

In the Wake of *West Virginia v. EPA*: Legislative and Administrative Paths Forward for Science-Driven Regulation

*Safeguarding Government Regulation from Improper
Judicial Interference*

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James Goodwin

Kevin Bell

Rachael Lyle

Andrew Rosenberg

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Executive Summary

With its recent decision in *West Virginia v. Environmental Protection Agency (EPA)*,¹ the Supreme Court of the United States launched an attack on government regulation. Regulations create a level playing field for businesses and help protect public resources such as clean air and water, but sensible rules that the majority of the US population supports are now at risk. The ruling in this case has had an immediate effect: it is now harder for the federal government to act in a comprehensive way to confront contemporary issues. Additionally, the signals this decision sends may jeopardize the future use of evidence-based decisionmaking to tackle our society's greatest policy challenges, from climate change to pandemics and other threats to public health. Moreover, the Court's strong anti-regulatory stance risks throwing our constitutional system of governance out of balance by concentrating too much policymaking authority in the federal judiciary. This report explores the potential impacts of *West Virginia v. EPA* on the effective functioning of the US regulatory system and proposes actions for Congress and federal agencies to take to preserve this critical government responsibility.

The statutes that Congress passes and that the president signs into law are rarely self-executing. Accordingly, Congress usually assigns the task of implementation and enforcement to administrative agencies. Congress creates general legal frameworks for regulatory programs, while charging subject-matter experts at agencies with the task of applying those frameworks to real-life circumstances. Often, this is accomplished through the development and enforcement of binding regulations, informed by scientific, technological, economic, and other expertise.

Unlike congressional or judicial actions, agencies are required, by the Administrative Procedure Act (APA),² to invite public input on their proposed rules and then demonstrate that they considered that input in drafting their final rules. The APA further requires that agencies prepare written statements detailing the reasoned legal, scientific, and policy bases for their final rules. These procedural requirements seek to ensure that the resulting regulatory policies reflect both agencies' in-house expertise and the on-the-ground expertise of the individuals, communities, and businesses that will be affected by those policies.

Significantly, agencies can be held accountable in federal court to ensure that they follow Congress's statutory instructions and that they comply with the APA's procedural requirements when issuing new rules. As generalists by training, judges typically lack subject-matter expertise in the often complex and technical issues involved in regulatory policies. Recognizing these limitations, judges have developed self-imposed constraints, which seek to prevent them from substituting their own views or preferences for what the "best" policy decisions might look like. The most notable of these self-imposed constraints is the *Chevron* deference doctrine, named after the 1984 Supreme Court case in which it was first articulated. According to this doctrine, courts should defer to an agency's interpretation of an ambiguous statutory provision, provided that the interpretation is a reasonable one.

A judicial campaign against regulation has emerged in the federal courts. A recent study found that between 2006, when Chief Justice John G. Roberts, Jr., joined the Court, and 2017, the Court ruled in favor of the US Chamber of Commerce's position 70 percent of the time (Frazelle 2017). It is important to note that the US Chamber of Commerce advocates for

policies supported primarily by the oil, banking, and tobacco industries and does not necessarily represent the views of the broader business community (Brodwin 2015).

In cases involving legal challenges to agency regulations implementing public interest laws, some judges have used several different doctrines and theories crafted to weaken the regulatory system. The effect of these anti-regulatory attacks extends well beyond blocking whatever rule happens to be at issue in the particular case by altering the underlying procedures and mechanisms by which new rules are written, implemented, and enforced.

West Virginia v. EPA represents the latest assault on regulations by the federal judiciary. *West Virginia v. EPA* arose from a long-running lawsuit brought by a group of Republican attorneys general (led by the attorney general of West Virginia) challenging the Clean Power Plan, an EPA regulation issued by the Obama administration to limit global warming emissions from fossil fuel-fed power plants. The regulation sought to accomplish these reductions as inexpensively as possible by drawing on the broad language of a Clean Air Act provision as the basis for a plan that would permit electricity utilities to meet emissions reduction targets by shifting generation from their most heavily polluting facilities to cleaner sources instead of using expensive control technologies at the most-polluting facilities. The coal industry and several states' attorneys general eventually challenged that regulation in the Supreme Court, arguing that the Clean Air Act did not authorize the EPA to issue a rule of this kind. The Court agreed.

The “major questions doctrine,” invoked in this case, has no basis in the Constitution or statutory law, and its precise contours remain murky. According to the doctrine, as articulated in *West Virginia v. EPA*, agencies cannot depart substantially from how they have made policy in the past without new direction from Congress. The doctrine therefore has the potential to significantly constrain future efforts to use science-based regulation to protect people against unacceptable risks of harm in the workplace, from consumer products, and from public health dangers.

To be sure, this threat's extent will depend on whether this doctrine really applies, as the majority claims, in extremely rare circumstances or whether courts use it to strike down a wide array of regulations. Already, industry groups are invoking the doctrine in their challenges to other regulations (Borst 2022), which raises concerns that its application will not be so rare in practice. An aggressive major questions doctrine would upset the fundamental balance of powers embedded in our constitutional system as a means for protecting the US public against arbitrary government action and for ensuring that people retain a meaningful opportunity to shape the policies that affect their lives. Below, we lay out legislative and agency actions for Congress and federal agencies to take to respond to this threat.

Legislative Actions

- Congress should codify *Chevron* deference by mandating that, so long as proper rulemaking or adjudicative procedures were followed under the APA, “a reviewing court shall defer to the agency’s reasonable or permissible interpretation of [their] statute.” Congress can also codify *Chevron* deference on an agency-by-agency basis when reauthorizing statutes or appropriating funds.

- Congress should safeguard science and expertise in the government policymaking process by passing the Scientific Integrity Act,³ which would codify and expand on executive branch policies that create principles and standards to protect government science.
- Congress should enact legislation that expressly grants agencies the power to handle matters of vast economic and political significance and spells out agencies' responsibility and authority to craft effective regulation to respond to contemporary and future issues, such as climate change and the COVID-19 pandemic.

Executive Branch Actions

- Agencies should proliferate regulations and enforcement actions while simplifying the regulatory process. Some agencies have set the precedent of pushing the limits of specific elements of court rulings, rather than taking the legally most cautious approach. In the face of anti-regulatory rulings, all agencies should consider taking the boldest action possible in line with their statutory responsibilities and missions.
- Agencies should **not** default to an exhaustive, slow-moving administrative process to proactively defend against potential legal challenges. To meet their missions and follow Congress's instructions to address major public health challenges such as pollution, emerging diseases, and the ravages of climate change, agencies will need to issue more rules, not fewer. This requires a certain degree of acceptance that some legal challenges to agency action may prevail.
- Agencies should promulgate smaller rules, and the regulatory process should be streamlined, particularly internal government reviews such as by the Office of Information and Regulatory Affairs (OIRA) within the White House Office of Management and Budget (OMB). Because an executive order (EO) instituted these reviews, they can be removed without involving Congress or the judiciary.
- Agencies, offices, and federally chartered corporations should take simultaneous action to address threats such as the climate crisis by closely tracking express grants of statutory authority and by following precedents for measures they have taken previously, thereby averting the major questions doctrine by avoiding issues that could potentially be considered to be of vast economic and political significance.

The *West Virginia v. EPA* decision suggests the Supreme Court is willing to strike down large swaths of the regulatory system that has allowed the US public to have confidence in the quality of our air, water, and consumer products for decades. To prevent the federal judiciary from upsetting the balance between our three branches of government and to forestall the destruction of a regulatory system that benefits us all, Congress and the executive branch must listen to their constituents and act, not retreat.

Introduction

With its recent decision in the case *West Virginia v. EPA*, the Supreme Court has raised major concerns about the future of drafting science-driven policies that benefit the public interest. In this case, the conservative supermajority struck down an Obama administration rule that set limits on global warming emissions from fossil fuel–fed power plants. The Court relied on the novel major questions doctrine to justify this outcome. The next few years will reveal whether and to what extent the major questions doctrine will affect the federal regulatory system.

This case is a massive setback for efforts to avoid the worst consequences of climate change. Climate scientists agree that we must take extraordinary actions to reduce our carbon emissions quickly (IPCC 2021), and the power sector represents one of the single largest sources of those emissions in the US economy (EPA n.d.).

