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INTRODUCTION

There are two issues in *West Virginia v. EPA*.¹ One regards justiciability, and the other delegation. Article III of the Federal Constitution limits justiciability to controversies, to disputes involving an injured party whose harm the judiciary believes it can remedy. The Constitution is silent on delegation.

This Essay summarizes the Court’s decision in *West Virginia v. EPA*.² It also analyzes Chief Justice Roberts’ reasoning and addresses the case’s flaws from two perspectives. It references the Court’s decision connecting it to the so-called New Deal Cases,³ because in both *Panama Refining Co. v. Ryan*,⁴ and *West Virginia v. EPA*,⁵ the Court accepted to review a lower court’s decision about a

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

2. *Id.*

3. Kenneth Culp Davis wrote:

In only two cases in all American history have congressional delegations to public authorities been held invalid. *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Neither delegation was to a regularly constituted administrative agency which followed an established procedure designed to afford the customary safeguards to affected parties. *The Panama case was influenced by exceptional executive disorganization and in absence of such a special factor would not be followed today.*

KENNETH CULP DAVIS, *ADMINISTRATIVE LAW AND GOVERNMENT* 55 (1960) (emphasis added).

4. *Panama Refin. Co.*, 293 U.S. at 405–06.

5. *EPA*, 142 S. Ct. at 2599–2600.

non-existent regulation.⁶ In 1935, the governmental kerfuffle was due to a lack of regulatory transparency; the Federal Register had yet to be established.⁷ This Essay's analysis incorporates Jeremy Bentham's 1809 work on two classes of fallacies, authority and confusion.⁸ Bentham's work on fallacious thinking continues to be relevant today as it exposes arguments used to cloud reasoning and block governmental reform.⁹

ANOTHER CASE ON A CONTINUUM OF JURISPRUDENTIAL ENVIRONMENTAL SKEPTICISM

Like all beings, humans need an environment conducive to survival. Yet, there is an amazing amount of jurisprudential debate about what constitutes such an environment and whether it is under threat from human activities.¹⁰ *Juliana v. United States*¹¹ is a better-known, recent federal case that contemplated our government's duty to protect the environment for future generations, and where the defendants acquiesced as self-evident that "human activity is likely to have been the dominant cause of observed warming since the mid-1900s."¹² In that case, *Juliana*,¹³ a federal district judge held that fossil fuel emissions are "damaging human and

6. Lotte E. Feinberg stated:

The specific provision that the Amazon Petroleum Company is charged with violating, and whose constitutionality the company is now challenging (section 9(c) of Title I of the NIRA of June 16, 1933), was inadvertently omitted when it was sent to the printer. This means that the company is charged with violating a provision that *technically does not exist*. More significantly, as the cases moved through the lower courts, almost no one knew about the omission—not the plaintiffs (Amazon Petroleum or Panama Refining), not the defendants (the Justice Department), and not the courts; instead, all believed "it in full force and effect."

Lotte E. Feinberg, *Mr. Justice Brandeis and the Creation of the Federal Register*, 61 PUB. ADMIN. REV., 359, 360 (2001) (emphasis added).

7. *Id.* at 361.

8. JEREMY BENTHAM, *THE BOOK OF FALLACIES: FROM UNFINISHED PAPERS OF JEREMY BENTHAM* (John Hunt & H. L. Hunt, eds., 1824).

9. Those familiar with Bentham's life know that during his life, as a young lawyer, Bentham was concerned with fallacies in legal argument, then as a concerned Tori he attacked natural rights in his work on anarchical fallacies, and finally, as a septuagenarian, Bentham was concerned with fallacious thinking used to block political reform. That latter work was eventually published. See generally BENTHAM, *supra* note 8.

10. See generally Dana Neacșu, *The Aesthetic Ideology of Juliana v. United States and Its Impact on Environmentally Engaged Citizenship*, 12 J. ENV'T STUD. & SCI. 28 (2022).

11. *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

12. First Am. Compl. ¶¶ 1, 5, 7, 10, 213, 217; *Juliana v. United States*, Docket No. 6:15-cv-01517 (D. Or. Aug 12, 2015) (filed on Sept 10, 2015).

13. For detailed analysis of the case, see, e.g., Neacșu, *supra* note 10.

natural systems[and] increasing the risk of loss of life.”¹⁴ Nevertheless, United States Supreme Court environmental jurisprudence remains unmoved by scientific advances connecting burning fossil fuel to climate change and environmental destruction. It continues its jurisprudence of doubt¹⁵ regarding corrosive environmental causes, including, like here, fossil fuel energy production.

Luckily, the marketplace and vibrant competition among producers, as well as increased involvement from discerning consumers, have contributed to major generational shifts in our electricity.¹⁶ As of 2021, 61% of electricity at the national level was produced by burning fossil fuel, and because carbon dioxide (CO₂) releases vary according to the type of fuel, the worst being coal, less than 22% was produced by burning coal.¹⁷

West Virginia v. EPA concerned the 2015 administrative rule requiring electrical plants nationwide to reduce their level of coal-burning-produced electricity to 27% by 2030.¹⁸ This 2015 rule, known as Clean Power Plan¹⁹ (CPP), was never applied and its mandated action became obsolete by 2021.²⁰ As of 2021, the level of coal-burning-produced electricity had been reduced to less than 27%.²¹ CPP was an empty regulatory shell unable to cause any injury to anyone. The Court seems to have ignored this reality when it held that “[t]he issue here is whether restructuring the Nation’s

14. *Juliana*, 339 F. Supp. 3d at 1072 (“[D]amaging human and natural systems, increasing the risk of loss of life, and requiring adaptation on larger and faster scales than current species have successfully achieved in the past, potentially increasing the risk of extinction or severe disruption for many species . . .”).

