

The Major Questions Doctrine's Upside for Combatting Climate Change

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Abstract

West Virginia v. EPA has been widely read as an attack on climate regulation and on ambitious, creative, effective regulation of all sorts. But there is another side to West Virginia's controversial major questions doctrine: That doctrine strongly undercuts claims of federal agency preemption, field preemption, and, to a lesser extent, federal conflict preemption. Invoking West Virginia, states and localities should be able to carve out a larger sphere of freedom in which to tackle pressing problems, including, but not limited to, climate change. That larger sphere of freedom includes the states' and localities' suits to force major companies to internalize some of the social costs of their fossil fuel products. Although this was almost certainly not the Supreme Court's intent, West Virginia may propel those suits towards a real hearing on the merits.

The Major Questions Doctrine’s Upside For Combatting Climate Change

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I. Introduction

Last term, in *West Virginia v. EPA*, the Supreme Court invalidated the U.S. EPA’s Clean Power Plan as exceeding the agency’s authority under Section 11 of the Clean Air Act.¹ But the Court’s decision has implications that go far beyond the Clean Power Plan, the requirements of which most States had already met. In announcing an expansive, amorphous, textually-ungrounded “major questions doctrine,” the Court’s conservative majority has made it far easier for those who dislike regulation to succeed in having the regulation struck, especially when that regulation really matters—when it deals with major problems, has major economic and other implications, and when it reflects major (or any) innovation and creativity on the part of the agency. In other words, in the climate change context, the major questions doctrine will enable fossil fuel companies and aligned States to undermine climate regulations unless, as is not generally and may never be true, Congress in a plain statement, in specific language, instructed the agency to regulate in the way it did.

West Virginia v. EPA and its “major questions doctrine,” then, is a problem for regulatory efforts to address climate change. Indeed, the major question doctrine already is being invoked against a range of federal climate-related proposed regulations. Because of political polarization and the structure of our federal government, we have and will continue to see federal regulation largely grounded on relatively old statutes that were not conceived of and enacted when climate change was perceived as the sort of existential problem it now is understood (by many) to be. Thus, any regulatory efforts regarding climate change will continue to be based on statutes that, at least arguably, do not specifically authorize the kind of climate regulation we need in the way the major questions doctrine seems to demand.

But while *West Virginia* and the major questions doctrine pose a substantial obstacle to federal climate regulation, they could be used as a tool to buttress climate litigation based on state public nuisance law. These claims, which are pending in many courts across the country, face the risk of dismissal based on the doctrine of federal preemption. But the very logic of the major questions doctrine works against federal preemption arguments, since those arguments are based on the absence of any Congressional statement of intent to preempt or any specific delegation to any federal agency to preempt through regulation. And whether state claims are preempted seems to qualify as a major question under any reasonable version of what a major question is.

¹ *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2616 (2022).

Of course, logic and doctrinal consistency do not always govern judicial decision-making. But to the extent they do, *West Virginia* and the major questions doctrine, while perhaps limiting federal regulatory creativity to address climate change, may be, in effect, a liberating force with respect to the use of state law as a climate change tool. And the preemption-limiting effect of *West Virginia* should extend to many contexts outside climate change.²

Part II discusses the *West Virginia* decision and the uncertain contours of the major questions doctrine it made a centerpiece of judicial review of federal regulation. Part III reviews the ways in which this new doctrine undercuts traditional understandings of federal preemption, focusing particularly on how regulatory and implied preemption run afoul of the major questions doctrine given Congressional silence and the impact on state sovereignty. Part IV describes the preemption and preemption-like theories that have and could be used to dismiss the state climate litigation, and explains how *West Virginia v. EPA* can be used to rebut the preemption arguments. One of our points is that *West Virginia* may prove to be an especially powerful precedent in arguing against so-called preemption by rule, federal preemption that is based on a federal agency rule purporting to preempt state law.

We do not endorse *West Virginia*, but it is part of our law now. The major questions doctrine can be invoked both against regulatory initiatives and, as we seek to show, in support of them in some instances involving state law.

II. Contours of the Major Questions Doctrine

A. The Law Before *West Virginia v. EPA*

Before *West Virginia v. EPA*, the scope of agency power was generally guided by the framework announced by the Supreme Court in *Chevron v. Natural Resources Defense Council*.³ In that case, the Court held that when an agency interprets an ambiguous statute, courts should first look to whether Congress has answered the precise question at issue, and if not (as in the case of ambiguity), should defer to the agency's interpretation as long as that interpretation is reasonable.⁴

From the beginning, this framework was criticized as giving agencies too much power to interpret statutes, in part because commentators believe the power to interpret ambiguous grants of power might effectively delegate legislative power to an executive agency.⁵ Indeed, it was the concern over improper delegation that led the Supreme Court in a number of earlier cases to refuse to defer to an agency's interpretation of an ambiguous statute, which in turn set the stage for *West Virginia v. EPA*. For example, in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, the Supreme Court held that the Federal Communications Commission (FCC) could not use its power to "modify" requirements under the statute to make such requirements

² One of us previously raised this point in much briefer form in a newspaper op ed, <https://www.chicagotribune.com/opinion/commentary/ct-opinion-supreme-court-epa-ruling-climate-change-illinois-action-20220719-2ulcwqox4nft5afvg4yo3svvti-story.html>.

³ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁴ *Id.* at 866.

⁵ See, e.g., John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 199 (1998) ("Given the prevalence of such statutory delegations, it may be a major error to treat any ambiguity as a delegation to an agency.").

voluntary: “It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”⁶ Similarly, in *FDA v. Brown & Williamson Tobacco Corp.*, the Court rejected the Food and Drug Administration’s (FDA) attempt to regulate cigarettes as “drug delivery devices” under expansive and ambiguous statutory language by holding that “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”⁷

However, while emanations of the major questions doctrine indeed found their way into Supreme Court cases, these cases focused primarily on questions of statutory interpretation—whether Congress might have intended to grant an agency expansive powers through ambiguous language. In *Whitman v. American Trucking Ass’n, Inc.*, for example, the Supreme Court held that the U.S. EPA could not take into account costs when setting air quality standards because Congress had not made cost an explicit consideration. In response to agency arguments that vague statutory language allowed the agency to take into account costs, the Supreme Court stated flatly that Congress “does not hide elephants in mouse holes.”⁸

Then, in a pair of so-called “shadow docket” cases in 2021 and 2022, the Supreme Court began moving away from the *Chevron* framework, focusing instead on the political and economic significance of the agency’s claim to power. In *Alabama Ass’n of Realtors v. Department of Health and Human Services*, the Court vacated a stay that a lower court had imposed on its own order overturning the CDC’s eviction moratorium.⁹ The CDC had imposed an eviction moratorium based on its statutory authority under 42 U.S.C. § 264(a) “to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.” The Supreme Court, though, held that an eviction moratorium under such authority was going too far, because “[e]ven if the text were ambiguous, the sheer scope of the CDC’s claimed authority under § 361(a) would counsel against the Government’s interpretation.”¹⁰

Similarly, in *National Federation of Independent Business v. Department of Labor*, the Supreme Court stayed OSHA’s vaccine mandate for all employers with at least 100 employees by noting that the mandate was a power of “vast economic and political significance” and thus the agency could not rely on a statute that allowed the agency to act where “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful.”¹¹ Despite the fact that the statute arguably covered the agency action, the Supreme Court demanded in such cases that Congress be far more explicit than it usually is, or than the Court itself had demanded in the past.

B. *West Virginia v. EPA*

⁶ See *MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 512 U. S. 218, 231 (1994).

⁷ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131 (2000).

⁸ *Whitman v. American Trucking Ass’n, Inc.*, 531 U. S. 457, 468 (2001).

⁹ *Alabama Ass’n of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485, 2488 (2021).

¹⁰ *Id.* at 2489.

¹¹ *National Fed’n of Indep. Bus. v. Department of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022).

The “shadow docket” cases set the stage for *West Virginia v. EPA*, where the Supreme Court hardly paid lip-service to the statutory interpretation question, making clear that it was now focused on curtailing agency power in cases involving “vast economic and political significance.”¹² *West Virginia* dealt with the question of whether EPA’s ability to demand the “best system of emissions reduction” pursuant to Clean Air Act section 111(d) allowed the agency to demand that states shift electricity generation from coal to natural gas, and from natural gas to renewables. The agency (and the dissent) argued that the statutory term “system” was a broad enough term to encompass what the agency wished to achieve. Justice Robert’s opinion for the majority, however, held that “in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there.”¹³ According to the majority, “something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.”¹⁴

As several scholars have noted, there are many ambiguities inherent in this so-called “major questions doctrine.”¹⁵ First, it is hardly self-evident what constitutes an “extraordinary case,” or a case involving issues of “vast economic and political significance.” The Court simply says that this question boils down to “common sense” and gives no guidance. We might thus expect much judicial randomness with respect to the threshold issue of whether a case poses a “major question,” with judges deciding this issue based on their political leanings more than on any objective factors. Second, even if a case is “major,” it is similarly ambiguous how “clear” Congress needs to be in order for an agency claim to power to survive judicial scrutiny. Again, the Supreme Court gives virtually no guidance on this issue, and, again, we might expect many random results.

C. Is Preemption a Major Question? Often, Maybe Always.

Aside from the general objections to the so-called major questions doctrine, there is also the question of how this doctrine would play out in various areas of law. We focus on preemption, which has an impact on every substantive area and may well prove to be a major unintended consequence of the Court’s major questions jurisprudence.

Whether federal law preempts state law is often, and perhaps always, a major question. The reason is simple: preemption involves one sovereign (the federal government) displacing the power of another sovereign (state governments). Preemption thus almost always involves an issue of “vast political significance”—a direct displacement of state political power, often in areas where the state has an interest in regulating.¹⁶ Federal preemption deprives state governments of the opportunity to make their own political choices, such that there “can be no experimentation or

¹² *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2604 (2022) (citation omitted).

¹³ *See id.* at 2609 (citation omitted).

¹⁴ *Id.* (citation omitted).

¹⁵ *See, e.g.,* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 287 (2022) (explaining that the major questions doctrine is open to “selective application and judicial discretion”). Our novel contribution here is in explicating how the major questions doctrine undercuts federal preemption and thus may empower state regulation.

