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Climate Change and the Death of the Administrative State?: West Virginia v. Environmental Protection Agency

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CLIMATE CHANGE AND THE DEATH OF THE ADMINISTRATIVE STATE?: *WEST VIRGINIA V. ENVIRONMENTAL PROTECTION AGENCY*

Davis P. Rosser[*]

> "[The *West Virginia* decision] will likely be used to challenge other federal politics and limit Congress's ability to rely on federal agencies to implement bold, forward-looking agendas."
> –Andrew J. Twinamatsiko[1]

> "The science has been ever more consistent and ever more clear . . . what's needed now is 'political courage,' [t]hat is what it will take – the ability to look beyond current interests."
> –Inger Andersen[2]

In recent decades, climate change events have surged in both frequency and intensity. Paradoxically, the most vulnerable and economically disadvantaged states, despite contributing the

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[1] Andrew J. Twinamatsiko & Katie Keith, *Unpacking West Virginia v. EPA and Its Impact on Health Policy*, O'NEILL INST. NAT'L & GLOB. HEALTH L. (July 13, 2022), https://oneill.law.georgetown.edu/unpacking-west-virginia-v-epa-and-its-impact-on-health-policy/.

[2] Sarah Kaplan & Brady Dennis, *The World Is Running Out of Options to Hit Climate Goals, U.N. Report Shows*, THE WASH. POST (Apr. 4, 2022, 11:00 AM), https://www.washingtonpost.com/climate-environment/2022/04/04/climate-change-report-united-nations-ipcc/.

least to global emissions, face the gravest consequences. Developed nations, despite their wealth of resources, have consistently failed to act in the face of this crisis. For example, the recent United States Supreme Court Decision, West Virginia v. Environmental Protection Agency*, limited the administrative state's rulemaking authority and thus, its ability to enact necessary climate policy. This decision, based in the infamous "major questions doctrine," asserts that administrative agencies must have explicit authority from Congress when deciding questions of vast economic and political significance – even in times of crisis. This Note, in four parts, traces the evolution of the American judiciary's interpretation of administrative rulemaking from* Chevron *to the present, ultimately urging Congress to enact legislation that requires courts to defer to the expertise of administrative agencies when interpreting the law—ultimately strengthening the administrative state and its ability to fight climate change. This Note aims to contribute to the ongoing discourse surrounding climate policy and administrative law, emphasizing the imperative for coordinated efforts to address the climate crisis at both the national and international levels.*

INTRODUCTION

Few domestic policy arenas have as tangible of an international impact as climate policy. For example, consider Pakistan's Dadu District, a region long characterized by its fertile landscape, natural resources, and agricultural output.[3] While Dadu is familiar with natural disasters,[4] in the summer of 2022 the district experienced its

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[3] Mohammad Hussain Khan, *The Beauty of Dadu*, DAWN (Feb. 8, 2021), https://www.dawn.com/news/1606111.

[4] In 2010 and 2014, for example, the Dadu region experienced significant flooding – albeit to a much lesser extent than in 2022. In 2010, 18 million were affected by flooding caused by monsoon rains. Michon Scott, *Heavy Rains, and Dry Lands Don't Mix: Reflections on the 2010 Pakistan Flood*, NASA EARTH OBSERVATORY (Apr. 6, 2011), https://earthobservatory.nasa.gov/features/PakistanFloods. In 2014, 2.5 million people were affected by flooding. Richard Davies, *Pakistan Floods*, *September 2014 – Facts and Figures*, FLOODLIST (Oct. 13, 2014), https://floodlist.com/asia/pakistan-floods-september-2014-facts-figures.

most catastrophic flooding to date,[5] displacing 33 million residents—half of whom were children.[6] Floodwaters as high as nine feet inundated Dadu,[7] transforming the once fertile landscape into what journalist Christina Goldbaum describes as "desperate islands."[8] In addition to the catastrophic loss of life and near complete destruction of Dadu's agricultural lands,[9] the floods decimated critical infrastructure including roads, bridges, schools, homes, and healthcare facilities.[10] "Our whole world is underwater, and nobody has helped us," said Rajul Noor, a twelve-year Dadu resident.[11] In an interview with the Associated Press, Pakistani Foreign Minister Bilawal Bhutto-Zardari stated, "[t]hese 33 million Pakistanis are paying in the form of their lives and livelihoods for the industrialization of bigger countries."[12]

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[5] Christina Goldbaum & Zia Ur-Rehman, *In Pakistan's Record Floods, Villages Are Now Desperate Islands*, N.Y. TIMES (Sept. 14, 2022), https://www.nytimes.com/2022/09/14/world/asia/pakistan-floods.html; *See* Riazat Butt & Jawad Khan, *Drive for Climate Compensation Grows After Pakistan's Floods*, ASSOCIATED PRESS (Oct. 10, 2022), https://apnews.com/article/floods-pakistan-united-nations-monsoons-climate-and-environment-403ba462fe9e808714e2fa849386d29d.

[6] *Devastating Floods in Pakistan*, UNICEF (Aug. 25, 2023), https://www.unicef.org/emergencies/devastating-floods-pakistan-2022.

[7] Qurban Ali Kushik, *Relief Efforts Underway as Parts of Dadu District Inundated with '8-Foot-High' Foods*, DAWN (Sep. 1, 2022), https://www.dawn.com/news/1707877.

[8] Goldbaum & Ur-Rehman, *supra* note 5; *see also* Butt & Khan, *supra* note 5.

[9] As of September 1, 2022, at least 1,191 people were reported dead, including 399 children. Kushik, *supra* note 7.

[10] Shah Meer Baloch & Matthew Taylor, *Pakistan Reels from Floods: 'We Thought We'd Die of Hunger. How We Fear Death from Water'*, THE GUARDIAN (Sept. 17, 2022, 1:00 PM), https://www.theguardian.com/world/2022/sep/17/drought-floods-pakistan-devastation-climate-crisis ("Torrents of water tore through villages, sweeping away thousands of houses, schools, roads and bridges and destroying 18,000 sq km of agricultural land . . . 90% of crops have been ruined."); Butt & Khan, *supra* note 5.

[11] Butt & Khan, *supra* note 5.

[12] *Id.*

Climate events, like those in Dadu, have increased in both frequency and intensity.[13] In a 2022 report, the Intergovernmental Panel on Climate Change ("IPCC") warned that humans should expect the effects of climate change to accelerate unless sweeping domestic and international policy changes are enacted.[14] Specifically, the IPCC report warns that the coming decades will bring significant sea level rises, the destruction of coral reefs, intensified natural disasters,[15] and perhaps most alarmingly, catastrophic loss of life.[16] While these consequences present as fearmongering to those who have yet to face the reality of a warming world, the most economically disadvantaged states (those who contribute least to global emissions) have faced, and are predicted to face, the most serious consequences of anthropogenic climate change.[17]

Now is the time for highly industrialized nations, like the United States, to utilize the resources at their disposal to enact sweeping climate policies. Despite the urgency of the problem, however, the U.S. has demonstrated a marked disinterest in enacting adequate climate policy.[18] For example, the United States Supreme Court

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[13] E360 Digest, *Extreme Weather Events Have Increased Significantly in the Last 20 Years*, YALE ENV'T 360 (Oct. 13, 2020), https://e360.yale.edu/digest/extreme-weather-events-have-increased-significantly-in-the-last-20-years (Finding an 83% increase in climate-related disasters between 2000-2019 compared to 1980-1999).

[14] *See* IPCC, *supra* note 2.

[15] *Id.* at 18–19; Kaplan, *supra* note 2.

[16] IPCC, *supra* note 2 at 8–19.

[17] Kaplan et al., *supra* note 2 ("[T]he nations and people who are least at fault for fueling climate change will be the ones who suffer the most."); Butt, *supra* note 5 ("Pakistan, which contributed only 0.8% to the world's emissions, now faces damages estimated at more than $30 billion."); *Developed Countries are Responsible for 79 Percent of Historical Carbon Emissions*, CTR. FOR GLOB. DEV., https://www.cgdev.org/media/who-caused-climate-change-historically (last visited Oct. 1, 2023) ("[T]he historical concentration of industry and wealth in developed countries means they are responsible for 79 percent of the emissions from 1850 to 2011.").

[18] Fiona Harvey, *Wealthy Nations 'Failing to Help Developing World Tackle Climate Crisis'*, THE GUARDIAN (Apr. 24, 2021, 10:42 AM), https://www.theguardian.com/environment/2021/apr/24/wealthy-nations-failing-to-help-developing-world-tackle-climate-crisis ("[M]ajor economies at the [2021 White House summit on climate change] were largely silent on funding"

decision *West Virginia v. Environmental Protection Agency*, the placed additional hurdles before the enactment of progressive climate policies.[19] In *West Virginia*, the United States Supreme Court signaled a potentially catastrophic upheaval of the administrative state, ultimately restricting the Environmental Protection Agency ("EPA")'s rulemaking authority.[20] The majority opinion, authored by Chief Justice John Roberts, invokes the "major questions doctrine" to limit the EPA's ability to regulate greenhouse gases.[21] This doctrine provides that agencies must point to "clear congressional authorization" before using their rulemaking authority to address "major questions," or "decisions of vast economic and political significance."[22] The majority reasoned that, although the Clean Air Act granted the EPA power to regulate emissions, the challenged regulations were improper as they were outside of the express authority granted to the EPA by Congress.[23] While the Court has hinted at accepting the "major questions doctrine" in past decisions,[24] the adoption of this doctrine in *West*

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policies to prevent the climate crisis from worsening.); *See* Matt McGrath, *Climate Change: US Formally Withdraws from Paris Agreement*, BBC (Nov. 4, 2020), https://www.bbc.com/news/science-environment-54797743.

