



SEPARATION OF POWERS IN FLUX

IN BOTH WISCONSIN AND WASHINGTON

Two legal scholars offer perspectives on court decisions and trends that are bringing momentous shifts in the allocation of governmental authority at both the state and federal levels.

The legal ground is shifting in the law of the separation of powers. Decisions by both the Supreme Court of the United States and the Wisconsin Supreme Court reflect and constitute important, even controversial, changes. The following pages present two sets of intelligent and accessible insights by distinguished professors into these legal developments.

The first is a question-and-answer session with Chad M. Oldfather, professor of law at Marquette University. The topic is his developing scholarship on separation of powers under the Wisconsin constitution, with particular emphasis on the approach of the Wisconsin Supreme Court. The touchstone is his new article, “Some Observations on Separation of Powers and the Wisconsin Constitution,” 105 Marq. L. Rev. 845 (2022).

The second is a recent series of guest posts on the Volokh Conspiracy blog by Thomas W. Merrill, the Charles Evans Hughes Professor of Law at Columbia University and a friend of Marquette Law School. The five-part series engages critically

with the U.S. Supreme Court’s decision this past summer in *West Virginia v. EPA*, holding unlawful an innovative approach by the federal agency to addressing the question of climate change.

The reasons for our presenting the two sets of entries include, most generally, that developments in federal law (the subject of the Merrill entries) often have a pull on state law (Oldfather’s topic).

Considerably more specifically: Both Oldfather and Merrill identify and criticize recent judicial justifications for upsetting decisions made by the other branches. Oldfather’s research quite directly takes on separation-of-powers questions under the Wisconsin constitution. Merrill’s approach addresses the future of the *Chevron* doctrine involving judicial deference in the administrative-agency context and the question whether Congress may become subject to a revival of the nondelegation doctrine.

In short, this latest work of both professors, while likely to produce spirited rejoinders, certainly merits attention and consideration.

“THE POTENTIAL FOR UNINTENDED CONSEQUENCES . . . IS HUGE.”

Chad Oldfather, professor of law at Marquette University, talks about his ongoing work analyzing the Wisconsin Supreme Court’s decisions on separation of powers.

State constitutions attract less attention than they deserve, in the view of Chad M. Oldfather, professor of law at Marquette University. So he has expanded his teaching and research—which already included federal constitutional law and judging and the judicial process—to include the Wisconsin constitution and its interpretation by the state’s highest court. The *Marquette Lawyer* caught up with Professor Oldfather about this recent work.

Tell us a bit about your latest project, a newly published article in the Marquette Law Review, called “Some Observations on Separation of Powers and the Wisconsin Constitution.”

There’s a bit of an origin story here, so let me start with that. State constitutional law has been understudied, not just in Wisconsin, but everywhere. There’ve been some law professors doing very good work in the field for quite a while, but most of the attention in the academy has gone to federal constitutional law. In fact, most law schools haven’t had a class on state con law. This in turn has meant, as Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit has pointed out, that the profession as a whole hasn’t paid enough attention to state constitutions.

I first started thinking about teaching state con law—adding such a course to my roster—in 2014. That ended up not happening until 2020, and, by that point, my motivations included not just a general sense that the subject

had been overlooked, but also a belief that trends at the U.S. Supreme Court suggested that a lot of the action would be shifting to state courts and state constitutions. And, of course, over the years, there have been a lot of significant cases under the Wisconsin constitution.

It matters also that the Wisconsin Supreme Court lately has been changing—with a majority of the seven justices having taken office since 2016, but changing otherwise as well. Suffice it to say here that, as someone who presents at conferences around the country attended by not just other professors but also state appellate court judges, I have gotten a lot of questions about the court. So I wanted to learn more.

So, the project itself?

Sure. The title, “Some Observations on Separation of Powers and the Wisconsin Constitution,” is, for better or worse, an accurate one. Most law review articles explore a specific topic. There’s a thesis, there are arguments developed in support of that thesis, and so on. This one meanders, even lingering in places because they seem interesting. You could think of it as kind of a travelogue, an account of visiting a place and offering up observations, questions, and commentary on what I saw. There are many more incomplete thoughts than in a typical article.

How’d that come to be?

It’s mostly a product of two factors. One is that I may have an inside track with the *Marquette Law Review*. So I didn’t feel constrained to meet all the conventional expectations about what a law review article should look like.



Professor Chad M. Oldfather

Another is how I approached the project overall. Typically when I start a new project, I have a fairly specific question in mind. Often that will be about something that puzzles me. A relatively recent one was “Why is there never talk of giving precedential effect to the methodological choices U.S. Supreme Court justices make in interpreting the Constitution?” Another was “Why is it that appellate courts always review questions of law *de novo*?” Things like that.

For this one, I decided that I would try to read everything the Wisconsin Supreme Court has ever written about separation of powers under the state constitution. And that I would do it with the same mindset as the bear who went over the mountain—to see what I could see. My hope was to add value by virtue of the perspective I enjoy as a full-time student of the law. I’m not an advocate for a particular client or cause, I don’t have to answer a question presented in a specific factual context, and I’m not constrained by a budget or short deadlines.

How did it go?

Well, attacking a project like this one turns out to be a very tall order in a couple of ways. One is the sheer amount of material involved. I started out by running a Westlaw search in

the Wisconsin Supreme Court database for the phrase “separation of powers,” which turned up a lot of opinions. And then when I started reading them, it became apparent that what I’d done wasn’t enough. At some level, every exercise of the power of judicial review is about separation of powers. Some more than others, of course. But it ends up being enough opinions that if you print them out and start stacking them up on your dining room table, not everyone is going to be happy about it. And that’s after excluding the ones that are only incidentally about separation of powers.

And so, anyway, as I sat there at my dining room table, reading through all these opinions, I kept track of what I was seeing and did my best to identify trends and inconsistencies and so forth. A lot ended up on the cutting room floor, though no doubt some of it will prove to be useful in future work.