15. Few can ever forget Justice Antonin Scalia in 2006, during the oral argument in *Massachusetts v. EPA*, 549 U.S. 497 (2007), proudly shouting his ecological ignorance: “Troposphere, whatever. I told you before I’m not a scientist. [Laughter]. That’s why I don’t want to have to deal with global warming, to tell you the truth.” Transcript of Oral Argument at 19, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05–1120). For a more in-depth discussion, see Neacsu, *supra* note 10.

16. “In 2021, about 4,116 billion kilowatt hours (kWh) (or about 4.12 trillion kWh) of electricity were generated at utility-scale electricity generation facilities in the United States. About 61% of this electricity generation was from fossil fuels—coal, natural gas, petroleum, and other gases.” *What is U.S. Electricity Generation by Energy Source?*, EIA, <https://www.eia.gov/tools/faqs/faq.php?id=427&t=3> (last updated Nov. 8, 2022).

17. *Id.*

18. *West Virginia v. EPA*, 142 S. Ct. 2587, 2592 (2022).

19. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64662-01 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60)

20. The EPA ultimately projected, for instance, that it would be feasible to have coal provide 27% of national electricity generation by 2030, down from 38% in 2014. *EPA*, 142 S. Ct. at 2593.

21. <u>Energy source</u>	<u>Billion kWh</u>	<u>Share of total</u>
<u>Fossil fuels (total)</u>	2,504	60.8%
<u>Natural gas</u>	1,575	38.3%
<u>Coal</u>	899	21.8%

What is U.S. Electricity Generation by Energy Source?, *supra* note 16.

overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the [best system of emission reduction] within the meaning of Section 111.”²² The Nation’s overall mix of electricity had reached below the contentious levels during litigation, through the voluntary actions of industry actors.

BRIEF SUMMARY: WHAT IS *WEST VIRGINIA V. EPA* ABOUT?

In 2015, the Environmental Protection Agency (EPA) issued the CPP, which was designed to reduce greenhouse gas emissions from electric power plants mostly by reducing the use of coal to 27% by 2030.²³ This reduction was viewed as essential by the Obama administration as it was getting ready to start its power transfer to the new administration. The CPP was issued within the first main regulatory programs established under the Clean Air Act (CAA)²⁴ “to control air pollution from stationary sources such as power plants.”²⁵ This program is the litigated²⁶ “New Source Performance Standards program of Section 111,”²⁷ which was meant to enable the EPA to regulate emissions from power plants, new and existing.²⁸

The CPP required each state to come up with a plan to reduce these emissions. That meant that the plants themselves had to (1) employ technology to become more efficient—a so-called technological cap—and (2) change the mix of fuels used (“generational shift”), by trading or procuring renewable energy, allowing emissions trading, and other actions.²⁹ The CPP was immediately met with a barrage of litigation.

22. *EPA*, 142 S. Ct. at 2607.

23. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64662-01.

24. Clean Air Amendments of 1970, 42 U.S.C. § 7401.

25. *EPA*, 142 S. Ct. at 2600.

26. *Id.*

27. 42 U.S.C.A. § 7411.

28. Section 7411 “directs EPA to list ‘categories of stationary sources’ that it determines ‘cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.’” *EPA*, 142 S. Ct. at 2601. The EPA also has to “(1) ‘determine[], . . . the ‘best system of emission reduction which . . . has been adequately demonstrated,’ (2) ascertain the ‘degree of emission limitation achievable through the application’ of that system, and (3) impose an emissions limit on new stationary sources that ‘reflects’ that amount. *Id.* The “EPA undertakes this analysis on a pollutant-by-pollutant basis, establishing different standards of performance with respect to different pollutants emitted from the same source category.” *Id.* Section 111 focuses on emissions limits for *new* and *modified* sources . . . Under section 111(d), . . . [EPA] must also address emissions by existing sources . . . not already regulated. *Id.*

29. *Id.*

In this first stage of litigation, the main argument against CPP was focused on the scope of delegation, the coin flip of deciding delegation itself, and whether legislative authority could be delegated.³⁰ This doctrinal shift from denying delegation to litigating how that delegated authority is used denotes a second jurisprudential continuity in addition to scientific cynicism. It is the same century-old distrust of the administrative state³¹ as shown by the Hughes Court in the New Deal cases mentioned at the beginning of this piece.³² Those cases were connected by the underlying labor act, the centerpiece of the Roosevelt administration’s “New Deal”—National Industrial Recovery Act (NIRA)³³—a statute promoting the most vital and communal interests of its time. Like the NIRA, the CAA is of similar importance. It manifests our communal attempt to improve life for all, by managing pollution. Now, the regulatory power in dispute focuses on Section 111 of the CAA³⁴ and the scope of the delegated power to an agency, rather than the power delegated to the U.S. President as in the New Deal Cases discussed here.

In the first round of CPP litigation, the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) denied the stay of the CPP rules³⁵ and set up a briefing schedule.³⁶ But, before the briefs were due, the petitioners appealed to the Supreme Court, and the Court decided the very contrary.³⁷ The Court stayed the rule pending litigation, with no reasoning offered by the majority (it was decided 5-

30. Such a blunt approach is harder to argue while opposing the administrative state, especially for an originalist court because the Constitution says nothing on this issue. But on the agency’s use of the authority delegated. DAVIS, *supra* note 3, at 56.

