

ARTICLES

# WEST VIRGINIA, THE INFLATION REDUCTION ACT, AND THE FUTURE OF CLIMATE POLICY

© by David D. Doniger

*David D. Doniger is a Senior Attorney and Senior Strategic Director for the Natural Resources Defense Council's Climate and Clean Energy Program.*

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## SUMMARY

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In June 2022, in *West Virginia v. Environmental Protection Agency*, the U.S. Supreme Court announced that on “major questions” the U.S. Congress must legislate with far more clarity and specificity than previously demanded. The Court held the U.S. Environmental Protection Agency (EPA) may regulate power plant carbon emissions in traditional ways, but the novel approach taken in the Clean Power Plan required clearer authorization than Congress had provided. Six weeks later, Congress enacted the Inflation Reduction Act (IRA). Designed in anticipation of the Court’s new demands, the IRA amends the Clean Air Act to provide a clear and contemporary statement that greenhouse gases are air pollutants and to direct EPA to issue new standards; and it provides large financial incentives to defray the cost of new regulations for power companies and their customers. In May 2023, EPA proposed new standards informed by both *West Virginia* and the IRA. This Article surveys the evolution of judicial review standards leading up to *West Virginia* and critically analyzes that decision; explains how the IRA rejuvenates the regulatory path for EPA to act on climate change; and reviews EPA’s new proposed carbon pollution standards for power plants.

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Two momentous events took place in summer 2022 with broad implications for the nation’s response to dangerous climate change. In June, in *West Virginia v. Environmental Protection Agency*,<sup>1</sup> the U.S. Supreme Court formalized the “major questions” doctrine and used it to invalidate the Clean Power Plan,<sup>2</sup> a novel approach

the U.S. Environmental Protection Agency (EPA) had taken under the Clean Air Act<sup>3</sup> to reduce carbon dioxide (CO<sub>2</sub>) emissions from existing power plants, the nation’s second-largest source of climate-changing air pollution. In August, the U.S. Congress passed and President Joseph Biden signed the Inflation Reduction Act (IRA),<sup>4</sup> which among other things provides large tax credits and grants for cleaner power generation, and a renewed mandate for EPA to regulate power plant carbon pollution under the Clean Air Act.

Nearly a year later, EPA has proposed new carbon standards for power plants that respond to both the Court and Congress.<sup>5</sup> This Article examines how *West Virginia* and the IRA affect EPA’s authority to meet the challenge of cli-

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*Author’s Note: I argued Chevron v. Natural Resources Defense Council, and have represented NRDC or other clients in all of the climate change cases referenced in this Article, as well as the ongoing U.S. Environmental Protection Agency rulemaking on power plant carbon emissions. Thanks to Sean Donahue, Jay Duffy, Ian Fein, David Hawkins, Olivia Keck, Amanda Levin, Ben Longstreth, and Lissa Lynch for exceptionally helpful comments, ideas, and assistance.*

1. 142 S. Ct. 2587, 52 ELR 20077 (2022).
2. U.S. Environmental Protection Agency (EPA), Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64662 (Oct. 23, 2015) [hereinafter Clean Power Plan].

3. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.
4. Pub. L. No. 117-169, 136 Stat. 1818 (2022).
5. U.S. EPA, New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule. 88 Fed. Reg. 33240 (May 23, 2023).

mate change, and how EPA has proposed to move forward on power plants.

The Clean Air Act is one of the most important public health and environmental laws that Congress enacted as public concern boiled up in the 1960s and 1970s over long-neglected pollution threats. That law was not limited to clearing the backlog of simmering air pollution problems. It was also intended to arm EPA with the tools necessary to address new pollution problems as they arose. For the past 50 years, while policing agency excesses, courts for the most part have respected this basic congressional decision to enlist executive branch agencies in addressing new problems.

In *West Virginia*, however, the Supreme Court took a different turn, announcing that in “extraordinary” cases involving “major questions,” it will be skeptical of novel and “transformative” interpretations of existing statutes and will require agencies to point to “clear congressional authorization.”<sup>6</sup> The Court’s criteria for determining what is a “major question,” which interpretations are “transformative,” and whether existing authority is clear enough are thus far ill-defined and subjective. *West Virginia* and other recent cases provide a few data points, but far less than is needed to stably guide lower courts, agencies, and Congress itself.

In the case at hand, interpreting §111 of the Clean Air Act, the Court held that the novel approach EPA took in the 2015 Clean Power Plan required a clearer authorization than it found Congress had provided. At the same time, the Court acknowledged that EPA may indeed regulate power plant carbon emissions under §111 in “traditional” ways.

Although the decision’s effect on EPA’s authority over power plant carbon pollution may be limited, the major questions doctrine has broad and ominous implications for the federal government’s capacity to meet the many complex challenges of our modern economy and society. Apart from two anomalous decisions in the 1930s, the Court has long recognized that Congress must be able to engage the expertise and capacity of administrative agencies in order to govern in a timely and effective way.

The major questions doctrine now threatens to stymie effective and timely agency actions to address emerging problems unless and until Congress has legislated again. While the Court’s conservative majority professes to be reinforcing congressional authority, it is well aware that the legislative process is slow even in productive times, let alone in today’s partisan gridlock. As a result, the real effects of the new doctrine are to make judges the principal arbiters of whether our government can meet big new challenges, and often to shield polluters and other malefactors from effective restraint unless and until Congress can pass sufficiently specific new laws.

In this instance, Congress enacted the IRA just six weeks after the *West Virginia* decision. This should not be mistaken as a sign of a new congressional quick response

capability. The IRA was an exception, enacted using the reconciliation process that allows one budgetary bill per year to pass the U.S. Senate on a simple majority rather than 60 votes. And it was more than 18 months in the making, with several near-death experiences.

Nonetheless, the IRA was designed in anticipation of the limits on EPA’s authority that the Supreme Court imposed. It provides a clear statement from the 2022 Congress that greenhouse gases are air pollutants, and that EPA should regulate power plant carbon pollution again under the existing Clean Air Act. And it provides large financial incentives for technology consistent with the “traditional” approach recognized by the Court in *West Virginia* that will defray the cost of new regulations for power companies and their customers.

EPA has now issued a new proposal designed to follow the dictates of both *West Virginia* and the IRA. The Agency has proposed standards on the “traditional” model that the Court accepted and the IRA reinforced. The proposed standards are based on pollution control technologies applied to individual plants, with long leadtimes and supported by the IRA’s generous incentives.

Part I of this Article briefly surveys the evolution of judicial review standards leading up to *West Virginia*, with special attention to the string of Supreme Court cases on EPA’s authority to regulate carbon pollution, which have played an outsized role in that evolution. Part II then analyzes the *West Virginia* decision, showing how the Court, in its rush to unveil the major questions doctrine, contorted the statutory and regulatory history and overlooked more straightforward paths to its end result. This discussion emphasizes not only what the Court blocked, but also the pathway the Court left open.

Part III explains how Congress, in enacting the IRA, rejuvenated and strengthened that pathway for EPA regulatory action on climate change. Part IV assesses EPA’s proposed new standards for power plants. Part V offer some conclusions.

## I. Judicial Review and Agency Discretion Before *West Virginia*

For almost 40 years, *Chevron U.S.A. v. Natural Resources Defense Council*<sup>7</sup> provided the dominant framework for judicial interpretation of statutes that task federal agencies with regulatory duties. The Court’s 2022 decision in *West Virginia* substantially changed the *Chevron* framework for a class of “extraordinary” cases deemed to pose “major questions.”<sup>8</sup> The Court also has taken a case for next term to consider whether to “overrule” or “clarify” *Chevron* for ordinary cases.<sup>9</sup> This section traces the rise of *Chevron* and the path toward *West Virginia*.

7. 467 U.S. 837, 14 ELR 20507 (1984).

8. See *infra* Part II.

9. *Loper Bright Enters. v. Raimondo*, No. 22-451, *cert. granted* (U.S. May 1, 2023).

6. *West Virginia*, 142 S. Ct. at 2614.

## A. *The Coming of Chevron*

As Prof. Thomas Merrill puts it in his 2022 book, *The Chevron Doctrine*:

Congress and the President . . . are severely constrained in their capacity to resolve even a fraction of the contested policy issues that arise. This is especially true in today's world, with its rapid rate of technological, economic, and social change. Out of necessity, Congress and the President, acting through the legislative process, have created administrative agencies to address many of these issues.<sup>10</sup>

When Congress “provides highly precise answers to questions of public policy,” a court's job is to respect and enforce those decisions. But if Congress is unable to decide all policy questions itself, Merrill asks what is the “second best” solution. His answer, with which I agree: “[I]f we want interpretations that involve discretionary interpretive choice to be made by the relatively more accountable decision maker, and the relevant choice is between an agency and a court, the agency wins hands down.”<sup>11</sup>

The premise that Congress can engage agencies in policymaking subject to high-level legislative criteria has guided law-writing at least since the New Deal. Apart from its two decisions striking down New Deal legislation in 1937, the Court has consistently approved statutes that delegate significant authority to agencies under guidelines as terse as acting “in the public interest,” or “as appropriate and necessary.”

The Clean Air Act, enacted in 1970 with major amendments in 1977 and 1990, is a key example of such legislation and has generated more than its fair share of the cases discussed in this Article. The Clean Air Act provides legislative guidance to EPA at a far more detailed level than a simple directive to act in the public interest, but still leaves many questions—some involving mixed questions of science, technology, economics, and policy—for EPA to resolve pursuant to the legislative guidance Congress provided.

This was by design as well as necessity. Congress could have limited itself to addressing the five air pollutants and the handful of industries that were front-and-center in 1970. But the Clean Air Act did more than that. Congress adopted programs tailored to address several different classes of air pollutants—those causing ubiquitous smog in urban areas (§110), those causing localized threats of cancer and other especially serious illnesses (§112), and those that endanger health and the environment in other ways (§111).<sup>12</sup>

Congress knew that science would identify new hazards, and therefore tasked EPA to review and update initial standards periodically and to cover new pollutants when their dangers became apparent. Congress also knew that air pol-

lutants came from a wide variety of industries with an even wider variety of potential emission control measures, and therefore tasked EPA to determine and periodically update standards that fit the circumstances of different industries.

On occasion, Congress itself was able to prescribe standards, most notably by requiring a 90% reduction in three automobile tailpipe pollutants in the 1970 Act.<sup>13</sup> But for most other industries, Congress specified the relevant factors (e.g., standards for industrial sources must reflect the best system of emission reduction (BSER) that is adequately demonstrated considering costs) and assigned the elaboration of standards to EPA's expertise, subject to public comment and judicial review.

Supreme Court decisions dating back to the New Deal have long accepted that courts should give a measure of respect and deference to agency decisions.<sup>14</sup> To be sure, while courts listened respectfully to agency views on the meaning of a statute, judges rightly viewed it as their role to decide pure questions of law. Courts gave agencies considerable leeway on questions involving a mixture of expertise and policymaking, while finding agency judgments arbitrary and capricious when developed without addressing relevant factors or without responding to public comment, or when patently illogical or unsupported by the record.<sup>15</sup>

The Court iconically restated these principles in 1984 in *Chevron U.S.A. v. Natural Resources Defense Council*,<sup>16</sup> a case reviewing a Reagan-era deregulatory decision under the Clean Air Act. As stated in Justice John Paul Stevens' opinion, when a court determines, using “traditional tools of statutory construction,” that Congress has “spoken to the precise question at issue” and “the intent of Congress is clear,” “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” But when a statute “is silent or ambiguous with respect to the specific issue,” Congress has implicitly delegated resolution of the question to the agency, and the court should uphold the agency's choice if it is a “permissible” or “reasonable” interpretation of the statute.

My own relationship to *Chevron* is complicated. As the Natural Resources Defense Council (NRDC) lawyer who argued—and lost—the case, I have always felt that Justice Stevens reached the wrong decision on the specific

13. Pub. L. No. 91-604, §6(a), adopting §202(a)(1)(A) & (B), 84 Stat. 1690 (1970) (amended 1977 & 1990, current version at 42 U.S.C. §7521).

14. *See, e.g.*, *Gray v. Powell*, 314 U.S. 402, 411-12 (1941) (Where Congress had left a matter to an administrative body, it was only for the Court to determine whether it “appl[ie]d the statute in a just and reasoned manner.” The Court recognized the “usual administrative routine. Congress, which could have legislated specifically. . . found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests . . .”); *National Lab. Rels. Bd. v. Hearst Publ'ns*, 322 U.S. 111, 131 (1944) (while statutory questions are the province of the Court, it must give appropriate weight to the administering agency and “where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited”); *see also* Cass Sunstein, *Chevron as Law*, 107 *Geo. L.J.* 1613, 1649 n.185 (2019) (listing additional examples).

15. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 13 *ELR* 20672 (1983).

16. 467 U.S. 837, 14 *ELR* 20507 (1984).

10. THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* 25 (2022).

11. *Id.* at 25, 26.

12. *Id.* §§7410-7412.

statutory question at issue in the first application of his two-step test. In my view, using the “traditional tools of statutory construction,” the Court should have found that the Clean Air Act provisions there at issue—the definition of “stationary source” and the scope of a newly enacted permit program—were unambiguous at Step 1. Instead, the Court found the statute ambiguous and deferred to the deregulatory-minded Reagan EPA’s redefinition of “stationary source” in a way that virtually negated the Act’s new permit program by reducing its scope by some 90%.<sup>17</sup>

Nevertheless, I consider *Chevron*’s two-part test a sound framework of neutral principles that judges should apply to resolve questions of an agency’s legal authority under statutes such as the Clean Air Act. That framework does not guarantee that the government will always receive deference. For example, while the Court deferred to EPA in *Chevron*, the Court ruled against EPA at Step 1 in its landmark climate change decision, *Massachusetts v. Environmental Protection Agency*, finding that CO<sub>2</sub> and other greenhouse gases emitted from cars and industries unambiguously meet the Act’s “capacious” definition of “air pollutant.”<sup>18</sup> In *Utility Air Regulatory Group v. Environmental Protection Agency*, Justice Antonin Scalia ruled against EPA at both Steps 1 and 2, finding that greenhouse gas emissions could not trigger certain Clean Air Act permitting requirements.<sup>19</sup>

The *Chevron* framework also does not guarantee that judges will agree on whether a statute is ambiguous or on whether an agency’s interpretation of ambiguous provisions is permissible. In *Massachusetts*, for example, Justice Stevens found that the definition of “air pollutant” unambiguously included greenhouse gases. But dissenting Justice Scalia argued fervently that the term was ambiguous, and that EPA’s decision to exclude greenhouse gases on policy grounds was permissible.<sup>20</sup> As another example, in *Environmental Protection Agency v. EME Homer City Generation*, Justice Ruth Bader Ginsburg found that EPA had reasonably interpreted ambiguous Clean Air Act provisions addressing interstate pollution and found a solution within

the range of options the law allowed.<sup>21</sup> Dissenting Justice Scalia thought that the statute unambiguously precluded EPA’s approach.<sup>22</sup>

As these examples show, the *Chevron* framework is not intrinsically biased for or against upholding agency decisions. It does, however, respect the intention of Congress in statutes like the Clean Air Act to solve the governance problem inherent in its own limited bandwidth and expertise. Congress cannot reasonably be expected to set the standards for each pollutant and each industry, and to keep those standards up-to-date as science, technology, and economic data progress. To be sure, courts must enforce the clear statutory limits or mandates that Congress has enacted; that is what Step 1 is for. But enforcing Congress’ will should also include respecting Congress’ decision to engage agencies in decisionmaking at levels the legislature cannot reasonably undertake itself, by applying legislative principles to concrete circumstances.

