University of Cincinnati Law Review

Volume 93 | Issue 1 | Article 7

October 2024

The Major Question: Who Wants a Functioning Government?

Christian Thompson
University of Cincinnati College of Law

Follow this and additional works at: https://scholarship.law.uc.edu/uclr

Part of the Administrative Law Commons, Constitutional Law Commons, and the Supreme Court of the United States Commons

Recommended Citation

Christian Thompson, *The Major Question: Who Wants a Functioning Government?*, 93 U. Cin. L. Rev. 206 (2024)
Available at: https://scholarship.law.uc.edu/uclr/vol93/iss1/7

This Student Notes and Comments is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

THE MAJOR QUESTION: WHO WANTS A FUNCTIONING GOVERNMENT?

*Christian Thompson**

I. INTRODUCTION

In recent years, the United States Supreme Court has spent much of its political capital overturning or undermining precedents in many salient areas of law. As a result, the Court has left many questioning the legitimacy of the institution, concerned about its current makeup, and perturbed regarding the future of lawmaking and individual rights in America. Often, these salient issues are matters of individual rights. Specifically, the *Chevron* doctrine—concerning judicial deference to administrative rulemaking—is one of the salient issues changed by the Court.[1] In 2021, the Court delivered its opinion in *West Virginia v. Environmental Protection Agency*. This opinion shifted the Court's previous position of giving deference to executive agencies; instead, the Court required the agency to demonstrate "clear articulation" from Congress.[2] This drastic change is known as the Major Questions Doctrine (MQD) and will be the subject of this Note. While there is value in discussing the moment of change in the doctrine, it is far more useful to discuss, overall, the MQD in practice, and where the Court is likely headed. For scholars, the issue of *Chevron* Deference (*Chevron*) has a brightly illuminated history, and its change in 2021 was telegraphed to persuade and instruct lower courts, Congress, and administrative agencies of what the standard ought to be going forward regarding judicial deference to administrative agencies.

The change in *Chevron* and administrative rulemaking begins with Justice Gorsuch. While sitting on the Tenth Circuit, he authored an opinion that closely resembled the legal rule established by the Court in

* Publications Editor 2024-2025, Associate Member 2023-2024, *University of Cincinnati Law Review*.

1. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that all pollutant-emitting devices within a singular "bubble" could be regulated through the agency interpretation of "stationary source" in the Clean Air Act; this would go on to be understood as "*Chevron* Deference," which would lead to decades of wide agency latitude with regard to interpretation of particular statutory terms due to their agency expertise and Congress's need and desire to delegate those sorts of tasks to experts).

2. W. Va. v. EPA, 597 U.S. 697 (2022) (holding that the EPA violated the MQD through its construction of instruction from Congress resulting from the agency's attempt to regulate inquiries of economic and political significance given that Congress had not provided "clear congressional authorization." This led to a sweeping change because of its departure from *Chevron*, which changed judicial deference to active judicial surveillance for "clear congressional authorization." In short, the EPA's attempt to apply the cap-and-trade scheme to carbon dioxide in a way that it had not been done historically was a statutory violation).

Published by University of Cincinnati College of Law Scholarship and Publications, 2024

West Virginia v. EPA.[3] The trend towards the MQD started with the Tenth Circuit and has continued through the present. A close reading of Justice Gorsuch's opinion is critical to understanding the changes to this area of law. Therefore, this Note will follow what began as a Tenth Circuit opinion, which then became a dissent from the Supreme Court, then a concurring opinion, then the majority opinion after *West Virginia v. EPA*, used to determine what powers administrative agencies retain. Since *West Virginia v. EPA* was decided, legal scholars have attempted to demonstrate how the case exists as a functionalist or formalist and textualist understanding of administrative law.[4] This Note will focus on Justice Gorsuch's concurrence and how it shaped the Court, and will follow to its logical conclusion Justice Gorsuch's understanding of and his desire for an ideal adherence to the separation of powers scheme inherent in American democracy.

The nature of a salient issue in constitutional law, in which a single Justice so sharply shaped the doctrine during their tenure, allows this Note to intimately examine the logic of said Justice to attempt to provide viable policy and efficiency solutions, while adequately discussing the new doctrine. As such, this Note will examine the relevant history of the MQD, Justice Gorsuch's most impactful opinions on the topic, how his understanding and desire for the "perfect" separation of powers scheme has led to the overturning of *Chevron*, and how the Court ought to address major questions going forward. This Note will argue that in an ideal scenario—one which fits Justice Gorsuch's particular desire for the separation of powers—*Chevron* and *West Virginia v. EPA* could have coexisted, even though it may seem that the two doctrines were inherently incompatible. This Note will explain why, in reality, the two holdings did not work well together. However, it is essential to take the claims put forward by Justice Gorsuch and the Court seriously and to discuss the ways in which the holdings could have, in theory, functioned. While working within that idealist paradigm, this Note will address the policy and efficiency reasons behind why the paradigm clashed with reality, and what the Court ought to do about it.

Section II of this Note will discuss the relevant history of the MQD as well as its close relative, the non-delegation doctrine. Beginning with *J.W. Hampton Jr., & Co. v. United States*,[5] Section II of this Note will discuss

---

3. *Id.* at 733-36.

4. Thomas A. Koenig & Benjamin R. Pontz, *The Roberts Court's Functionalist Turn in Administrative Law*, 46 HARV. J.L. & PUB. POL'Y 221 (2023); Oren Tamir, *Getting Right What's Wrong with the Major Questions Doctrine*, 62 COLUM. J. TRANSNAT'L L. 543 (2024); Kevin Tobia, *We're Not All Textualists Now*, 78 N.Y.U. ANN. SURV. AM. L. 243 (2023).

5. J.W. Hampton, Jr., & Co. v. U.S., 276 U.S. 394, 410-11 (1928) (holding that Congress did not delegate its legislative power to the President in violation of the non-delegation doctrine because the

the basic principles of the MQD and non-delegation doctrine and how they interact with one another. Next, Section II will discuss the historical fact that these doctrines have not been largely inconsequential, but for a few examples. Section II will use those examples to illustrate the state of the doctrines before Justice Gorsuch was appointed. Finally, Section II will discuss Justice Gorsuch's judicial history with the MQD leading up to *West Virginia v. EPA* and the case itself.

Section III of this Note will then discuss Justice Gorsuch's main themes and the logic of his opinions, as well as the ongoing shift away from agency deference, focusing on the Court's 2023 decisions in *Sackett v. Environmental Protection Agency* and *Biden v. Nebraska,*[6] before ending with the Court's 2024 opinion in *Loper Bright Enterprises, Inc. v. Raimondo*.[7] Next, Section III will discuss the policy and efficiency reasons as to why Justice Gorsuch's logic fails to grasp the realities of Congress, and what the Court ought to do going forward. This Note will argue that the Court should take a less aggressive approach as to what is necessary to pass the clear articulation standard, while empowering agencies under *Skidmore v. Swift & Co.* to allow space for the new understanding of agency deference to develop.[8]

II. BACKGROUND

In discussing the new trend in the MQD post-*West Virginia v. EPA*, it is necessary to outline the history of the intelligible principle doctrine and its relation to the non-delegation doctrine. That history informs the discussion of why the Court, and particularly Justice Gorsuch, brought

---

President was not bringing about any legislation or using Congress's legislative powers but was instead executing an act of Congress).

6. Sackett v. EPA, 598 U.S. 651 (2023) (holding that the EPA had incorrectly interpreted a statutory phrase in the Clean Water Act pursuant to the holding in *W. Va. v. EPA* that requires federal agencies acting upon political and economic issues of consequence to act through a "clear congressional authorization"); Biden v. Neb., 143 S. Ct. 2355 (2023) (holding that the Biden administration could not carry out its loan forgiveness program because it did not have a "clear congressional authorization" for an issue of political or economic significance, and because of that lack of authorization, the power to carry out such a regulatory scheme lies with Congress).

7. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (holding that *Chevron* is overruled due to its incompatibility with the Administrative Procedure Act and holding that courts may not defer to agency interpretations simply because of ambiguous statutes. This now means that the controlling law in the sphere of agency deference is the MQD on issues in which Congress is not allowed to defer, such as the energy sector, and Skidmore v. Swift & Co., 323 U. S. 134 (1944)); Skidmore v. Swift & Co., 323 U.S. 134 (1944) (holding that federal courts should consider agency views by law on a case-by-case approach that considers factors such as: (1) thoroughness of investigation, (2) validity of reasoning, and (3) consistency by the agency over time. It is the power to persuade, not to control. There is a split in opinion on how effective this approach would be in the absence of *Chevron*). This case is the on-point case in agency deference jurisprudence because *Chevron* was overturned in *Loper*. This is not a mandatory standard as in *Chevron*; the language from *Skidmore* is that courts *may* seek aid.

8. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

about the new understanding of agency deference as it relates to discussing and analyzing congressional authorization and delegation of intelligible principles. Part A will discuss the relevant history of the MQD and the non-delegation doctrine up through *Chevron*. Part B will discuss how the MQD operated post-*Chevron* and the way in which the *West Virginia v. EPA* majority upended the then-existing interpretation of the intelligible principle. Part C will discuss Justice Gorsuch's history with the MQD and his concurrence in *West Virginia v. EPA* for the purpose of laying out his internal logic and providing information essential to understanding the current legal paradigm in which the Court operates.

