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## West Virginia v. EPA

Troy C. Book

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# WEST VIRGINIA V. EPA

TROY C. BOOK<sup>1</sup>

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## INTRODUCTION

In 2022 the Supreme Court decided *West Virginia v. EPA*. The *West Virginia* case changed the way administrative agencies can regulate industries.<sup>2</sup> *West Virginia* dealt with the way the EPA interpreted the Clean Air Act.<sup>3</sup> The Clean Air Act authorizes the EPA to regulate power plants by setting a standard of performance in accordance with 42 U.S.C. § 7411.<sup>4</sup> The goal of having the EPA set a standard of performance for each power plant was to reduce pollution by having them operate more efficiently.<sup>5</sup> In 2015, the EPA issued a new rule called the best system of emission reduction (BSER) for existing and new coal-fired power plants.<sup>6</sup> The BSER required the existing coal plants to reduce their coal burning method of producing electricity by requiring them to use more natural gas, wind, or solar electricity power methods.<sup>7</sup>

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1. Candidate for Doctor of Jurisprudence, University of Tennessee College of Law, May 2024; Tennessee Law Review, Second-Year Editor.  
2. *West Virginia v. EPA*, 182 S. Ct. 2587 (2022).  
3. *West Virginia*, 182 S. Ct. at 2600.  
4. *Id.* at 2599.  
5. *Id.*  
6. *Id.*  
7. *Id.*

The EPA issued the BSER rule to target carbon dioxide pollution from new and existing power plants.<sup>8</sup> The BSER for existing coal-fired power plants had three building blocks.<sup>9</sup> First, power plants need to improve their heat rate to burn coal more efficiently.<sup>10</sup> The second building block was a shift from coal-fired plants to natural gas plants for electricity production.<sup>11</sup> The third building block was a shift away from both coal and gas to new low or zero-carbon generating sources of wind and solar.<sup>12</sup> The three building blocks each build on one another until the EPA reached its BESR of having mostly low-generating carbon dioxide energy sources.<sup>13</sup> However, these new rules never went into effect because the Supreme Court issued a stay to prevent the rule from taking effect.<sup>14</sup> A court of appeals took up the issue but a new Presidential administration took over and requested the litigation be held while it reconsidered the Clean Power Plan (CPP).<sup>15</sup> The Trump administration repealed the CPP because it allowed the EPA to act in excess of its statutory authority and is a generational shifting measure that triggered the Major Question doctrine (MQD).<sup>16</sup> In response to the Trump change, several States and private parties immediately filed a petition for review in the D.C. Circuit challenging the repeal of the CPP.<sup>17</sup> The D.C. Circuit held the Trump administration had mistakenly read the Clean Air Act in saying it did not allow for generation shifting measures.<sup>18</sup> Shortly after the D.C. Circuit issued its ruling, the Biden administration took office.<sup>19</sup> The EPA asked the D.C. Circuit to stay the issuance of its mandate to keep the CPP from immediately going back into effect while the EPA considered promulgating a new rule.<sup>20</sup> This led to more parties challenging and the Supreme Court granted certiorari.<sup>21</sup>

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8. *Id.* at 2602. The EPA started to target carbon dioxide because of the public danger it posed by causing climate change.

9. *Id.* at 2603.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 2604.

15. *Id.*

16. *Id.*

17. *Id.* at 2605.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

The Supreme Court used the MQD to reach its holding in *West Virginia*. The Court using the MQD held that Congress could not have intended the EPA to make a major policy decision that would greatly change the power grid without clear authorization.<sup>22</sup> The use of the MQD has left many wondering about the current condition of the administrative state and whether this new doctrine will constrain future efforts to use science-based regulation to solve public dangers.<sup>23</sup> The rest of this case note will cover the following: Part II will address the central issue in *West Virginia*; Part III will show how the MQD developed; Part IV will be an analysis of *West Virginia*; Part V will cover the policy implications of the MQD; and Part VI will be the conclusion.