*Chevron*’s two-step formulation was long championed by Justice Scalia. He sometimes found statutes clear (leading to no deference at Step 1), and other times found them ambiguous (deferring at Step 2 when he thought the agency interpretation permissible). But he preferred the relative simplicity of the *Chevron* formulation to multifactor tests that he believed left too much room for judges to substitute their own policy preferences for an agency’s or Congress’, and that rendered legal outcomes unpredictable for affected parties.<sup>23</sup>

Many commentators, including Merrill, have questioned how well the *Chevron* test actually prevents that judicial substitution of judgment.<sup>24</sup> But, as Merrill affirms, the strength of the *Chevron* framework remains that it recognizes the necessity for Congress to engage agencies in making policy choices too numerous and detailed for Congress to handle by itself, guided by substantive legislative criteria.<sup>25</sup>

## B. Rising Conservative Dissatisfaction

As noted, the *Chevron* doctrine was born in review of a deregulatory action by the Reagan Administration, and the Reagan and two Bush Administrations frequently argued

17. The statute established a preconstruction review permitting process for all new “major stationary sources”—defined as “any building, structure, facility, or installation” that emits at least 100 tons per year—built in polluted areas. The project builder had to meet specific conditions, including (1) applying state-of-the-art pollution controls (the “lowest achievable emission rate”); (2) making extra emissions reductions in the same area that *more than offset* the new source’s emissions; and (3) demonstrating compliance by all facilities owned by the same company. EPA’s redefinition of “stationary source” let companies evade all three statutory conditions merely by making a *partial* emissions offset inside the same plant. Overall emissions were allowed to increase rather than required to decline. Although the ultimate vote in *Chevron* was 6-0 for EPA, the papers of Justice Harry Blackmun show that three Justices initially agreed with NRDC and favored reversing EPA. See Robert V. Percival, *Environmental Law in the Supreme Court: Highlights From the Blackmun Papers*, 35 ELR 10637 (Oct. 2005), available at <https://www.elr.info/articles/elr-articles/environmental-law-supreme-court-highlights-blackmun-papers>.

18. 549 U.S. 497, 529, 37 ELR 20075 (2007). See Clean Air Act §302(g) (“air pollutant” defined as “any physical [or] chemical . . . substance or matter which is emitted into or otherwise enters the ambient air”). *Massachusetts* is discussed further *infra* notes 35-42 and 185-88.

19. 573 U.S. 302, 44 ELR 20132 (2014), discussed further *infra* notes 43-52.

20. *Massachusetts*, 549 U.S. at 555-58.

21. 572 U.S. 489, 513-14, 44 ELR 20094 (2014).

22. *Id.* at 525.

23. See *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (“The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ ol’ ‘totality of the circumstances’ test.”).

24. MERRILL, *supra* note 10, at 100-19.

25. *Id.* at 272 (*Chevron* doctrine’s “greatest strength is its simplicity, and its recognition that, with respect to many, if not most, legal questions resolved by agencies and reviewed by courts, the agency is the preferred interpreter.”); *id.* at 275:

[T]he administrative state will continue to expand, given the complexity of modern society and the need for coordination of its many interacting parts. And given the limited capacity of Congress and the federal courts to resolve the multitude of issues that will arise, the legal system will inevitably be forced to draw upon legal interpretations advanced by administrative agencies in bringing some order to the administrative state.

for statutory ambiguity and judicial deference in support of regulatory rollbacks and refusals to regulate. Business and conservative interests initially saw *Chevron* deference as supporting their deregulatory agenda.

In contrast, the Clinton and Obama Administrations frequently cited *Chevron* in support of more assertive interpretations of health and environmental statutes to meet significant emerging pollution problems. It was in those years that business and conservative interests changed their tune, recasting *Chevron* as enabling too much agency discretion.<sup>26</sup>

Near the end of the Clinton Administration, conservatives on the Supreme Court began signaling disquiet with such discretion. The path away from *Chevron* was not straight, however. In the first two decades of this century, the Court alternated between straightforwardly adhering to *Chevron* and carving out exceptions within the *Chevron* framework for “extraordinary” cases. It was only after 2020, after President Trump’s three appointments, that “major questions” fully emerged as an independent doctrine, rather than a consideration to be applied within *Chevron* analysis, and that the Court stopped relying on *Chevron* even for ordinary cases. The following case discussion is not intended to be comprehensive, but to trace the arc of key decisions leading up to *West Virginia*, with special focus on Clean Air Act cases.

### 1. “Economic and Political Significance” as a (Sometimes) Factor in *Chevron* Analysis

At first, Supreme Court doubts about deference in high-stakes cases found their expression *inside* the *Chevron* framework. In 2000, in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, a five-member majority declined to accept the Food and Drug Administration’s (FDA’s) interpretation that nicotine was a “drug” and cigarettes were delivery “devices” under the Federal Food, Drug, and Cosmetic Act (FFDCA). Justice Sandra Day O’Connor’s opinion held at Step 1 that “Congress has directly spoken to the issue here and precluded the FDA’s jurisdiction to regulate tobacco products.”<sup>27</sup> Although the statutory words were broad and inclusive and made no express carve-out for tobacco, Justice O’Connor wrote that courts must consider the context of the entire statute (which required a total ban on drugs without therapeutic value); other tobacco-specific legislation (whose “collective premise . . . is that cigarettes . . . will continue to be sold in the United States”); and long-standing FDA representations to the congressional committees writing that legislation (that the FFDCA did not apply to tobacco).<sup>28</sup>

So far, this seems consistent with *Chevron*’s direction to use “traditional tools of statutory construction.” Justice

O’Connor’s final argument, however, opened the door for exceptions from ordinary *Chevron* analysis for actions that judges believe expand the reach of an agency’s legal authority with big economic and political consequences. Justice O’Connor wrote: “In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation,” adding, “we are 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.”<sup>29</sup>

The Court did not immediately or consistently make use of *Brown & Williamson*’s “extraordinary cases” exception. Writing for a unanimous Court a year later in *Whitman v. American Trucking Ass’n*,<sup>30</sup> Justice Scalia rejected industry pleas to bring economic considerations into §109(b)(1) of the Clean Air Act, which requires EPA to set primary national ambient air quality standards (NAAQS) at the level “requisite to protect the public health.”<sup>31</sup> Alleging enormous economic impacts from implementing these standards, the industry petitioners asked the Court to find that the statute required, or at least allowed, EPA to consider such costs.

Justice Scalia rejected this argument at *Chevron* Step 1. Congress had been deliberate in authorizing the consideration of costs in some provisions of the Act, but not others. The NAAQS provision spoke only of health risks. Against that background, Justice Scalia wrote, the industry had to show a “textual commitment of authority to consider costs” in this specific provision; and given the NAAQS’ central role, “that textual commitment must be a clear one.”<sup>32</sup> Citing *Brown & Williamson*, Justice Scalia wrote that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”<sup>33</sup> Justice Scalia concluded: “The text of §109(b), interpreted in its statutory and historical context and with appreciation for its importance to the Clean Air Act as a whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA.”<sup>34</sup>

The Court declined another opportunity to pass through the *Brown & Williamson* door in its landmark 2007 climate change case, *Massachusetts v. Environmental Protection Agency*.<sup>35</sup> Over the objections of the Bush Administration, a five-member majority held that the

29. *Id.* at 159-60.

30. 531 U.S. 457 (2001).

31. 42 U.S.C. §7409(b)(1).

32. *Whitman*, 531 U.S. at 466-68.

33. *Id.* at 468.

34. *Id.* at 471. Two further points about *Whitman*: Not “hid[ing] elephants in mouseholes” was the reason to *reject* the industry argument for a special rule overriding ordinary *Chevron* analysis based on alleged economic consequences. Ironically, Justice Roberts later repurposed Justice Scalia’s phrase in *West Virginia* to exactly the opposite effect. *West Virginia v. Environmental Prot. Agency*, 142 S. Ct. 2587, 2622, 52 ELR 20077 (2022). *See infra* note 123. Additionally, *Whitman* notably rejected a nondelegation challenge, with only Justice Clarence Thomas expressing concern in a concurrence. *See infra* note 73.

35. 549 U.S. 497, 37 ELR 20075 (2007).

26. *See* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475 (2022) (charting the correspondence of views on *Chevron* with political affiliation and support for or opposition to regulation).

27. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

28. *Id.* at 133, 139, 143-56.

Clean Air Act authorizes EPA to regulate greenhouse gas emissions. Justice Stevens wrote that greenhouse gas emissions “unambiguous[ly]” met the 1970 Act’s “capacious” statutory definition of “air pollutants”—“any physical [or] chemical . . . substance or matter which is emitted into or otherwise enters the ambient air.”<sup>36</sup> The enacting Congresses understood “that without regulatory flexibility, changing circumstances, and scientific developments would soon render the Clean Air Act obsolete. The broad language . . . reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.” Broad language, he wrote, “does not demonstrate ambiguity. It demonstrates breadth.”<sup>37</sup>

Justice Stevens rebuffed the Bush EPA’s effort to invoke *Brown & Williamson*. The failure of a 1990 amendment to *mandate* regulation of vehicles’ CO<sub>2</sub> emissions “tells us nothing” about EPA’s preexisting *authority* to regulate those emissions under the 1970 Act.<sup>38</sup> Further, the Clean Air Act does not pose the stark choice before FDA; while that agency would have had to *ban* tobacco if the FFDCA applied, the Clean Air Act remedy was less drastic, requiring EPA only to set technologically and economically feasible standards to *reduce* new vehicle emissions.

Moreover, Justice Stevens found that none of the subsequently enacted statutes calling for climate research and coordination implied the absence of EPA regulatory authority—unlike the “unbroken series of congressional enactments [regarding tobacco] that made sense” only if Congress understood that the FFDCA did not apply.<sup>39</sup> And Justice Stevens rejected the argument that Congress had precluded EPA authority over emissions by giving the U.S. Department of Transportation authority over fuel economy, noting that overlapping statutory authority is common and that the agencies could coordinate their actions.<sup>40</sup>

Justice Scalia’s dissent also stayed squarely within the *Chevron* framework. He would have found ambiguity in various statutory terms, including “air pollutant” and “ambient air,” and he would have deferred at Step 2 to EPA’s denying or delaying regulation.<sup>41</sup> There is no mention of *Brown & Williamson* and no sign of the major questions doctrine in Justice Scalia’s dissent. In fact, his conclusion tended the other way:

This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.<sup>42</sup>

36. *Id.* at 529, 532.

37. *Id.* at 532.

38. *Id.* at 529-30.

39. *Id.* at 531.

40. *Id.* at 531-32.

41. *Id.* at 555-60.

42. *Id.* at 560.

Though *Whitman* and *Massachusetts* did not go there, the Court returned to the *Brown & Williamson* exception for “extraordinary” cases in 2014 in *Utility Air Regulatory Group v. Environmental Protection Agency*,<sup>43</sup> another Clean Air Act climate case. Writing for a five-Justice majority, Justice Scalia held, with a mixture of Step 1 and Step 2 reasoning, that greenhouse gases emissions do not trigger two statutory provisions that require industrial sources to obtain construction or operating permits.<sup>44</sup> Enacted in the 1977 and 1990 Amendments, those permit requirements apply to stationary sources emitting “any air pollutant” in specified amounts (100 or 250 tons per year, depending on the provision and the source category). For the pollutants already regulated when the 1977 amendments were written (e.g., sulfur dioxide), these amounts worked well to focus the permit requirements on only a few thousand large industrial sources (e.g., power plants, smelters, and refineries) that could readily absorb the permitting costs.

EPA reluctantly took the position that those permit provisions were also triggered by emissions of CO<sub>2</sub> and other greenhouse gases once the Agency had regulated vehicle emissions of those pollutants pursuant to *Massachusetts*.<sup>45</sup> The Agency correctly noted that sources emit CO<sub>2</sub> in much larger amounts than the earlier-regulated pollutants. That meant that applying the 100/250 ton thresholds to CO<sub>2</sub> would have swept millions of smaller sources into the permit programs, a result EPA acknowledged was not Congress’ intent.

EPA, however, felt unable to completely exclude greenhouse gases from triggering permitting obligations since those statutory provisions applied to “any air pollutant.” EPA attempted to resolve the dilemma by issuing a “tailoring rule” changing the threshold for CO<sub>2</sub> from 100/250 tons to 75,000 tons. This would have limited the permitting provisions to covering the same class of large sources already covered for other pollutants.<sup>46</sup>

Justice Scalia held at Step 1 that the statutory threshold numbers were specific and unambiguous, and that the statute gave EPA no authority to change them.<sup>47</sup> Instead, he found ambiguity in the term “air pollutant.” Without challenging the holding of *Massachusetts*, Justice Scalia wrote that the presumption in favor of giving terms the same meaning across a statute “readily yields” to context,<sup>48</sup> and required EPA to define “air pollutant” more narrowly in circumstances where using *Massachusetts*’ broad definition produced “an enormous and transformative expansion in

43. 573 U.S. 302, 44 ELR 20132 (2014).

