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Claremont McKenna College

Major Problems with the Major Questions Doctrine: The Impact of
West Virginia v. EPA on Environmental Regulations and Judicial Review

submitted to
Professor Paul Hurley
and
Professor Kenneth Miller

by
Holman Pettibone

for
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Abstract

This paper examines the historical and ongoing relationship between the Environmental Protection Agency (EPA) and the Supreme Court, with a focus on *West Virginia v. EPA* (2022). In *West Virginia*, the Court ruled that the EPA lacks the authority to implement the Obama-era Clean Power Plan, invoking the "major questions doctrine." Since 1984, the Court has used "Chevron deference" to guide its rulings on administrative action, which requires judges to defer to the administrative agency if its interpretation is reasonable, and the statute is ambiguous. *West Virginia* and the major questions doctrine put the future of *Chevron* deference into question and represent a turning point in judicial review of administrative action. Drawing on scholarly debates regarding the administrative state and judicial deference, this paper argues that the doctrine grants the Court arbitrary power and lacks jurisprudential coherence. It proposes an alternative approach that reconciles concerns about judicial deference with *Chevron*, while upholding the integrity of the Court's administrative law precedent. This paper contributes to ongoing discussions and debate about the EPA's authority as the agency announces new proposals to combat climate change.

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Introduction

On July 9, 1970, President Richard Nixon boldly announced that he would be making an “exception” to his “principle” that “new independent agencies normally should not be created” within the federal government.¹ In a statement to Congress, the conservative president explained that “because environmental protection cuts across so many jurisdictions, and because arresting environmental deterioration is of great importance to the quality of life in our country and the world, I believe that in this case a strong, independent agency is needed.”² Two years later, Nixon signed an executive order establishing the Environmental Protection Agency (EPA), responding to the public's overwhelming concern over pollution and forever changing how the United States approaches environmental challenges.

Bill Ruckelshaus, the agency's first Administrator, recalls: “We had, literally, tens of thousands of applications for jobs that came into our personnel office in those first few months of EPA's existence. That was a manifestation of... the great excitement that existed around the country about a new agency dealing with a big problem that people perceived and they wanted to be part of the solution.” He explains that when he assumed the role, “[t]here was a lot of concern about smell, touch, and feel kind of pollution. We were sort of surrounded by it. You couldn't avoid it.”³

¹ Richard Nixon, “Special Message to the Congress About Reorganization Plans To Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration” (address to Congress, July 09, 1970), The American Presidency Project, <https://www.presidency.ucsb.edu/node/240055>

² Nixon, “Special Message to the Congress About Reorganization Plans To Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration”

³ Bill Ruckelshaus, “Chapter #1: Starting up the Agency—Setting the Right Tone,” interview by Chuck Elkins, *Interview with Bill Ruckelshaus and his former assistants* (2013): 1, <https://www.epaalumni.org/userdata/pdf/605EA9C8EF2DD115.pdf#page>

Richard N.L. Andrews, in *Managing the Environment, Managing Ourselves: A History of American Environmental Policy*, notes that in the first two decades of the EPA's existence, the agency was "extraordinarily successful in reducing pollution." Despite tremendous gains in GDP and a steadily growing population, the United States saw particulate matter pollutants drop by 80 percent from 1970 to 1994. Thanks to the EPA, the country's water became cleaner, air became clearer, and hazardous waste and toxic chemicals were phased out, abated, or otherwise kept under control.⁴ While in many ways, the agency fell short of its lofty raison d'être, and much more was to be done as new challenges arose and old ones persisted, the federal government had successfully begun commandeering the fight against those pollutants the public could "smell, touch, and feel."

There was one noteworthy hiccup along the way: in the early 80s, the Reagan administration took over and gave a preview of the partisan and ideological battles within and around the EPA that would persist for the next four decades. Andrews writes that "Reagan made aggressive use of political appointments to control the regulatory agencies by putting ideological loyalists in key positions. Anne Gorsuch (later Burford), Reagan's first EPA administrator...had no experience in managing a large organization of any kind, let alone a federal regulatory agency... Her primary qualifications for the job were simply ideological loyalty and powerful friends."⁵ Following Reagan's deregulatory agenda, Gorsuch controversially shrank the EPA and disassembled key programs. Modern readers may be reminded of Scott Pruitt, who was picked to lead the EPA in 2017 after suing it over a dozen times as Attorney General of Oklahoma.⁶

⁴ Richard N.L. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy*, (Third edition.), New Haven: Yale University Press, 2020.

⁵ Andrews, *Managing the Environment, Managing Ourselves*

⁶ And attentive readers will recognize that the late EPA administrator shares her surname with current Associate Justice Neil Gorsuch, her son.

Gorsuch eventually resigned as agency director in 1982 after being cited in contempt of Congress for refusing to hand over Superfund records.⁷

Andrews writes that the 1990s was a “turning point” for the EPA, with its once widespread public support fracturing along ideological lines as the branches of government fought over agency control with each election cycle. “In effect, EPA was now repeating the political battles of the early Reagan years, only this time with its opponents in Congress and its defenders in the White House.”⁸

In the 21st century, with increased political polarization, the agency saw its support split cleanly, with liberal Democrats—both in Congress and in the Executive administration—supporting it, and conservative Republicans criticizing it. Support for the EPA declined. More and more Americans decided that if they had to pick between environmental protection and economic growth, they would choose the latter.⁹ What was once a popular agency became a lightning rod for political debate.

From the Reagan administration’s environmental deregulation in the 1980s to the stark ideological splits regarding climate change of the 21st century, the Supreme Court has been in the thick of the fray. Three era-defining court cases stand out among the dozens of Supreme Court cases involving the EPA in the last 50 years: *Chevron v. The Natural Resources Defense Council, Inc.* (1984), *Massachusetts v. Environmental Protection Agency* (2007), and *West Virginia v. Environmental Protection Agency* (2022). Each case explicitly disputes the EPA’s role in enforcing the Clean Air Act and each case has bearing on how the United States will tackle climate change through the regulation of greenhouse gasses.

⁷ Patricia Sullivan, “Anne Gorsuch Burford, 62, Dies; Reagan EPA Director.” *Washington Post*, July 22, 2004.

⁸ Andrews, *Managing the Environment, Managing Ourselves*

⁹ Lydia Saad, “American’s Emphasis on Environmental Protection Shrinks,” *Gallup*, April 8, 2021

Chevron allowed the Reagan-era EPA to proceed with its mission to weaken the agency by letting it relax permit standards for polluters. *Massachusetts* determined that pollutants, as defined by the Clean Air Act, did not apply to greenhouse gases (this decision was later modified by *Utility Air Group v. EPA* (2013)). *West Virginia* further restricted the agency's authority to regulate greenhouse gases, and is the subject of this paper.

Chapter 1: West Virginia v. EPA

Background

In 2015, the Obama administration’s Environmental Protection Agency (EPA), promulgated the Clean Power Plan (CPP), structuring the new regulation under Section 111 of the Clean Air Act, which authorizes the EPA to regulate pollution levels from power sources. The CPP was meant to establish new emission standards for new and existing power plants in an effort to curb greenhouse gas emission and mitigate global warming. Under Section 111, the EPA has the authority to determine an emission limit based on how much the “best system of emission reduction” (BSER) could reduce emission, with the states setting the enforceable rules to meet the limit. In other words, the EPA sets a target based on a hypothetical emission reduction scheme and the states choose the means by which they achieve this target.¹⁰

In crafting the CPP, the EPA adopted a three-tiered approach toward emission reduction to determine the BSER allowed by Section 111: first, reducing emission at the source-level; second, moving from coal to natural gas; and third, moving from coal and natural gas to the clean energy sources, namely wind and solar. These stages were called “building blocks” and comprised the EPA’s conception of how existing power sources could reduce their emissions to reach the CPP’s targets. The first “building block” followed a more traditional framework of improving the efficiency of individual facilities, while the second and third building blocks followed a new “generation shifting” framework. The ultimate goal of reducing the country’s reliance on coal from 38% to 27% of its energy was based on this three-tiered system.¹¹

¹⁰ Syllabus to West Virginia v EPA, 597 Reporter of Decisions No. 20–1530 (Supreme Court 2021).