[19] *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[20] *See* Shay Dvoretsky, et al., *West Virginia v. EPA: Implications for Climate Change and Beyond*, SKADDEN INSIGHTS 2 (Sep. 21, 2022), https://www.skadden.com/-/media/files/publications/2022/09/quarterly-insights/west_virginia_v_epa_implications_for_climate_change_and_beyond.pdf?rev=4e18af3a33434b80a3b46c32e7bc4d50 (stating that the Court's rejection of the Clean Power Plan in *West Virginia* will make meeting President Biden's goal to reduce greenhouse gas emissions by 50% by 2030 increasingly difficult).

[21] *West Virginia*, 142 S. Ct. at 2614.

[22] *Id.* at 2613–16.

[23] *Id.* at 2615–16; Stacey H. Mitchell, et al., *'Major Questions'? Supreme Court Decision in Climate Change Case Sends Ripples Across the Regulatory Landscape*, AKIN (July 6, 2022), https://www.akingump.com/print/v2/content/1057889/supreme-court-invokes-major-questions-doctrine-in-west-virginia-v-epa-to-limit-agency-authority-to-tackle-climate-change-with-implications-for-rulemakings-across-the-regulatory-landscape.pdf.

[24] In cases during the 20th and 21st centuries, the Court appeared wary of the power to interpret as giving deference to federal agencies. *See generally* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649–650 (1990) (holding that the Secretary of Labor was not afforded *Chevron* deference when interpreting the enforcement

Virginia signals the judiciary's willingness to limit the interpretive and rulemaking abilities of administrative agencies, even in times of crisis.

This Note, in four parts, chronicles and critiques the American judiciary's interpretation of administrative rulemaking from the 1980s to the present day. Part I of this Note describes how courts have traditionally approached delegations of legislative power, focusing specifically on the evolution of the Supreme Court's administrative law jurisprudence throughout the 20th and 21st centuries. Part II details the *West Virginia* decision, its procedural background, and how the Court eventually arrived at the adoption of the "major questions doctrine." Part III provides a critique of the majority's reasoning in *West Virginia* and argues that the adoption of the "major questions doctrine" will not only limit the United States government's ability to fight climate change, but hamstring both administrative and executive power. Part IV proposes a potential solution to a weakened administrative state, requesting that Congress enact legislation that allows agencies to adopt a more deferential approach to its interpretation of the law.

I. THE EVOLUTION OF AMERICAN ADMINISTRATIVE LAW: *CHEVRON*, ITS CRITICISMS, AND THE EMERGENCE OF THE "MAJOR QUESTIONS DOCTRINE"

In the late 20th century, the Supreme Court adopted a highly deferential standard, "*Chevron* deference," when considering if an Agency's interpretation of law is constitutionally valid.[25] This standard, expanded on in *Mistretta v. United States*, was based in an

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provisions of The Migrant Seasonal Agricultural Worker Protection Act because "[n]o such delegation regarding [the] enforcement provisions is evident in the statute"); Miller v. Johnson, 515 U.S. 900, 923 (1995) (refusing to extend deference to agencies when a regulatory interpretation "raises a serious constitutional question"); United States v. Mead Corp., 533 U.S. 218, 231–32 (2001) (holding that, because there was no evidence that Congress intended to delegate "authority to Customs to issue classification rulings with the force of law," the United States Customs Service's "tariff classification ruling" was not to be afforded *Chevron* deference).

[25] *See* Chevron U.S., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

assumption that Congress "simply cannot do its job absent an ability to delegate power under broad general directives."[26] *Chevron* deference, however, was not without critique.[27] In the following decades, the Court seemed to embrace these critiques and diverge from the approach announced in *Chevron*. This section traces the history of the administrative state and the changes in the Court's thinking that eventually lead to the adoption of the "major questions doctrine."

Perhaps the most famous case in all of administrative law,[28] the 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* demonstrated the Court's willingness to defer to the expertise of agencies when Congress was unclear.[29] This approach, commonly referred to as "*Chevron* deference," allowed judges to defer to an agency's interpretation of ambiguous grants of power from Congress, so long as the agency's interpretation of the statute is "reasonable."[30] The Court reasoned that *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the

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[26] Mistretta v. United States, 488 U.S. 361, 372 (1989). *See also* Brendan Bukalski, *Congressional Authority to Delegate Power*, THE INTELLIGENCER (Sep. 22, 2013), ("For example, the Environmental Protection Agency can pass rules and regulations that govern how many parts per million of some chemical are allowed in our water supply. In this example, the rules and regulations that are passed by the EPA are essentially the same as laws that could be passed by Congress itself.").

[27] *See, e.g.,* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV., 475, 476 (2021), https://administrativelawreview.org/wp-content/uploads/sites/2/2021/11/73.3-Sunstein_Final.pdf (arguing that the Chevron Doctrine is inconsistent with the Administrative Procedure Act, Article III of the Constitution, and the non-delegation doctrine).

[28] Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 Admin. L. Rev. 253, 254 (2014) ("[*Chevron*] continues to accumulate judicial citations at the rate of about 1000 per year . . . put[ting] it in roughly the same league as *Marbury v. Madison*.").

[29] *See Chevron*, 467 U.S. at 844.

[30] *See id.* at 845; *see also* James Kundhardt & Anne Joseph O'Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS (Aug. 18, 2022), https://www.brookings.edu/articles/judicial-deference-and-the-future-of-regulation/.

statutory gaps."[31] While the court has utilized *Chevron* deference on numerous occasions,[32] its application has not been without controversy.[33]

As the administrative state expanded throughout the 20th century, the Court began to express its dissatisfaction with *Chevron*, moving in the direction of more limited agency power.[34] Harvard Law professor Cass Sunstein wrote that the Court's approach post-*Chevron* "manifest[ed]" its skepticism of the administrative state and implicitly endorsed the "major questions doctrine" in the process.[35] Through these cases, the Court limited both *Chevron*'s reach and the scope of agency power.

In 2000, for example, the Supreme Court was tasked with determining whether the Food and Drug Administration ("FDA")'s regulatory framework for tobacco products was within the powers granted to them by Congress.[36] This case, *Food and Drug Administration v. Brown & Williamson*, was brought by several tobacco manufacturers, retailers, and advertisers challenging an FDA regulation concerning the "promotion, labeling, and

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[31] King v. Burwell, 576 U.S. 473, 485 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

[32] *See generally* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649–650 (1990); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 79 (2002).

[33] *See* Sunstein, *supra* note 27; *see also* Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) ("*Chevron* deference precludes judges from exercising [] [Article III] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute'") (quoted in Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs. 545 U.S. 967, 983 (2005)); *see also* U.S. Telcom Ass'n v. FCC, 855 F.3d 381, 417 (Kavanaugh, J., dissenting) (D.C. Cir. 2017) ("[T]he major [] [questions] doctrine helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority."); *See also* Pierce, *supra* note 27 (discussing two recent Supreme Court decisions in which *Chevron* was not explicitly overturned but rather was ignored).

[34] *See generally* MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 226, 231, 234 (1994) (rejecting FCC's claim of authority under the Communications Act of 1934 because "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency.").

[35] Sunstein, *supra* note 27 at 476–77.

[36] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000).

accessibility to children" of tobacco products.[37] The FDA argued that, under the Food, Drug, and Cosmetic Act, Congress granted it the authority to regulate "restrictive devices."[38] Alternatively, the respondents argued, that the FDA's determination that tobacco products were "restrictive devices" was an overbroad and unreasonable reading of the law, rendering the FDA's regulatory scheme void.[39] The Court, siding with the respondents, acknowledged that administrative agencies were afforded substantial judicial deference under *Chevron*.[40] However, *Chevron* did not extend to this "extraordinary case[]," as the FDA sought to regulate "an industry constituting a significant portion of the American economy."[41]

The Court justified its decision in *FDA v. Brown & Williamson* on two grounds. First, the majority wrote that Congress, when writing the Food, Drug, and Cosmetics Act, intended for the regulation of tobacco products to fall outside the FDA's jurisdiction.[42] The majority explained that "various provisions" of this Act limited the FDA's evaluation of products to their safety, *not*

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[37] *Id.* at 128–29 (challenging regulations that "prohibit[ed] the sale of cigarettes . . . to persons younger than 18; require[d] retailers to verify . . . the age of all purchasers; prohibit[ed] the sale of cigarettes in quantities smaller than 20; prohibit[ed] the distribution of free samples; and prohibit[ed] sales through self-service displays and vending machines").

[38] *Id.* at 129; *see also* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 360j(e), 321(h)(1)(C) (1983) (defining a "device" in this context as "an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory" and is "intended to affect the structure or any function of the body of man or other animals").

[39] *See Brown & Williamson*, 529 U.S. at 129-30; *see also* 21 U.S.C. §§ 321(g)-(h), 360j(e), 393 (1983) (defining "drug" as "articles (other than food) intended to affect the structure or any function of the body").

[40] *Brown & Williamson*, 529 U.S. at 159.

[41] *Id*. (citing secondary authority, suggesting that these "extraordinary circumstances" require special treatment); *see* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 28 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

[42] *Brown & Williamson*, 529 U.S. at 142.

their public health consequences.[43] Thus, had the FDA found tobacco products to be "unsafe," the Act would require it to remove *all* tobacco products from the market, contrary to Congress's intent.[44] Second, the majority stated that Congress had already outlined the FDA's role regarding tobacco regulation.[45] Pointing to six pieces of tobacco legislation between 1965 and 2000, the Court explained that Congress had already addressed "the problem of tobacco and health," precluding the FDA from using its authority to expand on the legislature's existing framework.[46] Therefore, Congress "could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[47] This decision reflects an early manifestation of the "major questions doctrine," as the Court struck down the FDA's existing the regulatory scheme due to its "economic and political significance," key language in the Court's definition of a "major question."

