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Forthcoming in CATO SUPREME COURT REVIEW

Abstract

In *West Virginia v. Environmental Protection Agency* (*WV v. EPA*) the Supreme Court rejected an expansive reading of Section 7411 of the Clean Air Act. Expressly invoking the "major questions doctrine" for the first time in a majority opinion, the Court concluded Section 7411 of does not allow the EPA to require generation shifting to reduce greenhouse emissions. This decision rested on the longstanding and fundamental constitutional principle that agencies only have that regulatory authority Congress delegated to them. The Court further bolstered the argument that delegations of broad regulatory authority should not be lightly presumed, but also left substantial questions about the major questions doctrine unanswered. By skimping on statutory analysis and front-loading consideration of whether a case presents a major question, the also Court failed to provide much guidance for lower courts. While *WV v. EPA* represents a missed opportunity to clarify and ground the major questions doctrine, it remains a tremendously important decision, and will be cited routinely in legal challenges to new regulatory initiatives. While limiting the scope of Section 7411, the decision did not curtail the EPA's traditional air pollution control authorities, nor does it preclude the EPA from using such authorities to regulate GHGs. It does, however, make it more challenging for the EPA or other agencies to develop new climate change policies relying upon preexisting statutory authority directed at other problems.

WEST VIRGINIA V. EPA: SOME ANSWERS ABOUT MAJOR QUESTIONS

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Introduction

The Supreme Court's decision to grant certiorari in *West Virginia v. Environmental Protection Agency* (*WV v. EPA*) was a surprise. The Court rarely grants cases involving challenges to regulations the executive branch no longer wishes to enforce. Once granted, however, the outcome was not surprising at all. Twice before the Court had shown skepticism of broad regulatory authority over greenhouse gas (GHG) emissions. There was no reason to think this time would be different. The EPA would retain its authority to regulate GHGs, but it would not be allowed to redesign the scope of its own regulatory authority for that purpose.

In *WV v. EPA*, Chief Justice Roberts wrote the opinion for a 6-3 Court, rejecting claims that the case was non-justiciable and concluding that the EPA lacks broad authority to limit GHG emissions from power plants under the Clean Air Act.[1] The Chief Justice's opinion was joined by

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[1] 142 S.Ct. 2587 (2022).

the Court's conservatives. Justice Gorsuch wrote a concurring opinion, joined by Justice Alito. Justice Kagan dissented on behalf of herself and the other liberal justices.

Expressly invoking the "major questions doctrine" for the first time in a majority opinion, the Chief Justice explained that Section 7411 of the CAA does not allow the EPA to require generation shifting (i.e. the replacement of coal with natural gas or renewable energy) to reduce GHG emissions.[2] In so doing, the Court rejected the expansive view of EPA's regulatory authority favored by the Obama and Biden Administrations and endorsed by the U.S. Court of Appeals for the D.C. Circuit.

WV v. EPA rested on the longstanding and fundamental constitutional principle that agencies only have that regulatory authority Congress delegated to them. The Court further bolstered the argument that delegations of broad regulatory authority should not be lightly presumed. Extraordinary assertions of regulatory authority, such as the EPA's claim that CAA provisions authorizing emission controls on stationary sources could be used to decarbonize the electricity grid, required a clear delegation from Congress.

The case's outcome was foreshadowed in the Court's decisions rejecting emergency pandemic measures barring evictions and mandating vaccination or testing of employees in large companies. These decisions, arising from the Court's "shadow docket," had signaled the Court's wariness of executive branch efforts to utilize long-extant statutory authority as the basis for novel and far-reaching regulatory initiatives.[3]

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[2] *Id.* at 2610 ("this is a major questions case.").

[3] *See* Ala. Assn. of Realtors v. HHS, 141 S.Ct. 2485 (2021) (finding the Centers for Disease Control and Prevention lacked authority to impose an eviction moratorium to prevent the interstate spread of COVID-19); NFIB v. Dept. of Labor, 142 S.CT. 661 (2022) (finding the Occupational Safety and Health Administration lacked the authority to impose a universal vaccine-or-test requirement on all firms with more than 100 employees). For a discussion of these cases, see [CITE SOMIN ARTICLE THIS VOLUME].

While *WV v. EPA* reaffirmed that courts should be wary of allowing agencies to pour new wine out of old bottles, it left substantial questions about the major questions doctrine unanswered. By skimping on statutory analysis and front-loading consideration of whether a case presents a major question, Chief Justice Roberts' opinion for the Court failed to provide much guidance for lower courts. It may be clear that statutory ambiguity cannot justify broad assertions of regulatory authority, but *WV v. EPA* provides little clarity on how the invigorated major questions doctrine should inform statutory interpretation.

The Chief Justice's failure to bring clarity to the major questions doctrine is particularly disappointing given the seeds of a broader doctrine can be found in his own prior opinions, including *King v. Burwell*[4] and his *Arlington v. Federal Communications Commission* dissent.[5] If federal agencies are "creatures of Congress" with only that power Congress has delegated,[6] it would seem to follow that the burden should be upon the agency to demonstrate the power it wishes to exercise has been delegated to it. And when confronted with broad, unprecedented and unusual assertions of agency power, some degree of judicial skepticism would be warranted—skepticism that can be overcome by a clear statement delegating the power at issue. Such a holding would not satisfy those hoping for a revival of the nondelegation doctrine, but it would ensure that agencies only exercise those powers actually delegated to them.

While *WV v. EPA* represents a missed opportunity to clarify and ground the major

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[4] King. v. Burwell, 576 U.S. 473 (2015). I have been quite critical of the Chief Justice's *King* opinion in these very pages, but that criticism focused upon the Chief Justice's statutory interpretation, not his understanding of the nature of agency power. See Jonathan H. Adler & Michael F. Cannon, King v. Burwell and the Triumph of Selective Contextualism, 15 Cato Sup. Ct. Rev. 35 (2015). As will become clear in this essay, the Chief Justice's statutory interpretation in WV v. EPA was not exemplary either.

[5] See City of Arlington v. FCC, 569 U.S. 290 (2013).

[6] *Id.* at 371 (Roberts, C..J., dissenting).

questions doctrine, it remains a tremendously important decision. It will be cited routinely in legal challenges to new regulatory initiatives. It also hampers regulatory efforts to address climate change, one of the most pressing policy concerns of the twenty-first century.[7] The Court barred the most expansive interpretations of EPA's authority under Section 7411 of the CAA, but did nothing to curtail the EPA's traditional air pollution control authorities, nor does *WV v. EPA* preclude the EPA from using such authorities to regulate GHGs. It does, however, make it more challenging for the EPA or other agencies to develop new climate change policies relying upon preexisting statutory authority directed at other problems. If there are to be additional tools in the EPA's climate-policy toolkit, Congress must provide them. The CAA was not written with climate change in mind, and there is only so much the EPA can do to constrain GHG emissions within existing statutory constraints. *WV v. EPA* put Congress in the policy driver's seat. Whether Congress has a direction in mind is yet to be determined.

From *Massachusetts* to *West Virginia*

Because *WV v. EPA* concerns the scope of the EPA's authority to regulate GHG emissions, it is worth placing the decision in the broader context of federal GHG regulation. Controversy over the scope of the EPA's authority to regulate GHG emissions has simmered for decades. Congress has never enacted legislation expressly granting EPA the authority to regulate

[7] For my argument as to why libertarians should care about climate change, see Jonathan H. Adler, Taking Property Rights Seriously: The Case of Climate Change, Social Phil & Pol'y, vol. 26, No. 2 (2009); see also Jonathan H. Adler, Without Constraint, Times Lit. Supp. (November 13, 2015), https://www.the-tls.co.uk/articles/without-constraint/.

GHGs as such.[8] Rather, the EPA has relied upon various provisions of the CAA, enacted for the purpose of controlling more traditional air pollutants, to control GHG emissions.