¹⁶ For example, much of federal preemption involves federal law preempting state tort law, but “[f]ederalism principles counsel a strong reluctance to displace state tort remedies, for those remedies entail the states’ historic power to protect the health and safety of their citizens and to redress injuries” and “[i]f those remedies are deemed preempted by federal safety regulations, the injured victim typically will be left without any means of obtaining compensation from the wrongdoer. That is so because federal regulations usually do not contain a damage remedy, but rather are designed only to deter conduct and prevent injury.” Betsy Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. Rev. 559, 613-615 (1997).

policy diversity, and little point to citizen participation” at the state level.¹⁷ As one scholar has pointed out, “preemption may be the most important issue for modern federalism theory because it reallocates regulatory authority between the national and state governments. Constricting state regulatory authority reduces states' capacity to provide benefits to their citizens, which in turn diminishes states' effectiveness at checking national expansionism in the political process—a critical prerequisite for a functioning set of ‘political process’ safeguards for federalism.”¹⁸

III. Implications of the Major Questions Doctrine for Preemption

A. Preemption Law, In Brief

Despite the fact that preemption is often, if not always, a major question, there is little debate that Congress can preempt state law if it expressly chooses to do so. Congress often expressly preempts state law in a federal statute.¹⁹ However, in cases involving “the historic police powers of the States, such as their power to regulate matters of health and safety,” state laws “are not to be superseded unless preemption was the clear and manifest purpose of Congress.”²⁰ For courts, “Congress's intent is our ultimate touchstone,” and courts “look to the language, structure, and purpose of the relevant statutory and regulatory scheme to develop a reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.”²¹

Even where an express preemption provision is absent from federal law, or federal law is ambiguous, federal law has been held to implicitly preempt state law. This implied preemption can be either “field” preemption or “conflict” preemption. For field preemption, “in the absence of explicit statutory language, federal law will preempt law that regulates conduct in a field that Congress intended the federal government to occupy exclusively.”²² In other words, “[f]ield preemption exists if Congress creates a scheme of regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”²³

For conflict preemption, “state law will be preempted to the extent that it actually conflicts with federal law.”²⁴ “Conflict preemption exists if compliance with both federal and state regulations is a ‘physical impossibility,’ or if the state law is an obstacle to the accomplishment and execution of the purposes and objectives of Congress in enacting the federal law.”²⁵

¹⁷ See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1850 (2004) (“Preemption doctrine . . . goes to whether state governments actually have the opportunity to provide beneficial regulation for their citizens; there can be no experimentation or policy diversity, and little point to citizen participation, if such opportunities are supplanted by federal policy.”).

¹⁸ Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 513 (2010).

¹⁹ See, e.g., *Shuker v. Smith & Nephew*, 885 F.3d 760, ___ (3rd Cir. 2018).

²⁰ *Id.* at 771.

²¹ *Id.* See also *Cipollone v. Liggett Grp.*, 505 U.S. 504, 529 n.27, 112 S. Ct. 2608, 2624 n.27 (1992) (“our ambition here is not theoretical elegance, but rather a fair understanding of congressional purpose”).

²² See Karen Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1157 (1998).

²³ *Schoolcraft Mem'l Hosp. v. Mich. Dep't of Cmty. Health*, 570 F. Supp. 2d 949, 958 (W.D. Mich. 2008) (citation and internal quotations omitted).

²⁴ Jordan, *supra* note 21, at 1157.

²⁵ *Schoolcraft*, 570 F. Supp. 2d at 958 (citation omitted).

Importantly, both field and conflict preemption operate in the absence of clear congressional authorization to preempt. While some courts have described implied preemption as coming into play only when congressional intent is clear,²⁶ the fact remains that preemption in this context is implicit precisely because Congress has *not* spoken and has *not* given a clear statement of intent to preempt.²⁷ How, then, do we square implied preemption with the major questions doctrine? We examine several different areas of preemption jurisprudence.

B. Congressional Silence Should Be Insufficient To Authorize An Agency To Preempt By Rulemaking

The area of preemption jurisprudence that seems most vulnerable to challenge under the major questions doctrine is where federal regulation, not federal statutory law, preempts state law. Federal administrative agencies can seek to preempt state law in myriad ways. They may, for example, interpret federal statutes to expand their implicit preemptive effect, or they may directly interpret an express preemption provision of federal law.²⁸ But where federal regulation itself preempts state law, the preemption does not stem directly from a federal statute but rather is one step removed, thereby highlighting the concerns over agency power that animated the Supreme Court in *West Virginia v. EPA*.

Courts have long held that “[p]reemption is not limited to acts of Congress. Federal regulation may also preempt state law.”²⁹ Courts have also made clear that “unless the underlying statute expressly preempts state law, there is, as a practical matter, a strong presumption against preemption by regulation.”³⁰ However, this presumption has been overcome in cases where an agency possesses the power to regulate along with a general mandate to oversee a certain area of regulation.³¹

Agencies can seek to preempt state law in two ways, even when the relevant federal statutes contain no express preemption clauses and no express provisions giving the federal agencies the power to decide whether to preempt state law. First, a federal agency can shape a regulation that obviously conflicts with state law, even though the federal agency *could have* drafted a regulation consistent with the federal statute.³² Second, a federal agency itself can declare that federal

²⁶ *Id.* at 958 (“[P]reemption is implied by a clear congressional intent to preempt state law.”).