A. What It Means to Delegate Through Chevron

Any coherent discussion on the MQD ought to begin with an analysis of *J.W. Hampton Jr., & Co v. United States*.[9] Chief Justice Taft's majority opinion explains the two interacting constitutional principles in modern inquiries relating to the MQD: the intelligible principle and the non-delegation doctrine.[10] To begin with the former, the Court explained, "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such [executive action] is directed to conform, such legislative action is not forbidden delegation of legislative power."[11] Thus, the Court denoted the intelligible principle as the opposite of non-delegation infringement.[12] The Court further explains that the intelligible principle test promotes co-governance, accepts the lack of information available to Congress, and—when Congress clearly describes its plan—allows the executive branch to adequately carry Congress's laws into effect even when circumstances change.[13] This practice is entirely lawful, and it forms the absolute bare minimum understanding of the intelligible principle and the non-delegation doctrine as it relates to the MQD.[14]

Turning to the non-delegation doctrine, the *Hampton* Court found that "it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch."[15] The Court aptly noted that the non-delegation doctrine is not intended to limit co-governance, but is fundamental in ensuring that

9. J.W. Hampton, Jr., & Co. v. U.S., 276 U.S. 394 (1928).
10. *Id.*
11. *Id.* at 409.
12. *Id.*
13. *Id.* at 405-06.
14. *Id.* at 409.
15. *Id.* at 406.

Congress does not divest its Article I, Section 8 powers.[16] On the whole, Congress cannot grant discretion to the executive or judicial branches to decide what the law shall be, but can confer upon the other two equal branches discretion to execute the law.[17] Further, Chief Justice Taft's majority opinion defined a basic standard for future courts to address concerns regarding the separation of powers.[18] The opinion reasoned that, "in determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination."[19] Thus, it is unlawful for Congress to delegate legislative powers, but it ought to yield to the fundamental constitutional principles of co-governance.[20]

Historically, the non-delegation doctrine and the intelligible principle test have been insignificant regarding their applicability to administrative law because of three cases that limited their jurisprudential impact.[21] The first principle, non-delegation, was last enforced in 1935 through *Schechter Poultry* and *Panama Refining.*[22] The former, coming after *Panama Refining,* helpfully envelopes principles from the case, which are useful for a discussion on non-delegation doctrinal history. *Schechter Poultry* first noted a general principle established in *Panama Refining*, that "the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."[23] Given that Congress cannot delegate purely legislative powers granted to it by Article I, Section 8 of the Constitution, this principle was virtually abandoned after Franklin Delano Roosevelt's threats between his first and second presidential term.[24]

16. *Id.*

17. *Id.* at 408-09 (citing State ex rel. Railroad & Warehouse Com'n v. Chicago, M. & St. P. Ry. Co., 38 Minn. 281, 298-302 (Minn. 1888)).

18. *Id.* at 406.

19. *Id.*

20. *Id.*

21. This is because only two cases since *Hampton* have truly tested the intelligible principle test prior to *Loper*. Both cases came in 1935. Further, after *Chevron*, but before it was overturned, agencies had wide deference for much of their executive action.

22. A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495, 537 (1935) (holding that Congress had delegated beyond what was known to be law by providing too much authority to trade authorities and had thus violated the principle of non-delegation essential to the Constitution); Panama Refin. Co. v. Ryan, 293 U.S. 388, 430 (1935) (holding that Congress overstepped its bounds and violated the non-delegation doctrine by neither laying down a standard, articulating a policy, nor requiring an action).

23. *Schechter Poultry*, 295 U.S. at 531 (citing *Panama Refin.*, 293 U.S. at 421).

24. William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, a Second Death*, 1985 DUKE L.J. 673-89 (1985). Franklin Delano Roosevelt's court-packing plan has long since been understood to have undermined the hardline rhetoric of the Court in its attempts to undermine the delegatory authority

While the non-delegation doctrine was seldom used—to preserve the sanctity of the Court and for practicality reasons—the need for an intelligible principle was enforced often in the sense that it was not enforced much at all.[25] The Court's decision in *Chevron* epitomizes this lack of enforcement. *Chevron* opposed the non-delegation doctrine by providing great deference to agency interpretation of statutes for the purposes of practical co-governance.[26] To understand how, it is necessary to break *Chevron* into its two basic components. The Court stated that, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue."[27] If yes, then the inquiry ends, and the Court defers to Congress.[28] However, if Congress has not explicitly spoken on an issue, historically, the Court deferred to agencies for various policy reasons.[29] For example, the Court refused to address the viability of judicial inquiry into the delegation and policy choices of agencies by emphasizing that it was not the job of the Court to assess the validity and wisdom of agency decisions.[30] *Chevron* was the ultimate case on agency deference, and thus, the opposite of the letter of non-delegation.[31]

Thus, post-*Chevron*, there were two situations relating to statutory interpretation that could arise: (1) Congress spoke directly on an interpretation and the agency either is, or is not, in line with that interpretation, or (2) Congress did not speak directly to an interpretation, and the Court simply deferred to the agency interpretation.[32] *FDA v. Brown & Williamson Tobacco Corp.* illustrates the first situation—when Congress directly speaks on an issue.[33] The term "drug," the Court ruled, could not have been read to include tobacco given the text of the Federal Food, Drug, and Cosmetic Act.[34] The Court did not intend to defer to a convoluted interpretation that departed from the logic necessary to ensure the statute itself made sense.[35] To address when Congress does not speak directly to an issue, the Court gave obvious

necessary to carry out the New Deal.

25. *See supra* note 21.

26. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

27. *Id.* at 842.

28. *Id.* at 842-43.

29. *Id.*

30. *Id.* at 866. The Court wrote that "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."

31. *Id.* at 843-44.

32. *Id.* at 842-44.

33. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 135-36 (2000) (holding that Congress was deemed to have directly spoken on an issue given that it would be illogical for the Food & Drug Administration to regulate tobacco under the Federal Food, Drug, and Cosmetic Act of 1938).

34. *Id.*

35. *Id.*

Thompson: The Major Question

deference to what the agency desired following *Chevron*. That changed with *West Virginia v. EPA*.

B. West Virginia v. EPA *Rocks the Boat*

The Court's decision in *West Virginia v. EPA* ended the times of unhindered *Chevron* deference.[36] The Court ruled that the Environmental Protection Agency's (EPA) plan was not granted authority by a "clear delegation [from Congress]."[37] Given the magnitude of the decision, the unadulterated *Chevron* deference of the past forty years would have to come to an end.[38] The phrase "clear delegation" would later morph into the more pertinent phrase of "clear congressional authorization," but the phrases can be used interchangeably.[39]

To break down this phrase by the Court into parts: (1) there needs to be a clear delegation of authority by Congress, but only with regard to (2) "extraordinary cases . . . [of] economic and political significance."[40] Further, there were three reasons as to why this doctrinal change was made.[41] The first relates to the Court's interpretation of congressional intent by writing that "[t]he basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself [because] we [] find it 'highly unlikely that Congress would leave' to 'agency discretion' [these far-reaching economic

36. The exact facts of *W. Va. v. EPA* are not entirely relevant to the discussions here, nor are the facts related to *Sackett* or *Biden v. Neb.*, even though they are on-point cases, because this Note is entirely focused on an internal logic review of the Court. This Note is particularly focused on Justice Gorsuch and the ways in which his internal logic and MQD jurisprudence impact the trends of the Court. Thus, there is no intensive inquiry on the facts of *W. Va. v. EPA*. Yet, it can be useful to illustrate the internal logic of *W. Va. v. EPA* because of the seismic shifts the case has created by impacting and shelving *Chevron*. So, for the benefit of the curious, this footnote will address those facts. The case came to the Court because a new regulatory scheme that had been used with other greenhouse gases as defined by the Clean Air Act was used to regulate carbon dioxide. Carbon dioxide had not been regulated that way before. However, it is in no way unregulatable as seen in Mass. v. EPA, 549 U.S. 497 (2007). Carbon dioxide was not within the list that Congress legislated into the Clean Air Act. The ruling was that the cap-and-trade scheme was not useable with regard to carbon dioxide because of this oversight; that is not to say that the Court would not defer to the agency choice to use that regulatory scheme on carbon dioxide again in the event that Congress clearly denotes that carbon dioxide is applicable to the list of greenhouses gases that the EPA can regulate in the Clean Air Act. In fact, Congress did make such an addition in Title VI of the Inflation Reduction Act by changing the definition of greenhouses gases in the Clean Air Act. Thus, the EPA, as it presently stands, is able to regulate greenhouses gases, which now include carbon dioxide, in non-attainment areas—a phrase that will be returned to in a later footnote—using a cap-and-trade system, as it originally intended before the lawsuit. *See infra* note 104.

37. W. Va. v. EPA, 597 U.S. 697, 733-36 (2022).

38. *Id.*

39. *Id.*; *but cf.* Sackett v. EPA, 598 U.S. 651 (2023); *but cf.* Biden v. Neb., 143 S. Ct. 2355 (2023). The two later cases use the "clear congressional authorization" language whereas *W. Va. v. EPA* does not.

40. *W. Va. v. EPA*, 597 U.S. at 700 (citing *Brown & Williamson*, 529 U.S. at 159-60).