The CAA was enacted in 1970 primarily to control traditional air pollutants, such as lead, soot, and smog. Congress amended the Act in 1990, providing explicit authority to control those pollutants that cause stratospheric ozone depletion and acid rain. Somewhat conspicuously, no equivalent authority was adopted to help mitigate global warming, and subsequent efforts to enact such authority repeatedly failed.[9] Thus, whether the EPA had the authority to regulate carbon dioxide and other GHGs due to their greenhouse-forcing potential was unclear. [10]

In 1999, several environmental organizations petitioned the EPA to regulate GHG emissions from new motor vehicles under the CAA.[11] The EPA's General Counsel had concluded the GHGs could be regulated as air pollutants under the Act. Based upon this judgment, the groups argued the EPA was required to Act. The EPA initially ignored the petition. After a change in administrations, however,r the EPA formally denied it, maintaining that it lacked the authority to regulate GHGs and that regulation of such pollutants under the CAA would not constitute an effective means to address the threat of climate change.[12]

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[8] Insofar as GHGs have other pollutant characteristics, Congress has enacted provisions that would enable EPA to regulate those substances due to factors other than their potential to contribute to climate change.

[9] See Arnold W. Reitze Jr., Federal Control of Carbon Dioxide Emissions: What Are the Options?, 36 B.C. Envtl. Aff. L. Rev. 1, 1 (2009) ("From 1999 to [2007], more than 200 bills were introduced in Congress to regulate [greenhouse gases], but none were enacted."); see also Daniel J. Weiss, Anatomy of a Senate Climate Bill Death, Center for American Progress, Oct. 12, 2010, https://americanprogress.org/article/anatomy-of-a-senate-climate-bill-death/ (discussing failure of climate legislation in 2010).

[10] See Richard Lazarus, Environmental Law Without Congress, 30 J. Land Use & Envtl. L. 15, 30 (2014)("Climate change is perhaps the quintessential example of a new environmental problem that the Clean Air Act did not contemplate.").

[11] For the full history of the effort to compel the EPA to regulate GHG emissions under the CAA, see Richard Lazarus, The Rule of Five: Making Climate History at the Supreme Court (2020). For a critique of this account, see Lisa Heinzerling, *The Rule of Five Guys*, 119 Mich. L. Rev. 1137 (2021).

[12] *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003).

A coalition of environmental groups and state governments sued, ultimately prevailing in the Supreme Court. In *Massachusetts v. EPA*, a 5-4 Court concluded that GHGs were "air pollutants" subject to regulation under the CAA, and that the EPA failed to offer an adequate justification for failing to regulate such emissions from motor vehicles.[13] While the Court did not command the EPA to begin regulating GHGs, that was the practical effect of the Court's holding. Under the Act, the EPA is required to regulate motor vehicle emissions of any "air pollutant" that, in the "judgment" of the Administrator "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[14] As the EPA was long on record acknowledging the threat posed by climate change, recognizing GHGs as pollutants subject to regulation under the Act made their eventual regulation inevitable.[15]

The EPA made its first formal "endangerment" finding in December 2009, concluding that GHG emissions from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[16] The agency's first regulations governing GHG regulations from new motor vehicles followed soon thereafter.[17] This, in turn,

[13] 549 U.S. 497 (2007). The Court also held, 5-4, that the petitioners had standing to challenge the EPA's petition denial.

[14] *See* 42 U.S.C. § 7521(a)(1).

[15] Indeed, in rejecting the environmentalist petition that led to *Mass v. EPA*, the EPA accepted that the federal government "must address" climate change. *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,929–52,931 (Sept. 8, 2003).

[16] *See* Endangerment and Cause or Contribute Findings for GHGs Under Section 202(a) of the CAA, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

[17] *See* Light-Duty Vehicle GHG Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

set the stage for the regulation of GHG emissions from stationary sources, and the beginning of the EPA's troubles trying to control GHGs under the CAA.[18]

The Court in *Massachusetts v. EPA* paid little attention to the difficulty of applying the CAA's provisions to GHGs. Had they done so, they may have discovered that the CAA "is not especially well designed for controlling GHG pollution."[19] Yet the justices are far from CAA experts and the question at hand – whether the EPA could regulate emissions from cars and trucks – did not create much administrative difficulty.[20] By contrast, meaningful regulation of GHGs from stationary sources under the CAA would force the Agency "to engage in interpretive jujitsu."[21]

Under Section 165 of the Act, "major" stationary sources are required to adopt emission controls for "each pollutant subject to regulation" when built or modified.[22] Title V of the Act further requires major sources to file permits demonstrating their regulatory compliance. Both define "major" sources to be those with the potential to emit more than 100 or 250 tons per year of pollutants, depending on the type of facility involved.[23] For traditional air pollutants, such as

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[18] For a discussion of how the EPA's initial endangerment finding under Section 202 of the CAA paved the way for subsequent GHG regulation, see Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation under the Obama Administration*, 34 Harv. J.L. & Pub. Pol'y 421 (2011).

[19] Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. Pa. L. Rev. 1, 20 (2014).

[20] One issue raised in *Massachusetts* was whether setting GHG emission standards for automobiles would conflict with fuel economy regulations administered by the National Highway Transportation and Safety Administration (NHTSA), but the Court concluded the two agencies could coordinate their efforts to address any potential problems. See Massachusetts, 549 U.S. at 532 ("The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.").

[21] *See* Freeman & Spence, *supra* note __, at 21.

[22] *See* 42 U.S.C. § 7475. These provisions are commonly referred to as "PSD" for "Prevention of Significant Deterioration."

[23] S*ee* 42 U.S.C. § 7479(1) (defining emission thresholds for Section 165); 42 U.S.C. § 7661(2) adopts the definition provided in 42 U.S.C. § 7602(j), defining a "major" source as "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." For

sulfur dioxide or nitrogen oxides, these thresholds only reach the biggest and dirtiest facilities—a total of several thousand facilities nationwide. Applied to GHGs, however, these same numerical thresholds would require the regulation of millions of facilities, including many commercial and residential buildings.[24]

Lest application of the CAA's express terms to GHGs unleash a regulatory tsunami, the EPA proposed to "tailor" the law's application and enforcement so as to reduce the number of regulated facilities.[25] Specifically, the Agency decided it would redefine the definition of what constitutes a major source so as to only reach facilities that emit over 75,000 tons per year. [26] The EPA acknowledged the relevant statutory provisions were "clear on their face,"[27] but defended the new regulation as a "common sense" approach[28] necessary to prevent the CAA's permitting programs from becoming "unrecognizable to the Congress that designed" them.[29]

However much the EPA thought this effort to "tailor" the Act's requirements made "common sense," the Supreme Court concluded otherwise. In *Utility Air Regulatory Group v. EPA* (*UARG*), the Court rejected the EPA's claim that it was required to treat GHGs as "air pollutants" for all provisions of the CAA, particularly where doing so would "bring about an

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regulation of hazardous air pollutants, 42 U.S.C. § 7661(2) incorporates the even more stringent definition contained in 42 U.S.C. § 7412.

[24] *See* Prevention of Significant Deterioration and Title V GHG Tailoring Rule, 74 Fed. Reg. 55,292, 55,294, 55, 302 (Oct. 27, 2009); see also Freeman & Spence, *supra* note __, at 24 (noting the "burden would have overwhelmed the agency and the states, frustrated small business, and led to accusations that the Obama Administration was over-regulating"). For a fuller discussion of the impact of applying the statutory thresholds for major stationary sources to GHGs, see Adler, *Heat Expands*, *supra* note __, at 432-35.

[25] Prevention of Significant Deterioration and Title V GHG Tailoring Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009).

[26] Prevention of Significant Deterioration and Title V GHG Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

[27] 74 Fed. Reg. at 55,306.

[28] Press Release, EPA, New EPA Rule Will Require Use of Best Technologies to Reduce GHGs from Large Facilities/Small businesses and farms exempt (Sept. 30, 2009).

[29] 75 Fed. Reg. 31,562.

enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[30] Not only would the EPA's interpretation greatly expand the universe of regulated entities, the Court concluded, it would also necessitate granting the agency the authority to rewrite clear statutory thresholds so as to ensure the Act's regulatory structure remained operational. In language foreshadowing the decision in *WV v. EPA*, the Court explained: "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.'"[31] Here, Congress had indicated neither that it wanted the EPA to regulate the millions of facilities that emit modest amounts of greenhouse gases nor that EPA could revise numerical statutory thresholds.

