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Major Questions (and Answers): A Call to Quiet the Quartet

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Gregory L. Ogden Award Recipient

Michael Reaves (JD ’23) received the inaugural Gregory L. Ogden Award, which is awarded to the most outstanding article written by a staff member of the Journal of the National Association of Administrative Law Judiciary (“the Journal”). The criteria for the Award includes that the winning article be exceptionally well written and researched, and that it address a compelling administrative law topic. Reaves’ article, "Major Questions (and Answers): A Call to Quiet the Quartet," discusses the Major Questions Doctrine as a determinative legal canon in an administrative rulemaking challenge. Reaves is currently a judicial law clerk at the Second Judicial District Court in Nevada.

The Journal developed the Award to acknowledge the work of Professor Emeritus Ogden, who served as a Professor of Law at the Pepperdine Caruso School of Law from 1987 to 2022. Professor Ogden was instrumental in bringing the Journal to the Law School in 2000-2001, and served as the faculty editor for the Journal from 2000 until his retirement in December 2022. An expert in administrative Law, Professor Ogden was the editor and contributing author for *California Public Agency Practice*, a three-volume treatise on California administrative law published in 1988, and he was the editor and principal author of the 1997 two-volume revision of that treatise, entitled *California Public Administrative Law*. Professor Ogden has spoken numerous times at conferences on topics related to administrative law, legal ethics, and judicial ethics, with an emphasis on the ethical duties of administrative law judges. He was the 1999 NAALJ fellowship recipient, and his paper on Demeanor Evidence was published in the Journal of the NAALJ in the Spring 2000 issue.

Major Questions (and Answers): A Call to Quiet the Quartet

INTRODUCTION

On June 30, 2022, the Supreme Court of the United States (SCOTUS) issued a landmark opinion in *West Virginia v. EPA*, limiting the authority of the Environmental Protection Agency (EPA) to implement the Clean Power Plan (CPP)—which would impose stricter restrictions on carbon emissions, and require power plants to shift away from coal as a means of producing electricity.[1] For the first time, the Court formally recognized the Major Question Doctrine (MQD) as a determinative legal canon in an administrative rulemaking challenge.[2] This case capped the 2022 term and a four-part saga most recently referred to as the "Major Questions Quartet." (Quartet).[3] While the substance of this case involved a seemingly limited issue in scope—the regulation of "generation-shifting" systems—its implications on agency rulemaking authority extend far beyond the contentious relationship between the EPA, states, and their powerplants.[4] In every region of the country, significant risks to community health come with delayed legislative and regulatory action on climate change; while not fully inclusive, the following examples highlighted by the Centers for Disease Control & Prevention (CDC) illustrate the consequences of inaction on climate:

- *Water Quality & Access*: Heavy downpours and flooding are becoming more commonplace in some regions of the United States, increasing the risk of exposure to microbes in drinking and recreational waters; flooding also causes significant structural damage to homes, businesses, and schools, which can cause respiratory illness from mold

[1] W. Virginia v. Env't Prot. Agency, U.S. 142, 2587 (2022).

[2] *Id.*

[3] Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 262–63 (2022).

[4] W. Virginia v. Env't Prot. Agency, U.S. 142, 2628 (2022) (Kagan, J. dissenting).

exposure.[5] Extreme drought also affects many regions of the United States dependent upon groundwater sources; in these regions, waning precipitation and increasing evaporation result in significant reductions in groundwater replenishment.[6] For tribal communities that already experience technical and financial limitations, these reductions add even more barriers to clean water access.[7] Authorities at both state and federal levels fear that decades of overconsumption of water in combination with the "far-reaching and worsening" realities of climate change[8] have drained the Colorado River to dangerously low levels, and will impact millions of people in the American Southwest.[9] In response, a 2022 request by the federal government was made to seven western states to cut usage by two to four million acre-feet (or what amounts to a third of the Colorado River's annual average flow).[10]

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[5] *Warming Water and Flooding Increase the Risk of Illness and Injury*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/climateandhealth/pubs/warmer-water-final_508.pdf (last visited Feb. 12, 2023).

[6] *Health Implications of Drought*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Jan. 16, 2020), https://www.cdc.gov/nceh/drought/implications.htm.

[7] *Tribal Drinking Water Program Improvement,* CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 12, 2022), https://www.cdc.gov/nceh/ehs/water/private-wells/tribal-drinking-water-program-improvement.html.

[8] Brady Dennis et al., *Climate change threatening 'things Americans value most,' U.S. report says*, THE WASH. POST (Nov. 7, 2022, 6:03 PM), https://www.washingtonpost.com/climate-environment/2022/11/07/cop27-climate-change-report-us/.

[9] Joshua Partlow, *Disaster scenarios raise the stakes for the Colorado River*, THE WASH. POST (Dec. 17, 2022, 7:00 AM), https://www.washingtonpost.com/climate-environment/2022/12/17/colorado-river-crisis-conference/.

[10] *Id*.

- *Air Quality*: The elevation of atmospheric emissions is expected to result in 1,000 to 4,300 additional annual premature deaths per year by 2050 from ozone and particle health effects.[11]
- *Food Security*: The continued elevation of atmospheric carbon dioxide is correlated with decreased nitrogen concentration in soil, which threatens food production, prices, and distribution networks across the country.[12]
- *Vector-Borne Disease*: Climate variability due to atmospheric CO2 shifts may increase the incidence of vector-borne disease (disease carried by mosquitos, fleas, and ticks) in North America.[13] Lyme disease, dengue fever, West Nile virus disease, Rocky Mountain spotted fever, plague, and tularemia may become more common in North America as shifts in climate expand the geographic ranges of disease.[14]
- *Wildfires*: Since the beginning of the twentieth-century, the temperature in California has increased approximately two degrees Fahrenheit; increased temperature has dried out the air, allowing for fire seasons to begin earlier and end later each year.[15] The dry conditions have placed much more land area in western states at risk of burning, as land

[11] *Air Pollution*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Dec. 21, 2020), https://www.cdc.gov/climateandhealth/effects/air_pollution.htm.

[12] *Food Security*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 18, 2020), https://www.cdc.gov/climateandhealth/effects/food_security.htm.

[13] *Diseases Carried by Vectors*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Dec. 21, 2020), https://www.cdc.gov/climateandhealth/effects/vectors.htm.

[14] *Id.*

[15] Alan Buis, *The Climate Connections of Record Five Year in U.S. West*, NASA CLIMATE (Feb. 22, 2021), https://climate.nasa.gov/ask-nasa-climate/3066/the-climate-connections-of-a-record-fire-year-in-the-us-west/.

burned by "high severity" wildfires has increased by 800% since 1985.[16] Smoke exposure increases hospitalizations, and the incidence of asthma, bronchitis, and chronic pulmonary disease (COPD).[17]

- *Temperature-related death and illness*: Residents of American cities have suffered increases in death from heat stroke, cardiovascular disease, respiratory disease, and cerebrovascular disease from heat waves.[18] Heatwave hospitalizations have also increased for Americans with cardiovascular, kidney, and respiratory disorders.[19] Climate projections show summer heat rising, and extreme heat will be more frequent in North America in the coming decades.[20] In the summer of 2022, the White House launched HEAT.gov, a new website to provide the public with information, and state governments with tools to address the impact of extreme heat.[21]
- *Mental Health & Stress-Related Disorders*: People with mental illness are especially susceptible to extreme temperatures.[22] Rising rates of suicide correlate with rising temperatures, suggesting a relation between extreme temperatures from climate change

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[16] S.A. Parks & J. T. Abatzoglou, *Warmer and Drier Fire Seasons Contribute to Increases in Area Burned at High Severity in Western US Forests from 1985-2017*, GEOPHYSICAL RESEARCH LETTERS 47, 22 (2020).

[17] *Wildfires*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 18, 2020), https://www.cdc.gov/climateandhealth/effects/wildfires.htm.

[18] *Temperature-Related Death and Illness*, CENTER FOR DISEASE CONTROL AND PREVENTION (Sept. 6, 2022), https://www.cdc.gov/climateandhealth/effects/temperature_extremes.htm.

[19] *Id.*

[20] *Id.*

[21] *HEAT.Gov - National Integrated Heat Health Information System*, NAT'L INTEGRATED HEAT HEALTH INFO. SYS., https://www.heat.gov/. (last visited Feb. 12, 2023).

[22] *Mental Health & Stress-Related Disorders*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 18, 2020), https://www.cdc.gov/climateandhealth/effects/mental_health_disorders.htm.

and mental illness.[23] Medications for mental illnesses, such as schizophrenia, may have adverse reactions concerning temperature regulation, placing patients at risk of hyperthermia when in extreme temperatures.[24] Although less understood, distress and anxiety resulting from environmental degradation may also worsen mental health problems.[25]

This Comment calls for action to quiet the Quartet—encouraging executive agencies to mitigate the pernicious impact of MQD. In Part I, this Comment discusses the political landscape in the area of climate action. Part II wades through the nearly forty-year doctrinal shift of delegation—from humble beginnings in a law review article from then-Judge Breyer in 1986,[26] to the application of major questions principles at various stages of agency-deference analyses.[27] Part III discusses the Quartet and its role in MQD as a determinative legal canon.[28] Recent scholarship calls into question if there are multiple iterations of MQD,[29] and whether the most recent iteration of MQD is merely a doctrinal bridge or "fig leaf" to the nondelegation doctrine.[30] In Part IV, this Comment addresses the current status of agency rulemaking in the

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[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

[27] *See generally* Part II: Early Days of Deference.

[28] Sohoni, *supra* note 3.

[29] Cass R. Sunstein, *There are Two 'Major Questions' Doctrines*, 73, 475 ADMIN. L. REV. (2021); Eli Nachmany, *There Are Three Major Question Doctrines*, YALE J. OF REGUL., https://www.yalejreg.com/nc/three-major-questions-doctrines/. (last visited Feb. 12, 2023).

[30] Alison Gocke, Chevron*'s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955 (2022) (suggesting MQD is a "fig leaf" to the nondelegation doctrine).

face of the uncertainty of MQD's evolving form. Developing an action plan to mitigate harm to the environment requires consideration of how lower courts may reconcile the competing doctrines of *Chevron* and MQD. This Comment submits that SCOTUS' posture in the mid-2020s will be formative in the law of statutory interpretation for generations to come.

In light of the rapid shift in the form of MQD in just a few years, and the inability of Congress to achieve meaningful legislative, actions within the executive branch must be taken to mitigate the Quartet's pernicious impact on the environment and public health. Achievable executive strategies include: (1) streamlining the rulemaking process by promulgating leaner rules; (2) repealing or narrowing the scope of EO 12866 to expedite regulatory review and avoid bolstering the legal arguments of anti-regulatory interests; (3) increasing the use of severability clauses to protect bulky regulatory schemes from complete vacatur; and (4) empowering enforcement offices to better protect the environment from the ravages of climate change.

I. THE POLITICAL POLARIZATION OF CLIMATE ACTION

In 1955, the first legislation involving air pollution was passed by Congress—the Air Pollution Control Act (APCA).[31] The APCA's purpose was not to regulate, but rather to fund research to identify the full scope of air pollution and its sources.[32] Subsequently, the Clean Air Act of 1963 (CAA 1963) was the first piece of bipartisan legislation aimed at understanding how to regulate—creating a program within the U.S. Public Health Service to develop methods for

[31] *Evolution of the Clean Air Act*, U.S. ENV'T PROT. AGENCY (Nov. 28, 2022), https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act#:~:text=The%20enactment%20of%20the%20Clean,industrial)%20sources%20and%20mobile%20sources.

[32] *Id.*

monitoring pollution and how to better control it.[33] Next, the groundwork to developing enforcement programs came with the passage of the Air Quality Act (AQA) in 1967.[34] The AQA expanded research further, but also initiated executive enforcement activities by mandating stationary source inspections and monitoring interstate air pollution transport.[35] The beginning of political environmentalism in the late twentieth century, however, came with the passage of the Clean Air Act of 1970 (1970 CAA)—creating four major regulatory programs including the National Ambient Air Quality Standards (NAAQs), the State Implementation Programs (SIPs), the New Source Performance Standards (NSPS), and the National Emission Standards for Hazardous Air Pollutants (NESHAPs).[36] This "golden era" of environmentalism in America was one of great bipartisan achievement, culminating in the passage of the 1990 Clean Air Act Amendments (1990 CAAA)—substantially increasing enforcement authority by expanding the responsibility of the federal programs created in 1970 CAA.[37] However, after the 1990 CAAA, there has been significantly less congressional action on climate change.[38] This legislative drought has tracked with the increased polarization of politics and, more specifically, the assignment of climate action as a political cause within the Democratic Party alone; while environmental action has never truly been bipartisan, the delta between the major American

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] C.M. Klyza & D. Sousa, *American Environmental Policy, 1990–2006: Beyond Gridlock* (2008).

political parties on climate policy initiatives has only grown wider over time.[39] From 1970 to 2014, the lowest average of congressional action on climate took place under unified Republican administrations when compared to all other government conditions—a trend supported by data collected after the "golden era" of bipartisan action on climate.[40] Further, in the same period, when assessing periods of government division, an increase in the number of "anti-environmental legislation" losses on the floor of Congress shows that at least one chamber of Congress was not only averse to advancing climate action, but was actively seeking a regressive legislative model.[41]

Separate from congressional action, partisanship on this issue can also be seen in the Executive's hot and cold approach to entering international climate accords.[42] For example, the Obama Administration (Democratic) entered the Paris Climate Accord in 2015,[43] the Trump Administration (Republican) gave notice of its withdrawal from the agreement in 2017,[44] and the Biden Administration (Democratic) re-entered the agreement in 2021.[45] All the while, during this generational lull of legislative activity and contentious executive action, average rates of

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[39] Samantha Yoest, *The Effect of Partisanship on the Passage of Environmental Legislation*, RES PUBLICA J. OF UNDERGRADUATE RSCH. 23, 1 (2018).

