the Winter 2017 issue of *Infrastructure,* we analyzed the prospects of the plan in light of the election of President Donald J. Trump, including the possible legal paths available to the new administration (and its opponents) to roll back or preserve the Clean Power Plan.[3]

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In our third article, *The ACE Rule and the* Chevron *Doctrine*, published in the Fall 2021 issue of *Infrastructure*, we examined the challenge to the Trump administration's replacement of the Clean Power Plan with the Affordable Clean Energy (ACE) Rule at the U.S.

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Court of Appeals for the D.C. Circuit.[4] In our third article, we noted that there were four pending petitions for certiorari seeking review of the D.C. Circuit's opinion in *American Lung Assn v. Environmental Protection Agency*.[5] We expressed skepticism that the Supreme Court would grant those petitions, given that the new Biden administration wanted neither to defend the ACE Rule nor "resurrect" the Clean Power Plan.[6]

But last October, the Court *did* grant certiorari, on the central interpretive question in *American Lung Assn*: whether section 111 of the Clean Air Act allows the EPA to determine the "best system of emission reduction (BSER)" for a category of stationary sources at the industry level, rather than at the source level, and whether it allows the EPA to select a BSER for fossil-fuel-fired electric generating units that requires generation shifting.[7] This article analyzes the U.S. Supreme Court's June 30, 2022 decision in *West Virginia v. Environmental Protection Agency*,[8] which invalidated the statutory interpretation on which the EPA relied for the Clean Power Plan and, in doing so, formally endorsed the less deferential approach to statutory interpretation called the "major questions" doctrine.

In major questions cases, however, *Chevron* deference does not apply, even if the statute is ambigious.

What Is the "Major Questions" Doctrine?

The "major questions" doctrine, as it was understood before *West Virginia* (without the Court calling it that), is an exception to the doctrine of judicial deference articulated in the Supreme Court's 1984 *Chevron*[9] decision.

Chevron—the most frequently cited administrative law case in the United States—accords deference to an agency's reasonable interpretation of ambiguous enabling legislation, "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[10] As we explained in our third article, the *Chevron* doctrine sets forth a two-step test for determining whether a court should defer to an agency's interpretation of a statute. In Step One, the court asks "whether Congress has directly spoken to the precise question at issue."[11] If it did, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[12] If the statute is silent or ambiguous, however, the court moves to Step Two. In Step Two, the court asks whether the agency's interpretation "is based on a permissible construction of the statute."[13] If the agency's interpretation is not "arbitrary, capricious, or manifestly contrary to the statute," the court must defer to that interpretation.[14]

In major questions cases, however, *Chevron* deference does not apply, even if the statute is ambiguous. In a 2006 law review article,[15] Professor Cass Sunstein analyzed a line of cases, which he called the "Major Questions" cases, in which he said the Supreme Court had "suggest[ed] the possibility that deference will be reduced, or even nonexistent, if a fundamental issue is involved, one that goes to the heart of the regulatory scheme at issue."[16] Before *West Virginia*, the Court applied this doctrine in at least two Clean Air Act cases. In *Whitman v. American Trucking Associations Inc.*, the majority opinion rejected an argument that a Clean Air Act provision directing the EPA to set national ambient air quality standards at a level "requisite to protect the public health" would allow the EPA to consider the costs imposed by particular standards, holding: "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[17] And in *Utility Air Regulatory Group v. Environmental Protection Agency*, the Court rejected an EPA rulemaking that would have extended the Clean Air Act's Prevention of Significant Deterioration (PSD) and Title V operating permit requirements to cover emissions of greenhouse gases from millions of relatively small sources not previously subject to regulation under those programs.[18] The majority opinion commented:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a

> significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[19]

Yet neither of these opinions explicitly referenced a major questions doctrine.

In *West Virginia*, the Court embraced that label and applied it to invalidate the statutory interpretation underlying the Clean Power Plan. As described below, the majority and concurrence concluded the major questions doctrine applies in lieu of *Chevron* deference in cases of major political or economic significance and may be seen as a subset of a long history of "clear statement" jurisprudence that calls for expressly clear statutory text commensurate with the scope of legislative discretion delegated by Congress.[20]

. . . the [Obama and Trump] administrations interpreted "system of emission reductions" quite differently.

How Did We Get Here?

