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Purposivism for Me, Textualism for Thee: West Virginia v. Environmental Protection Agency

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NOTE

Purposivism for Me, Textualism for Thee: *West Virginia v. Environmental Protection Agency*

West Virginia v. EPA, 142 S. Ct. 2587 (2022).

Doug Dolan*

I. INTRODUCTION

Like any other hardy administrative law article, this Note starts with *Chevron*. In 1984, the Supreme Court decided the landmark case, *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*¹ There, the Court said it will defer to an agency's interpretation of a statute if that interpretation is reasonable.² However, because some on the Court saw *Chevron* deference as “wrest[ing] from [c]ourts the ultimate interpretive authority to ‘say what the law is’ and hand[ing] it over to the Executive,”³ exceptions to *Chevron* deference have appeared like worms after a storm.⁴

The Major Questions Doctrine (“the Doctrine”) is one such exception. The Doctrine establishes a presumption that agencies cannot make decisions on a major question without “clear congressional authorization.”⁵ In other words, courts will look at an agency's decision about a major question with “skepticism” that can be overcome only by a clear statement of authorization from Congress.⁶ To determine if a

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¹ *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

² *Id.* at 844, 865–66.

³ *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring).

⁴ See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 231–47 (2006).

⁵ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324); Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 484 (2021).

⁶ *West Virginia*, 142 S. Ct. at 2614.

question is “major,” courts look to four factors: (1) the regulation’s economic impact, (2) its political importance, (3) whether the regulation expands the agency’s regulatory scope, and (4) the statutory basis for the regulation.⁷ A textbook case is one where an agency would attempt to (a) regulate a large portion of the American economy (b) on a topic of much political controversy (c) that would result in a large shift in regulatory scope (d) based on a strained reading of a statute.⁸ Much like too many glasses of a good wine, the Doctrine goes down easy enough. It is only later the implications set in.

While the Court has relied upon the Doctrine for nearly two decades, *West Virginia v. Environmental Protection Agency* trumpeted its formal introduction into administrative law.⁹ Relying upon its statutory mandate to regulate air pollution, the Environmental Protection Agency (“EPA”) issued the Clean Power Plan.¹⁰ The plan required, among other things, that power plants either reduce their own production of electricity or subsidize the production of energy from cleaner sources.¹¹ In *West Virginia*, the Court held that the Clean Power Plan decided a major question and thus required a clear statement of congressional authorization for the regulation.¹² Although EPA argued that § 111(d) of the Clean Air Act provided the requisite authority for the Clean Power Plan, the Court held that this statute did not provide a clear statement of such authorization.¹³ Thus, the Court struck down the Clean Power Plan.¹⁴

In the months since the decision, intermediate and trial courts have applied the Doctrine and enjoined or vacated key Democratic party regulations: vaccine mandates for federal contractors,¹⁵ student loan

⁷ Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent “Major Questions” Doctrine*, 49 CONN. L. REV. 355, 381–85 (2016).

⁸ *See id.* at 386–87. These factors are variable, however. Besides *Brown & Williamson*, there are no cases that fit cleanly under these four factors. *Id.* at 368.

⁹ *West Virginia*, 142 S. Ct. at 2634 (Kagan, J., dissenting).

¹⁰ *Id.* at 2599–602.

¹¹ *Id.* at 2599.

¹² *Id.* at 2614.

¹³ *Id.* at 2614–16.

¹⁴ *Id.* at 2615–16.

¹⁵ *Georgia v. President of the United States*, 46 F.4th 1283, 1295–97 (11th Cir. 2022) (enjoining the contractor vaccine mandate; *Louisiana v. Biden*, 55 F.4th 1017, 1019 (5th Cir. 2022) (same)).

forgiveness,¹⁶ DACA,¹⁷ and many more.¹⁸ An analysis of the foundations, holding, and ramifications of *West Virginia v. EPA* is thus vital to understanding this potent tool in a judge's toolbox.

This Note proceeds as follows. Part II details the facts and holding of *West Virginia v. EPA*. Part III focuses on the legal background of the case. Part III additionally discusses § 111(d), clear statement rules, and the Doctrine. Part IV recounts the instant decision of the case and the majority's argument for the Doctrine. Part V then argues that the Doctrine, as set forth in *West Virginia v. EPA*, offends the two most popular methods of statutory interpretation: textualism and purposivism. The Doctrine offends textualism because it is a clear statement rule that flouts the most natural reading of a statutory text, searches for congressional intent, relies upon legislative history to make a determination of "majorness," and is a multi-factor test that does not lead to predictable results. Further, the Doctrine offends purposivism because it erects antimajoritarian barriers to the results Congress intended.

¹⁶ *Brown v. U.S. Dep't of Educ.*, No. 4:22-CV-0908-P, 2022 WL 16858525, at *1, *11–14 (N.D. Tex. Nov. 10, 2022), *cert. granted*, 143 S. Ct. 541 (2022). In oral argument, Chief Justice Roberts floated the idea that the loan forgiveness plan would violate the Doctrine. Transcript of Oral Argument at 28, *U.S. Dep't of Educ. v. Brown*, No. 22-535 (U.S. argued Feb. 28, 2023) ("We like to usually leave situations of that sort, when you're talking about spending the government's money, which is the taxpayers' money, to the people in charge of the money, which is Congress. Now why isn't that a factor that should enter into our consideration under the Major Questions Doctrine again, where we look at things a little more strictly than we might otherwise when we're talking about statutory grants of authority, to make sure that this is something that Congress would have contemplated?").

¹⁷ *Texas v. United States*, 50 F.4th 498, 526–27 (5th Cir. 2022) (holding that because DACA violates the Doctrine, it fails under step two of Chevron, as it is an unreasonable reading of the Immigration and Nationality Act) It is important to note, however, that the court also held that DACA failed under step one of Chevron as well, so it did not rely solely on the Doctrine, as the other regulations did. *Id.* at 526.

¹⁸ *Kaweah Delta Health Care Dist. v. Becerra*, No. CV 20-6564-CBM-SP(X), 2022 WL 18278175, at *9 (C.D. Cal. Dec. 22, 2022) (finding that increasing Medicare reimbursements for the lowest-earning hospitals while decreasing reimbursements across the board offended the Doctrine); *Louisiana v. Becerra*, No. 3:21-CV-04370, 2022 WL 4370448, at *11 (W.D. La. Sept. 21, 2022) (finding that a vaccination requirement for Head Start employees, volunteers, and contractors who dealt with children and a masking requirement for children over the age of two violated the Doctrine); *Texas*, 50 F.4th at 526 (finding that because DACA violates the Doctrine, it fails under step two of Chevron because it is an unreasonable reading of the Immigration and Nationality Act); *W. Virginia v. U.S. Env't Prot. Agency*, No. 3:23-CV-032, 2023 WL 2914389, at *15 (D.N.D. Apr. 12, 2023) (partially relying upon the Doctrine to strike down EPA's new definition of what constituted the "waters of the United States" under the Clean Water Act).