31. As Gillian E. Metzger noted:

[T]he administrative state includes those oversight mechanisms, as well as other core features of national administrative governance: agencies wielding broad discretion through a combination of rulemaking, adjudication, enforcement, and managerial functions; the personnel who perform these activities, from the civil service and professional staff through to political appointees, agency heads, and White House overseers; and the institutional arrangements and issuances that help structure these activities. In short, it includes all the actors and activities involved in fashioning and implementing national regulation and administration - including that which occurs in hybrid forms and spans traditional public-private and nation-state boundaries.

Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8 (2017).

32. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 438–39 (1935).

33. National Industrial Recovery Act, 48 Stat. 195 (1933).

34. 42 U.S.C.A. § 7411.

35. Order Denying the Motions for Stay, No. 15-1363 (D.C. Cir. 2016).

36. *Id.*

37. *West Virginia v. EPA*, 577 U.S. 1126, 1126 (2016).

4).³⁸ Its words read: “The [CPP] is stayed pending disposition of the applicants’ petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants’ petition for writ of certiorari, if such writ is sought.”³⁹

While the D.C. Circuit was involved in hearing arguments about the stay of the Obama EPA Rule CPP, a first administrative interlude took place: The EPA got new leadership with a new administrator appointed by the new president, Donald Trump. The Trump EPA repealed the CPP and issued a new set of regulations called the Affordable Clean Energy Rule (ACER).⁴⁰ As a result, the challenge to the CPP became moot. There was no CPP, and the D.C. Circuit never issued a decision on the stay of the CPP.

In a second round of litigation, ACER, the Trump administration’s EPA rule on managing pollution, was also challenged in court. On January 19, 2021, in *American Lung Association v. EPA*,⁴¹ the D.C. Court ruled that ACER and the repeal of the CPP were both invalid. It reasoned that “[b]ecause promulgation of [ACER] and its embedded repeal of the [CPP] rested critically on a mistaken reading of the [CAA], we vacate [ACER] and remand to the Agency.”⁴²

A second administrative interlude took place while the second round of litigation was going on. When the new Biden administration took office in 2021, there was no CPP. Although the D.C. Circuit Court repealed ACER, and its repeal vacated ACER, it did not

38. Michael B. Gerrard et al., *West Virginia v. Environmental Protection Agency: The Agency’s Climate Authority*, 52 ENV. L. REP. 10429 (2022).

39. *EPA*, 577 U.S. at 1126.

40. As the EPA explained:

The U.S. Environmental Protection Agency (EPA) is finalizing three separate and distinct rulemakings. First, the EPA is repealing the Clean Power Plan (CPP) because the Agency has determined that the CPP exceeded the EPA’s statutory authority under the Clean Air Act (CAA). Second, the EPA is finalizing the Affordable Clean Energy rule (ACE), consisting of Emission Guidelines for Greenhouse Gas (GHG) Emissions from Existing Electric Utility Generating Units (EGUs) under CAA section 111(d), that will inform states on the development, submittal, and implementation of state plans to establish performance standards for GHG emissions from certain fossil fuel-fired EGUs. In ACE, the Agency is finalizing its determination that heat rate improvement (HRI) is the best system of emission reduction (BSER) for reducing GHG—specifically carbon dioxide (CO₂)—emissions from existing coal-fired EGUs. Third, the EPA is finalizing new regulations for the EPA and state implementation of ACE and any future emission guidelines issued under CAA section 111(d).

Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520-01 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

41. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (citing *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 995 (2021)).

42. *Am. Lung Ass’n*, 985 F.3d at 995.

automatically reinstate the CPP.⁴³ Moreover, the Biden EPA indicated that it was not going to reinstate the CPP.⁴⁴ It asked the D.C. Court to vacate the stay while it expressed its intention to work on a new set of measures to reduce power plant emissions.⁴⁵

This second administrative interlude proved to be a fiasco because it did not take into consideration the judiciary distrust of the administrative state.⁴⁶ The EPA could have engaged in direct final rulemaking and eliminated this legal purgatory of Wittgensteinian penumbra of meaning ambiguity:⁴⁷ was the CPP dead or could it have been resurrected? Direct final rulemaking is a tool for uncontroversial rulemaking (such as burying a repealed regulation). If rulemaking is a long process, of many months, usually up to one-year, direct final rulemaking is a thirty-day endeavor.⁴⁸ Unfortunately, the Biden EPA did not foresee the value of taking CPP off the books through a clear rule indicating that or that of issuing a proposed rule.

When the Biden EPA publicly announced its intentions regarding new regulatory measures to the D.C. Circuit Court, the third and

43. Gerrard et al., *supra* note 38, at 10429.

44. Brady Dennis & Juliet Eilper, *EPA to Jettison Major Obama Climate Rule, as Biden Eyes a Bigger Push.*, WASH. POST (Feb. 12, 2021), <https://www.washingtonpost.com/climate-environment/2021/02/12/epa-jettison-major-obama-climate-rule-biden-eyes-bigger-push/>.

45. *Id.*

46. *See generally* Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8 (2017).

47. Michael Davis & Dana Neacșu, *The Many Texts of the Law*, 3 BRIT. J. OF AM. LEGAL STUD. 481, 489 (2014) (“[A]s Wittgenstein noted, maybe all ‘assertions about reality, assertions which have different degrees of assurance’ may appear obvious, and easy to grasp, but somehow, the most obvious assertions ‘may become the hardest of all to understand.’”).

