Case Note: *West Virginia v. Environmental Protection Agency*

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I. INTRODUCTION

The Constitution vests the legislative power of the government of the United States in the Congress of the United States, which consists of the Senate and the House of Representatives.[2] To become law, an act of Congress must typically be approved by both the House of Representatives and the Senate, and then approved by the President of the United States.[3] The United States Supreme Court regards bicameralism, which requires an act to pass both houses of Congress before becoming law; and presentment, which requires an act to be presented to the President for approval or veto; to be crucial parts of the government's lawmaking process.[4]

The drafters of the Constitution intentionally separated the lawmaking power from the executive branch of the government because they believed that concentrating both the legislative and the executive power in a single entity would threaten the liberty of the people.[5] Recognizing the drafters' intent, the Court has long adhered to the separation of powers doctrine, which prohibits the legislative,

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[2] U. S. Const. art. 1, § 1.

[3] U. S. CONST. art. 1, § 7. However, an Act passed by both houses of Congress may also become a law if the President fails to object within 10 days after it is presented to him, or if the President "vetoes" the act, but the House of Representatives and the Senate override the veto by a supermajority vote. *Id*.

[4] *See* Clinton v. City of New York, 524 U.S. 417, 449 (1998) (striking down the federal Line Item Veto Act because it conflicted with the bicameralism and presentment clauses).

[5] *See* THE FEDERALIST NO. 47 at 301 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.").

executive, or judiciary branches from discharging powers which the Constitution vests in a different governmental branch.[6]

However, many United States laws and regulations are enacted by the executive branch's administrative agencies, outside of the constitutional process of bicameralism and presentment.[7] Congress has created numerous administrative agencies, such as the Environmental Protection Agency ("EPA"), and endowed these agencies with the power to create rules within statutorily defined confines.[8] Some judicial scholars remain skeptical of such delegations of lawmaking authority, to the extent that that delegations of rule making power encroach upon the separation of powers. However, the Court holds delegations of lawmaking power to be permissible, so long as Congress provides sufficiently clear instructions and an "intelligible principle" to guide the agencies in their rule making.[9] The Administrative Procedure Act ("APA") of 1946 also proscribes procedural rules to which administrative agencies must adhere when they enact and amend rules.[10] But aside from the "intelligible principle" requirement and the APA's procedural rules, what additional constraints are there on agency rule making?

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[6] *See* Immigr. and Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted").

[7] *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1-2 (Univ. of Chicago Press 2015).

[8] *See* Legal Information Institute, *Administrative Law*, CORNELL.EDU (June 2022), https://www.law.cornell.edu/wex/administrative_law.

[9] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power").

[10] *See generally* 5 U.S.C. §§ 551-9 (formal agency rule making procedures are controlled by §§ 553, 556 and 557; informal rule making procedures are governed by 553).

In *West Virginia v. Environmental Protection Agency*, the Court recognized an important additional limitation on the lawmaking authority of administrative agencies.[11] The Clean Air Act authorizes the EPA to determine the "best system for emissions reduction" for power production facilities, and to proscribe emissions regulations based thereon.[12] In 2015, the EPA announced the new Clean Power Plan, which included a finding that the "best system" for reducing emissions from coal and natural gas power plants was to reduce the amount of energy produced in those types of plants, and require operators of such plants to subsidize energy production via cleaner energy sources.[13] For decades prior to 2015, the EPA had maintained that the "best system" for reducing pollution from fossil fuel fired plants involved using technologies and techniques to make power production more fuel-efficient and clean.[14] Never before had the EPA determined that the best system of emissions reductions for a fossil fuel plant involved reducing power production at that plant, or requiring producers to subsidize cleaner means of production.[15] After the EPA's actions were challenged, The Court held that the EPA acted unlawfully by making emissions rules based on its finding that the best system of emissions reduction for fossil fuel fired power plants was to reduce production at those plants, or require them to subsidize production at other plants, because the EPA's actions violated the major questions doctrine.[16]

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[11] West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2615 (2022).
[12] *Id.* at 2599.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 2616.

This case note explains why the *West Virginia* holding was a good decision, based on decades of precedent and the constitutional separation of powers doctrine. Section II sets forth the factual background and the elaborate procedural history which underlie the *West Virginia* case. Section III explains the Court's holding and rationale in detail. Section IV explains the history and development of related caselaw. Section V considers the landscape of the law concerning constitutional delegations of lawmaking power, post *West Virginia*, and explores alternate avenues by which the EPA's goals of reducing national carbon emissions may be achieved.

II. BACKGROUND: WEST VIRGINIA V. ENVIRONMENTAL PROTECTION AGENCY

A. Factual Background

On October 23, 2015, the EPA published a set of rules in the Federal Register, announcing its decision to start regulating carbon dioxide gas emissions from electric utility generating plants under the Clean Air Act's New Source Performance Standards program.[17] The EPA had determined that climate change constituted a threat that touched "nearly every aspect of public welfare," and that the United States, over the next few decades, would likely face serious risks of water and food shortage, along with extreme weather events such as heat waves, droughts, severe hurricanes, and flooding, and other negative consequences, as a result of climate change.[18] The EPA stated that carbon dioxide gas is a greenhouse gas which is known

[17] Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64510-64660 (Oct. 23, 2015) (amending 40 C.F.R. §§ 60, 70, 71, et al.).
[18] *Id.* at 64517.

to cause climate change, and is therefore an "air pollutant" that endangers "public health or welfare," making it subject to regulation under the Clean Air Act.[19]

In the substantive rule that followed, the EPA enacted two separate regulatory schemes to limit carbon dioxide emissions from power plants — one for new power plants and one for existing power plants.[20] For new power plants, the EPA determined that the "best system of emissions reduction" involved using a combination of high-efficiency energy production processes and carbon-capture exhaust filtration technologies; the EPA set emissions limits based on what was attainable by employing this "best system."[21] The regulatory scheme for new power plants is generally not at issue in this case. However, when creating the Clean Power Plan for existing fossil fuel power plants, the EPA took a more controversial approach, finding that the "best system" of emissions reduction included three "building blocks," and involved a concept called "generation shifting."[22]

The first building block involved using efficient technologies and processes to obtain "heat rate improvements" and improve the thermal efficiency of energy production at existing power plants.[23] However, the EPA noted that most fossil fuel fired power plants already operate at close to the optimal heat rate, so building block one would only result in "small emission reductions."[24] The EPA explained that, in

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[19] *Id.* at 64530.
[20] *Id.* at 64512, 64662.
[21] *Id.* at 64512.
[22] Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64661, 64667 (October 23, 2015) (amending 40 C.F.R. § 60).
[23] *Id.* at 64727.
[24] *Id.*

order to achieve the desired reduction in carbon dioxide emissions, existing power plants would also need to embrace building blocks two and three which involved "generation shifting from higher-emitting to lower-emitting" methods for producing electricity.[25] Building block two was to shift electricity production away from coal-fired power plants and towards natural-gas-fired plants, which the EPA noted would reduce carbon dioxide emissions, since natural gas plants produce "typically less than half" as much carbon dioxide per unit of electricity as coal plants.[26] The third building block was to shift from both coal- and gas-fired plants to plants with"low- or zero-carbon generating capacity," such as wind or solar plants.[27]

