

The Major Questions Doctrine: Unfounded, Unbounded, and Confounded

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***The Major Questions Doctrine: Unfounded, Unbounded, and
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by

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Ronald M. Levin*

As recently explicated by the Supreme Court in West Virginia v. EPA, 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 Supreme Court has given for enforcing the doctrine do not withstand scrutiny even on their own terms.

In West Virginia, 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 did offer some normative arguments on behalf of the doctrine, but the 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.

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 decisionmaking in cases involving major questions (a regrettably ill-defined term). Although the Court may be unlikely to abandon the doctrine entirely, the article's analysis suggests that the Court should apply it restrictively rather than expansively.

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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 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 in 2021 and 2022. The Court relied in part on the doctrine when it invalidated two measures that the Biden administration had adopted in response to the Covid-19 pandemic, including a moratorium on tenant evictions⁴ and a mandate that workers at numerous large employers must be vaccinated or regularly tested.⁵ This series of cases culminated 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 and joined by two other dissenting Justices.⁹

Professional commentary on the major questions doctrine has been plentiful, to put it mildly, in law reviews, exclusively online legal journals, blogs, and panel discussions.¹⁰ Some of

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>, (“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, April 11, 2022, <https://www.eenews.net/articles/inside-a-legal-doctrine-that-could-derail-biden-climate-regs/> (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 *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021)

⁵ *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661 (2022) (*NFIB*).

⁶ 142 S. Ct. 2587 (2022).

⁷ *Id.* at 2599-16.

⁸ *Id.* at 2516-26 (Gorsuch, J., concurring).

⁹ *Id.* at 2526-44 (Kagan, J., dissenting).

¹⁰ For an extensive compilation of sources, see Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REG.: NOTICE & COMMENT, Nov. 21, 2022, <https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann/>.

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.¹¹ By its nature, the doctrine has a libertarian or “anti-administrativist” thrust.¹² 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.¹³

Of course, the policy and analytical critiques of the major questions doctrine are not sharply distinct. Nevertheless, I believe there is a need for a discussion in which a critique of the Court’s own claimed justifications for the doctrine is front and center. I seek to evaluate 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 that 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.¹⁴ 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. In essence, the early cases held that particular agencies’ answers to so-called major questions did not deserve *Chevron* deference. In other words, the doctrine allowed the courts to exercise their judgment more independently than would otherwise have been permissible.

¹¹ Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174 (2022); David B. Spence, *Naïve Administrative Law: Complexity, Delegation and Climate Policy*, 39 YALE J. ON REG. 963 (2022); Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, THE ATLANTIC, July 26, 2022, <https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/>; 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/>; cf. 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).

¹² See Gillian E. Metzger, *Foreword: 1930’s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (coining the term “anti-administrativist”).

¹³ “Confounded” can mean “confused” or “perplexed,” but also “damned” or “blasted.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 477 (Merriam-Webster Co. 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.”).

¹⁴ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-23 (1984).

Later, the major questions doctrine turned into a principle that directly favored challengers, by setting up a presumption *against* agency power. In other words, in a case that presented a “major question” about the 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 apparently relied heavily on tenuous assertions that the earlier line of case had, in fact, endorsed the more recent approach. In practice, therefore, the Court used strained readings of precedent 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* case, a task that is not easy. It explores such issues 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 issues have been rather debatable, and the Court’s discussion has appeared to be driven substantially by assumptions as to what the Court prefers to believe Congress would have intended (section A).

Justice Gorsuch has defended the major questions doctrine as inspired by, or perhaps as a means of implementing, the nondelegation doctrine. The Justice’s enthusiasm for reviving that long-neglected constitutional doctrine is well known,¹⁵ but his effort to rely on it in this context has some difficulties. Perhaps the most important one is that the nondelegation rationale does not lend itself at all well to justifying a distinction between major statutory questions and non-major statutory questions (section 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 (section 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 must rest on a grant of legislative rulemaking authority. I argue, however, that a presumption *against* the existence of such authority, in the absence of “clear” congressional authorization, is ill-advised in light of 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 as an alternative means by which the nation’s pressing social and political challenges can be addressed (section D).

Part IV takes up reasons to object to the major questions doctrine. The most straightforward argument is that the courts’ reliance on it must inevitably serve to weaken the ability of agencies to tackle pressing social challenges (section A). A subtler point is that the

¹⁵ See *Gundy v. United States*, 139 S. Ct. 2116, 2131-48 (2019) (Gorsuch, J., dissenting).

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 (section B). Another 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 (section C).

Part V of the article offers concluding thoughts about the potential of the major questions doctrine to be applied broadly or narrowly over time.

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. Its development was more than a little erratic. Courts began with a relatively narrow elaboration on the *Chevron* paradigm, but over time the doctrine expanded into a freestanding exception to *Chevron*, and then, apparently, into a clear statement principle. In this process, however, the courts failed to acknowledge the expansions and consequently made no more than a cursory effort to justify them.

By the time of *West Virginia*, the Supreme Court had a substantial body of case precedent that it could invoke, and naturally it did so. But it did not acknowledge how far it was extrapolating from those precedents. Then it used this purported foundation in precedent 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 themselves did not describe themselves 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.*,¹⁶ 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:

¹⁶ 529 U.S. 120 (2000).

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 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").

