Maryland Law Review

Volume 82 | Issue 3 Article 8

West Virginia v. EPA: Majorly Questioning Administrative Agency Action & Authority

Halina R. Bereday

NOTE

WEST VIRGINIA V. EPA: MAJORLY QUESTIONING ADMINISTRATIVE AGENCY ACTION & AUTHORITY

HALINA R. BEREDAY*

In *West Virginia v. Environmental Protection Agency*,[1] the United States Supreme Court held that the Environmental Protection Agency ("EPA") could not promulgate the Clean Power Plan ("CPP"), which was authorized by Section 111 of the Clean Air Act ("CAA"),[2] and allowed fossil-fuel fired plants to limit carbon dioxide emissions through generation-shifting, a process that allows fossil-fuel fired power plants to meet emission limits by "shifting" to lower-carbon-emitting plants.[3] In failing to interpret the language of Section 111(d), the Court ignored a key principle of administrative law and instead held that the CPP exceeded the EPA's statutory authority under the Major Questions Doctrine ("MQD").[4] The MQD, a relatively new canon developed by the conservative super-majority of the Supreme Court, mandates that in "extraordinary cases" of "economic and political significance," Congress must speak clearly to authorize agency action.[5] The Court's holding was incorrect because the MQD should not have been applied as generation-shifting was not a major economic issue.[6] Further,

* J.D. Candidate, 2024, University of Maryland Francis King Carey School of Law. The author wishes to thank the staff of the *Maryland Law Review* for their fantastic feedback throughout the writing and editing process, specifically Luca Artista, Kaitlin Barnes, Michelle Lim, Christine Parola, and Celine Esmeir. The author also thanks her faculty advisor, Professor Rena Steinzor, for fostering the author's passion for administrative law and providing continuous feedback, mentorship, and guidance, both on this piece and in life. Finally, the author thanks her family, friends, peers, and partner for their patience, encouragement, and support throughout her law school career.

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

2. 42 U.S.C. § 7411(d).

3. The CPP in particular provided several ways to shift, including (1) by reducing electricity production; (2) by building or investing in a new gas plant or wind and solar facilities; or (3) by purchasing emissions allowances and credits as part of a cap-and-trade program. *West Virginia*, 142 S. Ct. at 2603.

4. *Id.* at 2609–10.

5. *Id.* at 2608 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

6. *See infra* Section IV.A.

the Court misconstrued the MQD by failing to evaluate the statutory scheme, subsequent legislation, and state encumbrances.[7] Finally, the Court failed to consider the repercussions of its decision, including a deterioration of democratic principles and an increased burden on administrative agencies, Congress, and the judiciary.[8]

I. THE CASE

In August 2015, under President Barack Obama's Administration, the EPA promulgated the CPP under Section 111 of the CAA, which set out three methods that coal-fired power plants could use to reduce carbon dioxide emissions.[9] However, the CPP never went into effect, as twenty-seven states challenged the rule in the United States Court of Appeals for the D.C. Circuit.[10] The Supreme Court intervened by granting a stay, preventing the CPP from taking effect.[11]

The D.C. Circuit heard the case en banc, but President Donald Trump took office before a decision was issued.[12] The Trump Administration asked that the litigation be held in abeyance, and so the D.C. Circuit suspended the CPP while the EPA reconsidered its stance.[13] The EPA eventually repealed the CPP and replaced it with the more lenient Affordable Clean Energy ("ACE") Rule, resulting in numerous legal challenges to the ACE Rule in the D.C. Circuit.[14] Other parties, including West Virginia and North Dakota, intervened to defend both the ACE Rule and repeal of the CPP.[15] All twelve petitions were consolidated and reviewed.[16]

In January 2021, the D.C. Circuit vacated the ACE rule and repeal of the CPP[17] and remanded to the EPA for reconsideration;[18] shortly thereafter, President Joe Biden took office.[19] The D.C. Circuit suspended the vacatur of the repeal of the CPP.[20] The D.C. Circuit's suspension was so that the CPP would not immediately be reactivated while the EPA was considering

7. *See infra* Section IV.B.
8. *See infra* Section IV.C.
9. *West Virginia*, 142 S. Ct at 2602.
10. *Id.* at 2604.
11. *Id.*
12. *Id.*
13. *Id.* at 2604–05.
14. *Id.* at 2605.
15. *Id.*
16. *Id.*
17. *Id.* at 2605–06.
18. *See generally* Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021).
19. *West Virginia*, 142 S. Ct. at 2606.
20. *Id.*

promulgation of a new rule.[21] The Supreme Court of the United States granted certiorari to answer whether Section 111(d) of the CAA grants the EPA authority to permit fossil-fuel power plants to meet emissions limits through generation-shifting.[22]

II. LEGAL BACKGROUND

In *West Virginia v. EPA*, the Supreme Court of the United States failed to apply statutory interpretation and instead invoked the MQD to invalidate the CPP, a rule promulgated by the EPA that would have reduced emissions through generation-shifting, although the CPP never went into effect.[23] Section II.A explains the CAA and the EPA's promulgation of the CPP and ACE rules.[24] Section II.B discusses eras of agency deference, including pre- and post-*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[25] Section II.C recounts how the Court over time has limited deference by deploying the MQD.[26] Section II.D examines exceptions where the EPA regulated major economic issues, but the Court declined to invoke the MQD.[27]

A. The Climate Change Crisis, Promulgation of the CPP, and the ACE Rule

This Section examines climate change and Section 111 of the CAA[28] and provides context for the promulgation of the CPP[29] and ACE[30] rules. *West Virginia* was the first significant climate change case since *Massachusetts v. EPA*[31] in 2007.[32] The Court has described climate change as "the most pressing environmental challenge of our time"[33] and has acknowledged that increased greenhouse gases enhance the greenhouse effect, spurning global warming.[34] The CPP in particular was promulgated to regulate fossil-fueled power plants to limit emissions of carbon dioxide, a greenhouse gas

21. *Id.*
22. *Id.* at 2600, 2616.
23. *Id.* at 2610. See *supra* note 3 for a discussion of generation-shifting.
24. *See infra* Section II.A.
25. 467 U.S. 837 (1984); *see infra* Section II.B.
26. *See infra* Section II.C.
27. *See infra* Section II.D.
28. *See infra* text accompanying notes 38–44.
29. *See infra* text accompanying notes 35–37, 45–53.
30. *See infra* text accompanying notes 54–56.
31. 549 U.S. 497 (2007).
32. West Virginia v. EPA, 142 S. Ct. 2587, 2627 (2022) (Kagan, J., dissenting).
33. *Massachusetts*, 549 U.S. at 505 (citation omitted).
34. *Id.* at 509.

("GHG"),[35] as these facilities are responsible for one-quarter of the United States' GHG emissions.[36] The CPP was the first instance where the EPA authorized generation-shifting as a permissible method by which existing sources could comply with emission standards.[37]

The Court has recognized that as the "primary regulator of greenhouse gas emissions,"[38] the EPA is authorized under Section 111(d) of the CAA to (A) prescribe rules that "establish[] standards of performance for any existing source for any air pollutant" and (B) "provide[] for the implementation and enforcement of such standards of performance."[39] An existing source is "any building, structure, facility, or installation which emits or may emit any air pollutant" "other than a new source."[40] Based on Section 111, the EPA regulates emissions from existing fossil-fuel fired power plants[41] by setting a standard reflecting "the best system of emission reduction" ("BSER")[42] tempered by limits such as costs, non-air quality health impacts, and environmental and energy impacts.[43] These limits are restrained because they must be "adequately demonstrated."[44]

Based on energy modeling that considered costs and energy supply and demand, the EPA set a BSER that would lower coal's proportion of national electricity generation by eleven percent.[45] In other words, coal would provide twenty-seven percent "of national electricity generation . . . down from [thirty-eight percent] in 2014."[46] The CPP employed a flexible system of three building blocks by which plant operators could choose to reduce emissions in order to meet the BSER: (1) technology-based measures, also referred to as "inside the fence" by the Court, where coal plants upgrade technology, resulting in minimal emission reductions;[47] (2) a measure where coal plants switch from coal to natural-gas fired plants;[48] or (3) a measure

35. *West Virginia*, 142 S. Ct. at 2602 (majority opinion). Greenhouse gases include carbon dioxide, methane, nitrous oxide, and fluorinated gases. *Overview of Greenhouse Gases*, EPA (May 16, 2022), https://www.epa.gov/ghgemissions/overview-greenhouse-gases.

36. *Sources of Greenhouse Gas Emissions*, EPA (Aug. 5, 2022), https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions.

37. For a discussion of generation-shifting, *see supra* note 3.

38. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428 (2011).

39. 42 U.S.C. § 7411(d)(1)(A)–(B).

40. 42 U.S.C. § 7411(a)(3), 7411(a)(6).

41. *Id.*

42. 42 U.S.C. § 7411(a)(1).

43. *Id.*

44. *Id.*

45. West Virginia v. EPA, 142 S. Ct. 2587, 2603–04 (2022).

46. *Id.* at 2604.

47. *West Virginia*, 142 S. Ct. at 2603.

48. *Id.*

where plants can switch to lower carbon sources, including wind and solar.[49] These latter two mechanisms are known as generation-shifting, or "outside the fence,"[50] and enable more significant and cost-effective reductions in carbon dioxide emissions.[51] Generation-shifting boasted additional flexibility and permitted a plant operator to comply through three options: (1) reducing electricity production; (2) building or investing in a new gas plant, or wind and solar facilities, thereby increasing generation; or (3) purchasing emissions allowances and credits as part of a cap-and-trade program.[52] However, as previously noted, the CPP never went into effect.[53]

The Trump Administration replaced the CPP with the ACE Rule.[54] The ACE Rule allowed power plants to use technology-based approaches only, resulting in miniscule reductions of GHG emissions and depriving plant operators of flexibility.[55] When the Supreme Court granted certiorari, both the ACE Rule and the CPP were vacated (and defunct), and the EPA was in the midst of devising an entirely different rule with no plans to revive the CPP or ACE Rule.[56]

B. Origins of Deference to Agencies and the Evolution and Application of Chevron *Deference*

This Section will explore judicial deference to federal agencies,[57] including the eras of deference pre- and post-*Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,[58] and the Court's narrowing of deference over time.[59]

In 1944, the Court decided the most important pre-*Chevron* deference case in *Skidmore v. Swift & Co.*[60] There, the Court held that agency action is not controlling upon the Court and deference afforded to agencies depends

49. *Id.*

50. Oral Argument at 10:01, 13:20, 35:06, 41:24, *West Virginia*, 142 S. Ct. 2587 (2022) (Nos. 20-1530, 20-1531, 20-1778, and 20-1780), https://www.oyez.org/cases/2021/20-1530.

51. *West Virginia*, 142 S. Ct. at 2603.

52. *Id.*

53. *Id.* at 2604.

54. *Id.* at 2605.

55. *Id.*

56. *See id.* at 2604 ("[T]he Clean Power Plan never went into effect."); Brief in Opposition for Power Company Respondents at 2, *West Virginia*, 142 S. Ct. 2587 (Nos. 20-1530, 20-1531, 20-1778, and 20-1780) ("[N]either the ACE Rule nor the CPP Rule is in effect at this time. . . . [T]he agency has since announced that it will revisit . . . on a clean slate."); *West Virginia*, 142 S. Ct. at 2632 (Kagan, J., dissenting) ("[T]he oddity of the Court's declaring a defunct regulation unlawful.")