While *UARG* was working its way through the Courts, the Agency was also beginning work on regulations governing GHG emissions from new and existing power plants.[32] This was a priority for the Obama Administration because electricity generation is responsible for approximately one quarter of annual greenhouse gas emissions.[33]

Under CAA Section 7411, the EPA is instructed to establish federal "standards of performance" for categories of stationary sources that "cause[], or contribute[] significantly to,

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[30] 573 U.S. 302, 324 (2014).

[31] *Id.* at 324 (quoting FDA v. Brown & Williamson, 529 U.S.120, 159 (2000)).

[32] This rulemaking was the result of a settlement agreement the EPA entered into in 2010 under which it committed to proposing such regulations no later than July 2011 and final rules no later than May 2012. That timeline slipped.

[33] In 2020, the electricity sector was responsible for 25 percent of U.S. greenhouse gas emissions. By comparison, transportation was responsible for 27 percent. See EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2020, April 2022, https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks.

air pollution which may reasonably be anticipated to endanger public health or welfare."[34] The "standard of performance" is defined as that standard "which reflects the degree of emission limitation achievable through the application of the best system of emission reduction," accounting for cost and other factors, that has been "adequately demonstrated."[35] Once such a standard is set for new sources, the EPA promulgates guidelines identifying the standard of performance for existing sources. [36] The EPA does not impose such standards on existing sources directly, however. Rather, Section 7411(d) instructs the Agency to issue regulations providing for states to submit plans imposing the appropriate standard of performance on existing sources.[37] Section 7411(d) also requires EPA to permit states to "take into consideration . . . the remaining useful life of the existing source" when applying and enforcing the standard of performance to a particular source.[38]

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[34] 42 U.S.C. § 7411(b)(1).

[35] 42 U.S.C. § 7411(a)(1).

[36] 42 U.S.C. § 7411(d)(1). Under this provision, the EPA is not to set standards of performance for emissions from existing sources that are regulated under the CAA's National Ambient Air Quality Standards (NAAQS) or Hazardous Air Pollutant (HAP) provisions. Before the U.S. Court of Appeals for the D.C. Circuit, some petitioners argued that Section 7411 precludes the regulation of emissions from new sources if the *sources* are subject to regulation under Section 112. As power plant emissions of mercury are regulated under Section 112, this would have barred the adoption of any GHG standards for existing power plants under Section 7411. The D.C. Circuit rejected this argument. *See* American Lung Assn. v. EPA, 985 F.23d 914, 932 (D.C. Cir. 2021). The Supreme Court did not accept certiorari on this question and the Court's *WV* opinion appears to adopt the D.C. Circuit's interpretation of this provision. See WV,142 S.Ct. at 2601.

[37] *Id.*

[38] *Id.* [38] It is common in environmental law to set different standards for new and existing sources, reflecting both the fact that it is often easier or less costly to install or include pollution control technologies when designing a facility than to retrofit an old one, as well as the fact that owners and employees of existing sources tend to have more political clout than owners and employees of new, not-yet-built sources. See See Jonathan R. Nash & Richard l. Revesz, Grandfather and Environmental Regulation: The Law and Economics of New Source Review, 101 Nw. U. L. Rev. 1677, 1733 (2007) ("grandfathering may be appropriate in environmental regulation to the extent that installing and upgrading pollution control equipment in existing plants may be both logistically difficult and expensive"); E. Donald Elliot, A Critical Assessment of the EPA's Air Program at Fifty and A Suggestion for How It Might Do Even Better, 70 Case W. Res. L. Rev. 895, 915-916 (2020) ("Regulating future polluters more stringently than those already operating often happens because it is less difficult politically to impose costs on speculative future projects than on existing industries that are organized and have political clout…it seemed

After years of development, the EPA finalized a set of regulations governing emissions from new and existing power plants, the latter of which were called the Clean Power Plan (CPP).[39] Under the CPP, the EPA determined that the "best system of emission reduction" (BSER) for existing coal fired power plants would not be based exclusively upon emission reductions that could be achieved at individual plants, such as by the adoption of heat-rate improvements that would result in more efficient fuel consumption. Rather, the EPA set the BSER based upon consideration of the additional emission reductions that could be achieved by shifting power generation from existing coal-fired power plants to lower-emitting facilities, such as natural gas-fired plants, as well as "new low- or zero-carbon generating capacity," such as wind and solar.

The CPP anticipated that existing coal-fired power plants would reduce their emissions by curtailing their own electricity generation, increasing reliance upon new natural gas, wind, or solar facilities, or purchasing emission allowances from lower emitting sources. As described by the Court in *WV v. EPA*, the BSER for existing coal-fired power plants was "one that would reduce carbon pollution by moving production to cleaner sources," not one that would reduce the emissions from existing sources themselves.[40] Indeed, the ultimate emission limit adopted in the CPP was "so strict" that no existing coal plant could meet the standard without engaging in some form of generation shifting.[41] Under the CPP, states were required to submit their

intuitively obvious to the drafters that it would be less expensive to design pollution-control equipment for a new plant than to retrofit an existing plant").

[39] See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units. 80 Fed. Reg. 64,661 (2015).

[40] WV, 142 S.Ct. at 2603..

[41] *Id.* at 2604.

implementation plans in 2018 for how the power sector would achieve the necessary emission reductions by 2030.

Even supporters of the CPP recognized it rested on a "novel and far-reaching" interpretation of the relevant statutory provisions.[42] The CPP would never take effect, however. States and coal companies immediately filed legal challenges against the CPP.[43] In February 2016, a majority of the Court voted to stay the CPP, pending resolution of the legal challenges, thereby preventing it from ever going into effect.[44]

The election of Donald Trump prompted a dramatic reversal in the EPA's approach to GHG regulation under the CAA. In March 2017, President Trump issued an executive order instructing the EPA to review and consider rescinding the CPP and other EPA regulations affecting the energy industry.[45] Pursuant to this order, the EPA developed an alternative to the CPP, known as the Affordable Clean Energy (ACE) rule.[46] This rule, promulgated in July 2019 was based upon a much narrower interpretation of the EPA's regulatory authority under the CAA—an interpretation the EPA now claimed was compelled by the plain text of the statute. The EPA also argued that a narrow interpretation was necessary to avoid adopting a broad rule

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[42] See Freeman & Spence, *supra* note __, at 37.

[43] Indeed, one such challenge was filed *before* the CPP regulations were finalized. See In re Murray Energy Corp., 788 F.3d 330 (D.C. Cir. 2015) (proposed regulation of GHGs from coal-fired power plants was not a final agency action subject to judicial review).

[44] Chamber of Commerce v. EPA, 1326 S.Ct. 999 (Mem) (Feb. 9, 2016); see also, Jonathan H. Adler, Supreme Court Puts the Brakes on the EPA's Clean Power Plan, Wash. Post., Feb. 9, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/.

[45] See Promoting Energy Independence and Economic Growth, Exec. Order No. 13783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

[46] See 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).

that would trigger the major questions doctrine. Citing the *UARG* decision, the agency noted that "the major question doctrine instructs that an agency may issue a major rule only if Congress has clearly authorized the agency to do so."[47]

Specifically, the EPA now concluded that standards of performance under Section 7411 could only be based upon emission control measures that could be adopted at each regulated source—so-called "inside the fenceline" measures—and this could not include generation shifting. Accordingly, the EPA concluded the CPP was unlawful, and the EPA could not impose emission reductions on existing coal-fired power plants beyond that which could be achieved through heat-rate improvements at individual plants. The narrow scope of the rule meant narrow climate benefits. The emission reductions from the ACE rule were estimated to be as little as 1 percent by 2030.[48] Just as red states and coal companies challenged the CPP, blue states and environmental organizations immediately challenged the ACE rule, joined by some electric utilities .