44. These permit provisions, in the prevention of significant deterioration and operating permits provisions of the Act, are distinct from the ones at issue in *Chevron*.

45. Notably, the automakers did not challenge those vehicle emission standards, but other parties did. The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit rejected those challenges. *Coalition for Responsible Regul. v. Environmental Prot. Agency*, 684 F.3d 102, 126-27, 42 ELR 20141 (D.C. Cir. 2012). The Supreme Court granted certiorari only on the permit applicability issue.

46. *Utility Air Regul. Grp.*, 573 U.S. at 312-13, 321-22.

47. *Id.* at 325-26.

48. *Id.* at 320 (quoting *Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 574, 37 ELR 20076 (2007)).

EPA’s regulatory authority”—especially one that EPA conceded Congress did not intend. Justice Scalia thus found it unreasonable at Step 2 for EPA to include greenhouse gases as “air pollutants” for the purpose of triggering the two permit programs.<sup>49</sup>

Referencing *Brown & Williamson*, Justice Scalia then penned two sentences that the Court now regularly invokes in major question cases that cast *Chevron* aside:

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.”<sup>50</sup>

But Justice Scalia was not aiming to supplant *Chevron*. Like Justice O’Connor, he lodged his concerns squarely within the *Chevron* framework, in this case rejecting one agency contention at Step 1 and another at Step 2. And in the same decision, Justice Scalia upheld at Step 2 the reasonableness of including greenhouse gases in the second phase of construction permitting—where the large sources that already need such permits by virtue of their other emissions must adopt the “best available control technology” (BACT) for “each pollutant subject to regulation.” There, he found it reasonable to require sources that already must adopt BACT for other pollutants to do the same for CO<sub>2</sub>. That, he wrote, did not bring any additional, smaller sources into the permitting process and did not produce any unexpected economic or administrative consequences.<sup>51</sup>

The harshness of Justice Scalia’s two-sentence reprimand in *Utility Air Regulatory Group* thus may well have been calibrated to the peculiar and extreme circumstances of that case—where EPA interpreted the statute in a way that the Agency expressly acknowledged went far beyond what Congress intended. Yet, his two sentences are now routinely invoked to turn far less extraordinary agency constructions into “major questions.”<sup>52</sup>

49. *Id.* at 320, 324.

50. *Id.* at 324.

51. *Id.* at 331–34. See Lyle Denniston, *Opinion Analysis: EPA Mostly Wins, but With Criticism*, SCOTUSblog (June 23, 2014), <https://www.scotusblog.com/2014/06/opinion-analysis-epa-mostly-wins-but-with-criticism/> (Justice Scalia “said from the bench that the Court was leaving the agency with authority to cut back on such pollution at eighty-three percent of the sources across the country, while denying it authority over an additional three percent. ‘EPA is getting almost everything it wanted in this case,’ he commented.”).

52. The same thing has happened with another Justice Scalia decision, *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), in which he ruled that the power to “modify” tariff-filing requirements for telecom companies did not permit the Federal Communications Commission to exempt companies from those requirements entirely. Justice Scalia rejected the argument that the modification authority allowed the Commission “to make even basic and fundamental changes” in the statutory scheme. *Id.* at 225.

The Court’s current majority has characterized *MCI* as a forerunner of its major questions doctrine. See, e.g., *West Virginia v. Environmental Prot. Agency*, 142 S. Ct. 2587, 2609, 52 ELR 20077 (2022), discussed further *infra* note 122. But *MCI* seems far more modest—a straightforward

## 2. Stepping Outside *Chevron*

In *King v. Burwell*,<sup>53</sup> the Court took a big step toward turning the “extraordinary cases” exemption into a free-standing doctrine rather than merely a consideration in applying *Chevron*. Writing for a six-member majority, Chief Justice John Roberts upheld the availability of the Affordable Care Act’s tax credits to persons who purchased health insurance policies on federal insurance exchanges. The statute encouraged each state to set up its own exchange, and it directed the federal government to establish a federal exchange if a state did not create its own. But in a drafting quirk, the tax credit provisions referred only to state exchanges. This led opponents of the health care law to argue that insurance subsidies could not be given to customers buying policies on a federal exchange—which they openly hoped would cause the entire statute to collapse.

The government defended the availability of tax credits on federal exchanges at both *Chevron* steps. At Step 1, it contended that read as a whole the statute allowed only one interpretation. At Step 2, it contended that to the extent the statute was ambiguous, the government’s interpretation was permissible. The U.S. Court of Appeals for the Fourth Circuit had deferred to the government’s position at Step 2. In contrast, in another case, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit had ruled at Step 1 that the statute unambiguously barred extending tax credits to customers on the federal exchanges.

Justice Roberts addressed the Step 2 argument first. *Chevron* deference was not due, he wrote, for two reasons. First, the issue’s financial magnitude—the tax credits “involv[e] billions of dollars in spending each year and affect[ ] the price of health insurance for millions of people”—made it “a question of deep ‘economic and political significance’ that is central to this statutory scheme.” Second, Justice Roberts gave the Internal Revenue Service (IRS) (which administered the tax credit provisions) no deference because he deemed it to have no health care policy expertise.<sup>54</sup>

Nonetheless, reviewing the whole statute’s interlocking provisions, Justice Roberts agreed that the tax credit provisions could be read only one way: to include both federal and state exchanges. Citing *Brown & Williamson*, he emphasized that the disputed statutory words must be read “in their context and with a view to their place in the overall statutory scheme.” The health insurance system Congress intended to create would fall apart if tax credits were not available through federal exchanges. “A fair reading of legislation demands a fair understanding of the legislative plan,” Justice Roberts wrote. “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the

application of *Chevron* holding that a limited power to *adjust* a statutory requirement cannot be read, either at Step 1 or 2, as a broad deregulatory authority to *waive* that requirement altogether.

53. 576 U.S. 473 (2015).

54. *Id.* at 485–86.

Act in a way that is consistent with the former, and avoids the latter.”<sup>55</sup>

*Burwell* is often cited as creating a Step Zero preceding the normal *Chevron* inquiry.<sup>56</sup> What is striking is that Justice Roberts could have framed his analysis as a conventional *Chevron* Step 1 inquiry. Although he characterized the statutory *text* as “ambiguous,” he concluded that the Affordable Care Act could be given only one meaning when read as a whole and considering its structure and purpose. Thus, applying all the “traditional tools of statutory construction” per *Chevron*, which encompass statutory context and purposes as well as the bare text itself, Justice Roberts could have found the statute *unambiguous* at Step 1. There would then have been no occasion to address the government’s Step 2 arguments and to articulate an exception from the normal Step 2 inquiry—that deference to agency interpretations of ambiguous language is not due for “extraordinary cases” raising issues of “vast economic or political significance” on which the administering agency lacks relevant expertise.

Since the government won in *King v. Burwell*, the implications of Justice Roberts’ “extraordinary cases” doctrine were somewhat masked. Those implications have become clearer in subsequent cases that the government has lost.

### 3. From “Extraordinary” to More Commonplace

In the past several years, the Court’s newly conservative majority has taken its special rule for high-stakes cases from an “extraordinary” exception from *Chevron* to a much more frequent mode of analysis. The Court’s new approach grew to full flower in the COVID cases on the Court’s shadow docket in 2021 and 2022 even before officially receiving the “major questions doctrine” nameplate in *West Virginia*.

As with many recent developments, the doctrine’s emergence is traceable to the Court’s changing makeup. Two justices appointed by President Trump came to the Court expressing strong views on *Chevron*, separation of powers, and the administrative state. As a U.S. Court of Appeals for the Tenth Circuit judge, Justice Neil Gorsuch (ironically, son of the EPA Administrator whose legal interpretation earned deference in *Chevron* itself) had argued that Step 2 deference violates separation-of-powers principles. He contended that judges should decide the “best reading” of laws, informed by but not deferring to agency views.<sup>57</sup> Justice Gorsuch recently repeated his concerns with *Chevron* in a dissent from a denial of certiorari.<sup>58</sup>

As a D.C. Circuit judge, Justice Brett Kavanaugh had advocated replacing *Chevron*’s two-step framework with

a “best reading” approach,<sup>59</sup> and he championed what he called the “major rules” doctrine: “If an agency wants to exercise expansive regulatory authority over some major social or economic policy . . . an *ambiguous* grant of statutory authority is not enough.”<sup>60</sup> Justice Kavanaugh had also signaled his view that “climate change” regulations presumptively fell into this basket.<sup>61</sup>

Other conservative justices have expressed hostility to *Chevron*. Justice Anthony Kennedy, just before retiring, stated concern with how “reflexive[ly]” *Chevron* deference was being applied in some lower court cases and suggested that the decision’s “premises” and “how courts have implemented” it should be reconsidered.<sup>62</sup> Justice Clarence Thomas, who had previously upheld agency action under *Chevron*,<sup>63</sup> came to view Step 2 deference as countenancing “potentially unconstitutional delegations.”<sup>64</sup>

Some *Chevron* antagonists suggest that before his death Justice Scalia may have been reconsidering his support for *Chevron*, based on his opposition to allowing agencies the same leeway in interpreting their own regulations (so-called *Auer* deference<sup>65</sup>); this, however, has the feeling of hopeful speculation.<sup>66</sup> As has been widely observed, the Court has simply stopped using *Chevron* in recent years, even for Step 1 determinations in “ordinary” cases.<sup>67</sup> And as noted earlier, the Court will consider next term whether to “overrule” or “clarify” *Chevron*; the question presented leaves room for a sweeping or narrow ruling.<sup>68</sup>

Five current members of the Court have also signaled renewed interest in the nondelegation doctrine,<sup>69</sup> not-

55. *Id.* at 498.

56. See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron*’s *Domain*, 89 GEO. L.J. 833, 836 (2001).

57. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring) (“Of course, courts could and would consult agency views and apply the agency’s interpretation when it accords with the best reading of a statute.”).

58. *Buffington v. McDonough*, 143 S. Ct. 14 (2022) (Gorsuch, J., dissenting from denial of certiorari).

59. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016).

60. U.S. Telecom Ass’n v. Federal Comm’n Comm’n, 855 F.3d 381, 421 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

61. *Mexichem Fluor, Inc. v. Environmental Prot. Agency*, 866 F.3d 451, 460-61, 47 ELR 20097 (D.C. Cir. 2017) (referencing *Utility Air Regulatory Group* and stating that neither “EPA’s well-intentioned policy objectives with respect to climate change” nor “Congress’s failure to enact general climate change legislation” authorizes EPA to act).

62. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring).

63. *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

64. *Michigan v. Environmental Prot. Agency*, 576 U.S. 743, 762, 45 ELR 20124 (2015) (Thomas, J., concurring).

65. *Auer v. Robbins*, 519 U.S. 452 (1997).

66. See, e.g., Federalist Society, *Chevron: Scalia’s Evolution*, YOUTUBE (May 6, 2020), <https://www.youtube.com/watch?v=i3ZA3XRJ0rU> (speculating from Justice Scalia’s concurrence in *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 45 ELR 20050 (2015)).

67. See, e.g., *American Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896 (2022).

68. *Loper Bright Enters. v. Raimondo*, No. 22-451, cert. granted (U.S. May 1, 2023). The question presented is: “Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.” Petition for Writ of Certiorari at i-ii, *Loper*, No. 22-451, [https://www.supremecourt.gov/DocketPDF/22/22-451/246256/20221110145441811\\_2022-11-10%20Loper%20Bright%20Cert%20Petition%20FINAL.pdf](https://www.supremecourt.gov/DocketPDF/22/22-451/246256/20221110145441811_2022-11-10%20Loper%20Bright%20Cert%20Petition%20FINAL.pdf). While totally overruling *Chevron* is possible, a decision clarifying the appropriate treatment of statutory silence could be of limited scope. See Jonathan H. Adler, *Has the Supreme Court Put Chevron in the Crosshairs?*, REASON (May 1, 2023), <https://reason.com/volokh/2023/05/01/has-the-supreme-court-put-chevron-in-the-crosshairs/>.

69. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment, Gorsuch, J., joined by Roberts, C.J., and Thomas, J.,



withstanding Justice Scalia's unanimous decision in 2001 dismissing such concerns in *Whitman v. American Trucking Ass'n*,<sup>70</sup> discussed earlier. In *Whitman*, in addition to excluding economic considerations from the setting of national ambient air quality standards, Justice Scalia found that the Clean Air Act's command to set standards "requisite to protect the public health with an adequate margin of safety"<sup>71</sup> easily satisfied the traditional "intelligible principle" test.<sup>72</sup>

At least for now, however, major questions, rather than nondelegation, has been the conservative justices' outlet. The new doctrine emerged in substance (but not yet in name) in two 2021 shadow-docket COVID cases. While those decisions purport simply to follow *Brown & Williamson, Utility Air Regulatory Group*, and *Burwell*, they substantially lowered the bar for detecting a major question and raised the bar for the legislative clarity that the Court will now require when it perceives one.

In a short per curiam opinion in *Alabama Ass'n of Realtors v. Department of Health & Human Services*, the 6-3 majority stayed a Centers for Disease Control and Prevention (CDC) moratorium on evictions in counties with high COVID levels under a 1944 statute authorizing regulations "necessary to prevent the introduction, transmission, or spread of communicable diseases." The majority found the eviction moratorium a matter of "vast economic and political significance" on which Congress must "speak clearly." The majority also demanded "exceedingly clear" language because the rule affected "an area that is the particular domain of state law" (landlord-tenant relations).<sup>73</sup> Measured against this heightened clarity yardstick, the majority found the moratorium "virtually certain" to exceed the CDC's authority.<sup>74</sup>

Six months later, in *National Federation of Independent Business v. Department of Labor*,<sup>75</sup> the six conservative justices stayed the Occupational Safety and Health Administration's (OSHA's) "vaccine or test" rule intended to reduce the spread of COVID in workplaces.<sup>76</sup> The per curiam opinion gives primacy to the now-familiar vast economic and political significance test. Requiring 84 million workers to get vaccinated or tested for COVID is no "everyday exercise of federal power" but a "significant encroachment into the lives—and health—of a vast number of employees."<sup>77</sup>

As for the text of the Occupational Safety and Health Act, the per curiam opinion dubiously distinguishes between "workplace safety standards" and "broad public

health measures," saying that COVID is not an "occupational" hazard because (in the majority's view) the risk of transmission in most workplaces was not greater than at other public gatherings. Asserting that "[t]hat kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases," the majority held it outside OSHA's jurisdiction.<sup>78</sup>

The per curiam opinion also broke new ground by citing *unsuccessful* legislation—a Congressional Review Act resolution that passed only the Senate—to cast doubt on OSHA's authority.<sup>79</sup> This runs counter to the usual rule that courts draw no conclusions from unsuccessful legislation,<sup>80</sup> and it contrasts with Justice O'Connor's reliance on *enacted* tobacco legislation in *Brown & Williamson*. And despite the unprecedented nature of the pandemic, the opinion counted it against OSHA that it had used a 50-year-old law and had not adopted a similar rule before.<sup>81</sup> We will see these arguments again in *West Virginia*.