Before we discuss where the U.S. Supreme Court ended up, it is worthwhile to remind the reader where the EPA started and how it got there. The EPA promulgated both the Clean Power Plan and the ACE Rule[21] under Clean Air Act section 111. Section 111 requires the EPA's administrator to publish lists of categories of stationary sources that "cause[], or contribute[] significantly to, air pollution [that] may reasonably be anticipated to endanger public health or welfare."[22] The EPA must then establish "standards of performance" for new sources in those categories.[23] And when the EPA promulgates New Source Performance Standards (NSPS) for an air pollutant from a category of new stationary sources, states are then generally required (with certain exceptions outlined in our prior article) to establish standards of performance for the same otherwise unregulated air pollutant from *existing* sources in that category, sometimes referred to as Existing Source Performance Standards (ESPS).[24] Importantly, both the NSPS and the state ESPS must "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction [BSER] which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) [EPA's] Administrator determines has been adequately demonstrated."[25]

The Clean Power Plan and the ACE Rule both relied on the Obama and Trump administrations' conceptions of BSER. Yet the two administrations interpreted "system of emission reduction" quite differently. For the Clean Power Plan, the Obama EPA interpreted that phrase to mean "a set of measures that work together to reduce emissions,"[26] and looked at "BSER from the perspective of the source category as a whole."[27] The resulting BSER comprised three combined measures: (1) increasing the efficiency of existing fossil fuel-fired generating units; (2) shifting generation from existing steam electric generating units to existing natural gas combined cycle (NGCC) units; and (3) shifting generation from existing fossil fuel-fired electric generating units to "new low- or zero-carbon generation sources."[28] For the ACE Rule, the Trump EPA interpreted section 111 as EPA has historically applied it, that is, to require a BSER that "can be put into operation *at* a building, structure, facility, or installation," such as "add-on controls" or "inherently lower-emitting processes/practices/designs."[29] Applying its narrower interpretation, the Trump EPA concluded the BSER would be heat rate (efficiency) improvements at individual generating units.[30]

In *American Lung Assn* (2021), the D.C. Circuit vacated and remanded the ACE Rule, with a partial dissent.[31] The Trump administration had defended the ACE rule exclusively on *Chevron* Step One grounds (i.e., the absence of ambiguity), which would have precluded a different interpretation by a subsequent administration.[32] But the per curiam opinion, which was joined by Judges Patricia A. Millett and Cornelia T. L. Pillard (both Obama appointees), concluded that nothing in the statute "constrain[ed] the Agency to identifying a best system of emission reduction consisting only of controls 'that can be applied at and to a stationary source.'"[33] The opinion also declined the Trump administration's invitation to apply the major questions doctrine, finding it inapplicable. "Unlike cases that have triggered the major questions doctrine," the majority held, "each critical element of the Agency's regulatory authority on this very subject"—the status of greenhouse gases as air pollutants, the EPA's authority to regulate those pollutants under section 111, and the factors to weigh when choosing BSER—"has long been recognized by Congress and judicial precedent."[34]

Judge Justin R. Walker (a Trump appointee) reached the opposite conclusion. In Walker's view, how to address climate change is clearly a "decision[]

of vast economic and political significance."[35] Consequently, Walker wrote, the major questions doctrine would require the court to invalidate the Clean Power Plan absent a "clear statement [in section 111(d)] unambiguously authorizing the EPA to consider offsite solutions like generation shifting."[36] Walker found no such statement in section 111. Accordingly, Walker concluded, "I doubt § 111 authorizes the [Clean Power Plan]."[37]

The Supreme Court Finds the Petitioners' Claims Were Justiciable

On appeal, a majority of the Supreme Court justices agreed with Walker's dissent. But before the Court discussed the application of the major questions doctrine to the Clean Power Plan, it had to address the question of justiciability. As noted above, neither the Clean Power Plan nor the ACE Rule was in place when the Court granted certiorari. The Supreme Court stayed the Clean Power Plan before it went into effect, and the Trump administration replaced it with the ACE Rule. The D.C. Circuit then vacated and remanded the ACE Rule, although the D.C. Circuit stayed its mandate at the EPA's request. Moreover, by the time the Supreme Court agreed to hear *West Virginia*, the Biden administration had already announced plans to promulgate a new rule. Accordingly, the administration argued that the parties' dispute over the proper interpretation of the Clean Air Act section 111 was moot.

The majority disagreed. The Court noted that the government had not explained or supported its argument that the stay of the D.C. Circuit's mandate "extinguished the controversy," and the majority found the argument made no sense given that "[l]ower courts frequently stay their mandates when notified that the losing party intends to seek our certiorari review."[38] The Court further held that the Biden administration's decision not to enforce the Clean Power Plan did not moot the dispute because the administration had indicated that it intended to apply the same broad legal interpretations in whatever rules it promulgated to replace the ACE Rule.[39]

The dissenting opinion, for its part, did not contest that taking up the case was permissible under "Article III mootness rules," which it described as "notoriously strict."[40] The dissent nonetheless questioned the Court's choice to take the case, noting that "the Court's docket is discretionary" and asserting that "there was no reason to reach out to decide this case" before the Biden administration issued its new rule.[41]

The majority opinion, concurring opinion, and dissenting opinion differed in their conclusions . . .

The Supreme Court Formally Enshrines the "Major Questions" Doctrine in the Canons of Statutory Interpretation

Having justified its decision to grant certiorari, the Court moved on to the merits. The majority opinion, concurring opinion, and dissenting opinion differed in their conclusions regarding the existence of the major questions doctrine, its applicability to the Clean Power Plan, and whether the Clean Power Plan would pass muster under the doctrine.