Any examples of what got left out that come readily to mind?

Sure. One obvious thing is that today’s opinions are much, much longer. Things started to pick up not long after the court of appeals was created in 1978. But the trend toward greater length has continued. The opinions are considerably longer. That is, of course, hardly to say that they’re better.

One of the things you included in this initial article relates to interpretation of the state constitution.

Yes—and the story turns out to be more complex than most of the court’s opinions let on. The court in the state’s early decades was very pluralistic in its methodologies. It didn’t regard the task of interpreting the state constitution as following a single path, or as an endeavor in which only one approach is legitimate. As much as anything, the justices acted like common-law judges.

And it’s not that the court lacked examples of alternatives. Thomas Cooley’s *Constitutional Limitations*, first published in 1868, was unquestionably the leading treatise on

state constitutional law. Cooley’s aim was to describe prevailing practices, and he outlines an approach that looks like a rough version of originalism. The Wisconsin justices cited Cooley for some things, but they didn’t follow his general approach. These days the court often invokes a framework that’s somewhat akin to Cooley’s approach, but it didn’t adopt that until the mid-1970s, and its emergence then appears to have been almost by happenstance.

But that’s not all. The court has an entirely different approach when it’s dealing with separation-of-powers questions—and still another when interpreting provisions in the state constitution’s Declaration of Rights. All of which is at least broadly consistent with the pluralism of the earlier years.

Another thing that’s notable—and this is hardly unique to Wisconsin—is that the court frequently draws on the U.S. Constitution, and cases interpreting it, in its efforts to discern the meaning of the Wisconsin constitution. That, it seems to me and to an awful lot of other people who’ve thought about state constitutions, is problematic.

For one thing, it’s not even clear that state constitutions are the same sort of document as the federal constitution. They might be more like statutes, they might be less like statutes, they might be something else altogether. That can have implications for interpretation. But even setting that aside, there are critical differences.

Could you elaborate on those differences?

Start with the legislative power. A state legislature has the police power. Certainly, Congress’s power is broad, but there are limits. So right off the bat, there’s this different and larger legislative power in Wisconsin.

And then the executive branch in many states, including Wisconsin, is, as some describe it, “unbundled.” There are more executive officers identified in the state constitution than just the governor (or president), and more of

them selected by the people.

The judiciary, too, is different. The scope of its jurisdiction is broader, and members of the judiciary are elected. One of the big theoretical issues in federal constitutional law is what Alexander Bickel famously called the “countermajoritarian difficulty”—the fact that judicial review in the federal system entails unelected judges overturning the work of the people’s elected representatives. That’s not present here, at least not in the same way.

I haven’t worked my way through how that should cash out in terms of a differing conception of the judicial power. The fact that the justices have a popular mandate to exercise their power doesn’t tell us what the nature of that power is. But one thing that seems clear is that it’s inadvisable (I’m using a mild word) to draw any kind of easy analogies with the federal judicial power.

Taken together, all of this calls into question the idea that one can derive conclusions about how power is separated at the state level from how it’s done at the federal level.

My sense is that you have more to say about the differences.

You’re right. There’s also the fact that the two documents were drafted six decades apart, and in very different contexts. The drafters of the U.S. Constitution were coming out of a British system in which the notion of a constitution did not necessarily entail a written document. A half-century-plus can make a tremendous difference in terms of social priorities, the general sense of how government ought to work, and so on. Even the same words could have different implications.

As an academic, all of this suggests to me that there’s a lot of interesting work to be done. If I were on the court, I’d take it all as a reason to tread carefully and with a great deal of humility.

But you don’t see the court doing that?

I don’t. One of the things I do in



“... it’s not even clear that state constitutions are the same sort of document as the federal constitution.”

the article is briefly to survey some of the more prominent recent decisions concerning separation of powers. A few things seem clear from those cases. One is the truth of Justice Robert Jackson’s observation in *Youngstown*, or the *Steel Seizure Case*, that “the opinions of judges . . . often suffer the infirmity of confusing the issue of a power’s validity with the cause it is invoked to promote.” Which leads, he continued in that 1952 concurrence, to an emphasis on short-term results over a longer view of what makes sense as a matter of constitutional government.

That looks to be exactly where the Wisconsin Supreme Court is at. It’s hard to imagine these cases coming out the same way were the partisan affiliations or affinities of the branches switched. Even if that’s not the reality, it’s the perception. Part of the blame for that can be placed at the feet of the media, including some who ought to know better. But most of it belongs with the court.

How so?

I’ve already mentioned some of the reasons. But there’s more. Some of the justices recently have had big ideas about how things should be when it comes to separation of powers, which are some distance from how things are and have been. Some of those ideas, if implemented, would work fundamental changes on the structure of state government. But those ideas don’t seem

to have a basis in anything directly connected to the Wisconsin constitution.

Or at least the justices propounding the ideas haven’t made the effort to make that connection. What they provide instead is general references to some of the political philosophy underlying the U.S. Constitution, or citations of separate opinions of justices on the U.S. Supreme Court, which aren’t even binding authority as statements of federal constitutional law.

So there’s this kind of castle-in-the-sky vision of what government should be, which then gets dropped, bit by bit, into a landscape or edifice that’s been built in a very different way. The potential for unintended consequences—at least assuming the justices are willing to adhere consistently to the principles they articulate—is huge. The logic of reinvigorating the nondelegation doctrine with respect to administrative agencies, for example, creates the possibility that some of the ways in which the legislature goes about its work through committees would also be problematic. That’s among the examples that I take up in the article.

More here, too?

Yes. In fact, probably the biggest thing is the tone of the opinions. There’s a boldness to some of them that’s, shall we say, unmerited. And also unhelpful. No doubt they’re good reads to people who already agree with them. But

they confidently assert as *established* all sorts of propositions of the sort I just mentioned that are in fact highly contestable. I don’t think I’m going too far out on a limb in suggesting that judicial opinions ought to be judicious, particularly in a world that’s as fractured as ours.