41. *Id.*

Published by University of Cincinnati College of Law Scholarship and Publications, 2024

decisions.]"[42] Further, the Court noted that even if it had conferred such discretion, it would not have done so in a "backwater provision," which in the mind of the majority made it awkward and unlikely that such authority existed.[43] Even still, the majority noted that Congress rejected these sorts of regulations by refusing to amend the Clean Air Act.[44] Taking all those considerations together, and pulling from *Brown & Williamson*, the Court firmly moved in a new direction regarding the MQD when Congress is silent.

C. Enter Justice Gorsuch

After four decades of what might be considered low-effort deference to agencies, and nearly one hundred years of the non-delegation doctrine being a non-factor, one may wonder where the Court's change comes from and why it is a trend important enough to discuss so extensively. The answer is Justice Gorsuch. His concurrence in *West Virginia v. EPA* extensively laid out his reasoning and how he would necessarily apply the new MQD. Further, it is mandatory when discussing that opinion to denote two of his other opinions, to be discussed in this Part. Subpart 1 will discuss one of Justice Gorsuch's Tenth Circuit opinions that was foundational in his approach to major questions as a Supreme Court Justice—*Gutierrez-Brizuela v. Lynch*.[45] Subpart 2 will discuss a dissent written by Justice Gorsuch that also pertains to those foundational lessons from the Constitution.[46] Subpart 3 will then turn back to Justice Gorsuch's concurrence in *West Virginia v. EPA* to take on an immersive examination of the fundamentals of his opinion.

1. *Gutierrez-Brizuela v. Lynch*

The opinion in *Gutierrez-Brizuela v. Lynch* begins by stating that ". . . when a statute is ambiguous and an executive agency's interpretation is reasonable, the agency may indeed exercise delegated legislative authority to overrule a judicial precedent in favor of the agency's preferred interpretation."[47] Justice Gorsuch here directly

42. *Id.* at 729.

43. *Id.* at 730. A backwater provision here means that it is a non-relevant provision from which Congress likely would not have intended for discretion to arise.

44. *Id.* at 731-32.

45. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143 (10th Cir. 2016) (holding that it was impermissible for the agency's new rule to retroactively apply to illegal aliens and that it violated general non-delegation principles).

46. Gundy v. U.S., 139 S. Ct. 2116 (2019).

47. *Gutierrez-Brizuela*, 834 F.3d at 1143.

deferred to *Chevron*. Yet, what is far more interesting is his concurrence, which he begins by discussing what he deems to be the "elephant in the room" as it relates to the MQD.[48] On the whole, he indicated that *Chevron* in purpose and effect was at odds with traditional notions of the separation of powers.[49] Here, Justice Gorsuch signaled an important element of his own jurisprudence, which was an emphasis not necessarily on the form the separation of powers took relative to the Constitution itself, but a willingness and desire to have a stout separation of powers doctrine as it related to congressional abandonment.[50]

It is also pertinent to examine Justice Gorsuch's understanding of a functional government as it is presented in the opinion. When discussing a world without *Chevron* with respect to Congress's role in lawmaking, he wrote that "[s]urely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes."[51] Further, when discussing what he believed the Court's role would look like given it would be enforcing stricter delegation principles on Congress, he wrote, "[t]he only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law *is*."[52] Regardless as to whether this is correct, it is absolutely necessary to focus on Justice Gorsuch's exact language in this historical analysis for later reference.[53]

2. *Gundy v. United States*

Gundy v. United States invalidated a claim that the Sex Offender Registration and Notification Act violated the non-delegation doctrine.[54] Yet, what is far more important to this discussion is Justice Gorsuch's dissent, which was his first major opinion regarding *Chevron* as a Supreme Court Justice. As in *Gutierrez-Brizuela v. Lynch*, Justice Gorsuch was concerned with structuralist arguments around the Constitution; for him, the structure of the separation of powers inherent

48. *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring) (in this concurrence, Justice Gorsuch pens one of the most aggressive attacks that the justice system had sustained with regard to agency deference and congressional abandonment as it relates to the delegation of congressional duties. He, first and foremost, discussed *Chevron* as an elephant in the room that allows for large swathes of constitutional power to divert to the executive branch).

49. *Id.*

50. *Id.* at 1154.

51. *Id.* at 1158.

52. *Id.*

53. *See infra* Sections III.A, III.C.1.

54. Gundy v. U.S., 139 S. Ct. 2116 (2019).

University of Cincinnati Law Review, Vol. 93, Iss. 1 [2024], Art. 7

in the Constitution was once again paramount.[55] Justice Gorsuch indicated it was essential for him to dissent because the lack of continuity with the intuitive separation of powers—particularly regarding the Vesting Clause—would be invalidated by the legislative branch to hand off legislation to the executive branch.[56]

Invoking the Founders to bolster his structuralist argument, Justice Gorsuch denotes that "[t]he framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch."[57] Essentially, Justice Gorsuch combined the arguments of structuralists' historical readings of the Constitution in an effort to appear more formalist.[58] Through a structuralist argument, he postulated that the Framers too anticipated what he dissented against: the allowance by the plurality, in Justice Gorsuch's opinion, to promote, or, more accurately to Justice Gorsuch's rigor, to condone through inaction, congressional abandonment.[59] Congressional abandonment is unintuitively, for Justice Gorsuch, weakening the purpose and effect of the separation of powers.[60]

Following his structuralist argument, Justice Gorsuch turned next to the intelligible principle case itself, *Hampton*, to examine the source of his grief as demonstrated by his dissent.[61] This is not to say Justice Gorsuch took a hard stance against *Hampton* or the intelligible principle test. In fact, using the original language from that case, he confirmed *Hampton* with his structuralist argument earlier in the *Gundy* opinion.[62] He demonstrated through his and the *Hampton* majority's understanding of the separation of powers that *Hampton* likely comports with the separation of powers doctrine; however, Justice Gorsuch also wrote that the principle took on a life of its own post-*Schechter Poultry* and post-*Panama Refining*.[63]

---

55. *Gundy*, 139 S. Ct. at 2134-35 (Gorsuch, J., dissenting) (denoting that the extraconstitutional conclusion that the plurality comes to confuses the structuralist issues that define the Constitution in the same way that the statute as it stands confuses the issues of delegation and abandonment of legislative powers. This opinion prominently features Justice Gorsuch's concern with congressional abandonment, whereas his concurrence in *Gutierrez-Brizuela v. Lynch* was more concerned with upholding an abstract understanding of the separation of powers).

56. *Id.* The Vesting Clause refers to Article II, Section 1, Clause 1 of the Constitution. It grants the executive power, and only the executive power, to the President of the United States.

57. *Gundy*, 139 S. Ct. at 2135.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 2139.

62. *Id.*

63. *Id.*

Through that morphing of a constitutionally viable principle, Justice Gorsuch explained that, in his opinion, ". . . we don't follow that rule when the 'statutory gap' concerns 'a question of deep 'economic and political significance' that is central to the statutory scheme.'"[64] He demonstrated through a plethora of cases what he believes to be an abandonment of those very principles, given that ". . . we've rejected agency demands that we defer to their attempts to rewrite rules for billions of dollars in healthcare tax credits, to assume control over millions of small greenhouse gas sources, and to ban cigarettes."[65] These quotations are essential; Justice Gorsuch attempted to draw a line between gap-filling from clear statutory language and constitutional violations when agencies are actively making rules in areas of economic and political significance.[66] This language is present in *West Virginia v. EPA*, to which this Note will now turn.

3. *West Virginia v. EPA*

Justice Gorsuch ensured to prioritize his language from *Gundy* by denoting that "agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance.'"[67] In the six years since *Gundy* and being appointed to the Supreme Court, Justice Gorsuch was sure not to forget what was at the top of his agenda when it came to addressing issues regarding the fulfillment of constitutionally imposed duties. Now, having succeeded in allowing the Court to have space for such "independent judgment" as he desired in *Gutierrez-Brizuela*, the question was what the jurisprudence ought to look like.[68] The doctrine had thus changed, and Justice Gorsuch, ever-prepared, reserved space in his concurrence for providing exemplary scenarios to guide lower courts.[69]

Despite writing them in the order of "economic and political significance," Justice Gorsuch began by illustrating situations in which there is an "agency claim[ing] power to resolve a matter of great 'political significance' . . . or 'earnest and profound debate across the country.'"[70] This is akin to an agency non-justifiable political question.[71] Second, he

64. *Id.* at 2141.

65. *Id.* at 2141-42 (citing King v. Burwell, 576 U.S. 473 (2015); Util. Air Reg. Group v. EPA, 573 U.S. 302 (2014); FDA. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)).

66. *Id.*

67. W. Va. v. EPA, 597 U.S. 697, 735-36 (2022) (Gorsuch, J., concurring).

68. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016).

69. *W. Va. v. EPA*, 597 U.S. at 742-43.

70. *Id.* (citing Nat'l Fed'n of Indep. Bus. v. Dept. of Lab., Occupational Safety & Health Admin., 142 S.Ct at 665 (2022); see also Gonzales v. Or., 546 U.S. 243, 267-68 (2006)).