48. Further explained:

Direct final rules were pioneered by EPA. They were initially used in the context of a situation in which the Agency needs to promulgate a completely noncontroversial rule. The Agency doesn’t expect any comments on this particular action. So, what the Agency would do is publish simultaneously a final rule that basically purports to implement the action within a certain time frame, and at the same time publish a proposed rule in which it would explain why it thinks the rule is noncontroversial and solicit comments. What the final rule would say is: We publish this proposed rule simultaneously. We don’t expect to get any comments. If we don’t receive any comments, then we are going to go forward in this time frame. The time frame was set forth in the direct final rule and we’ll implement the rule as it is written here The Agency can simply say: Listen, this is moot. This serves no purpose. To the extent that we as a matter of administrative law need to formally revoke this or put it out of its misery, we’re going to do so with this instrument. We’ll take comment on it, but I would suggest that the comment should be directed to specifically persuade the Agency that there is a reason to keep the [moribund rule] in effect. If the comment doesn’t do that effectively, the direct final rule goes forward.

Gerrard et al., *supra* note 38, at 10432.

final round of litigation started. The Supreme Court granted four writs of certioraris to review the D.C. Circuit decision in *Am. Lung Ass'n*.⁴⁹ One came from the state of West Virginia, so the final consolidated cases read *West Virginia v. EPA*.⁵⁰ This case had no connection to the first round of litigation involving West Virginia and the CPP. This new consolidated West Virginia case was about the decision to vacate ACER on grounds that the EPA misused its delegated power.⁵¹ Alas, the Court's decision was not about ACER. It was about a rule that did not exist at the time the delegation of authority it invoked was judged, CPP.⁵² It is a fable with a moral tale about finding a legal solution to a non-justiciable situation.

THE TWO ISSUES DISCUSSED

The legal issues at hand are justiciability and administrative delegation. Justiciability is defined constitutionally, while administrative delegation is not.

The constitutional demands for justiciability include standing, which is defined constitutionally, and it requires a redressable injury.⁵³ Here, plaintiffs invoked a potential injury which would have resulted from the CPP's mandate that the industry reduce its emissions from burning coal by 10% to 27% by 2030.⁵⁴

The second issue concerns the delegated authority used by the EPA in issuing the CPP to implement CAA's provisions and engage in CO₂ emission control from old and new power plants. CPP mandated a change which would have had a systemic, industry-wide effect, according to the fuel used, and the type of plants, new and existing.⁵⁵ Thus, the question of delegation had a political and

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

50. *Id.* at 2605.

51. *See generally id.*

52. *See generally id.*

53. As noted by James W. Moore:

One rationale for the injury-in-fact requirement is to ensure that the court will have the benefit of an adversary presentation with full development of the relevant facts. Combined with the redressability requirement (discussed in § 101.42), it tends to assure that the legal questions presented to the court will be resolved in a concrete, factual context conducive to a realistic appreciation of the consequences of judicial action, rather than in the rarified atmosphere of a debating society. Put more colloquially, it prevents "kibitzers, bureaucrats, publicity seekers, and 'cause' mongers from wresting control of litigation from the people directly affected."

JAMES W. MOORE, *15 Moore's Federal Practice – Civil § 101.40*, in MOORE'S FEDERAL PRACTICE – CIVIL (2022).

54. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

55. *EPA*, 142 S. Ct. at 2599.

economic penumbra of meaning: whether that regulatory power could be exercised plant by plant, monitoring each individual source to use the most efficient technology to control its performance, or whether it could be exercised at the electrical grid level, nationally, by encouraging a series of cap-and-trade measures. If successful, the CPP would have engendered a generational shift from coal to gas to wind and solar sources, which could have potentially cost a multi-billion-dollar industry billions of dollars to implement.⁵⁶ Because the market implemented all these changes voluntarily, the CPP was never applied, and the delegation was never employed in reality.

DID THE SUPREME COURT SETTLE A JUSTICIABLE CASE, OR DID IT ENGAGE IN ADVISORY DECISION-MAKING?

All actions heard in federal courts are subject to the case-or-controversy requirement of Article III of the Constitution.⁵⁷ This requirement has been developed by four justiciability doctrines: standing, ripeness, political question, and mootness.⁵⁸ Under Article III, Section 2 of the Constitution, an actual controversy requires standing, which involves a redressable injury.⁵⁹ If standing addresses the beginning of a case, “mootness requires that justiciability be present throughout the pendency of the action.”⁶⁰ When a case becomes moot, the court need not remain involved because the initial injury has been resolved.

TYPES OF MOOTNESS

In 2015, when the CPP became a final rule, coal-burning was at 38%–39%.⁶¹ By the time the Supreme Court granted certiorari, that percentage was lower than the one envisioned by the CPP—whose

56. “EPA’s own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sector.” *Id.* at 2604.

57. U.S. CONST. art. III § 2; see JAMES W. MOORE, *12 Moore’s Federal Practice – Civil* § 57.22, in *MOORE’S FEDERAL PRACTICE – CIVIL* (2022).

58. U.S. CONST. art. III § 2.

59. “The third prong of the requirement of constitutional standing is that the plaintiff’s injury likely will be redressed by a favorable decision. This requirement has been described as the ‘redressability’ prong of Article III.” JAMES W. MOORE, *15 Moore’s Federal Practice – Civil* § 101.42, in *MOORE’S FEDERAL PRACTICE – CIVIL* (2022).