More than that, the justices routinely accuse one another of activism, partisanship, and being result-oriented. As I’ve suggested, those charges almost certainly have some basis. But for the justices themselves to make those allegations, and as frequently as they do, seems unlikely to have any effect but to perpetuate the impression of dysfunction that, fairly or not (in the nature of impressions), the court has exhibited for some time now. It’s hard to advance the rule of law with some of this rhetoric.

So what’s the solution?

Group dynamics can be hard to change, especially when change comes one member at a time. So there are no easy solutions. But it will be a good start if the profession—and the academy—will begin to pay closer attention and, more than that, to convey the message that we expect something better from the justices, not just when they are on the bench but also when they campaign for it (and when others campaign for them). It’ll take time, and it won’t always be comfortable. But it would be worth the effort. ■

MAJOR QUESTIONS ABOUT *WEST VIRGINIA V. EPA*—AND THE FUTURE OF THE *CHEVRON* DOCTRINE

In a series of guest posts at the Volokh Conspiracy blog, a noted scholar of administrative law critically engages with the Supreme Court's approach to reviewing challenges to the authority of federal administrative agencies.

By Thomas W. Merrill, Charles Evans Hughes Professor of Law, Columbia University

1. *WEST VIRGINIA V. EPA*: AN ADVISORY OPINION?

Deciding the case might have been squarable with Article III, but not the way Supreme Court went about it.

West Virginia v. EPA, decided on June 30, 2022, will long be remembered as the decision in which the U.S. Supreme Court officially endorsed the “major questions doctrine,” as Jonathan Adler has noted on this blog. In this series of five guest blog posts, I will get to that in due course.

But the briefs and the oral argument were also concerned with whether the case was justiciable. The government argued that West Virginia and the coal producers had no standing, that the case was moot, and that the Court was being asked to render an advisory opinion. The majority opinion by Chief Justice John G. Roberts, Jr., spent little time in swatting these arguments aside, and Justice Elena Kagan's dissent showed little interest in them—although at one point she casually referred to the Court's decision as an “advisory opinion.”

It is tempting to dismiss these threshold issues as technicalities and to move on to the main controversy. But I think that the government was right that the Court was being asked to offer an advisory opinion and that this is in fact what the Court did.

And the advisory nature of the decision is more than a technicality. It undermines the Roberts Court's efforts (which have been substantial if not

entirely consistent) to insist on strict observance of Article III limits on federal courts. More importantly, the advisory nature of the opinion decisively shaped the way the Court characterized the major questions doctrine. As we shall see in a later post, the Court framed the major questions doctrine as an abstract exercise in political science, detached from the ordinary role of courts as interpreters of controlling legal texts.

To understand the justiciability aspect of the case, it is necessary briefly to recap the sequence of decisions. In 2015, the Obama Environmental Protection Agency announced something called the Clean Power Plan (CPP), its most ambitious initiative to reduce greenhouse gas emissions. The CPP set new limits on carbon dioxide emissions from existing fossil-fueled power plants. The plan was highly innovative because the limits were based on what individual plants would discharge if they were linked in a grid with other power sources emitting lower amounts of CO₂, such as generating facilities powered by natural gas, solar, or wind.

In effect, the Obama administration's objective in the CPP was to force existing plants to enter into cap-and-trade systems that would favor renewables and discourage the use of fossil fuels. This became known in the litigation as a “generation shifting” control strategy, as opposed to more traditional strategies based on technological measures at individual plants, such as installing scrubbers.



Professor Thomas W. Merrill

The CPP was challenged in court, and in an unusual move, it was stayed by the Supreme Court in 2016 before any of the challenges produced a final judgment. In 2019, the Trump administration formally repealed the CPP, based on its legal conclusion that generation shifting was not permitted by the relevant provision of the Clean Air Act. The Trump EPA simultaneously issued a new plan for regulating emissions of CO₂ from existing fossil-fueled power plants, called the Affordable Clean Energy rule (or ACE). This set new, and comparatively modest, limits on emissions by existing plants, based on the use of more efficient combustion devices.

A coalition of blue states and (interestingly) electric utility companies filed a massive review proceeding in the U.S. Court of Appeals for the D.C. Circuit, challenging ACE. One day before the inauguration of President Joseph Biden, a divided panel of the D.C. Circuit struck down the Trump plan. The bulk of the court's nearly 150-page majority opinion consisted of a labored analysis explaining how the repealed

CPP could be squared with the language of the act. The bottom line was that since generation shifting as imposed by the CPP was legally permissible, the Trump EPA erred in concluding that it had been impermissible. The ACE plan was accordingly reversed and remanded to the EPA.

After the decision was rendered, the D.C. Circuit clarified, in response to a motion by the Biden administration, that its mandate did not mean that the CPP was reinstated. Indeed, the court's conclusion would seem to be required by principles of administrative law: In *Burlington Northern, Inc. v. United States* (1982), the Supreme Court held that when an agency issues sequential decisions, reversal by a court of a later decision does not automatically reinstate an earlier one.

In this posture, West Virginia and its coal-producing allies petitioned the Supreme Court to review the D.C. Circuit's decision. The solicitor general opposed the request, arguing that the petitioners lacked standing since they were no longer subject to any form of CO₂ emissions controls—the CPP having been stayed and repealed and the ACE rule having been vacated and remanded. The Court nevertheless granted certiorari.

In my assessment, West Virginia clearly had standing to ask the Supreme Court to review and reverse the D.C. Circuit's decision invalidating the Trump plan. The ACE rule imposed rather modest limits on coal-burning power plants, and West Virginia could plausibly argue that these limits would be relatively easy for it to administer and enforce. Given that the states have frontline responsibility to implement emissions limits on existing sources, this was a sufficient interest to give West Virginia a tangible stake in the perpetuation of the ACE plan.