1. The Existence of the Major Questions Doctrine

a. The majority opinion

The majority opinion, written by Chief Justice Roberts and joined by Justices Alito, Barrett, Gorsuch, Kavanaugh, and Thomas, formally declared the existence of the major questions doctrine, but characterized it as a long-standing legal principle that had simply gone unnamed (by the Court) until now. The majority implicitly conceded that the Court has not previously "label[ed]" the major questions doctrine as such, but asserted "[s]cholars and jurists" had recognized it as a "body of law . . . developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[42] The opinion cited several cases in which the Court has applied the doctrine over the last 20 years, including:[43]

- *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*,[44] which held that the Food and Drug Administration's "authority over 'drugs' and 'devices'" did not "include[] the power to regulate, and even ban, tobacco products";
- *Gonzales v. Oregon*,[45] which held that the attorney general's "power to revoke licenses where he found them 'inconsistent with the public interest'" did not include the authority to "rescind the license of any physician who prescribed a controlled substance for assisted suicide";
- *Alabama Assn. of Realtors v. Department of Health & Human Services*,[46] which held the Centers for Disease Control's "authority to adopt measures 'necessary to prevent the . . . spread of' disease"

did not include the power to "institute a nationwide eviction moratorium in response to the COVID-19 pandemic"; and

- *National Federation of Independent Business v. Occupational Safety & Health Administration*,[47] which held the Occupational Safety & Health Administration's "authority to regulate occupational hazards" did not include the authority to require COVID-19 vaccination or testing.

The "common thread" linking these cases, Chief Justice Roberts wrote, was that they all involved agencies making "[e]xtraordinary [claims] of regulatory authority" based on "'modest words'" or "oblique or elliptical language."[48] "[I]n certain extraordinary cases," the majority explained, "both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claiming to be lurking there."[49]

b. The concurring opinion

The concurring opinion, written by Justice Gorsuch and joined by Justice Alito, further explained how the "major questions" doctrine is designed to protect the constitutional separation of powers,[50] described its decades-long history,[51] and provided additional "guidance about when an agency action involves a major question for which clear congressional authority is required."[52]

The opinion began by situating the major questions doctrine as one of several "clear statement" rules developed at common law "to ensure that acts of Congress are applied in accordance with the Constitution."[53] In the same way courts require clear statutory text before interpreting a statute to apply retroactively or to "abrogate . . . sovereign immunity," Justice Gorsuch stated, the major questions doctrine requires clear statutory direction before courts will interpret a statute to delegate the authority to make important policy decisions to the executive branch.[54] Justice Gorsuch wrote that "the framers" chose to "vest[] the lawmaking power in the people's elected representatives" and designed a system that "deliberately sought to make lawmaking difficult"—not only to protect "individual liberty," but also "to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives," and "preserve room for lawmaking" at the state and local levels, among other reasons.[55] "Permitting Congress to divest its legislative power to the Executive Branch," Justice Gorsuch wrote, "would 'dash [this] whole scheme.'"[56] Justice Gorsuch then traced the doctrine back to an 1897 case involving the Interstate Commerce Commission's authority "to set carriage prices for railroads,"[57] and cited a handful of cases applying the doctrine in the 1980s and since the turn of the century.

Justice Gorsuch . . . traced the [major questions] doctrine back to an 1897 case . . .

c. The dissenting opinion

The dissenting opinion, written by Justice Kagan and joined by Justices Breyer and Sotomayor, rejected the proposition that there *is* such a thing as a nondelegation doctrine[58] or a major questions doctrine.[59] Instead, the dissent asserted, there is a line of cases in which the Court concluded that "an agency exceeded the scope of a broadly framed delegation when it operated outside the sphere of its expertise, in a way that warped the statutory text or structure."[60]

According to Justice Kagan's dissent, "Congress delegates . . . decisions [on matters of significant 'economic and political magnitude'] all the time—and often via broadly framed provisions."[61] And Justice Kagan saw no problem with such delegations. According to Justice Kagan, the framers said nothing to "suggest[] any limit on Congress's capacity to delegate policymaking authority to the Executive Branch" and routinely "gave sweeping authority to the Executive Branch to resolve some of the day's most pressing problems."[62] Nor, the dissent argued, could Congress do otherwise; society is too complex, and "[m]embers of Congress often don't know enough . . . to regulate sensibly on an issue" or to update regulatory approaches "to adapt . . . to new times."[63]

Instead of assuming limitations on Congress's authority to delegate policymaking decisions, the dissent stated, "the Court has done statutory construction of a familiar sort": analyzing the statute's text; reading it "in the context of a broader statutory scheme"; and asking "whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience."[64] Only "when there is a mismatch between the agency's usual portfolio and a given assertion of power," Justice Kagan wrote, should "courts have reason to question whether Congress intended a delegation to go so far."[65] Accordingly, Justice Kagan recharacterized some of the cases that Chief Justice Roberts had cited as proof of the "major questions" doctrine's existence:[66]