II. FACTS AND HOLDING

The procedural history of this case spanned seven years and three presidential administrations. In 2015, EPA issued the Clean Power Plan pursuant to § 111(d) of the Clean Air Act.¹⁹ Section 111(d) allows EPA to set emission requirements that reflect the “best system of emission reduction [BSER] . . . adequately demonstrated.”²⁰ EPA determined one of the BSER to combat carbon dioxide emissions was “generation shifting” because both regulators and power plants had long used it effectively.²¹ Generation shifting is a “system” that requires transitioning the nationwide generation of electricity from coal-fired power plants with higher CO₂ emissions to natural-gas-fired and renewable-energy-fired plants with lower CO₂ emissions.²² While EPA determined it *could* mandate a small or a great amount of transition,²³ it settled on what it called a “reasonable” amount of generation shifting: a shift in the amount of the nation’s coal-generated electrical energy from 38% to 27%.²⁴

The Clean Power Plan never became law.²⁵ Soon after its issuance, dozens of states and other private parties sued to prevent the rule from taking effect.²⁶ The Supreme Court issued a stay ahead of a hearing on the merits in the D.C. Circuit.²⁷ Before the hearing could occur, however, Donald Trump became President, and the Trump EPA asked the court to pause the litigation as it “reconsider[ed]” the Clean Power Plan.²⁸ Due to the Trump EPA’s reconsideration, the D.C. Circuit dismissed the case as moot.²⁹

In 2019, the Trump EPA formally repealed the Clean Power Plan.³⁰ In its official rulemaking, the Trump EPA argued the Clean Power Plan was a major shift in regulatory scope that would wholly reorder the

¹⁹ *West Virginia v. EPA*, 142 S. Ct. 2587, 2602 (2022).

²⁰ *Id.* at 2601 (quoting 42 U.S.C. § 7411(a)(1)).

²¹ *Id.* at 2637 (Kagan, J., dissenting).

²² *Id.* at 2603.

²³ *Id.*

²⁴ *Id.* at 2603–04.

²⁵ *Id.* at 2604.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 2604–05. EPA administrators frequently cycle in-and-out of office, entering when the President is inaugurated and departing when the President leaves the White House. *EPA’s Administrators*, EPA, <https://www.epa.gov/history/epas-administrators> [<https://perma.cc/2464-94XU>] (last visited Apr. 20, 2023).

²⁹ *West Virginia*, 142 S. Ct. at 2604.

³⁰ *Affordable Clean Energy Rule*, EPA, <https://www.epa.gov/stationary-sources-air-pollution/affordable-clean-energy-rule> [<https://perma.cc/95GE-8G25>] (last visited Apr. 20, 2023).

electricity sector.³¹ Therefore, the Trump EPA argued, the regulation decided a Major Question and required a clear statement of congressional authorization.³² The Trump EPA argued the obscure and backwater § 111(d) could not serve as a clear statement of congressional authorization for the Clean Power Plan and thus repealed the regulation.³³

A number of states and private entities sued EPA for its repeal of the Clean Power Plan and its replacement rule, the Affordable Clean Energy Rule.³⁴ These petitioners argued EPA had invented a legal restraint that did not exist.³⁵ Therefore, they contended, because EPA based the Clean Power Plan repeal and the promulgation of the Affordable Clean Energy rule on a fundamental mistake of law, those laws were rendered invalid.³⁶ Other states and private entities intervened to defend both the repeal of the Clean Power Plan and the promulgation of the Affordable Clean Energy Rule.³⁷ This case, challenging the Clean Power Plan's repeal, went straight to the U.S. Court of Appeals for the D.C. Circuit.³⁸ The D.C. Circuit held that the Doctrine did not apply because Congress and the Supreme Court had already determined that EPA could regulate greenhouse gas emissions from power plants under § 111(d).³⁹ The D.C. Circuit also concluded the case did not implicate the Doctrine because it did not expand EPA's regulatory scope and had strong statutory support.⁴⁰ Thus, the D.C. Circuit applied normal rules of statutory interpretation and held that the statutory text did not "clearly foreclose" the Clean Power Plan.⁴¹ Therefore, because EPA had fundamentally misunderstood the

³¹ *West Virginia v. EPA*, 142 S. Ct. 2587, 2601, 2604 (2022).

³² 84 Fed. Reg. 32523 (2019).

³³ *West Virginia*, 142 S. Ct. at 2605.

³⁴ *Id.* Agencies must follow the same procedures in repealing a rule as they do in promulgating one. Thus, to repeal a rule, an agency must publish a notice of the proposed rulemaking in the Federal Register. After reviewing all the comments, an agency may, but does not have to, publish a final rule in the Federal Register. These rules normally don't take effect until 30 days after their publication. CONG. RSCH. SERV., R46673, AGENCY RECISSIONS OF LEGISLATIVE RULES 2 (2021).

³⁵ Initial Opening Brief of Public Health and Environmental Petitioners at 16, *Am. Lung Ass'n v. EPA*, 985 F.3d 914 (No. 19-1166), 2020 WL 1904536 at *16.

³⁶ Initial Opening Brief of Public Health and Environmental Petitioners at 16, *Am. Lung Ass'n v. EPA*, 985 F.3d 914 (No. 19-1166), 2020 WL 1904536 at *16. When courts hold that agencies are basing their rulemaking on fundamental mistakes of the law, the judiciary can force the agencies to change their rules. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 995 (D.C. Cir. 2021); *see also* *Massachusetts v. E.P.A.*, 549 U.S. 497, 534–35 (2007).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 964 (D.C. Cir. 2021).

⁴⁰ *Id.* at 967–68.

⁴¹ *Id.* at 995.

law, its repeal of the Clean Power Plan could not stand.⁴² Thus, the court vacated the repeal of the Clean Power Plan and remanded the case to the agency to “consider the question afresh.”⁴³ The parties who had intervened to defend EPA appealed, and the Supreme Court granted certiorari.⁴⁴

The Court held that the Doctrine applied because EPA intended to enlarge its own regulatory authority, based on a strained reading of § 111(d), to decide a question of economic and political importance.⁴⁵ Because the case implicated the Doctrine, the Court looked for a clear statement of congressional authorization for this regulatory shift.⁴⁶ According to the Court, § 111(d) was too “vague” a statutory grant to be a clear statement of congressional authorization for the Clean Power Plan, and thus the Court struck down the rule.⁴⁷

III. LEGAL BACKGROUND

Environmental law is a notoriously complicated field whose absolute dullness is matched only by its incredible importance in the fight against climate change. This arcane and opaque field has stymied many a liberal do-gooder. Thus, the precise mechanisms of EPA’s regulations are beyond the scope of this Note. However, a brief overview is necessary to understand how clear statement rules and the Doctrine intersect with the case. So put on your helmet, fasten your kneepads, and click your seatbelt; it will be a bumpy ride.