The standards of performance that the EPA established in the Clean Power Plan for existing power plants were based on its "best system" definition which included the three building blocks.[28] Notably, the two "generation shifting" building blocks accounted for the vast majority of the carbon dioxide emissions reductions, and the emissions standards for existing power plants ended up being more stringent than the emissions standards for new plants, due to the use of "generation shifting" in calculating the attainable emissions reductions for existing plants.[29]

The EPA explained that energy producers could comply with the new rules by reducing electrical production at their existing fossil fuel plants and building newer, more efficient power plants. Alternatively, producers could buy emission allowances

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[25] *Id.* at 64728.
[26] *Id.*
[27] *Id.* at 64729.
[28] 80 Fed. Reg. 64661, 64729.
[29] *Id.* at 64728.

or credits in a "cap and trade" program, wherein producers of electricity who met the emissions standards could sell "emissions credits" to other producers.[30] The EPA noted that it could apply "a wide range of potential stringencies for the [best system of emissions reduction]," meaning that it could require only slight generation shifting, or aggressive generation shifting, and that it had selected standards that it regarded as "reasonable."[31] Overall, the EPA projected that by 2030, it's plan would reduce coal-based electricity generation by eleven percent and significantly increase production by renewable energy sources such as wind and solar.[32]

On the very same day that the EPA published these rules, numerous parties, including twenty-seven states, filed suit against the EPA, seeking to have the Clean Power Plan stayed and declared unconstitutional.[33] They argued that the term, "best system of emissions reduction" in the Clean Air Act referred to technological systems and techniques which make the production of energy cleaner, and that the EPA's use of "generation shifting" as a system for emissions reduction contradicted the historical and intended meaning of this term.[34]

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[30] *Id.* at 64731-32. The EPA created a sophisticated "cap-and trade" program, wherein power producers who meet their emissions goals can sell credit representing the value of that reduction to operators of power plants who cannot meet their emissions goals. *Id.* Thus, a power plant that fails to meet the carbon emissions cap set by the EPA may continue to operate by buying emissions credits from more environmentally friendly power producers. *Id.*

[31] *Id.* at 64797-64811.

[32] *Id.* at 64665.

[33] West Virginia v. Env't Prot. Agency, 142 S.Ct. 2587, 2604 (2022).

[34] *Id.*

B. Procedural History

The plaintiffs asked the D.C. Circuit Court of Appeals to stay the Clean Power Plan on October 23, 2015, the same day that EPA published its new rules.[35] The court declined to stay the rule, but the plaintiffs appealed to the United States Supreme Court, which granted a temporary stay, preventing the rule from taking effect until the EPA's new rules were subjected to further judicial review.[36]

The D.C. Circuit Court of Appeals heard arguments on the merits *en banc*. However, before a judgement was entered, the presidential administration changed over, in January 2017.[37] The new administration requested that litigation related to this issue be delayed, so that it could reconsider the Clean Power Plan.[38] The D.C. Circuit agreed, and later dismissed petitions for review as moot.[39]

In July 2019, the EPA repealed the Clean Power Plan, concluding that it had exceeded its own statutory authority under the Clean Air Act.[40] The EPA specifically noted that "generation shifting" should not have been considered as part of the "best system of emissions reduction," instead finding that the best system should only include systems that can be put into operation at a building, structure, facility or installation to limit emissions, such as add-on controls or more efficient practices.[41]

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[35] *Id.* Petitioners filed directly in the D.C. Circuit Court of Appeals pursuant to Federal Rule of Appellate Procedure 15, which provides that judicial review of an agency order is commenced by filing a petition for review in the appropriate Court of Appeals. Fed. R. App. P. 15.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] 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. 32523 (July 8, 2019) (amending 40 C.F.R. § 60).
[41] *Id.* at 32523.

The EPA further concluded that the Clean Power Plan's generation shifting scheme fell under the "major question doctrine," which holds that administrative agencies cannot make changes to their regulatory schemes which would result in major economic or societal impacts without clear authorization from Congress.[42] The EPA then promulgated a replacement rule, the Affordable Clean Energy Rule, which was similar in substance to building block one of the Clean Power Plan, requiring equipment upgrades and operating practices that would improve electrical power plants' heat rates.[43]

A number of other states and private parties immediately filed petitions for review in the D.C. Circuit, challenging the EPA's 2019 repeal of the Clean Power Plan and the enactment of the Affordable Clean Energy Rule.[44] Other parties, including West Virginia, intervened to defend the EPA's actions.[45] The D.C. Circuit Court of Appeal consolidated all the petitions for review into a single case, and held, on January 19, 2021, that the EPA's repeal of the Clean Power Plan was based upon a mistaken reading of the Clean Air Act.[46] The court concluded that the statute could be reasonably read to allow for generation shifting as part of the best system for emissions reduction; it vacated the Affordable Clean Energy Rule and revived the Clean Power Plan, which the Affordable Clean Energy rule had replaced.[47]

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[42] *Id.* at 32529.
[43] *Id.* at 32522, 32537.
[44] *West Virginia*, 142 S.Ct. at 2605.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 2606.

Soon after this holding, in January 2021, the presidential administration changed again, and the EPA asked the court to stay its holding so that the new administration could reconsider its stance on the Clean Power Plan.[48] The court agreed to temporarily stay the holding, but Petitioners, seeking to establish that the Clean Power Plan was unlawful, appealed to the United States Supreme Court, which granted certiorari and consolidated the cases into *West Virginia v. Environmental Protection Agency*.[49]

C. Issue and Holding

The central question that the United States Supreme Court addressed in *West Virginia v. Environmental Protection Agency* was whether the EPA exceeded its authority when it determined that the "best system of emissions reduction" for existing power plants required either the full or partial shut-down of those power plants, or the subsidization of cleaner energy plants.[50] The Court addressed this question through the lens of the "major questions doctrine," which provides that in "extraordinary cases" in which the agency's action exceeds the "historical breadth of the authority that [the agency] has asserted" and the matter involved has great "economic and political significance," then the agency's action is invalid, unless it can show "clear congressional authorization" to support its new assertion of authority.[51] Ultimately, the Court found the Clean Power Plan invalid because the authority the EPA asserted under the Clean Power Plan exceeded historical norms, the matter

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[48] *Id.*
[49] *Id.*
[50] *West Virginia*, 142 S.Ct. at 2607.
[51] *Id.* at 2608.

involved was of great national importance, and the EPA failed to show "clear congressional authorization" to justify its actions.[52]

III. RATIONALE: WEST VIRGINIA V. ENVIRONMENTAL PROTECTION AGENCY

A. The Historical Breadth of the EPA's Authority

The Clean Air Act establishes three air-pollutant regulatory programs which are administered by the EPA: the National Ambient Air Quality Standards program, the New Source Performance Standards program, and the Hazardous Air Pollutants program.[53] Each of these regulatory programs addresses a particular type of harmful air pollution.[54]

At issue in the *West Virginia* was the New Source Performance Standards program, which primarily targets new and modified sources of pollution.[55] It directs the EPA to identify stationary sources which contribute significantly to "air pollution which may reasonably be anticipated to endanger public health or welfare."[56] After identifying such sources, the EPA promulgates "standards of performance" for new sources of pollution, which "reflect the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] determines has

