The Major Questions Doctrine: Unfounded, Unbounded, and Confounded

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As explicated by the Supreme Court in West Virginia v. EPA *in 2022, and reaffirmed in* Biden v. Nebraska *in 2023, the "major questions doctrine" provides that an administrative agency's rule in a "major" case must rest on "clear congressional authorization." Many commentators have deplored the major questions doctrine on the basis of its policy consequences. This Article offers a critique of the doctrine from a different angle. It primarily contends that the reasons the Court has given for enforcing the doctrine do not withstand scrutiny, even on their own terms.*

In West Virginia *and* Nebraska*, the Court relied heavily on its prior precedents. But this Article's review of the history of the doctrine highlights the Court's repeated use of overstatements of the holdings in these prior cases as a substitute for giving reasons to justify the doctrine's expanding scope.*

The majority and concurring opinions in West Virginia *and the concurring opinion in* Nebraska *offered some normative arguments on behalf of the doctrine, but this Article takes issue with them. For example, the doctrine's supposed foundations in the nondelegation doctrine and other separation of powers principles are unsatisfactory, because they do not supply a credible basis for distinguishing major rules from non-major rules. Moreover, the major questions doctrine appears to make overly optimistic assumptions about the extent to which our currently polarized and dysfunctional Congress can be counted on to resolve pressing and important social policy problems itself.*

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Thus, the Court has not provided an adequate justification for the major questions doctrine, which threatens not only to weaken administrative governance, but also to politicize the Court's decision-making in cases involving major questions (a regrettably ill-defined term). Although the Court may be unlikely to abandon the doctrine entirely, this Article's analysis suggests that the Court should apply it restrictively rather than expansively.

INTRODUCTION

The "major questions doctrine" has recently emerged as the most widely discussed trend in the law governing the scope of judicial review of administrative rules. The doctrine has no precise definition and has evolved over time. Originally understood as a limitation on judicial deference to agency interpretations, it is now more often explained as a clear statement rule or a presumption against agency authority. A commonly repeated formulation is the Supreme Court's declaration in *Utility Air Regulatory Group v. EPA*[1] that "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[2]

Whatever the terms in which it is couched, the major questions doctrine has mushroomed into an enormously prominent phenomenon for the administrative law practitioner.[3] Attention to this phenomenon has become especially intense as a result of decisions by the Supreme Court during and after 2021. The Court relied in part on the doctrine when it invalidated a moratorium on tenant evictions[4] and a mandate that workers at numerous large employers be vaccinated or regularly tested[5]—two measures that the Biden administration had adopted in response to the COVID-19 pandemic. In 2022, this series of cases came to a head in *West Virginia v. EPA*,[6] in which the Court relied squarely on the major questions doctrine as the basis for invalidating a rule that the Obama administration had adopted to reduce climate change. The case featured lengthy discussion of the doctrine in a majority opinion by Chief Justice Roberts,[7] a boldly expansive concurring opinion by Justice Gorsuch, joined by Justice Alito,[8] and a heated dissent written by Justice Kagan, joined by two other dissenting Justices.[9] The Court's decision a year later in *Biden v. Nebraska*,[10] which nullified the administration's student loan forgiveness program by a sharply divided vote, demonstrated that the disagreements within the Court had not abated.

Professional commentary on the major questions doctrine has been plentiful, to put it mildly, in law reviews, online legal journals, blogs, and panel

1. 573 U.S. 302 (2014).
2. *Id.* at 324.
3. *See* Erin Webb, *Major Questions Doctrine Filings Are Up in a Major Way*, BLOOMBERG NEWS (Feb. 1, 2022), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-major-questions-doctrine-filings-are-up-in-a-major-way [https://perma.cc/S4PP-ZP4B] ("The major questions doctrine was rarely argued in federal courts by name before 2018, . . . [but] the phrase appeared a record 69 times in federal filings in 2021," because "[t]he current Supreme Court is receptive to it."); *see also* Pamela King, *Inside a Legal Doctrine that Could Derail Biden Climate Regs*, GREENWIRE (Apr. 11, 2022), https://www.eenews.net/articles/inside-a-legal-doctrine-that-could-derail-biden-climate-regs/ [https://perma.cc/SAV2-L2RK] (quoting a lawyer at Covington & Burling, a prestigious Washington, D.C. law firm: "All the cool kids are now citing the major questions doctrine.").
4. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758 (2021).
5. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109 (2022).
6. 597 U.S. 697 (2022).
7. *Id.* at 706–35.
8. *Id.* at 735–53 (Gorsuch, J., concurring).
9. *Id.* at 753–84 (Kagan, J., dissenting).
10. 143 S. Ct. 2355 (2023).

discussions.[11] Some of these analyses have been supportive of the doctrine, but the great majority have been critical. Normative debate regarding the doctrine has most often been framed in terms of its policy implications, inflected with a strongly ideological dimension.[12] By its nature, the doctrine has a libertarian or "anti-administrativist" thrust.[13] Indeed, this framing grows naturally out of the ideologically polarized state of public policy debate in society generally.

This Article has a different focus. I argue that the major questions doctrine cannot be defended even on the Court's own terms. In the words of the title of this Article, I refer to the doctrine as *unfounded* because the appeals to precedents, constitutional principles, and political theories that the Court or individual Justices have offered to defend the doctrine are not very persuasive; *unbounded* because of the enormous uncertainty that the Court has created regarding the reach of the doctrine; and *confounded* because of the perplexity that the Court's shifting explanations have created.[14] The issues surrounding the doctrine are timely and pressing, as the continuation of this debate in *Biden v. Nebraska* confirmed.

Of course, the policy and analytical critiques of the major questions doctrine are not sharply distinct. Indeed, the current debate over the doctrine can be understood as reflecting, at least in part, a much broader controversy regarding the legitimacy of the Court's decision-making. Transformative rulings in a variety of public law cases have given rise to accusations that the

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11. For an extensive compilation of sources, *see* Beau J. Baumann, *Volume IV of the Major Questions Doctrine Reading List*, YALE J. ON REGUL.: NOTICE & COMMENT (Aug. 14, 2023), https://www.yalejreg.com/nc/volume-iv-of-the-major-questions-doctrine-reading-list-by-beau-j-baumann/ [https://perma.cc/Y64U-6VAN].

12. *See* Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 175–76 (2022); *see also* Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55, 58–59 (2023) (warning that the rise of the major questions doctrine will strip the executive of its ability to make foreign affairs and national security policy); David B. Spence, *Naïve Administrative Law: Complexity, Delegation and Climate Policy*, 39 YALE J. ON REGUL. 964, 969–70 (2022) (claiming that the doctrine will create regulatory chaos and delegitimize existing regulatory regimes, such as those in the environmental and energy sectors); Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, ATLANTIC (July 26, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/ [https://perma.cc/PH6T-ZQT8] (asserting that the "obvious result" of the doctrine is that the federal government will have little ability to address many of the "biggest issues society faces"); Peter M. Shane, *Conservative Supreme Court Justices v. Statutory Text, the Constitution, and Public Safety*, WASH. MONTHLY (Jan. 31, 2022), https://washingtonmonthly.com/2022/01/31/conservative-justices-versus-legal-text-the-constitution-and-public-health/ [https://perma.cc/J94X-XEYL] (arguing that the Court's use of the doctrine in handling the OSHA vaccine standards signals the "possibility of devastating judicial interference with the federal government's capacity to protect American's health and welfare more generally"); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine,* 74 ADMIN. L. REV. 217, 255–62 (2022) (criticizing the Trump administration's attempts to use the major questions doctrine to weaken environmental regulation).

13. *See* Gillian E. Metzger, *Foreword: 1930's Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017) (coining the term "anti-administrativism").

14. "Confounded" can mean "confused" or "perplexed," but also "damned" or "blasted." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 477 (1961). I do not necessarily disagree with the latter connotation, but the former is what I will defend here. *Cf.* 2 JOHN MILTON, PARADISE LOST 996 (1667) ("Confusion worse confounded.").

conservative majority Justices' political ideologies have been exerting influence on the Court's output.[15] Members of the Court itself have felt a need to defend the Court against allegations of politicized decision-making.[16] In the case of the major questions doctrine, the Court's rhetorical position seems to be that—whatever people may think about its motives—it has defensible apolitical grounds for applying the doctrine. Hence the need for an analysis that delineates and evaluates the Court's own claimed justifications for the doctrine. I will present a critique of the doctrine on grounds that hopefully will be persuasive even to readers who tend to be skeptical about current regulatory policy. Insofar as some of those readers remain unpersuaded, I hope they will at least find my perspective challenging.

Part I of this Article traces the development of the major questions doctrine in pre-*West Virginia* case law. The earliest cases treated the doctrine as having created a limiting gloss on the *Chevron* doctrine.[17] As is well known, that case generally requires a reviewing court to defer to an agency's reasonable interpretation of an ambiguous statute that the agency administers. It is conventionally understood as a two-step inquiry. At "step one," the reviewing court asks "whether Congress has directly spoken to the precise question at issue."[18] If the answer is yes, meaning that the statute is *not* ambiguous in regard to that question, the court must follow that clear meaning. If, however, the court finds that the statute has *not* directly addressed the precise question at issue, the court proceeds to "step two" and must accept the administering agency's interpretation if it is "permissible" or reasonable.[19] In essence, the early cases on the major questions doctrine held that particular agencies' answers to such questions did not deserve *Chevron* deference. In other words, the doctrine allowed courts to exercise their judgment more independently than would have otherwise been permitted.

Later, the major questions doctrine turned into a principle that directly favored challengers by setting up a presumption *against* agency power. In other words, the doctrine appeared to have become a clear statement rule—i.e., a principle that prohibited or discouraged courts from adopting a particular construction of a statute unless the legislation "clearly" expressed that meaning. Thus, in a case that presented a "major question" about an agency's authority to regulate, the agency would lose unless it could point to clear congressional authority for its proposed action. An understanding of this chronology is important, because the recent cases have relied heavily on tenuous assertions that the earlier line of cases had, in fact, endorsed the more recent approach. In practice, therefore, the Court repeatedly used overstatements of the holdings of

15. *See* Editorial, *The Supreme Court Isn't Listening, And It's No Secret Why*, N.Y. TIMES (Oct. 1, 2022), https://www.nytimes.com/2022/10/01/opinion/supreme-court-legitimacy.html [https://perma.cc/S47F-VNSB].

16. Ariane de Vogue, *Alito on SCOTUS Critics: "Questioning Our Integrity Crosses an Important Line*,*"* CNN (Sept. 29, 2022), https://www.cnn.com/2022/09/29/politics/alito-supreme-court-kagan-roberts [https://perma.cc/3DHU-UXT4].

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

18. *Id.* at 842.

19. *Id.* at 843.

those prior cases as something of a substitute for the need to justify the clear statement rule as an original proposition.

Part II undertakes to pin down the administrative law lessons of the *West Virginia* and *Nebraska* cases, a task that is not easy. It explores issues such as how the Court's newfound presumption is supposed to work, what role—if any—remains for *Chevron* in a major questions doctrine case, and what kinds of cases are governed by the doctrine.

Part III seeks to evaluate the arguments that supposedly justify the major questions doctrine. The Court typically expresses itself as expounding what authority Congress did or did not intend to confer on the agency, but in practice these interpretive claims have been more than a little debatable. Indeed, the Court's discussion has appeared to be substantially driven by assumptions based on what the Court prefers to believe Congress *would* have intended (Part III.A).

Justice Gorsuch has defended the major questions doctrine as inspired by, or perhaps as a means of implementing, the nondelegation doctrine. His enthusiasm for reviving that long-neglected constitutional doctrine is well known,[20] but his effort to rely on it in this context has some difficulties. Perhaps the most important one is that the nondelegation rationale is not at all conducive to justifying a distinction between major statutory questions and non-major statutory questions (Part III.B). In *West Virginia v. EPA*, Gorsuch reframed his position as resting on the principle of separation of powers, but the same basic objection to his argument arises in that context as well (Part III.C).

Finally, Part III considers the proposition that, apart from any constitutional considerations, the clear statement rule is warranted as a principle that reaffirms the importance of Congress as the appropriate source of major policy decisions. Of course, nobody disputes that every agency rule that has the force of law must rest on a grant of legislative rulemaking authority. I argue, however, that a presumption *against* the existence of such authority, whenever the agency cannot point to "clear" congressional authorization, is ill-advised. One objection to it derives from the serious breakdown in Congress's capacity to resolve such issues on its own, especially during the past decade or two. Executive action that can survive ordinary standards of judicial review—unimpeded by the major questions doctrine—should remain an alternative means by which the nation's pressing social and political challenges can be addressed (Part III.D).

Part IV takes up reasons to object to the major questions doctrine. The most straightforward argument is that courts' reliance on the doctrine must inevitably serve to weaken agencies' ability to tackle pressing social challenges (Part IV.A). A subtler point is that the doctrine can be seen as an effort to write an attitude of skepticism toward regulation into the fabric of administrative law—a move that casts doubt on the Court's status as a body governed by law rather than ideology (Part IV.B). A third concern is that the criteria by which the Court decides whether to invoke the doctrine appear to be arbitrary and may well be inherently so; at least, the Court has not yet made any serious effort to define the outer boundaries of the doctrine (Part IV.C).

20. *See* Gundy v. United States, 588 U.S. 128, 149–79 (2019) (Gorsuch, J., dissenting).

Part V of this Article offers concluding thoughts about the potential of the major questions doctrine to be applied broadly or narrowly over time. The current trajectory is toward expansion, but this Article's analysis indicates that the Court ought to be heading in the opposite direction.

I.
THE EVOLUTION OF THE DOCTRINE

In this Part, I will discuss the case law that led up to the gradual emergence of the major questions doctrine. This development was more than a little erratic. The Court began by treating the doctrine as a relatively narrow elaboration on the *Chevron* paradigm. Over time, however, the Court expanded it into a freestanding exception to *Chevron*, and then, apparently, into a clear statement principle. In this process, however, the Court failed to acknowledge the expansions and consequently made no more than a cursory effort to justify them.

By the time of *West Virginia v. EPA*, the Court had a substantial body of case precedent that it could and did invoke. But it did not acknowledge how far it was extrapolating from those precedents. At the same time, it used this purported precedential foundation as a surrogate for explication of why the major questions doctrine should operate as it most recently has.

These assertions are admittedly argumentative, but the discussion in Part I will provide the support for them. To clarify the doctrine's evolution, I will subdivide my discussion of the predecessor cases in a manner that emphasizes the distinction between treating the major questions doctrine as a limitation on *Chevron* deference and treating it as a clear statement principle.

A. Deference and Non-Deference Cases

1. Brown & Williamson *and its precursors*

There is no consensus about when the major questions doctrine got its start. At times, both courts and commentators have interpreted some of the Court's decisions as exemplifying that doctrine, even though the decisions were not phrased in those terms. I will address those decisions in due course, but I will begin this analysis by examining a case that is widely viewed as having overtly launched the doctrine. That case was *FDA v. Brown & Williamson Tobacco Corp.*,[21] decided in 2000. The FDA promulgated rules that would have tightly regulated the sale of tobacco and nicotine products to minors, but the Supreme Court set those rules aside in a 5–4 decision. Justice O'Connor's opinion for the majority included this key language:

> Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary

21. 529 U.S. 120 (2000).

> cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. Cf. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration").[22]

Justice O'Connor then mentioned several reasons why "[t]his is hardly an ordinary case."[23] Each of these points was actually a brief recapitulation of arguments that she had developed at length earlier in the opinion.[24] First, her "hesitation" to discern an implied delegation rested in part on the lack of "fit" between the nature of tobacco products and the structure of the Act.[25] That is, FDA regulation revolved around the agency's duty to find that a product is "safe and effective," but tobacco products were irredeemably *unsafe*. Moreover, the agency had assured Congress for decades that it did not believe it had power to regulate tobacco, and the legislature had enacted its own limited health-protective measures (such as cigarette labeling requirements) in light of those assurances.[26] In addition, tobacco had a "unique political history."[27] What Justice O'Connor meant by that last point was not entirely clear, but she may have been referring to the fact that a number of states' economies heavily depended on growing tobacco, and their congressional representatives would not have been likely to agree to legislation that would give a federal agency life-or-death power over such an important crop. She concluded this discussion by declaring that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[28]

It is not surprising that *Brown & Williamson* gave rise to excitement about the advent of a new discretion-limiting doctrine. The language just quoted could reasonably be read to signal that "extraordinary" cases would evoke a comparatively intrusive standard of review, and that a characterization of a rule as "major" would be relevant to that "extraordinary" status. Commentators speculated about what other kinds of cases would also fall within this "extraordinary" category.[29] Was this new category defined by the presence of agency self-aggrandizement?[30] By an agency's attempt to expand the boundaries

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22. *Id.* at 159.
23. *Id.* at 159–60.
24. *Id.* at 133–59.
25. *Id.* at 133–43, 160.
26. *Id.* at 143–59, 159–60.
27. *Id*. at 159.
28. *Id*. at 160.
29. *See, e.g*., Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 231–47 (2006). Although Sunstein was among the first to argue that the Court appeared to be using *Brown & Williamson* and other contemporaneous decisions to usher in a distinctive doctrinal category, he himself questioned the value of this nascent development and argued that such cases were best resolved within the standard *Chevron* framework. *Id.* at 194, 243–47.
30. *See* Timothy K. Armstrong, Chevron *Deference and Agency Self-Aggrandizement*, 13 CORNELL J.L. & PUB. POL'Y 203, 250–62 (2004).

of its jurisdiction?[31] By an agency's attempt to circumvent the democratic process by resolving an issue without regard for the preferences of the current Congress or the general public?[32] Clearly, if the Court was going to extrapolate from *Brown & Williamson* and create a definable "doctrine" of some sort, it was going to have to do a good deal more amplifying.

Standing alone, however, the opinion did not commit the Court to very much. In the first place, the "extraordinary" nature of the case did not, in Justice O'Connor's telling, turn exclusively on the "economic and political significance" of the proposed FDA rule. It rested on all of the arguments just mentioned, with no suggestion that any of them was predominant.

Although the dissent in *Brown & Williamson* had good answers to several of these merits arguments,[33] my concern at this point is not with whether or not the Court's points were cogent. Rather, it is with the structure of the Court's analysis. The opinion did not treat the factors that made the case "extraordinary" as carving out an exception to *Chevron*. Quite the contrary, the Court began its analysis by reciting the *Chevron* formula,[34] and used those factors to show that, under *Chevron* step one, Congress had "directly addressed" the question at hand. If the Court had entertained the idea that the "extraordinary" features of the case rendered other interpretive arguments unnecessary, it surely would not have devoted the first 90 percent of the opinion to discussing them. One other point to notice here is that the ultimate question from the Court's standpoint was the will of Congress; there was no suggestion of a clear statement rule that could make an answer to that question superfluous.

Finally, I should discuss two authorities on which Justice O'Connor relied in this portion of her opinion in *Brown & Williamson*. Although neither actually endorsed a major questions doctrine, they warrant analysis because subsequent opinions of the Court have treated them as though they had.

The first of these authorities was *MCI Telecommunications Corp. v. AT&T*.[35] In that case, the Federal Communications Commission (FCC) sought to exempt all long-distance telephone companies except the most dominant one (AT&T) from the obligation to file tariffs (rate schedules) with the Commission. The FCC relied on its statutory authority to "modify any requirement" imposed by the Communications Act. In explaining why this provision in the Act could not support the FCC's proposed rule, Justice Scalia, writing for the Court, remarked that "[i]t 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

31. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 845 (2001).

32. *See* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 779–86 (2007).

33. 529 U.S. 120, 161–92 (2000) (Breyer, J., dissenting).

34. *Id.* at 132 (majority opinion).

35. 512 U.S. 218 (1994) (cited in *Brown & Williamson*, 529 U.S. at 160).

requirements."[36] In *Brown & Williamson*, Justice O'Connor called the *MCI* decision "instructive," quoting that same sentence.[37]

MCI has itself often been cited as an early example of the major questions doctrine.[38] It does resemble *Brown & Williamson* to the extent that it noted the broad significance of the FCC's proposal. Moreover, its argument that the detariffing plan was incompatible with the FCC's scheme for regulation of common carriers is analogous to Justice O'Connor's argument that the FDA's tobacco regulation did not "fit" the structure of the FDA's enabling statute.

Closer examination of *MCI* shows, however, that it does not really fit the major questions model. Justice Scalia primarily argued that the new policy was too radical a departure from the premises of the Act to be described as a "modification." This was true, he continued, because, according to virtually every dictionary, "'to modify' means to change moderately or in minor fashion."[39] Moreover, insofar as he objected to the magnitude of the proposed wholesale abrogation of the tariff-filing requirement, Justice Scalia's point was not that, as an abstract matter, the plan was so broad that the agency should be presumed to lack power to adopt it. Rather, he grounded his analysis in a carefully argued explanation that rate filing was fundamental to the scheme of common carrier regulation under the Communications Act.[40] In any event, he argued only for the result of the case at hand and did not suggest that *MCI* typified a category of cases to which any cross-cutting "doctrine" might apply. In short, *MCI* is a significant data point illustrating one of the interpretive arguments that the Court has used (in *West Virginia*, inter alia) in challenging an agency in a major questions case, but it was not, itself, a major questions doctrine case.

The second authority to consider is the sentence that Justice O'Connor quoted in the passage from *Brown & Williamson* excerpted above. That sentence came from an early article by Justice Breyer (written while he was a circuit judge).[41] On its face, the sentence reads as though it squarely endorses the concept of a major questions doctrine of some sort. Not surprisingly, academic commentators have often cited it as supporting the idea.[42] Presumably, Justice

36. *Id.* at 231.

37. *Brown & Williamson*, 529 U.S. at 160.

38. *See, e.g.*, Brunstein & Revesz, *supra* note 12, at 224–25; Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 473 (2021).

39. 512 U.S. at 225–28.

40. *Id.* at 228–31 (observing that the rate-filing provision had "enormous importance to the statutory scheme"); *see* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1950–51 (2017) (noting that the Court emphasized that the agency's interpretation might "fundamentally undermine the statutory scheme," as distinct from being "economically consequential and politically fraught").

41. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (cited in *Brown & Williamson*, 529 U.S. at 159).

42. *See, e.g.*, Alison Gocke, Chevron*'s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 979–80 (2021).

Breyer's reputation as a liberal-leaning jurist has been regarded as bolstering the doctrine's credibility.[43]

One must wonder, however, about how many of the judges and commentators who favor this reading of the quotation from then-Judge Breyer's article have actually examined it in the context of the underlying article. In reality, he was not contemplating or referring to anything like the major questions doctrine as it has been understood in the case law. The equation is fundamentally misconceived for two principal reasons.

