# *West Virginia v. EPA*: Congress, Not Agencies, Must Decide the Major Questions

The Supreme Court has just returned to commence October Term 2022, ending its summer adjournment. The previous term of the court proved to be historic. One reason is due to the court's decision in *West Virginia v. Environmental Protection Agency*, decided on June 30.[1] Although primarily only regulatory law aficionados followed the case, *West Virginia* will affect businesses, individuals, and all entities that have anything to do with federal administrative agencies. Indeed, given the vast reach of the modern administrative state, the decision will have a widespread affect.

In *West Virginia*, the court firmly and assertively implanted the clear-statement rule known as the **major questions doctrine** (MQD) into its canons of statutory interpretation. The MQD stands for the proposition that a federal agency may not claim the power to do anything of political or economic significance without explicit authorization from Congress. The court had been building up to this apex through several decades' worth of cases but reaching this zenith was remarkable nonetheless. The MQD will have significant consequences for the power that federal agencies have over people's lives and businesses and for the constitutional order itself.

*West Virginia* arms every business or individual confronting the reach of the federal administrative state with a potential argument that Congress just has not given the agency in question the power it is claiming. In the ensuing terms, the court likely will strengthen the MQD by deciding additional cases — before eventually going maximalist, through the Constitution's separation of powers, on curbing most law-making delegations to agencies.

## Brief Recap of *West Virginia v. EPA*

Taft attorneys have previously articulated why *West Virginia* proved momentous on its own terms. To briefly recap:

*West Virginia* started out as a dispute between the federal government and certain states about the scope of Section 111(d) of the Clean Air Act (CAA). Under the CAA, the EPA must establish a "standard of performance" for power plants and other air pollution-emitting sources. And that standard is required to be the best system of emission reduction (BSER). In 2015, acting pursuant to its Section 111 authority, the EPA devised the Clean Power Plan (CPP or Plan). That Plan endeavored to create the BSER on the basis of three building blocks: (1) improving heat rates at coal plants to help coal burn more cleanly; (2) requiring plants in each state over time to move away from coal to natural gas; and (3) then incentivizing those plants to move to wind and solar power.

[1] 142 S. Ct. 2587. Prior to joining Taft, Sohan Dasgupta filed an *amicus curiae* brief on behalf of the Michigan legislature in support of the petitioners.

The bottom line of this approach was that the EPA "force[d] nationwide transition away from the use of coal to generate electricity." This is because the final two building blocks — they focused on what the EPA regarded as a "generation-shifting approach" — meant that the agency would not permit emissions to exceed the level that would essentially "force nationwide transition away from the use of coal to generate electricity." The EPA's position was that buying emissions allowances or credits as part of a cap-and-trade system would also elicit this outcome.

Certain states and businesses sued the EPA challenging the CPP. The case ended up in the Supreme Court. After holding that the challengers had standing, the court held that the Plan exceeded the EPA's statutory authority under the CAA. On the merits, the court pinpointed the core question as "whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the [BSER] within the meaning of Section 111." The Regulatory Impact Analysis carried out by the EPA had projected that the EPA's Plan "would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors."

Delivering the court's opinion, Chief Justice Roberts invoked the MQD to articulate that the CPP's generation-shifting approach involved a matter of "vast economic or political significance." After all, it carried the heavy cost of moving away from coal. This shift also implicated sensitive and impactful political reconfiguration. Through the CPP, the EPA tried to "improve the *overall* power system," rather than the emissions performance of individual sources, by forcing a shift throughout the power grid from one type of energy source to another. The CAA's vague language would not carry the EPA's water, and the Plan fell.

As far as the *West Virginia* court was concerned, "there are extraordinary cases … in which the history and the breadth of the [statutory] authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." Absent an explicit delegation from Congress to the Executive — a delegation that did not, in the Supreme Court's eyes, exist — Congress had not made a delegation at all. The EPA, accordingly, lacked the statutory authority to regulate such a highly consequential matter.

Joined by Justices Breyer and Sotomayor, Justice Kagan filed a dissenting opinion. She contended that "Congress ma[de] [a] broad delegation[] like Section 111" for the EPA to "respond, appropriately and commensurately, to new and big problems." According to the dissent, generation shifting was the "best way," *viz.* "the most effective and efficient way," "to reduce power plants' carbon dioxide emissions." That, the dissent argued, rendered the EPA's authority to issue the CPP incontestable. Lastly, the dissent was concerned that a majority of the court was insufficiently committed to textualism in statutory interpretation: When textualism "frustrate[s] [the Court's] broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards." Justice Kagan ended her dissent by saying: "The Court appoints itself — instead of Congress or the expert agency — the decision-maker on climate policy. I cannot think of many things more frightening."