Beyond these consequences, the import of *West Virginia v. EPA* has the potential to extend even further. The Court’s decision—particularly the new doctrine at the heart of its reasoning—casts a dark shadow over the future use of evidence-based decisionmaking to tackle our society’s greatest policy challenges. Regulations create a level playing field for businesses and help protect public resources such as clean air and water, but sensible rules that nearly the entire US population supports are now at risk. Moreover, aggressive use of the major questions doctrine also risks throwing out of balance our constitutional system of governance by concentrating too much policymaking authority in the federal judiciary, which lacks meaningful accountability to the public affected by its decisions.

This report explores the potential negative effects of *West Virginia v. EPA* on the US regulatory system’s effective functioning and proposes actions for federal agencies and Congress to take to preserve this critical government responsibility. It begins by providing background on the important role science-driven regulation plays within our constitutional framework. As part of this background, it also describes how federal judges who are hostile to the regulatory system have deployed various legal theories and doctrines aimed at undermining its effectiveness. The report then turns to the *West Virginia v. EPA* case. After outlining the case’s key issues, it discusses the broader implications of the Court’s decision: federal agencies are statutorily required to make policy based on evidence and informed by their deep subject matter expertise, but this decision could instead empower judges to in effect overrule agencies and make policy based on their personal preferences. As Justice Elena Kagan observes in the conclusion to her powerful dissent in the case, “The Court appoints itself—instead of Congress or the expert agency—the decisionmaker on climate policy. I cannot think of many things more frightening.”⁴ This report provides recommendations for advancing evidence-based policymaking in the face of such improper judicial interference, outlining both specific steps agencies can take now to address climate change and ways that agencies and Congress can ensure the regulatory system continues to function as intended by those who enshrined it in law. Congress and federal agencies must act to overcome such judicial interference to ensure that the government continues to protect public health, safety, financial security, and the environment.

Background

The Role of Science-Driven Regulation

Modern federal regulatory agencies are a crucial part of the US system of governance. The statutes that Congress passes and that the president signs into law are rarely self-executing. Accordingly, Congress usually assigns the task of implementation and enforcement to administrative agencies.

When it comes to protective safeguards, Congress in many cases has opted to create general legal frameworks for regulatory programs. It charges subject-matter experts at agencies with putting these programs into action through the writing and enforcement of binding regulations that are informed by scientific, technological, economic, and other expertise (Novak 2022). To be sure, in creating these programs, Congress does include detailed instructions that establish clear parameters for how agencies should approach program implementation. But within those parameters, agencies retain significant discretion. So, for instance, in response to a spate of high-profile foodborne illness outbreaks connected to raw produce (Civil Eats Editors 2019), Congress passed the Food Safety Modernization Act, which became law in 2011.⁵ The law requires the Food and Drug Administration (FDA) to establish science-based standards regarding production and handling of fruits and vegetables with the goal of reducing sources of contamination that can result in foodborne illness.⁶ Implementing this provision was an enormous and complex undertaking that required the FDA to draw on its expertise about such technical issues as human physiology, microbiology, and agricultural economics in order to design a rule that would be effective in preventing illness and practicable enough for industry to follow.

As the FDA produce safety rule illustrates, the division of responsibilities that characterizes the modern regulatory system is particularly well suited for our increasingly complex and technology driven society. Congress lacks the expertise to write detailed legislation on multifaceted policy matters (Furnas and LaPira 2020), particularly when compared to agencies that employ thousands of professional experts, including those with advanced training in various sciences, engineering, and the law (Wagner 2015).

The fact that Congress passed something like the Food Safety Modernization Act at all is something of an outlier in our contemporary political climate. After decades that saw bipartisan success in passing laws concerning environmental protection, civil rights for disabled people, taxes, campaign finance regulation, and other topics (BPC n.d.), Congress has recently failed to respond effectively to many important issues (Willis and Kane 2018). Nevertheless, the FDA and other regulatory agencies remain nimble enough to use their statutory authority to incorporate new technologies and address new sources of risk that may not be foreseeable yet.

Critically, Congress has also imposed various procedural rules that agencies must follow when implementing regulatory programs. For most regulations, the APA requires agencies to invite public input on their proposed rules and then demonstrate that they considered that input in drafting the final rule. The APA further requires that agencies prepare written statements detailing the reasoned legal and policy bases for the provisions contained in their final rules.

These procedural requirements seek to ensure that the resulting regulatory policies reflect both the in-house specialized expertise of agencies and the on-the-ground expertise of the individuals, communities, and businesses that will be affected by those policies (Mashaw 2018). They also seek to ensure that agency decisions are not arbitrary or made for illegitimate reasons.

When regulatory programs or related implementation actions are challenged in court, judges carefully review them to ensure that agencies have complied with all applicable statutory requirements. Separation of powers concerns and various policy considerations generally counsel judges to refrain from using these reviews to second-guess agency expert judgments or to substitute their policy preferences (Levin 2016). Unlike the political branches, federal judges are unelected and relatively insulated from public accountability. In addition, as generalists by training, judges typically lack subject matter expertise on the often technical and complex issues at the heart of most disputes involving regulatory policies. Recognizing these limitations, judges have developed self-imposed constraints, which seek to prevent them from substituting their own views or preferences for what the “best” policy decisions might look like.

The most notable of these self-imposed constraints is the *Chevron* deference doctrine, which is named after the 1984 US Supreme Court case in which it was first articulated.⁷ According to this doctrine, courts should defer to an agency’s interpretation of an ambiguous statutory provision, provided that the interpretation is a reasonable one. By directing courts to respect Congress’s choice to assign interpretation of ambiguous statutory language to expert agencies (instead of to nonexpert judges), this doctrine safeguards against judicial overreach, thereby respecting constitutional separation of powers concerns. Relatedly, *Chevron* deference is also a linchpin of science-informed policymaking, because it empowers agencies to draw upon their specialized expertise to give those provisions their most efficacious reading—in effect, helping to ensure that regulations fulfill Congress’s statutory objectives (Goodwin 2020).

Growing Tension between the Judiciary and an Effective Regulatory System

A majority of the public has long supported regulations for environmental protection, workplace health and safety, drug safety, and other elements of public health (Kohut et al. 2012; Newport 2018). However, over the last several decades, the federal courts have adopted an increasingly skeptical if not hostile stance toward the US regulatory system (Yaffe-Bellany 2020). Setting this tone from the top has been the Roberts Supreme Court, which a 2013 study found to be one of the most “pro-business” Courts in US history and which has only grown more so (Epstein, Landes, and Posner 2013). A more recent study found that between 2006, when Roberts joined the Court, and 2017, the Court ruled in favor of the US Chamber of Commerce’s position 70 percent of the time (Frazelle 2017). It is important to note that the US Chamber of Commerce and the “pro-business” positions it advances are typically those of the oil, banking, and tobacco industries rather than businesses as a whole; several large corporations have parted ways with it over its stances on climate change, anti-smoking policies, and other issues (Brodwin 2015).

In cases involving legal challenges to agency regulations implementing public interest laws, judges have deployed a variety of constitutional arguments and novel legal theories that weaken the regulatory system. Many of these arguments and theories are the products of think

tanks and advocacy organizations, such as the American Enterprise Institute and the Pacific Legal Foundation, which are dedicated to deregulation. Legal organizations with a broader area of focus—most notably the Federalist Society—have also embraced and promoted these theories (Green 2021). Rather than supporting one side of the longstanding back-and-forth about how strict regulations should be, these organizations endorse a radical dismantling of a system that has allowed the public to have confidence in the air we breathe, the prescription drugs we consume, and the financial systems we rely on (McGarity 2013).

