Overcoming the Major Questions Doctrine with Federal Public Health Authorities

Erica N. White, J.D.*

Abstract

Emerging with full force in the 2022 U.S. Supreme Court decision West Virginia v. Environmental Protection Agency, *the major questions doctrine (MQD) purports to strike down federal administrative agency regulations and rule-making that implicates matters of "economic and political significance." With little guidance from the Court on how and when to apply MQD, there seems to be no limit to what courts consider "significant" in early applications of the doctrine, leading to far-reaching rulings restricting federal initiatives concerning climate change, social justice, and public health. However, agencies cannot simply cease regulating, absent explicit direction from Congress, even when consequences are "significant." And, as demonstrated by the Court's own precedent, protections and guarantees inherent in the Constitution's structure often require agency action to give full effect to individual rights and government obligations. Deference to agency interpretations of plain statutory language are most secure where regulations enhance individual rights, such as through civil rights statutes, and, conversely, are weak where spurning congressional directions to mitigate or otherwise address discrete public health and other harms. Ultimately, administrative action and judicial review are intertwined, as each is designed to achieve the same constitutional purpose of fully realizing individual rights and governmental guarantees. Agencies—and courts—accept broad readings of statutory text to further constitutional rights protections, and, conversely, reject plausible statutory interpretations that fail to protect the public's health when so ordered by congress.*

* Erica White is a Research Scholar at the Center for Public Health Law & Policy at the Sandra Day O'Connor College of Law at Arizona State University. Erica researches and publishes in public health law and policy. Her primary focuses are in emergency legal preparedness, public health legal powers, public health topics in constitutional and administrative law, and regulation and its reform. Her most recent interests include judicial and other threats to administrative authorities including the major questions doctrine, trends in Chevron deference, and the re-emergence of the non-delegation doctrine. She is a member of the State Bar of Texas and currently pursuing a Master of Public Health (MPH) at the Johns Hopkins Bloomberg School of Public Health.

Introduction

The pronouncement of the major questions doctrine (MQD) in *West Virginia v. Environmental Protection Agency* (EPA)[1] at the end of the U.S. Supreme Court's 2021–22 term seriously threatens federal administrative agency authorities to address contemporary problems, including key public health threats like climate change and infectious disease. The novel MQD holds that in "certain extraordinary cases" of "economic and political significance," clear, unambiguous congressional authorization is required for agency action, regardless of plain statutory text.[2] Given that every federal statute has some imprecise language, MQD could seemingly be used to challenge any subjectively "extraordinary" agency action. In early 2023, MQD has been used offensively against virtually all federal environmental initiatives[3] and was again invoked by the court in *Biden v. Nebraska*, where the Court negated theBiden administration's efforts to forgive some student loan debt.[4]

The public's health depends extensively on federal, state, and local agencies operating under legislatively mandated instructions aimed protecting or improving public health. As explained in Part I, public health administrative law is premised on the need to regulate private parties and requires government action to enhance health outcomes. Congress directs federal agencies to

[1] West Virginia v. EPA, 142 S.Ct. 2587, 2609 (2022).

[2] *Id.* at 2608-09.

[3] Dan Reich, *The Supreme Court Could Doom Biden's Environmental Agenda*, Hill (Feb. 10, 2023), https://thehill.com/opinion/judiciary/3852797-the-supreme-court-could-doom-bidens-environmental-agenda/ [https://perma.cc/9AN5-ZKXU].

[4] 600 U.S. 1, 20 (2023).

implement programs, set standards, and ensure compliance with statutes that can be simultaneously highly specific and vague or imprecise.

Courts review agency action to ensure compliance with constitutional individual rights and structural constraints, but generally defer to agencies' policy and gap-filling decisions based on expertise and political accountability. Long-standing judicial deference is typically attributed to the 1984 Supreme Court decision *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which established a two-step test for evaluating agency decision-making.[5] This test is based on reasonableness and congressional intent.[6] Efficiency and ease of replication, among other policy considerations, justify deference to agencies. Yet, as discussed in this article, deference principles also help fulfill federal constitutional obligations, including protecting individual rights. They also help enforce separation of powers principles by preserving executive branch control over specific areas required by the Constitution.

While *Chevron* has long served as a model for constitutional deference, the Supreme Court has not deferred to agencies under *Chevron* since its 2015–16 term, opting instead to adjudicate administrative law cases based primarily on statutory interpretation.[7] Under Chief Justice John Roberts, the Court rarely finds statutes ambiguous.[8] Even when it does, it still does not defer to agency decision-making, often rejecting reasonable interpretations entirely, and generally interpreting statutes on its own.[9] As mentioned in the *West Virginia* majority opinion and expounded at length in Justice Neil Gorsuch's concurrence, MQD is often justified under separation of powers principles, as enforcing constitutional provisions that relegate sole legislative authority to Congress.[10] In actuality, MQD essentially transfers policy-making decisions from the executive branch to the Court.

The Supreme Court's remarkable hostility to the administrative state[11] culminates with MQD's emergence in 2022 (as discussed in Part II). In *West Virginia*,[12] the Court invalidated EPA's Clean Power Plan (CPP), which aimed to reduce the environmental and health impacts of carbon emissions produced by power plants, the largest source of harmful greenhouse gas (GHG) emis-

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[5] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

[6] *Id.*

[7] Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, Yale J. Reg. Notice & Comment (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended/ [https://perma.cc/XB3C-3PGG].

[8] *Id.*

[9] *Id.*

[10] *West Virginia*, 142 S.Ct. at 2609 ("Separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed"); *id.* at 2620 (Gorsuch, J., concurring) ("At stake is […] basic questions about self-government, equality, fair notice, federalism, and the separation of powers").

[11] Andrew T. Bloom, Matthew J. Greenberg, Larry J. Saylor, *Supreme Court Signals Move Away from Judicial Deference to Administrative Agencies*, Nat'l Law Rev. (July 20, 2022), https://www.natlawreview.com/article/supreme-court-signals-move-away-judicial-deference-to-administrative-agencies [https://perma.cc/WD7D-6ME8].

[12] *West Virginia*, 142 S.Ct. at 2616.

sions. The Court found that the projected effects on national energy production exceeded EPA's authorities under the Clean Air Act (CAA).[13] The Court rejected plausible and logical interpretations supporting EPA regulation based on plain statutory language, relying instead on its own recent precedents striking down COVID-era public health measures in 2021–22.[14]

Despite amorphous standards and minimal guidance on when and how MQD should be applied, MQD is surfacing in multiple contexts, including legal challenges to the Biden administration's key climate policies, student loan forgiveness initiatives, labor reforms, executive orders on COVID-19 vaccination, among other areas. Specious applications of MQD to date raise fears that it will be used to challenge public health regulations arising from any broad, ambiguous, or imprecise statutory language.[15] But while extensive MQD usages stymie federal regulatory efforts, nationwide implications are limited, and agencies continue to promulgate rules and regulations pursuant to presidential and other directives.

Individual rights elevated in the Constitution's guarantees and in inherent, historical, government duties to protect the public's health necessitate administrative action. Constitutional principles underlying administrative law—primarily rights-based and structural constraints—allow and even require courts to defer to agency interpretations, without explicit congressional authorization. As detailed in Part III, the Court has long deferred to agency action pursuant to statutory interpretations extending constitutional rights to groups not explicitly mentioned in civil rights statutes and responding to discrete public health harms as tasked by Congress. Court jurisprudence recognizing individual rights and affirming administrative rules and regulations expanding protections to discrete groups are closely intertwined. Statutory duties to protect the public's health are often encompassed in broad terms that (1) outline fundamental purposes and goals and (2) seek agency expertise or discretion to facilitate rapid, efficient government action.[16] The Constitution's cohesive structure requires legislation rooted in constitutional provisions and administrative action to give full force to essential freedoms and guarantees.

As discussed in Part IV, extensive legal arguments offensively using MQD against federal agency authorities present robust constitutional trials. But cohesive legal solutions emerge from the Court's own civil rights and public health jurisprudence to anticipate and mitigate challenges by (1)

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[13] *Id.* at 2612.

[14] *Id.* at 2608–09.

[15] Allie Reed & Celine Castronuovo, *Covid, Tobacco Policy at Risk After High Court Emissions Ruling*, Bloomberg Law (July 1, 2022), https://news.bloomberglaw.com/health-law-and-business/high-court-emission-call-risks-tying-hhs-hands-on-covid-tobacco [https://perma.cc/HXA8-5LSX]; Keith Goldberg, *High Court Ruling Hobbles Climate Policy Moves, Sen. Says*, Bloomberg Law (Feb. 6, 2023), https://www.law360.com/environmental/articles/1572856 [https://perma.cc/YC4G-BY4S].

[16] Although the majority of regulations impacting public health are crafted at state and local levels, federal authorities are necessary to regulate solely federal jurisdictions including immigration and foreign affairs (e.g., the Immigration and Nationality Act of 1965).

re-framing agency action in terms of individual rights; (2) balancing or alternatively sourcing the constitutional source of agencies' authority; and (3) bolstering administrative policy with public health data and targeted solutions to compel federal responses and empower state guardianship.

Superficial statutory analysis under MQD cannot overcome extensive precedents supporting individual rights protections and governmental guarantees achieved jointly through jurisprudence and executive policies.

I. Administrative Action, Judicial Deference, and Public Health

Administrative agencies provide politically accountable, technical expertise to fulfill governmental duties to protect the public's health. They do so in a wide range of areas, ranging from communicable disease control to food-, water-, and air-quality standards.[17] Recognizing that agencies are best equipped to respond efficiently and effectively in addressing modern problems, Congress generally identifies areas of concern in specific legislation and directs agencies to respond practically and utilize expertise to fill in gaps as needed. Both Congress and federal courts are ill-equipped to do so.

Although not neatly spelled out in the Constitution, the judiciary's historic role is limited to resolving questions of law. Long-standing principles of deference allow courts to settle legal disputes neatly and consistently across jurisdictions while leaving policy decisions to expert agencies. This division allows each branch of government to fulfill its constitutional role, preserves executive flexibilities to tailor policy-making as presidential administrations change, and enables responses to pressing public health threats as they emerge.

A. *Public Health and the Rise of the Administrative State*

Public health law is one of the oldest forms of U.S. administrative law.[18] Early in United States history, extensive state health and safety regulations impacted virtually everything, improving quality of daily living and increasing life expectancy.[19] Cities like Boston and New York City regulated public health matters as early as the late 1700s, before Massachusetts and New York even joined the United States.[20] Although public health powers are primarily

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[17] *See* Stephen G. Breyer et al., Administrative Law and Regulatory Policy 2–4 (8th ed. 2017).

[18] *See* Edward P. Richards, *Public Health Law as Administrative Law*, 10 J. Health Care L. & Po'y 61, 61 (2000).

[19] Following food and water regulation, sanitation and housing condition requirements, and vaccination and isolation laws, the life expectancy in Boston, home of the first board of health and health department in the U.S., increased by more than 50 years between 1850 and 2004. Lemuel Shattuck et al., Report of the Sanitary Commission of Massachusetts – 1850 104 (Harv. Univ. Press 1948).

[20] Esther Forbes, Paul Revere & the World He Lived in 76-78 (Sentry ed., 1969) (describing "Selectmen" elected by the Boston community to regulate the smallpox outbreak in 1764).

delegated to states,[21] federal regulations setting health and other standards were historically undergirded by constitutionally delegated authorities.

With the first administrative agency created in 1887,[22] the modern federal administrative state is rooted in the Progressive Era (1880–1920).[23] Key reforms achieved during the presidencies of Woodrow Wilson (1913–21)[24] and Franklin Delano Roosevelt (1933–45)[25] necessitated creation of new agencies to enact congressional legislative reforms, such as the New Deal. Supreme Court jurisprudence during this era was shaped by progressive ideals, governmental roles in economic regulation, and distrust of private markets.[26] As industries exploded in the years following World War II, regulation of the U.S. economy grew enormously in the mid-1960s[27] through management of oil prices and energy production; control over environmental pollutants and monopoly powers; and greater oversight of workplace safety, highways, and consumer products.[28]

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[21] When the drafters reserved police powers to the states, public health actions were at the forefront of their minds. Smith v. Turner, 48 U.S. 283, 341 (1849), an early Supreme Court case evaluating commerce powers, focused heavily on the role of marine quarantine hospitals and the 1798 yellow fever epidemic in Philadelphia, where 5,000 of the city's 55,000 inhabitants died. Richards, *supra* note 18.

[22] The Interstate Commerce Act of 1887 created the Interstate Commerce Commission (ICC). I. Leo Sharfman, who wrote five volumes on the ICC, wrote that it "reflected the Progressive vision in almost pristine form." Peter J. Wallison, Judicial Fortitude: The Last Chance to Rein in the Administrative State 62 (2018).

[23] The Progressive Era emphasized state paternalism over individual rights to achieve remarkable, large-scale societal reforms. For a brief history of key reforms achieved during the era, see *id*. at ch. 4.

[24] *See* Richard Allen Morton, Roger C. Sullivan and the Triumph of the Chicago Democratic Machine, 1908-1920 186–87 (2009) (President Wilson's New Freedom domestic agenda included conservation of natural resources, banking reform, tariff reduction, and increasing farmers' access to raw materials by breaking up Western mining trusts).

[25] Perhaps the greatest achievements of the administrative state occurred during FDR's New Deal, including creation of the Federal Housing Administration, Federal Security Agency, and Social Security Act. *See generally* Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70,* 62 Maryland L. Rev. 515 (2003).

[26] In 1905, Justice Oliver Wendell Holmes complained in his *Lochner* dissent that the majority's decision striking down a ten-hour law for bakers "is decided upon an economic theory which a large part of the country does not entertain." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). During the Progressive Era and New Deal, the Court "removed great parts of the economy from free market control and subordinated concerns for the efficient use of resources to other values that were much more difficult toarticulate." Herbert Hovenkamp, The Mind and Heart of Progressive Legal Thought, The University of Iowa Twelfth Annual Presidential Lecture, 9 (Feb. 5, 1995) (transcript available at Iowa Research Online).