The first problem is that his concept of what would make a question "major" was nothing like Justice O'Connor's. At the time Judge Breyer wrote his article, *Chevron* had not yet become established as a controlling paradigm in federal administrative law. He considered that case too rigid and formalistic in its approach to determining the circumstances in which courts should defer to administrative views.[44] He recognized that any such determination would rest on "a kind of legal fiction," but he thought that courts should implement this fiction by "imagin[ing] what a hypothetically 'reasonable' legislator would have wanted [in light of] . . . practical facts surrounding the administration of a statutory scheme."[45] In this context, Breyer discussed the "importance" of the question presented as one of those "practical facts."[46] In other words, he seems to have used "major" to mean "*relatively* important" as compared with the "interstitial" matters that agencies would be better positioned to answer for themselves.

In short, Judge Breyer undertook to spell out a methodology for resolving *everyday* legal questions that arise in the course of judicial review.[47] Obviously, Congress routinely expresses judgments about the policy issues that it considers most important; the remaining issues become, by definition, "interstitial." This banal observation had nothing to do with any effort to propose a special methodology for "extraordinary" cases.

The second problem is that the "importance" of an issue was only one of the "practical facts" that Judge Breyer suggested a court should consider in deciding whether Congress would want it to defer to an agency. Others included whether the agency had any relevant special expertise; whether the statutory language was inherently imprecise; whether the answer to the legal question would clarify, illuminate, or stabilize a broad area of the law; and whether the agency can be trusted to give a properly balanced answer (as opposed to an answer distorted by the agency's tunnel vision).[48] These additional factors

43. *West Virginia v. EPA and the Major Questions Doctrine*, REGUL. TRANSPARENCY PROJECT (Aug. 18, 2022), https://regproject.org/video/west-virginia-v-epa-and-the-major-questions-doctrine/ [https://perma.cc/6PQX-CL7P] (recording at 16:35) (remarks of Mr. Adam Gustafson) (stating that Breyer's article "goes to show that [the major questions doctrine] is a principle on which different people of different political persuasions can agree as a matter of interpretation").

44. Breyer, *supra* note 41, at 373–81.

45. *Id.* at 370.

46. *Id.*

47. In this connection, Breyer cited in a footnote to three court of appeals cases that he apparently thought would illustrate his argument. *Id*. at 370 n.38. All of them raised garden-variety legal issues that were nothing like the momentous issues the Court has examined in the cases in which it has applied the major questions doctrine.

48. *Id*. at 370–71.

further illustrate my point that Judge Breyer was talking about how to approach typical administrative appeals, not "extraordinary" ones. He was by no means trying to articulate a doctrine in which "major" questions (however defined) would be sharply distinguished from other administrative cases.

2. Utility Air

The next significant step in the development of the major questions doctrine occurred in 2014 in *Utility Air Regulatory Group v. EPA*,[49] another Clean Air Act case. In 2007, the Court had held in *Massachusetts v. EPA* that carbon dioxide must be classified as an "air pollutant" for purposes of Title II of that Act, which regulates vehicle emissions.[50] Soon afterwards, EPA issued a rule concluding that the same definition must apply to its regulation of pollution from stationary sources under Titles I and V of the Act. The agency acknowledged, however, that a straightforward application of that definition in the latter context would be unworkable because it would vastly expand the number of entities that would be regulated under this program. To avoid that consequence, EPA also adopted a "tailoring rule" that would initially apply Titles I and V only to large entities.

Applying *Chevron*, the Court held that the stationary source rule was unlawful. More specifically, the first step in the *Chevron* analysis was inconclusive, but the agency's rule failed the second step. Justice Scalia, writing for the Court, said that the term "air pollutant" did not need to have the same meaning throughout the Act.[51] Given the practical implications of EPA's reading, the agency's interpretation was unreasonable under step two of *Chevron* insofar as it served to expand the number of entities that would be subject to Titles I and V. Owners of thousands of homes and small businesses would have to apply for permits, resulting in unmanageable administrative burdens for the agency and unprecedented burdens on the affected entities. It was thus contrary to the design and structure of the Act.[52] As Scalia emphasized, the agency essentially agreed with that conclusion.[53] The Court further held, however, that the tailoring rule was flatly contrary to the Act's terms and therefore not a tenable solution to the flaws in the agency's interpretation.[54]

In the course of this discussion, Justice Scalia inserted a paragraph that set forth a separate reason for rejecting the EPA's interpretation as unreasonable: "[I]t would bring about an enormous and transformative expansion in EPA's regulatory authority *without clear congressional authorization.*"[55] He elaborated:

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49. 573 U.S. 302 (2014).

50. 549 U.S. 497 (2007).

51. *Util. Air*, 573 U.S. at 315–20.

52. *Id.* at 321–24 (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 353 (2013)). The Court upheld the rule insofar as it applied to stationary sources that were already subject to Titles I and V. *Id.* at 329–33. Justices Alito and Thomas dissented from the latter holding. *Id.* at 343–50 (Alito, J., concurring in part and dissenting in part).

53. *Id*. at 321–22.

54. *Id.* at 325–28.

55. *Id.* at 324 (emphasis added).

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. *We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."* The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text.[56]

At a minimum, this passage marked *Utility Air* as a major questions doctrine case in substance, even though the Court had not yet adopted that terminology. Although, as in *Brown & Williamson*, the "exceptional" status of the case, by virtue of its economic and political significance, was only one facet of a much broader argument, it would be difficult to deny that this status played some role in the Court's reasoning. *Utility Air* also broke new ground by singling out the rule's "vast economic and political significance" as the trigger for its status as presenting a major question.

A more provocative question is whether the second sentence in this passage propounded a clear statement rule. Certainly, when read in isolation, the sentence *could* be read that way. That would make it the first appearance of such a rule in the Court's case law on major questions. Indeed, commentators on the major questions doctrine have often read it that way.[57]

There are, however, good reasons to doubt that the Court meant it that way. The first and third sentences in the passage expressed "skepticism" and "reluctan[ce]" about accepting the EPA's interpretation—essentially because of the same practical consequences that I have already mentioned. But if the second sentence were understood to declare, as a matter of law, that a highly consequential rule could not stand without "clear congressional authorization," those surrounding sentences would be superfluous. So would the rest of the Court's lengthy discussion of the practical problems that EPA's interpretation would have brought about, as the agency itself admitted.[58] Read in context, therefore, the "expect[ation]" in the second sentence probably did not mean that the Court would treat clear congressional authorization as a sine qua non in the major questions context. It's more likely that the Court meant to treat the absence of clear authorization as simply one factor that would cast doubt on the validity of the agency's action. Those two alternatives are not equivalent. Under the latter

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56. *Id.* (emphasis added).

57. *See, e.g.*, Heinzerling, *supra* note 40, at 1947 (interpreting this sentence as "an expectation of clarity created by the Court itself").

58. *See* Asher Steinberg, *Another Addition to the Chevron Anticanon: Judge Kavanaugh on the "Major Rules" Doctrine*, NARROWEST GROUNDS (May 7, 2017), § A.2, http://narrowestgrounds.blogspot.com/2017/05/another-addition-to-chevron-anticanon.html [https://perma.cc/C5Y7-99QC] ("[The Court's statement] that it 'expect[s] Congress to speak clearly' when giving agencies vast regulatory powers . . . can only be read as an expectation or presumption, not a clear-statement rule. Otherwise, the Court would greet interpretations of ambiguous statute to yield vast regulatory powers with more than skepticism, and otherwise, all the extensive discussion of how EPA's interpretation of air pollutant didn't cohere with the permitting program would have been unnecessary.").

reading, the absence of clear authorization might, at least theoretically, be outweighed by countervailing evidence or argumentation as to what the statute meant.

Whether or not Justice Scalia meant to announce a clear statement rule, he offered no real justification for such a requirement. He cited to a few cases in which the Court had ruled that Congress had not granted the sweeping authority that an agency claimed to possess, but none of those cases had purported to lay down any generic requirement to govern all "agency decisions of vast economic and political significance."[59] At best, they were analogous holdings that the Court could properly cite as precedents, but none of them had suggested that "clear congressional authorization" should be required with respect to any broad class of cases.

Nor did Justice Scalia offer any policy rationale for such a clear statement principle. In particular—to anticipate an issue that would prove important in *West Virginia*—he did not suggest that the doctrine of separation of powers would support such a principle. Later in the opinion, however, he did invoke the separation of powers as a reason to reject EPA's "tailoring" rule.[60] He argued that, under our system of government, Congress makes laws, and the President or agencies "faithfully execute" them, but the latter role "does not include a power to revise clear statutory terms that turn out not to work in practice."[61] The absence of similar constitutionally inflected language in the Court's discussion of the stationary source rule—the context in which it arguably relied on the major questions doctrine—is telling.

In summary, *Utility Air* is probably most accurately read as a case in which the Court rejected an agency interpretation by applying a *Chevron* analysis, with major question themes serving as one component of that analysis. Certainly, the Court's opinion did contain language that, read out of context, could be taken as endorsing a clear statement approach to the major questions doctrine. Indeed, hindsight reveals that supporters of a robust version of that doctrine did interpret it that way. Even if we assume that the Court did mean to adopt such an approach, however, the casual and essentially unexplained manner in which it did so was noteworthy.

3. King v. Burwell

The next significant event in the development of the major questions doctrine occurred in *King v. Burwell*.[62] This well-known decision upheld a rule issued by the Internal Revenue Service (IRS) and its parent agency, the Department of the Treasury. The rule provided tax credits for many citizens who purchased health insurance on federal exchanges pursuant to the Affordable Care

59. The Court cited to *Brown & Williamson*, *MCI*, and *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (commonly known as the *Benzene* case). The first two of those cases have been fully discussed in the preceding section. For my analysis of *Benzene* on this issue, *see infra* Part III.C.2.

60. *Util. Air*, 573 U.S. at 327.

61. *Id.*

62. 576 U.S. 473 (2015).

Act (ACA). The most relevant section of the Act spoke only of subsidies for insurance purchased on exchanges "established by the State."[63] Nevertheless, a 6–3 majority of the Court found, in an opinion by Chief Justice Roberts, that the apparent meaning of this limitation was belied by other language in the Act and by the Act's purpose of strengthening, not undermining, insurance markets.[64]

Enroute to that conclusion, the Court specifically declined to rely on *Chevron*. It cited the "extraordinary cases" language from *Brown & Williamson* and explained:

> The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly [citing *Utility Air*]. It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.[65]

Notice that *King* departed from prior holdings regarding the major questions doctrine in a significant respect: it treated the doctrine as a threshold test rather than an integral part of the two-step *Chevron* inquiry. In scholarship on judicial review of agency action, such threshold tests are often known as "*Chevron* step zero"[66] (although this "step" could be more accurately described as a loose collection of exceptions that have no intrinsic relationship to one another). Chief Justice Roberts offered no explanation for this revised approach to the *Chevron* test. Indeed, as I will explain, *King* provides an excellent object lesson as to why the switch to a step zero approach was problematic.

In the first place, the Court's justifications for invoking the major questions doctrine at all were questionable. In *Utility Air*, the Court's assertion that Congress would not entrust a determination of vast economic and political significance to an agency without clear authorization was subsumed within a concrete discussion of the ruinous consequences the claimed authority would bring about (as EPA essentially admitted).[67] In *King*, however, Chief Justice Roberts identified no adverse consequences that would tend to make Congress reluctant to grant the power in question. More importantly, that question was wholly academic and counterfactual. As he was just about to explain, he believed that Congress had itself decided, albeit somewhat obscurely, that users of federal exchanges had to be made eligible for the tax credits. In other words, this

63. Affordable Care Act § 36(B), I.R.C. § 36B(b)(2)(A).

64. *King*, 576 U.S. at 486–98. *See generally* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 76–78, 99 (2015) (discussing the Court's statutory interpretation methodology in *King*).

65. *King*, 576 U.S. at 485–86.

66. *See* Sunstein, *supra* note 29, at 191; Merrill & Hickman, *supra* note 31, at 873 (a leading treatment).

67. *See supra* notes 53–56 and accompanying text.

provision of the Act did not "assign [a] question to an agency" in the first place.[68] Roberts would have had no occasion to make this completely artificial inquiry into the propriety of *Chevron* deference if he had not, for unexplained reasons, undertaken to treat the supposedly "extraordinary" aspect of the case as raising a threshold issue instead of incorporating that factor into his analysis of the merits of the case.

Indeed, the Court could have gotten to the same destination using the standard *Chevron* model without even mentioning the major questions doctrine. The Court could simply have said that the ACA, properly construed, clearly favored the government's reading. That is, in *Chevron*'s language, "the intent of Congress [was] clear, [and] that [was] the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[69] The district courts in *King* and a companion case had followed exactly that approach,[70] as has the Supreme Court in other decisions.[71] Alternatively, the Court could have declared that the meaning of the Act was clear without mentioning *Chevron* at all; that approach would have shown less concern for doctrinal transparency, but the Court has often followed it, especially recently.[72] Either way, the Court could have resolved the dispute in *King* without having to attribute any significance to what Chief Justice Roberts called the "extraordinary" nature of the question presented.

The Court's further argument that the IRS "has no expertise in crafting health insurance policy of this sort" did not strengthen its case for invoking the major questions doctrine. In this connection, the Court relied on and drew its

68. To clarify, Chief Justice Roberts did say that the statutory text, standing alone, was ambiguous. But he went on to explain, in the paragraph immediately following the one under discussion, that "oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King*, 576 U.S. at 486 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000)).

69. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984). Of course, the question of whether the Act was unambiguous, and if so in what direction, was a hotly contested point in *King*. The dissenters maintained that, in reality, the terms of the Act unambiguously favored the challengers' position. *King*, 576 U.S. at 500 (Scalia, J., dissenting). What counts for present purposes, however, is how the majority in *King* perceived the matter. Roberts's opinion leaves no doubt that, in his eyes, the overall structure and purpose of the ACA eliminated any uncertainty that might have ensued from reading § 36B in isolation from those factors. *See* Gluck, *supra* note 64, at 64–65.

70. King v. Sebelius, 997 F. Supp. 2d 415, 427–28 (E.D. Va. 2014), *aff'd sub nom*. King v. Burwell, 759 F.3d 358 (4th Cir. 2014), *aff'd*, 135 S. Ct. 2480 (2015); Halbig v. Sebelius, 27 F. Supp. 3d 1, 23, 25 (D.D.C. 2014), *rev'd*, Halbig v. Burwell, 758 F.3d 390 (D.C. Cir. 2014).

71. *See, e.g.*, FERC v. Elec. Power Supply Ass'n, 577 U.S. 260, 277 n.5 (2016); Edelman v. Lynchburg Coll., 535 U.S 106, 114 (2002) ("We find the EEOC rule not only a reasonable one, but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch. Because we so clearly agree with the EEOC, there is no occasion to defer and no point in asking what kind of deference, or how much."); Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos., 498 U.S. 211, 223 (1991); Guedes v. BATF, 45 F.4th 306, 313–14 (D.C. Cir. 2022). The converse situation is perhaps more common: the Court says it doesn't have to decide how *Chevron* might apply, because the agency decision would be unlawful regardless. *See, e.g.*, Esquivel-Quintana v. Sessions, 581 U.S. 385, 396–97 (2017); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004).

72. *See infra* Part II.D.

inspiration from *Gonzales v. Oregon*.[73] In that case, the U.S. Attorney General issued an interpretive rule declaring that the Controlled Substances Act prohibited doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding an Oregon law that permitted the procedure. The Court, in an opinion by Justice Kennedy, held that the rule was unlawful because it exceeded the Attorney General's authority to implement the Act. The Attorney General's duties under the Act were very circumscribed, largely relating to registration and scheduling and descheduling of drugs.[74] Moreover, the Attorney General had no expertise in making medical judgments; instead, the Act allocated decision-making authority for medical judgments to the Secretary of Health and Human Services, whom the Attorney General had not even consulted.[75]

Gonzales did not purport to apply the major questions doctrine. Justice Kennedy decided the statutory interpretation question by applying the standard two-step *Chevron* framework, although he ultimately decided that the rule did not survive scrutiny under that test.[76] Indeed, physician-assisted suicide is a relatively rare phenomenon, so the case could not easily be described as possessing "vast economic and political significance."[77] Nevertheless, the Court's reasoning in *Gonzales* seems plausible on its own terms.

Even so, the *Gonzales* "lack of expertise" argument did not provide a very convincing justification for applying the major questions doctrine in *King*. For one thing, the Internal Revenue Code authorized the Treasury Department to "prescribe such regulations as may be necessary to carry out the provisions of this section,"[78] which is a grant of authority that would seem amply broad enough to apply to the rule that Treasury and the IRS issued in *King*.[79] Indeed, Treasury and the IRS have long administered the tax aspects of related programs, such as health savings accounts.[80] Moreover, as two district courts had recognized at

73. 546 U.S. 243 (2006).

74. *Id.* at 258–64.

75. *Id.* at 264–69.

76. *See id.* at 258–68.

77. *See* Nicole Steck, Matthias Egger, Maud Maessen, Thomas Resich & Marcel Zwahlen, *Euthanasia and Assisted Suicide in Selected European Countries and US States*, 51 MED. CARE 938 (2013) ("The percentage of physician-assisted deaths among all deaths ranged from 0.1%–0.2% in the US states and Luxembourg to 1.8%–2.9% in the Netherlands."). The best argument for characterizing *Gonzales* as a major questions doctrine case is that the opinion relied directly on the remark in *Brown & Williamson* that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Gonzales*, 546 U.S. at 267 (quoting *Brown & Williamson*, 529 U.S. at 160). Justice Kennedy's citation of this remark, however, followed immediately after a reference to the familiar canon that Congress does not "hide elephants in mouseholes." *Id.* In all probability, Kennedy was citing *Brown & Williamson* in order to highlight the "cryptic" nature of the supposed delegation—not to highlight its "economic and political significance," which was actually rather modest.

78. 26 U.S.C. § 36B(h); *see* Kurt Eggert, *Deference and Fiction: Reforming* Chevron*'s Legal Fictions After* King v. Burwell, 95 NEB. L. REV. 702, 715 (2017).

79. In fact, *Gonzales* specifically contrasted the rulemaking language in the Communications Act, which was similarly broad, with the Attorney General's limited authority under the CSA. *See Gonzales*, 546 U.S. at 258–59.

80. DEP'T OF THE TREASURY, IRS, HEALTH SAVINGS ACCOUNTS AND OTHER TAX-FAVORED HEALTH PLANS (2023), https://www.irs.gov/pub/irs-pdf/p969.pdf [https://perma.cc/H27J-6TQ7].

earlier stages in this dispute, the rulemaking process was a joint project of Treasury, the IRS, and HHS,[81] and the tax agencies borrowed the specific language from prior HHS rules on a corresponding issue.[82] In addition, the issue before the Court did not, in any substantial sense, raise a health insurance *policy* issue. The question of whether users of federal exchanges were eligible for tax credits raised a tightly focused statutory interpretation issue, calling for a simple yes-or-no answer. And, according to the Court's own analysis, Congress itself had answered that question in the affirmative. Again, it was only because Roberts had chosen, without explanation, to discuss the applicability of the major questions doctrine in isolation from the basic *Chevron* analysis of the merits that he got sidetracked onto the irrelevant issue of the IRS's expertise in health insurance *policy*.

Some commentators have argued that the Court's express finding that *Chevron* was inapplicable in *King*, and that the case should be resolved as a matter of legal interpretation, served the public interest because it meant that a later administration would not be able to alter the outcome by invoking *Chevron* deference.[83] This reasoning is based on the Supreme Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*.[84] That case held that, in a situation in which *Chevron* does apply, an agency may change the legal interpretation of its predecessor and receive *Chevron* deference for its newfound position, even if the prior view had been upheld on judicial review.[85] The wisdom of this supposed strategy may seem to have been confirmed only a few years later, when the Trump administration, overtly hostile to the ACA, had no room to rescind and replace the rule that the Court upheld in *King*.

However, the Court would not have needed to depart from the standard *Chevron* model in order to achieve the stability that the theory assumes the Court was seeking. The opinion in *Brand X* stated that *Chevron* applies when an agency revises its interpretation of an *ambiguous* statute (in other words, at *Chevron* step two). It does not apply "if the prior court decision holds that its construction follows from the unambiguous terms of the statute."[86] Presumably the same limitation comes into play when the prior court decision holds, as *King* did, that any ambiguity in the specific phrase being construed has been dispelled by the

81. King v. Sebelius, 997 F. Supp. 2d 415, 431–32 (E.D. Va. 2014); Halbig v. Sebelius, 27 F. Supp. 3d 1, 17 (D.D.C. 2014); *see also* Eggert, *supra* note 78, at 715, 734–35 (describing the joint rulemaking process conducted by the Treasury Department and HHS).

82. *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377, 30378 (May 23, 2012); Gluck, *supra* note 64, at 94.

83. *See, e.g.*, Eggert, *supra* note 78, at 745, 749–50 (warning that the "hazard of any deference" is the "instability of a 'final decision' . . . by the Supreme Court that could be later overturned by agency reinterpretation under a different presidential administration"); *see also* Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2209 (2016) ("If the Court had deferred to the under a new IRS's interpretation as one reasonable possibility under *Chevron*, the IRS could conceivably have later switched its interpretation to *disallow* tax credits on federal exchanges, perhaps under a new administration.").

84. 545 U.S. 967 (2005).

85. *Id.* at 974.

86. *Id.* at 982.

context and purpose of the legislation considered as a whole.[87] There is little, if any, reason to think that Chief Justice Roberts, who is hardly a *Chevron* enthusiast,[88] would have been inclined to expand the scope of the *Brand X* doctrine beyond its existing limits. Thus, if the Court was indeed seeking to maintain the stability of the ACA despite a possible change of administrations later, a straightforward ruling under *Chevron* step one, unaided by the major questions doctrine, would have achieved the same objective.

In summary, the Court's elaboration of the major questions doctrine in *King* was unpersuasive as a general matter, and particularly in its elevation of the doctrine to "step zero" status. In hindsight, the case seems to have become something of an outlier among cases applying the doctrine.[89] That development may have less to do with the shakiness of its reasoning than with the fact that *Chevron* itself is fading in importance, at least at the Supreme Court level, so the Court is becoming less interested in exploring possible elaborations of the two-step test.[90] As the next Section will show, subsequent cases have treated the major questions doctrine as a clear statement rule, as opposed to being merely a basis for withholding deference from an agency interpretation. Nevertheless, *King* did break new ground insofar as it treated the major questions doctrine as an issue that a court should face before digging into the merits of an appeal. As the next Section will also demonstrate, that lesson has been carried over into the cases that have adopted a clear statement approach.

