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# THE MAJOR ANSWERS DOCTRINE

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The Supreme Court's newly articulated "major questions doctrine" is not actually about major questions; it is about major answers. When faced with a problem of large economic and political significance, an agency is perfectly free to answer the legal questions raised by that problem by acting only fecklessly or even not acting at all. It is not free to answer those questions by enacting an ambitious regulatory response to the problem. The Court's decision to deploy the major questions doctrine, in other words, turns on the character of the agency's answer to a significant problem. Because of this, as I will explain, the major questions doctrine is not only misnamed, but also misconceived.

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## I. WEST VIRGINIA'S PATH TO THE SUPREME COURT

The Supreme Court's decision in *West Virginia v. Environmental Protection Agency*,[1] the most detailed elaboration of the major questions doctrine the Court has offered to date, makes it obvious that application of the major questions doctrine turns on an agency's answer to a major question. To see why this is so, it helps first to grasp the unusual posture in which the case was heard. Tracing how the case came to the Court also reveals how very anxious the conservative justices were to kill an Obama-era rule on climate change not just once, but twice, and how casual they were about blessing the Trump-era rule that replaced it.

*West Virginia v. EPA* involved the Environmental Protection Agency's ("EPA") effort under the Clean Air Act to address greenhouse gas emissions from existing fossil fuel-fired power plants. Fossil fuel-fired power plants emit far more carbon dioxide than any other stationary source category in the United States, and the overwhelming majority of these emissions come from coal-fired plants.[2] Section 111 of the Clean Air Act instructs EPA to set standards of performance for categories of stationary sources, like power plants, that contribute to air pollution that endangers public health or welfare, and it tells EPA to set standards based on application of "the best system of emission reduction" that has been "adequately demonstrated."[3] In 2015, EPA issued a rule—which it called the "Clean Power Plan"—setting emission limits for fossil fuel-fired power plants based in part on shifting electricity generation from coal-fired power plants to gas-fired plants and to wind and solar facilities.[4] In 2016, without full briefing or argument, and with no

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

[2] Standards for Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64510, 64522-23 (Oct. 23, 2015).

[3] 42 U.S.C. § 7411(a)(1).

[4] Carbon Pollution Emission Guidelines for Existing Statutory Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015).

written explanation, the Supreme Court stayed EPA's implementation of the Clean Power Plan before any lower court had reviewed it.[5]

The administration then changed hands. Under its new management, EPA issued two "separate and distinct" rules relating to the Clean Power Plan.[6] The first rule repealed the Clean Power Plan.[7] The second replaced the Clean Power Plan with the "Affordable Clean Energy" (ACE) rule, which identified, but did not mandate, measures that would improve the efficiency of individual coal-fired power plants.[8] Unlike the Clean Power Plan, the ACE rule did not identify the "best system" for emission reduction as one that would shift electricity generation from coal-fired power plants to gas-fired plants or to wind and solar facilities. Nor did it allow, as part of the "best system" for pollution reduction or as strategies for complying with emission standards under section 111, the production of energy from biomass or the use of emissions trading and averaging.[9] While the agency had estimated that the Clean Power Plan would reduce carbon emissions from fossil fuel-fired power plants by 32 percent by 2030,[10] it reported that the ACE rule would, at best, reduce carbon

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[5] West Virginia v. EPA, 577 U.S. 1126 (2016) (order granting stay). For a critique of the Court's stay, see Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 GEO. ENV'T L. REV. 425 (2016).

[6] 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 (July 8, 2019).

[7] *Id.* at 32522-32532.

[8] *Id.* at 32532-32564.

[9] *Id.* at 32546-32547, 32556-32557.

