

IMPLICIT REJECTION OF *MASSACHUSETTS V. EPA*: THE PROMINENCE OF THE MAJOR QUESTIONS DOCTRINE IN CHECKS ON EPA POWER

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Over the past four decades, many landmark administrative law cases have involved challenges to environmental agency action.¹ Environmental regulation exemplifies the tensions within the administrative state: unelected agencies tackle highly technical problems with pervasive nationwide effects that impact industries and individuals alike. The Court's recent decision in *West Virginia v. Environmental Protection Agency* is one such example.² In *West Virginia*, the Court considered whether the EPA's broader conception of its authority to regulate "outside-the-fence"³ is within the power granted by the Clean Air Act (CAA). The 6-3 opinion, authored by Chief Justice Roberts, takes aim at broad assertions of agency power in the absence of clear congressional intent through the major questions doctrine (MQD), a tool of statutory interpretation typically used as an appendage of *Chevron* analysis that the Court now relies upon as a standalone principle.⁴ The prominence of the MQD in *West Virginia* signals the Court's

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¹ See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014).

² *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

³ Transcript of Oral Argument at 12, *West Virginia v. EPA*, 142 S.Ct. 2587 (2022) (No. 20-1530). The phrase "outside the fence" essentially references regulation of power plant emissions that goes beyond the plant itself—i.e., the regulation does not impact the infrastructure within the fence-line of the single power plant.

⁴ The MQD has appeared, in different forms, in recent cases before the Court. In the per curiam opinion *Alabama Association of Realtors v. Department of Health and Human Services*, the Court based its decision, in part, on the principle that Congress did not clearly authorize the Centers for Disease Control and Prevention (CDC) to exercise such significant, broad power. 141 S.Ct. 2485 (2021) (per curiam). The Court wrote "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Alabama Ass'n of Realtors*, 141 S.Ct. 2485, 2489 (2021) (per curiam) (citing *Utility Air Regulatory Group*, 573 U.S. at 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000))) (internal quotations omitted). Even if the statute had been ambiguous (the Court determined it was not), because Congress did not explicitly grant the CDC the power it claimed, the CDC could not exercise the "breathtaking amount of authority" to regulate landlord-tenant relationships across the nation. *Id.* Although not named, the MQD accompanied the Court's statutory analysis and bolstered the conclusion that the CDC exceeded its authority.

Within six months, the Court issued another per curiam opinion in January 2022, *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*, where it determined that the Occupational Health and Safety Administration (OSHA) exceeded its statutory authority in issuing a vaccine mandate for all who work for an employer with 100 or more employees. 141 S.Ct. 661 (2022) (per curiam). The opinion only *referenced* the MQD. *Id.* at 667. However, Justice Gorsuch's concurrence named the MQD as the animating principle behind the decision and distinguished the major questions doctrine from the closely related nondelegation doctrine. *Id.* at 669 ("The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials."). Justice Gorsuch connected the MQD with the separation of powers, writing that the federal government must "properly invoke a constitutionally enumerated source of authority to regulate in this area or any other" and "act consistently with the Constitution's separation of powers." *Id.* at 667.

growing skepticism of broad agency power and its willingness to use the doctrine in statutory interpretation. In addition, the majority and concurrence in *West Virginia* suggest that the current Court would have decided *Massachusetts v. EPA*,⁵ another landmark environmental case, differently.⁶

I. BACKGROUND

Section 111(a) of the CAA grants the EPA the power to regulate power plants as stationary sources under a standard called the “best system of emission reduction” (BSER).⁷ Under this framework, the EPA applies a system of reduction, determined “best” by the EPA Administrator, to emissions from new and existing plants.⁸ In its 2015 Clean Power Plan Rule (CPP), the EPA set the BSER for existing coal and gas power plants in a way that “caused a shift toward wind, solar, and natural gas.”⁹ This approach provided the EPA with significant flexibility in the demands it placed on power plants—“in translating the BSER into an operational emissions limit, EPA could choose whether to require anything from a little generation shifting to a great deal.”¹⁰ The EPA then settled on a program that forced the States to implement generation-shifting practices.¹¹

Shortly after the 2016 presidential election, the Trump Administration repealed the rule and replaced the CPP with the Affordable Clean Energy (ACE) Rule.¹² The ACE Rule was challenged in the D.C. Court of Appeals in 2020, which determined that, contrary to what the Trump EPA asserted in its repeal of the CPP, the EPA possessed the authority to force generation shifting.¹³ Shortly after this decision, and the 2020 election, President Biden’s EPA requested a stay of the court’s mandate so that the CPP did not “immediately go back into effect.”¹⁴ However, several states challenged the EPA’s authority to regulate emissions under the CPP, culminating in *West Virginia*.