A. Section 111(d)

The Clean Air Amendments of 1970 provided EPA with three regulatory mechanisms to control pollution: the National Ambient Air Quality Standards (“NAAQS”), the Hazardous Air Pollutants (“HAP”), and the New Source Performance Standards (“NSPS”) under § 111.⁴⁸ Certain pollutants are classified for regulation under NAAQS and others are classified under HAP.⁴⁹ If a pollutant does not fall under NAAQS or

⁴² *Id.*

⁴³ *Id.* (quoting *Negusie v. Holder*, 555 U.S. 511, 523 (2009)).

⁴⁴ *West Virginia v. EPA*, 142 S. Ct. 2587, 2606 (2022).

⁴⁵ *Id.* at 2610–14; *Cf.* Oral Argument at 55:34, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530) (By this time, Joe Biden was elected President. Biden’s Solicitor General, Elizabeth Prelogar, argued that the case should have been mooted because of the change in presidents, and that petitioners were nonetheless wrong on the merits of the case.).

⁴⁶ *West Virginia*, 142 S. Ct. at 2614.

⁴⁷ *Id.* at 2609, 2614.

⁴⁸ *Id.* at 2600–02.

⁴⁹ *Id.* at 2600.

HAP, Congress provided a gap-filler,⁵⁰ or backstop,⁵¹ provision: § 111.⁵² Section 111(d) requires EPA to establish a standard of performance to reduce the emission of the pollutant.⁵³ A standard of performance is defined as the “best system of emission reduction [BSER] . . . adequately demonstrated” to reduce the pollutant.⁵⁴ In other words, the BSER is simply the system best proven to reduce emissions of a given pollutant.⁵⁵ From there, EPA determines the degree by which the agency *could* reduce emissions with the BSER and, finally, fixes the emissions cap for the pollutant based on that finding.⁵⁶

B. Clear Statement Rules

Clear statement rules require clear and express language before allowing the legislature to pass a law that might appear to threaten a “favored constitutional value.”⁵⁷ Although commentators have labeled this rule a congressional “clarity tax,”⁵⁸ a better way to understand the concept might be as a court “certainty tax.” Where certain constitutional values are at issue, courts want to be absolutely certain that Congress demanded it threaten those values before taking the plunge.⁵⁹ For example, the Court will interpret a law to displace state sovereignty only when absolutely certain that Congress compels it to do so.⁶⁰ As one commentator put it, clear statement rules demand “not just that Congress speak, but that Congress yell.”⁶¹

Judges adopt these rules with orders demanding clear language in statutes.⁶² For example, the Court adopted the federalism canon with the following language: “[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its

⁵⁰ *Id.* at 2610.

⁵¹ *Id.* at 2629 (Kagan, J., dissenting).

⁵² *Id.*

⁵³ *Id.* at 2601.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 401 (2010); see also David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 940 (1992).

⁵⁸ Manning, *supra* note 57.

⁵⁹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

⁶⁰ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

⁶¹ Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 283 (2022).

⁶² *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

intention to do so *unmistakably clear* in the language of the statute.”⁶³ In this way, nothing more is required to establish a clear statement rule than language like the above.

C. *The Twin Pillars of the Major Questions Doctrine*

This Part focuses on the twin pillars of the Major Questions Doctrine: *FDA v. Brown & Williamson* and *Utility Air Regulatory Group v. EPA*. *Brown & Williamson* laid out the four factors for the Doctrine, whereas *UARG* tied a clear statement rule to the Doctrine.

In *FDA v. Brown & Williamson*, the Court established the four factors of the Major Questions Doctrine: (1) economic importance, (2) political importance, (3) major shift in regulatory scope, and (4) a strained statutory basis for its regulations.⁶⁴ FDA attempted to regulate tobacco under its statutory power to regulate “drugs” and “devices.”⁶⁵ First, the Court stressed that the tobacco industry was economically important, noting it represented a “significant” portion of the American economy.⁶⁶ Second, the Court emphasized that the tobacco industry was also politically important, detailing the many different ways Congress had regulated the industry, the many ways it had not regulated the industry, and the dire threat to child and adolescent health that tobacco presented.⁶⁷ Third, the Court noted the regulation would result in a large shift in regulatory authority because it would allow FDA to regulate the sprawling tobacco industry.⁶⁸ Fourth, and finally, the Court held that the one sentence description of “drugs” in the corresponding statute was a strained statutory basis for such a large expansion of FDA’s regulatory authority.⁶⁹

After discussing these factors, the Court held that FDA had exceeded its regulatory power.⁷⁰ According to the Court, the one sentence in the

⁶³ *Id.* at 460 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)) (emphasis added); Manning, *supra* note 57, at 408. Alternatively, the *Gregory* clear statement could be, “inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress’ Commerce Clause powers, we must be *absolutely certain* that Congress intended such an exercise.” *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (emphasis added); William N. Eskridge, Jr., *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593, 624 (1992).

⁶⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

⁶⁵ *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022); *Brown & Williamson*, 529 U.S. at 126. The FDA also claimed authority under its statutory power to regulate “articles (other than food) intended to affect the structure or any function of the body.” *Id.* at 126 (quoting 21 U.S.C. § 321(g)(1)(C) (1994) (amended 2022)).

⁶⁶ *Brown & Williamson*, 529 U.S. at 159.

⁶⁷ *Id.* at 143–59, 161.

⁶⁸ *Id.* at 160–61.

⁶⁹ *Id.* at 126.

⁷⁰ *Id.* at 160–61.

statute that allowed FDA to regulate “drugs” and “devices” did not give it the authority to enlarge its own power and regulate the economically and politically important tobacco industry.⁷¹ In this way, *Brown & Williamson* established the four factors of the Doctrine.⁷²

Where *Brown & Williamson* established the four factors for the Doctrine, *UARG* tied it to a clear statement rule.⁷³ In *UARG*, EPA sought to regulate greenhouse gases through its statutory mandate to regulate “air pollutant[s].”⁷⁴ Under EPA’s regulations, if any source could be expected to emit more than the 250 tons per year cap of the “air pollutant” (here, greenhouse gases), that source would be considered a “major emitting facility” and subject to permitting requirements.⁷⁵ Because greenhouse gases are much more potent than other pollutants under the Clean Air Act, small sources, like apartments and schools, would be subject to permitting requirements.⁷⁶ According to the Court, this would represent an “unheralded power to regulate a significant portion of the American economy.”⁷⁷ The Court treated the regulation with skepticism as an attempt by an agency to expand its own authority to regulate an economically important part of the American economy.⁷⁸ The only way to overcome such skepticism, the Court provided, is with a “clear statement of congressional authorization,” as the Court expects Congress to speak “clearly” when it delegates such important decisions.⁷⁹ In this way, *UARG* tied a clear statement rule to the Major Questions Doctrine.⁸⁰

IV. INSTANT DECISION

According to the Court, *West Virginia v. EPA* was a Major Questions case because EPA tried to decide an economically and politically important question by expanding its own regulatory authority based on a strained statutory basis.⁸¹ Thus, the Court looked for a clear statement of

⁷¹ *Id.* at 126.