[27] The number of pages in the federal register grew from 2,599 in 1936 to 65,603 in 1977, with the number triplingduring the 1970s. By 1975, 23.7% of U.S. gross national product was produced in "regulated" industry, up from 8.5% in 1965. Stephen Breyer, Regulation and its Reform 1 (1982).

[28] Former Justice Stephen Breyer, writing in 1982, cited other key justifications of regulation: unequal bargainingpower; rationalization; moral hazard; paternalism; and scarcity. *Id.*

Federal agencies are statutory creations—they are brought into being, given core powers and duties, and limited by legislation passed by Congress.[29] Agencies promulgate rules and regulations pursuant to statutes authorizing governmental responses to economic and social problems.[30] External constraints, notably the Administrative Procedure Act (APA) of 1946,[31] encourage administrative proposals and justifications for rulemaking, followed by a public comment period. Among other procedural safeguards reducing the risk of executive abuse, the APA declares agency decisions subject to judicial review.[32]

The U.S. Constitution provides little guidance on agencies, aside from minimal discussion of the executive's role in appointing officers.[33] Still, since the earliest days in the United States, broad grants of discretion to the executive were recognized as promoting the general welfare, as Congress passed laws to be faithfully "executed" by the president and, by necessity, his officers.[34]

Similarly, the Constitution does not expound upon the role of the federal judiciary, but since the 1803 Supreme Court decision in *Marbury v. Madison*, federal courts are empowered to determine constitutionality via judicial review.[35] The Supreme Court controls regulatory powers through rulings applied by lower courts, including thousands of administrative appeals reviewed annually.[36] Beyond influencing individual disputes, the Court's opinions establish general principles utilized by all lower courts, promoting efficiency and reliability.[37]

B. *Chevron Doctrine*

The Supreme Court's 1984 decision in *Chevron*[38] is often credited with creating a standard, followed by lower federal courts, where courts "defer" to

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[29] Adrian Vermeule, Law's Abnegation 43 (2016).

[30] As Progressive James M. Landis wrote, "[T]he art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy." Eric R. Claeys, Progressive Political Theory, Contemporary Politics, and the REINS Act, in Progressive Challenges to the American Constitution 303 (Bradley C.S. Watson, e.d., Cambridge Univ. Press 2017).

[31] 5 U.S.C. 51. § 500

[32] 5 U.S.C. §§ 701–06.

[33] U.S. Const. art. II, § 2.

[34] *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1729, 1733 (2002); Jerry L. Mashaw, Creating the Administrative Constitution 53 (2012) ("The constitutional responsibility falls to the President and . . . the direct power of execution was delegated to him by a host of early statutes, albeit with the understanding that he would often subdelegate. Other statutes delegated authority directly tosubordinate officers, both department heads and the heads of particular bureaus.").

[35] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (invalidating provisions of the Judiciary Review Act of 1789, holding Congress cannot pass laws contrary to the Constitution, and pronouncing that the judiciary's role is to interpret what the Constitution allows).

[36] Matthew L. Spitzer & Linda R. Cohen, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. Cal. L. Rev. 433, 433 (1996).

[37] *Id.*

[38] *Chevron*, 467 U.S. 837.

agencies making reasonable decisions in carrying out their statutes. *Chevron* is one of the most-cited Supreme Court decisions of all time,[39] but frequently draws harsh criticism that federal courts "abrogate" duties to determine legality and thereby allow over-expansion of the administrative state.[40]

In its unanimous opinion evaluating EPA's interpretation of the Clean Air Act (CAA) term "stationary source," the Supreme Court famously held in *Chevron* that agency interpretation of ambiguous statutes warrants judicial deference so long as the interpretation is "reasonable."[41] The Court crafted a two-step test to evaluate whether an agency correctly interpreted its enabling statute, without substituting a court's own construction of relevant statutory provisions.[42] First, courts determine whether Congress provided a "clear" or "unambiguous" answer in the statute.[43] If Congress addressed the "precise question at issue," courts should assess the agency's fulfillment of Congress' intent.[44] If Congress is silent, courts must then determine whether the agency's interpretation of the statute is "reasonable," and if so, given deference.[45]

Nothing in the *Chevron* opinion indicates the framework should be used widely. But, in the following decades, *Chevron* prevailed as a leading method for evaluating agency action.[46] The D.C. Circuit, which hears most challenges to administrative agency actions, adopted the two-step framework immedi-

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[39] As of 2017, Chevron had been cited in about 15,000 judicial decisions. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 2 (2017) (citing Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 Ga. L. Rev. 757, 786 (2015) (citing 1 Richard Pierce, Jr., *Administrative Law Treatise* § 3.2(5th ed. 2010)); Peter M. Shane & Christopher J. Walker, *Foreword, Symposium on Chevron at 30: Looking Back and Looking Forward*, 83 Fordham L. Rev. 475, 475 (2014).

[40] Wallison, *supra* note 22 at 137. Hugh Hewitt, *Opinion: Save Us, Supreme Court, from Runaway Regulation*, Wash. Post (March 14, 2023), https://www.washingtonpost.com/opinions/2023/03/14/supreme-court-regulation-control/ [https://perma.cc/SC2L-TDWA] ("The so-called Chevron doctrine "requires judges to defer to administrative agencies' interpretations of federal law in most cases where the law may be 'ambiguous' and the agency's position seems 'reasonable,'" Ilya Somin, a law professor at George Mason University, wrote in The Post. The decision has licensed regulatory overreach. "Chevron deference" has come to mean government by bureaucrats.").

[41] *See Chevron*, 467 U.S. at 2782.

[42] *Id.*

[43] Multiple scholars have criticized Chevron's definition of when a statute is "clear." Notably, then-Judge Brett Kavanaugh, when on the D.C. Circuit, wrote in the Harvard Law Review that without a common understanding among judges about the threshold for ambiguity in the *Chevron* context, the doctrine is highly unpredictable and judges are susceptible to "serious incentives and pressures" when determining whether there is ambiguity. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2134–44 (2016). However, Professor Ryan Doerfler retorts that it does not make any sense to impose a uniform metric of clarity because the degree of certainty should vary with the stakes involved. *See* Ryan D.Doerfler, *How Clear is "Clear" Enough?* at 9 (Univ. of Chi., Pub. Law Working Paper No. 720, 2019).

[44] *Chevron*, 467 U.S. at 2782.

[45] *Id.* at 2792–93.

[46] *See supra* note 37.

ately,[47] citing it in 13 decisions in the two years after it was announced.[48] Other circuit courts soon followed. Still, it was not until 1986—two years after the decision—that the Supreme Court applied the two-step test in another opinion,[49] and not until 1990 before *Chevron* was mentioned in over half the Court's cases evaluating agency statutory interpretations.[50]

While all Supreme Court opinions represent binding precedent on federal courts, few opinions present clear frameworks allowing lower courts to easily apply the doctrine in a wide variety of claims. *Chevron* preserves the judiciary's role determining constitutionality but permits agencies the flexibility to expertly respond to emerging issues. Additionally, studies find little evidence of overly increasing support for agency decision-making post-*Chevron*.[51]

But, since 2016, the Supreme Court has not cited *Chevron* as a reason to uphold agency action.[52] Why? One possibility relates to the composition of the Court itself. Following the election of former President Donald Trump in 2016, the Supreme Court gained two Justices (Neil Gorsuch and Brett Kavanaugh) who exhibit blatant hostility toward *Chevron*.[53] The Trump Depart-

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[47] Gen. Motors Corp. v. Ruckelhaus, 742 F.2d 1561, 1566 (D.C. Cir. 1984) (upholding EPA interpretations of a CAA provision authorizing noncompliant motor vehicle recall based on *Chevron*'s two step analysis) ("the Supreme Court has recently outlined our proper task in reviewing an administrative construction of a statute that the agency administers").

[48] *See* Gary Lawson, Federal Administrative Law 593–605 (8th ed. 2019); Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 Admin L. Rev. 253, 278 (2014).

[49] Young v. Cmty. Nutrition Inst., 476 U.S. 974, 980 (1986).

[50] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 981 (1992).

[51] Although facially lenient toward agency action, numerous studies have found that the doctrine is associated with only a modest increase in deference to agency interpretations. After Chevron, agencies "won" 65–75% of challenges (i.e., the appellate court agreed with the agency's interpretation), compared with a 55–65% "win" rate before Chevron. *See* David H. Willison, *Judicial Review of Administrative Decisions: Agency Cases Before the Court of Appeals for the District of Columbia, 1981-84*, 14 Am. Pol. Q. 317, 320–21 (1986) (win rate of 66% in 1981-84); Martha Anne Humphries & Donald R. Songer, *Law and Politics in Judicial Oversight of Federal Administrative Agencies*, 61 J. Pol. 207, 215 (1999) (win rate of 58% in 1969–88); Peter H. Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984, 1008 (win rate of 60.6% in 1975; win rate of 76.6% in 1984–85); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 Yale L.J. on Reg. 1, 30 (1998) (win rate of 73% in 1995–96 when applying *Chevron*); Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. Colo. L. Rev. 767, 783 (2008) (win rate of 69% in EPA cases in 2003-05); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 28 (2017) (win rate of 71.4% in 2003-13 when *Chevron* was applied). Professors Kent Barnett and Christopher J.Walker's 2017 comprehensive empirical study found a 71% win rate based on 1,588 agency interpretations by federal circuit courts from 2003 to 2013, which dropped to 64% "when the court refused to decide which standard applies," 56% under the *Skidmore* standard, and 38.5% "when the court applied *de novo* review." *Id.* at 30.

[52] The last successful invocation of the *Chevron* doctrine to uphold an agency interpretation appeared in Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2142 (2016). The case was argued and decided after the deathof Justice Scalia but before Justice Gorsuch joined the Court.

[53] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) ("In this way, Chevron seems no less than a judge-made doctrine for the abdication of the judicial duty."); Kent Barnett, Christina L. Boyd & Christopher J. Walker, Judge Kavanaugh, Chevron

ment of Justice sought to derail applications of *Chevron* as the administration systematically worked to undo former President Barack Obama's extensive regulations and reforms.[54] Absent *Chevron*, conservative-leaning judges seemingly relied more heavily on their own perceptions of statutory interpretations, lessening agencies' abilities to make policy changes. Yet, *Chevron* is still used in lower courts[55] to set uniform standards under a single framework.[56] And, even without *Chevron*, judicial deference toward agencies perseveres in function, if not by name. Deference trends are "not derived from any one judicial decision," but instead reflect a "global feature of law," "observable in many legal systems over time."[57]

II. Major Questions Doctrine: *West Virginia v. EPA*

General constitutional directives and real-world practicalities support "reasonable" agency action carrying out congressional directives even against political opposition. Following the election of former president Donald Trump in 2016, select U.S. courts and lawmakers heartily embraced promises to limit an allegedly over-reaching bureaucracy, especially environmental regulations.[58] The Fifth Circuit in particular undertook a "systematic campaign" to dismantle the "administrative state,"[59] going so far as to declare an entire agency unconstitutionally created in 2022 (with Supreme Court review pending).[60] In only two years (2020–22), distrust of agencies generally culminated in MQD's emergence as a blunt tool for activist courts to deny agency abilities to craft specific regulations. Given the politicization of global climate change, environmental regulations are particularly targeted, even with record global carbon

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Deference, and the Supreme Court, Reg. Rev. (Sept. 3, 2018), https://www.theregreview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court/ [https://perma.cc/C3LN-T8LE].

[54] *See* Phillip Dane Warren, *The Impact of Weakening Chevron Deference on Environmental Regulation*, 118 Colum. L. Rev. Online 62, 63 (2018).

[55] From January 1, 2020 to December 31, 2021, *Chevron* was analyzed 142 times in federal circuit courts. *See* Brief of the Cato Institute and Liberty Justice Center as Amici Curiae in Support of Petitioners at 20-21, Loper Bright Enters. v. Raimondo, No. 22-451 (Dec. 9, 2022).

[56] City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013) (noting that Chevron's "stabilizing purpose" is to set uniform standards and prevent thethirteen courts of appeal from applying differing tests rendering judicial review of agency rules unpredictable).

[57] Adrian Vermeule, Law's Abnegation 13 (2016).

[58] John Schwartz, *Trump's Climate Views: Combative, Conflicting and Confusing*, N.Y. Times (Mar. 10, 2017), https://www.nytimes.com/2017/03/10/climate/donald-trump-global-warming-views.html [https://perma.cc/X64A-B353].

[59] Michael Hall, *The Rogue Court That Paved the Way for Roe's Demise*, Tex. Monthly (Sept. l 2022), https://www.texasmonthly.com/news-politics/fifth-circuit-court-appeals-roe-wade-scotus-supreme-abortion-rights/ [https://perma.cc/4B9Z-ESCP].

[60] Nina Totenberg, *Supreme Court to Hear Case that Threatens Existence of Consumer Protection Agency*, NPR (Feb. 27, 2023), https://www.npr.org/2023/02/27/1159748990/supreme-court-cfpb [https://perma.cc/9FYJ-HHP2]; Ian Millhiser, *The Supreme Court Will Decide if a Whole Federal Agency is Unconstitutional*, Vox (Feb. 27, 2023), https://www.vox.com/politics/2023/2/27/23613506/supreme-court-federal-agency-unconstitutional-cfpb-consumer-protection [https://perma.cc/QG3J-3TL4].

dioxide emissions in 2022[61] and "99 percent of the global population" exposed to harmful levels of air pollution in 2023.[62]

The *Chevron* framework has been scapegoated as "requiring" courts to allow agencies free reign, without oversight. But a clear replacement framework was not apparent until MQD entered. Despite lacking consensus on its origin even among the Court,[63] MQD first appeared by name in a Supreme Court opinion in the June 2022 decision *West Virginia v. EPA*.[64] As with many attacks on the administrative state, the dispute arose over environmental policies. [65]

A. *The Clean Power Plan*

West Virginia implicated state objections to the EPA's attempted exercise of authority to revise certain environmental policies during the Obama era. In August 2015, former president Barack Obama announced the CPP, [66] which would combat anthropogenic climate change by reducing power-sector car-

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[61] William Mathis, *Global CO2 Emissions Hit a Record Even as Europe's Decline*, Bloomberg Law (Mar. 2, 2023), https://www.bloomberglaw.com/bloomberglawnews/esg/XA79JPUS000000?bna_news_filter=esg#jcite [https://perma.cc/HY5H-C62S].