The per curiam opinions in these two cases do not use the phrase "major questions doctrine." The term is found only in Justice Gorsuch's concurrence in the OSHA case,<sup>82</sup> echoing his dissent in *Gundy v. United States*.<sup>83</sup> Here, he makes a brief attempt to construct a noble pedigree for the doctrine, citing a string of cases going back to a 1980 case over OSHA's regulation of benzene.<sup>84</sup> Justice Gorsuch positions the major questions doctrine as a surrogate for nondelegation, ensuring that federal regulation of the "daily lives and liberties of millions of Americans" is traceable to "a clear grant of authority from Congress."<sup>85</sup> He gave no apparent weight to the impact of the disease itself on the lives and liberties of millions of Americans.

Justice Stephen Breyer's strong dissents in both cases are suffused with dismay that the majority gave such short shrift to the magnitude of the pandemic (then nearly a million lives already lost).<sup>86</sup> In Justice Breyer's view, the CDC's statute does indeed authorize an eviction moratorium, essentially as a lesser-included alternative to expressly authorized quarantine measures.<sup>87</sup>

In the OSHA case, Justice Breyer focused on the statutory text and the record evidence, unlike the majority. The

dissenting); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari).

70. 531 U.S. 457 (2001).

71. 42 U.S.C. §7409(b)(1).

72. *Whitman*, 531 U.S. at 474-76. Only Justice Thomas, concurring, expressed a nondelegation concern. *Id.* at 486-87.

73. *Alabama Ass'n of Realtors v. Department of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

74. *Id.* at 2486.

75. 142 S. Ct. 661 (2022).

76. OSHA, COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021).

77. *National Fed'n of Indep. Bus. (NFIB)*, 142 S. Ct. at 665 (quoting *In re MCP No. 165*, 20 F.4th 264, 272 (2021)).

78. *Id.* The majority did allow that OSHA could require vaccination or testing in types of workplaces where there is a "special danger" of transmission due to crowding, for example. *Id.* at 665-66. The same day, the Court upheld a vaccine requirement for health care workers in federally supported medical institutions. *Biden v. Missouri*, 142 S. Ct. 647 (2022).

79. *NFIB*, 142 S. Ct. at 666.

80. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020) ("speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt").

81. *NFIB*, 142 S. Ct. at 666.

82. *Id.* at 667.

83. 139 S. Ct. 2116, 2141 (2019).

84. *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 10 ELR 20489 (1980). We will see a more extended effort establish the doctrine's noble breeding from Chief Justice Roberts in *West Virginia*. See *infra* note 122.

85. *NFIB*, 142 S. Ct. at 668.

86. *Id.* at 670.

87. *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2491-92 (2021).

virus, he argued, squarely met the occupational health statute's terms: employees are exposed to "grave danger" from "substances or agents" that are "toxic or physically harmful" and COVID is a "new hazard." "The Court does not dispute that the statutory terms . . . read in the ordinary way, authorize this Standard," he wrote.<sup>88</sup> That a workplace hazard is also found outside the workplace also should not matter. "Nothing about [OSHA's] measure is so out-of-the-ordinary as to demand a judicially created exception from Congress's command that OSHA protect employees from grave workplace harms." The majority "substitutes judicial diktat for reasoned policymaking."<sup>89</sup>

The table was now set for *West Virginia*.

## II. West Virginia: The Major Questions Doctrine in Full Bloom

The major questions doctrine reached full bloom in June 2022 in *West Virginia v. Environmental Protection Agency*,<sup>90</sup> another Clean Air Act case concerning climate-changing pollution. Before analyzing this case, however, it is necessary to briefly summarize one more climate change case and the EPA power plant regulations under review in *West Virginia*.

### A. American Electric Power Co. v. Connecticut

As already noted, the Court ruled in *Massachusetts v. Environmental Protection Agency* that the Clean Air Act's "capacious" definition of air pollutants—"any physical [or] chemical . . . substance or matter which is emitted into or otherwise enters the ambient air"—includes greenhouse gases.<sup>91</sup> That case arose under the Act's motor vehicle provisions. The Court's next climate change case, *American Electric Power Co. v. Connecticut*,<sup>92</sup> confirmed EPA's authority also to regulate those emissions from power plants under §111 of the Clean Air Act, the provision later at issue in *West Virginia*.

A coalition of states had sued power companies under century-old federal common-law precedents recognizing a cause of action to enjoin interstate air pollution.<sup>93</sup> In an opinion by Justice Ginsburg, the Court unanimously<sup>94</sup> ruled that the enactment of §111 displaced federal common-law claims. Justice Ginsburg found that "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants."<sup>95</sup> Section 111 "speaks directly" to power plant emissions of CO<sub>2</sub>, Justice Ginsburg wrote.<sup>96</sup> Specifically, §111(d) "requires regulation of existing sources . . . . For existing sources, EPA

issues emissions guidelines . . . ; in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction."<sup>97</sup>

### B. EPA's Regulations for Existing Power Plants

After this decision, EPA issued two very different regulations in the Obama and Trump Administrations with opposing interpretations of §111, and in particular the key phrase that directs EPA to base emission standards on the "best system of emission reduction."<sup>98</sup>

As Justice Ginsburg summarized, regulating existing sources under §111 involves both EPA and the states. EPA issues a regulation (called a guideline) specifying emission limits for a category of sources (in this case, coal- and gas-burning power plants). That emissions limit must "reflect" "the degree of emission limitation achievable" through application of the "best system of emission reduction" that the EPA Administrator determines has been "adequately demonstrated," taking account of cost and various other factors.<sup>99</sup> The emission limit usually takes the form of an allowable emissions rate per unit of activity—for power plants, pounds of pollution allowed per megawatt hour of electricity generated. The emission rate is a *performance* standard, meaning that sources do not have to use the specific technology or method on which EPA based the standard; they may choose other means to meet the required emission rate.

Under §111(d), states then adopt standards of performance that meet the EPA guideline and submit state plans for EPA approval. EPA approves the state plan if its performance standards meet the EPA-specified emission limit.<sup>100</sup> If the state does not submit a "satisfactory" plan, then EPA must issue a federal plan with standards for its existing sources.<sup>101</sup>

In the 2015 Clean Power Plan, the Obama EPA identified three techniques for reducing CO<sub>2</sub> emissions at individual power plants: (1) coal and gas plants could burn fuel more efficiently (improve their "heat rates"); (2) coal and gas plants could install equipment to capture CO<sub>2</sub> and store it underground (carbon capture and storage); and (3) coal plants could cut emissions by mixing natural gas into their fuel (co-firing).<sup>102</sup> EPA found the first measure inexpensive but not very effective, and the latter two more effective but

88. *NFIB*, 142 S. Ct. at 673.

89. *Id.* at 674-75.

90. 142 S. Ct. 2587, 52 ELR 20077 (2022).

91. 549 U.S. 497, 529, 532, 37 ELR 20075 (2007).

92. 564 U.S. 410, 41 ELR 20210 (2011).

93. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

94. Justice Sonia Sotomayor did not participate, as she had been on the U.S. Court of Appeals for the Second Circuit panel.

95. *American Elec. Power*, 564 U.S. at 426.

96. *Id.* at 424.

97. *Id.* No justices dissented. Concurring Justices Samuel Alito and Thomas, however, signaled their view that *Massachusetts* was not correctly decided. *Id.* at 430.

98. Clean Air Act §111(a)(1), 42 U.S.C. §7411(a)(1).

99. *Id.* EPA may subcategorize, setting different emission rates for different types or sizes of plants. Clean Air Act §111(b)(2), 42 U.S.C. §7411(b)(2).

100. Clean Air Act §111(d), 42 U.S.C. §7411(d). Section 111(d) includes a procedure for states to issue variances for specific sources, subject to EPA approval, based on "remaining useful life" and other factors. The variance provisions were not at issue in *West Virginia* and are not discussed further here.

101. *Id.*

102. Clean Power Plan, 80 Fed. Reg. 64662, 64727 (Oct. 23, 2015).

more expensive—though still within the range of values EPA had historically found cost effective.<sup>103</sup>

EPA identified another option, however, that it found both more effective and less expensive: shifting generation from high-emitting plants to cleaner ones, including non-emitting solar and wind generators. This approach was implemented by setting emission rate limits for coal and gas plants and by allowing companies to earn “emission rate credits” by increasing generation at wind and solar generators; these emission rate credits could then be used for compliance by high-emitting coal plants.<sup>104</sup> (Gas plants stood in the middle; they could both use credits from renewables and make credits for use by coal plants.) The result would be to increase generation from cleaner plants and reduce it from dirtier ones, cutting overall power-sector emissions.

EPA found this “generation-shifting” approach a reasonable interpretation of the “best system of emission reduction” because it would reduce power plant emissions more effectively and less expensively than the plant-by-plant options. Further, it matched industry practices for distributing power across the electric grid by shifting output among various plants to meet electricity demand at any given moment most cost effectively.<sup>105</sup>

EPA projected that the Clean Power Plan would reduce power plant carbon emissions in 2030 by nearly one-third below their peak 2005 levels.<sup>106</sup> As we will see, however, EPA underestimated business-as-usual industry trends toward cleaner generation. Even though the rule never took effect, the industry met that 2030 emission reduction target more than a decade earlier, by 2019.

The rule did not take effect because a coalition of opposing states and companies brought suit,<sup>107</sup> and the Supreme Court—in one of its first aggressive actions on its shadow docket—stayed the rule in 2016 on a 5-4 vote with no opinion, freezing implementation pending the D.C. Circuit’s review and any subsequent Supreme Court consideration.<sup>108</sup> The D.C. Circuit heard argument in an unusual all-day en banc session, but did not issue a decision before President Trump took office. Ultimately, that court dismissed the case when EPA switched course.<sup>109</sup>

In 2019, the Trump EPA repealed the Clean Power Plan and replaced it with a rule adopting a strictly “inside-the-fence” interpretation of the Agency’s authority. This time, EPA contended that the law (1) unambiguously limited the BSER to measures undertaken “at or to” each individual plant,<sup>110</sup> and (2) unambiguously barred all forms of emissions trading.<sup>111</sup>

This time, EPA also asserted that the Clean Power Plan interpretation posed a major question. To show vast economic and political consequences, EPA relied on the Agency’s *original* cost estimate from 2015, ignoring its *current* finding that the Clean Power Plan actually imposed no cost because of the industry’s faster-than-expected voluntary adoption of cleaner generation.<sup>112</sup>

The replacement rule required almost no further reduction. For coal-fired plants, it deemed minor heat rate improvements<sup>113</sup> to be the only BSER available, despite projecting that these efficiency tune-ups would reduce the plants’ emissions less than an additional 1%.<sup>114</sup> The replacement rule included no standards at all for gas-fired plants.<sup>115</sup>

The Trump EPA rules were challenged by environmental and health groups, states, and allied power companies in *American Lung Ass’n v. Environmental Protection Agency*.<sup>116</sup> One day before President Biden took office, the D.C. Circuit ruled 2-1 that both the repeal and replacement rules rested on an erroneous interpretation of the Act. The panel majority found that §111 did *not* unambiguously limit the BSER to measures applied “at and to” each individual source, nor did it bar emission credit trading.<sup>117</sup>

The majority also held that neither rule implicated the major questions doctrine because (1) the Supreme Court had already determined EPA has the authority to regulate power plant carbon pollution in *Massachusetts and American Electric Power*; (2) unlike the small sources implicated in *Utility Air Regulatory Group*, power plants had been subject to regulation for 50 years; and (3) the statute’s cost, energy impact, and other limitations safeguarded against unreasonable economic impacts.<sup>118</sup> The court vacated both the repeal and replacement rules, but at EPA’s request stayed reinstatement of the Clean Power Plan until the Agency issued a new rule.<sup>119</sup> This meant neither the states

103. EPA did *not* find that CCS or co-firing was too expensive to be adopted under §111(d), only that the generation-shifting options were less costly. EPA said: “[S]ome of these co-firing and CCS measures are technically feasible and within price ranges that the EPA has found to be cost effective in the context of other [greenhouse gas] rules. . . . However, these co-firing and CCS measures are more expensive than other available measures for existing sources.” *Id.*

104. For example, a coal plant with an actual CO<sub>2</sub> emission rate above the allowable pounds per megawatt-hour limit could apply emission rate credits generated from a wind plant to keep its “adjusted CO<sub>2</sub> emission rate” under the limit.

105. Clean Power Plan, 80 Fed. Reg. at 64728-29.

106. *Id.* at 64924.

107. *West Virginia v. Environmental Prot. Agency*, Nos. 1563 et al. (D.C. Cir. filed Oct. 29, 2015). Although the caption is the same, this is a different case from the one decided in 2022.

108. *West Virginia v. Environmental Prot. Agency*, 577 U.S. 1126 (2016) (stay order).

109. Order Dismissing Case as Moot, *West Virginia v. Environmental Prot. Agency*, No. 15-1363 (D.C. Cir. Sept. 17, 2019) (en banc), ECF No. 1806952.

110. U.S. EPA, Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520, 32534 (July 8, 2019).

111. *Id.* at 32560.

112. *Id.* at 32529 (“*At the time the [Clean Power Plan] was promulgated*, its generation-shifting scheme was projected to have billions of dollars of impact on regulated parties and the economy . . . .”) (emphasis added).

113. “Heat rate” is a measure of how much electricity a plant produces per unit of fuel burned.