[10] Carbon Pollution Emission Guidelines for Existing Statutory Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64665, 64679, 64924 (Oct. 23, 2015).

emissions by less than 1 percent in this time frame[11] – a reduction which the agency itself characterized as "modest."[12]

The agency's sole legal explanation for its change of heart was that it had no authority under section 111 to set emission limits based on any measures that did not apply at and to an individual source at a particular location.[13] In repealing the Clean Power Plan, the agency asserted that the Clean Power Plan was irreparably flawed because it based its emission limits on control measures that "cannot be put to use at the regulated building, structure, facility, or installation."[14] In issuing the ACE rule, EPA found that this same legal judgment ruled out not only generation shifting, but also the use of biomass feedstocks and emissions trading and averaging as part of the pollution control program governed by section 111.[15]

The D.C. Circuit invalidated the repeal rule and the ACE rule.[16] The only legal question the D.C. Circuit decided in vacating these rules was whether EPA was correct in concluding that section 111 clearly foreclosed the consideration of any air pollution control measures that did not apply at and to the individual source.[17] The court found that EPA's legal conclusion that the Clean Air Act was clear in this respect required invalidation of the two rules because the court decided that EPA was mistaken in finding the statute clear on this question.[18] Because EPA had not offered any other justification for the rules, once the D.C. Circuit found that the justification failed, it could not uphold the rules. To do so would have violated a basic

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[11] KATE C. SHOUSE ET AL., CONG. RSCH. SERV., R46568, EPA'S AFFORDABLE CLEAN ENERGY RULE: IN BRIEF 7 (2020).

[12] 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, 32561 (July 8, 2019).

[13] *Id.* at 32524, 32534, 32555-32556.

[14] *Id.* at 32524.

[15] *Id.* at 32546-32547, 32556-32557.

[16] Am. Lung Ass'n v. EPA, 985 F.3d 914, 995 (D.C. Cir. 2021).

[17] *Id.* at 944, 995.

[18] *Id.* at 995.

principle of administrative law, known as the *Chenery* principle: a court may not uphold an agency decision based on grounds that the agency neither articulated nor embraced.[19] The court thus vacated the repeal rule and ACE rule and remanded these matters to the agency to "interpret the statutory language anew."[20] In all this, the D.C. Circuit did not pass judgment on the Clean Power Plan itself; indeed, due to the Supreme Court's stay of the rule and the subsequent change in presidential administration, the D.C. Circuit *never* passed judgment on the Clean Power Plan itself.[21]

Given this procedural history, one might have thought that the only EPA actions appropriate for Supreme Court review upon appeal from the D.C. Circuit's decision were the repeal rule and the ACE rule, and that the only question suitable for review was whether section 111 clearly foreclosed consideration of any pollution control measures that did not apply at or to an individual source. But that is not how things went.

In *West Virginia v. EPA*, the Supreme Court brushed aside the government's argument that the validity of the Clean Power Plan was not a fit subject for judicial review because it had never taken effect, the agency did not intend to revive it, its deadlines had long passed, and its emission goals had been met.[22] The Supreme Court explained that the D.C. Circuit's vacatur of the repeal rule "purport[ed] to bring the Clean Power Plan back into legal effect."[23] Neither the D.C. Circuit's opinion nor its judgment said anything to this effect, and, in any event, it is difficult to perceive the concrete injury that could have flowed from the hypothetical revival of a rule whose

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[19] *Id.* at 995 (citing SEC v. Chenery Corp., 318 U.S. 80, 94 (1943)).

[20] *Id.* at 944.

[21] *Id.* at 974.

[22] Brief for the Federal Respondents in Opposition at 15, 17–18, West Virginia v. EPA, 142 S. Ct. 2587 (No. 20-1530, 20-1531, 20-1778, & 20-1780).

[23] West Virginia v. EPA, 142 S. Ct. 2587, 2606 (2022).

deadlines, goals, and agency backing had passed. The Clean Power Plan was a dead horse, and the Supreme Court did not need to beat it again.