The mid-2010s brought new challenges to the administrative state. In *King v. Burwell*, for example, the Court heard a challenge to the Internal Revenue Service ("IRS")'s interpretation of the Affordable Care Act.[48] In this case, four Virginia residents challenged a provision of the Affordable Care Act requiring states to either establish a state-run health insurance exchange or participate in the federal health insurance exchange.[49] In particular,

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[43] *Id.*

[44] *Id.* at 142–143.

[45] *Id.* at 143–145.

[46] *Id.* at 157–158.

[47] *Id.* at 160; *Id.* at 161–192 (Breyer, J., dissenting) (arguing that (1) the FDA's authority to regulate tobacco products fell squarely within the text and congressional intent of the Food, Drug, and Cosmetics Act; and (2) the FDA's previous interpretation of the Act did not bar them from re-interpreting it based on changing social or political circumstances); *but see* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2608 (2022) (noting that substantial similarity exist in the Court's reasoning between Brown & Williamson and this case).

[48] King v. Burwell 576 U.S. 473, 483–84 (2015).

[49] *Id.* at 483–484; Brenden Mochoruk & Louise Sheiner, *King v. Burwell Explained,* BROOKINGS (Mar. 3, 2015), https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2015/03/03/king-v-burwell-explained/#:~:text=The%20issue%20in%20King%20v,in%20the%20federally%20run%20exchange.

the petitioners took issue with IRS regulations that granted federal tax credits for those who purchased health insurance on the government marketplace.[50] Petitioners challenged this regulation because on the ground that this "[r]ule . . . require[d] [them] to either buy health insurance they do not want, or make a payment to the IRS."[51] Echoing similar concerns found in *Brown & Williamson*, the Court found this to be an "extraordinary case[]" where *Chevron* deference was not appropriate.[52] The Court wrote that the interpretive question here was one of "economic and political significance," as the tax credit provisions "involv[ed] billions of dollars in spending each year and affecting the price of health insurance for millions of people."[53] Considering this, the Court concluded that it is "especially unlikely" that the IRS was granted this regulatory authority by the Affordable Care Act as "[the IRS] has no expertise in crafting health insurance policy of this sort."[54] Thus, the regulation was struck down and the rulemaking ability of the administrative state was weakened yet again.

Further, in *Utility Air Regulatory Group. v. Environmental Protection Agency,* the Court emphasized its skepticism of *Chevron*, this time in the realm of environmental policy.[55] Here, several states and private actors petitioned the Court to review an EPA regulation that set emission standards for greenhouse gases emitted by motor vehicles.[56] The EPA argued that, under the Clean Air Act, this regulation "automatically triggered" section 7602(g) of the Act.[57] This section allows the EPA to promulgate regulations concerning "regulated air pollutants," which it interpreted to include greenhouse

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[50] *King*, 576 U.S. at 483; *see* 77 Fed. Reg. 30378 (2012) (stating a taxpayer may receive a tax credit if they are enrolled in an insurance plan through "an Exchange, which is defended as 'an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by HHS'").

[51] *King*, 576 U.S. at 483-484.

[52] *Id.* at 485–86.

[53] *Id.*

[54] *Id.* at 474.

[55] *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014).

[56] *Id.* at 313–14.

[57] *Id.* at 307.

gases.[58] In opposition, the plaintiffs challenged the EPA's interpretation of section 7602(g) as unreasonable, requiring the Court review the constitutionality of the EPA regulations. The Court, ultimately siding with the petitioners, held that the EPA's interpretation of the Clean Air Act was unreasonable, and thus not afforded *Chevron* deference.[59]

The Court reasoned that, while the Clean Air Act authorized regulation of "regulated air pollutants," this language was not meant to include greenhouse gases.[60] In support, the majority pointed to previous EPA rulemaking, in which "air pollutants" were given a "narrower, context-appropriate meaning."[61] Thus, the Court refused to extend deference to the EPA, as its interpretation of law was "plainly excessive" of the authority granted to it under the Clean Air Act.[62] The majority explained that to hold otherwise would result in a "transformative expansion in EPA's regulatory authority without clear congressional authorization."[63]

While the fundamental principles of *Chevron* remain,[64] it is clear from these cases that the Court has become increasingly wary of

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[58] The Clean Air Act, 42 U.S.C. § 7602(g) (1970) (defining an air pollutant as "any air pollution agent or combination of such agents, including any physical, chemical, biological [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."); *Util. Air Regul. Grp*., 573 U.S. at 316.

[59] *See id.* at 323–24.

[60] *Id.* at 316.

[61] *Id.*

[62] *Id.* at 316, 323.

[63] *Id*. at 324; *see generally Id.* at 338 (Breyer, J., concurring in part, dissenting in part) (critiquing the majority's understanding of the phrase "regulated air pollutants" as far too narrow. Breyer wrote "I do not agree with the Court that the only way to avoid an absurd or otherwise impermissible result in these cases is to create an atextual greenhouse gas exception to the phrase 'any air pollutant.' After all, the word 'any' makes an earlier appearance in the definitional provision.").

[64] *See* Pierce, *supra* note 27. While *Chevron* remains good law, on October 13, 2023, the Supreme Court granted certiorari announced it will hear oral argument in *Loper Bright Enterprises v. Raimondo*, in which it will decide whether to formally overrule *Chevron*. Amy Howe, *Justices Grant Four New Cases, Including Chevron Companion Case*, SCOTUSBLOG (Oct. 13, 2023, 3:16 PM) https://www.scotusblog.com/2023/10/justices-grant-four-new-cases-including-chevron-companion-case/.

agency interpretations of law. In fact, as would become apparently clear in *West Virginia*, these cases illustrate early manifestations of the "major questions doctrine."

II. *WEST VIRGINIA* AND THE ADOPTION OF THE "MAJOR QUESTIONS DOCTRINE"

The Clean Air Act was passed with the "primary goal . . . to encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention."[65] In just a half century, the Clean Air Act appeared to achieve this goal, as harmful air pollutants, like carbon monoxide, were reduced by up to 74%.[66] Despite these apparent benefits, some parties—like those in *Utility Air Regulatory Group*—mounted challenges to the EPA's regulatory authority under The Clean Air Act.[67] Notably, several states and interest groups challenged the scope of the EPA's ability to regulate carbon emissions, resulting in the case *West Virginia v. Environmental Protection Agency*.[68]

A. Procedural History

The Clean Air Act grants the EPA the authority to regulate emissions from energy production, so long as the regulations "reflect the 'best system of emission reduction' that the EPA has determined to be 'adequately demonstrated.'"[69] The Clean Air Act grants three categories of regulatory authority to the EPA:[70] (1) "New Source Performance Standards,"[71] (2) "National Ambient Air

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[65] 42 U.S.C. § 7401(c).

[66] *Our Nation's Air*, EPA (last accessed Oct. 13, 2023) https://gispub.epa.gov/air/trendsreport/2019/#highlights.

[67] Lyle Denniston, *States Move to Block "Clean Power Plan*," SCOTUSBLOG (Jan. 26, 2016) https://www.scotusblog.com/2016/01/states-move-to-block-clean-power-plan/.

[68] West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2599 (2022).

[69] *Id*. (quoting the Clean Air Act, 42 U.S.C. §§ 7411(a)(1), (b)(1), (d)) (1970).

[70] *Id.* at 2600.

[71] *Id.* "New Source Performance Standards" can be defined as the power granted to the EPA under the Clean Air Act to establish "emission limitations

Quality Standards" ("NAAQS"),[72] and (3) "Hazardous Air Pollutants" ("HAP").[73] In all three categories, the Clean Power Plan requires the EPA to consider "the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements" when promulgating regulations.[74] In past decades, the EPA regularly exercised this power by establishing nationwide energy production performance standards and requiring power plants to operate more efficiently.[75]

In 2015, for example, the Obama administration-led EPA promulgated the "Clean Power Plan."[76] The Clean Power Plan aimed to reduce harmful emissions by increasing the efficiency of fossil-fuel-powered energy plants and implementing "cap-and-trade programs."[77] The EPA provided three "building blocks" to

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achievable through the application of adequately-demonstrated" technology, "taking into account cost, non-air quality health or environmental impacts, and energy requirements." Jason Gordon, *Clean Air Act – New Source Performance Standards and New Source Review*, THE BUSINESS PROFESSOR (Apr. 8, 2023), https://thebusinessprofessor.com/en_US/environmental-law/clean-air-act-new-source-performance-standards-and-new-source-review.

[72] The Clean Air Act, 42 U.S.C. §§ 7408-7410. The EPA is granted authority to set air quality standards for six pollutants "that are common in outdoor air, considered harmful to public health and the environment, and that come from numerous and diverse sources." Namely, the EPA can set standards concerning carbon monoxide, lead, particulate matter, ozone, nitrogen dioxide, and sulfur dioxide. *Reviewing National Ambient Air Quality Standards (NAAQS): Scientific and Technical Information*, EPA (last updated Aug. 2, 2023), https://www.epa.gov/naaqs.

[73] 42 U.S.C. § 7412. "Hazardous air pollutants are those known to cause cancer and other serious health impacts. the Clean Air Act requires the EPA to regulate toxic air pollutants." *Hazardous Air Pollutants*, EPA (last updated Feb. 9, 2023), https://www.epa.gov/haps.