¹¹ Syllabus to West Virginia v EPA

In 2016, the Supreme Court stayed the CPP, temporarily stopping it from taking effect.¹² In 2019, after a change in presidential administration, the Trump administration’s EPA found that the CPP would impose limits beyond what could be accomplished at the source level (at individual power plants or facilities), would instead regulate at the grid level, and thereby go beyond the scope of its statutory authority under the Clean Air Act. In summary, the new EPA determined that the “generation shifting” building block toward emission reduction should not be considered as part of its BSER analysis. The EPA then repealed the CPP and replaced it with the significantly less aggressive Affordable Clean Energy rule (ACE), which followed the more traditional framework of the first building block: regulating only at the source level and using small technological adaptations to make coal and natural gas facilities marginally more efficient.¹³

The change from the CPP to ACE brought a lawsuit from public health groups, states, cities, and other interest groups, who argued that—by showing restraint rather than zeal—the EPA was neglecting its duty to implement the Clean Air Act, a statute the plaintiffs saw as compelling forceful, sweeping, and existentially necessary environmental regulations. The D.C. Circuit Court ruled in favor of the plaintiffs, vacating the ACE and opening the door for the incoming Biden administration to implement the CPP, should it choose to adopt the nearly 6-years-old regulation. A lawsuit ensued from interest groups and states on the other side, led by West Virginia, and eventually made its way to the Supreme Court. Meanwhile, the new Biden administration EPA expressed interest in implementing an updated power plan to better fit the times.¹⁴

¹² Syllabus to *West Virginia v EPA*.

¹³ Syllabus to *West Virginia v EPA*.

¹⁴ Syllabus to *West Virginia v EPA*.

On June 30, 2022 the Supreme Court, in *West Virginia v. EPA*, formally established the “major questions doctrine” and found that the CPP would go beyond the scope of the EPA’s authority.¹⁵ This finding enjoined the Executive Branch from implementing the CPP and has bearing on the regulations the EPA will attempt next.

Opinions

Majority Opinion

The majority opinion, delivered by Chief Justice John Roberts, ruled that Congress did not, in the Clean Air Act, grant the EPA the authority to regulate emissions through a “generation shifting” framework, thereby preventing the CPP from being promulgated in the future.¹⁶

The Roberts opinion begins with a discussion of standing to determine that the petitioners, led by the State of West Virginia, are injured by the idle CPP and are entitled to have their case heard by the Supreme Court. The majority then turns to evaluating the case on its merits.

On the merits, the Roberts opinion uses a framework of statutory interpretation that focuses on legislative intent, as “precedent teaches that there are extraordinary cases that call for a different approach [than regular statutory interpretation]—cases in which the history and breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority” (internal quotation marks removed).¹⁷ The Court points to the Food and Drug

¹⁵ Syllabus to *West Virginia v. EPA*, 6.

¹⁶ *West Virginia v. Environmental Protection Agency* 597 U.S. ____ (2022) (slip opinion).

¹⁷ *West Virginia v. EPA*, 17 (Opinion of the Court).

Administration’s proposal to ban cigarettes (*FDA v. Brown & Williamson Tobacco Corp.* (2000)), the Attorney General’s attempt to rescind licenses of physicians who assisted patient suicides (*Gonzalez v. Oregon* (2006)), the Centers’ for Disease Control and Prevention (CDC) attempt to impose an eviction moratorium to prevent the spread of COVID-19 (*Alabama Assn. of Relators v. Department of Health and Human Servs* (2021)), and The Occupational Safety and Health Administration’s (OSHA) vaccine mandate effort (*National Federation of Independent Business v. Occupational Safety and Health Administration* (2022)), all relatively recent cases, as precedent in which the Court curbed administrative power due to its doubts that Congress meant to confer that power.

The Court calls this approach the “major questions doctrine,” which—it claims—requires that “in certain extraordinary cases, both separation of powers and a practical understanding of legislative intent makes us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there” and that “[the Court should] presume that “Congress intends to make major policy decisions itself, not leave those decisions to agencies.”¹⁸ In short, the majority finds that the CPP is so broad and consequential that it needs to be reviewed with skepticism by the Court, and that upon closer inspection, it is clear that Congress did not intend to grant the EPA the ability to enforce the generation shifting measures outlined in the CPP.

More specifically, the major questions doctrine argument outlined by the majority is as follows: CPP is an “extraordinary case” because it would “substantially restructure the American energy market” and gives the Court “reason to hesitate” because of its extraordinary nature, the EPA’s prior and minimal use of Section 111(d), and Congress’ past reluctance to adopt a similar

¹⁸ *West Virginia v. EPA*, 19 (Opinion of the Court).

program itself. Thus, CPP falls under the “major questions doctrine” and the EPA must therefore “point to clear congressional authorization to regulate in that manner.”¹⁹

The majority finds that the EPA, despite its best efforts to overcome the skepticism advised by the major questions doctrine, is not able to point to that necessary authorization, or “clear statement,” as Justice Gorsuch calls it in his concurring opinion.

In summary, Justice Roberts’ majority opinion uses the “major questions doctrine” to determine that Congress had not granted the EPA the authority to enforce the CPP. The major questions doctrine, in its first explicit use by a Supreme Court majority, assumes that Congress means to keep policymaking to itself rather than conferring it upon agencies like the EPA. The Court cites past cases where it had curbed administrative power due to doubts that Congress had intended to confer such power. The majority found that the CPP was an “extraordinary case” that would substantially restructure the American energy market and that the EPA must point to clear congressional authorization to regulate in that manner. The majority found that it was not able to point to such necessary authorization.

Concurring Opinion

Justice Gorsuch wrote a concurring opinion, joined by Justice Alito, highlighting the Constitutional values that the major questions doctrine seeks to protect. Taking the reader through a history lesson from the Federalist papers to the Constitution itself to recent court cases, his opinion emphasizes the importance of the separation of powers: that the framers created a slow, deliberative, and representative lawmaking process that “sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives

¹⁹ West Virginia v. EPA, 1-31 (Opinion of the Court).

during their consideration, and thanks to all this prove stable over time”²⁰ by restricting the process to the legislature. His reasoning echoes that of legal scholars who have in recent years formulated theories of law that try to rein in what they see as executive overreach and deconstruct or remove the administrative state.

While ultimately concurring with the Roberts opinion judgment and expressing support for the major questions doctrine, Justice Gorsuch’s opinion reads differently. Whereas Roberts cites the breadth and force of the CPP as a reason for the Court’s closer scrutiny of the EPA’s interpretation, Gorsuch’s opinion implies that the breadth and force of the CPP may itself put the regulation at odds with the Constitution.

Going a step further than Roberts’ opinion, Gorsuch iterates a few key points expressed by other anti-administrative state scholars, such as Philip Hamburger, whom he cites in his concurring opinion. (Notably, Hamburger is the author of *Is Administrative Law Unlawful?*, a question he answers in the book in the affirmative)²¹. First, the administrative state (or at the very least, too much of it) violates the Framers’ construction of a government in which lawmaking is strictly in the purview of elected officials and that those officials, who comprise the Legislative Branch, can never delegate their power. Second, considerable expansion of the administrative state happened around the time of Woodrow Wilson, a pro-bureaucracy, pro-technocracy president who also happened to be racist, and who argued that common people were too ignorant to govern themselves. Third, the legislative process is designed to be difficult, and the administrative state is a shortcut for those wanting to cheat and speed up the process (In *Is Administrative Law Unlawful?*, Hamburger likens administrative lawmaking to off road driving,

²⁰ West Virginia v. EPA, 5 (Gorsuch, J., concurring).

²¹ Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014), 2.

“exhilarating” but “unlawful and dangerous”²²). Fourth, in an appeal to liberals’ interest in minority rights and protecting voting access, the administrative state is antithetical to self-government and diminishes the vote while excluding minority voices—and was established to do exactly that. These points put forward by Gorsuch in his opinion each echo Hamburger’s work. Finally, unlike the majority opinion, Gorsuch’s concurring opinion explicitly mentions the nondelegation doctrine, which in its traditional formulation would greatly restrict Congress’ ability to confer any authority at all to the Executive Branch.

Justice Gorsuch outlines what qualifies a case for requiring the major questions doctrine. While as a concurring opinion, his test is not binding, it serves to justify and explain the (now binding) major questions doctrine and may be used by litigants in the future to argue their case as “persuasive precedent.”²³ Under Justice Gorsuch’s test, the doctrine applies if the administrative rule in question addresses a matter of “great political significance,” if the administrative rule “seeks to regulate a significant portion of the American economy,” or if the rule intrudes into the domain of states’ rights.²⁴ Gorsuch writes that these three “triggers” are not “exclusive,” but since each of them apply to this case, it is obvious the major questions doctrine applies, and the agency must therefore point to a clear congressional statement.