At the same time, the Supreme Court declined to pass judgment on the one issue decided by the D.C. Circuit, calling it, curiously, "an interpretive question that is not at issue":

> We have no occasion to decide whether the statutory phrase "system of emission reduction" refers exclusively to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. . . . [T]he only interpretive question before us, and the only one we answer, is more narrow: whether "the best system of emission reduction" identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no.[24]

This may all be well and good with respect to determining the legality of the Clean Power Plan, but it does not explain the Court's treatment of the ACE rule. The Court nowhere explained why the "best system of emission reduction" *identified by EPA in the ACE rule*—not in the Clean Power Plan—was within EPA's authority. The system identified by EPA in the ACE rule was not at all like the system identified in the Clean Power Plan. Even so, without opining on the relevant legal issue, and indeed without separately discussing the merits of the ACE rule at all, the Court reversed the "judgments" of the D.C. Circuit,[25] which had vacated the ACE rule in addition to vacating the

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[24] 142 S. Ct. at 2615-16 (emphasis added).

[25] *See* Judgment at 2, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (Nos. 20-1530, 20-1531, 20-1778, & 20-1780). The judgment refers to reversing the D.C. Circuit's "judgments," while the majority opinion had referred to reversing the lower court's "judgment." *See* 142 S. Ct. at 2616.

repeal of the Clean Power Plan.[26] In vacating the vacatur of the ACE rule, the Supreme Court *upheld* the ACE rule – without explaining why and without answering the legal question that had moved the D.C. Circuit to vacate it, and without grappling with the agency's own contemporaneous legal justification for the rule. By the Court's own logic in defending its review of the Clean Power Plan, the ACE rule is, technically, back on the books, despite the Supreme Court's failure to explain why it should survive.[27]

All of this is pretty irregular. For present purposes, however, the most important point is this: in one decision, with one reasoning process, the Supreme Court simultaneously axed the Clean Power Plan and spared the ACE rule. This asymmetrical result, which turned on the agency's different interpretive choices, is a problem for the major questions doctrine.

## II. MAJOR ANSWERS, QUESTIONED

In *West Virginia v. EPA*, the Court held that Congress may not authorize an administrative agency to address an issue of great economic and political significance—a "major question"—unless Congress speaks clearly in doing so.[28] This interpretive principle rests, fundamentally, on a simple and superficially appealing proposition: Congress, not the executive branch, should make the really big policy decisions itself.[29] The pragmatic idea behind this proposition is that Congress is the institution most suited to performing the delicate and complicated balancing required for any especially important piece of

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[26] Am. Lung Ass'n v. EPA, 985 F.3d 914, 995 (D.C. Cir. 2021).

[27] The D.C. Circuit declined to say so explicitly in its order on remand. *See* Am. Lung Ass'n v. EPA, No. 19-1140, slip op. at *1 (D.C. Cir. Oct. 27, 2022).

[28] 142 S. Ct. at 2609.

[29] *Id.* ("We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies.") (internal quotations omitted).

law.[30] The implication is that Congress is the institution that must clearly decide major policy questions, *one way or the other*, not that Congress must decide major policy questions only when it is deciding them in a particular direction.

Yet this is not how the "major questions" idea works in the Supreme Court's new interpretive framework. By at once keeping the ACE rule and dumping the Clean Power Plan, the Court demonstrated that its new framework leaves untouched agency decisions that answer major questions, without clear legislative authorization, by limiting the agencies' own regulatory authority.

In issuing the Clean Power Plan and the ACE rule, EPA considered the same legal question: does section 111 of the Clean Air Act empower the agency to require generation shifting in setting emission limits for existing power plants? In the Clean Power Plan, EPA answered yes. In the ACE rule, EPA answered no. The statutory language governing each rule was exactly the same. The economic and environmental consequences and the political repercussions of the rules—central factors in identifying a "major question"—were mirror images of each other. Under a judicial test that denies agencies' authority to make major policy decisions in the absence of clear language from Congress, the challenges to each of these rules should have come out the same.