²⁷ See Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 271 (2011) (explaining that “[t]he presumption against preemption has generally been just that—a *presumption*, not a clear statement rule,” otherwise courts would only recognize express preemption, not implied preemption).

²⁸ See Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (discussing Chevron deference in this context).

²⁹ *Schoolcraft*, 570 F. Supp. 2d at 958.

³⁰ *Id.*

³¹ See, e.g., *In re Initial Pub. Offering Antitrust Litig.*, 2004 U.S. Dist. LEXIS 6248, at *9 (S.D.N.Y. Apr. 13, 2004) (“the SEC, both directly and through its pervasive oversight of the NASD and other SROs, either expressly permits the conduct alleged in the Sherman Act Complaint or has the power to regulate the conduct,” and possesses a “unique mandate to balance competition with other market concerns”) (citation omitted). See generally David A. Dana, *DEMOCRATIZING THE LAW OF FEDERAL PREEMPTION*, 102 NW. U. L. REV. 507, 510 (2008) (noting that courts sometimes ignore the presumption).

³² See, e.g., *United States v. Shimer*, 367 U.S. 374, 382-83 (1961) (holding that if the federal agency’s choice not to take advantage of state law “represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”).

regulation preempts state law, even in the absence of an obvious conflict.³³ While there is some debate as to whether an agency can preempt state law solely through an express statement of preemption or whether there needs to be some actual conflict between the federal regulation and state law,³⁴ there is little question that federal agencies can craft rules that preempt state law even when Congress itself does not expressly preempt state law.

However, preemptive regulation where Congress itself did not expressly preempt seems to directly contradict the major questions doctrine. The Court in *West Virginia* was clear that given both separation of powers principles and a practical understanding of legislative intent, the agency must point to “clear congressional authorization” for the authority it claims.³⁵ In many cases of regulatory preemption, however, there is no clear congressional authorization for the agency to preempt. Moreover, where an agency preempts through regulation, separation of powers concerns are even further heightened because such preemption is the result of an agency acting on its own volition. Indeed, there is some reason to believe that Congress would never intend agencies to preempt by rulemaking.³⁶ In other words, preemption through regulation involves an executive agency using a broad grant of power from Congress to preempt another sovereign even where Congress itself has not demanded such preemption. This might prove especially problematic where agencies seek to expand their own power at the expense of states (with agency aggrandizement of power being one of the main animating concerns of the Supreme Court in *West Virginia*).³⁷ Because preemption is often, perhaps always, a major question given the curtailing of state sovereignty, regulatory preemption in cases of congressional silence seems to run afoul of the major questions doctrine.

C. Congressional Silence Should Be Insufficient For Implied Field Preemption

While regulatory preemption appears most vulnerable to a major questions challenge given the heightened separation of powers concerns, the major questions doctrine also calls into question many instances of implied field preemption. Here, too, we face a situation where federal law is deemed to preempt state law without an express statement from Congress. Moreover, because field preemption almost always involves federal administrative agencies as the party enacting the comprehensive federal regulation, we face similar (though perhaps not as stark) separation of powers concerns as in the case of regulatory preemption.

³³ See *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (stating that beyond conflict preemption, “in proper circumstances the agency may determine that its authority is exclusive”); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Fidelity Federal Sav. and Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (stating that the relevant question is whether the “Board meant to preempt” state law).

³⁴ See Mendelson, *supra* note 28, at 754 n.67.

³⁵ *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2595 (2022) (citation omitted).

³⁶ See Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 *FORDHAM L. REV.* 703, 721 (2014) (“over half of the rule drafters surveyed already do not assume Chevron deference applies to agency preemption decisions”); cf. Abbe R. Gluck & Lisa S. Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part 1* 65 *STAN. L. REV.* 901 (2013) (describing an empirical study of federal statute drafters and showing how their assumptions of interpretive rules often departed from those applied by the courts).

³⁷ For an argument against agency preemption, see Mendelson, *supra* note 28, at 740-42 (arguing that “Chevron deference to agency interpretations of the preemptive effect of statutes is nonetheless inappropriate” because such preemption “may result in inadequately constrained decisionmaking processes” and “might increase the risk that agencies would inappropriately expand their own authority at the expense of the states.”). See also Ernest A. Young, *Executive Preemption*, 102 *NW. U. L. REV.* 869, 870-71 (2008).

Once again, because field preemption involves an infringement upon state sovereignty, it appears to involve a “major question,” or a question of “vast political significance,” not least because “preemptive federal action threatens to cut off state access to the wellsprings of popular support.”³⁸ Moreover, because field preemption is merely *implied* from congressional silence, it seems to also run afoul of the *West Virginia* court’s mandate that there needs to be some “clear congressional authorization” before the federal government assumes powers in such areas of “vast political significance.”³⁹ Cases of field preemption generally do *not* involve direct conflicts between federal and state law (otherwise they would fall under the category of conflict preemption), nor do they involve expressly preemptive statements by Congress (otherwise they would fall under the category of express preemption), meaning that the infringement upon state sovereignty is at best implied from a comprehensive federal program.