The legal theories judges have recently relied on to constrain regulatory action include the following:

- **Weakened *Chevron* deference doctrine.** Critics of *Chevron* deference claim that it gives agencies too much policymaking power and has contributed to the expansion of the US regulatory system (Beerman 2010). The elimination of the *Chevron* deference doctrine would give judges greater leeway to reject agency interpretations of statutes and instead rely on a reading that is more consistent with their own policy preferences.
- **Major questions doctrine.** As discussed in greater detail below, the Supreme Court invoked this doctrine of statutory interpretation in *West Virginia v. EPA* to justify striking down the EPA’s greenhouse gas emissions standard for power plants. It is also, relatively speaking, a recent creation, having grown out of a distorted reading of a 2000 case, *FDA v. Brown & Williamson Tobacco Corp.*,⁸ in which the Supreme Court determined that the original Federal Food, Drug, and Cosmetic Act did not give the FDA authority to regulate tobacco products. The precise contours of the doctrine remain murky, as the Supreme Court has articulated a few different formulations. The formulation announced in *West Virginia v. EPA*, which appears designed to define how the doctrine is understood in the future, generally holds that the major questions doctrine applies only in those “‘extraordinary cases’ in which the ‘history and breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”⁹ For example, an agency that relies on a vague statutory provision as a basis for far-reaching regulations that depart substantially from how the agency has regulated in the past runs a clear risk of having its regulations overturned under this new doctrine. Prior to *West Virginia v. EPA*, the Supreme Court appeared to rely on the major questions doctrine in two high-profile cases that arose from the Biden administration’s efforts to respond to the COVID-19 pandemic. In the first, *Alabama Association of Realtors v. HHS*,¹⁰ it relied obliquely on the doctrine to strike down the Centers for Disease Control and Prevention’s (CDC) temporary moratorium on evictions, which the agency implemented to mitigate the spread of COVID-19. In the second, *National Federation of Independent Business v. OSHA*,¹¹ the Court again invoked the underlying reasoning of the major questions doctrine (but did not cite it by name) to block the Department of Labor’s (DOL) emergency “vaccine-or-test” standard that sought to protect workers from contracting COVID-19. Significantly, while the Court overruled DOL’s workplace requirements, it did not apply the major questions doctrine in a related case involving the Department of Health and Human Services’ (HHS) COVID-19 vaccine requirements for health workers in facilities that receive Medicare or Medicaid funding. The Court readily found this within HHS’s traditional authority, even though “the vaccine mandate goes further than what the Secretary has done in the past to implement infection control.

But he has never had to address an infection problem of this scale and scope before. In any event, there can be no doubt that addressing infection problems in Medicare and Medicaid facilities is what he does.”¹²

- **Nondelegation doctrine.** This doctrine purports to bar Congress from “delegating,” or passing off, its lawmaking authority to executive agencies. The nondelegation doctrine rests on a misunderstanding of the US Constitution’s separation of powers framework, one that runs counter to that held by the founders (Mortenson and Bagley 2021). The modern regulatory system is largely built on congressional delegations of lawmaking power to agencies. So, a strict application of the nondelegation doctrine could render many of the most important public interest laws—such as the Clean Air Act or the Fair Housing Act—unconstitutional (Bagley 2019). The Court used a strict application of the nondelegation doctrine only twice, both in the 1930s, before adopting a more lenient approach and upholding all subsequent legislation (Walters 2022). As with the *Chevron* deference doctrine, opponents of the regulatory system blame this lenient approach for the expanded role the US regulatory system plays in our society and are calling for the Court to reinstate a stricter approach (Wallison 2020). There was widespread fear that the Court might use *West Virginia v. EPA* as an opportunity for reinstating the strict approach to the doctrine (Millhisser 2021), but only Justice Neil M. Gorsuch invoked nondelegation language in his concurring opinion, joined by Justice Samuel A. Alito. That does not mean that the Court will not revive the nondelegation doctrine in a future case, though. Recently, in *Jarkesy v. SEC*,¹³ a federal appeals court relied on the nondelegation doctrine to strike down the statutory basis for the Security and Exchange Commission’s entire enforcement program, arguing it gave the agency too much lawmaking authority to decide how to hold companies accountable for violating regulations. The case is expected to be appealed to the Supreme Court.
- **Commerce Clause.** By authorizing Congress to regulate interstate commerce, the Commerce Clause in the US Constitution provides the constitutional basis for most federal regulatory programs. In a series of cases in the past 25 years, the Court has construed the Commerce Clause narrowly in striking down provisions of several laws, including a provision allowing victims of gender-based violence to sue their attackers in federal court,¹⁴ a law against gun possession in local school zones,¹⁵ and the Affordable Care Act’s requirement for individuals to purchase health insurance.¹⁶ Continuing in this vein, federal courts could strike down other laws that protect social welfare and regulate the economy.
- **“Dormant” Commerce Clause.** The Court has ruled that states cannot use their own regulatory power in ways that might obstruct or interfere with interstate commerce (Zelinsky 2019). This so-called Dormant Commerce Clause doctrine, if read broadly, could seriously constrain states’ ability to regulate for the welfare of their residents. In October, the Court is set to hear oral arguments in *National Pork Producers Council v. Ross*,¹⁷ a case involving an industry challenge to California regulations governing industrial animal agriculture on the grounds that they violate the Dormant Commerce Clause. As the courts limit federal responses to new and emerging policy challenges, many states are likely to take more ambitious action to protect their residents. *Ross* has the potential to foreclose aggressive state action at the same time that other doctrines hamstring federal regulation.

- **First Amendment.** Even though corporations are abstract entities, not human beings, federal courts have still determined that they are subject to the various protections of the First Amendment just as people are. Federal judges have in turn relied on these First Amendment protections as grounds for striking down regulations. The most well-known and controversial of all corporate First Amendment free speech cases remains *Citizens United v. FEC*,¹⁸ which involved a challenge to the Federal Election Commission’s attempt to enforce a federal bar on electoral campaign-related communications. The Court determined that the statutory provision violated the corporation’s First Amendment rights and struck it down. Lower courts have also used the First Amendment as an anti-regulatory tool. For instance, in *R.J. Reynolds Tobacco Co. v. FDA*,¹⁹ the DC Circuit Court of Appeals struck down an FDA regulation requiring graphic warning labels for cigarettes on the grounds that it “compelled speech” in violation of the tobacco industry’s First Amendment free speech rights.
- **Fifth Amendment Takings Clause.** Among the specific protections included in the Fifth Amendment is a bar against the government taking private property without providing the owner due compensation. Drawing on this provision, the Court has developed a regulatory takings doctrine, under which regulations can be deemed to “take” private property, thereby requiring compensation. The Court established the current test for assessing regulatory takings in *Lucas v. South Carolina Coastal Council*.²⁰ The Court most recently invoked this doctrine in the 2021 case *Cedar Point Nursery v. Hassid*,²¹ in which it struck down a 45-year-old California regulation designed to ensure that labor organizations could enter farm property under limited circumstances for worker organizing activities as a Takings Clause violation.

The potential impact of these theories and doctrines would extend well beyond blocking whatever rule happens to be at issue in the particular case. The precedents they set fundamentally alter the underlying procedures and mechanisms by which new rules are written, implemented, and enforced to make it harder for agencies to fulfill their statutory missions of protecting people and the environment and creating level playing fields for business. Because these changes can involve complex and technical matters of law, they often evade sustained public scrutiny. Furthermore, it can be hard for members of the public to recognize and appreciate the additional deaths, disabling injuries and illnesses, and other harms that would have otherwise been prevented if not for the judiciary’s interference in the effective functioning of the regulatory system; this is because the causal connection is not always clear, and few entities—including the press—are well positioned to explain that connection to the public (Bollier, McGarity, and Shapiro 2004).

Significantly, public interest regulation has faced a hostile federal judiciary before. The so-called *Lochner*-era Supreme Court of the early 20th century similarly demonstrated a strong pro-business bias by repeatedly defeating governmental efforts to protect workers from dangerous working conditions (Bagenstos 2020). Indeed, the *Lochner* moniker harkens back to the Court’s infamous 1905 decision in *Lochner v. New York*,²² in which it struck down a state law establishing maximum workweek hours for bakers on the grounds that it violated their constitutionally protected “liberty of contract.” During the early years of the New Deal, democratically elected officials challenged the Court’s anti-regulatory views. There was even serious talk of a “Court packing” plan to add new justices with presumably more progressive views in order to dilute the anti-regulatory majority. In the end, with the famous “switch in

time that saved nine,” the *Lochner* Court relented and adopted a more deferential review of New Deal policies, including public interest regulations (CRF n.d.).

As then, we too can overcome the obstacles that today’s federal judiciary might present to effective government regulation. The next section of this report outlines a comprehensive legislative and administrative agenda to accomplish just that.