On the Supreme Court's account, the Clean Air Act itself does not *clearly prohibit* EPA from considering generation shifting in setting emission standards under section 111. If it did, there would be no "plausible textual basis" for the idea that the Clean Air Act allows such consideration.[31] Nor would there have been any warrant for the Court to have constructed and then invoked its new "major questions" principle; this principle kicks in only when a statute is

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[30] *See, e.g.*, *id.* at 2618 (Gorsuch, J., concurring).
[31] *Id.* at 2609.

ambiguous, not when it is clear.[32] If the Clean Air Act does not clearly prohibit EPA from considering generation shifting in setting emission standards under section 111, it also does not clearly allow EPA to ignore generation shifting in setting these standards. The statute is simply ambiguous; either result could be squared with the text and structure. Congress did not clearly forbid *or* authorize generation shifting as a part of the "best system" of emission reduction.

Yet the Court required clarity only for EPA's decision to consider generation shifting, not for its decision to eschew it. Ambiguity, in other words, sufficed for Congress's answer to the question whether EPA could legally justify an environmentally ineffective rule like the ACE rule (it could), but ambiguity did not suffice for its answer to the question whether the agency could legally justify an environmentally ambitious rule like the Clean Power Plan (it could not).

The same asymmetrical approach seems to apply when an agency decides not to regulate at all. In *Massachusetts v. EPA*, the Court rejected EPA's claim that it had no authority to regulate greenhouse gases as "air pollutants" under the Clean Air Act.[33] Three current Justices joined Justice Scalia in dissent, arguing that the statutory language was ambiguous and that the Court should have deferred to EPA's denial of authority.[34] Later, in *Utility Air Regulatory Group v. EPA*, the Court rejected EPA's claim that it had authority to require permits for and control of greenhouse gases from particular stationary sources under a specific permitting program of the Clean Air Act.[35] In a precursor to the major questions doctrine as articulated in *West Virginia v. EPA*, the Court explained that it was looking for clear

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[32] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (turning to "major questions" idea only in discussing the possibility of statutory ambiguity, not clarity).

[33] 549 U.S. 497, 528–32 (2007).

[34] *Id.* at 556–60 (Scalia, J., dissenting).

[35] 573 U.S. 302, 323–24 (2014).

statutory language because the underlying policy question was so important.[36]

The difference between the two cases was the nature of the agency's answer to the underlying regulatory question. In *Massachusetts*, EPA did not want to do anything about climate change. In *UARG*, it did. If anything, the question EPA answered in *Massachusetts*—whether it had any power at all to regulate greenhouse gases under the Clean Air Act—was far more consequential than the comparatively narrow permitting question it addressed in *UARG.* Comparing the conservative justices' differential treatment of these cases, it becomes plain that their unspoken premise is that an administrative agency may indeed speak authoritatively on a major policy question, and (at least in those days)[37] may even get judicial deference for its decision, but only if it supplies an ideologically appropriate answer—which, for the conservative dissenters in *Massachusetts*, meant refusing to regulate at all.

The Supreme Court must believe that a major policy question can become a minor policy question when the agency gives an answer that the Court approves of. As shown in its decisions on climate change, ineffective regulation and no regulation at all are answers the Court approves of.

How beautifully this anti-regulatory bias aligns with the deregulatory agenda of the Republican Party. The conservative justices, however, tell us—and maybe themselves—that the major questions doctrine is driven by their understanding of the constitutional separation of powers. In *West Virginia v. EPA*, the majority (subtly)[38] and the concurrence (overtly)[39] linked this doctrine to the principle that

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[36] *Id.* at 324.

[37] For a cogent discussion of the Court's recent, sharp turn against *Chevron* deference, see Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441 (2021).

[38] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (referring to "separation of powers principles" in describing the "major questions" idea).

[39] *Id.* at 2617 (Gorsuch, J., concurring).

Congress may not delegate its legislative power to any other entity. Yet the doctrine itself flouts the nondelegation principle as the Court has applied it.

In *Whitman v. American Trucking Associations*, the Supreme Court reviewed the D.C. Circuit's rejection of EPA's National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, set under the Clean Air Act.[40] The D.C. Circuit had faulted EPA for failing to interpret the Clean Air Act in a way that would have limited its discretion, writing:

> Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own.[41]

Writing for a unanimous court, Justice Scalia rejected the D.C. Circuit's novel attempt to allow an administrative agency to correct an unconstitutionally broad delegation of power by adopting a narrowing interpretation of a statutory provision. He wrote:

> In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. . . . We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. . . . The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice

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[40] 531 U.S. 457 (2001).