One response might be to argue that *West Virginia* was concerned merely with delegation to a federal agency and did not purport to establish a “major questions” test for the viability of federal law more generally. However, there seems to be little difference between Congress directly regulating private parties and Congress delegating to an agency the power to regulate private parties. Moreover, in the vast majority of cases, a field preemptive federal law—or a law that “so occupies the field” of regulation that it leaves no room for states to act—is in fact administered by some federal agency, making field preemption quite close to regulatory preemption in most cases.⁴⁰

Thus, if regulatory preemption runs afoul of the major questions doctrine, it is only a small additional step to hold that field preemption more generally can no longer pass muster under the Supreme Court’s test. Here, too, we have the federal government assuming power in an area of great political significance without the requisite clear congressional authorization to do so.

D. Congressional Silence Should Be Insufficient For Implied Conflict Preemption

Finally, we turn to the area of implied conflict preemption, where federal and state law conflict such that it is impossible to comply with both. In such instances, courts have generally held the state law preempted even without a clear congressional authorization. While this is an area where courts will be tempted to uphold the preemptive effect of federal law by virtue of the obstacle state law may pose to full compliance with federal law, it is nonetheless an area that also lacks any “clear congressional authorization” to preempt. As such, it remains vulnerable to a “major questions” challenge.

One possible judicial resolution would be to cabin conflict preemption narrowly to cases where there is a direct conflict between federal and state law, such that it is literally impossible to comply with both. In such cases, courts could hold that there is in effect a “clear congressional authorization” to follow federal law, as Congress could not intend that state law be preserved at the costs of compliance with federal law.

However, in cases of “softer” conflict preemption, where state law merely stands as an “obstacle” to federal law but both federal and state law could technically be followed, courts might

³⁸ See Young, *supra* note 27 at 264.

³⁹ Moreover, “[a]pplication of a ‘clear and manifest rule’ before preempting state tort claims would have the added benefit of forcing Congress to speak more clearly.” Grey, *supra* note 16 at 617.

⁴⁰ See *Fellner v. Tri-Union Seafoods*, 539 F.3d 237, 243 (3d Cir. 2008) (“Where Congress has delegated the authority to regulate a particular field to an administrative agency, the agency’s regulations issued pursuant to that authority have no less preemptive effect than federal statutes, assuming those regulations are a valid exercise of the agency’s delegated authority”) (citation omitted).

decide that there is no “clear congressional authorization” to preclude a party from following state law in addition to federal law. Indeed, for years, some scholars have called for the Supreme Court to cut back on preemption in precisely such cases, reserving preemption for cases where Congress has been extremely clear about its desire to preempt state law, or the rare cases where federal and state law are in direct conflict such that it is literally impossible to comply with both.⁴¹ As one scholar has noted, “commentators have criticized [obstacle preemption] for giving too much discretion to the courts in construing the purposes of federal law and for paying insufficient regard to whether Congress actually intended to preempt state laws.”⁴²

IV. West Virginia’s Power as an Anti-Preemption Argument: States’ and Localities’ Climate Adaptation Suits

As discussed above, *West Virginia v. EPA*’s reasoning undercuts arguments based on implied preemption of various kinds, as well as express preemption by agency rule. A very wide range of state climate change initiatives already have been challenged on preemption grounds.⁴³ Here, we focus on one such state initiative—state lawsuits against energy companies seeking recovery of the costs they have borne and will bear adapting to climate change.⁴⁴ Energy companies argue that such suits are impliedly preempted both by the decisions of federal agencies like EPA and by the federal Clean Air Act itself. Moreover, if it becomes politically feasible, the energy companies presumably will lobby EPA and other agencies for rule(s) expressly purporting to preempt such suits. *West Virginia v. EPA* provides a counter to these preemption strategies, as we detail below.

First, some background on these suits and their relevance to climate change policy is in order. Broadly speaking, litigation is one of the tools governments and non-governmental actors have used to address climate change.⁴⁵ In the United States, this litigation has taken three major forms: suits using current federal and state environmental and other law; suits seeking to compel government(s) or companies to institute reductions in greenhouse gas emissions using a federal common law, federal constitutional or other non-statutory theory; and, third and finally, suits against major energy/oil companies seeking damages for the costs that the government plaintiffs have or will incur in adapting to climate change by, among many things, addressing sea level rise

⁴¹ See Betsy Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 565 (1997) (“When Congress has manifested no express intent to preempt, courts should reject private tort remedies only when compliance with the obligations imposed by both state tort law and federal law is impossible”); see also *id.* at 626 (noting that “impossibility of compliance is rare”).

⁴² *Id.* at 623.

⁴³ See, e.g., Tyler Runsten, *Climate Change Regulation, Preemption, and the Dormant Commerce Clause*, 72 HASTINGS L.J. 1313 (2021) (explaining that “preemption is one of the federal government’s strongest tools to limit states’ authority to regulate climate change” and that “[p]reemption challenges have been increasing lately and have largely succeeded”).