This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no "reasonable assurance of safety," it would have the authority to ban cigarettes and smokeless tobacco entirely. Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power. . . .

[W]e 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.¹⁷

That *Brown & Williamson* gave rise to excitement about the advent of a new discretion-limiting doctrine is not surprising. 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.¹⁸ Was this new category defined by the presence of agency self-aggrandizement?¹⁹ By an agency's attempting to expand the boundaries of its jurisdiction?²⁰ By an agency's attempt to circumvent the democratic process by resolving an issue without regard for

¹⁷ *Id.* at 159-60 (case citation omitted).

¹⁸ 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.

¹⁹ Timothy K. Armstrong, *Chevron Deference and Agency Self-Aggrandizement*, 13 CORNELL J.L. & PUB. POL'Y 203, 250-62 (2004).

²⁰ Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 845 (2001).

the preferences of the current Congress or the general public?²¹ 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. Her “hesitation” also rested on the lack of “fit” between the nature of tobacco products and the structure of the Act.²² 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 for decades assured Congress 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.²³ In addition, tobacco had a “unique political history.” 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 depended heavily 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. Justice O’Connor’s conclusion that the case was “extraordinary” rested on all of these arguments jointly, without specifying that any of them was predominant.

Although the dissent in *Brown & Williamson* had good answers to several of these merits arguments,²⁴ 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,²⁵ and it used those factors as showing that, for purposes of that formula, 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 ninety 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 issue superfluous.

Finally, I should discuss two authorities on which Justice O’Connor relied in this portion of her opinion in *Brown & Williamson*. One of these was *MCI Telecomms. Corp. v. AT&T*.²⁶ 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

²¹ Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 779-86 (2007).

²² *Brown & Williamson*, 529 U.S. at 133-43, 160.

²³ *Id.* at 143-59, 159-60.

²⁴ *Id.* at 161-92 (Breyer, J., dissenting).

²⁵ *Id.* at 132 (opinion of the Court).

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

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, the Court, speaking through Justice Scalia, 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 requirements.”²⁷ In *Brown & Williamson*, Justice O’Connor called the *MCI* decision “instructive,” quoting that same sentence.

MCI has itself often been cited as an early example of the major questions doctrine.²⁸ 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 the *MCI* case shows, however, that it does not really fit the major questions paradigm. Justice Scalia’s primary argument was 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.”²⁹ 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 is fundamental to the scheme of common carrier regulation under the Communications Act.³⁰ 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.

Also needed here is an analysis of the sentence that Justice O’Connor quoted from an early article by Justice Breyer (written while he was a circuit judge).³¹ On its face it reads as though it squarely endorses the concept of a major questions doctrine of some sort. Not surprisingly,

²⁷ *Id.* at 231.

²⁸ See, e.g., Brunstein & Revesz, *supra* note 11, at 224-25; Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL’Y 463, 473 (2021).

²⁹ 512 U.S. at 225-28.

³⁰ *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”).

³¹ 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).

academic commentators have often cited it as supporting the idea.³² Presumably, Justice Breyer's reputation as a liberal-leaning jurist has been regarded as imparting to the doctrine an extra dollop of credibility.³³

One has to 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.³⁴ 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."³⁵ In this context, Breyer discussed the "importance" of the question presented as one of those "practical facts."³⁶ 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 was undertaking to spell out a methodology for resolving *everyday* legal questions that arise in the course of judicial review.³⁷ Obviously, Congress does routinely express 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

³² 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).

³³ *West Virginia v. EPA and the Major Questions Doctrine*, REGULATORY TRANSPARENCY PROJECT, Aug. 18, 2022, <https://regproject.org/video/west-virginia-v-epa-and-the-major-questions-doctrine/> (recording at 16:35) (remarks of 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").

³⁴ Breyer, *supra* note 31, at 373-81.

³⁵ *Id.* at 370.

³⁶ *Id.*

³⁷ 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 that the Court has examined in the cases in which it has applied the major questions doctrine.

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).³⁸ These additional factors 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*,³⁹ another Clean Air Act case. In 2007, the Court had held in *Massachusetts v. EPA*⁴⁰ that carbon dioxide must be classified as an "air pollutant" for purposes of Title II of the Clean Air Act, which regulates vehicle emissions.⁴¹ Soon afterwards, EPA issued a rule in which it concluded 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 Supreme Court held that the rule was unlawful. Justice Scalia, writing for the Court, said that the term "air pollutant" did not need to have the same meaning throughout the Act.⁴² Given the practical implications of EPA's reading, the agency's interpretation was unreasonable 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 contrary to the design and structure of the Act.⁴³ As Scalia emphasized, the agency essentially agreed with that conclusion.⁴⁴ 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.⁴⁵

³⁸ *Id.* at 370-71.

³⁹ 573 U.S. 302 (2014).

⁴⁰ 549 U.S. 497 (2007).

⁴¹ *Id.* at 528-29.

⁴² *Utility Air*, 573 U.S. at 315-20.

⁴³ *Id.* at 321-24 (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)). In other words, the first step in the *Chevron* analysis was inconclusive, and the agency's rule flunked the second step. 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 344-50 (Alito, J., concurring in part and dissenting in part).

⁴⁴ *Id.* at 321-22 (opinion of the Court).

⁴⁵ *Id.* at 325-28.