[74] 42 U.S.C. § 7411(a)(1).

[75] *West Virginia*, 142 S. Ct. at 2599.

[76] *Id.* at 2592.

[77] The Clean Power Plan, 80 Fed. Reg. 64667–64928 (Oct 23, 2015) (to be codified at 40 C.F.R. pt. 60). *See also* Marlo Lewis, Jr., *The Inflation Reduction Act's Implications for West Virginia v. EPA: A Response to Professor Dan Farber*, COMPETITIVE ENTERPRISE INSTITUTE (Sep. 6 2022), https://cei.org/blog/thoughts-on-the-inflation-reduction-acts-implications-for-west-virginia-v-epa/. "In a cap-and-trade system, the government sets an emissions cap and issues a quantity of emission allowances consistent with that cap. Emitters must hold allowances for every ton of greenhouse gas they emit.

accomplish these goals:[78] (1) "heat rate improvements,"[79] (2) "new low- or zero-carbon generating capacity" electricity producers, and, at issue in *West Virginia*, (3) "generation shifting[80] from higher-emitting [energy production] to lower-emitting [energy production]."[81] The EPA estimated that the Clean Power Plan would reduce carbon dioxide emissions by 32%, sulfur dioxide emissions by 90%, and nitrogen dioxide emissions by 72% nationwide.[82]

Despite its apparent benefits, the Clean Power Plan never came into effect.[83] After the 2016 election, the Trump-administration led EPA brought about major changes to U.S. climate policy, including

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Companies may buy and sell allowances, and this market establishes an emissions price." *Cap and Trade Basics*, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, https://www.c2es.org/content/cap-and-trade-basics/#:~:text=In%20a%20cap%2Dand%2Dtrade,market%20establishes%20an%20emissions%20price (last visited Sep. 16, 2023).

[78] *West Virginia*, 142 S. Ct. at 2593; The Clean Power Plan, *supra* note 74, at 64667.

[79] The Clean Power Plan, *supra* note 74, at 64727. "Heat rate" is one of several efficiency measures for power plants. *What Is the Efficiency of Different Types of Power Plants?*, U.S. ENERGY INFORMATION ADMINISTRATION, https://www.eia.gov/tools/faqs/faq.php?id=107&t=3 (last reviewed Sep. 20, 2022). Thus, the "heat rate improvements" building block is intended to increase the efficiency of coal power plants, resulting in a reduction in emissions. EPA, FACT SHEET: OVERVIEW OF THE CLEAN POWER PLAN (2015).

[80] The Clean Power Plan, *supra* note 74, at 64772. Generation shifting is defined as "shifting generation away from existing coal-fired power plants by requiring them to 'reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.'" Stacey H. Mitchell, et al., *'Major Questions'? Supreme Court Decision in Climate Change Case Sends Ripples Across the Regulatory Landscape*, AKIN GUMP (July 6, 2022), https://www.akingump.com/en/news-insights/supreme-court-invokes-major-questions-doctrine-in-west-virginia-v-epa-to-limit-agency-authority-to-tackle-climate-change-with-implications-for-rulemakings-across-the-regulatory-landscape.html#:~:text=For%20the%20first%20time%2C%20the,strike%20down%20an%20agency%20rule.

[81] The Clean Power Plan, *supra* note 74, at 64772. The EPA described "new low- or zero-carbon generating capacity" as "substituting increased electricity generation from new zero-emitting renewable energy sources (like wind and solar) for reduced generation from existing coal-fired power plants." FACT SHEET: OVERVIEW OF THE CLEAN POWER PLAN, *supra* note 78.

[82] FACT SHEET: OVERVIEW OF THE CLEAN POWER PLAN, *supra* note 78.

[83] *West Virginia*, 142 S. Ct. at 2604.

the repeal of the Clean Power Plan.[84] The Trump EPA issued several agency statements in support, stating stated that the Obama-era Clean Power Plan was "in excess of [the EPA's] statutory authority" granted by the Clean Air Act.[85] Relying on the Court's skepticism of broad agency power,[86] the Trump EPA invoked the "major questions doctrine" in determining that "'Congress has . . . precluded' the use of measures" like those in the Clean Power Plan.[87] The Trump EPA then replaced the Clean Power Plan and promulgated a new rule, the Affordable Clean Energy ("ACE") Rule.[88]

The ACE Rule stripped much of the Clean Power Plan's regulatory mechanisms, retaining only provisions related to "equipment upgrades and operating practices that would improve facilities' heat rates."[89] Concerningly, as noted in a 2019 report published in Discover Magazine, the ACE Rule would have potentially *increased* carbon dioxide emissions—resulting in a counterintuitive result for an agency tasked with protecting the environment.[90] In response, several states filed petitions in the D.C.

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[84] *See id.*

[85] *Id.* (quoting Affordable Clean Energy Rule, 84 Fed. Reg. 32523 (2019)). Specifically, Trump's EPA took issue with the "generation shifting" provisions in the Clean Power Plan. EPA argued that the Clean Power plan's standard-setting was not "based on the application of equipment and practices at the level of an individual facility" but rather "a shift in the energy generation mix at the grid level." *Id.* at 2604–05.

[86] *See id.* at 2605. The court considered the EPA's reference to Util. Air Regul. Grp. V. EPA, 573 U.S. 302 (2014) when arguing for the Clean Power Plan's repeal, specifically considering the EPA's argument that courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.* (quoting Util. Air Regul. Grp. V. EPA, 573 U.S. 302 (2014)).

[87] *Id.* (quoting Repeal of Clean Power plan, 84 Fed. Reg. 32529 (July 8, 2019).

[88] *Id.* (citing Affordable Clean Energy Rule, 84 Fed. Reg. 32532).

[89] *Id.*; *See also* Repeal of Clean Power Plan, 84 Fed. Reg. 32520 (July 8, 2019).

[90] Tom Yulsman, *Study Shows that Trump's New "Affordable Clean Energy" Rule Will Lead to More CO2 Emissions, Not Fewer*, DISCOVER MAGAZINE (Jun. 19, 2019, 10:46 PM), https://www.discovermagazine.com/environment/study-shows-that-trumps-new-affordable-clean-energy-rule-will-lead-to-more. A study published in 2019

Circuit Court challenging the Trump EPA's repeal of the Clean Power Plan.[91] The D.C. Circuit sided with the states, and the plan was reinstated.[92] Shortly thereafter, the Supreme Court granted certiorari to review the decision of the Circuit Court.[93]

B. Summary of the Opinion

The Supreme Court took this case to review whether the EPA exceeded its statutory mandate under the Clean Air Act to regulate carbon emissions as promulgated in the Clean Power Plan.[94] Specifically, the parties challenging the reinstatement of the Clean Power Plan argued that the provisions of the Plan exceeded the EPA's authority to determine "the best system of emission reduction" under the Clean Air Act.[95] In response, the Government argued that the Act granted the EPA the "authority to establish emission caps" like the one found in the Clean Power Plan.[96]

Relying on the Court's previous skepticism of *Chevron*, Chief Justice John Roberts announced, for the first time, that the majority would undergo a "major questions doctrine" analysis.[97] The Court then outlined its application of the "major questions doctrine" as a two-pronged test.[98] First, the Court would ask whether the EPA's

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found that the ACE Rule will cause coal plants to "operate more frequently, and for longer periods of time." *Id.* The authors' studies concluded that this would result in higher carbon dioxide emissions "by 2050 compared to what would happen if there were no rule in place at all." *Id.*; *See also* Amelia T. Keyes, et al., *The Affordable Clean Energy Rule and the Impact of Emissions Rebound on Carbon Dioxide and Criteria Air Pollutant Emissions*, 14 ENV'T RSCH. LETTERS (Apr. 9, 2019), https://iopscience.iop.org/article/10.1088/1748-9326/aafe25/pdf.

[91] *West Virginia*, 142 S. Ct. at 2605.

[92] *Id.*

[93] *Id.* at 2606.

[94] *Id.* at 2600.

[95] *Id.* at 2592 (quoting Standards of performance for new stationary sources, 42 U.S.C.A. § 7411(a)(1)).

[96] *Id*. at 2614.

[97] *Id.* at 2609.

[98] Stacy H. Mitchell et al., *'Major Questions'? Supreme Court Decision in Climate Change Case Sends Ripples Across the Regulatory Landscape*, AKIN (July 6, 2022), https://www.akingump.com/en/news-insights/supreme-court-invokes-major-questions-doctrine-in-west-virginia-v-epa-to-limit-agency-

interpretation of "best system of emission reduction" under the Clean Air Act constituted a "major question," or one of "vast economic and political significance."[99] Then, if the Court found that the EPA's interpretation warranted a "major questions" analysis, the Court would then ask if "clear congressional authorization" supported the promulgation of the Clean Power Plan.[100]

The Court first concluded that this case was one where a "major questions" inquiry was appropriate.[101] The Court stated that the EPA "claim[ed] to discover in a long-extant statute an unheralded power" which represented a "transformative expansion in [its] regulatory authority."[102] When analyzing the language of the Clean Air Act, the Court found that the EPA took advantage of the statute's "vague language . . . one that was designed to function as a gap filler and had rarely been used in the preceding decades."[103] Thus, the majority concluded that because transformative nature of the Clean Power Plan was of "vast economic and political significance," a "major questions" analysis was warranted.[104]

After finding the first prong satisfied, the Court moved to the second prong: whether the EPA was granted "clear congressional authorization" to enact the Clean Power Plan.[105] The Court stated that while the provisions of the Clean Power Plan would reduce emissions substantially, these benefits alone do not automatically qualify the Plan as "the kind of 'system of emissions reduction'" referred to in the Clean Air Act.[106] In support, the majority stated that "agencies have only those powers given to them by Congress," meaning that powers granted to agencies by Congress are not an

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authority-to-tackle-climate-change-with-implications-for-rulemakings-across-the-regulatory-landscape.html#:~:text=For%20the%20first%20time%2C%20the,strike%20down%20an%20agency%20rule; *West Virginia*, 142 S. Ct. at 2620–2621.