[62] Coco Liu, *Less Than 1% of Earth Has Safe Levels of Air Pollution: Study,* Bloomberg Law (Mar. 6, 2023), https://news.bloomberglaw.com/environment-and-energy/less-than-1-of-earth-has-safe-levels-of-air-pollution-study [https://perma.cc/UM6J-HXZ5]; Kasha Patel, *Nearly Everyone is Exposed to Unhealthy Levels of Tiny Air Pollutants, Study Says*, Wash. Post (Mar. 7, 2023), https://www.washingtonpost.com/climate-environment/2023/03/06/air-pollution-unhealthy-levels-exposure/ [https://perma.cc/UM6J-HXZ5].

[63] MQD is generally attributed to a 1986 article by Justice Stephen Breyer reconciling "the need for regulation" with "the need for checks and controls." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L.Rev. 363, 368-372 (1986). Since then, however, Justice Breyer has criticized MQD as an improper limit to agency regulations. Robert Iafolla, *Breyer to Exit After High Court Tackles 'Major Questions' Law*, Bloomberg Law (Jan. 28, 2022), https://news.bloomberglaw.com/daily-labor-report/breyer-to-exit-after-high-court-tackles-major-questions-law [https://perma.cc/9GX9-Y74Y]. The 2000 decision first citing MQD language, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), cited Breyer's 1986 article, but Breyer rejected the Court's reasoning in *Brown & Williamson* and penned a scathing dissent. Since 2000, Breyer has written three more dissents in MQD cases. In his *West Virginia* majority opinion, Chief Justice John Roberts cites the Court's seminal tobacco regulation jurisprudence (which cited Breyer's article) as the beginning of MQD. *See West Virginia*, 142 S. Ct. at 2595. Justice Neil Gorsuch traces the origin back even further, to the nineteenth century. *See id.* at 2619 (Gorsuch, J., concurring); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 Ohio State L. J. ___ (forthcoming 2023).

[64] 142 S. Ct. 2587.

[65] Thomas O. McGarity, *The Trump Effect on Power Plant Carbon Dioxide Emissions*, 9 San Diego J. Climate & Energy L. 151, 152 (2018).

[66] Unveiling CPP, President Obama lauded the "biggest, most important step we have ever taken" in tackling climatechange, which he characterized as a "moral obligation." Matt McGrath, *Climate change: Obama Unveils Clean Power Plan*, BBC News (Aug. 3, 2015), https://www.bbc.com/news/world-us-canada-33753067 [https://perma.cc/YFJ2-5GDK].

bon emissions.[67] EPA estimated that the CPP would reduce pollutants by up to 25%, leading to billions in net climate and health benefits.[68]

The CPP was an ambitious strategy targeting the largest source of GHG emissions: fossil fuels.[69] EPA's "unprecedented" exercise of energy-sector jurisdiction[70] came from a CAA provision[71] authorizing regulation of air-pollutant emissions from stationary sources under the "best system of emission reduction" (BSER) standard.[72] States would be required to develop and implement strategies to meet specific emission-reduction targets or become subject to EPA's own regulatory plans.[73] For new and existing power plants, the BSER was determined to be a generation-shifting model requiring existing plants to transition to cleaner forms of energy (e.g., natural gas, wind, solar) over specific time periods.

Power industry members and select states immediately challenged the CPP in the D.C. Circuit in 2014, citing vast implementation expenses and (intended) devastating effects on the existing coal industry.[74] Tied up in litigation amid changing presidential administrations,[75] the CPP was never implemented. However, its emissions-reduction goals were met eleven years early in 2019 due to energy efficiency, increased wind and solar power, and energy

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[67] CPP aimed to reduce carbon emissions from power plans 32% (compared with 2005 levels) by 2030. Burning fossil fuels for electricity, heat, and transportation is the largest source of carbon emissions. U.S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks* (updated Mar. 21, 2023), https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks [https://perma.cc/ZP5E-RHTJ].

[68] EPA estimated $26–45 billion in net climate and health benefits, avoiding 90,000 asthma attacks and 3,600 premature deaths yearly. U.S. Environmental Protection Agency, FACT SHEET: Overview of the Clean Power Plan 3 (last updated June 27, 2016), https://19january2017snapshot.epa.gov/sites/production/files/2015-08/documents/fs-cpp-overview.pdf [https://perma.cc/8XZP-ZSCY].

[69] U.S. Environmental Protection Agency, *Sources of Greenhouse Gas Emissions* (updated Aug. 5, 2022), https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions [https://perma.cc/TRU9-J879].

[70] *The Clean Power Plan*, 129 Harv. L. Rev. 1152, 1152 (2016), https://harvardlawreview.org/2016/02/the-clean-power-plan/ [https://perma.cc/GR5T-TATZ].

[71] 42 U.S.C. § 7411(d) (2012).

[72] As the *West Virginia* Court acknowledges, EPA exercised authority under this provision for 50 years to setperformance standards causing power plans to operate more cleanly. *West Virginia,* 142 S. Ct. at 2599.

[73] Reduction goals were met by focusing on three targets: (1) Increasing existing fossil fuel plant generation efficiency; (2) substituting lower carbon dioxide emitting natural gas generation for coal powered generation; and (3) substituting generation from new zero carbon dioxide emitting renewable sources for fossil fuel poweredgeneration. Fact Sheet, *supra* note 68.

[74] In petitioners' brief, the states cite an estimated $9.4 billion dollars annually cost to meet emission limits, necessary shutdowns of existing coal-fired power plants, and disproportionate effect on regions more reliant oncoal. Opening Brief of Petitioner at 4, Murray Energy Corp. v. U.S. Env't Prot. Agency, No. 14-1112 & No. 14-1151 (D.C. Cir. Dec. 15, 2014).

[75] In 2017, former President Trump issued an executive order mandating that EPA review the CPP and withdraw the U.S. from the Paris Agreement. Coral Davenport, *Trump Signs Executive Order Unwinding Obama Climate Policies*, N.Y. Times (Mar. 28, 2017), https://www.nytimes.com/2017/03/28/climate/trump-executive-order-climate-change.html [https://perma.cc/9TUA-N97K].

market prices shifting generation from coal to gas.[76] Still, antagonists petitioned the Supreme Court to evaluate the legality of EPA's utilization of specific CAA provisions to regulate emissions via generation-shifting, consolidated in *West Virginia v. EPA*.

B. *West Virginia's Holding*

On June 30, 2022, the Court held that Congress did not grant EPA authority in CAA § 111(d) to devise emissions caps based on the CPP's generation-shifting approach. The 6–3 opinion, authored by Chief Justice John Roberts, asserted that the case should be decided not under "traditional" statutory interpretation, but under MQD because an agency is asserting "highly consequential power" beyond reasonable assessments of congressional intent in the CAA.[77] Citing a 2000 case rejecting FDA jurisdiction over tobacco regulation, the Court identified nebulous "extraordinary cases" requiring novel solutions.[78]

The Court began its analysis with the BSER, which would restructure overall U.S. electricity generation from 38% coal to 27% coal by 2030.[79] Acknowledging scientific models, the Court was still troubled by strict standards for existing power plants, questioning feasibility.[80] The Court also noted the CPP's complicated history and EPA's shifting views as presidential administrations—and executive goals—changed.[81] Ultimately it came down to the numbers. Reducing coal power under the CPP was projected to raise retail electricity prices by 10% in many states and reduce U.S. gross domestic product by at least a trillion dollars by 2040.[82]

Chief Justice Roberts proffered several factors to determine whether a "major question" existed, including (1) previous agency usages of the statutory provision; (2) previous regulation in the particular manner at issue; (3) agency area expertise; (4) feasibility of compliance; (5) whether the regulation was a policy judgment; and (6) whether Congress previously considered legislation

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[76] Todd Snitchler, *How We Passed the Clean Power Plan Target a Decade Early*, Electric Power Supply Association (May 28, 2020), https://epsa.org/power-sector-meets-clean-target-a-decade-early-thanks-to-competitive-markets/ [https://perma.cc/DL6N-FRZH].

[77] *West Virginia*, 142 S. Ct. at 2609.

[78] Courts must depart from ordinary methods of statutory interpretation where the "history and the breadth of [agency] authority" and the "economic and political significance" of the assertion provide areason to "hesitate" before concluding Congress intended to confer the authority. *Id.* at 2608. However, the Court did not consider EPA's fact-finding efforts in developing a "best system of emission reduction" nor the projected public health and environmental impacts of the CPP. *Id.* at 2595. Likewise, the Court does not consider its own precedent regarding CAA. *Id.* at 2596.

[79] *Id.* at 2604.

[80] *Id* at 2593. Standards for existing power plants were stricter than for new power plants. Older power plants tend to rely heavily on coal. In fact, 74% of coal-fired power plants are at least 30 years old. Todd Woody, *Most Coal-Fired Power Plants in the US are Nearing Retirement Age*, Quartz (Mar. 12, 2023), https://qz.com/61423/coal-fired-power-plants-near-retirement [https://perma.cc/T2J5-E9RZ].

[81] *Id.* at 2602–07.

[82] *Id.* at 2604.

specifically regarding the subject at issue.[83] But, the Court did not systematically apply each of these six factors. First, CAA § 111(d) was not a typical source for EPA powers, with EPA using these specific authorities only a "handful of times."[84] Second, although previous Supreme Court precedent granted EPA jurisdiction over GHG as "air pollutants," CPP's understanding of the statute would impermissibly expand the vast number of sources EPA could regulate. Third, the CPP would allow EPA to determine where Americans procure energy, which is not the agency's area of expertise, as evidenced by requests for additional funding and support.[85] The Court was troubled as well by the lack of a limiting principle in EPA's policy construction.[86] What would stop EPA from requiring "shifting" to whatever it deemed "best"? Finally, the Court pointed to ongoing congressional debates and disagreements over climate change, coal reduction, and CAA amendments.[87]

Justice Neil Gorsuch penned a lengthy concurrence providing additional insight into MQD application that is destined to be cited in subsequent adjudications. Factors for consideration are: (1) obscurity of legislative language; (2) statutory age and focus compatibility with problem addressed; (3) statutory interpretation cohesiveness with past interpretations; and (4) alignment between challenged action and agency's mission and expertise.[88] According to Justice Gorsuch, MQD is a "clear statement rule" rather than an ambiguity rule, as stated in the majority opinion.[89] Absent a clear statement, Congress intends laws to operate within constitutional bounds (here, separation of powers and the Framers' supposed intent to reserve law-making to Congress rather than "unaccountable ministers").[90]

Justice Elena Kagan, joined by Justices Sonia Sotomayor and Stephen Breyer, authored a scathing dissent criticizing the Court's excitement to negate EPA authorities *without threat of them being enforced.*[91] Justice Kagan argued that GHG regulation is well within EPA's "wheelhouse" and comports

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[83] *Id.* at 2610–12.

[84] *Id.* at 2604. The Court found that the "vague" language of a "previously little-used backwater" in CAA could not be used to enact a regulatory program similar to programs considered and rejected by Congress. *Id.*

[85] *Id.* at 2612.

[86] *Id.*

[87] *Id.* at 2614.

[88] *Id.* at 2622–24 (Gorsuch, J., concurring).

[89] *Id.* at 2620 n.3. The difference between "clear congressional authorization" and "clear statement rule" is a seemingly small step with enormous consequences.

[90] In the end, Justice Gorsuch's examples undermine his conclusions. For example, he points to MQD's "first" Court application in *Interstate Commerce Comm'n v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U.S. 479 (1897), as withholding legislative powers to set transport rates. *Id.* at 2619. However, this case involved a federal statute enacted before Congress specified that ICC's orders were self-executing, and is generally understood to be an example of the Court denying regulatory powers which are subsequently granted by Congress. *See* Daniel Carpenter, The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928 65–93 (2001).

[91] *West Virginia*, 142 S. Ct. at 2628 (Kagan, J., dissenting).

with congressionally assigned duties to address air pollution generally and especially from coal-fired power plants.[92]

III. Constitutional Protections and Agency Action

Following *West Virginia*, "significant" agency action appears ripe for challenge. Agencies, fearful that actions affecting large numbers of people will be judicially denied, may greatly reduce their regulatory activities. However, constitutional protections, including individual rights guarantees and affirmative government duties, often require agencies to promulgate rules and regulations, regardless of statutory language, giving full effect to constitutional guarantees.

Under what Professor James G. Hodge, Jr. labeled "constitutional cohesion" in 2019, protecting individual rights and assuring structural stability are not distinct constitutional functions, but rather highly synergistic concepts.[93] Pursuant to the Constitution's cohesive design, rights and structural principles naturally intersect because each are designed to protect individuals and groups against government overreach.[94]

Similarly, individual rights jurisprudence and deference to agency action that strengthens civil rights statutes or addresses discrete public health issues are intertwined because each accomplishes the same thing: fully realizing constitutional guarantees. Broad agency (and Supreme Court) interpretations of statutes embodying constitutional protections extend essential rights and freedoms to larger groups of people, regardless of plain text or congressional intent. Even where courts do not cite deference principles, upholding agency action expanding rights achieves the same purpose as congressional legislation recognizing the same. Congress may pass the laws, but it relies on administrative agencies to fully implement policies nationally.

Civil rights jurisprudence and progressive agency actions are closely related, with similar purposes and largely achieving the same results. Broad equal protection and other guarantees in constitutional text enforced by the courts necessarily expand over time, including by the Supreme Court itself. Extensive Supreme Court precedent extends individual rights even outside constitutional text (e.g., privacy rights[95]). And, just as the Court explicitly defines additional rights, administrative agencies craft federal policies to enforce rights uniformly nationwide.