57. *See generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) (discussing judicial deference to federal agencies).

58. *See infra* notes 60–66, 74–75 and accompanying text.

59. *See infra* notes 76–81 and accompanying text.

60. 323 U.S. 134 (1944).

"upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[61] *Skidmore* deference is still applied today as a stricter, less deferential alternative to *Chevron* deference.[62]

After *Skidmore*, the regime of *Beth Israel Hospital* deference was more acquiescent to agencies.[63] In *Beth Israel Hospital v. National Labor Relations Board*,[64] the Court held that if an agency adopts an interpretation of their authorizing statute that is reasonable, the interpretation is permissible.[65] The Court explained that in order for the agency to accomplish its congressional mandates, an agency "must have authority to formulate rules to fill the interstices of the broad statutory provisions."[66] *Beth Israel Hospital* deference indicated a shift from strict *Skidmore* deference back to a permissive and deferential approach to judicial review of administrative agency decision-making.

In June 1984, the Supreme Court decided the preeminent deference case—*Chevron*.[67] There, the Court outlined the two-step process for determining when an agency's interpretation of its authorizing statute is given deference.[68] In step one, the reviewing court must look to "whether Congress has directly spoken to the precise question at issue."[69] If so, the court must give effect to the intent of Congress.[70] If Congress was not clear, however, courts must move on to step two, where the court considers whether the agency's interpretation "is based on a permissible construction of the

61. *Id.* at 140. While *Skidmore* deference is still applied today, it is more stringent, providing less deference to agencies. *See* RENA STEINZOR, CORE CONCEPTS IN ADMINISTRATIVE LAW 444 (2d ed. 2022) (explaining judicial application of *Skidmore* deference); United States v. Mead Corp., 533 U.S. 218 (2001) (narrowing *Chevron* deference while broadening *Skidmore* deference); *infra* text accompanying notes 78–81.

62. *See supra* note 61.

63. Beth Isr. Hosp. v. Nat'l Lab. Rel. Bd., 437 U.S. 483, 501 (1978).

64. 437 U.S. 483 (1978); *see* William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1106–09 (2008) (discussing the regime of *Beth Israel Hospital* deference).

65. *Beth Isr. Hosp.*, 437 U.S. at 501.

66. *Id.* Several other decisions applied *Beth Israel Hospital* deference. *See* Batterton v. Francis, 432 U.S. 416, 425 (1977) (noting the agency has "the primary responsibility for interpreting" a statute, and a reviewing court cannot set aside regulations because it would have interpreted the statute differently (citing Am. Tel. & Tel. Co. v. United States, 299 U.S. 232, 235–37 (1936))); Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 476 (1979) (noting when a statutory term is not well-defined, the "Court customarily defers to" an agency interpretation that is reasonable (citing United States v. Cartwright, 411 U.S. 546, 550 (1973))).

67. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 837 (1984).

68. *Id.* at 843.

69. *Id.* at 842.

70. *Id.* at 843.

statute."[71] The Court explained that deference should be granted if "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision" necessitated reconciliation of opposing policies.[72] Moreover, the Court noted that since judges are not experts in CAA regulation, it is appropriate for the agency, rather than the courts, to make policy choices.[73]

In the aftermath of *Chevron*, the Supreme Court has routinely upheld agency interpretations under *Chevron*,[74] and lower courts have thoroughly reiterated and applied *Chevron* deference.[75] Despite this, the future of *Chevron* remains uncertain, because in the modern era, the Court has used case law[76] and judicial interpretation[77] to narrow deference.

In 2001, the Supreme Court signaled a retreat from deference to federal agencies in deciding *United States v. Mead Corp.*,[78] which narrowed *Chevron* deference.[79] *Mead* suggested that *Chevron* applies only to actions "carrying the force of law."[80] In other words, interpretive agency action, such as letters and guidance documents with no legal force, are entitled to *Skidmore* deference rather than *Chevron* deference, narrowing *Chevron*'s application.[81] Narrowing of the deference doctrine signaled the Supreme Court's aversion for administrative agencies and galvanized development of the MQD framework, as explained below.[82]

71. *Id.*

72. *Id.* at 865.

73. *Id.* at 866.

74. *See* EPA v. EME Homer City Generation, 572 U.S. 489, 496 (2014) (applying *Chevron* and finding permissible agency construction of statute); United States v. Eurodif, 555 U.S. 305, 316–17 (2009) (same); City of Arlington v. Fed. Commc'ns Comm'n, 569 U.S. 290, 307 (2013) (same).

75. *See* Chem. Waste Mgmt. v. EPA, 873 F.2d 1477, 1480–83 (D.C. Cir. 1989) (upholding agency interpretation as reasonable under *Chevron*); Van Hollen, Jr. v. Fed. Elections Comm'n, 811 F.3d 486, 492–95 (D.C. Cir. 2016) (same); Loper Bright Enters. v. Raimondo, 45 F.4th 359, 365–69 (D.C. Cir. 2022) (same); Tulelake Irrigation Dist. v. U.S. Fish and Wildlife Serv., 40 F.4th 930, 935–36 (9th Cir. 2022) (same).

76. *See infra* text accompanying notes 78–81.

77. Judges are split on the interpretation of *Chevron* deference. Under the narrow reading, employed by conservative judges, the Court continues to interpret the statute in all cases except for the most complex statutes in the most technical cases. *See generally* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (reflecting the narrow view in majority). Under the broad reading, used by liberal judges, the Court should defer to the agency unless Congress "directly spoke[]" with crystal clarity. *See generally id.* at 162–92 (Breyer, J., dissenting) (reflecting the broad view in dissent).

78. 533 U.S. 218 (2001).

79. *Id.* at 237–38.

80. *Id.* at 227.

81. *Id.* at 237–38.

82. *See infra* text accompanying notes 85–129.

C. Further Restraining Chevron*: Application of the Major Questions Doctrine*

The MQD is another way that the Supreme Court has sought to limit *Chevron* deference.[83] The doctrine has existed obscurely for a few decades, but it was first formally labeled by the Court in *West Virginia*.[84] This Section details the cases routinely cited as justification for the MQD.[85]

Industrial Union Department, AFL-CIO v. American Petroleum Institute,[86] commonly referred to as the "Benzene case," reveals the first inkling of the MQD.[87] There, the Court invalidated an Occupational Safety and Health Administration ("OSHA") regulation explaining that "[i]n the absence of a clear mandate . . . it is unreasonable to assume that Congress intended to give the Secretary [of Labor] the unprecedented power over American industry."[88] The Benzene case displayed the Court's doubt related to congressional delegations of power to federal agencies, an omnipresent concern under the modern MQD.[89]

Next, in *MCI Telecommunications v. American Telephone & Telegraph*,[90] the Court was more specific about when an agency exceeds its authority.[91] There, the Court invalidated a Federal Communications Commission ("FCC") regulation that "modified" the Communications Act to exempt nearly all long-distance telephone carriers from the Act's tariff-filing requirement.[92] The Court reasoned that it was highly unlikely that Congress intended the agency to substantially regulate the telecommunications industry because the regulation impacted forty percent of all long distance customers, and all long distance carriers except for AT&T, which was "too extensive to be considered a 'modification.'"[93] *MCI Telecommunications* laid the MQD foundation that *Food & Drug Administration v. Brown & Williamson Tobacco Corp*.[94] built off of.[95]

---

83. *See* Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 960–961 (2021) (examining use of the MQD to limit *Chevron* deference).

84. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

85. *Id.* at 2608–09; *see infra* text accompanying notes 86–129.

86. 448 U.S. 607 (1980).

87. *Id.* at 645–46.

88. *Id.* at 645.

89. *Id.* at 645–46.

90. 512 U.S. 218 (1994).

91. *Id.* at 232.

92. *Id.* at 229–32.

93. *Id.* at 231.

94. 529 U.S. 120 (2000).

95. *MCI Telecomms. Corp.*, 512 U.S. at 231–32.

From this, *Brown & Williamson*—the most prominent MQD case—emerged.[96] There, the Court invalidated a Food and Drug Administration ("FDA") regulation of tobacco, holding that the statutory language requiring all FDA products be "safe for their intended use" foreclosed regulation of tobacco products.[97] The Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[98] The Court relied heavily on its precedent in *MCI Telecommunications*, explaining that it was "guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[99] *Brown & Williamson* is the principle MQD case that forms the backbone of the modern MQD.[100]

Following *Brown & Williamson*, two cases emphasized the importance of clear language in the statute in order to authorize agency action.[101] In *Whitman v. American Trucking Ass'n*,[102] the Court held that the EPA could not consider costs in setting National Ambient Air Quality Standards ("NAAQS"), noting that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[103] In *Gonzales v. Oregon*,[104] the Court invalidated the Attorney General's claim that he could rescind physician licenses, explaining that "[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation . . . is not sustainable."[105] *Whitman* and *Gonzales* underscored a central principle of the modern MQD—skepticism—as vague organic statutes do not confer permission for an agency to act.[106]

The Court deployed this skepticism against the EPA and found an example of economically significant agency action that was not given deference in *Utility Air Regulatory Group v. EPA*.[107] There, the Court reversed the EPA's determination that all stationary sources were subject to permitting requirements in part because the regulation would have impacted

96. West Virginia v. EPA, 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting).

97. *Brown & Williamson*, 529 U.S. at 142–43.

98. *Id.* at 142, 160.

99. *Id.* at 133 (citing *MCI Telecomms. Corp.*, 512 U.S. at 231).

100. *West Virginia*, 142 S. Ct. at 2634.

101. Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 472 (2001); Gonzales v. Oregon, 546 U.S. 243, 269 (2006).

102. 531 U.S. 457 (2001).

103. *Id.* at 468.

104. 546 U.S. 243 (2006).

105. *Id.* at 267.

106. *Id.*; *Whitman*, 531 U.S. at 468.

107. 573 U.S. 302 (2014).

tens of thousands of pollution emitters and millions of people.[108] The Court stated: "The power to require permits for . . . tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text."[109] While the Court did not explicitly mention the MQD by name, the Court elaborated:

> 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."[110]

The Court noted that the claimed authority is not permissible because it "would render the statute 'unrecognizable to the Congress that designed' it."[111] *Utility Air* reflected the Court's heightened skepticism towards agency action undertaken by the EPA.[112]

In *King v. Burwell*,[113] the Court articulated the MQD with greater specificity.[114] There, the Court proclaimed that "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[115] The Court elaborated that when agency action implicates "deep 'economic and political significance' . . . had Congress wished to assign that question to an agency, it surely would have done so expressly."[116] The language utilized in *King* reflects the particular language employed by the Court to describe the modern MQD.[117]

The two most recent MQD cases demonstrate how the Court employs this doctrine in the modern context.[118] In *Alabama Ass'n of Realtors v. Department of Health & Human Services*,[119] the Court found that the Center for Disease Control ("CDC") could not issue a nationwide eviction

108. *Id.* at 324.

109. *Id.*

110. *Id.* (citation omitted) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159, 160 (2000)).

111. *Id.* (quoting Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,513, 31,555 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, and 71)).

112. *Id.*

113. 576 U.S. 473 (2015).

114. *Id.* at 485–86.