Then, Justice Gorsuch outlines, step by step, the tools courts can use to determine whether a regulation meets the “clear statement by Congress” required by the major questions doctrine, perhaps to give it some precedential teeth when used in the future. “First, courts must look to the legislative provisions on which the agency seeks to rely with a view to their place in

²² Hamburger, *Is Administrative Law Unlawful?*, 2

²³ “Concurring opinion,” Legal Information Institute, Cornell Law School, last modified June 2021, https://www.law.cornell.edu/wex/concurring_opinion.

²⁴ *West Virginia v. EPA*, 9 (Gorsuch, J., concurring).

the overall statutory scheme”²⁵ (internal quotation marks omitted). At first glance, this is a traditional statutory interpretation, but Gorsuch goes on to reiterate that agencies must have a “clear statement,” and anything vague means the regulation may not stand. Second, courts “may” look at how old the statute is to determine if the agency is acting inappropriately. Although Gorsuch concedes that “sometimes old statutes may be written in ways that apply to new and previously unanticipated situations” he also suggests that in other cases, using an old provision to address a new problem would be enough to “be a warning sign that [an agency] is acting without clear congressional authority.”²⁶ Third, the court can be skeptical if an agency uses a statute it has not used before, has not used in a while, or has not used much. “Fourth, skepticism may be merited when there is a mismatch between an agency’s challenged action and its congressionally assigned mission and expertise.”²⁷

Gorsuch’s opinion finds that these tools “yield[] a clear answer in this case.”²⁸

In summary, Gorsuch’s concurring opinion sides with the majority opinion on the merits but goes into more detail about the thinking behind the newly-minted major questions doctrine. Gorsuch cites anti-administration scholars to support the notion that significant administrative action is enough to make anyone loyal to the Constitution squeamish, and that the major questions doctrine is a tool to curb that power. He then outlines the specific considerations for the Court when judging a major questions case.

Again, Justice Gorsuch’s opinion is not binding, so his tests are not precedential and will not be explicitly cited by the Court in future cases. However, Justice Gorsuch’s stated goal is to

²⁵ West Virginia v. EPA, 13 (Gorsuch, J., concurring).

²⁶ West Virginia v. EPA, 14 (Gorsuch, J., concurring).

²⁷ West Virginia v. EPA, 15 (Gorsuch, J., concurring).

²⁸ West Virginia v. EPA, 15 (Gorsuch, J., concurring).

“write to offer some additional observations about the doctrine on which it rests,”²⁹ not to offer a completely different justification for the Court’s conclusion. Therefore, critics and proponents of the major questions doctrine concerned with how it could be applied in the future may look to Justice Gorsuch’s concurring opinion for guidance.

Dissenting Opinion

The dissenting opinion, written by Justice Kagan and joined by Justices Breyer and Sotomayor, opens by saying “[t]oday, the Court strips the Environmental Protection Agency (EPA) of the power Congress gave it to respond to “the most pressing environmental challenge of our time,”³⁰ citing *Massachusetts v. EPA* (2007).

Justice Kagan, joined by Justices Breyer and Sotomayor, criticizes the Court for even hearing the case in the first place, noting that the CPP had become “as a practical matter, obsolete” when the Court decided to “pronounce on [its] legality,” and that although “[t]he Court may be right that doing so does not violate...mootness rules...the Court’s docket is discretionary, and ...there was no reason to reach out to decide this case.”³¹ She argues that “[t]he Court today issues what is really an advisory opinion” to the current administration and any future president and EPA hoping to tackle climate change.³²

Justice Kagan then criticizes the majority for “announcing the arrival” of the major questions doctrine, which she views as a way for the justices in the majority to flout textualism when convenient. She criticizes the majority for taking a hypocritical, anti-textualist approach in its interpretation, and gives her own interpretation of Section 111, showing that in the context of

²⁹ *West Virginia v. EPA*, 1 (Gorsuch, J., concurring).

³⁰ *West Virginia v. EPA*, 1 (Kagan, J., dissenting).

³¹ *West Virginia v. EPA*, 4 (Kagan, J., dissenting).

³² *West Virginia v. EPA*, 4 (Kagan, J., dissenting).

the Clean Air Act, it confers broad authority to the EPA to do the types of things outlined in the CPP.

While the majority argues that under the major questions doctrine, the Court must assume that Congress did not grant the EPA the authority it claims to have been granted, the dissent rejects the major questions doctrine—which Kagan notes is a term that had never before been used by a Supreme Court majority³³—as a misapplication of precedent, and insists that a traditional and proper framework of statutory interpretation shows that this authority has in fact been conferred and thus the regulation must stand.

One clear difference between the majority and the dissent is highlighted by Kagan’s distinction between “vague” and “broad” statutory provisions, noting that sometimes, Congress intentionally confers “broad” authority to agencies such that the agency can use its expertise to solve complex and dynamic problems. While the majority argues the EPA is exploiting a “vague” section of a statute, the dissent argues the section is not vague, but “broad.” The dissent says “Section 111 describes the prescribed regulatory effort in expansive terms,”³⁴ meaning the EPA is given flexible and far-reaching authority. The opinion concludes that “The Clean Power Plan falls within EPA’s wheelhouse,”³⁵ writing “Congress...knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion”³⁶ (citing *Arlington v. FCC*).

The dissent quibbles with the majority’s assertion that Section 111(d) is an “ancillary provision” that has rarely been used and should play a minor, gap-filling role like it has in the

³³ The majority and dissent disagree on the “newness” of the major questions doctrine, as discussed in the section “The Origins of the Major Questions Doctrine.”

³⁴ *West Virginia v. EPA*, 6 (Kagan, J., dissenting).

³⁵ *West Virginia v. EPA*, 13 (Kagan, J., dissenting).

³⁶ *West Virginia v. EPA*, 12 (Kagan, J., dissenting).

past. The dissent says otherwise, calling it a “backstop” that should be employed when the NAAQS and HAPs standards—other provisions in the Clean Air Act—are not enough to combat extreme pollution threats like greenhouse gasses.³⁷ Kagan writes, “[e]ven if they are needed only infrequently...backstops can perform a critical function—and this one surely does. Again, Section 111(d) tells EPA that when a pollutant—like carbon dioxide—is not regulated through other programs, EPA must undertake a further regulatory effort to control that substance’s emission from existing stationary sources.”³⁸

Kagan takes issue with what she sees as the majority’s failure to adhere to textualism, the framework of statutory interpretation championed by former Justice Scalia, and ostensibly followed—albeit in different forms—by diligent liberal and conservative justices alike. To highlight this, she somewhat flippantly cites a series of dictionary definitions (“supposedly a staple of this Court’s supposedly textualist method of reading statutes”³⁹) to argue that the CPP “falls within EPA’s wheelhouse” and appropriately fits the expansive provisions granted by Congress in the Clean Air Act.⁴⁰ She then looks at the precedential cases cited by the majority, showing that those cases used familiar statutory interpretation, rather than the major questions doctrine. She argues that the cases from which the majority derives the major questions doctrine involved statutes used by an agency in a way that did not fit within the agency’s purview. The CPP, however, fits squarely, and therefore passes any familiar or traditional form of statutory interpretation.

³⁷ West Virginia v. EPA, 6 (Kagan, J., dissenting).

³⁸ West Virginia v. EPA, 6 (Kagan, J., dissenting).

³⁹ West Virginia v. EPA, 7 (Kagan, J., dissenting).

⁴⁰ West Virginia v. EPA, 13 (Kagan, J., dissenting).

Finally, Kagan doubles down on the notion that the expansiveness and strength of the CPP is overblown. If implemented in 2022, it would achieve nothing, as the energy sector has already reached the generation shifting goals aimed for by the regulation.

In summary, the dissenting opinion argues that the majority misrepresents precedent in introducing the major questions doctrine, which ignores the familiar textualist approach. It argues further that the majority exaggerates the consequences of the CPP and ignores the fitness between it and the Clean Air Act.

Discussion and Analysis

West Virginia is an inflection point for administrative law in the United States, particularly regarding environmental policy, and has consequences for both executive agencies and Congress. The Court's opinion restricts the EPA and serves as a warning to climate-conscious administrations by determining that environmental regulations like the CPP are “extraordinary” enough to be met with the major questions doctrine.