On January 19, 2021, the day before Joseph Biden was to be sworn in as the 46th President of the United States, a divided panel of the U.S. Court of Appeals for the D.C. Circuit concluded that the repeal of the CPP and promulgation of the ACE rule were unlawful.[49] Specifically, the court held that both the ACE rule and the repeal of the CPP were based upon "a fundamental misconstruction" of the EPA's statutory authority.[50] Whereas the Trump EPA

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[47] *Id.* at 32,529.

[48] See Congressional Research Service, EPA's Affordable Clean Energy Rule: In Brief, CRS Report R465468, Oct. 15, 2020, at 7.

[49] Although the three judges disagreed on the rationale, they were unanimous in rejecting the Trump regulation. *See* American Lung Assn v. EPA, 985 F.3d 914 (D.C. Cir. 2021).

[50] ALA, 985 F.3d at 930 ("the central operative terms of the ACE Rule and the repeal of its predecessor rule, the Clean Power Plan . . . hinged on a fundamental misconstruction of Section 7411(d) of the Clean Air Act.").

believed that standards of performance for existing sources had to be based upon measures that could be adopted at each source, the D.C. Circuit concluded that Section 7411 "imposed no limits on the types of measures the EPA may consider" beyond requiring the agency to consider cost, non-air quality health and environmental impacts, and energy requirements.[51] And because the ACE rule rested "squarely" on an "erroneous" reading of the Act, it was vacated and remanded to the agency.[52]

One month later, upon the Biden Administration's request, the D.C. Circuit issued a partial stay of the mandate in the case, so as to prevent imposition of the CPP.[53] While the Biden Administration preferred the Obama Administration's interpretation of the CAA over that of the Trump Administration, the CPP's deadline for state plan submission had passed, and the relevant emission reduction targets had been met or surpassed in much of the country. Despite the stay, a coalition of states and coal companies filed petitions of certiorari. And somewhat surprisingly, the Court granted certiorari.

Questions about Jurisdiction

From the moment the justices agreed to hear *WV v. EPA*, there were questions about whether or not the case was properly before the Court. Article III jurisdiction only extends to "cases or controversies." Among other things, this means that those seeking to invoke a court's jurisdiction must have standing, and the case presents a live controversy that has not been

[51] *Id.* at 946.

[52] *Id.* at 995.

[53] See WV, 142 S.Ct. at 2606 (noting stay).

mooted by subsequent events. Given the EPA did not want to enforce the CPP or defend the ACT rule, it was fair to ask whether there was Article III jurisdiction to hear the case.

Although it had not pressed this issue in its brief opposing certiorari,[54] the Solicitor General (SG) argued that the Court lacked Article III standing to hear the petitioners challenge to the D.C Circuit's decision.[55] Specifically, the SG maintained that none of the petitioners could demonstrate an actual or imminent injury from the D.C. Circuit decision to vacate the ACE rule and CPP repeal, rendering any Supreme Court decision an "impermissible advisory opinion."[56] Accordingly, the SG argued, the Court should either dismiss the case for lack of standing or merely vacate the D.C. Circuit's decision and remand the case back to the EPA. The standing argument was also picked up by the non-governmental organization and trade association respondents, but not the other parties that intervened on behalf of the EPA.[57]

It became clear at oral argument that there was little support for the SG's jurisdictional arguments, and the dissenting justices did not meaningfully challenge the Chief Justice's conclusion that the Court had jurisdiction over the case. While some Justices suggested there might be prudential reasons to avoid a decision, none pushed hard on the Article III claim—and for good reason. While the decision to grant certiorari in *WV v. EPA* may have been unusually aggressive, the Court had jurisdiction to hear the case.

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[54] Of note, neither "standing" nor "case or controversy" appears SG's brief opposing certiorari. *See* Brief for the Federal Respondents in Opposition, WV v. EPA, 142 S.Ct 2587 (2022)(Nos. 20-1530, et seq.). The brief did, however, suggest that the petitioners' claims would become moot, but only if the EPA adopted a new regulation more akin to the ACE rule than to the CPP. *Id.* at 20.

[55] See Brief for the Federal Respondents at 15-23, WV v. EPA, 142 S.Ct 2587 (2022)(Nos. 20-1530, et seq.).

[56] *Id.* at 18.

[57] See Brief of Non-Governmental Org. & Trade Ass'n Respondents at 23-32, WV v. EPA, 142 S.Ct. 2587 (2022) (Nos. 20-1530, et seq.).

Standing is necessary both when a plaintiff first files a suit in federal court, as well as when a party pursues an appeal.[58] In the latter context, the standing inquiry focuses on whether the petitioners experience an injury that is "fairly traceable to the judgment below," and whether a favorable ruling would provide redress for that injury.[59] There was no question the petitioning states met this standard. The D.C. Circuit's judgment invalidated *both* "the ACE rule *and* its embedded repeal of the Clean Power Plan."[60] Thus, as the Chief Justice explained, insofar as the CPP injured the petitioning states, by obligating them to adopt regulations of the power sector, there was "little question" they were injured by the lower court's judgment.[61] Tellingly, the dissent did not contest this point.

While framing its argument in terms of standing, the SG also suggested that the D.C. Circuit's decision to stay the mandate until the EPA adopted new regulations under Section 7411 "mooted the prior dispute."[62] While intervening events may deprive a litigant of a sufficient stake in the outcome of a lawsuit to deprive a court of jurisdiction, it takes more than a stay of a lower court order to moot a case.[63] Courts are reluctant to allow a party's voluntary cessation of challenged conduct render a case moot. As the Chief Justice explained, "voluntary cessation does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not

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[58] See Hollingsworth v. Perry, 570 U.S. 693,705 (2013) (noting "Article III demands that an 'actual controversy' persist throughout all stages of litigation.").

[59] Food Marketing Inst. v. Argus Leader Media, 139 S.Ct. 2356, 2362 (2019).

[60] ALA, 985 F.3d at 995 (emphasis added).

[61] WV, 142 S.Ct. at 2606.

[62] *See* Brief for the Federal Respondents at 17.

[63] At oral argument, Justice Alito asked the SG whether the Court had "ever held that the issuance of a stay can moot a case." The SG conceded she was "not aware of a precedent" to that effect. Transcript of Oral Argument at 86-87, WV v. EPA, 142 S.Ct. 2587 (2022) (Nos. 20-1530, et seq.).

reasonably be expected to recur."[64] The government offered no assurance it would not rely upon generation shifting or the D.C. Circuit's broad conception of the EPA's regulatory authority in a future rule, nor could it. Thus neither the D.C. Circuit's stay—which was not indefinite—nor the potential of new regulatory standards, could moot the case. Again, the dissent did not argue the point, even if only because the standard for mootness is "notoriously strict."[65]

While conceding the Court *could* hear the case, Justice Kagan would not concede that Court *should* have heard it. In a rush to "pronounce on the legality" of an "old rule," Justice Kagan complained, the Court issued "what is really an advisory opinion on the proper scope of the new rule EPA is considering."[66] Whatever the merits of the legal arguments against the CPP, she suggested, the EPA no longer sought to administer it, and was well at work on a replacement, so the Court was effectively telling the EPA what it could or could not do in the future.

Justice Sotomayor pressed a similar point at oral argument, citing the Supreme Court's disposition of *EPA v. Brown*.[67] That case presented a quite different question, however, which may explain why it was not cited in Justice Kagan's dissent. In *Brown,* the Court had accepted certiorari at the government's behest to review multiple lower court decisions striking down EPA regulations that purported to commandeer state governments to implement particular air pollution control measures.[68] Although the government had sought certiorari, it then conceded that the regulations could not be defended as written. Accordingly, the Court declined "the

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[64] WV, 142 S.Ct. at 2607 (cleaned up).

[65] *Id.* at 2628 (Kagan, J., dissenting).

[66] *Id.*

[67] Transcript of Oral Argument at 22 (citing EPA v. Brown, 431 U.S. 101 (1977).