⁷² *Id.* at 133. There is no set grouping of factors that need to exist for there to be a major question. *Brown & Williamson* had all four factors; but *UARG*, discussed below, only had two. Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent “Major Questions” Doctrine*, 49 CONN. L. REV 355, 389 (2016).

⁷³ Sohoni, *supra* note 61, at 272.

⁷⁴ *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 311 (2014).

⁷⁵ *Id.* at 309, 325.

⁷⁶ *Id.* at 328.

⁷⁷ *Id.* at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159) (quotations omitted).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Sohoni, *supra* note 61, at 272.

⁸¹ *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022).

congressional intent which allowed EPA to institute the Clean Power Plan.⁸² Finding none, the Court struck down the rule.⁸³

A. *This Is a Major Questions Case*

First, the Court held that the Clean Power Plan involved a question of vast economic and political significance.⁸⁴ The Court wrote that the plan was economically significant because it would entail billions of dollars in compliance costs, higher electricity prices, dozens of coal plant closures, and an elimination of tens of thousands of jobs.⁸⁵ The Court noted that this regulation was politically important because it sought to do what prior legislation failed to: establish a cap-and-trade scheme to regulate carbon emissions.⁸⁶ The Court also pointed out that, because the issue of how to regulate climate change is subject to an “earnest and profound debate” nationwide, the Court would be skeptical of any regulation (as opposed to legislation) in this area.⁸⁷

Second, the Court determined that the Clean Power Plan sought to expand EPA’s regulatory scope.⁸⁸ While it was certainly within EPA’s authority to regulate power plants, the Court said, it was not within EPA’s authority to regulate the entire energy grid.⁸⁹ Previously, EPA had relied on § 111(d) to regulate only individual power plants, which was within its

⁸² *Id.* at 2614.

⁸³ *Id.* at 2616.

⁸⁴ *Id.* at 2604–05, 2613 (“We also find it ‘highly unlikely that Congress would leave’ to ‘agency discretion’ the decision of how much coal-based generation there should be over the coming decades. . . . We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”).

⁸⁵ *Id.* at 2604.

⁸⁶ *Id.* at 2614. Under a cap-and-trade scheme, “sources that achieve a reduction in emissions can sell a credit representing the value of that reduction to others, who able to count it toward their own applicable emissions caps.” *Id.* at 2603–04. As an example, imagine EPA sets an emission cap at 10 units of CO₂. Further imagine there are two electricity producing facilities: Facility A emits 8 units of CO₂ and Facility B emits 12 units of CO₂. Because Facility A has two units of CO₂ emission “leftover,” it can sell (“trade”) those two units to Facility B. Facility B can now apply those two units of leftover CO₂ emissions to its own plant and thus become compliant with EPA’s cap. *See Club v. EPA*, 793 F.3d 656, 660 (6th Cir. 2015).

⁸⁷ *West Virginia*, 142 S. Ct. at 2614 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006)).

⁸⁸ *Id.* at 2615–16 (“[T]he only interpretive question before us, and the only one we answer, is . . . 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.”).

⁸⁹ *Id.* at 2616.

regulatory wheelhouse.⁹⁰ However, the Court stressed that, under the Clean Power Plan, EPA sought not to improve the efficiency of individual power plants, but the entire power system.⁹¹ Under this new paradigm, EPA could now dictate the “optimal mix of energy sources” and demand a shift in coal-based generation of electricity from 37% to 28%.⁹² Under the Clean Power Plan, EPA would indirectly regulate power plants by regulating the grid, which would then have a downstream effect on power plants.⁹³ Thus, according to the Court, the Clean Power Plan expanded EPA’s regulatory authority from solely improving efficiency of individual plants to unilaterally dictating what energy sources can produce and how they can produce it.⁹⁴

Third, and finally, the Court stated that EPA based the expansion of its regulatory authority on a strained reading of § 111(d).⁹⁵ Before the Clean Power Plan, EPA had consistently relied on § 111(d) to regulate only individual power plants.⁹⁶ As the Court noted, an agency’s contemporaneous and long-held interpretation of a statute is due “some weight as evidence of the statute’s original charge to an agency.”⁹⁷ Additionally, the Court declared that an agency’s deployment of an old statute in a radically new environment is evidence the agency might be straining the statute.⁹⁸ Since § 111’s inception, EPA had consistently applied the provision only to at-the-plant regulations.⁹⁹ This changed with the Clean Power Plan, and the Court held the deployment of this old statute to a radically new context strained belief.¹⁰⁰ Thus, the Court explained, EPA relied upon a strained reading of § 111(d) for the expansion of its own regulatory authority.¹⁰¹

Because all four factors of the Doctrine applied—EPA tried to decide an economically and politically important question by expanding its own regulatory authority based on a strained statutory basis—the Court established this was a Major Questions case.¹⁰²

⁹⁰ *Id.* at 2610–11.

⁹¹ *Id.* at 2611.

⁹² *Id.* at 2611–13.

⁹³ *Id.* at 2611–12.

⁹⁴ *Id.* at 2611–13.

⁹⁵ *Id.* at 2610–14.

⁹⁶ *Id.* at 2610.

⁹⁷ *Id.* at 2623 (Gorsuch, J., concurring).

⁹⁸ *Id.* (Gorsuch, J., concurring).

⁹⁹ *Id.* at 2610.

¹⁰⁰ *Id.* at 2610–11.

¹⁰¹ *Id.*

¹⁰² *Id.* at 2610.