B. Clear Statement Rule Cases

1. U.S. Telecom

The first clear-cut judicial endorsement of a clear statement approach to the major questions doctrine occurred in 2017 in a dissenting opinion by then-Judge Brett Kavanaugh. The case was *United States Telecom Association v. FCC* (*U.S. Telecom*).[91] It concerned one of the D.C. Circuit's several encounters with the issue of "net neutrality," which essentially meant treating internet service providers as common carriers. The Supreme Court had earlier held in *Brand X* that the Communications Act is ambiguous on this issue; thus, when the Commission promulgated a rule that endorsed net neutrality, the court upheld the choice under the judicial review principles of *Chevron* and *Brand X* itself.[92]

Judge Kavanaugh dissented on the basis of what he called the "major rules doctrine" (although he noted that it is usually called the major questions

87. *See* United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 487–90 (2012) (plurality opinion) (so interpreting *Brand X*).

88. *See* City of Arlington v. FCC, 569 U.S. 290, 316, 322–23 (2013) (Roberts, C.J., dissenting) (advocating a narrow reading of *Chevron*).

89. In *West Virginia*, when Chief Justice Roberts's majority opinion summarized previous cases that had applied the doctrine, his own opinion in *King* was conspicuously absent from the list. *See West Virginia*, 597 U.S. 697, 740–44 (2022). Of course, one reason for that omission may have been that in that case, unlike *West Virginia*, the Court ruled in favor of the government.

90. *See infra* Part II.D.

91. 855 F.3d 381 (D.C. Cir. 2017) (en banc).

92. *Id.* at 383 (Srinivasan, J., concurring in denial of rehearing en banc).

doctrine).[93] In his account of the doctrine, "[f]or an agency to issue a major rule, Congress must *clearly* authorize the agency to do so. If a statute only *ambiguously* supplies authority for the major rule, the rule is unlawful."[94] To justify this line of argument, he relied primarily on prior judicial pronouncements, and he described (or reinterpreted) a series of them, including Judge Breyer's 1986 article, *MCI*, *Brown & Williamson*, *Gonzales*, and *Utility Air*.[95] For reasons discussed in Part I.A, one must regard this reliance as resting on considerable exaggeration. One sentence in *Utility Air* arguably did support the judge's reading, although, when read in context, that interpretation may not be what the Court meant. In any event, none of the other authorities endorsed a clear statement approach to the major questions doctrine. Either they did not deal with that doctrine at all, or they treated it as a basis for interpreting what might otherwise be an ambiguity in the enabling statute.[96]

To give him due credit, Judge Kavanaugh did not rely exclusively on these precedents. He also referred briefly to a pair of theories that, he suggested, provided the underpinnings for the clear statement rule that he was propounding. Specifically, he stated that it "is grounded in two overlapping and reinforcing presumptions: (i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch, and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies."[97] He also cited to some supportive academic commentary.[98] I will engage with all of these points later in this Article.[99] For now, however, I will simply note that those arguments were far overshadowed by his reliance on the supposed message of the case law.[100]

In any event, after joining the Supreme Court, Justice Kavanaugh published a brief opinion in which he signaled his continued interest in a clear statement approach to the major questions doctrine.[101] Unsurprisingly, the Court did soon move in that direction.

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93. *Id.* at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc).

94. *Id.*

95. *Id.* at 419–21. He distinguished *King v. Burwell* as a case about spending rather than coercive regulation, but he did not explain why that distinction was material to the purposes of the major questions doctrine. *Id.* at 421 n.2. In hindsight, this distinction did not survive *Biden v. Nebraska. See infra* Part II.B.

96. *See* Steinberg, *supra* note 58, § C.1. Nor, despite his claims to the contrary, did the lower court holdings cited by Judge Kavanaugh articulate anything like a clear statement principle. *U.S. Telecom*, 855 F.3d at 421 n.3 (Kavanaugh, J., dissenting).

97. 855 F.3d at 419 (citation omitted).

98. *Id.* at 421–22 (discussing works by William Eskridge and by Abbe Gluck and Lisa Bressman).

99. *See infra* Parts III.A (congressional intent and Gluck & Bressman), III.C (separation of powers), III.D (Eskridge).

100. *See* 855 F.3d at 422 n.4 (Kavanaugh, J., dissenting) (declaring, in response to academic critics of the major rules doctrine, that "as a lower court, we are constrained by precedent," in view of the Court's "repeated invocations" of the doctrine).

101. Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari).

2. Alabama Association of Realtors

The clear statement version of the major questions doctrine began to make its influence palpably felt at the Supreme Court level in *Alabama Association of Realtors v. HHS*.[102] During the initial months of the coronavirus pandemic, Congress adopted a four-month moratorium on evictions of tenants from properties that had benefitted from federal financial assistance. When that moratorium expired, the Centers for Disease Control (CDC) extended it through administrative action and expanded its scope to reach nearly all residential properties. Realtor associations and rental property owners brought suit to contest the CDC rule. The district court found that the CDC rule was unlawful but stayed its judgment pending appeal. After more skirmishing in the lower courts, the dispute reached the Supreme Court as an emergency application to vacate the stay.

The Supreme Court granted the application in a brief per curiam opinion, with Justices Breyer, Sotomayor, and Kagan dissenting.[103] Although the majority opinion did not refer to the major questions doctrine by name, it did recite and follow the statement in *Utility Air* that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'"[104] The opinion concluded: "If a federally imposed eviction moratorium is to continue, Congress must *specifically* authorize it."[105]

As noted, the case came before the Court in an emergency posture, on the so-called shadow docket.[106] The Court announced its decision only six days after the application was filed, with no oral argument and little time for deliberation. There has been some debate about whether such an emergency order has precedential force at all.[107] That debate is now apparently settled, because the Court has in fact relied on *Alabama Association* in subsequent cases involving the major questions doctrine. However, even if the decision was technically precedential, its summary nature probably goes far to explain the obscurity of the Court's treatment of the major questions doctrine in general or the clear statement approach in particular. The Court took the *Utility Air* dictum at face value, ignoring the context in which it had been enunciated. The Court did not discuss whether that dictum was a legal requirement or simply an assumption about Congress's intentions. Nor did the Court undertake to defend the clear statement principle as an original proposition.

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102. 594 U.S. 758 (2021).

103. *Id.* at 766.

104. *Id.* at 764.

105. *Id.* at 766 (emphasis added).

106. For criticisms of the Court's use of the emergency docket to resolve questions that ought to receive plenary consideration, see, for example, STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2022); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

107. *See generally* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effect of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827 (2021) (discussing circumstances in which precedential effect is warranted).

In any case, the actual impact of the doctrine on the outcome may have been quite limited. To judge from the rhetoric in the opinion, the Justices in the majority seemed to think that the CDC's ban on evictions was almost self-evidently improper. They declared that, even at this preliminary stage, "it is difficult to imagine [the applicants] losing."[108] Moreover, the government's interpretation of the enabling statute "would give the CDC a breathtaking amount of authority," potentially extending to such absurdities as mandating free groceries, free computers, and high-speed Internet service at home.[109] Thus, the outcome was probably inevitable, with or without reliance on a major questions rationale. In addition, the Court said that the intrusion of the CDC rule on landlord-tenant relations triggered a clear statement rule based on federalism: "Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[110] In view of that assumption, one can doubt that the major questions doctrine changed the majority's calculus in any significant way.

In sum, the Court's apparent embrace of a clear statement approach to the major questions doctrine in *Alabama Association* was a noteworthy development, but the circumstances of the decision cast doubt on the extent to which it definitively established the Court's adherence to that approach. In any event, the issue would soon be revisited.

3. NFIB v. OSHA

Five months later, the Court decided its next COVID-19 case: *National Federation of Independent Business v. OSHA* (*NFIB*).[111] As a means of reducing risks attributable to the virus, OSHA directed employers with one hundred or more employees to require their employees either to receive COVID-19 vaccination or to undergo weekly COVID testing and wear masks in the workplace. The applicable language for the mandate came from the Occupational Safety and Health Act, which authorized OSHA to set "occupational safety and health standards" and identified the persons who were to be protected by such standards as "employees." In an emergency appeal, however, the Supreme Court granted a stay of the mandate in a per curiam decision.[112] Its primary rationale was that OSHA's province was "occupational" hazards, not broad public health measures that were only indirectly related to the workplace.[113]

The Court did not expressly say that it was applying the major questions doctrine through a clear statement rule, but its reasoning left no doubt that it had.[114] The Court quoted *Alabama Association* for the proposition that "[w]e

108. *Ala. Ass'n*, 594 U.S. at 763.
109. *Id.* at 764–65.
110. *Id.* at 764.
111. 595 U.S. 109 (2022).
112. *Id.* at 113–14.
113. *Id.* at 117–20.
114. *See* Josh Blackman, NFIB v. OSHA *Cites Shadow Docket Decision as Precedential*, VOLOKH CONSPIRACY (Jan. 14, 2022), https://reason.com/volokh/2022/01/14/nfib-v-osha-cites-shadow-docket-decision-as-precedential/ [https://perma.cc/M772-V2P3].

expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[115] In a sense, *NFIB* went further than *Alabama Association* had, because it deployed this principle at the outset of its discussion of the merits of the appeal, treating the principle as defining the standard of review by which the OSHA rule would be measured. As in *Alabama Association*, the Court did not elaborate on *why* it was embracing this clear statement rule. Rather, it basically took the prior case's verbal formula at face value, even though the burden shift just mentioned was arguably a substantial expansion of the major questions doctrine.

In a concurring opinion, Justice Gorsuch, joined by Justices Thomas and Alito, did provide an elaborate argument for the major questions doctrine, rooted in the nondelegation doctrine.[116] I will analyze his argument at length below.[117] It is worth noting, however, that the Justices in the majority who joined only the per curiam opinion (namely Roberts, Kavanaugh, and Barrett) did not endorse Justice Gorsuch's approach.[118] Those Justices rested on statutory rather than constitutional grounds and did not significantly justify the major questions doctrine in his (or any other) terms.

The brevity of discussion regarding the major questions doctrine in the per curiam opinion may be related to the fact that this was another case on the emergency docket. To be sure, unlike the situation in *Alabama Association*, the Court did hold oral argument, but the procedural difference between the two decisions should not be overstated. *NFIB* was decided only six days after oral argument.[119] If it was not literally within the shadow docket, it was at least within the penumbra.

The per curiam opinion as a whole seems to have suffered from the haste with which it was prepared. The most conspicuous example was the Court's misapplication of the test for granting or denying a stay. The traditional test considers, among other factors, whether issuance of the stay will substantially injure the other parties interested in the proceeding, and where the public interest lies.[120] In *NFIB*, however, the Court stated that "[i]t is not our role to weigh such tradeoffs."[121] Several commentators have pointed out this fundamental inconsistency between the Court's argument and the settled balancing test.[122] The Court's analysis of the probability that the plaintiffs would succeed on the merits was also quite superficial. It was hardly obvious that the OSHA standard

115. *NFIB*, 595 U.S. at 117.

116. *Id.* at 121–26 (Gorsuch, J., concurring).

117. *See infra* Part III.B.

118. *See* Simon Lazarus, *Biden Misread the Supreme Court's Ruling Against the OSHA Vaccine Rule*, NEW REPUBLIC (Jan. 19, 2022), https://newrepublic.com/article/165066/osha-vaccine-mandate-gorsuch-roberts [https://perma.cc/G8D7-P4NJ] (noting this omission).

119. 595 U.S. at 117.

120. *See, e.g.*, Nken v. Holder, 556 U.S. 418, 425–26 (2009).

121. 595 U.S. at 120.

122. Will Baude, *Balancing the Equities in the Vaccine Mandate Case*, VOLOKH CONSPIRACY (Jan. 14, 2022), https://reason.com/volokh/2022/01/14/balancing-the-equities-in-the-vaccine-mandate-case/ [https://perma.cc/R945-9HNF]; Richard Re, *Did the Supreme Court Overrule Equity?*, RE'S JUDICATA (Jan. 14, 2022), https://richardresjudicata.wordpress.com/2022/01/14/did-the-supreme-court-overrule-equity/ [https://perma.cc/CWM9-UQN7].

was insufficiently workplace-related to satisfy the statute. The brief opinion did not make a close analysis of the statutory text and, as the dissenters in the case argued, neglected the close relationship between the COVID-19 rule and OSHA's core mission.[123]

In view of the majority opinion's vulnerability on these grounds and others, the Court's resort to the clear statement rule seems especially important. The Court's burden of showing that the Act did not "clearly" authorize the rule was somewhat less than if it had felt compelled to show that the Act provided no authority for the rule on the basis of the usual review standards (with or without *Chevron*).

In sum, the Court's opinion in *NFIB* was a significant expansion of the major questions doctrine but did not add to the justifications for it. The Court left that task to be fulfilled in *West Virginia*, which the Court had already agreed to hear when it granted the stay in *NFIB*.

4. Biden v. Missouri

I should also briefly mention a recent case in which the Court could have been expected to discuss the major questions doctrine but failed to do so. In *Biden v. Missouri*, the Secretary of Health and Human Services issued a rule that required entities participating in the Medicare and Medicaid programs to ensure that their employees would be vaccinated against COVID-19 (with a few exemptions).[124] In a case argued and decided in tandem with *NFIB*, the Court granted a stay of lower court injunctions that would have prevented enforcement of this requirement.[125] The Court concluded that the vaccination mandate fell well within the agency's authority. Writing on behalf of four dissenters, Justice Thomas disagreed with that conclusion. He also invoked the major questions doctrine: "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[126] In this instance, he noted, the rule "requires millions of healthcare workers to choose between losing their livelihoods and acquiescing to a vaccine they have rejected for months."[127]

The majority did not respond to this point, and one could well wonder why it did not. The per curiam opinion basically argued that the rule fell squarely within the agency's area of responsibility and was consistent with past practice.[128] That may well be so, but the Court did not explain whether it thought

123. *NFIB*, 595 U.S. at 127–39 (Breyer, Sotomayor & Kagan, JJ., dissenting); *see* Shane, *supra* note 12 (elaborating on this critique); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1026–30 (2023) (same). With fuller consideration, the Court could have pursued a narrower but potentially stronger argument that the particular lines OSHA had drawn, such as the one-hundred employee cutoff, were arbitrary and capricious. *See* Shane, *supra.* By comparison, the Court's actual rationale seems unnecessarily heavy-handed.

124. 595 U.S. 87, 89 (2022) (per curiam).

125. *Id.* at 97–98.

126. *Id.* at 104 (Thomas, J., dissenting) (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).

127. *Id.*

128. *Id.* at 94 (majority opinion).

that those circumstances satisfied the threshold showing required by the major questions doctrine or, instead, that the doctrine did not apply in the first place.

The simplest explanation for the Court's failure to address the major questions doctrine in *Biden v. Missouri* may be that this was another emergency docket case, decided under the same time constraints as those involved in *NFIB*; the Justices in the majority may simply not have taken time to consider this specific issue. Regardless, the majority's silence on the issue suggests that the Court did not yet have a coherent theory as to when or how to apply the doctrine.

C. Summary

The preceding pages have traced the somewhat erratic manner in which the major questions doctrine took hold in the Supreme Court prior to *West Virginia*. The Court began in *Brown & Williamson* with a comment that the case was, for a variety of reasons, "extraordinary." This comment was squarely situated within a standard *Chevron* step one analysis. Some of those reasons were distinctive to the specifics of that case, but the Court also included language—based on an out-of-context quote from Justice Breyer—suggesting that those circumstances included the broad economic and political impact of the decision.

That comment soon gave rise, especially among theorists, to the idea that the Court had launched a "doctrine."[129] They were further encouraged by *Utility Air*, in which the Court, although still adhering to the *Chevron* two-step framework, included an isolated sentence that could be read as adopting a general policy disfavoring administrative rules with broad economic and political significance absent "clear congressional authorization." That sentence later morphed into a threshold test of validity in *King* and then into a presumption or clear statement rule in *Alabama Association* and *NFIB*. The credibility of that last step in the progression was somewhat undercut by the fact that each of those two cases was decided on the emergency docket, without much time for deliberation, let alone any discernible dialogue with dissenters on the major questions issue.

All of this history may seem, after *West Virginia* and *Nebraska*, like water under the bridge, but I have recounted it at length to make a particular point. It's normal, of course, for judges to use references to past cases as support for the conclusions they reach in statutory interpretation cases. In the case law on the major questions doctrine, however, the Court has tended to rely on past holdings—or exaggerated descriptions of those holdings—as a substitute for serious exploration of the justifications for the doctrine. As the Court proceeded to give more attention to the doctrine, beginning in *West Virginia*, the questions of interest were how far it would continue to take the past pronouncements largely for granted, and how far it would make a serious effort to justify the assumptions underlying the doctrine. The following Sections of this Article will address those questions.

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129. *See* Alli Orr Larsen, *Becoming a Doctrine*, 76 FLA. L. REV. 1, 9–14 (2024) (tracing the intellectual history of the so-called doctrine).

II.
THE MAJOR QUESTIONS DOCTRINE TODAY

A. West Virginia v. EPA

West Virginia v. EPA[130] is a lengthy, technically complex decision. I will describe the case in only as much detail as is necessary to provide a grounding for the discussion that will follow.

Under § 111(d) of the Clean Air Act,[131] the EPA may regulate power plants by setting a "standard of performance" for their emission of various pollutants into the air. Each such standard must reflect the "best system of emission reduction" that the agency has found to be "adequately demonstrated" for the pollutant in question.[132] For many years, the agency exercised this authority by issuing standards that required power companies to operate more cleanly by upgrading the equipment in their respective plants. In 2015, the Obama administration adopted a new approach to § 111(d). This approach, known as the Clean Power Plan, was intended to bring about sharp reductions in carbon dioxide emissions that contribute to climate change. The plan required plants to reduce their production of electricity or subsidize plants that utilized cleaner sources of energy such as natural gas, wind, or solar energy. Various states and companies sought judicial review of the plan, and the question before the Supreme Court was whether this approach, called "generation shifting," was authorized by the Clean Air Act. The Court answered that question in the negative.

In his majority opinion, Chief Justice Roberts wrote that there are "'extraordinary 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.'"[133] He then reviewed and quoted from the Court's prior cases on the major questions doctrine to illustrate how the Court had found such "reasons to hesitate" in each of them. He concluded:

> Thus, 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. To convince us otherwise, 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.[134]

Applying these lessons to the case before the Court, he declared that "this is a major questions case" and accordingly decided that the EPA rule could not stand.[135] He emphasized that the agency was claiming a "transformative

130. 597 U.S. 697 (2022).
131. 42 U.S.C. § 7411(d).
132. *Id.* § 7411(a)(1).
133. 597 U.S. at 721.
134. *Id.* at 723.
135. *Id.* at 724.

expansion in [its] regulatory authority," based on an "unheralded power" derived from a rarely used "ancillary provision" in the Clean Air Act. Moreover, Congress had "conspicuously and repeatedly declined" to authorize generation shifting itself.[136]

Justice Gorsuch, joined by Justice Alito, wrote a lengthy concurring opinion. He said that the Court has often adopted clear statement rules, and it should do so in this instance to protect the Constitution's separation of powers.[137] He explained his view that the elected legislature should adopt the nation's laws, therefore, "[p]ermitting Congress to divest its legislative power to the Executive would 'dash [this] whole scheme.'"[138] It would lead to "easy and profuse" intrusions on liberty, instability, and flourishing of "[p]owerful special interests."[139] This separation of powers argument in support of the major questions doctrine was largely equivalent to the analysis that Gorsuch had used to defend the doctrine on nondelegation grounds in *NFIB*. Then, in order to provide guidance as to when a major question is presented, he cited to numerous cases in which, by his account, the Court had found the requirements for major question status to be satisfied (although none in which they had *not* been satisfied).[140]

In dissent, Justice Kagan, joined by Justices Breyer and Sotomayor, argued that Congress has always delegated broad powers to agencies like the EPA, because it relies on these agencies' superior expertise and ability to keep regulatory schemes working over time.[141] The Court should give effect to this congressional choice, she declared, especially in light of the nation's enormous stake in responding to climate change.[142] In any event, she said, the Clean Power Plan differed from the rules at issue in some of the prior major questions cases because the EPA was acting squarely within its field of expertise and its plan fit easily into the structure of the Clean Air Act.[143]

B. Biden v. Nebraska

The Court's next encounter with the major questions doctrine occurred exactly one year after *West Virginia* in *Biden v. Nebraska*.[144] In that case, the Court relied on the doctrine as a basis for invalidating the Biden administration's student loan forgiveness program. The Secretary of Education had adopted the program by relying on the so-called HEROES Act, which authorized the Secretary to "waive or modify" provisions of student loan legislation as necessary to alleviate financial hardship resulting from a national emergency.[145]

136. *Id.*
137. *Id.* at 736 (Gorsuch, J., concurring).
138. *Id.* at 739.
139. *Id.*
140. *Id.* at 743–44.
141. *Id.* at 755–64 (Kagan, J., dissenting).
142. *Id.* at 753–54, 783–84.
143. *Id.* at 769–79.
144. 143 S. Ct. 2355 (2023).
145. *Id.* at 2363.

Presidents Trump and Biden had indeed declared the COVID pandemic to be a national emergency.

In his opinion for the Court, Chief Justice Roberts asserted that the terms "modify" and "waive" connote modest changes and could not reasonably be construed to allow the Secretary to rewrite the statute from the ground up.[146] More broadly, he stated that, "[u]nder the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act. This would "effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind . . . ."[147] Emphasizing that the program could result in "abolit[ion of] $430 billion in student loans, completely canceling loan balances for 20 million borrowers," Roberts quoted directly from the *West Virginia* opinion: "'A decision of such magnitude and consequence' on a matter of 'earnest and profound debate across the country' must 'res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.'"[148] Again quoting from *West Virginia*, he concluded that "'the basic and consequential tradeoffs' inherent in a mass debt cancellation program 'are ones that Congress would likely have intended for itself.' In such circumstances, we have required the Secretary to 'point to "clear congressional authorization"'" to justify the challenged program."[149]

The Secretary argued that the major questions doctrine should apply only to agency decisions to regulate, not the provision of government benefits, such as the program in this case.[150] Then-Judge Kavanaugh had hinted at such a limitation in *U.S. Telecom*,[151] but the Court rejected the distinction: "Among Congress's most important authorities is its control of the purse. . . . It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations."[152]

Justice Kagan, joined by Justices Sotomayor and Jackson, dissented, making points similar to the ones she had deployed in her *West Virginia* dissent. She wrote that the majority's major questions doctrine

> prevents Congress from doing its policy-making job in the way it thinks best. . . . Congress delegates to agencies often and broadly. And it usually does so for sound reasons. Because agencies have expertise Congress lacks. Because times and circumstances change, and agencies are better able to keep up and respond. . . . Except that this Court now won't let it reap the benefits of that choice . . . .
>
> The policy judgments, under our separation of powers, are supposed to come from Congress and the President. But they don't when the Court refuses to respect the full scope of the delegations that Congress makes

146. *Id.* at 2368–71.
147. *Id.* at 2373.
148. *Id.* at 2374 (quoting *West Virginia*, 597 U.S. at 735).
149. *Id.* at 2375.
150. *Id.* at 2374–75.
151. *See supra* note 95.
152. 143 S. Ct. at 2375.