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: “it would bring about an enormous and transformative expansion in EPA’s regulatory authority *without clear congressional authorization*.”⁴⁶ He elaborated:

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.⁴⁷

At a minimum, this passage marked *Utility Air* as a major questions doctrine case. 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 departed from prior cases in this series 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 jurisprudence. Indeed, commentators on the major questions doctrine have often read it that way.⁴⁸

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.⁴⁹ Read in context, therefore, the “expect[ation]” in the second sentence probably did not mean “we will *insist* on a clear congressional authorization and refuse to uphold the rule unless

⁴⁶ *Id.* at 324 (emphasis added).

⁴⁷ *Id.* (emphasis added).

⁴⁸ See, e.g., Heinzerling, *supra* note 30, at 1947 (interpreting this sentence as “an expectation of clarity created by the Court itself”).

⁴⁹ See Asher Steinberg, *Another Addition to the Chevron Anticanon: Judge Kavanaugh on the “Major Rules” Doctrine*, THE NARROWEST GROUNDS, May 7, 2017, § A.2, <http://narrowestgrounds.blogspot.com/2017/05/another-addition-to-chevron-anticanon.html> (“[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”).

we find one.” It’s more likely that the Court meant “it seems very doubtful that Congress would have authorized the rule without saying so in plain language, so the absence of clear authorization gives us one more reason to think it did not do so.” Those two alternatives are not equivalent, because under the latter 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 past 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.”⁵⁰ 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 rule. Just a few paragraphs later, he did invoke the separation of powers as a reason to reject EPA’s “tailoring” rule. 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.”⁵¹ The absence of similar constitutionally inflected language in the Court’s discussion of 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. 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, and 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*. This well-known decision upheld an IRS rule that provided subsidies, in the form of tax credits, for many citizens who purchased health insurance on federal exchanges pursuant to the Affordable Care Act (ACA). Although the most relevant section of the Act⁵² spoke only of subsidies for insurance purchased on exchanges “established by the State,” a 6–3 majority of the Court found, in an opinion by Chief Justice Roberts, that this limitation was belied by other

⁵⁰ The Court cited to *Brown & Williamson*, *MCI*, and *Industrial Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 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* notes 252-256 and accompanying text.

⁵¹ *Utility Air*, 573 U.S. at 327.

⁵² Affordable Care Act (Internal Revenue Code) ACA § 36(B), 26 U.S.C. § 36(B)(2)(A).

language in the Act and by the Act's purpose of strengthening, not undermining, insurance markets.⁵³

En route to that conclusion, the Court specifically declined to rely on *Chevron*, citing the “extraordinary cases” language from *Brown & Williamson* and explaining:

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.⁵⁴

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.”⁵⁵ 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 ill-advised.

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 that the claimed authority would bring about (as EPA essentially admitted).⁵⁶ In *King*, however, Roberts identified no adverse consequences that would tend to make Congress reluctant to grant the power in question. And, in any event, 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, the Act did not contain a “gap” in the first place. Roberts would have had no occasion to take up this completely artificial question 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, he could have gotten to the same destination without even mentioning the major questions doctrine. The standard *Chevron* model would have sufficed. Roberts could simply have

⁵³ *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*).

⁵⁴ *King*, 576 U.S. at 485-86.

⁵⁵ See Sunstein, *supra* note 18; Merrill & Hickman, *supra* note 20 (a leading treatment).

⁵⁶ See *supra* notes 42-45 and accompanying text.

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 to Congress.”⁵⁷ The district courts in *King* and in a companion case had followed exactly that approach,⁵⁸ as has the Supreme Court in other decisions.⁵⁹ Alternatively, the Court could have declared that the meaning of the Act was clear without mentioning *Chevron* at all; this approach would have shown less concern for doctrinal transparency, but the Court has often followed it, especially recently.⁶⁰ 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.

In arguing that the IRS “has no expertise in crafting health insurance policy of this sort,” the Court relied on and drew its inspiration from *Gonzales v. Oregon*.⁶¹ In that case the United States 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.⁶² Moreover, the Attorney General had no expertise in making medical judgments; instead, the Act allocated decisionmaking authority for medical judgments to the Secretary of Health and Human Services, whom the Attorney General had not even consulted.⁶³

⁵⁷ *Chevron*, 467 U.S. at 842-43. Of course, the question of whether the Act was unambiguous, and if so in what direction, was a hotly contested point in the litigation. The dissenters in *King* maintained that, in reality, the terms of the Act unambiguously favored the challengers’ position. 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 purposes of the ACA eliminated any uncertainty that might have ensued from reading § 36B in isolation from those factors. See Gluck, *supra* note 53.

⁵⁸ *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).

⁵⁹ See, e.g., *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 277 n.5 (2016); *Edelman v. Lynchburg College*, 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. & Prod. Se. 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*, 137 S. Ct. 1562, 1572 (2017); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (20004).

⁶⁰ See *infra* notes 130-131 and accompanying text.

⁶¹ 546 U.S. 243 (2006).

⁶² *Id.* at 258-64.

⁶³ *Id.* at 264-69.

Gonzales did not purport to apply the major questions doctrine. Writing for the Court, 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.⁶⁴ Indeed, physician-assisted suicide is a relatively rare phenomenon, so the case could not easily be described as possessing “vast economic and political significance.”⁶⁵ Nevertheless, the Court’s reasoning seems plausible on its own terms.