60. JAMES W. MOORE, *15 Moore’s Federal Practice – Civil* § 101.05, in *MOORE’S FEDERAL PRACTICE – CIVIL* (2022).

61. Erica Martinson, *The Fall of Coal*, POLITICO (Apr. 16, 2015), <https://www.politico.com/story/2015/04/coal-power-plants-epa-regulations-117011> (“Since 2008, coal has dropped from providing nearly half of the U.S. power market to about 39 percent.”).

purpose was to reduce the level of coal burning by 10%.⁶² This organic reduction rendered the CPP an obsolete rule, which could not have harmed anyone, even if revived.

During the second round of litigation, the D.C. Circuit decided against the Trump EPA: it vacated its rule, ACER, and its CPP repeal.⁶³ It did not address the reason behind the Trump EPA's repeal of the Obama-era CPP—the major question doctrine. It only called it unnecessary, superfluous.

With ACER vacated, the Biden EPA diligently moved to state the vacatur because it wanted to issue a new regulation to implement CAA and actually reduce CO₂ emissions.⁶⁴ The CPP was still on the books as an obsolete rule—if you remember, its emissions requirements had been met and surpassed.⁶⁵

Under these circumstances, reasonably, the government argued lack of standing. “Article III demands that an actual controversy persist throughout all stages of litigation.”⁶⁶

Not only were the rules vacated and abandoned, but the mandated behavior ceased to exist: the CPP, even if reinstated, could have had no impact. The reduction level had been achieved voluntarily by the industry.

The lack of applicable regulations eliminated the possibility of injury.⁶⁷ All these reasons ordinarily would have eliminated the controversy.

But, as Justice Frankfurter would have noticed, and the Roberts Court cited his words,⁶⁸ semantics matter. The government's lawyer tersely referenced that the lack of controversy “mooted the prior dispute as to the CPP Repeal Rule's legality,”⁶⁹ instead of arguing that the controversy had been mooted by the plaintiffs' voluntary action.

Chief Justice Roberts disagreed and engaged in a Benthamite fallacy of confusion.⁷⁰ Such a fallacy uses sweeping classifications:

62. Air Quality Implementation Plan; Florida; Attainment Plan for the Hillsborough Area for the 2008 Lead National Ambient Air Quality Standards, 80 Fed. Reg. 20441 (April 16, 2015) (to be codified at 40 C.F.R. pt. 52).

63. See *supra* notes 41 & 42.

64. See Gerrard et al., *supra* note 38; Dennis & Eilper, *supra* note 44.

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

66. *Id.* at 2606 (majority opinion) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013)).

67. *Id.*

68. *Id.*

69. *Id.* at 2606–07.

70. BENTHAM, *supra* note 8 (emphasis added). “For instance, explains Bentham, one engages in the fallacy of confusion through sweeping generalities when they speak about cruelties to a Catholic king and conclude with how such behavior becomes cruelties to all Catholics.” *Id.* at 266.

here the doctrine of mootness. Chief Justice Roberts addressed its limits—mootness means that while injury exists at the outset of litigation, it subsequently disappears.⁷¹ Thus, he established justiciability at the outset. On that positive note, he continued by focusing on the government’s actions: reimposing emission limits. Chief Justice Roberts concluded that because the government had the technical ability to regulate the plaintiffs’ behavior, it could harm them, too.⁷² However, the facts in *West Virginia v. EPA*⁷³ supported the opposite, and discrete facts rather than generalities are the foundation of any case or controversy. In this instance, the emission limits in question had been met voluntarily by the industry—the plaintiffs—outside the purview of governmental action. Even if the EPA had reinstated the obsolete rule, the plaintiffs would have suffered no harm.

By addressing mootness in terms of defendant’s “voluntary cessation,” when the facts of the case indicated that injury was an impossibility, the Chief Justice engaged in the fallacy of confusion. He did so through sweeping generalities. Mootness became defendant’s voluntary action, an incorrect summation of the facts: the plaintiffs—the industry—voluntarily made the switch away from coal.

But “voluntary cessation does not moot a case” unless it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” . . . Here the Government “nowhere suggests that if this litigation is resolved in its favor it will not” reimpose emissions limits predicated on generation shifting; indeed, it “vigorously defends” the legality of such an approach.⁷⁴

The Court reasoned that had the vacatur been reinstated, and the EPA changed its mind, then the injury would have been real to the losing side⁷⁵ (an impossibility because the demands of the CPP had been met). Furthermore, referencing Freudian slips, but using Wittgensteinian penumbra of meaning, the Chief Justice played

71. EPA, 142 S. Ct. at 2606.

72. “Here the Government ‘nowhere suggests that if this litigation is resolved in its favor it will not’ reimpose emissions limits predicated on generation shifting; indeed, it ‘vigorously defends’ the legality of such an approach. We do not dismiss a case as moot in such circumstances.” EPA, 142 S. Ct. at 2607 (internal citations omitted).

73. *Id.* at 2606.

74. *Id.* at 2607.

75. *Id.* at 2606. What a departure from his dissent in *Massachusetts v. EPA* where he argued that losing coastline due to water level rising due to increased temperature was not a sufficiently direct injury for the state of Massachusetts to prove standing. See *Massachusetts v. EPA*, 549 U.S. 497, 542 (2007) (Roberts, J., dissenting).

“gotcha” with his governmental colleagues—all paid by taxpayers’ money.