Chapter Two will discuss the scholarly debate happening behind the scenes. The administrative state—another name for the federal bureaucracy, home to the EPA and the other Executive Branch agencies—is subject to considerable scrutiny, dispute, and discussion in politics and law, with, generally speaking, one side advocating for strengthening and expanding it and the other side advocating for weakening and reducing it. In the legal community, the two poles of the debate are occupied on one side by scholars who believe the administrative state in its entirety to be unlawful and anti-Constitutional and those on the other side who believe it is inevitable and necessary and perhaps even more effective at lawmaking than Congress. Most scholars—and historically, the Supreme Court—occupy the vast area between these poles and

believe that the administrative state must play some role in creating rules and regulations based on statutes “handed” to them by Congress.

Since 1984, the Supreme Court has used “*Chevron* deference,” named for *Chevron U.S., Inc. v. Natural Resources Defense Council, Inc.*, to guide its rulings on administrative action. With *Chevron* deference, the court defers to the administrative agency so long as its interpretation is “reasonable” and the statute vague. While critics of *Chevron* are concerned it mandates bias in favor of the government and prevents courts from objectively interpreting statutes, others have pointed out that *Chevron* only served to clarify what the Supreme Court had been doing for years and does not keep courts from practicing this objective interpretation. Despite this, those who advocate against the administrative state, for Constitutional reasons or otherwise, have been devising ways to circumvent or replace *Chevron* and inch the country’s highest court towards the anti-administrative pole. Notably, the majority, concurring, and dissenting opinions each neglect to cite this ubiquitous precedent. Chapter Two will discuss *Chevron* in more detail.

Chapter Three will explore the origins of the major questions doctrine, finding that it has its roots in anti-administrative state legal theory. It will argue that the major questions doctrine promotes a new, radical, and momentous interpretation of precedent that is internally incoherent, and will assert that the best way for the Court to have made sense of perhaps scattered administrative-law precedent would have been to clarify *Chevron* instead of arming itself with a powerful new doctrine. It will show that the christening of this doctrine makes *West Virginia v. EPA* a landmark case for administrative law and gives the Supreme Court undue control over the administrative state while incapacitating Congress.

Chapter Three will then introduce an alternative to the major questions doctrine that reconciles concerns about judicial deference with *Chevron*. The paper will conclude by discussing Congress and the Biden administration's response to *West Virginia*, and the future of environmental regulation post-*West Virginia*.

Chapter 2: The Administrative State and Judicial Review

Introduction

The expanding “Administrative State” has been subject to intense scrutiny and debate in the legal community,⁴¹ especially as political polarization and partisan gridlock in Congress has led to liberal Democrats seeking policy avenues through the Executive Branch and conservative Republicans seeking judicial truncation of administrative power in the 21st century.⁴²

The Obama administration, facing barriers in Congress after the 2010 elections, began a series of federal bureaucratic actions that was greeted by a skeptical Supreme Court. Then the Trump administration vowed to begin the “deconstruction of the administrative state”⁴³ and the President nominated three conservative justices to the Supreme Court, beginning with Neil Gorsuch, a longtime critic of executive overreach, followed by Brett Kavanaugh, another administrative state-skeptic.

Current Associate Justice Elena Kagan, then a Harvard Law Professor, wrote in a 2001 article on Presidential power in the Administrative State, “[t]he history of the American administrative state is the history of competition among different entities for control of its policies. All three branches of government—the President, Congress, and Judiciary—have participated in this competition.”⁴⁴

⁴¹ Hamburger, *Is Administrative Law Unlawful?*; Jerry Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012); The Stanford Constitutional Law Center, “Is Administrative Law Unlawful? A Roundtable Discussion with Philip Hamburger,” YouTube. October 17, 2018. <https://www.youtube.com/watch?v=thouFmMFhtA>

⁴² Eric Helland and Kenneth P. Miller, “Polarization and the Administrative State,” in *Parchment Barriers*, ed. Zachary Courser, Eric Helland, and Kenneth P. Miller (Lawrence: University Press of Kansas), 97-114.

⁴³ Helland and Miller, “Polarization and the Administrative State,” 98-99.

⁴⁴ Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114, (2001): 2245, 10.2307/1342513.

This chapter will look at the history of the administrative state and judicial review of executive agencies.

The History of the Administrative State: The Debate

In *Creating the Administrative Constitution* by Jerry L. Mashaw and *Is Administrative Law Unlawful?* by Philip Hamburger, the authors write two almost diametrically opposed historical accounts of administrative law in the United States, with Hamburger finding the administrative state to be a relatively recent invention antithetical to the Constitution and Mashaw finding it deeply rooted in the history of the nation and necessary to a thriving democracy. These books represent two sides of the hotly contested administrative state debate, with one side claiming that administrative law is new and troubling and the other side saying that it is old and good, or at the very least, necessary.

Mashaw argues that while the popular story of the administrative state's origins is that the administrative state began in the Progressive Era in the late 19th century and blossomed into its modern form during the New Deal, the administrative state can be traced back to the US Pension Office and other similar programs during the birth of the nation. He asserts that the most significant modern development is the *fear* of administrative power and the judicial backlash against bureaucratic action. Mashaw writes that “[f]rom the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking” and that “[i]f there has been a major shift in our understanding of the place of administration in American governance, it is a shift that we tend to celebrate as

legitimizing our otherwise “unaccountable” administrative state—the ubiquity of judicial review of administrative action.”⁴⁵

Mashaw divides his historical account chronologically between the following time periods: “Federalist Foundations, 1787-1801,” which discusses the necessity of administration to the founding goal of rapid state-building, “Reluctant Nationalists, 1801-1829,” which uncovers the perhaps surprising role Jeffersonian-Republicans played in developing a framework for the administrative state, “Administration and ‘The Democracy,’ 1829-1861,” and “Administrative Government in the Gilded Age.” The underlying point of this account is to offer perspective to anti-administration scholars who claim the administrative state is a recent phenomenon.

Hamburger, who claims that the power of the administrative state is increasing at a troubling rate and was not around in any recognizable form at the time of the country’s founding, actually traces its origins earlier than Mashaw, to monarchical England. He suggests that the form of unchecked, nonrepresentative, extralegal rulemaking and enforcement is rooted in the despotic power of kings and is precisely what the founders were trying to avoid when they set up the three separate branches of government. He blames the modern administrative state for consolidating power that was meant to be separated, placing it under the Executive, and thereby diminishing civil liberties.

One central component to Hamburger’s thesis is that progress on voting rights has historically been followed by expansion of the administrative state. He opines that expansion of the franchise has historically made the ruling elite uneasy, and in fear of power being put in the hands of minorities and lower classes, they have responded by giving more power to bureaucrats who generally come from the wealthy and educated upper class. Like others skeptical of

⁴⁵ Mashaw, *Creating the Administrative Constitution*, 6.

administrative power, Hamburger cites Woodrow Wilson, who over a century ago, outlined a plan for the administrative state and justified it with blatantly racist and classist thinking.

Hamburger's scholarship presents a wholesale rejection of the administrative state. He decries the delegation of legislative power to administrative agencies, the use of administrative adjudication sans due process, whereby the Executive can be both prosecutor and judge, and the sheer size and scope of the modern bureaucracy which he sees as having led to the administrative state bleeding into the everyday lives of Americans.

Though there is clear division in the legal community, most scholars agree that the administrative state—in some form—is here to stay. Critics and supporters of Hamburger's *Is Administrative Law Unlawful?* alike have emphasized that achieving a modern government without the type of administration he criticizes is undesirable or impossible, and that his book therefore represents one extreme pole of the debate.⁴⁶

The material, practical controversy pertains to the judiciary's role in checking administrative power; on one side are proponents of judicial deference, the practice of giving weight to administrative agencies in statutory interpretation, and on the other side are critics of deference, who believe that courts should be more eager to curb runaway administrative power. This debate is robust, important, and has consequences for the structure of the government and the strength of democracy.

Though the term is now embraced by both sides of the debate, “administrative state” is perhaps a misnomer, as it suggests the growing bureaucracy is an extralegal entity operating as its own sovereignty and has consolidated powers designed to be separated. Again, this robust

⁴⁶ The Stanford Constitutional Law Center, “Is Administrative Law Unlawful? A Roundtable Discussion with Philip Hamburger,” YouTube. October 17, 2018. <https://www.youtube.com/watch?v=thouFmMFhtA>

debate is important, and there are powers wielded by the administrative state that may in fact need to be better checked and restrained, but the basic function of implementing laws is not only justified and necessary, but constitutionally sound—that our country’s corpus juris is enlarging, and its administration is growing more complex does not invalidate this.