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[52] *Id.* at 2616.
[53] *See* 42 U.S.C. §§ 7408–7412 (sections 7408 to 7410 create the National Ambient Air Quality Standards Program; § 7411 creates the New Source Performance Standards program; and § 7412 creates the Hazardous Air Pollutant program).
[54] *West Virginia*, 142 S.Ct. at 2600.
[55] *See* 42 U.S.C. § 7411.
[56] 42 U.S.C. § 7411(b)(1)(A).

adequately been demonstrated."[57] After the EPA establishes standards for new sources, it must also address emissions of the same pollutants by preexisting sources of pollution, but only for chemicals which are not already regulated under the National Ambient Air Quality Standards or Hazardous Air Pollutant programs.[58] Thus, § 7411(d) "operates as a gap-filler," allowing the EPA to regulate emissions from existing sources which are not already regulated by the other two programs.[59] The EPA lacks authority to directly govern producers of pollutants under the New Source Performance Standards program.[60] Instead, the states must each submit plans to the EPA which explain the restrictions they will adopt to ensure that producers of pollution within their jurisdiction will meet the EPA's standards.[61]

Historically, the EPA used the powers granted to it under § 7411(d) in only a handful of instances.[62] In 1976, the EPA used § 7411(d) to place limits on acid mist being generated by sulfuric acid production plants.[63] In 1979, the agency again used § 7411(d) to limit sulfide gas pollution by Kraft pulp mills.[64] In 1996, the EPA used §

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[57] 42 U.S.C. § 7411(a)(1).
[58] 42 U.S.C. § 7411(d).
[59] *West Virginia*, 142 S.Ct. at 2601 (quoting *Am. Lung Ass'n v. Env't Prot. Agency*, 985 F.3d 914, 932 (CADC 2021)).
[60] *Id.*
[61] 42 U.S.C. § 7411(d)(1).
[62] *West Virginia*, 142 S.Ct. at 2602 ("Reflecting the ancillary nature of Section [7411(d)], EPA has used it only a handful of times since the enactment of the statute in 1970"); Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64703 ("Over the last fourty years, under [section 7411(d)], the [EPA] has regulated four pollutants from five source categories ").
[63] Standards of Performance for New Stationary Sources; Emission Guidelines for the Control of Sulfuric Acid Mist From Existing Sulfuric Acid Production Units, 41 Fed. Reg. 48706 (November 4, 1976) (amending 40 C.F.R. Part 60)).
[64] Kraft Pulp Mills; Final Guideline Document; Availability, 44 Fed. Reg 29829 (May 22, 1979) (amending 40 C.F.R. § 60).

7411(d) to limit the emission of various harmful gasses from municipal landfills.[65] Aside from these instances, the record of § 7411(d)'s use prior to 2015 is sparse.[66]

Carbon dioxide is not one of the specific chemicals that is controlled under the National Ambient Air Quality Standards or the Hazardous Air Pollutant programs, so the EPA lacks authority to regulate it under those programs.[67] Instead, the EPA sought to regulate carbon dioxide under the § 7411 New Source Performance Standards program.[68] For preexisting power plants, only the § 7411(d) "gap filler" provision could apply.[69] Thus, the EPA used the "obscure, never used" gap filler provision, § 7411(d), as the sole statutory basis to support the Clean Power Plan,

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[65] Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9907 (March 12, 1996) (amending 40 C.F.R. Parts 51, 52, and 60)).

[66] *West Virginia*, 142 S.Ct. at 2602 (quoting Hearings on S. 300 et al. before the Subcommittee on Environmental Protection of the Senate Committee on Environment and Public Works, 100th Long., 1st Sets., 13 (1987) (remarks of Sen. Durenberger) ([Section 7411(d)] is an "obscure, never used section of the law")).

[67] *West Virginia*, 142 S.Ct. at 2602. The National Ambient Air Quality Standards program targets pollutants which "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1). The statute tasks the EPA to establish "ambient air quality standards" for each such pollutant which would be adequate "to protect the public health" from the harmful effects of those pollutants. 42 U.S.C. § 7409(b). Carbon dioxide is not one of the chemicals that the EPA regulates under the National Ambient Air Quality Standards program. *See Util. Air Regul. Grp. v. Env't Prot. Agency*, 573 U.S. 302, 308 (noting that National Ambient Air Quality Standards regulations only exist for six pollutants: "sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead"). The Hazardous Air Pollutants program targets pollutants other than those already covered by the National Ambient Air Quality Standards program, which present "a threat of adverse human health effects," including "carcinogenic, mutagenic" and otherwise toxic substances. 42 U.S.C. § 7412(b)(2). The statute requires the EPA to promulgate emissions standards for such substances to achieve "the maximum degree of reduction in emissions . . . taking into consideration the cost of achieving such emission reduction" and other important factors." 42 U.S.C. § 7412(d)(2). The Clean Air Act lists 189 chemicals which Congress determined to be hazardous, and authorizes procedures by which the EPA to amend the list. 42 U.S.C. § 7412(b). Carbon dioxide is not one of the pollutants covered by the Hazardous Air Pollutants program. *See* 42 U.S.C. 7412(b)(1); *see also* United States Environmental Protection Agency, *Initial List of Hazardous Air Pollutants with Modifications*, EPA.GOV (December 19, 2022), https://www.epa.gov/haps/initial-list-hazardous-air-pollutants-modifications.

[68] *West Virginia*, 142 S.Ct. at 2602.

[69] *Id.*

which was intended to effectuate an "aggressive transformation in the domestic energy industry," away from fossil fuel and towards renewables, on a national scale.[70] Not only did the breadth of authority the EPA asserted under § 7411(d) exceed the historical norm; the manner in which the EPA set emissions limits in the Clean Power Plan also conflicted with historical precedent.[71] Prior to 2015, the EPA had never devised a "system" for emissions reductions that involved shutting down or reducing production at any particular type of power plant, or requiring the plant operator to subsidize other producers of electricity.[72] Instead the EPA previously based its "best systems of emissions reduction" on techniques, technologies and measures which could be deployed at existing power plants to increase efficiency and cleanliness of energy production.[73] For the foregoing reasons, the Court found that the breadth of the authority that the EPA asserted under § 7411(d) in the Clean Power Plan substantially exceeded the historical breadth of the authority that the EPA had asserted under that statute.[74]

B. Economic and Political Significance

Next, the Court considered the economic and political significance of the Clean Power Plan. The economic significance of the Clean Power Plan was hardly in dispute: The EPA acknowledged that its new rules would require plant operators to spend billions of dollars in compliance costs, and would result in the closure of numerous

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[70] *Id.* at 2603 (citing U.S. ENV'T PROT. AGENCY, *Fact Sheet: Overview of the Clean Power Plan; Cutting Carbon Pollution From Power Plants* 2, EPA.GOV (2015), https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html#print.
[71] *West Virginia*, 142 S.Ct. at 2611.
[72] *Id.*
[73] *Id.*
[74] *Id.*

fossil fuel-fired power plants.[75] Additionally, the United States Energy Information Administration predicted that the adoption of the Clean Power Plan would cause persistent increases in electricity prices and would reduce gross domestic product by at least a trillion dollars by 2040.[76] The Court noted that the EPA's newly asserted powers under § 7411(d) "conveniently enabled it to enact a [cap-and-trade] program" under the Clean Air Act, although Congress "consistently rejected proposals to amend the Clean Air Act to create such a program."[77] Concluding that the topic of greenhouse gas regulation under the Clean Air Act would have significant economic effects, and was a hotly debated political topic, the Court found that the EPA's actions were covered by the "major questions doctrine" and would therefore be unlawful unless the EPA could show "clear congressional authorization."[78]