[99] *West Virginia*, 142 S. Ct. at 2603–05.

[100] *See id.* at 2609.

[101] *Id.* at 2595.

[102] *Id.* at 2610 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

[103] *Id.*

[104] *Id*.

[105] *Id.* at 2614.

[106] *Id.* at 2615.

"open book to which the agency [may] add pages and change the plot line."[107] Thus, because the EPA Congress did not *explicitly* grant the power to enact the Clean Power Plan, the Court held that the EPA was acting outside its authority under the Clean Air Act.[108]

Justice Gorsuch, joined by Justice Alito, authored a concurrence to this opinion.[109] Justice Gorsuch agreed with the majority's conclusions, but provided alternative reasoning.[110] Justice Gorsuch reasoned that as the representative of the American people, Congress, not the EPA, is the final decisionmaker in climate policy and did not intend for the EPA to regulate in the manner it did.[111] Acknowledging the vagueness of the majority's decision, Justice Gorsuch laid out a multi-factor analysis for determining if a question is a "major" one.[112] These factors, while non-dispositive, analyze the scope and scale of an agency action, and ultimately attempt to provide a more systematized approach to a new doctrine.[113] Utilizing these factors, Justice Gorsuch determined that the challenged provisions of the Clean Power Plan constituted a "major question" and proceeded to echo the majority's textualist argument

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[107] *Id.* at 2609. (citing Ernst Gellhorn & Paul Verkuil, *Controlling Chevron Based Delegations,* 20 CARDOZO L. REV. 989, 1011 (1999)).

[108] This section authorizes the EPA to create the "best system of emission reduction." The Clean Air Act, 42 U.S.C. § 7411 (1970); *see West Virginia*, 142 S. Ct. at 2615–2616.

[109] *West Virginia*, 142 S. Ct. at 2616. (Gorsuch, J., concurring).

[110] *Id.* at 2624.

[111] *Id.* at 2626.

[112] These factors include: "whether the agency claims the power to resolve a matter of great political significance, … whether the agency attempts to regulate 'a significant portion of the American economy' or require massive spending by regulated parties," and "whether the agency's rulemaking seeks to 'intrud[e] into an area that is the particular domain of state law.'" Stacey H. Mitchell, et. al., *'Major Questions'? Supreme Court Decision in Climate Change Case Sends Ripples Across the Regulatory Landscape*, AKIN (July 6, 2022), https://www.akingump.com/en/insights/alerts/supreme-court-invokes-major-questions-doctrine-in-west-virginia-v-epa-to-limit-agency-authority-to-tackle-climate-change-with-implications-for-rulemakings-across-the-regulatory-landscape#:~:text=For%20the%20first%20time%2C%20the,strike%20down%20an%20agency%20rule; *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

[113] *See West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

in support of a restricted administrative state.[114] He reasoned that because the provisions of the Clean Power Plan were not *specifically* outlined in the Clean Air Act, the EPA could not regulate in this way.[115]

Justice Kagan, joined by Justices Breyer and Sotomayor, authored a dissenting opinion critiquing the Court's decision to strip power from the EPA and acknowledging the detriment this decision may cause to our climate.[116] Justice Kagan took issue with the Court's "textualist" interpretation of the Clean Air Act, stating that the majority reading of the Clean Air Act was too narrow and ignored the context surrounding the EPA's interpretation.[117] In context, Justice Kagan explained, the Clean Air Act establishes the EPA as the expert in evaluating carbon emissions, and how to reduce them.[118] The Court, said Justice Kagan, has no expertise in climate emissions, stating, "[w]hatever else this Court may know about, it does not have a clue about how to address climate change."[119] Justice Kagan supported this point by stating that the majority's reasoning demonstrated a fundamental "misunderstanding of how the electricity market works" in the United States.[120] Despite these misunderstandings, Justice Kagan stated that the majority improperly asserted itself as the definitive rule maker regarding climate change.[121] Thus, Justice Kagan concluded, the determination of the "best system of emissions reduction" should be left to agency interpretation, not, as the majority suggests, judicial deference.[122]

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[114] *See id.* at 2624.
[115] *Id.* at 2626.
[116] *Id.* (Kagan, J., dissenting).
[117] *Id.* at 2634.
[118] *See id.* at 2627.
[119] *West Virginia*, 142 S. Ct. at 2644.
[120] *Id.* at 2637.
[121] *Id.* at 2644.
[122] *Id.* at 2643.

III. CONSEQUENCES OF THE *WEST VIRGINIA* DECISION: STRIPPING OF ADMINISTRATIVE AND EXECUTIVE POWER

In the months following the Supreme Court's decision, speculation began surrounding *West Virginia*'s impact on the future of the administrative state.[123] In addition to concerns about the future of climate policy in the United States,[124] concerns arose about the expansive scope of the *West Virginia* decision[125] and the broadness of the "major questions doctrine" altogether.[126] While Justice Gorsuch's concurring opinion prescribed numerous factors that courts could consider when determining if the "major questions

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[123] *See* Twinamatskio, *supra* note 1. In a report in Georgetown University's Institute for National and Global Health Law, Andrew J. Twinamatsiko examined the impacts of the *West Virginia* decision, asserting that the Supreme Court "severely handcuffed the EPA's ability to combat climate change." *Id.* In a similar vein, another scholar argues that the *West Virginia* decision allows courts to "hamstring" the ability of the executive branch to implement policy "address[ing] a host of big problems facing the country." *See* Daniel Cronin, *The Impacts of West Virginia v. EPA*, CARBON TRACKER (Jul. 12, 2022), https://carbontracker.org/the-impact-of-west-virginia-v-epa/.

[124] *See e.g.*, Shay Dvoretsky, et al., *West Virginia v. EPA: Implications for Climate Change and Beyond*, SKADDEN INSIGHTS (Sep. 21, 2022), https://www.skadden.com/insights/publications/2022/09/quarterly-insights/west-virginia-v-epa (arguing that the Court's rejection of the Clean Power Plan in West Virginia will make meeting President Biden's goal to reduce greenhouse gas emissions by 50% by 2030 increasingly difficult).

[125] *See e.g.*, Mitchell, *supra* note 23 (arguing that *West Virginia* will affect "all corners of the administrative state," not just the environmental setting). Additionally, David Engstrom and John Priddy assert that it is "very likely" that *West Virginia* will have significant impacts on policy surrounding climate change. They state that "regulatory changes that affect an entire industry at a fundamental level will be highly suspect." David Freeman Engstrom & John E. Priddy, *West Virginia v. EPA and the Future of the Administrative State,* STAN. L. SCH. (Jul. 6, 2022), https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/.

[126] *See* Cronin, *supra* note 124. Dena Adler, a research scholar at the Institute of Policy Integrity at New York University School of Law, expressed concern regarding the broadness of the Court's "major questions" framework, stating "[u]ntil recently, this interpretive framework was little-used, and it remains poorly defined." *Id.*

doctrine" applies,[127] these factors are non-inclusive and do little to clarify "decisions of vast economic and political significance."[128] Thus, the factors serve no other purpose than becoming a vague extension of a broad and discretionary rule.

Additionally, through the adoption of the "major questions doctrine," the Court is engaging in exactly what it sought to prevent—taking power away from Congress.[129] As Justice Kagan's dissent notes, it is well established that the EPA possesses policy expertise in the area of emission regulations.[130] Under the Clean Air Act, Congress implicitly recognizes this "comparative expertise" in granting the EPA authority to establish caps on emissions.[131] It would, as the Court previously acknowledged, be impractical to require Congress to lay out precisely *how* the EPA seeks to achieve this goal.[132] Thus, while the language of the Clean Air Act may be ambiguous, Congress likely intended it to be as agencies are generally tasked with interpreting this language to develop sensible "solution[s] to the crisis of the day."[133] However, as associate director of the Health Policy and the Law Initiative at the O'Neill Institute, Andrew Twinamatsiko asserts, the Court, in invoking the

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[127] *See West Virginia*, 142 S. Ct. at 2587 (Gorsuch, J., concurring).

[128] *Id.*

[129] *See*, *e.g., Id.* at 2634 (Kagan, J., dissenting).

[130] *Id.* Justice Kagan's dissent supports this claim by invoking the 2007 decision *Massachusetts v. EPA*, in which the Court held that "[T]here is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter." *Id.* at 2637 (Kagan, J., dissenting) (citing Massachusetts v. EPA, 549 U.S. 497, 531 (2007)).

[131] *Id.* at 2636–37.

[132] *See e.g.*, Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (determining that, because it is "unreasonable and impracticable to compel Congress to prescribe detailed rules[,] it [is] constitutionally sufficient if Congress clearly delineates the general policy [and] the public agency which is to apply it . . . ."); Mistretta v. United States, 488 U.S. 361, 372 (1989) (stating that in "our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives . . . .").

[133] *See* New York v. United States, 505 U.S. 144, 186–87 (1992). "Common sense suggests that where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated." *Id.* at 186.