[40] *Id*. at 13.

[41] *Id*. at 26.

[42] *See infra* notes 43–45.

[43] *Paris Agreement*, UNITED NATIONS (Dec. 12, 2015), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

[44] *Paris Agreement*, UNITED NATIONS (Aug. 4, 2017), https://treaties.un.org/doc/Publication/CN/2017/CN.464.2017-Eng.pdf.

[45] *Paris Climate Agreement*, THE WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/.

U.S. greenhouse gas emissions continue to alarm climate scientists and subject matter experts at federal agencies, with total emissions in 2020 exceeding 5,981 million metric tons of CO2 equivalent.[46] Most alarming are the emissions of America's largest culprit of pollution—transportation—accounting for 27% of total carbon emissions in that same year.[47]

The explanation of an exacerbated political climate surrounding climate change is simple: campaign contributions.[48] Oil and gas companies have increasingly favored Republican political platforms over Democratic platforms.[49] Between 1990 and 2022, these industries have given tens of millions more to Republican candidates, and the disparity only continues to grow.[50] For example, in the 1992 general election, the difference between oil and gas company contributions between parties was a mere $7 million.[51] Thirty years later in the 2020 general election, the Republican Party received a collective $63.6 million from oil and gas companies, while the Democratic Party received a collective $12.3 million—a difference of $51.3 million.[52] Thus, as a legislator who seeks to retain their seat in Congress or the Senate, the strategic advantage to

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[46] *Sources of Greenhouse Gas Emissions*, ENV'T PROT. AGENCY, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions#:~:text=The%20largest%20sources%20of%20transportation,emissions%20from%20the%20transportation%20sector (last visited Nov. 9, 2023).

[47] *Id*.

[48] *See infra* note 49.

[49] *Lobbying spending of oil and gas companies in the United States during election cycles from 1990 to 2022*, by receiving political party, STATISTA (Jan. 31, 2023), https://www.statista.com/statistics/788056/us-oil-and-gas-lobbying-spend-by-party/.

[50] *Id.*

[51] *Id*.

[52] *Id*.

stalling climate action appears prudent to avoid loss of political capital (as a Democrat) and bountiful to fill a campaign coffer (as a Republican).

In September 2022, after decades of only minor progress on emissions, the Inflation Reduction Act of 2022 (IRA) passed with narrow bipartisan support, including $369 billion to fund efforts to reduce annual climate pollution to half of its 2005 amount by 2030.[53] Climate analysts are more optimistic about the future of emissions reduction in light of this recent legislation; however, the administration's strategy falls short in that it continues to perpetuate fossil fuel and carbon-capture industries.[54] Reporting on this months-long negotiation between parties in the passage of IRA focused primarily on that of a single U.S. Senator's vote, Senator Joe Manchin of West Virginia.[55] In 2023, the Biden administration granted a permit in the Mountain Valley Pipeline development—a project Senator Joe Manchin undoubtedly secured for his affirmance of the IRA in 2022.[56] Despite opposition by environmentalists and climate experts, the decision by the Biden administration will inject $6.6 billion into the pipeline project aimed at funneling gas through 3.5 miles of the Jefferson National Forest between West Virginia and Virginia.[57] In a similar move, and against his campaign promise to stop oil drilling on federal lands, the Biden administration approved the ConocoPhillips drilling project in Alaska,

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[53] *FACT SHEET: Inflation Reduction Act Advances Environmental Justice*, THE WHITE HOUSE (Aug. 17, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/17/fact-sheet-inflation-reduction-act-advances-environmental-justice/.

[54] *Id.*

[55] Rebecca Hersher, *The spending bill will cut emissions, but marginalized groups feel they were sold out*, NPR (Aug. 17, 2022), https://www.npr.org/2022/08/17/1117725655/the-spending-bill-will-cut-emissions-but-marginalized-groups-feel-they-were-sold.

[56] Lisa Friedman, *Biden Administration Approves Key Permit for West Virginia Gas Pipeline*, N.Y. TIMES (May 16, 2023), https://www.nytimes.com/2023/05/16/climate/biden-mountain-valley-pipeline.html.

[57] *Id.*

which is estimated to produce up to 180,000 barrels of crude oil per day.[58] Given its contradictory stances on drilling in the Alaskan Artic,[59] the Administration appears to be in a delicate dance—balancing the interests of industry and economy with climate action.[60]

In fairness to the IRA, however, its passage aims to address disproportionate harms to underrepresented communities across America—such as building affordable climate resilient housing, establishing community and urban forests, increasing investment in solar energy development, expanding green spaces, lowering energy bills, and reducing heat-related death and illness.[61] In August of 2023, the Department of the Interior announced $44 million of investment "to meet critical ecosystem resilience, restoration and environmental planning needs for the National Park Service in fiscal year 2023."[62] The IRA provides this investment in an effort of unprecedented conservation.[63] On the IRA's first anniversary, the Administration touted its success—applauding the IRA as an economic driver in the creation of over 170,000 clean energy

[58] Matthew Daly and Chris Megerian, *Biden OKs Alaskan oil project, draws ire of environmentalists*, AP (Mar. 13, 2023), https://apnews.com/article/alaska-oil-biden-willow-drilling-climate-24f135580259b9f9b245383dba921fe7.

[59] *Willow Master Development Plan*, U.S. DEP'T. OF INTERIOR BUREAU OF LAND MGMT. Anchorage Alaska, https://www.documentcloud.org/documents/23706055-alaska-willow-oil-project-decision.

[60] Daly and Megerian*, supra* note 58.

[61] *Id*.

[62] *Biden-Harris Administration Announces $44 Million to Restore and Strengthen Climate Resilience Across America's National Parks as Part of Investing in American Agenda*, U.S. DEP'T. OF THE INTERIOR (Aug. 8, 2023), https://www.doi.gov/pressreleases/biden-harris-administration-announces-44-million-restore-and-strengthen-climate.

[63] *FACT SHEET: Biden-Harris Administration Takes New Action to Conserve and Restore America's Lands and Waters*, THE WHITE HOUSE (Mar. 21, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/21/fact-sheet-biden-harris-administration-takes-new-action-to-conserve-and-restore-americas-lands-and-waters/.

jobs.[64] Further, in April of 2023, and by Executive Order, the Administration announced the creation of the White House Office of Environmental Justice Interagency Counsel, which facilitated collaboration between agencies on the science, data, research, and policy related to the goals of environmental justice.[65] In his announcement of the Order, the President spoke to the importance of engaging with all executive agencies on the issue: "Every federal agency must take into account environmental and health impacts on communities and work to prevent those negative impacts . . . [e]nvironmental justice will be the mission of the entire government."[66]

While all of these efforts are helpful in combating the effects of climate change, upon closer inspection, none tend to address the root problem at the magnitude necessary to mitigate the long-term harm posed by climate change; the IRA does nothing to empower regulatory authorities to compel industry into the adoption of cleaner systems of emissions. Due to the growing polarization of climate change, the tall task of environmental justice has fallen to executive branch of government—relying upon its agencies to promulgate and enforce rules under outdated statutory schemes.[67]

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[64] Trevor Hunnicutt and Jarrett Renshaw, *Biden touts Inflation Reduction Act on first anniversary*, REUTERS (Aug. 16, 2023), https://www.reuters.com/business/energy/one-year-biden-still-needs-explain-his-signature-clean-energy-legislation-2023-08-16/.

[65] *Executive Order on Revitalizing Our Nation's Commitment to Environmental Justice for All*, THE WHITE HOUSE (Apr. 21, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/04/21/executive-order-on-revitalizing-our-nations-commitment-to-environmental-justice-for-all/.

[66] Lisa Friedman, *Biden to Create White House Office of Environmental Justice*, N.Y. TIMES (Apr. 21, 2023), https://www.nytimes.com/2023/04/21/climate/biden-environmental-justice.html.

[67] *See infra* notes 56, 58, 59.

II. EARLY DAYS OF DELEGATION

The United States Constitution grants Congress the sole authority to make law, but Congress may delegate rulemaking authority to executive branch agencies by passing statutes.[68] These agencies, however, must not veer too far into the law-making function or beyond what Congress has allowed within a statute.[69] When disputes arise over whether Congress properly delegated this authority, or whether the agency has gone beyond the scope of its explicitly delegated authority, the Court has used a set of legal canons of statutory construction and related doctrines rooted in the separation of powers principles developed over hundreds of cases.[70]

A. From the Nondelegation Doctrine to *Chevron*

The Supreme Court uses the nondelegation doctrine, one of the oldest legal doctrines, to keep the roles of the executive, legislative, and judicial branches of the federal government distinct, or to maintain the separation of powers.[71] Courts apply the nondelegation doctrine to determine if the rulemaking authority was properly delegated in cases concerning the extent to which agencies reasonably interpret statutory language.[72] In assessing the reasonableness of agency interpretation, the Courts apply a relatively flexible "intelligible principle" that looks at

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[68] U.S. CONST. art. I, § I.

[69] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (holding "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"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding Congress could not delegate essential legislative functions).

[70] *Id*.

[71] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. at 495 (1935) (holding Congress could not delegate essential legislative functions).

[72] Edward H Stiglitz, 34 *The Limits of Judicial Control and the Nondelegation Doctrine*, *THE J. OF L., ECON., AND ORG.* 1, 27–53 (2018).

whether Congress provided agencies with a principle for which to base their regulations—rooted in concerns of the public interest, convenience, or necessity.[73] If the Court meets this principle, it would find the interpretation of just and "common sense" in consideration of what is necessary to govern effectively.[74]

In the late 20th century, however, citizens and businesses sued the federal government because they believed agency rules and regulations had gone too far and feared that agencies had become an unchecked, law-making branch of government beyond the authority Congress had properly delegated.[75] The seminal case of this era, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, resulted in a new doctrine guiding how courts were to determine whether an agency's interpretation of authority was within the scope of the statutory delegation from Congress.[76] The *Chevron doctrine* calls the court to engage in a two-step analysis to determine whether an agency's rules are within that scope.[77] Judicial decision-making has since employed this analysis, and it follows this process: in *Step One*, a court examines the statutory language and ensures it is clear and specific enough to guide the agency's action.[78] If the statute is clear, explicit, or unambiguous, the inquiry ends, and the agency may promulgate the regulation. If the statute is ambiguous, the Court proceeds to *Step Two*.[79] In *Step Two*, when the statute is

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[73] *J.W. Hampton*, 276 U.S. at 409.

[74] *Id* at 7.

[75] Chevron U.S.A. Inc. v. NRDC, Inc., 467 U. S. 837 (1984).

[76] *Id*. at 843.

[77] *Id.*

[78] *Id*.

[79] *Id.* at 844.

ambiguous or does not defer authority explicitly, a court assesses the reasonableness of the agency's interpretation in the context of its responsibilities and the public need for rulemaking.[80] If the interpretation is reasonable to the court, the court *defers* to the agency's authority to promulgate the regulation[81]—commonly referred to as *Chevron*-deference.

B. From *Chevron* to *Burwell*

After *Chevron*, courts deferred to agency interpretation to gap-fill authority granted by Congress, so long as the interpretation of the authority is reasonable.[82] Courts have also extended deference to agencies even when Congress did not expressly delegate authority to the agency to gap-fill a statutory scheme.[83] However, in a series of cases post-*Chevron*, the Court addressed whether granting *Chevron* deference to agency rulemaking was proper when the controversy involved issues that impacted large industries in the American economy or included questions of a political nature or history better suited for Congress to decide.[84] The origins of major question are first seen in a 1986 law review article authored by then-Judge Stephen Breyer, where he set out to discuss how courts look at imprecise language of statutes and whether Congress has answered the "major questions" at play when delegating to agency expertise:

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[80] *Id*.

[81] *Id.*

[82] *Id*.

[83] *See* United States v. Mead, 533 U.S. 218, # (2001) (holding that even if an agency's interpretation of a statute is not entitled to deference under *Chevron* because the authority is not expressly granted by Congress, it may still granted deference under *Skidmore); see also* Skidmore v. Swift & Co. 323 U.S. 134, 140 (1944) (holding agency rulings, interpretations, and opinions are entitled to respect and may be used for guidance by courts and litigants).

[84] *Infra* notes 90-118.

> Is the particular question one that the agency or the court is more likely to answer correctly? Does the question, for example, concern common law or constitutional law, or does it concern matters of agency administration? A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, *major questions*, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.[85] (emphasis added).

What was first a mere suggestion by then-Judge Breyer to "soften *Chevron*'s rigidity" and "command" over the courts[86] has slowly evolved into what we now know as MQD.[87] During the period that followed (1994–2015), the Court considered the economic and political significance undergirding many agency-promulgated rules, and at different stages of the *Chevron* two-step analysis.[88] This period signaled the Court's growing concern over agency regulations involving major policy questions, resulting in what scholars believe to be the first iteration of major question principles in action—a "weak" iteration of MQD.[89]

i. 1994: Telecom Tariffs

In *MCI Telecommunications Corp. v. AT&T. Co.*, an FCC regulation that would permit de-tariffing for 40% of the telecom industry and result in significant market fluctuations was challenged by anti-regulatory interests.[90] The Court applied the traditional *Chevron* two-step framework—in *Step One*, the Court determined the word "modify" was included within the

[85] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

[86] *Id.*

[87] *West Virginia*, 142 S. Ct. at 2587

[88] *Infra* notes 116-122.

[89] Sunstein, *supra* note 29 at 488.