For the same reason, I do not think that the question of the legality of the ACE plan was moot. If the Supreme Court reversed the D.C. Circuit, the ACE plan would remain in effect, and this

would have different legal consequences relative to a world in which there were no EPA standard in place for existing fossil-fueled power plants.

The briefing and argument nevertheless made clear that what West Virginia and its allies really wanted was a decision from the Supreme Court that the Obama administration's CPP—or something like it—was not legally permissible.

That was a request for an advisory opinion. The CPP had never been put in effect and was long dead. The particular form of generation shifting the CPP sought to mandate was of no continuing legal consequence.

Of course, any sophisticated observer of the Washington scene could predict that the Biden administration was likely to put something similar to CPP in place. Or perhaps not. There are a variety of moves the Biden administration could take to hasten the demise of coal-burning power plants. At this point, it is completely unknown what form future regulation will take.

In any event, the critical legal point is that no generation-shifting plan for existing power plants was in effect when the Court rendered its decision. There being no actual plan to review, the Court's ruling that such a plan would be beyond the power of the EPA was an advisory opinion.

One could perhaps argue that the D.C. Circuit's conclusion that the CPP was legally permissible was critical to its judgment that the Trump administration erred in concluding it was impermissible, and hence for its decision to reverse and remand ACE to the EPA. This, in turn, might justify a decision by the Supreme Court dissecting the D.C. Circuit's reasons for concluding that the Trump EPA had adopted an overly narrow interpretation of the EPA's authority, and either accepting or rejecting those reasons.

But this defense against the charge of an advisory opinion is not available, as the Court did not engage

with the D.C. Circuit's analysis of the statute. Instead, it held that any form of generation shifting—at least with respect to greenhouse gas emissions from existing power plants—was beyond the delegated power of the EPA. This was effectively an advisory opinion about the long-defunct CPP—or any future plan that entails similar characteristics.

The Court was telling the Biden administration what it could not do in the future; it was not adjudicating the legality of anything of current significance. This can perhaps be explained by the fact that the D.C. Circuit had rendered such an elaborate advisory opinion that the CPP was permissible. But federal courts review “judgments, not opinions,” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984), and the only judgment before the Court was the one overturning the Trump administration ACE plan.

So much for federal courts being limited to deciding actual “cases” or “controversies.”

2. WEST VIRGINIA V. EPA: WAS “MAJOR QUESTIONS” NECESSARY?

A correct interpretation of the statute at issue—Section 111(d) of the Clean Air Act—does not give the EPA the authority to issue the sort of regulations at issue in the case.

The Supreme Court held in *West Virginia v. EPA* that the federal agency did not have authority to adopt what amounted to a cap-and-trade system for existing fossil-fueled power plants because this raised a “major question,” of “economic and political significance,” as to which Congress had not clearly delegated authority to the EPA. But a close reading of the relevant statute, Section 111 of the Clean Air Act, indicates that the EPA has *no authority* to issue legally binding emissions standards for existing stationary sources—period.

So the Court did not have to create

a novel legal doctrine to limit the authority of the Biden administration to adopt something like the Clean Power Plan. It could have reached the same result simply by paying close attention to the language of the statute that purportedly granted such authority. This second of five guest blog posts on the Supreme Court's decision makes this case (the first one suggested that the decision was an advisory opinion).

We need to know a bit about the statute. When Congress adopted the modern form of the Clean Air Act in 1970, the central regulatory mechanism was a classic exercise in cooperative federalism. The act required the EPA, in Section 109, to promulgate National Ambient Air Quality Standards (NAAQS), setting forth permissible limits on the ambient concentration of certain key air pollutants. Once these NAAQS were established, the states were required, under Section 110, to develop state implementation plans (SIPs), setting forth a strategy for achieving the federal standards.

The federal agency was directed to review the SIPs to make sure that they were adequate, and if a state utterly failed to promulgate an adequate SIP, the EPA could step in and promulgate a plan for the state. But the core idea was that the federal government would set the air quality standards and the states would have substantial discretionary authority to develop a regulatory plan to meet these standards, taking into account the circumstances of each state.

The Clean Air Act also gave the EPA authority to set *direct* control standards on sources in a number of situations, including emissions standards for hazardous air pollutants and for mobile sources such as automobiles. And, of relevance to the issue in *West Virginia*, Congress gave the EPA authority, in Section 111, to establish direct controls on certain categories of *new* stationary sources discharging pollutants that can endanger public health and welfare.

Having instructed the EPA to

establish the NAAQS and having authorized the EPA to create direct emissions standards for hazardous pollutants and mobile sources, why did Congress also give the EPA authority to regulate *new* stationary sources? The answer is grounded in industrial policy rather than environmental policy.

Many members of Congress were concerned that states with relatively clean air would use the discretion they enjoyed in establishing SIPs to set relatively lax environmental standards, in an effort to induce industry to relocate to the state. To prevent this outflow of industry from dirty air states to clean air states, Congress directed the EPA to establish mandatory emissions standards for new stationary sources of air pollution that would apply everywhere in the nation. Since new sources would have to comply with these standards anywhere, there would be no incentive to relocate for environmental reasons.

A glance at Section 111 confirms that the overwhelming focus is on new sources. The section is titled "Standards of Performance for New Stationary Sources," and most subsections deal exclusively with new and modified sources. Only one subsection—Section 111(d)—addresses existing stationary sources. Indeed, it is a bit of a puzzle as to why existing sources were mentioned at all in Section 111. Until the Obama administration adopted the Clean Power Plan, subsection (d) rested in unremarked obscurity.

In any event, the key point for present purposes is that the EPA is given very different authority to regulate new stationary sources as opposed to existing sources. Under Section 111(b) (1)(B), which applies to new sources, the EPA is instructed to "promulgate" (and periodically revise) "standards of performance" for new sources. The statute expressly requires that these EPA-promulgated standards be developed using notice-and-comment rulemaking, which is required under



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the Administrative Procedure Act (APA) when agencies issue legally binding legislative rules.