"major questions doctrine," usurped Congress's authority to delegate and effectively declared the judiciary the "final decision-maker on federal climate policy."[134]

The fallout of this opinion does not stop with mere speculation and critique. In fact, in the first six months after *West Virginia*, courts interpreted this decision as an implicit grant to strip the executive branch of its discretionary and policy-making powers.[135] For example, in *Georgia v. President of the United States*, the Eleventh Circuit invoked the "major questions doctrine" to the detriment of public health and workplace safety.[136] This case involved a challenge to President Biden's Executive Order mandating federal contractors be fully vaccinated against COVID-19.[137] Authority for the mandate was found in the Procurement Act, which gives the president broad oversight over the "economical and efficient system for procurement and contracting."[138] Relying on *West Virginia*, the court held that, while the Procurement Act provides an "expansive grant of authority," absent "clear

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[134] Twinamatsiko, *supra* note 1.

[135] *See e.g.*, Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022); Louisiana v. Becerra, 629 F.Supp.3d 477 (W.D. La. 2022); Midship Pipeline Co. v. Fed. Energy Regul. Comm'n, 45 F.4th 867 (2022); Index Newspapers LLC v. City of Portland, No. 3:20-CV-1035-SI, 2022 WL 4466881 (D. Or. Sep. 26, 2022).

[136] *Georgia*, U.S., 46 F.4th at 1295–97. In a similar vein, the Western District of Louisiana relied on *West Virginia* in holding that the Department of Health and Human Services rule requiring COVID-19 vaccinations and mask-wearing was contrary to the "major questions doctrine." *See* Louisiana v. Becerra, 629 F.Supp.3d 477 (W.D. La. 2022).

[137] *See* Exec. Order No. 14042, 86 Fed. Reg. 50985–86 (requiring that people working under a federal contract comply with "Taskforce Guidance," which included vaccination against COVID-19); *see also* Georgia v. President of the U.S., 46 F.4th 1283, 1290–91 (11th Cir. 2022) (referencing Exec. Order No. 14042 and specifying that the order requires that federal employees adhere to Safer Federal Workforce Task Force Guidance, which included COVID-19 vaccination requirements).

[138] 40 U.S.C. § 101 (2002); *see also* Georgia v. President of the U.S., 46 F.4th 1283, 1297–98 (11th Cir. 2022) (addressing the government's argument that, under the Procurement Act, the President must "ensure[] that federal contractor performance is more efficient [and] in turn enhances the economy and efficiency of the overall federal procurement system . . . .").

congressional authorization," the vaccine mandate was outside the president's authority under this act.[139]

The judiciary applied a similar logic when examining rulemaking in the energy sector.[140] In *Midship Pipeline Company v. Federal Energy Regulatory Commission*, the Federal Energy Regulatory Commission ("FERC") determined the "reasonable cost" for remediation after a company's construction of a natural gas pipeline damaged private land in Oklahoma.[141] While the agency pointed to its authority under the Natural Gas Act in support, the company asserted that the FERC lacked the statutory authority to determine the definition of a "reasonable cost."[142] In response, the agency argued that the Natural Gas Act's broad provisions, namely those giving them the power to "prescribe . . . rules[] and regulations as it may find necessary or appropriate to carry out the provisions of this chapter,"[143] granted them this authority, but the Court seemed

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[139] Georgia v. President of the U.S., 46 F.4th 1283, 1296–97 (11th Cir. 2022). This is not the only decision in which *West Virginia* was invoked to strip administrative decision-making away in the public health sector. In September 2021, the Western District of Louisiana struck down a Department of Health and Human Services rule requiring mask-wearing and COVID-19 because it violated the "major questions doctrine." *See Louisiana v. Becerra*, 629 F.Supp.3d 477 (W.D. La. 2022).

[140] *See Midship Pipeline Co., L.L.C.*, 45 F.4th at 876–877 ("Administrative agencies must ground their actions 'in a valid grant of authority from Congress.'").

[141] *See id.* at 870–71.

[142] *Id.* at 871–872. The court delineated two powers granted to the FERC under the Natural Gas Act. First, the power to "[i]nvestigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provisions of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress." *Id.* at 876 (quoting 15 U.S.C. § 717m(a)). Second, "[the] power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter." *Id.* (quoting 15 U.S.C. § 717o).

[143] *Midship Pipeline Co., L.L.C.*, 45 F.4th at 876 (quoting 15 U.S.C. § 717o).

to require something more.[144] The majority invoked *West Virginia* in holding that the agency's interpretation of the Natural Gas Act was improper given that "[a]gencies have only those powers given to them by Congress."[145] The majority explained that because remediation was not *explicitly* listed in the statute, the agency was acting outside of its authority and therefore, unconstitutionally.[146]

Exactly one year after the *West Virginia* decision, the Supreme Court in *Biden v. Nebraska* invoked the "major questions doctrine" once again in striking down President Biden's student loan forgiveness program.[147] There, the Department of Education invoked the Health and Economic Recovery Omnibus Emergency Solutions ("HEROES") Act to discharge up to $20,000 of debt for qualified student loan borrowers.[148] The HEROES Act explicitly allows the Secretary of Education to "'waive or modify' existing statutory or regulatory provisions applicable to financial assistance programs under . . . the Education Act."[149] Despite the broadness of this language, the Court explained that because the HEROES Act does not provide "clear congressional authorization" to enact comprehensive debt cancellation, the Department of Education is constitutionally prohibited from enacting such a program.[150]

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[144] *Midship Pipeline Co*., *L.L.C*., 45 F.4th at 876-877 ("Thus the FERC's argument that it is 'necessary' or 'appropriate' under the NGA to 'develop [] a record as to the necessary measures and their cost' . . . has no explicit support in the NGA's text . . . .").

[145] *Id.* at 877 (quoting West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2609 (2022)).

[146] *See id.* at 876–77.

[147] *See generally* Biden v. Nebraska, 143 S. Ct. 2355, 2373–75 (June 30, 2023).

[148] *See id*. at 2368–69 ("The new program vests authority in the Department of Education to discharge up to $10,000 for every borrower with income below $125,000 and up to $20,000 for every such borrower who has received a Pell Grant.").

[149] *Id.* at 2363 (quoting 20 U.S.C. § 1098bb(a)(1)).

[150] *See id.* at 2375 (quoting *West Virginia*, 142 S. Ct., at 2613) ("In such circumstances we have required the Secretary to 'point to "clear congressional authorization"' to justify the challenged program . . . [a]nd as we have already shown, the HEROES Act provides no authorization for the Secretary's plan even when examined using ordinary tools of statutory interpretation–let alone 'clear congressional authorization' for such program.").

Although they paint an incomplete picture of recent "major questions" jurisprudence,[151] these cases demonstrate the significant impact *West Virginia* has on administrative and executive power. In mere months, the Court severely restricted the ability of federal agencies to interpret sources of authority—weakening the administrative state altogether. As environmental law scholar Alice C. Hill asserts, *West Virginia* will have significant impacts on U.S. climate policy and will severely hinder the government's ability to fight climate change.[152] With increased political strife and polarization among the American populace,[153] it is unlikely that sweeping legislation will make its way out of the halls of Congress.[154] Thus, creative legal minds dedicated to fighting the effects of global climate change must act quickly to discover a new regulatory framework within the Court's reasoning in *West Virginia*.

While the current situation may appear bleak, there may be hope on the horizon. As senior fellow at the Competitive Enterprise

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[151] *See* Sackett v. Env't Prot. Agency, 143 S. Ct. 1322 (2023); Sweet v. Cardona, 641 F. Supp. 3d 814 (N.D. Cal. 2022); Clark v. Governor of New Jersey, 53 F.4th 769 (3d Cir. 2022) (Matey J., dissenting); Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 50 F.4th 164 (D.C. Cir. 2022).

[152] Alice C. Hill & Madeline Babin, *The Supreme Court's EPA Ruling Will Delay U.S. Climate Action*, COUNCIL ON FOREIGN REL. (July 6, 2022, 5:36 PM), https://www.cfr.org/in-brief/supreme-court-epa-west-virginia-ruling-delay-us-climate-change-action.

[153] *See, e.g.*, *As Partisan Hostility Grows, Signs of Frustration with the Two-Party System*, PEW RSCH. CTR. (Aug. 9, 2022), https://www.pewresearch.org/politics/2022/08/09/as-partisan-hostility-grows-signs-of-frustration-with-the-two-party-system/. According to a recent study, 72% of Republicans regard Democrats as immoral, and 63% of Democrats say the same about republicans. This is an increase from 2016, where the percentages were 47% and 35%, respectively. *Id.*

[154] *Compare* Benjamin Zycher, *The Green New Deal Is Awful but Unlikely*, NAT'L REV. (Oct. 15, 2020, 11:47 AM) https://www.nationalreview.com/magazine/2020/11/02/the-green-new-deal-is-awful-but-unlikely/%E2%80%9C. (criticizing climate plans like the "Green New Deal" and "Biden Plan for a Clean Entergy Revolution and Environmental Justice" as "radical, massively expensive, and profoundly coercive"), *with* Robert Kuttner, *Green New Deal: The Urgent Realism of Radical Change*, THE AM. PROSPECT (Dec. 5, 2019), https://prospect.org/greennewdeal/the-urgent-realism-of-radical-change/ (describing the "Green New Deal" as a plan that could "broaden and redefine the meaning of prosperity and the good life").