⁴⁴ See, e.g., David A. Dana, *Public Nuisance When Politics Fails*, 83 OHIO STATE UNIV. L. REV. 61, 70-92 (2022) (describing these lawsuits).

⁴⁵ For a list of lawsuits, see COLUM. CLIMATE SCHOOL SABIN CENTER FOR CLIMATE CHANGE LAW, *Climate Change Litigation*, <https://climate.law.columbia.edu/content/climate-change-litigation> (last visited Feb. 3, 2022) (tracking over 1000 climate change lawsuits across the world).

and its threats to human settlements and infrastructure.⁴⁶ To date, at least twenty-two state and local governments have brought such climate adaptation suits.⁴⁷

These climate-adaptation suits for damages have been brought both under a federal common law theory of public nuisance (or something similar) and under a state common law theory of public nuisance. Public nuisance, whether federal or state, is generally defined as an unreasonable interference with a public right.⁴⁸

States' and localities' federal common law claims have been uniformly dismissed by the federal courts, albeit on a wide number of (highly contestable) theories.⁴⁹ Therefore, in the last few years, states and localities have brought their climate adaptation suits solely under state law, and almost always in state court. The suits are modelled after suits by states and localities against opioid drug manufacturers for the governments' costs of addressing the opioid crisis and suits brought against the tobacco companies for governments' costs of addressing the public health harms from tobacco.⁵⁰

The basic theory of these state-public-nuisance, climate-adaptation suits is that the energy companies misled the public and governments about the risks of climate change, and as a result, climate change has been allowed to occur on a scale that will cause the plaintiff substantial costs to adapt to climactic effects, even assuming the world now undertakes substantial, effective mitigation and a shift to a decarbonized economy. Each government plaintiff seeks only damages from the public nuisance of climate change that are particular to its geographical area and specific adaptation needs.⁵¹ At least in theory, each corporate defendant would be responsible for a share of a state's or locality's adaptation costs that is proportional to the share of the greenhouse gas emissions for which the defendant was responsible.⁵²

For a variety of reasons, these suits have disadvantages when compared against a federal adaptation funding mechanism funded in part by appropriate taxes on energy companies.⁵³ However, the reality is that sufficient federal adaptation funding is by no means guaranteed. Moreover, given the historic power of energy companies over the Senate and the filibuster requirement of 60 votes to pass controversial legislation, it is next to impossible to suppose such

⁴⁶ See Hari M. Osofsky, *Litigating Climate Change Infrastructure Impacts*, N.U. L. REV. (forthcoming 2023) (citing JACQUELINE PEEL & HARI M. OSOFSKY, *CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY?* (2015)).

⁴⁷ The name and a short description of each suit is available at SABIN CENTER FOR CLIMATE CHANGE LAW, U.S. Litigation Chart, <http://climatecasechart.com/case-category/common-law-claims/> (last visited Feb. 3, 2022).

⁴⁸ See RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1977).

⁴⁹ See, e.g., *Native Village of Kivalina v. Exxon*, 696 F.3d 849, __ (9th Cir. 2012) (affirming the dismissal of federal common law claims of public nuisance against energy and utility companies for damages related to the sinking of the village into the sea).

⁵⁰ See Dana, *supra* note 45, at 61-65.

⁵¹ *Id.* at 99-102.

⁵² See Jessica Wentz and Benjamin Franta, *Liability for Public Deception: Linking Fossil Fuel Disinformation to Climate Damages*, 52 ENVTL. L. REP. 10995, __ (2022).

⁵³ Among other things, federal funding coupled with taxes could allow for a more rationalized process than a decentralized litigation approach, such that the allocation funding to each jurisdiction would be based on a consistent set of criteria. See generally Jonathan H. Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J. L. ECON. & POL. 217, 250 (2022) ("there are serious arguments for centering climate change policy").

taxes could ever be enacted, even if Democrats retain control of the Presidency and all of Congress, at least absent some buy-in from the energy companies themselves.⁵⁴

Therefore, these suits warrant real policy consideration. The most obvious potential of successful suits would be to provide a source of funding for adaptation efforts that otherwise might not be undertaken. Any awards against energy companies would also serve as precedents that may incentivize corporations going forward to minimize the environmental harms associated with the products they produce and market, as well as to disclose those risks as fully and promptly as possible. Even if plaintiffs in these suits do not ultimately prevail, the discovery phase of the suits might reveal information about the companies' knowledge and conduct suppressing climate risks, as well as the causal links between that conduct and adaptation costs. That information, along with the defendant companies' desire to avoid large state court judgments, might alter the federal political landscape by building more broad public support for federal legislation and by convincing at least some of the companies that legislation is a less expensive, less disruptive path than continuing litigation.⁵⁵

But none of the possible benefits of the climate adaptation suits can be realized if they are dismissed on federal preemption grounds before discovery can even commence. The defendant energy companies, in fact, have two opportunities to argue preemption. First, in seeking the removal of suits filed in state court to federal court (which the companies regard as a friendlier venue), the companies can argue "complete preemption" as a basis for removal; if the federal court agrees to removal on the basis of complete preemption, the suit will then be dismissed as preempted.⁵⁶ Second, if the federal courts deny removal and the suits remain in state court, the companies can and certainly will argue that the claims are preempted in whole or in part. When the state and local governments succeed in keeping the suits in state court, the energy companies will not be restricted to just rehashing the preemption arguments they made in fighting for removal—they can add and refine arguments.