115. *Id.* at 485 (quoting *Brown & Williamson*, 529 U.S. at 159).

116. *Id.* at 486 (quoting *Util. Air*, 573 U.S. at 324).

117. West Virginia v. EPA, 142 S. Ct. 2587, 2609–10 (2022).

118. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022).

119. 141 S. Ct. 2485 (2021).

moratorium during the COVID-19 pandemic because the Court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'"[120] The Court noted that the mortarium would impact eighty percent of the country and intrude into a domain of state law.[121] Therefore, the Court found that "Congress . . . must enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power" and that the statutory language was "a wafer-thin reed on which to rest such sweeping power."[122] *Alabama Ass'n of Realtors* reflects the Court's strong inclination to apply the MQD to invalidate agency action.[123] This case also displays the Court's unwillingness to allow agencies to remedy modern and potentially unprecedented situations that may arise.[124]

Finally, in the shadow-docket case of *National Federation of Independent Business v. OSHA*,[125] the Court explained one example of "vast economic . . . significance."[126] There, the Court invalidated OSHA's COVID-19 vaccine mandate in part because it would impact eighty-four million Americans and qualified as a significant economic action that the Court "expect[s] Congress to speak clearly" on.[127] *National Federation* indicates the Court's eager and frequent application of the MQD.[128] Currently, the Court is still in the process of clarifying the MQD's criteria and application, and the Justices hold different views on this doctrine.[129]

120. *Id.* at 2489 (quoting *Util. Air*, 573 U.S. at 324).

121. *Id.*

122. *Id.* at 2489 (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1850 (2020)).

123. *Id.*

124. *Id.*

125. 142 S. Ct. 661 (2022).

126. *Id.* at 665 (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489).

127. *Id.* (citing *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489).

128. *Id.*

129. For example, the concurrence and dissent in *West Virginia v. EPA* demonstrate the Court's vastly different characterization of application of the MQD. *Compare* West Virginia v. EPA, 142 S. Ct. 2587, 2636 (2022) (Kagan, J., dissenting) (explaining the MQD applies where (1) "the agency had strayed out of its lane" and has no expertise or experience in that area and (2) "the statutory framework was 'not designed to grant' the authority claimed" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))), *with id.* at 2620–21 (Gorsuch, J., concurring) (noting the MQD applies when an agency regulates (1) matters of "great 'political significance,'" (2) "a significant portion of the American economy," and (3) in the "domain of state law" (first quoting Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022); then quoting *Util. Air*, 573 U.S. at 324; and then quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489)).

D. Outliers: When the Court Declines to Invoke the Major Questions Doctrine

Despite the Court's use of the MQD to limit agency decision-making, the Court has declined to apply the MQD to the EPA several times.[130] This Section outlines three such examples.[131]

In *Massachusetts v. EPA*, the Court struck down the EPA's efforts to resist regulating GHGs.[132] During the Bush Administration, the EPA declined to regulate GHGs and asserted the MQD as a justification for refusing to regulate, emphasizing that even more so than *Brown & Williamson*, "imposing emission limitations on greenhouse gases would have even greater economic and political repercussions," hence, "climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the Agency to address it."[133] The Court rejected the EPA's reliance on *Brown & Williamson*, noting "[t]here is no reason, much less a compelling reason, to accept [the] EPA's invitation to read ambiguity into a clear statute."[134]

Similarly, in *American Electric Power Co. v. Connecticut*,[135] the Court failed to deploy the MQD and instead found the EPA had expansive authority to regulate emissions from power plants.[136] There, the Court declined to deploy the MQD since "Congress delegated to [the] EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants,"[137] and it was "fitting that Congress designated an expert agency, here, [the] EPA, as best suited to serve as primary regulator of greenhouse gas emissions."[138]

Finally, in *EPA v. EME Homer City Generation*,[139] the Supreme Court rejected the D.C. Circuit's application of MQD principles.[140] The controversy concerned the EPA's Transport Rule, where states located upwind from other

130. *See* Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 465–69 (2016) (discussing cases involving significant economic issues where the Court has failed to apply the MQD).

131. *See infra* text accompanying notes 134–143.

132. 549 U.S. 497, 529–31 (2007).

133. *Id.* at 512.

134. *Id.* at 530–31. The pertinent statutory provision authorized the EPA to regulate "air pollutant[s]" which was defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g).

135. 564 U.S. 410 (2011).

136. *Id.* at 424.

137. *Id.* at 426.

138. *Id.* at 428.

139. 572 U.S. 489 (2014).

140. *Id.* at 524.

states had to limit emissions from power plants to meet the CAA's Section 110 good neighbor provision.[141] In invalidating the EPA's interpretation, the D.C. Circuit cited to *Whitman*, *Gonzales*, and *Brown & Williamson*, stating that Congress could not have intended the EPA to have authority to promulgate the Transport Rule, "a decision of such economic and political significance" in such a cryptic manner.[142] The Supreme Court rejected this reasoning and reversed, holding that the EPA's interpretation was a permissible construction of the statute.[143]

III. THE COURT'S REASONING

Seeking to reconcile conflicting interpretations of Section 111(d) of the CAA, the Court addressed whether it was within the EPA's authority to promulgate the CPP which permitted emissions reduction through generation-shifting.[144] Writing for the majority, Chief Justice Roberts held that the CPP was an impermissible exercise of authority by the EPA under the MQD, which was embraced in lieu of statutory interpretation—the linchpin of administrative law.[145] First, the Court analyzed justiciability and statutory interpretation tools.[146] Then, the Court differentiated between the air pollution reduction provisions in the CAA[147] and explained the CPP.[148] Finally, the Court did not undertake statutory interpretation and instead applied the MQD.[149]

First analyzing justiciability, the Court concluded that despite the ACE Rule and CPP being defunct, the claims were justiciable since the EPA might promulgate a future plan that resembled the CPP and employed generation-shifting.[150] Next turning to statutory interpretation tools, the Court explained that the statutory language must be read in the context of the overall statutory scheme.[151] Next, the majority discussed other air pollution regulation schemes in the CAA—the NAAQS program,[152] the Hazardous Air Pollutants

141. EME Homer City Generation v. EPA, 696 F.3d 7, 11–12 (D.C. Cir. 2012).

142. *Id.* at 28 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

143. *EME Homer City Generation*, 572 U.S. at 492.

144. West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

145. *Id.*

146. *See infra* text accompanying notes 150–151.

147. *See infra* text accompanying notes 152–155.

148. *See infra* text accompanying notes 156–159.

149. *See infra* text accompanying notes 160–176.

150. *West Virginia*, 142 S. Ct. at 2607 ("The case thus remains justiciable . . . .").

151. *Id.* at 2607 ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989))).

152. *Id.* at 2600 (quoting 42 U.S.C. §§ 7408–7410).

("HAPs") program,[153] and the New Source Performance Standards ("NSPS") under Section 111 (the statute at issue here)[154]—and acknowledged that cap-and-trade is permissible under the Acid Rain and NAAQS programs because they have a pre-set cap.[155]

Then, the Court examined the CPP and discussed how the Agency calculated the BSER.[156] The Court felt that the EPA's determination that coal should only be twenty-seven percent of generation capacity reflected an impermissible change in energy markets,[157] as the Court was concerned that the EPA could force coal plants to stop operating.[158] The Court worried that the CPP gave the EPA power to limit "emissions based on a very different kind of policy judgment."[159]

Next, the majority embraced the MQD and overturned the agency's interpretation of Section 111(d) without engaging with the statutory language.[160] The Court explained the MQD's constitutional[161] and precedential grounds,[162] traced commonalities between the MQD cases,[163] and applied the MQD.[164] Starting with constitutional bases, the majority explained that the doctrine is rooted in separation of powers and legislative intent where "in certain extraordinary cases" the Court hesitates "'to read into ambiguous statutory text' the delegation claimed to be lurking there."[165] The Court contended the MQD establishes a presumption "that 'Congress intend[ed] to make major policy decisions itself'" (rather than leaving those

153. *Id.* (quoting 42 U.S.C. § 7412).

154. *Id.* at 2601.

155. *Id.* at 2615.

156. *Id.* at 2603–04, 2607; *see also id.* at 2601 ("[T]he statute directs [the] EPA to (1) 'determine[],' taking into account various factors, the 'best system of emission reduction which . . . has been adequately demonstrated,' (2) ascertain the 'degree of emission limitation achievable through the application' of that system, and (3) impose an emissions limit on new stationary sources that 'reflects' that amount. . . . [A] source may achieve that emissions cap any way it chooses . . . ." (quoting 42 U.S.C. § 7411(a)(1)). For a more thorough discussion of the CPP, see *supra* notes 35–53 and accompanying text.

157. *Id.* at 2610.

158. *Id.* at 2612 ("And on this view of EPA's authority, it could go further, perhaps forcing coal plants . . . to cease making power altogether.").

159. *Id.*

160. E-mail from Rena Steinzor, Edward M. Robertson Professor of L., Univ. of Md. Francis King Carey Sch. of L., to author (Oct. 6, 2022, 05:45 PM EST) (on file with author).

161. *See infra* text accompanying note 165.

162. *See infra* text accompanying notes 168–170.

163. *See infra* text accompanying notes 172–175. For a more thorough discussion of these cases, see *supra* Section II.C.

164. *See infra* text accompanying notes 176–190.

165. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

decisions to agencies),[166] and agencies can overcome this presumption only by "clear congressional authorization."[167]

Rather than engaging with the statutory language, the majority circularly reasoned that based on *FDA v. Brown & Williamson Tobacco Corp.* and *Alabama Ass'n of Realtors v. Department of Health & Human Services*,[168] Congress did not intend to issue authority to allow the FDA to regulate tobacco nor the CDC to regulate eviction moratoriums because this could not have been intended by Congress.[169] Next, the Court found that *Utility Air Regulatory Group v. EPA* shaped the MQD in the context of the EPA.[170]

Then, the Court struggled to decipher commonalities among the "extraordinary cases" that warrant MQD application.[171] Examining *Gonzales v. Oregon* and *National Federation of Independent Business v. OSHA*, the Court emphasized "broad," "unusual," "remarkable," and "not sustainable" authority by agencies that caused the Court to overturn such agency actions.[172] The Court explained that while in all cases, regulations asserted by the agency "had a colorable textual basis," the Court's conception of common sense as to how Congress would likely delegate power indicated that the delegations at issue were unlikely.[173] The Court emphasized that modest and vague words and subtlety[174] are not enough to infer broad grants of power, since Congress does not typically use "elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme."[175]

Finally, without interpreting the statutory language of Section 111(d), the Court applied the MQD and concluded that the CPP is one of the "extraordinary cases" where "economic and political significance" caused the Court to hesitate before granting the EPA authority under Section 111(d).[176]

166. *Id.* (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)).

167. *Id.* (quoting *Util. Air*, 573 U.S. at 324).

168. *Id.* at 2608–09. For a thorough review of these cases, see *supra* Section II.C.

169. *Id.* at 2608.

170. The Court noted that the *Utility Air Regulatory Group* Court declined to grant the EPA "'unheralded' regulatory power" in part because it affected "a significant portion of the American economy." *Id.* (quoting *Util. Air*, 573 U.S. at 324).

171. *Id.* at 2608–09.

172. *Id.* (first citing Gonzales v. Oregon, 546 U.S. 243, 267 (2006); and then citing Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665–66 (2022)).