The Role of the Judiciary: The Debate

We can again turn to Hamburger and Mashaw to look at the two opposing perspectives of what role the judiciary should play in checking the administrative state. Hamburger, continuing his condemnation of all things administrative, critiques *Chevron* for its deference to administrative agencies in their interpretation of statutes. He asserts that “deference to interpretation is an abandonment of judicial office”⁴⁷ and suggests that the automatic deference he observes in the modern judiciary is *worse* than the system that supported the despotic monarchies to which he compares the modern administrative state, as “not even James I got such consistent deference to his proclamations, regulations, interpretations, and adjudications.”⁴⁸ While the latter claim may separate him from his peers, Hamburger is not alone in believing that *Chevron* deference violates Constitutional principles and causes a dereliction of judicial duty.⁴⁹

Mashaw, on the other hand, argues that modern judicial review of administrative action is unprecedented, and historically, the judicial branch took a more “hands off” approach to reviewing administrative action. This claim is also supported by other scholars who say that

⁴⁷ Hamburger, *Is Administrative Law Unlawful?*, 316

⁴⁸ Hamburger, *Is Administrative Law Unlawful?* 319

⁴⁹ Helland and Miller, “Polarization and the Administrative State,” 107.

courts have begun to check administrative power more and more in recent years, with some blaming Congress' lack of control over the administrative state.⁵⁰

A Closer Look at Judicial Deference

The most cited precedent for guiding judicial deference is *Chevron* deference. As noted above, *Chevron* deference emerged in the 1984 case *Chevron v. The Natural Resources Defense Council*, which held that the Supreme Court should defer to agency interpretation with ambiguous statutes so long as the interpretation is reasonable, and the issue falls within the agency's purview.

Courts have interpreted *Chevron* in varying ways and—as evidenced by *West Virginia v. EPA*, which did not mention *Chevron* once, in either the majority, concurring, or dissenting opinions—have applied it inconsistently to administrative law cases. However, *Chevron* deference essentially boils down to a two-step test. First, the statute in question must be ambiguous enough to require interpretation in application; if Congress uses explicit terms, there is no room for agency discretion and deference is not granted. Second, the agency's interpretation must be “reasonable.” What “reasonable” means is worthy of its own body of legal scholarship, but in short, “reasonableness” tests open the case to a variety of interpretive techniques, such as evaluating the textual basis for the agency's interpretation and looking at Congress' generalized intent.⁵¹

Justice John Paul Stevens writes in the *Chevron* opinion “First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is

⁵⁰ Helland and Miller, “Polarization and the Administrative State,” 100.

⁵¹ Intent, of course, is also tricky. Textualists, from Scalia to Dworkin, criticize using the intent of lawmakers as an interpretive tool, yet embrace the finding of contextual, “generalized intent” as necessary to textual statutory construction. Roberts and Gorsuch, when they use Congressional intent to reject the CPP in *West Virginia*, walk a very fine line, as noted by Kagan in her dissent and discussed later in “Evaluating the Major Questions Doctrine.”

clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”⁵²

According to *Chevron*, even if the court may have interpreted the statute differently, it is obliged to defer to reasonable agency discretion because it must accept that Congress granted the agency interpretive authority over the statutes it hands to it. In other words, the court cannot substitute its own interpretation of a statute for an agency’s interpretation when Congress has intended for the agency to determine how to implement the laws it is tasked with implementing.

The debate about *Chevron* contains two notable ironies. First, the *Chevron* two-step test was ostensibly conceived in an effort to sustain the separation of powers, to prevent “legislating from the bench,” what conservative justices have typically criticized liberal justices for. However, modern critics of *Chevron* charge it with doing the exact opposite: flouting the separation of powers by allowing the Executive Branch to consolidate lawmaking and judicial power. Second, the regulation disputed by *Chevron* was put forth by a politically conservative, Reagan-era EPA that, according to environmental groups, limited the Clean Air Act by allowing states to circumvent permit requirements.⁵³ Since then, it has been criticized by political conservatives for allowing agencies to regulate too much.

⁵² *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)

⁵³ "*Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*" Oyez. Accessed March 2023. <https://www.oyez.org/cases/1983/82-1005>.

In the years prior to *West Virginia v EPA*, administrative law scholars and the Supreme Court had increasingly expressed disapproval of *Chevron* deference. The Court signaled a shift of its stance towards *Chevron* in the 2015 case *King v Burwell*, where it “chose not to defer to the IRS’s interpretation of the ACA’s tax provisions, stating that *Chevron* should not apply in cases of ‘deep economic and political significance.’”⁵⁴ With Justice Gorsuch added to the Court in 2017 and *King* in the rearview mirror, the time was ripe for the Supreme Court to begin departing from *Chevron*. Enter the major questions doctrine.

⁵⁴ Helland and Miller, “Polarization and the Administrative State,” 108.

Chapter 3: The Major Questions Doctrine

Introduction

Chapter Two began with Justice Kagan’s insight that “[t]he history of the American administrative state is the history of competition among different entities for control of its policies. All three branches of government—the President, Congress, and Judiciary—have participated in this competition.”

This chapter will argue that the major questions doctrine is flawed for the power and discretion it gives the Judicial branch in this competition for control.

The origins of the Major Questions Doctrine

The major questions doctrine has roots in anti-administrative and anti-*Chevron* legal theory,⁵⁵ with the rise of the major questions doctrine coinciding directly with the increased criticism of *Chevron* deference. Unsurprisingly, the precise origins of the major questions doctrine are also hotly debated. Justice Kagan, in her dissenting opinion, claims the majority “announced the arrival of” the doctrine in *West Virginia v. EPA*, and emphasizes that the doctrine has never before been explicitly mentioned by a Supreme Court majority. Chief Justice Roberts, in response, notes that “the major questions doctrine label... took hold because it refers to an identifiable body of law that has developed over a series of significant cases,”⁵⁶ (internal quotation marks omitted) deemphasizing the inaugural usage of the phrase and the fresh blueprint for the doctrine provided by the concurring opinion. The term “major questions”

⁵⁵ Importantly, opposition to the administrative state and opposition to *Chevron* deference, though obvious bedfellows, are distinct ideologies. The former ideology, occupied by Philip Hamburger and echoed by Justice Gorsuch, involves a motive to significantly restructure the government and is considerably more radical than the latter.

⁵⁶ *West Virginia v. EPA*, 20 (Opinion of the Court).

actually traces its origins in legal writing to an article penned by former Justice Breyer (who joined the dissent in *West Virginia*) when he was on the First Circuit Court of Appeals.⁵⁷

Unsurprisingly, the argument made by Breyer in 1986 is much different than the argument made by the majority *West Virginia*.

As with the administrative state itself, critics of the major questions doctrine like to say it is a recent practice unsupported by traditional values and proponents like to say it has always been around. The truth is easier to clarify here: “major questions doctrine” is a phrase first used by the Court in *West Virginia*, citing precedent exclusively in 21st century cases, beginning with *FDA v Brown and Williamson Tobacco Corp.* (2000). So, it has been gradually developing in recent years but was “officially” instituted in its current form by its explicit mention in *West Virginia*.

***Chevron* Deference Versus the Major Questions Doctrine**

Many opponents of *Chevron* deference—and proponents of the major questions doctrine—have complained that deference granted by the Judicial Branch and delegation granted by the Legislative Branch are antithetical to the republican goals of the Constitution and represent an anti-egalitarian boost to the elite class. Critics have been concerned that *Chevron* deference forces the Judiciary to abandon its duty to, as Chief Justice John Marshall said, “say what the law is.”⁵⁸ Some commentators note that it needlessly introduces bias to the adjudication process, stacking the cards in favor of the Executive Branch. Interestingly, many on the pro-administration state make the same type of argument, but the inverse: that deferring to highly

⁵⁷ Thomas B. Griffith and Haley M. Proctor, “Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine,” *The Yale Law Journal Forum* 132, (2022): 693-728.

⁵⁸ “It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137.

educated or specialized bureaucrats is a good thing, as it is efficient and leads to better policy. Some supporters of *Chevron* deference claim that “the experts” are the best interpreters of ambiguous law, even saying that Congress is too inept or incompetent.

If these opponents and proponents of *Chevron* deference are both correct on the fundamental notion that *Chevron* deference requires outside weight to the opinions of bureaucrats, and that this deference is supposedly justified by these bureaucrats' expertise, then *Chevron* deference is deeply flawed and should be thrown out. The critics would be right to say that it is anti-republican, diminishes the value of the vote, and unconstitutionally hands legislative power to unelected bureaucrats.