Even so, Chief Justice Roberts’s reliance on this rationale in *King* was strained. 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,”⁶⁶ a grant of authority that would seem amply broad enough to apply to the rule that Treasury issued in this case.⁶⁷ Moreover, as two district courts had recognized at earlier stages in this dispute, the rulemaking process was a joint project of Treasury and HHS,⁶⁸ and Treasury borrowed the specific language from prior HHS rules on a corresponding issue.⁶⁹ In addition, the issue before the Court did not, in any substantial sense, raise an issue of health insurance *policy*. The question of whether users of federal exchanges were eligible for tax credits raised a tightly focused issue of statutory interpretation, 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*.

It has been argued that the Court’s express finding that *Chevron* was inapplicable in this case, and that the case should be resolved without deference, served the public interest, because it meant that a later administration would not be able to alter the outcome by invoking *Chevron*

⁶⁴ See *id.* at 256, 258-68.

⁶⁵ See Nicole Steck et al., *Euthanasia and Assisted Suicide in Selected European Countries and US States*, 31 MEDICAL CARE 938 (2013), https://journals.lww.com/lwwmedicalcare/Abstract/2013/10000/Euthanasia_and_Assisted_Suicide_in_Selected.12.aspx (“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.” 546 U.S. at 547 (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.” 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.

⁶⁶ 26 U.S.C. § 36B(g); see. Kurt Eggert, *Deference and Fiction: Reforming Chevron’s Legal Fictions After King v. Burwell*, 75 NEB. L. REV. 702, 715 (2016)

⁶⁷ 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. *Gonzales*, 546 U.S. at 258-59.

⁶⁸ *King v. Sebelius*, 997 F. Supp. 2d at 431-32; *Halbig v. Sebelius*, 27 F. Supp. 3d at 17; Eggert, *supra* note 66, at 715, 734-35.

⁶⁹ Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012); see Gluck, *supra* note 53, at 94.

deference.⁷⁰ This reasoning is based on the Supreme Court’s decision in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,⁷¹ according to which an agency may change the legal rulings of its predecessor and receive *Chevron* deference for its newfound position, even if the prior view had been upheld on judicial review. 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* states that its principle 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.”⁷² 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 context and purpose of the legislation considered as a whole.⁷³ There is little if any reason to think that Chief Justice Roberts, who is hardly a *Chevron* enthusiast,⁷⁴ would have been inclined to expand the scope of the *Brand X* doctrine beyond its existing limits. Thus, if the Court were 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, could 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 more 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.⁷⁵ 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 carving out exceptions to it.⁷⁶ As the next section will show, subsequent cases have increasingly 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

⁷⁰ See, e.g., Eggert, *supra* note 66, at 745, 749-50; Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2209 (2016).

⁷¹ 545 U.S. 967 (2005).

⁷² *Id.* at 982.

⁷³ See *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487-90 (2012) (plurality opinion) (so interpreting *Brand X*).

⁷⁴ See *City of Arlington v. FCC*, 569 U.S. 290, 316, 322-23 (2013) (Roberts, C.J., dissenting) (advocating a narrow reading of *Chevron*).

⁷⁵ In *West Virginia*, when the majority opinion by Chief Justice Roberts summarized previous cases that had applied the doctrine, his own opinion in *King* was conspicuously absent from the list. 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.

⁷⁶ See *infra* Part II.C.

issue that a court should face before digging into the merits of an appeal, and that lesson has been carried over into the cases that have adopted a clear statement approach, as we are about to see.

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 Ass’n v. FCC (U.S. Telecom)*.⁷⁷ 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 that choice under the judicial review principles of *Chevron* and *Brand X* itself.⁷⁸

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 doctrine).⁷⁹ 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.”⁸⁰ 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*.⁸¹ As discussed above, one sentence in *Utility Air* arguably did support that reading, although, when read in context, that interpretation may not be what the Court meant. As to the other pronouncements on the judge’s list, I see less room for agreement with him. None of them 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.⁸²

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 underpinnings for the clear statement rule that he had propounded: 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.”⁸³ He also

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

⁷⁸ *Id.* at 383 (Srinivasan, J., concurring in denial of rehearing en banc).

⁷⁹ *Id.* at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc).

⁸⁰ *Id.*

⁸¹ *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.

⁸² Steinberg, *supra* note 49, § C.1. Nor, despite his claims to the contrary, did the lower court holdings cited by Judge Kavanaugh, 855 F.3d at 421 n.3, articulate anything like a clear statement principle.

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

cited to some supportive academic commentary.⁸⁴ I will engage with all of these points later in this article.⁸⁵ For now, however, I will simply note that those arguments were far overshadowed by his reliance on the supposed message of the case law.⁸⁶

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.⁸⁷ Unsurprisingly, the Court did soon move in that direction.

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*.⁸⁸ During the initial months of the coronavirus pandemic, Congress had adopted a wide variety of measures to alleviate its destructive impact. One was a four-month moratorium on evictions of tenants from properties that had benefitted from federal financial assistance. When that moratorium period expired, the Centers for Disease Control (CDC) extended it through administrative action and also extended 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 courts, the case reached the Supreme Court in the context of an emergency application to vacate the stay.