In contrast, under Section 111(d), the EPA is instructed to “prescribe regulations which shall establish a procedure similar to that provided by [Section 110] under which each State shall submit to the Administrator a plan which . . . establishes standards of performance for any existing source for any air pollutant [subject to exceptions].” Note that, under subsection (d), it is the states, not the EPA, that “establis[h]” the “standards of performance.” The EPA’s authority is to establish procedural regulations about the manner in which the states are to submit to the EPA the standards they are establishing.

There is no mention of notice-and-comment rulemaking in Section 111(d). Procedural regulations are exempt from notice-and-comment under the APA. But substantive regulations having the force of law generally are not. All of this confirms that the EPA was not given authority to issue binding nationwide standards in this context.

Note, too, that subsection (d) expressly analogizes the state standards for existing sources to the SIPs that the states establish under Section 110. As with the SIPs, the EPA is instructed to review the state standards to see if they are “satisfactory,” and if a state utterly defaults, the EPA is given authority to prescribe a federal standard in the state for existing stationary sources. But the EPA’s authority is limited to reviewing the specific plans developed by each state, and it can override these plans only on a finding that a specific state plan is unsatisfactory.

The conclusion is inescapable that the EPA has no delegated authority to issue legally binding rules that establish, on a nationwide basis, standards of performance for existing stationary sources. This straightforward reading of the statute provides an ample basis for concluding that the Obama EPA had no authority to issue the Clean Power Plan.

For that matter, the Trump EPA had no authority to issue the Affordable Clean Energy rule either.

In the regulatory proceedings developing the CPP, the Obama EPA offered only one statutory argument in support of its authority to impose a binding standard of performance on all existing power plants. The act, in its current incarnation in Section 111(a)(1), defines “standard of performance” to mean the “best system of emission reduction” (BSER) that “the Administrator [of the EPA] determines has been adequately demonstrated.” The same term—“standard of performance”—appears in both section 111(b)(1)(B), delegating authority to the EPA to “promulgate” standards for new sources, and in section 111(d), directing the states to submit plans establishing standards of performance for existing sources.

But the determination by the EPA that a standard has been “adequately demonstrated” can be made *ex post*, when the EPA reviews the standards set by each state, as well as *ex ante*, in the federal agency’s promulgating national standards for new sources. There is no language in the statute suggesting that the EPA must determine which standards of performance have been adequately demonstrated *in advance* of the exercise of authority by states to establish standards of performance for existing sources, let alone for its making such standards legally binding.

Although the EPA has no authority to issue binding regulations setting emissions standards for existing sources, presumably it has the authority to issue guidance documents (“general statements of policy”) setting forth its advice to the states about how to regulate existing sources. But if the EPA followed a practice of disapproving state plans for failure to conform to the EPA’s advice, the agency would be vulnerable to having a court characterize its advice as a binding rule that it has no statutory authority to make.

There is no mention in *West Virginia* of the EPA’s delegation deficit under Section 111(d). Quite to the contrary, Chief Justice John G. Roberts, Jr., in setting forth the statutory and regulatory background of the case, completely endorsed the EPA’s view of its authority under section 111(d):

Although the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section 111(d). The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does so by again determining, as when setting the new source rules, “the best system of emission reduction . . . that has been adequately demonstrated for [existing covered] facilities.” The States then submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA.

(Citations of regulations omitted.)

This passage will be quoted with glee by the EPA in any future controversy over its authority to issue binding nationwide regulations on existing sources of pollution. This is highly ironic. In its eagerness to adopt the “major questions” doctrine designed to limit the type of regulation that agencies can adopt without clear congressional approval, the Court ratifies a conception of the EPA’s authority over existing sources that is not supported by a careful reading of the statute.

All of which suggests the desirability, to which I will return in the last entry (after the forthcoming third and fourth posts), of a court’s carefully considering the actual authority delegated to agencies, as opposed to ruminating about “major questions.”

3. WEST VIRGINIA V. EPA: WHAT WOULD HAVE BEEN THE RESULT UNDER THE CHEVRON DOCTRINE?

The Court did not engage with the deference doctrine directly (as opposed to simply creating an exception to it). How, in fact, would the case have been decided under *Chevron*?

The Supreme Court's June 2022 decision in *West Virginia v. EPA* will be remembered for its endorsement of the "major questions doctrine." The new doctrine, as would have been obvious to all participating justices, is designed to function as an exception to the *Chevron* doctrine, so named for *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984).

By contrast, this would not be apparent to the casual reader, since *Chevron* was never mentioned by Chief Justice John G. Roberts, Jr., in his opinion for the Court, or in the enthusiastic concurrence by Justice Neil M. Gorsuch. Justice Elena Kagan mentioned it in passing in dissent, but not to suggest that the Court should have reviewed the matter under *Chevron*.

Silence about *Chevron* is the order of the day in the Supreme Court. The Court last applied the doctrine in 2016, and it appears that the Court cannot decide what to do about it, although it still gets invoked with some frequency in the lower courts.

In order to assess the significance of the major questions exception, it will be useful to consider how the case would have been decided under the *Chevron* doctrine, as it came to be understood by the Court in the run up to *West Virginia*. After all, one cannot fairly judge an exception without understanding the doctrine from which the exception is carved out. This is my purpose in this third blog post in this five-post guest series.

As detailed in my recent book, *The Chevron Doctrine: Its Rise and Fall*,

and the Future of the Administrative State (Harvard University Press 2022), the *Chevron* doctrine has undergone significant revision over its almost 40-year life span. In its classical formulation, the doctrine was understood to require courts to accept reasonable agency interpretations of ambiguities in the statutes the agency administers. The Court narrowed the doctrine in *United States v. Mead Corporation* (2001): the agency must act with the "force of law" in order to be eligible for *Chevron* deference, as opposed to some lesser degree of deference.