Agencies' powers may thus be greatest when acting under civil rights statutes to extend constitutional protections. Civil rights statutes are as broad and ambiguous as constitutional provisions and amendments, necessitating agency interpretations to create and enforce policies. Agencies then build

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[92] *Id.*

[93] James G. Hodge, Jr., et al, *Constitutional Cohesion and the Right to Public Health*, 53 U. Mich. J. L. Reform 173, 180–81 (2019) ("[H]istorical and modern conceptions of *constitutional cohesion* support how structural facets and rights-based principles are interwoven within the fabric of federal or state constitutions.").

[94] *Id.* at 182.

[95] *Id.*

upon Supreme Court precedent upholding their statutory interpretations and crafted policies in a reinforcing cycle.

A. *Enhancing Equal Protection through Legislation and Administration*

Individual and structural discrimination are recognized social determinants of health,[96] hindering many Americans from fully enjoying constitutional guarantees. Extending rights requires constitutional amendments, civil rights legislation, administrative policies substantially interpretating civil rights statutes, and judicial deference.

Considering the long history of discrimination in the United States, the Equal Protection Clause of the Fourteenth Amendment (ratified in 1868), which provides that no state can deny any person the "equal protection of the laws,"[97] falls flat. The Civil Rights Act (CRA)[98] was passed in 1964 to expand equal protection by outlawing "discrimination" based on race, color, religion, sex, and national origin, and creating the Equal Employment Opportunity Commission (EEOC) to enforce and administer civil rights laws.[99]

Agencies and courts generously interpret undefined CRA terms to explicitly expand protections outside statutory-specific voting requirements, racial segregation, and employment discrimination. For example, CRA Title VII prohibits employment discrimination[100] but permits an undetermined category of professionally developed ability tests.[101] With Congress silent on requisite evidence for an employment "discrimination" determination, 1966 EEOC guidelines authorized showings without actual intent to discriminate.[102] Deferring to EEOC, the Supreme Court upheld the guidelines in 1971.[103] Con-

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[96] *People 2030: Discrimination*, U.S. Dep't Health & Human Servs. Office Disease Prevention & Health Promotion, https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/discrimination#cit1 [https://perma.cc/C7HW-77XB].

[97] U.S. Const. amend. XIV, § 1.

[98] Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 1971 et seq. (2006)).

[99] The EEOC was created to administer the CRA and is authorized to investigate violations and determine whether there is "reasonable" cause to determine the alleged violation occurred. 2 USC § 2000e-5(b). *See also* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 Utah L. Rev. 51, 56 (1995) (describing the powers and duties of the EEOC).

[100] § 703(a) of the Act makes it an unlawful employment practice for an employer to limit, segregate, or classify employees to deprive them of employment opportunities or adversely to affect their status because of race, color, religion, sex, or national origin.

[101] § 703(h) authorizes the use of any professionally developed ability test, provided that it is not designed, intended, or used to discriminate.

[102] EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966, provide: "The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII."

[103] *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

sidering congressional intent holistically, and noting on-the-job discrimination realities, the Court applied its own "disparate impact" reasoning to find that tests or measures negatively effecting ethnic minorities, even without specific intent, are covered under the CRA.[104] The Court extended disparate impact theory to the Fair Housing Act (FHA) in 2015,[105] even finding Congress specifically intended to include disparate impact claims in the 1968 FHA,[106] despite the theory's 1971 origins in the Court.[107]

In the 1970s, 80s, and 90s, the Supreme Court upheld additional EEOC determinations extending Title VII "discrimination" based on "sex" to include sexual harassment,[108] gender stereotyping,[109] and sexual harassment between members of the same sex.[110] In 2016, the EEOC filed its first Title VII sex discrimination lawsuit against a private employer based on sexual orientation.[111] Against a circuit split[112] and congressional inability to pass the Employment Non-Discrimination Act and other anti-discrimination laws,[113] in 2020, the Supreme Court expanded discrimination based on "sex" under Title VII to include sexual orientation and gender identity in its landmark civil rights case, *Bostock v. Clayton County*.[114] According to Justice Gorsuch's majority opinion, Title VII discrimination includes actions against gay or transgender employees based on conduct that would be acceptable for employees of one sex

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[104] *Id.*

[105] *See generally* Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015).

[106] *Id.* at 521.

[107] D. Frank Vinick, *Disparate impact theory and Title VII*, Brittanica, https://www.britannica.com/topic/disparate-impact [https://perma.cc/U3D5-4ZAH].

[108] *See generally* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (holding sexual harassment a form of unlawful discrimination under Title VII).

[109] City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (holding gender stereotyping an unlawful form of discrimination under Title VII).

[110] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (extending *Meritor Savings Bank* to hold sexual harassment between members of the same sex unlawful discrimination under Title VII).

[111] Press Release, U.S. Equal Employment Opportunity Commission, EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination (March 1, 2016), https://www.eeoc.gov/newsroom/eeoc-files-first-suits-challenging-sexual-orientation-discrimination-sex-discrimination [https://perma.cc/J38T-HL8L].

[112] *Compare* Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (holding discrimination based on sexual orientation violative of Title VII), *and* Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339, 341 (7th Cir. 2017) (same), *with* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017) (upholding precedent that discharge for homosexuality is not prohibited by Title VII).

[113] *See generally History of Nondiscrimination Bills in Congress*, Nat. Gay & Lesbian Task Force, http://www.thetaskforce.org/issues/nondiscrimination/timeline [https://perma.cc/6M9R-JG88]; *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country*, ACLU (2016), https://www.aclu.org/other/past-lgbt-nondiscrimination-and-anti-lgbt-bills-across-country-2016 [https://perma.cc/ESM9-PMQ8].

[114] Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) (holding that employees could not be discriminated against on the basis of sexual orientation or gender identity under Title VII).

but not the other.[115] The Court did not interpret Title VII on a blank slate or judge the "ordinary meaning" in 1964 of the phrase "discriminate against because of sex" but rather assumed that decades of caselaw accurately interpreted the phrase.[116] Although the *Bostock* decision hinged on the meaning of "sex" in the statute rather than on constitutional analyses extending equal protections, by reaching the same result as the EEOC, *Bostock* demonstrated that an agency can affirm constitutional protections on its own without courts' supporting constitutional analyses. *Bostock* is an example of administrative rules extending constitutional equal protection guarantees to achieve civil rights achievements before they are recognized independently by federal courts.

Conversely, the Court has rejected equally plausible definitions of "discriminatory" to adhere to the "spirit" of civil rights statutes, elevating function over form. Title VI, for example, extends discrimination protections to higher education,[117] almost certainly to further desegregation. Beginning in the 1960s (and until a pair of 2023 Supreme Court decisions found that affirmative action programs in college admissions processes violate the Equal Protection Clause of the Fourteenth Amendment),[118] many state colleges and universities considered applicants' race or ethnicity in admission decisions to enhance campus diversity. With "discrimination" undefined in the statute, the Court could have broadened the definition to outlaw affirmative action entirely as technically discriminatory. Courts have largely upheld affirmative action, finding state educational agencies entitled to deference when considering race in applications. A 2003 Supreme Court decision found no constitutional violations when Michigan considered race when evaluating applicants holistically.[119] In 2013, the Court reaffirmed deference to state universities in considering diversity to be a "compelling state interest," but declined to extend deference to universities' findings that affirmative action entails educational benefits and is necessary to achieve diversity goals.[120] However, a recent pair of affirmative action suits before the Court found the affirmative action preferences at Harvard and the University of North Carolina to be unconstitutional because they violate the Equal Protection Clause.[121]

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[115] *Id.* at 1748.

[116] *See* Josh Blackman, *Justice Gorsuch's Legal Philosophy Has a Precedent Problem*, Atlantic (July 24, 2020), https://www.theatlantic.com/ideas/archive/2020/07/justice-gorsuch-textualism/614461/ [https://perma.cc/LF8J-2CR7].

[117] 42 U.S.C. § 2000 (d)(1)–(7). Title VI prevents discrimination by programs and activities that receive federal funds,including public colleges and universities.

[118] *See generally* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023); Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 600 U.S. 181 (2023).

[119] Grutter v. Bollinger, 539 U.S. 306, 341–43 (2003).

[120] Fisher v. Univ. of Tex., 570 U.S. 297, 307, 314 (2013).

[121] *See generally* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

Title IX of the Education Amendments of 1972 was a follow-up to the CRA and Title VI,[122] protecting against discrimination "on the basis of sex" in educational institutions receiving federal aid.[123] DOJ states that Title IX was passed in response to "marked educational inequalities" women faced prior to the 1970s,[124] but the statutory language is brief.[125] President Richard Nixon therefore directed the Department of Health, Education, and Welfare (HEW) to publish regulations clarifying the law's application in 1975.[126] Given common understandings at the time, Congress almost certainly intended these protections to enhance opportunities only for women in higher education. Over the decades since its enactment, however, it has been expanded in depth,[127] breadth,[128] and scope.[129] As a result of these expansions, Title IX's "significance" is unparalleled, originally applying to 50% of the U.S. population,[130] but now applying to potentially 100%.

In 1980, the Second Circuit upheld HEW regulations that interpreted Title IX protections to extend to sexual harassment and school responses.[131] These interpretations are difficult to justify under Title IX's text, especially considering the school at issue only received federal funds indirectly.[132] Still, courts extended Title IX to ensure due process protections, including a Su-

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[122] Title VI had been enacted in 1964 to prohibit discrimination based on race, color, or national origin in federallyfunded public and private entities, but did not include sex. *See* Title VI, 42 U.S.C. § 2000 (d)(1)-(7).

[123] *See* Pub. L. 92-318, 86 Stat. 235 (codified as 20 U.S.C. §§ 1681–1688).

[124] U.S. Dep't Just., Equal Access to Education: Forty Years of Title IX 2 (2012), www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf [https://perma.cc/U2G9-FD9T].

[125] "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefitsof, or be subject to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a) (amending the Higher Education Act of 1965).

[126] *See* Welch Suggs, A Place on the Team: The Triumph and Tragedy of Title IX (2005) at 66–80.

[127] The Civil Rights Restoration Act of 1987 expanded Title IX to all levels of schooling, not just higher education,and regardless of whether funding was direct or indirect. *See* Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (amending 20 U.S.C. § 1687).

[128] Congress approved Title IX regulations promulgated by the Department of Health, Education, and Welfare, which included athletic programs in 1975. *See* 34 CFR 106.41 (1975).

[129] Title IX was expanded to sexual violence proceedings in educational institutions. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R.§106 (2020).

[130] In 1971, fewer than 295,000 girls participated in high school varsity athletics, accounting for just 7 percent of all varsity athletes. Barbara Winslow, *The Impact of Title IX*, Gilder Lehrman Inst. of Am. Hist. (2010), https://www.gilderlehrman.org/history-resources/essays/impact-title-ix [https://perma.cc/6TGN-UTQN]. In 2001, that number leaped to 2.8 million, or 41.5 percent of all varsity athletes, according to the National Coalition for Women and Girls in Education. *Id.* In 1966, 16,000 females competed in intercollegiate athletics. *Id.* By 2001, that number jumped to more than 150,000, accounting for 43 percent of all college athletes. *Id.* In addition, a 2008 study of intercollegiate athletics showed that women's collegiate sports had grown to 9,101 teams, or 8.65 per school. *Id.*

[131] Alexander v. Yale Univ., 631 F.2d 178, 180–81 (2d Cir. 1980).

[132] *Id.*

preme Court holding in 1984 that found Title IX applied to any institution receiving federal financial assistance through grants provided directly to students.[133] In 2020, Department of Education regulations sought to increase protections for accused parties, spurring multiple lawsuits.[134] And in 2022, Biden administration regulations narrowed the definition of "sexual harassment" and school response requirements.[135] Critics allege these changes deplete due process rights for accused parties, with legal challenges pending.[136]

In 2020, final regulations from the Department of Education interpreted "sex" to include sexual orientation or gender identity, extending protections to LGBTQ+ community members.[137] Although "gender" and "sex" have been used synonymously since the fourteenth century,[138] only since the 1990s have anthropologists used "gender" to refer to sexual stereotypes.[139] Professor Dean Spade argues that furthering legal protections for transgender and gender-diverse individuals may best be accomplished via administrative action instead of expanding legal rights under existing law.[140] Nineteen states and 200 municipalities have nondiscrimination laws explicitly protecting LGBTQ+ pop-

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[133] Grove City Coll. v. Bell, 465 U.S. 555, 575 (1984).

[134] Greta Anderson, *Legal Challenges on Many Fronts*, Inside Higher Ed (July 13, 2020), https://www.insidehighered.com/news/2020/07/13/understanding-lawsuits-against-new-title-ix-regulations [https://perma.cc/R32U-5DGL].

[135] This rule narrows the definition of sexual harassment to unwelcome conduct on the basis of sex so severe and objectively offensive that it denies the person equal access to the school's education program. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R.§106 (2020). Obama-era guidelines simply defined sexual harassment as "unwelcome conduct of a sexual nature." *See* Michael Powell, *Trump Overhaul of Campus Sex Assault Rules Wins Surprising Support*, N.Y. Times (June 25, 2020), https://www.nytimes.com/2020/06/25/us/college-sex-assault-rules.html [https://perma.cc/7RAK-T6AU]. The rule also narrows the circumstances under which schools are obligated to respond to an incident to when the school has "actual knowledge" of sexual harassment. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R.§106 (2020). The "actual knowledge" clause requires the accuser to officially report to an individual who has authority to institute corrective measures. The incident must also have taken place within the school's own programs or activities. Lastly, by not mentioning LGBTQ+ students, this rule does not extend Title IXprotections to this group, and the Trump administration had previously explicitly rescinded Obama-era Title IX protections for transgender students. *Tracking Regulatory Changes in the Biden Era*, Brookings (Sept. 19, 2023), https://www.brookings.edu/interactives/tracking-regulatory-changes-in-the-biden-era/ [https://perma.cc/AUB8-UMEU] (under "Title IX Guidances on transgender student rights"); Amy Dickerson, et al., *OCR Issues Q&A on Title IX Regulations on Sexual Harassment*, Title IX Insights (July 22, 2021), https://www.titleixinsights.com/2021/07/ocr-issues-qa-on-title-ix-regulations-on-sexual-harassment/ [https://perma.cc/76G8-Z653].