B. There Is No Clear Statement of Congressional Authorization for the Clean Power Plan

Because this was a Major Questions case, the Court required a clear statement of congressional authorization for the Clean Power Plan.¹⁰³ The parties defending the Clean Power Plan argued that § 111(d) sufficed.¹⁰⁴ Section 111(d), recall, gives EPA authority to establish emission caps that reflect “the best system of emission reduction [BSER] . . . adequately demonstrated.”¹⁰⁵ For support, EPA cited a dictionary definition of “system” that defined it as “an aggregation or assemblage of objects united by some form of regular interaction.”¹⁰⁶ The Court held that this definition was too broad and nowhere clear enough to satisfy the clear statement rule.¹⁰⁷ Clear statements require something more than just a “colorable textual basis.”¹⁰⁸ In searching for a clear statement, the Court keeps in mind common sense as to how Congress usually delegates.¹⁰⁹ Because § 111(d) was a “vague” statutory grant for the Clean Power Plan,¹¹⁰ the Court saw the provision as merely a “colorable textual basis,”¹¹¹ far from the required clear statement needed to authorize this transformative regulation.¹¹² Therefore, the Court struck down the rule.¹¹³

V. COMMENT

The Major Questions Doctrine offends both of the most popular methods of statutory interpretation: textualism and purposivism. To reiterate, the Doctrine offends textualism because it flouts the most natural interpretation of a statute, it relies upon legislative intent and history, and it is a multi-factor test that does not lend itself to predictable results. It

¹⁰³ *Id.* at 2614.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (quoting 42 U.S.C. § 7411(a)(1)) (internal quotations omitted).

¹⁰⁶ *Id.* (quoting Brief for Federal Respondents 31).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2609.

¹⁰⁹ *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (alterations in original)).

¹¹⁰ *Id.* at 2614.

¹¹¹ *Id.* at 2609.

¹¹² *Id.* at 2614.

¹¹³ *Id.* at 2616. Gorsuch’s concurrence puts more meat on the skeletal Major Questions Doctrine, explicitly listing the factors it would have considered and how they would have applied here. *Id.* at 2616–26 (Gorsuch, J., concurring). Gorsuch only commanded one other vote, and his view on the Major Questions Doctrine, while interesting and easier to analyze, is not the law. The Dissent argued none of the cases relied on actually used the Major Questions Doctrine, but merely looked to see if an agency was straying outside its lane. *Id.* at 2634–36 (Kagan, J., dissenting).

offends purposivism because it erects anti-majoritarian barriers to what Congress could have reasonably intended.

A. *The Major Questions Doctrine Offends Textualism*

In interpreting a statute, textualism boasts an assiduous focus on the statute's, well, text.¹¹⁴ Textualists seek to understand the “plain meaning”¹¹⁵ of a statute from the perspective of a “skilled user of words at the time [of enactment].”¹¹⁶ Textualists are not literalists, however.¹¹⁷ They understand that a skilled user of language operates within linguistic and social contexts.¹¹⁸ So textualists will frequently consider some extra-textual materials—such as dictionaries, settled background conventions of meaning, statutory context, and substantive canons—to discern the best reading of a statute.¹¹⁹ Thus, the extra-textual materials serve as tools for the discernment of the best reading of the statute, which is the touchstone of textualist statutory interpretation. From a textualist perspective, however, clear statement rules are suspect because they flout the most natural reading of the statute.¹²⁰ This case is no different. If the *West Virginia* Court had applied a true textualist approach, it would have upheld the Clean Power Plan.

¹¹⁴ Chad Squitieri, *Major Problems with Major Questions*, LAW AND LIBERTY (Nov. 18, 2022, 10:00 AM), <https://lawliberty.org/major-problems-with-major-questions/> [<https://perma.cc/X975-6KC2>].

¹¹⁵ *Alexander v. Sandoval*, 532 U.S. 275, 305–06 (2001) (Stevens, J., dissenting) (“The plain meaning of the text reveals Congress’ intent”); *Chicago v. Envt’l. Def. Fund*, 511 U.S. 328, 334 (1994) (“plain meaning of this language.”).

¹¹⁶ Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 61 (1988).

¹¹⁷ ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 24 (Amy Gutmann ed., 1st ed. 1997).

¹¹⁸ Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RES. L. REV. 855, 856–57 (2020).

¹¹⁹ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2456–58 (2003); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000) (“[T]he court should not confine itself to examining a particular statutory provision in isolation. Rather, it must place the provision in context, interpreting the statute to create a symmetrical and coherent regulatory scheme.”).

¹²⁰ See generally *Crayton v. United States*, 27 F.4th 652, 656 n.4 (8th Cir. 2022); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123–24 (2010); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 125 (2001); SCALIA, *supra* note 117, at 27–29; William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 682 (1999); *Venue Statutes-Patent Suits-Definition of Corporate Residence-Tc Heartland LLC v. Kraft Foods Group Brands LLC*, 131 HARV. L. REV. 393, 401 (2017); *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959 (1994).

1. The Major Questions Doctrine Flouts the Natural Interpretation of a Statute

As Dean John Manning explained, clear statement rules “mitigate the textualists’ strict focus on the conventional meaning of the enacted text.”¹²¹ Thus, to a textualist, clear statement rules are risky because a court might mangle the plain meaning of a statute and substitute a “merely bearable” one in service of a constitutional value.¹²²

A similar problem plagues the Doctrine. The Doctrine is a clear statement rule that has, as its constitutional value, the separation of powers.¹²³ One searches the *West Virginia* majority opinion in vain for a reading of the statute from the perspective of an “ordinary English speaker—a congressional outsider,”¹²⁴ who is a “skilled user of the language.”¹²⁵ Recall that the statute at issue said EPA could use the “best system of emission reduction [BSER] . . . adequately demonstrated” for

¹²¹ Manning, *supra* note 120, at 125.

¹²² Barrett, *supra* note 120, at 123–24; *see also* Manning, *supra* note 120, at 123.

¹²³ *Compare* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)) (“[I]f Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute’”) *with* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting Util. Air Regul. Grp. v. EPA., 573 U.S. 302, 324 (2014)) (“Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there. 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.”). *See also* West Virginia, 142 S. Ct. at 2605 (“EPA argued that under the major questions doctrine, a *clear statement* was necessary to conclude that Congress intended to delegate authority ‘of this breadth to regulate a fundamental sector of the economy.’”) (emphasis added); *id.* at 2605 (“As part of that analysis, the Court of Appeals concluded that the major questions doctrine did not apply, and thus rejected the need for a *clear statement* of congressional intent to delegate such power to EPA.”) (emphasis added.); *id.* at 2616 (“[A]s constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I’s Vesting Clause has its own: the major questions doctrine.”) (Gorsuch, J., concurring). *See generally* Georgia v. President of the United States, 46 F.4th 1283, 1314 (11th Cir. 2022) (Anderson, J., concurring); Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2044 (2018); Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1125–26 (2019); Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1934 (2020).

¹²⁴ Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2194 (2017).

¹²⁵ Barrett, *supra* note 120, 124.

power plants.¹²⁶ What is a textualist interpretation of this clause? Unfortunately, the majority sidelined the text of the statute and sidestepped the issue. The Court waited until page twenty-eight of a thirty-one-page opinion to address what “system” might mean,¹²⁷ and it never discussed the “best reading” of any other part of the statute.¹²⁸ Still, a textualist understanding of this statute is possible. The language can be divided into three parts: “best,” “system of emission reduction,” and “adequately demonstrated.”