## I. THE RISE OF THE MAJOR QUESTION DOCTRINE

The central issue in *West Virginia* was the shift from using the Chevron doctrine to the MQD. Why is that shift in doctrinal approach important? That shift is important because when courts used the Chevron doctrine, courts treat statutory silence or ambiguity as an implicit delegation of authority from Congress to the agency.<sup>24</sup> The Chevron doctrine presumes that when Congress leaves ambiguity in a statute meant for implementation by an agency, Congress understood that the ambiguity will be resolved by the agency.<sup>25</sup> Unlike the Chevron doctrine, the MQD presumes that Congress does not vest significant policy-making authority in agencies because Congress should not do so.<sup>26</sup> In other words, courts using the MQD expect Congress to clearly delegate power that will have great political or economic significance. Courts will not look upon silence and ambiguity favorably when using MQD.<sup>27</sup> The central issue that *West Virginia* raise is whether an agency has the statutory authority

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22. *Id.* at 2608.

23. James Goodwin et al., *In the Wake of West Virginia v. EPA: Legislative and Administrative Paths Forward for Science-Driven Regulation* 4 (2022), <https://www.ucsusa.org/resources/west-virginia-vs-epa#ucs-report-downloads>

24. Thomas B. Griffith and Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. F. 693, 695 (2022).

25. Griffith and Haley, *supra* note 23, at 696.

26. *Id.*

27. *Id.*; *West Virginia*, 182 S. Ct. at 2609 (To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to “clear congressional authorization” for the power it claims.)

to act a certain way when Congress is silent on a matter or leaves ambiguity.<sup>28</sup>

## II. THE DEVELOPMENT OF THE MAJOR QUESTIONS DOCTRINE

The Supreme Court has developed the MQD over several decades of case law with six cases. Those five cases are *MCI Telecomms. Corp. v. AT&T*, *FDA v. Brown & Williamson Tobacco Corp.*, *Gonzales v. Oregon*, *Utility Air Regulatory Group v. EPA*, *King v. Burwell*, and *NFIB v. OSHA*.<sup>29</sup>

### A. *MCI Telecommunications Corp. v. AT&T*

In *MCI Telecommunications*, the Supreme court had to consider if the FCC had correctly interpreted an ambiguous statute as giving them the power to eliminate tariff filing.<sup>30</sup> The statute at issue required common carriers to file tariffs with the FCC but also allowed the FCC to modify requirements.<sup>31</sup> The Supreme Court held the FCC's reading was outside the bounds of Congress's intent when it crafted the statute.<sup>32</sup> The Court held, "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, regulated to agency discretion -- and even more unlikely that it would achieve that through such a subtle device as permission to "modify" rate-filing requirements."<sup>33</sup> The Supreme Court did not have an issue with the FCC doing minor changes, but the Court took issue with the FCC doing "a whole new regime" change that Congress had not considered.<sup>34</sup> This was the inception of the MQD.

### B. *FDA v. Brown & Williamson Tobacco Corporation*

The second time the MQD can be trace back to is in *Brown & Williamson*. In 1996, the FDA claimed that tobacco products were

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28. Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511 (1989).

29. 512 U.S. 218 (1994); 529 U.S. 129 (2000); 546 U.S. 243 (2006); 573 U.S. 302 (2014); 576 U.S. 473 (2015); 142 S. Ct. 661 (2022).

30. Natasha Brunstein & Richard L. Revesz, *Mangling the Major Question Doctrine*, 74 ADMIN. L. REV. 217, 224 (2022).

31. *Id.*

32. *Id.*

33. *MCI Telecomms. Corp. v. AT&T*, 512 U.S. at 231.