[136] Emma Camp, *Biden Administration Guts Due Process Protections for Students Accused of Sexual Misconduct*, Reason (Oct. 2022), https://reason.com/2022/09/15/biden-guts-title-ix-due-process/ [https://perma.cc/ABT8-VSE8].

[137] 85 Fed. 34 C.F.R. pt. 106 (2020) (Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance).

[138] David Haig, *Of Sex and Gender*, 25 Nature Genetics 373 (2000).

[139] *See* Frances E. Mascia-Lees & Nancy Johnson Black, Gender and Anthropology 20, 80 (2d ed. 2016).

[140] Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law 73–93 (2015).

ulations but have achieved no net gains in public safety.[141] Nondiscrimination and hate crime statutes are limited in their application and ability to meaningfully improve individuals' lives (and may be revoked[142]) whereas administrative law enables governments and administrations to meaningfully impact the provision of health care via Medicaid or other services.[143]

B. *Tailoring Public Health Solutions*

Just as judicial review and agency deference intersect to recognize constitutional rights, federal public health statutes and agency action are interconnected. By recognizing statutes' "function over form," agencies and courts address discrete public health issues identified by Congress, including climate change and health care reform. Elevating a public health statute's "function," such as, for example, overhauling health insurance markets to expand coverage,[144] enables courts to reconcile literal interpretations of statutory text that are otherwise completely at odds with the overall scheme to enhance positive health outcomes. The Court does not tolerate agency inaction in the presence of targeted statutes, allowing state *parens patriae* lawsuits.[145]

Where targeted legislation directs a specialized agency to act in furtherance of the public's health, the Supreme Court often uses rationales and projected outcomes to overcome otherwise "reasonable" agency interpretations contravening the system. In the 1980 "Benzene Case," the Court declined to apply specific statutory language over general language, finding that the generalized language applied to achieve congressional occupational safety goals.[146] Considering Occupational Safety and Health Administration (OSHA) practices regulating carcinogens, the Court rejected a plain reading of Occupational Safety

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[141] Most states' nondiscrimination laws do not explicitly protect LGBTQ+ populations. For example, supporting Professor Spade's point, harming someone in a restroom is already criminalized and subject to a fine or jail time. Updating nondiscrimination laws to protect transgender or gender-nonconforming individuals will not change this, and bathroom bans have severe public health consequences. Moreover, LGBT people often lack protections from discrimination in employment, education, housing, public accommodations, and credit. *See generally* Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat. Ctr. for Transgender Equal. & Nat. Gay and Lesbian Task Force (Feb. 3, 2011), https://www.thetaskforce.org/wp-content/uploads/2019/07/ntds_full.pdf [https://perma.cc/C9FY-Q6FL].

[142] *See, e.g.* Kyle Hopkins, *Alaska Drops Policy Banning Discrimination Against LGBTQ Individuals*, Anchorage Daily News (updated Mar. 7, 2023), https://www.adn.com/alaska-news/2023/03/04/alaska-says-its-now-legal-in-some-instances-to-discriminate-against-lgbtq-individuals/ [https://perma.cc/F8YY-ULP6].

[143] *Id.*

[144] King v. Burwell, 576 U.S. 473, 478–79 (2015).

[145] *Parens patriae* originated as an English equitable doctrine where the king served as "guardian for persons legallyunable to act for themselves." Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972). In the U.S., *parens patriae* enabled the state to "make decisions regarding treatment on behalf of one who is mentally incompetent to make the decision on his or her own behalf, but the extent of the state's jurisdiction is limited to reasonable and necessary treatment." *See* Sarah Abramowicz, *English Child Custody Law, 1660–1839: The Origins of Judicial Intervention in Parental Custody*, 99 Colum. L. Rev. 1344, 1346 (1999).

[146] *See generally* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980).

and Health (OSH) Act provisions directing the agency to set exposure limits at the "lowest technologically feasible level" not impairing the regulated industries.[147] Whereas OSHA argued it could not determine safe exposure levels (and was not statutorily required to), the Court elevated OSH Act language ordering the agency to craft policies "reasonably necessary or appropriate" to provide safe and healthful places of employment, *to the extent feasible*.[148] The Court held that where Congress specifically asked OSHA to regulate carcinogens, the agency must act, regardless of feasibility, as the statute stated.

Similarly, in 2007 the Court held that EPA must regulate emissions endangering public health and the environment, despite significant economic consequences.[149] EPA declined to regulate GHG under the CAA, despite state petitions, utilizing reasoning very similar to the Court's *West Virginia* MQD framework to argue meaningfully addressing GHG would necessitate major economic restructuring, surely outside its authority, and thus not statutorily required.[150] In *Massachusetts v. EPA*,[151] the Court disagreed, criticizing the agency's "misplaced" use of *Brown & Williamson*,[152] and disallowing EPA from abrogating its duties to protect against GHG emission harms. Although the CAA did not explicitly include GHGs in its definition of "air pollutants,"[153] and despite precedent striking down "vague" statutory provisions, the Court ultimately upheld CAA's overall mission to ensure clean air quality. The Court rejected arguments that Congress should have spoken "clearly," noting EPA's GHG emission regulation would not lead to an "extreme" increase in agency jurisdiction[154] and no congressional enactments conflicted with regulation.[155]

The Patient Protection and Affordable Care Act (ACA) is one of the greatest achievements of health care reforms in United States history, next to Medicare and Medicaid. The Supreme Court considered three challenges to the ACA in ten years, narrowly choosing to uphold the law each time.[156] In the first ACA case in 2012, *National Federation of Independent Business v. Sebelius*, the Court considered Congress' authority to regulate by requiring the

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147 *Id.* at 613.

148 *Id.* at 639.

149 Massachusetts v. EPA, 549 U.S. 497, 534–35, 549 (2007).

150 *Id.*

151 549 U.S. 497.

152 EPA argued under *Brown* that "imposing emission limitations on greenhouse gases would have even greater economic and political repercussions than regulating tobacco." *Id.* at 512. Even Justice Scalia's dissent avoided mention of *Brown* or "major questions." *See id.* at 549–60 (Scalia, J., dissenting) (finding the statute ambiguous).

153 *Id.* at 529 (majority opinion) ("[A]ny . . . substance . . . emitted into . . . the ambient air.").

154 *Id.* at 531.

155 *Id.*

156 In *King v. Burwell*, Justice Scalia called the majority's reasoning (ruling that health care exchanges establishedby the state were constitutional) "quite absurd." 576 U.S. at 498 (Scalia, J., dissenting). He wrote that the court's decision reflected the "philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery." *Id.* at 515.

purchase of health insurance.[157] Despite copious precedent supporting very broad commerce powers, the Court elected to ground congressional authorities in its tax powers. Noting the statute's carefully crafted cohesiveness,[158] the Court read statutory language referring to a "penalty" for lacking health insurance coverage as a "tax" based on the penalty's form and function.[159] Holding taxation constitutional, the Court did not consider the "wisdom and fairness" of the ACA entirely.[160]

Three years later, the Court constitutionally upheld the ACA's "function over form" again despite another blatant contradiction to statutory text, using MQD offensively. In its infamous, unanimous 2015 opinion in *King v. Burwell*, the Court evoked "economic and political significance" to fashion a complete exception to *Chevron* and bypass deference inquiries entirely.[161] Considering ACA provisions authorizing the Internal Revenue Service (IRS) to regulate state exchanges (but with no mention of federal exchanges), the Court rejected IRS's contention that it was only authorized to regulate state exchanges,[162] despite acknowledging that IRS offered the most natural reading of the statutory phrase.[163] Key to the Court's decision was acknowledging potential adverse consequences, disrupting the ACA's cohesive scheme.[164]

The Court's third ACA case, *California v. Texas* (2021), again considered the individual mandate.[165] However, because the associated penalty was reduced to $0 by the Tax Cuts and Jobs Act of 2017, the ACA's constitutionality under congressional taxing authorities was literally negated.

Under the Court's own precedent, the ACA was potentially entirely unconstitutional, but the Court punted on considering the issue entirely, finding the opposing states lacked standing to challenge the health care law.[166] In his

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[157] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[158] The ACA resolves insurance "risk pool" problems of "guaranteed issue" and "community rating" via an "individual mandate" requiring *everyone* to participate in the insurance marketplace or be penalized monetarily. *Id.* at 547-48.

[159] *Id.* The penalty is calculated by the IRS and deducted from income, like a tax, and can thus be "reasonably . . . characterized as a tax." *Id.* at 574.

[160] *Id.*

[161] 576 U.S. at 474–75.

[162] *King* implicated the ACA provision authorizing IRS to issue tax credits and impose associated penalties only "through an Exchange established by the State." *Id.* at 474. The Court rejected IRS interpretations only including exchanges directly established by states, not federal exchanges established by HHS. *Id.* at 475.

[163] Chief Justice Roberts, in his majority opinion, does not meaningfully engage with the statutory text (and even agrees with the "plain meaning" he ultimately rejects) based on significance. Professor Kristin Hickman has suggested that the Court may have intended for *King* to be a one-time exception to *Chevron*. *See* Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 2015 Pepp. L. Rev. 56, 69.

[164] The Court cited potential adverse consequences to "compel[]" a reading more cohesive with the ACA's overall purpose and structure: three "interlocking" ACA reforms operating to expand coverage in the health insurance market and protect against "adverse selection" evidenced by prior health reform attempts in select states. *King v. Burwell,* 576 U.S. at 478.

[165] *See* California v. Texas, 141 S. Ct. 2104 (2021).

[166] *Id.* at 2112.

dissent, Justice Alito cited the ACA's scope (906 pages and thousands of regulations), complexity, and financial burden on states to find standing.[167] Ultimately, the Court's disagreement on standing created little binding precedent, and the ACA continued successful operation even without the "tax," reaching record numbers of enrollees in 2022[168] and providing an avenue for coverage for millions more during the COVID-19 pandemic.

C. *Rejecting Public Health Authorities*

Massachusetts and the Benzene and ACA cases stand for utilizing public health outcomes in line with congressional intentions to overlook problematic, but plausible, textual readings, emphasizing the statute's overall purpose and goals over individual lines of text. Several pre-*West Virginia* COVID-era cases take the opposite approach: singling out statutory phrases, often without context, to reject broader legislative agendas. However, like the third ACA case, the COVID cases hyper-focus on statutory text and create little binding precedent.

In August 2021, the Court held that the Centers for Disease Control and Prevention (CDC) lacked statutory authorities to implement a nationwide eviction moratorium[169] under the Public Health Service Act.[170] Lower courts upheld CDC's assertion of authority based on the unprecedented COVID-19 pandemic,[171] but the Court balked at CDC's exercise of a "breathtaking amount of authority" of "vast 'economic and political significance.'"[172] The Court failed to provide guidance on what more Congress should do in

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[167] *Id.* at 2123, 2129 (Alito, J., dissenting).

[168] Press Release, U.S. Department of Health and Human Services, New Reports Show Record 35 Million People Enrolled in Coverage Related to the Affordable Care Act, with Historic 21 Million People Enrolled in Medicaid Expansion Coverage (April 29, 2022), https://www.hhs.gov/about/news/2022/04/29/new-reports-show-record-35-million-people-enrolled-in-coverage-related-to-the-affordable-care-act.html [https://perma.cc/8QRC-55WB].

[169] The temporary national moratorium on most evictions for nonpayment of rent was intended to help combat the spread of COVID-19 by facilitating social distancing practices, ensuring compliance with stay-at-home orders, and providing immediate relief for 6.5 million renter households behind on rent and at increased risk of eviction.

[170] Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

[171] Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 21-5093, 2021 WL 2221646 (D.C. Circ. June 2, 2021). Persuaded by the severity of the COVID-19 pandemic when considering the case in September 2020, the D.C. Circuit found, in its June 2021 holding that the rule was likely to succeed constitutionally and declined to stay pending appeal. *Id.* at *2. The court found that the eviction moratorium fell within the plain text of the PHSA. In addition to a plain reading of the statute, Congress expressly determined that "responding to events that by their very nature are unpredictable, exigent, and pose grave danger to human life and health requires prompt and calibrated actions grounded in expert public-health judgments." *Id.* Congress thereby designated HHS Secretary as best positioned to determine the need for such preventative measures "in his judgment[as] necessary." *Id.* The statute additionally requires a determination of necessity prerequisite to any exercise of authority, providing a limiting principle in a material and substantial way. *Id.*

[172] *Id.* at *4 (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); Ala. Ass'n, 141 S. Ct. at 2489.

crafting statutes but warned CDC that its reading of the statute would leave "no limit" on its powers.[173]

The Court considered two federal vaccine requirements in January 2022: OSHA's Emergency Temporary Standard (ETS)[174] and the Centers for Medicare and Medicaid Services' (CMS) vaccination requirement for health care workers.[175] Citing the eviction moratorium case, the Court struck down the ETS as outside OSHA's authority[176] but upheld the CMS rule. The OSHA and CMS cases are markedly similar—impacting thousands of Americans under broad grants of authority using generalized statutory language—but with disparate results.[177] One key distinction may be CMS precedent supporting imposed conditions on federal funding.[178]

Ultimately, however, the only difference between the OSHA and CMS cases is that Chief Justice Roberts and Justice Kavanaugh saw the cases differently. The other seven justices found no distinction. The Court did not explain contradictory results or address how factors were weighed. Distressed by the two-month delay between President Biden's announcement and the OSHA rule's issuance, the Court was not troubled by the two-month delay in the CMS case. Whereas 20 million would be affected by the OSHA rule, "only" 10 million health care workers were implicated by the CMS requirement. The Court criticizes the unprecedented nature of the OSHA rule but praises CMS's vaccine requirement as going "further than what has done in the past to implement infection control," even noting that historically states retained authorities to implement vaccine requirements.[179] Where the Court weighs factors without assigning weight or cites "significance" as justifying special circumstances without further explanation, lower courts struggle to apply precedent to support striking down—or upholding—federal statutes.