⁵ 549 U.S. 497 (2007).

⁶ Chief Justice Roberts, Justices Thomas, Alito, and Breyer were all on the Court at the time *Massachusetts v. EPA* was decided. Chief Justice Roberts authored a dissenting opinion that argued that the plaintiffs lacked standing; he was joined by Justices Thomas, Alito, and Scalia.

⁷ 42 U.S.C. §7411(a)(1) (“The term ‘standard of performance’ means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.”).

⁸ See 42 U.S.C. §7411(b)(1); 42 U.S.C. §7411(b)(1).

⁹ *West Virginia*, 142 S.Ct. at 2601.

¹⁰ *Id.*

¹¹ *Id.* at 2604.

¹² 84 Fed. Reg. 32,520 (July 8, 2019) (since vacated). The Court in *West Virginia* describes that the CPP was repealed on the grounds that it exceeded its statutory authority. 142 S.Ct. at 2604. The subsequent ACE Rule determined that the BSER only required minor, source-specific facility upgrades. *Id.*

¹³ *West Virginia*, 142 S.Ct. at 2605. The MQD was cited by the Trump Administration EPA as a reason for the repeal of the CPP. 84 Fed. Reg. 32,520 at 32,529 (July 8, 2019).

¹⁴ *West Virginia*, 142 S.Ct. at 2606 (“The court’s decision, handed down on January 19, 2021, was quickly followed by another change in Presidential administrations. One month later, EPA moved the Court of Appeals to partially stay the issuance of its mandate as it pertained to the Clean Power Plan.”). The EPA chose to stay the reimplementing of the CPP because they were reconsidering promulgating a new §111(d) of the CAA. *Id.* The “EPA believed that such a result would not make sense while it was in the process of considering whether to promulgate a new Section 111(d) rule.” *Id.*

II. OPINION

In *West Virginia*, the Court considered whether the EPA had the authority to “restructure the Nation’s overall mix of electricity generation. . . [as] the ‘best system of emission reduction’ within the meaning of Section 111.”¹⁵ Writing for the Court, Chief Justice Roberts asserted that this is a “major questions case”¹⁶ because it involved an agency “asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”¹⁷ The majority asserted that the EPA constructed a regulatory framework devoid of clear statutory roots; basing its “newfound power in the vague language” of §111(d) of the CAA, the EPA concluded that this vague language “allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”¹⁸ The Court stated that the EPA had never used a systematic approach like generation shifting that looked beyond individual source emissions reduction or technological standards, and Congress would not employ the “previously little-used backwater of Section 111(d)” to confer such authority on the EPA.¹⁹ Essentially, the EPA’s interpretation of Section 111(d) gave the EPA unprecedented authority to demand “much greater reductions in emissions based on a very different kind of policy judgment: that it would be ‘best’ if coal made up a much smaller share of national electricity generation.”²⁰ The majority also described how the Court could not ignore the fact that Congress “considered and rejected” such a course of action “multiple times.”²¹ To the question of “whether the ‘best system of emission reduction’ identified by EPA in the [CPP] was within the authority granted to the Agency in Section 111(d),”²² the Court employed the MQD and answered with a resounding “no.”