[90] MCI Telecommunications Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231–32 (1994).

statutory delegation by Congress to mean change in a minor fashion.[91] The Court held that the FCC aimed to fundamentally alter the statutory scheme in its interpretation, "changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist."[92] Such concern over the FCC's interpretation on the economic status of the telecom market is of particular note here, as it is used by the Court as reason to reject FCC's construction of the statute within its exercise of statutory interpretation—finding "not the slightest doubt" that Congress had already spoken directly to the question that has such a high degree of economic impact.[93]

ii. 2000: Tobacco

In *FDA v. Brown & Williamson Tobacco Corp.*, at issue was whether FDA had the authority to regulate tobacco products under the Food, Drug, and Cosmetic Act (FDCA).[94] Again, as in *MCI*, when applying *Step One* of the *Chevron* two-step analysis, the Court held that Congress had no intention of delegating the FDA authority to regulate tobacco products, and rejected the argument by FDA that tobacco fits the definition of a drug.[95] As the Court explained, Congress did not intend to give FDA the broad power to regulate the tobacco industry at large, an "industry constituting a significant portion of the American economy."[96] Again, the Court contemplated questions of economic and political significance in evaluating what level of

[91] *Id.* at 225.

[92] *Id.* at 231.

[93] *Id.*

[94] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

[95] *Id.* at 159-60.

[96] *Id.*

authority Congress had intended to grant to the agency; unconvinced by the government's interpretation of the FDCA, the Court noted that Congress could not have intended to delegate "a decision of such economic and political significance to an agency in so cryptic a fashion."[97]

iii. 2001: Elephants in Mouseholes

In *Whitman v. American Trucking Associations, Inc.,* the Court assessed whether Section 109(a) of the Clean Air Act (CAA) requires the EPA Administrator to promulgate revisions to the National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter.[98] The Court held that, although *Step One* of the *Chevron*-deference analysis may be satisfied as to the ambiguity of the statutory language, the EPA's interpretation went "beyond the limits of what is ambiguous and contradicts what in our view is quite clear."[99] Therefore, in finding the interpretation unreasonable under *Step Two* of *Chevron*-deference analysis, the Court remanded the policy to the EPA for "a reasonable interpretation of the nonattainment implementation provisions insofar as they apply to revised ozone NAAQS."[100] Explaining the Court's determination that EPA's promulgation was unreasonable, the late Justice Scalia noted that Congress need not "provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators . . . it must provide substantial guidance on setting air standards that affect the entire national economy."[101] Famously, he continued, "Congress, we have held, does

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[97] *Id*.

[98] Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 462 (2001).

[99] *Id*. at 481, 484.

[100] *Id*. at 486.

[101] *Id*. at 475.

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."[102] The case highlighted how an agency may not reach out too far in its interpretation as a basis to promulgate rules. *Id*.

iv. 2006: Assisted Suicide

In *Gonzales v. Oregon*, the controversy surrounded legalized assisted suicide through a 1994 Oregon state ballot measure affording civil and criminal immunity to physicians engaged in these practices.[103] The drugs, however, were regulated under the Controlled Substances Act (CSA), and the U.S. Attorney General issued an interpretive ruling that dispensing drugs for the use of assisted suicide was not a legitimate medical practice under the CSA.[104] The Court held that if multiple agencies are authorized by Congress to promulgate rules and enforce statutory provisions, the agency with the most familiarity and expertise on the subject would be properly delegated that authority.[105] The proper authority in this case, the Court noted, would be the Secretary of Health and Human Services, not the Attorney General.[106] The Court cited back to *Whitman*, noting how "Congress could not have intended to delegate a decision of economic and political significance"[107] to the Attorney General.[108]

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[102] *Id*. at 468.

[103] Gonzales v. Oregon, 546 U.S. 243 (2006).

[104] *Id*. at 246.

[105] *Id*.

[106] *Id*. at 266.

[107] *Id.* at 267.

[108] *Id*. at 267.

v. 2007: Greenhouse Gases, Part I

In *Massachusetts v. EPA*, the Court rejected an EPA argument that was based on major questions principles. In this case, Massachusetts, along with several other states, petitioned the EPA to regulate emissions of greenhouse gases (GHGs) as "any air pollutant" that can "reasonably be anticipated to endanger the public health or welfare"[109] under the Clean Air Act (CAA). The EPA denied the petition, claiming it did not have the statutory authority to regulate GHGs.[110] EPA stated that it was "urged on in this view" by the decision in *Brown & Williamson*, arguing that there is a tangible "political history" of climate change in America and that regulating GHGs under the CAA would be far more impactful than the FDA's attempt to regulate of tobacco—calling upon the thrust of the Court's application of major questions principles in the *Step One* of the *Chevron*-deference analysis seen in *Brown & Williamson*.[111] Despite the government's call to apply such major questions principles, the Court, by a narrow majority (5-4), held that EPA had the authority under CAA to designate GHGs as "air pollutants."[112]

vi. 2009: Greenhouse Gases, Part II

In *Utility Air Regulatory Group v. EPA*, the EPA was challenged in its interpretation of authority from Section 7602(g) of the CAA to promulgate a regulation establishing permitting requirements for greenhouse gas emissions.[113] The Court held that the EPA's interpretation

[109] Massachusetts v. EPA, 549 U.S. 497, 506 (2007).

[110] *Id*. at 497.

[111] *Id*. at 512.

[112] *Id*. at 532.

[113] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 323 (2014).

could not have been what Congress intended as it pulled too many stationary source facilities into the permitting program.[114] While operating within the traditional *Chevron* two-step framework, the Court noted that this "complicated, resource-intensive, time-consuming, and sometimes contentious process" would result in billions of dollars in administrative and permitting costs.[115] The Court thus chose to apply major questions principles in *Step-Two* of the *Chevron* analysis, determining the EPA's interpretation was unreasonable given the costly implications the agency action to the American economy.[116]

vii. 2015: "Obamacare" Tax Credits & the Post-Burwell Buzz

In *King v. Burwell*, however, the Court diverged from the traditional *Chevron* two-step framework altogether.[117] The controversy surrounded the legitimacy of Internal Revenue Service (IRS) authority to promulgate rules and regulations to implement a tax-credit program under the Affordable Care Act (ACA).[118] At that time, the ACA required that only those individuals enrolled in a state-created exchange would be entitled to tax credits funded through the legislation. The Court held it would not grant deference to agencies when reviewing regulatory actions that involve issues of deep economic and political significance. Since these tax credits at issue were worth billions of dollars and would (naturally) affect the health insurance costs of

[114] *Id.* at 333.

[115] *Id.* at 323.

[116] *Id.* at 324.

[117] King v. Burwell, 576 U.S. 473, 135 (2015).

[118] *Id.*

millions of Americans as a result, deferring to agency-interpretation was deemed inappropriate.[119]

Upon review of this early series of case law on statutory interpretation and the delegation power, it is clear the Court reflected deeply on how to utilize the *Chevron*-doctrine in a way that did not run afoul the Constitution, but that also enabled agencies to regulate areas of subject matter expertise. The Court then began by taking a concept posed in academic thought (then-Judge Breyer's law review article) and tested its application in different contexts, using economic and political considerations to drive its traditional *Chevron* analysis at *Step One*, *Step Two*, and, most notably, "*Step Zero*."[120] As used in *Burwell*, *Step Zero* is now known as a "'Chevron-carve out,' meant to ensure that Courts exercise independent judgment" when interpreting ambiguous statutes.[121] In post-*Burwell* speculation, some scholars opined on the "doctrinal, pragmatic, and constitutional concerns," such as seemingly massive power shift that may take place from the executive to the judiciary branch of government.[122] In the years that followed *Burwell*, the likelihood of the Court coronating MQD formally over *Chevron* increased dramatically as the Trump Administration was empowered to nominate several justices to the Supreme Court.[123] With the nominations and confirmations of Justice Gorsuch in 2017, Justice

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[119] *Id.*

[120] Kevin O'Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 499 (2016).

[121] Sunstein, *supra* note 29.

[122] O'Leske, *supra* note 119.

[123] Natasha Brunstein and Richard L. Revesz, *The Trump Administration's Weaponization of the "Major Questions" Doctrine*, THE REGUL. REV. (May 10, 2021), https://www.theregreview.org/2021/05/10/brunstein-revesz-trump-administrations-weaponization-major-questions-doctrine/.

Kavanaugh in 2018, and Justice Amy Coney-Barrett in 2020, it was clear the conservative wing of the Court would be in a position to cause a seismic shift in the law of statutory interpretation.

III. THE RISE OF A MODERN MQD

On June 30, 2022, the Major Questions Doctrine (MQD) was recognized as a formal, determinative legal canon upon release of the decision in *West Virginia v. EPA*.[124] A modern, "stronger,"[125] MQD was coronated at the close of a four-part series now coined by scholars as the "Major Questions Quartet" [126] (Quartet).

First, in *Alabama Ass'n of Realtors v. HHS* (2021), the Court used major questions principles to prevent the CDC from extending its nationwide eviction moratorium, making no mention of the *Chevron* doctrine in its decision.[127] The plaintiffs, an association of landlords, argued that "Congress never gave the CDC the staggering amount of power it now claims" at the cost of billions of dollars to landlords.[128] The Court determined that the moratorium was of nationwide economic significance, noting "[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium . . . Congress has provided nearly $50 billion in emergency rental assistance—a reasonable proxy of the moratorium's economic impact." [129]

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[124] *West Virginia*, 142 S. Ct. at 2587.

[125] Sunstein, *supra* note 29.

[126] Sohoni, *supra* note 3.

[127] Ala. Ass'n of Realtors v. HHS, U.S. 141, 2485, 2489 (2021).

[128] Response in Opposition to Applicant's Emergency Application to Vacate the Stay Pending Appeal Issued by the United States District Court for the District of Columbia. U.S. 141, 2485 (2021) (No. 21A23).

[129] *Ala Ass'n of Realtors,* U.S. 141 at 2489.

Second, in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration* (2022), the Court assessed the Occupational Safety and Health Administration (OSHA) vaccination and testing requirements on an estimated 80 million persons in America's workforce.[130] Again, the Court did not engage in a *Chevron* analysis, choosing instead to focus on the major economic and political significance of the mandate's fiscal impact on the American workforce.[131] While the majority did not address MQD formally, Justice Gorsuch's concurrence made explicit reference to MQD, noting that "[t]he Court rightly applies the *major questions doctrine* and concludes that this lone statutory subsection does not clearly authorize OSHA's mandate."[132] Beyond economic considerations, Justice Gorsuch went a step further, contending that even if OSHA's authority had clearly and specifically covered vaccination, Congress provided no limitations upon the agency's rulemaking, which violated the nondelegation doctrine.[133] Justice Gorsuch noted how both MQD and nondelegation are useful canons for the Court to "ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands."[134]

Third, in the 5-4 decision of *Biden v. Missouri*, the Court stayed injunctions granted by the lower courts regarding a COVID-19 vaccine mandate.[135] The Court held that the Centers for Medicare & Medicaid Service (CMS) may require COVID-19 vaccinations for facility staff if

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[130] Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 595 U.S. 109, 112–13 (2022).

[131] *Id.* at 117.

[132] *Id.* at 123 (Gorsuch J., concurring)

[133] *Id.* at 126.

[134] *Id.* at 124.

[135] Biden v. Missouri, 595 U.S. 87 (2022).

those facilities are funded in party by Medicare and Medicaid programs.[136] What was most notable, however, was the dissent authored by Justice Thomas and joined by Justices Barrett, Gorsuch, and Alito, arguing CMS lacked clear statutory authority to adopt the employment vaccine requirement: "If Congress had wanted to grant CMS authority to impose a nationwide vaccine mandate, and consequently alter the state-federal balance, it would have said so clearly. It did not."[137]

At the close of the Quartet is *West Virginia v. Environmental Protection Agency*, where the majority opinion of the Court halted EPA's Clean Power Plan and, for the first time, formally recognized MQD as a determinative legal canon.[138] The controversy began in 2015, when the EPA proposed the Clean Power Plan (CPP) to address climate change consistent with the Paris Agreement by reducing carbon dioxide emissions from power plants producing electricity.[139] Under the CPP, states would be required to implement efficiency improvements and emissions controls or engage in new renewable energy generation methods; further, those states with power plants would be required to submit implementation plans by 2018 and enforcement would begin in 2022.[140] In 2015, upon publishing the rule in the *Federal Register*,[141] hundreds of companies

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[136] *Id.* at 93.

[137] *Id.* at 104 (Thomas, J. dissenting).

[138] *West Virginia*, 142 S. Ct. at 2587.

[139] The New York Times, *What Is the Clean Power Plan, and How Can Trump Repeal It?*, N.Y. TIMES (Oct. 10, 2017) https://www.nytimes.com/2017/10/10/climate/epa-clean-power-plan.html#:~:text=Under%20the%20Paris%20agreement%2C%20the,crucial%20part%20of%20that%20strategy.

[140] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830 (proposed June 8, 2014) (to be codified at 40 C.F.R. 60).

[141] *Id.*

and dozens of states challenged the EPA's new rule and, in 2016, the D.C. Circuit chose not to grant a temporary injunction to stay the enforcement of CPP, but the Supreme Court issued a stay on its implementation.[142]

In 2018, under a new administration, the EPA proposed a set of emissions regulations known as the Affordable Clean Energy rule, or ACE rule.[143] In comparison to the CPP'S 32% reduction goal, the ACE rule set goals of targeting emission reduction between 0.7% and 1.5%.[144] The ACE rule effectively repealed the CPP, with a final rule published in 2019.[145] The American Lung Association and American Public Health Association promptly filed suit to challenge the rule.[146] In January 2021, the D.C. Circuit ruled to vacate the ACE rule and its repeal of CPP.[147] However, in October of 2021, the Supreme Court certified four petitions challenging the D.C. Circuit decision and consolidated them under *West Virginia v. EPA*.[148]

The contested language at the center of the controversy, Section 111(d) of the Clean Air Act (CAA), required the EPA to implement "the maximum degree of reduction in emissions . . . that the [EPA] Administrator, taking into consideration the cost of achieving such emission

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[142] Courtney Scobie, *Supreme Court Stays EPA's Clean Power Plan*, AM. BAR ASS'N (Feb. 17, 2016), https://www.americanbar.org/groups/litigation/committees/environmental-energy/practice/2016/021716-energy-supreme-court-stays-epas-clean-power-plan/.