So, what does “best” mean in this situation? Because “best” is not defined in the statute or case law, one must turn to dictionaries.¹²⁹ Oxford Learner’s Dictionary defines it as: “of the most excellent type or quality.”¹³⁰ Merriam-Webster states: “excelling all others . . . most productive of good, offering or producing the greatest advantage, utility, or satisfaction.”¹³¹ And American Heritage says: “[s]urpassing all others in excellence, achievement, or quality; most excellent.”¹³² Thus, no matter how one slices it, any definition of “best” implies a value judgment. For broad words like these, textualists rely heavily upon the linguistic context.¹³³ When someone asks, “What is the best way to the grocery store?” she is asking for a value judgment. She is really asking, “What is the quickest way to the grocery store?” or “What is the safest way to the grocery store?” And a value judgment (about how quickly each route takes or how safe the routes are, for example) necessarily implies that someone be an expert, so they can give the best appraisal of the situation. As a resident of the city, one might consult their own experience and

¹²⁶ 42 U.S.C. § 7411(a)(1).

¹²⁷ *West Virginia*, 142 S. Ct. at 2614.

¹²⁸ Brett M. Kavanaugh, *Fixing Statutory Interpretation Judging Statutes* by Robert A. Katzmann. New York, N.Y.: Oxford University Press 2014, 129 HARV. L. REV. 2118, 2144 (2016).

¹²⁹ *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 935 (D.C. Cir.), *rev’d and remanded sub nom. West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

¹³⁰ *Best*, OXFORD LEARNER’S DICTIONARY, <https://www.oxfordlearnersdictionaries.com/definition/english/best> [https://perma.cc/2TZP-D5TZ] (last visited Nov. 18, 2022).

¹³¹ *Best*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/best> [https://perma.cc/VL8R-RKD3] (last visited Nov. 18, 2022).

¹³² *Best*, AMERICAN HERITAGE, <https://www.ahdictionary.com/word/search.html?q=best> [https://perma.cc/U9RH-PXEZ] (last visited Nov. 18, 2022).

¹³³ *Smith v. United States*, 508 U.S. 223, 241–42 (1993) (noting that confining the definition of “use” to dictionary definitions offends “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”) (Scalia, J., dissenting). *See also* Barrett, *supra* note 118, at 859 (“[T]extualism isn’t about holding language ‘in isolation from actual usage.’ It isn’t about taking things out of context or strictly construing language that isn’t strict. It is about identifying the plain communicative content of the words.”).

explain that, during the day, the “best way” is the highway, but during rush hour, the “best way” is the backroads. If one is new to the city, they might consult an expert on the matter (likely Google Maps or Apple Maps) to determine the “best way.” In any case, determining the “best” of anything requires an expert judgment.

Here, determining the “best” system requires a judgment from the experts: EPA and the power plant operators. None dispute that the “best system of emission reduction” is generation shifting.¹³⁴ Despite the majority’s warnings of higher electricity prices, dozens of coal plant closures, and an elimination of tens of thousands of jobs,¹³⁵ coal companies have attained the goals of the Clean Power Plan with market-based forces alone.¹³⁶ Thus, regardless of whether the government or the market is the expert in determining the “best” regulation, both conclude that the “best” system is generation shifting.¹³⁷

What is a “system of emission reduction?” Since “system” is not defined in the statute or the case law, one must use dictionaries.¹³⁸ Merriam-Webster defines it as: “a regularly interacting or interdependent group of items forming a unified whole.”¹³⁹ According to American Heritage Dictionary, it is: “[a]n organized and coordinated method; a procedure.”¹⁴⁰ And Oxford Learner’s Dictionary says it is: “an aggregation or assemblage of objects united by some form of regular interaction.”¹⁴¹ Generation shifting is an organized procedure by which EPA would shift a segment of American electricity production from “higher-emitting sources to lower-emitting sources.”¹⁴² Thus, a procedure by which EPA dictates the energy mix in the American electric grid must be included under any definition of “system.” And, no matter what else it does, generation shifting certainly reduces emissions.¹⁴³ Thus, generation shifting is a “system of emission reduction.”

¹³⁴ *West Virginia v. EPA*, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting).

¹³⁵ *Id.* at 2604.

¹³⁶ *Id.* at 2627–28 (Kagan, J., dissenting).

¹³⁷ *Id.* at 2628 (Kagan, J., dissenting).

¹³⁸ *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 946 (D.C. Cir.), *rev’d and remanded sub nom. West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

¹³⁹ *System*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/system> [<https://perma.cc/WZM9-HRZK>] (last visited Nov. 18, 2022).

¹⁴⁰ *System*, AMERICAN HERITAGE, <https://www.ahdictionary.com/word/search.html?q=system> [<https://perma.cc/VQ4N-5W55>] (last visited Nov. 18, 2022).

¹⁴¹ *System*, OXFORD LEARNER’S DICTIONARY, <https://www.oxfordlearnersdictionaries.com/definition/english/system?q=system> [<https://perma.cc/E25S-5JV8>] (last visited Nov. 18, 2022).

¹⁴² *West Virginia*, 142 S. Ct. at 2603 (quoting 80 Fed. Reg. 64728–29).

¹⁴³ *Id.* at 2615.

Finally, a court must determine if generation shifting is “adequately demonstrated.”¹⁴⁴ Case law provides that a system of emission reduction is “adequately demonstrated” if it is “reasonably reliable, reasonably efficient, and [] can reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way.”¹⁴⁵ The power industry “overwhelmingly” supported the Clean Power Plan because its generation shifting sought to do the same thing the power industry did: achieve massive reductions in carbon dioxide emissions in a “cost-effective way” while ensuring the electric grid remained stable.¹⁴⁶ Given that both the regulatory agency and the regulated industry itself agree the Clean Power Plan is necessary, it can be inferred that the rule is “reliable,” “efficient,” and not “exorbitantly costly in an economic or environmental way.”¹⁴⁷ Thus, generation shifting is “adequately demonstrated.”

In sum, because (1) both the government and the market deem generation shifting the “best” way to reduce emissions, (2) generation shifting is a “system of emission reduction,” and (3) generation shifting is “adequately demonstrated,” a skilled user of the English language would determine that generation shifting is the “best system of emission reduction . . . adequately demonstrated.” The Court abandoned textualism when it decided otherwise.

2. Legislative History and Intent

Some textualists would be happy to stomach “imperfect textualism”¹⁴⁸ to protect separation of powers. Others would see the Major Questions Doctrine, as applied here, as merely a “tie breaker[] between two equally plausible interpretations of a statute.”¹⁴⁹ Even for these textualists, though, the Doctrine should still be rejected because of its search for legislative history and its use of legislative intent.