III. CONCURRENCE AND DISSENT

Justice Gorsuch’s concurrence further bolstered the history behind the MQD and traced its roots to the separation of powers doctrine.²³ Justice Gorsuch first outlined four questions that identify whether agency action is based on a valid, clear statement by Congress.²⁴ Ultimately, he determined that the EPA’s assertion of power in the form of the CPP fit each category, and despite

¹⁵ *Id.* at 2606. The Court also addressed the issue of standing. The Court first held that the states had standing because they were injured by the Court of Appeals’ judgment which vacated the ACE Rule and seemed to reinstate the CPP: “to the extent the Clean Power Plan harms the States, the D.C. Circuit’s judgment inflicts the same injury.” *Id.* The Court did not find the government’s mootness argument persuasive—the case was not mooted just because the EPA voluntarily decided not to enforce the CPP, partially because the EPA actively defended the “legality of [the CPP’s] approach.” *Id.* at 2607.

¹⁶ Chief Justice Roberts defended the major questions “thread” from attack by the dissent, claiming that cases like *FDA v. Brown & Williamson*, 529 U.S. 120 (2000) (a case comparison the Court rejected in *Massachusetts v. EPA*, 549 U.S. 497 (2007)), *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), and the recent case *NFIB v. OSHA*, 142 S.Ct. 661 (2022), support the relevance and validity of major questions analysis in the space of agency authority.

¹⁷ *West Virginia*, 142 S.Ct. at 2609.

¹⁸ *Id.* at 2610.

¹⁹ *Id.* at 2613.

²⁰ *Id.* at 2612.

²¹ *Id.* at 2614 (citing *Brown & Williamson*, 529 U.S. at 144).

²² *Id.* at 2616.

²³ *Id.* at 2616 (2022) (Gorsuch, J., concurring). Justice Gorsuch specifically emphasized the importance of the major questions doctrine with the rise of the administrative state in the 1970s, writing that the “constitutional lines at stake here are surely no less important than those this Court has long held sufficient to justify parallel clear-statement rules.” *Id.* at 2620.

²⁴ *Id.* at 2622.

the dissent's criticism, Justice Gorsuch concluded that the Court's decision returned power to the "people's elected representative[s]";²⁵ agency power could not be used to circumvent constitutional design.

In her dissent, Justice Kagan criticized the majority and concurrence, claiming that the majority flouted "judicial modesty" in an attempt to constrain the EPA and alleging that the concurrence failed to rigorously analyze the statutory text.²⁶ Justice Kagan stated that Congress used "capacious" language²⁷ to permit the EPA to address "new and big" problems.²⁸ Specifically targeting the majority's use of the MQD, Justice Kagan argued that the MQD was inappropriate in the instant case because there was no "misfit" between agency action and statute; she emphasized that the CPP "fits perfectly" within the EPA's wheelhouse.²⁹ Justice Kagan concluded that simply answering "major issues of public policy" did not expose an agency to judicial scrutiny.

IV. IMPLICATIONS FOR *MASSACHUSETTS V. EPA* AND THE ADMINISTRATIVE STATE

As the nation's approach to climate change continues to be litigated, environmental law will become increasingly salient. The impact of the majority's use of the MQD in *West Virginia* is not limited to power plant regulation; this case signaled a shift in the Court's view of agency power. In the past, the MQD appeared only as an interpretative device under the *Chevron* doctrine,³⁰ where judges used it in the "step one" analysis to determine whether a "statute [was] silent or ambiguous."³¹ In *West Virginia*, the doctrine appeared without mention of *Chevron*.

The MQD's prominence in *West Virginia* implicitly rejected the logic used in past administrative and environmental decisions, notably *Massachusetts v. EPA* (2007).³² In *Massachusetts*, the Court rejected the EPA's argument that it lacked the statutory authority to regulate greenhouse gases on a principle similar to the MQD; Congress would have spoken clearly if it intended the EPA to regulate greenhouse gases because of their political and economic significance.³³ The EPA relied on the Court's decision in *Brown & Williamson*,³⁴ and argued that "imposing emission limitations on greenhouse gases would have even greater economic and political repercussions than regulating tobacco."³⁵ The Court, however, rejected these arguments and determined that the "EPA's reliance" on *Brown & Williamson* was "misplaced."³⁶ The majority

²⁵ *Id.* at 2624.

²⁶ *West Virginia*, 142 S.Ct. at 2633 (Kagan, J., dissenting); see also *id.* at 2641 n.8 ("Nowhere will you find the concurrence ask: What does the phrase 'best system of emission reduction' mean? §7411(a)(1). So much for 'begin[ning], as we must, with a careful examination of the statutory text.'") (citing *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718 (2017)).