> to the Executive Branch. When that happens, the Court becomes the arbiter—indeed, the maker—of national policy. That is no proper role for a court. And it is a danger to a democratic order.[153]

The majority did not make any extended effort to justify the major questions doctrine as an original matter. Roberts did emphasize that the magnitude of the loan forgiveness program was, indeed, "major."[154] He also referred to separation of powers a few times, accompanied by biting rhetoric (such as describing the program as "the Executive seizing the power of the Legislature").[155] But he did not explain why his vision of separation of powers compared favorably with Kagan's. For the most part, he relied on precedent.[156] Indeed, by this time in the development of the major questions doctrine, several of the Court's past cases did squarely support his argument, as compared with the largely contrived appeals to precedent that earlier cases on the major questions doctrine had employed.

Overall, the major questions doctrine appeared to play a less prominent role in the *Nebraska* opinion than it had in *West Virginia*. Chief Justice Roberts did not even mention the doctrine until after he had written at length using conventional statutory interpretation arguments to cast doubt on the Secretary's plan.[157] He relied heavily on the interpretation of "modify" in *MCI v. AT&T*, which did not itself endorse a special rule for major questions (although the Court has sometimes pretended otherwise).[158] Indeed, Roberts said explicitly that he could have reached the same result using "normal" statutory interpretation because "the statutory text alone precludes the Secretary's program."[159] Ultimately, therefore, the decision is opaque as to the degree of force that the Court would have been willing to accord to the doctrine under other circumstances.

The most noteworthy aspect of the decision, from a doctrinal standpoint, was the concurring opinion written by Justice Barrett.[160] Although she stated at the outset that she joined the majority opinion in full, she later proceeded to outline a very different basis for the major questions doctrine, contending that it grows out of "commonsense principles of communication."[161] I will give close attention to Barrett's analysis in a later Section of this Article.

C. The Uncertain Meaning of the Doctrine

An initial step in evaluating the major questions doctrine in the aftermath of *West Virginia* and *Nebraska* is to understand the nature of the doctrine the

153. *Id.* at 2397–98 (Kagan, J., dissenting).
154. *Id.* at 2373 (majority opinion).
155. *Id.* at 2373, 2375.
156. *Id.* at 2374.
157. *Id.* at 2368–71.
158. *Id.* at 2368; *see supra* notes 39–40 and accompanying text.
159. 143 S. Ct. at 2375 & n.9.
160. *Id.* at 2376–84 (Barrett, J., concurring).
161. *Id.* at 2380.

Court has adopted. This is not as easy a task as it may seem. Chief Justice Roberts's opinions in these cases are decidedly vague on that score.

In *West Virginia*, as I have discussed, the Court apparently endorsed a presumption that an agency would have to overcome to prevail in a major questions case. The presumption looked quite potent, effectively dominating the Court's consideration of the merits of that case. The Court spent fourteen paragraphs arguing that the EPA rule fell within the scope of the major questions doctrine,[162] and only eight responding to the arguments that the agency put forward in an effort to overcome the presumption.[163]

On the other hand, the presumption did not seem to be as categorical as it might have been. Although some commentators have interpreted the Court to mean that the agency must point to "explicit and specific" congressional authorization,[164] none of the Court's cases have applied the presumption in so draconian a manner. If the Court in these cases had wished to treat it as a flat rule, much of the rest of its discussion in its respective opinions would have been superfluous. Evidently, therefore, the Court remained willing to give at least some consideration to the other arguments that the agency could normally use to support its interpretation. This would mean, at least theoretically, that the government's arguments could potentially overcome the Court's "hesitation" and validate the agency's action. *Massachusetts v. EPA*,[165] another climate change-related case, is noteworthy in this regard, because it expressly distinguished *Brown & Williamson*.[166]

Indeed, in the wake of *West Virginia*, one could only speculate about the continued viability of *Brown & Williamson*, which did not rely on a clear statement requirement at all. Chief Justice Roberts's opinion in *West Virginia* did not expressly disavow that case's relatively holistic approach to the major questions doctrine, let alone explain why he was doing something different. To the contrary, he purported to follow it as though it were directly controlling.[167] Thus, the Court appeared to have left itself space to revert to a relatively modest approach in a case that might impel it to do so—for example, if a lower court were to attempt to extend the major questions doctrine further than the Supreme Court wished to go.

Biden v. Nebraska did not dispel these uncertainties. If anything, the Court's discussion of the major questions doctrine appeared to take an even less muscular form than its discussion in *West Virginia* had. As I have just explained,

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162. 597 U.S. 697, 725–32 (2022).

163. *Id.* at 732–35.

164. Deacon & Litman, *supra* note 123, at 1012; *see* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 275–76 (2022) (explaining that "statutory text [must] surmount this clear statement hurdle").

165. 549 U.S. 497 (2007).

166. *Id.* at 530–31. The Court did not refer to the major questions doctrine by name, but it was well aware of that issue. *See id.* at 512–13 (discussing EPA's reliance on the doctrine in the preamble to its rule); Brief for Federal Respondents at 21–22, 31–32, *Massachusetts*, 549 U.S. 497 (relying on apposite language from *Brown & Williamson*); *see also* RICHARD J. LAZARUS, THE RULE OF FIVE: MAKING CLIMATE HISTORY AT THE SUPREME COURT 93–95 (2020) (discussing EPA's heavy reliance on that case in its brief in the D.C. Circuit).

167. *West Virginia*, 597 U.S. at 723.

the Court began discussing the doctrine only at the end of its analysis of the merits, and it said explicitly that it would have reached the same result even if the doctrine had not been implicated.[168] Of course, alternative holdings are not particularly unusual in the Court's case law. However, the structure of the opinion did highlight the Court's disinclination to place a great deal of weight on the major questions doctrine as such.

Ultimately, I think it is too soon to assess how flexibly the Court will implement the major questions presumption over time. Other circumstances or other judicial authors might apply it in a looser fashion, as just mentioned, or apply it more strictly. In any event, the most recent opinions have articulated a clear statement approach forcefully enough to invite the conclusion that the Court will probably continue to adhere to it (with or without Justice Barrett's support). Accordingly, the remaining sections of this article will be primarily devoted to appraising the merits of that approach.

D. What About Chevron*?*

A related issue to address is the role, or non-role, of *Chevron*. That case was, of course, a prominent point of reference in the earliest major questions doctrine cases. But times have changed. Neither the majority opinion, nor the concurrence, nor the dissent in *West Virginia* even mentioned the case. Nor was *Chevron* mentioned in either of the two COVID cases that the Court decided earlier in the same term. Indeed, this silence was part of a more general pattern of neglect. It is well known that no Supreme Court case has relied on *Chevron* since 2016.[169] In some cases that would seem to have been conducive to being resolved based on a *Chevron* analysis, the Court has ruled in the agency's *favor* on the basis of its own reading of the statute, thereby avoiding any question of deference.[170] In other cases it has ruled *against* the agency on the basis of arguments that it could potentially have framed as a reversal under *Chevron* step one but that it did not describe in those terms.[171]

At this writing, the Court is poised to engage in a major reappraisal of *Chevron* during the 2023 term in *Loper Bright Enterprises v. Raimondo*[172] and its companion case, *Relentless, Inc. v. United States Department of Commerce*.[173] That reappraisal may lead the Court to overrule *Chevron*, modify it, or leave it essentially unchanged.

For purposes of this Article, however, I will generally treat *Chevron* as extraneous to my analysis, although I will mention it in a few places where it is particularly relevant. This working assumption will enable me to throw into sharp relief the contrasts between the major questions doctrine and the statutory

168. *See supra* notes 157–159 and accompanying text.

169. *See* James Kunhardt & Anne Joseph O'Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS INST. (Aug. 18, 2022), https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/ [https://perma.cc/UYQ9-LG3R].

170. *See, e.g.*, Becerra v. Empire Health Found., 597 U.S. 424 (2022); Babcock v. Kijakazi, 595 U.S. 77 (2022); Nielsen v. Preap, 586 U.S. 392 (2019).

171. *See, e.g.*, Am. Hosp. Ass'n v. Becerra, 596 U.S. 742 (2022).

172. 143 S. Ct. 2429 (2023) (mem.) (granting certiorari).

173. 144 S. Ct. 325 (2023) (mem.) (granting certiorari).

interpretation methods that the Court would follow in ordinary cases. One of the objectives of this article is to demonstrate that, regardless of whether *Chevron* stands or falls, the major questions doctrine has serious flaws that ought to be recognized even by *Chevron* skeptics.

Incidentally, I should note that the substantive implications of *Chevron* deference can cut in a variety of directions, depending on the predilections of the administration that is in power at any given time. Thus, subordination of the *Chevron* issue in the context of the major questions doctrine will not always be bad news from the standpoint of supporters of a strong regulatory state.

E. The Scope of the Major Questions Doctrine

I now take up the issue of what kinds of cases are governed by the major questions doctrine. This topic tends to corroborate two-thirds of this Article's title, because the boundaries of the doctrine are indeterminate at best, and the task of trying to pin them down is indeed confounding.

For several years this inquiry did not seem particularly complex. The cases treated *Utility Air* as containing the authoritative formula: "We expect Congress to speak clearly if it wishes to assign to an agency decisions of 'vast economic and political significance.'"[174] *Alabama Association*, *NFIB*, and Justice Kavanaugh's *U.S. Telecom* dissent all relied on this formula,[175] and it was also prominent in *King v. Burwell*.[176] That formulation did leave open questions about how "vast" the rule's impact would have to be, and also, as I discussed in Part II.C., exactly what consequences would ensue if this test were met, but at least the threshold inquiry sounded fairly straightforward.

In *West Virginia v. EPA*, however, Chief Justice Roberts's opinion left the scope question more uncertain. He spoke more vaguely of "'extraordinary cases' . . . in which the 'history and 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."[177] He then proceeded to review the precedents that had exemplified this class of cases. One case on his list was *Gonzales v. Oregon*, which had declined to find that the Attorney General's licensing authority under the Controlled Substances Act gave him the power to ban assisted suicide.[178] The curious thing about this reasoning was that assisted suicide cannot be credibly described as having vast economic significance (nor did the opinion in that case say that it did).[179] It is possible that the Chief Justice was simply slipping into a non sequitur here: *Gonzales* relied on the mismatch between the Attorney General's usual realm of authority and the policy he was pursuing[180]—a line of

174. 573 U.S. 302, 324 (2014).

175. *See supra* notes 94, 105, and 115 and accompanying text.

176. *See supra* note 69 and accompanying text (noting *King*'s reliance on the *Utility Air* criterion and the agency's perceived lack of expertise).

177. 597 U.S. 697, 721 (2022).

178. *Id.* at 722 (citing Gonzales v. Oregon, 546 U.S. 243 (2006)).

179. *See supra* notes 76–77 and accompanying text.

180. *Gonzales*, 546 U.S. at 258–68.

argument often invoked in major question cases—but that overlap in rationales need not have been taken to mean that *Gonzales* was itself a major questions case.[181] If the Court was serious about what it said, however, it would seem to have expanded the scope of the major questions doctrine well beyond the bounds that the doctrine has usually been assumed to possess.

Justice Gorsuch's concurrence in *West Virginia* added further uncertainties. He began with a close paraphrase of the *Utility Air* formula: "Under th[e] [major questions] doctrine's terms, administrative agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance.'"[182] (Note, however, his omission of the word "extraordinary.") Later in his opinion, he undertook to elaborate on circumstances in which an agency action involves a major question for which clear congressional authorization is required. One criterion he mentioned was that "an agency must point to clear congressional authorization when it seeks to regulate 'a significant portion of the American economy' or require 'billions of dollars in spending' by private persons or entities."[183] That point was largely equivalent to the *Utility Air* benchmark. Where the economic interests at stake are large, one can probably expect that significant political ramifications will follow.

Some of Gorsuch's other examples, however, seem much more provocative and questionable. First, he asserted flatly that the doctrine applies when an agency claims the power to resolve a matter of great "political significance" or end an "earnest and profound debate across the country."[184] The first of those quotes came from *NFIB*, which actually had used the phrase "economic *and* political significance."[185] His source for the second quote was *Gonzales*, which, as I have said, did not purport to be a major questions doctrine case at all.[186] Aside from the dubiousness of his case support, the practical implications of Gorsuch's assertion are sobering. A host of cases that the Supreme Court decides every year do stimulate earnest and profound debate or are politically significant. If Gorsuch meant that all of them must be resolved against the agency in the absence of a clear congressional statement, he was broadening the major

181. Eight pages later, at the very end of his discussion of Congress's failure to enact bills that would have specifically authorized action like the Clean Power Plan, Roberts quoted from *Gonzales* in asserting that "'[t]he importance of the issue,' along with the fact that the same basic scheme EPA adopted 'has been the subject of an earnest and profound debate across the country, . . . makes the oblique form of the claimed delegation all the more suspect." *West Virginia*, 597 U.S. at 732 (citing *Gonzales*, 546 U.S. at 267–68). Given the placement of this quote, one is entitled to wonder whether the Court used this reference as part of its doctrinal analysis or simply as a makeweight observation placing EPA's position in a generally unfavorable light.

182. 597 U.S. at 735 (Gorsuch, J., concurring) (quoting from the majority opinion).

183. *Id.* at 744.

184. *Id.* at 743.

185. 595 U.S. 109, 117 (2022) (emphasis added).

186. *But see* Bressman, *supra* note 32, at 771–75 (endorsing *Gonzales* as a major questions doctrine case). Although Bressman criticizes aspects of the Court's analysis, she proposes a reinterpretation of *Gonzales* that also emphasizes political saliency issues. *Id.* at 776–86. For my contrary perspective, see *infra* Part III.D.

questions doctrine in a truly dramatic fashion.[187] Moreover, a criterion that turns on whether a debate is "earnest and profound" (as opposed to being "calculated and shallow"?) does not sound like a very manageable test.[188]

Second, Gorsuch stated that "this Court has found it telling when Congress has 'considered and rejected' bills authorizing something akin to the agency's proposed course of action."[189] He explained that this situation "may be a sign that an agency is attempting to 'work [a]round' the legislative process to resolve for itself a question of great political significance."[190] This argument for invoking the major questions doctrine seems to presume that if an agency does ask for explicit congressional authority, it *must have known* that it lacked authority to proceed without such a legislative blessing. He provided no support for this supposition.[191]

Indeed, one would think that, even where an agency might well have sufficient authority to address a particular problem on its own, it should be *encouraged* to explore the possibility of working with the legislature to arrive at a mutually satisfactory solution. A judicial review principle that would give an agency a perverse incentive to refrain from seeking such cooperation would seem to be decidedly unwise.[192] At least one agency official is already predicting this chilling effect.[193]

Third, Gorsuch declared that "this Court has said that the major questions doctrine may apply when an agency seeks to 'intrud[e] into an area that is the particular domain of state law,'" relying on *Alabama Association*.[194] "Of course," he added, "another clear statement rule—the federalism canon—also applies in these situations. . . . But unsurprisingly, the major questions doctrine and the federalism canon often travel together."[195] This was another non sequitur.

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187. *See* Deacon & Litman, *supra* note 123, at 1050–59 (warning against the disruptive consequences of such an expansion).

188. It would, however, give new meaning to the expression "the importance of being earnest."

189. 597 U.S. at 743 (Gorsuch, J., concurring).

190. *Id.*

191. In this connection, Gorsuch relied on *Brown & Williamson*, but that reference was inapt. In that case, the majority opinion was unequivocal: "We do not rely on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority—in reaching [our] conclusion." 529 U.S. 120, 155 (2000). Rather, the Court emphasized the FDA's repeated *affirmative* declarations that it lacked jurisdiction to regulate tobacco products and Congress's adoption of its own limited measures in reliance on those assurances. *Id.* at 155–56.

192. Gorsuch probably had in mind the Obama administration's creation of the Deferred Action for Childhood Arrivals (DACA) program through executive action after congressional action on comprehensive immigration reform stalled. *See West Virginia*, 597 U.S. at 752 (Gorsuch, J., concurring) (recalling a familiar Obama catchphrase when declaring that "the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives"). The legality of DACA has never been definitively adjudicated. *See Texas v. United States*, 50 F.4th 498 (5th Cir. 2022) (remanding a decree enjoining the program for further consideration). It would be odd to conclude that the program would have stood on a firmer footing on appeal if Obama had not first tried to engage Congress in immigration reform efforts.

193. Fred B. Jacob, *The Major Questions Doctrine and Legislative Experimentation*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 3, 2023), https://www.yalejreg.com/nc/the-major-questions-doctrine-and-legislative-experimentation-by-fred-b-jacob/ [https://perma.cc/HY8E-9U9L].

194. 597 U.S. at 744 (quoting *Ala. Ass'n*, 141 S. Ct. at 2489).

195. *Id.*

Even when they do "travel together," as in *Alabama Association*, it does not follow that an impact on federal-state relations should itself trigger major questions status.

When the Court returned to the major questions doctrine the following year in *Biden v. Nebraska*, it did not say very much to answer the scope questions that the opinions in *West Virginia* had raised. Indeed, the Court did not linger over the question of whether the loan forgiveness program posed a major question, in light of the program's "staggering" economic and political significance.[196] Practically every student borrower would benefit from the program, and its projected budgetary impact exceeded $400 billion. The dissenters pointed out that, unlike *West Virginia*, the case did not involve an agency invoking a "long-extant" and "ancillary" statutory provision, nor an agency acting "far outside its 'particular domain.'"[197] The absence of those factors therefore serves to identify criteria that the majority believes are *not* essential to major question status.[198]

Finally, the Chief Justice did draw attention to the numerous bills that had been introduced in Congress to institute a loan forgiveness program and the "earnest and profound" debate that had surrounded the issue.[199] But he made these points in the context of a program that he would almost certainly have regarded as presenting a major question anyway because of its huge impact and cost. Evidently this track record of past congressional and public deliberations helped to make invocation of the major questions doctrine attractive to the majority. But it is far from clear that such deliberations could, on their own terms, sweep into that domain a question that would otherwise not be there, as Justice Gorsuch had suggested in *West Virginia*.

For purposes of this Article, I will generally discuss the major questions doctrine on the assumption that it is intended to apply to agency decisions with "vast economic and political significance." This language drawn from *Utility Air* is the most commonly used definition, and its relatively narrow scope harmonizes with the frequently stated expectation that the doctrine applies to "extraordinary" situations. I do not take for granted that this formula will always circumscribe the doctrine, but at least it will provide a more or less coherent basis for discussion. I will argue that the doctrine as so understood is not defensible and gives rise to troubling consequences. Should my premise about the doctrine's scope prove to be too limited, this Article's concerns will be amplified commensurately.

One other variation to consider is the possibility that the major questions doctrine might be triggered by one or more of the "reasons to hesitate" cited in the *West Virginia* opinion *in combination with* (not in lieu of) a major economic and political impact. Some commentators do appear to read the opinion as

196. 143 S. Ct. 2355, 2373 (2023).

197. *Id.* at 2398–99 (Kagan, J., dissenting).

198. *See id.* at 2384 (Barrett, J., concurring) (suggesting that the more factors are present, the less likely it is that Congress delegated authority with ambiguous language).

199. *Id.* at 2374 (majority opinion).

endorsing such a definition.[200] Such formulations may well have the virtue of narrowing the scope of the doctrine, but they also may contribute to the confusion regarding the justifications, if any, for the doctrine. In a given context, considerations such as the fact that a statute was passed years ago or is being used in a novel fashion might or might not be relevant to the question of whether an agency decision is authorized. Even when such considerations are relevant, however, it is hard to see why they should impel a court to apply an especially demanding standard of review—a clear statement rule—to its consideration of that question. Similarly, an aphorism such as "Congress does not hide elephants in mouseholes," which predated[201] and exists apart from the major questions doctrine,[202] can sometimes be persuasive as a reason to reject an agency's interpretation, but it should not be conflated with the major questions doctrine itself.

In any event, the Supreme Court has not yet expressly endorsed such a combined approach, and, more to the point, has not tried to justify it. Insofar as the Court, or individual Justices, have offered defenses of the major questions doctrine, they have spoken at a more generic level. In Part III of this Article, accordingly, I will explore the cogency, or lack of cogency, of those defenses on the same level. That discussion will, I hope, shed at least some light on the question of whether the Court would be able to justify any of these more complex variants instead.

III.
PURPORTED JUSTIFICATIONS

As I discussed in Part I, the Supreme Court's cases on the major questions doctrine prior to *West Virginia* made hardly any effort to provide a coherent defense of the doctrine. Although the Court did offer defensible—if debatable—explanations for their specific holdings in light of the facts and legal frameworks from which they arose, the cases provided no clear justifications for expanding these holdings into a broad principle. For the most part, the Court treated its past precedents, or exaggerated accounts of those precedents, as a substitute for actual argumentation. This history invites suspicion that the Court drifted into relying on the major questions doctrine in a series of cases without thinking seriously about reasons that could justify it.

200. *See* Richard J. Pierce, Jr., *The Remedies for Constitutional Flaws Have Major Flaws*, 18 DUKE J. CONST. L. & PUB. POL'Y 105, 113 (2023) ("The Court held that the agency actions were unlawful because the agencies took unprecedented actions that had significant economic and political effects based on power that Congress delegated to the agencies in old, broadly worded statutes."); Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 86 (2022) ("[W]hen an agency stretches the boundaries of statutory interpretation to claim new authority to address big problems that, previously, were not obviously within the agency's purview.").

201. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

202. *See, e.g.*, Epic Sys. Corp. v. Lewis, 584 U.S. 497, 515 (2018); Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 465 (2017); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010) (thoroughly surveying the literature on the mouseholes canon but almost completely ignoring the major questions doctrine).