71. This means that the agency has no jurisdiction to interpret questions of political significance,

University of Cincinnati Law Review, Vol. 93, Iss. 1 [2024], Art. 7

wrote that an agency needs a "clear congressional authorization" when regulating "a significant portion of the American economy . . . ."[72] When combined with the political significance question, this wholly ruled out the regulation of coal in West Virginia, seemingly due to the state's intense reliance on the fossil fuel.[73] Justice Gorsuch further denoted a Tenth Amendment limitation on executive agencies by writing that the Court also excludes intrusions on state law.[74] Then, ensuring no similar regulation be attempted again, Justice Gorsuch penned a section barring "aggressive" changes to the structure of energy sectors, which implicates coal.[75] Having laid out what Justice Gorsuch characterizes as "blocked lanes" through which agencies must now seek "clear congressional authorization," it is necessary to lay out the basic fundamentalist understanding upon which Justice Gorsuch based his opinion.[76]

Justice Gorsuch included two very poignant statements in his concurrence. The first relates to the difference in interpretation of the intelligible principle between the majority and the dissent. Justice Gorsuch wrote that "in the end, our disagreement really seems to center on a difference of opinion about whether the statute at issue here clearly authorizes the agency to adopt the Clean Power Plan."[77] He plainly wrote that it is an authorization question, not necessarily a difference in opinion of the underlying law (i.e., *Chevron*). *Chevron* was limited regarding Congress delegating with wide authority to agencies.[78] Justice Gorsuch denoted that Congress could continue to delegate as it had with the exclusion of the topics he articulated before, whereas the dissenters would not articulate those differences.[79]

Justice Gorsuch's second statement relates to the separation of powers.[80] Justice Gorsuch illustrated his adherence to a particular understanding of the separation of powers by writing that, while Congress may seem slow, the lack of action does not greenlight agencies in their ability to pass legislation, as that is strictly reserved for Congress.[81] Taken together, these statements demonstrate Justice Gorsuch's adherence to a fundamentalist—though not necessarily formalist—understanding of the

similar to the Court not having jurisdiction to adjudicate claims of political significance.

72. *W. Va. v. EPA*, 597 U.S at 743-44.

73. *Id.* at 744 (citing Util. Air Reg. Grp. v. EPA, 573, U.S. 302, 324 (2014); see also King v. Burwell, 576 U.S. 473 (2015)).

74. *Id.* (citing FDA. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

75. *Id.* at 745-46.

76. What has been laid out until now has been the essential linchpin of the MQD.

77. *W. Va. v. EPA*, 597 U.S. at 752.

78. *Id.* at 752-53.

79. *Id.*

80. *Id.*

81. *Id.*

separation of powers, as well as a disagreement on clear authorizations. Yet, the final paragraph in his *West Virginia v. EPA* concurrence, referencing his prediction in *Gutierrez-Brizuela*, acutely illustrates how inconsistent Justice Gorsuch's primary themes and their relation to the Constitution are with political truths regarding Congress in modern America.

III. DISCUSSION

This Note will endeavor to explore Justice Gorsuch's primary jurisprudential themes, while examining his prediction regarding congressional abandonment and providing space for a hypothetical to fully explore what the Court likely expected following *West Virginia v. EPA*. Later cases can then be used as a general confirmation or denial as to whether that thinking conforms with the Court's rulings.

A. Meaning behind Themes and Predictive Thinking

The meaning of Justice Gorsuch's jurisprudence comes to light when discussing his opinions in a literal sense, while giving full credence to the legitimacy of his attempts to address congressional abandonment. First, following *West Virginia v. EPA*, the basic elements from *Hampton* and *Chevron* were still intact, because the Court did not throw out—nor did Justice Gorsuch insinuate or advise the Court to throw out—those cases.[82] Instead of using the "clear intelligible principle" language from *Hampton*, the language has been re-shaped to "clear congressional authorization" with a caveat relating to particular matters of importance.[83] Yet, clear language of congressional intent remains unfettered.[84] What Justice Gorsuch also wants is a more active judicial role in stopping congressional abandonment; this is absolutely essential to him.[85] He particularly denotes the irksome *Chevron* allowing legislators to pass off legislative powers to executive agencies.[86] Justice Gorsuch also wrote a deeply rooted political scheme of protection from such abandonment focused on the separations of powers, due to predictions of congressional incentives to do as such by the Framers.[87] To not understand Justice

82. *Id.* at 735.

83. *Id.*; *cf.* Sackett v. EPA, 598 U.S. 651 (2023); *cf.* Biden v. Neb., 143 S. Ct. 2355 (2023). The two later cases use the "clear congressional authorization" language whereas *W. Va. v. EPA* does not.

84. *W. Va. v. EPA*, 597 U.S. at 735.

85. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016); Gundy v. U.S., 139 S. Ct. 2116, 2135 (2019).

86. *Gutierrez-Brizuela*, 834 F.3d at 1149.

87. *Gundy*, 139 S. Ct. at 2135.

University of Cincinnati Law Review, Vol. 93, Iss. 1 [2024], Art. 7

Gorsuch's desire to address this Founding-Era concern would be to entirely miss his disagreement with *Chevron* and would lead to a disingenuous discussion regarding what he understands to be a judicial duty to ensure that issues of congressional abandonment are quashed.

Justice Gorsuch's fixation on congressional abandonment can be examined in *Gutierrez-Brizuela*. In *Gutierrez-Brizuela*, the beginning monologue of his concurrence demonstrated a desire for stronger delineations regarding the separation of powers essential to his MQD jurisprudence.[88] Justice Gorsuch also discussed the separation of powers in his *West Virginia v. EPA* concurrence, where, citing Justice John Marshall, he denoted that "important subjects . . . must be entirely regulated by the legislature itself," while also directly writing that "the major questions doctrine works . . . to protect the Constitution's separation of powers."[89] Without the issue of congressional abandonment, there is no *West Virginia v. EPA*. The decision was brought about to protect the sanctity of the separation of powers, while continuing to allow delegation to executive agencies.[90] While not a quote from Justice Gorsuch, the statement above equivalently describes the reasons for and outcomes of Justice Gorsuch's jurisprudence in *West Virginia v. EPA*.

Having discussed these themes and Justice Gorsuch's commitment to the separation of powers, this Note will briefly turn to Justice Gorsuch's helpful prediction in *Gutierrez-Brizuela* regarding a post-*Chevron* era. Justice Gorsuch's *Gutierrez-Brizuela* concurrence predicted the following of a post-*Chevron* era:

> Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes. The only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law is.[91]

Whether this prediction is correct is best saved for its own section, but the prediction helps inform what Justice Gorsuch envisioned about how to best understand *West Virginia v. EPA*.

Two hypotheticals serve as useful illustrations of Justice Gorsuch's logic in *West Virginia v. EPA*. These hypotheticals are intended to be illustrative of the minute difference between the MQD and the non-delegation doctrine that exists inherently in Justice Gorsuch's jurisprudence, further demonstrating exactly what is and is not the trend

88. *Gutierrez-Brizuela*, 834 F.3d at 1149.
89. W. Va. v. EPA, 597 U.S. 697, 737 (2022) (citing Wayman v Southard, 23 U.S. 1, 43 (1825)).
90. *Id.*
91. *Gutierrez-Brizuela*, 834 F.3d at 1157.

in the law. First, suppose Congress passed a law that contained only two of the following provisions exactly as written:

(a) Congress delegates to the Equal Employment Opportunity Commission (EEOC), as is necessary for combating civil inequality and dissuading public injustices, as it relates to Title VII retaliation, the ability to promulgate a new regulatory scheme for protecting concerted activity.
(b) The EEOC may impose such a scheme upon employers generally covered by Equal Employment Opportunity Commission law.

For the second hypothetical, note both the identical language and the additional language in the law:

(a) Congress delegates to the EEOC, as is necessary for combating civil inequality and dissuading public injustices, as it relates to Title VII retaliation, the ability to promulgate a new regulatory scheme for protecting concerted activity.
(b) The EEOC may impose such a scheme upon employers generally covered by Equal Employment Opportunity Commission law.
(c) The Equal Employment Opportunity Commission may also apply this to any business it deems necessary for the purposes of justice.

Concerning the first hypothetical: in the existing jurisprudence, would Justice Gorsuch find it satisfied? The answer is likely yes. In the event that a problem arose with respect to rule promulgation relating to this new law, it would likely fall within the realm of the MQD for the same reason the issue in *West Virginia v. EPA* does—because it is a system where "a significant portion of the American economy" is regulated.[92] Similar to *West Virginia v. EPA*, given that Title VII retaliation claims are nationally economically significant, in the sense that economic significance on a national level is in some ways arbitrary, the Court would then look to curtail or cabin the issue so that it falls into the sort of traditional notions of regulation expected regarding Title VII retaliation.[93] This cabining—to be reductive for the purposes of clarity, and not to say this is the precise method by which it is done—would focus on what the EEOC has traditionally regulated. Turning again on *West Virginia v. EPA*, the regulation of carbon dioxide was permissible under previous case law.[94] However, the issue was regulation of carbon dioxide in a way not done

92. *W. Va. v. EPA*, 597 U.S. at 744.
93. *Id.*
94. Mass. v. EPA, 549 U.S. 497 (2007).

University of Cincinnati Law Review, Vol. 93, Iss. 1 [2024], Art. 7

before.[95] Thus, to solve the major question, the Court cabined the issue off by denoting that the agency needs to have "clear congressional authority."[96]

This means, for the first hypothetical, that the EEOC needs to regulate as it typically does, given that the law does not grant any authority beyond what discretion the agency is generally afforded.[97] In the first section of the first hypothetical, Congress clearly delegates in a manner that satisfies the Court's standard when taken as a whole.[98] In the second section, Congress proscribes that such a scheme be carried out in the same manner as other laws enforced and promulgated by the EEOC, which is to say it applies to employers with fifteen or more employees—excluding age discrimination, which applies to employers with twenty or more employees.[99] On the whole, the problem is solvable through the use of the MQD because the system involves a traditional ends-means fit which Congress has addressed.[100] The issue can be cabined without informing Congress of what it can and cannot delegate because of the construction of the law and the breadth of the MQD.[101] Further, this system empowers Congress to pass legislation in an effort to support congressional abandonment.