34. Brunstein & Revesz, *supra* note 30, at 525.

under its jurisdiction based on its new interpretation of the Food, Drug, and Cosmetic Act.<sup>35</sup> As a result of this new interpretation, the FDA enacted a regulation to restrict the sale of tobacco products to minors.<sup>36</sup> Just as the Court had rejected the FCC interpretation, the Supreme Court rejected the FDA's new interpretation. Part of the reasoning for rejecting the FDA's interpretation was for forty-plus years, Congress had rejected several bills that would have given the FDA jurisdiction over tobacco products.<sup>37</sup> Thus the Court held, "The marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare."<sup>38</sup> Therefore, Congress would not be fine with the FDA having power over an industry with such great economic and political significance.<sup>39</sup>

### *C. Gonzales v. Oregon*

In *Gonzales v. Oregon*, the Supreme Court invoked the logic used in *Brown & Williamson*. In 2006, the Oregon Legislative branch passed the Death with Dignity Act.<sup>40</sup> The act allowed physicians to administer drugs to terminally ill patients who requested to die with dignity.<sup>41</sup> A few years after Oregon passed the Death with Dignity Act, the Attorney General (AG) issued an interpretive rule based on the Controlled Substances Act (CSA). The AG claimed these controlled substance drugs physicians were administering served no "legitimate medical proposes."<sup>42</sup> Just like the Court held in *Brown & Williamson*, it held here:

The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable. Congress . . . does not alter the fundamental details of a regulatory scheme in vague

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35. *Id.*

36. *Id.*

37. Brunstein & Recesz, *supra* note 30, at 526.

38. *FDA v. Brown & Williamson Tobacco Corp.*, 546 U.S. at 137.

39. *Id.*

40. Brunstein & Recesz, *supra* note 30, at 528.

41. *Id.*

42. *Id.*

terms or ancillary provisions--it does not . . . hide elephants in mouseholes.<sup>43</sup>

The AG was reaching when he issued his interpretive rule using the CSA. The Supreme Court does not allow agencies to make major political and economic changes absent clear language.

#### D. *Utility Air Regulatory Group v. EPA*

The issue in the *Utility Air Regulatory Group* was the EPA's interpretation of the Prevention of Significant Deterioration (PSD) program and Title V of the Clean Air Act to eliminate greenhouse gases.<sup>44</sup> Stemming from the EPA's interpretation of the PSD, it created a tailoring rule that changed the threshold for emitting greenhouse gases to only industries that emitted at least 75,000 to 100,000 tons per year.<sup>45</sup> And the EPA enacted the tailoring rule because the clear meaning of PSD if followed would cause an absurd result.<sup>46</sup> The Supreme Court rejected the EPA's logic.<sup>47</sup> The court held that "EPA's interpretation is [ ] unreasonable because it would bring about an enormous and transformative expansion in the EPA's regulatory authority without clear congressional authorization."<sup>48</sup> So, just as in the previous four cases, the Court does not allow agencies to make major political and economic changes absent clear language.

#### E. *King v. Burwell*

In *King v. Burwell*, the IRS was dealing with a discrepancy as to whether a tax credit apply to only federal exchanges or did it also apply to state exchanges.<sup>49</sup> The IRS promulgated a rule to solve the discrepancy by making tax credits available to both federal and state exchanges.<sup>50</sup> The Supreme Court rejected the IRS's solution by holding:

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43. *Gonzales v. Oregon*, 546 U.S. at 267.

44. *Brunstein & Rechez*, *supra* note 30, at 530.

45. *Id.*

46. *Id.* at 531. The absurd result was the sheer increase in the number of industries the EPA would now have to regulate.

47. *Id.*

48. *Utility Air Regulatory Group v. EPA*, 573 U.S. at 324.

49. *Brunstein & Rechez*, *supra* note 30, at 332.

50. *Id.*



The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. [Thus,][w]hether those credits are available on Federal Exchanges is a question of deep “economic and political significance” . . . ; had Congress wished to assign that question to an agency, it surely would have done so expressly.<sup>51</sup>

For the fifth time, the Supreme Court invoked the logic that Congress does not give agencies great economic and political power through silence or ambiguity.