West Virginia v. EPA provided the Court with an opportunity to plug this unfilled gap. Chief Justice Roberts's opinion for the Court did rely heavily on prior cases, asserting that he was merely adhering to principles that the Court had been following ever since *Brown & Williamson*.[203] In the course of this synthesis, however, he offered a handful of normative generalizations that, in his telling, served to justify this line of authority. More specifically, he said 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."[204] Quoting Judge Kavanaugh's dissent in *U.S. Telecom*, he declared that "[w]e presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[205] He continued by remarking that the major questions doctrine took hold "addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[206] And, in the concluding paragraph of his opinion, he asserted that "[a] decision of such magnitude and consequence [as was at issue in *West Virginia*] rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[207] Roberts made other comments to similar effect, but these quotes sufficiently capture the majority opinion's rationales.

In this Section, I will analyze how well these and similar arguments from the Court stand up to critical scrutiny. I will also engage with the fuller policy discussion that has appeared in individual Justices' opinions and in the work of academic defenders of the major questions doctrine. I will discuss descriptive and normative justifications for the major questions doctrine separately. In practice, these two types of rationales blur together, but it will be helpful to distinguish between them for purposes of my critique.

A. Descriptive Rationales

As just noted, the Court's defense of the major questions doctrine has largely been phrased in descriptive terms: "We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[208] Despite the prominence of this sort of generalization in the majority opinions in *West Virginia*, *Nebraska*, and other cases, it is an unsatisfactory justification for the doctrine.

My criticism here is not directed at situations in which the Court, having reached a reading of legislative intent that disfavors an agency, cites to previous cases in which it has reached the same result under similar circumstances. That is a standard practice. But elevating such individual holdings into a generalized prediction is a qualitatively different judicial move. My claim here is that the

203. 597 U.S. 697, 731–32 (2022).
204. *Id.* at 723.
205. *Id.*
206. *Id.* at 724.
207. *Id.* at 735.
208. *See id.* at 723.

Court has not produced a cogent defense of the latter development. I will examine the topic first on a general level; then in light of the empirical evidence that purportedly supports it; and then in light of Justice Barrett's analysis in *Biden v. Nebraska*.

1. The Relevance of Past Interpretations

A difficulty with the Court's generalization about congressional intentions immediately strikes the eye: many jurists have not subscribed to it. In other words, judges in past generations have often concluded that Congress did give a particular agency broad power to make highly consequential decisions.[209] For example, the Court has upheld what would seem to be "major" decisions under statutes that authorized particular agencies to regulate in the "public interest, convenience, or necessity,"[210] to set "fair and equitable" prices,[211] and to prescribe "just and reasonable" rates.[212] A more recent example was the Court's decision in *Whitman v. American Trucking Associations*[213] to uphold and apply the Clean Air Act's provision authorizing EPA to set air quality standards that are "requisite to protect the public health." *Chevron* itself could be described in similar terms. And I have already mentioned the decision in *Massachusetts v. EPA*, which interpreted the Clean Air Act to find that EPA had power to regulate greenhouse gas emissions from vehicular tailpipes—by any measure a politically and economically consequential power—even though opponents of such regulation had actually relied on the reasoning of *Brown & Williamson* to cast doubt on this conclusion.[214] In addition, as Beau Baumann has pointed out, "we have all come upon examples of Congress's propensity to do 'major' things through underdetermined statutory provisions. A word we use to describe some such statutes is '*superstatutes*.'"[215]

Professor Ilan Wurman, who supports a version of the major questions doctrine on descriptive grounds, takes issue with these examples. He acknowledges that Congress often delegates authority to resolve important questions through *broad* language, such as in these instances, but he denies that these examples demonstrate that Congress delegates the resolution of important

209. *See, e.g.*, Sohoni, *supra* note 164, at 276–82; *cf.* Pierce, *supra* note 200, at 116 ("There are hundreds of statutes that are worded more broadly than the statutes that the agencies relied on in the vaccine mandate and climate change cases.").

210. Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943); *cf.* N.Y. Cent. Secs. Corp. v. United States, 287 U.S. 12, 24 (1932) (regarding "public interest").

211. Yakus v. United States, 321 U.S. 414, 422, 427 (1944).

212. Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 602 (1944).

213. 531 U.S. 457, 472 (2001).

214. *See supra* notes 169–170 and accompanying text.

215. Beau J. Baumann, *Let's Talk About That Barrett Concurrence (on the "Contextual Major Questions Doctrine")*, YALE J. ON REGUL.: NOTICE & COMMENT (June 30, 2023), https://www.yalejreg.com/nc/lets-talk-about-that-barrett-concurrence-on-the-contextual-major-questions-doctrine-by-beau-j-baumann/ [https://perma.cc/38XT-GLJ5]; *see, e.g.*, WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 16, 27–28 (2010) (listing and describing multiple superstatutes).

questions through *ambiguous* language, because those statutes, although broad, are "*unambiguous* delegations of authority."[216]

That distinction is entirely illusory. These statutes, like many others, are *both* broad and ambiguous. Statutes that delegate authority are never completely blank checks. Courts must often decide whether a broad enabling statute applies to a particular agency action, and that inquiry can be difficult precisely because the statute is, *in that respect*, ambiguous.[217] Moreover, even if Wurman's distinction were not misconceived in principle, it would likely prove incoherent in practice, because statutes that seem straightforward initially often turn out to be ambiguous when applied to newly emergent situations. Wurman himself also recognizes that "empirical research has shown that Congress does often legislate with deliberate ambiguity to achieve greater consensus."[218] He seems to discount this research on the ground that these compromises occur only in relatively inconsequential situations, not "important" ones. But the authors of the study in question, Victoria Nourse and Jane Schacter, nowhere suggest that their findings support that (improbable) limitation. To the contrary, those researchers report that time pressures can lead congressional staff to forego clarity when they deal with a "high profile" issue and that "[t]he demands of coalition building may create an additional incentive for ambiguity . . . in the case of controversial legislation."[219]

Ultimately, Wurman's argument comes across as a strained effort to deny the straightforward observation that Congress frequently does what proponents of the major questions doctrine say it does not do. In other words, I can see no reason for serious doubt that these statutes—many of which were enacted by Congresses that were more liberal than the current Congress and Court—have been *accurately* construed as having authorized numerous important regulatory decisions, even where the authorizing language was not always "clear."

Of course, it is a fact of life that changes in the Court's membership will often lead to new perspectives. Indeed, greater skepticism about regulation is largely what the Trump appointees were selected to display.[220] Some might argue that the earlier decisions were mistaken about Congress's willingness to empower agencies to make "major" decisions without clear authorization, and the Supreme Court has at long last arrived at a more realistic appraisal. But when the Court relies heavily on a factual premise that is so much at odds with the

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216. Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 39–40 n.213), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708 [https://perma.cc/DEA4-GRWH].

217. *Cf.* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984) (stating that a court should first inquire whether "the statute is silent or ambiguous *with respect to the specific issue*") (emphasis added).

218. Wurman, *supra* note 216, at 40 (citing Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 594–97 (2002)).

219. Nourse & Schacter, *supra* note 218, at 595, 596 n.40.

220. Coral Davenport, *Republican Drive to Tilt Courts Against Climate Action Reaches a Crucial Moment*, N.Y. TIMES (June 19, 2022), https://www.nytimes.com/2022/06/19/climate/supreme-court-climate-epa.html [https://perma.cc/2TQ2-3ZUG] (quoting Donald McGahn, President Trump's White House Counsel) ("[T]he judicial selection and the deregulatory efforts are really the flip side of the same coin.").

premises underlying decades of previous decisions, it should at least explain why it thinks it has discovered an insight that earlier generations of Justices missed. The Court's cases on the major questions doctrine have never offered more than unadorned ipse dixits to support its assertion that, unless it clearly signals otherwise, Congress wishes to make "major" decisions on its own without leaving them to be made by an agency.

The situation is reminiscent of reasoning that the Court adopted in a related context. In *FCC v. Fox Television Stations, Inc.*, Justice Scalia's opinion for the Court squarely upheld an agency's prerogative to revise its *policy* judgments, without having to explain why its new policy is better than the one it is replacing.[221] But, he continued, a reversal of *factual* assumptions is different. To avoid a finding that its position is arbitrary and capricious, the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate . . . [if] its new policy rests upon factual findings that contradict those which underlay its prior policy."[222]

2. Empirical Evidence, or the Lack Thereof

To get a sense of how much difficulty the Court would have if it actually did undertake to defend the *West Virginia* presumption as a factually grounded generalization about congressional intentions, we can examine an empirical argument along these lines, as offered by then-Judge Kavanaugh in his dissenting opinion in the D.C. Circuit in *U.S. Telecom*. He cited an article by Abbe Gluck and Lisa Bressman for the proposition that the major questions doctrine "supports a presumption of *non*delegation in the face of statutory ambiguity over major policy questions or questions of major political or economic significance."[223]

Gluck and Bressman's article was an ambitious empirical study of congressional staff members' views on various aspects of the legislative drafting process. The article is admirable in many ways, but Judge Kavanaugh found greater significance in the staff members' responses on this particular subject than the authors' data can support.

The relevant survey question asked: "What kinds of statutory ambiguities or gaps do drafters intend for the agency to fill?" and then listed various types of "[a]mbiguities/gaps" that a statute might contain.[224] It elicited affirmative answers of 28% with respect to "major policy questions," and 38% with respect to "questions of major economic significance," in contrast to much higher figures with respect to "the details of implementation" (99%) and "the agency's area of expertise" (93%).[225]

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221. 556 U.S. 502, 529–30 (2009).

222. *Id.* at 515.

223. *U.S. Telecom*, 855 F.3d at 422 (Kavanaugh, J., dissenting from denial of rehearing en banc); *see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I,* 65 STAN. L. REV. 901, 1003 (2013).

224. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: Methods Appendix*, 65 STAN L. REV. 905 app. at 37 (2015).

225. *Id.* at 1003–04.

Just looking at this data on its face raises some initial doubts about Judge Kavanaugh's thesis. The figures of 28% and 38% are not especially low. Can one defend the clear statement rule on the basis of a generalization that Congress doesn't delegate certain decisions, if about a third of the congressional staff members say that it does delegate such decisions?[226]

A more probing evaluation of the data raises further doubts. The survey question did not define "major," a word that has a variety of connotations.[227] There is no particular reason to think that many of the respondents understood it to refer to the kind of "extraordinary" issue that Justice O'Connor had in mind in *Brown & Williamson*. Perhaps more importantly, the question did not clarify how often Congress would have to have made a given type of delegation in order to warrant an affirmative answer. Was it asking whether such delegation occurs "generally"? "Frequently"? "Sometimes"? "Ever"? Any given respondent's answer could have depended vitally on how he or she interpreted that variable. In short, the ambiguity in the survey data greatly weakens its capacity to substantiate the assumptions on which Judge Kavanaugh relied, especially when placed alongside the nuanced comments of the staff members whom Nourse and Schacter interviewed for their study.[228]

Finally, a strictly literal interpretation of the survey responses seems unwarranted. Notwithstanding a few flights of hyperbole in some of the responses,[229] Gluck and Bressman themselves appear to acknowledge that the staff members' responses were to a significant degree aspirational; the staffers would *prefer* to resolve major questions (however defined) in the legislation, but

226. Professor Wurman (responding to an earlier draft of this article) takes issue with the negative answer that my rhetorical question contemplated. He writes, "The question . . . is why the burden here should be on proponents of the major questions doctrine. A doctrine that maintained that Congress does intend to delegate through ambiguities would only be substantiated by a mere third of congressional drafters. That is certainly no better for the doctrine's opponents." Wurman, *supra* note 216, at 42 n.217. With respect, that reply is seriously misconceived. *Of course* the proponents of a doctrine that has never been part of American law until the last several years should bear the burden of justifying it. If opinions about Congress's practices among survey respondents are sharply divided, the proper response is not to choose which subgroup had a majority, but to say that the survey *does not support any reliable generalization* about whether or not a given statute is likely to have authorized "major" decisions.

227. Recall that Judge Breyer, in his 1986 law review article, used the term "major questions" in a very different manner from the sense in which the Supreme Court's major questions doctrine cases have used it. *See supra* notes 44–47 and accompanying text. Professor Wurman acknowledges that my point about the ambiguity in the survey question's use of the term "major" is "[f]air enough," but he says that "it is hardly obvious" that a clearer question would have elicited different responses. Wurman, *supra* note 216, at 42 n.217. Once again, Wurman is relying on an untenable shift in the burden of justification. If the survey question was unclear, that should be a problem for those who seek to rely on the survey, not for those who seek to cast doubt on it.

228. *See* Nourse & Schacter, *supra* note 218, at 594–97.

229. One staff member quoted by Gluck and Bressman, and relied on by Judge Kavanaugh, declared broadly that "[d]rafters don't intend to leave [major questions] unresolved." Gluck & Bressman*, supra* note 224, at 1004. The extravagance of that assertion should be obvious; indeed, one of the favorite claims of proponents of an expanded nondelegation doctrine is that Congress too often does intend to leave such questions unresolved. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 124–25 (2022) (Gorsuch, J., concurring).

sometimes they cannot achieve that end.[230] Nothing in the staffers' responses indicated that when such ambiguities inevitably (if regrettably) occur, they prefer for the ambiguity to be resolved by *courts* rather than agencies. Still less did their responses express any support for a clear statement rule that would resolve any ambiguities in favor of less burdensome regulation.

My point here is simply that the factual premises of the major questions doctrine presumption are inherently speculative, and the Gluck and Bressman study does not dispel that uncertainty.[231] The Court's sharp departure from longstanding principles of scope of review cannot be convincingly defended on the ground that it is simply a more accurate assessment of congressional enabling statutes than previous generations of judges have made.

3. Justice Barrett's Linguistic Canon

I will now turn to an analysis of Justice Barrett's concurring opinion in *Biden v. Nebraska*,[232] which undertook to justify the major questions doctrine from an entirely different angle. Her opinion was an ambitious attempt to synthesize her own academic scholarship, reformulate the major questions doctrine as a "linguistic canon," and analyze existing case law on the doctrine. I will discuss each of these lines of argument in turn, but I ultimately conclude that her defense of the doctrine was unsuccessful.

The first part of the opinion was based on her article *Substantive Canons and Faithful Agency*,[233] which she had published in 2010 while she was still a professor at Notre Dame Law School. She distinguished between linguistic canons and substantive canons of statutory interpretation. Linguistic canons seek, at least in principle, to interpret a statute in order to effectuate legislative intent; substantive canons, on the other hand, openly interpret statutes to advance values external to the statute.[234] A "strong-form" substantive canon—equivalent to a clear statement rule—directs courts to "*strain* statutory text in order to advance a particular value."[235] In other words, it invites a court to adopt an interpretation that somewhat deviates from the statute's most natural meaning. Barrett considered this latter type of canon to be in significant tension with the fundamental textualist principle that courts should strive to be faithful agents of the legislature.[236] She seemed reconciled to, or at least ambivalent about, canons

230. *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1056–57 (2015) (quoting some of Gluck and Bressman's interviewees as acknowledging that they sometimes "have to punt" when they cannot reach agreement on major questions).

231. *See* Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 157 (2017) ("These survey results, *despite their methodological limitations*, provide *some* evidence that the Court's new major questions doctrine is an accurate (*or at least colorable*) understanding of congressional delegation preferences and thus a valid inquiry under *Chevron* step zero.") (emphasis added and footnotes omitted). The multiple qualifiers in this remark bring to mind the expression "damning with faint praise." Again, however, the crucial point is that the authors' survey data does not support a presumption *against* agency authority.

232. 143 S. Ct. 2355, 2376–84 (2023) (Barrett, J., concurring).

233. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).

234. 143 S. Ct. at 2376 & n.1.

235. *Id.* at 2376.

236. *Id.* at 2377.

that have been part of our legal system for many years. She also acknowledged that substantive canons can have a relatively strong claim to legitimacy if they are inspired by the Constitution.[237] But she was decidedly wary about adopting any new strong-form substantive canon.[238]

Against the background of these premises, Barrett made clear that she did not support the major questions doctrine insofar as it is understood as a strong-form substantive canon or clear statement rule.[239] She rejected the goal of "loading the dice" against the best reading of a statute by imposing a "clarity tax" that would drive up the costs to Congress of adopting legislation that would implicate such a doctrine.[240] Barrett made a passing effort to harmonize this perspective with the Roberts opinions in *West Virginia* and *Nebraska*,[241] but that effort required her to ignore the manifest thrust of those opinions. The reality seems to be that Justice Barrett, who joined the Court's opinions "in full" in those cases has a perspective that does not fully mesh with those of other Justices and that might lead to fracturing of the majority in future cases.

Notwithstanding this deviation from the majority's approach, Justice Barrett's next move in her concurring opinion was to spell out a rationale under which she did support the major questions doctrine. She argued that the doctrine could be interpreted as a *linguistic* canon, by which she meant a canon that followed from the text and context of regulatory legislation, without depending on extrinsic value judgments.[242] Although she described herself as a textualist, her conception of the "context" of a statute was decidedly broad. It would include not only the language that Congress enacted, but also "background legal conventions" and "common sense."[243] More specifically, she argued, an enabling statute must be read as encompassing common sense *limits*, and her version of the major questions doctrine was an embodiment of those limits.[244] It corresponded, in her view, to the way in which people ordinarily use words.

To illustrate this thesis, Barrett resorted to a memorable metaphor (actually drawn from Ilan Wurman's article).[245] She asked the reader to imagine a parent entrusting a babysitter with a credit card and instructing the latter to use it to "[m]ake sure the kids have fun!" Barrett argued that this "delegation" could reasonably be interpreted to authorize modest spending on recreation, but, in the absence of clear language or unusual circumstances, not lavish spending. Correspondingly, according to Barrett, when an agency uses its purported statutory authority to engage in the equivalent of lavish spending, a court properly uses the major questions doctrine to intercept that plan. This ruling, she said, would not rest on an extrinsic value judgment (frugality in recreational

237. *Id.* at 2377 & n.2 (citing, with respect to constitutionally based canons, Barrett, *supra* note 233, at 168–70).
238. *Id.*
239. *Id.* at 2377–78 & n.2.
240. *Id.*
241. *See id.*
242. *Id.* at 2378.
243. *Id.* at 2378–79.
244. *Id.* at 2379.
245. *Id.* at 2379–80; *see* Wurman, *supra* note 216, at 63.

spending), but simply on familiarity with the way in which ordinary speakers use language.[246]

Barrett's babysitter metaphor was vulnerable to critique on its own terms. There is some empirical evidence that many citizens would interpret the parent's instruction more generously than Barrett supposed.[247] Furthermore, Barrett's choice of a factual context for her metaphor may have unfairly skewed her reasoning. Perhaps a better analogy would be to a parent sending the children to boarding school, where the usual expectation would be that the "delegate" will have very wide discretion.

In my view, however, Barrett's reasoning had a more fundamental problem. These domestic analogies assumed too quickly that the authors of regulatory legislation expect their mandates to be construed in such homely terms. As I discussed earlier in this Part, congressional drafters have ample experience writing legislative delegations, and a well-informed agency counsel or regulatory lawyer would expect a particular statute to be read against the context of those provisions. Many of these statutes have long been understood as delegating wide authority to administrators, and the Supreme Court's disinclination to follow those interpretations—even if packaged as "common sense"—appears to amount to the Court's projecting its own skepticism about agency power onto Congress. Barrett's entirely intuitive account fares no better, even if packaged as "common sense." After all, common sense is very much in the eye of the beholder. In particular, entirely missing from her account were reasons why Congress may *wish* to delegate broadly, as outlined in, for example, Justice Kagan's dissents in *West Virginia* and *Nebraska*.

As her argument proceeded, it became increasingly evident that Justice Barrett's notions of common sense were deeply inflected with the kind of debatable judgments that might sound right to a regulation skeptic but not to a progressive. In upholding the proposition that Congress should be expected to speak clearly if it wishes to authorize an agency to make highly consequential decisions, she relied on "the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies.'"[248] As I discussed in the preceding section, this premise goes well beyond the extant empirical evidence, and many judges and other authorities in our legal tradition have not shared that intuition. Barrett then continued: "Because the Constitution vests Congress with '[a]ll legislative Powers,' Art. I, § 1, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch."[249] And "in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'"[250] At best, these assertions are

246. 143 S. Ct. at 2379–80.

247. Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. (forthcoming 2024) (manuscript at 38–44), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4520697 [https://perma.cc/QJ9C-LHAP] (reporting results of a survey based on the babysitter situation).

248. 143 S. Ct. at 2380.

249. *Id.*

250. *Id.* at 2380–81 (quoting Wayman v. Southard, 23 U.S. 1, 43 (1825)).

statements about what Justice Barrett believes a "reasonably informed interpreter" *should* believe, not about what every "reasonably informed interpreter" actually *does* believe.

Justice Barrett's "common sense" argument appeared even more strained when, at the end of her opinion, she turned to a discussion of individual cases. She argued that *Brown & Williamson*, *Alabama Association*, *NFIB*, *West Virginia*, and the *Nebraska* case itself, among others, were all cases in which common sense demonstrated the unlikelihood of Congress's having authorized the rule in dispute.[251] In all of these cases, however, the Court was sharply divided. Could Justice Barrett have meant to imply that she and her colleagues in the majority were better informed about Congress's ways, and better equipped with common sense, than the dissenters were?[252] She probably did not intend to endorse that implication, but it is where her reasoning appears to have led.

In short, I do not think that the major questions doctrine can be persuasively justified as a *linguistic* canon. Indeed, despite Justice Barrett's disavowals, it looks quite a bit like a substantive canon. The difference between her position and that of the other justices in the majority seems to be that the majority opinions were forthrightly normative, but Justice Barrett either did not recognize the normative implications of her argument or chose not to acknowledge them.

I should add, however, that I do not believe the major questions doctrine should be criticized simply because it appears to be tantamount to a substantive canon. Unlike Justice Barrett, I believe that clear statement rules, which the Court has adopted in a variety of contexts, can be a legitimate form of administrative common lawmaking.[253] Indeed, the *Chevron* deference doctrine is commonly described as a fictional presumption about congressional intent, and I have defended it on that basis.[254] As subsequent Sections will explain, however, I do not believe the Court has successfully defended the major questions doctrine on normative grounds either.

Regardless, the fact that both the Court and Justice Barrett have chosen to characterize the major questions doctrine as a presumption about congressional intent is part of the reason why people find the doctrine confusing—indeed, confounding.

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251. *Id.* at 2381–84.

252. See Adrian Vermeule, *Text and "Context,"* YALE J. ON REGUL.: NOTICE & COMMENT (July 13, 2013), https://www.yalejreg.com/nc/text-and-context-by-adrian-vermeule/ [https://perma.cc/LF8Q-LG2U] ("Do the Justices in dissent simply lack common sense, in Barrett's view?").