The second hypothetical, however, illustrates the exact limits of the MQD.[102] The first two sections are the same as in the first hypothetical and are likely reasonable for the reasons given in the above paragraph.[103] The third provision of the second hypothetical, however, goes out of the bounds commonly understood to be set by Congress. When Congress delegates authority to the EEOC, it expects the agency to carry out that delegation through its typical methods. At the heart of the MQD is statutory interpretation, so when a law runs afoul of the MQD, it is necessary to read the statute in a way most favorable to save the statute.

95. *W. Va. v. EPA*, 597 U.S. at 724-25.

96. *Id.*

97. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/overview (last visited Nov. 7, 2023).

98. *See supra* p. 15 for the hypothetical to which this refers; the Court standard referred to here would be the MQD as laid out in *W. Va. v. EPA* in combination with *Skidmore* given the recent overturning of *Chevron*.

99. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 97; *id.*

100. "Traditional ends-means fit" here refers to agency deference being granted in areas where the agency is regulating as it traditionally has. This can best be illustrated through a counterfactual referencing *W. Va. v. EPA*. That case did not involve a traditional ends-means fit because of the cap-and-trade scheme was used as a regularly scheme where it had historically not applied. *See infra* note 104.

101. "Cabined" here meaning to confine the EEOC issue from the hypothetical away from the other provisions of the imagined statute as to not instruct Congress on its delegatory duties, thus, reviving the non-delegation doctrine as in the second hypothetical.

102. *See supra* note 98.

103. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 97.

The issue is the way the law is written, given that it separates the second and third provisions; the problem relating to the MQD cannot be solved without saying that the third provision is unconstitutional and removing it, which revives the non-delegation doctrine, because the non-delegation doctrine cannot relate the second and third provisions by reading the clauses together due to their separate designations.

Hypotheticals one and two precisely demonstrate the line between the MQD and the non-delegation doctrine, as well as the types of authority necessary when involving Congress. Hypothetical one is right up to the line at which Congress can be reined in and allowed to delegate, as well as legislate. Hypothetical two is just outside the scope of the MQD as it involves declaring part of the statute unconstitutional because Congress cannot allow the EEOC to define its own scope in such a manner relating to delegating legislative power; however, that involves reviving a century-long forgotten doctrine. The MQD is an irksome doctrine.[104] This

104. This footnote addresses problems avoided in footnote 36 when discussing the facts of the case, the inherent differences between Justice Gorsuch's trend in his own jurisprudence, Justice Gorsuch's impact on the Court, the Court's trends, and the miniscule theoretical delineation between the MQD and the non-delegation doctrine. That Section intended to discuss the Inflation Reduction Act, but became too cumbersome because of the intersection of the MQD and non-delegation doctrine. The differences in how the Court and Justice Gorsuch would separately interact with this problem and its effects on the Court will be discussed here beginning with *W. Va. v. EPA*.

The Inflation Reduction Act adds to the Clean Air Act following *W. Va. v. EPA*. It added the following sort of language: the EPA can regulate greenhouses gases in non-attainment areas as it sees fit. Now, one can break that down piece by piece. The EPA defines greenhouses gases to now include carbon dioxide. (Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat 2069 (2022) (codified as amended at 42 U.S.C. § 7345)). This was one of the points at which it failed in *W. Va. v. EPA*. Non-attainment is a definition wholly involving standards set forth by the EPA itself, and those definitions can be found in both 42 U.S.C. § 7501(2) and 41 U.S.C. § 7407(d)(1)(A)(i). The question of how the EPA could regulate was discussed in *W. Va. v. EPA*. The cap-and-trade scheme was not the issue because it was used on other greenhouse gases. The problem was that carbon dioxide historically had not been subject to that definition in greenhouse gases or the cap-and-trade system.

Now, intuitively think of what that sounds like when presented to a Court, and one can find the difference between the majority at present and Justice Gorsuch and the lengths to which the majority would expand the MQD. The Court would be faced with the question of (speaking colloquially, as this is not found anywhere in the jurisprudence, and is in fact a product of this Note for the sake of reductionist clarity) what is being regulated, where is it being regulated, and how is it being regulated. The question of "what" has been cleared up through the Inflation Reduction Act, post-*W. Va. v. EPA*, because Congress deliberately included carbon dioxide in the list of greenhouse gases. The "how" has been cleared up through *W. Va. v. EPA* itself because it allowed cap-and-trade for greenhouse gases.

This leaves the question of "where" carbon dioxide is being regulated, which falls on the definition of non-attainment areas. The definition can be viewed in 41 U.S.C. § 7407(d)(1)(A)(i), but comparatively the phrase notes that non-attainment areas are areas where the EPA determines, through its own standards, that areas are not meeting those standards. In simple terms, that changes the meaning of the statement on what the Inflation Reduction Act is doing to the following: the EPA can regulate carbon dioxide through the regulatory scheme that it sees fit in areas as it deems necessary. The following two questions are illustrative of how intuitive the issues arising from the MQD and non-delegation doctrine are through the answer one might assume the Court or Justice Gorsuch would give: would the present majority of the Court allow that legislation, and would Justice Gorsuch as a majority leader allow such legislation?

Note focuses on trends in the Court as they exude from Justice Gorsuch. While Justice Gorsuch's opinions have influenced a shift in the Court up to this point, where he would likely desire for the revival of the non-delegation doctrine to curtail congressional abandonment, the Court likely would not go that far. Overall, it is difficult to be precise when focusing on the predictability of the Court, but to examine the ways in which Justice Gorsuch's influence continues to impact jurisprudence, it is necessary to examine relevant trends in the law.

B. The Trend in the Law

Following a major upheaval such as *West Virginia v. EPA*, it is necessary to confirm the logic uncovered from said case to ensure the Court has followed through with its promise, given the existence of a one-time-use of the capital of the Court.[105] Two MQD cases have been decided since *West Virginia v. EPA*, and a third case overturning *Chevron* changed the way scholars view agency deference.[106] Because the MQD deals with non-delegation principle implications regarding what Congress can or cannot delegate to begin with—as opposed to whether courts or agencies are afforded that deference on issues in which Congress can delegate—it is easiest to begin with the two MQD cases: *Sackett v. EPA*

This Note is of the opinion that the Court's majority at present, which would likely include Chief Justice Roberts, Justice Kavanaugh, Justice Sotomayor, Justice Kagan, and Justice Jackson, would likely denote that action as a "clear congressional authorization" from Congress given that the issue of non-attainment did not arise in *W. Va v. EPA*.

This Note further takes the stance that if one were to present that scope-defining-scope situation, referencing (1) the regulations defining the non-attainment areas, then (2) setting the scope of non-attainment within which further regulations can regulate emissions of carbon dioxide, that Justice Gorsuch would likely find that Congress cannot pass off that scope defining power to the EPA. This abandons the sort of MQD inquiry relating to statutory interpretation in which the Court is attempting to locate a way to save the statute, while also curtailing issues related to the larger economy. It becomes an issue of telling Congress that it cannot delegate to the EPA to define its own scope with regard to non-attainment because the EPA sets the standards for non-attainment in and of itself. That would revive the non-delegation doctrine. On the whole, this is much farther than any sort of influential trend Justice Gorsuch can bring upon the Court as a Justice. This exercise, although not included in full in this Note, demonstrates the way in which these sorts of issues can clash as the Court determines the exact difference between the two similar doctrines. The hypotheticals presented earlier attempted to demonstrate an instance in which MQD can be used to save a statute and where non-delegation would have to be used to declare a statute unconstitutional, but in the Inflation Reduction Act example, these two complex doctrines peculiarly interact to create a difficult problem. The sort of predicting there is in essence impractically speculative beyond what can be reasonably and predictively argued.

105. *See generally* Leuchtenburg, *supra* note 24; the Supreme Court, like any other branch of government, has a certain amount of political capital, colloquially, that it can expend when making decisions. To refer back to the packing scheme, the Court exercised its power to combat the New Deal, up until the point of the threat to pack the court. When that was publicized, the Court began to allow more New Deal legislation through. The overturning of salient issues is thought to consume much of the Court's political capital.

106. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

Thompson: The Major Question

and *Biden v. Nebraska*.[107]

To begin with the former, *Sackett* triggers the MQD because it impedes on what Justice Gorsuch denotes in *West Virginia v. EPA* as intruding on state law because of the purpose set out by the Clean Water Act.[108] On the whole, the argument is strictly textualist.[109] Further, the majority uses similar language to Justice Gorsuch as it discusses the language of the statute through the statement, "we cannot redraw the Act's allocation of authority."[110] Overall, the opinion might be aptly summarized by the following: "Congress did not say you could make that policy decision for the greater good."[111] *Biden v. Nebraska* contains much of the same language and many of the same arguments; the MQD is triggered because of what is determined to be such an impactful and consequential decision of such importance that either Congress must act on its authority to carry out the decision or the agency must find a clear delegation of authority.[112]

On all four of the major categories to which Justice Gorsuch explicitly spoke in *West Virginia v. EPA*, the Court has now affirmatively shown its support for all four. In the two cases denoted here, neither satisfied *West Virginia v. EPA* because neither of their grants of authority denoted specifically enough what they were attempting to regulate to overcome the state or national interests relevant to the MQD.[113] Helpfully, *Biden v. Nebraska* ends on a note that hints to the issue between the majority and the dissent. The majority brought to light what it believed to be "a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary."[114] The issue, while denoted here as the role of judiciary, is essentially an issue regarding the ability and capacity of the legislative branch. Justice Gorsuch has indicated and influenced the Court towards addressing the issue with congressional abandonment, and doing so by forcing Congress to legislate more effectively and literally through intentionality. Yet, it is important to discuss whether Congress even has the ability to clearly articulate as the MQD requires.[115]

107. Sackett v. EPA, 598 U.S. 651 (2023); Biden v. Neb., 143 S. Ct. 2355 (2023).

108. W. Va. v. EPA, 597 U.S. 697, 743-44 (2022); *Sackett*, 598 U.S. at 680.

109. *Sackett*, 598 U.S. at 684.

110. *Id.* at 683.

111. *Id.*

112. Biden v. Neb., 143 S. Ct. 2374 (2023).

113. Sackett v. EPA, 598 U.S. 651 (2023); Biden v. Neb., 143 S. Ct. 2355 (2023).

114. *Biden v. Neb.*, 143 S. Ct. at 2375.

115. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1157 (10th Cir. 2016). It is incredibly relevant here to remember Justice Gorsuch's prediction in *Gutierrez-Brizuela* on the function of government in a world without any *Chevron* Deference, where MQD is incredibly broad due to state and national interests.

Published by University of Cincinnati College of Law Scholarship and Publications, 2024

Take, then, *Loper Bright Enterprises Inc., v. Raimondo*.[116] This case ended *Chevron* deference, which itself was replaced by the MQD in Supreme Court decisions of years prior.[117] What *Loper* accomplished is twofold: (1) the MQD will govern statutory interpretation regarding question as to whether Congress has or can delegate certain powers to any given agency,[118] and (2) *Skidmore*,[119] by extension of *Loper*, becomes the on-point case for situations concerning the ambiguity of a particular statute through which an agency attempts to act.[120] Thus, outside of the four major areas signed onto by the Court in later jurisprudence, but first introduced in Justice Gorsuch's concurrence in *West Virginia v. EPA*, *Skidmore* is good law regarding agency deference.[121]

Within the scope of this Note, there are two *Loper* opinions that merit discussion. The first is Chief Justice Roberts' majority opinion that overruled *Chevron*.[122] Chief Justice Roberts' opinion notes that *Chevron* is directly at odds with 5 U.S.C. § 706—the statute that gives courts the power to decide all questions of law—but that courts "[may] seek aid" based on the *Skidmore* factors, which, while important, are still persuasive authority that defers to the Court.[123] It is the role of the Court to set boundaries within which the agency has delegated authority from which the Court ensures agency compliance.[124] Justice

116. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

117. *Id.*

118. *W. Va. v. EPA* serves as the most readily understandable on-point case to explain this role. Carbon dioxide had historically not been regulated through the Clean Air Act by the EPA with the cap-and-trade system. It was not necessarily, with that understanding, a question of interpreting an ambiguous statute; the Court chose to draw a line and equivalently note that coal was policy beyond which the EPA could regulate.

119. Skidmore v. Swift & Co., 323 U.S. 134 (1944). Again, there are three factors indicated in *Skidmore* that would make a court more likely to acquiesce to the agency's aid in statutory interpretation: (1) thoroughness of investigation by the agency, (2) validity of reasoning regarding how it interpreted the statute, and (3) consistency by the agency over time in applying the law that way. Using *W. Va. v. EPA* as an example, the first prong would likely be satisfied, but the latter two likely would not, and the Court would not defer to the agency interpretation of the Clean Air Act.

120. When it is unclear in the statute as to whether a rule promulgated by an agency—such as in *Loper,* regarding whether Atlantic fishermen could be made to hire and fund on-board sea-monitors to comport with the rules and regulations of the agency—is founded in the authority granted to the agency by the statute. The rule in question is not within the realm of what is considered a major question; thus, *Skidmore* is controlling as a "may" statute as to whether the Court is obligated to agree with the agency's interpretation.

121. *Id.*; W. Va. v. EPA, 597 U.S. 697, 742-43 (2022); *W. Va. v. EPA*, 597 U.S. at 742 (citing Nat'l Fed'n of Indep. Bus. v. Dept. of Lab., Occupational Safety and Health Admin., 142 S. Ct. at 665 (2022); *see also* Gonzales v. Or., 546 U.S. 243, 267-68 (2006)); *W. Va. v. EPA*, 597 U.S. at 742-44 (citing Util. Air Reg. Grp. v. EPA, 573, U.S. 302, 324 (2014); *see also* King v. Burwell, 576 U.S. 473 (2015)); *W. Va. v. EPA*, 597 U.S. at 743 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

122. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

123. *Id.* at 2261 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

124. *Id.* at 2263 (citing Mich. v. EPA, 576 U. S. 743, 750 (2015)).

Gorsuch—perhaps uncharacteristically—does not advance much beyond his own understanding of a stare decisis argument: the argument for overturning *Chevron*.[125] He devotes expansive space to the notion that not everything in prior opinions ought to be given equal weight because of the inherent difference between common law and stare decisis.[126] Justice Gorsuch takes three lessons from *Loper*: (1) judicial decisions inconsistent with the law do not control over the statutes, (2) judicial decisions merit respect, colloquially subject to the factors on stare decisis presented in *Dobbs v. Jackson Women's Health Organization*, and (3) statutes trump judicial decisions, which is clarified as to not confuse judgments focused on particular facts as anything more than "vapours and fumes of law."[127] Justice Gorsuch believes the jurisprudence came to where it was prior to *Loper* through "power quoting."[128] He further believes from this change the nation can move forward without experts.[129]

This change in the jurisprudence could: (1) lead to an expansion of the MQD, making it a close relative of the non-delegation doctrine, or (2) lead to a use of *Skidmore* at a level where agency expertise can still prove useful for difficult decisions, while forcing Congress to actually pass laws—however likely that may or may not be following the Court's overruling of *Chevron*.[130] Instead of continuing to subjugate agency expertise by dooming *Skidmore* to be little more than briefing material, an opportunity presents itself for the Supreme Court to affirm the lines along which the MQD was established, while allowing agency input in spaces of past regulation through the application of the *Skidmore* factors.[131]

The answer lies within Justice Gorsuch's logic itself, which is almost entirely based on strict separation of powers and Congress's abdication

125. *Id.* at 2275-76 (Gorsuch, J., concurring).

126. *Id.* at 2276-78.

127. *Id.* at 2277 (quoting FRANCIS BACON, *The Lord Keeper's Speech in the Exchequer* (1617), *in* 2 THE WORKS OF FRANCIS BACON 478 (B. Montagu ed. 1887); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

128. *Loper*, 144 S. Ct. at 2289.

129. The mention of experts meaning that now, post-*Chevron*, with those understandings from *Loper*, the country can abet congressional abandonment and continue forward. Rethink to the block quote of Justice Gorsuch's prediction from earlier. *Cf.* Alison Durkee, *Supreme Court Corrects EPA Opinion After Gorsuch Confuses Laughing Gas With Air Pollutant*, FORBES, (Jun. 28, 2024) https://www.forbes.com/sites/alisondurkee/2024/06/28/supreme-court-corrects-epa-opinion-after-gorsuch-confuses-laughing-gas-with-air-pollutant/.

130. It is feasible that some sort of non-delegation doctrine may begin to grow from an expanded MQD, but *Loper* certainly does not indicate that it is on forefront of any Justices' mind.

131. The three *Skidmore* factors are: (1) the thoroughness of investigation by the agency, (2) the validity of reasoning regarding how it interpreted the statute, and (3) the consistency by the agency over time in applying the law that way.

of its role. Justice Gorsuch is not trying to destroy executive expertise. The MQD likely exists as broadly as it does with an underlying understanding that, in a perfect world, Congress can clearly articulate all that is necessary for executive administration of law. However, the MQD does not work exactly as Justice Gorsuch understands. The following Part examines Justice Gorsuch's internal logic in his opinions and points out faults.

C. Justice Gorsuch's Logic and Why It Does Not Work

Before discussing any prescriptive or descriptive remedies for judicial policy regarding the MQD, Justice Gorsuch's jurisprudential logic and the reasons why it fails should be examined. This review separates the majority opinions and Justice Gorsuch's concurrences and delineates areas where Justice Gorsuch does not affect the Court. This Part also focuses on policy and efficiency issues at the heart of MQD jurisprudence after attempting to play favorably and respectfully to Justice Gorsuch's sincere arguments. Not taking the Supreme Court Justices seriously has immense consequences as it relates to the legitimacy of the Court, but it is also necessary to accurately and fairly critique the issues resulting from and arising out of their decisions.