However, *Chevron* deference, properly implemented by the courts, actually looks more like regular old statutory interpretation. Historically, in fact, *Chevron* has been implemented by the courts as part of this “regular old statutory interpretation” framework. One paper shows that *Chevron* did not substantially change judicial review of administrative action, and in the majority of cases using the *Chevron* framework, the Court *did not practice deference to the agency*.⁵⁹ However, critics of *Chevron*, including a state supreme court judge who—emboldened by *West Virginia*—vehemently rejected it this year,⁶⁰ insist that *Chevron* precludes judges doing their job of interpreting the law and saying what it is.

For a moment, let us ignore doctrines and controversial precedents and imagine the Court's proper role in “saying what the law is” when it comes to the relationship between Congress and the administrative state: first, if Congress' statute is ambiguous, the relevant court

⁵⁹ William N. Eskridge and Lauren Baer, “The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*,” *Social Science Research Network*, (2008). 10.2139/ssrn.1132368

⁶⁰ “Courts Not Mandated to Defer to Agency Interpretations.” *Court News Ohio*, December 29, 2022 <https://www.courtnewsOhio.gov/cases/2022/SCO/1229/211440.asp#.ZEYPXezMK3I>

should interpret the statute so as to maintain the integrity of law. In other words, the Court should say what the law is, or “find” the law, as some prefer to put it. The agency must follow this interpretation. This is mostly uncontroversial.

If Congress’ statute is intentionally capacious, broad, or requires significant agency discretion, the agency should come up with a reasonable and appropriate implementation plan. If the plan is unreasonable or inappropriate or based on a misinterpretation of the law, the courts should correct it. While some may dislike it when Congress gives broad authority to administrative actors, this is also relatively uncontroversial and consistent with the historical relationship between the Legislature and the Executive.

If the statute at hand is so capacious, vague, or requires so much discretion that it violates the Constitution’s framework of separation of powers, the judiciary may have to send it back to the Legislature, for it is the law itself, not the regulation, that violates Constitutional norms and principles.

Fortunately, *Chevron* deference, properly used, allows all of the above. In fact, it requires it. As Justice Scalia explained in an address to Duke University School of Law in 1989: "An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency. *When the former is the case, what we have is genuinely a question of law, properly to be resolved by the courts.* When the latter is the case, what we have is the *conferral of discretion upon the agency, and the only question of law presented to the courts is whether the agency has*

acted within the scope of its discretion-i.e., whether its resolution of the ambiguity is reasonable” (emphasis added).⁶¹

On one view, the major questions doctrine is just one theoretical framework for evaluating the “reasonableness” standard in *Chevron*, and therefore the majority does not depart from precedent. Put another way, the major questions doctrine fits within *Chevron*’s two-step formula, but takes into account the size and scope of the administrative action before determining whether the agency’s interpretation is reasonable. While plausible, this is not a faithful account of the majority’s argument.

First, analysts on both sides of the debate agree that for better or for worse, *West Virginia* is a unique and significant decision that changes how the Supreme Court evaluates administrative law cases.⁶² Second, *Chevron* and “reasonableness” are not mentioned in either the majority or concurring opinions. At the very least, the majority believes the CPP must be judged outside the realm of the *Chevron* framework, due to the “bigness” of the administrative action. At most, it believes *Chevron* was wrongly decided or misinterpreted in a number of subsequent cases,⁶³ but cannot or will not uproot so much precedent in one case. Second, we can assume that the Court intentionally went the extra mile to outline the major questions doctrine and did not merely forget that they could have just cited *Chevron* and explained why the CPP relies on an unreasonable interpretation of the Clean Air Act.

Finally, with the doctrine’s origins in anti-*Chevron* theory in mind, it can reasonably be assumed that it is separate from the *Chevron* two-step test and is meant to supplant *Chevron* in

⁶¹ The Honorable Antonin Scalia, “Judicial Deference to Administrative Interpretations of Law,” *Duke Law Journal* 1989, no. 3 (1989): 511-521.

⁶² Philip A. Wallach, “Will *West Virginia v. EPA* cripple regulators? Not if Congress steps up.” *Brookings*, July 1, 2022. <https://www.brookings.edu/research/will-west-virginia-v-epa-cripple-regulators-not-if-congress-steps-up/>

cases of “major” administrative action. And the difference between the two doctrines is stark: with *Chevron*, the agency’s interpretation just needs to be reasonable, with the major questions doctrine, there can be no interpretation whatsoever: either the statute is crystal clear and speaks to the issue at hand, or the agency is powerless.

Evaluating the Major Questions Doctrine

Proponents of the major questions doctrine believe that introducing a substantial exception to normal judicial deference is necessary to fix what they see as administrative overreach. In effect, however, making this exception takes some of the power held by the executive and legislative branches—the authority of Congress to pass laws and the prerogative of the Executive to implement them accordingly—and transfers it to the judiciary in cases that the court deems involve “major questions.”

The fundamental idea behind the major questions doctrine is that the Court should assume that Congress intends to solve “major questions” itself, rather than delegating to an administrative body, but crucially, the majority and concurring opinions lack specificity in their definitions of “major.” Justice Roberts says the major questions doctrine applies to “extraordinary cases” of administrative actions with “economic and political significance” that claim “extravagant statutory power over the national economy.” Justice Gorsuch suggests that a question may be major when it would “regulate a significant portion of the American economy” or “end an earnest and profound debate across the country” (though it’s unclear which “earnest and profound” debate the Clean Power Plan would end).⁶⁴

⁶⁴ Not surprisingly, Congress is much more specific when it outlines its own guidelines for the administrative state in the Administrative Procedures Act. See, for a particularly relevant example, 5 U.S. Code § 706, which outlines the scope of judicial review of administrative agencies. While the Court frequently emphasizes that our democracy is designed to grant legislative authority to Congress, it fails to

The lack of a clear definition becomes evident when examining the CPP. The decision to adopt a generation shifting strategy to transition the power grid away from coal dependency resolves a supposedly “major question” that involves the EPA claiming “extravagant statutory power over the national economy.” Yet, in the absence of the CPP, the U.S. economy has, from 2015 to 2022, in the absence of the CPP, *already reduced its reliance on coal by more than the amount the CPP would have required.*⁶⁵ Therefore, the major questions doctrine, as defined by the Court, does not restrict its use to “extraordinary” regulations with “economic...significance”, which suggests the Court may use it as an “I’ll know it when I see it” doctrine. By failing to provide clear and defensible criteria for deeming a question “major,” the Court grants itself the same type of discretion it accuses the EPA of abusing; discretion that is best exercised by Congress or by expert agencies acting under Congressional authority.

After determining that a proposed regulation is “major,” under the major questions doctrine, the Court looks to the text to see if there is clear authorization, looks at how old the statute is, looks to see if the statute has not been used before, has not been used in a while, or has not been used much, and determines if there is a mismatch between the statutory authority and the agency’s expertise. Justice Gorsuch suggests that any of these can be a “sign that an agency is attempting to work around the legislative process” (internal quotations omitted)⁶⁶ and that

acknowledge the irony of issuing an opinion that writes over Congress’ own guidelines, even though Congress wrote them through a rigorous, lengthy, and highly representative process. A House of Representatives report describes the process of writing the Administrative Procedures Act: “For more than 10 years this legislation has been under consideration. Certainly no measure of like character has had the painstaking and detailed study and drafting. Both the legislative and executive branches have participated, and private interests of every kind have had an opportunity to present their views.” *Administrative Procedure Act*, Report of the House Judiciary Committee, No. 1989, 79th Congress, 1946. If Congress believes that agencies have become too powerful, it is free to revise the APA with its own version of the major questions doctrine. It would likely be more detailed and involve more public opinion than this Court’s opinion.

⁶⁵ “What is U.S. electricity generation by energy source?,” United States Environmental Protection Agency, last modified March 2, 2023. <https://www.eia.gov/tools/faqs/faq.php?id=427&t=3>

⁶⁶ *West Virginia v. EPA*, 10 (Gorsuch, J., concurring).

some combination of these factors is enough for the Court to overrule the agency. These standards fail to provide the type of rigor necessary to even-handed, textualist statutory interpretation.