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[173] *Id.*

[174] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022).

[175] *See* Biden v. Missouri, 142 S. Ct. 647 (2022).

[176] The Court wrote that Congress should "speak clearly when authorizing an agency to exercise powers of vast economic and political significance" and that there was "little doubt that OSHA's mandate qualifies as an exercise of such authority." NFIB v. OSHA, 142 S. Ct. at 665.

[177] Speaking in November 2022 during oral argument in Wilkins v. United States, Justice Ketanji Brown Jackson warned that the Court's ever-changing views would lead to "messy and odd" situations "in which near-identical if not identical statutory provisions that have the same text, structure, and even history related to this time bar questionwould have different legal results about the characterization" because of when the court weighed in on their meaning. Kimberly Strawbridge Robinson, *Justices Eye 'Time Travel' for Second-Guessing Predecessors*, Bloomberg Law (Nov. 30, 2022), https://news.bloomberglaw.com/us-law-week/justices-consider-second-guessing-predecessors-using-new-tools [https://perma.cc/S6VV-KFA4].

[178] The Supreme Court concluded that HHS authorities pursuant to spending powers were within the scope of thestatute since the rule relates duties to "impose conditions on the receipt of Medicaid and Medicare funds" that arefound to be "necessary in the interest of the health and safety of individuals who are furnished services.'" Biden v. Missouri, 142 S. Ct. at 650.

[179] *Id.*

IV. Cohesive Solutions for Congress, Agencies, and Courts

The Supreme Court's civil rights and public health jurisprudence consider statutes holistically, firmly grounding textual interpretations on constitutional rights and Congress' intentions to achieve better public health outcomes in response to discrete threats. Statutory phrases and provisions are examined through the lens of individual rights protections rooted in constitutional amendments and leading to specific federal legislation. Just as Congress recognizes imprecise "equal protection" guarantees but elicits specific instructions for federal agencies to assure rights are enforced in locales and for persons not fully experiencing rights, the Court resolves disputes over civil rights statutes by further building on the constitutional foundation. Similarly, where Congress considers public health issues and passes legislation in response, the Court upholds the ultimate purpose of the statute.

Ultimately, MQD factors enunciated in *West Virginia* are subjective, nebulous, and malleable. Without defining a "major question" or providing criteria for what is of "major economic and political significance," the Court fails to provide a workable standard for lower courts to follow in how and when MQD should be applied. In its first use of MQD since *West Virginia*, in June 2023 the Court failed to provide any further clarify on its application.[180] Less than a year since its formal pronouncement, lower federal courts struggle to apply MQD uniformly in quests to assess agency action, stymying federal responses to immigration, national security threats, COVID-19, climate change, social justice, and other issues. Additionally, uncertain of *Chevron*'s viability or whether MQD replaces *Chevron* entirely, lower courts lack consistency nationwide.

A. *Existing Legal Challenges*

Immigration has long been a politically charged issue[181] but has generally been considered an executive branch power,[182] with judges tending to defer to agencies regarding immigration policies.[183] The Obama-era Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA), promulgated under 2012 Department of Homeland Security (DHS) Memorandum, were rebuffed under *Chevron* by a Texas federal

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[180] Biden v. Nebraska, 143 S. Ct. 2355, 2372–76 (2023) (holding that the Biden administration's proposal to forgive up to $20,000 of federally-guaranteed student loan debt violated the major questions doctrine but not applying *West Virginia*'s factors).

[181] *See* Engy Abdelkader, *Immigration in the Era of Trump: Jarring Social, Political, and Legal Realities*, 44 N.Y.U. Rev. L. & Soc. Change—The Harbinger 76, 76 (2020) (discussing immigration policy as political strategy in the 2016 and 2020 elections).

[182] Daniel Schutrum-Boward, *United States v. Texas and Supreme Court Immigration Jurisprudence: A Delineation of Acceptable Immigration Policy Unilaterally Created by the Executive Branch*, 76 Md. L. Rev. 1193, 1196 (2017) ("The Supreme Court has consistently, with some restrained deviations, held that enactment and enforcement of immigration law are only within the purview of the federal political branches. . .").

[183] Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (finding that executive authorities regarding immigration are "fairly wide" and emphasizing the government's "broad discretion").

district court in 2021.[184] Days after *West Virginia*, the Texas solicitor general asked[185] the Fifth Circuit to strike down the policies under MQD. In October 2022, the court complied,[186] finding that immigration implicated "question[s] of deep 'economic and political significance'"[187] outside the scope of DHS' powers, conflicting with Immigration and Naturalization Act schemes, and, even if ambiguous, not reasonable.[188] While litigation ensues, the Biden administration is blocked from processing new applications (although it can consider and process renewals).[189] COVID-era Title 42 immigration policies allowing border agents to rapidly turn away migrants ended in May 2022 alongside the Public Health Emergency (PHE).[190] In February 2023, the Biden administration unveiled a new policy limiting asylum eligibility for migrants not following certain procedures,[191] effectively eliminating asylum opportunities at the U.S.-Mexico border U.S.-Mexico border,[192] likely in violation with existing law.[193] In June 2023, the Supreme Court mooted state

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[184] Texas v. United States, 549 F. Supp. 3d 572, 578 (S.D. Tex. 2021) (finding that DHS lacked authority to enact the programs).

[185] Letter from Judd E. Stone II, Solicitor General, Texas, to Lyle W. Cayce, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (July 5, 2022) (on file with the Fifth Circuit Court of Appeals).

[186] Avalon Zoppo, *After Supreme Court's EPA Ruling, Texas Turns to 'Major Questions' Doctrine in DACA Challenge*, Nat'l L. J. Online (July 6, 2022), https://www.law.com/nationallawjournal/2022/07/06/after-supreme-courts-epa-ruling-texas-turns-to-major-questions-doctrine-in-daca-challenge [https://perma.cc/6GD8-JQQQ].

[187] Texas v. United States, 50 F.4th 498, 525 (5th Cir. 2022) (holding that "DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits, and "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency").

[188] *Id.* at 526.

[189] Micah Danney, *Texas Court Can't Cancel DACA Nationwide, Feds Say*, Law360 (Mar. 3, 2023), https://www.law360.com/articles/1582066/texas-court-can-t-cancel-daca-nationwide-feds-say [https://perma.cc/8MJB-SGWX].

[190] In late January 2022, President Biden announced that Title 42 would end with the PHE. Suzanne Monyak, *Biden Push to End Title 42 Border Policy Won't End the Legal Fights*, Roll Call (March 2, 2023), https://rollcall.com/2023/03/02/biden-push-to-end-title-42-border-policy-wont-end-the-legal-fights/ [https://perma.cc/N4RT-PEPQ]. The policy is actually legally grounded under separate CDC authorities independent of the PHE but is tied up in litigation, with the Supreme Court accepting and then denying certiorari. *Id.*

[191] Migrants must have proper documentation and must seek legal protection in other countries. Circumvention ofLawful Pathways, 88 Fed. Reg. 11704 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. pt. 1208).

[192] Britain Eakin, *New Asylum Curbs Target Travel Through Other Countries*, Law360 (Feb. 21, 2023), https://www.law360.com/immigration/articles/1578444/new-asylum-curbs-target-travel-through-other-countries [https://perma.cc/A2KN-3ZWF].

[193] The Biden policy likely violates the Refugee Act of 1980, which was incorporated into the Immigration and Nationality Act. The Biden administration emphasizes that, technically other legal avenues remain available to migrants. Still, the rule likely hinges on whether it is inconsistent with Congress' wishes. Britain Eakin, *Biden's Asylum Rule May Also Die Like Trump's 'Transit Ban'*, Law360 (Feb. 22, 2023), https://www.law360.com/publicpolicy/articles/1578844 [https://perma.cc/G5Y4-WMGZ].

challenges to Title 42 and found states lacked standing to contest executive immigration prosecutorial authorities.[194]

Federal policies addressing gun violence face Second Amendment and MQD concerns. The Fifth Circuit struck down federal efforts[195] to restrict bump stocks[196] (which allow shots to be fired in rapid succession, like a fully automatic weapon) in January 2023.[197] Although DOJ did not raise *Chevron* in defense, the court applied its own *Chevron* exception, finding no need to evaluate deference because Bureau of Alcohol, Trade, Firearms, and Explosives (ATF) interpretations of the National Firearms Act (NFA) imposed criminal penalties.[198] The Fifth Circuit's holding is countered by favorable assessments of bump stock restrictions in the Sixth and Tenth Circuits and a federal court in Washington.[199]

Courts across the U.S. remain skeptical of the Biden administration's efforts to vaccinate federal employees and contractors.[200] In December 2022,

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[194] United States v. Texas, 599 U.S. 670, 673 (2023).

[195] In April 2019, the D.C. Circuit denied a motion for a preliminary injunction, finding that the statutory definition of machine gun is ambiguous and the rule is entitled to *Chevron* deference. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Exp., 920 F.3d 1, 29 (D.C. Cir. 2019) (per curiam). In a statement regarding the Supreme Court's denial of certiorari for *Guedes*, Justice Gorsuch wrote that the rule is not entitled to deference. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Exp., 140 S. Ct. 789, 789 (2020). The Tenth Circuit issued a similar opinion in 2020. *See generally* Aposhian v. Barr, 958 F.3d 969 (10th Cir. 2020). But, in March 2021, a Sixth Circuit panel found that the rule was not entitled to *Chevron* deference and not the best interpretation of the statute. Gun Owners of Am., Inc. v. Garland, 992 F.3d 446, 450 (6th Cir. 2021), *vacated*, 2 F.4th 576 (6th Cir. 2021). Another Sixth Circuit panel held that a bump stock is not a machine gun "part" prohibited by federal law. Hardin v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 65 F.4th 895 (6th Cir. 2023). In December 2021 a Fifth Circuit panel acknowledged that other Circuits applied *Chevron* in assessing the bump stock rule but decided to review the interpretation de novo, independently finding that the agency's interpretation was the best interpretation.Cargill v. Garland, 20 F.4th 1004, 1006 (5th Cir. 2021), *vacated*, 57 F.4th 447 (5th Cir. 2023). But, in January 2023, a Fifth Circuit judge held that the bump stock rule was not entitled to *Chevron* deference. Cargill, 57 F.4th at 456.

[196] Following a deadly Las Vegas attack in October 2017 featuring semi-automatic rifles equipped with "bump stocks," ATF promulgated a rule (the Bump Stock Rule) stating that bump stocks were machine guns for the purposes of the National Firearms Act (NFA). Bump-Stock-Type Devices, 83 Fed. Reg. 66514 (Dec. 26, 2018) (codified at 27 C.F.R. pts. 447, 449).

[197] Cargill, 57 F.4th at 451.

[198] *Id.* at 457 (citing Justice Gorsuch's dissent concerning denial of certiorari in a 2020 NFA bump stock case, finding *Chevron* inappropriate for criminal statutes implicating constitutional vagueness restraints and where prior, inconsistent ATF positions may fail to provide "fair notice" of criminalized conduct). However, in *United States v. Grimaud*, 220 U.S. 506 (1911), in considering agricultural regulations under the Forest Reserve Act of 1891, the Court held that Congress may delegate power to an agency to adopt regulations that are subject to criminal penalties. The Court held that ambiguities in the statute was a matter of administrative detail. *Id.* at 516.

[199] The Associated Press, *A U.S. Appeals Court Blocks a Ban on Rapid-Fire 'Bump Stocks'*, NPR (Jan. 7, 2023), https://www.npr.org/2023/01/07/1147698112/bump-stocks-ban-struck-down-court [https://perma.cc/D4B5-584F].

[200] The Eleventh, Fifth, and Sixth Circuits have upheld injunctions against the federal contractor rule's enforcement. *See, e.g.,* Georgia v. President of the United States, 46 F.4th 1283, 1295–97 (11th Cir. 2022) (holding that the nationwide contractor mandate was "too broad" and violated MQD); Louisiana v. Biden, 55 F.4th 1017, 1033 (5th Cir. 2022) (blocking contractor

a Fifth Circuit panel issued a split 2-1 decision, disagreeing whether MQD applied to delegations of power to the president, rather than agencies, but ultimately held the vaccine requirement was outside the scope of the Procurement Act.[201] In January 2023, the Sixth Circuit struck down the policy as outside executive authorities under the federal Property and Administrative Services Act of 1949, citing the "stunning" scope of the mandate covering 20% of the U.S. workforce.[202] Additional vaccine challenges implicate the Head Start program,[203] military branches, and National Guard.[204] In April 2022, two judges in the federal Middle District of Florida addressed the Department of Transportation's travel mask mandate, each conducting their MQD analysis distinctly[205]—and both differing from Supreme Court's application in *West Virginia*.[206] Judge Kathryn Kimball Mizelle held that the travel mask mandate exceeded CDC's' authority under the Public Health Service Act, by starting with the dictionary definitions of the words at issue, and finding the statute not ambiguous. Eleven days later, Judge Paul G. Byron upheld the mask mandate after finding that MQD did not apply because there was no question of economic and political significance, and CDC was regulating interstate commerce, not a traditional area of state law. Both cases were appealed to the Eleventh Circuit, which heard oral argument in January 2023 and declared both cases moot in June 2023.[207]

Presidential administrations often target social justice issues through strategic Executive Orders directing agencies to achieve a goal by using existing statutory authorities.[208] The Biden administration's Federal Trade Com-

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mandate as exceeding presidential authority under the Procurement Act); Kentucky v. Biden, 23 F.4th 585, 604 (6th Cir. 2022) (blocking contractor mandate in Kentucky, Ohio, and Tennessee as exceeding presidential authority under the Property Act).

[201] Daniel Wilson, *5th Circ. Backs Block on COVID Vax Mandate for Contractors*, Law360 (Dec. 19, 2022), https://www.law360.com/articles/1559735/5th-circ-backs-block-on-covid-vax-mandate-for-contractors [https://perma.cc/58LA-KERB].

[202] Leah Shepherd, *Court Curbs Federal Contractor Vaccine Mandate*, SHRM (Jan. 17, 2023), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/federal-contractor-vaccine-requirement.aspx [https://perma.cc/4NMV-7U8W].