[68] For a brief discussion of this litigation, see Jonathan H. Adler & Nathaniel Stewart, Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism, and Conditional Spending after NFIB v. Sebelius, 43 Ecol. L.Q. 671, 685-86 (2016).

federal parties' invitation to pass upon the EPA regulations" at issue, because "the ones before us are admitted to be in need of certain essential modifications."[69] Because the EPA would be revising its rules to cure their legal defects, any decision by the Court "would amount to rendering an advisory opinion."[70] Accordingly, the Court vacated the lower court decisions and remanded the regulations back to the EPA.[71]

Unlike in *Brown*, the EPA did not concede there was any legal problem with the CPP, or the legal theory upon which it was based. The EPA sought to update and modernize its rules, not reconsider whether it had the statutory authority to issue them in the first place. Nonetheless, the government's merits brief did suggest a similar disposition: Vacating the D.C. Circuit's judgment and remanding the case to the agency.[72] Such a move would have redressed the petitioning states' injuries without requiring the Court to assess the scope of the EPA's authority in the absence of a rule to be enforced, and might have appealed to the Chief Justice's minimalist instincts. Curiously, this possibility was only raised in the SG's merits brief, and had not been suggested at the certiorari stage.

Choosing to Answer a Major Question

[69] EPA v. Brown, 431 U.S. at 103-4.

[70] *Id.* at 104.

[71] Of note, Justice Stevens dissented on the ground that the litigation would not be moot unless and until the EPA actually rescinded the regulations at issue, and because "an apparent admission that those regulations are invalid unless modified is not a proper reason for vacating the Court of Appeals judgments which invalidated the regulations." *Id.* at 1-4 (Stevens, J., dissenting).

[72] *See* Brief for the Federal Respondents at 21.

The Court's decision to grant certiorari and schedule *WV v. EPA* for oral argument was an ominous sign for the EPA. There was no reason to even consider hearing this case at this time if a majority of the Court were inclined to rubber-stamp the D.C. Circuit's broad construction of the EPA's regulatory authority. But the breadth of the issues presented—and the various questions presented in the four cert petitions the Court accepted—gave the Court a wide range of options.

At one end of the range of possibilities was a surgical, text-based holding, limiting BSER to those measures that can be applied at or to a given stationary source subject to regulation. At the other end was a broadside against broad delegations of regulatory authority, rejective even the possibility that Congress could have so casually delegated power to the EPA to decide how to remake the electricity sector. The most likely course, however was a middle course, echoing *UARG* in relying upon the major questions doctrine and the notion that extraordinary assertions of regulatory authority require extraordinarily clear congressional delegations. All four of the cert petitions granted pointed in this direction, and the Court's two COVID decisions indicated it was primed to go in this direction.

Expectedly, Chief Justice Roberts' opinion spent little time focused on the intricacies of statutory text and made scant mention of constitutional concerns about delegation. Instead, after engaging in a bit of traditional interpretive throat-clearing about how to conduct statutory interpretation in an "ordinary case," the Chief noted there are "'extraordinary cases' that call for a different approach"[73] *WV v. EPA*, the Chief then announced, was just such "a major questions case."[74] The EPA was asserting the authority "to substantially restructure the American energy

[73] WV, 142 S.Ct. at 2608.

[74] *Id.* at 2610.

market" based upon an "ancillary" statutory provision that had never before been used for such a purpose.[75] Whether the EPA could define generation shifting as the BSER was not treated as a routine question of statutory interpretation, in which a "plausible textual basis for the agency action" would be sufficient.[76] More would be required to justify uphold the EPA's authority to "restructure[e] the Nation's overall mix of electricity generation" under the guise of setting performance standards for stationary sources of air pollution.[77]

In deploying the major questions doctrine, the Court still faced a choice, whether to invoke the doctrine as a canon of construction favoring more modest interpretations of agency authority insofar as the scope of delegation is in doubt, or whether to use the doctrine to drive a presumption against the agency's claimed authority. These two potential approaches to major questions were illustrated in the Court's decisions rejecting emergency COVID-19 measures.

As a canon of construction, the doctrine would help resolve any lingering uncertainty or statutory ambiguity left after a directly engaging with the relevant statutory text. This is how the Court deployed the major questions doctrine in the eviction moratorium case.[78] Only after identifying reasons to reject the CDC's claimed authority to forestall evictions did the Court note that "if the text were ambiguous, the sheer scope of the CDC's claimed authority . . . would counsel against the Government's interpretation."[79] The Court could not see textual or historical support for the CDC's claimed authority, and the major questions doctrine merely confirmed this conclusion. Major questions was icing on the interpretive cake

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[75] *Id.*

[76] *Id.* at 2609.

[77] *Id.* at 2607.

[78] Ala. Assn. of Realtors v. Dept. of Health & Human Svcs., 141 S.Ct. 2485 (2021).

[79] *Id.* at 2489.

The approach in *Alabama Association of Realtors* contrasts with that in the Occupational Safety & Health Administration's vaccinate-or-test mandate.[80] In *NFIB v. Department of Labor*. the Court announced that it expects a clear statement from Congress when "authorizing an agency to exercise powers of vast economic and political significance," and that the OSHA mandate would qualify, *before* even beginning to analyze the relevant statutory text.[81] Here a concern for "major questions," and a skepticism of the government's authority, was baked into the interpretive cake from the beginning. Rather than reject the OSHA policy based upon a close reading of OSHA's statutory authority, and the agency's historical practice in applying that authority, the Court deployed the major questions to drive the ultimate outcome.[82]

In *WV*, the Chief Justice adopted the latter approach. Despite the availability of textual arguments that would have precluded the expansive construction of EPA authority that underlay the CPP, the Chief Justice opted to deploy the major questions concern at the front end of his analysis. This no doubt allowed for a shorter and less technical opinion, and avoided any need to consider whether the EPA's interpretation of Section 7411 could qualify for *Chevron* deference, but it also left the Court majority vulnerable to the criticism that it had abandoned textualism in favor of a result-oriented, purposivist analysis.

Under this approach, even if one might conclude that the EPA's preferred interpretation of Section 7411 were a reasonable one, the nature of the power the EPA was asserting, and its

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[80] NFIB v. Dept. of Labor,142 S.Ct. 661 (2022).

[81] *Id.* at 665.

[82] For reasons why the OSHA standard was legally vulnerable even without resort to the major questions doctrine, see Jonathan H. Adler, OSHA (Finally) Issues Emergency Standard Mandating Large Employers Require Vaccination or Testing (Updated), The Volokh Conspiracy, Nov. 4, 2011, https://reason.com/volokh/2021/11/04/osha-finally-issues-emergency-standard-mandating-large-employers-require-vaccination-or-testing/.

lack of precedent, counseled a narrower construction. That the EPA's interpretation of its authority to define BSER might be plausible "as a matter of 'definitional possibilities'" was insufficient to justify the breadth of authority the EPA sought to assert.[83] That the word "system"—and the phrase "best system of emission reduction"—could be interpreted broadly when "shorn of all context" was "not close to the sort of clear authorization required by our precedents."[84] Such a cursory argument may have sufficed given this was a "major questions case," but it was hardly compelling statutory interpretation.

Justice Kagan did not pass up the opportunity to point out the weakness of the Court's statutory analysis, which relied more upon the history of EPA's past practices and Congressional inaction than it did a meaningful engagement with the text. She wrote a powerful dissent, harping on the majority's failure to provide a convincing explanation for why generation shifting could not be a "system" of emission reduction.[85] While her analysis is superficially powerful, Justice Kagan did not grapple with the full statutory text either, nor did she delve much into the CAA's structure and operation. Instead she hammered away at the pliable nature of the word "system" and the majority's rush to embrace the major question doctrine. There were textual counter-arguments to be made.[86] The majority did not make them. Justice Gorsuch's concurrence

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[83] WV, 142 S.Ct. at 2614.

[84] *Id.*.

[85] *Id.* at 2641 (Kagan, J., dissenting) ("Some years ago, I remarked that "[w]e're all textualists now." . . . It seems I was wrong. The current Court is textualist only when being so suits it.").