²⁷ *Id.* at 2632.

²⁸ *Id.* at 2628.

²⁹ *Id.* at 2633.

³⁰ The majority does not employ the *Chevron* doctrine, or mention the case, in the opinion. See *West Virginia*, 142 S.Ct. 2599.

³¹ *Chevron*, 467 U.S. at 843. This language may conjure images of other notable doctrines and axioms of interpretation— notably, the nondelegation doctrine and the assertion that Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

³² 549 U.S. 497. Only Justice Kagan referenced the case in her dissent; the majority did not mention the case, even in reference.

³³ 549 U.S. at 512.

³⁴ 529 U.S. at 120.

³⁵ *Massachusetts*, 549 U.S. at 512.

³⁶ *Id.* at 530.

stated that the analogy failed because 1) while it was “unlikely that Congress meant to ban tobacco products,” it was plausible Congress meant to allow the EPA to “only regulate emissions;”³⁷ and 2) in *Brown & Williamson*, the Court “pointed to an unbroken series of congressional enactments that made sense only if adopted ‘against the backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco,’”³⁸ while the EPA had “not identified any congressional action that conflict[ed] with the regulation of greenhouse gases from new motor vehicles.”³⁹ For these reasons, the Court rejected the EPA’s reliance on *Brown & Williamson* and declared that the EPA had the authority to regulate greenhouse gases.

The result of *West Virginia* runs counter to the 2007 decision in *Massachusetts*, suggesting that today’s Court would decide *Massachusetts* differently. In *West Virginia*, the Court rejected its reasoning in *Massachusetts*; it construed EPA regulation of emissions as a major question and interpreted congressional silence as a limit rather than an authorization. First, the *West Virginia* Court departed from *Massachusetts* by holding that the EPA’s CPP posed a major question because it did not “only regulate emissions” but reconfigured the national landscape of power generation. Emphasizing that the EPA could demand “much greater reductions in emissions based on a very different kind of policy judgment” than that which Congress authorized, the Court diverged from its earlier reasoning in *Massachusetts* where it had rejected reliance on *Brown & Williamson*.⁴⁰ In *Massachusetts*, the Court wrote that there was nothing “counterintuitive to the notion that EPA can curtail the emission of substances” that were harming the climate, so a comparison with *Brown & Williamson* was unsuitable.⁴¹ The Court highlighted that because there was no “mismatch” between regulating pollutants and emissions, unlike the FDA and tobacco, the EPA had not overreached its statutory authority.⁴² The MQD as articulated by the *West Virginia* Court, however, did not rely on statutory “mismatch”;⁴³ despite Justice Kagan’s urging, the MQD weighed principles such as the separation of powers against agency interpretation.⁴⁴ While the Court of 2007 saw nothing incongruous between forcing the EPA to regulate an entirely new category of pollutants and Congressional ambiguity on the matter, the 2022 Court would view Congressional silence as a red flag; extreme authorizations of agency power require extremely clear language from Congress. Therefore, if faced with the same question the Court faced in *Massachusetts*, today’s Court would curb the EPA’s power in the absence of clear congressional authorization.

Second, in *West Virginia*, the Court departs from its reasoning in *Massachusetts* by interpreting congressional silence as a limit, rather than a blessing, on regulation. The *West Virginia* Court pointed to “an unbroken series of congressional enactments that made sense only if adopted ‘against the backdrop’” of the EPA’s inability to regulate beyond individual sources under

³⁷ *Id.* at 531.

³⁸ *Id.* (internal citation omitted).

³⁹ *Id.*

⁴⁰ *West Virginia*, 142 S.Ct. at 2612.

⁴¹ *Massachusetts*, 549 U.S. at 531.

⁴² *West Virginia*, 142 S.Ct. at 2624 (Gorsuch, J., concurring).

⁴³ *Id.*

⁴⁴ *West Virginia*, 142 S.Ct. at 2637 (Kagan, J., dissenting) (“It is EPA (that’s the Environmental Protection Agency, in case the majority forgot) acting to address the greatest environmental challenge of our time.”).