In the course of fighting vigorously to remove these suits from state court, the corporate defendants have made clear they will press at least two lines of federal preemption arguments. First, the corporate defendants have argued that the climate adaptation suits, sounding in nuisance, undermine the cost-benefit analyses federal agencies conduct to determine efficient or desirable levels of fossil fuel production and consumption. According to the defendants, the suits threaten the operations and decisions of the federal administrative state, which has already completed the social utility balancing the law of nuisance calls for and impliedly determined that fossil fuel

⁵⁴ For example, oil companies were able to score "big wins" in a federal infrastructure bill even with Congress controlled by Democrats and despite criticism from environmentalists. See Leslie Kaufman, *Infrastructure Bill Has Big Wins for Oil, Climate Advocates Say*, BLOOMBERG (Aug. 6. 2021), <https://www.bloomberg.com/news/articles/2021-08-06/biden-s-agenda-is-tainted-by-oil-interests-say-climate-advocates#xj4y7vzkg>.

⁵⁵ On the ways complicated ways public nuisance litigation can inform and fuel regulation, see Nora Engstrom & Robert Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 350-360 (2021); Dana, *supra* note 45, at 115 ("even half-measures on the part of courts, even a court simply refusing to immediately dismiss a public nuisance suit, may result in reductions in public harm by prompting harm-reducing actions on the part of ... governments").

⁵⁶ *City of Hoboken v. Exxon*, 558 F. Supp. 3d 191, ___ (D.N.J. 2021) (explaining that the complete preemption inquiry in the removal context is distinct from the consideration of the defendants' preemption defense on its own terms, and that "Defendants may ultimately prevail with their federal preemption defense argument" even when preemption does not justify removal to federal court).

production and sale is not a nuisance. Hence, these claims are completely preempted. Consider this excerpt from a recent brief filed by the corporate defendants in the public nuisance suit brought by the City of Baltimore:

Plaintiff’s nuisance claims require a determination of whether the harm allegedly caused by Defendants’ conduct outweighs the benefits of that conduct to society. *See City of Oakland*, 325 F.Supp. 3d at 1026 (resolving plaintiffs’ nuisance claim would require weighing the “conflicting pros and cons” of fossil fuel consumption and global warming); *Tadger v. Montgomery Cty.*, 300 Md. 539, 552 (1984) (defining public nuisance as “an unreasonable interference with a right common to the general public”)

For decades, federal law has required agencies to weigh the costs and benefits of fossil-fuel extraction. . . . An agency may impose a significant regulation “only upon a reasoned determination that the benefits ... justify its costs.” Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). . . .

Plaintiff would invite a state court factfinder to adjudicate the reasonableness of these federal agencies’ balancing of harms and benefits. This action thus amounts to a “collateral attack” on federal agencies’ regulatory decisions.⁵⁷

This kind of preemption-based-on-interference-with-agency-decisions argument is not novel: as already discussed, agencies like the FDA and DoT can and sometimes do make exactly this kind of argument in favor of preemption as part of an agency rule. And, as discussed, such preemption by agency rule sometimes succeeds in the federal courts.

Here, however, none of the arguably relevant agencies—EPA, DoE, or DoT—have said anything in rulemaking or otherwise to the effect that the state lawsuits against the energy companies will interfere with the decisions they have made. Explicit support from the relevant federal agencies would greatly strengthen the companies’ agency-centric preemption argument.

We could see just such explicit support in the next administration, depending on who is elected. The behavior of agencies during the Trump Administration—which might not differ much from the behavior of agencies during any Republican Administration beginning in 2025—suggests that an agency rule or other statements advocating preemption of all the climate adaptation suits is indeed within the realm of possibility. Under the Trump Administration, the EPA and DoT issued the SAFE rule in September 2019 that cancelled the waiver that allowed California to maintain its own tailgate emissions and LEV mandates and more generally purported to preempt any state or local law or initiative that directly or indirectly affected fuel economy.⁵⁸ The legal and factual grounding for this so-called SAFE rule was contestable, and the Biden Administration withdrew it before courts could decide its validity.⁵⁹ But the same forces of political economy—the same

⁵⁷ Opening Brief for Appellant at 33, *City of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020) (No. 19-1644), 2019 WL 3491806, at *33.

⁵⁸ *See* Environmental Protection Agency, News Release: Trump Administration Announces One National Program Rule on Federal Preemption of State Fuel Economy Standards (Sep. 19, 2019), <https://www.epa.gov/newsreleases/trump-administration-announces-one-national-program-rule-federal-preemption-state-fuel>.

⁵⁹ *See* Tyson Fisher, *Biden administration moves on stricter emission standards*, LAND LINE, <https://landline.media/biden-administration-moves-on-stricter-emissions-standards/>.

lobbying—that produced the SAFE rule could produce an EPA, DoT or DoE rule that purports to preempt the climate adaptation suits as contrary to the cost-benefit balancing inherent in national energy, environmental, transportation and infrastructure decisionmaking and planning.