114. 84 Fed. Reg. at 32561 tbl.3 (projecting 2030 CO<sub>2</sub> reduction of just 11 million tons from 2.8 billion tons in 2005).

115. *Id.* at 32535.

116. 985 F.3d 914, 51 ELR 20009 (D.C. Cir. 2021), *rev’d sub nom.* *West Virginia v. Environmental Prot. Agency*, 142 S. Ct. 2587, 52 ELR 20077 (2022).

117. *Id.* at 944-59.

118. *Id.* at 959-69.

119. Order, *American Lung Ass’n v. Environmental Prot. Agency*, No. 19-1140 (D.C. Cir. Feb. 22, 2021), ECF No. 1886386.

nor industry would have any obligations until EPA issued a new rule.

### C. Supreme Court Review

When red states and their coal industry allies sought review of the D.C. Circuit decision, the Supreme Court reversed under the name *West Virginia v. Environmental Protection Agency* in a 6-3 ruling written by the Chief Justice. Announcing that “[u]nder our precedents, this is a major question case,”<sup>120</sup> Justice Roberts both formalized the doctrine and refashioned the facts of the case to fit it.

#### 1. Formalizing the Major Questions Doctrine

As shown above, what now goes by the name “major questions doctrine” began as relatively modest observations within otherwise ordinary *Chevron* analyses. In *Brown & Williamson* and *Utility Air Regulatory Group*, for example, Justices O’Connor and Scalia respectively explained why the agency statutory construction at issue was unambiguously wrong or outside the range of permissible constructions. That the proffered construction had big economic or political implications was only part of their reasoning for finding it faulty at *Chevron* Step 1 or Step 2. Neither justice would have claimed to have created a new doctrine that overrode *Chevron*.

A distinct doctrine began to emerge with *King v. Burwell*, and reached full strength (if still not formally named) in the COVID cases. As Justice Roberts acknowledged, the doctrine took on its name in the academic literature before getting the official label in *West Virginia*.<sup>121</sup> Building on Justice Gorsuch’s concurrence in *National Federation of Independent Business*, Part III.A. of Justice Roberts’ opinion glosses over the doctrine’s humble beginnings within *Chevron*, and endows it with the appearance of a more coherent and noble pedigree than it deserves.<sup>122</sup>

Nonetheless, even if its origins were less clear than Justice Roberts portrayed, the major questions doctrine is now fully here. As Justice Roberts put it in *West Virginia*:

[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us “reluctant to read into ambiguous statutory text” the delegation claimed to be lurking there. . . .

To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to “clear congressional authorization” for the power it claims.<sup>123</sup>

It was still difficult to make the major questions doctrine fit the facts of *West Virginia*, however.

#### 2. Justiciability

Let us start with whether there was a proper controversy before the Court. That the Court took the case surprised many observers because no rule was in effect, the original rule’s emission reduction goals had already been met at no cost, the Biden EPA had committed not to enforce either regulation and to issue a new rule on a “clean slate,”<sup>124</sup> and the lower court had stayed its mandate until a new rule was issued. Even some commentators who thought the case might be technically justiciable expected the Court would deny certiorari and await the next rule.<sup>125</sup>

Nevertheless, Justice Roberts found the challenging states were injured by the possible revival of the Clean Power Plan.<sup>126</sup> He dismissed EPA’s argument that its non-implementation pledge and the lower court’s stay mooted the possibility of any state harm. EPA had failed to carry the “heavy” burden of proving mootness, Justice Roberts wrote, because EPA *might* reverse its pledge and the D.C. Circuit *might* lift its stay. Apparently, he did not consider reinforcing the lower court’s stay by imposing one from the highest level, as the Court had done in 2016.

In dissent, Justice Elena Kagan emphasized that the Clean Power Plan was “as a practical matter, obsolete” and would not be implemented. Even if technically not moot, the Court could have declined to grant certiorari. “The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering.” Though that rule would be subject to review, “this Court could not wait—even to see what the new rule says—to constrain EPA’s efforts to address climate change.”<sup>127</sup>

#### 3. Switching the Point of Attack

In *American Lung Ass’n*, the petitioners challenged and the D.C. Circuit reviewed the 2019 *repeal* of the Clean Power Plan, not the original 2015 rule. The Supreme Court major-

120. *West Virginia*, 142 S. Ct. at 2610.

121. *Id.* at 2609 (The major questions label “took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem.”).

122. In addition to the cases I have surveyed, Justice Roberts lays claim to two others that would likely have given their author, Justice Scalia, pause. For example, Justice Roberts cites *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), and *Whitman v. American Trucking Ass’ns*, 531 U.S. 457 (2001), as precursors of the major questions doctrine. *West Virginia*, 142 S. Ct. at 2609. Justice Scalia’s opinion in *MCI* was an unremarkable *Chevron* analysis. See 512 U.S. at 229 (“an agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear,” citing *Chevron*). And *Whitman* exemplifies *refusing* to reach beyond statutory text in response to claims of enormous economic impact.

123. *West Virginia*, 142 S. Ct. at 2609 (citations to *Utility Air Regulatory Group v. Environmental Protection Agency* omitted).

124. *Hearing on the Nomination of Michael S. Regan to be Administrator of the Environmental Protection Agency Before the Senate Committee on Environment and Public Works*, 117th Cong. 42-43 (2021), [https://www.epw.senate.gov/public/\\_cache/files/b/b/bb8ad566-12ca-4ff6-adb5-e3f61d44b3ab/736007F6C59AEDCCF63FD6C63517DAD5.spw-02032021-nomination-hearing.pdf](https://www.epw.senate.gov/public/_cache/files/b/b/bb8ad566-12ca-4ff6-adb5-e3f61d44b3ab/736007F6C59AEDCCF63FD6C63517DAD5.spw-02032021-nomination-hearing.pdf).

125. Jonathan H. Adler, *Does the Supreme Court Have Jurisdiction to Hear West Virginia v. EPA?*, REASON (Feb. 3, 2022), <https://reason.com/volokh/2022/02/03/does-the-supreme-court-have-jurisdiction-to-hear-west-virginia-v-epa/>; Tom Merrill, *West Virginia v. EPA: An Advisory Opinion?*, REASON (July 25, 2022), <https://reason.com/volokh/2022/07/25/west-virginia-v-epa-an-advisory-opinion/>.

126. *West Virginia*, 142 S. Ct. at 2606-07.

127. *Id.* at 2628.

ity, however, virtually ignored the repeal rule and focused instead on the original rule.

As an initial matter, it is difficult to see how the Court had jurisdiction over the 2015 rule; the D.C. Circuit had dismissed West Virginia’s challenge to the original rule, with the state’s consent, when EPA promulgated the repeal. The jurisdictional question—which rule was under review—should have mattered, because the two rules had very different *factual* records.

To justify treating this as a major questions case, Justice Roberts relied on the 2015 record’s forecast that the Clean Power Plan would cause what he found to be significant shifts away from coal (from 38% of generation in 2014 to 27% in 2030) and significant costs (estimated by EPA at \$9 billion per year and by the industry challengers at \$200 billion). He also referenced administration statements in 2015 that the plan would “transform[ ]” the industry.<sup>128</sup> But in the 2019 repeal rule, EPA had acknowledged that the market shift predicted for 2030 had *already occurred by 2019* without any regulation, and that implementing the Clean Power Plan would have imposed *no* added costs.

It is quite rare in preenforcement review cases to have the empirical basis to check the accuracy of the agency’s and industry’s economic projections during judicial review. In this case, however, those predictions could be checked against actual history. As just shown, by 2019, it was clear that EPA’s original cost projections were wrong, and that the industry’s original projections were *wildly* wrong. In fact, the data showed that market forces had already achieved the original rule’s goals, making the rule both cost-free and obsolete.

The closest Justice Roberts came to acknowledging the factual shift between 2015 and 2019 was to say that the original projections “were never tested” because the Court stayed the original rule.<sup>129</sup> But the shifted facts should have made it impossible to maintain that the case posed a major question. As Justice Kagan wrote in dissent: “As to bigness—well, events have proved the opposite: The Clean Power Plan, we now know, would have little or no impact. . . . In effect, the Plan predicted market behavior, rather than altered it.”<sup>130</sup>

If Justice Roberts had stuck to the record of the repeal rule that was actually under review, he could not have found that the rule was of “vast economic and political significance.” Yet, in pronouncing this “a major questions case,” Justice Roberts relied exclusively on the now-disproved projections from 2015. Since the 2019 repeal rule, not the original 2015 rule, was the one before the Court, this seems a significant sleight of hand. It makes plain that Justice Roberts was considering not what EPA had actually done, but speculating on the impact of a hypothetical rule that EPA might issue in the future. That further underscores the advisory nature of the opinion and the tenuous basis for the Court’s Article III jurisdiction.

128. *Id.*

129. *Id.* at 2604.

130. *Id.* at 2639.

#### 4. Belittling § 111 (d)

Although the Court has not been shy about reconsidering precedents, Justice Roberts did not challenge *American Electric Power’s* holding that §111(d) of the Clean Air Act authorizes EPA to regulate the carbon pollution from existing power plants. But hand-in-hand with exaggerating the Clean Power Plan’s consequences, Justice Roberts belittled §111(d)’s significance, calling it “ancillary,” “rarely . . . used,” a “gap-filler,” and a “backwater.”<sup>131</sup>

Section 111(d)’s role as “gap-filler” should have counted as a plus, not a minus. As stated in the Senate Report on the 1970 Clean Air Act, the express purpose of §111(d) was to ensure that there would be “no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.”<sup>132</sup> It comes into play precisely to cover existing sources’ emissions of dangerous air pollutants that are not controlled by the two provisions that precede and follow it.<sup>133</sup> As Justice Kagan observed, “there is nothing insignificant about Section 111(d), which was intended to ensure that EPA would limit stationary sources’ emissions of otherwise unregulated pollutants (however few or many there were).”<sup>134</sup>

Combining a supposedly hyper-aggressive regulation and a supposedly unimportant statutory provision allowed Justice Roberts to invoke Justice Scalia’s formulation from *Utility Air Regulatory Group* and proclaim “skepticism” about the Agency’s “discover[y] of] . . . an unheralded power to regulate ‘a significant portion of the American economy.’” Generation-shifting thus required clear congressional authorization. Justice Roberts contrasted his description of EPA’s “traditional” approach (basing standards on “the application of measures that would reduce pollution by causing the regulated source to operate more cleanly”<sup>135</sup>) with what he called an attempt “to substantially restructure the American energy market.”<sup>136</sup> This, he wrote, needed more than a “colorable” or “merely plausible textual basis.” EPA “instead must point to ‘clear congressional authorization’ for the power it claims.”<sup>137</sup>

Justice Roberts then parried each argument that the statute provided the necessary authorization. EPA, the lower court, and the dissent emphasized that the broad term “best system of emission reduction” showed a deliberate legislative decision to engage EPA’s expertise; since Congress could not know the regulatory design that best fit each of the many different industries to which §111 applied, it gave EPA the authority to make those determinations. At the same time, Congress bounded EPA’s dis-

131. *Id.* at 2610, 2613.

132. S. REP. NO. 91-1196, at 20 (1970).

133. Clean Air Act §110, 42 U.S.C. §7410, addresses existing source emissions of “criteria” air pollutants, and §112, 42 U.S.C. §7412, addresses existing source emissions of “hazardous” air pollutants. Congress adopted §111(d) to deal with existing source emissions of any other pollutants EPA determines endanger public health or welfare. CO<sub>2</sub> and other greenhouse gases precisely fit that description.

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

135. *Id.* at 2599.

136. *Id.* at 2610.

137. *Id.* at 2609.

cretion with concrete textual requirements to show that control measures are adequately demonstrated taking into account costs, other health and environmental impacts, and energy requirements.

Justice Roberts, however, dismissed “system” as an “empty vessel” and called the whole provision “a vague statutory grant . . . not close to the sort of clear authorization required by our precedents.”<sup>138</sup> And, echoing his treatment of the IRS in *King v. Burwell*, Justice Roberts dismissed the idea that EPA had expertise in management of the electricity grid, or that Congress had given EPA authority to make a policy judgment “that it would be ‘best’ if coal made up a much smaller share of national electricity generation.”<sup>139</sup>

Justice Kagan’s dissent points out that “[t]he majority’s decision rests on one claim alone: that generation shifting is just too new and too big for Congress to have authorized it in Section 111’s general terms.”<sup>140</sup> As the dissent observes, Justice Roberts took Justice Scalia’s above-quoted comments in *Utility Air Regulatory Group* well beyond their original meaning. Justice Scalia grounded his rulings in that case in *Chevron* Steps 1 and 2. But as Justice Roberts refashioned them, Justice Scalia’s comments become a ticket to *replace* normal *Chevron* analysis with a heightened clear statement requirement whenever judges find a regulation too innovative and its subject matter sufficiently big or controversial.

## 5. Mischaracterizing Emissions Trading

Justice Roberts consistently describes the Clean Power Plan’s source-specific emission limits as emission “caps,” and its generation-shifting BSER as a “cap-and-trade” program.<sup>141</sup> But the Clean Power Plan was based on a different kind of emissions trading that imposed no caps on either individual power plants or the sector as a whole. The mischaracterization was consequential.

The 2015 rule set limits on each coal or gas source’s emission *rate*, its emissions per unit of electricity output (pounds per megawatt-hour (lbs/MWh)). These rate limits imposed no cap on either a source’s total emissions or its total electricity production. They allowed each plant to produce as much electricity as its operator chose. As long as the plant met the limit on its emission rate, its total emissions could rise or fall with its electricity output. Reducing production does not help a source meet an emission rate limit; the obligation remains the same per unit of production.

The rule’s provisions for trading emissions rate credits made this even clearer. A source could operate above the rule’s lbs/MWh rate limit if it acquired sufficient emission reduction credits from low- or zero-emitting generators to cover its excess emissions.