## Background of the Major Questions Doctrine

The MQD reinforces much of the Constitution's separation of powers among the federal government's three branches. The Legislative Vesting Clause in Article I, Section 1 of the Constitution says that the **entirety** of the constitutionally-endowed legislative power of the United States "shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Unsurprisingly, then, it once was orthodoxy that Congress did the law-making and the Executive executed those laws.[2] Those roles are distinct and may not be commingled. The risk of commingling is said to carry the resultant peril of undermining individual liberty and was regarded by the original Constitution's ratifying generation as the "very definition of tyranny."[3] That is known as the non-delegation principle, and it largely was exemplified in American history until the New Deal.

As Justice Gorsuch pointed out in his concurrence in *West Virginia*: "The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty." He then added: "As a result, the framers deliberately sought to make lawmaking difficult by insisting that two houses of Congress must agree to any new law and the President must concur or a legislative supermajority must override his veto." Justice Gorsuch's point is unmistakable: Enacting legislation is difficult and was designed to be so; and that difficulty does not entitle the Legislature to hand law-making over to others.[4]

From the beginning of the Republic, Congress has delegated to the Executive the authority to make rules "*not* for the government of their departments, but for administering the laws which did govern."[5] Arguably, 1935 bore witness to the non-delegation principle's finest hour. In *A. L. A. Schechter Poultry Corp. v. United States*, the Supreme Court held that Congress may not "delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable" to address an evil or problem (in that case, "the rehabilitation and expansion of trade or industry").[6] Nor had Congress prescribed any meaningful limits on the President's discretion.[7]

And in *Panama Refining Co. v. Ryan*, the Supreme Court struck down a delegation because "Congress ha[d] declared no policy, ha[d] established no standard, ha[d] laid down no rule."[8] Indeed, Congress had spelled out "no requirement" and "no definition of circumstances and conditions in which the" conduct in question was permissible. *Id*. In the court's eyes, the untrammeled delegation asked the Executive to make up rules of conduct that were entirely a figment of the latter's imagining.[9]

The subtle, but dispositive, rule that emerged from all these cases:

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[2] *See Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42—43 (1825).
[3] The Federalist No. 47, p. 301 (C. Rossiter ed. 1961).
[4] Justice Scalia seems to have concurred in this view. See *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("The whole theory of lawful congressional 'delegation' is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else …").
[5] *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (emphasis added).
[6] 295 U.S. 495, 537—38 (1935).
[7] *See id*. at 538.
[8] 293 U.S. 388, 430 (1935).
[9] *See id.*

"[A]dministrative rule[s] for the appropriate execution of the policy laid down in the statute" would presumably survive a separation-of-powers challenge, whereas statutes giving unguided discretion to the Executive to devise rules would run afoul of the separation of powers.[10] Therefore, so long as Congress "establish[ed] primary standards, devolving upon others the duty to carry out the *declared* legislative policy," its delegation presumably was permissible.[11]

This is not to say that close calls did not arise since the difference between lawmaking and the execution of laws could occasionally be minuscule. Under those circumstances, the degree of granularity made all the difference. The theory is that since a "certain degree of discretion … inheres in most executive or judicial action, … it is up to Congress, by the relative specificity or generality of its statutory commands, to determine — up to a point — how small or how large that degree shall be."[12] In any event, the non-delegation principle was not to last long in the Supreme Court's annals.

The new principle was that as long as Congress uses an "intelligible principle" to delegate certain issues to the Executive Branch, courts will uphold those delegations.[13] That doctrine overturned the earlier non-delegation cases. And it established a new constitutional order in the United States. That is because Congress needs to "obtain[] the assistance of its coordinate Branches," to address the "ever changing and more technical problems" of our "increasingly complex society."[14]

Adhering to this new regime, the court went on to uphold delegations so long as Congress had asserted "the general policy" that the delegee must pursue and the "boundaries of [his] authority."[15] As a plurality of the court noted a few terms ago, "[t]hose standards … are not demanding."[16] That is because the court had maintained that "we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[17] The court has upheld congressional delegations to the Executive to promulgate regulations in the "public interest."[18] The court has also upheld delegations letting agencies set "fair and equitable" prices and "just and reasonable" rates.[19] In short, the court has watered down the standard of what passes for a valid delegation to be consistent with the separation of powers.