C. Clear Congressional Authorization

To determine whether there was clear congressional authorization, the Court looked to the text of the Clean Air Act.[79] Section 7411(d) authorizes the EPA to determine the best "system" of emissions reduction, and then to proscribe emissions caps attainable by applying that system.[80] The Court noted that, in some contexts,

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[75] U.S ENV'T PROT. AGENCY, *Regulatory Impact Analysis for the Clean Power Plan Final Rule* 3-22, 3-30, 3-33, 6-24, 6-25 EPA.GOV (August 2015), https://archive.epa.gov/epa/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf.
[76] United States Department of Energy, *Analysis of the Impacts of the Clean Power Plan* 21, 63-64 EIA.GOV (May 2015), https://www.eia.gov/analysis/requests/powerplants/cleanplan/pdf/powerplant.pdf.
[77] *West Virginia*, 142 S.Ct. at 2614 (citing American Clean Energy and Security Act of 2009, H. R. 2454, 111th Cong., 1st Sess.; Clean Energy Jobs and American Power Act, S. 1733, 111th Cong., 1st Sess. (2009)).
[78] *West Virginia*, 142 S.Ct. at 2614.
[79] *Id.*
[80] *Id.*

the term "system" can have a very broad, almost all-encompassing definition, such that a "generation shifting" regulatory scheme could be considered a system.[81] However, within the context of § 7411, the term "system" was intended to have a more narrow definition.[82]

The Court noted that the EPA had historically understood the term "system" as referring to technological systems or techniques.[83] Additionally, the Court remarked that the use of "generation shifting" as a part of a "system" conflicted with the statutory text requiring the EPA to proscribe caps at levels attainable by applying the "system," because the degree of emission limitation achievable through generation shifting depends on the degree generation shifting required.[84] Therefore, the Court found that Congress didn't clearly authorize the EPA to enact the type of system that was used in the 2015 Clean Power Plan.[85]

The Court also noted that, when Congress amended the Clean Air Act in 1990, emissions trading programs like the one created in the Clean Power Plan were a "novel and highly touted concept," and Congress specifically made amendments to the National Ambient Air Quality Standards program to authorize their use, and to proscribe clear "measures, means and techniques" that could be used in cap-and-trade programs.[86] Although Congress did alter § 7411 in the 1990 amendment to the Clean Air Act, Congress, notably, did not authorize the use of emissions trading programs

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[81] *Id.*
[82] *Id.* at 2615.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* (citing L. Heinzerling & R. Steinzor, *A Perfect Storm: Mercury and the Bush Administration*, 34 ENV. L. REP. 10297, 10309 (2004)).

under that section, suggesting that Congress did not intend for emissions trading programs to be created as a "system" for emissions reduction under § 7411.[87] For the foregoing reasons, the Court concluded that the EPA did not have "clear congressional authorization" to enact the Clean Power Plan, and struck down the plan as an invalid exercise of agency lawmaking.[88]

IV. HISTORICAL CONTEXT: THE RISE OF THE MAJOR QUESTIONS DOCTRINE

The holding in *West Virginia v. Environmental Protection Agency* is based on the application of the "major questions doctrine;" but what is the major questions doctrine? Where does it come from, and how should it be applied? To answer these questions, it's important to consider the history and judicial framework surrounding delegations of lawmaking power in the United States.

A. Constitutional Separation of Powers

The framers of the United States Constitution feared that vesting too much power into any governmental entity would eventually allow the holder of those powers to gain nearly unlimited power, like the despotic monarchs reigning in Europe at that time.[89] In an effort to constrain the tendency of the government towards autocracy, the framers separated the legislative, executive, and judicial powers into three distinct branches of government, and emplaced a system of checks and balances

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[87] *Id.*
[88] *Id.* at 2616.
[89] *See, e.g.*, THE FEDERALIST NO. 47 at 301 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny); Thomas Jefferson, Notes on the State of Virginia (1787), *in* THE ESSENTIAL JEFFERSON 77, 99 (John Dewey ed., 2008) ("The concentrating [of legislative, executive and judicial powers] in the same hands is precisely the definition of despotic government").

through which each branch could act to counter the actions of the other branches.[90] The Constitution vests all legislative power in Congress, all executive power in the President, and all judicial power in the United States Supreme Court.[91] Indeed, the very structure of the Constitution, with Articles I through III each delegating the legislative, executive and judicial powers to the three branches of government, respectively, suggests that the framers of the Constitution considered the separation of powers doctrine to be of foundational importance.[92] As a result, the Court recognizes the separation of powers doctrine as a limit on the discharge of governmental powers by each branch, and has struck down numerous laws and regulations over the years for running afoul of that doctrine.[93]

However, as a practical matter, the separation of powers is not absolute — the executive branch is necessarily endowed with the power to interpret the statutes it administers, and make certain rules.[94] In the first half of the twentieth century, the Court addressed the issue of whether certain delegations of legislative power to the executive branch were consistent with the separation of powers.[95]

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[90] *See*, *e.g.*, Letter from John Adams to Richard Henry Lee (Nov. 15, 1775) ("A legislative, an executive and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained.").
[91] U.S. CONST. art. 1, § 1, cl. 1; U.S. CONST. art. 2, § 1, cl. 1; U. S. CONST. art. 3, § 1, cl. 1.
[92] Immigr. and Naturalization Serv. v. Chadha, 462 U.S. 919, 946 (1983) ("The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers").
[93] *See*, *e.g.*, Morrison v. Olson, 487 U.S. 654, 693 (1988) (noting that the Court has repeatedly "reaffirmed the importance in our constitutional scheme of the separation of powers into the three coordinate branches.").
[94] *See*, *e.g.*, Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) ("no statute can be entirely precise, and some judgements, even some judgements involving policy considerations, must be left to the officers executing the law").
[95] *See* I. Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 375 (February 2017).