In contrast, a cap-and-trade system (like the Acid Rain Program<sup>142</sup>) sets a limit on the total tonnage of emissions allowed from a group of sources in a state, a region, or the whole nation. Each plant needs to have enough emissions “allowances” to cover its annual emissions. Here, reducing production *does* help a source comply, because it reduces the number of allowances the source needs to obtain. The Clean Power Plan allowed a state to adopt a cap-and-trade state plan as an alternative to the rule’s default emission-rate approach, but this was entirely the state’s option.<sup>143</sup>

There are many Clean Air Act precedents for emission rate trading programs that impose no caps. For example, EPA phased out lead in gasoline by gradually reducing the grams of lead permitted in each gallon of gasoline; refiners could exceed the per-gallon lead limit if they acquired credits from other refiners that produced gasoline with lead levels below that limit. Likewise, many motor vehicle standards are set as grams-per-mile limits that allow automakers to average or trade across vehicle models on a sales-weighted basis.<sup>144</sup> EPA’s emission standards for municipal waste combustors—set under §111—allowed averaging and trading of emissions of nitrogen oxides on an emission rate basis.<sup>145</sup>

The Clean Power Plan followed the same formula. Its emission rate standards followed the same approach that Justice Roberts held up as EPA’s historical approach (“always set[ting] emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly”<sup>146</sup>), with the addition of emission rate credit trading—which, as just noted, EPA had included in prior §111 rules for municipal incinerators. But mischaracterizing the rule’s emission rate limits as “caps” and as creating a “cap-and-trade” system enabled Justice Roberts to portray the Clean Power Plan as fundamentally different from prior rules.

Justice Roberts then rejected all of EPA’s textual arguments as insufficiently clear to authorize a cap-and-trade approach. For example, EPA noted that §111(d) expressly cross-references the state plan process provided in §110,<sup>147</sup> which expressly authorizes states and EPA to employ “economic incentives such as fees, marketable permits, and

138. *Id.* at 2614.

139. *Id.* at 2612.

140. *Id.* at 2628.

141. *See id.* at 2601, 2603, 2604, 2610, 2614-15, 2616.

142. *See* Clean Air Act tit. IV, 42 U.S.C. §§7651-7651o.

143. Clean Power Plan, 80 Fed. Reg. 64662, 64666 (Oct. 23, 2015).

144. *See* RICHARD G. NEWELL & KRISTIAN ROGERS, RESOURCES FOR THE FUTURE, THE U.S. EXPERIENCE WITH THE PHASEDOWN OF LEAD IN GASOLINE 6-9 (2003), <https://web.mit.edu/ckolstad/www/Newell.pdf>; A. DENNY ELLERMAN ET AL., PEW CENTER ON GLOBAL CLIMATE CHANGE, EMISSION TRADING IN THE U.S.: EXPERIENCE, LESSONS, AND CONSIDERATIONS FOR GREENHOUSE GASES 9-11, 27-29 (2003), <https://www.c2es.org/wp-content/uploads/2003/05/emissions-trading-us-experience-lessons-and-considerations-ghgs.pdf>. To be candid, the respondents’ and respondent-intervenors’ briefs emphasized cap-and-trade precedents and did not draw the distinction between rate-based trading and cap and trade.

145. U.S.EPA, Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources, 60 Fed. Reg. 65387, 65402 (Dec. 19, 1995) (state plans for controlling emissions of oxides of nitrogen from municipal waste combustors under §111(d) and 129, 42 U.S.C. §§7411(d) and 7429, may allow for “trading of emissions between MWC [municipal waste combustor] plants”).

146. *West Virginia*, 142 S. Ct. at 2610.

147. Clean Air Act §111(d)(1), 42 U.S.C. §7411(d)(1).

auctions of emissions rights.”<sup>148</sup> Justice Roberts dismissed that cross-reference as not enough to clearly show the same authority in §111.<sup>149</sup>

Justice Kagan’s dissent defended the Clean Power Plan design as fully consistent with the statutory text: it was a “system” that reduced emissions. Justice Kagan found that EPA had rationally determined it to be the “best” system fit to the circumstances of the power industry.<sup>150</sup>

Neither the majority nor the dissent, however, dealt directly with the petitioners’ central complaint: that the Clean Power Plan was structured to force coal plants to subsidize their renewable competitors. It did this by endowing solar and wind plants with emission reduction credits for each MWh of zero-emitting generation, and by setting a limit for coal plants that they could most easily meet by buying those emission reduction credits.

If structuring the rule to make fossil fuel-fired plants subsidize renewables was the problem, there were *textual* solutions that did not require a supervening major questions doctrine. There were textual ways the Court could have rejected the breadth of the Clean Power Plan but approve narrower trading programs (i.e., between the plants that emit CO<sub>2</sub> but excluding renewables). A stopping point could be found in the statutory term “stationary source,” which is defined as “any building, structure, facility, or installation *which emits or may emit any air pollutant.*”<sup>151</sup>

Since solar and wind generators do not emit air pollutants, the Court could have found they are not stationary sources eligible to participate in a trading system under §111. Additionally, the statute directs EPA to define the “categories of sources” to which §111 standards apply.<sup>152</sup> Since the Agency had defined the category as *fossil fuel-fired* generators, the Court could have concluded that solar and wind plants could not be included in the trading system because they were not in the EPA-defined category.<sup>153</sup>

Justice Roberts did not address these potential textual solutions. We will see, however, that Justice Roberts’ decision leaves open the possibility of including rate-based emissions trading in a future rule, without caps and restricted to CO<sub>2</sub>-emitting plants.

## 6. Deepening Reliance on Failed Legislation

Justice Roberts also deepened the majority’s commitment to making inferences from *unenacted* legislation. Citing *Brown & Williamson*, Justice Roberts wrote: “[W]e cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions ‘had become well known, Congress considered and rejected’

multiple times.” He listed unsuccessful bills proposing cap-and-trade systems or emission taxes between 2009 and 2013. “At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon. . . . Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program.”<sup>154</sup>

*Brown & Williamson*, however, drew inferences only from *enacted* laws, which Justice O’Connor found showed Congress’ intent to handle tobacco through statutes other than the FFDCA. Bristling with frustration, Justice Kagan cites opinions by Justices Scalia and Gorsuch dismissing inferences from failed legislation as “particularly dangerous” and “not [to] be taken seriously.”<sup>155</sup>

But even if failed bills were relevant, the ones Justice Roberts picked out compared apples to oranges. The Clean Power Plan was not modeled on the cap-and-trade and carbon tax bills he cited. For one thing, those were “economywide” bills that addressed multiple industrial sectors, not just the power sector. And as shown above, the Clean Power Plan was *not* a cap-and-trade system even for the power sector. In short, the failure to have passed new *emission-capping* legislation applying *economywide* should have shed no light on whether prior law authorized the inclusion of averaging or trading in a regulation limiting *emission rates* (without caps) for a single category of sources.

Further, Justice Roberts’ choice of failed legislation was highly selective. At least a dozen bills or amendments were proposed to block the Clean Power Plan or other Clean Air Act regulations limiting greenhouse gas emissions, and none passed.<sup>156</sup> If inferences from failed legislation were persuasive, these would have counted in *favor* of EPA’s approach. Yet, Justice Roberts completely ignored them.

## 7. Justice Kagan’s Dissent

I have summarized many key points in Justice Kagan’s dissent above, but her overall critique is even stronger. Justice Kagan denounces the majority’s readiness to take the case and to deploy a new antiregulatory doctrine absent any effective rule and any economic impact.<sup>157</sup> She challenges Justice Roberts’ (and Justice Gorsuch’s) derivation of the major questions doctrine from cases she characterizes as “normal statutory interpretation.”<sup>158</sup>

She calls out the conservatives’ abandonment of textualism,<sup>159</sup> the short shrift they gave the actual statutory text,<sup>160</sup> and their willingness to speculate on Congress’ true

148. Clean Air Act §110(a)(2)(A), 42 U.S.C. §7410(a)(2)(A).

149. *West Virginia*, 142 S. Ct. at 2614-15.

150. *Id.* at 2641.

151. Clean Air Act §111(a)(3), 42 U.S.C. §7411(a)(3).

152. *Id.* §111(b)(1)(A).

153. See Brief of Nongovernmental Organization and Trade Association Respondents at 41, 49, *West Virginia v. Environmental Prot. Agency*, 142 S. Ct. 2587 (2022) (Nos. 20-1530 et al.), 2022 WL 209765.

154. *West Virginia*, 142 S. Ct. at 2614.

155. *Id.* at 2641 (citing opinions by Gorsuch and Scalia, JJ.).

156. See, e.g., S. 1324, 114th Cong. (2015); H.R. 3626, 114th Cong. (2015); S. Amend. 458 to S. Con. Res. 8, 113th Cong., 1st Sess. (2013); H.R. 2081, 113th Cong. (2013); S. 2365, 112th Cong. (2012); H.R. 3409, 112th Cong. (2012); S.J. Res. 26, 111th Cong. (2010); S. 1622, 111th Cong. (2009); H.R. 2846, 111th Cong. (2009); S. 570, 111th Cong. (2009).

157. *West Virginia*, 142 S. Ct. at 2627-28.

158. *Id.* at 2633.

159. *Id.* at 2641.

160. *Id.* at 2634 (“The result is statutory interpretation of an unusual kind. It is not until page 28 of a 31-page opinion that the majority begins to seriously discuss the meaning of Section 111.”).

intent from dubious legislative history and failed legislation.<sup>161</sup> She decries the majority's propensity to substitute its own factual analyses and policy preferences for those of the political branches,<sup>162</sup> and its hostility to historic forward-looking statutes that arm agencies with the tools to address critical, emergent problems<sup>163</sup>:

The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the “major questions doctrine” magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence.<sup>164</sup>

Justice Kagan concludes: “The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening.”<sup>165</sup>

## 8. Justice Gorsuch's Concurrence

What might be more frightening than Justice Roberts' opinion, however, is signaled in Justice Gorsuch's concurrence, which demonstrates that some of the conservative justices have a very low threshold for applying the new doctrine and a very high bar for the statutory clarity required to overcome it. Justice Gorsuch reiterates his theory that by requiring clearer legislation and making legislation harder, the major questions doctrine protects citizens' and businesses' liberty.<sup>166</sup> As in the COVID vaccine cases, Justice Gorsuch emphasizes the “liberty” interests of regulated industry and places little value on the liberty interest of citizens in need of governmental protection from, for example, a business' dangerous pollution.

He lays out a broad menu of reasons to deem a question “major.” Fifty-year-old statutes are almost per se suspect, for example—a position that may seem odd coming from one who reveres decisions made 230 years ago at the Founding. Justice Gorsuch's concurrence also opens the door for well-funded special interests to manipulate the standard of judicial review simply by paying to raise political controversy, for example through “astroturf” campaigns to stuff the public comment docket or raise the level of partisan disagreement.

Only Justice Samuel Alito joined Justice Gorsuch's concurrence, however, suggesting that the other conservatives may be satisfied, for now at least, by the Chief Justice's opinion. Large uncertainties remain, however, because *West Virginia* and the COVID cases do not give clear guidance on what makes a case “extraordinary,”

what makes a question “major,” or what makes a statute “sufficiently clear.”<sup>167</sup>

## 9. What Justice Roberts Left Open

All this said, Justice Roberts' specific holding regarding EPA's authority under §111(d) is limited—more limited perhaps than if he had assigned the opinion to one of the other conservatives.<sup>168</sup> Justice Roberts did not question the holdings in *Massachusetts* that greenhouse gases are air pollutants and in *American Electric Power* that §111(d) gives EPA the responsibility to regulate those emissions from existing power plants.

Brushing aside a challenge from North Dakota,<sup>169</sup> Justice Roberts affirmed that EPA has “the primary regulatory role in Section 111(d).” He further stated:

The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does so by again determining, as when setting the new source rules, “the best system of emission reduction . . . that has been adequately demonstrated for [existing covered] facilities.” . . . The States then submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA.<sup>170</sup>

While rejecting EPA's “broader conception” of its authority<sup>171</sup> (a standard premised on generation-shifting), Justice Roberts contrasted it with EPA's “traditional” practice of setting standards that “caus[e] plants to operate more cleanly”<sup>172</sup> and “ensur[e] the efficient pollution performance of each regulated source.”<sup>173</sup> And while rejecting cap and trade, he did not foreclose the possibility of more limited use of emissions averaging or trading: “We have no occasion to decide whether the statutory phrase ‘system of emission reduction’ refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER.”<sup>174</sup>

Justice Roberts' opinion does not resolve how EPA may consider costs, energy requirements, and the other limiting factors enumerated in §111(a)(1)'s definition of “standard

167. The conservatives' high bar for congressional clarity is on display in *Sackett v. Environmental Protection Agency*, 598 U.S. \_\_\_, 2023 WL 3632751, 53 ELR 20083 (May 25, 2023). While not labeling the scope of Clean Water Act jurisdiction over wetlands a major question, Justice Alito nonetheless imposed a requirement for “exceedingly clear [statutory] language.” *Id.* at \*14.

168. Like his concurrence in *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661 (2022), Justice Gorsuch's concurrence here extols the liberty-protection virtues of the major questions doctrine and does not address the specific statutory provisions at all. *West Virginia*, 142 S. Ct. at 2616-26. Had he or the other conservatives held the pen, the main opinion might have been more sweeping.

169. Brief for North Dakota, *West Virginia v. Environmental Prot. Agency*, 142 S. Ct. 2587 (2022) (Nos. 20-1530 et al.).

170. *West Virginia*, 142 S. Ct. at 2601-02.

171. *Id.* at 2600.

172. *Id.* at 2610.

173. *Id.* at 2612.

174. *Id.* at 2615.

161. *Id.* at 2641 (citing opinions by Gorsuch and Scalia, JJ.).

162. *Id.* at 2643.

163. *Id.* at 2626-27, 2643.

164. *Id.* at 2641 (footnote omitted).

165. *Id.* at 2644.

166. *Id.* at 2616-27.



of performance.” He acknowledged, however, an “obvious difference” between a rule set in the traditional format that “end[s] up causing an incidental loss of coal’s market share,” and a generation-shifting plan where EPA “announc[es] what the market share of coal, natural gas, wind, and solar must be, and then requir[es] plants to reduce operations or subsidize their competitors to get there.”<sup>175</sup> This suggests that as long as EPA’s next standard fits within the traditional approach Justice Roberts described, the Agency retains significant latitude to determine the appropriate balance of emission reductions and cost.

*West Virginia* set the terms for a new EPA rulemaking. As we will see, the enactment of the IRA also markedly affects that rulemaking.