[86] See Nathan Richardson, Trading Unmoored: The Uncertain Legal Foundation for Emissions Trading under §111 of the Clean Air Act, 120 Penn St. L. Rev. 181 (2015)(identifying reasons why the EPA may not be able to require or utilize emissions trading as the BSER); see also Lisa Heinzerling & Rena I. Steinzor, A Perfect Storm: Mercury and the Bush Administration, 34 Envtl. L. Rep. 10297, 10309 (2004) (arguing Section 7411 "clearly contemplates individualized, performance-based standards for sources").

responded to the dissent to defend the provenance and utility of the major questions doctrine, but it too failed to square off with Kagan on the statutory text.

What Makes a Question Major?

Once Chief Justice Roberts had declared *WV v. EPA* a major questions case, his task became easier. No longer did he need to find that the EPA's desired interpretation of the relevant statutory provisions was out of bounds (with or without *Chevron* deference). Invoking the doctrine enabled him to flip the presumption, and demand that those defending the D.C. Circuit's interpretation of the CAA find "clear congressional authorization" for that position.[87] But what made *WV v. EPA* a "major questions case"?

Chief Justice Roberts identified several factors indicative of "major questions" cases under the Court's precedents. These include that an agency is seeking to exercise broad regulatory power over a substantial portion of the economy, that this power is "unheralded" or had not been previously discovered or utilized, and that Congress has "conspicuously and repeatedly declined to enact" express authorization for what the agency wants to do.[88] If these criteria sound somewhat fuzzy, that is because they are. Even before *WV v. EPA*, scholars had complained that the doctrine did not produce an administrable line between which cases should be considered major and which should not.[89] Even though *WV v. EPA* was more obviously a

[87] WV, 142 S.Ct. at 2609.

[88] *Id.* at 2610.

[89] See Nathan D. Richardson, Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine, 49 Conn. L. Rev. 355, 406 (2016)(noting "it is hard to determine what divides major questions from minor or interstitial ones"); Cass R. Sunstein, Beyond Marbury: The Executive's Power to Say What the Law Is, 115 Yale. L.J. 2580, 2607 (2006)(noting there is "no metric . . . for making the necessary distinctions"); Jacob Loshin & Aaron

"major questions" case than some others, [90] the Chief Justice did little to delineate a set of clear legal criteria that could resolve closer cases.

In cases such as *FDA v. Brown & Williamson* and *NFIB v. Department of Labor*, the agencies sought to use long extant power in a new way that was likely unanticipated by the Congress that enacted the statute, or Congresses since. Insofar as an agency's delegated power derives its democratic legitimacy from a deliberate legislative choice by the legislature to authorize such power, finding new powers in old statutes is a problem.[91] If an agency can go decades before discovering broad authority within its authorizing legislation, that is "telling" evidence that such power was not delegated.[92]

The age of the statute and the novelty of the agency's asserted authority played a significant role in the Chief Justice's analysis. Citing Justice Frankfurter, the Chief Justice placed substantial weight upon history and agency practice in the major questions analysis:

> just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.[93]

This is a reasonable inference to draw. Yet as discussed below, it is not clear why this inference should only be drawn in the context of "major questions." If the question before the Court is

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Nielson, Hiding Delegation in Mouseholes, 62 Admin. L. Rev. 19, 23 (2010) ("One judge's mouse is another judge's elephant, and it ever will be so.")

[90] See Richardson, *supra* note __, at 388-89 (explaining why a challenge to the CPP would almost certainly be considered a "major questions" case).

[91] See generally Jonathan H. Adler & Christopher J. Walker, Delegation and Time, 105 Iowa L. Rev. 1931 (2020).

[92] WV, 142 S.Ct. at 2609.

[93] FTC v. Bunte Brothers, Inc., 312 U. S. 349, 352 (1941).

whether an agency is exercising delegated power, and agency practice and historical understandings are probative of statutory meaning, this would seem to be true for major and minor questions alike. Further, suggesting that once litigants are able to convince a court that a given case presents a "major question" they can discard traditional methods of statutory interpretation is not conducive to consistent and principled decision-making.

Justice Gorsuch wrote a separate concurrence, stressing his view that the major questions doctrine is properly understood as a clear statement rule that prevents Congress from delegating broad legislative power to agencies. There is much to this intuition, even if one does not ground the major questions doctrine in a concern for excessive delegation, as Justice Gorsuch would wish to do. It does not, however, solve the problem of identifying which cases are major and which are not. If anything, it suggests that whether a case presents a "major question" should not be a threshold inquiry.

A Step (Zero) Beyond Major Questions

Rather than focus on whether a given case presents a "major question" that would justify loading the interpretive deck, the Court should have instead started at the beginning, what we might call Delegation Step Zero.[94]

All legislative powers are vested in Congress. Whether or not such powers may be delegated to the executive branch, there is no question where such powers begin. Put another

[94] See Jonathan H. Adler, A 'Step Zero' for Delegations, in The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine (Peter Wallison & John Yoo eds., AEI Press 2022), from which this portion of this article draws. For the origins of the "Step Zero" concept, see Thomas W. Merrill & Kristin E. Hickman, Chevron's Domain, 89 Geo. L.J. 873 (2001).

way, the constitutional allocation of powers embodies a nondelegation baseline: Absent legislative action, all legislative power is in the legislature's hands, and none is in the hands of any administrative agency or part of the executive branch. This is not a nondelegation doctrine, so much as a *delegation* doctrine: A doctrine that recognizes that delegations are necessary for agencies to have regulatory power.

As the Supreme Court has noted repeatedly, "an agency literally has no power to act . . . unless and until Congress confers power upon it."[95] This is (or should be) "axiomatic."[96] As the Court further explained in *Chrysler Corp. v. Brown*:

> The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.[97]

This means that a delegation of power is necessary for administrative agencies to act. Without a delegation, the agency has no regulatory power.

That Chief Justice Roberts reiterated this point in *WV v. EPA*,[98] as he had in other opinions. In his *Arlington* dissent, for instance, the Chief Justice noted that *Chevron* deference is premised upon legislative delegation of interpretive authority to a federal agency.[99] Without such

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[95] Louisiana Pub. Svc. Comm'n v. FCC, 476 US 355, 374 (1986).

[96] Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulation is limited to the authority delegated by Congress.")

[97] 441 U.S. 281, 302 (1979).

[98] WV 142 S.Ct. at 2609 ("Agencies have only those powers given to them by Congress").

[99] City of Arlington v. F.C.C., 569 U.S. 290, 317 (2013)(Roberts, C.J., dissenting). According to Tom Merrill, this dissent "deserves to enter the annals as a classic statement of the principles of administrative law." Thomas W. Merrill, The Chevron Doctrine: Its Rise and Fall and the Future of the Administrative State 226 (2022).

a delegation, no deference is due. And because it is for courts to resolve questions of law, "whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently."[100] Further, such delegations are not dispersed wholesale. Rather, such authority is delegated with regard to "particular" statutory provisions or purposes.[101]

As then-Judge Breyer noted in a 1985 lecture, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the courts of [a] statute's daily administration."[102] While then-Judge Breyer was focused on the question of *Chevron* deference, he was making a point about when it is reasonable to presume that a delegation of authority has occurred absent a clear statement in the statutory text. As he put it, this simply reflects "common sense as to the manner in which Congress [is] likely to delegate" power to federal agencies.[103]

That language may be ambiguous, or may be creatively interpreted to justify a given assertion of regulatory power is not enough to establish that a delegation has taken place. In *Chevron* cases, courts recognize that statutory ambiguity is not enough to justify deference to an agency's interpretation. There must also be reason to believe that Congress delegated authority to resolve the ambiguity to the agency. Thus, in *King v. Burwell*, the Court refused to grant *Chevron* deference to the Internal Revenue Service even though it found the relevant statutory language to be ambiguous (and ultimately agreed with the agency's interpretation on the

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[100] Arlington, 569 U.S. at 317 (Roberts, C.J., dissenting).

[101] *Id*. at 320.

[102] Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin L. Rev., 363, 370 (1986).