Institute, Marlo Lewis Jr., asserts, the EPA may have received additional congressional authorization to fight climate change in 2022.[155] Namely, the recently-passed Inflation Reduction Act might grant additional authority to the EPA to regulate carbon emissions.[156] Although the challenged provisions of the Clean Power Plan have been discarded, the Inflation Reduction Act has been hailed as a "a huge step froward in the fight to preserve a livable planet," as it invests $369 billion into climate initiatives.[157] In a recent assessment, the Rhodium Group found that if these investments are implemented properly, they are expected to reduce emissions by 40% by 2030.[158]

As profound as these impacts may seem, it is difficult to appreciate the Inflation Reduction Act's full effects without first discussing its background and general structure. The Inflation Reduction Act was signed by President Biden on August 15, 2022 after a strict party line vote.[159] The provisions of the Act are broad, concerning issues including corporate taxation, prescription drug cost, health care, deficit reduction, job-creation, and environmental policy.[160] A recent analysis by J.P. Morgan found that these provisions will result in $737 billion in revenue for the federal

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[155] Lewis, *supra* note 79.

[156] *See id.*; *See also* Dan Farber, *Does the New Climate Law Expand Regulatory Authority?,* LEGAL PLANET (Aug. 29, 2022), https://legal-planet.org/2022/08/29/does-ira-expand-regulatory-authority/.

[157] *What the Inflation Reduction Act Means for Climate*, EARTHJUSTICE (Aug. 16 2022), https://earthjustice.org/brief/2022/what-the-inflation-reduction-act-means-for-climate.

[158] *Id.*; *See also* Ben King, John Larsen & Hannah Kolus, *A Congressional Climate Breakthrough*, RHODIUM GROUP (July 28, 2022), https://rhg.com/research/inflation-reduction-act/.

[159] *See* Rebecca Goldman, *What Are the Inflation Reduction Act and Budget Reconciliation?*, LEAGUE OF WOMEN VOTERS OF THE U.S. (Sept. 1, 2022), https://www.lwv.org/blog/what-are-inflation-reduction-act-and-budget-reconciliation. The Inflation Reduction Act was passed using a process called "budget reconciliation," which requires only a simple majority in both houses of congress. *Id.* Thus, Democrats were able to avoid a filibuster in the senate. *Id.* No republicans voted in favor of the Inflation Reduction Act. *Id.*; *See also* Lewis, *supra* note 79.

[160] HOUSE OF REPRESENTATIVES COMMITTEE ON THE BUDGET, *The Inflation Reduction Act* (2022), https://budget.house.gov/legislation/InflationReductionAct.

government over the next ten years.[161] Of these funds, $437 billion are intended to be used for social infrastructure, including climate initiatives and healthcare subsidies, making the Inflation Reduction Act the single largest investment into climate policy in the United States.[162] The Inflation Reduction Act also provides incentives, like tax credits, to individuals and corporations in hopes of more sustainable consumption, production, and construction.[163] These provisions have been applauded by numerous climate-policy scholars.[164] In a recent article published by the Center for American Progress, the authors argue that if implemented properly, "[t]he Inflation Reduction Act [will put] the United States on track to meeting" its international obligations, including those under the Paris Climate Accords to (among other things) limit global temperature rises to 1.5 degrees Celsius.[165] In total, seven provisions in the Inflation Reduction Act explicitly amend the Clean Air Act.[166] Section 60107 of the Inflation Reduction Act, for example, "provides [the] EPA with $87 million 'to ensure that reductions in

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[161] Meera Pandit, *How Will the Inflation Reduction Act Impact the Economy?*, J.P. MORGAN ASSET MGMT. (Aug. 17, 2022) https://am.jpmorgan.com/us/en/asset-management/adv/insights/market-insights/market-updates/on-the-minds-of-investors/how-will-the-inflation-reduction-act-impact-the-economy/.

[162] Jordan Fabian, *Biden Tax-Climate Bill, Marking Long-Sought Democratic Win*, BLOOMBERG NEWS (Aug. 16, 2022, 4:13 PM), https://news.bloombergtax.com/daily-tax-report/biden-signs-tax-climate-bill-marking-long-sought-democratic-win.

[163] *Id.*

[164] Frances Colón, et al., *How the Inflation Reduction Act Will Drive Global Climate Action*, CENTER FOR AMERICAN PROGRESS ACTION FUND (Aug. 17, 2022) https://www.americanprogress.org/article/how-the-inflation-reduction-act-will-drive-global-climate-action/; Pandit, *supra* note 159.

[165] Colón, *supra* note 165. "At the 2021 Leaders' Summit on Climate, President Biden" committed to "reduce[] U.S. [national greenhouse (GHG)] emissions 50 to 52% below 2005 levels by 2030." *Id.*; David Kidd, *US Regulatory Barriers to an Ambitious Paris Agreement Commitment*, ENV'T & ENERGY L. PROGRAM (Apr. 22, 2021), https://eelp.law.harvard.edu/2021/04/us-paris-commitment/.

[166] *See* Lewis, *supra* note 79 (citing Inflation Reduction Act of 2022, Pub. L. No. 117-169, §§ 60101–60103, 60107, 60113–60114, 60201, 136 Stat. 1818, 2063–67, 2069–70, 2073–77, 2078–79)).

greenhouse gas emissions are achieved through use of existing authorities of [the Clean Air Act].'"[167]

While commentators like the *New York Times*'s Paul Krugman have praised the environmental accomplishments of the Inflation Reduction Act,[168] this bill misses the mark in several aspects and is hardly responsive to the judiciary's weakening of the administrative state.[169] Rather than explicitly challenging the Court's usurpation of agency power, the Inflation Reduction Act contains vague language that, when relied upon by agencies to promulgate significant climate legislation, presents an open challenge under the *West Virginia* rule that would be brought to an "agency-skeptical" Supreme Court.[170]

IV. A PROPOSED SOLUTION TO THE COURT'S STRIPPING OF AGENCY POWER: CONGRESSIONAL NULLIFICATION OF THE "MAJOR QUESTIONS DOCTRINE"

To better protect the integrity of the administrative state, Congress must enact legislation explicitly nullifying the "major

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[167] *See* Farber, *supra* note 157.

[168] *See* Paul Krugman, *Did Democrats Just Save Civilization?*, N.Y. TIMES (Aug. 8, 2022), https://www.nytimes.com/2022/08/08/opinion/climate-inflation-bill.html ("[The Inflation Reduction Act] will catalyze progress in green technology; its economic benefits will make passing additional legislation easier; it gives the United States the credibility it needs to lead the global effort to limit greenhouse gas emissions.").

[169] *See* Patrick Parenteau, *The Inflation Reduction Act Doesn't Get Around the Supreme Court's Climate Ruling in West Virginia v. EPA, but It Does Strengthen the EPA's Future Abilities*, THE CONVERSATION (Aug. 24, 2022, 1:43 AM), https://theconversation.com/the-inflation-reduction-act-doesnt-get-around-the-supreme-courts-climate-ruling-in-west-virginia-v-epa-but-it-does-strengthen-epas-future-abilities-189279#:~:text=What%20the%20new%20law%20does,Act%20to%20reduce%20greenhouse%20gases. (While acknowledging the Inflation Reduction Act's successes, Vermont Law School professor Patrick Parenteau states that the Inflation Reduction Act "cannot undo what the Supreme Court has done" and "falls short of granting the EPA the authority to revive the . . . approach of the Clean Power Plan"). *Id.*

[170] *Id.* ("[T]he Inflation Reduction Act does not change the impact of the Supreme Court's Determination in *West Virginia v. EPA* that the EPA lacks authority to require a systematic shift to cleaner sources of electricity generation."). *Id.*

questions doctrine" in favor of a more deferential, *Chevron*-style approach toward federal rulemaking. To prevent ambiguity, Congress should explicitly state that administrative agencies are free to interpret the authority granted to them by Congress, so long as the interpretation is both (1) reasonable and (2) consistent with the purpose and statement of the statute granting that agency authority. While some may raise separation of powers concerns, Congress should explicitly state that agency interpretations are subject to judicial review to determine if the interpretation amounts to an unreasonable or unconscionable derivation of law.[171] This approach, which allows courts to defer to agencies more readily, reflects a broader view of administrative power analogous to that outlined in *Chevron*, while dismissing the narrow and regressive approach in *West Virginia*.[172] Further, this solution addresses the concerns expressed by dissenting justices in *West Virginia*, namely, that the announcement of the "major questions doctrine" implicitly removed the ability of agencies to assert their respective fields/areas of expertise when promulgating rules concerning complex areas of law and policy.[173]

Take, for example, a hypothetical EPA regulation enacted to reduce emissions from motor vehicles. Say that this regulation contains several provisions, including a highly controversial requirement that all fossil-fuel powered cars must exit the automobile market by 2030. The EPA, in support of its regulatory

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[171] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

[172] *Compare id.* at 845 ("If [an administrative agency's construction of a statutory scheme] represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [the Court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.") *with* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2609 (2022) (contending that for an agency interpretation of ambiguous statute to hold up "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims.").

[173] *See West Virginia*, 142 S. Ct. at 2633–34 (Kagan, J., dissenting).

authority, would cite the Clean Air Act to claim that this regulation reflects the "best system of emission reduction"[174] to address the problem of emissions from automobiles. Throughout the text of the hypothetical regulation, the EPA includes several expert and internal analyses demonstrating that this mandate will result in both lower emissions and substantial economic growth.[175] After the EPA enacts the regulation, several car manufacturers challenge the EPA's action, claiming that the EPA is acting in excess the authority granted to it by Congress.

Under the proposed solution above, if the regulation were challenged in a federal court, the EPA would likely succeed over challenges by dissenting entities. By eliminating the "major questions doctrine," courts assume a much more deferential role when reviewing agency decisions, like those granted to the EPA under the Clean Air Act. By allowing courts to defer to agencies in this way, the EPA could more rely more heavily on its expertise rather than relying on Congress to craft legislation that sways with the political discourse of the day.