253. For further discussion of this topic, see *infra* Parts III.C–D.

254. Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 132–33 (2021) [hereinafter *Assault on Deference*]. The same can be said about so-called *Auer* deference, the parallel doctrine governing judicial deference to administrative interpretations of *regulations*. *See id*. In a more recent article, I discussed and defended a variety of APA interpretations that have departed from the expectations of the Act's authors. Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. 7, 10–28 (2022). As I noted, these holdings have been phrased as statutory interpretation but are analytically similar to administrative common lawmaking. *Id.* at 9–10.

B. Nondelegation

Perhaps the most prominent normative explanation for the major questions doctrine is that it is an outgrowth of a constitutional principle: the nondelegation doctrine. Justice Gorsuch's concurring opinion in *NFIB* declared that the two are "closely related"[255] and added, "Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands."[256] He staked out a similar position in his dissenting opinion in *Gundy v United States*: "Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[257]

Numerous commentators have also discerned a connection between the two doctrines.[258] Whether or not they approve of the major questions doctrine, these commentators seem to regard the logic of this connection as plausible. In this section, however, I will argue that this justification for the major questions doctrine is not tenable.

1. Conceptual Difficulties

Most readers of this Article are probably familiar with the nondelegation doctrine, so I will offer only a very brief summary of its current status in order to frame the ensuing discussion. The doctrine is said to derive from the Vesting Clause of the Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States."[259] In the abstract, that clause would seem to prevent Congress from delegating any of its legislative power to another branch of government. As is well known, however, the nondelegation doctrine is not currently very active, nor has it been for most of our country's history. In Cass Sunstein's concise quip, "the conventional doctrine has had one good year, and 211 bad ones (and counting)."[260] (He wrote this in 2000, so today the latter figure would be 235.) Specifically, in 1935, the Court held two federal statutes to be unconstitutional on this basis in *Panama Refining Co. v. Ryan*[261] and *A.L.A. Schechter Poultry Corp. v. United States*.[262] Subsequent to that "one good year," the Court has applied a different test: a delegation of authority to an executive

255. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring).

256. *Id.*

257. 588 U.S. 128, 167 (2019) (Gorsuch, J., dissenting).

258. *See, e.g.*, Brian Chen & Samuel Estreicher, *The New Nondelegation Regime*, 102 TEX. L. REV. 539, 540–41 (2024); Clinton Summers, *Nondelegation of Major Questions*, 74 ARK. L. REV. 83, 83–84 (2021); Gocke*, supra* note 42, at 995; Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 805–09 (2017); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 242 (2000).

259. U.S. CONST. art. I, § 1.

260. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

261. 293 U.S. 388, 430 (1935).

262. 295 U.S. 495, 529–42 (1935).

official is valid if it "lay[s] down by legislative act an intelligible principle to which the person or body . . . is directed to conform."[263] That "intelligible principle" standard is interpreted so loosely that it imposes no practical constraint on congressional delegation. Recently, in *Gundy v. United States*, Justice Gorsuch wrote at length in support of a more intrusive approach,[264] but he could not persuade a majority to join him, so the intelligible principle test still reigns.

An initial difficulty with Gorsuch's argument is that it seems to depend on the way he and others would like the Constitution to be interpreted, rather than the way it actually is interpreted. For now, the authoritative gloss on the nondelegation doctrine is the intelligible principle test, and relative to *that* baseline, none of the statutes at issue in the major questions doctrine cases look constitutionally shaky. Indeed, if the nondelegation doctrine were reinvigorated, one cannot know what the new doctrinal test would be; it would not necessarily be the one for which Gorsuch advocated in *Gundy*.[265]

For the sake of analysis, however, I will put that reservation aside and address the substance of Gorsuch's argument. In *West Virginia*, he elaborated at length on why, in his view, "the Constitution's rule vesting federal legislative power in Congress is 'vital to the integrity and maintenance of the system of government ordained by the Constitution.'"[266] For example, "by vesting the lawmaking power in the people's elected representatives," the framers expected that the Constitution would ensure that power would reside in "a number of hands," so that "those who make our laws would better reflect the diversity of the people they represent and have an 'immediate dependence on, and an intimate sympathy with, the people.'"[267] Moreover, "[b]y effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time."[268] This system would also "protect minorities" and "preserve room for lawmaking" at the local level. "Permitting Congress to divest its legislative power to the Executive Branch" would undermine all of these advantages.[269] There was more in this vein, but the details I have just mentioned should be sufficient to convey the thrust of Gorsuch's argument.

Gorsuch's argument has attracted admiration in some quarters,[270] but to my mind it is entirely unpersuasive. The problem is that it proves far too much. This discussion says nothing at all about why there should be a special standard of

263. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

264. 588 U.S. 128, 149–79 (2019) (Gorsuch, J., dissenting).

265. *Cf.* Big Time Vapes, Inc. v. FDA, 963 F.3d 436, 447 (5th Cir. 2020) ("The Court might well decide—perhaps soon—to reexamine or revive the nondelegation doctrine. But '[w]e are not supposed to . . . read tea leaves to predict where it might end up.'") (quoting United States v. Mecham, 950 F.3d 257, 265 (5th Cir. 2020)).

266. 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring).

267. *Id.* at 737–38.

268. *Id.* at 738.

269. *Id.* at 739.

270. *See, e.g.*, Randolph J. May & Andrew Magloughlin, NFIB v. OSHA*: A Unified Separation of Powers Doctrine and* Chevron*'s No Show*, 74 S.C. L. REV. 265, 266 (2022).

review for major questions as opposed to non-major questions. It is really a lament about the consequences of *delegation* as such.

I do not think that Justice Gorsuch actually meant to suggest that all delegations of lawmaking authority are unconstitutional. His major pronouncement on nondelegation—his dissenting opinion in *Gundy*—did not endorse so radical a proposition.[271] Indeed, that position would bear no resemblance to our society's actual legal system. In the first place, the modern prevailing view is that the Vesting Clause does not prevent Congress from empowering agencies to issue rules that have the force of law; such rules are considered to be exercises of the *executive* power.[272] Indeed, this flexible approach to the Vesting Clause is a product of necessity. As the Court wrote in *Mistretta v. United States*, "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[273] The Court elaborated on this idea in *Loving v. United States*: "To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government. Thomas Jefferson observed: 'Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution.'"[274] The Court in *Loving* even found acknowledgment of this proposition in the *Schechter Poultry* case.[275] Although *Schechter* ultimately found a violation of the nondelegation clause, it acknowledged "the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly."[276] Indeed, it is estimated that, among major statutes enacted between 1947 and 2016, 99 percent of them contained some sort of delegation to one or more administrative agencies.[277] Nor has any other advanced nation sought to govern without a bureaucracy.

Against this background, legal and policy controversies over nondelegation characteristically inquire into how much delegation is *excessive* (if there is to be a limit at all). The conventional view is that this line cannot feasibly be drawn.

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271. *See Gundy*, 588 U.S. 128, 157–59 (2019) (Gorsuch, J., dissenting) (setting forth a "test" for identifying unconstitutional delegations).

272. City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013) (Scalia, J.) (citing U.S. CONST. art. II, § 1, cl. 1) ("Agencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'").

273. 488 U.S. 361, 372 (1989).

274. 517 U.S. 748, 758 (1996) (citing 5 WORKS OF THOMAS JEFFERSON 319 (P. Ford ed. 1904) (letter to E. Carrington, Aug. 4, 1787)).

275. *Id.* at 758. Justice Scalia wrote separately in *Loving* to take issue with the majority's terminology. He argued that Congress does not "delegate" legislative power; rather, it *assigns responsibilities* to the executive branch. *Id.* at 776–77. The subsequent *Arlington* case may suggest that Scalia's reasoning has prevailed. But the two formulations in *Loving* appear to be equivalent in substance.

276. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935).

277. Pamela Clouser McCann & Charles R. Shipan, *How Many Major US Laws Delegate to Federal Agencies? (Almost) All of Them*, 10 POL. SCI. RSCH. & METHODS 438, 440 (2022).

Justice Scalia famously articulated that view in his dissenting opinion in *Mistretta*:

> Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. . . . [I]t is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law. As the Court points out, we have invoked the doctrine of unconstitutional delegation to invalidate a law only twice in our history, over half a century ago. . . . What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a "public interest" standard?

Of course, in his dissent in *Gundy*, Justice Gorsuch pressed the opposite view on this question about line drawing. The issue of whether a manageable approach to the nondelegation doctrine can be devised is the subject of a vast literature, and I will not take it up here. The important point for present purposes is that the serious debate is about *how much* delegation is acceptable, not about *whether* delegation is unacceptable. That is why Justice Gorsuch's generalizations in *NFIB* and *West Virginia* about the Founders' plan sweep too broadly and indiscriminately to illuminate the key normative question about the major questions doctrine: whether the nondelegation doctrine can justify an approach to judicial review of "extraordinary" cases that is distinct from the inquiries that a court would conduct when reviewing more "ordinary" regulatory issues.

2. Asserted Antecedents

The only passages in Justice Gorsuch's concurring opinions in *NFIB* and *West Virginia* that might be taken as relevant to this more focused question revolved around his references to two case precedents, which I will now examine.

The first of these precedents was the plurality opinion of Justice Stevens in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[278] commonly known as the *Benzene* case. When Justice Gorsuch declared in *NFIB* that "for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine,"[279] he cited the *Benzene* plurality opinion as support for this assertion. In that case, the plurality read into the Occupational Safety and Health Act a requirement that OSHA may not regulate a toxic substance unless it finds that the rule would ameliorate a "significant risk."[280] Justice Stevens wrote, "If the Government was correct in arguing that [the

278. 448 U.S. 607, 645 (1980) (plurality opinion).
279. 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring).
280. *Benzene*, 448 U.S. at 639–40.

statutes do not] require[] that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under [*Schechter Poultry* and *Panama Refining*]."[281]

But that constitutional argument was tellingly frail. That this fleeting remark appeared in a plurality opinion, not an opinion of the Court, and revolved around the word "might" was only the beginning of the problem. More fundamentally, Stevens's reasoning was flawed, because the essence of a nondelegation claim is that it leaves too wide a range of choices to the executive branch, but the *absence* of a significant risk requirement in the Act would make the statute less discretionary, not more so.[282] The dissent by Justice Marshall briskly dismissed Stevens's argument for exactly this reason: "The plurality's apparent suggestion . . . that the nondelegation doctrine might be violated if the Secretary were permitted to regulate definite but nonquantifiable risks is plainly wrong. Such a statute would be quite definite and would thus raise no constitutional question under *Schechter Poultry.*"[283] Then-Professor Scalia similarly wrote at the time that the plurality had invoked the nondelegation doctrine "erroneously, it would seem."[284] In addition to being out of line with then-current doctrine, this reasoning has not been embraced by the Court subsequently. That Justice Gorsuch put weight on this outlier opinion is a sign of the precariousness of his constitutional analysis, not its strength.

The only other gesture that Justice Gorsuch made in the direction of suggesting why the nondelegation doctrine might apply more forcibly to major questions than other questions was a quote from Chief Justice John Marshall's 1825 opinion in *Wayman v. Southard*.[285] The issue in that case was whether the federal judiciary could adopt rules to exempt federal court proceedings from Kentucky's provisions on execution of judgments (which would otherwise have been applicable under other federal legislation). In the course of that discussion, the Chief Justice wrote that "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative,"[286] but nevertheless "[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the

281. *Id.* at 646.

282. Except for a passing remark in one amicus brief, none of the briefs filed in the Supreme Court or the lower court in *Benzene* relied on, or even mentioned, any issue about nondelegation. Rachel Rothschild, *Juristocracy and Administrative Governance: From Benzene to Climate* 50–51 (Univ. of Mich. L. Sch. Pub. L. & Legal Theory Rsch. Paper, Paper No. 24-008, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4602927 [https://perma.cc/T7N6-JBLT].

283. *Benzene*, 448 U.S. at 717 n.30 (Marshall, J., dissenting).

284. Antonin Scalia, *A Note on the Benzene Case*, REGULATION, July/Aug. 1980, at 25, 27 (1980). Any remaining belief that a regulatory statute would violate the nondelegation doctrine simply by virtue of being stringent would seem to have been negated by *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 486 (2001) (holding that a Clean Air Act provision requiring EPA to promulgate air quality standards without considering implementation costs did not violate the nondelegation doctrine).

285. 23 U.S. 1 (1825).

286. *Id.* at 42–43.

legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[287]

Wayman was an exceedingly insubstantial authority for the distinction that Gorsuch wanted to draw. The comment that he quoted was simply an isolated dictum that Chief Justice Marshall wrote on the way to declaring that procedural rules for the courts *were* among the subjects of "lesser interest" that the judiciary (not the executive branch) could address through delegated authority. The Chief Justice provided no reasoning and no reference to any prior history, precedent, or practice to elaborate on the supposed category of matters that only the legislature could address. His remark about what "will not be contended" should be read in that light. It did not go quite as far as to say "assuming arguendo that some kinds of matters may not be delegated," but it might as well have. His acknowledgment that the Court had never drawn a line between "important matters" and those of "lesser interest" was hardly a strong endorsement of the idea that they can or should be distinguished.

This fleeting remark might have been significant to our inquiry if subsequent decisions by the Court had ever used it as a basis for elaborating on the category of "important" nondelegable matters—but none ever has.[288] In later decisions, the Court sometimes has quoted the same sentence from *Wayman* in the context of holding that an administrative decision fell into the "details" category, but never in order to elaborate on the "important subjects" category. Even 1935, the nondelegation doctrine's "one good year," was not a good year for *Wayman*. In *Panama Refining*, the Court did cite to *Wayman* as authority for discussing what Congress *may* do,[289] but not for its language hinting at an exclusion for "important subjects." Indeed, the Court also cited to other nondelegation case law formulas, including the "intelligible principle" test, and indicated no preference among them.[290] In *Schechter Poultry*, the Court did not cite to *Wayman* at all.[291]

Finally, even if the "important subjects" versus "details" construct could somehow be given a robust and coherent form, it could not serve as a persuasive basis for defining—and thus justifying—the scope of the major questions doctrine. The major questions and nondelegation doctrines are not, and cannot

287. *Id.* at 43.

288. In a thorough survey of this case law, Gary Lawson found that "[s]ubsequent Supreme Court cases . . . have never significantly elaborated on Chief Justice Marshall's formulation." Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 361–72 (2002). Lawson's own assessment of the *Wayman* distinction was not very laudatory: "As constitutional tests go, this one certainly sounds pretty lame—not to mention absurdly self-referential." *Id.* at 361.

289. Panama Refin. Co. v. Ryan, 293 U.S. 388, 426, 429 (1935).

290. *Id.* at 429–30.

291. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935) (relying primarily on *Panama Refining* for its constitutional benchmark). For a thoughtful effort to develop a workable nondelegation test based on the language of *Wayman*, see Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147 (2017). To date, however, the courts have not been receptive to such theories.

be, coextensive.[292] On the one hand, the sphere of the nondelegation doctrine consists of matters that purportedly *cannot* be delegated, whereas the major questions doctrine concerns matters that *can* be delegated if Congress speaks clearly. Chief Justice Roberts apparently recognized this difference when he stated at the end of the *West Virginia* majority opinion, which Justice Gorsuch joined, that "[a] decision of such magnitude and consequence [as the Clean Power Plan] rests with Congress itself, *or an agency acting pursuant to a clear delegation from that representative body*."[293] On the other hand, the sphere of the nondelegation doctrine as Gorsuch would like to see it defined would undoubtedly include some issues that could not plausibly be considered "major questions." For example, I am aware of no one who has seriously argued that the merits issue underlying *Gundy v. United States* presented a major question.[294]

In conclusion, the nondelegation doctrine and the major questions doctrine are similar to the extent that each aims, in one sense or another, to circumscribe the scope of agency power. To my mind, however, that loose connection is far too tenuous to provide a persuasive justification for the major questions doctrine.[295] Accordingly, I will turn to other lines of argument that might furnish a better justification for it.

C. Separation of Powers

Nondelegation is not necessarily the only constitutional concept that can be deployed in defense of the major questions doctrine. In his majority opinion in *West Virginia*, Chief Justice Roberts remarked that the major questions doctrine is based on "separation of powers principles and a practical understanding of legislative intent."[296] He also mentioned separation of powers a few times in

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292. *See* Coenen & Davis, *supra* note 258, at 806–07 ("[N]ondelegation doctrine provides little support for the intuition that the 'legislative' character of a statutory determination meaningfully correlates with its majorness."); Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy* 11 (Colum. Pub. L. Rsch. Paper, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4437332 [https://perma.cc/3AND-4A72] ("[I]f Congress has exclusive authority to legislate, and cannot transfer this to another branch of government by giving it great discretionary power, it makes no sense to say Congress can transfer great discretionary authority by clearly authorizing the transfer.").

293. 597 U.S. 697, 735 (2022) (emphasis added); *see also* Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J.) (drawing a similar distinction).

294. 588 U.S. 128 (2019). It is conceivable that the question of *whether* 100,000 unregistered sex offenders should be required to register would have presented a major question, but the only issue in *Gundy* concerned the effective date of that requirement. *Id.* at 2121. It's doubtful that any significant number of members of the public would ever have become aware of this narrow issue if it had not become an object of Supreme Court litigation. Nor did Gorsuch express any tangible, as opposed to theoretical, objection to the choice that the Attorney General had actually made.

295. Writing two decades ago, Dean Manning interpreted *Brown & Williamson* as largely driven by nondelegation concerns. Manning, *supra* note 258, at 237. He went on to warn, however, that this impulse, like other nondelegation arguments, was self-defeating: "As both *Benzene* and *Brown & Williamson* illustrate, when the Court departs from its usual methods of interpretation to avoid a serious nondelegation question, it runs the risk of departing from congressional commands in the process. If the aim of the nondelegation doctrine is to force Congress to take responsibility for legislative policy, the Court's avoidance strategy defeats, at least as much as it promotes, that constitutional objective." *Id.* at 277.

296. 597 U.S. at 723 (2022).

Nebraska.[297] However, he did not elaborate on the constitutional theory behind these references in either opinion.

Justice Gorsuch did discuss separation of powers themes at length in his concurring opinion in *West Virginia*.[298] He barely mentioned nondelegation, but his understanding of the two concepts seems to have involved some overlaps. One can only speculate as to the reason for this switch in constitutional framework. Perhaps he simply modified his terminology so that he could join the majority opinion and claim to be elaborating on its position. Regardless, this Section will examine whether his separation of powers discussion adds any further justification for the major questions doctrine.

1. Nondelegation Revisited?

Justice Gorsuch defended the major questions doctrine in the context of other clear statement rules: "Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine."[299] He elaborated:

> The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does "not inadvertently cross constitutional lines." . . . The major questions doctrine seeks to protect against "unintentional, oblique, or otherwise unlikely" intrusions on [constitutionally protected] interests . . . by ensuring that, when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not "exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond" those the people's representatives actually conferred on them.[300]

In this passage, Justice Gorsuch's reference to "inadvertently cross[ing] constitutional lines" was a quote from Justice Barrett's article on substantive canons.[301] As previously mentioned, then-Professor Barrett maintained in her article that substantive canons can be most readily defended when they are devised in order to promote constitutional values.[302] Presumably, her view helps to explain why Justice Gorsuch framed his case for the major questions doctrine in separation of powers terms.

However, the logic behind Justice Gorsuch's argument is not easy to follow. Of course, the courts should protect citizens against agency actions that *actually* exceed the agency's statutory authority. That is a function that judicial review has traditionally performed, without regard to any special standard of review for "major" or "extraordinary" cases. Indeed, as noted above, Justice Scalia did speak in separation of powers terms in his opinion for the Court in

297. 143 S. Ct. 2355, 2373, 2375 (2023).
298. 597 U.S. at 737–42 (Gorsuch, J., concurring).
299. *Id.* at 740.
300. *Id.* at 742 (quoting Barrett, *supra* note 233, at 175).
301. Barrett, *supra* note 233, at 175.
302. *Id*. at 169–71.

Utility Air, when he explained why the EPA "tailoring" rule was unauthorized and therefore unlawful.[303] (As the reader may also recall, Scalia did *not* refer to the separation of powers doctrine three pages earlier, when he wrote the sentence that has been so often quoted in opinions on the major questions doctrine—that "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of 'vast economic and political significance.'")[304]

What needs explaining is why, in the name of maintaining the constitutional separation of powers, the Court has set up a presumption that prevents agency actions unless the statutory authority is "clear." If an agency's authority is within the statute according to normal interpretive rules, though not "clearly" so, why isn't that good enough? And why does this constitutionally based safeguard apply only to "major" rules, a limitation that is by no means commonplace in separation of powers jurisprudence?

Ultimately, Justice Gorsuch's position appears to trace back to the nondelegation doctrine, even though he does not call it by that name in his *West Virginia* concurrence. That seems to be the implication of this passage, which also cites to Justice Barrett's article:

> One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain "clear-statement" rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts "act as faithful agents of the Constitution."[305]

The passage only makes sense if one assumes that *delegation* is constitutionally suspect in much the same way that retroactive laws or intrusions on sovereign immunity are. As the preceding section discussed, that does seem to be Gorsuch's attitude, but on the whole, our legal system considers the exercise of delegated authority by agencies to be legitimate, so long as the agency does not *actually* exceed its mandate. Such action does not "test [the Constitution's] bounds" at all. That Gorsuch thinks it does seems directly attributable to his deeply revisionist perspective on the nondelegation doctrine. Moreover, his only explanation[306] as to why his position applies solely to major questions is a reference back to the "important subjects" language of *Wayman v. Southard*,[307] which is a nondelegation case (although that baseline is not very satisfactory in the major questions context, as discussed above).

Assuming that this understanding of Gorsuch's concurring opinion in *West Virginia* is correct, I doubt that I need to add much to what I said in Part III.B. Indeed, my discussion there regarding the purported nondelegation justifications for the major questions doctrine did directly respond to some of Gorsuch's

303. 573 U.S. 302, 327 (2014).
304. *See supra* note 65 and accompanying text.
305. 597 U.S. at 736 (quoting Barrett, *supra* note 233, at 169).
306. *Id.* at 737.
307. 23 U.S. 1 (1825).

arguments in that opinion. However, his *West Virginia* opinion did bring some additional case law authority into the major questions debate,[308] so I will now turn to an analysis of those cases.[309]

2. Asserted Antecedents

One case on which he relied was a very old one: *ICC v. Cincinnati, New Orleans, and Texas Pacific Railway*,[310] sometimes known as the *Queen and Crescent* case, decided in 1897. The dispute concerned the Interstate Commerce Act, which authorized the Interstate Commerce Commission (ICC) to order railroad carriers to make refunds to shippers when it found that the carriers' rates were unreasonable. The disputed issue was whether the Act should also be interpreted to empower the Commission to prescribe rates prospectively. As Justice Gorsuch summarized, the Court "deemed the claimed authority 'a power of supreme delicacy and importance,'" and therefore a "special rule" applied: "That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. . . . [I]f Congress had intended to grant such a power to the [agency], it cannot be doubted that it would have used language *open to no misconstruction*, but *clear and direct*."[311]

Gorsuch interprets the holding of the *Queen and Crescent* case too broadly. Read in context, the clear statement language in the opinion refers only to the need for clarity in regard to a rate-setting power. The opinion is not about administrative law and says nothing about legislative rulemaking in general. In fact, the Court's opinion literally does not contain even one sentence indicating that the Court was considering any problem outside the rate regulation context. Any reader who is masochistic enough to read through the Court's tedious twenty-page opinion can confirm that fact.[312]

Regardless, the supposed requirement of "clear and specific" authorization is not generally followed in administrative law cases today. As Thomas Merrill writes, leading decisions handed down more than forty years ago have brought about a situation in which "lower courts today tend to assume that *any* grant of

308. 597 U.S. at 740–41 (Gorsuch, J., concurring).