Textualism, championed by the late Justice Scalia, is now embraced by many liberal and conservative judges alike as the gold standard for statutory interpretation. Today, every member of the Supreme Court is to some extent a textualist, including—or even especially—the conservative justices who brought the major questions doctrine to life.⁶⁷

The fundamental mandate of textualism is that the text of the law is what matters, as opposed to, for example, its legislative history or the individual intent of the legislators who enacted it. Furthermore, textualists tend to be Constitutional originalists, meaning they denounce the notion of a "living Constitution" and strictly consider the text of the Constitution in its original context.⁶⁸

Together, textualism and originalism say that the age of a law should not be considered, nor should the actions or inactions of a subsequent Congress, so long as the original law still stands. In fact, the age of a law may further *justify* adherence to it, because it means the law has stood the test of time. Ignoring this, Justice Gorsuch recommends looking to the age of a statute, and Justice Roberts cites the actions of Congress since the law's passage.⁶⁹ This causes

⁶⁷ Harvard Law School, "The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes," Youtube. November 25, 2015. Starting at 8:13 <https://www.youtube.com/watch?v=dpEtszFT0Tg> Justice Kagan references her statement in this dialogue, "we're all textualists now," in her concurring opinion.

⁶⁸ "Originalism," Legal Information Institute, Cornell Law School, last modified May 2022, https://www.law.cornell.edu/wex/concurring_opinion.

⁶⁹ The majority opinion notes that the subsequent actions of Congress are used to evaluate whether the question at hand is major, not to evaluate the Clean Air Act itself. But is using an irrelevant extratextual test to preclude normal statutory interpretation any better than using it during statutory interpretation? In *Sullivan v. Finkelstein* (1990), Justice Scalia pointedly wrote a concurring opinion because he was troubled with a single footnote in the majority opinion for referencing Congress' "subsequent legislative history." *Sullivan v. Finkelstein*, 496 U.S. 617 (1990)

incoherence between the doctrine and the Court's larger jurisprudence. The major questions doctrine, as Justice Kagan writes, is a “get-out-of-text-free card,” because normal textualism would reject a reliance on these extratextual criteria.⁷⁰ Without a firm basis in the text, the major questions doctrine gives the Court arbitrary power.

Moreover, the majority and concurring opinions, while developing the major questions doctrine, confuse the utilization of old laws for a novel objective with the utilization of old laws to confront novel obstacles. When the Constitutional right to free speech is used to protect messages posted to the internet, an old law is being used for a new purpose but serving its original objective. Similarly, it is important to distinguish between an agency using innovative methods to confront new developments with the intention of fulfilling a purpose specified in an old statute and an agency changing the purpose of the statute. Those on either side of the debate may concede that in some cases, Congress should do more to update old statutes with modern significance. But the effect of rejecting a regulation because it uses an old provision to confront a modern challenge—as the Court does in *West Virginia*—is that Congress becomes limited in its ability to pass major legislation meant to last for a long time. It is better to follow these democratically passed laws—no matter how outdated—than to allow unelected members of the Court to depart from the values of textualism and originalism and render old provisions obsolete.

Still, the Court claims that it finds justification for this departure from textualism in precedent. Justice Kagan describes how the precedent cited by the majority follows “normal statutory interpretation”: in the other cases the majority opinion cites, the agency in question claimed authority in a subject matter beyond its expertise and in a way that conflicted with the contextual statutory scheme. The CPP however, “falls within EPA’s wheelhouse, and it fits

⁷⁰ *West Virginia v. EPA*, 28 (Kagan, J., dissenting).

perfectly...with all the Clean Air Act's provision."⁷¹ The dissenting opinion also notes that the major questions doctrine "replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules."⁷² This new set of rules is comparable to strict scrutiny, a test the Court uses to ensure core individual rights like freedom of speech and freedom of religion are protected. As Justice Souter famously said, "strict scrutiny leaves few survivors."⁷³ The major questions doctrine may not leave many either.

The Court admits that it is making an exception to normal statutory interpretation. When Justice Kagan writes that the cases cited by the majority (*FDA v. Brown & Williamson Tobacco Corp.* (2000), *Gonzalez v. Oregon* (2006), *Alabama Assn. of Relators v. Department of Health and Human Servs* (2021), *National Federation of Independent Business v. Occupational Safety and Health Administration* (2022) follow regular statutory interpretation, rather than the non-textualist major questions doctrine that the majority claims they follow, Justice Roberts responds:

The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of “congressional authorization”—confirms that the approach under the major questions doctrine is distinct.⁷⁴

Thus, Justice Roberts agrees that the major questions doctrine is distinct from routine (read: textualist) statutory interpretation. So, under the major questions doctrine, the Court allows itself to skip the interpretive work and just look for a clear statement, so long as it is skeptical of the agency's interpretation and there is a major question at stake. Justice Gorsuch defends this approach by claiming the dissent also endorses it:

⁷¹ *West Virginia v. EPA*, 13 (Kagan, J., dissenting).

⁷² *West Virginia v. EPA*, 15 (Kagan, J., dissenting).

⁷³ *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)

⁷⁴ *West Virginia v. EPA*, 19-20 (Opinion of the Court).

At times, the dissent appears to dismiss the doctrine as a “get-out-of-text free car[d].” ...But then again, the dissent also acknowledges that the major questions doctrine should “sensibl[y]” apply in at least some situations.⁷⁵

This is a complete misrepresentation of Justice Kagan’s point, which is that precedent advises that “courts have reason to question whether Congress intended a delegation to go so far” only when there is a “mismatch” between the agency’s expertise and the authority it claims. When the authority it claims (like reducing greenhouse gas emissions) is matched with its expertise (environmental protection), there is no need to load the dice against the agency before interpreting the statute at hand:

To decide whether an agency action goes beyond what Congress wanted, courts must assess (among other potentially relevant factors) the nature of the regulation, the nature of the agency, and the relationship of the two to each other. See, e.g., *Barnhart v. Walton*, 535 U. S. 212, 222 (2002). In particular, we have understood, Congress does not usually grant agencies the authority to decide significant issues on which they have no particular expertise. So when there is a mismatch between the agency’s usual portfolio and a given assertion of power, courts have reason to question whether Congress intended a delegation to go so far. The majority today goes beyond those sensible principles.⁷⁶

Justice Gorsuch also defends the approach by claiming that the major questions doctrine is a “clear-statement” rule and that “our law is full of clear-statement rules and has been since the founding.” The Court does in fact have clear-statement rules, but these normally apply to equally clear and extraordinary transgressions against Constitutional principles.⁷⁷

⁷⁵ *West Virginia v. EPA*, 19-20 (Gorsuch, J., concurring).

⁷⁶ *West Virginia v. EPA*, 14 (Kagan, J., dissenting).

⁷⁷ Natasha Brunstein and Donald L. R. Goodson, writing in the *Yale Journal on Regulation*, make the point that the majority may have declined to call the major questions doctrine a “clear-statement rule” for this reason. Yet, as they point out, “the more that commenters, litigants, and lower courts start using the *West Virginia* concurring opinion’s use of clear statement rather than the majority’s use of “clear congressional authorization,” the more likely it is that the clear-statement label will take hold.”

Natasha Brunstein and Donald L. R. Goodson, “To Be Clear, the Major Questions Doctrine Is Not a Clear-Statement Rule,” *Yale Journal on Regulation*, December 21, 2022. <https://www.yalejreg.com/nc/mqd-not-clear-statement-rule/>

Going back to Justice Kagan’s point, what would be “extraordinary” is the EPA claiming the authority to regulate food and drugs. In that case, the agency would need clear authorization from Congress. But if it is claiming authority, even significant authority, within the confines of its expertise, the Court is tasked with interpreting whether the statute grants such significant authority, not rejecting the regulation at first glance.

In conclusion, by misapplying precedent and erroneously identifying the CPP as “extraordinary,” the Court allows itself to turn its back to the text and use interpretive tools and standards of scrutiny normally reserved for more straightforward violations of Constitutional principles. By attaching the “major questions” label to a regulation like this, the Court opens the door for it to reject other regulations based on the age of the law in question, Congress’ subsequent legislative actions, and other shaky criteria, without going through the process of text-based statutory interpretation. In doing so, the Court limits Congress’ ability to have its laws implemented by agencies and affords itself undue discretion.