The Supreme Court granted the stay in a brief per curiam opinion, with Justices Breyer, Sotomayor, and Kagan dissenting.⁸⁹ 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.’”⁹⁰ The opinion concluded: “If a federal imposed eviction moratorium is to continue, Congress must *specifically* authorize it.”⁹¹

As noted, the case came before the Court in an emergency posture, on the so-called shadow docket. There has been some debate about whether such an emergency order has precedential force at all;⁹² that debate is now apparently settled, because the Court has in fact relied on the *Alabama Association* case in subsequent cases involving the major questions doctrine. Even if it

⁸⁴ *Id.* at 421-22 (discussing works by William Eskridge and by Abbe Gluck and Lisa Bressman).

⁸⁵ See *infra* Parts III.A. (congressional intent and Gluck & Bressman), III.C. (separation of powers), III.D (Eskridge).

⁸⁶ See 855 F.3d at 422 n.4 (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).

⁸⁷ *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari).

⁸⁸ 141 S. Ct. 2485 (2021).

⁸⁹ *Id.* at 2490.

⁹⁰ *Id.* at 2489.

⁹¹ *Id.* at 2490 (emphasis added).

⁹² 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).

was technically precedential, however, the fact that the Court announced its decision only six days after the application was filed, with no time for oral argument and little time for deliberation, raises obvious questions about whether the Court could really have thought through the implications of its approach to the major questions doctrine.⁹³

The summary nature of the Court’s opinion 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 uttered. 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.

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 imposition of a ban on tenant evictions was almost self-evidently improper. They declared that, even at this preliminary stage, “it is difficult to imagine [the applicants] losing.”⁹⁴ 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.⁹⁵ 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.”⁹⁶ 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, a revisit of this issue, in the context of another COVID case, was soon forthcoming.

3. *NFIB v. Department of Labor*

The Court decided another COVID-19 case five months later, captioned *National Federation of Independent Business v. Department of Labor (NFIB)*.⁹⁷ As a means of reducing

⁹³ For criticisms of the Court’s use of the emergency docket to resolve questions that ought to receive plenary consideration, see, e.g., 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);

⁹⁴ 141 S. Ct. at 2488.

⁹⁵ *Id.* at 2489.

⁹⁶ *Id.*

⁹⁷ 142 S. Ct. 661 (2022).

risks attributable to the virus, OSHA issued an emergency temporary standard that generally applied to all employers with 100 or more employees. Such employers were directed to require their employees to undergo COVID-19 vaccination or to take weekly COVID testing and wear masks in the workplace. The applicable language of the Occupational Safety and Health Act authorized OSHA to set “occupational safety and health standards” and identified the persons who were to be protected by such standards as “employees.” In a judicial review proceeding initiated by businesses and other entities that would be regulated by the standard, the Sixth Circuit refused to stay the effectiveness of the mandate pending appeal. In an emergency appeal to the Supreme Court, however, the Court granted the stay in a per curiam decision.⁹⁸ Its primary rationale was that OSHA’s province was “occupational” hazards, not broad public health measures that are only indirectly related to the workplace.⁹⁹

The Court in *NFIB* 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 was doing so.¹⁰⁰ The Court quoted *Alabama Association* for the proposition that “[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”¹⁰¹ In a sense, *NFIB* went further than the earlier case had, because it deployed this principle at the outset of its discussion of the merits of the appeal, treating it 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. 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 doctrine, rooted in the nondelegation doctrine.¹⁰² I will analyze his argument at length below.¹⁰³ It is worth noting, however, that the Justices in the majority who joined only the per curiam (namely Roberts, Kavanaugh, and Barrett) did not endorse it.¹⁰⁴ They rested on statutory rather than constitutional grounds but did not significantly justify the major questions doctrine in those terms.

The brevity of discussion regarding the major questions doctrine 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

⁹⁸ *Id.* at 663.

⁹⁹ *Id.* at 665-66.

¹⁰⁰ 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-osh-cites-shadow-docket-decision-as-precedential/>.

¹⁰¹ 142 S. Ct. at 665.

¹⁰² *Id.* at 667-70 (Gorsuch, J., concurring).

¹⁰³ See *infra* Part III.B.

¹⁰⁴ 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/osh-vaccine-mandate-gorsuch-roberts> (noting this omission).

decisions should not be overstated. *NFIB* was decided only six days after oral argument.¹⁰⁵ If it was not literally within the shadow docket, it was at least within the penumbra.

The 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. Among the factors a court considers, according to the traditional test, are whether issuance of the stay will substantially injure the other parties interested in the proceeding; and where the public interest lies.¹⁰⁶ In *NFIB*, however, the Court stated that "[i]t is not our role to weigh such tradeoffs."¹⁰⁷ Several commentators have pointed out this fundamental inconsistency between the Court's argument and the settled balancing test.¹⁰⁸ 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 was insufficiently workplace-related to satisfy the statute. The opinion's 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 rule and OSHA's core mission.¹⁰⁹

In view of the vulnerability of the majority opinion on these and other grounds, 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 according to the usual review standards (with or without *Chevron*).

In sum, the Court's opinion in *NFIB* was a significant expansion in 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*.

C. Summary

The preceding pages have traced the somewhat erratic manner in which the major questions 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 step-one *Chevron* analysis. Some of those reasons were distinctive to the specifics of that case, but the Court also included language – based on an out-of-

¹⁰⁵ *Id.* at 664 (opinion of the Court).