1. Logic Review

It is imperative to take Justice Gorsuch at his word when using his paradigm to discuss shifts of the Court; this Note endeavors to do as much. To put his logic into plain language, Justice Gorsuch intends for a "perfected," steadfast, and delineated separation of powers enforced by an active Court arbiter to ensure there is no legislative abandonment. The solution to legislative abandonment is to ensure that the legislature is properly and acutely aware of its imperative by the Court rejecting non-MQD-compliant statutes to demand the legislature carry out its mandate. From *West Virginia v. EPA* onward, there have been continual efforts to incorporate the various parts of Justice Gorsuch's opinion into future jurisprudence to prevent congressional abandonment of its role.[132] These incorporations resulted from a desire to have Congress legislate more and repress its urges of abandonment.[133] One may turn to *Sackett* or *Biden v. Nebraska* as apt examples for what Justice Gorsuch expects going forward; further, one

132. *See* Sackett v. EPA, 598 U.S. 651 (2023); Biden v. Neb., 143 S. Ct. 2355 (2023); Gundy v. U.S., 139 S. Ct. 2116 (2019); *see also* W. Va. v. EPA, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring).

133. Gundy v. U.S., 139 S. Ct. 2116 (2019); *see also* W. Va. v. EPA, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring).

may engage with his discussion and prediction in *Gutierrez-Brizuela* for his idealistic—or what he may deem to be forthright and ordinary—understanding of the separation of powers.

2. Policy Failures

Rigor and analysis are not necessary to understand that the jurisprudence set forth by the Court is burdensome, non-adaptive, and harsh towards federal agencies, as well as Congress. It is far too burdensome of a policy for Congress to attempt to pass these types of laws. In practice, this policy can be completely unworkable. It is important for anyone engaged in this sort of administrative law inquiry to engage with various struggles in present legislative governance.[134] Legislation does not get passed frequently, and faces extensive roadblocks. Justice Gorsuch's prediction in *Gutierrez-Brizuela* overcommits to the capabilities of Congress. This Note does not take the position that the Justice is being disingenuous with his prediction of a post-*Chevron* regime, but Justice Gorsuch misses the mark in creating any sort of practical regime within the separation of powers.[135] Further, this discussion assumes a good faith reading of the MQD set out in Justice Gorsuch's *West Virginia v. EPA* concurrence. There, Justice Gorsuch is incredibly broad, but it is unclear the true extent to which the MQD can expand when faced with political, economic, or

134. It is not an uncommon trend recently among Supreme Court Justices to assert the need to reinvestigate past doctrine, whether for the benefit of Supreme Court jurisprudence or not, without considering the efficiency issues that come with those suggestions. Here, Justice Gorsuch attempts to make it more difficult to delegate to federal executive agencies in an effort to force Congress to pass more legislation. While fine on the surface, it is imperative to note the time between *W. Va v. EPA* and the passage of the Inflation Reduction Act. If this were to occur with more frequency, with an increasingly polarized legislature, that could become far more cumbersome than the turnaround presently is. It is the equivalent of adding more cases to the Supreme Court docket; it is impractical. This choice by Justice Gorsuch has shades of Justice Thomas, who works closely with Justice Gorsuch on his MQD jurisprudence regarding the privileges and immunities clause jurisprudence. In Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), Justice Thomas discusses wanting to further engage with substantive due process for the purposes of eliminating that doctrine and moving those cases under the Privileges and Immunities Clause of the Fourteenth Amendment. The issue there is that every case overturned would have to be reconsidered, which would take far too long to be practical, given one would be without those previously protected rights.

135. It is pertinent to reiterate, for the more cynical, the issue with the sort of statement from Justice Gorsuch where he noted that the legislature will continue to pass laws. The legislature, by design and because of the inherent strife in the nation-state at present, cannot pass substantive amendments to laws and new bills to address any particularly substantive issues often, and certainly not as often as Justice Gorsuch alludes to in his *Gutierrez-Brizuela* prediction. What is more illustrative of the truth is the colloquial understanding among the average American that, on the whole, a President, assuming they even serve two terms, will likely manage to accomplish two large pieces of legislation in their tenure. The Inflation Reduction Act, with a specific title meant to address *W. Va. v. EPA*, does not come around often in any given presidential term.

University of Cincinnati Law Review, Vol. 93, Iss. 1 [2024], Art. 7

state-related interests.

A discussion attempting to determine the extent of the MQD is all notwithstanding the forgetfulness of the new MQD regime. It is pertinent to remember that "clear congressional authorization" has its roots in the intelligible principle.[136] The entire point of the majority opinion in *Hampton* was that the Court understood the need for delegation; it is imperative to have delegation or there is, in fact, no governance at all.[137] There is a mandate for co-governance and coordination in the Constitution.[138] To forget this principle and force upon Congress the mandate of legislation—although it might seem counter-intuitive—does not give the executive or legislative branches their due respect. A more active Court that interprets the legislative intent and the application of executive duties by the executive branch, disregards the basic need of co-governance and establishes a type of supremacy, none of which is healthy in a purposefully entangled and deliberate governmental model. On the whole, what is demonstrated here is the sacrificing of practical and respective co-governance, which anticipates and appreciates the realities of passing legislation with any regularity and accuracy, while limiting the injection of the executive branch's expertise into the regulatory and rule-making process for the purposes of securing a "perfected" separation of powers.[139]

It is relevant to note the harsh understanding that comes out of the MQD. It is particularly non-adaptive to the needs of government in the twenty-first century, and in particular, Justice Gorsuch is far too harsh in his generous interpretation of congressional legislation and what Congress is presently capable of. This Note will not engage in a discussion of whether the needs of a twenty-first century Congress particularly concern him; assuming they do, it is a gross miscalculation. One look at the sort of discussion on the "waters of the United States" in

---

136. W. Va. v. EPA, 597 U.S. 697 (2022); J.W. Hampton, Jr., & Co. v. U.S., 276 U.S. 394 (1928).

137. *Hampton*, 276 U.S. at 409-10.

138. *Id.* at 406.

139. A "perfected" separation of powers imposes more of a burden than is practical on the legislature for the purpose of upholding an idealistic understanding of the structure of the government as laid out in the Constitution. Essentially, it is impractical for the purpose of being cumbersome based on an understanding that such impracticalities are forced upon the government by the Founders. What is meant to be difficult for the purpose of good governance is not meant to be made nearly impossible in the face of present political realities for the purpose of attempting to accomplish said difficult structure. That is not to say to throw out the Founders' purposefully clunky and encumbered design, as that system works quite well when executed properly, but shifting burdens onto Congress in a scenario when most understand it to not be an era of proper legislative execution is backwards thinking. For proper co-governance, which is also envisioned by the Founders, it is necessary to lend a helping hand to the legislature through executive experience and judicial deference. The doctrine for that already existed because of those precise understandings in a time where it was much easier to pass legislation. Further, that doctrine still enforced and endorsed the separation of powers, just not a "perfected" version.

Sackett or greenhouse gases in *West Virginia* would yield such an answer.[140] The hypothetical introduced and endorsed earlier in this Note also demonstrates the fine line that Congress must walk to properly carry out the Supreme Court's demands; in some respects, the fact that it is certainly possible to receive feedback from the Court and *still* fail to account for the Court's demands by a bicameral legislature split between two ever-diverging parties is cause for concern.[141] This is not to say that outcome is predetermined, but at a minimum, it is concerning for anyone invested in having a working administrative state on matters of actual relevance.[142]

3. Efficiency Concerns

First, it is absolutely necessary when discussing the efficiency of the federal government to defer to the Founders' understanding and intention behind a purposefully inefficient government.[143] As much as one might desire a speedy, efficient government to address problems requiring immediate attention as opposed to deliberate inertia, that is not the system this country has the luxury of working with.[144] The energy and acute action of a Prime Minister is not to be found within the checks and balances system, or with the separation of powers inherent in the Constitution.[145] Still, it is necessary to point out the instances of further purposeful inefficiency resulting from the MQD brought about by the Court for the purpose of strengthening the separation of powers doctrine.

The efficiency-related qualms or issues arising from a particular doctrine almost certainly come from the unintuitive nature of the

140. Focusing primarily on *W. Va. v. EPA*, practically speaking, it is difficult to assume that Congress did not intend for carbon dioxide to be regulated given the plethora of other greenhouse gases denoted under the label. A response to this might be that if it were meant to be added it ought to have been added; however, this response is disingenuous for two reasons. First, it forgets the multitudes of individuals and interests at work in both houses of Congress. To have all those interests and people focus in on each and every particularity and word is a monumental task; Congress can be forgiven for leaving one greenhouse gas out of a list of ten or more for practical governance. Second, all of this is to assume proper and adequate governance is being carried out by any given Congress throughout the plethora of years and turnover. This Note cautions against the assumption that Congress is working correctly at every waking hour for the purposes of presuming any realism.

141. It is relevant to add a sidebar here that, equivalently, unless this Note has a drastic misreading of the Court, because of the need to bring the non-delegation doctrine back from the dead to tackle the Inflation Reduction Act, such an attack of the Inflation Reduction Act would not win a majority of the Court. It might appeal to Justice Gorsuch and Justice Thomas at a minimum, but they do not make a majority. This Note does, however, emphasize that with the existing doctrine, such a ruling is in fact possible. That should be of concern.