173. *Id.* at 2609.

174. *Id.* (quoting Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001)).

175. *Id.* (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994)).

176. *Id.* at 2610.

The Court considered congressional intent,[177] legislative history,[178] and the EPA's history promulgating rules under Section 111.[179] For congressional intent, the Court did not think Congress meant to assign vast grants of power to the EPA.[180] Without justification, the majority explained that Congress wanted technology-based regulation, not generation-shifting,[181] emphasizing that "just because a cap-and-trade 'system' can be used . . . does not mean that it is the kind of 'system of emission reduction' referred to in Section 111."[182] The Court asserted that the EPA does not have "'comparative expertise'" in regulating power plant emissions and found it highly unlikely that Congress wanted the EPA to decide levels of coal-based generation.[183]

For legislative history, the Court contended that the CAA amendments were explicit to permit cap-and-trade for the NAAQS program, but "not a peep was heard from Congress about . . . a trading regime" under Section 111.[184] The Court looked to dead bills as evidence that Congress did not intend regulation through cap-and-trade programs for NSPS.[185] The Court found it significant that the EPA has always limited emissions through technology-based measures,[186] not generation-shifting,[187] and asserted Section 111(d) was "previously little-used backwater."[188]

Finally, the Court stated that the EPA could overcome the MQD by pointing to clear congressional authorization to regulate through generation-shifting, but the statutory language of "best system of emission reduction"

177. *See infra* text accompanying notes 180–183.

178. *See infra* text accompanying notes 184–185.

179. *See infra* text accompanying notes 186–187.

180. *West Virginia*, 142 S. Ct. at 2612–13 ("'When [an] agency has no comparative expertise' in making certain policy judgments, we have said, 'Congress presumably would not' task it with doing so." (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019))).

181. *Id.* at 2611 ("This consistent understanding . . . tracked the seemingly universal view . . . that 'Congress intended a technology-based approach' to regulation in that Section." (quoting Standards of Performance for New Stationary Sources, 40 Fed. Reg. 53,340, 53,343 (Nov. 17, 1975))).

182. *Id.* at 2615.

183. *Id.* at 2612–13.

184. *Id.* at 2615.

185. *Id.* at 2614.

186. Technology-based sources, such as scrubbers (air-pollution-reduction technology that removes or "scrubs" pollutants from smokestacks), improve emissions performance of individual sources. *Id.* at 2611.

187. *Id.* at 2611–12.

188. *Id.* at 2613.

was insufficient[189] because "system" was broad and unclear.[190] Nowhere did the Court undertake statutory interpretation of Section 111(d).[191]

In a separate concurrence joined by Justice Alito, Justice Gorsuch explained that the MQD operates to ensure agencies do not exploit ambiguity within the statute and "'assume responsibilities far beyond' those the people's representatives actually conferred on them."[192] In Justice Gorsuch's opinion, the MQD applies when an agency (1) claims power to resolve a matter of great political significance; (2) regulates a significant portion of the American economy or requires billions of dollars in spending; or (3) intrudes into a domain of the states,[193] and the Supreme Court will look to a clear statement by Congress authorizing agency action.[194] He also encouraged reviewing courts to examine other relevant factors, such as (1) legislative provisions the agency seeks to rely on; (2) the age and focus of an agency's organic statute in relation to the problem addressed; and (3) an agency's past interpretation of the statute.[195] Finally, when there is a mismatch between the agency action and its congressionally assigned mission and expertise, Justice Gorsuch directed courts to be skeptical of agency action.[196]

Writing for the dissent, Justice Kagan, joined by Justices Breyer and Sotomayor, examined the majority's embrace of the MQD in lieu of statutory interpretation,[197] congressional intent, and legislative history.[198] First, Justice Kagan analyzed the impacts of climate change and outlined the goals of the CAA,[199] explaining that the EPA was charged by Congress with authority to address dangers of climate change and regulate pollutants (including carbon emissions) produced by stationary sources such as power plants.[200]

Second, Justice Kagan was troubled that the majority ignored the crux of administrative law—statutory interpretation—and instead applied the MQD, which in her opinion applies narrowly in the few circumstances where

189. *Id*. at 2614 (quoting 42 U.S.C. § 7411(a)(1)) ("Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.").

190. *Id.*

191. E-mail from Rena Steinzor, *supra* note 160.

192. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (quoting Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 669 (2022)).

193. *Id.* at 2620–21.

194. *Id.* at 2622 ("[W]e look for clear evidence that the people's representatives in Congress have actually afforded the agency the power it claims.").

195. *Id.* at 2622–23.

196. *Id.* at 2623 ("When an agency claims to have found a previously 'unheralded power,' its assertion generally warrants 'a measure of skepticism.'" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))).

197. *See infra* text accompanying notes 206–210.

198. *See infra* text accompanying notes 211–214.

199. *West Virginia*, 142 S. Ct. at 2627 (Kagan, J., dissenting).

200. *Id.*

(1) an agency is operating far outside its traditional lane with no claim of expertise; or (2) the agency action conflicts with its authorizing statute or statutory scheme.[201] Justice Kagan concluded that the MQD was improperly applied because generation-shifting was within the EPA's expertise and fit within the CAA statutory framework.[202] The dissenters noted that Section 111 grants the EPA authority on "whether and how to regulate" emissions from power plants as recognized in prior precedent.[203] Justice Kagan challenged the majority for ignoring that eleven years earlier, the Court found that according to Congress, regulating emissions "was smack in the middle of [the] EPA's wheelhouse."[204]

Next turning to statutory interpretation, Justice Kagan commented on the majority's reading of earlier MQD cases, explaining that the cases that the majority relies on as essential were simply "read in context, and with a modicum of common sense,"[205] which is "normal statutory interpretation."[206] Troubled by the majority's disregard of statutory interpretation, Justice Kagan applied plain meaning, textualist, and originalist methods to interpret the statutory language of Section 111(d).[207] Her analysis examined cases where the Court specifically referred to a cap-and-trade program as a system,[208] and the statutory language of the CAA which refers to cap-and-trade as a system.[209] Justice Kagan indicated that the majority's concerns that the EPA could force coal plants to shut down are overblown since the statute includes limits.[210]

Examining the congressional intent, history, goals, and legislative history[211] of Section 111(d), Justice Kagan explained that power was granted

201. *Id.* at 2633.

202. *Id.* at 2633, 2637–38.

203. *Id.* at 2636 (quoting Am. Elec. Power v. Connecticut, 564 U.S. 410, 426 (2011)).

204. *Id.* at 2637.

205. *Id.* at 2633.

206. *Id.*

207. A dictionary from 1971 defines "system" as "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." *Id.* at 2630 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2322 (1971)). Based on the textualist approach of defining words by their original public meaning, generation-shifting "fits comfortably within the conventional meaning of a 'system of emission reduction.'" *Id.*

208. *Id.* ("[T]his type of 'cap-and-trade' *system* cuts costs while still reducing pollution to target levels." (quoting EPA v. EME Homer City Generation, 572 U.S. 489, 503 n.10 (2014))).

209. *Id.* ("The Clean Air Act's acid rain provision, for example, describes a cap-and-trade program as an 'emission allocation and transfer *system*.'" (quoting 42 U.S.C. § 7651(b))).

210. *Id.* at 2629 ("[M]eaningful constraints [include]: Tak[ing] into account costs and nonair impacts, and mak[ing] sure the best system has a proven track record.").

211. Before the amendments, Section 111(d) read "best *technological* system of continuous emission reduction." *Id.* at 2631 (citing Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 109(c)(1)(A), 91 Stat. 685, 700). In the 1977 amendments of the CAA, Congress struck out the limiting word "technological" for existing sources. *Id.* (citing H.R. REP. NO. 95-564, at 129

broadly to the EPA because it fostered efficiency[212] and provided flexibility,[213] and she elaborated that Section 111 does not include restrictions on the EPA's authority that Congress included in other sections of the CAA.[214]

Finally, Justice Kagan criticized the majority's failure to engage in statutory interpretation, its selective application of textualism,[215] and its reliance on dead bills as evidence of congressional intent.[216] She scolded the majority's usurpation of the power granted by Congress to the EPA.[217] Refuting the majority's assertion that Section 111(d) is backwater, Justice Kagan stated that 111(d) is critical to achieving the CAA's purpose of comprehensive pollution control[218] and reprehended the majority's mention of only the consequences and not the benefits of the CPP.[219]

IV. ANALYSIS

In *West Virginia v. EPA*, the Court found that Section 111(d) of the CAA did not grant the EPA authority to promulgate the CPP, which would have allowed power plants to meet emissions standards in part by generation-shifting through (1) reducing electricity production; (2) building or investing in new gas, wind, or solar facilities; or (3) purchasing emissions allowances and credits as part of a cap-and-trade program.[220] The Court's conclusion is

(1977)). In the 1990 CAA amendments, Congress explained that they did not want to "confine [the] EPA to technological controls." *Id.* at 2632 (citing Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 403(a), 104 Stat. 2399, 2631).

212. The legislature must delegate power broadly to agencies in order to properly perform legislative functions. *Id.* at 2642. According to Justice Kagan, this is because (1) "[m]embers of Congress often don't know enough . . . to regulate sensibly on an issue;" and (2) "[m]embers of Congress often can't know enough . . . to keep regulatory schemes working across time." *Id.*

213. *Id.* at 2628 ("A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems.").

214. *Id.* at 2631 ("[Q]uite a number of statutory sections confine EPA's emissions-reduction efforts to technological controls . . . . But nothing like the language of those provisions is included in Section 111.").

215. *Id.* at 2641.

216. *Id.* at 2641 (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1747 (2020)).

217. *Id.* at 2628.

218. *Id.* at 2629 ("Even if they are needed only infrequently, . . . backstops can perform a critical function . . . .").

219. *Id.* at 2638 n.6 ("[T]he . . . 'compliance costs' the majority highlights were vastly outweighed by the Plan's projected benefits." (quoting *id.* at 2593 (majority opinion)) (first citing Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,679 (Oct. 23, 2015); and then citing EPA, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE 6–35 (2015), https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-clean-power-plan-existing-units_2015-08.pdf)). For a discussion of the economic benefits of the CPP, see *infra* text accompanying notes 231–233.

220. *Id.* at 2603 (majority opinion).

erroneous for three reasons: (1) the MQD was improperly deployed to invalidate generation-shifting which was not an issue of extraordinary economic significance;[221] (2) the Court's interpretation of Section 111 misapplied MQD principles;[222] and (3) the Court ignored the consequences of its decision, including a degradation of democratic principles and an increased burden on administrative agencies, Congress, and the judiciary.[223]

A. The Court Improperly Deployed the Major Questions Doctrine for Generation-Shifting, Which is Not an Issue of "Extraordinary Economic Significance"

The majority improperly deployed the MQD to curb the EPA's authority to use generation-shifting under Section 111(d), finding generation-shifting to be an "extraordinary case" of "economic and political significance."[224] Specifically, the majority erroneously used the MQD to invalidate generation-shifting by overstating the economic impact of the CPP;[225] thus, the Court improperly concluded that the CPP implicated a significant economic issue.[226]

First, in deploying the MQD, the Court magnified the economic consequences of the CPP and made no mention of the benefits.[227] Specifically, the majority alleged that the CPP would reduce GDP by at least a trillion dollars by 2040 and impose billions of dollars in compliance costs.[228] The majority's framing of this seemingly catastrophic prediction is contrary to a Department of Energy report that noted the cost of compliance was miniscule, equivalent to less than "a few tenths of [one] percent from baseline."[229] Aside from overblowing the CPP's economic consequences, the majority was eager to highlight the costs but failed to acknowledge the economic benefits of the Plan.[230] For instance, the EPA found that the quantified net benefits, which account for compliance costs, were projected

221. *See infra* Section IV.A.