West Virginia v. EPA

THE FACTS OF THE CASE

West Virginia v. EPA involved a challenge brought by a group of Republican attorneys general against the Obama administration’s 2015 Clean Power Plan, a then-defunct regulation aimed at limiting global warming emissions (Dennis and Eilperin 2021). The Obama EPA issued the regulation under section 111(d) of the Clean Air Act, which authorizes the agency to set emissions standards based on the “best system of emissions reduction . . . adequately demonstrated.”²³ Under the Clean Power Plan, states had the option of meeting this standard by designing their own programs, which could be tailored to local needs and conditions.²⁴

The regulation gave states a variety of compliance options to incorporate into their own programs. Some of these options involved “inside the fenceline” measures at specific plants, such as efficiency rate improvements that would reduce the amount of carbon dioxide (CO₂) emitted for each unit of electricity the plant produced. Other options—such as shifting generation to renewable sources such as wind and solar—would necessarily take place “beyond the fenceline” (Roberts 2015). Once implemented, the EPA projected that the regulation would reduce power plant emissions of CO₂ by 32 percent, compared to 2005 levels, by 2030.²⁵

The regulation followed a tortuous path to the Supreme Court in *West Virginia v. EPA*. After the Obama EPA released the final regulation, a group of states and industry groups immediately challenged it in the US Court of Appeals for the DC Circuit. The court denied a request that the regulation be temporarily blocked until the challenge to its legality could be resolved (E&E News n.d.). In an unprecedented step, the Supreme Court reversed this decision and granted the plaintiffs’ request in February 2016, issuing a temporary injunction and preventing the Clean Power Plan from taking effect (King 2021). Meanwhile, the DC Circuit, where the challenge to the regulation was still pending, heard oral arguments in September 2016 (E&E News n.d.). Before the court issued a decision, however, the Trump administration asked the DC Circuit to pause its consideration of the challenge to the Clean Power Plan because it intended to repeal the regulation and replace it with its own (Cushman 2017).

In July 2019, the Trump EPA issued its Affordable Clean Energy regulation,²⁶ which repealed the Clean Power Plan and replaced it with a much weaker program. This new program relied entirely on certain forms of “inside the fenceline” compliance measures and was projected to lead to an *increase* in CO₂ emissions from covered power plants (Roberts 2019). Significantly, by this point, power plants had already met the Clean Power Plan’s 32-percent emissions reduction target, well over a decade early, because the costs of generating electricity using less-polluting natural gas and renewable sources such as wind and solar had dropped more quickly than expected (EIP 2021).

Several environmental and public interest organizations challenged the Trump administration's rule in the DC Circuit, and in January 2021, the court struck down the Trump EPA rule, finding that it was based on a misreading of section 111(d) of the Clean Air Act.²⁷ Soon thereafter, the Biden administration stipulated in court filings that it would not issue a replacement rule modeled on the 2015 Clean Power Plan (Dennis and Eilperin 2021). Supporters of the Trump EPA rule, including a group of Republican state attorneys general, nonetheless appealed the DC Circuit's decision overturning the rule to the Supreme Court. The Supreme Court accepted those appeals, with the cases consolidated as *West Virginia v. EPA*.

“POLICYMAKING FROM THE BENCH”

That the Supreme Court took up the appeal in *West Virginia v. EPA* at all surprised many observers (Millhiser 2022). That is because under our constitutional system, the task of policymaking is assigned to the politically accountable branches—the legislative and executive branches—while the judiciary is supposed to be confined to resolving cases that involve “live” controversies. According to longstanding judicial precedent, for a policy-based case to be an appropriate subject of judicial consideration, it must involve a real, particularized harm that is caused by a policy and the harm could theoretically be redressed by a decision from a court (for example, by striking down the policy). In contrast, the absence of such characteristics raises the perception, if not the reality, of an “advisory opinion” that is “policymaking from the bench,” which would be incompatible with constitutional limits on judicial authority.²⁸

In *West Virginia v. EPA*, the lack of any such live controversy was clear across three different dimensions. First, as noted above, the Clean Power Plan never went into effect due to the Supreme Court's surprise judicial stay. Second, the Clean Power Plan's power plant emissions reduction goals were met well ahead of schedule, even without the Plan's implementation. Thus, given that the Clean Power Plan did not “do” anything, practically speaking, it by definition could not have caused harm to the power sector. Third, in light of the Biden administration's stipulation that it would not pursue a rule similar to the Clean Power Plan, there was no credible risk of future harm here, either. As Kagan noted in her dissenting opinion, “because no one is now subject to the Clean Power Plan's terms, there was no reason to reach out to decide this case. The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering.”²⁹

Further amplifying concerns about the Court's decision to take up this case was the role the fossil fuel industry played in pursuing litigation. The case involved “a coordinated, multiyear strategy by Republican attorneys general, conservative legal activists and their funders, several with ties to the oil and coal industries, to use the judicial system to rewrite environmental law, weakening the executive branch's ability to tackle global warming” (Davenport 2022). Financial disclosure records show that fossil fuel interests spent lavishly to support the election campaigns of the Republican attorneys general who drove the litigation leading up to *West Virginia v. EPA*. These same industry interests were also major financial backers of the campaigns to support the confirmations of the five most recent Republican-appointed members of the Supreme Court (Davenport 2022). Similarly, Senator Sheldon Whitehouse (D-RI) highlighted in his *amicus* brief on behalf of several US senators that industry interests had also supported many of the *amicus* briefs that urged the Court to use the case as a vehicle for weakening the regulatory system, with many calling for an end to Congress's ability to delegate meaningful regulatory authority to agencies.³⁰

THE DECISION

In *West Virginia v. EPA*, the Supreme Court struck down the Clean Power Plan, finding that section 111(d) of the Clean Air Act did not provide the EPA with sufficient authority to issue a rule that was intended to induce “generation shifting” by electric utilities. In an opinion joined by Alito, Justice Amy Coney Barrett, Gorsuch, Justice Brett M. Kavanaugh, and Justice Clarence Thomas, Roberts reached this decision based on an application of a newly articulated understanding of the major questions doctrine.

Significantly, Roberts and the justices who joined the opinion favor an approach to statutory interpretation called “textualism.” That means they strive to confine themselves to the “four corners” of a law and not consider such external factors as legislative intent (Kimble 2017). Section 111(d) of the Clean Air Act authorizes the EPA to adopt the “best system of emission reduction” from the power sector. The EPA’s interpretation of section 111(d) in support of the Clean Power Plan would have been confirmed by a standard textualist approach. Indeed, given that individual plants are highly interconnected within the electrical grid, it was reasonable for the EPA’s engineers and other scientists to treat that grid as a “system” for regulatory design purposes.

To justify going beyond the simple text of the statute, the majority turned to the newly minted version of the major questions doctrine. In so doing, Roberts claimed that the major questions doctrine is an extremely rare exception to the general textualist rule, one that applies to “extraordinary cases.”

Roberts offered two criteria for determining when the major questions doctrine applies. The first concerns the “history and the breadth of the authority that [the agency] has asserted,” and the second relates to the “vast economic and political significance” of the rule at issue. When consideration of these criteria “provide[s] a ‘reason to hesitate before concluding that Congress’ meant to confer such authority,” then the agency must point to a “clear congressional authorization” for the rule to be upheld. But if an agency cannot point to clear authorization, then the reviewing court is obliged to strike down the rule as beyond the agency’s statutory authority.

The majority opinion leaned heavily on the first of these two criteria, focusing its analysis on making the case that the Clean Power Plan involved a novel and far-reaching use of section 111(d) of the Clean Air Act because the EPA had never used this statutory authority in this manner before. In addition, the majority asserted that the technical and engineering issues raised by the Clean Power Plan—such as those related to electricity transmission, distribution, and storage—are not those that typically fall within the EPA’s recognized zone of expertise. Finally, the majority stated that it could find no other provision in the Clean Air Act that explicitly gives the EPA substantial regulatory authority over the electrical grid. As such, the majority expressed doubt that Congress would grant such authority implicitly through an obscure and seldom-used provision like section 111(d).

In contrast, the second criterion—political and economic significance—was given a bare bones discussion in the opinion. The Court stated in conclusory fashion that “[w]e 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 . . . The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself.”³¹ The majority also observed that Congress has failed to pass climate legislation in the past, which

arguably relates to the rule's political significance. Surprisingly, the majority did not mention the costs of the Clean Power Plan, even though this was a major criticism of the rule.