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[10] *Id*. at 429 (citing *Field v. Clark*, 143 U.S. 649 (1892)).
[11] *Id*.
[12] *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting).
[13] *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).
[14] *Mistretta*, 488 U.S. at 372.
[15] *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).
[16] *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019).
[17] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474—75 (2001) (cleaned up).
[18] *See*, *e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943); *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24 (1932).
[19] *See*, *e.g.*, *Yakus v. United States*, 321 U.S. 414, 422 (1944); *FPC v. Hope Natural Gas Co*., 320 U.S. 591 (1944).

Truth be told, the MQD erodes that prevailing doctrine. And it does a heavy lift for the non-delegation principle. Going forward, agencies will not be able to act on a major policy question unless Congress **clearly** has delegated that power to the pertinent agency.

## How the Major Questions Doctrine Works

**(1)** Legislative delegations to the Executive by nature implicate the separation of powers. And such delegations concerning politically or economically significant matters particularly so. Consequently, the MQD requires that before a federal agency involves itself in governing the lives of citizens through legislative delegation, it must at least be armed with clear authorization from Congress. Since the law-making power is vested only in Congress, the least that Congress must do is say clearly when, on a significant issue, it is turning some of that duty over to the Executive.

There is nothing unusual about clear-statement rules in statutory interpretation. As Justice Gorsuch recently reminded us in his concurrence in *West Virginia*: "Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules," so do federalism and, relatedly, agency power on major policy questions. In particular, proposed interpretations of federal law unsettling the expected federal-state balance of power[20] or those authorizing administrative agencies to regulate matters of vast political or economic significance[21] must clearly and explicitly be stated in a statute.

And this presumption applies to situations beyond just constitutional rules. "[U]nless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect," courts "presume it is primarily concerned with domestic conditions."[22] This presumption against extraterritoriality "represents a canon of construction, or a presumption about a statute's meaning, ***rather than a limit upon Congress's power to legislate***."[23]

There is a reason for this: Before courts can ascribe some extraordinary decision to Congress, they tend to make sure that Congress actually said so and did so. The clear text, therefore, becomes an effective indicator of Congress' intent. If Congress did not spell out some extraordinary step in a statute it enacted — thereby expressing an "affirmative intention" — courts generally do not deem themselves empowered to give the law that effect.[24]

Let us start with the federalism canon. Federal-state balance concerns federalism in our Constitution. In order for the clear-statement rule to apply, the risk of constitutional tension or the upsetting of the federal-state balance in any other way would trigger the clear-statement rule. Referring back to Justice Felix Frankfurter's derivation of a clear-statement requirement from federalism, the Supreme Court informed us almost three decades ago: "Federal statutes impinging upon important state interests 'cannot ... be construed without regard to the implications of our dual system of government .... [W]hen

[20] *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).
[21] *See West Virginia*, 142 S. Ct. 2587.
[22] *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (cleaned up).
[23] *Id.* (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932)) (emphasis added).
[24] *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

the Federal Government takes over ... local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.'"[25]

That principle applies well beyond the commercial context to **all** areas of traditional state control.[26] Without being "certain of Congress's intent" — through an explicit mention in statute — to encroach on that state preserve, courts will not deem Congress to have "legislate[d] in areas traditionally regulated by the States."[27] The reason is that this "constitutionally mandated balance of power between the States and the Federal Government" exists "to ensure the protection of our fundamental liberties."[28]

That brings us back to the MQD. As suggested earlier, the MQD is the cardinal principle of statutory interpretation stating that without a clear delegation from Congress, an administrative agency may not regulate matters of "vast political and economic significance."[29] In Justice Gorsuch's words: "[T]he major questions doctrine and the federalism canon often travel together." This is because "[w]hen an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States."

This implicates the Constitution's separation of powers. The Supreme Court has held, over a series of cases covered in *West Virginia*, that federal agencies, which are reposed in the Executive Branch, are not allowed to regulate matters important to Americans' lives by claiming Congress has given them that power out of a fit of absentmindedness or, in any way, without speaking clearly. A cavalier grant of authority from Congress to the Executive on a matter of high economic or political significance might raise the distinct possibility that Congress is abdicating its law-making responsibilities — something Congress would not lightly do. That is why, on major policy questions, courts look to see whether Congress has clearly made the delegation to the Executive.