### III. The Inflation Reduction Act

Six weeks after *West Virginia*, Congress passed and the president signed into law the IRA.<sup>176</sup> In the wake of the Supreme Court’s decision, the new law provides a clear and up-to-date statement of congressional intent to reduce greenhouse gas emissions through a combination of federal investments and federal regulation under the Clean Air Act.

The IRA makes the largest ever federal investments in clean energy and lower climate pollution across many sectors: power generation, motor vehicles, oil and gas operations, buildings and appliances, and other major industries. A partial list of the incentives focused on electricity production and use includes extended and enlarged tax credits for deploying wind and solar generation and maintaining existing nuclear capacity; deploying batteries and other energy storage technologies; upgrading electricity transmission; deploying carbon capture and storage (CCS) technology; promoting hydrogen as a fuel; and deploying heat pumps and other building and appliance energy-efficiency upgrades.

The Congressional Budget Office estimated the bill’s emission-reducing tax incentives and grant provisions across all sectors at \$369 billion over the next 10 years.<sup>177</sup> Since use of the tax incentives is not capped, and since some extend beyond the 10-year period, the total investment in reducing climate pollution may well be significantly larger.<sup>178</sup>

Initial analyses have projected that the tax credits and grants could reduce total U.S. greenhouse gas emissions in 2030 roughly 40% below the 2005 peak.<sup>179</sup> This improves on the approximately 30% reduction expected before the law was passed, and closes approximately half the gap to President Biden’s overall target of reducing national greenhouse gas emissions 50%-52% below the 2005 peak by 2030.<sup>180</sup> NRDC modeling prior to the new EPA proposal suggested that the IRA’s clean electricity tax incentives will cut the power sector’s 2030 carbon emissions to roughly 65% below 2005 levels.<sup>181</sup> EPA has recently projected that market forces and the IRA will cut power-sector emissions 60% below 2005 levels by 2030 and 80% below those levels by 2040.<sup>182</sup> These emission reductions are a major advance over the prior business as usual, but short of the Biden Administration’s power-sector target of 80% reduction by 2030 and 100% reduction by 2035.

Those are estimates of what will happen by virtue of the incentives alone, in the absence of further emission reduction regulations. But the IRA does more.

The IRA also amends the Clean Air Act to renew and reinforce EPA’s regulatory authority. It amends the Act by adding new sections that make long-term appropriations with directions for EPA to issue greenhouse gas standards and take other actions to help states, industry, and others reduce such emissions in the power, transportation, industrial, and other sectors.<sup>183</sup>

The IRA’s Clean Air Act provisions and its investment incentives work hand-in-hand to enable more ambitious EPA carbon standards by reducing the costs of those rules for the regulated industries and their customers. Together, these provisions demonstrate Congress’ clear intent for EPA to set stronger standards that help achieve the Administration’s 2030 power-sector emissions target.<sup>184</sup> The following

175. *Id.* at 2613 n.4. Another footnote casts doubt on whether EPA “could requir[e] coal plants to become natural gas plants.” *Id.* at 2612 n.3. Justice Roberts could have been referring to hypothetical requirements that a plant owner completely replace a coal plant with a gas plant on the same site, or that an existing coal plant burn only gas (something coal plants actually have done when gas prices are very low). It is not clear how the Court would react to a regulation requiring the less dramatic step of “co-firing”—running coal plants on a mixture of coal and gas—which such plants already do fairly commonly.

176. Pub. L. No. 117-169, 136 Stat. 1818 (2022).

177. CONGRESSIONAL BUDGET OFFICE, ESTIMATED BUDGETARY EFFECTS OF H.R. 5376, THE INFLATION REDUCTION ACT OF 2022 (2022), [https://www.cbo.gov/system/files/2022-08/hr5376\\_IR\\_Act-8-3-22.pdf](https://www.cbo.gov/system/files/2022-08/hr5376_IR_Act-8-3-22.pdf).

178. Jim Tankersley & Brad Plumer, *Companies Flock to Biden’s Climate Tax Breaks, Driving Up Cost*, N.Y. TIMES (May 4, 2023), <https://www.nytimes.com/2023/05/03/business/ira-climate-tax-breaks-biden.html>.

179. John Larsen et al., *A Turning Point for US Climate Progress: Assessing the Climate and Clean Energy Provisions in the Inflation Reduction Act*, RHODIUM GRP. (Aug. 12, 2022), <https://rhg.com/research/climate-clean-energy-inflation-reduction-act/>; JESSE D. JENKINS ET AL., PRINCETON UNIVERSITY ZERO LAB, PRELIMINARY REPORT: THE CLIMATE AND ENERGY IMPACTS OF THE INFLATION REDUCTION ACT OF 2022 (2022), [https://repeatproject.org/docs/REPEAT\\_IRA\\_Preliminary\\_Report\\_2022-09-21.pdf](https://repeatproject.org/docs/REPEAT_IRA_Preliminary_Report_2022-09-21.pdf).

180. Fact Sheet, The White House, President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

181. LISSA LYNCH & DAVID DONIGER, NRDC, THE EPA’S POWER PLANT CARBON RULES CAN BE BUILT TO LAST (2023), <https://www.nrdc.org/sites/default/files/2023-04/power-plant-carbon-rules-ib.pdf>. The modeling reflected in this paper was led by Amanda Levin, NRDC’s director of policy analysis.

182. U.S. EPA, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED NEW SOURCE PERFORMANCE STANDARDS FOR GREENHOUSE GAS EMISSIONS FROM NEW, MODIFIED, AND RECONSTRUCTED FOSSIL FUEL-FIRED ELECTRIC GENERATING UNITS; EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING FOSSIL FUEL-FIRED ELECTRIC GENERATING UNITS; AND REPEAL OF THE AFFORDABLE CLEAN ENERGY RULE 3-15, tbl. 3-5 (2023), [https://www.epa.gov/system/files/documents/2023-05/utilities\\_ria\\_proposal\\_2023-05.pdf](https://www.epa.gov/system/files/documents/2023-05/utilities_ria_proposal_2023-05.pdf).

183. IRA, Pub. L. No. 117-369, tit. VI, subtit. A, 136 Stat. 1818, 2063-78 (2022).

184. Robinson Meyer, *The EPA Just Quietly Got Stronger*, ATLANTIC (Aug. 24, 2022), <https://www.theatlantic.com/science/archive/2022/08/inflation-re>

discussion focuses on the IRA provisions that bear on the power sector and EPA's authority after *West Virginia*.

### A. Expressly Designating Greenhouse Gases as "Air Pollutants"

Although only two Justices have voiced interest in reconsidering *Massachusetts*,<sup>185</sup> the IRA takes the proactive step of expressly designating greenhouse gases as "air pollutants." It amends the Clean Air Act in six provisions pertaining to power plants, motor vehicles, and other sources, defining "greenhouse gases" as "the air pollutants carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons, and sulfur hexafluoride."<sup>186</sup> These are the same substances covered by EPA's post-*Massachusetts* endangerment finding issued in 2009.<sup>187</sup>

These amendments remove any room for doubt about whether greenhouse gases are air pollutants subject to EPA regulation under the Clean Air Act. The central holding of *Massachusetts* is now contained in express statutory text.<sup>188</sup>

### B. Directing EPA to Set New Power Plant Standards Taking Tax Incentives Into Account

The IRA adds a new §135 to the Clean Air Act entitled "Low Emissions Electricity Program," which addresses "domestic electricity generation and use."<sup>189</sup> This provision

reinforces EPA's existing authority to regulate CO<sub>2</sub> emissions from existing power plants under §111(d).

Subsection (a) provides funding to EPA for, among other things, these purposes:

(5) . . . to assess . . . the reductions in greenhouse gas emissions that result from changes in domestic electricity generation and use that are anticipated to occur on an annual basis through fiscal year 2031; and

(6) . . . to ensure that reductions in greenhouse gas emissions are achieved through the use of the existing authorities of this Act, incorporating the assessment under paragraph (5).<sup>190</sup>

The first clause directs EPA to update its assessment of the no-regulation baseline—the emission reductions expected to occur due to business-as-usual industry trends and the IRA's incentives, without further standards. The second clause directs EPA to set new standards under its existing authority. As noted above, *West Virginia* recognized EPA's "traditional" authority to limit power plant carbon pollution under §111.

The IRA's tax credits and grants affect both the baseline assessment and the future standards. First, the IRA's incentives related to the power sector (e.g., for deploying renewable generation, electricity storage, transmission grid upgrades, CCS technology, and energy efficiency in buildings, appliances, and industry) substantially lower the no-regulation emissions baseline.

Second, some of these measures fit the Supreme Court's description of EPA's "traditional" standard-setting process under §111 (i.e., "set[ting] performance standards based on measures that would reduce pollution by causing plants to operate more cleanly"<sup>191</sup>). CCS, for example, is a technological measure that directly reduces CO<sub>2</sub> emissions at coal- and gas-fired power plants. The IRA increases the tax credit for capturing CO<sub>2</sub> and storing it deep underground to \$85 per ton of CO<sub>2</sub>. The credit is available for retrofitting coal- and gas-fired power plants as well as other industrial facilities.<sup>192</sup>

The IRA also creates a new tax credit for clean hydrogen production.<sup>193</sup> Using hydrogen as a power plant fuel could be another carbon pollution control measure consistent with *West Virginia*. However, it is critical to have effective rules to ensure that hydrogen is in fact very low-carbon, taking into account the emissions associated with how it is produced. Otherwise burning hydrogen in power plants could *increase* overall emissions. Even very low-carbon hydrogen may not achieve as much reduction as CCS.<sup>194</sup>

duction-act-epa-carrots-sticks/671218/; Greg Dotson & Dustin Maghamfar, *The Clean Air Act Amendments of 2022: Clean Air, Climate Change, and the Inflation Reduction Act*, 53 ELR 10017 (Jan. 2023), available at <https://www.eli.org/sites/default/files/files-pdf/53.10017.pdf>.

185. See Justice Alito's concurring opinion in *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 430, 41 ELR 20210 (2011), and his opinion concurring in part and dissenting in part in *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302, 344, 44 ELR 20132 (2014). Both were joined by Justice Thomas.

186. IRA §60101, adding Clean Air Act §132(d)(4); §60102, adding Clean Air Act §133(d)(2); §60103, adding Clean Air Act §134(c)(2); §60107, adding Clean Air Act §135(c); §60113, adding Clean Air Act §136(i); §60114, adding Clean Air Act §137(c)(4). The same definition is included in IRA §§60105, 60106, 60108, 60111, 60112, and 60116, which appropriate funds to EPA for monitoring, reporting, and reducing greenhouse gas emissions under provisions of the Clean Air Act and other laws.

187. U.S. EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009). The endangerment finding was upheld in *Coalition for Responsible Regulation v. Environmental Protection Agency*, 684 F.3d 102, 42 ELR 20141 (D.C. Cir. 2012). Six petitions for certiorari were subsequently filed. The Supreme Court denied review of the endangerment finding, but granted review on whether setting greenhouse gas emission standards for motor vehicles triggered the Act's new source review and operating permit requirements for stationary sources. 571 U.S. 951 (2013). The Court ultimately held that those permit requirements were not triggered. *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302, 44 ELR 20132 (2014).

188. These amendments should dispose of a pending case claiming that "*Massachusetts v. EPA* should be revisited in light of the major question doctrine." Brief for Petitioner at 52, Concerned Household Elec. Consumers Council v. Environmental Prot. Agency, No. 22-1139, 2022 WL 14498711 (D.C. Cir. filed June 27, 2022). The court dismissed the petition for lack of standing. 2023 WL 3643436 (D.C. Cir. May 25, 2023).

189. IRA §60107, adding Clean Air Act §135.

190. Clean Air Act §135(a)(5) & (6).

191. *West Virginia v. Environmental Prot. Agency*, 142 S. Ct. 2587, 2599, 52 ELR 20077 (2022).

192. IRA §13104, amending 26 U.S.C. §45Q.

193. IRA §13204, adding 26 U.S.C. §45V.

194. Rachel Fakhry, *Success of IRA Hydrogen Tax Credits Hinges on IRS and DOE*, NRDC (Dec. 8, 2022), <https://www.nrdc.org/bio/rachel-fakhry/success-ira-hydrogen-tax-credit-hinges-irs-and-doe>.

These tax incentives will affect EPA's assessment of costs under §111 of the Clean Air Act. In determining the emission limit that reflects the "best system of emission reduction," EPA must "tak[e] into account the cost."<sup>195</sup> Through the IRA, Congress has clearly decided to incentivize these technologies and has clearly told EPA to set new standards taking those incentives into account. The IRA tax credits sharply reduce the cost of applying CCS to coal and gas power plants. Thus, when EPA considers cost in its new standards, only the portion of the costs that will be borne by power plant operators and their customers is properly charged to the regulation under §111.

Further, as it considers cost, EPA also must consider the health and environmental benefits of reducing emissions. The amount of air pollution reduced is a relevant factor along with costs in determining emission limits under §111.<sup>196</sup> As the Supreme Court stated in *Michigan v. Environmental Protection Agency* (a case under another provision of the Clean Air Act): "Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."<sup>197</sup> The Court left EPA significant flexibility on how to do this and did not demand "a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value."<sup>198</sup>

#### IV. EPA's New Proposed Standards

EPA proposed its long-awaited new standards in May 2023.<sup>199</sup> The proposed standards under Clean Air Act §111 cover existing coal plants and existing and new gas plants.<sup>200</sup> The Agency has hewn closely to the guidance it received from the Court in *West Virginia* and from Congress in the IRA.

As instructed by the IRA, EPA started by updating its assessment of the baseline emissions anticipated to result from industry trends and the IRA's incentives without further standards. As already noted, EPA projects that these forces will cut power-sector emissions 60% below peak 2005 levels by 2030 and 80% below those levels by 2040.<sup>201</sup>

EPA then proposed new standards that follow the "traditional" approach sanctioned in *West Virginia*, by defining the "best system of emission reduction" as measures that make power plants operate more cleanly. The central

element of the proposal is a set of performance standards—emission rate limits—based on the pollution-reduction capabilities of CCS. EPA finds that CCS is the best such system, is adequately demonstrated, and can reduce emissions by 90% or more. As elaborated below, companies do not have to employ the technologies on which these emissions performance standards are based; they are free to adopt any strategy that achieves the same result.