A Better Method

To summarize, *Chevron* deference first asks if the statute in question is ambiguous, then asks if the agency’s interpretation is reasonable. If the answers are “yes” and “yes,” the rule stands. If not, the Court will overrule the agency. On the other hand, the major questions doctrine first asks if the issue at hand is major, then asks if the Court has reason to be skeptical of the agency’s interpretation (which it likely is), then asks if the agency can point to clear authorization from Congress. If the answer is “yes” to the first two questions, the answer to the third has to be “yes” in order for the rule to stand.⁷⁸

⁷⁸ The majority opinion is difficult to distill into a sequential, coherent, and specific test, which is part of the problem with the major questions doctrine.

I propose a series of questions that reconcile *Chevron* with concerns about the separation of powers while eliminating the “I’ll know it when I see it” slippery slope of the major questions doctrine. First, the Court must answer the preliminary questions it should answer in any case, including, but not limited to, “Is the agency responsible to the statute in question?” and “Are there any Constitutional liberties violated by the statute?”

Next the Court should determine whether the statute in question is either broad, vague, or explicit. This follows the reasoning outlined by the late Justice Scalia in his address to Duke University and the point made by Justice Kagan in her dissent. If the statute is broad (or capacious, or deferential) the Court must defer to the agency—for Congress intended for the agency to practice discretion—so long as the interpretation is reasonable. If the statute is *too* broad, capacious, or deferential, the Court should use other tools in its arsenal to address the legality of the statute itself (as opposed to the agency’s rule or regulation). If the statute is vague, the Court must determine what the law is and determine whether the agency is following the correct interpretation. If the statute is explicit, the Court must determine whether the agency is following the explicit statute. Each of these steps allows the Court to exercise its duty to “say what the law is,” but does not allow the Court to reject the notion that democratically elected lawmakers may decide to grant an agency some level of discretionary authority to confront one issue over time.

The major questions doctrine, in effect, gives the Court arbitrary power. It jettisons statutory interpretation and travesties textualism in an attempt to prevent agencies from claiming too much authority.

Perhaps there is a way to achieve this goal by raising the Court’s scrutiny toward certain regulations in a coherent and defensible manner while maintaining the integrity of well-

established precedent and textualism. Within the *Chevron* framework, the Court could decide certain regulations may have a higher bar to clear to meet the “reasonableness” standard, whether because there is a considerable distance in time between the passing of the statute and the proposing of the regulation or because of the regulation’s practical implications across an industry or sector.

An alternative like this may be feasible, but realistically, it would not look any different from how the Supreme Court typically defines law by looking at it within its context. So, we are back to “regular old statutory interpretation.” Thus, a Court concerned with administrative overreach can and should operate within the *Chevron* framework and precedent in order to ensure regulations are constitutional. In short, Justice Roberts should have gone toe-to-toe with Justice Kagan and argued his point while playing by the rules of statutory interpretation. Whether he *could* have done this convincingly is another matter.

The crux of the issue is not that the CPP should stand,⁷⁹ it is that the major questions doctrine is not a defensible way to render it—or any regulation—unlawful. A regulation should be judged unlawful by determining, through an interpretation of the statute’s text and its context, what the statute means and whether the regulation fits. The major questions doctrine pertains to any regulations with “economic and political significance” that claim “statutory power over the national economy” that the Court deems “extravagant.” Thus, it may permit the Court to judge much of what the EPA is tasked with doing as unlawful, because as President Nixon said when establishing the “strong” and “consolidated” agency, “environmental protection cuts across so many jurisdictions.”

⁷⁹ See the dissenting opinion for a robust explanation of why it should.

Conclusion

The relationship between the EPA and the Supreme Court is storied and combative. Environmental regulations have historically been at the forefront of the administrative state's battles with the country's highest court. It is hardly a coincidence that *Chevron* deference, perhaps the most significant Supreme Court precedent relating to the administrative state in the last century, is itself based on a disputed EPA rule. It is no more a coincidence that the major questions doctrine was established in response to another environmental regulation.

In 2022, Congress passed the Inflation Reduction Act, “the most significant climate legislation in US history,”⁸⁰ which clarified that greenhouse gasses are in fact pollutants. As Lisa Friedman of the New York Times put it, “[w]hen the Supreme Court restricted the ability of the Environmental Protection Agency to fight climate change [in *West Virginia v. EPA*], the reason it gave was that Congress had never granted the agency the broad authority to shift America away from burning fossil fuels. Now it has.”⁸¹ However, *Utility Air v EPA* had already—albeit tentatively—determined that greenhouse gas emissions could be considered air pollutants in the context of the Clean Air Act.

While the Inflation Reduction Act takes significant steps towards climate mitigation, such as incentives to adopt clean energy through tax rebates and clean energy financing through the Greenhouse Gas Reduction Fund, *West Virginia v EPA* and the major questions doctrine still pose considerable threats to climate mitigation efforts.

⁸⁰ “The Inflation Reduction Act,” United States Environmental Protection Agency, last modified April 17, 2023, <https://www.epa.gov/green-power-markets/inflation-reduction-act#:~:text=The%20Inflation%20Reduction%20Act%20of,to%20a%20clean%20energy%20economy.>

⁸¹ Lisa Friedman, “Democrats Designed the Climate Law to Be a Game Changer. Here’s How.,” *The New York Times*. August 22, 2022. <https://www.nytimes.com/2022/08/22/climate/epa-supreme-court-pollution.html>

First, it empowers the Supreme Court to make decisions when Congress is silent. While the Inflation Reduction Act was a significant victory for climate activists, its only bearing on future Court decisions is that clarifying note about the greenhouse gas emissions question, something that should have been put to bed a long time ago by any reasonable interpretation of the term “air pollutant.” The judicial branch should not be able to require a “clear statement” from Congress whenever it raises an eyebrow at a regulation. That is why we have courts: to interpret the text and say what it means. Furthermore, if Congress intends to answer major questions itself, it can. If a statute is outdated, or its implementation no longer savory, democratically elected representatives can and should act accordingly.

Second, it clearly demonstrates this Court’s skepticism towards the EPA’s power. The EPA (and the administrative state) is there for a reason: Congress needs an agency to execute the laws it passes. And it needs the agency to continue implementing laws and adapting their approach as circumstances change—something that may happen frequently when an agency’s purview is something as dynamic as the natural environment of the country. The CPP was never the power grab the Court purported it was, it was merely an agency fulfilling its lawfully prescribed duty. The need for Congress to step in and pass a massive piece of legislation to clarify things to the Court is a sign of the power struggle for the administrative state, not an emblem of the separation of powers.

Finally, the Court takes power from the administrative state in the name of empowering the people and maintaining democracy. The Court, however, is unelected, so granting itself more discretion hardly achieves this goal. Readers who are not convinced that the EPA is acting appropriately should hesitate before cheering for the Supreme Court to remedy the agency’s missteps. Both sides of the administrative debate can agree that sitting between these opposing

forces is a stagnant Congress, and any effort to build upon hard-won voting rights victories and empower Congress to better meet its Article One duties should be celebrated.

In April 2023, the EPA announced the “strongest-ever pollution standards for cars and trucks to accelerate transition to a clean-transportation future.”⁸² This new proposal, like the CPP, is structured under to the Clean Air Act. The same day, the Attorney General of West Virginia said, “over the coming weeks, we’ll be taking a closer look at the proposed rule, and we’ll be ready to once again lead the charge against wrongheaded energy proposals like these.”⁸³ Days later, reports circled of new Biden-administration EPA plans to drastically cut carbon emissions by 2040, in a long-awaited response to *West Virginia v. EPA*. The new plans, which are more aggressive than the CPP, attempt to clear the hurdle set by the major questions doctrine.⁸⁴

⁸² “Biden-Harris Administration Proposes Strongest-Ever Pollution Standards for Cars and Trucks to Accelerate Transition to a Clean-Transportation Future,” *EPA Press*, April 12, 2023 <https://www.epa.gov/newsreleases/biden-harris-administration-proposes-strongest-ever-pollution-standards-cars-and>

⁸³ Coral Davenport, “E.P.A. Lays Out Rules to Turbocharge Sales of Electric Cars and Trucks,” *The New York Times*, April 12, 2023. <https://www.nytimes.com/2023/04/12/climate/biden-electric-cars-epa.html>

⁸⁴ Timothy Puko, “Delays plague Biden’s push for rapid action on climate change,” *Washington Post*, January 19, 2023. <https://www.washingtonpost.com/climate-environment/2023/01/19/biden-climate-change-delays/>; Timothy Puko, “EPA plan would impose drastic cuts on power plant emissions by 2040,” *Washington Post*, April 22, 2023. <https://www.washingtonpost.com/climate-environment/2023/04/22/epa-power-plant-emissions-climate/>

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