- In *Brown & Williamson Tobacco Corp.*, Justice Kagan wrote that the Court concluded that it made no sense for the FDA to regulate tobacco products because the "FDA's governing statute required the agency to ensure that regulated products were 'safe' to be marketed," and "there was no making tobacco products safe" beyond banning them.[67]
- In *Gonzales*, Justice Kagan wrote that the Court concluded that it made no sense to delegate "authority . . . to rescind doctors' registrations" to an official without "'medical expertise.'"[68]
- In *Alabama Association of Realtors*, Justice Kagan wrote that the Court based its decision on the fact that "'the landlord-tenant relationship' [was] a matter outside the CDC's usual 'domain.'"[69]

In each of these cases, Justice Kagan wrote, "the Court thought[] the agency had strayed out of its lane, to an area where it had neither expertise nor experience," and in doing so had tried to make the statute work in a way different than intended.[70]

2. The Applicability, and Application, of the "Major Questions" Doctrine to the Clean Power Plan

a. The majority opinion

As indicated above, the majority opinion concluded that "this is a major questions case,"[71] for three main reasons. First, in adopting the Clean Power Plan, the EPA asserted a "newfound power" it had never previously claimed.[72] Previously, Chief Justice Roberts noted that the "EPA had always set emissions limits under section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly."[73] The majority conceded that a prior section 111 rulemaking had included "a cap-and-trade mechanism" that allowed the trading of allowances to *meet* required emissions reductions, but noted that that prior rulemaking "set the cap based on the application of particular controls."[74] But now, the majority said, the EPA was using trading to decide how much the regulated source category should be allowed to produce its product, in proportion to competing categories.[75] Second, the majority held, the EPA had "located that newfound power in the vague language" of a portion of the Clean Air Act that "had rarely been used."[76] And third, it held that "the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."[77] The majority opinion noted "Congress . . . has consistently rejected proposals to amend the Clean Air Act to create [a cap-and-trade] program [for carbon]" or "to enact similar measures, such as a carbon tax."[78]

Having concluded that the major questions doctrine applied, the majority then asked whether there was "'clear congressional authorization'" in "section 111 . . . to devise carbon emissions caps based on a generation shifting approach."[79] The majority concluded there was not. Instead, the majority said, Congress had simply used the word "system." That "vague statutory grant," the majority concluded, "is not close to the sort of clear authorization required by our precedents."[80]

. . . "the Court thought[] the agency had strayed out of its lane" to an area where it did not have expertise or experience . . .

b. The concurring opinion

Unlike the majority opinion, the concurring opinion offered "guidance" on the kinds of cases that "involve[] a major question," derived from the Court's prior opinions applying the doctrine.[81] Such cases, Justice Gorsuch summarized, involve "a question of great political significance,"[82] relate to a regulatory scheme that "seeks to regulate 'a significant portion of the American economy[]'" or will cost "'billions of dollars'"[83] and may relate to an agency action that "risks intruding on powers reserved to the States."[84]

Justice Gorsuch found each of those "triggers" for application of the major questions doctrine applicable to the Clean Power Plan.[85] First, he wrote, whether "coal and gas-fired power plants . . . should be allowed to operate" is a matter that "Congress has debated . . . frequently."[86] Second, he noted, "'[t]he electric power sector is among the largest in the U.S. economy," and the Clean Power Plan had the potential to "eliminate thousands of jobs" and cost consumers billions of dollars.[87] And third, he stated, "'regulation of utilities'" is traditionally left to the States.[88] Accordingly, Justice Gorsuch concluded, the "major questions" doctrine applied to the Clean Power Plan.

The concurring opinion then went on to discuss "what qualifies as a clear congressional statement authorizing an agency's action."[89] First, Justice Gorsuch wrote, the language is not "'oblique or elliptical,'"[90] the interpretation does not purport to find "'elephants in mouseholes,'" and the agency does not "rely on 'gap filler' provisions."[91] Second, he wrote, the proffered interpretation does not "attempt to deploy an old statute

focused on one problem to solve a new and different problem."[92] Third, the interpretation is consistent with "[a] 'contemporaneous' and long-held Executive Branch interpretation of [the] statute."[93] Fourth, "there is [no] mismatch between [the] agency's challenged action and its congressionally assigned mission and expertise."[94] However, the concurrence cautioned "that such a mismatch is [not] necessary to the doctrine's application."[95]

Applying this test, the concurring justices found that BSER was not a clear congressional authorization. Justice Gorsuch wrote that section 111 is "a rarely invoked statutory provision that was passed with little debate," that the EPA has never "previously interpreted the . . . provision to confer on it such vast authority," and that "there is a 'mismatch' between the EPA's expertise over environmental matters" and its adoption of regulations that effectively set national energy policy.[96]

c. The dissenting opinion

As noted above, Justice Kagan's dissent denied the existence of a major questions doctrine. Her dissent also dissected and rejected each piece of the majority's and concurrence's determinations that the doctrine would apply to the Clean Power Plan.