The first step is to determine whether a question is major or minor. Although courts have not fully explicated what a matter of vast **economic** significance is, an administrative policy is believed to be of vast economic significance when it involves "billions of dollars in spending."[30] The Supreme Court has held that agency actions involving $3 billion onwards are matters of vast economic significance.[31] It is sufficient but not necessary, for the courts have not specified a minimum sum of money that is required for a matter to be one of vast economic significance.

And as for matters of vast **political** significance, again the courts have not yet specified what qualifies and what does not. But certainly if Congress has been "engaged in robust debates" concerning whether the agency ought to be able to tackle the salient

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[25] *BFP*, 511 U.S. at 544 (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539—40 (1947)).
[26] *See Gregory v. Ashcroft*, 501 U.S. 452, 459–60 (1991).
[27] *Id*.
[28] *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (cleaned up).
[29] *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).
[30] *King v. Burwell*, 576 U.S. 473, 485 (2015).
[31] *See BST Holdings, L.L.C v. OSHA*, 17 F. 4th 604, 617 (5th Cir. 2021); *Alabama Assn. of Realtors v. Department of Health and Human Servs*., 141 S. Ct. 2485, 2489 (2021) (*per curiam*).

issue, then the matter is one of vast political significance.[32] Moreover, if Congress had "considered and rejected" such legislative proposals, "that too may be a sign that an agency is attempting to work around the legislative process to resolve for itself a question of great political significance."[33] For instance, when Congress had considered but failed to authorize COVID-19 vaccine mandates and an agency had gone forth to so mandate millions of Americans, the Supreme Court regarded that as a major political question.[34]

Second, assuming the policy question is a major one, the courts will read the statute to have made such a delegation **only if** Congress clearly has said so. As the Supreme Court usually says in opening its statutory-interpretation enterprise, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[35] The Supreme Court in *West Virginia* thus observed: "Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be 'shaped, at least in some measure, by the nature of the question presented' — whether ***Congress in fact meant to confer the power the agency has asserted***."[36] Of course, "[i]n the ordinary case," one not involving agency power, "that context has no great effect on the appropriate analysis."

But the Supreme Court has insisted that agency claims of authority to resolve important policy questions of great economic or political significance do not bring to mind ordinary cases. Such questions, by nature, implicate the thorny question of power **horizontally** — among the branches of the national government — and often, as here, their **vertical** incursion into the sovereignty of states, which are their co-sovereigns. Such doubly "extraordinary cases" warrant a significantly "different approach" in statutory interpretation because these are "cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[37]

As already suggested, casually presuming such sweeping agency power poses the risk, in the Supreme Court's view, of running afoul of the separation of powers and federalism principles ensconced in our Constitution. And they run counter to the presumption that Congress would not casually or lightly delegate such consequential matters to agencies or thus upset the federal-state balance. Therefore, the least that courts may do, the reasoning now goes, is to make sure that Congress actually, unambiguously, affirmatively, and explicitly — in short, clearly — gave the go-ahead to such federal administrative incursion.

**(2)** Although *West Virginia* is the Supreme Court's latest word on this subject, the court had been building up to it for a while. "[B]oth separation of powers principles and a practical understanding of legislative intent," the Supreme Court in *West Virginia* noted, render the courts "reluctant to read into ambiguous statutory text the delegation claimed to be lurking there." "To convince [the courts] otherwise, something more than a merely

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[32] *West Virginia*, 142 S. Ct. at 2620—21 (Gorsuch, J., concurring).
[33] *Id*. (Gorsuch, J., concurring) (cleaned up).
[34] *See National Federation of Independent Business v. Occupational Safety and Health Administration*, 142 S. Ct. 661, 665 (2022) (*per curiam*) [*NFIB*].
[35] *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).
[36] Cleaned up.
[37] Cleaned up.

plausible textual basis for the agency action is" deemed to be "necessary."