The energy companies also argue implied statutory preemption of the state public nuisance claims, relying on the Clean Air Act and (to a lesser degree) the Outer Continental Shelf Lands Act.⁶⁰ The gist of their Clean Air Act argument is that the adaptation suits violate the logic and structure of the Clean Air Act because that Act does not allow a State to address the effects of emissions of pollutants that occurred outside the State, and that is precisely what the adaptation suits in effect do:

The CAA establishes the exclusive vehicle for regulating nationwide emissions of air pollutants to “promote the public health and welfare and the productive capacity of its population.” . . . At the heart of this system are emission limits, permitting, and related programs set by the EPA, which reflect the CAA’s dual goals of protecting both public health and welfare and the nation’s productive capacity. . . . The district court rejected complete preemption, stating that there is no “indication that Congress intended for these causes of action in the CAA to be the exclusive remedy for injuries stemming from air pollution.” . . . But the CAA authorizes states to impose additional restrictions only on *in-state* emissions, and to provide remedies only for localized injuries stemming from in-state air pollution. . . . Nothing in the CAA suggests that Congress intended that state law be used to regulate *nationwide* (and worldwide) emissions.⁶¹

This implied statutory preemption argument runs into the problem that the Clean Air Act contains an express savings clause, which preserves “any right which any person . . . may have under . . . common law to seek enforcement of any emission standard or limitation or to seek any other relief.”⁶² Nonetheless, in the only appellate decision to date that addresses preemption on the merits, the Second Circuit in *Chevron v. New York* dismissed New York’s climate adaptation claims under New York law as, in effect, impliedly preempted by the Clean Air Act.⁶³ The Second Circuit’s reasoning is somewhat convoluted,⁶⁴ but the decision’s upshot is clear enough. The court explained that New York’s state law claims were somehow preempted by federal common law, and then posited that federal common law in turn was displaced—barred, as in preempted—by the Clean Air Act. Although the Court’s reasoning is gymnastic, it boils down to saying that the Clean Air Act simply leaves no room for state court common law claims tied to greenhouse gas emissions; or, in the Court’s own words, “[a]t bottom, it is enough to say that the issues raised in this dispute concerning domestic emissions are squarely addressed by the Clean Air Act.”⁶⁵

In deciding the preemption question as applied to the state climate adaptation suits, *West Virginia v. EPA* should figure prominently, especially in the plaintiffs’ arguments. The Second Circuit’s decision in *Chevron*—again, the only preemption decision on the merits to date—predated *West Virginia v. EPA*. If the Second Circuit, or for that matter any state or federal court, were today to address the preemption issue, *West Virginia v. EPA* would be highly relevant as a

⁶⁰ Opening Brief for Appellant, *supra* note 58, at 34-36.

⁶¹ *Id.* at 35.

⁶² 42 U.S.C. § 7604(e)

⁶³ *City of New York v. Chevron Corp.*, 993 F.3d 81, 86 (2d Cir. 2021).

⁶⁴ See generally Adler, *supra* note 54 (criticizing the opinion’s logic).

⁶⁵ *City of New York*, *supra* note 64, at 86.

very recent (and certainly the most recent) Supreme Court statement on what Congressional silence means with respect to major issues such as preempting state common law suits and, in particular, what it means with respect to the scope of federal agency authority.

Given *West Virginia*, it should be very difficult for the energy companies to convince a court that Congress in the Clean Air Act impliedly gave EPA or any other federal agency the authority to decide whether or not to preempt state adaptation suits; after all, preemption of that sort is not squarely in the “lane” or core business of EPA, such preemption could have substantial economic consequences (as the defendants in the lawsuits themselves argue), and preemption in general has not been and is not politically uncontroversial. Thus, *West Virginia v. EPA* should undercut the energy companies’ agency-based preemption argument, even if, in a future presidential administration, EPA and/or other federal agencies were to promulgate a rule purporting to preempt state adaptation suits.

Likewise, *West Virginia v. EPA*’s construction of statutory silence as not impliedly tackling major questions seems to run counter to the companies’ argument that the Clean Air Act directly, but only impliedly, preempts the state adaptation lawsuits. Nonetheless, federal and state courts may come to differing conclusions as to what *West Virginia* means for the preemption of the state lawsuits, so, ultimately, it may be the Supreme Court’s conservative majority that will be called upon to decide whether it will apply the logic of *West Virginia*—logic the sitting Justices in that majority endorsed—even in situations where they may be ideologically sympathetic to preempting state law.

V. Conclusion

West Virginia has been widely read as an attack on climate regulation and on ambitious, creative, effective regulation of all sorts. But there is another side to *West Virginia*’s controversial major questions doctrine: that doctrine strongly undercuts claims of federal agency preemption, field preemption, and, to a lesser extent, federal conflict preemption. Invoking *West Virginia*, states and localities should be able to carve out a larger sphere of freedom in which to tackle pressing problems, including, but not limited to, climate change. That larger sphere of freedom includes the states’ and localities’ suits to force major companies to internalize some of the social costs of their fossil fuel products. Although this was almost certainly not the Supreme Court’s intent, *West Virginia* may propel those suits towards a real hearing on the merits.