¹⁰⁶ *See, e.g.,* *Nken v. Holder*, 556 U.S. 418 (2009).

¹⁰⁷ *NFIB*, 142 S. Ct. at 666.

¹⁰⁸ 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/>; 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/>.

¹⁰⁹ *NFIB*, 142 S. Ct. at 670-77 (Breyer, Sotomayor, & Kagan, JJ., dissenting); see Shane, *supra* note 11 (elaborating on this critique); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, VA. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724, at 16-18 (same). With fuller consideration, the Court could have pursued a narrower but potentially strong argument that the particular lines OSHA had drawn, such as the 100-employee cutoff, were arbitrary and capricious. *See* Shane, *supra*. By comparison, the Court's actual rationale seems unnecessarily heavyhanded.

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.” They were further encouraged when the Court in *Utility Air*, while still adhering to the *Chevron* two-step framework, also 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 became transmuted 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 within the space of a few days 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*, like water under the bridge, but I have recounted it at length in order 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 in *West Virginia*, the question of interest was how far it would continue taking 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 that question.

II. THE MAJOR QUESTIONS DOCTRINE TODAY

A. The *West Virginia* Decision

*West Virginia v. EPA*¹¹⁰ is a lengthy, technically complex decision. I will describe the case in only as much detail as necessary to provide a grounding for the discussion that will follow.

Under § 111(d) of the Clean Air Act,¹¹¹ 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.¹¹² 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

¹¹⁰ 142 S. Ct. 2587 (2022).

¹¹¹ 42 U.S.C. § 7411(d).

¹¹² *Id.* § 7411(a)(1).

to reduce their production of electricity or to subsidize plants that utilized cleaner sources of energy such as natural gas, wind, or solar energy. The question before the Supreme Court was whether this approach, called “generation shifting,” was authorized by the Clean Air Act.

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.”¹¹³ 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. “Thus,” he concluded,

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.¹¹⁴

Applying these lessons to the case before the Court, he declared that “this is a major questions case” and accordingly the EPA rule could not stand.¹¹⁵ He emphasized that the agency was claiming a “transformative 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.¹¹⁶

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.¹¹⁷ He explained his view that the elected legislature should adopt the nation’s laws, and “[p]ermitting Congress to divest its legislative power to the Executive would “dash [this] whole scheme.”¹¹⁸ 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, so that clear congressional authorization would be required, 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).¹¹⁹

Justice Kagan, dissenting on behalf of herself and Justices Breyer and Sotomayor, argued that Congress has always delegated broadly to agencies like the EPA, because it relies on these

¹¹³ 142 S. Ct. at 2608.

¹¹⁴ *Id.* at 2609.

¹¹⁵ *Id.* at 2610.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2616-17 (Gorsuch, J., concurring).

¹¹⁸ *Id.* at 2617-18.

¹¹⁹ *Id.* at 2620-21.

agencies’ superior expertise and their ability to keep regulatory schemes working over time.¹²⁰ 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.¹²¹ 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.¹²²

B. Decoding the *West Virginia* Opinion

An initial step in evaluating the major questions doctrine in the aftermath of *West Virginia* is to understand the nature of the doctrine the Court actually adopted. This is not as easy a task as it may seem. Chief Justice Roberts’s opinion is decidedly vague on this score.

In substance, as I have just discussed, the Court has apparently endorsed a presumption that an agency will have to overcome in order to prevail in a major-questions case, but the presumption does not seem to be as categorical as it could be. Although some commentators have interpreted the Court to mean that the agency must point to “explicit and specific” congressional authorization,¹²³ none of the Court’s cases has 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 remains willing to give at least some consideration to the other arguments that the agency could normally use to support its interpretation. At least in principle, therefore, the government’s arguments could overcome the Court’s “hesitation” and validate the agency’s action. *Massachusetts v. EPA*,¹²⁴ another climate change-related case, is noteworthy in this regard, because it expressly distinguished *Brown & Williamson*.¹²⁵

On the other hand, the holding of *West Virginia* and the other major questions cases demonstrates that the presumption can be quite potent, effectively dominating the Court’s consideration of the merits of an appeal. In *West Virginia*, for example, the Court spent fourteen paragraphs arguing that the EPA rule fell within the scope of the major questions doctrine,¹²⁶ and

¹²⁰ *Id.* at 2828-33 (Kagan, J., dissenting).

¹²¹ *Id.* at 2626-27, 2644.

¹²² *Id.* at 2633-41.

¹²³ Deacon & Litman, *supra* note 109, at 3; see Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 275-76 (2022) (“statutory text [must] surmount this clear statement hurdle”).

¹²⁴ 549 U.S. 497 (2007).

¹²⁵ *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, *West Virginia*, at 21-22, 31-32 (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).

¹²⁶ 142 S. Ct. at 2610-14.

only eight responding to the arguments that the agency put forward in an effort to overcome the presumption.¹²⁷

An important question that remains indeterminate in the wake of *West Virginia* is the extent, if any, to which prior opinions that took a less assertive approach to the major questions doctrine are still authoritative. For example, what is the status of earlier opinions such as *Brown & Williamson* and *Utility Air*, which integrated their consideration of the “extraordinary” nature of the challenged rule within a larger inquiry into statutory interpretation, instead of treating it as a threshold issue? Chief Justice Roberts’s opinion in *West Virginia* did not expressly disavow the approaches of those cases, let alone explain why he was doing something different. Quite the contrary, he purported to follow them as though they were directly controlling.¹²⁸ Thus, the Court would seem to have left itself space to revert to prior approaches in a case that impels it to do so—for example, in the event that a lower court attempts to extend the major questions doctrine further than the Supreme Court wishes to go.