The majority concluded that the Clean Power Plan triggers the major questions doctrine, thereby requiring a sufficiently clear authorization from Congress. The majority found that section 111(d) does not clearly authorize the rule's generation-shifting compliance options and struck it down as beyond the agency's legal authority.³²

IMPLICATIONS FOR SCIENCE-DRIVEN REGULATION

The new major questions doctrine invoked in *West Virginia v. EPA* has the potential to significantly constrain future efforts to use science-based regulation to protect people against unacceptable risks of harm in the workplace, from consumer products, and from other public health dangers. To be sure, this threat's extent will depend on whether this doctrine really is, as the majority claims, an extremely rare exception to the textualist approach to statutory interpretation or whether courts use it to strike down a wide array of regulations. Already, industry groups are invoking the doctrine in their challenges to other regulations, which gives reason for concern that its application will not be so rare in practice (Borst 2022; Webb 2022). The Supreme Court's reliance on the major questions doctrine to strike down two other regulations in the past year—the DOL vaccine-or-test rule and the CDC temporary eviction moratorium—further reinforces this concern.

One likely consequence of the decision is that it may discourage agencies from applying their independent expertise in carrying out their responsibilities using existing statutory authorities in ways that might be regarded as “too novel.” Agencies' limited capacity to regulate may be further stretched by litigation demands.

A second important consequence of the major questions doctrine is that it risks disregarding choices by Congress to confer broad discretion on agencies through its past laws. To be sure, as the Clean Air Act illustrates, many provisions in public interest law include detailed instructions for agencies to follow, which quite clearly comport with the major questions doctrine. In writing these laws, however, Congress also recognized that it could not foresee all the relevant risks that might implicate the laws' objectives and goals. Consequently, Congress sought to buttress the detailed provisions with more open-ended grants of authority to the implementing agencies so that these laws might have a chance to evolve and adapt to meet new, relevant challenges. The provision at issue in *West Virginia v. EPA* demonstrates the value of building flexibility into detailed regulatory statutes in this manner. The effect of the major questions doctrine is to deny giving full effect to these kinds of provisions. In addition, the existence of the major questions doctrine could discourage Congress from making this choice in legislative design in future laws.

Congress, of course, will face several challenges in attempting to meet this new responsibility. First, it is not clear from the majority opinion how clear language must be under the major questions doctrine in order to satisfy the doctrine's clear statement rule. This could become a major source of contention in future negotiations over statutory language, which might ultimately prevent many important statutes from passing through Congress.

A second challenge is the relative lack of expertise that members of Congress can call upon when drafting statutory language. Congressional staff simply lack the in-house expertise that agencies can bring to bear when developing effective policies to meet technologically challenging and complex problems. For instance, the rapid development of autonomous vehicle technology will require detailed regulations governing it and vigilant oversight to ensure the safety of people on the road. The National Traffic and Motor Vehicle Safety Act charges the Department of Transportation (DOT) with issuing motor vehicle safety standards aimed at preventing accidents and at preventing injury or death when accidents do occur. These standards govern “the design, construction, or performance” of all automobiles, including autonomous vehicles.³³ Congressional staff will likely not be able to match the expertise on this complex and quickly evolving technology possessed by the professional staff employed by the DOT.

A third challenge is that future congressional efforts to operate within the new constraints of the major questions doctrine might exacerbate partisan gridlock. Congress already has enough difficulty securing bipartisan compromise on statutes written in broader and more general terms. It is even less likely that lawmakers will be able to achieve such compromise on legislation that contains the kind of precise and detailed instructions to agencies demanded by the majority opinion.

The bottom line is that, with Congress largely unable to pass new laws—and with older laws applied in some circumstances unlikely to pass muster under the major questions doctrine—in many cases agencies might be unable to respond to emerging threats to the public interest. The HHS vaccine rule case suggests that the major questions doctrine is not an insurmountable obstacle for future agency rulemakings, but nonetheless it appears to create a formidable one. As such, the doctrine could significantly affect how agencies and Congress approach their respective roles in promoting the public interest.

Finally, the major questions doctrine may confer on judges enormous power to advance an agenda hostile to regulation as industry groups and other opponents of regulation raise major questions doctrine challenges to future rules. First, the major questions doctrine calls on judges to make two highly subjective judgments that, due to their intrinsic fuzziness, provide more than ample room for manipulation to achieve outcome-based results. Reviewing judges are tasked with making the threshold determination of whether a particular rule involves an “extraordinary case” to which the major questions doctrine applies. The two criteria the majority lays out for making this determination are broad and indeterminate.

Second, reviewing judges must determine whether the language in the relevant statutory provision is clear enough to authorize the rule. Here, too, judges could fit their analysis of the statutory language to either preserve or strike down the rule, consistent with their policy preferences.

In this way, the major questions doctrine risks precipitating a massive shift in policymaking power from the democratically elected and accountable branches—namely, Congress and the presidency—to the federal judiciary. Such a shift runs directly counter to our constitutional system of governance. By potentially concentrating so much power in the one branch of our federal government least responsible to the public, this shift would upset the fundamental balance of powers that our constitutional system has struck as a means for protecting the US public against arbitrary government action and for ensuring that people retain a meaningful

opportunity to shape the policies that affect their lives. Indeed, the provenance of this decision—a case that lacked any real controversy, suggesting a desire to make policy from the bench—illustrates the dangers of courts straying beyond their constitutionally limited role. Thus, it should not be surprising if one of the results of this decision is to lock in still greater opportunities for policymaking from the bench in the future.

Recommendations: Potential Legislative and Administrative Responses

Legislative Solutions

Significantly, the majority opinion in *West Virginia v. EPA* explained that the major questions doctrine was meant to support constitutional “separation of powers” principles, but stopped short of concluding the doctrine was required by those principles. That means Congress can still act to restore the balance between the three branches of government and ensure federal agencies are able to craft the kinds of regulations that statutes have tasked them with writing. And it has several options for doing so. Congress can codify *Chevron* deference, either generally through a new law that mandates this standard of review for agency action or on an agency-by-agency basis when reauthorizing statutes or appropriating funds. It can pass the Scientific Integrity Act, which will help establish an infrastructure to ensure agencies are following appropriate steps to produce science-based regulations as required by statute. And, where the kinds of regulations needed have been struck down or are under threat because of a court decision, Congress can pass laws that explicitly grant agencies authority to regulate on major topics of public concern, such as climate change.

CODIFY *CHEVRON* DEFERENCE

Although it is not framed in explicit opposition to the doctrine of *Chevron* deference, the major questions doctrine is a means of rejecting agencies’ interpretations of their own authorizing legislation in order to constrain regulatory power. The Court has been increasingly reluctant to address arguments relying on *Chevron*, which has long been a target for reactionary legal scholars and activists who seek to limit the powers of the executive branch. While it has not been overruled, *Chevron* deference appears precarious.

Congress can stop the erosion of *Chevron* deference. In December 2021, Representative Pramila Jayapal introduced the Stop Corporate Capture Act. The bill effectively codifies *Chevron* by mandating that, so long as proper rulemaking or adjudicative procedures were followed under the APA, “a reviewing court shall defer to the agency’s reasonable or permissible interpretation of [their] statute,” where ambiguity exists.³⁴ Congress can also codify *Chevron* on an agency-by-agency basis when reauthorizing statutes or appropriating funds.

PASS THE SCIENTIFIC INTEGRITY ACT

Congress should also safeguard science and expertise in the government policymaking process by passing the Scientific Integrity Act. This bill would codify and expand on executive branch policies that create principles and standards to protect government science; it would also codify channels for reporting violations.³⁵ Having such infrastructure in place can help assure judges and others who evaluate the validity of regulations that agencies are following appropriate steps to produce science-based regulations as required by statute.

AMEND LEGISLATION TO ENSURE THAT AGENCIES HAVE AUTHORITY TO HANDLE MAJOR QUESTIONS OF VAST ECONOMIC AND POLITICAL SIGNIFICANCE

Congress should also enact legislation that expressly grants agencies the power to handle matters of vast economic and political significance; this legislation should spell out agencies' responsibility and authority to craft effective regulation to respond to contemporary and future issues, such as climate change and the COVID-19 pandemic. Because the Supreme Court's ruling in *West Virginia v. EPA* is based on the principle that administrative agencies cannot exercise powers that are not authorized explicitly enough, Congress can be more explicit in the scope of its authorizations. An example of this is a bill that Representative Alexandria Ocasio-Cortez recently introduced in response to the Court's decision in *West Virginia v. EPA*. This bill responds to the literal holding of the Court by amending section 111 of the Clean Air Act's "best system of emissions reductions" to include "measures that apply beyond an individual stationary source or category of stationary sources, including measures that would reduce emissions by altering the relative market share of such sources or categories."³⁶ In addition to including the type of program at issue in *West Virginia v. EPA*, it makes explicit that each EPA determination regarding a best system of emissions reductions under section 111 of the Clean Air Act in the Clean Power Plan is "deemed to be authorized" by section 111 of the Clean Air Act.³⁷ This bill, if passed, has a strong chance of solving the specific concern in *West Virginia v. EPA*, assuming it is not deemed an unconstitutional delegation of legislative power, but it would need to be repeated in response to every subsequent unfavorable judicial ruling under the major questions doctrine.