309. Louis Capozzi has identified a line of nineteenth century cases that he regards as antecedents of the major questions doctrine. *See* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 200–02 (2023). These cases endorsed a presumption against implied delegations. As he recognizes, however, they did not distinguish between major issues and mundane issues. Just for that reason, these cases seem unhelpful to our inquiry into possible justifications for the major questions doctrine, which seeks to draw exactly such a distinction.

310. 167 U.S. 479 (1897).

311. 597 U.S. at 740–41 (Gorsuch, J., concurring) (quoting *Queen and Crescent*, 167 U.S. at 505) (emphasis added by Justice Gorsuch).

312. Whatever ambiguity lurked in the language on which Justice Gorsuch relied—that "such a power" may not be conferred without a clear statement—was dispelled elsewhere in the opinion, where the Court was more precise about what "power" it had in mind. *See Queen and Crescent*, 167 U.S. at 494–95 ("The question debated is whether [the Act] vested in the commission the power and the duty to fix rates. . . . The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper . . . that no just rule of construction would tolerate a grant of such power by mere implication.").

rulemaking authority delegates authority to act with the force of law, as opposed to authorizing only procedural rules or interpretive rules, and make no serious inquiry to determine Congress's delegatory intent."[313]

In short, Justice Gorsuch's separation of powers argument based on *Queen and Crescent* depends on a greatly exaggerated interpretation of what the opinion said, as well as a failure to heed more than a century's experience in which courts have failed to follow the lesson that he ascribes to it.[314]

On a less farfetched note, Justice Gorsuch's concurrence in *West Virginia* also revisited the plurality opinion in the *Benzene* case.[315] In this instance, in contrast to his argument in *NFIB*, he did not mention the plurality's highly questionable reliance on the nondelegation doctrine.[316] Instead, he simply treated that opinion as an example of the growing importance of the major questions doctrine in the modern era. He wrote, "In 1980, this Court held it 'unreasonable to assume' that Congress gave an agency 'unprecedented power[s]' in the 'absence of a clear [legislative] mandate.'"[317] Although the *Benzene* plurality had not referred to the major questions doctrine, which of course did not exist in 1980, it is noteworthy that then-Judge Kavanaugh's 2016 dissent in *U.S. Telecom* drew a more explicit connection between the doctrine and the *Benzene* plurality opinion. Citing that opinion, he asserted that the "major rules doctrine (usually called the major questions doctrine) is [partly] grounded in . . . a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch."[318]

The *Benzene* plurality's position did provide a certain degree of support for Justices Gorsuch's and Kavanaugh's claims. Justice Stevens was obviously persuaded that Congress would not have empowered OSHA to regulate *all* workplace risks, regardless of how significant those risks might be. Therefore, he said, the statute had to be construed as requiring OSHA to make a threshold

313. Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2113 (2004). Merrill's objections to these lower court holdings are longstanding and have strong historical support, but equally longstanding is his candid acknowledgment that the case law doesn't agree with him. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 545–46, 582 (2002).

314. Two decades after *Queen & Crescent*, the Court decided *Siler v. Louisville & Nashville Railroad*, 213 U.S. 175 (1909). Capozzi relies on both cases as support for the major questions doctrine. Capozzi, *supra* note 309, at 202–05. Like the earlier decision, however, *Siler* dealt only with railroad rate regulation and said nothing about any broad administrative law principles. (Responding to an earlier draft of this article, Capozzi concedes these facts but replies that he "struggle[s] to see why their logic would not apply when agencies claim other 'vast and comprehensive' powers through 'mere implication.'" *Id.* at 205 n.102. We can all speculate about where the Court's logic would lead, but courts often choose not to extend generalizations to the limits of their logic. The case should not be cited as authority for a proposition that the Court did not articulate, hint at, or give any indication of having considered.)

315. 597 U.S. at 741 (Gorsuch, J., concurring) (discussing *Benzene*, 448 U.S. 607).

316. For discussion of the problems with that reliance, *see supra* notes 285–290 and accompanying text.

317. 597 U.S. at 741 (Gorsuch, J., concurring).

318. *U.S. Telecom*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc).

finding about the significance of a given risk in order to regulate it.[319] Although the four dissenters in *Benzene* did not share Stevens's belief,[320] his position sounds very much like the conclusions that today's Supreme Court has drawn in the recent major questions doctrine cases. One can imagine that Stevens might well have relied on that doctrine if it had existed in 1980.[321]

In a vital respect, however, *Benzene* ultimately did not go as far as Justices Gorsuch and Kavanaugh claimed. Somewhat like the decision in *Queen and Crescent*, Stevens stated his conclusion in a manner that was limited to the Occupational Safety and Health Act. His opinion contained no language prescribing, or even hinting at, a broadly applicable clear statement requirement.

The two holdings have some significance as individual data points, but the rarity of such holdings is also telling, considering how frequently the Court has handed down decisions over the years that are not compatible with such a requirement. I do not think the major questions doctrine presumption can be defended as implicit in our legal system's traditions, whether or not phrased in separation of powers garb. The question remains as to whether the Court can justify the presumption as a matter of its own authority to create new case law principles. I turn to that question in the next Section.

D. Legislative Exclusivity: Of Deliberation and Inertia

In the preceding Sections, I have maintained that the major questions doctrine cannot be defended as a factually grounded generalization about Congress's likely intentions, nor on the basis of its asserted constitutional underpinnings. I do not suppose, however, that these conclusions, even if accepted, would fully answer the concerns that have led the Court to adopt the major questions doctrine. Some of the Court's language in *West Virginia* suggests that it supports the major questions doctrine simply because it believes, for policy reasons, that "major" agency policy initiatives *should* require clear congressional authorization. That thought seems implicit in Chief Justice Roberts's closing remark in *West Virginia*: "A decision of such magnitude and consequence [as the Clean Power Plan] rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[322] The closing paragraph of Justice Gorsuch's concurrence sounded a similar note: "In our Republic, '[i]t is the peculiar province of the legislature to prescribe general rules for the government of society.'"[323] Another hint that the Court was thinking in broader terms is that Roberts quoted from a 2016 book by Professor William Eskridge: "Even if Congress has delegated an agency general rulemaking or adjudicatory power, judges presume that Congress does not delegate its authority

319. *Benzene*, 448 U.S. at 645–46 (plurality opinion).

320. *Id.* at 708–15 (Marshall, J., dissenting).

321. Although Justice Stevens wrote for only a plurality, this "significant risk" gloss on the Act was later endorsed by a majority and has survived down to the present era. Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 513 n.32 (1981); *See* Nat'l Maritime Safety Ass'n v. OSHA, 649 F.3d 743, 750 & n.8 (D.C. Cir. 2011).

322. 597 U.S. 697, 735 (2022).

323. *Id.* at 753 (Gorsuch, J., concurring) (quoting Fletcher v. Peck, 10 U.S. 87, 136 (1810)).

to settle or amend major social and economic policy decisions."[324] Eskridge, a celebrated authority on the law of legislation, had supported this presumption as a principle of statutory interpretation, not as a constitutional canon.

The Court's rhetoric continued in a similar vein in *Biden v. Nebraska*, exemplified by the remark that this case was about "the Executive seizing the power of the Legislature."[325]

Accordingly, although the Court has been somewhat obscure on the point, I will use this Section to explore whether the major questions doctrine can be defended on a nonconstitutional basis, as a substantive canon or exercise of administrative common law.[326] I will argue that, under current conditions, a canon that insists on "clear congressional authorization" for any "major" agency initiative is difficult, if not impossible, to defend on its own terms. This analysis will set the stage for my contention in Part IV that the emergence of the major questions doctrine portends significant problems for our legal system and for the Court itself.

A major difficulty with this rationale for the major questions doctrine is that it appears to presuppose a Congress that will supply legislative direction and guidance when necessary. At present, however, that is not the Congress we have. Congressional dysfunction is such a familiar phenomenon in our political life today[327] that many people simply take it for granted. Sarah Binder, a political scientist who has long studied and tracked stalemate in Congress, reports that "the frequency of deadlock rises steadily over time. Perceptions that Congress struggles more today than it did decades ago hit the mark."[328] In a survey of experienced senior congressional staff conducted by the Congressional Management Foundation, 76% disagreed with the statement that "Congress currently functions as a democratic legislature should," and only 24% agreed.[329]

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324. *Id.* at 730 (majority opinion) (quoting WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 288 (2016)). In his earlier dissent in *U.S. Telecom*, then-Judge Kavanaugh relied on the same quote. 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

325. 143 S. Ct. 2355, 2373 (2023).

326. For discussion of whether Justice Barrett supports this approach—perhaps more than she acknowledges—see *supra* Part III.A.3.

327. See Richard J. Pierce, Jr., *Ending Legislative Impotence*, REGUL. REV. (July 13, 2020), https://www.theregreview.org/2020/07/13/pierce-ending-legislative-impotence/ [https://perma.cc/KZ3R-UPPV] ("[A]lmost nothing of importance *becomes the law* through the process of legislative action in today's conditions. Over the past few decades, political polarization has become so extreme that it is impossible for anyone to put together the kind of bipartisan legislative compromise that used to be routine."). *See generally* STEVEN S. SMITH, THE SENATE SYNDROME: THE EVOLUTION OF PROCEDURAL WARFARE IN THE MODERN U.S. SENATE (2014) (tracing the Senate's increasing dysfunction over time); Barbara Sinclair, *Is Congress Now the Broken Branch?*, 2014 UTAH L. REV. 703, 704 ("[D]evelopments in the last five years leave me much less sanguine [than I previously was] about the contemporary Congress's capacity to adequately perform its central functions."); THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012) (documenting growth of polarization and extremism in Congress, especially on the Republican side).

328. Sarah Binder, *Presidential and Congressional Rivalry in an Era of Polarization*, *in* RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS 83, 88 (James A. Thurber ed., 7th ed. 2022).

329. KATHY GOLDSCHMIDT, CONG. MGMT. FOUND. & P'SHIP FOR PUB. SERV., STATE OF THE CONGRESS 2022, at 5 (2022), https://www.congressfoundation.org/storage/documents/SOTC/state%20

Numerous factors have contributed to low productivity in the modern Congress. An obvious factor is the greatly expanded use of the Senate filibuster. In earlier days, senators invoked the filibuster only occasionally. Now, the Senate minority routinely employs it as an obstructive tool, resulting in the "60-vote Senate."[330] Moreover, both houses of Congress have increasingly been beset by increased polarization, partisanship, and the decline of internal norms favoring cooperation.[331] In addition, diminished investment in staff resources has worsened the situation.[332] Factors outside of Congress itself have also contributed, such as the waning of competitive elections due to gerrymandering, incendiary media platforms, etc.[333]

I do not want to exaggerate the breadth of congressional dysfunction. As some observers have pointed out, the modern Congress does enact important legislation from time to time.[334] By and large, however, these decisions occur in contexts other than the ones that are most relevant to this article. For example, Congress has recently passed landmark legislation like the American Rescue Plan Act[335] (economic stimulus) and Inflation Reduction Act[336] (clean energy spending, prescription drug price reforms, etc.) using the reconciliation

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of%20congress%202022.pdf[https://perma.cc/2F3N-6DVK]. For multiple perspectives on congressional gridlock, see Symposium, *The American Congress: Legal Implications of Gridlock*, 88 NOTRE DAME L. REV. 2065 (2013).

330. "The number of filibusters has skyrocketed. From 1917, when the cloture rule was put in place, to 1970, there were fewer than 60 cloture motions . . . [but] starting in the 2000s, minority parties in the Senate began to routinely filibuster substantive legislation proposed by the other party. . . . [T]he conservative R Street Institute described [the 115th Congress (2017–2018)] as 'more dysfunctional than ever'—only 52 pieces of legislation were passed in the Senate by a recorded vote." Alex Tausanovitch & Sam Berger, *The Impact of the Senate on Federal Policymaking*, CTR. FOR AM. PROGRESS (Dec. 5, 2019), https://www.americanprogress.org/article/impact-filibuster-federal-policymaking/ [https://perma.cc/33LE-TWLB]. The most recent figures broke even those records, with 298 cloture votes in the 116th Congress (2019–20) and 289 in the 117th (2021–22). *Cloture Motions*, U.S. SENATE, https://www.senate.gov/legislative/cloture/clotureCounts.htm [https://perma.cc/QZJ2-N2GD].

331. Steven S. Smith, *Note 1. Gridlock*, STEVE'S NOTES ON CONG. POL., June 19, 2021, https://stevesnotes.substack.com/p/note-1-gridlock [https://perma.cc/RGN2-MJ89] ("*Partisan* polarization often is treated as *ideological* polarization—a deepening divide in the policies advocated by the two parties. It is, but it also is . . . likely to be rooted in several electoral, policy, and legislative motivations. The political activists, organized interests, campaign donors, voters, and others who help elect legislators continue to put pressure on them once in office. The intense competition between the parties for majority control of the House and Senate creates strong incentives for fellow partisans to behave as teammates in designing legislative strategies. And congressional parties, subject to these electoral pressures, use the legislative process in a way that scores points for themselves and against the opposition with the electorate.").

332. *See, e.g.*, CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM 1–2 (Timothy M. LaPira, Lee Drutman & Kevin R. Kosar eds., 2020).

333. David Blankenhorn, *The Top 14 Causes of Political Polarization*, AM. INT. (May 16, 2018), https://www.the-american-interest.com/2018/05/16/the-top-14-causes-of-political-polarization/ [https://perma.cc/3DMW-NS6L].

334. Jim Saksa, *What If Congress Isn't Hopelessly Locked in Partisan Gridlock? What If It's Getting a Lot Done?*, ROLL CALL (Mar. 3, 2022), https://rollcall.com/2022/03/03/congress-gridlock-getting-stuff-done [https://perma.cc/NBL3-AV36]; Simon Bazelon & Matthew Yglesias, *The Rise and Importance of Secret Congress*, SLOW BORING (June 21, 2021), https://www.slowboring.com/p/the-rise-and-importance-of-secret [https://perma.cc/T3GS-KRKZ].

335. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

336. Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

procedure, which allows circumvention of the filibuster and passage by simple majorities in the Senate. That procedure, however, is generally available only in regard to revenue and spending measures. It normally cannot be used to adopt or amend important enabling statutes that could raise "major questions" on judicial review. Moreover, although bipartisan cooperation sometimes occurs in low salience subject areas, "major questions" tend to arise in areas of regulation that are highly polarized by ideological and partisan divisions.[337]

More specifically, Suzanne Mettler, a political scientist, reports:

> The reauthorization of existing laws, an activity that occurred routinely and with bipartisan cooperation in prior decades, is now long overdue for policies ranging from the Clean Air Act to the Juvenile Justice and Delinquency Prevention Act. Congress has also fallen behind on updating several laws that do not require formal reauthorization but received regular legislative attention in earlier decades. Examples include tax policy and immigration policy. The lack of policy maintenance undermines laws' ability to achieve the purposes for which they were created.[338]

On a related note, two legal scholars, Jonathan Adler and Christopher Walker, have recently lamented the fact that agencies are regulating through the use of obsolete statutes that were not designed to meet current challenges.[339] They offered a wide variety of suggestions as to how Congress might be encouraged to engage in regular reauthorizations.[340] In the abstract, I would agree with that goal. But the authors also acknowledged that this goal may be "easier said than done." They said that Members of Congress do not currently seem to think the benefits of regular legislating outweigh the costs, for "a variety of reasons, including competing demands on legislators' time and alternative ways to invest their political capital."[341]

Another consequence of the recent transformation in the legislative branch is that "congressional overrides of Supreme Court statutory interpretation precedents have become exceedingly rare."[342] Professor Bruce Huber elaborates: "In the '70s and '80s, Congress was passing major legislation all the time. . . . When something was wrong, there was a real colloquy between the court and Congress. [But now,] with things as polarized as they are, the possibility of

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337. *See* Bazelon & Yglesias, *supra* note 334; *see also* Steven S. Smith, *Note 2. Beneath the Surface*, STEVE'S NOTES ON CONG. POL. (June 16, 2021), https://stevesnotes.substack.com/p/beneath-the-surface [https://perma.cc/DS63-SWYB] ("[W]e should not be misled by a few examples of popular legislation, often enacted in response to crises, that attracts bipartisan support. . . . When it comes to the major issues of the day—taxes and spending, climate change, social justice, education and social programs, the size of military, and others—genuine bipartisanship is seldom seen.").

338. Suzanne Mettler, *The Policyscape and the Challenges of Contemporary Politics to Policy Maintenance*, 14 PERSPS. ON POL. 369, 369–70 (2016); *see id.* at 379–82 (compiling data).

339. Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1936–37, 1941–46 (2020).

340. *Id.* at 1957–64, 1975–82.

341. *Id.* at 1959.

342. Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 210 (2013).

amending a statute has diminished to the vanishing point."[343] Even Eskridge acknowledges a "very significant falloff" during the past twenty years.[344]

Professor Richard Lazarus has spelled out the implications of these trends for the consequences of the major questions doctrine in cases like *West Virginia*: "By insisting . . . that an agency can promulgate an important and significant climate rule only by showing 'clear congressional authorization' at a time when the court knows that Congress is effectively dysfunctional, . . . the court threatens to upend the national government's ability to safeguard the public health and welfare."[345]

Actually, the issue goes well beyond whether Congress is prepared to react to Supreme Court holdings. At least sometimes, the legislature can accomplish that task with a tweak to a single provision. For Congress to legislate on a policy question that it has not previously addressed, with all the complications that such an initiative can entail, may be a heavier lift. The legislation may require consensus-building on such fundamental issues as what problem needs solving, what aspects of that problem to take up, and what decisional criteria to prescribe. The likelihood of disagreements about these issues goes far to explain why Congress often leaves those decisions for agencies to resolve within the framework of existing legislation.[346]

How do supporters of the major questions doctrine respond to these patterns of legislative dysfunction? The predominant answer is that clear congressional authorization is a sine qua non for major policy decisions, even if that requirement becomes a substantial constraint on policy development. For example, Justice Gorsuch wrote in his concurring opinion in *West Virginia* that, "[a]dmittedly, lawmaking under our Constitution can be difficult," but "[t]he framers believed that [the lawmaking power] could, if not property checked, pose a serious threat to individual liberty."[347] "As a result," he continued, "the framers . . . [insisted] that two houses of Congress must agree to any a new law and the President must concur or a legislative supermajority must override his veto."[348] This design would also, among other things, "ensure that any new laws

343. Adam Liptak, *Gridlock in Congress Has Amplified the Power of the Supreme Court*, N.Y. TIMES (July 2, 2022), https://www.nytimes.com/2022/07/02/us/supreme-court-congress.html (quoting Huber).

344. *Id.* (quoting Christiansen & Eskridge).

345. *Id.* (quoting Lazarus).

346. Abigail Moncrieff has argued that the major questions doctrine should be reformulated into a rule of "noninterference": "[W]hen Congress has, in fact, remained actively interested in a regulatory regime, agencies should be forbidden from enacting regulations that would interfere with ongoing congressional bargaining." Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 621 (2008). This idea has appeal in the abstract. In practice, however, courts would rarely, if ever, be in a position to make an accurate prediction as to whether their restraint would have a realistic chance of leading to enactment of a bill. In a divided and polarized Congress, even the passage of a bill in one chamber does not necessarily mean that favorable action by the other chamber is likely or even plausible.

347. 597 U.S. 697, 738 (2022) (Gorsuch, J., concurring).

348. *Id.*

would enjoy wide social acceptance, profit from input by an array of different perspectives . . . [and] protect minorities."[349]

It is uncontroversial that bicameralism and presentment are fundamental elements of the constitutional design, intended to restrain legislative power.[350] As I have just explained, however, a combination of structural and social factors has made lawmaking considerably *more* difficult in recent decades, resulting in a significant curtailment of Congress's output. These modern trends cannot claim validation from original constitutional meaning, nor from longstanding traditions. For example, the filibuster has long been defended as a safeguard for deliberation and minority influence, but its most salient consequence today is obstruction, not deliberation.[351] If the Court is going to adopt a clear statement canon as an exercise of administrative common lawmaking, it should take account of these realities.

At the beginning of this Section I mentioned Professor William Eskridge's support, as of 2016, for the major questions doctrine. He wrote that it rests on "the strong presumption of continuity for major policies unless and until Congress has deliberated about and enacted a change in those major policies."[352] At the same time, however, he candidly recognized that this stance involves a tradeoff:

> The presumption of continuity is consistent with both the rule of law and democratic accountability—albeit often inconsistent with effective governance. As *Chevron* recognizes, a central role of agencies is to update statutory policy to take account of new circumstances. The major questions doctrine ought not disturb the ability of agencies to carry out this important mission (within the limits imposed by *Chevron*), but for the most important statutory issues the modern regulatory state usually profits from an interaction between Congress, which sets policy; agencies, which apply congressional policy to new circumstances; and the judges, who integrate statutes and agency rules into the broader

349. *Id.*

350. INS v. Chadha, 462 U.S. 919, 945–51 (1983).

351. *See* Norman Ornstein, *Five Myths About the Filibuster*, WASH. POST (Jan. 7, 2022), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-the-filibuster/2022/01/07/7c374788-6e4d-11ec-b9fc-b394d592a7a6_story.html [https://perma.cc/H5XR-PZN9] (arguing, in opposition to the claim that the filibuster "encourages consensus," that this "may have been true in the distant past, but it has not been the case for a long time, that "[o]n most issues, when it is clear that a cloture vote (that is, a vote to end debate) would fail, there is no debate, which would only take up precious floor time," and that "[t]he minority can kill bills with few or no visible traces, and has no incentive for moderation or compromise"). For a similar analysis, see Ezra Klein, *The Definitive Case for Ending the Filibuster*, VOX (Oct. 1, 2020), https://www.vox.com/21424582/filibuster-joe-biden-2020-senate-democrats-abolish-trump [https://perma.cc/36DU-SZ6Y].