142. *Id.*

143. THE FEDERALIST NO. 51 (James Madison).

144. *Id.*

145. *Id.*

University of Cincinnati Law Review, Vol. 93, Iss. 1 [2024], Art. 7

jurisprudence. If the jurisprudence were intuitive, there would likely be no efficiency concerns because the doctrine would carry itself out seamlessly. *Biden v. Nebraska* includes two concerning statements. Chief Justice Roberts, ever the caretaker of the Court, wrote: "[w]e do not mistake this plainly heartfelt disagreement for disparagement. It is important that the public not be misled either. Any such misperception would be harmful to this institution and our country."[146] Although respectful to the dissenters in the Court, this statement unsuccessfully hides the result of the MQD jurisprudence since *West Virginia v. EPA*; there is reasonable disagreement beyond that of mere quarrels over interpretation of law.[147]

To denote the need for the public to understand the nature of the disagreement between the Justices is illustrative to the keen-eyed viewer of a sort of confirmation bias on the part of the Court, and possibly on those viewers who too can see the seams of this doctrine as it is stressed and pulled. First, Chief Justice Roberts tries to conceal that the resulting MQD jurisprudence is unintuitive and limits agencies and those not sufficiently familiar with logic resulting from "clear congressional authority" and its differences from the "intelligible principle." Second, viewers who engage with the literature see the stress the doctrine is under as it increases in breadth and limits its own workability.

The more hidden, unintuitive nature of the opinion is demonstrated by the last few sentences of Chief Justice Roberts' majority opinion as he attempted to get ahead of the response to the MQD jurisprudence. A second example is likely more illuminating and demonstrative to even the least politically savvy viewer. Chief Justice Roberts, quoting *West Virginia v. EPA*, wrote that, "[a]ll this leads us to conclude that '[t]he basic and consequential tradeoffs' inherent in a mass debt cancellation program 'are ones that Congress would likely have intended for itself.'"[148] This is the sort of language that ought to be familiar by now; it is the same paternal logic Justice Gorsuch has attempt to instill in the Court, given a need that he derives from a fear of congressional abandonment and the way in which abandonment impacts the separation of powers.

As discussed, when dealing directly with Justice Gorsuch's logic, this understanding, or lack thereof, of the acute particularities of the modern Congress are illuminating regarding the Court's lack of careful attention to the legislative branch.[149] Only a Court deeply entrenched in this basic

146. Biden v. Neb., 143 S. Ct. 2335, 2376 (2023).

147. *Id.*

148. *Id.*

149. Politically savvy readers might picture very easily the capabilities of the modern-day Congress, and they will almost certainly picture Congress negatively. While it is possible to assume that any reader would be as disappointed with Congress, it is useful to denote particularly what instances demonstrate

misunderstanding would conclude that Congress has the capacity to intend that any such discrete powers be left to itself. What a modern Congress is much more likely to intend is to defer those powers to the more capable. The general populace understands the proper capabilities of modern Congress; that intuitive understanding denotes the need for agency deference and the efficiency issues with the MQD.[150]

4. Using Reductionism to Examine Unintuitive Jurisprudential Logic

There are three intuitive categories in which the jurisprudence fell. Justice Gorsuch's driving logic in the MQD can be understood as functionalist or realist: formalist as it relates to non-delegation, or textualist or originalist regarding agency deference. Of course, none of these are absolutely true, given the Court's position is not intuitive, but going through these understandings can allow one to understand exactly what is at issue with the doctrine in the first place. Before engaging in those sorts of discussions, it is pertinent to define those three ideas, as any good reductionist argument can be traced to the principles underpinning it: functionalism, formalism, and textualism. Textualism, at an absolute minimum, is an understanding of the Constitution as it is written directly, using the understanding of those who engaged with and created the literature at the time through a historical perspective, as well as their notes and any sort of underlying logic that can be recreated through their personal publications or thoughts. At a maximum, textualism is a literalist reading of the Constitution. Either definition will suffice for this discussion.

---

this lack of capableness attributed to the modern-day Congress. The following will be a brief list from the past few years demonstrating why Congress is largely incompetent: Merrick Garland's 2016 Supreme Court appointment proceedings following the death of Justice Scalia; the holdup of Build Back Better by Democrat Senator Joe Manchin, despite his status as a Democrat; Senator Manchin's announced retirement due to his likely impending failure were he to run for re-election because of his most recent term; the recent Republican struggles to appoint a speaker when they appointed Speaker Kevin McCarthy and his replacement; Senator Tommy Tuberville's blocking of the appointment of military generals; the various escapades of George Santos as a member of the House of Representatives; and the ever decreasing number of legislation passed since the 1970s. GOVTRACK, https://www.govtrack.us/congress/bills/statistics (last visited Nov. 25, 2023).

150. This Note has discussed at various points the issue of efficiency as it relates to properly passing competent laws when this extra burden is placed on the legislature by the Court. Here, a brief statement on efficiency is necessary because the MQD, as do many constitutional law problems, assumes that if Congress or the executive branch is given a second shot at things, that now having the law clarified will mean success and smooth sailing with regard to what they are attempting to accomplish. One concerning issue this Note wishes to emphasize is the fact that because of the MQD check over legislative delegation that was not present in *Chevron*, it is possible that the legislature can fail at multiple junctures to accomplish the sort of "clear congressional authorization" necessary to delegate a task. This pessimistic concern is likely overplayed, but it is necessary to denote the possibility because what is possible with constitutional law can at any moment become a practical roadblock.

Functionalism and formalism are helpfully defined by Judge Richard Posner. Although he refers to functionalism as realism, they are equivalently the same; Judge Posner defines functionalism as "more likely to be judged sound or unsound than correct or incorrect[]- the latter pair suggests a more demonstrable, verifiable mode of analysis than will usually be possible in weighing considerations of policy."[151] Judge Posner also defines formalism as "enabl[ing] a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect."[152] Equivalently, formalism here means sticking to the structure as intended by the Constitution.[153]

Having identified those definitions, this Note will now dispel common MQD misconceptions. First, the MQD is not textualist for the simple fact that its commitment to agency deference and allowance of delegation of some tasks, but not Article I, Section 8 tasks, is nowhere to be found in the Constitution. Whether read to its zenith or nadir, allowing "clear congressional authorization" to stand as a sort of replacement for the "intelligible principle" in questions of major importance does not invoke the doctrine of non-delegation. Delegation very much still exists, albeit in an obtuse capacity; one can still delegate, it is just difficult to achieve because the process has been made so taxing on the agencies.[154] Second, the MQD is not functionalist because the realist interpretation and understanding necessary to have a doctrine that intuits the present political circumstances does not exist. An impractical doctrine is not realist or functional first. Further, the MQD is not formalist as it relates to the structure of the Constitution with respect to non-delegation. MQD jurisprudence does not defer the respect of an equal branch of government required by the Constitution to either the executive or legislative branches; it is inherently paternalistic. Further, the opinion abandons any formal understanding of co-governance in the letter of the law, because in its attempt to make Congress govern at all, it makes Congress govern alone. Beyond even that, there is certainly no respect for stare decisis in this jurisprudence; if anyone is interested in giving credence to Justice Alito's five factors in *Dobbs*, this Note invites them to do so separately for their own enjoyment.[155]

151. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1968).

152. *Id.*

153. *Id.*

154. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

155. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

Thompson: The Major Question

D. What Is to Be Done?

To answer the above question? Nothing! That statement is made in jest. While there are only nine Justices on the Supreme Court, this Note briefly offers some suggestions concerning the reality that the Court is incredibly unlikely to reverse course on doctrine it is currently charting. Consider the following a reductionist and functionalist appeal: have the Court punt on the expansion of the issue with a more realistic balance between *Skidmore* and *West Virginia v. EPA*. That would entail allowing *Skidmore* to continue to exist outside of Justice Gorsuch's list in *West Virginia v. EPA*, while indicating to lower courts the necessity to use *Skidmore* as an extreme form of persuasive authority. *Skidmore* will likely never impact the Supreme Court docket as persuasive on any given issue, given the nature of the docket.

To reemphasize, it is not necessary to reverse course; however, it is pertinent to use functionalism to take a less aggressive approach, one which is not is so averse to proper governance. To continue down the cliff the Court seems inclined to take, likely at the behest of Justice Gorsuch and his whittling of the ground the Court stood on over time, would be so averse to popular governance that governance could cease further than it already has.[156] It would be the inverse of Justice Gorsuch's prediction. Second, all this undertaking within the current Court's logic is not to say that it will continue to exist; likely, an overhaul of much of the Supreme Court's jurisprudence will be reconsidered in due time as it is wont to do, but that likely will not take place for several decades.

IV. CONCLUSION

This Note has endeavored an unintuitive undertaking of examining the jurisprudence of agency deference and the MQD up through the present. It attempted to envelope itself within Justice Gorsuch's logic to examine the trend set upon the Court itself; this included examining Justice Gorsuch's most salient opinions and attempting to create a coherent overarching logic for the purposes of taking that logic apart bit by bit, while explaining common misconceptions and issues within that logic for the purposes of explaining why exactly the doctrine does not intuitively sit well with many. Yet, while also being realistic, this Note asks for the best of what the Court can do in most situations, which is to hope to punt

156. Justice Holmes's *Lochner* dissent says it well: "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." Lochner v. N.Y., 198 U.S. 45, 75 (1905).

Published by University of Cincinnati College of Law Scholarship and Publications, 2024

University of Cincinnati Law Review, Vol. 93, Iss. 1 [2024], Art. 7

on the expansion of the issue and allow agencies to continue to govern for the sake of the country. A modern nation-state necessitates bureaucracy. To attack the bureaucracy goes against ever-intuitive principles of governance underlying the most basic political theories. All this to ask, who wants a functioning government?