Administrative Solutions

Agencies can continue to implement regulatory safeguards under existing laws by proliferating regulations and enforcement actions, simplifying the regulatory process, and using authority that exists across several agencies to address public health threats such as climate change. They may also wish to consider adopting a policy or practice of not acquiescing to adverse judicial rulings.

FLOOD THE ZONE: TAKE MORE REGULATORY ACTION

Historically, federal agencies have responded to threats from a regressive judiciary by retreating into what Harvard Law School Professor Emeritus Mark Tushnet describes as a "defensive crouch" posture: every liberal position is asserted nervously, its proponents in fear of judicial retaliation against bold positions. In terms of litigation strategy, Tushnet argues that the better approach is to embrace legal realism, reject bad precedent as wrong on the day it was decided, and aggressively exploit ambiguities in bad cases by altering agency actions only as explicitly ordered by court decisions (Tushnet 2016).

Given an ambiguous new judicial standard, agencies should not default to the strategy of undertaking an exhaustive, slow-moving administrative process to defend proactively against potential challenges. Instead, agencies should be bold and dynamic. Caution is the wrong response to judges hostile to all regulation. Taking fewer and more modest steps while developing longer procedural and substantive justifications for them will not protect agencies from the major questions doctrine. Even small rules affecting niche markets such as custom racecar modifications are being challenged by regulated parties under its broad sweep (Chen

2022), and *West Virginia v. EPA* has given lower courts precedential cover to disguise ideological motivations for striking down rules.

To follow Congress's instructions to address major public health challenges such as pollution, emerging diseases, the ravages of climate change, and more, agencies will need to take more and bolder risks and issue more rules, in particular by using the catch-all grants of regulatory authority like the one challenged in *West Virginia v. EPA*. The EPA and other agencies should not be scared away from using those grants of authority where it is appropriate to do so. This requires a certain degree of acceptance that agencies will be sued and may lose. Antiregulation litigants and courts are constrained by their ability to bring and hear cases, respectively, so even given emboldened lower court judges issuing major questions decisions, agencies will always have the volume advantage. For instance, only one in every 450 National Environmental Policy Act analyses is ever challenged in court (Ruple and Race 2020).

The Supreme Court has the capacity to review only a few dozen administrative actions per year, as it must devote at least some of the approximately 65 cases it hears per year to issues of criminal and civil law, interstate disputes, and other matters of great importance (O'Connell 2021). Administrative agencies enjoy a greater likelihood of having challenges heard by more ideologically diverse district court and appellate judges. On the critically important US Court of Appeals for the DC Circuit, which hears more administrative challenges than any other, there are five judges appointed by Democratic presidents and four by Republican presidents, with two vacancies and three pending nominations (Ballotpedia n.d.). The numbers favor the administrative state (Phillips and Walters 2022). Federal agencies should understand and use what advantages they have.

While there is obvious appeal in single unified regulatory programs, such as a cap-and-trade system to address pollution, the Court has signaled that that is exactly the kind of agency action it is most comfortable erasing. To press the numerical advantage the administrative state has over the judiciary, it should, wherever possible, break up rulemaking into smaller actions, which will necessitate myriad legal challenges, increasing the time and expense that antiregulatory litigants and judges will need to stop agency action.

Finally, an enforcement-focused paradigm will make it harder for hostile courts to undo entire regulatory programs with the stroke of a pen. Moreover, relying on voluntary industry cooperation with comprehensive rules-based regimes has made it easier for those industries to delay implementation and bring high-stakes challenges against national programs. Agencies should focus more on enforcement actions, such as inspecting factories, mines, and power plants to compel compliance with permit requirements; imposing stricter permit requirements on individual polluting facilities; conducting more searching review of new chemicals; and dedicating resources to enforcing the many broad powers already on the books. Given the EPA's precipitous decline in enforcement actions in recent years, caused in part by diversion of staff and resources to rulemaking activities (EPA OIG 2021), this is a clear opportunity to correct course.

STREAMLINE OIRA REVIEW

Promulgating smaller rules would expedite their implementation by eliminating the need for review by OIRA within the White House's OMB. Instituted by President William J. Clinton's EO 12866, OIRA review is a necessary prerequisite for the issuance of any "significant

regulatory action,” defined as any rulemaking that will have an effect of \$100 million or more on the economy, raise novel legal or policy issues, conflict with another agency policy, or materially alter the allocation of grants or resources (OIRA n.d.). It is unclear the extent to which a “significant” action according to OIRA is also a “major question,” but the parallels between the two standards at least suggest that a rule that is subject to OIRA review could become prey to a legal challenge under the major questions doctrine.

OIRA review is often lengthy, opaque, and fundamentally antiregulatory. Delays at OIRA are nominally capped at 90 days by EO 12866, but compliance with that deadline is voluntary, and OIRA has taken a year or more to approve (or disapprove of) dozens of rules after agencies complete them (Narang 2013). OIRA’s cost-benefit analyses undervalue future public health benefits (Heinzerling 2021) and reinforce racial injustice (Goodwin 2021). OIRA takes far more meetings with industry and sophisticated lobbying groups to hear arguments about regulatory costs than with representatives of the millions of potential beneficiaries of regulations (Goodwin 2015); it resembles more “a meeting at the Wharton Club” than an objective assessor (Verchick 2013). The president should seriously consider repealing EO 12866 or at least reducing the scope of rulemaking activity OIRA should consider “significant” enough to scrutinize, given that administrative agencies have already applied expertise during that activity.

NONACQUIESCENCE

Agencies may wish to consider nonacquiescence—the practice of restricting adverse judicial precedents to the specific facts of their cases, or “the selective refusal of administrative agencies to conduct proceedings consistently with adverse rulings of the courts of appeals” (Estreicher and Revesz 1989). This is not the same as direct refusal to follow court orders (Parrillo 2018).

Nonacquiescence has a long and continuous history in US administrative governance. Agency nonacquiescence has become less common since the 1980s, but the Supreme Court has declined to rule on nonacquiescence’s constitutionality, so it remains a legitimate practice today (Koh 2021). The Social Security Administration (SSA) and the National Labor Relations Board (NLRB) had formal nonacquiescence policies in place for years without major controversy, and “empirical studies have shown that a number of federal agencies still practice nonacquiescence in varying forms” (Bates 2013).

At the SSA, from the 1960s until June 1985, official agency policy was to follow circuit court decisions. Where these divergences existed, the agency occasionally issued formal nonacquiescence rulings that indicated the agency’s explicit disagreement with particular circuit court decisions. For example, under the Reagan administration, “[i]n an effort to reduce the number of recipients of Social Security disability benefits in the face of circuit court rulings requiring proof of a change in medical condition before benefits could be terminated, SSA directed its personnel to follow agency policy and disregard contrary decisions of the court of appeals” (Estreicher and Revesz 1989).

Similarly, the NLRB ruled in 1944 that it retains the right to continue disagreement with circuit court rulings that are “contrary to the Board’s interpretation of national labor policy,” treating rulings from circuit courts as the “law of the case” that was appealed but limiting courts’ pronouncements of law to the individual cases in question (Estreicher and Revesz

1989). The NLRB has ordered individual administrative law judges to comply with its legal interpretations when ruling on specific cases, rather than on their own interpretations of circuit precedent³⁸ (Estreicher and Revesz 1989).