Taking leadtime and costs into account, the proposed rules would adopt different emission rate limits and deadlines for various subcategories of plants considering, among other things, how long plants will operate and how much they will be used. The following requirements are handily summarized in chart form in an EPA presentation<sup>202</sup> and an NRDC blog post.<sup>203</sup>

Starting with existing coal plants, EPA proposes that plants expected to run for the long term (i.e., past 2040) must by 2030 meet an emission rate reflecting the capabilities of CCS (90% reduction). Less stringent emission rate limits are proposed for coal generating units that make legally enforceable commitments to specific retirement dates and to limits on how much they will be used. If a unit is committed to retire before 2040, it would be subject to an emission limit based on 40% co-firing with gas. If committed to retire by 2035 and also to operate infrequently (i.e., at a capacity factor of 20% or less), a unit would be required only to undertake routine operations and maintenance and to stay within its historical emission rate. A coal unit committed to retire by 2032 would be subject to the same maintenance and no-emission-rate-increase requirements, but without the limit on its capacity factor.

New gas plants also would have emission limits dependent on how much they will be used. These requirements would take effect in two phases. In phase one, "baseload" units (those to be used at more than around a 50% capacity factor) would have to meet the emission rate of an efficient combined cycle plant upon startup. In phase two, emission rate requirements would tighten—either to reflect 90% CCS by 2035, or (to create a pathway for green hydrogen) to reflect 30% hydrogen co-firing by 2032, ramping up to 96% by 2038.

"Intermediate" new gas plants (units to be used at a 20% to around 50% capacity factor) would have less demanding phase one and phase two emission limits. And those limited to use only at "low load" (under 20% capacity factor) would basically be allowed to run on natural gas without further controls.

The proposal covers only the largest existing gas plants—units with a capacity greater than 300 megawatts and used at a capacity factor of more than 50%. Their requirements resemble those for baseload new gas plants

195. Clean Air Act §111(a)(1), 42 U.S.C. §7411(a)(1).

196. *Sierra Club v. Costle*, 657 F.2d 298, 326, 11 ELR 20455 (D.C. Cir. 1981). 197. 576 U.S. 743, 753, 45 ELR 20124 (2015).

198. *Id.* at 759.

199. U.S. EPA, New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33240 (May 23, 2023).

200. EPA set a standard based on CCS for new coal-fired power plants in 2015. Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64510 (Oct. 23, 2015). A challenge to this standard was filed, but has not been pursued to date. *North Dakota v. Environmental Prot. Agency*, No. 15-1381 (ordered held in abeyance, Aug. 10, 2017). No new coal plants are expected in the United States.

201. U.S. EPA, *supra* note 182.

202. U.S. EPA, Presentation, Clean Air Act Section 111 Regulation of Greenhouse Gas Emissions From Fossil Fuel-Fired Electric Generating Units 8, 13 (2023), [https://www.epa.gov/system/files/documents/2023-05/111%20Power%20Plants%20Stakeholder%20Presentation2\\_4.pdf](https://www.epa.gov/system/files/documents/2023-05/111%20Power%20Plants%20Stakeholder%20Presentation2_4.pdf).

203. Lissa Lynch, *The EPA Tackles Power Plants' Carbon Pollution*, NRDC (May 11, 2023), <https://www.nrdc.org/bio/lissa-lynch/epa-tackles-power-plants-carbon-pollution>.

(emission rates reflecting 90% CCS by 2035, or 30% and 96% clean hydrogen by 2032 and 2038, respectively). This would cover less than 30% of the emissions of the existing gas fleet. EPA is requesting comment on covering lower-capacity and less heavily used existing gas units as well.

The different subcategories and schedules reflect EPA's judgments at the time of proposal on cost-effectiveness and leadtime considerations. The capital costs of CCS are easier to amortize over the lifetime of longer-lived plants, and for plants that will be used at high-capacity factors. For these plants, EPA finds that the cost of installing and operating CCS is reasonable, especially taking into account that the IRA's tax incentives will cover most of the cost of installing and operating CCS.

A consequence of the proposal's cut points, however, is that the projected CO<sub>2</sub> emission reductions beyond the baseline emission reductions are quite modest.<sup>204</sup> The combined reductions from the baseline and the proposed standards fall substantially short of meeting the Administration's stated goals of reducing power-sector emissions 80% below 2005 levels by 2030 and 100% by 2035. Since the power sector is the second-largest source of U.S. climate-warming emissions—and the most cost-effective sector to control—this has concerning implications for the nation's ability to meet its overall climate targets (50%-52% reduction by 2030 and net zero by 2050).

Consequently, NRDC and others will comment this summer that greater and faster power plant carbon reductions are both needed and achievable based on these technologies, and consistent with *West Virginia*. For example, NRDC modeling of more stringent requirements projects that, building on the IRA baseline, EPA standards can bring overall reductions to 77% by 2030 and 83% by 2035 at very reasonable cost.<sup>205</sup>

In response to EPA's request for comment, NRDC and other groups are likely to press the Agency to expand the coverage of existing gas plants to cover units responsible for as much as 80% of emissions from the existing gas fleet. NRDC and others will also press for safeguards needed to make sure that CCS technology, wherever it is used, does not leak from plants or from pipelines and storage sites, and that emissions of other pollutants do not increase, especially in communities already overburdened by pollution.

While improvements are needed, the proposed standards reflect the traditional structure described in *West Virginia*. They are premised on applying adequately demonstrated, reasonable cost technology to individual generating units. They make no "transformative expansion in

[EPA's] regulatory authority."<sup>206</sup> As already noted, the vast bulk of projected CO<sub>2</sub> reductions are attributable to underlying market forces and the tax incentives adopted by Congress in the IRA.

Some opponents will surely complain that these standards, even though traditionally structured, will *indirectly result* in shifting generation. That does not make out a major question. As Chief Justice Roberts noted, there is an "obvious difference" between standards that are premised on dictating market shares, and traditional standards based on pollution control technology that result in "incidental" changes in how much companies choose to operate their plants.<sup>207</sup>

Incidental changes of this kind are inherent in any effective pollution control law. The most basic premise of the Clean Air Act is that companies cannot keep dumping dangerous pollution in the atmosphere for free; they must internalize the reasonable costs of controlling their pollution. The Congress that wrote the Clean Air Act was explicit in the expectation that those costs may affect companies' choices of which plants they use to make their products.<sup>208</sup> In enacting the IRA incentives and instructing EPA to issue standards under the Clean Air Act, Congress has spoken clearly again.

As noted earlier, §111 regulations are *performance* standards. Sources are not required to use the technologies on which the standards were based. Nothing in *West Virginia* limits how plant operators may choose to comply. Likewise, the IRA incentivizes certain technologies, but it does not require their use. If the final standard is based on CCS, some plant operators will likely choose to install and operate that technology. Others may innovate and meet the required emission rate through alternative control technologies. And reflecting current trends in the industry, others may choose to replace those plants with alternative sources of power generation.

When writing state plans for existing sources, states have substantial flexibility. They may choose to adopt state-level subsidies or requirements that influence power companies' compliance choices—either to favor retrofitting existing coal and gas plants or to encourage their replacement. Ultimately, it will be up to power companies to decide, in light of underlying sectoral trends and the IRA incentives, which plants to retrofit and which to replace.

Though opponents may have trouble ringing the major question bell this time around, they may make more conventional claims that CCS and hydrogen are not "adequately demonstrated," that the emission rates are not achievable in the time frames allowed, or that the standards are too costly. As the proposal summarizes, however, a robust body of case law makes clear that §111 grants EPA

204. The proposal projects additional CO<sub>2</sub> reductions of approximately 617 million metric tons cumulatively from 2028 through 2042 from the standards for existing coal plants and certain requirements for new gas plants. Another 215-409 million metric tons of cumulative reductions are projected from the standards for existing gas plants and the remaining requirements for new gas plants. See 88 Fed. Reg. at 33411.

205. LYNCH & DONIGER, *supra* note 181; JACKIE ENNIS & AMANDA LEVIN, NRDC, CLEAN ENERGY NOW FOR A SAFER CLIMATE FUTURE: PATHWAYS TO NET ZERO IN THE UNITED STATES BY 2050 (2023), <https://www.nrdc.org/sites/default/files/2023-04/clean-energy-pathways-net-zero-2050-report.pdf>.

206. *West Virginia v. Environmental Prot. Agency*, 142 S. Ct. 2587, 2610, 52 ELR 20077 (2022).

207. *Id.* at 2613 n.4.

208. See, e.g., *Union Elec. Co. v. Environmental Prot. Agency*, 427 U.S. 246, 6 ELR 20570 (1976) (quoting 1970 Senate Report on Clean Air Act: "the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down").

substantial authority to make such technical and economic determinations, as long as it supports them with a factual record and makes reasonable projections to address areas of uncertainty, such as the pace and cost at which technology can be deployed.

In particular, control technologies do not have to be already “commercial” or in “widespread” use, and EPA may set more stringent standards when longer leadtimes are allowed.<sup>209</sup> Those judgments are reviewed in the first instance by the D.C. Circuit under the traditional “arbitrary and capricious” standard. The Supreme Court can, but rarely does, take up technical or scientific determinations of this kind.

As of this writing, the comment period is expected to remain open through early August. EPA intends to promulgate final rules next year after addressing all comments and data. Opponents are almost certain to petition the D.C. Circuit for review, and to try for another round at the Supreme Court. The structure of these standards in conformity with *West Virginia*, and enactment of the IRA with its clear and contemporaneous intent that EPA should act again on power plant climate pollution taking the new law’s incentives into account, will make those challenges much more difficult.

## V. Conclusion

The major questions doctrine articulated in *West Virginia* and the COVID cases is a dark cloud threatening the federal government’s capacity to meet the many complex challenges of our modern economy and society. It remains to be seen whether the major questions doctrine will remain “extraordinary,” or become the new general rule. As mentioned, the Court has not yet given clear guidance on what makes a case “extraordinary,” what makes a question “major,” or what makes a statute “sufficiently clear.”

Opponents of regulation are already trying to deploy *West Virginia* with gusto. Lower courts have dismissed some early major question cases for lack of standing. For example, the D.C. Circuit rejected a hyperbolic challenge to EPA prohibitions on tampering with emission controls.<sup>210</sup> The U.S. Court of Appeals for the Fifth Circuit and the U.S. Court of Appeals for the Eighth Circuit found that states have not yet suffered any harm from administration guidance on calculating the benefits of reducing greenhouse gas emissions (the social cost of carbon).<sup>211</sup>

On the other hand, district courts in Florida and Louisiana have aggressively invoked the major questions doctrine to prohibit COVID-masking requirements on

airplanes and in the Head Start preschool program.<sup>212</sup> As of this writing, the Supreme Court is expected to decide whether the Biden Administration’s student debt relief program raises a major question.<sup>213</sup> States and the oil industry are claiming that EPA’s latest vehicle emission standards raise a major question because they will increase electric vehicle sales and hurt demand for gasoline.<sup>214</sup> States and industries are promising major questions challenges to forthcoming rules from the Securities and Exchange Commission.<sup>215</sup> It remains to be seen how far the lower courts will run with the new doctrine, and whether the Supreme Court will reserve it for “extraordinary” use as advertised.

The silver lining for climate policy is the enactment of the IRA. It shines a shaft of light through the cloud on the power-sector regulations directly at issue in *West Virginia*, as well as other EPA climate rules. The IRA provides the clear and contemporaneous statement of congressional intent on climate policy that the Court demanded. It codifies into the text of the Clean Air Act the holdings of *Massachusetts* and *American Electric Power* that greenhouse gases are air pollutants subject to EPA regulation, and it directs EPA to regulate power plants’ carbon pollution again. And it provides large tax incentives and other federal support to reduce the cost of deploying the kind of technologies that comfortably fit within the constraints *West Virginia* imposes.

To reiterate a point made at the outset, however, the IRA is more likely the exception rather than the new rule. Through the major questions doctrine—and potentially through its reconsideration of *Chevron* next term—the Court is striking hard at Congress’ capacity to write forward-looking legislation that arms administrative agencies with the tools to meet the many critical challenges that beset our 21st-century world. The Court is doing this knowing Congress does not have the capacity to legislate at the level or the speed necessary to keep up with those challenges. That does not enhance Congress’ power so much as aggrandize power in the judiciary and protect incumbent industries.

Justice Kagan is entirely right that there is hardly “anything more frightening” than the Court’s veto power over laws duly enacted by the political branches to meet challenges like climate change. But in this instance, Congress has quickly enacted new legislation that reinforces existing law and gives us a fighting chance to meet the climate crisis before it is too late. And EPA has proposed new standards for power plants using the new tools Congress has provided. It is not an overstatement to say that the future of our children and grandchildren rides on the success of these next moves to protect our climate.

209. See 88 Fed. Reg. at 33271-76 (reviewing D.C. Circuit cases).

210. *Racing Enthusiasts & Suppliers Coal. v. Environmental Prot. Agency*, 45 F.4th 353, 52 ELR 20096 (D.C. Cir. 2022). Petitioners’ opening brief hyperbolically claimed EPA’s anti-tampering rules imposed a “draconian ban affecting millions of Americans and a multi-billion dollar slice of the economy.” Petitioners’ Opening Brief at 49, *Racing Enthusiasts*, 45 F.4th 353, 2022 WL 970950.

211. *Louisiana v. Biden*, No. 22-30087, 2022 WL 866282, 52 ELR 20035 (5th Cir. Mar. 16, 2022); *Missouri v. Biden*, 52 F.4th 362 (8th Cir. 2022).

212. *Health Freedom Def. Fund v. Biden*, 599 F. Supp. 3d 1144 (M.D. Fla. 2022); *Louisiana v. Becerra*, No. 3:21-CV-04370, 2022 WL 4370448, 52 ELR 20118 (W.D. La. Sept. 21, 2022).

213. *Biden v. Nebraska*, No. 22A444, 2022 WL 17348754 (U.S. Nov. 23, 2022). [will need to update if decided before we go to print]

214. *Texas v. Environmental Prot. Agency*, No. 22-1031 (D.C. Cir.) (to be argued in September 2023).

215. Avery Ellfeldt, *Up Next: West Virginia AG Targets SEC Climate Proposal*, E&E NEWS: CLIMATEWIRE (July 1, 2022), <https://www.eenews.net/articles/up-next-west-virginia-ag-targets-sec-climate-proposal/>.