That Freudian slip, however, reveals the basic flaw in the Government’s argument: It is the doctrine of mootness, not standing, that addresses whether “an intervening circumstance [has] deprive[d] the plaintiff of a personal stake in the outcome of the lawsuit.”⁷⁶

Finding justiciability, the Chief Justice ignored the facts in his reasoning, as both Bentham and H.L.A. Hart⁷⁷ would agree. The Chief Justice ignored that the market had eradicated the harm, not the government: by 2021 the transition reached much lower levels than 27%.⁷⁸ The market wiped out the controversy. However, the Court swapped concepts, and equated mootness with voluntary mootness by government and did not address the voluntary solution implemented by the market. Bentham calls this fallacy concept-swapping, used to deflect attention through semantic choices.⁷⁹ Once the attention was diverted from the lack of justiciability, the majority moved to solve the second issue, that of statutory delegation of power.⁸⁰

ADMINISTRATIVE DELEGATION: CAA AND EPA

The only substantive question in *West Virginia v. EPA* was one of delegation: did the EPA have the needed authority to issue the CPP and mandate reduced level of coal-burning electricity?⁸¹

There is no constitutional text to guide the Court on how Congress should confer powers to agencies.⁸² Thus, the majority could not rely on textualist support for finding the wisdom of our Founding Fathers and engage in what Bentham calls the “wisdom of our ancestors” fallacy.⁸³ Absent constitutional guidance, the majority

76. *EPA*, 142 S. Ct. at 2607 (quoting *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013)).

77. H.L.A. Hart, *Bentham*, in *JEREMY BENTHAM—TEN CRITICAL ESSAYS* 73, 81 (Bhikhu Parekh ed., 2010).

78. *See supra* note 21.

79. *Id.*

80. *See infra* pp. 106–11.

81. “The issue here is whether restructuring the Nation’s overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the ‘best system of emission reduction’ within the meaning of Section 111.” *EPA*, 142 S. Ct. at 2607.

82. *See generally* DAVIS, *supra* note 3.

83. Bentham further stated:

Instead of being guided by their own judgment, the men of the 19th century shut their own eyes, and give themselves up to be led blindfold by the men of the 18th century. The men who have the means of knowing

looked for *stare decisis*, going for the established jurisprudential rule. Semantically, that means finding past holdings, rulings supporting the chosen solution. Refusing to address the novelty of the harm, the majority engaged in the “wisdom of our ancestors” fallacy.⁸⁴ Justice Roberts chose not the words of the Founding Fathers, but past rulings devised on far more limited and imperfect experiences, than the evidence and reasoning at hand.⁸⁵ This variation of the “wisdom of our ancestors” fallacy avoids engaging the facts of the case.

[O]ur precedent teaches that there are “extraordinary cases” that call for a different approach—cases in which the “history and the breadth of the authority that [the agency] has asserted,” and the “economic and political significance” of that assertion, provide a “reason to hesitate before concluding that Congress” meant to confer such authority.⁸⁶

Even within this fallacious thinking, the majority relied only on ideological precedent⁸⁷ supporting its opposition to EPA’s power to regulate “a significant portion of the American economy.”⁸⁸ For instance, Chief Justice Roberts could have chosen the wisdom of past jurists who, when confronted with “the evil at hand,” as Justice Douglas did in *FTC v. Bunte Bros.*, whose majority opinion he cited,⁸⁹ had been persuaded by the complexity of the task at hand, rather than its technicality. “It warns us not to whittle away administrative power by resolving an ambiguity against the existence

the whole body of the facts on which the correctness and expediency of the judgement to be formed, must turn, give up their own judgement to that of a set of men entirely destitute of any of the requisite knowledge of such facts.

BENTHAM, *supra* note 8, at 84.

84. *Id.*

85. J.H. Burns, *Bentham’s Critique of Political Fallacies*, in JEREMY BENTHAM—TEN CRITICAL ESSAYS 154, 160–61 (Bhikhu Parekh ed., 2010).

86. *EPA*, 142 S. Ct. at 2607–08 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)) (emphasis added).

87. Rachel Reed, *Politics, the Court, and ‘the Dangerous Place we Find Ourselves in Right Now’*, HARV. L. TODAY (Sept. 21, 2022), <https://hls.harvard.edu/today/politics-the-court-and-the-dangerous-place-we-find-ourselves-in-right-now/>.

88. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U.S. at 159).

89. *FTC v. Bunte Bros.*, 312 U.S. 349, 357 (1941) (holding that the Federal Trade Commission is without authority under § 5 of the Federal Trade Commission Act to prevent a candy manufacturer within a State from selling, wholly within that State, candy in so-called “break and take” assortments).

of that power where the full arsenal of that power is necessary to cope with the evil at hand.”⁹⁰

Instead, of focusing on the evil the EPA tried to mitigate, CO₂ emissions, the Chief Justice chose a doctrine—the major questions doctrine—which blocked the environmental reform needed to control them:

As for the major questions doctrine “label[],” . . . it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we.⁹¹

Furthermore, the Roberts Court seems to value only certain ancestral wisdom, that which mirrors his.(with one remarkable exception—Justice Frankfurter).⁹² Given this quasi-unidimensional approach to reasoning, the Court’s analysis denotes an obtuse approach to the role of legal normativity. Paraphrasing Justice Cardozo’s words, laws *lato sensu*, statutes and regulations, ought to be interpreted in such a manner that they produce the end in view.⁹³ Subsequently, the role of the very delegation of legal authority is to allow the government to inquire into various “evils and upon discovery correct them.”⁹⁴

The majority opinion refused delegation because, in light of its sweeping impact on the economy, the enabling statute did not use express language to delegate authority.⁹⁵ The Court held that system-based rulemaking, like the one the CPP envisaged, needed express congressional authority:

Generally speaking, a source may achieve that emissions cap any way it chooses; the key is that its pollution be no more than the amount “achievable through the application of the best system of emission reduction . . . adequately

90. *Id.*

91. *EPA*, 142 S. Ct. at 2595 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324) (internal citations omitted).