[41] Am. Trucking Ass'ns v. Browner, 175 F.3d 1027, 1038 (D.C. Cir. 1999).

> of which portion of the power to exercise – that is to say, the prescription of the standard that Congress had omitted – would itself be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.[42]

*American Trucking* teaches that an unconstitutional delegation cannot be fixed by the agency receiving the delegation; that would exacerbate, not solve, any nondelegation problem the statute posed.

Thus, to return to the situation the Supreme Court faced in *West Virginia v. EPA,* EPA cannot cure Congress's failure to clearly decide whether generation shifting is an appropriate system for controlling air pollution under section 111 of the Clean Air Act by declining to adopt generation shifting to control air pollution. If the statute does not clearly answer this question, as *West Virginia v. EPA* held it does not, then EPA cannot save section 111 by enacting a measly rather than an ambitious rule under that provision – that is simply, as Justice Scalia put it, "a choice of which portion of the power to exercise."[43]

In assessing the Supreme Court's adoption of an interpretive principle that resembles the D.C. Circuit's failed approach to nondelegation in *American Trucking,* it is also worth recalling that in *American Trucking* the D.C. Circuit linked its novel approach to the dominance at that time of *Chevron* deference in administrative law. The court wrote: "the approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of *Chevron*."[44] Contemporaneous conservative commentary on the D.C. Circuit's approach approvingly made the same connection, describing the

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[42] *Whitman*, 531 U.S. at 472-73.

[43] *Id.* at 473.

[44] Am. Trucking Ass'ns v. Browner, 195 F.3d 4, 8 (D.C. Cir. 1999) (opinion on denial of rehearing en banc).

court's reasoning as follows: "in a highly deferential nod to EPA's *Chevron* power to interpret the Clean Air Act, the majority gave EPA the first opportunity to solve the nondelegation problem presented by the Agency's interpretation of the statute."[45] It is strange that the Court that can no longer bear to say *Chevron*'s name[46] has fashioned a new interpretive principle that was originally conceived as a tribute to *Chevron*, and even stranger that the Court seemed not to notice the connection.

The "major questions" idea silently nods to *Chevron* in another way as well. One of the factors the Court lists in describing when this idea will apply is the agency's own historical approach to the statutory question.[47] It appears that an agency that tries a new approach to its implementation of a statute will get into more trouble under the major questions framework than an agency that has always done the same thing.[48] But unless a principle like *Chevron* deference is lingering in the background, on what grounds would the Court uphold an agency's answer to a major question not clearly answered in the statute, even if it came early in the statute's history?

The major answers doctrine embraced in *West Virginia v. EPA* is ideologically driven and analytically careless. It empowers the courts to undo agency decisions based on the decisions' regulatory valence. It ignores the Supreme Court's own precedent concerning the constitutional principle supposedly underlying the doctrine. And it

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[45] Jeffrey Bossert Clark, *The Recent Controversy Over the Nondelegation Doctrine*, FEDERALIST SOCIETY ENVIRONMENTAL LAW & PROPERTY RIGHTS PRACTICE GROUP NEWSLETTER (Oct. 1, 1999) [https://perma.cc/46BL-CDRY].

[46] For a discussion of *Chevron*'s disappearance from the Supreme Court's vocabulary, see Lisa Heinzerling, *How Government Ends*, BOSTON REVIEW (Sept. 28, 2022) [https://perma.cc/KC5C-HQHT].

[47] West Virginia v. EPA, 142 S. Ct. 2587, 2608-09 (2022).

[48] Not that an agency will necessarily prevail under the "major questions" framework even when it interprets a brand-new for the first time. *See* King v. Burwell, 576 U.S. 473, 485–86 (2015).

subtly bows to a principle of deference that it has otherwise shunned. In prizing ideology over analysis, the Court has at least done one thing well: it has shown us who is boss.