#### F. *NFIB v. OSHA*

In *NFIB v. OSHA*, OSHA issued a mandate that would require around 84 million people to get the Covid-19 vaccines. OSHA based its authority to pass this mandate on the Occupational Safety and Health Act of 1970.<sup>52</sup> The act tasked OSHA with ensuring safe and healthful working conditions.<sup>53</sup> And OSHA can promulgate standards that are reasonably necessary or appropriate to provide a safe work environment.<sup>54</sup> The act also provides an “emergency temporary standards” where OSHA could enact standards quicker than the normal process.<sup>55</sup> In the wake of the Covid-19 pandemic, OSHA published its vaccine mandate on November 5, 2021.<sup>56</sup> The Supreme Court held that OSHA had overstepped its authority with its vaccine mandate by saying:

It is telling that OSHA . . . has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This “lack of historical precedent,” coupled with the breadth of authority that the Secretary now claims, is a “telling indication” that

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51. *King v. Burwell*, 576 U.S. at 485-86.

52. *NIFB v. OHSA*, 142 S. Ct. at 663

53. *Id.*

54. *Id.*

55. *Id.* For OSHA to do the emergency temporary standard, OSHA must show “(1) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (2) that the emergency standard is necessary to protect employees from such danger.”

56. *Id.* at 664.

the mandate extends beyond the agency's legitimate reach.<sup>57</sup>

Again, the Supreme Court focused heavily on the fact that this agency's action had far-reaching implications that Congress would not have dealt with without a clear expression.

The common theme in the development of the MQD through these six cases is Congress does not delegate an enormous and transformative expansion of an agency's power that will have huge economic and political significance through silence or ambiguity. Congress does not hide elephants in mouseholes.<sup>58</sup>

### III. ANALYSIS

As discussed in Part I, the EPA issued a new rule called the "best system of emission reduction" (BSER), and the BSER had three building blocks.<sup>59</sup> The EPA's three building blocks would create a power grid system of mostly low-generating carbon dioxide energy sources.<sup>60</sup> The reason there is a case here in *West Virginia* is the three building blocks caused a huge economic and political impact. As the Concurrence points out, that huge economic and political impact was the closing of dozens of power plants, the elimination of thousands of jobs by 2025, and consumers' electricity costs would increase by \$200 billion.<sup>61</sup> To the Court those three factors constitute a major political and economic change. As the Supreme Court said in *West Virginia*, "We presume that "Congress intends to make major policy decisions itself."<sup>62</sup> So, the Court doubted Congress had granted EPA the power to shut down numerous power plants, eliminate thousands of jobs, and increase consumers' electricity bills by \$200 billion.

The Supreme Court backed up its claim that Congress could not intend to give the EPA such awesome power by pointing to the fact that, "Before 2015, EPA had always set emissions limits under section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. It had never devised a cap by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner

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57. *Id.* at 666.

58. *Gonzales v. Oregon*, 546 U.S. at 267.

59. *West Virginia*, 182 S. Ct. at 2602

60. *Id.*

61. *Id.* at 2622.

62. *Id.* at 2609

sources.”<sup>63</sup> As the Court stated, “It is one thing for Congress to authorize regulated sources . . . to comply with a preset cap or a cap that must be based on some scientific [or] objective criterion . . . . [But] It is quite another to simply authorize EPA to set the cap itself wherever the Agency sees fit”.<sup>64</sup> The Supreme Court using the MQD could not find that Congress intended the EPA to wield power that will have a significant political and economic impact without a clear expression of authority. As seen in the development of the MQD, Congress does not hide elephants in mouseholes.<sup>65</sup> When EPA makes a decision that has a significant political and economic impact, the EPA will have to point to clear language that grants it such expressed authority.

Another reason for the ruling in *West Virginia* that the Majority suggests and the Concurrence advocates for is a separation of powers (SoP) issue. The Majority said it is reluctant to grant a delegation of power based on ambiguity because of SoP principles.<sup>66</sup> The Concurrence builds on this SoP idea. The Concurrence holds that “The Major Questions doctrine works in much the same way to protect the Constitution’s separation of powers.”<sup>67</sup> The way the MQD protects the Constitution by using SoP principles is it guards against a ruling class of largely unaccountable “ministers” who gain power through “unintentional, oblique, or otherwise unlikely” intrusions on these interests.”<sup>68</sup> As shown in Part III, the Courts do not allow agencies to wield significant political and economic power absence of a clear expression of authority. And part of the reason for not allowing agencies to have such power is explained through SoP. Voters do not elect agency members, thus to allow agencies to have significant political and economic power in the absence of a clear expression of authority would be a Constitutional travesty. The MQD prevents agencies from gaining such power absence a clear authority.