[103] WV, 142 S.Ct. at 2609 (quoting FDA v. Brown & Williamson, 529 U.S. at 133).

merits).[104] Likewise, the U.S. Court of Appeals for the D.C. Circuit has recognized that "mere ambiguity in a statute is not evidence of congressional delegation of authority."[105] Ambiguity is necessary, but not sufficient.

There is no reason to confine this inquiry to *Chevron* cases. If the *Chevron* step zero inquiry is necessary because courts must first determine whether Congress has delegated interpretive authority before deferring to an agency, then a similar inquiry should be required before a court upholds an agency's assertion of regulatory authority. And, as with *Chevron*, such authority must be demonstrated. As the Court held in *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railway Co.*, known as the Queen and Crescent Case, in 1897, the power to issue rules mandating or prohibiting private conduct (in this case, rates for rail transport) "is not to be presumed or implied from any doubtful and uncertain language."[106] The Supreme Court has not always adhered to this approach (which is why Chief Justice Roberts found himself in dissent in *Arlington*), but it has never been repudiated.[107]

In place of a threshold inquiry into whether the economic or political stakes of a case are sufficiently "major" or "extraordinary," courts would be better off focusing on the root question

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[104] King, 576 U.S. at 485-486.

[105] ABA v. FTC, 430 F.3d 457 (D.C. Cir. 2005).

[106] See ICC v. Cincinnati, New Orleans, & Tx. Pacific Rwy. Co., 167 US 497, 505 (1897). The case is referred to as the "Queen and Crescent" case because the rail line went between the Queen City (Cincinnati) and the Crescent City (New Orleans).

[107] The U.S. Court of Appeals for the D.C. Circuit has also recognized in numerous cases going back decades. See, for example, Atlantic City Elec. Co. v. FERC, 295 F.3d 1 (D.C. Cir. 2002) ("Agency authority may not be lightly presumed. 'Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony." (cleaned up)); American Bus Assn v. Slater, 231 F.3d 1, 9 (D.C. Cir. 2000) (Sentelle, J., concurring) ("Agencies have no inherent powers. They . . . are creatures of statute . . . [that] may act only because, and only to the extent that, Congress affirmatively has delegated them the power to act."); Railway Labor Executives' Assn v. Natl. Mediation Bd., 29 F.3d 55 (D.C. Cir 1994) ("the Board would have us presume a delegation of power from Congress absent an express withholding of such power.").

of whether Congress delegated the asserted authority to the agency, and whether the evidence of such a delegation is commensurate with the nature of the authority asserted. In this way, the major-ness of the question at issue would be less of a threshold to be crossed, than a continuum to be incorporated into the statutory analysis. The weight of evidence necessary to support an asserted delegation should be proportional to the breadth, scope, and novelty of the delegated power claimed.

The specific inquiry contemplated here would consider several factors, all of which center on whether a prior delegation authorizes the agency action in question. The delegation of authority must be explicit in the plain language of the authorizing statute, as it would have been understood at the time of enactment. It must be plausible that the delegation of power is supported by the statute's original public meaning. In addition, the agency must be able to demonstrate that the problem it seeks to address is that which the legislature had in mind when the authority was delegated—or was at least of the sort that the legislative enactment was designed to address. That a contemporary reading of previously enacted statutory language would seem to encompass a previously unknown problem would not be sufficient. Relatedly, insofar as the authorizing legislation embodies an "intelligible principle," this principle should be understood as it would have been at the time of enactment. Accordingly, any such delegation must be understood to address then-contemporary problems and not as an open-ended grant of future authority to be deployed in unforeseen circumstances to address unanticipated problems. It is also appropriate for the Court to ask whether the agency is claiming delegated authority in an area within its expertise and the expertise it had at the time of the enactment.

Ambiguous language and the passage of time should not present an opportunity for agencies to bootstrap authority over previously unregulated concerns.[108] Merely because a given word (say, "system"), taken out of context, may seem to be a capacious vessel for a convenient power is no reason to green-light a newfound regulatory power. There is good reason for courts to be skeptical when agencies (or outside litigants) purport to identify previously undiscovered and unused authority to address emergent mischief. Agency departures from past practice or prior understandings of their own authority should be particularly suspect. Indeed, where an agency seeks to enter into a new field or exercise long dormant powers, this should create a presumption against the existence of a delegation.

Both for deciding the case at hand, and bequeathing a manageable doctrine to the lower courts, the Court would have been better off engaging in a holistic statutory inquiry into the nature of the agency power asserted, and whether there is sufficient evidence to support the agency's claim of delegated power, than to offer a one-off escape hatch dependent upon a contested judgment about whether a given action is sufficiently "major" or "extraordinary." The latter course invites unprincipled and politically contingent inquiries outside of judges core competencies, and invites the complaint that courts are making political judgments, rather than legal ones.

Questions about EPA's Remaining Authority

[108] See Adams Fruit Co. v. Barrett, 494 US 638, 650 (1990)("It is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" (cleaned up)).

WV v. EPA bars the EPA from adopting expansive regulations under Section 7411 that would require existing power plants to engage in generation shifting. The decision does not bar the EPA from continuing to regulate GHGs, however. The Court took no steps toward overturning *Mass v. EPA*, and raised no questions about the legal viability of other GHG regulations on the books. *WV v. EPA* does not even bar the regulation of GHGs under Section 7411. It simply bars the EPA from re-interpreting longstanding regulatory authority in new and expansive ways, particularly insofar as such re-interpretation is intended to adopt regulatory measures that the enacting Congress had not anticipated. In this sense, *WV v. EPA* is a clear sequel to *UARG v. EPA*, which likewise reaffirmed the EPA's traditional regulatory authority while simultaneously invoking the major questions doctrine to reject the agency's effort to unilaterally update its authority so as to more effectively control GHGs.

While a Section 7411(d) rule requiring generation shifting is off the table, the EPA is likely to adopt a new set of rules governing GHG emissions from coal-fired power plants. In late June the EPA indicated that it had already begun working on a new rule, planned to release a proposed rule in March 2023, and a final rule in 2024.[109] These new rules will not replicate the CPP, or anything like it, but the agency retains a range of options beyond a narrow focus on heat-rate improvements and other plant-specific efficiency improvements. Possibilities include basing BSER on co-firing, which would require power plants to incorporate greater use of natural gas or other lower-carbon fuels.[110] While the Trump Administration rejected co-firing as an option in promulgating the ACE rule, co-firing is used at a substantial percentage of fossil-

[109] Jean Chemnick, Biden Admin Postpones Power Plant Carbon Rules, ClimateWire, June 22, 2022.

[110] See Maya Domeshek & Dallas Burtraw, Reducing Coal Plant Emissions by Cofiring with Natural Gas, Resources for the Future Issue Brief 21-04, May 2021, https://media.rff.org/documents/RFF_IB_21-04.pdf.

fuel-fired power plants.[111] Thus the EPA could argue that it has been adequately demonstrated as a system of emission reduction that can be adopted at individual stationary sources. Another possibility would be to identify carbon, capture and sequestration as the BSER, though this might be challenged as either not adequately demonstrated or too costly.

While the EPA's options are much narrower than they would have been under the D.C. Circuit's interpretation of Section 7411, the agency retains some residual flexibility to draft a new Section 7411(d) rule governing GHG emissions from power plants, and should not preclude states from authorizing cap-and-trade or generation shifting as a means of complying with a more traditional standards of performance. Indeed, the Chief Justice seemed to go out of his way to make clear that the Court was not embracing the rigid interpretation of Section 7411 the Trump Administration had adopted, noting the Court had "no occasion to decide whether 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."[112] The only question the Court decided was "whether the 'best system of emission reduction' identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 7411(d) of the CAA."[113]

As noted, *WV v. EPA* does nothing to curtail the EPA's use of other existing authorities to regulate GHG emissions directly, such as has been done with vehicular emissions in the wake of *Massachusetts v. EPA* and major sources already subject to regulation under Section 165. *WV v.*

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[111] *Id.* at 1.

[112] WV, 142 S.Ct. at 2615-16.