But then the Court, in *City of Arlington v. FCC* (2013), adopted a restrictive interpretation of *Mead* that effectively expanded the *Chevron* doctrine. The Court held in *Arlington* that it is not necessary to identify a delegation of power to act with the force of law with respect to the specific statutory provision in question; it is enough that Congress has in general terms authorized the agency to act with the force of law. In fact, *Arlington* went even further, holding that *Chevron* applies to an agency's interpretation of the scope of its authority, as opposed to merely interpretations of statutory terms that clearly fall within the agency's delegated powers. Chief Justice Roberts dissented from both propositions, which may help explain his adoption of the major questions doctrine in *West Virginia*.

If we take *City of Arlington* as the Court's last (i.e., most recent) word on the *Chevron* doctrine, it seems that a reviewing court should accept either the Obama administration's Clean Power Plan or the Trump administration's Affordable Clean Energy rule as a permissible interpretation of Section 111(d) of the Clean Air Act.

Let's start with the Obama administration's CPP. Under *Arlington*, it would not matter that Congress delegated authority to the EPA to act with the force of law with respect to new stationary sources of air pollution

but not with respect to existing stationary sources (see the second post in this series). All that would be required to trigger *Chevron* deference is that Congress delegated authority to the EPA to act with the force of law somewhere in the Clean Air Act, as of course it did with respect to new sources. And the fact that the CPP expanded the EPA authority over existing power plants in an unprecedented fashion would not matter, so long as one could point to ambiguities in the statute that could be interpreted to support this.

As the tortured D.C. Circuit decision that became *West Virginia* reveals, it is possible to interpret the statutory definition of standard of performance—the "best system of emission reduction"—to authorize a standard based on requiring individual plants to participate in a cap-and-trade system. After all, a cap-and-trade approach is a "system," and none of the other factors that the states are directed to consider with respect to existing plants (such as "cost" and the remaining "useful life" of a plant) explicitly precludes such an approach.

But as the old saw goes, what is sauce for the goose is sauce for the gander. The Trump administration's Affordable Clean Energy rule, or ACE, should also pass muster under the *Chevron* doctrine, as interpreted in *Arlington*.

Again, *Arlington* requires that the reviewing court wave away any objections based on the EPA's lack of rulemaking authority over existing sources, or objections based on the implications of that interpretation for the scope of agency authority. So the question would boil down to whether the Trump administration's interpretation of "best system of emission reduction" was itself permissible.

The Trump EPA explained that emission standards under Section 111 had always been based on available

technology that could be adopted at the site of each individual source—inside the “fence line” of the plant was the expression adopted. Invoking the idea that historical practice often contains embedded wisdom, the Trump EPA concluded that the statute should be interpreted as requiring a standard set in the tried-and-true fashion. This, too, seems like an interpretation within the bounds of reason, and it, too, should be upheld under *Chevron*.

The fact that the *Chevron* doctrine, as it stood after 2013, would support either the Obama or the Trump approaches to regulating carbon emissions from existing fossil-fueled power plants highlights an important weakness in the doctrine. In an era when Congress frequently fails to legislate on important policy questions, *Chevron* can generate significant regulatory instability as policy shifts from one presidential administration to another.

Thus, we have witnessed climate change policy oscillating between skepticism (Bush 43) to enthusiasm (Obama) back to skepticism (Trump) and once more to enthusiasm (Biden). This makes it difficult to gain traction on the issue and for the relevant actors to engage in long-range planning, which is absolutely vital in the electric power industry.

Similar shifts have occurred with respect to so-called “net neutrality” requirements for internet service providers, federal authority over the filling of wetlands, and the provision of information about abortion providers by family-planning clinics. In each case, regular shifts in policy as the Executive changes hands have been abetted by the *Chevron* doctrine.

The fact that the *Chevron* doctrine, as interpreted by *Arlington*, would allow the EPA to launch a transformation of the electric power industry without any authorization from Congress points to a more serious concern. As my new book argues, *Chevron* has played a role in facilitating a major shift in power from

Congress to the administrative state. Since the Constitution contemplates that Congress will enact laws laying down federal policy and the Executive will assure that the laws are faithfully executed, this represents a troubling distortion of the plan of government reflected in the founding document.

Whether the major questions doctrine represents a workable corrective to this trend is the subject of my fourth and next blog post.

4. WEST VIRGINIA V. EPA: QUESTIONS ABOUT “MAJOR QUESTIONS”

The major questions doctrine inverts the *Chevron* doctrine, is indeterminate, and, as a practical matter, will encourage courts to engage in something more akin to political punditry than law.

West Virginia v. EPA is clearly designed to impose new limits on federal agencies insofar as they seek to rewrite the scope of their authority. The Supreme Court’s attention to the scope of agency authority is welcome. As noted in the immediately prior post (the third in this five-post guest series), the Court held in *City of Arlington v. FCC* (2013) that federal courts must give *Chevron* deference to an agency’s interpretation of the scope of its authority. This would effectively give agencies the power to determine the dimensions of their regulatory mandate unless it is clear that Congress has not conferred authority on the agency to act.

West Virginia turns this *Chevron* doctrine principle on its head: At least with respect to “major questions,” an agency will be presumed to have no authority to act unless the court finds that Congress “clearly” has conferred authority on the agency to decide the matter in question.

West Virginia thus establishes a “two-step” standard of review very different from the “two-step” standard commonly associated with *Chevron*. As formulated in *West Virginia*, a court is supposed to

ask, first, whether the agency is seeking to regulate in a manner that presents a “major question” of “economic and political significance.” If the answer is “Yes,” the court asks, second, whether there is a “clear statement” by Congress conferring such authority. In the absence of a clear statement, the agency will be held to have exceeded the scope of its authority. (*West Virginia* does not say what happens if the answer to the first question is that the question is “minor.”)