The reason for the Supreme Court ruling in *West Virginia* deals with basic statutory interpretation and the MQD’s SoP like principles.

#### IV. IMPLICATIONS

Several concerns are raised by the Supreme Court’s signaling it will be deciding more cases with the MQD. While the MQD has its

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63. *Id.*

64. *Id.* at 2615.

65. *Gonzales v. Oregon*, 546 U.S. at 267.

66. *West Virginia*, 182 S. Ct. at 2609.

67. *Id.* at 2617

68. *Id.* at 2617-20.

merits by preventing unaccountable agency directors and officers from gaining power through unintentional, oblique language, are the MQD negative consequences worth it?<sup>69</sup> There are two potential negative consequences flowing from the MQD: (1) limiting science-based regulations and (2) taking policymaking power from Congress.

Congressional staff normally do not possess all the needed expertise to craft laws that will regulate rapidly evolving technologies like administrative agencies staff members.<sup>70</sup> Thus, Congress cannot foresee all the future possible pitfalls or obstacles and thus Congress tries to write laws that confer broad discretion to agencies staff to solve its limitations.<sup>71</sup> MQD threatens the current method of conferring broad discretion to agencies because courts can label such conferring as ambiguously granting power over an area of economic or political significance. The current Supreme Court presumes that Congress intends to make major policy decisions for itself absent a clear expression to an agency. The current Court's reasoning threatens Congress' current system of regulating industries.

The second concern raised by MQD is the doctrine calls on judges to make highly subjective judgment calls.<sup>72</sup> MQD calls on judges to make highly subjective judgment calls. These type of subjective judgment calls can lead to the judiciary taking away policymaking power from democratically elected representatives.<sup>73</sup> The MQD helps take away policymaking power in two ways. First, the MQD ask judges to decide if the agencies policy is an extraordinary case of economic and political power.<sup>74</sup> Second, if a judge does decide the policy is an extraordinary case, the judge must determine whether there is clear authorization for the agency to act.<sup>75</sup> These two steps are subjective enough that judges can overturn numerous laws passed by democratically elected representatives. While the Concurrence argued that MQD protects democracy by preventing agencies from acquiring power that does not belong to it, the MQD is inviting the judiciary to possess that power by second guessing Congress when it confers broad discretion to agencies. However, if courts are only supposed to invoke the MQD in extraordinary circumstances then this concern is not warranted. But the Court has already decided on two cases this past year using the MQD. The very thing the Supreme

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69. *West Virginia*, 182 S. Ct. at 2617-20.

70. James Goodwin et al., *supra* note 23, at 15.

71. *Id.*

72. *Id.* at 16.

73. *Id.*

74. *Id.*

75. *Id.*

Court feared of unelected agency officials wielding significant political or economic power is the power the Supreme Court is wielding with the subjective test of MQD.

#### CONCLUSION

The Supreme Court invoking the MQD in *West Virginia* has raised two concerns (1) the judiciary is overstepping its power into policymaking and (2) MQD threatens Congress from being able to write laws that confer broad discretion to agencies to fill in the gaps of Congress non-expertise shortcoming. The Court developed MQD over six cases to prevent agencies from possessing political or economic significance to protect voters' voices. As Part V discusses, the Court is doing more harm than good by inviting the judiciary to overstep its role and no longer allowing Congress to have the flexibility to write broader laws to take advantage of administrative agencies' expertise. If the MQD is here to stay, then Congress will have to change the way it confers broad discretion to agencies.

# TENNESSEE LAW REVIEW

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