[143] 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, 32520-01 (Sept. 6, 2019) (to be codified at 40 C.F.R. 60).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021).

[148] *West Virginia*, 142 S. Ct. at 2587.

reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable . . . through application of measures, processes, methods, systems or techniques."[149] The EPA argued that this delegation is one that implicitly tasks it with regulatory power to implement a generation-shifting approach to clean power like that adopted in the CPP.[150] However, the Court rejected this argument and, for the first time, formally recognized MQD as a determinative legal canon in its rationale:

> *Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to "clear congressional authorization" for the authority it claims. This is a major questions case. EPA claimed to discover an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler. That discovery allowed it to adopt a regulatory program that Congress had conspicuously declined to enact itself. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d).*[151]

Ultimately, the Court reasoned that only Congress has the legislative authority to enact change of significant legal or economic consequence and that, to overcome the Court's skepticism towards EPA's claim that Section 111 empowers such a generation-shifting approach to emissions, the agency must be able to point to clear statutory language authorizing its rulemaking to satisfy MQD.[152] Despite the agency's argument that the term "system" in the CAA provision allowed it to regulate cleaner fuel sources consistent with that outlined in the CPP, the Court determined "[t]he word 'system' shorn of all context, however, is an empty

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[149] 42 U.S.C.S. § 7412; *Id.*

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

[151] *Id.* at 2595 (citations omitted)

[152] *Id.* at 2614.

vessel. Such a vague statutory grant is not close to the sort of clear authorization required."[153] However, the Court recognized the EPA still has the narrower, decades-old authority to set technology-based standards to reduce emissions.[154] This authority includes, for example, promulgating standards requiring coal-fired power plants to install or retrofit new pollution control measures on existing systems.[155] As a result, the Court did not fully undercut the EPA's regulatory authority over stationary sources.[156]

The dissent, authored by Justice Kagan and joined by Justice Breyer and Justice Sotomayor, disagrees with the majority's interpretation of the word "system," instead finding Congress intended the word to give EPA flexibility to regulate emissions standards in times of rapidly shifting environmental challenges.[157] Justice Kagan noted that the case was determined on one claim alone: "that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms."[158] Given the rapidly evolving context that is climate change, the dissent noted how Congress knows what it "doesn't and can't know when it drafts a statute," and its intention was to give authority to subject matter experts to achieve a reduction in emissions of greenhouse gases as a result.[159]

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[153] *Id.*

[154] *Id.* at 2611.

[155] *Id.* at 2601.

[156] *Id.* at 2612.

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

[158] *Id.*

[159] *Id.*

Scholars of the Quartet claim *West Virginia* gave rise to a "strong," modern version of MQD, evolving from its weaker counterpart as applied in *Burwell*.[160] While the weaker form of MQD makes agency initiatives like that of EPA in *West Virginia* much more difficult to achieve, the stronger iteration (and its clear authorization requirement) further complicates agency rulemaking.[161] Strong MQD makes the effort nearly impossible for agencies to step outside the bounds of a crystalized clear statement rule and forbids agencies from making major policy decisions unless authority is specifically delegated.[162] In light of the Quartet, many (major) questions still remain as lower courts will be forced to reconcile *Chevron* with the MQD(s) when faced with challenges to agency rulemaking at the District and Appellate levels.

IV. STATUS OF AGENCY RULEMAKING

In the words of one of the most prolific thought-leaders in administrative law and statutory interpretation: "Administrative law is not for sissies."[163] In a post-*West Virginia* world, it is safe to assume the late Justice Scalia would agree the elephant in the room of administrative law is *Chevron*, and it is not hiding in a mousehole.[164] As he noted in a 1989 visit to Duke University Law School: "In the long run, *Chevron* will endure. . . not because it represents a rule that is easier to follow and thus easier to predict . . . but because it more accurately reflects the reality of government, and thus more adequately serves its needs."[165] The Justice's prediction of

[160] Sunstein, *supra* note 29 at 483.

[161] *Id*. at 479.

[162] *Id*.

[163] Robin Bravender, *Scalia and Chevron: It's Complicated*. E&E NEWS BY POLITICO (Feb. 19, 2016, 1:07 PM), https://www.eenews.net/articles/scalia-and-chevron-its-complicated/.

[164] *Whitman*, 531 U.S. at 462.

[165] *Id*.

Chevron's enduring legacy now, unfortunately, appears amiss. In light of *West Virginia*, how the lower courts expect to reconcile these competing doctrines is largely unknown and may only be speculated.[166] More curious is the posture of SCOTUS as it signals towards its development of MQD in imminent challenges to agency rulemaking.[167]

A. Impact on Lower Courts

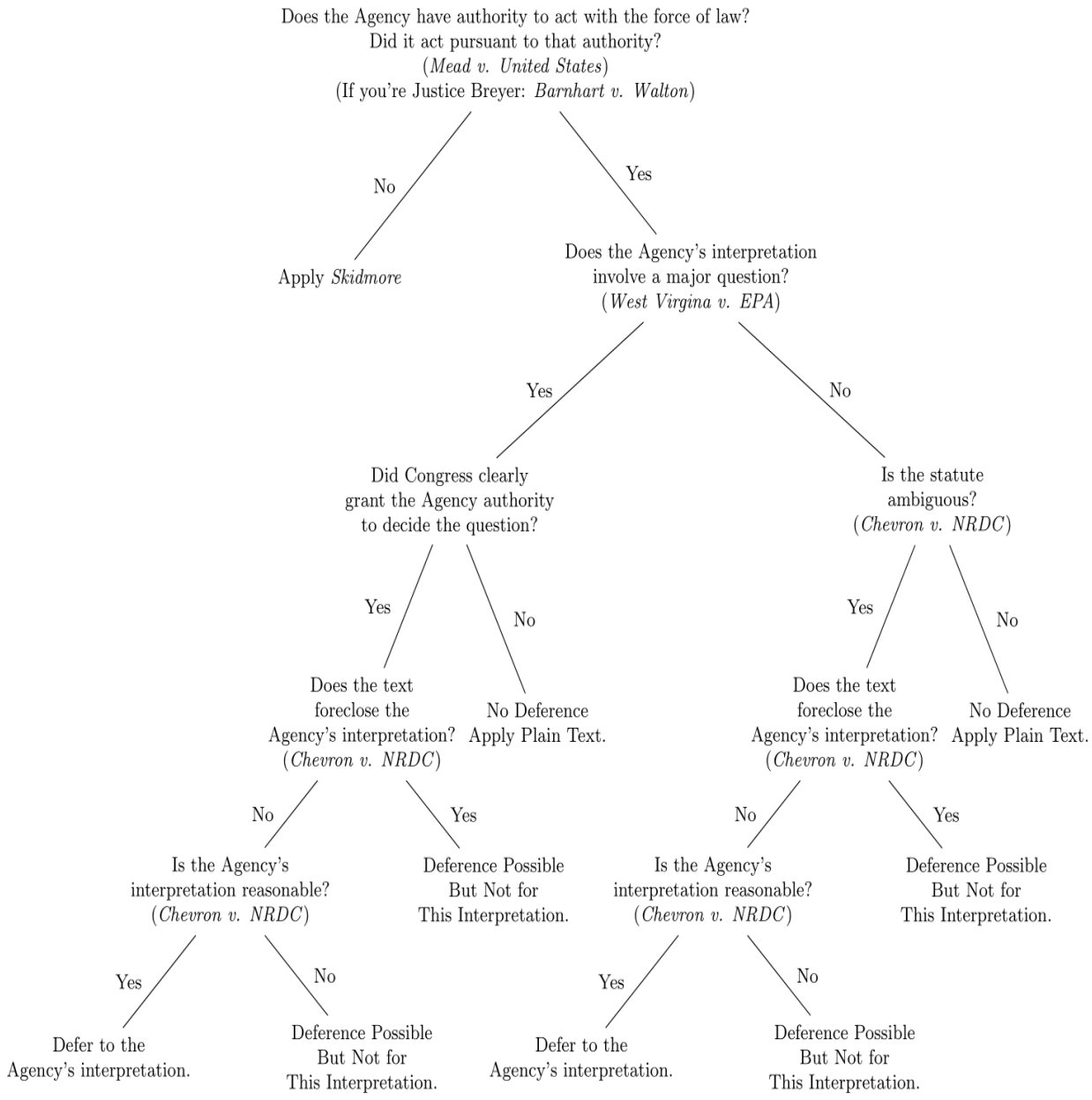
In an effort to bridge the gap between MQD and *Chevron*, Professor Nicholas Bednar of University of Minnesota Law School has created a diagram predicting the courts' flow of analysis in this new era of statutory interpretation.[168]

[166] *See generally* Part II, Section A.

[167] *See generally* Part II, Section B; *see also* Part II, Section C.

[168] Nicholas Bednar, *Chevron's Latest Step*, YALE J. ON REGUL. (Jul. 3, 2022), https://www.yalejreg.com/nc/chevrons-latest-step/.

The *Chevron* Analysis



Author: Nick Bednar (@NicholasBednar)

Challenges to agency rulemaking can be approached by lower courts in (at most) a five-step inquiry.[169] Step one asks whether the agency has authority to act with the force of law and act pursuant to that authority.[170] Most often the answer will be in the affirmative; challenges to rulemaking efforts are controversies rooted in whether an agency's reading of its statutory authority is proper, requiring there first to be an interpretation of statutory language. For example, in *West Virginia v. EPA*, the EPA points to the CAA as its force of law pursuant to its authority to regulate generation-shifting systems in powerplants.[171] Therefore, simply pointing to a congressionally codified statute is likely sufficient.

Next, step two asks whether the disputed interpretation involves a major question.[172] But what is a major question, exactly? Two categories of major questions exist: political and economic questions.[173] Scholars expound upon the significance and difficulty surrounding that question; however, a "major" question is typically identified when agencies claim significant regulatory powers over American industries of vital importance to a thriving economy.[174] For example, in *FDA v. Brown & Williamson Tobacco Corp.*, the Court took issue with the FDA seizing control to "regulate an industry constituting a significant portion of the American

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[169] *Id.*

[170] *Id*; *See* United States v. Mead, 533 U.S. 218 (2001) (holding that even if an agency's interpretation of a statute is not entitled to deference under *Chevron* because the authority is not expressly granted by Congress, it may still be granted deference under *Skidmore); see also* Skidmore v. Swift & Co. 323 U.S. 134, 140 (1944) (holding agency rulings, interpretations, and opinions are entitled to respect and may be used for guidance by courts and litigants).

[171] *West Virginia*, 142 S. Ct. at 2596.

[172] Bednar, *supra* note 167.

[173] Louis J. Capozzi III, The Past and Future of the Major *Questions* Doctrine, 84 OHIO ST. L.J. 191, 228 (2023).

[174] *Id.* at 228-229.

economy."[175] Similarly, in *West Virginia v. EPA*, the Court held energy production to be an industry of significance, meeting this threshold of importance to the economy.[176] The Court will also consider the economic costs of the industries and persons the agency seeks to regulate and how their economic rights are impacted.[177] For example, in *Alabama Ass'n of Realtors*, the Court was concerned about the cost to landlords and that "[d]espite the CDC's determination that landlords should bear a significant financial cost of the pandemic, many landlords have modest means. And preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership–the right to exclude."[178] While there may not be a dollar amount or precise equation to determine whether a question is of major economic significance, the Court may create specific standards in the future.

The next kind of major question—major political questions—appears much more difficult for the Court to positively identify. Then-Judge Kavanaugh's "you-know-it-when-you-see-it" rationale for identifying some major political questions may be attractive to the lower courts.[179] In advocating for courts to consider how many public comments resulted from the published proposed rule, courts determine significance by looking for the public's level of engagement with the issue—finding a connection between civic engagement to the political significance of

[175] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

[176] *West Virginia*, 142 S. Ct. at 2596.

[177] Alabama Ass'n of Realtors v. HHS 141 S. Ct. 2485, 2489 (2021).

[178] *Id*.

[179] *See* United States Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir., 2017) (Kavanaugh, J., dissenting).

the question.[180] However, as is common in the many knotted regulatory cases outlined in this Comment, many cases are not so black and white—requiring courts to come up with a more formulaic approach to identify whether the question is one of political significance. Recent scholarship has suggested courts can look to whether Congress has "taken an interest in the issue at hand."[181] This approach appears to cast a wider net around anything Congress may entertain in the course of legislating, and is, therefore, a bit suspect as a determinative factor indicating political significance of the issue.[182]

Another method may urge courts to focus on how states address the relevant political issue in question.[183] For example, courts may assess the divide in state policy approach to eviction moratoriums, finding the states' varied approaches a clear showing of political contention and, thus, a major question of political significance.[184] In adopting such an approach, courts may identify whether a particular regulatory action should be considered one of major political significance in America—evaluating the extent to which political contentions exist amongst the populous.[185] Finally, the courts may evaluate the Administration's posture or

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[180] *Id*. ("[W]hen the issue was before the FCC, the agency received some 4 million comments on the proposed rule.") *Id.*

[181] Capozzi, *supra* note 172 at 232. (citing to Justice Gorsuch's understanding in *NFIB v. OSHA*, where he viewed the Senate's resolution of disapproval as evidence that the proposed agency rule is one of political significance and would not be approved by Congress); *Nat'l Fed'n of Indep. Bus*, 142 S. Ct. at 668 (Gorsuch, J. concurring).