Before considering the workability of the major questions doctrine, it is worth asking whether, as Justice Neil M. Gorsuch suggested in his concurring opinion, *West Virginia* is a way station on the road to the revival of the nondelegation doctrine, i.e., the idea that under the Constitution only Congress has the power to legislate. It helps here to distinguish between two nondelegation doctrines.

One such doctrine says that Congress may not delegate too much discretion to nonlegislative actors such as agencies because this would constitute a delegation of legislative power. This is the source of the requirement (which has proved to be very difficult to enforce) that Congress must include in any delegation an “intelligible principle” for an agency or other delegate to follow.

The major questions doctrine does not enforce the nondelegation principle in this sense. It is essentially contradictory to say that Congress cannot delegate too much discretion to an agency unless Congress does so clearly.

The other nondelegation doctrine says that only Congress has authority to delegate power to act with the force of law to agencies or other nonlegislative actors. In other words, an agency—or for that matter the president—has no inherent authority to regulate unless this power has been conferred by Congress. This principle has proved to be much easier to enforce—indeed, it

is enforced every time a court strikes down an agency action for violating a clear limitation found in the statute under which the agency operates.

West Virginia's major questions doctrine is designed to reinforce this second version of nondelegation. It is imperative to enforce this version of nondelegation in *some* way if the separation of powers and the principle of legislative supremacy are to continue to have any meaning. And there is nothing contradictory about saying that an agency has no authority to act unless the power to do so has been clearly delegated by Congress.

The more telling objection to the major questions doctrine, as the doctrine is articulated in *West Virginia*, is that it either will prove unworkable or—worse—will invite judges to overturn agency initiatives based on reasons other than the court's best judgment about what Congress has actually authorized the agency to do.

The major questions doctrine did not come out of nowhere. But in the Court's previous decisions that made some reference to "major questions," the idea was advanced in the context of a careful exercise in statutory interpretation. The Court took a close look at the agency's statute and concluded that the agency was either exceeding, or declining to exercise, authority conferred by Congress. Then, as a kind of afterthought or rhetorical flourish, the Court would observe that it was unlikely that Congress ever imagined the agency's taking the step it was proposing to take—given the "economic and political significance" of the agency action.

But in *West Virginia*, the inquiry into whether the question is "major" comes first, and the examination of the statute is limited to searching for a "clear statement" authorizing such action. The ultimate reason for this, as I suggested in the first blog post, is that the Obama administration's Clean Power Plan was not before the Court, and there

was no Biden plan yet in existence. Consequently, the Court was forced to opine in the abstract about whether "generation shifting" or a standard based on a cap-and-trade system was a "major question."

This is essentially to ask the federal courts to engage in a kind of political punditry. In determining whether something is a "major question," the factors mentioned by the Chief Justice, and by Justice Gorsuch in his concurring opinion, include such things as whether the matter is politically controversial, whether large numbers of dollars are involved, whether large numbers of people are affected, whether Congress has sought and failed to legislate on the matter, whether the question takes away authority from state governments, and whether the agency action is unprecedented or departs from settled agency practice.

There are several problems with this approach. One is the extreme indeterminacy of the inquiry—something that is endemic to any inquiry that posits a large number of variables of no specified weight. The net effect is a kind of all-things-considered test that confers enormous discretion on a court to decide whether the agency does or does not have authority over the relevant issue.

A related problem is what is meant by a "clear statement" from Congress conferring the required authority. Does this mean that authority must be conferred in the text of the statute? Or can it be "clear" based on the context? And just how "clear" is clear?

Another problem is how lower courts will respond to the major questions doctrine. Some lower court judges will undoubtedly regard the new doctrine as an invitation to overturn agency rules they do not like, by declaring the question "major." Other judges will just as surely disagree. The new doctrine thus raises the prospect of all sorts of confusion and conflicts in the circuits breaking out, which the Supreme Court

does not have the decisional capacity to sort out.

Finally, the major questions doctrine ignores the most important insight of the *Chevron* doctrine. Justice John Paul Stevens pointed out in *Chevron* that when statutory interpretation ultimately turns on a policy dispute, agencies have two big advantages over courts: agencies are accountable to elected officials and thus indirectly to the people, and they have more experience with the statute in question and the problems it is designed to solve.

In theory, the major questions doctrine means that really important policy questions should be decided by Congress, which, of course, is as it should be.

But what we face all too often today is a question of the second best. Yes, Congress is the *best* choice for resolving controversial policy questions. But if Congress does not want to face the music, what is the second-best choice: an agency or a court? The major questions doctrine portends a world in which the most consequential questions—the most controversial and those implicating the most significant conflicting interests—will be made by unelected courts having no expertise. This is, let us say, a questionable allocation of authority over regulatory policy.

My fifth and final post will discuss the best way to preserve the separation-of-powers principle of legislative supremacy, while preserving the understanding that courts are charged with interpreting the law rather than meddling in policy. It is to require courts to determine in each case, as a matter of independent judgment, whether Congress has *actually delegated* authority to the agency to decide a particular question.

To be sure, careful interpretation of the statute requires more work by judges. No presumptions, no clear-statement shortcuts. But a central reason why we have federal courts,

and give their judges life tenure, is to answer such difficult questions.

5. WEST VIRGINIA V. EPA: GETTING TO ACTUAL DELEGATION

The Court should assimilate the “major questions” doctrine of *West Virginia v. EPA* and earlier precedents—including *Chevron* and what came even before that—to an approach that asks whether Congress has made an actual delegation. Only this will serve the relevant separation-of-powers principle.

Both the *Chevron* doctrine and *West Virginia v. EPA* are based on ideas about the delegation of interpretive authority from Congress to administrative agencies. *Chevron* introduced the idea of “implicit” delegations, and the doctrine spawned by it eventually held that any ambiguity in an agency statute is an implicit delegation. *West Virginia* is effectively an unacknowledged carve out. Without the majority’s mentioning *Chevron*, the case posits that when a “major question” is involved, a delegation must take the form of a clear statement; presumably, only express delegations or something close to this will count.