B. Constitutional Limits on Delegations of Lawmaking Authority

In *J.W. Hampton, Jr. & Co. v. United States*, the United States Supreme Court considered a challenge to the "flexible tariff provision" of the Tariff Act of September 21, 1922, which delegated to the President the traditionally Congressional power to amend the tariff schedule based on fluctuations to the "costs of production" for particular goods.[96] The Court decided that Congress could properly delegate this power to the President, so long as it laid down "an intelligible principle" to direct the executive in determining the tariff rate.[97] The Court explained that the flexible tariff provision did not involve an unlawful use of the legislative power to set tariffs by the executive, because the executive could only set the tariff pursuant to the directives which Congress had provided in the act.[98] Therefore, the executive only had discretion "to be exercised in the execution of the law" and not in the legislative practice of making of policy itself.[99]

Although the Court found that the flexible tariff provisions met constitutional muster, it struck down several delegations of legislative power as improper in 1935, because they lacked an adequately intelligible principle.[100] As part of the New Deal legislation, Congress passed the National Industrial Recovery Act ("NIRA"), which included provisions giving the President wide authority to create law to promote the

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[96] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 401 (1928).
[97] *Id.* at 352.
[98] *Id.*
[99] *Id.* (quoting *State ex rel. R.R. & Warehouse Comm'n v. Chi., Milwaukee & St. Paul Ry. Co.*, 37 N.W. 782, 788 (Minn. 1888), *rev'd*, 134 U.S. 418 (1890)).
[100] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-2 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

rehabilitation and expansion of trade and industry in response to the great depression.[101] In *Panama Refining Co. v. Ryan*, the Court struck down provisions of NIRA which gave the President authority to prohibit the transportation of petroleum products in interstate and foreign commerce, because the provisions lacked adequate guiding principles to direct the President in the execution of the law.[102] Similarly, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down additional NIRA provisions because, considering "the nature of the few restrictions that are imposed, the discretion of the President" in making policy decisions and rules was "virtually unfettered," therefore the law constituted an "unconstitutional delegation of legislative power."[103]

During World War II, the Court repeatedly upheld delegations of legislative power as permissible, reiterating the "intelligible principle" requirement articulated in *J. W. Hampton*.[104] The Court's trend of allowing delegations of legislative and judicial authority continued after World War II and through the remainder of the 20th century.[105] The nondelegation doctrine espoused in *Panama* and *Schechter* was never overturned, but it was never again used by the Court to strike down a federal

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[101] See *A.L.A. Schechter*, 295 U.S. at 521; *Panama*, 293 U.S. at 406.
[102] *Panama*, 293 U.S. at 430.
[103] *A.L.A. Schechter*, 295 U.S. at 542.
[104] *See*, *e.g.*, Am. Power & Light Co. v. Sec. Exch. Comm'n, 329 U.S. 90, 104 (upholding a delegation of authority which allowed the executive branch's Securities and Exchange Commission to prevent unfair or inequitable distribution of voting power among security holders); Yakus v. United States, 321 U.S. 414, 426 (1944) (upholding delegation allowing an executive "Price Administrator" to set commodity prices under the Emergency Price Control Act of 1942); Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 602 (1944) (upholding delegation allowing an executive agency to set "just and reasonable" rates for the cost of power); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225-6 (1943) (upholding delegation to the executive branch's Federal Communications Commission to regulate broadcast licensing "as public interest, convenience, or necessity" require).
[105] *See*, *e.g.*, Lichter v. United States, 334 U.S. 742, 778 (upholding a delegation of legislative authority which allowed the executive to determine what constituted "excessive profits.").

statute.[106] Although seldom used, the decisions in *Panama* and *Schechter* remain valid law to this day, and the Court remains mindful of the separation of powers issue posed by delegation of legislative power.[107]

C. Judicial Deference to Administrative Agencies

In 1984, in the landmark case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court addressed a question of statutory interpretation by an administrative agency.[108] In the Clean Air Act, Congress delegated to the EPA the authority to regulate "stationary sources [of pollution]," but Congress had not provided a definition for that term.[109] The EPA created and promulgated its own definition for the term, and its definition was challenged in court.[110] The Court established a two-step process for judicial review of agency interpretations of the statutes that the agency administers.[111] First, it looks to see if Congress has "directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court."[112] Second, if Congress has not directly addressed the precise question at issue, the Court must accept the agency's interpretation of the

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[106] Mistretta v. United States, 488 U.S. 361, 373 (1989) ("After invalidating in 1935 two statutes as excessive delegations, see [*A.L.A. Schechter* and *Panama*] we have upheld, again without deviation, Congress' ability to delegate power under broad standards.").
[107] Gundy v. United States, 139 S.Ct. 2116, 2121 (2019) ("The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."); *Gundy*, 139 S.Ct. at 2132 (Gorsuch, J., dissenting) (explaining that dissenters would have struck down certain provisions of the Sex Offender Registration and Notification Act under the nondelegation doctrine for lack of an intelligible principle).
[108] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).
[109] *Id.*
[110] *Id.*
[111] *Id.* at 842-4.
[112] *Id.* at 842-3.

statute, unless the agency's interpretation is unreasonable.[113] The Court explained that its decision rested upon the fact that Congress had implicitly delegated to EPA the power to reasonably interpret the Clean Air Act, for if the EPA was powerless to construct an understanding of its own statute, then the EPA would also be powerless to administer the program created by the statute.[114] In the case of *Auer v. Robbins*, the Court reaffirmed its *Chevron* holding, noting that, in step two of the *Chevron* test, a court must uphold "an agency's permissible interpretation of its regulation."[115]

D. Limitations on Deference and the Rise of the Major Questions Doctrine

The Court's holdings in *Chevron* and *Auer* became known as the *Chevron* deference or *Chevron-Auer* deference doctrine, and they are still binding precedent at the present time.[116] However, in the past few decades, the Court delivered a series of holdings which significantly limited the scope of *Chevron* deference.

For instance, ten years after *Chevron*, in 1994, the Court invalidated the Federal Communications Commission's ("FCC's") interpretation of a statutory provision which granted the FCC the authority to "modify" certain requirements under the Communications Act of 1934.[117] It held that the FCC was not entitled to

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[113] *Id.* at 844 ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").
[114] *Id.*
[115] Auer v. Robbins, 519 U.S. 452, 457 (1997).
[116] *See, e.g.*, West Virginia v. Env't Prot. Agency, 142 S.Ct. 2587, 2016 (although the Court did not apply the *Chevron* test under this case, the commentary implies that the *Chevron* test is still valid as of 2022).
[117] MCI Telecomm. Corp. v. Am. Tel. and Tel. Co., 512 U.S. 218, 229 (1994).

Chevron deference because its interpretation of the statute went "beyond the meaning that the statute [could] bear."[118]

In 2000, in the case of *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, the Court again struck down regulations after the Food and Drug Administration ("FDA") stepped beyond the bounds of its statutory power.[119] In *Brown & Williamson Tobacco Corp.*, the FDA promulgated new regulations for tobacco advertisement, pursuant to its powers under the Food, Drugs and Cosmetics Act ("FDCA"), intending to reduce tobacco consumption among minors.[120] However, the Court struck down these regulations, finding that the FDA could not regulate tobacco marketing under the FDCA, because doing so conflicted with Congressional intent.[121] It noted that the FDA was not entitled to *Chevron* deference because Congress had already provided for the regulation of tobacco advertisement, under a regulatory scheme including the Federal Cigarette Labeling and Advertising Act, and other statutes.[122] The Court explained that it was important to view the statute at issue, in this case the FDCA, in context within the relevant regulatory framework and within history, in order to determine Congress's intent.[123] Further, the Court noted that, "in extraordinary cases . . . there may be reason to hesitate" before deferring to an agency's interpretation of its statute.[124]

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[118] *Id.*
[119] Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).
[120] *Id.* at 127.
[121] *Id.* at 161.
[122] *Id.* at 137.
[123] *Id.* at 157.
[124] *Id. at 158.*