[182] *Id.*

[183] *Id*. at 666 (Gorsuch, J. concurring) ("And in fact, States have pursued a variety of measures in response to the current pandemic."). *Id.*

[184] *CDC Issues Eviction Moratorium Order in Areas of Substantial and High Transmission*, CDC (Aug. 3, 2021) https://www.cdc.gov/media/releases/2021/s0803-cdc-eviction-order.html.

[185] *Id.*

statements implicating the political issue.[186] This may include an evaluation of statements by the President or those within his or her administration.[187] In *West Virginia v. EPA*, for example, the Court cites to President Obama himself, suggesting that the direction of the EPA was to achieve an "aggressive transformation in the domestic energy industry."[188] If the Court took this approach seriously in practice, an agency's efforts in promulgation of a rule may be undercut by a president's statements.[189]

In step three, courts determine if there was clear congressional authorization for the agency to determine the question.[190] The Court in *West Virginia v. EPA* adopted the requisite clarity approach as in *Whitman*: Congress must "speak with the requisite clarity to place [its] intent beyond dispute."[191] The EPA, for example, in reaching for authority in Section 111(d) of the CAA, rested its claim to expand authority on the basis of the word "systems," which the Court found lacked requisite clarity to satisfy the clear congressional authorization requirement in *West Virginia v. EPA*.[192] Without that clear authorization, one can assume courts will apply a plain reading assessment and halt the rule from its final promulgation.[193] Emerging discussion of

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[186] Capozzi, *supra* note 172 at 233.

[187] *Id.*

[188] *West Virginia*, 142 S. Ct. at 2604 (quoting White House Fact Sheet on Clean Power Plan).

[189] *Id.*

[190] Bednar, *supra* note 167.

[191] *Whitman*, 531 U.S. at 468; *see also* U.S. Forest Serv. V. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849 (2020) ("[W]hen Congress wishes to 'alter the fundamental details of a regulatory scheme," courts "expect it to speak with the requisite clarity to place that intent beyond dispute."). *Id.* (quoting *Whitman*, 531 U.S. at 468).

[192] *West Virginia*, 142 S. Ct. at 2596.

[193] *Id.*

what "clear authorization" means and whether it should be construed as a traditional "clear statement rule" are likely to be prevalent in the coming years.[194] Some scholars have called the Court's approach a clear statement rule of the common variety,[195] and likely the result of Justice Gorsuch's concurrence in *West Virginia v. EPA*, where he describes the congressional authorization requirement as a clear statement requirement.[196] Other scholars suggest that the clear authorization was a strategic move by the Court to avoid the rigidity and higher threshold of a clear statement requirement, suggesting that Justices Thomas, Kavanaugh, and Barrett (who did not join Justice Gorsuch's concurrence) were unwilling to support the MQD as a more rigid clear-statement rule.[197] While mere speculation, it is also possible these Justices were uncomfortable with the notion that a court may not step outside the bounds of an express delegation,[198] or the Justices merely wanted to retain some level of flexibility, allowing them to read what a statute means to speak naturally, if not explicitly. In any event, if the court identifies requisite clarity in the statutory language, a reviewing court moves to steps four and five.[199] These steps follow the traditional *Chevron* two-step inquiry: whether the text forecloses the agency interpretation and, if so, whether that agency interpretation was reasonable.[200]

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[194] Natasha Brunstein & Donald L. R. Goodson, *To Be Clear, the Major Questions Doctrine is Not a Clear-Statement Rule*, YALE J. ON REGUL.(Dec. 21, 2022), https://www.yalejreg.com/nc/mqd-not-clear-statement-rule/.

[195] Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. Rev. 1009 (Sep. 8, 2023).

[196] *West Virginia*, 142 S. Ct. at 2617-18 (Gorsuch, J., concurring).

[197] Brunstein and Goodson, *supra* note 191.

[198] *Id.*

[199] Bednar, *supra* note 167.

[200] *Chevron*, 467 U. S. at 843-44.

While this predictive model for a five-step analysis may be useful to predict outcomes of forthcoming challenges to rulemaking, it is uncertain if lower courts will use this approach. Given how many lower courts generally expound upon administrative law, it is likely that some courts will adopt the strong MQD, some courts will adopt a weak MQD, and some may abstain from MQD completely to apply traditional *Chevron* two-step analysis. Studies monitoring *Chevron*'s use in the circuit courts are sparse and may not represent modern trends accurately.[201] However, in evaluating data from cases from 2003 to 2013, of 1,327 circuit opinions that applied Chevron, 71.4% of the time agencies won.[202] Most notably, where courts made it to *Step-2* of the *Chevron*-deference analysis, agencies won 93.8% of the time.[203] More recent data shows over 140 Circuit court cases between 2020 and 2021 that cited to *Chevron* "at least 4 times, discussed it in the majority, and analyzed whether to apply *Chevron*."[204] In 2022, the Ninth Circuit pushed back on MQD's application of *Chevron*—noting it "remain[s] bound by past decisions of the Supreme Court until it overrules those decisions" and therefore "must apply *Chevron* where relevant."[205] However, it seems as though, despite what the lower courts do, SCOTUS is well on its way to resurrecting the nondelegation doctrine—or, at the very least, something close to it.

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[201] Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

[202] *Id*. at 6.

[203] *Id*.

[204] *Circuit Court of Appeals Opinions Analyzing and Applying Chevron in 2020-2021*, CATO INST. AND LIBERTY JUST. CTR. (last visited Feb.12, 2023), https://www.cato.org/sites/cato.org/files/2022-12/Loper-App.pdf.

[205] Diaz-Rodriguez v. Garland, 55 F.4th 697 n.30 (9th Cir. 2022), petition for cert. filed, 55 F.4th 697 (2023).

B. Supreme Posture

While there is much skepticism surrounding the reception of MQD by the lower courts, the future posture of the Supreme Court is predictable. *West Virginia v. EPA* foreshadows not only the reapplication of MQD in cases to come, but also the Court's shift to something closer to nondelegation doctrine—a continued evolution of MQD.[206] Further, prior opinions, statements, and questions at oral argument from the members of the Court support a theory that the law of statutory interpretation is heading backward towards nondelegation principles.[207]

i. Justice Kavanaugh

In 2016, then-Judge Brett Kavanaugh published a book review in *Harvard Law Review* entitled "Fixing Statutory Interpretation." [208] In the essay, Justice Kavanaugh calls to leash "aggressive" executive agencies before they engage in legal theory crafting to achieve its unlawful regulatory ends:

> *We must recognize how much* Chevron *invites an extremely aggressive executive branch philosophy of pushing the legal envelope (a philosophy that, I should note, seems present in the administrations of both political parties). After all, an executive branch decisionmaker might theorize, "If we can just convince a court that the statutory provision is ambiguous, then our interpretation of the statute should pass muster as reasonable. And we can achieve an important policy goal if our interpretation of the statute is accepted. And isn't just about every statute ambiguous in some fashion or another? Let's go for it." Executive branch agencies often think they can take a particular action unless it is clearly forbidden.*[209]

[206] Gocke, *supra* note 30 (suggesting MQD is a "fig leaf" to the nondelegation doctrine).

[207] *Supra* note 205-21.

[208] Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016).

[209] *Id.* at 2151.

Further, in a 2019 statement of denial for writ of certiorari in *Paul v. United States*, Justice Kavanaugh considered the future of judicial review in agency rulemaking challenges.[210] Justice Kavanaugh foreshadowed what would become the strong MQD—a "closely related statutory interpretation doctrine" to that of the nondelegation doctrine.[211] In the wake of the Quartet, it is now proposed that this prior statement signals an even stronger, third iteration of MQD.[212] This hypothetical "triage rule" would apply the nondelegation doctrine to all questions of major policy—even if Congress expressly and specifically delegates the authority to do so.[213] Kavanaugh encouraged the Court to consider such "thoughtful" opinions previously raised both by his predecessor (Justice Rehnquist) and current colleague (Justice Gorsuch):

> *In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce. . . The opinions of Justice Rehnquist and Justice Gorsuch would not allow that second category—congressional delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority. Under their approach, Congress could delegate to agencies the authority to decide less-major or fill up-the-details decisions. Like Justice Rehnquist's opinion. . . Justice Gorsuch's thoughtful Gundy opinion raised important points that may warrant further consideration in future cases.*[214]

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[210] Paul v. United States, 140 S. Ct. 342 (2019).

[211] *Id.* at 342.

[212] Nachmany, *supra* note 29.

[213] *Id.*

[214] *See Paul*, 140 S. Ct. at 342.

In drawing upon Chief Justice Rehnquist's opinion in *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*[215] and Justice Gorsuch's opinion in *Gundy*,[216] Justice Kavanaugh gives a nod and a wink to the possibility of MQD developing into a doctrine even closer to the nondelegation doctrine than it is today.[217] He suggests the Court should consider whether the nondelegation doctrine should be applied to all Congressional attempts at delegating matters that implicate major policy questions (even if expressly granted), but not to those questions that implicate mere "less-major or fill-up-the-details decisions."[218]

ii. Justice Gorsuch

While on the Tenth Circuit Court of Appeals, Justice Gorsuch noted permitting "executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[219] This view has translated in his most recent concurrence in *West Virginia v. EPA* in a discussion of separation of power principles.[220] Calling upon the racist tendencies of the Wilson Administration (commonly known as the "Father of Public Administration"), Justice Gorsuch notes concern that agencies without clearly delegated authority may begin to act as "unaccountable 'ministers.'"[221] The Court may look to this concurrence in subsequent cases, calling upon Gorsuch's concern of whether subject matter

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[215] Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980).

[216] Gundy v. United States, 204 U.S. 2116 (2019).

[217] *See Paul*, 140 S. Ct. at 342.

[218] *Id.*

[219] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

[220] *West Virginia*, 142 S. Ct. at 2617–18 (Gorsuch, J., concurring).

[221] *Id.* (citing The Federalist no. 11, p.85).

experts within agencies have too much legislative power or are at risk of ignoring the wisdom of the masses as the framers of the Constitution had intended.

iii. Chief Justice Roberts

Most notably in the consideration of how this doctrine will be applied in the future, at oral argument in *West Virginia v. EPA*, Chief Justice Roberts teed up the Solicitor General of West Virginia for a discussion of when to apply MQD:

> *I think there's some disagreement about how to apply it . . . why wouldn't you look at it … at the outset and say, as I think the Court did in FDA, you know, why is the FDA deciding whether, you know, cigarettes are illegal or not*, a*nd then that is something that you look at while you are reading the particular statute or whatever other things you look at when you're trying to interpret a statute and see if it's reasonable to suppose that???. I mean*,… I['m] *just thinking back* on Alabama Realtors *or the* OSHA *vaccine case*, *I don't know how you would read those as not starting with the idea that this*[,] *however you want to phrase it, this is kind of surprising that* the *CDC is … regulating evictions and all that and then look to see if there's something in there, I guess*, *that suggests, well, however surprised,* you know *. . . we think that type of regulation was … appropriate*. [222]

With context of the inquiry above, it appears as though the Chief Justice would like to rationalize why the Court may first, before reading the statute, question whether the regulation appears appropriate for the particular agency to take on.[223] In following such an exercise, when posed with the CDC eviction moratorium case, this mode of judicial inquiry appears more akin to a layman's guesswork than it does legal interpretation. The Chief Justice considers whether the CDC is an agency qualified to be exercising the authority to cease evictions.[224] While reasonable minds may disagree on this point, under the Chief Justice's approach, critical

[222] Transcript of Oral Argument at 83–84, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (No. 20-1530).

[223] *Id.*

[224] *West Virginia*, 142 S. Ct. at 2613

regulatory actions may be flagged by courts as an agency-overstep before a judge or justice even reads the statute at issue.

C. Imminent Challenges to Agency Rulemaking

Since *West Virginia*, recent events both threaten to confirm MQD's reign over agency rulemaking decisions and foreshadow the demise of *Chevron*—including: (1) SCOTUS' decision in *Biden v. Nebraska*;[225] (2) lawsuits challenging EPA's "Revised Definition of 'Water of the United States'" (WOTUS) Rule;[226] (3) calls to challenge SEC's Climate-Related Disclosure Rule; [227] and (4) SCOTUS' grant of *certiorari* in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce* (in consolidation with *Raimondo*).[228]

i. Biden v. Nebraska (2023)

In *Biden v. Nebraska*, controversy stemmed from the Biden administration's direction of the Secretary of Education to develop a plan and act on discharging student loan debt under the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES) Act. [229] Six states contended that this action violated separation of powers principles and the Administrative Procedure Act (APA).[230] In October 2022, the district court ruled the states did not have Article III standing to sue over the APA violation—holding lost tax revenues as mere speculative

[225] Biden v. Nebraska, 143 S. Ct. 2355 (2023).

[226] *E.g.,* Complaint, Texas v. EPA, (S.D. Tex. 2023) (No. 3:23-cv-20).

[227] The Enhancement and Standardization of Climate-Related Disclosures for Investors, Proposed Rule, 87 Fed. Reg. 29059 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pt. 210, 229, 232, 239, 249).

[228] Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429; Relentless, Inc. v. DOC, 217 L. Ed. 2d 154.

[229] *Biden v. Nebraska*, 143 S. Ct. at 2362.