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 the latter event, the domain of “major questions” could apply more widely than before, or the degree of “clear congressional authorization” that would be required to sustain the agency action could become increasingly difficult to demonstrate. It would be hard to say that the Court has yet reached a stable equilibrium on these issues.

C. 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 2016.¹²⁹ In cases that would seem to have been conducive to being resolved on the basis of a *Chevron* analysis, the Court has either ruled in the agency’s favor on the basis of its own reading of the statute, thereby avoiding any question of deference,¹³⁰ or it has ruled *against* the agency on the basis of arguments that it could potentially have been framed as a reversal under *Chevron* step one but that it did not describe in those terms.¹³¹ Consequently, there is no way to tell whether the Court has been ignoring *Chevron* in the major questions case law for reasons that pertain specifically to that doctrine, or

¹²⁷ *Id.* at 2614-16.

¹²⁸ *Id.* at 2609.

¹²⁹ See James Kunhardt & Anne Joseph O’Connell, *Judicial deference and the future of regulation*, BROOKINGS, Aug. 18, 2022, <https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/>.

¹³⁰ See, e.g., *Becerra v. Empire Health Found.*, 142 S. Ct. 2354 (2022); *Babcock v. Kijahazi*, 142 S. Ct. 641 (2022).

¹³¹ See, e.g., *Am. Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896 (2022).

instead because of the larger trend that we are seeing in cases involving judicial review of ordinary agency actions.

Some commentators have contended that the Court's recent failure to cite to or even mention *Chevron* is evidence that it has decided to abandon that doctrine.¹³² I am skeptical of this interpretation, because the doctrine is still alive and well in the lower courts, or at least some of them,¹³³ and the Court has not made any effort to discourage them from applying it. Explicit overruling would presumably require the Court to engage in the kind of full-scale debate that it recently conducted in deciding whether to abandon *Auer* deference.¹³⁴ That effort failed, largely for stare decisis reasons,¹³⁵ which would surely have at least as much force, or probably more force, in the context of a reconsideration of *Chevron*.¹³⁶ Thus, my guess is that the Justices have simply agreed to let the issue remain unresolved for now. Because some Justices won't join an opinion that relies on *Chevron*, opinion writers have found it expedient to avoid applying its terminology overtly. For now, the Court's silence may simply mean silence.¹³⁷

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 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 jurists and commentators who are skeptics about *Chevron*.

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.

¹³² See generally Richard Re, *Overruling By Ignoring*, RE'S JUDICATA, July 6, 2022, <https://richardresjudicata.wordpress.com/2022/07/06/overruling-by-ignoring/> (suggesting that the Court might treat *Chevron* as it did in a recent declaration that *Lemon v. Kurtzman* has been abandoned through persistent avoidance).

¹³³ Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

¹³⁴ *Kisor v. Wilkie*, 139 S. Ct. 3400 (2019).

¹³⁵ *Id.* at 2425 (Roberts, C.J., concurring).

¹³⁶ Since *Kisor* was decided, Justice Ginsburg has been succeeded by Justice Barrett, but I question whether this turnover will alter the picture materially. As I have written elsewhere, then-Judge Barrett's opinions for the Seventh Circuit, and the articles she wrote as a professor, do not seem to have exhibited the kind of anti-deference spirit that had been conspicuous in the writings of Judges Gorsuch and Kavanaugh prior to their elevation to the Court. See Ronald M. Levin, *Law & Leviathan: The Best Defense?*, YALE J. ON REG.: NOTICE & COMMENT, April 12, 2021, <https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-01/>.

¹³⁷ To similar effect, see Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 88-91 (2022) [hereinafter Hickman, *Structural Incrementalism*].

D. 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.'" ¹³⁸ *Alabama Association, NFIB*, and Justice Kavanaugh's *U.S. Telecom* dissent all relied on this formula, ¹³⁹ and it was also prominent in *King v. Burwell*. ¹⁴⁰ 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.A., 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.'" ¹⁴¹ 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. ¹⁴² 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). ¹⁴³ It is possible that the Chief Justice was simply guilty of a non sequitur here: *Gonzales* relied on the mismatch between the Attorney General's usual realm of authority and the policy he was pursuing ¹⁴⁴—a line of 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. ¹⁴⁵ If the Court was serious about what it said, however, it would seem to have

¹³⁸ *Utility Air*, 573 U.S. at 324.

¹³⁹ See *supra* notes 81, 90, 101 and accompanying text.

¹⁴⁰ See *supra* note 54 and accompanying text (noting *King*'s reliance on the *Utility Air* criterion and also the agency's perceived lack of expertise).

¹⁴¹ *West Virginia*, 142 S. Ct. at 2608.

¹⁴² *Id.* (citing *Gonzales v. Oregon*, 546 U.S. 243 (2006)).

¹⁴³ See *supra* notes 64-65 and accompanying text.

¹⁴⁴ *Gonzales*, 546 U.S. at 258-68.