[203] Likewise, a Louisiana district court found COVID vaccination requirements for Head Start, a federal-state initiative for under-severed young children, invalid. Louisiana v. Becerra, 577 F.Supp.3d 483, 503 (W.D. La. 2022).

[204] Erica White, James G. Hodge, Jr., & Jennifer Piatt, *Federal Vaccine Mandates in Response to COVID-19*, Network Pub. Health L. (updated June 16, 2022), https://www.networkforphl.org/resources/federal-vaccine-mandates-in-response-to-covid-19/ [https://perma.cc/3GFD-PPG6].

[205] Erica White & James G. Hodge, Jr., *CDC Travel Mask Mandate*, Network Pub. Health L. (updated Nov. 4, 2022), https://www.networkforphl.org/resources/cdc-travel-mask-mandate-litigtion/ [https://perma.cc/U8JP-UG7N].

[206] *See* Erin Webb, *Analysis: Twin Cases Show 'Major Questions' is Far From Settled*, Bloomberg Law (Aug. 4, 2022), https://www.bloomberglaw.com/bloomberglawnews/bloomberg-law-analysis/X2PSMV2C000000 [https://perma.cc/2B77-FW9H].

[207] Health Freedom Def. Fund v. President of United States, 71 F.4th 888 (11th Cir. 2023).

[208] For example, in 1994 the Clinton administration aimed to achieve social justice goals under executive orders targeting minority and low-income populations, persons with limited English proficiency, and more. *See, e.g.,* Exec. Order 12928, 59 Fed. Reg. 48377 (Sept. 16, 1994) ("Promoting Procurement With Small Businesses Owned and Controlled by Socially and Eco-

mission (FTC) rule banning virtually all non-competition agreements ("non-competes")[209] was alleged as exceeding the scope of FTC's enabling statute and contradicting precedent; legal challenges are imminent following the final rule.[210] President Biden's promise to forgive federally guaranteed student loan debt[211] was explicitly struck down under MQD by a three-judge Fifth Circuit panel in late November 2022. Although the court passed on the opportunity to make MQD a clear-statement rule when asked to do so on appeal,[212] the Supreme Court appeared skeptical of executive authorities at oral arguments for *Biden v. Nebraska*[213] and *Department of Education v. Brown*[214] in October 2022.[215] The proposal was summarily rejected under MQD in June 2023, but without applying *West Virginia*'s factors or offering further explanations.[216] Efforts to advance racial equity[217] have similarly been attacked.[218] Even before *West Virginia*, MQD was cited in (eventually denied) petitions for certiorari involving veterans' benefit claims[219] and referenced

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nomically Disadvantaged Individuals, Historically Black Colleges and Universities, and Minority Institutions," requiring federal actors to promote the use of specified entities in procurement).

[209] In promulgating the rule, FTC relied on a provision of the Federal Trade Commission Act empowering FTC to "prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C.A. § 45. "Unfair methods of competition" has been interpreted to include total removal of non-competes. *Non-Compete Clause Rulemaking*, U.S. Federal Trade Commission (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking [https://perma.cc/72GP-3YNT].

[210] William J. Kishman, *the Non-Compete Landscape in 2023: What Employers Should Know about Changes in Non-Compete Law from the FTC, NLRB, Antitrust Claims and New State Laws*, Nat'l L. Rev. (Sept. 28, 2023), https://www.natlawreview.com/article/non-compete-landscape-2023-what-employers-should-know-about-changes-non-compete-law [https://perma.cc/S7V3-P7BS].

[211] In 2022, President Biden issued an E.O. directing the Department of Education to create and administer a program forgiving $10,000 per borrower in federal student loan debt, utilizing authorities in the 2003 HEROES Act. *See* Ilya Somin, *Don't Let the Executive Abuse Emergency Powers to Raid the Treasury*, SCOTUSBlog (Feb. 21, 2023), https://www.scotusblog.com/2023/02/dont-let-the-executive-abuse-emergency-powers-to-raid-the-treasury/ [https://perma.cc/95RX-LWQW].

[212] Erin Webb, *Analysis: Major Question—Can Congress Predict the Future?*, Bloomberg Law (Feb. 27, 2023), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-major-question-can-congress-predict-the-future [https://perma.cc/6PQQ-3S67].

[213] 143 S. Ct. 2355 (2023).

[214] 600 U.S. 551 (2023).

[215] MQD was addressed by both parties on the merits in both cases. Adam Liptak, *Supreme Court Heard Arguments Challenging Student Loan Forgiveness*, N.Y. Times (Feb. 28, 2023), https://www.nytimes.com/live/2023/02/28/us/student-loans-supreme-court [https://perma.cc/2Q9P-SH2L].

[216] Biden v. Nebraska, 143 S. Ct. at 2372-76.

[217] Exec. Order No. 13985, 86 F.R. 7009 (Jan. 20, 2021).

[218] *New Racist Biden EO Installs Equity Czars in Every Federal Agency and Converts Entire Exec Branch Into Woke DEI Cult: AFL Vows Relentless Opposition*, Am. First Legal (Feb. 17, 2023), https://aflegal.org/new-racist-biden-eo-installs-equity-czars-in-every-federal-agency-and-converts-entire-exec-branch-into-woke-dei-cult-afl-vows-relentless-opposition/ [https://perma.cc/2JXN-X776].

[219] *See* Buffington v. McDonough, 7 F.4th 1361 (Fed. Cir. 2021), *cert. denied,* 143 S. Ct. 14 (2022).

during oral arguments[220] concerning HHS' drug reimbursement rates.[221] Pharmaceutical companies cite MQD against federal rules requiring discounts to contract pharmacies.[222] A Tennessee district court enjoined Title IX guidance documents regarding sexual orientation and gender identity in twenty states.[223] Similarly, interpretations of ACA's ban on sex discrimination was found invalid by a Texas district court.[224] MQD particularly threatens federal efforts to regulate tobacco,[225] with the FDA carefully evaluating whether changes are necessary in existing statutes.[226] In contrast, an Arizona district court upheld President Biden's Executive Order increasing the minimum wage for federal contractors[227] as consistent with executive branch precedent in January 2023, rebuffing MQD arguments.[228] The attorney general of Texas evoked MQD in challenges to HHS guidelines regarding health care providers' obligations under the Emergency Medical Treatment and Labor Act (EMTALA) to stabilize pregnant patients.[229]

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[220] *See* Transcript of Oral Argument at 31, American Hospital Ass'n v. Becerra, 142 S. Ct. 1896 (2022) (No 20-1114).

[221] *See* Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896, 1904 (2022) (holding that Medicare statutory provisions HHS to set reimbursement rates based on average price and affords the agency discretion to 'adjust' the price up or down," but not to "vary the reimbursement rates by hospital group.").

[222] AstraZeneca Pharms. LP v. Becerra, No. CV 21-27-LPS, 2022 WL 48458 (D. Del. Feb. 16, 2022). Brief for Appellee AstraZeneca Pharms. at 34 (July 21, 2022).

[223] Tennessee v. United States Dep't of Educ., 2022 WL 2791450 at *21 (E.D. Tenn. 2022) (relying on the Administrative Procedure Act, rather than the Major Questions Doctrine, to find that the executive cannot reinterpret a statute to accomplish objectives that Congress has not embraced).

[224] Neese v. Becerra, 2022 WL 16902425 (N.D. Tex. 2022).

[225] Michael B. Farber & Anand Shah, *The FDA is at a Crossroads for Reducing Tobacco-Related Disease and Death*, STAT News (Aug. 24, 2022), https://www.statnews.com/2022/08/24/crossroads-us-reducing-tobacco-related-disease-death/ [https://perma.cc/96HT-5NGV].

[226] Celine Castronuovo, *FDA to Seek Authority to Collect Fees from Vaping Industry*, Bloomberg Law (Feb. 24, 2023), https://news.bloomberglaw.com/bloomberg-law-news/fda-to-push-for-authority-to-collect-fees-from-vaping-industry [https://perma.cc/XKX5-2D8P].

[227] President Biden's April 2021 Executive Order 14026 increased the minimum wage for federal contractors to $15 per hour, ordering the Department of Labor to issue regulations to implement the E.O. Following public notice and comment, DOL issued its final rule in November 2021.

[228] A federal district court in Arizona initially upheld the minimum wage increase in January 2023. Arizona v. Walsh, 2023 WL 120966 (D. Ariz., Jan. 6, 2023). The court rejected a narrow reading of the Federal Property and Administrative Services Act (FPASA) to hold that MQD did not apply to President Biden's Executive Order 14026, Increasing the Minimum Wage for Federal Contractors. *Id.* at *9. The court distinguished the EO from CDC's eviction moratorium, writing that the scope of executive authority was "not akin to [] novel and 'breathtaking' authority" where presidents of "both political parties" issued similar EOs pertaining to compensation of federal contractors and their employees, including specifically setting requirements for minimum wages. *Id.* at *7–8. And, unlike *West Virginia*, the court found that the agency did not rely on "an ancillary statutory provision to exercise novel regulatory powers." *Id.* at *7. Instead, the president relied on a "broad statutory delegation to exercise proprietary authority in an area—general administrative control of the Executive Branch—over which he also enjoys inherent powers." *Id.*

[229] Plaintiffs' Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction, Texas v.Becerra, N.D. Tx. 2022, No. 5:22-CV-00185.

The Biden administration has emphasized aggressive climate change policies (including cutting carbon emissions in half) since President Biden took office in January 2021.[230] Against an eleven-year budget low,[231] EPA is struggling to enact climate policies post-*West Virginia*[232] (however, a $5 billion EPA initiative for states to cut carbon emissions and pollutions was announced in early March 2023.)[233] In the 2023 Supreme Court, *Sackett v. EPA*,[234] the court rejected the EPA's interpretation of what constitute "waters of the United States" in the Clean Water Act (CWA),[235] an infamously inscrutable phrase that has already inspired much litigation.[236] At issue was whether the Court would reject industry attempts to eliminate federal clean water protections for streams and wetlands that safeguard families, communities, rivers, and lakes against pollution.[237] Antagonists argued that only Congress can define the term. Multiple federal climate efforts pursuant to the CWA would be implicated by an adverse ruling,[238] including regulations minimizing pollutants effecting marginalized

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[230] Zack Colman & Eric Wolff, *Biden Unveils Sweeping Climate Goal—And Plans to Meet it Even if Congress Won't*, Politico (Apr. 4, 2021), https://www.politico.com/news/2021/04/22/biden-climate-goal-congress-484141 [https://perma.cc/LA4X-Y37E].

[231] Stephen Lee, *EPA Enforcement Budget Even Lower Than Under Trump, Group Says*, Bloomberg Law (Feb. 22, 2023), https://news.bloomberglaw.com/environment-and-energy/epa-enforcement-budget-even-lower-than-under-trump-group-says [https://perma.cc/F2Z3-CMG2]. However, the fiscal 2024 budget proposes $12 billion for agency. Stephen Lee, EPA Would Get 19% Boost to Record High Funding in Biden Budget, Bloomberg Law (Mar. 9, 2023), https://news.bloomberglaw.com/environment-and-energy/epa-would-get-19-boost-to-record-high-funding-in-biden-budget [https://perma.cc/WCQ5-J45V].

[232] Lisa Friedman, *Depleted Under Trump, a 'Traumatized' E.P.A. Struggles With Its Mission*, N.Y. Times (Jan. 23, 2023), https://www.nytimes.com/2023/01/23/climate/environmental-protection-agency-epa-funding.html [https://perma.cc/ECR3-FNTS].

[233] Stephen Lee, *States' Climate Pollution Fight Gets $5 Billion Boost from EPA*, Bloomberg Law (Mar. 1, 2023), https://news.bloomberglaw.com/environment-and-energy/states-climate-pollution-fight-gets-5-billion-boost-from-epa [https://perma.cc/Q9A8-P9V9].

[234] Sackett v. EPA, 598 U.S. 651 (2023).

[235] Kalvis Golde, *In the South Carolina Countryside, a Dispute Over "Citizen Suits" Under the Clean Water Act*, SCOTUSBlog (Feb. 24, 2023), https://www.scotusblog.com/2023/02/in-the-south-carolina-countryside-a-dispute-over-citizen-suits-under-the-clean-water-act/ [https://perma.cc/C5Y6-ZWM5]. *Sackett* is not the only case before the Court regarding the CWA. Several suits question CWA's provisions allowing private actors to sue for polluting a water system but only if government is not already enforcing the law. In early 2023, several cert petitions ask the Court to consider the level of state action required to preclude citizen suits under the CWA.

[236] *Current Implementation of Waters of the United States*, U.S. Environmental Protection Agency (updated Feb. 14, 2023), https://www.epa.gov/wotus/current-implementation-waters-united-states [https://perma.cc/U5Y3-NLU8]. Bobby Magill, Kellie Lunney, & Lillianna Byington, *Biden's Rule on Clean Waters Draws Rebuke from House Committee*, Bloomberg Law (Feb. 28, 2023), https://news.bloomberglaw.com/environment-and-energy/bidens-rule-on-clean-waters-draws-rebuke-from-house-committee [https://perma.cc/98TU-E6C9]. The "waters of the United States" definition has shifted in each presidential administration since 2008. Most recently, House Republicans objected to the Army Corps of Engineers' latest definition in February 2023.

[237] Bob Wendelgass & Lynn Thorp, *The Clean Water Act at the Supreme Court*, Clean Water Action (Oct. 4, 2022), https://cleanwater.org/2022/10/04/clean-water-act-supreme-court [https://perma.cc/R5MC-A8FC].