92. With one exception, when he quotes Justice Frankfurter discussing the importance of a Congressional “want of assertion.” *Id.* at 2610.

93. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting).

94. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., dissenting).

95. *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022).

demonstrated,” or the BSER. EPA undertakes this analysis on a pollutant-by-pollutant basis, establishing different standards of performance with respect to different pollutants emitted from the same source category.⁹⁶

Nevertheless, the Court did not hold all “systems” untenable solutions. Using the wisdom of the past, it accepted those types of “system,” which did not prove problematic, such as individual source control, which was viewed as a “building block of a “best system” in lieu of a national grid system.⁹⁷ Thus, the Court swapped one meaning of “system” for another to justify the desired outcome without much explanation. Only one “building block” of this system will be sanctioned by the Court⁹⁸ that which allowed the Court to block the EPA’s environmental administrative reform.⁹⁹

West Virginia v. EPA, might create a cloud of doubt over what government agencies can do without extremely specific Congressional authorization. As far as the Biden EPA is concerned, it cannot use particular words such as system¹⁰⁰ in its new rulemaking, if “system” denotes a power grid. But it can use it if it denotes technological systems applicable as an emission cap.¹⁰¹ The EPA’s work may seem that is going to require more individual power source implementation.

In the case at hand, both the statutory goal and the delegated authority have the same aim: to manage CO₂ emissions on an ongoing basis. Given the enormity of its charge, the EPA needs a “roving commission to inquire into evils and upon discovery correct them.”¹⁰² More clearly, referencing the words of Justice Cardozo, because there is no legal “standard, definite or even approximate, to which legislation must conform”¹⁰³ in order to delegate its authority to achieve its legislative goals, the Court had the option to

96. *Id.* at 2601 (internal citations omitted).

97. *Id.* at 2603.

98. *Id.* at 2604.

99. The Court stated:

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions “had become well known, *Congress considered and rejected*” multiple times. . . . Given these circumstances, our *precedent counsels skepticism* toward EPA’s claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach.

Id. at 2614 (emphasis added).

100. *Id.* at 2604.

101. *Id.* at 2610–11.

102. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 552 (1935).

103. *Id.*

promote environmental reform. It chose the opposite by engaging in fallacious reasoning.

It is disconcerting that the Roberts Court found refuge in the Trump EPA defense of “major question doctrine” to dismantle its predecessor’s work and minimize the impact of its subsequent rule (even if a mere shell by 2021). The Roberts Court, filled with three Trump appointed justices, found that political position so persuasive as to embrace it as its legal argument in a case that arguably did not meet the threshold of justiciability (no injury – ergo no controversy).¹⁰⁴

West Virginia v. EPA seems thus poised to go down in history like the New Deal Cases, especially *Panama Ref. Co. v. Ryan*,¹⁰⁵—a case involving two Texas oil companies charged with violating a provision of regulations that technically did not exist at the time the Hughes Court analyzed its delegated authority.¹⁰⁶ Here, the CPP existed on the books, but its content had evaporated into thin air when the market met its mandate and surpassed it when coal burning represented only 21.8% of the national electricity by 2021.¹⁰⁷ That level was lower than 27% by 2030, as the CPP envisaged.¹⁰⁸ *West Virginia v. EPA* is thus a superfluous political decision that deepened the perception of the Supreme Court as an ideological powerhouse fighting scientific evidence on environmental issues.

The *Panama Oil* case¹⁰⁹—discussed in the Davis treatise¹¹⁰ right next to Frankfurter’s decision in *FTC v. Bunte Bros.* remains a relevant warning for ideological courts, like the Roberts Court. In his dissent in the *Panama Oil* Case,¹¹¹ Justice Cardozo defined a workable approach to delegation which takes into consideration the needs of governing a complex reality, where statutory delegation could not encompass a reality unfathomable at the time:

104. The rule under discussion was obsolete – its purpose of reducing the coal produced electricity to 27% by 2030, already met. For all intended purposes other than a pedantic exercise in jurisprudential power, the rule under discussion had ceased to exist. *EPA*, 142 S. Ct. at 2628.

105. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 438–39 (1935).

106. See *A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register*, NAT’L ARCHIVES AND REC. ADMIN. (Mar. 14, 2006), <https://www.archives.gov/files/federal-register/the-federal-register/history.pdf>. On December 10, 1934, at the Supreme Court, the Assistant Attorney General of the United States had been grilled during oral arguments in the first case to reach the Court challenging the constitutionality of the centerpiece of President Roosevelt’s “New Deal”—the National Industrial Recovery Act (NIRA). The defects in the case highlighted a fundamental problem facing a democratic government that was exploding with new agencies and new regulations. *Id.*

107. See *supra* note 21.

108. *Id.*

109. *Panama Ref. Co.*, 293 U.S. at 388.

110. See generally DAVIS, *supra* note 3.

111. *Panama Ref. Co.*, 293 U.S. at 433 (Cardozo, J., dissenting).