[230] *Id.* at 2365.

injury.[231] In that same month, the states moved for preliminary injunction pending appeal to the Eighth Circuit Court of Appeals, and the Supreme Court granted *certiorari* before appellate judgement.[232] During oral arguments, much of the time was spent workshopping the limits and application of the strong iteration of MQD.[233] Justice Alito, Chief Justice Roberts, Justice Kavanagh, and Justice Gorsuch asked several questions prompting discussion of MQD, hinting that expansion of the doctrine is on the horizon.[234]

During his questioning, Justice Alito posed to the Solicitor General a hypothetical implicating whether this administrative debt relief program both (1) constitutes a regulatory action subject to scrutiny under the doctrine and (2) contains a major policy question:

> *General, let's say that nobody in Congress was aware that there is such a thing in our case law called the major questions doctrine. So put that out of their minds. And you simply polled every member of Congress and asked that person whether, in the ordinary sense of the term, they would regard what the government proposes to do with student loans as a major question or something other than a major question.*[235]

Here, it appears Justice Alito seeks to parse out how administrative executive actions, such as waiving/modifying student loan policy, are different than that of an agency's promulgation of a final rule.[236] This line of questioning indicates the Justice's consideration of MQD's expansion to executive agency action beyond that of mere

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[231] *Id.*

[232] *Id.*

[233] Transcript of Oral Argument, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506).

[234] *Id.*

[235] *Id.* at 13.

[236] *Id.*

rulemaking. Similarly, Chief Justice Roberts expands upon this point, soliciting at oral argument whether MQD should guide the Court in this context:

> *I just have a question on -- on the major questions doctrine, and I wanted just a little bit of background for why -- I want to get your views on how it applies…Now we take very seriously the idea of the separation of powers and that power should be divided to prevent its abuse, and there are many procedural niceties that have to be followed for the same purpose. The case reminds me of the one we had a few years ago under a different administration where the administration tried acting on its own to cancel the Dreamers program, and we blocked that effort. And I just wonder, given the posture of the case and given our historic concern about the separation of powers, you would recognize at least that this is a case that presents extraordinarily serious, important issues about the role of Congress and about the role that we should exercise in scrutinizing that, significant enough that the major questions doctrine ought to be considered implicated?...* [W]*hether Congress acted or not was a factor that we considered in the major questions doctrine, and the way we considered it is whether or not the issue that was before the Court is something that had been seriously considered and debated and was a matter of political controversy before Congress. That certainly is the case here, right?*[237]

Following Justice Alito's line of questioning here, the Chief Justice states his view in the form of a question—that executive administrative action in the context of an emergency (COVID-19 pandemic) should be subjected to the same doctrinal scrutiny as traditional agency-rulemaking under (at least) a strong MQD analysis.[238]

On June 30, 2023, the decision in the case was released.[239] Predictably, the Court ruled 6-3, concluding the Biden Administration overstepped its authority in the waiver of student debt.[240] MQD was invoked in the majority opinion, as Chief Justice Roberts noted, "the question

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[237] *Id.* at 32.

[238] *Id.*

[239] *Biden v. Nebraska*, 143 S. Ct. at 2355.

[240] *Id*.

here is not whether something should be done; it is who has the authority to do it."[241] The Court held that the HEROES Act did not authorize the debt-relief program at all, much less clearly enough to satisfy the MQD's clear authorization requirement.[242] Justice Barrett, writing in concurrence, discussed MQD far more generally and took "seriously the charge that the doctrine is inconsistent with textualism"—arguing the canon should be used as a "tool for discerning—not departing from—the text's most natural interpretation."[243] In dissent, Justice Kagan took aim at the Court's use of MQD—arguing that the ability of agencies to keep up with the changing times and circumstances requires reasonable interpretation of Congressional statutes.[244] While unrelated to the environment, *Biden v. Nebraska* appears to affirm MQD's reign—supporting a new trend of the Supreme Court stepping into a national policy debate. As Justice Kagan notes, "that is a major problem not just for governance, but for democracy too."[245]

ii. Revised Definition of "Waters of the United States" (WOTUS)

In January 2023, the EPA, Department of Defense, and U.S. Army Corps of Engineers (the Corps) together promulgated a final rule, defining the scope of protected waters under the Clean Water Act (CWA).[246] As published, the final rule "advances the objective of the CWA and ensures critical protections for the nation's vital water resources, which support public health, environmental protection, agricultural activity, and economic growth across the United

[241] *Id*. at 2372,

[242] *Id*. at 2374.

[243] *Id.* at 2376 (Barrett, J., concurring).

[244] *Id.* at 2397 (Kagan, J., dissenting).

[245] *Id*.

[246] 40 C.F.R. 120 pt. 328 (2023); 33 C.F.R. pt.328 (2023).

States."[247] Scientists, engineers, and civil works experts at all three agencies collaborated on the rule to "deliver a durable definition of WOTUS that safeguards our nation's waters, strengthens economic opportunity, and protects people's health while providing greater certainty for farmers, ranchers, and landowners."[248] This rule provides:

> *The agencies construe the term "waters of the United States" to mean: (1) traditional navigable waters, the territorial seas, and interstate waters ("paragraph (a)(1) waters"); (2) impoundments of "waters of the United States" ("paragraph (a)(2) impoundments"); (3) tributaries to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard ("jurisdictional tributaries"); (4) wetlands adjacent to paragraph (a)(1) waters; wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard; and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard ("jurisdictional adjacent wetlands"); and (5) intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard ("paragraph (a)(5) waters"). This rule also contains, at paragraph (b), the longstanding exclusions in the 1986 regulations, as well as additional exclusions based on well-established practice, from the definition of "waters of the United States" and, at paragraph (c), definitions for terms used in this rule.*[249]

In short and predictable order, the state of Texas and agricultural groups led by the American Farm Bureau Federation filed suit in the U.S. District Court for the Southern District of Texas.[250] Soon after, twenty-three states joined North Dakota in filing suit to challenge the

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[247] *Id.*

[248] *EPA and Army Finalize Rule Establishing Definition of WOTUS and Restoring Fundamental Water Protections*, EPA (Dec. 30, 2022), https://www.epa.gov/newsreleases/epa-and-army-finalize-rule-establishing-definition-wotus-and-restoring-fundamental.

[249] 40 C.F.R. 120 pt. 328 (2023); 33 C.F.R. pt.328

[250] Complaint, Texas v. Env't Prot. Agency, 829 F.3d 405 (5th Cir. 2016) (No. 3;23-cv-17).

rule in the U.S. District Court for the District of North Dakota.[251] In the Amended Complaint, filed in November of 2023, the states allege the EPA has effectively "toppled the cooperative federalism regime" by implementing a rule that is "overbroad and hopelessly vague."[252] North Dakota Agriculture Commissioner Doug Goehrig released a statement supporting the lawsuit, alleging the "revised WOTUS definition is a blatant overreach of authority that significantly and unlawfully expands federal control of state land and water resources."[253] Specifically, in the Texas brief, the petitioner cites both the weak and strong versions of MQD—calling upon *West Virginia* and *Brown* as support to vacate the rule:

> *Therefore, an agency's claim of authority must be rejected when: (1) the rule concerns an issue of economic and political significance; and (2) Congress has not clearly empowered the agency with the statutory authority. The Court should "hesitate before concluding that Congress meant to confer such authority" that the Federal Agencies grant themselves in the Final Rule. See West Virginia v. Envt. Prot. Agency, 142 S. Ct. at 2608 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-160 (2000)). The Federal Agencies are casting a broad, amorphous shadow over the economy through the Final Rule.*[254]

Given the petitioner's arguments and assertions, WOTUS is most likely bound for at least partial vacatur. If not partially or completely vacated in the lower courts, then certainly by SCOTUS if certiorari was granted upon appeal. When applying any iteration of MQD, the text of the delegation is unlikely to pass muster.

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[251] *New Waters of the United States Rule an Overreach of Authority*, N.D. DEP'T OF AGRIC. (Mar.1, 2023, 3:23 PM), https://www.ndda.nd.gov/news/new-waters-united-states-rule-overreach-authority.

[252] Amended Complaint, States of West Virginia; North Dakota; Georgia; and Iowa v. Env't Prot. Agency, No. 3:23-cv-00032-DLH-ARS (D.N.D. Nov. 13., 2023), ECF No. 176.

[253] *Supra* note 247.

[254] Nachmany, *supra* note 29.

First, the weak MQD would likely exclude this rule from Chevron-deference analysis due to its enormous economic impact. The industry sentiment is that this regulation will be "burdensome and costly regulations" on farmers, ranchers, and the broader agricultural industry.[255] In opposition, the federal government contends, "this rule will establish a regime that is generally comparable to current practice, and this rule is expected to generate *de minimis* costs and benefits as compared to the pre-2015 regulatory regime that the agencies are currently implementing."[256] While there is contention about whether this rule costs more or less than the 2015 pre-regulatory state regime, the government's regulation likely holds inherent economic significance to this Court given its preference towards MQD principles. Further, as will likely be considered in its opinion, Congress has considered this political issue in the past—aiming to override state law regulations that offer a scheme of economic incentives. [257]

Under a strong MQD framework, WOTUS is unlikely to survive scrutiny. WOTUS affords broad and sweeping regulatory authority over American waterways, impoundments, intrastate lakes, and ponds.[258] Therefore, it is highly unlikely that the reviewing court, when applying a strong MQD, will determine these agencies received a clear statement or clear authorization from Congress to regulate such broad categories of American water that impact such a significant economic sector of the American economy.[259] Finally, a court applying some

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[255] *Supra* note 247.

[256] U.S. ENV'T PROT. AGENCY, ECONOMIC ANALYSIS FOR THE FINAL "REVISED DEFINITION OF 'WATERS OF THE UNITED STATES" RULE (2022).

[257] *Supra* note 247.

[258] *Supra* note 252.

[259] *West Virginia*, 142 S. Ct., 2587.

iteration of the MQD "triage rule"[260] would certainly vacate WOTUS. This is because observers would likely see the agencies as interpreting the CWA to expand the statutory reach of its provisions. Creating a mere "fill-up-the-details" regulatory scheme under this MQD appears improper.[261] Therefore, under all theories of MQD, this rule would be at least partially vacated–sending EPA and its fellow co-writing agencies back to the drawing board in its effort to protect America's waters.

iii. SEC's Environmental Disclosure Rule

Another foreseeable area that may implicate MQD with respect to the environment involve, oddly, promulgations by the SEC.[262] Recently, the SEC has turned its attention to the fast-growing area of Environmental, Social, and Governance (ESG) investment regulation—aiming to mandate corporate disclosures regarding climate change impact and emissions categorized as "Scope 3."[263] Despite the 72% of institutional investors who support ESG principles in investing,[264] conservative politicians intend to challenge the proposed rules—claiming statutory overreach by the SEC.[265] As the top Republican on the House Financial

[260] Nachmany, *supra* note 29.

[261] *See Paul*, 140 S. Ct. at 342.

[262] 17 CFR 210, 229, 232, 239, and 249, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Proposed Rule, https://www.sec.gov/rules/proposed/2022/33-11042.pdf

[263] Paul Kiernan, *SEC Floats Mandatory Disclosure of Climate-Change Risks, Emissions*, WALL ST. J. (Mar. 21, 2022, 3:58 PM), https://www.wsj.com/articles/sec-to-float-mandatory-disclosure-of-climate-change-risks-emissions-11647874814?mod=article_inline.

[264] *ESG-focused Institutional Investment Seen Soaring 84% to US$33.9 Trillion in 2026, Making Up 21.5% of Assets Under Management: PwC Report*. PWC (Oct. 10, 2022), https://www.pwc.com/gx/en/news-room/press-releases/2022/awm-revolution-2022-report.html.

[265] Sen. Pat Toomy (@SenToomey), TWITTER (Mar. 21, 2022), https://twitter.com/SenToomey/status/1505930604721938435 "Today's action hijacks the democratic

Services Committee, Patrick McHenry (NC-10), notes: "it is Congress' job to set our environmental policy, not ill-suited and unelected bureaucrats. The SEC should focus on its core mission–protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation–rather than a far-left social agenda."[266] Further, a coalition of twenty-two red-state attorneys general are gesturing toward legal action against the proposed rule.[267] In an open letter to the Secretary of the SEC, West Virginia Attorney General Patrick Morrisey argues such rulemaking, which mandates climate disclosure, is "distant from areas of ordinary finance" and "are well outside the SEC's area of expertise."[268] In citing *West Virginia*, these AGs point to the Court's own language, noting, "the Government must … point to clear congressional authorization to regulate in that manner. This clear statement must be something more than a 'merely plausible textual basis' to allow the SEC to enact a 'radical or fundamental change to a statutory scheme."[269]

Under all three iterations of MQD the rule will likely fail under scrutiny. First, under the "weak" version of MQD, a step-zero exception to *Chevron* will likely apply, given the market implications of the SEC rule.[270] There is a natural correlation between ESG-related disclosures

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process and disrespects the limited scope of authority that Congress gave to the SEC. This is a thinly-veiled effort to have unelected financial regulators set climate and energy policy for America." *Id.*

[266] *Id*.

[267] State of West Virginia, Office of the Attorney General, Comment Letter *on Proposed Rule* to *Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices* (Aug. 16, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/2022.08.16%20ESG%20Funds%20Comment-c1.pdf.

[268] *Id*. at 1–2.

[269] *Id*. at 8–9.

[270] Sunstein, *supra* note 29.

and the market economy at large; ESG assets may surpass $50 trillion by 2025, nearly one-third of the total global assets managed.[271] Therefore, the Court will likely view the proposed SEC rule as one of "deep 'economic and political significance' that is central to the statutory scheme"[272] and easily exclude itself from any engagement with a *Chevron*-deference analysis.[273] Next, under the "strong" version of MQD,[274] the expectation is similar pursuant to *West Virginia*.[275] Without clear authorization from Congress, the SEC cannot claim broad authority concerning mandated ESG disclosures.[276] Since the SEC claims its authority through a reasonable reading of the statute–which makes no clear or explicit mention of compelling companies or investment entities to disclose climate-related impact data—it is difficult to imagine the Court allowing the SEC such expansive reach within a decades-old statutory framework, impacting the global markets significantly.[277] Finally, under the "triage rule,"[278] the amendments proposed by the SEC would also be subject to vacatur. The Court would likely find the SEC's approach to ESG as a novel issue and, consequently, an expansion to the statutory scheme—something only Congress has the authority to do.