Because textualists focus on congressional outsiders’ creation of meaning, they reject legislative history and seek “the linguistic patterns of the governed,” not the governors.¹⁵⁰ Discerning the intention of Congress is a useless exercise for the honest textualist, since they interpret statutes

¹⁴⁴ *Id.* at 2599.

¹⁴⁵ *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

¹⁴⁶ *West Virginia*, 142 S. Ct. at 2638–39 (Kagan, J., dissenting).

¹⁴⁷ *Essex Chemical*, 486 F.2d at 433.

¹⁴⁸ Note, *Venue Statutes-Patent Suits-Definition of Corporate Residence-Tc Heartland LLC v. Kraft Foods Group Brands LLC*, 131 HARV. L. REV. 393, 402 (2017).

¹⁴⁹ Barrett, *supra* note 120, at 123.

¹⁵⁰ Barrett, *supra* note 124, at 2194.

from the perspective of congressional outsiders, not insiders.¹⁵¹ The textualist analysis focuses on how the congressional outsider would *read* the statute, not what the congressional insiders intended when they *drafted* the statute.¹⁵²

Textualists reject the search for legislative intent because it is both irrelevant and nonexistent.¹⁵³ Legislative intent is irrelevant for the reasons noted above; the search for objective meaning focuses on how a congressional outsider would understand the statute, so what the legislators intended when they wrote the statute does not matter.¹⁵⁴ Legislative intent is nonexistent because there are 536 people (at least in Congress) who are involved in the passing of a law and they do not have a shared intent; they all enact a law for different reasons and lack a single, shared, and unifying intent.¹⁵⁵ Thus, with such varied intentions, the *search* for legislative intent becomes a *construction* of legislative intent.¹⁵⁶

As put forth in this case, the Doctrine offends these foundations of textualism. The Court searched for a “practical understanding of legislative intent” before deciding if Congress delegated the power to implement generation shifting.¹⁵⁷ That is, the Court looked at the congressional insiders’ intentions when *drafting* the statute instead of the congressional outsiders’ interpretation when *reading* the statute.¹⁵⁸ This

¹⁵¹ *Id.*

¹⁵² Chad Squitieri, *More on Section 7 of the Torture Convention*, LAW AND LIBERTY (Nov. 18, 2022, 10:00 AM), <https://lawliberty.org/major-problems-with-major-questions/> [<https://perma.cc/B9N5-MTWG>].

¹⁵³ Barrett, *supra* note 120.

¹⁵⁴ *Id.* at 2205 (citing *Lawson v FMR LLC*, 134 S. Ct. 1158, 1176–77 (2014)).

¹⁵⁵ John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2431.

¹⁵⁶ *Id.*

¹⁵⁷ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

¹⁵⁸ The examples of divining congressional insiders’ intentions in the case are legion. *Id.* at 2608 (“Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be shaped . . . by . . . whether *Congress in fact meant* to confer the power the agency has asserted.”) (emphasis added and quotations omitted); *id.* (“We rejected that expansive construction of the statute, concluding that *Congress could not have intended to delegate*. . . .”) (emphasis added) (quotations and citations omitted.); *id.* at 2609 (“As for the major questions doctrine ‘label[]’, . . . it took hold because it refers to an identifiable body of law . . . : agencies asserting highly consequential power *beyond what Congress could reasonably be understood to have granted*.”) (emphasis added); *id.* at 2611 (“[A]s stated by EPA in its inaugural Section 111(d) rulemaking . . . *Congress intended* a technology-based approach.”) (emphasis added and citations and quotations omitted.); *id.* at 2613 (“The basic and consequential tradeoffs involved in such a choice are ones that *Congress would likely have intended for itself*.”) (emphasis added); *id.* (“But we said nothing about the ways in which *Congress intended* EPA to exercise its power under that provision.”) (emphasis added).

focus on congressional insider intentions should offend any “honest textualist.”¹⁵⁹

The focus on congressional insider intentions is magnified by the inclusion of legislative history. In arguing that § 111(d) is a “backwater” provision,¹⁶⁰ the Court referred to a single Senator’s comment that § 111(d) was an “obscure, never-used section of the law.”¹⁶¹ This is yet another example of the Court ignoring its textualist roots in applying the Doctrine.

Because it includes both determinations of legislative intent and investigation into legislative history, the Major Questions Doctrine offends textualism.

3. Multi-Factor Balancing Test

The Doctrine further offends textualism because it is too amorphous to be a judicially manageable standard.¹⁶² Recall the four factors in a Major Questions case: (1) economic importance, (2) political importance, (3) regulation resulting in a major shift in an agency’s scope, and (4) a strained statutory basis for that shift. How does one tell if something is economically important? Billions of dollars in government spending?¹⁶³ Do the costs have to be borne by every American? Or can it affect only a subset and still be considered important?

And how does one determine if something is politically important? The Court says that an issue is politically important if it is the subject of an “earnest and profound debate” nationwide.¹⁶⁴ How does one prove the debate? Must the Court produce a string cite of op-eds or Twitter interactions? Or a string cite of the number of lawsuits filed by political organizations or states? And how many op-eds, how many retweets, how many lawsuits are enough?

Similar criticisms can be launched against the last two factors. Reasonable judges can—as they did here—debate if a regulation expands

¹⁵⁹ SCALIA, *supra* note 117, at 28.

¹⁶⁰ *West Virginia*, 142 S. Ct. at 2613.

¹⁶¹ *Id.* at 2602 (2022) (quoting Hearings on S.300 et al. before the Subcommittee on Environmental Protection of the Senate Committee on Environment and Public Works, 100th Cong., 1st Sess., 13 (1987) (remarks of Sen. Durenberger)).

¹⁶² See Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN L. REV. 19, 23 (2010); Sunstein, *supra* note 5, at 487; Lisa Heinzerling, *The Power Canons*, 58 WM. AND MARY L. REV. 1933, 1984 (2017).

¹⁶³ See *West Virginia v. EPA*, 142 U.S. 2587, 2604 (2022); *King v. Burwell*, 576 U.S. 473, 485–86 (2015).

¹⁶⁴ *West Virginia v. EPA*, 142 U.S. at 2614 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006)).

an agency's scope.¹⁶⁵ And reasonable judges can—as they did here—debate if an agency's reading of a statute was a strained one.¹⁶⁶ Not only will the Doctrine's complicated multi-factor test consume precious judicial resources, but it is unlikely that many judges will come out the same way when weighing all these factors. They are simply too malleable to produce predictable results that lawyers can rely on. Justice Gorsuch said it best: “Headscratchers like these are sure to enrich lawyers and entertain law students, but they also promise to leave everyone else wondering about their legal duties, rights, and liabilities.”¹⁶⁷ In this way, the Doctrine offends textualism because it is a multi-factor balancing test that is too malleable to be judicially manageable.