[238] Bobby Magill, *EPA Proposes Update to Wastewater Testing Methods*, Bloomberg Law (Feb. 17, 2023), https://news.bloomberglaw.com/environment-and-energy/epa-proposes-update-

communities.[239] On May 25, 2023, the Court rejected the federal definition, vastly narrowing the wetlands protected by the CWA.[240] Other initiatives aiming to limit vehicle emissions,[241] require climate impact disclosures,[242] and regulate hydrofluorocarbons[243] have likewise been called too "significant" for executive action without express congressional direction. In other cases, EPA has removed or updated Trump-era adjustments to environmental standards that chipped away at the agency's legal authorities.[244] Judges continue to challenge *Chevron* applications when reviewing environmental policies.[245]

Ultimately, however, only a few courts (to date) rely solely on *West Virginia* to invalidate agency action. However, *West Virginia* and MQD have been cited against varying federal policies, with health policies are disproportionately affected by MQD. This seems fitting, given MQD's prominence in the COVID-era cases, and past reasonings emerging in ACA cases. Health care is incredibly complex and entails many delegations to expert agencies like HHS,

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to-wastewater-testing-methods [https://perma.cc/RJA4-8V3A].

[239] For example, a community in St. James Parish, Louisiana, home to "Cancer Alley," has historically been targeted by industry polluters. Thea Louis, *Continuing Sackett v. EPA into 2023 and the Potential Impact on Environmental Justice*, Nat'l Wildlife Fed'n Blog (updated Jan. 24, 2023). https://blog.nwf.org/2023/01/continuing-sackett-v-epa-into-2023-and-the-potential-impact-on-environmental-justice/ [https://perma.cc/52H9-ATRJ]. A *Sackett* win would implicate plastics polluters that have already filed for wetlands permits in the Parish. *Id.*

[240] Sackett v. EPA, 598 U.S. 651, 684 (2023).

[241] In its brief, EPA argued that MQD is reserved for a "handful" of extraordinary cases, and this is not one of them. EPA's Proof Answering Brief at 2, Texas v. EPA, No. 22-01031 (D.C. Cir. Feb. 24, 2023). "Far from doing something unexpected or novel, EPA merely tightened existing standards. . . In doing so it acted in the heartland of its Section 7521(a) authority, using the same regulatory approach that it has used in every vehicle greenhouse-gas rule." *Id.*

[242] Over twenty Republican attorneys general challenge Securities and Exchange Commission climate disclosure rules, with *West Virginia* forming the backbone of attacks. Andrew Ramonas & Clara Hudson, *ESG Foes in States, Congress Ready Attacks on 'Woke' Investing*, Bloomberg Law (Nov. 21, 2022), https://news.bloomberglaw.com/esg/esg-foes-in-states-congress-ready-attacks-on-woke-investing [https://perma.cc/Q7J4-BU72]. In March 2023, the Senate vetoed the ESG disclosures. Austin R. Ramsey & Diego Areas Munhoz, *ESG Investing Rule Rejected by Senate, Biden Promises Veto*, Bloomberg Law (Mar. 1, 2023), https://news.bloomberglaw.com/esg/esg-investing-rule-rejected-by-senate-biden-promises-veto [https://perma.cc/GM4Q-BDTD].

[243] Jennifer Hijazi, *Judges Probe Limits of EPA Authority in Hydrofluorocarbon Rule*, Bloomberg Law (Nov. 18, 2022), https://news.bloomberglaw.com/environment-and-energy/judges-probe-limits-of-epa-authority-in-hydrofluorocarbon-rule [https://perma.cc/QER5-6DGB].

[244] Jennifer Hijazi, *EPA Restores Key Legal Foundations of Landmark Mercury Rules*, Bloomberg Law (Feb. 17, 2023), https://news.bloomberglaw.com/environment-and-energy/epa-restores-key-legal-foundation-of-landmark-mercury-rules [https://perma.cc/PH79-4Z5K]; Keith Goldberg, *EPA Bolsters Power Plant Water Pollution Standards*, Law360 (Mar. 8, 2023), https://www.law360.com/articles/1583712/epa-bolsters-power-plant-water-pollution-standards [https://perma.cc/DZ99-5ZML]; Juan Carlos Rodriguez, *EPA Floats Stronger Pesticide Rules*, Law360 (Feb. 16, 2023), https://www.law360.com/environmental/articles/1577258 [https://perma.cc/JP72-L87A].

[245] Jess Krochtengel, *DC Circuit Judge Blasts 'Chevron Maximalism' in Dissent*, Law360 (Feb. 15, 2023), https://www.law360.com/publicpolicy/articles/1576824 [https://perma.cc/QHQ7-SBMU]. In his dissent, D.C. Circuit Judge Justin Walker criticized the Circuit's use of Chevron and alleged "default" deference as contrary to Supreme Court views. *Id.*

CMS, and others. Moreover, virtually every person in the United States will require health care services at some time, and climate change and other environmental factors affect everyone. Public health is perhaps the most "economically and politically significant" field of regulation. But, despite its magnitude, rights and protections essential to the Constitution's scheme necessitate federal agency actions impacting public health.

B. *Interconnecting Legal Strategies*

A Supreme Court case explicitly rejecting MQD against structural constitutional principles or upholding individual rights may never come. However, considering the Roberts Court's tendencies to limit administrative agency authority case-by-case without outright rejecting statutory powers,[246] overruling precedent,[247] or even creating applicable standards for lower courts,[248] a clear statement restricting MQD may not be required. And MQD analyses rejecting specific actions under particular statutory provisions should not inhibit agencies from pursuing policy goals under different authorities or strategies. Even further aggressive judicial MQD usages[249] will not estop agencies from promulgating rules and regulations or issuing guidelines and memoranda extending individual rights protections, or addressing specific issues detailed in statutes, no matter how "economically and politically significant" the consequences.

West Virginia's amorphous standards and haphazard factors may be its own downfall. Although a broad doctrine striking down any action of "economic and political significance" seems promising to litigants, uneven application across lower courts speaks for itself. Whereas *Chevron* and the civil rights cases create buildable precedent across courts and time, *West Virginia* fails to be evenly applicated at all. Moreover, *West Virginia* fails to explicitly overrule precedent such as *Massachusetts* and proves difficult to reconcile with other recent Court decisions interpreting statutory provisions directly contradictory to MQD.

While MQD may persist as a constitutional thorn for decades, cohesive legal strategies may shift outcomes or influence courts' reasonings. First, agency actions may be reframed as enhancing specific individual rights following the Court's own precedent. Second, select agency authorities may be balanced or redefined following structural understandings of specific branches' inherent authorities. Finally, specific public health interventions may prevail with supporting data and targeted solutions assigned by Congress.

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[246] *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); West Virginia v. EPA, 142 S.Ct. 2587 (2022).

[247] *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007); Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014).

[248] *See* disparate lower court applications *supra* Part IV, Section A.

[249] Chris Williams, *The Student Loan Forgiveness Cases are Set to Answer Major Questions about Standing and Major Questions*, Above the Law (Mar. 1, 2023), https://abovethelaw.com/2023/03/the-student-loan-forgiveness-cases-are-set-to-answer-major-questions-about-standing-and-major-questions/ [https://perma.cc/K88Z-MQML].

Considering the first situation, select agency actions may be justified by civil rights expansions. For example, suits challenging state laws expanding protections for transgender individuals under Equal Protection arguments may prevail as another extension of CRA guarantees. Even Justice Gorsuch, writing for the *Bostock* majority, acknowledged that the decision may emerge as precedent against challenges to so-called "bathroom bans."[250] EMTALA obligations requiring stabilizing treatment may similarly overcome MQD accusations where pregnant patients are denied care.[251] Affirmative action, however, may not prevail based on civil rights statutes' interconnectedness. During oral argument in February 2023, the Court questioned "racial diversity" as a determinant in admittance evaluations.[252] The Department of Education and other federal government bodies treat "Hispanic," for example, as an "ethnic" classification, not racial.[253] As the Civil Rights Act forbids any arbitrary racial classification, select affirmative action policies not comporting with the overall federal scheme may be struck down. Conversely, litigants in the student loan forgiveness case argued, albeit unsuccessfully, that MQD should not be applied to benefits programs that do not impose costs to individual liberty interests.[254]

Next, select agency actions may be redefined to cite authorities under differing federal sources based on cohesive federalism and separation of powers principles. Difficulties in pinpointing existing executive authorities may doom MQD applications. For example, despite disparate MQD application in lower courts, executive authorities to impose requirements for federal contractors and employees will likely be preserved overall. The evidence is in lower courts' disagreement on applicable statutes. For example, the Fifth and Sixth Circuits negated vaccination requirements for federal contractors under completely different statutes, as did two federal district courts in Florida evaluating travel mask requirements. Executive branch powers over itself are so inherent to constitutional powers that policies cannot be cleanly attributed to a single federal law, leaving opponents attacking various statutory authorities

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[250] *Bostock*, 140 S. Ct. at 1753 ("They say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today but none of these other laws are before us; we have not had the benefit of adversarial testingabout the meaning of their terms, and we do not prejudge any such question today.").

[251] James G. Hodge, Jr., et al., *Abortion Bans Threatening Pregnant Patients' Lives are Unconstitutional*, Bill of Health (Oct. 5, 2022), https://blog.petrieflom.law.harvard.edu/2022/10/05/abortion-bans-threatening-pregnant-patients-lives-are-unconstitutional/ [https://perma.cc/4HQ8-6SDW].

[252] David Bernstein, *The One Key Question No Justice Asked in the Harvard/UNC Affirmative Action Case*, Reason Mag. (Mar. 14, 2023), https://reason.com/volokh/2023/03/14/the-one-key-question-no-justice-asked-in-the-harvard-unc-affirmative-action-case/ [https://perma.cc/2TQV-RRHG].

[253] Integrated Postsecondary Education Data System, Definitions for New Race and Ethnicity Categories, Nat'l Ctr. Educ. Stats., https://nces.ed.gov/ipeds/report-your-data/race-ethnicity-definitions [https://perma.cc/W573-MTFT].

[254] *Major Questions in the Student-Loan Forgiveness Case*, Wall St. J. (Feb. 28, 2023), https://www.wsj.com/articles/student-loan-case-supreme-court-oral-argument-elizabeth-prelogar-major-questions-doctrine-fef7cf7f [https://perma.cc/LLS8-UPJZ].

under MQD, with no cohesive legal scheme. However, executive powers must be balanced against civil and legal rights. Despite strong executive agency authorities in immigration, Biden administration policies restricting asylum-seeking migrants may fall under civil rights and other federal law violations. Similar Trump-era "transit bans" were rejected by the Ninth Circuit as impermissibly "categorical" and conflicting with federal law.[255] In other cases, courts may impose their own limiting principles to ensure agency action does not violate separation of powers principles by rising to the level of legislation. In the Benzene case, the Court imposed its own extra-statutory requirements for the agency, noting that otherwise OSHA's jurisdictional authority would be uncontrolled as it could act without justification.[256]

Finally, agency action prevails where supporting public health data or targeted solutions and directives compel agency action and bolster state guardianship. Despite *West Virginia* seemingly declaring all extensive climate change efforts too "major" for regulation despite specific instructions, interconnected precedent supports aggressive agency action regardless. *Massachusetts* and the Benzene case, for example, forbid agency inaction when tasked to respond by Congress and empower states to sue to compel regulation based on *parens patriae* obligations. Ironically, even *West Virginia* stands for increased state standing by permitting West Virginia and other states to sue regarding EPA regulations that never went into effect. Given the interconnected scheme created by court precedent, states have extensive *parens patriae* responsibilities to compel federal agency action. For example, as *West Virginia* did not explicitly overrule *Massachusetts* or other precedents, it left in place multiple federal laws circumventing civil climate change suits regardless of the sufficiency of EPA regulation. In recent years multiple climate change suits against energy companies and others arose in state courts, but with uncertain viability, including a petition for certiorari currently pending before the Supreme Court asking whether claims can proceed in state courts.[257] If not, state pressure on federal agencies may be one of the few available avenues for resolution. And, where jurisprudence ignores public health findings and projected outcomes, value as precedent may be limited, as with the COVID cases' highly specific holdings.

Ultimately, MQD's piecemeal analysis of statutes cannot overcome the Constitution's interwoven rights, protections, and guarantees. Each are bol-

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[255] East Bay Sanctuary Covenant v. Trump, 932 F.3d 742 (9th Cir. 2018).

[256] Am. Petroleum Inst., 448 U.S. at 639–44 (finding the OSH Act required demonstrating significant risks of harms in justifying set exposure levels and imposing several action steps on OSHA not mentioned in statute). To comply with the statute, the secretary must determine (1) that a health risk of a substance exists at a particular threshold and (2) decide whether to issue the most protective standard, or issue a standard that weighs the costs and benefits. *Id.* The Court noted OSHA must conduct a cost-benefit analysis, at minimum, in promulgating standards. *Id.* Acting otherwise would give OSHA "unprecedented power" over American industry, conflicting with extensive legislative history establishing agency duties regarding major workplace hazards. *Id.*

[257] Theodore Garrish, *Climate Lawsuits in State Courts Are an Abuse of US Legal System*, Bloomberg Law (Mar. 1, 2023), https://news.bloomberglaw.com/us-law-week/climate-lawsuits-in-state-courts-are-an-abuse-of-us-legal-system [https://perma.cc/CSJ5-2YWT].

stered by decades of legislation, resulting administrative agendas, and judicial support. As the Court continues to validate administrative policies, interpret statutes contradictory to literal text, and allow increasingly permissive state standing, jurisprudence and agency action will continue to work in tandem, upholding executive action as imagined by the Constitution.

Conclusion

MQD is a prominent specter threatening agency action based on separation of powers principles and preservation of policy decisions to a democratically elected and politically accountable Congress. However, agencies should not—and cannot—cease regulation entirely. Consistent with historic principles underscoring administrative agencies' expertise—still flexible as presidential administrations turn over—the Supreme Court upholds or requires agency action to strengthen constitutional individual rights and enforce structural constitutional principles, despite the plain language of the operating statute.

West Virginia, the COVID cases, and others seemingly hinge on strict analysis of relevant statutes to rein in agencies overstepping their authorities. But the converse is true. Federal government authorities are so vast—and vaster still as Congress passes new legislation and assigns agencies additional duties—that cherry-picked language is often the only way to estop authorities otherwise permitted to enhance individual rights or structural barriers. And, plain language may be easily overcome, even with limited analysis, when conflicting with constitutional rights and inherent structure.