Section 111(d) of the CAA;⁴⁵ the Court concluded that the petitioners had “identified . . . congressional action that conflicts with”⁴⁶ the CPP. The Court stated that the EPA did not succeed in its claim that the “vague language” of §111(d) of the CAA “allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”⁴⁷ The majority highlighted Congress’s reluctance to impose the kind of regulatory scheme outlined in the CPP as well as the absence of “outside-the-fence” regulation of power plants.⁴⁸ The Court did not ignore that Congress “considered and rejected” such a course of action “multiple times” and that a systematic approach like generation-shifting remains unprecedented under the CAA.⁴⁹ In *Massachusetts*, on the other hand, the Court seemed content to state that “the EPA ha[d] not identified any congressional action that conflict[ed] in any way with the regulation of greenhouse gases from new motor vehicles,” another reason why the petitioners should not have relied on *Brown & Williamson*, where Congress denied an agency the ability to regulate tobacco.⁵⁰ The *Massachusetts* Court saw the EPA’s failure to “disavow[] the authority to regulate greenhouse gases” as an open door through which additional regulatory power could enter.⁵¹ The *West Virginia* Court took the opposite stance and recognized the similarities between the EPA’s actions and those of the FDA in *Brown & Williamson*; the *West Virginia* Court concluded that Congress’s failure to *avow* the agency’s authority to regulate never opened the door in the first place. The *West Virginia* Court would view the major policy implications and congressional silence in *Massachusetts* as a resounding “no” to regulation, not a “yes.”

The petitioners in *West Virginia* raised similar points as the petitioners in *Massachusetts*, but this time, the Court accepted the arguments and placed the *Brown & Williamson* decision at the forefront of a “series of significant cases” that address the “particular and recurring problem”⁵² of agency aggrandizement of power. In doing so, the Court embraced *Brown & Williamson* as a limit on EPA power. While the Court did not name the MQD in its analysis in *Massachusetts*, the EPA employed the principles underlying the doctrine—the absence of explicit Congressional authorization and the unique political history of climate change.

V. IMPLICATIONS OF JUSTICE GORSUCH’S CONCURRENCE FOR *MASSACHUSETTS V. EPA* AND THE ADMINISTRATIVE STATE

Justice Gorsuch’s proposed analysis of the MQD differed from Chief Justice Roberts’s two-step analysis by forcing a more rigorous examination of the potential ambiguity in the statutory text. In *West Virginia*, Chief Justice Roberts performed (in the words of Justice Kagan) a two-step MQD analysis, first asking if the agency action qualifies as an “extraordinary case” and then asking where the agency finds its “clear congressional authorization” for its action.⁵³ It was

⁴⁵ *Massachusetts*, 127 S.Ct. at 1461 (internal citation omitted).

⁴⁶ *Id.*

⁴⁷ *West Virginia*, 142 S.Ct. at 2595.

⁴⁸ Transcript of Oral Argument at 12, *West Virginia v. EPA*, 142 S.Ct. 2587 (2022) (No. 20-1530).

⁴⁹ *West Virginia*, 142 S.Ct. at 2614 (internal citation omitted).

⁵⁰ *Massachusetts*, 127 S.Ct. at 1461.

⁵¹ *Id.*

⁵² *West Virginia*, 142 S.Ct. at 2609.

⁵³ *Id.* at 2608–10 (internal quotations omitted).

unclear which method the Court adopted in *Massachusetts*; Justice Kagan remained convinced that past Courts only used a “common sense” approach that analyzed “the fit between the power claimed, the agency claiming it, and the broader statutory design.”⁵⁴ Despite Justice Kagan’s assertion, Chief Justice Roberts’s two-step approach mapped onto the Court’s analysis in *Massachusetts*; the difference is that the *Massachusetts* Court stopped at step one: the question of whether the issue of greenhouse gas regulation was an “extraordinary case.” Because there was no “mismatch” between the EPA’s authority and the agency action at-issue, the *Massachusetts* Court did not view the question as “extraordinary” and stopped at the first step of Chief Justice Roberts’s major questions analysis.⁵⁵ Although the Court addressed congressional authorization, it did so only by pointing to the *absence* of congressional *disapproval*. The *Massachusetts* Court did not rigorously analyze the second element (whether Congress expressly authorized the agency action) after they determined that the issue was not extraordinary.