B. The Major Questions Doctrine Offends Purposivism

One might be tempted to think that the Doctrine would be acceptable to purposivists because it searches for congressional intent. But one would be wrong.

Because of the success of the textualist revolution,¹⁶⁸ modern purposivists start—and usually end—their analysis with the text.¹⁶⁹ Where modern purposivists and modern textualists differ is on those thorny statutes where two interpretations are equally plausible.¹⁷⁰ In those situations, purposivists, like textualists, focus on the text of the statute,

¹⁶⁵ Compare *id.* at 2604 (“We also find it highly unlikely that Congress would leave to agency discretion the decision of how much coal-based generation there should be over the coming decades) (quoting *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)) (quotations omitted) with *West Virginia v. EPA*, 142 U.S. at 2636 (“[The majority] claims EPA has no comparative expertise in balancing the many vital considerations of national policy implicated in regulating electricity sources. . . . But that is wrong.” (Kagan, J., dissenting)) (quotations omitted).

¹⁶⁶ Compare *West Virginia v. EPA*, 142 U.S. at 2615–16 (“[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”) with *West Virginia v. EPA*, 142 U.S. at 2630 (Kagan, J., dissenting) (“For generation shifting fits comfortably within the conventional meaning of a ‘system of emission reduction.’”).

¹⁶⁷ *Air & Liquid Sys. Corp. v. DeVries*, 139 U.S. 986, 999 (2019) (Gorsuch, J., dissenting).

¹⁶⁸ Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006) (“Textualists have been so successful discrediting strong purposivism and updating their new brand of ‘modern textualism’ that they have forged a new consensus on the interpretive enterprise that dwarfs any remaining disagreements.”).

¹⁶⁹ John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 87 (2006).

¹⁷⁰ Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538–39 (1947).

canons of interpretation, and accepted methods of interpretation.¹⁷¹ However, purposivists also seek legislative intent, either subjective or constructive, and use legislative history in that search.¹⁷² The general textualist-purposivist distinction is gleaned from the names themselves. In matters of ambiguity, purposivists give greater weight to the purpose of the statute, while textualists give greater weight to the text.

In enacting clear statement rules like the Doctrine, the Court imposes a “clarity tax” on Congress.¹⁷³ This means that Congress must “legislate exceptionally clearly” when it runs up against a Court-prescribed constitutional value.¹⁷⁴ The Court thus makes it more difficult for Congress to pass laws that might appear to threaten those Court-prescribed constitutional values.¹⁷⁵ In this way, clear statement rules are counter-majoritarian because they allow the Court to “override probable congressional preferences in statutory interpretation in favor of norms and values favored by the Court.”¹⁷⁶ Put differently, when courts use clear statement rules, like the Doctrine, to strike down statutes that are not as clear as the courts would like, they risk contravening congressional intent. For a rule, like the Doctrine, that rationalizes itself on understanding and confirming congressional intent,¹⁷⁷ this is a particularly dangerous risk. That risk is further exacerbated when it is applied by a group of non-elected judges who obviate the intent of their duly elected counterparts in Congress who better understand the wants and needs of the American populace.

The counter-majoritarian critique applies with full force to the case at hand. The Clean Air Act is an important law designed to “speed up, expand, and intensify the war against air pollution.”¹⁷⁸ At the time of its enactment, it was a “drastic remedy to what was perceived as a serious and otherwise uncheckable problem.”¹⁷⁹ To ensure the Clean Air Act remained useful, Congress included § 111 as a backstop provision to catch any unregulated harmful air pollutants not categorized under NAAQS or HAP.¹⁸⁰ Though rarely used, § 111 is not useless. Indeed, Congress refused to restrict § 111 in the same way it restricted other sections of the

¹⁷¹ Manning, *supra* note 169, at 99.

¹⁷² *Id.*

¹⁷³ Manning *supra* note 57, at 399.

¹⁷⁴ *Id.*

¹⁷⁵ Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 390 (2019).

¹⁷⁶ Eskridge, *supra* note 63, at 638.

¹⁷⁷ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

¹⁷⁸ H.R. Rep. No. 91–1146, at 1 (1970).

¹⁷⁹ *Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976).

¹⁸⁰ *West Virginia*, 142 S. Ct. at 2629 (Kagan, J., dissenting).

Clean Air Act.¹⁸¹ The language is simple and unrestricted: the “best system of emission reduction . . . adequately demonstrated.” Congress, at first, did impose a “best technological control” restriction on § 111 for new sources, but it refused to do the same for existing sources, like existing power plants.¹⁸² For existing sources, the House Report stated that “the standards adopted [were] to be based on available means of emission control (not necessarily technological).”¹⁸³ Later, Congress deleted the technological restriction on new sources under § 111.¹⁸⁴ Congress’s intent is thus clear: it wanted a flexible standard—shorn of any textual restrictions—by which EPA could wage the “war against air pollution”¹⁸⁵ and provide a “remedy”¹⁸⁶ for those pollutants not covered by NAAQS or HAP. By deciding otherwise, the Doctrine established a “clarity tax” that allows unelected judges to trample over what Congress wanted. The Doctrine thus vitiates legislative intent, and, therefore, purposivism.

VI. CONCLUSION

West Virginia trumpeted the formal introduction of the Major Questions Doctrine.¹⁸⁷ It held that because EPA was trying to decide a major question, EPA needed to point to a clear statement of congressional authorization for the Clean Power Plan.¹⁸⁸ Because it saw no such statement, the Court struck down the rule.¹⁸⁹ The Doctrine, however, rests on shaky statutory interpretation foundations, as it offends both textualism and purposivism. Despite these infirmities, however, expect anti-administrative agency judges to continue striking down many of the Biden Administration’s prominent regulations.¹⁹⁰ Few, if any, will withstand the Doctrine.

¹⁸¹ *Id.* at 2631 (Kagan, J., dissenting) (So, for example, one provision tells EPA to set standards “reflect[ing] the greatest degree of emission reduction achievable through the application of technology. Others direct the use of the ‘best available retrofit technology,’ or the ‘best available control technology,’ or the ‘maximum achievable control technology.’”) (citations omitted).

¹⁸² *Id.* at 2631 (Kagan, J., dissenting).

¹⁸³ *Id.* at 2631 (Kagan, J., dissenting) (quoting H.R. Rep. No. 95-564, at 129 (1977)).

¹⁸⁴ *Id.*

¹⁸⁵ H.R. Rep. No. 91-1146, at 1 (1970).

¹⁸⁶ *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976).

¹⁸⁷ *West Virginia*, 142 S. Ct. at 2609.

¹⁸⁸ *Id.* at 2614-16.

¹⁸⁹ *Id.* at 2616.

¹⁹⁰ *See supra* notes 15-18 and accompanying text.