More recently, in 2014, the Court struck down a set of EPA regulations under the Clean Air Act which would have required permitting for certain producers of greenhouse gasses, in the case *Utility Air Regulatory Group v. Environmental Protection Agency*.[125] The EPA's regulations were premised on a definition of the term "any air pollutant" within the context of the Clean Air Act's Title V provision related to permitting.[126] The Court found that, when read within the statutory scheme, the term "any air pollutant" could only reasonably be constructed to apply to air pollutants regulated under the National Ambient Air Quality Standards program, which did not cover greenhouse gasses.[127] It held that the EPA's interpretation of the term was inconsistent with the statutory scheme, therefore the EPA was not entitled to *Chevron* Deference.[128] The Court further noted that if the EPA's interpretation of the statute were accepted, it would dramatically increase the administrative costs related to the Clean Air Act.[129] When "an agency claims to discover 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."[130]

In 2021, the Court again snubbed an agency's assertion of a new power in the case, *Alabama Association of Realtors v. Department of Health and Human*

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[125] Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 333–34 (2014).
[126] *Id.* at 308.
[127] *Id.* at 320.
[128] *Id.* at 321.
[129] *Id.* at 322 (according to the EPA, "annual permit applications would jump from about 800 to nearly 82,000 [and] annual administrative costs would swell from $12 million to over $1.5 billion" if EPA's construction of the statute was not struck down).
[130] *Id.* (quoting *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 161 (2000)).

Services.[131] During the COVID-19 pandemic, the Centers for Disease Control ("CDC") imposed a moratorium on the eviction of tenants by landlords, "covering all residential properties nationwide and imposing criminal penalties on violators."[132] The CDC claimed authority for the moratorium under § 361(a) of the Public Health Service Act, which authorizes "[t]he Surgeon General . . . to make and enforce such regulations as in his judgement are necessary to prevent the introduction, transmission, or spread of communicable diseases."[133] The Court found that, reading the statutory language in context, the statute only gives the surgeon general discretion to undertake "direct targeting of disease" through measures such as "fumigation, disinfection, sanitation" or "pest extermination," whereas the CDC was claiming the broad power to impose a general eviction moratorium which would have only a remote, downstream effect on the spread of the pandemic.[134] Additionally, the Court noted that it expected Congress to "speak clearly" when authorizing an agency to exercise powers of "vast economic and political significance."[135] As such, the Court ended the eviction moratorium, finding that the CDC's reading of the statute would give the CDC "a breathtaking amount of authority" and noted: "Section 361(a) is a wafer-thin reed on which to rest such sweeping power."[136]

Less than a year later, in *National Federation of Independent Businesses v. Department of Labor Occupational Safety and Health Administration*, the Court

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[131] Alabama Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S.Ct. 2485, 2490 (2021).
[132] *Id.* at 2486.
[133] *Id.* at 2487 (quoting 42 U.S.C. § 264(a)).
[134] *Alabama Ass'n of Realtors*, 141 S.Ct. at 2489.
[135] *Id.* (quoting *Util. Air Regul. Grp. v. Env't Prot. Agency*, 573 U.S. 302, 324 (2014)).
[136] *Alabama Ass'n of Realtors*, 141 S.Ct. at 2490.

stayed a mandate issued by the Occupational Safety and Health Administration which required all employers of 100 or more employees to either require all employees to receive vaccination against COVID 19, or wear masks and undergo weekly testing for the COVID-19 virus at their own expense.[137] The Court found that "this [was] no ordinary exercise of federal power," again repeating that it "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[138] It held that the Occupational Safety and Health Act merely authorized OSHA to enforce "occupational" safety and health standards associated with "work-related dangers," whereas the vaccine mandate constituted a "general public health measure" associated with the "universal" risk posed by COVID-19.[139] Notably, the concurring opinion clearly embraced, for the first time in a United States Supreme Court opinion, the term "major questions doctrine" to describe the holding.[140]

V. ANALYSIS: THE UNITED STATES SUPREME COURT WAS RIGHT TO STRIKE DOWN THE EPA'S CLEAN POWER PLAN

A. The Roots of the Major Questions Doctrine

In *West Virginia v. Environmental Protection Agency*, the United States Supreme Court formally adopted the major questions doctrine, which holds that when an administrative agency makes a novel assertion of authority which has broad economic and political significance, and which exceeds the agency's historic breadth

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[137] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. Occupational Safety and Health Admin., 142 S.Ct. 661, 666 (2022).
[138] *Id.* at 665.
[139] *Id.*
[140] *Id.* at 667 (Gorsuch, J., concurring).

of authority, the agency must show "clear congressional authorization" to support its new assertion of authority.[141] The primary purpose of the major questions doctrine is to ensure that Congress remains the governmental body that makes major national policy decisions, rather than administrative agencies under the executive branch.[142] The major questions doctrine bolsters the constitutional separation of powers, by preventing administrative agencies from exercising legislative policy-making power on important issues.[143]

While the major questions doctrine's name is new, a review of judicial precedent shows that the principles and policy behind the doctrine are not. The major questions doctrine is an outgrowth of the separation of powers — a foundationally important concept in constitutional law.[144] Almost a century ago, when the Court first considered the legality of delegations of congressional lawmaking power to the executive branch, it considered the separation of powers issue and imposed the "intelligible principle" restriction, drawing an important distinction between allowing the executive discretion in the execution of the law, and discretion in determining "what [the law] should be."[145] In 1935, the Court renewed its commitment to the separation of powers by striking down numerous provisions of the National Industrial

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[141] West Virginia v. Env't Prot. Agency, 142 S.Ct. 2587, 2616 (2022).
[142] *Nat'l Fed'n of Indep. Bus.*, 142 S.Ct. at 667 (Gorsuch, J., concurring) ("The central question we face today is: Who decides? . . . an administrative agency in Washington, . . . or . . . the people's elected representatives in Congress[?]").
[143] *West Virginia*, 142 S.Ct. at 2617 (Gorsuch, J., concurring) ("The major questions doctrine works . . . to protect the Constitution's separation of powers.").
[144] Immigr. and Naturalization Serv. v. Chadha, 462 U.S. 919, 946 (1983) ("The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers").
[145] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 401 (1928).

Recovery Act for failure to comply with the intelligible principle and discretionary requirements imposed in *J.W. Hampton*, giving rise to the nondelegation doctrine.[146]

The Court's *Chevron* holding in 1984 appears, at first glance, to weaken the nondelegation doctrine, to the extent that *Chevron* adopted a deferential policy allowing agencies to reasonably interpret their own powers. However, upon careful consideration, the *Chevron* holding and its progeny do not depart from the separation of powers, but instead reflect a judicial decision to respect the lawmaking power of Congress. If the Court had not held in *Chevron* that the EPA had the implicit authority to reasonably interpret the Clean Air Act, then the EPA would be unable to effectively administer the Clean Air Act, and Congress's intent in passing the Clean Air Act would be frustrated. Thus, *Chevron* deference is not a departure from the separation of powers: it is a common-sense policy intended to provide agencies with the basic discretionary authority that they need to carry out Congress's will with efficiency.

In the years that followed *Chevron*, the Court demonstrated that it remained skeptical of congressional delegations of power by pointing out numerous circumstances where agencies were not entitled to *Chevron* Deference.[147] In recent years, perhaps in an effort to avoid political gridlock in Congress, especially in response to the COVID-19 pandemic, federal agencies began to make bold new

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[146] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935).