With regard to the majority's assertion that the Clean Power Plan's use of a trading mechanism to *determine* a cap on emissions, rather than simply as a means to *comply* with a cap on emissions set through other means, was unique, Justice Kagan asserted that the EPA had done something similar with its section 111(d) regulations for mercury. Justice Kagan explained that the EPA had made its mercury limits "more stringent than it otherwise could have, because the EPA knew that plants unable to cost-effectively install scrubbers could instead meet the limits through generation shifting."[97] Kagan also noted that the use of "trading and other tools of generation shifting" as a means of compliance was "common" under section 111 and in other Clean Air Act programs.[98] In response to the majority's comment that section 111 is "rarely used," the dissent countered that section 111 is "a backstop . . . , protecting against pollutants that the NAAQS and HAP programs let go by," and that it "perform[s] a critical function" even if it is "needed only infrequently."[99] And with regard to the majority's comment that it could take guidance from Congress's failure to enact legislation establishing a greenhouse cap-and-trade program or carbon tax, Justice Kagan noted that Congress had also "failed to enact bills barring [the] EPA from implementing the Clean Power Plan."[100] More substantively, the dissent noted recent Court precedent rejecting the proposition that a later Congress's failure to pass legislation sheds useful light on an earlier Congress's intent in enacting the statute being interpreted.[101]

With regard to the concurrence's statement that climate change is a question of great political significance, Justice Kagan asserted that "Congress delegates . . . decisions [on matters of significant 'economic and political magnitude'] all the time—and often via broadly framed provisions like section 111."[102] In response to the concurrence's finding that the Clean Power Plan would regulate a significant portion of the American economy, the dissent noted that the EPA's authority to decide "'whether and how'" to regulate greenhouse gas emissions from power plants under section 111 was already settled in *American Electric Power Co. v. Connecticut* (2011).[103] With regard to the concurrence's suggestion that the Clean Power Plan would have had significant economic impacts, the dissent noted that the Clean Power Plan's generation shifting requirements reflected existing trends in the electric industry and noted that the industry exceeded the Clean Power Plan's emissions-reduction targets even though it never went into effect.[104] The dissent further argued a regulation's form bears no relation to its financial impact, and that "'traditional' technological controls," such as fuel-switching or carbon capture, "can have equally dramatic effects."[105] And in response to the concurrence's suggestion that determining "the 'mix of energy sources nationwide'" went beyond the EPA's authority, the dissent responded that "[e]very regulation of power plants . . . 'dictat[es]' the national energy mix to one or another degree . . . because regulations affect costs, and the electrical grid" dispatches generation according to cost.[106]

Justice Kagan concluded that the Clean Power Plan is well within the scope of section 111 as written. The dissent asserted that section 111 was written to "give[] broad authority to EPA" to choose BSER, as long as EPA "[t]ake[s] into account costs and nonair impacts, and make[s] sure the best system has a proven track record."[107] And generation shifting, the dissent wrote, "fits comfortably within" the statutory language.[108] A "system," Justice Kagan wrote, is just "[a]n organized and coordinated method."[109] A "cap-and-trade scheme," Justice Kagan continued, is a common system for reducing emissions, used in the Clean Air Act's acid rain program and authorized for states' use in their plans to attain and maintain the National Ambient Air Quality Standards.[110] The dissent further noted that section 111 does not "confine EPA's emissions reduction efforts to technological controls" and that Congress explicitly chose, in 1977, to remove such a limitation from the act.[111] And, the dissent asserted, "[t]he parties do not dispute that generation shifting is indeed . . . the most effective and efficient way to reduce power plants' carbon dioxide emissions."[112] The dissent thus concluded that "section 111, most naturally read, authorizes EPA to develop the Clean Power Plan."[113]

What Does the Formal Adoption of the "Major Questions" Doctrine Portend?

Chevron was a court-made endorsement of judicial restraint in an era not only of prolific, near-unanimous, bipartisan, congressional output of environmental and

other regulatory legislation, but also of disdain for judicial activism.[114] The ensuing 38 years have led to a very different era, one of extreme political polarization and congressional gridlock. The premise that Congress implicitly or deliberately delegated legislative or quasi-legislative powers in poorly written statutory text, or in ambiguously written text born of political compromise or stalemate, has far less plausibility today than it did almost four decades ago. Thus, it was not surprising that former Justice Anthony Kennedy wrote, in his final opinion before retirement, "It seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."[115] Only four years later, two of his former clerks, Justices Gorsuch and Kavanaugh, joined the majority in *West Virginia*.