Justice Gorsuch proposed four questions that courts must ask when performing major questions analysis:

- Is the language in the legislative provision “oblique” or obscure?⁵⁶
- Does the “age and focus of the statute the agency invokes” align with the “problem the agency seeks to address”?⁵⁷
- Does the desired interpretation match the agency’s “past interpretations of the relevant statute”?⁵⁸
- Is there is a “mismatch” between the “agency’s challenged action and its congressionally assigned mission and expertise”?⁵⁹

Justice Gorsuch inverted the framework used by Chief Justice Roberts and the *Massachusetts* Court by grounding the question of congressional authority in the first step, not the second. Instead of simply asking whether there is a congressional authorization after the determination of “extraordinariness,” Justice Gorsuch made the inquiry the threshold question—if the language was “oblique,” then the Court must become skeptical of whether there was legitimate congressional delegation. The second, third, and fourth questions of Justice Gorsuch’s framework tackled the traditional first question—answering whether the agency action was “extraordinary” by analyzing its history, past interpretations, and alignment with the agency’s purpose.

If the Court analyzed *Massachusetts* under Justice Gorsuch’s framework, it would likely reach a different result than that reached in 2007.

First, under Justice Gorsuch’s framework the *Massachusetts* Court would probably consider the language used in the legislative provision at issue in *Massachusetts* as “oblique”;⁶⁰ indeed, in

⁵⁴ *West Virginia*, 142 S.Ct. at 2634 (Kagan, J., dissenting).

⁵⁵ The *Massachusetts* Court held that “there [was] nothing counterintuitive to the notion that EPA [could] curtail the emission of substances that [were] putting the global climate out of kilter,” *Massachusetts*, 127 S.Ct. at 1461, and then succinctly determined that “[t]here [was] no reason . . . to accept EPA’s invitation to read ambiguity into a clear statute.” *Id.*

⁵⁶ *West Virginia*, 142 S.Ct. at 2620 (Gorsuch, J., concurring).

⁵⁷ *Id.* at 2623. (Gorsuch, J., concurring).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *West Virginia*, 142 S.Ct. at 2620 (Gorsuch, J., concurring).

its 2007 opinion the *Massachusetts* Court acknowledged that the CAA provided a “capacious definition of ‘air pollutant.’”⁶¹ The use of the word “capacious” indicated that the 2007 Court knew that Congress did not speak with sharp clarity when defining “air pollutant” in the CAA. Therefore, analyzing *Massachusetts* under the first factor of Justice Gorsuch’s framework, the Court would likely view the CAA’s language as “oblique.”

Second, the Court would probably reason that the “age and focus of the statute the agency invokes” does not align with the “problem the agency seeks to address.”⁶² The *Massachusetts* Court stated that “the Congresses that drafted §202(a)(1) might not have appreciated the possibility [of] global warming,” and thus Congress had made an “intentional effort to confer the flexibility necessary to forestall such obsolescence.”⁶³ Justice Gorsuch’s third factor, however, would likely highlight such a lack of foreseeability as evidence that the age of the statute does not align with the agency’s attempted use of the statute. In *West Virginia*, Justice Gorsuch used the example of the forty-year gap between the adoption of OSHA provisions and the COVID-19 pandemic as illustrative of a statute that does not align with the problem it seeks to address.⁶⁴ Similarly, in *Massachusetts*, the provision of the CAA the Court cited was first passed in 1977 and amended in 1990, decades before the climate change issue addressed in the case arose. Therefore, the age of the statute did not align with the problem the EPA sought to address, failing Justice Gorsuch’s second factor.