Both positions are extreme. The idea that any ambiguity is a delegation transfers too much power to the administrative state. The view that only express delegations will do for major questions concentrates too much power in reviewing courts.

The better position, as I have suggested in *The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State* (Harvard University Press 2022), is that courts should condition any strong form of deference to agency interpretations on a finding that Congress has *actually delegated* authority to the agency to resolve the issue. This means more than finding ambiguity; courts must carefully interpret the statute and conclude that Congress left a gap for the agency to fill.

But it does not mean the delegation must be express; the delegation can be implicit but actual. For example, when Congress delegated authority to the EPA to promulgate emissions standards for new stationary sources (by the agency’s determining the “best system of emissions reduction”), this was an implicit but actual delegation to the agency to interpret the meaning of “best system” for that purpose (Section 111(b)(1)(B) of the Clean Air Act).

There are multiple reinforcing reasons for requiring courts to find an actual delegation before deferring in a strong sense to an agency’s interpretations. This was the universal assumption before *Chevron*. See, e.g., *Social Security Bd. v. Nierotko* (1946) (“An agency may not finally decide the limits of its statutory power. That is a judicial function.”). It is required by the Administrative Procedure Act. See 5 U.S.C. § 706(2)(C) (authorizing courts to set aside agency action “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”). It is, as I argue in chapter 3 of *The Chevron Doctrine*, most likely what Justice John Paul Stevens had in mind in *Chevron* when he concluded that Congress had left a gap in the Clean Air Act about the meaning of “stationary source” and implicitly delegated authority to the EPA to fill that gap.

Importantly, independent judicial judgment about the existence of an actual delegation is critical to preserving the separation-of-powers principle, reaffirmed in *West Virginia*, that (in the words of that decision) “[a]gencies have only those powers given to them by Congress.”

Tasking courts with determining, as a matter of independent judgment, that there has been an actual delegation to the agency requires courts to do something as to which they have a comparative advantage: statutory interpretation. There is no simple test for identifying the limits of agency authority, no escape from a court’s

examining all relevant aspects of the statutory language, structure, purpose, and the evolution of the statute over time.

Sweeping presumptions, such as *any ambiguity = delegation* or *any major question = no delegation*, will only disserve the underlying separation-of-powers principle, which is that Congress has exclusive authority to decide the scope of agency authority.

This does not mean that courts must proceed in a purely ad hoc or unguided fashion. As I discuss in the new book (chapter 11), it is possible to identify a number of rule-like principles here. Express delegations, when they exist, should be enforced according to their terms. Issues as to which some other entity exercises decisional authority should not qualify as a delegation to the agency. Agencies have no delegated authority to override incontrovertible statutory limits, as when the EPA sought to interpret “250 tons” of air pollutant to mean “100,000 tons.” See *Utility Air Regulatory Group v. EPA* (U.S. 2014).

There are also situations that should qualify as “red flags,” requiring courts to engage in a more searching examination of the scope of agency authority. One is when an agency adopts an interpretation that deviates from the settled understanding of the scope of its authority, as when the FDA decided that it had authority to regulate tobacco products after consistently disclaiming such power. *FDA v. Brown & Williamson Tobacco Corp.* (U.S. 2000). Another is when an agency adopts an interpretation that sharply expands or contracts the scope of its authority, as when the FCC decided that its authority to “modify” tariff-filing requirements permitted it to deregulate much of the long-distance telephone industry. *MCI v. AT&T* (U.S. 1994).

These sorts of red flags should not be regarded as rule-like constraints on agency authority, but they should alert courts to the need to engage in closer scrutiny of the statute in



“... it would be desirable if the Court, in some future encounter with a question about the scope of agency authority, did not proceed as if *West Virginia* established a hard-edged clear statement rule ...”

order to determine if the agency is either overstepping the bounds of its delegated authority or abdicating a type of function it is expected to perform.

The appropriate use of these red flags brings us back to *West Virginia* and the major questions doctrine. Decisions such as *Brown & Williamson*, *MCI v. AT&T*, and *Utility Air* were precedents heavily relied upon by Chief Justice John G. Roberts, Jr., in support of recognizing a major questions doctrine. The crucial difference, however, is that in these previous decisions, observations about the “economic and political significance” of the agency interpretation, or its potential for “radical or fundamental change,” or its “unprecedented” nature were offered in the course of the Court’s exercise of traditional statutory interpretation to determine the scope of the agency’s authority.

The provenance of the major

questions idea gives rise to hope that *West Virginia* can be assimilated to the complex of norms about statutory interpretation—which is to say, to the world of conventional interpretation, as displayed in the precedents upon which *West Virginia* draws.

To be more specific, it would be desirable if the Court, in some future encounter with a question about the scope of agency authority, did not proceed as if *West Virginia* established a hard-edged clear statement rule, requiring first an abstract determination (based on multiple factors of uncertain weight) whether the question is “major” and, if so, then demanding a clear statement from Congress authorizing the agency to address the issue.

It would be better to treat *West Virginia* as requiring, in every case, that the agency possesses actual delegated authority over a question before the court will defer to its interpretation. And the circumstances

that led the Supreme Court to deem the question in *West Virginia* “major” should be cited as ones that *alert* the reviewing court to the need for a particularly careful examination of the agency’s claim of authority.

We live in a perilous world in which the rule of law is vulnerable to being crushed in a universal game of political “hardball.” The *Chevron* doctrine was a notable attempt to distinguish the realm of “law” from that of “policy,” and to define the role of the courts as being the enforcers of law, with agencies given primacy in the realm of policy.

Over time, as I set forth at length in my book, the *Chevron* doctrine proved to have a number of shortcomings. But the Court, in its efforts to define something better, needs to tread cautiously, lest it make the ideal of the rule of law, and the courts’ role in enforcing it, more difficult to attain than ever before. ■