222. *See infra* Section IV.B.

223. *See infra* Section IV.C.

224. *West Virginia*, 142 S. Ct. at 2608, 2610 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

225. *See infra* text accompanying notes 227–233.

226. *See infra* text accompanying notes 234–246.

227. *See infra* text accompanying notes 228–233.

228. *West Virginia*, 142 S. Ct. at 2604.

229. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, ANALYSIS OF THE IMPACTS OF THE CLEAN POWER PLAN 63–64 (2015), https://www.eia.gov/analysis/requests/powerplants/cleanplan/pdf/powerplant.pdf.

230. *See infra* text accompanying notes 231–233.

to be between $26–$45 billion by 2030.[231] Further, the EPA found many benefits that could not be monetized from reduction of GHGs, including the prevention of ocean acidification, ecosystem detriments, and visibility impairments.[232] And, according to an independent study by the Economic Policy Institute, the net job gain would have been about 100,000.[233] In omitting this information, the majority portrays a faulty and biased picture of the CPP without acknowledging the well-documented benefits the CPP would likely have had if enacted.

Moreover, the MQD should not apply here because generation-shifting is not an issue of extraordinary economic significance, evidenced by power company support[234] and the nature of market-based mechanisms, such as the cap-and-trade approach used by the CPP.[235] First, nearly all power companies supported the EPA in this case, primarily because the CPP provided for the most desirable form of regulation—one that is flexible, market-based, and balanced for efficiency and cost effectiveness.[236] Second, market-based mechanisms such as generation-shifting lessen compliance costs, making them even less expensive than technological-based measures alone.[237] Market-based mechanisms such as cap-and-trade programs have successfully been implemented to curtail emissions and compliance costs: at the federal level, to limit sulfur dioxide emissions at a fraction of the originally estimated cost, while at the state level, to reduce GHGs and nitrogen oxides.[238] Hence, in finding that the CPP involved the EPA exercising "extravagant statutory

231. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,679 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60); EPA, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE (2015), https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-clean-power-plan-existing-units_2015-08.pdf.

232. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,682.

233. JOSH BIVENS, ECON. POL'Y INST., A COMPREHENSIVE ANALYSIS OF THE EMPLOYMENT IMPACTS OF THE EPA'S PROPOSED CLEAN POWER PLAN (2015), https://www.epi.org/publication/employment-analysis-epa-clean-power-plan/.

234. West Virginia v. EPA, 142 S. Ct. 2587, 2639 (2022) (Kagan, J., dissenting).

235. Market-based mechanisms help to efficiently reduce carbon emissions by putting an explicit price on emissions, galvanizing businesses to cost-effectively reduce emissions. *Market-Based Strategies*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/market-based-strategies/ (last visited Mar. 16, 2023).

236. *West Virginia*, 142 S. Ct. at 2638 n.5.

237. *See* Brief for the Federal Respondents at 46, *West Virginia*, 142 S. Ct. 2587 (Nos. 20-1530, 20-1531, 20-1778, 20-1780); *West Virginia*, 142 S. Ct. at 2639 (Kagan, J., dissenting).

238. CTR. FOR CLIMATE & ENERGY SOLS., MARKET MECHANISMS: UNDERSTANDING THE OPTIONS (2015), https://www.c2es.org/wp-content/uploads/2015/04/market-mechanisms-brief.pdf.

power over the national economy,"[239] the Court erred because the CPP is not a case of "extraordinary . . . economic . . . significance."[240]

As a result of a shift in market forces and industry initiatives,[241] even the Trump Administration acknowledged that there is "no difference between a world where the [Clean Power Plan was] implemented and one where it [was] not."[242] Utilities now routinely employ generation-shifting methods in order to ensure reliable power at a low cost.[243] In fact, the power industry, spurred on by market forces, implemented generation-shifting to achieve the CPP's 2030 emissions targets by 2019, eleven years ahead of schedule.[244] Thus, the majority ignored the simple truth that the power industry has now met more stringent standards than the CPP's targets, demonstrating that the CPP does not implicate the economic significance and "aggressive transformation"[245] claimed by the majority.[246]

B. The Court's Interpretation of Section 111 Misapplied Principles of the Major Questions Doctrine

Further, the Court misapplied central MQD principals set out in *FDA v. Brown & Williamson Tobacco Corp.* and *Alabama Ass'n of Realtors v. Department of Health and Human Services.* In *Brown & Williamson*, the Court stated that a statute's "overall regulatory scheme" and "subsequent . . . legislation" allows a Court to conclude that "Congress has directly spoken to the question at issue and precluded the [agency] from regulating."[247] Furthermore, in *Alabama Ass'n of Realtors*, the Court stated that the MQD is applied when an agency regulates a domain of state law.[248] Here, the Court erred by failing to consider critical MQD principals such as (1) the overall regulatory scheme,[249] (2) subsequent legislation,[250] and (3) federalism concerns.[251]

239. *West Virginia*, 142 S. Ct. at 2609 (majority opinion) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

240. *Id.* at 2608, 2610 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

241. *Id.* at 2638 (Kagan, J., dissenting).

242. *Id.* (quoting Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520, 32,561 (Sept. 6, 2019) (to be codified at 40 C.F.R. pt. 60)).

243. *See* Brief for the Federal Respondents at 41, *West Virginia*, 142 S. Ct. 2587 (Nos. 20-1530, 20-1531, 20-1778, 20-1780).

244. *West Virginia*, 142 S. Ct. at 2638.

245. *Id.* at 2622 (Gorsuch, J., concurring).

246. *Id.* at 2638 n.6 (Kagan, J., dissenting).

247. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160–61 (2000).

248. Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2489 (2021).

249. *See infra* Section IV.A.1.

250. *See infra* Section IV.A.2.

251. *See infra* Section IV.A.3.

1. The Majority Failed to Situate Section 111 within the Overall Regulatory Scheme

According to the Court, reviewing courts must interpret agency organic statutes "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts [of a statutory scheme] into a harmonious whole."[252] Similarly, in *West Virginia*, the Court noted "it is a 'fundamental canon of statutory construction that the words of a statute must be read *in their context* and with a view to their place in the *overall statutory scheme*.'"[253] Yet, in *West Virginia*, the Court failed to adhere to these principles.[254]

First, the majority failed to situate the words in context by ignoring references to cap-and-trade as a "system" in other portions of the CAA.[255] One specific example is Section 401 of the CAA where cap-and-trade is referred to as "an emission allocation and transfer *system*."[256] In ignoring this use, the Court ignores a central principle of the MQD which requires that a statute be interpreted as a "harmonious whole."[257] Hence, in holding that cap-and-trade is not a "system," the Court erred because it did not interpret the entirety of the statutory scheme.[258]

Second, the majority failed to acknowledge precedent explicitly stating that cap-and-trade constitutes a "system."[259] In *EPA v. EME Homer City Generation*, the Court referred to cap-and-trade as a "system."[260] In ignoring statutory language and precedent, the Court violates its own articulated MQD framework by failing to interpret the regulatory scheme as symmetrical, harmonious, and coherent.

2. The Majority Failed to Consider Subsequent Legislation Demonstrating Congress Intended to Increase the EPA's Authority to Curb Climate Change

The Court also failed to consider pertinent legislation in the works at the time of its decision. Passage of subsequent legislation such as the Inflation Reduction Act of 2022 ("IRA") is evidence of Congress's intention to correct an erroneous interpretation by the Court and directly grant broad authority to

252. *Brown & Williamson*, 529 U.S. at 133.

253. West Virginia v. EPA, 142 S. Ct. 2587, 2607 (2022) (emphasis added) (citation omitted) (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)).

254. *See infra* text accompanying notes 255–292.

255. *West Virginia*, 142 S. Ct. at 2607 (quoting *Davis*, 489 U.S. at 809).

256. 42 U.S.C. § 7651(b) (emphasis added).

257. *Brown & Williamson*, 529 U.S. at 133.

258. *See generally* E-mail from Rena Steinzor, *supra* note 160 (discussing the Court's failure to engage in statutory interpretation in *West Virginia*).

259. *See infra* text accompanying note 260.

260. *See* EPA v. EME Homer City Generation, 572 U.S. 489, 503 n.10 (2014) (recognizing a cap-and-trade program as a "system" that "cuts costs while still reducing pollution to target levels").

the EPA to minimize GHG emissions and curb climate change.[261] The IRA, passed in August 2022, strengthens the EPA's ability to take action to regulate and reduce GHGs under the CAA.[262] The IRA provides substantial budget increases across a wide range of air pollution and clean energy programs but also defines GHGs as "pollutants," indicating they are within the purview of the EPA to regulate, and codifying the holding of *Massachusetts v. EPA*.[263]

While the IRA does not directly overrule *West Virginia*, the IRA is significant because the MQD is premised on the idea that Congress must "directly [speak] to the question at issue"[264] if it wishes to delegate "agency decisions of vast 'economic and political significance.'"[265] The IRA is Congress's way of speaking clearly—and the act signals that mitigating climate change is a top Congressional priority, and that no longer can a conservative executive administration—or power-hungry courts—utilize means such as the MQD to prevent the EPA from regulating GHGs.[266]

Finally, in *City of Arlington v. FCC*,[267] the Court stated that "Congress knows [how] to speak in . . . capacious terms when it wishes to enlarge[] agency discretion."[268] In response to *West Virginia*, Congress clearly and directly spoke in capacious terms, inserting language into the IRA that solidifies the EPA's authority to regulate GHG emissions, including emissions from the power sector, and authorizing billions in appropriations for these undertakings.[269] The IRA indicates heightened congressional intent for the EPA to address power sector GHG emissions.[270] Hence, in ignoring "subsequent legislation," the majority contravened MQD principles.[271]

3. The Majority's Holding Runs Afoul of State Federalism Concerns That are a Central Major Questions Doctrine Consideration

According to the Court, the MQD applies when federal agency regulation implicates state interests by harmfully intruding into a domain of

261. Inflation Reduction Act of 2022, Pub. L. No. 117-169, §§ 60101–60506, 136 Stat. 1818, 1818–2090; William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991).

262. Inflation Reduction Act of 2022 §§ 60101–60506.

263. *Id.* at §§ 134(c)(2)–60105(h); *see also* 549 U.S. 497, 512 (2007) (holding that the EPA must regulate greenhouse gases).

264. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160–61 (2000).

265. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

266. *Id.*

267. 569 U.S. 290 (2013).

268. *Id.* at 296.

269. Inflation Reduction Act of 2022, Pub. L. No. 117-169, §§ 60101–60506, 136 Stat. 1818, 1818–2090.

270. *Id.* §§ 134(c)(2)–60105(h).