Examples galore make the point. When the Food and Drug Administration (FDA) claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products, the Supreme Court refused to countenance it.[38] The court deduced that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion."[39] In a different case, the Supreme Court would liken such claims of agency power to claiming that Congress has "hid[den] elephants in mouseholes."[40]

Then, in *Alabama Assn. of Realtors v. Department of Health and Human Servs*., the Supreme Court concluded that the Centers for Disease Control and Prevention (CDC) could not, under its authority to adopt measures "necessary to prevent the ... spread of" disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic.[41] The court found the statutory language a "wafer-thin reed" on which to rest such a measure, given "the sheer scope of the CDC's claimed authority," its "unprecedented" nature, and the fact that Congress had failed to extend the moratorium after previously having done so.[42]

In *Utility Air Regulatory Group v. EPA*, the Supreme Court had to decide whether the EPA could construe the term "air pollutant," in a particular Clean Air Act provision, to cover greenhouse gases.[43] Despite what the Supreme Court in *West Virginia* later would call the "textual plausibility" of that agency's statutory argument, the court refused to go along with it at the time it was deciding *Utility Air*.[44] Textual plausibility just was not enough under the circumstances. The court noted that the EPA's interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements.[45] The court declined to uphold the EPA's claim of such "unheralded" regulatory power over "a significant portion of the American economy."[46]

In *Gonzales v. Oregon*, the Attorney General had claimed the power to rescind the license of any physician who prescribed a controlled substance for assisted suicide, even in a state where state law deemed such action lawful.[47] The Attorney General had argued that this came within his statutory authority to revoke licenses where he found them "inconsistent with the public interest."[48] The *Gonzales* court deemed the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation" to be "[un]sustainable."[49]

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[38] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126—27 (2000).
[39] *Id*. at 160.
[40] *Whitman*, 531 U.S. at 468.
[41] 141 S. Ct. at 2487.
[42] *Id*. at 2488—90.
[43] 573 U.S. 302, 324 (2014).
[44] 142 S. Ct. at 2608.
[45] *Id*. at 310, 324.
[46] *Id*. at 324.
[47] 546 U.S. 243 (2006).
[48] 21 U. S. C. § 823(f).
[49] 546 U.S. at 267.

For similar reasons, the Supreme Court recently struck down the Occupational Safety and Health Administration's (OSHA) mandate that "84 million Americans ... either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense."[50] That OSHA for the first time ever, in its half century of being around, found this extraordinary statutory authority made it more than a little suspect.[51] The convenient and sudden timing of such agency invocations of sparse, vague or general statutory support (sometimes expressed through enabling legislation) tends to be a telltale sign that it is not apt congressional authorization.

Given the MQD (on top of the federalism canon), the clear-statement requirement in this case becomes even more heightened and entirely essential. In fact, it becomes strictly **conditional** to the validity of the delegation. Context and "common sense" insist on a clear and express delegation before courts may give such delegation effect.[52] An unmistakable pattern emerges — one that the Supreme Court just a few months ago did not fail to grasp.

Even "a colorable textual basis" in the statute for the claimed agency power will fall short of authorizing the administrative move. To this end, "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"[53] "Nor," the court has noted, "does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme."[54]

Because federal agencies are creatures of the congressional will and "have only those powers given to them by Congress," vaguely-suggested — and sometimes loftily-phrased — "'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'"[55] The appropriate judicial presumption is that it is "*Congress* [which] make[s] major policy decisions itself," thereby "not leav[ing] those decisions to agencies."[56]

**(3)** The MQD is not without its critics. Among the concerns some have directed at the MQD is that a court is not best placed to determine what is a major question and what is not, a question on which reasonable minds may differ.[57] A related concern some have expressed is that the MQD is inconsistent with textualism, which asks what the ordinary, contemporary meaning of the statute was at the time it was enacted (and, using its

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[50] *NFIB*, 142 S. Ct. at 665.
[51] *See id*. at 666.
[52] *West Virginia*, 142 S. Ct. at 2609 (cleaned up).
[53] *Id*. (quoting *Whitman*, 531 U.S. at 468).
[54] *Id*. (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co*., 512 U.S. 218, 229 (1994)).
[55] *Id*. (quoting E. Gellhorn & P. Verkuil, *Controlling* Chevron-*Based Delegations*, 20 Cardozo L. Rev. 989, 1011 (1999)).
[56] *Id*. (emphasis added) (quoting *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).
[57] *See generally* JEFFREY SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 225 (2021); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J. L. & PUB. POL'Y 463, 466, 495—513 (2021) (MQD requires "courts improperly [to] insert[] themselves into the [Constitution's] Article I, Section 7 lawmaking process.") [*Majorness*].

subspecies, originalism, to invalidate the statute if it turns out to be unconstitutional). To critics, the MQD might change the statute's meaning altogether..[58]