[147] *See*, *e.g.*, MCI Telecomm. Corp. v. Am. Tel. and Tel. Co., 512 U.S. 218, 229 (1994); Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000); Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 333–34 (2014).

assertions of authority which required judicial intervention at an increasing rate.[148] It is likely that the Court decided to articulate the major questions doctrine clearly in *West Virginia*, at least in part, as a counter measure against this rising trend of administrative agencies making bold new forays into the policy domain.

In review, the major questions doctrine is a judicial policy intended to help the courts preserve the separation of powers. It is a countermeasure against a trend of increasing activity from the executive branch, acting through its administrative agencies, in the legislative domain of policy making. The major questions doctrine supplements, rather than supplants, *Chevron* deference. The Court will continue to find delegations of legislative power constitutional and give deference to reasonable agency decisions on most matters. Only in "extraordinary cases," when an agency asserts new authority that transcends its historical authority and pertains to an important national issue, will the major questions doctrine be invoked.

B. The Lay of the Law Following West Virginia

The major questions doctrine fits together with the related judicial doctrines of nondelegation and *Chevron* deference, to provide the courts with a flexible system for handling challenges to agency authority. Whenever an agency's authority to make a new rule or regulation is challenged, the adjudicating court must consider (1) whether the statute granting the agency authority violates the non-delegation

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[148] *See*, *e.g.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. Occupational Safety and Health Admin., 142 S.Ct. 661, 666 (2022); West Virginia v. Env't Prot. Agency, 142 S.Ct. 2587, 2616 (2022); Alabama Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S.Ct. 2485, 2486 (2021).

doctrine; (2) whether the action invokes the major question doctrine; and (3) whether the agency is otherwise entitled to deference.

When handling a challenge to a new agency rule, a court should first consider the non-delegation doctrine. The non-delegation doctrine prohibits broad and open-ended delegations of law-making power.[149] In order to survive a challenge under the non-delegation doctrine, the statute in which Congress granted the agency its asserted authority must provide the agency with sufficiently intelligible guidelines or principles to direct the agency in its rule-making, such that the agency is only given discretion in the execution of the law, and not in determining the policy underlying the law.[150] A trivial example of a law that would not survive the non-delegation test would be a law which reads "The EPA has plenary power to make any laws related to the climate which it sees fit." Such a law would certainly fail the non-delegation test because the law purports to give an agency unfettered power and discretion to create national policy and laws related to the climate. A law must provide an "intelligible principle," to guide agency rule making.[151] Most statutes have no trouble meeting this low bar, as is evidenced by the fact that no federal statute has been struck down for violating the non-delegation doctrine since 1935.[152] However, the Court clarified in the 2019 *Gundy* opinion that the non-delegation doctrine still could be used to invalidate a delegation of power, if it lacks an intelligible principle.[153]

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[149] *Panama*, 293 U.S. at 430 (invalidating a delegation of lawmaking authority because it provided the executive with "unfettered discretion" to make certain types of rules).
[150] *J.W. Hampton*, 293 U.S. at 430.
[151] *Id.*
[152] Gundy v. United States, 139 S.Ct. 2116, 2121 (2019).
[153] *Id.*

If the non-delegation doctrine does not apply, then courts should next consider the major questions doctrine, which is the newest test in administrative law. The major questions doctrine prevents administrative agencies from using ambiguous language in the decades-old statutes granting them authority as pretext for usurping the legislative power and effectuating policy objectives.[154] During a major questions analysis, the court will consider whether the new agency rule constitutes an assertion of new authority that departs from the historical breadth of authority that the agency asserted under the relevant statute.[155] If so, then courts must consider whether the challenged rule will have major economic or political consequences.[156] If this element is also present, then the major questions doctrine is triggered, and the challenged rule will be presumed invalid unless the agency can show "clear congressional authorization" for its actions.[157]

If the nondelegation doctrine and the major questions doctrine do not render an agency rule invalid, then courts should revert to the *Chevron* Deference doctrine. This doctrine consists of a two-part evaluation, wherein the court will first consider whether Congress has directly addressed the question presented.[158] If so, courts will accept Congress's determination of the matter; but if Congress has not addressed the issue, then courts will accept the agency's determination of the question, unless the

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[154] *See* Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014) ("when an agency claims to discover 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.").
[155] *West Virginia*, 142 S.Ct at 2608.
[156] *Id.*
[157] *Id.* at 2616.
[158] Auer v. Robbins, 519 U.S. 452, 457 (1997); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

court finds that the agency's interpretation is not "reasonable" or "permissible."[159] In the past, agency interpretations have been struck down as unreasonable when the agency's interpretation cuts against the clear intent of the written statute, or when the agency acts outside of its regular domain, in an area governed by other entities.[160] However, for an agency acting reasonably and within its regular scope of authority, the *Chevron* deference doctrine provides agencies significant discretionary autonomy, allowing the agency to fulfill its statutory duties efficiently.

In sum, both the non-delegation doctrine and the *Chevron* doctrine remain intact. Adding the major questions doctrine, a tripartite framework for dealing with challenges to agency authority emerges. First, when Congress delegates rule-making authority to an agency, Congress must provide sufficient intelligible principles to guide the agency's rule-making, otherwise the law will be struck down for violating constitutional separation of powers under the non-delegation doctrine.[161] Second, if an agency makes a decision or interprets a statute in a manner that causes the agency's purported authority to increase beyond its historical bounds, and the agency's decision has a major political and economic impact, then the court will apply the major questions doctrine.[162] Under this doctrine, courts will strike down the agency's decision or interpretation unless the agency can show "clear congressional authorization" for its actions.[163] Third, courts will defer and accept the agency's

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[159] *Id.*
[160] *See, e.g.,* Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 333-4 (2014); Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*,* 529 U.S. 120, 161–62 (2000).
[161] *See Gundy*, 139 S.Ct. at 2132 (Gorsuch, J., dissenting).
[162] *See West Virginia*, 142 S.Ct. at 2616.
[163] *Id.*

reasonable statutory interpretations, under the *Chevron* doctrine, for matters that are not major questions.[164] This framework wisely preserves the *Chevron* doctrine, which allows agencies to operate efficiently and easily defeat frivolous judicial challenges, while adding additional safeguards against *ultra vires* agency actions. In this way, the Court found a clever way to preserve the separation of powers, without upsetting the status quo or losing the efficiency of valid administrative rule making.