271. West Virginia v. EPA, 142 S. Ct. 2587, 2644 (2022) (Kagan, J., dissenting).

state law.[272] The MQD is applied to prevent agency regulation of an area reserved for states, restoring the states' power as the sole regulator of that domain.[273] The Court's use of the MQD to foreclose generation-shifting methods is improper because, rather than restoring state freedom and power, it deprives states of autonomy by *limiting* states to one method of compliance alone to meet emissions limits[274] and diminishes their economic benefits.[275]

First, the Court's decision deprives states of freedom because it *removes* avenues for compliance with emissions limits. The CPP granted states significant flexibility by permitting power plant operators to meet emissions limits through technological measures *or* generation-shifting.[276] And, generation-shifting could be accomplished through three malleable means, giving power plant operators numerous avenues for pursuing compliance.[277] By contrast, the holding of *West Virginia* robs states of liberty and latitude by forcing compliance through technology-based measures alone.[278] This deprivation of state power is incompatible with the MQD, which is deployed to *preserve* state interests, police powers, and independence.[279] Hence, the Court's use of the MQD is improper as it *hinders* state interests by limiting states to one compliance option alone, contravening a central MQD principle.[280]

West Virginia harms states because the decision essentially prohibited the EPA from utilizing generation-shifting to regulate power plant emissions.[281] And, while states are still permitted to create state-based generation-shifting programs, the EPA is *not* allowed to use such programs to regulate power plants.[282] Since the EPA *cannot* use generation-shifting programs to regulate, from here on out, states are unlikely to engage in generation-shifting programs due to external pressures that prevent states

272. *See id.* at 2621 (Gorsuch, J., concurring) (explaining that the Supreme Court has signaled that the MQD applies when an agency attempts to regulate a domain of state law and that federalism concerns are intertwined with the MQD); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (explaining that the CDC's eviction moratorium regulates the landlord-tenant relationship, a domain of state law, and so to permit agency regulation over state domains, Congress must enact "exceedingly clear language").

273. *West Virginia*, 142. S. Ct. at 2621.

274. *See infra* notes 278–280.

275. *See infra* notes 284–292.

276. *See supra* text accompanying notes 47–49.

277. *See supra* note 3 for a discussion of these generation shifting methods.

278. *West Virginia* 142 S. Ct. at 2611 (majority opinion).

279. *Id*. at 2621 (Gorsuch, J., concurring) (explaining the MQD applies when an agency "intrude[s] into an area that is the particular domain of state law" (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486–87 (2021))).

280. *See* Brief for the Federal Respondents at 51, *West Virginia*, 142 S. Ct. 2587 (Nos. 20-1530, 20-1531, 20-1778, 20-1780).

281. *See generally West Virginia*, 142 S. Ct. 2587.

282. *Id*. at 2615.

from taking action beyond federal requirements.[283] Therefore, the Court's decision harms states, impedes existing and future generation-shifting programs, and deprives all states not already in generation-shifting programs of economic benefits.[284]

West Virginia damages state interests by depriving states of economic benefits.[285] Recall that generation shifting includes cap-and-trade programs.[286] One prominent state-based program that authorizes and relies on generation-shifting as a method to limit emissions is the Regional Greenhouse Gas Initiative ("RGGI").[287] RGGI is composed of thirteen states that have a state-based cap-and-trade program to limit carbon dioxide emissions from power plants.[288] To date, the RGGI program has reduced power plant emissions by more than fifty percent, which is twice as fast as the nation as a whole, and has generated over $4 billion that has been reinvested into local communities.[289] The Court's decision in *West Virginia* disincentivizes participation in state-based generation shifting programs because, since the EPA will not be able to regulate power plants through generation-shifting, states will decline to participate in these programs due to external pressures that prevent states from taking action to limit GHG emissions beyond federal requirements.[290] Hence, "giving the states the option of exercising their democratic prerogative does not mean that such

283. *See* Alice Kaswan, *Decentralizing Cap-and-Trade? State Controls Within a Federal Greenhouse Gas Cap-and-Trade Program*, 28 VA. ENV'T L.J. 343, 348 n.12 (2010) (explaining that states do not have a strong interest in creating their own cap-and-trade programs because of pressures such as increased cost and ineffectiveness of state-based measures alone); *see also infra* note 290.

284. *See infra* notes 287–292 and accompanying text.

285. Brief for the Federal Respondents at 27, 44–45, *West Virginia*, 142 S. Ct. 2587 (Nos. 20-1530, 20-1531, 20-1778, 20-1780).

286. See *supra* note 3 for a discussion of generation-shifting.

287. *See* Brief for the Federal Respondents at 28, 49, *West Virginia*, 142 S. Ct. 2587 (Nos. 20-1530, 20-1531, 20-1778, 20-1780) (discussing the Regional Greenhouse Gas Initiative, in which states allocate tradeable carbon emission allowances for power plants); REG'L GREENHOUSE GAS INITIATIVE, THE REGIONAL GREENHOUSE GAS INITIATIVE 101 FACT SHEET (2023) https://www.rggi.org/sites/default/files/Uploads/Fact%20Sheets/RGGI_101_Factsheet.pdf.

288. RGGI states include Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia. REG'L GREENHOUSE GAS INITIATIVE, *supra* note 287. California and Washington also have self-imposed state cap-and-trade programs for many sectors, including power plants. *Market-Based State Policy*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/market-based-state-policy/ (last visited Feb. 7, 2023); *see also* STATE & LOCAL ENERGY PROGRAM, EPA, CUTTING POWER SECTOR CARBON POLLUTION: STATE POLICIES AND PROGRAMS (2016), https://www.epa.gov/sites/default/files/2015-08/documents/existing-state-actions-that-reduce-power-sector-co2-emissions-june-2-2014_0.pdf.

289. REG'L GREENHOUSE GAS INITIATIVE, *supra* note 287.

290. Kaswan, *supra* note 283. These pressures include potential increased costs and ineffectiveness of state-based measures alone. *Id.*

prerogatives are likely to be exercised."[291] Inevitably, this will deprive states of economic benefits associated with generation-shifting.[292]

C. The Court's Embrace of the Major Questions Doctrine in Lieu of Statutory Interpretation and Agency Deference Will Damage Administrative Efficiency and Degrade American Democracy

In deploying the MQD in lieu of statutory interpretation, the Court creates dangerous precedent that subjects a myriad of agency action to invalidation.[293] Further, the Court ignores the grave impacts its decision will have on administrative agencies, Congress, and the judiciary.[294] The Court's decision is detrimental for several reasons. First, in finding the statutory constraints insufficient, all future congressional and agency actions, both environmental and otherwise, are impeded.[295] Second, by ignoring legislative history and focusing on dead bills, the Court facilitates a chilling effect on congressional action and permits the degradation of American democracy.[296] Third, failing to engage with the statutory language and neglecting to apply *Chevron* deference upsets stability and evenhandedness in the application of the laws in lower courts.[297] Fourth, deploying the MQD instead of applying statutory interpretation impedes judicial economy and delegitimizes the Supreme Court.[298]

1. By Finding that the Statute Had No Limits, the Court Hinders Agency and Congressional Action

The Court found that Section 111, which directs the EPA to set standards of performance for existing sources through "the best system of emission reduction" after accounting for costs and non-air impacts such as health, environmental impact, and energy requirements,[299] did not sufficiently constrain the authority of the EPA.[300] The Court's analysis is erroneous because the statutory limits significantly restrained the EPA.[301]

291. *Id.* at 390.

292. Brief for the Federal Respondents at 27, 44–45, *West Virginia*, 142 S. Ct. 2587 (Nos. 20-1530, 20-1531, 20-1778, 20-1780).

293. Richard L. Revesz, *SCOTUS Ruling in* West Virginia v. EPA *Threatens All Regulation*, BLOOMBERG L. (July 8, 2022, 4:00 AM), https://news.bloomberglaw.com/environment-and-energy/scotus-ruling-in-west-virginia-v-epa-threatens-all-regulation.

294. *See infra* text accompanying notes 310–395.

295. *See infra* Section IV.C.1.

296. *See infra* Section IV.C.2.

297. *See infra* Section IV.C.3.

298. *See infra* Section IV.C.4.

299. 42 U.S.C. § 7411(a).

300. West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

301. *See infra* notes 304–307.

Further, requiring more extreme statutory constraints hinders agency[302] and congressional action.[303]

First, the statutory constraints were sufficient as evidenced by their practical effect.[304] For example, the statutory limits prevent the EPA from shutting down coal plants completely and in fact limited the EPA's implementation of the CPP.[305] These statutory limits are why no one method of compliance was mandated under the CPP; rather, the Plan included several technological and generation-shifting measures, giving power plant operators numerous avenues to innovatively (or not so innovatively) pursue compliance with the CPP.[306] The statutory limits have also limited the EPA's course of action in the past, and in prior BSER proceedings, the EPA has excluded natural gas repowering and refueling, natural gas co-firing, carbon capture and sequestration, and biomass co-firing because of the statutory limits.[307] Because the statutory limits have the effect of actually limiting the EPA, both in past practice and regarding the CPP, the statutory limits are clearly sufficient.[308]

Second, the Court's requirement that statutes have more clearly defined limits than the statute at hand[309] imposes an unrealistic view of the federal agency system, impedes agency action,[310] and subjects numerous agency decisions to invalidation.[311] This is because the risk of invalidation imposes a chilling effect on agencies that may be unsure of the interpretation of their governing statutes.[312] Such agencies may opt to postpone or altogether cease issuing regulations that rely on interpretations of the authorizing statute.[313] This is detrimental to the United States as a whole because the work of administrative agencies affects nearly every American.[314]

The implications for congressional action are similarly grave, as Congress will be forced to write statutes with extremely specific language to

302. *See infra* text accompanying notes 311–314, 319–322.

303. *See infra* text accompanying notes 315–318.

304. *West Virginia*, 142 S. Ct. 2587, 2639 n.7 (Kagan, J., dissenting); Brief for the Federal Respondents at 49, *West Virginia*, 142 S. Ct. 2587 (Nos. 20-1530, 20-1531, 20-1778, 20-1780).

305. *West Virginia*, 142 S. Ct. at 2639.

306. *Id.*

307. Brief for the Federal Respondents at 49, *West Virginia*, 142 S. Ct. 2587 (Nos. 20-1530, 20-1531, 20-1778, 20-1780).

308. *See supra* text accompanying notes 305–307.

309. 42 U.S.C. § 7411(a)(1).

310. *See infra* text accompanying notes 311–314, 319–322.

311. Revesz, *supra* note 293.

312. Dan Farber, *Climate Change and the Major Question Doctrine*, LEGAL PLANET (July 12, 2022), https://legal-planet.org/2022/07/12/the-major-question-doctrine-and-climate-change/.