Third, under Justice Gorsuch’s framework the Court would probably conclude that the EPA’s desired statutory interpretation in *Massachusetts* did not match the agency’s “past interpretations.”⁶⁵ After debating this point, the *Massachusetts* Court concluded that the “EPA had never disavowed the authority to regulate greenhouse gases, and in 1998 it in fact affirmed that it had such authority.”⁶⁶ The EPA’s one-time 1998 affirmation of this regulatory authority, however, contrasted starkly with the EPA’s interpretation that it definitely lacked the authority to do so. Thus, the *Massachusetts* EPA seemed to fail Justice Gorsuch’s third factor of matching agency “past interpretations.”⁶⁷

Fourth, under Justice Gorsuch’s framework, the Court would probably conclude that there was a “mismatch” between the *Massachusetts* EPA’s “challenged action and its congressionally assigned mission and expertise.”⁶⁸ The 2007 Court determined that the CAA’s definition of “air pollutant” “embrace[d] all airborne compounds of whatever stripe,” a determination that granted the EPA broad authority to regulate emissions across almost any industry.⁶⁹ While Justice Kagan would likely agree with the *Massachusetts* Court that there was no “mismatch” between EPA

⁶¹ *Massachusetts*, 127 S.Ct. at 1462.

⁶² *West Virginia*, 142 S.Ct. at 2623 (Gorsuch, J., concurring).

⁶³ *Massachusetts*, 127 S.Ct. at 1462.

⁶⁴ *West Virginia*, 142 S.Ct. at 2623 (Gorsuch, J., concurring).

⁶⁵ *Id.*

⁶⁶ *Massachusetts*, 127 S.Ct. at 1461.

⁶⁷ *West Virginia*, 142 S.Ct. at 2623 (Gorsuch, J., concurring).

⁶⁸ *Id.* at 2623 (Gorsuch, J., concurring).

⁶⁹ *Massachusetts*, 127 S.Ct. at 1443. In addition, the 2007 Court disregarded the EPA’s argument that its actions impeded on authority traditionally reserved for the Department of Transportation by writing that the obligations of the two agencies “may overlap, but there is no reason to think [they] cannot both administer their obligations and yet avoid inconsistency.” *Id.* at 1462.

authority and the regulation of emissions from (essentially) the entire automotive industry,⁷⁰ today's Court disagreed: the majority saw the economic and industrial significance of generation-shifting as outside the EPA's wheelhouse—they lacked the expertise necessary to redefine how the entire nation receives energy.⁷¹ As in *Massachusetts*, the EPA in *West Virginia* was tasked with regulation that involved policymaking tools they traditionally did not use.⁷² Under Justice Gorsuch's fourth factor, today's Court would see this break from tradition as a sign that the EPA acted in a way that did not match its statutory authority.

Thus, Justice Gorsuch's MQD framework strongly suggests that today's Court would rule differently in *Massachusetts*. Justice Gorsuch's framework also indicates that today's Court is focused on the more demanding threshold question of congressional ambiguity rather than the abstract idea of agency-statute "mismatch." Justice Gorsuch's concurrence revealed the intensified rigor of the major questions analysis, and it signaled that pervasive assertions of agency authority would be met with pervasive skepticism.

CONCLUSION

West Virginia "announce[d] the arrival" of the major questions doctrine as a standalone doctrine in power plant regulation, environmental law, and administrative law.⁷³ Advocates should look to this case as foreshadowing the Court's approach to non-delegation and agency authority. Some may say this opinion came as no surprise; some of the Justices have expressed skepticism about expansive delegation in the past.⁷⁴ However, the birth of the MQD as an independent tool of statutory interpretation does not simply mark a shift in environmental jurisprudence. Instead, it undermines regulatory precedent by chipping away at the logic of *Massachusetts*, provides a new tactic for opponents of the administrative state, and signals that today's Court is willing to tackle the problem that broad delegation poses to foundational constitutional principles.

⁷⁰ *West Virginia*, 142 S.Ct. at 2637 (Kagan, J., dissenting) ("the 'how' of generation shifting creates no mis-match with EPA's expertise.").

⁷¹ Justice Gorsuch referenced the majority's phrasing: "requires technical and policy expertise not traditionally needed in [the] EPA's regulatory development." *Id.* at 2624 (Gorsuch, J., concurring).

⁷² *Id.*

⁷³ 142 S.Ct. at 2633 (2022) (Kagan, J., dissenting).

⁷⁴ See, e.g., *Gundy v. United States*, 139 S.Ct. 2116 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.).