Considering the case study above, to meet the statutory definition for standard of performance, the EPA must "adequately demonstrate[]" that the limits on fossil-fuel-powered vehicles is the

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[174] 42 U.S.C. §§ 7411(a)–(j).

[175] For the sake of this hypothetical, assume that the EPA's due diligence here meets the requirement of considering "the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements" as discussed above. *Id.* at § 7411(a)(1). For an analysis of the economic impacts of climate change adaptation measures like the one in this hypothetical, *see* Nicolas Maitre et al., *The Employment Impact of Climate Change Adaptation*, INT'L LABOUR ORG. (Aug. 2018), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_645572.pdf. For more on the data and science underlying the contribution of automobiles to global emissions, *see generally Greenhouse Gas Emissions from a Typical Passenger Vehicle*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/greenvehicles/greenhouse-gas-emissions-typical-passenger-vehicle#:~:text=typical%20passenger%20vehicle%3F-,A%20typical%20passenger%20vehicle%20emits%20about%204.6%20metric%20tons%20of,8%2C887%20grams%20of%20CO2 (Aug. 28, 2023); Jocelyn Timperley, *How Our Daily Travel Harms the Planet*, BBC (Mar. 17, 2020), https://www.bbc.com/future/article/20200317-climate-change-cut-carbon-emissions-from-your-commute.

"best system of emissions reduction" under the current circumstances.[176] Given that the EPA relied upon both internal and external data analysis to support its provision, this requirement would be satisfied. Thus, under the proposed deferential approach, a court will likely conclude that the EPA's assessment is reasonable, holding that the regulatory scheme need not be limited.

Compare this result to that under a *West Virginia*-style "major questions" analysis. Given the significant economic, social, and political impacts that would arise from such a drastic change in manufacturing, a court would likely find that the EPA is deciding a "major question."[177] Under the majority's reasoning, a court would likely take issue with the EPA's interpretation of the Clean Air Act. Like the majority in *West Virginia*, a court would point out that the Clean Air Act does not *explicitly* provide the EPA the power to regulate method of manufacturing automobiles. Despite its positive impacts on air quality and the environment, a court would likely rely on this lack of explicit authority in holding that the EPA's regulatory scheme falls outside of its regulatory authority.

As demonstrated in the paragraphs above, the Supreme Court's current "major questions" analysis both ignores the expertise of agencies and stifles the ability of our government to handle a crisis of increasing severity. While this hypothetical regulation would certainly have short-term economic impacts on the automobile market, the EPA is choosing to regulate in a manner that will bring long-term environmental[178] and economic prosperity.[179] Further, while the *West Virginia* Court contended an agency cannot treat its powers as an "open book to which the agency [may] add pages and

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[176] *See* 42 U.S.C. §§ 7411(a)(1).

[177] *See West Virginia*, 142 S. Ct. at 2605, 2608.

[178] *See, e.g., Electric Vehicles Can Dramatically Reduce Carbon Pollution from Transportation, and Improve Air Quality*, NRDC (Sep. 17, 2015), https://www.nrdc.org/experts/luke-tonachel/study-electric-vehicles-can-dramatically-reduce-carbon-pollution.

[179] *See, e.g.*, Nicolas Maitre et al., *The Employment Impact of Climate Change Adaptation*, INT'L LABOUR ORG. (Aug. 2018), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_645572.pdf.; *See also* Luke Tonachel, *Study*.

change the plot line,"[180] this contention is short-sighted as it ignores the complexities of a rapidly changing world. If agencies were, as the *West Virginia* majority suggests, bound by legal authorities enacted decades before a crisis, the administrative state would be rendered largely useless in addressing said crises. A standard allowing greater deference to agencies would allow agencies to prescribe rules as crises arise, rather than wait for Congress to reach an agreement on a specific policy prescription.

This type of standard would likely generate criticism. Some may argue, for example, that an act of Congress formally rebutting a Supreme Court ruling is an overreach and reduces the powers of the judiciary. This argument, however, ignores a long history of Congress acting in exactly this way. For example, consider the case of Lilly Ledbetter. Lilly Ledbetter was an employee at a Goodyear Tire plant who brought a suit against her employer alleging pay discrimination on the basis of her sex.[181] Despite having a seemingly valid claim of pay discrimination, the Supreme Court ruled against Ledbetter based on stringent, procedural requirements;[182] drawing the ire of the public and legal scholars alike.[183] In response to the public outcry, Congress passed the "Lilly Ledbetter Fair Pay Act," which removed several procedural hurdles that prevented claims of pay discrimination.[184] This example demonstrates the Congress's ability to remedy burdensome and unjust procedural hurdles, even

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[180] *West Virginia*, 142 S. Ct. at 2609 (quoting Ernst Gellhorn & Paul Verkuil, *Controlling Chevron Based Delegations,* 20 CARDOZO L. REV. 989, 1011 (1999)).

[181] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621–22 (2006); *see also* Rachel M. Cohen & Marcia Brown, *Court Order: Congress Has the Power to Override Supreme Court Rulings. Here's How*. THE INTERCEPT (Nov. 24, 2020, 5:00 AM), https://theintercept.com/2020/11/24/congress-override-supreme-court/.

[182] *Ledbetter*, 550 U.S. at 642–43.

[183] *See* Cohen, *supra* note 182; *see also* Richard Thompson Ford, *Bad Think: The Supreme Court Mixes Up Intending to Screw Over Your Employee and Actually Doing It*, SLATE (May 30, 2007, 5:39 PM) https://slate.com/news-and-politics/2007/05/supreme-court-mix-up-in-ledbetter.html; John M. Husband, *Ledbetter Decision Limits Time Frame for Filing EEOC Claims*, 36 COLO. LAW. 61 (2007).

[184] *See,* e.g., Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-5(e)(3)(A).

when the judiciary is determined to uphold them. Looking to past practice, therefore, Congress's elimination of the "major questions doctrine" would not amount to an unconstitutional overreach, but a valid exercise of the legislature's established powers.

Additionally, some may find that granting expansive rulemaking powers to federal agencies will expand what critics refer to as a bloated administrative state.[185] This argument fails, as it ignores the bureaucratic hurdles put in place by a doctrine as stringent as the "major questions doctrine." The opinion that the federal government moves "at a snail's pace" is a pervasive idea in American political analysis.[186] Much of this is attributed to the presence of "red tape," described by policy analyst Daniel R. Pérez as "cumbersome and unnecessary government burdens," as agencies are hamstrung by strict compliance rules that slow the pace of policymaking.[187] Doctrines like the "major questions doctrine" place just this type of

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[185] *See* Dave Tomar, *Overcoming Administrative Bloat in Higher Education*, ACAD. INFLUENCE (July 28, 2023) https://academicinfluence.com/inflection/college-life/overcoming-administrative-bloat#:~:text=Administrative%20bloat%20is%20what%20occurs,detracts%20from%20that%20educational%20mission. The phrase "administrative bloat" is used by critics to describe increases in the cost and scale of an administrative agency that led to more complications than improvements. *Id.*

[186] *See, e.g.*, Miriam Jones, *The Slow Government Movement*, GOV'T TECH., https://www.govtech.com/pcio/the-slow-government-movement-opinion.html (last visited Sep. 14, 2023); Harold Meyerson, *Bidenomics Refutes the Canard that Government Is Slow*, THE AM. PROSPECT (Aug. 1, 2023), https://prospect.org/blogs-and-newsletters/tap/2023-08-01-bidenomics-refutes-canard-government-is-slow/; Angela Phuong, *At a Snail's Pace: How the Federal Government Responded to the Coronavirus Pandemic,* THE SCI. SURV. (May 11, 2020), https://thesciencesurvey.com/editorial/2020/05/11/at-a-snails-pacehow-the-government-responded-to-the-ongoing-pandemic/.

[187] Daniel R. Pérez, *Red Tape Literature in Public Administration*, GEO. WASH. UNIV. REGUL. STUD. CTR. 1 (Sep. 16, 2022), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2022-09/gwrsc_insight_red_tape_literature_pa_2022_09-16_drp.pdf. Pérez states that "red tape" frequently manifests in the administrative state as "rules, regulations, and procedures that remain in force and entail a compliance burden for organization but have no efficacy for the rules' functional object." *Id.* (quoting Barry Bozeman, *A Theory of Government "Red Tape*,*"* 3 J. OF PUB. ADMIN. RSCH. * THEORY: J-PART 273, 284 (1993)).

burden on federal agencies. Under a "major questions" framework, agencies will be not only be required to consider compliance with existing legislation, but also a new and more stringent framework imposed by the Court. This new requirement would likely require additional training, staff, and research, ultimately bloating the size and cost of running a federal agency. Alternatively, if the proposed deferential standard is enacted, this legal "compliance burden" will, at worst, keep the size of the administrative state the same; ultimately reducing extraneous costs and preventing additional "red tape."[188]

CONCLUSION

Congress must take action to protect the administrative state from collapse. Given the Supreme Court's increased skepticism regarding broad agency rulemaking and adoption of the "major questions doctrine," failure to act will result in widespread policy failures; perhaps most notably related to climate change. The Court appears to be adopting a "wait and see" approach, challenging the decisions of experts while waiting for an increasingly divided Congress to enact significant climate policy. This approach both ignores the reality of the climate crisis and prevents federal rule makers from making decisions absent an explicit authorization from Congress. However, if Congress acts quickly, clearly, and effectively, there is a chance to strengthen the power of federal rulemaking and, in turn, mitigate the effects of climate change for future generations.

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[188] *See* Pérez, *supra* note 188, at 1.