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[271] *ESG May Surpass $41 Trillion Assets in 2022, But Not Without Challenges, Finds Bloomberg Intelligence,* BLOOMBERG (Jan. 24, 2022), https://www.bloomberg.com/company/press/esg-may-surpass-41-trillion-assets-in-2022-but-not-without-challenges-finds-bloomberg-intelligence/.

[272] King v. Burwell, 576 U.S. 473 (2015); Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); *Brown & Williamson*, 529 U.S., at 160.

[274] Sunstein, *supra* note 29.

[275] *West Virginia*, 142 S. Ct., 2587.

[276] *Id.*

[277] *Supra* note 267.

[278] Nachmany, *supra* note 29.

iv. Raimondo & Relentless

In 2024, SCOTUS has the opportunity to reshape the law of statutory interpretation for generations to come. *Raimondo* (D.C. Circuit Court of Appeals)[279] and *Relentless* (First Circuit Court of Appeals)[280] will be heard in combination, and the facts of the case are relatively plain. The issue for review is whether the National Marine Fisheries Service (NMFS) has the authority to require industry to bear the cost of its oversight and monitoring activities pursuant to Section 1853 of the Magnuson-Stevens Act (MSA)—allowing the agency to "prescribe such other measures, requirements, or conditions and restrictions" as are "necessary and appropriate for the conservation and management of the fishery."[281] Upon review, both circuits held the language is not wholly unambiguous—satisfying the *Step-One* inquiry under *Chevron* and requiring engagement with *Step Two*.[282] Both courts found that, while the MSA expressly authorizes NMFS to impose and collect some fees, it does not expressly authorize specific fees to pay for its staff in this context.[283] While lacking that express authorization, the courts determined NMFS' interpretation as reasonable and upheld fee requirement.[284] Alternatively, in *Mexican Gulf Fishing, Co.*, the Fifth Circuit Court of Appeals interpreted the same language to be express by

[279] Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359 (D.D.C. 2022), *cert granted in part sub nom.* Loper Bright Enterprises v. Raimondo, 143 S.Ct. 2429 (2023).

[280] Relentless, Inc. v. U.S. Dep't of Com., 62 F.4th 621 (1st Cir. 2023), *cert granted in part sub nom*. Relentless Inc., v. Dep't of Com., No. 22-1219 (2023).

[281] *Raimondo*, 45 4th at 368-69.

[282] *Id.*

[283] *Raimondo*, 45 4th at 369 (holding "the Service's interpretation of the Act as authorizing additional industry-funded monitoring programs is reasonable").

[284] *Id*.

way of negative implication—noting the disputed clause only authorizes the agency the ability to promulgate rules strictly necessary or appropriate under the MSA.[285]

Given its recent signals towards a rebirth of the nondelegation doctrine, is likely SCOTUS will take one of two paths forward in its review of *Raimondo*. The first path will retain the *Chevron*-doctrine but will severely restrict its application. In choosing this path, the Court will evaluate whether the language "necessary or appropriate" qualifies as ambiguous or express language. The Court may choose to side with the Fifth Circuit's interpretation of MSA—holding that the "necessary or appropriate" clause acts as an express limitation and, therefore, there exists no need to engage in the second step of *Chevron* in its decision to vacate the rule.[286] Choosing this path could mean that, going forward, statutory silence is not tantamount to statutory ambiguity—barring entry of many future regulations at a more rigorous *Step One* of the *Chevron*-deference analysis. However, given the backdrop of MQD's development and posture favoring the nondelegation doctrine, this Court may also take an entirely different path in this case. The second path seeks to place *Chevron* in the ground once and for all—overruling the doctrine in its entirety and, as a result, gutting all administrative rulemaking absent clear congressional authorization. This path would amount to complete reversion to the nondelegation doctrine (or something close to it) and would only further bolster the separation of power principles for which MQD is grounded in. While mere speculation, the Court's signals since the Quartet tend to favor either heightening the walls to engage in *Chevron* or, dramatically so, overruling it in its entirety.

[285] Mexican Gulf Fishing Co. v. Department of Commerce, 60 F.4th 956 (5th Cir. 2023).

[286] *Id*.

V. HOW TO QUIET THE QUARTET

Upon release of the decision in *West Virginia*, Michael Regan, the sitting EPA Administrator, noted: "[w]hile I am deeply disappointed by the Supreme Court's decision, we are committed to using the full scope of EPA's authorities to protect communities and reduce the pollution that is driving climate change."[287] While *Chevron* is not in the ground (yet), external forces have rendered it effectively toothless due to the one-two punch of the "weak and strong"[288] MQDs. With the crystallization of the clear statement (or "clear congressional authorization")[289] requirement of MQD, Article III Courts may, in short order, tighten the leash on agency rulemaking efforts in the areas of climate action and public health. Therefore, external measures beyond the courts are necessary to quiet the disorienting noise of the Quartet.

Several actions can be taken without the help of Congress that will allow agencies to better protect the environment. A few of these strategies include: (1) streamlining the rulemaking process by promulgating leaner rules as a numerical strategy to both avoid challenges to rulemaking and reduce the likelihood such rules will be, (2) repealing or narrowing the scope of EO 12866 to expedite regulatory review and avoid MQD's application, (3) protecting rules from complete vacatur by increasing use of severability clauses, and (4) shifting resources to enforcement activities to protect the environment more effectively from bad actors and anti-regulatory interests.

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[287] *EPA Administrator Regan Issues Statement on* West Virginia v. Environmental Protection Agency, ENV'T. PROT. AGENCY (June 30, 2022), https://www.epa.gov/newsreleases/epa-administrator-regan-issues-statement-west-virginia-v-environmental-protection#:~:text=Regan%20issued%20the%20following%20statement.

[288] Sunstein, *supra* note 29.

[289] Brunstein and Goodson, *supra* note 191.

A. Streamline Agency Rulemaking

In lamenting the political strategies of progressive political actors, Harvard Law Professor Mark Tushnet warned against "defensive-crouch liberalism,"[290] or "the tendency of liberal or progressive actors to try to minimize losses rather than pushing the envelope."[291] In light of *West Virginia*, agencies should go on the offensive, not the defensive. First, agencies must focus on reforming internal regulatory planning with an emphasis on producing leaner rules. When drafting an executive strategy, it is important to consider how limited the role of the Supreme Court is in the day-to-day review of challenges to agency-rulemaking. SCOTUS has limited capacity in reviewing administrative law cases, as it must allocate a percentage of its case count to many other areas of law: criminal, civil, interstate challenges, etc.[292] While survey data is limited, the U.S. District and Appellate Courts are far more friendly to the administrative state and apply *Chevron*-deference principles more often when reviewing challenges.[293] More specifically, the Court of Appeals for the D.C. Circuit hears more administrative law cases than any other court.[294] Given the administrative limitations of the courts, therefore, agencies should strategically produce more, leaner rules to avoid unnecessary review—forcing anti-regulatory

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[290] Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism,* BALKIN.COM, https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html (last visited Sept. 25, 2023).

[291] Phillips, Todd & Daniel E. Walters, *How Agencies Should Respond to West Virginia v. EPA*, LP ECON. PROJECT (July 5, 2022), https://lpeproject.org/blog/how-agencies-should-respond-to-west-virginia-v-epa/.

[292] Samantha O'Connell, *Supreme Court 'Shadow Docket' Under Review by US House of Representatives*, A.B,A. (Apr. 14, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/scotus-shadow-docket-under-review-by-house-reps/.

[293] Eric Fraser, David Kessler, Matthew Lawrence & Stephen Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J. OF L. AND PUB. POL'Y, 131 (2013).

[294] *Id*.

groups to spend more litigation resources on combating environmentally conscious rules. This is simply a numbers game where the administrative state has an advantage over anti-regulatory litigants and industry-friendly Article III judges. Theoretically, then, if multiple rules that could have been bundled together are now promulgated separately, the likelihood of each individual rule surviving to its final promulgation increases. Breaking up rulemaking will necessarily require industry and anti-regulatory litigants to invest far more time and money in challenging climate action. At the very least, this effort pressures anti-regulatory litigants to pick and choose their regulatory challenges with more care and shields far more rules that benefit environmental justice from the threat of vacatur.

B. Repeal or Amend Executive Order 12866

Another strategy is to repeal or reduce the scope of Executive Order 12866 (EO 12866). EO 12866, or "Regulatory Planning and Review," is an executive order made by President Bill Clinton in 1993.[295] The purpose of the order was to mandate regulatory review by the Office of Information and Regulatory Affairs (OIRA), a subagency responsible for overseeing all regulatory actions at executive agencies in government that sit within the Office of Management and Budget (OMB).[296] OIRA review of agency-proposed rules is mandated so long as the rule constitutes "significant regulatory action,"[297] or action that will have an economic impact of "$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local

[295] Exec. Order No. 12,866, 58 CFR § 190 (1993).

[296] *About OIRA*, OBAMA WHITE HOUSE, https://obamawhitehouse.archives.gov/omb/oira/about (last accessed Feb. 19, 2023).

[297] *Id.*

or tribal governments or communities."[298] This language bolsters many of the Pro-MQD arguments made on behalf of anti-regulatory interests; a challenger may simply point to the language of EO 12866 and argue that, under the regulatory review process of the federal government itself, any rule subject to OIRA review constitutes a "major question" of deep economic or political significance.[299]

With respect to expeditious review, OIRA has "90 days (which can be extended) to review a rule. This review helps to promote adequate interagency review of draft proposed and final regulatory actions, so that such actions are coordinated with other agencies to avoid inconsistent, incompatible, or duplicative policies."[300] EO 12866 appears useful in spirit, if not necessary, in a system of many high-functioning regulatory agencies tasked with overseeing rulemaking and enforcement of all sectors of the economy, public health, and the environment. However, despite any intention, EO 12866 has many problems. The 90-day cap appears on its face as an efficient ceiling, moving regulation forward to avoid stagnant governance. But it has failed. OIRA review delays are commonplace because compliance with the 90-day cap is entirely voluntary.[301] Since 2011, the average OIRA review time has trended upward,[302] and significant increases are seen in the data published on OIRA's website.[303] In some cases, review

[298] Exec. Order No. 12,866, *supra* note 291.

[299] *Id.*

[300] *About OIRA*, *supra* note 292.

[301] *Id.*

[302] Cassidy B. West, *Timeliness of OIRA Reviews: A Snapshot in Time*, GEO. WASH. U. REGUL. STUD. CTR. (Apr. 2, 2014) https://regulatorystudies.columbian.gwu.edu/timeliness-oira-reviews-snapshot-time.

[303] *Agencies With the Most Regulatory Actions Currently Under Review*, OFFICE OF INFO. AND REGUL. AFFS., https://www.reginfo.gov/public/ (last accessed Feb. 20, 2023).

has taken a year or more to approve after the agencies have completed writing and submitting the rule for OIRA consideration.[304]

OIRA review has also perpetuated many social ills as a result of its mandated cost-benefit analysis of proposed rules; for example, the cost-benefit analysis under OIRA review "involves describing the potential costs and benefits of a regulation in quantified and monetized—that is, assigned a dollar value—terms when possible, and otherwise in qualitative terms. Then, the potential costs and benefits of a rule are compared, with regard to both the quantified and qualitative considerations."[305] While adopted in a noble pursuit to better evaluate rules, this cost-benefit analysis has been shown to both perpetuate racial biases[306] and undervalue the public health benefits of rulemaking.[307] It's time to consider, then, whether EO 12866 is the best model for regulatory planning in the government. Not only does the language of the order encourage casting too broad a net over federal rules as major policy questions under MQD, but it also places further administrative burden to rulemaking with a *voluntary* 90-day cap on an approval process that perpetuates poor grading of weighted interests and worsens social ills. At the very least, what constitutes a *significant* federal regulatory action should be narrowed in scope to avoid giving courts another metric to rely upon in its MQD evaluation. Further, since there

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[304] Narang, Amit, *The Perils of OIRA Regulatory Review*, PUB. CITIZEN (June 12, 2013), http://www.citizen.org/wp-content/uploads/oira-delays-regulatory-reform-report.pdf.

[305] MAVEY P. CAREY, CONG. RSCH. SERV., IF12058, *Cost-Benefit Analysis in Federal Agency Rulemaking* (2022).

[306] James Goodwin, *A Post-Neoliberal Regulatory Analysis for a Post-Neoliberal World*, LPE PROJECT (Oct. 14, 2021), https://lpeproject.org/blog/a-post-neoliberal-regulatory-analysis-for-a-post-neoliberal-world/.

[307] Lisa Heinzerling, *Climate Change, Racial Justice, and Cost-Benefit Analysis*, L. AND POL. ECON. PROJECT (Sept. 28, 2021), https://lpeproject.org/blog/climate-change-racial-justice-and-cost-benefit-analysis/.

appears to be a slippery slope of noncompliance with the 90-day cap recommendation, a new cap should be strictly enforced to ensure more efficient rulemaking activity.