313. *Id.*

314. *See* STEINZOR, *supra* note 61, at 13–14 (discussing the scope of the impact of federal agencies on the American public).

meet the Court's strict requirements.[315] This high bar is impracticable to meet since statutes will have to be potentially thousands of pages in length and specific in wording to meet the Court's scrupulous standard.[316] This would require Congress to anticipate every tangentially related problem that might arise and Congress simply does not have the expertise or the resources to write this kind of legislation.[317] In an era where it is already difficult for Congress to act because of gridlock, these strict requirements are catastrophic and debilitating.[318]

Finally, even if Congress somehow manages to pass legislation that meets the Court's stringent conditions, the agency will be unable to implement the law.[319] This is because the exacting specificity required by the Court leaves no room for flexibility.[320] As conditions change, the agency will not have the necessary leeway to act without congressional amendment, contravening the primary reason why statutes are broadly construed in the first place.[321] Therefore, the Court's decision stymies both congressional and agency action.[322]

2. By Selectively Interpreting Legislative History and Considering Dead Bills, the Court Chills Congress, Thereby Undermining Democracy

In invalidating the CPP with the MQD, the Court erroneously failed to consider pertinent legislative history[323] and instead focused on dead bills.[324] First, the Court ignored pertinent legislative history.[325] For example, in the CAA Amendments of 1977, Congress differentiated between new and existing sources (generally, new and existing powerplants).[326] As Justice Kagan explained in her dissent:

> For new sources, [the] EPA could select only the "best technological system of continuous emission reduction." But for

315. Phillip Wallach, *Will* West Virginia v. EPA *Cripple Regulators? Not if Congress Steps Up*, BROOKINGS (July 1, 2022), https://www.brookings.edu/research/will-west-virginia-v-epa-cripple-regulators-not-if-congress-steps-up/.

316. *Id.*

317. West Virginia v. EPA, 142 S. Ct. 2587, 2642 (2022) (Kagan, J., dissenting).

318. *See* STEINZOR, *supra* note 61, at 73.

319. *See infra* text accompanying notes 320–322.

320. *See West Virginia*, 142 S. Ct. at 2642 (noting the legislature must delegate power broadly to agencies because (1) members of Congress cannot "know enough . . . to keep regulatory schemes working across time" and (2) an agency must be able to respond "to new and big problems").

321. *Id.*

322. *See supra* text accompanying notes 310–321.

323. *See infra* text accompanying notes 326–333.

324. *See infra* text accompanying notes 334–346.

325. *West Virginia*, 142 S. Ct. at 2632 (Kagan, J., dissenting).

326. *Id.*

> existing sources, the word "technological" was struck out: [The] EPA could select the "best system of continuous emission reduction." The House Report emphasized Congress's deliberate choice: Whereas the standards set for new sources were to be based on "the best technological" controls, the "standards adopted for existing sources" were "to be based on available means of emission control (not necessarily technological)."[327]

Yet, the majority completely ignored this legislative history.[328] Limiting the EPA to "technological" methods of emissions reduction despite that word being struck contravenes precedent, as the Court "do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply," and the Court's "reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."[329] Moreover, several other provisions within the CAA limit the EPA to regulating through technology-based methods only,[330] and such limitations are not present in Section 111.[331] Therefore, the majority usurped conventional statutory interpretation techniques of *expresio unius est exclusion alterius*[332] and arrived at an incorrect result.[333]

Further, the Court's reliance on cap-and-trade bills that failed to pass as evidence that congressional intent was lacking[334] is erroneous because it is both illogical[335] and ignores precedent.[336] The Court's analysis is illogical because, in relying on failed cap-and-trade bills, the Court failed to consider cap-and-trade bills that have passed both the Senate or House of Representatives.[337] One such example is the 1990 CAA amendments which

---

327. *Id.* at 2631 (first quoting Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 109(c)(1)(A), 91 Stat. 685, 700; and then quoting H.R. REP. NO. 95-564, pt. 129 (1977)).

328. *Id.* at 2632.

329. Jama v. Immigr. & Customs Enf't, 543 U.S. 335, 341 (2005).

330. *Compare* 42 U.S.C. § 7521(a)(3)(A)(i) ("[G]reatest degree of emission reduction achievable through the application of *technology*." (emphasis added)), *id.* § 7491(b)(2)(A) ("[B]est available retrofit *technology*." (emphasis added)), *id.* § 7475(a)(4) ("[B]est available control *technology*." (emphasis added)), *id.* § 7412(g)(2)(A) ("[M]aximum achievable control *technology*." (emphasis added)), *and id.* § 7411(h)(1) ("[B]est *technological* system of continuous emission reduction." (emphasis added)), *with id.* § 7411(a)(1) ("[B]est system of emission reduction.").

331. *Id.* § 7411; *West Virginia*, 142 S. Ct. at 2632.

332. The expression of one thing indicates intent to exclude other things. *Expressio Unius Est Exclusio Alterius*, BLACK'S LAW DICTIONARY (11th ed. 2019).

333. *West Virginia*, 142 S. Ct. at 2632.

334. The Court reviewed several failed cap-and-trade bills from 2009–2013 and could not "ignore" that Congress in recent years has "considered and rejected" cap-and-trade schemes. *Id.* at 2614 (majority opinion).

335. *See infra* text accompanying notes 337–339.

336. *See infra* text accompanying notes 340–346.

337. *West Virginia*, 142 S. Ct. at 2630 (Kagan, J., dissenting). Other bills related to cap-and-trade that have passed either the House or Senate include the American Clean Energy and Security

amended the NAAQS program to permit cap-and-trade.[338] Therefore, in ignoring Congress's delegation to the EPA to regulate NAAQS through cap-and-trade in the 1990 CAA amendments, the Court acted impermissibly.[339]

Moreover, the majority ignored precedent that prohibits the consideration of dead bills.[340] The Court has held that "failed legislation 'offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress' adopted."[341] Furthermore, "[i]t is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation."[342] Additionally, *Brown & Williamson* explicitly stated the Court cannot rely on congressional failure to act.[343] Based on this, it was inappropriate for the Court to rely on dead bills[344] as evidence of lack of intent.[345] Hence, even if the Court suddenly decides to consider dead bills to aid statutory interpretation, it cannot do so selectively as it did here by ignoring that Congress failed to pass a bill that barred the EPA from implementing the CPP.[346]

Act of 2009, H.R. 2454, 111th Cong. (2009), https://www.congress.gov/bill/111th-congress/house-bill/2454). *See also Congress Climate History*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/congress-climate-history/ (last visited Mar. 5, 2023).

338. *See* sources cited *supra* note 337.

339. *West Virginia*, 142 S. Ct. at 2630 (Kagan, J., dissenting) (citing Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 403(a), 104 Stat. 2399).

340. *See infra* text accompanying notes 341–346.

341. *West Virginia*, 142 S. Ct. at 2641 (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1747 (2020)).

342. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 186 (1994) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 175, n.1 (1989)).

343. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155 (2000) ("We do not rely on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority—in reaching this conclusion.").

344. The majority cites to several dead bills where cap-and-trade was rejected. *West Virginia*, 142 S. Ct. at 2614 (majority opinion) (first citing American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009); and then citing Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009)). The majority also notes that rejected bills related to carbon taxation are similar enough to evidence lack of congressional intent. *Id.* (first citing Climate Protection Act of 2013, S. 332, 113th Cong. (2013); and then citing Save our Climate Act of 2011, H.R. 3242, 112th Cong. (2011)).

345. Daniel Himebaugh, *Against Interpreting Dead Bills*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (2020) ("A legislature may be presented with the introduction of thousands of bills. . . . Some bills conflict with each other. Sometimes two bills would be impossible to enforce at the same time. Most bills do not pass. . . . Under these circumstances, a court cannot determine which unenacted bills authentically reflect the position of the legislature.").

346. *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting) ("[U]nder normal principles of statutory construction, the majority *should* ignore [dead bills] (just as I should ignore that Congress failed to enact bills barring [the] EPA from implementing the Clean Power Plan).").

Finally, the majority's finding that dead bills indicate a lack of intent will impede democracy.[347] This is because judicial scrutiny of dead bills encourages malevolent congressional action[348] and will have a chilling effect on legitimate legislation.[349] First, congressional representatives acting in bad faith could use judicial consideration of dead bills to invalidate a significant portion of progressive regulation.[350] More specifically, in the sphere of environmental law, malicious representatives could introduce climate change bills that they know will fail.[351] From there, the judiciary could find lack of congressional intent, evidenced by the dead bill, and invalidate environmental regulations.[352] Another concern is that analyzing dead bills will create a chilling effect for legitimate legislation because representatives, concerned that the Court will interpret failure of a bill to pass as lack of intent, will postpone or altogether halt introducing bills.[353] The Court's decision facilitates these repercussions, undermining a fair and just democratic system.[354]

3. The Court Fails to Discuss Chevron *Deference, Undermining Stability and Uniformity in Application of the Laws in Lower Courts*

In 2018, Justice Alito criticized the Court for failing to apply *Chevron* deference.[355] He noted "unless the court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law."[356] While the Court in *West Virginia* declined to overrule *Chevron*, this decision leaves *Chevron* deference hanging by a thread, and the policy implications from both retreat from statutory interpretation and deference to expert agencies hinder the judicial branch.[357] First, judges are not equipped to resolve policy choices delegated to an expert agency by Congress.[358] Second, retreat from statutory interpretation and deference contradicts precedent.[359] Finally, this recoil from analyzing statutory language and discussing

347. *See infra* text accompanying notes 348–354; Himebaugh, *supra* note 345 ("A court . . . lacks knowledge about the manifold considerations that motivated the legislature—and individual legislators—to reject or ignore a particular bill.").

348. *See infra* text accompanying notes 350–352.

349. *See infra* text accompanying note 353.

350. Himebaugh, *supra* note 345.

351. *Id.*

352. *Id.*

353. *Id.*

354. *See supra* text accompanying notes 347–353.

355. Pereira v. Sessions, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting).

356. *Id.*

357. *See infra* text accompanying notes 361–378.

358. *See infra* text accompanying notes 361–364.

359. *See infra* text accompanying notes 365–368.

deference undermines stability and uniformity in application of the laws and is contrary to constitutional values.[360]

First, in failing to interpret Section 111(d) and evaluate deference to agency interpretation, the Court erred because judges are not equipped to resolve policy choices delegated to expert agencies by Congress.[361] Here, Congress made a policy judgement and designated the EPA as the regulator of GHGs.[362] In *Massachusetts v. EPA*, the Court noted that judges "have neither the expertise nor the authority to evaluate these policy judgments" concerning the CAA.[363] Therefore, it is critical that judges respect delegations of power by Congress and leave regulation and policy decisions to agency experts, because, as the Court has previously noted, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[364]

Further, in failing to engage with the statutory language and evaluate deference, the Court usurps precedent.[365] The Supreme Court routinely engages in statutory interpretation of authorizing statutes, evaluates *Chevron* deference, and upholds agency interpretations under *Chevron*.[366] Further, a 2019 study found that the Court adheres to *Chevron* in eighty percent of eligible cases.[367] Therefore, in declining to undertake statutory interpretation and subsequently apply or even discuss deference to agencies, the Court contradicts prior decisions and leaves lower courts unclear as to whether *Chevron* deference is still viable.[368]

360. *See infra* text accompanying notes 369–379.

361. *See infra* text accompanying notes 363–364.

362. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428 (2011).

363. Massachusetts v. EPA, 549 U.S. 497, 533 (2007).

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

365. *See infra* text accompanying notes 366–368.