I concede that to uphold the delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed. I deny that such a standard is lacking in respect of the prohibitions permitted by this section [9(c)] *when the act with all its reasonable implications is considered as a whole*. What the standard is becomes the pivotal inquiry.¹¹²

Chief Justice Roberts writing for the majority found that the scope of the CPP was much too far-reaching. Indeed, the CPP was meant to create a grid (another synonym for system) affecting our national electrical power structure. But the market made it inoperative before it could become binding, and arguably harming. This suggests that Jeremy Bentham’s criticism of political and judicial argument (fallacies) stands the test of time. Looking backward for future guidance is both fallacious and unsuitable in our complex, fast-paced reality.

CONCLUSIONARY REMARKS

At first brush, it may appear that federal agencies after *West Virginia v. EPA* may have an exceedingly difficult time to deal with new problems which did not exist at the time the enabling statute was passed, and the delegation established. The reality is that with the EPA each state has to create their own means of implementing emission controls, which suggests a closer relationship between the federal “administrative state” and state-level agencies. Furthermore, as shown in this instance, the market and engaged citizenship may make a bigger difference than government ruling. Gas burns more efficiently than coal, which is evident from the percentage of electricity which comes from gas, about 40%.¹¹³ The CPP aimed to reduce coal use to 27%;¹¹⁴ the market had already

112. *Id.* at 434 (emphasis added). And for further clarity, I will add another quote: [S]eparation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee to-day the developments of tomorrow in their nearly infinite variety. . . . In the complex life of to-day, the business of government could not go on without the delegation, in greater or less degree, of the power to adapt the rule to the swiftly moving facts.

Id. at 440–41.

113. Electricity Explained, EIA, <https://www.eia.gov/energyexplained/electricity/electricity-in-the-us.php> (last updated July 15, 2022).

114. *West Virginia v. EPA*, 142 S. Ct. 2587, 2604 (2022) (“Based on these changes, EPA projected that by 2030, it would be feasible to have coal provide 27% of national electricity generation, down from 38% in 2014.”).

produced that result. The CPP was thus obsolete by the time the Supreme Court pronounced itself in this case.

Another way to look at *West Virginia v. EPA* is through the lens of administrative efficiency as the government does not learn fast. For allowing itself the time to “think” about promulgating a new regulation limiting the emission of CO₂ from power plants while both the 2015 CPP and the 2019 ACER regulations were in legal limbo, it received a very harsh penalty.

Presciently, Professor Davis wrote in 1960, about the *Panama* case mentioned earlier: “The Panama case was influenced [in its decision] by exceptional executive disorganization and in absence of such a special factor would not be followed today.”¹¹⁵ Alas, *West Virginia v. EPA* managed to rise from a similarly chaotic situation to that of *Panama*.

Similarly, now like then, the Supreme Court granted certiorari and eventually decided a nonexistent controversy.¹¹⁶ However, then, in the absence of the Federal Register, the Court could not have known the rule did not exist. Today, the Court found justiciability by stating that if the lower court would have decided in the favor of the government, then the parties would suffer injury.¹¹⁷ As shown here, that was an impossibility, because the lack of controversy was not due to the government’s voluntary action. And, while it did not acknowledge the followed precedent—the *Panama* case and the Hughes Court reasoning—the Roberts Court chose to issue a highly ideological decision. The Roberts decision is inimical to the doctrine of delegation of power, and unfavorable to what is called the “administrative state”—and plays the semantic game loosely.

Again, for the reasons mentioned above by Professor Davis about the *Panama Oil* case,¹¹⁸ *West Virginia* will not be influential. The Court ignored not a legal penumbra of meaning, but reality, when it unnecessarily and arguably illegally granted certiorari. Diligently, the government could have prevented yet another conservative decision by engaging in direct final rule making—even after oral argument. It would have taken thirty days to put to rest an obsolete rule for a Court too ideological to acknowledge its profound distrust of the EPA and determined to prevent environmental regulations from having any real impact on a destructive, corrosive, humanly harmful electric grid.

115. DAVIS, *supra* note 3, at 55.

116. See *supra* pp. 95-96.

117. EPA, 142 S. Ct. at 2607.

118. DAVIS, *supra* note 3, at 55.

There is no evil more direct and injurious than the injury we choose to let happen against our planet, our lives, and especially our youth. It is remarkable that instead of choosing to focus on the problem at hand—pollution, whose regulation requires an electrical grid solution, a communal perspective about the res-publica, the air we all breath—the Chief Justice found the amount of money that its implementation would require to be the problem that required a direct statement of delegation.

For all these reasons, its decision to ignore the lack of controversy, and the lack of constitutional standards to judge EPA's regulatory charge, the decision in *West Virginia v. EPA* will not have any more impact than the *Panama Oil* case had.¹¹⁹

119. As a final trivia, the only case that followed it was vacated and remanded by the Supreme Court only years later.

Beware of the Supreme Court's misleading language. That the literal opinions in the Panama and Schechter cases do not embody the effective law is entirely clear. This is dramatically shown when a lower court takes those opinions seriously. For instance, the opinions were followed to the letter by a three-judge district court, which held a delegation invalid because: "We are unable to find in the Act a declaration of policy or standard of action which can be deemed to relate to the subject . . ." Because the lower court took literally what the Supreme Court had said in the Panama and Schechter opinions, the Supreme Court reversed it!

DAVIS, *supra* note 3, at 58–59 (internal citations omitted).