C. Lawful pathways exist to regulate carbon dioxide emissions

In *West Virginia*, the Court applied the major questions doctrine to the EPA's 2015 Clean Power Plan and declared it invalid, because the EPA's actions constituted a departure from the EPAs historical authority with major economic and political impact, and the EPA failed to show "clear congressional authorization" for its actions.[165] This holding was controversial, because it touched the hotly debated topic of climate change. As the dissent points out, many scientists believe that climate change caused by greenhouse gas emissions, including carbon dioxide, will present difficult challenges for both our nation, and humanity as a whole in the coming decades.[166] The dissent lists receding shorelines, draught, more frequent and severe hurricanes, and disruptions in our agricultural systems and water supplies as a few examples of potential consequences of climate change.[167] U.S. Senate Majority Leader Schumer criticized the Court's decision on the day it was released, asserting that the ruling would "cause more needless deaths — in this instance because of more

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[164] *See Chevron*, 467 U.S. at 866.
[165] *West Virginia,* 142 S.Ct. at 2616.
[166] *Id.* at 2626-2627 (Kagan, J., dissenting).
[167] *Id.*

pollution that will exacerbate the climate crisis and make our air and water less clean and safe."[168]

Despite the controversy, the Court was right to strike down the EPA's Clean Power Plan because the plan ran afoul of the Constitution's separation of powers. Before the EPA announced the Clean Power Plan, Congress had, on multiple occasions, debated amending the Clean Air Act and considered other potential measures such as enacting a "carbon tax" on businesses, yet Congress took no such action.[169] Nevertheless, in 2015, the EPA spontaneously decided that it didn't need Congress to amend the Clean Air Act or take any other action, finding that it had, in fact, always possessed the power to regulate carbon dioxide emissions, unbeknownst to Congress and in direct conflict with its own prior statements on the matter.[170] This strange turn of events suggests that the executive branch wanted to regulate carbon dioxide emissions due to concerns similar to those voiced by the Justice Kagan in the dissent. After becoming tired of waiting for Congress to take action, the executive decided to jump over Congress and take action itself. The Court was right to step in and stop this, because this type of unilateral executive action is exactly what the separation of powers precludes. Under the United States Constitution, the executive

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[168] Pete Williams & Dares Gregorian, *Supreme Court curbs EPA's power to limit greenhouse gas emissions*, NBC NEWS (June 30, 2022 at 11:38 a.m. E.D.T.), https://www.nbcnews.com/news/amp/rcna31904.

[169] *West Virginia*, 142 S.Ct. at 2614 (citing American Clean Energy and Security Act of 2009, H. R. 2454, 111th Cong., 1st Sess. (2009); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong., 1st Sess. (2009); Climate Protection Act of 2013, S. 332, 113th Cong., 1st Sess.; Save our Climate Act of 2011, H. R. 3242, 112th Cong., 1st Sess.).

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

is not allowed to make major domestic policy decisions by writ and decree.[171] Instead, major policy decisions must be made by Congress, pursuant to the constitution's lawmaking procedure, which includes the important checks and balances, such as bicameralism and presentment.[172] The executive should act as a steward of the law, and remain faithful to Congress's intent, even when Congress fails to take action as quickly as the executive would like.

The fact that the stakes are high does not constitute a valid reason for the executive branch, acting through the EPA, to circumvent the regular legislative process.[173] Even assuming that the EPA's claims are all true; and that the United States faces drought, flooding, hurricane winds, and more as the result of climate change; the Court was still right to strike down the Clean Power Plan. If the Court failed to strike down the Clean Power Plan, its decision would have served as precedent to enable future presidential administrations to enact major policy shifts through the administrative agencies, vastly expanding the executive's power while diminishing Congress's. This state of affairs would weaken the separation of powers and thereby dismantle one of the most important institutional safeguards that our Constitution affords against governmental despotism. According to the EPA, the coming climate crisis will continue for decades if not centuries, and will affect nearly

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[171] *See* Clinton v. City of New York, 524 U.S. 417, 448 (1998) (discussing the importance of Congress's involvement in the lawmaking process).
[172] *Id.*
[173] Lichter v. United States, 334 U.S. 742, 779 (1948) (noting that "in peace or in war, it is essential that the Constitution be scrupulously obeyed," the Court shows that even in times of national emergency, the Court's duty is to uphold the Constitution).

every aspect of society.[174] Therefore, setting aside the Constitution's restrictions on executive power to allow the government to deal with climate change more efficiently is tantamount to setting aside those restrictions permanently. Rather than indulging in the temptation to take a shortcut in the lawmaking process to obtain an immediate policy victory on climate change via executive action, advocates of climate change reform should put their faith in Congress and the legislative process.

Political gridlock in Washington is not a valid reason for the executive branch to circumvent the regular legislative process. History shows that Congress can and will act when circumstances call for it. For example, the Clean Air Act itself was passed in a bipartisan effort to reduce air pollution from harmful chemicals such as lead and carbon monoxide.[175] Similarly, Congress responded in a bipartisan effort to curb damage to the ozone layer of the atmosphere, and came together to pass the 1990 amendment to the Clean Air Act.[176] More recently, after the Court issued its decision in *West Virginia*, Congress passed the Inflation Reduction Act of 2022, amending to the Clean Air Act to improve the EPA's ability to regulate greenhouse gas emissions.[177] The record shows that Congress, though it sometimes acts slowly,

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[174] Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64510, 64517 (Oct. 23, 2015) (amending 40 C.F.R. §§ 60, 70, 71, et al.).
[175] *See* United States Environmental Protection Agency, *Clean Air Act Requirements and History*, EPA.GOV (August 10, 2022), https://www.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-history.
[176] *See* United States Environmental Protection Agency, *1990 Clean Air Act Amendment Summary*, EPA.GOV (December 8, 2021), https://www.epa.gov/clean-air-act-overview/1990-clean-air-act-amendment-summary.
[177] U.S. ENV'T PROT. AGENCY, *Delivering Cleaner Air*, EPA.GOV (February 15, 2023), https://www.epa.gov/inflation-reduction-act/delivering-cleaner-air.

is capable of providing the types of reform that advocates in favor of climate change reform desire.

Furthermore, an act of Congress is more durable than executive action, because executive actions can be terminated via the stroke of the President's pen in an executive order, but valid Congressional actions can only be amended or repealed by a subsequent act of Congress. For example, the Clean Power Plan, created under the Obama Administration, was repealed and replaced with the Affordable Clean Energy Plan by the Trump Administration, before it was ever implemented.[178] Four years later, the Biden Administration announced that it was contemplating a new set of regulations to replace the Affordable Clean Energy Rule. The fact that the past three presidential administrations each flip-flopped on this important issue illustrates that executive action can be too easily reversed or replaced each time the administration changes. Greenhouse gas emission regulations need to be consistently applied for a number of years to affect the global climate, and executive action lacks the durability to be consistently enforced over such a long time span. A better solution can be achieved through the legislative process, since the executive branch is obligated to faithfully execute the law, and no President can repeal or amend congressional law via executive order.[179] Congressional laws tend to remain in force

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[178] *See* Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32523 (July 8, 2019) (amending 40 C.F.R. § 60) (repealing the Clean Power Plan).

[179] U.S. CONST. art. 2, § 3 ("[the President] shall Take Care that the Laws [of the United States] be faithfully executed"); U. S. CONST. art. 1, § 1 ("All legislative Powers heron granted shall be vested in a Congress of the United States").

for decades.[180] It follows that congressional law is far better suited to to combat climate change than unilateral executive action.

VI. CONCLUSION

In sum, the United States Supreme Court's holding in *West Virginia v. Environmental Protection Agency* was correct and helped to preserve the separation of powers, which is of foundational importance to our great republic. Although climate change may pose serious issues to our nation in the near- and long-term future, the government should only act to address it through legitimate legal processes, and the executive branch should not overstep Congress on policy decisions related to climate change. The political process can be slow, but history shows that it works, and that it creates much more robust and long-lasting solutions than those produced by executive action.

[180] *See*, *generally*, 42 U.S.C. §§ 7401-7675 (2022) (the Clean Air Act, for example, has remained in force for over 50 years, since its first revision was passed in 1970).