The federal bureaucracy will not be eliminated any time soon. Knowledge and expertise are indispensable to governance and policymaking in an increasingly complex country and world. The never-ending challenge of modern government, then, is to constructively and desirably channel agency discretion and provide appropriate accountability, checks and balances, and recourse to correct errors. A healthy administrative state depends upon safeguards to abusive exercise of discretion. Tradeoffs are always inevitable, but care must be taken to throw out only the bathwater, not the baby. In *West Virginia* and in *Kisor v. Wilkie*,[116] a recent case involving deference to an agency's interpretation of its own ambiguous regulations, the Supreme Court has taken a measured and gradual approach to finding a reasonable balance. In particular, we think it makes sense that the clarity of statutory text used to delegate legislative or quasi-legislative authority to an administrative agency should be commensurate with the nature and extent of the power delegated.

While the approach of both the majority and the concurrence constrains executive actions in meaningful ways, it still affords the executive branch more policymaking authority than might have been expected from the justices' prior writings. As discussed in our third article, Justices Thomas's and Gorsuch's prior opinions had argued that Congress cannot leave policy decisions up to the executive branch without violating Article I, Section I, of the Constitution. In contrast, *West Virginia* suggests that Congress *can* delegate policymaking authority to the executive branch, as long as it does so clearly and explicitly. Call this "nondelegation light."

And in the end, the majority, the concurrence, and the dissent are not as far apart as they appear. All three opinions agree that a federal agency rulemaking can "roam[] [so] far afield" that it "raise[s] an eyebrow" from the courts, to borrow a phrase from Justice Kagan's dissent.[117] For all three, "[t]he eyebrow-raise is . . . [a response] to something the Court found anomalous—looked at from Congress's point of view—in a particular agency's exercise of authority."[118] The opinions simply differ on where to draw the line between acceptable and unacceptable executive activism. Under the approach of both the majority and the concurrence, if an executive agency declares that it has located the authority to address some politically significant problem (for example, cigarette smoking, climate change, or COVID-19) in ambiguous statutory language that neither the agency nor any court had previously read to provide such authority, then the agency's interpretation will be struck down under the major questions doctrine. This approach might be summarized broadly in four words: "Don't be too creative." The dissent, on the other hand, would allow agencies to interpret their enabling statutes broadly, as long as the agencies do not end up regulating in areas outside their jurisdiction. The dissent summarizes its approach (paraphrasing slightly) as: "Stay in your lane."[119]

Yet even in enunciating these different principles, the majority and dissent are not so far apart. The majority's conclusion is, effectively, that EPA *did* leave its lane when it promulgated the Clean Power Plan, commenting, "There is little reason to think Congress" intended the EPA to make decisions such as "how much of a switch from coal to natural gas is practically feasible . . . before the grid collapses, and how high energy prices can go as a result before they become unreasonably 'exorbitant.'"[120] The dissent disagreed, holding that generation shifting is just another "system of emission reduction" and that "[e]valuating systems of emission reduction is what [the] EPA does."[121] Thus, the differing opinions in *West Virginia* really just come down to differing views on the width of the EPA's "lane"—and whether the EPA left it.

Where Does the Biden EPA Go from Here?

According to the Spring 2022 *Unified Agenda of Regulatory and Deregulatory Actions*, the Biden administration expected to propose its replacement to the Clean Power Plan and the ACE Rule in March 2023.[122] The Fall 2022 *Unified Agenda* moved the estimated publication date back to April 2023, with a final rule not to be published until June 2024.[123]

What that replacement will look like, nobody (outside of the administration) knows. And the decision in *West Virginia* offers minimal guidance. Generation shifting is forbidden, but, otherwise, the majority explicitly declined to rule that "the statutory phrase 'system of emission reduction' refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER."[124]

In the absence of new legislation explicitly authorizing the regulation of greenhouse gas emissions, the White House faces formidable challenges in formulating national climate change regulations, foremost among them the difficulty of accomplishing anything

meaningful in a manner that outlasts a change of administration. The past three presidential administrations have adopted polar opposite climate change policies. Given the ambiguity that the EPA and the courts have found in section 111 of the Clean Air Act, executive rather than legislative climate change governance runs the risk of continuing pendulum swings from one administration to the next. And whatever climate change regulations come after the Clean Power Plan and the ACE Rule are likely to spawn another decade of litigation.

Perhaps command-and-control regulation has met its match in trying to micromanage climate change. The last few years suggest that spending may be the Biden administration's best solution. Congress has approved billions of dollars in funding for clean energy in the last few years, as highlighted in the Biden administration's "guidebooks" on the funding opportunities available in the Bipartisan Infrastructure Law of 2021[125] and the Inflation Reduction Act of 2022.[126] For example, the Bipartisan Infrastructure Law included billions of dollars to deploy new transmission lines, support existing nuclear reactors, upgrade hydropower facilities, and fund clean energy demonstration projects.[127] The Inflation Reduction Act, as another example, modified and extended the Production Tax Credit and Investment Tax Credit for renewable energy for two years (after which they will be replaced by "technology-neutral, emissions-based credits"), gave the EPA $27 billion to finance "clean energy and climate projects," and gave the Department of Energy $40 billion in "loan authority to guarantee loans for innovative clean energy projects."[128] Alternatively, innovation, technological advances, the marketplace, state and local governmental policies, and nongovernmental initiatives may be best suited to take a lead role.