Many regulatory agencies, including the EPA,³⁹ maintain official, though narrowly tailored, nonacquiescence policies regarding disputes between the circuit courts of appeals about their implementing statutes. And at times, agencies have engaged in arguably nonacquiescent actions without announcing a formal policy. For instance, in *Hornbeck v. Salazar*,⁴⁰ after the Department of the Interior (DOI) placed a six-month moratorium on new offshore drilling following the Deepwater Horizon disaster, a district court granted a preliminary injunction prohibiting the moratorium from being enforced, on the grounds that the moratorium was inadequately explained and justified per APA requirements. In response, the DOI rescinded the moratorium and then immediately issued a new directive that reestablished it, this time including a more thorough explanation of reasons and additional evidentiary support. Although the party that had sought the injunction challenged this new moratorium in the courts, the new moratorium stayed in place while this litigation proceeded. The DOI rescinded it close to the end of its planned six-month duration, and the Fifth Circuit later found that the agency's actions were legitimate.⁴¹ The DOI's actions in this case "expressed clear intent to frustrate the court's ability to meaningfully rule on the merits by allowing the injury to continue" (Bates 2013). In so doing, these actions allowed the agency to achieve its policy goal.

Commentators have observed that if agencies aggressively wielded their nonacquiescence power, "the courts would be crushed by the burden of adjudicating repetitive identical cases" and "agencies will craft bolder, more aggressive policies"⁴² (Diller and Morawetz 1990). This is because agency processes and procedures tend to be far more complicated than judges may realize, and judges often find themselves "flying almost blind," preferring to hold back, avoid hard deadlines, or accede to requests for extensions of deadlines they have imposed (Parrillo 2018). Courts have used their contempt power against agencies and individual officials, but they have "a virtually complete unwillingness" to permit actual sanctions to follow those findings of contempt (Parrillo 2018). More often, judges either try to negotiate or strike down a specific offending action, allowing the process to start over.

Nonacquiescence could raise concerns about the rule of law, stare decisis, and agency good faith, as well as questions about abuse by future administrations antagonistic to statutory objectives. Although these concerns are worth considering—and might provide an impetus for Congress to avoid the problem by legislating—the long history of nonacquiescence shows that it is practical and does not undermine judicial review of agency action. Moreover, in an environment in which the assault on regulatory safeguards has escalated far beyond normal administrative, legal, and political rules of engagement, the stakes may be too great for agencies to be hindered by fears of future abuse.⁴³

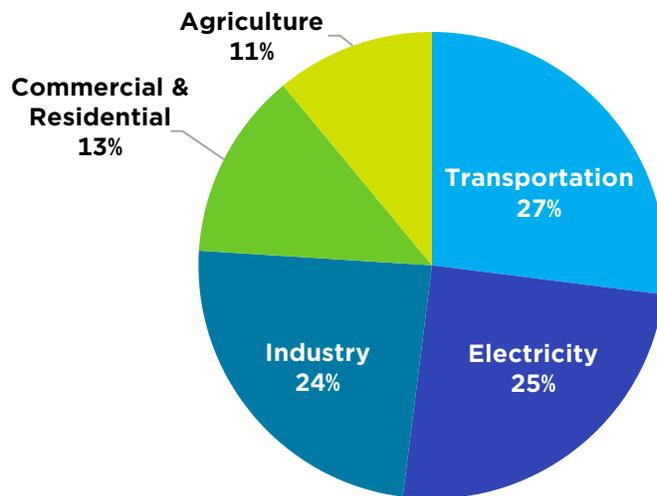
MULTIFACETED AGENCY EFFORTS TO ADDRESS CLIMATE CHANGE

Meaningful executive branch action to mitigate the climate crisis is still possible after the Court's decision in *West Virginia v. EPA*—particularly if action is scattered across myriad agencies, offices, and federally chartered corporations. Pursuant to this strategy, the regulations that each federal agency issues might avert the major questions doctrine by avoiding issues of vast economic and political significance, tracking express grants of statutory authority closely, and following precedents for measures the agencies have taken previously. If

multiple agencies take multiple actions that avoid courts invoking the major questions doctrine, the agencies might achieve major popular regulatory goals, such as curbing fossil fuel emissions while revitalizing our economy by incentivizing a clean energy infrastructure. Although this approach is notably less efficient than the ambitious and comprehensive agency plans the Court has struck down recently, it can still result in substantial positive change. While this section addresses government authority to tackle the climate crisis, it can also serve as a template for multi-agency efforts for effective regulatory action.

As an example, while *West Virginia v. EPA* gutted the EPA’s authority to regulate the electrical grid, it did not restrict the agency’s ability to regulate individual power plants (Friedman 2022). The EPA can and should still exercise its remaining administrative and regulatory authority to combat climate change, as should other federal agencies that have statutory authority to issue regulations affecting emissions. To heighten efficiency, agencies will need to address each of the economic sectors that contribute the most to climate change.

Figure. Total US Global Warming Emissions by Economic Sector in 2020



According to the EPA, the largest percentage of global warming emissions in the United States arises from the transportation sector (27 percent), followed by the electricity (25 percent), industry (24 percent), commercial and residential (13 percent), and agriculture (11 percent) sectors (EPA n.d.). Accordingly, administrative changes within federal agencies affecting all five of these sectors can, taken together, meaningfully curb domestic emissions.

TRANSPORTATION

In the transportation sector, emissions come primarily from the burning of fossil fuels, and about 90 percent of the fuel burned by cars, trucks, ships, trains, and planes is petroleum based (mainly gasoline and diesel fuel) (EIA n.d.). Increasing the use of electric vehicles (EVs) and ensuring that their electricity comes from clean sources can substantially reduce this sector's global warming emissions.

Shifts in this direction are already taking place. The Federal Highway Administration (FHWA), for example, is providing funds to states to deploy an EV charging infrastructure and setting minimum standards for state programs (Reyes and Rushton 2022). Meanwhile, the Tennessee Valley Authority (TVA) has stated that it intends to pave the way for over 200,000 EVs in the Tennessee Valley by 2028 (TVA n.d.). That number and timeline will not be nearly sufficient to curb emissions to the degree needed, but *West Virginia v. EPA* does not prevent either the FHWA or TVA from doing more to help the US transition to clean energy transportation. The TVA, a federally owned utility established by the New Deal, could expand its public EV fast-charging network on a timeline that meets the Paris Climate Agreement goals while shifting to cleaner power sources such as wind and solar to protect Tennessee Valley residents' health; they have long been harmed by the TVA's failure to handle its coal-fired plants' waste safely (Gaffney 2021). The TVA board of directors should protect future generations by shutting down its remaining coal plants and prioritizing EV infrastructure.

Although shifting to EV travel is an important step, it will be nearly impossible to transition to a clean energy economy without a reliable high-speed train network. Currently, most of AMTRAK's passenger rail trains (that is, those outside the Northeast Corridor and Harrisburg, Pennsylvania, lines) run on diesel fuel rather than electricity from climate-friendly sources (BTS 2022). Although rail travel powered by fossil fuel is more energy efficient and less damaging to the environment than road freight or aviation, not all trains are equally efficient (Hoffrichter 2019). Moreover, diesel-powered trains release soot, volatile organic compounds, nitrogen oxides, and sulfur oxides into the air, which harm public health and contribute to climate change (CARB n.d.; King 2019). The United States should prioritize fossil fuel-free train travel that is powered by clean energy sources, particularly where railroads pass through urban areas. AMTRAK's annual sustainability reports tout the climate benefits of train travel, but most riders are not traveling on its high-speed, partly electric Acela trains, which charge high ticket prices and make up only a small fraction of AMTRAK's total trains (AMTRAK n.d.). As the federal government owns AMTRAK (AMTRAK 2018), the DOT should continue working to replace outdated trains with reliable, affordable, clean-source electric trains.

ELECTRICITY

With 25 percent of emissions arising from electricity usage alone, federal agencies must focus on the nation's electricity sources and transition to a clean electrical grid. They can do so without running afoul of the major questions doctrine, which the Court made clear in *West Virginia v. EPA* would be applied only "[i]n extraordinary cases." Upgrading outdated electricity sources is a small step that does not involve transforming the national economy, but it is nonetheless important for reducing domestic emissions and combatting climate change. Agencies can also advance energy efficiency to help reduce energy demand.

To that end, the Office of Energy Efficiency and Renewable Energy (EERE), an office within the Department of Energy (DOE) that works to build a clean energy economy (EERE n.d.a.), should continue to provide resources to the country’s vast public school network through its Solar Decathlon program (DOE n.d.), and it should update its educational materials to focus on climate change education curricula and the importance of energy efficiency and clean energy for healthy schools (EERE n.d.b.).