352. ESKRIDGE, *supra* note 324, at 289. As one facet of his argument, Eskridge asserted that congressional drafting staff "overwhelmingly support" the premise of the major questions doctrine because they do not view legislative delegations as extending to such questions. *Id.* The only source he mentioned as a basis for this factual assertion was the study by Gluck and Bressman. For reasons explained above, I do not think the findings in their study can adequately support this factual claim. *See supra* notes 224–231 and accompanying text. However, I think Eskridge's argument was primarily normative, and I will discuss it as such here.

fabric of the law.[353]

To my mind, the major questions doctrine, at least as it has evolved in the eight years since he wrote those words, erects too high of an obstacle to evolution in administrative policies in the interest of obtaining the "profit" of this three-way interaction. Amid current conditions of polarization, partisanship, and obstruction, the problem with a strong "norm of continuity" in the context of regulatory legislation is that such profits can only rarely be accrued.

More recently, Eskridge and a coauthor have expressed dismay about where the major questions doctrine has led:

> The Roberts Court's assault on the modern administrative state through its threat to strike down laws delegating lawmaking authority to agencies and through its new super-strong clear statement rule trumping agency rules having a large social or economic impact is judicial lawmaking on steroids . . . [W]e consider the Court's opinion in the OSHA COVID Case to be the most significant violation of the APA in recent memory . . . . This is breathtaking judicial activism at its worst.[354]

Evidently, Eskridge has come to believe that the risks of judicial overreach inherent in the major questions doctrine overwhelm the doctrine's supposed theoretical benefits.

IV.
OBJECTIONS TO THE MAJOR QUESTIONS DOCTRINE

Having argued, I hope persuasively, that the Court has not articulated a credible justification for the major questions doctrine, I will turn to discussing a few objections that can be raised against the doctrine. I will focus on the disempowerment of administrative agencies, risks to the legitimacy of the Court, and indeterminacy regarding the scope of the doctrine.

A. Weakening of Administrative Agencies

Perhaps the most obvious basis for concern is that the doctrine will limit agencies' ability to respond to social needs that at least arguably fall within the scope of their respective missions.

I will not dwell on this critique, because other authors have discussed it in depth,[355] and in any event the point is fairly obvious. The central purpose of the doctrine is to curtail agencies' powers, at least somewhat. It can be expected to have that effect not only directly, but also through in terrorem discouragement of initiatives that an agency may fear would become a target of the doctrine.[356] Also, curtailment of an agency's authority when it makes a "major" decision may

353. *Id.* at 289–90; *cf.* Bressman, *supra* note 32, at 779–86 (arguing that the Court should reject significant agency rulemaking that lacks support from the current Congress and the public).

354. William N. Eskridge & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1906 (2023); *see id.* at 1950–52, 1957–60.

355. *See supra* note 12 (listing multiple sources).

356. *See* Sohoni, *supra* note 168, at 314; Jacob, *supra* note 197.

unravel a host of other, less sweeping decisions that rested on the "major" decision that the doctrine derails.

I argued in Part III.D that congressional action on important regulatory matters is rare today, or at least not forthcoming with any regularity. The obverse side of that argument is that a judicial doctrine that disfavors administrative action in these areas has a good chance of reinforcing policy stasis where the public interest could be better served by a more energetic response.

One context in which the doctrine may prove to have significant bite is when a rule that allegedly presents a major question arises under a statute that is worded in broad but general terms. The issue then might be whether the statute fails to pass muster under the major questions doctrine because its wording is not specific enough. As I discussed above, the administrative state is replete with time-honored provisions of that kind.[357] Moreover, as Justice Kagan noted in her dissent in *West Virginia*, Congress often adopts such broad provisions *because* it wants the agency to be in a position to take action without awaiting further legislative direction.[358] To this extent, the doctrine's potential to serve as a weapon against long-accepted forms of administrative rulemaking may be significant.

Of course, some of the cases in which the major questions doctrine has been invoked might have been decided in the challenger's favor even in the absence of such a doctrine. If the presumption means anything, however, it must mean that it is intended to encourage courts to reach results in the future that they might otherwise hesitate to adopt.

It seems safe to infer that the Justices who composed the majority in *West Virginia*, as well as commentators who support the major questions doctrine, would largely agree with the description just offered, although they would likely see it in positive rather than negative terms. The majority opinion said that the major questions doctrine cases have "all address[ed] a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[359] Similarly, although I do not think Justice Gorsuch has succeeded in locating a constitutional basis for his warnings about misuses of executive power, there is no mistaking the depth of his concerns on a policy level.[360]

Indeed, the boldness with which the Court has made use of the major questions doctrine to respond to these concerns has been striking. There is, however, still a question of how the Court can reconcile the doctrine with its need to maintain its reputation as a body governed by law rather than policy preferences. I will take up this question in the next Section.

Finally, I want to return briefly to *Chevron*. As I said earlier,[361] I have excluded that case from most of my analysis, because the Court's recent cases on the major questions doctrine have themselves remained silent about the case,

357. *See supra* notes 213–18 and accompanying text.
358. 597 U.S. 697, 756–64 (2022) (Kagan, J., dissenting).
359. *Id.* at 724 (majority opinion).
360. *See supra* note 139 and accompanying text.
361. *See supra* Part II.D.

and the Court is currently reexamining it. Moreover, this exclusion has allowed me to present critiques of the major questions doctrine without getting entangled in a debate about the viability of that precedent. But I do not assume that the Court will definitively abandon *Chevron* deference, nor that it should.[362]

Whether or not the Court invokes the *Chevron* doctrine by that name, the policies underlying it—rooted in agencies' specialized experience and expertise as compared with courts, as well as their political accountability—apply as fully to agency actions with a large impact as to those with a smaller one.[363] The Court ought to be mindful of these points about comparative qualifications, but its recent major questions decisions suggest that it has not been sufficiently attentive to them. Indeed, as the dissenters in some of these recent cases have argued, the Court's interventions have raised serious doubts about judicial overambition.[364]

B. Legitimacy

As noted in the introduction to this article, "legitimacy" has recently become a prominent topic in discourse about the Supreme Court, as the ideological split between Republican and Democratic Court appointees has widened.[365] The discussion has become particularly intense as the current strongly conservative majority has unveiled dramatic changes in various doctrinal areas.[366] The concept has many dimensions that cannot be explored here. I want to suggest, however, that the Court's decisions endorsing the major questions doctrine do raise significant legitimacy concerns by weaving anti-regulatory ideology into the fabric of administrative law itself.

Shortly after then-Judge Kavanaugh introduced the idea of a clear statement approach to the major questions doctrine in his dissent in the *U.S. Telecom* case, Professor Daniel Deacon described Kavanaugh's approach as "weaponized administrative law."[367] He commented that "[g]etting rid of *Chevron*

362. I have been a supporter of *Chevron*, at least when it is understood in light of the limitations built into the so-called steps zero, one, and two. *See* Levin, *Assault on Deference*, *supra* note 254, at 183–85.

363. *See* Moncrieff, *supra* note 346, at 612 ("[T]he majorness of the policy makes the technocratic expertise and democratic accountability of the [agency] decision-maker more relevant, not less."); Sunstein, *supra* note 29, at 243, 246.

364. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2396–400 (2023) (Kagan, J., dissenting); *West Virginia*, 597 U.S. at 764 (Kagan, J., dissenting) ("Whatever else the Court may know about, it does not have a clue about how to address climate change."); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 138–39 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (contrasting "[a]n agency with expertise in workplace health and safety" with "a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes"); Heinzerling, *supra* note 40, at 1999–2000.

365. *See, e.g.*, Paul M. Collins, Jr. & Artemus Ward, *Why Have So Many Americans Come to Mistrust the Supreme Court?*, WASH. POST (Sept. 30, 2022), https://www.washingtonpost.com/politics/2022/09/30/supreme-court-new-term-public-approval/ [https://perma.cc/WGV8-DFJY].

366. *See* Chris Cillizza, *Trust in the Supreme Court Is at a Record Low*, CNN (Sept. 29, 2022), https://www.cnn.com/2022/09/29/politics/supreme-court-trust-gallup-poll [https://perma.cc/VUP8-4K35] ("The court, simply put, is at its lowest ebb in terms of public opinion in the history of Gallup polling.").

367. Daniel Deacon, *Judge Kavanaugh and "Weaponized Administrative Law,"* YALE J. ON REGUL.: NOTICE & COMMENT (July 11, 2018), https://www.yalejreg.com/nc/judge-kavanaugh-and-

altogether . . . , at least on its face, would favor neither regulation nor deregulation. . . . But we should be particularly wary of attempts by judges to use administrative law to put their thumbs on the scale."[368] That analysis anticipated the argument I offer here.

To be sure, the major questions doctrine case law is not completely one-sided. The idea that "major" administrative decisions require clear congressional authorization is nominally neutral, and a few decisions have deviated from the anti-regulatory pattern. The most conspicuous example is *King v. Burwell*,[369] which served to maintain the viability of the Affordable Care Act. As I have discussed, however, *King* increasingly looks like an unrepresentative outlier in the Court's case law on the major questions doctrine.[370] The dominant thrust of that case law is anti-regulatory and is generally perceived as such.

Indeed, the Justices' pronouncements have repeatedly indicated that they intend to apply it in an anti-regulatory direction. As Deacon pointed out, Judge Kavanaugh's dissent in *U.S. Telecom* contained some ambiguities, but "the overall logic and tenor of his argument is largely anti-regulatory."[371] For example, the judge summarized the lesson of the major questions doctrine precedents as being that "[i]f an agency wants to exercise *expansive* regulatory authority over some major social or economic activity . . . an *ambiguous* grant of statutory authority is not enough."[372] Kavanaugh also said that the FCC's prior decision on the same subject, which had imposed a much less onerous regime than net neutrality, had been "an ordinary rule, not a major rule."[373] More recently, as I have explained, the policy arguments in Chief Justice Roberts's and Justice Gorsuch's opinions in *West Virginia v. EPA* and *Biden v. Nebraska* have strongly emphasized their objections to agency overreach.[374] They certainly do not evince similar concern about agency *underreach*.

Insofar as the major questions doctrine is shaping up as one-sided, it may be ushering in an extraordinary turn in administrative law. In effect, it suggests

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weaponized-administrative-law-by-daniel-deacon/ [https://perma.cc/8GM6-7G69] (citing Justice Kagan's accusation in *Janus v. AFSCME*, 588 U.S. 878, 955 (2018) (Kagan, J., dissenting), that the majority had "weaponiz[ed] the First Amendment").

368. *Id.*

369. 576 U.S. 473 (2015).

370. *See supra* notes 89–90 and accompanying text. Also arguably relevant to this discussion are *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), in which the Court overturned an agency's *deregulatory* rule, and *Gonzales v. Oregon*, 546 U.S. 243 (2006), which blocked a Justice Department initiative that would have made regulation stricter, but nevertheless reached a "liberal" result. As previously discussed, neither of these cases endorsed any presumption comparable to the major questions doctrine. *See supra* notes 41 and 76–77 and accompanying text. Even so, the Justices have sometimes referred to them as having done so; these references have added rhetorical ballast to the Court's claims that major questions doctrine cases have "arisen from all corners of the administrative state." *West Virginia v. EPA*, 597 U.S. 697, 721–22 (2022).

371. Deacon, *supra* note 367.

372. *U.S. Telecom*, 855 F.3d at 421 (Kavanaugh, J., dissenting) (first emphasis added).

373. *Id.* at 425 n.5. Skepticism about agencies' regulatory power was a persistent theme in Judge Kavanaugh's opinions when he was a circuit judge. *See* Jacob Gershman, *Brett Kavanaugh Has Shown Deep Skepticism of Regulatory State*, WALL ST. J. (July 9, 2018), https://www.wsj.com/articles/nominee-has-shown-deep-skepticism-of-regulatory-state-1531186402 [https://perma.cc/9G88-TWDH].

374. *See supra* notes 359–360 and accompanying text.

that judges of all backgrounds and political inclinations will be expected to interpret regulatory statutes through a lens that incorporates the ideology of the currently prevailing majority. As Deacon suggested, *Chevron* doesn't work that way[375] (nor, one might add, do functionally comparable standards of review such as *Skidmore*[376]). The deference that it prescribes is helpful to both liberal and conservative administrations, depending on which one is in power. Similarly, the hard look doctrine constrains both liberal and conservative administrations. Judges have an incentive to develop *those* doctrines with nuance and boundaries because they realize that the precedents will apply to both liberal and conservative administrations over time. In contrast, judges who have been promoting the major questions doctrine have much less incentive to articulate limitations on it—and, in fact, they have not done so.

To illustrate what is so exceptional, and arguably illegitimate, about this aspect of the major questions doctrine, I propose a thought experiment. Suppose a liberal faction gained control of the Court and announced a presumption that no major rule that tends to perpetuate racial inequity may be adopted without clear congressional authorization. Its proponents could claim that this new canon is inspired by the equal protection guarantees of the Constitution. This foundation would be at least as plausible as the support that proponents of the major questions doctrine claim to derive from the nondelegation doctrine (actually more plausible, considering the currently quiescent status of the latter doctrine). I think conservatives would disagree with this canon on the merits, but they presumably would also object that this move would be fundamentally illegitimate. They would rightly argue that the Court should not review agency action using judicial review standards that have an overt ideological twist. The actual major questions doctrine as currently implemented is worrisome for essentially the same reason.

The observations in this Section must necessarily be tentative because the doctrine is still in flux. But the Court's current trajectory does seem to point toward an antiregulatory message that warrants concern about the Court's use of the doctrine to "weaponize" administrative law in the service of an ideological end. Of course, the Court could prove me wrong by invoking the major questions doctrine to intercept a rule that deregulates in a manner that has vast economic and political significance, but recent signals certainly do not point in that direction.

Over time, the Court has gradually adopted a variety of administrative law principles, some with a generally pro-regulatory thrust and others with a more anti-regulatory flavor. It could scarcely have avoided doing so. But the major questions doctrine does not have to exist at all. The Court has very recently gone out of its way to inject it into judicial review proceedings, superimposing a presumption that closely tracks one end point in the current political spectrum. Such a doctrinal move does not look like business as usual. As such, it is decidedly unhelpful to the Court's effort to present itself as a neutral tribunal that

375. Deacon, *supra* note 367.

376. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (articulating a standard of review of legal interpretations by agencies that lack delegated lawmaking authority).

stands apart from the tumult of the political process. These days, the Court can ill afford to give the public more grounds for concern on that score.

C. Indeterminacy and the Rule of Law

Commentators have frequently and voluminously criticized the major questions doctrine for its indeterminacy and the resulting lack of guidance for lower courts and practitioners.[377] In some contexts, criticisms of this sort should be taken with a grain of salt. Many administrative law doctrines implicate judgment calls, and often the Court leaves these gaps intentionally in order to allow for adaptation to disparate situations.[378] Moreover, when the Court is opening up a new doctrinal path, as one might describe its development of the major questions doctrine, one could expect some initial vagueness as the Court feels its way along. In addition, the Court often prefers to leave issues unsettled in order to give lower courts the first crack at addressing those issues.

In this instance, however, I think the criticism is well founded. As I discussed above,[379] the major questions doctrine is indeed "unbounded" along at least three dimensions. First, what agency decisions qualify as having "vast economic and political significance"? (For example, were *Massachusetts v. EPA*[380] and *Biden v. Missouri*,[381] which did not mention the doctrine, less consequential?) Second, to what other types of actions, not encompassed within that formula, does the major questions doctrine apply? (For example, can political impact alone qualify?) Third, how specific does the requisite congressional authorization have to be? (There will always be some level of specificity that Congress could have provided but did not.) The second of these conundrums may be the most ill-defined, but all three are puzzling. This lack of articulated boundaries fortifies the criticism that the major questions doctrine is in tension with rule-of-law values.

What is most striking about this situation is that the Court has not made even the slightest effort to alleviate this uncertainty. Its opinions contain plenty of statements, arguments, and intimations as to what agency decisions raise major questions, but not even one sentence identifying or suggesting any situations that would *not* implicate the doctrine. Its posture is entirely on offense,

377. *See* Capozzi, *supra* note 309, at 227 n.281(compiling fifteen citations asserting the difficulty of the inquiry); Baumann, *supra* note 11, ¶ II.

378. As I suggested above, the *Chevron* doctrine is one area of administrative law in which open-endedness serves a useful purpose, because it gives courts room to maneuver but also incorporates qualifications and nuances that give courts a sense of direction. *See supra* note 375 and accompanying text. Nevertheless, prior to his appointment to the Supreme Court, Judge Kavanaugh criticized the doctrine on the basis that the question of whether a statute "clearly" excludes an agency's choice is too subjective. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2134–44 (2016) (reviewing ROBERT A. KATZMANN, FIXING STATUTES (2014)). He has not commented on whether a similar critique would apply to the major questions doctrine, as expressed either in his initial version in *U.S. Telecom* or in the majority opinion (which he joined) in *West Virginia.* It would seem, however, that the indeterminacy problems plaguing the latter doctrine would far overshadow those inherent in the former.

379. *See supra* Part II.E.

380. 549 U.S. 497 (2007).

381. 595 U.S. 87 (2022).

offering nothing explicit to an agency by way of possible defense.[382] The Court presents an image of Justices on the warpath, not Justices who are striving to navigate their way carefully amid competing objectives.

Presumably, the Court's silence about limits to the major questions doctrine will only be temporary. Before long, the Court may, for example, encounter a case in which a lower court has relied on the doctrine enroute to reaching a result that the Court cannot abide.[383] In that situation, or a comparable one, the Court will need to do some line-drawing, either explicitly or tacitly, in order to explain why the doctrine is not controlling. From the standpoint of this Article, the tangible results of guidance from the Court as to the doctrine's outer boundaries would of course be welcome.

However, the doctrine's underlying theoretical incoherency problem may well persist. The challenge for the Court will be to ensure that this line-drawing will not be arbitrary in relation to the reasons that the Court identifies for having a major questions doctrine. This Article's critiques of the purported justifications for the doctrine would surely be germane to that challenge. If the Court prescribes limitations on the major questions doctrine that do *not* relate to the doctrine's claimed purposes, they will inevitably have an element of arbitrariness about them, no matter how quantitatively exact they may be on their own terms.[384]

382. Essentially the same observation can be made about Justice Gorsuch's concurring opinion in *West Virginia*. He presents a barrage of situations in which he says the doctrine is likely to apply. 597 U.S. 697, 742–49 (2022) (Gorsuch, J., concurring). The only passage that arguably points toward a situation in which the doctrine would not apply states that "[a] 'contemporaneous' and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to an agency." *Id.* at 747 (citing United States v. Philbrick, 120 U.S. 52, 59 (1887)). At most, this grudging concession, based on a century-old case, suggests that the agency interpretation that he describes would deserve some interpretive weight; it does not seem to have a strong bearing on the question of whether such an agency decision would be "major" or would have to be supported by "clear congressional authorization."

383. Even in that situation, the Court might well be able to find an escape route if it wants one. It could choose not to refer to the major questions doctrine at all or say that it would reach the same result regardless of whether the doctrine applies. *Cf. supra* notes 69–72 and accompanying text (discussing cases that have resorted to similar avoidance techniques in the *Chevron* context).

384. Louis Capozzi, who served as Justice Gorsuch's law clerk during the term in which the Court decided *West Virginia*, has a more upbeat view of the major questions doctrine in general and this issue in particular. Capozzi, *supra* note 309, at 227–36. However, his reassurances about the feasibility of guidelines to clarify the scope of the major questions doctrine are vulnerable to both reservations I have offered in the text. First, all of his suggestions as to when the doctrine should be recognized point toward situations in which he says the doctrine *should* apply; he does not identify any situation in which he thinks it should *not* apply. Second, insofar as he suggests a few guideposts that could be quantified and thus implemented predictably, such as the executive branch's criteria for identifying "economically significant" rules that warrant cost-benefit analysis, or the number of public comments a proposed rule elicits, *id*. at 229–30, 232, he does not relate them directly to the putative justifications for having a major questions doctrine.

CONCLUSION

At this time, the potential for the major questions doctrine to continue expanding is evident. The doctrine is being widely invoked by litigants.[385] That attention is completely understandable, because the boundaries of the doctrine are ill defined, and litigants have nothing to lose by appealing to it. Similarly, jurists who wish to stake out a position in opposition to prominent agency rules can easily make a colorable argument that the doctrine applies, and many of them have seized this opportunity.[386] The Court's admonition that the doctrine is reserved for "extraordinary" cases may be increasingly incompatible with legislative realities. And, as I have said, it is not clear what criteria the Court could use to limit the doctrine, even assuming it has the motivation to do so.

Nevertheless, the Court could choose a different path. Just as it has heretofore boldly reinterpreted its precedents in the service of a broader doctrine, it could also reinterpret those precedents to limit the doctrine's scope and stringency. Indeed, this Article has maintained that the Court has not articulated a credible rationale for the major questions doctrine and probably cannot do so. Hopefully, if this Article's thesis comes to be widely accepted, the Court might respond by displaying a greater degree of restraint in its reliance on the doctrine than has yet been evident.

385. Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN. L. REV. 661, 663 (2023) ("[L]ower court judges have taken vastly different approaches to defining and applying the doctrine both within and across circuits. These differences illustrate that many judges may view the doctrine as little more than a grab bag of factors, which they seem to be choosing from at their discretion."); Lisa Heinzerling, *How Government Ends*, BOSTON REV. (Sept. 28, 2022), https://www.bostonreview.net/articles/how-government-ends/ [https://perma.cc/YVW9-8KYD] ("In the aftermath of [the recent major questions] decisions, motivated parties have had little trouble characterizing agency decisions as 'major'—and thus illegitimate—unless underwritten by extreme legislative clarity. Agencies' specific policy choices about immigration, telecommunications, antitrust, student debt relief, climate change disclosures, diagnostic medical devices, insurance coverage of contraceptives, nuclear waste storage, and discrimination based on gender identity and sexual orientation—to name a few—have all been tagged as unlawful because the relevant issues are too important and the statutory language less than crystalline.").

386. *See, e.g.*, Biden v. Missouri, 595 U.S. 87, 103–04 (2022) (Thomas, J., dissenting); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 51–52 (2020) (Thomas, J., concurring in part and dissenting in part); County of Maui v. Haw. Wildlife Fund, 590 U.S. 165, 209 (2020) (Alito, J., dissenting).