Nonetheless, it appears the Biden EPA intends to find a new interpretation and application of section 111(d) that will meet the challenge of climate change while also passing judicial muster. When it tries—and when that new interpretation is challenged in the D.C. Circuit, as it most assuredly will be—a continuation to this series of articles may be in order. inf

Endnotes

1. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60, subpt. UUUU) [hereinafter Clean Power Plan].

2. Robert L. Brubaker & Eric B. Gallon, *Part One: The Clean Power Plan: Legal Challenges and Prospects*, Infrastructure, Fall 2016, at 1.

3. Robert L. Brubaker & Eric B. Gallon, *Part Two: The Clean Power Plan: Legal Challenges and Prospects*, Infrastructure, Winter 2017, at 3.

4. Robert L. Brubaker & Eric B. Gallon, *The ACE Rule and the* Chevron *Doctrine*, Infrastructure, Fall 2021, at 1.

5. *See* West Virginia v. Env't Prot. Agency, No. 20-1530 (U.S. Apr. 29, 2021); N. Am. Coal Corp. v. Env't Prot. Agency, No. 20-1531 (U.S. Apr. 30, 2021); Westmoreland Mining Holdings LLC v. Env't Prot. Agency, No. 20-1778 (U.S. June 23, 2021); North Dakota v. Env't Prot. Agency, No. 20-1780 (U.S. June 23, 2021).

6. Brief for the Federal Respondents in Opposition at 16, West Virginia v. Env't Prot. Agency, No. 20-1530 (U.S. Aug. 5, 2021).

7. West Virginia v. Env't Prot. Agency, No. 20-1530 (U.S. Oct. 29, 2021) (certiorari granted).

8. West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022).

9. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

10. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

11. *Chevron*, 467 U.S. at 842.

12. *Id.* at 842–43.

13. *Id.* at 843.

14. *Id.* at 844.

15. Cass Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006).

16. *Id.* at 193.

17. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 466–68 (2001).

18. Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 321–22 (2014).

19. *Id.* at 324 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159, 160 (2000)).

20. West Virginia v. Env't Prot. Agency, 597 U.S. ___, 142 S. Ct. 2587 (2022).

21. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60, subpt. UUUUa) [hereinafter ACE Rule].

22. 42 U.S.C. § 7411(b)(1)(A).

23. *Id.* § 7411(b)(1)(B).

24. *Id.* § 7411(d).

25. *Id.* § 7411(a)(1) (defining "standard of performance").

26. Clean Power Plan, *supra* note 1, at 64,720.

27. *Id.* at 64,744.

28. *Id.* at 64,724.

29. ACE Rule, *supra* note 21, at 32,524 (emphasis in original).

30. *See id.* at 32,535.

31. Am. Lung Ass'n v. Env't Prot. Agency, 985 F.3d 914, 995 (2021).

32. *Id.* at 944.

33. *Id.*; *see also id.* at 945.

34. *Id.* at 959.

35. *Id.* at 1001–02 (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)) (Walker, J., dissenting in part) (further citation omitted).

36. *Id.* at 996 (Walker, J., dissenting in part).

37. *Id.* at 999–1000.