## The *West Virginia* Effect

*West Virginia* will have a demonstrable and powerful impact on a vast swath of federal regulations. The Food and Drug Administration's (FDA) proposed rule banning flavored cigars, already projected to cost the market billions of dollars annually[59]: Affected and possibly invalidated as a major question decided by the administrative state without clear congressional authorization. The U.S. Securities and Exchange Commission's proposed rule for climate disclosure requirements, including detailed data reporting requirements: Same.[60] The FDA's proposed rule banning menthol cigarettes:[61] True again. Just recently, the U.S. District Court for the Northern District of Texas invoked *West Virginia's* MQD analysis in invalidating the Biden Administration's student loan forgiveness policy.[62]

This is not all. *West Virginia* might be the opening salvo in the Supreme Court's endeavor to restore the original Constitution's separation of powers. Deference doctrines such as *Auer* deference[63] and *Chevron* deference[64] might be imperiled. The deference that federal agencies have gotten used to receiving when interpreting their own regulations (under *Auer*) and when construing statutes enacted by Congress (under *Chevron*) might soon be curtailed. *Auer* and *Chevron* had "enshrined a new rule" — one not inherited from the traditions of our progenitors or contained in the Constitution — requiring courts to defer to Executive Branch interpretations of the law."[65] After all, some Members of the Court have articulated that courts are duty-bound to "apply independent judgment on all questions of law."[66]

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[58] *See* John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1339 (1998); *see also* Squitieri, *Majorness*, *supra*, at 465 n.4 (citing statements by then-Judge Gorsuch and then-Judge Kavanaugh), 495—513.
[59] *See Tobacco Product Standard for Characterizing Flavors in Cigars*, 87 Fed. Reg. 26396 (May 4, 2022).
[60] *See Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (April 11, 2022).
[61] *See Tobacco Product Standard for Menthol in Cigarettes*, 87 Fed. Reg. 26454 (May 4, 2022).
[62] *See Brown v. U.S. Dep't of Educ.*, 2022 WL 16858525 (Nov. 10, 2022).
[63] *See Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).
[64] *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).
[65] *Buffington v. McDonough*, 2022 WL 16726027, *3 (2022) (Gorsuch, J., dissenting from denial of certiorari) (cleaned up).
[66] *Id.*

Along similar lines, just three Terms ago, the Court fell just one vote short of overruling *Auer*.[67] While the Supreme Court has not yet formally reconsidered *Chevron*, it has also not mentioned it much, let alone paid it much heed, in recent Terms. *West Virginia's* conceptualization of statutory interpretation — and the brakes it imposes on agency power — might limit how much *Chevron* deference to agencies comes into play at all on a major question. Indeed, it is possible that *Chevron's* formal demise is on the anvil (even though the Supreme Court recently denied a certiorari petition so requesting, over Justice Gorsuch's dissent).[68]

If truth be told, the Supreme Court might be on its way to restoring the ancient principle that the Judiciary is not "bound by ... administrative construction[s]" of the law, which might "be taken into account only to the extent that [they are] supported by valid reasons."[69] And both *Gundy* and the steady progression of the Supreme Court's MQD cases are making increasingly clear that the non-delegation principle has yet to see its most resurgent hour in almost a century. It is possible for the Court to one day reason from its MQD precedents that the law-making function rests exclusively with Congress — indeed, it would be logical to apply this constitutionally-derived principle (one that is currently used in statutory interpretation) in constitutional adjudication.

This is not all. The kinds of past, present, or future agency rules that potentially implicate the MQD include:

- Medical mandates, such as the U.S. Department of Education requiring teachers to be vaccinated against certain diseases.

- The Department of Transportation adopting rules seeking zero emissions by certain dates (like California's rule, in which 100% of new cars and light trucks must produce zero emissions by 2035).

- The FDA's banning all e-cigarettes.

- The EPA's requiring reductions in pollution from existing oil and natural gas entities "for the first time" ever.

- The Federal Communications Commission's imposing requirements, such as net neutrality rules, on all internet providers.

- The Federal Aviation Administration's imposing certain flying requirements, such as the necessity of showing vaccination cards in order to fly.

It is evident that *West Virginia* was a resounding start to the Supreme Court's curtailment of agency power. Taken on its own terms, too, it is laden with potency and potential.

[67] *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).
[68] *Buffington*, 2022 WL 16726027, *1.
[69] *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932).

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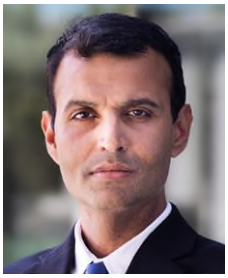

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