EERE should also fund the installation of energy efficient and safe school lighting fixtures. More than 40 years ago, toxic polychlorinated biphenyls (PCBs) were banned due to concerns they could be carcinogenic, but millions of magnetic, fluorescent light ballasts containing PCBs likely remain in public schools and day care centers across the country (AP 2019; Ramadan 2022). In addition to their potential health risks, these light fixtures are inefficient. According to the California Department of Toxic Substances Control, disposing of these light fixtures, “in conjunction with lighting upgrades, is an investment that pays off by preventing exposure to hazardous materials, saving energy, and reducing liability for school districts” (DTSC n.d.).

In addition to the EERE, the Federal Energy Regulatory Commission (FERC) has authority to address this issue. FERC is tasked with regulating the interstate transmission of electricity (FERC n.d.) and can require—rather than simply recommend, as it does now (FERC 2017)—that natural gas pipelines, pipeline liquids, or other facilities contaminated with PCBs are shut down first. This policy change would both remove sources of potential toxic exposure and allow for cleaner energy when transmitting electricity; it would also allow a level playing field for companies that have already invested in safer infrastructure.

LAND MANAGEMENT AND NATURAL RESOURCES

The Bureau of Land Management (BLM) is the single largest federal public land manager and a trustee of the country’s natural resources. The agency is responsible for one of every 10 acres of land in the country (BLM n.d.a.). It can therefore play a major role in reducing emissions from heavy polluters, particularly in the oil and gas industry, which is a major source of global warming emissions (Ivanova 2021). By engaging in land management practices that prioritize conservation above fossil fuel extraction, the BLM can help reduce global warming emissions substantially. The BLM currently leases large portions of public lands to the oil and gas industry (BLM n.d.b.), which not only feeds fossil fuel consumption, but also releases the potent warming gas methane and other types of pollution (Ruas 2020). This leasing policy should be reversed.

The BLM should also reverse its plans to remove thousands of acres of old-growth forests in Oregon (CBD 2022). Because old trees store carbon in their wood, their widespread removal releases CO₂ that drives climate change (Biello 2008). Because rotational grazing can store significant amounts of carbon in the soil (Bertrand, Roberts, and Walker 2022), the BLM should prioritize the voices of Indigenous people, who have historically favored rotational grazing in their regenerative agricultural practices, and safeguard the land rights of Indigenous communities when determining its management practices and conservation efforts (Little 2022). This is not only a moral imperative, given the historical forced migration of Indigenous people and taking of their lands (Walsh 2021), but also a critical move in the fight against climate change (Mowat and Veit 2019).

COMMERCIAL AND RESIDENTIAL SECTOR

EPA data show that businesses and homes create 13 percent of domestic global warming emissions (EPA n.d.). The US Department of Housing and Urban Development (HUD) oversees approximately 4.5 million public and subsidized housing units (HUD n.d.a.). Currently, HUD aims to transition to some renewable energy supplying its federally assisted housing by midcentury (HUD 2022), and the agency is partnering with the DOE to increase its multifamily rental housing’s energy efficiency by 20 percent (HUD n.d.b.). HUD and the DOE can and should do more. For instance, HUD should transition away from energy-inefficient lighting and upgrade its housing units with more efficient Energy Star® and WaterSense® products and appliances, including showerheads, faucets, furnaces, and refrigerators. HUD would not be exercising “newly discovered authority” by simply accelerating its timelines to protect its residents from toxic pollution or by upgrading its lighting and appliances to be more energy efficient. Given that HUD spends up to 14 percent of its budget on utilities at its properties (HUD n.d.a.), these minor policy improvements and accelerated timelines would have a broad positive effect by both reducing emissions and saving taxpayer money.

AGRICULTURE

The agricultural sector accounts for 11 percent of total US global warming emissions (EPA n.d.) and the largest portion of methane emissions (Held 2022). The US Department of Agriculture (USDA) subsidizes farms based solely on how much they produce—often in an environmentally unsustainable manner (Gustin 2019). The USDA should address climate change by prioritizing financial support to farms that use sustainable farming practices, including diversified operations that help preserve the soil. The recently passed Inflation Reduction Act will provide \$19.5 billion to support conservation practices on farms across the country (CRS 2022). The USDA should use these funds to implement practices at industrial farms that help promote drought resilience and soil preservation and to support the smaller, organic farms already engaging in these resilience practices.

Because the USDA currently bases its taxpayer-funded farm subsidies on how much a farm produces, larger, industrial-sized farms receive the largest government payouts; in 2019, just 100,000 farmers collected over 70 percent of this money (Charles 2019). Yet, the larger the farm, the more manure, fertilizer, chemicals, and antibiotics are released into the soil, polluting the water, degrading the soil, and, in turn, driving climate change (Gustin 2019; Manyi-Loh et al. 2018). The USDA should instead prioritize taxpayer-funded payouts to small, organic farms that use responsible farming practices. Given the 2 million farms across the country (ERS n.d.), this small shift in policy would make material strides toward reducing domestic agricultural emissions.

A MODEL FOR OTHER REGULATORY ACTIVITY

As the above examples demonstrate, relatively modest actions taken by multiple agencies can combine successfully to address a problem that a single agency could address with a larger regulatory move under a Supreme Court less hostile to regulation. Agencies should consider a similar approach in order to tackle other crises, such as the COVID-19 pandemic, maternal mortality, and homelessness, notwithstanding current doctrinal constraints.

Conclusion

The *West Virginia v. EPA* decision demonstrates the Supreme Court's willingness to strike down large swaths of the regulatory system that has allowed the US public to have confidence in the quality of our air, water, and consumer products for decades. To prevent the federal judiciary from upsetting the balance between our three branches of government and forestall the potential destruction of a regulatory system that benefits us all, Congress and the executive branch must act. Agencies can respond with a refusal to be cowed into paralysis and with smaller regulatory actions that add up to significant impacts. Congress can reduce the need for such responses by codifying *Chevron* deference to limit the judiciary from running roughshod over agency expertise, by passing the Scientific Integrity Act, and by explicitly granting agencies authority to address issues of vast economic and political significance, such as climate change and pandemics. The health and wellbeing of future generations depend on our ability to ensure that federal agencies can use their extensive expertise to craft evidence-based regulations that benefit us all.

AUTHORS

James Goodwin is a senior policy analyst at the Center for Progressive Reform. His work focuses on promoting a more robust, responsive, and inclusive regulatory system.

Kevin Bell is an attorney with Public Employees for Environmental Responsibility. His expertise is in whistleblower complaints and FOIA and environmental regulatory litigation.

Rachael Lyle is an environmental lawyer whose recent writing focuses on climate politics and activism. She is currently an attorney at the Climate Science Legal Defense Fund, based in New York City.

Andrew Rosenberg is a Senior Fellow at the Carsey School of Public Policy at the University of New Hampshire. Previously he led the Center for Science and Democracy at the Union of Concerned Scientists, focusing on the role of science in public policy and democracy.

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ENDNOTES

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- 3 Scientific Integrity Act, H.R. 849, 117th Cong. (2021).
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- 37 *Ibid.*
- 38 *Insurance Agents' Int'l Union*, 19 NLRB 768 (1957).
- 39 Regional Consistency Regulations, 40 C.F.R. § 56.
- 40 *Hornbeck Offshore Services, L.L.C v. Salazar*, 696 F. Supp. 2d 627 (E.D. La. 2010).
- 41 *Hornbeck Offshore Services, et al. v. Salazar, et al*, 701 F.3d 810, No. 11-30936 (5th Cir. 2012).
- 42 Any attack on nonacquiescence might be rhetorically defended against by invoking the legacy of Abraham Lincoln, arguably US history's most notable nonacquiescer, who ignored Chief Justice Roger B. Taney's adverse judgment in *Ex parte Merryman*.
- 43 Although it is possible that regulatory agencies' adoption of nonacquiescence policies could embolden agencies that actively harm people, it is worth noting that reactionary agencies rarely feel squeamish about disregarding law that conflicts with their goals. For instance, the habitual failures of the Department of Homeland Security and Customs and Border Protection to follow statutorily required procedures at the border almost never face judicial review: "If the officer conducting the credible fear interview determines that the fear described is not sufficient, they may seek review by an IJ to evaluate the negative credible fear determination. But if an IJ upholds the officer's assessment, then neither the statute nor regulations permit any further judicial or administrative review" (Koh 2018). See also Koh (2021).

For more information, please contact scientificintegrity1@gmail.com.