38. West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2607 (2022).

39. *Id.*

40. *Id.* at 2628 (Kagan, J., dissenting).
41. *Id.*
42. *Id.* at 2609 (Roberts, C.J.).
43. *Id.* at 2608–09. The majority opinion also cites *King v. Burwell*, 474 U.S. 988 (2015), in which the Court declined to defer to the IRS's interpretation of the tax credits available on federal exchanges under the Affordable Care Act, as an example of a prior "major questions" case in which the Court addressed "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted" without using the "major questions" label. *West Virginia*, 142 S. Ct. at 2609.
44. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
45. Gonzales v. Oregon, 546 U.S. 243 (2006).
46. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021).
47. Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661 (2022).
48. *West Virginia*, 142 S. Ct. at 2609 (citation omitted).
49. *Id.* (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)).
50. *Id.* at 2617–18 (Gorsuch, J., concurring).
51. *See id.* at 2619–20 (Gorsuch, J., concurring).
52. *Id.* at 2620 (Gorsuch, J., concurring).
53. *Id.* at 2616–17.
54. *Id.*
55. *Id.* at 2617–18.
56. *Id.* at 2618 (quoting Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 61 (2015) (Alito, J., concurring)).
57. *See id.* at 2619 (citing Interstate Com. Comm'n v. Cincinnati, N. O. & T. P. Ry. Co., 167 U.S. 479, 499 (1897)).
58. *See id.* at 2641–43(Kagan, J., dissenting).
59. *See id.* at 2633–34.
60. *Id.* at 2635.
61. *Id.* at 2633.
62. *Id.* at 2642.
63. *Id.*
64. *Id.*
65. *Id.* at 2633.
66. Justice Kagan did not recharacterize *National Federation of Independent Business v. Occupational Safety & Health Administration*. Instead, she noted that she and Justices Breyer and Sotomayor had dissented from that opinion. *See id.* at 2642–43.
67. *Id.* at 2634.
68. *Id.* at 2635.
69. *Id.* at 2636 (quoting Ala. Ass'n of Realtors, 141 S. Ct. at 2489).
70. *Id.*
71. *Id.* at 2610 (Roberts, C.J.).
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 2612.
76. *Id.*
77. *Id.*
78. *Id.* at 2614.
79. *Id.*
80. *Id.*
81. *Id.* at 2620 (Gorsuch, J., concurring).
82. *Id.* at 2621.
83. *Id.* (citations omitted).
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 2622.
88. *Id.* (citation omitted).
89. *Id.*
90. *Id.* (citation omitted).
91. *Id.* (citations omitted).
92. *Id.* at 2623.
93. *Id.* (citation omitted).
94. *Id.* (citation omitted).
95. *Id.* at n.10.
96. *Id.* at 2624 (citation omitted).
97. *Id.* at 2639–40 (Kagan, J., dissenting) (citation omitted).
98. *Id.* at 2640.
99. *Id.* at 2629.
100. *Id.* at 2641.
101. *See id.* (citing, inter alia, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020)).
102. *Id.* at 2633 (citing Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).
103. *Id.* at 2636 (quoting Am. Elec. Power, 564 U.S. 410, 417 (2011)).
104. *Id.* at 2638.
105. *Id.* at 2639.
106. *Id.* at 2637 (quoting majority opinion at 2613).
107. *Id.* at 2629.
108. *Id.* at 2630.
109. *Id.* (quoting American Heritage Dictionary 1768 (5th ed. 2018)).
110. *See id.*
111. *See id.* at 2631.
112. *Id.* at 2628.
113. *Id.* at 2643.
114. *See, e.g.*, Richard J. Lazarus, The Making of Environmental Law (2004).
115. Pereira v. Sessions, 138 S. Ct. 2105 (2018) (emphasis in original).
116. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).
117. *West Virginia*, 142 S. Ct. at 2636 (Kagan, J., dissenting).
118. *Id.*
119. *Id.*
120. *Id.* at 2612 (Robert, C.J.).
121. *Id.* at 2643 (Kagan, J., dissenting).
122. *See* Off. of Info. & Regul. Affs., *Emission Guidelines for Greenhouse Gas Emissions from Fossil Fuel–Fired Existing Electric Generating Units*, Unified Agenda of Regul. & Deregul. Actions (Spring 2022), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=2060-AV10.
123. Off. of Info. & Regul. Affs., *Emission Guidelines for Greenhouse Gas Emissions from Fossil Fuel–Fired Existing*

Electric Generating Units, Unified Agenda of Regul. & Deregul. Actions (Fall 2022), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=2060-AV10.

124. *West Virginia*, 142 S. Ct. at 2615.

125. White House, Building a Better America: A Guidebook to the Bipartisan Infrastructure Law for State, Local, Tribal, and Territorial Governments, and Other Partners (2022) [hereinafter Building a Better America], https://www.whitehouse.gov/wp-content/uploads/2022/05/BUILDING-A-BETTER-AMERICA-V2.pdf.

126. White House, Building a Clean Energy Economy: A Guidebook to the Inflation Reduction Act's Investments in Clean Energy and Climate Action (2023) [hereinafter Building a Clean Energy Economy], https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf.

127. Building a Better America, *supra* note 125, at 150–51.

128. Building a Clean Energy Economy, *supra* note 126, at 9–10.

Editor's Column

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the major questions doctrine, the nuances involving the different standards for applying the doctrine expressed in the majority, concurring and dissenting opinions, and the impact when applying the doctrine to the Clean Power Plan regulations.

The authors explain that the majority and concurring opinions embrace the notion that the doctrine prevents deference to an administrative agency if a fundamental issue is involved that goes to the heart of the regulatory scheme at issue. However, the specific criteria used in applying the doctrine as well as its practical effect in limiting Chevron has been left by the Court to future decisions. The concurring Justices seem to suggest the doctrine will apply only in extraordinary circumstances but do not clearly delineate what those are.

As the authors explain, we do know the Court applied the doctrine to invalidate an interpretation of the EPA statutory language, "best system for emission reduction," which required electric utilities to shift electric generation from sources like fossil fuels to renewables like wind and solar. Prior regulations applied that term to the best system for limiting pollutants using the existing generating equipment.

The authors close with an examination of alternatives the administration may pursue in revising the Clean Power Plan in furtherance of its carbon-reducing, green power agenda and a corresponding forecast of more litigation ahead.

We hope you enjoy this issue as well as our associated podcasts. If you have suggested topics for future issues or podcasts, or would like to submit an article for consideration, please contact me at billdrex@yahoo.com. end. inf

Endnotes

1 West Virginia v. EPA, 597 U.S. __, 142 S. Ct. 2587 (2022).