C. Utilize Severability Clauses

While streamlining rulemaking is essential to get rules formulated and promulgated efficiently on the front end, it is also essential to protect agencies from increased administrative burdens on the back end when rules are challenged and, subsequently, struck down by Article III courts. In an environment where rules will be subject to more challenges from states and industry groups, it is prudent for agencies to protect rules from complete vacatur by increasing use of severability clauses. When a court holds parts or sections of a rule unconstitutional, and the agency promulgating the rule has not mentioned severability in the text of the rule, the typical remedy is for the court to vacate the rule in its entirety, even if there are parts of the rule that could be separated and operate independently.[308] Before 2015, most agencies had never included a severability clause within a rule.[309] While some agencies already value this defensive strategy, survey data reveals use of severability clauses are rare—with the Federal Trade Commission promulgating the most rules with severability clauses followed by the EPA.[310] Most notably, EPA included severability clause language in the Clean Power Plan in 2014.[311]

In 2018, the Administrative Conference of the United States (ACUS) recommended that agencies more frequently include such clauses in their rules to reduce costs associated with

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[308] ADMIN. CONF. OF THE U.S., Severability in Agency Rulemaking (2018).

[309] Charles Tyler, *Severability in Agency Rulemaking*, THE REGUL. REV. (Oct. 31, 2018), https://www.theregreview.org/2018/10/31/tyler-severability-agency-rulemaking/.

[310] Charles Tyler & Donald Elliot, *Administrative Severability Clauses*, 124 YALE. L. J. 7, 2202 (2015).

[311] Charles Tyler & Donald Elliott, *Administrative Severability Clauses*, ADMIN. CONF. OF THE U.S. (Aug. 11, 2014), https://www.acus.gov/newsroom/administrative-fix-blog/administrative-severability-clauses.

redrafting and repromulgating rules—doing so would reduce the "regulatory vacuum" that administratively burdens underfunded agencies.[312] Further, ACUS recommends agencies include these severability clauses in the final version of the rule not merely in the statement of purpose so that the reviewing court will recognize that it was the agency's true intent to promulgate a severable rule.[313] There are not many answers as to why agency lawyers wait until litigation arises to opine on severability, although some suggest that upon reviewing a rule with a severability clause, a court may speculate that the contentious portion of the rule is, in fact, unlawful.[314] Given the MQD's hostility to agency rulemaking, agencies should actively consider including severability clauses into contentious rules to protect the administrative investment that went into developing and drafting the rule. Implementing this strategy can improve the regulatory scheme and reduce litigation burden in the long run—allowing each agency to better focus on advancing rulemaking to achieve its mission.

D. Empower Enforcement Divisions

In Pulitzer Prize-winning author Jesse Eisinger's book, *The Chickenshit Club*, the resounding message is that the Department of Justice (DOJ) has lost the will to pursue the highest-ranking corporate wrongdoers.[315] While Eisinger's reporting focuses primarily on the DOJ's enforcement culture within the financial sector, it provides lessons that can and should be applied broadly across all of government enforcement both in civil and criminal matters. As

[312] *Id*.

[313] *Id*.

[314] Charles Tyler & Donald Elliot, *supra* note 306.

[315] *See generally* JESSE EISINGER, THE CHICKENSHIT CLUB (2017).

MQD continues to hamstring regulatory agencies, now is the time for a cultural shift in how enforcement divisions respond to this regression in the judiciary.

Specifically, EPA leadership must evaluate its performance and pivot to a more effective enforcement and compliance structure. It is time to double down on the resources statutorily and constitutionally available to federal regulators and enforcers tasked with achieving environmental justice Americans. In 2019, the independent watchdog organization the Environmental Data & Governance Initiative (EDGI) published the "Sheep in the Closet" report, which made public an analysis of both civil and criminal case enforcement initiations, referrals, and outcomes.[316] In compiling enforcement data published by the EPA and producing an analysis from FY 1975 to FY 2018, EDGI had sobering results to share with the public.[317] For example, in FY 2018, for civil case initiations (new cases the EPA opens to investigate violations), the EPA was at its lowest case count since 1982.[318] Further, FY 2017 and FY 2018 yielded the lowest number of civil referrals to the DOJ (the most serious violations the EPA chooses to litigate) since FY 1976; the cases opened in FY 2018 yielded the lowest number of civil case conclusions since 1994.[319] On the criminal side, the same pattern exists. Criminal

[316] Leif Fredrickson, *Update of Sheep in the Closet Report – EPA Enforcement Record in the Trump Administration Through Fiscal Year 2018*, ENV'T DATA & GOVERNANCE INITIATIVE (June 11, 2019), https://envirodatagov.org/update-of-sheep-in-the-closet-report-epa-enforcement-record-in-the-trump-administration-through-fiscal-year-2018/.

[317] *Id.*

[318] *Id.*

[319] *Id.*

case initiations in FY 2018 were at record lows since 1992, and criminal defendants were charged at the lowest rate since 1991.[320]

In 2023, EDGI released its most recent report documenting updates based on FY 2022 data—showing that, despite the change of administration from President Trump to President Biden, there has been "slow to minimal progress . . . restoring the capacity of the EPA" to manage enforcement and compliance initiatives driven by large statutory schemes like the CWA and CAA.[321] In FY 2022, many enforcement measures remained among the lowest counts in decades, including civil and criminal cases opened or initiated, civil judicial referrals, civil cases' conclusions, years sentenced for criminal cases, and compliance costs (injunctive relief provided).[322] These poor results, however, should not be surprising considering that (after adjusting for inflation) the "funding for the agency's main enforcement and compliance programs was the lowest in the last eleven years, 29% below the peak in FY 2011, 14% lower than FY 2016, and 2% lower than in FY 2019."[323] These budget struggles naturally correlate to staffing issues in enforcement, as reported in 2023.[324] In FY 2022, the overall time dedicated to

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[320] *Id.*

[321] Christopher Sellers, Eric Nost & Leif Fredrickson, *EPA Enforcement Still Struggling to Recover Under Biden*, THE ENV'T DATA & GOVERNANCE INITIATIVE (Feb. 22, 2023), https://envirodatagov.org/publication/epa-enforcement-still-struggling-to-recover-under-biden/#:~:text=Our%20analysis%20carefully%20attends%20to,of%20our%20nation's%20environmental%20laws.

[322] *Id.* at 3.

[323] *Id.*

[324] Lisa Friedman, *Depleted Under Trump, a 'Traumatized' EPA Struggles with Its Mission*, N.Y. TIMES, (Jan. 23, 2023), https://www.nytimes.com/2023/01/23/climate/environmental-protection-agency-epa-funding.html.

enforcement and compliance initiatives was "33% lower than FY 2012, 11% lower than FY 2016, and only 4% more in FY 2020." [325]

These statistics are alarming and may be exacerbated as SCOTUS continues to whittle away agency authority. Agencies like EPA must, in response, shift resources to support and staff the offices responsible for investigating and prosecuting violations. On the criminal side, this means prosecuting to the extent of the law against the most egregious violators—promoting criminal deterrence. On the civil side, this means pursuing the most egregious violations to a judgment instead of settling on statutory minimums or reduced fines. Any fear of the development of an overzealous administrative state, as is expected in reaction to this Comment, is unfounded. The status of agency enforcement is simply behind the curve, not ahead of it. The EPA's dramatic decline in enforcement action, for example, is attributable to a lack agency leadership decisions,[326] the COVID-19 pandemic,[327] staff shortages, and diversion of resources under the Trump Administration.[328] While setting benchmarks and quotas in enforcement is unnecessary and contrary to achieving environmental justice, baseline funding of the appropriate teams of engineers, scientists, and lawyers to investigate and enforce the law is necessary to keep up with the prevailing threats of climate change.

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[325] *EPA Enforcement Still Struggling to Recover Under Biden*, *supra* note 317.

[326] *Resource Constraints, Leadership Decisions, and Workforce Culture Led to a Decline in Federal Enforcement*, OFFICE OF THE INSPECTOR GEN. U.S. ENV'T PROT. AGENCY (May 13, 2021), https://www.epa.gov/office-inspector-general/report-resource-constraints-leadership-decisions-and-workforce-culture-led.

[327] *Enforcement and Compliance Annual Results for FY 2022: Data and Trends*, EPA, https://www.epa.gov/enforcement/enforcement-and-compliance-annual-results-fy-2022-data-and-trends (last accessed Feb. 18, 2023).

[328] Friedman, *supra* note 320.

CONCLUSION

Much of this Comment has focused on the impact and influence of the current Supreme Court in the development of MQD as a formal legal canon. While no one can or should speak on his behalf, it is safe to assume that Chief Justice Roberts will not be pleased when his hometown of Buffalo, NY, suffers extreme weather patterns as a result of unchecked climate change, with dramatic increases in rainfall, snowmelt, and average precipitation all but assured in coming decades.[329] It would be shocking to hear that Justice Gorsuch (born in Denver, CO) is indifferent to the Colorado River running near-dry by the year 2050.[330] Likewise, it is safe to assume Justice Kavanaugh (a D.C. native) will not be thrilled to feel the scorching heat of summer in Washington D.C. as it climbs well beyond the national average temperature in the coming summers.[331] However, it is clear the conservative-bend of this Court believe executive agencies should not be taking corrective action without clear authorization from Congress.[332] Under this Court's trajectory on statutory interpretation, only Congress can save us. Indeed, a terrifying proposition.

At the forefront, this Comment highlights connections between legislative *inaction* on climate due to political polarization and, subsequently, the often far-reaching actions taken by

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[329] *Climate Change. It's Happening. It's Local.* ERIE CNTY. CLIMATE ACTION, https://www3.erie.gov/climateaction/sites/www3.erie.gov.climateaction/files/2022-03/climate_change_infographic.pdf (revised Feb. 2021).

[330] Nicole Pla, *Climate Change is Water Change: The Impact of the Climate Crisis on the Colorado River Basin*, UNIV. OF DEN. WATER L. REV. May 2022, https://www.duwaterlawreview.com/climate-change-is-water-change-the-impact-of-the-climate-crisis-on-the-colorado-river-basin.

[331] *The Climate Ready DC Plan*, SUSTAINABLE DC, https://sustainable.dc.gov/climateready (last accessed, Mar. 22, 2023).

[332] *West Virginia*, 142 S. Ct. at 2615.

executive agencies to promulgate rules with decades-old statutory authority.[333] Importantly, MQD would not be what it is today without the ills of political polarization in climate action.[334] What was once the "golden era" of environmental achievement in the mid-to-late twentieth-century has become a legislative drought.[335] Admittedly, IRA is a clean energy job creator and should be recognized as the biggest environmental achievement in decades.[336] However, in the aggregate, this Administration's success under IRA will achieve only marginal harm reduction—perpetuating American dependence on unsustainable energy.[337] All the while, the ravages of climate change persist.[338]

As a result of this legislative inaction, executive agencies have (for decades) been forced to get *creative* in promulgating new regulatory schemes.[339] By diving into decades-old statutory authority, agencies search for new and colorable claims of authority that the Court determines reasonable under a *Chevron*-deference analysis.[340] In the early days of delegation, the Court waffled on when and where to apply major questions principles—hesitating on whether economically and politically significant issues should be evaluated within *Step One*, *Step Two*,

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[333] *See generally* Part I: The Political Polarization of Climate Change

[334] *Id.*

[335] *Id.*

[336] Hunnicutt and Renshaw, *supra* note 64.

[337] *See Lobbying spending of oil and gas companies in the United States during election cycles from 1990 to 2022, by receiving political party*, *supra* note 43.

[338] *Supra* notes 5-25.

[339] *See generally* Part II: Early Days of Delegation; *see also* Part III: The Rise of Modern MQD

[340] *Id.*

or, most recently, *Step Zero* (weak MQD) of a *Chevron*-deference analysis.[341] However, in the 2022 term, SCOTUS chose to adopt a more demanding version of MQD that now poses incredibly difficult challenges to agencies tasked with protecting the climate and public health.[342] Even further, some suggest that this strong MQD may continue to evolve into a new version of the nondelegation doctrine—limiting agency action from basic administrative tasks to a mere "triage" analysis.[343] Further, given the imminent challenge in *Raimondo*, traditional *Chevron*-deference is on the chopping block and may result in a rebirth of the nondelegation doctrine.[344]

In light of MQD's ascendency under the Quartet, executive action should be a priority to mitigate its pernicious impact upon public health and the environment—seeking to place more litigation and administrative burden upon anti-regulatory interests that will wield MQD as a weapon to thrash newly-promulgated rules.[345] By forcing these litigants to pick and choose which of the many leaner rules to challenge, more of those rules will be protected from vacatur by way of numerical strategy.[346] Simply put, a good offense the best defense. Further, to facilitate the streamlining of rules, the repeal or amendment of OIRA review may be a useful effort. OIRA review is burdensome and impairs the executive branch from promulgating new

[341] *Id.*

[342] *West Virginia*, 142 S. Ct. at 2587.

[343] Nachamy, *supra* note 29.

[344] *Supra* notes 275-282.

[345] *See generally* Part V: How to Quiet the Quartet.

[346] *Id.* at Section A.

rules in a timely manner.[347] Apart from its troubling neglect of marginalized groups,[348] OIRA may now serve as another metric available to the courts in its assessment of an issue as one of major economic or political significance.[349] Next, while offensive strategy is important, lawyers within rulemaking agencies should continue to utilize defensive severability clauses in larger rules at risk of litigation—reducing administrative burden and protecting bulky regulatory schemes from complete vacatur.[350] Finally, agencies should prioritize enforcement both as a budget item and in practice—shifting enforcement culture from settlement to accountability.[351]

As state attorneys general cite MQD as a legal basis to challenge administrative rulemaking for the foreseeable future, action must be taken to mitigate its downstream impact of this doctrine on administrative governance. Executive agencies are now called to act in favor of a defensive crouch to protect the health and well-being of future generations of Americans at risk from the ravages of climate change.

[347] *Id.* at Section B.

[348] *Id*.

[349] *Id*.

[350] *Id*. at Section C.

[351] *Id* at Section D.