366. *See* Cuozzo Speed Techs. v. Lee, 579 U.S. 261, 280 (2016) (upholding agency interpretation under *Chevron*); EPA v. EME Homer City Generation, 572 U.S. 489, 492 (2014) (same); United States v. Eurodif, 555 U.S. 305, 322 (2009) (same). But some legal scholarship suggests deference to agency action is far from binding on the Court. *See* Eskridge & Baer, *supra* note 64, at 1099 (noting the Supreme Court has only applied *Chevron* in about eight percent of applicable cases from 1983–2005); Connor N. Raso & William N. Eskridge, Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1733–34 (2010) (discussing how Justices do not treat *Chevron* deference as binding precedent, but rather, a canon that is applied selectively and influenced by ideological considerations). *But see* Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply* Chevron *When it Should?*, 57 INT'L REV. L. & ECON. 81, 89 (2019) (finding that the Court applies *Chevron* deference in eighty percent of eligible cases).

367. *See* Salmanowitz & Spamann, *supra* note 366.

368. *Chevron* deference was created by the U.S. Supreme Court to control lower courts and provide stability and uniformity in application of the laws. *See* Cass R. Sunstein, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 18 (2017). The Court has acknowledged this effect: "[t]hirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of

Next, by failing to both analyze statutory language and discuss *Chevron* deference, the Court confuses lower courts and contravenes constitutional values.[369] Most important is lower courts' application of *Chevron*, especially in the D.C. Circuit, as it "dominate[s]" in the realm of "[a]dministrative law cases implicating these questions."[370] Hence, it is significant that lower courts have thoroughly reiterated and applied *Chevron* deference and engaged in statutory interpretation,[371] even in the aftermath of *West Virginia*.[372] For example, in *Loper Bright Enterprises v. Raimondo*,[373] the D.C. Circuit reviewed a rule promulgated by the National Marine Fisheries Service to implement and revise industry-funded monitoring programs in New England fisheries.[374] The D.C. Circuit dismissed a challenge to the rule on MQD grounds, holding instead that *Chevron* deference applied and the agency's statutory interpretation was reasonable.[375]

But outside of the D.C. Circuit, *Chevron* deference is rarely applied, as many appellate judges do not look favorably on the doctrine.[376] This discrepancy indicates that lower courts are sufficiently confused on when to apply *Chevron* because *West Virginia* leaves a very tenuous future for deference to agency action because the Court did not attempt any sort of statutory interpretation or give any deference to the EPA's course of action.[377] Lower courts' inconsistent application of *Chevron* is contrary to values that the Constitution seeks to promote—clear and comprehensible laws which are

agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*." City of Arlington v. FCC, 569 U.S. 290, 307 (2013).

369. *See infra* text accompanying notes 370–379.

370. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1320 (2018).

371. *See* Chem. Waste Mgmt. v. EPA, 873 F.2d 1477, 1480–83 (D.C. Cir. 1989) (outlining the *Chevron* two-step test and upholding agency interpretation of the statute); Van Hollen, Jr. v. FEC, 811 F.3d 486, 488–96 (D.C. Cir. 2016) (same).

372. *See* Hong v. Sec. Exch. Comm'n, 41 F.4th 83, 94 (2d Cir. 2022) (applying *Chevron* deference after *West Virginia v. EPA*); Voigt v. EPA, 46 F.4th 895, 900–01 (8th Cir. 2022) (same); Tulelake Irrigation Dist. v. U.S. Fish & Wildlife Serv., 40 F.4th 930, 935 (9th Cir. 2022) (same); Loper Bright Enters. v. Raimondo, 45 F.4th 359, 365 (D.C. Cir. 2022) (same).

373. 45 F.4th 359 (D.C. Cir. 2022).

374. *Id.* at 363–64.

375. *Id.*

376. *See* Gluck & Posner, *supra* note 370, at 1302 (noting that out of forty-two Federal Appellate Judges surveyed, most were "not fans of *Chevron*," except those on the D.C. Circuit); Midship Pipeline Co. v. Fed. Energy Regul. Comm'n, 45 F.4th 867, 874 (5th Cir. 2022) (declining to apply deference and instead applying MQD principles); Georgia v. President of the U.S., 46 F.4th 1283, 1313 (11th Cir. 2022) (Anderson, J., concurring in part and dissenting in part) (same).

377. *See generally West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (making no attempt to give the EPA deference).

internally consistent and steadily and coherently enforced.[378] Hence, the Supreme Court's failure to both undertake statutory interpretation and its failure to discuss *Chevron* deference has sufficiently confused lower courts, which is detrimental since lower courts are responsible for the majority of administrative law cases.[379]

4. The Court Fails to Acknowledge that Deployment of the Major Questions Doctrine in Lieu of Statutory Interpretation Will Impede Judicial Economy and Delegitimize the Supreme Court

Application of the MQD instead of analyzing statutory language hinders the judicial branch because it impairs judicial economy,[380] confuses lower courts due to unworkability,[381] and undermines the legitimacy of the Court.[382] First, the MQD burdens the judiciary and impedes judicial economy because more suits will be filed challenging agency action on MQD grounds.[383] Republican Attorneys General are already challenging agency action through both lawsuits and comments in instances such as the EPA's emissions standards for cars, the Securities and Exchange Commission's Climate Change disclosures based on Environmental, Social, and Governance measures, and the Federal Energy Regulatory Commission's consideration of carbon emissions when approving pipelines.[384] These challenges will undoubtedly impede an already overburdened judicial system.[385]

Second, the Court failed to set out a comprehensible framework for applying MQD, leaving lower courts clueless and struggling to apply an unworkable doctrine.[386] More specifically, the Court essentially applied the MQD instead of interpreting the language of Section 111(d) and failed to outline any sort of clear test for determining when an issue qualifies as an

378. *Overview–Rule of Law*, ADMIN. OFF. OF THE U.S. CTS. https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law (last visited Mar. 5, 2023).

379. *See* Gluck & Posner, *supra* note 370.

380. *See infra* text accompanying notes 383–385.

381. *See infra* text accompanying notes 386–391.

382. *See infra* text accompanying notes 392–396.

383. *See infra* text accompanying notes 384–385.

384. Lesley Clark & Nina H. Farah, *Three Climate Rules Threatened by the Supreme Court's EPA Decision*, SCIENTIFIC AM. (July 7, 2022), https://www.scientificamerican.com/article/three-climate-rules-threatened-by-the-supreme-courts-epa-decision/; *see also* Brief for State Petitioners, Texas v. EPA, No. 22-1031 (D.C. Cir. Nov. 3, 2022) https://www.texasattorneygeneral.gov/sites/default/files/images/press/20221103%20Proof%20Brief%20for%20State%20Petitioners_FM.pdf.

385. *Id.*

386. *See infra* text accompanying notes 387–391.

"extraordinary case" where the MQD applies.[387] This vagueness is because the Court is still figuring out for itself what constitutes an extraordinary case of economic or political significance, especially in the context of the EPA.[388] With no clear test or standards, the MQD has been a nightmare for lower courts to apply,[389] and the D.C. Circuit has just opted to apply *Chevron* deference; this delegitimizes the MQD, as the unworkability of the doctrine creates inconsistencies in its application and disempowers and delegitimizes the few "extraordinary cases" in which the MQD applies.[390] For example, the Tenth Circuit applied the MQD to invalidate a Department of Interior regulation under the Indian Gaming Regulatory Act concerning the process by which Native American tribes and states negotiate compacts to allow gaming on tribal lands.[391] The MQD was not intended to apply to such narrow and niche rules and this lower court's application underscores the unworkability of the canon.

Finally, applying the MQD instead of undertaking a keystone principle of administrative law—statutory interpretation—creates negative policy implications that will erode the legitimacy of the Court.[392] Specifically, the Supreme Court's decision facilitates deregulation that rewards fossil-fuel-fired-power-plant laggards that are nearly the worst contributors to climate change, accounting for almost a quarter of this country's GHG emissions, and effectively punishes power companies who have invested time and money in alternative technologies to diminish GHG emissions.[393] This decision is a significant step backwards that disenfranchises the judiciary, as it demonstrates the Justices are out of touch and antiquated, and confirms the

387. West Virginia v. EPA, 142 S. Ct. 2587, 2608, 2610 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)) (highlighting, but not explaining "extraordinary cases").

388. *Compare* Massachusetts v. EPA, 549 U.S. 497, 512 (2007) (holding that the EPA must regulate GHGs for the entire motor vehicle industry and declining to deploy the MQD), EPA v. EME Homer City Generation, 572 U.S. 489, 524 (2014) (holding that the EPA can regulate emissions from upwind states and declining to adopt the lower court's suggestion that the MQD applies) *and* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011) (noting that the EPA can regulate carbon dioxide emissions for all fossil-fuel fired plants), *with West Virginia*, 142 S. Ct. at 2610 (holding that the EPA cannot use generation-shifting to regulate under Section 111 because it is a major questions case that requires clear congressional authorization).

389. Midship Pipeline Co. v. Fed. Energy Regul. Comm'n, 45 F.4th 867, 874–75 (5th Cir. 2022) (attempting to apply the MQD); Georgia v. President of the U.S., 46 F.4th 1283, 1295–96 (11th Cir. 2022) (same); Kentucky v. Biden, 23 F.4th 585, 607 (6th Cir. 2022) (same); New Mexico v. Dep't of Interior, 854 F.3d 1207, 1224–26 (10th Cir. 2017) (same).

390. *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359, 364–65 (D.C. Cir. 2022) (rejecting the MQD and applying *Chevron*, signaling that the D.C. Circuit disfavors the MQD).

391. *New Mexico*, 854 F.3d at 1224–26.

392. *See infra* text accompanying notes 393–396.

393. *See Sources of Greenhouse Gas Emissions*, *supra* note 36 (explaining that coal and natural gas power plants are primarily responsible for twenty-five percent of GHG emissions).

fear of the public at large: that the Court is a purely political vessel.[394] Justice Kagan has acknowledged this, noting that judges create legitimacy concerns "when they don't do things that are recognizably law and when they instead stray into places [that] are an extension of the political process or where they are imposing their own personal preferences."[395] Thus, in applying the MQD in lieu of statutory interpretation, the majority burdens the judicial branch and undermines its own legitimacy.[396]

CONCLUSION

In *West Virginia v. EPA*, the Supreme Court of the United States held that the EPA acted impermissibly under Section 111(d) of the CAA in promulgating the CPP because the MQD requires that Congress speak clearly in "extraordinary cases" of "economic and political significance."[397] The Court's holding was incorrect because the Court improperly used the MQD to invalidate generation-shifting which is not a major economic question.[398] Further, the Court misapplied the MQD framework by ignoring the statutory scheme, subsequent legislation, and resulting state burdens.[399] Finally, the Court embraced the MQD in lieu of statutory interpretation—the linchpin of administrative law—and failed to acknowledge the negative policy implications that will arise, namely, a degradation of democratic principles and an increased burden on administrative agencies, Congress, and the judiciary.[400] The Court's decision has grave implications for the future of the administrative state and threatens to disempower and uproot this country's system of federal government.[401]

394. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 27 (2021).

395. Debra Cassens Weiss, *After Roberts Defends SCOTUS, Kagan Warns of Judges Creating 'Legitimacy Problems for Themselves'*, AM. BAR ASS'N J. (Sept. 14, 2022, 2:19 PM), https://www.abajournal.com/news/article/after-roberts-defends-scotus-kagan-warns-of-judges-creating-legitimacy-problems-for-themselves.

396. *Id.*

397. *West Virginia*, 142 S. Ct. at 2608, 2610 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

398. *See supra* Section IV.C.1.

399. *See supra* Section IV.C.2.

400. *See supra* Section IV.C.3.

401. *See supra* Section IV.C.3.