[113] *Id.*

EPA may, however, make it more difficult for the EPA to deploy other CAA provisions against GHGs.

The CAA provisions establishing and enforcing National Ambient Air Quality Standards for criteria air pollutants are the "heart" of the Act.[114] Ever since *Mass v. EPA*, environmentalist organizations have urged the EPA to utilize these provisions more aggressively to mitigate climate change. Some have even proposed listing GHGs as criteria air pollutants for purposes of the NAAQS provisions.[115] Give that the NAAQS provisions were written and structured to ensure that each portion of the country achieves a set national standard for *ambient* air quality, and not to control emission levels generally or stabilize atmospheric concentrations of a globally dispersed pollutant, any such effort would be likely to fail in the wake of *WV v. EPA*.

GHGs need not be listed as criteria air pollutants for the NAAQS provisions to be useful in reducing GHG emissions, however. Tightening the national ambient air quality standard for particulate matter, for example, would not only reduce soot and fine particles in the air. It would also put the squeeze on many large sources of GHGs, coal-burning facilities in particular, reducing GHGs emissions as a co-benefit. This would appear to be a viable strategy, so long as the EPA does not lead courts to believe that such regulatory measures are adopted for the purpose of GHG control.

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[114] See Union Elec. Co. v. EPA, 427 U.S. 246, 249 (1976) (characterizing NAAQS provisions as "heart" of the CAA).

[115] See, e.g,, See Center for Biological Diversity, Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act (Dec. 2, 2009).The EPA denied this petition in January 2021, but then subsequently withdrew reversed the denial in March 2021 "as the agency did not fully and fairly assess the issues raised by the petition." See Letter from Acting Administrator Jane Nishida, Mar. 4, 2021, https://www.biologicaldiversity.org/programs/climate_law_institute/pdfs/21-03-05-Decision-Withdrawing-Denial.pdf.

WV v. EPA and the COVID cases highlight the Court's concern that the executive branch sometimes seeks to expand and repurpose existing statutory authority to address broader (and perhaps worthwhile) policy goals beyond those with which Congress was focused when the statute was enacted. There is no problem if an agency action that addresses A (particulates) necessarily addresses B (GHGs) at the same time. In such cases, B is a co-benefit of addressing A. If, however, the agency decides to address A for the purpose of B—and Congress has not authorized B—this raises the prospect of what we might call "regulatory pretext."

Concern for pretext is common in administrative law, but the rule against is rarely enforced with much vigor. Provided that an agency can offer a reasoned explanation of its actions and justify the choices it made in terms aligned with its statutory authority, that is usually good enough to survive judicial review. In the Census case, however, Chief Roberts suggested courts should look more closely when there is reason to suspect an agency's explanation is "contrived."[116] What judicial review requires, Roberts explained, is that agencies provide "genuine justifications for important decisions," and not "distractions" or subterfuge.[117]

Whereas pretext analysis is often used to ferret truly nefarious motives, such as racial or religious discrimination, the Roberts Court is suspicious of agency attempts to use regulatory authority delegated for one purpose to address another. So, for example, it appears the Court's majority in *NFIB* was concerned that the Biden Administration was trying to use OSHA's authority to set workplace safety standards as a means of increasing vaccination more

[116] Dep't of Com. v. New York, 139 S.Ct. 2551, 2575-2576 (2019).

[117] *Id.* at 2556.

generally.[118] Lacking any clear statutory authority to impose a nationwide COVID-19 vaccination requirement, the Biden Administration sought to use the OSHA rule as part of (what the President described as) "a new plan to require more Americans to be vaccinated."[119] Likewise, in *WV*, the Court's majority showed some concern that the Biden Administration was seeking to use provisions authorizing the imposition of source-specific pollution control standards as a way to "drive a[n] . . . aggressive transformation in the domestic energy industry."[120] Thus, were the EPA to tighten the particulate NAAQS standards for the stated purpose of reducing coal consumption and thereby reducing GHG emissions, this might raise a red flag.

More broadly, *WV v. EPA* suggests that efforts to encourage a "all-of-government" approach to climate change through executive order and presidential directive are likely to face stiff headwinds in court.[121] Congress retains the authority to direct any and all federal agencies to do more to mitigate the threat of climate change, but unless and until it does so, the authority of individual administrative agencies to pursue climate goals is limited, particularly where it involves taking pre-existing authorities and redirecting them toward climate change

One regulatory proposal sure to get additional scrutiny in the wake of WV v. EPA is the Security and Exchange Commission's proposal to "enhance and standardize climate-related

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[118] See Michael C. Dorf, Pretext Explains (But Does Not Justify) the SCOTUS Invalidation of the OSHA Vaccine Rule, Dorf on Law, Jan. 17, 2022, http://www.dorfonlaw.org/2022/01/pretext-explains-but-does-not-justify.html.

[119] See NFIB v. Dep't. of Labor, 142 S.Ct. 661, 663 (2022).

[120] WV, 142 S.Ct. at 2604 (quoting White House Fact Sheet on Clean Power Plan).

[121] The Office of Domestic Climate Policy in the Biden Administration "implements the President's domestic climate agenda, coordinating the all-of-government approach to tackle the climate crisis, create good-paying, union jobs, and advance environmental justice." https://www.whitehouse.gov/odcp/.

disclosures for investors."[122] Insofar as such disclosure requirements represent an extension of SEC authority beyond its core mission of protecting investors and force it to address matters outside of its traditional areas of expertise, it would seem to implicate the major questions doctrine and be vulnerable to challenge under *WV v. EPA*.[123] To defend its rule, the SEC will likely argue that climate disclosures merely represent an update of traditional disclosure requirements in light of recent developments. Efforts by other regulatory agencies, including the Federal Energy Regulatory Commission, to focus their preexisting regulatory authority on climate change would also seem potentially vulnerable as implicating major questions as well.

The implications of *WV v. EPA* extend beyond environmental policy, however. As the Chief Justice noted, such questions of extraordinary importance may arise from any corner of the administrative state, and the opinion makes clear that courts are to be suspicious when agencies engage in self-aggrandizing behavior or otherwise seek to pour new wine from old bottles. Wherever an agency opts to update, redirect, or repurpose its authority in light of technological or other changes, there is a risk the major questions doctrine could be implicated. Agencies such as the Federal Communications Commission and Federal Trade Commission are on notice too.

Conclusion

[122] See Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022).

[123] See Paul Atkins and Paul Ray, The SEC's Climate Rule Won't Hold Up in Court, Wall. St. J., July 12, 2022, https://www.wsj.com/articles/the-sec-climate-rule-wont-hold-up-in-court-west-virginia-epa-agency-congress-11657659630.

When the Supreme Court concludes that an agency action exceeds the scope of the agency's delegated authority, it is an invitation to Congress to consider whether the agency *should* have such authority. After the Court rejected the FCC's claimed authority to relieve long-distance carriers of tariff filing obligations in *MCI v. AT&T*,[124] Congress enacted the 1996 reforms to the Communications Act, providing the FCC with the authority to relieve regulatory burdens so as to enhance competition in telecommunications services.[125] Similarly, after the Court rejected the FDA's claimed authority to regulate tobacco as a "drug" under the FDCA,[126] Congress soon enacted a new tobacco-control statute providing the FDA with new authority to regulate tobacco products, tailored to the particulars of the tobacco industry.[127] In both cases, the new authorities delegated by Congress were different from the authority the agency's had sought to exercise.

The Supreme Court's decision in *WV v. EPA* need not be the last word on whether generation shifting should play a role in mitigating the threat of climate change. There is broad consensus that more flexible, outcome-based strategies are more cost effective and efficient than facility-by-facility permitting. If legislative majorities support federal regulation of the power sector to reduce greenhouse gas emissions, Congress can still take that step. What Congress cannot do is sit back and hope that agencies discover how to unearth broad regulatory powers in the deepest regions of statutes it passed decades ago.

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[124] 512 U.S. 218 (1994).

[125] Telecommunications Act of 1996, , Pub. L. No. 104-104, 110 Stat. 56.

[126] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[127] Family Smoking Prevenetion & Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).