¹⁴⁵ 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." 142 S. Ct. at 2614 (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.

expanded the scope of the major questions doctrine well beyond the bounds that it had 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 the [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.'"¹⁴⁶ (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."¹⁴⁷ 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."¹⁴⁸ The first of those quotes came from *NFIB*, which actually had used the phrase "economic *and* political significance."¹⁴⁹ 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.¹⁵⁰ 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 questions doctrine in a truly dramatic fashion.¹⁵¹ 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.¹⁵²

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

¹⁴⁶ 142 S. Ct. at 2616 (Gorsuch, J., concurring) (quoting from the majority opinion).

¹⁴⁷ *Id.* at 2621.

¹⁴⁸ *Id.* at 2620.

¹⁴⁹ *NFIB*, 142 S. Ct. at 665 (emphasis added).

¹⁵⁰ *But see* Bressman, *supra* note 21, 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.

¹⁵¹ *See* Deacon & Litman, *supra* note 123, at 33-39 (warning against the disruptive consequences of such an expansion).

¹⁵² It would, however, give new meaning to the expression "the importance of being earnest."

action.”¹⁵³ 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.”¹⁵⁴ This argument 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.¹⁵⁵ 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.¹⁵⁶

Third, Gorsuch declared that “this Court has said that the major questions doctrine may apply when an agency seeks to ‘intrude into an area that is the particular domain of state law,’” relying on *Alabama Association*.¹⁵⁷ “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.”¹⁵⁸ This was another non sequitur: 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.

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 it 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.

¹⁵³ 142 S. Ct. at 2620-21 (Gorsuch, J., concurring).

¹⁵⁴ *Id.* at 2621.

¹⁵⁵ 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.” *FDA v. Brown & Williamson Tobacco Corp.* 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.

¹⁵⁶ 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*, 142 S. Ct. at 2626 (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*, ___ F.4th ___ (5th Cir., Oct. 5, 2022). (remanding an 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.

¹⁵⁷ 142 S. Ct. at 2621 (quoting *Alabama Association*, 142 S. Ct. at 2489).

¹⁵⁸ *Id.*

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 a major economic and political impact *in combination with* (not in lieu of) one or more of the “reasons to hesitate” cited in the *West Virginia* opinion. Some commentators do appear to read the opinion as endorsing such a definition.¹⁵⁹ But the Supreme Court has not yet expressly endorsed such a combined approach, and, more to the point, has not tried to justify it.¹⁶⁰ 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 the reasons, if any, that would justify it.

*West Virginia v. EPA*¹⁶¹ 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*. 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

¹⁵⁹ See Richard J. Pierce, Jr., *The Remedies for Constitutional Flaws Have Major Flaws*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203719 [hereinafter Pierce, *Remedies*], at 5 (“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.”); Hickman, *Structural Incrementalism*, *supra* note 137, at 86 (“when 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”).

¹⁶⁰ The issue is not whether a court should give weight to any or all of these “reasons to hesitate” when it considers whether an agency decision is authorized. Rather, the issue is whether these factors justify a court’s applying an especially demanding standard of review—a clear statement rule—to its consideration of that question.

¹⁶¹ 142 S. Ct. 2587 (2022).

ambiguous text’ the delegation claimed to be lurking there.”¹⁶² 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.’”¹⁶³ 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.”¹⁶⁴ 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.”¹⁶⁵ Roberts made other comments to similar effect, but these quotes should be sufficient to convey the majority opinion’s rationales.

In this Part 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: “[w]e presume that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’”¹⁶⁶ Despite the prominence of this sort of predictive reasoning in the majority opinion in *West Virginia* and other cases, it is a weak 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 Court has not defended, and probably could not defend, the latter development.

A difficulty that immediately strikes the eye about this generalization is that many previous generations of judges have not subscribed to it. Judges typically do make law by drawing upon the lessons of experience on and off the bench. But past generations of judges have often concluded that Congress did give a particular agency broad power to make highly consequential

¹⁶² *Id.* at 2609.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 2616.

¹⁶⁶ *See id.* at 2609.

decisions.¹⁶⁷ The Court has, for example, upheld what would seem to be “major” decisions under statutes that authorized particular agencies to regulate in the “public interest, convenience, or necessity,”¹⁶⁸ to set “fair and equitable” prices,¹⁶⁹ and to prescribe “just and reasonable” rates.¹⁷⁰ A more recent example was the Court’s decision in *Whitman v. American Trucking Ass’n*¹⁷¹ 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.¹⁷²

Of course, it is a fact of life that changes in the Court’s membership will often lead to new perspectives, and indeed greater skepticism about regulation is largely what the Trump appointees were selected to display.¹⁷³ 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 Supreme Court relies heavily on a factual premise that is so much at odds with the 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.*,¹⁷⁴ Justice Scalia’s opinion for the Court strongly 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. 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

¹⁶⁷ See, e.g., *Sohoni*, *supra* note 123, at 276-82; cf. *Pierce, Remedies*, *supra* note 159, at 7 (“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.”).

¹⁶⁸ *Nat’l Broad. Co. v. United States*, 319 U.S.190, 216 (1943); *N.Y. Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24 (1932) (“public interest, convenience, and necessity”).

¹⁶⁹ *Yakus v. United States*, 321 U.S.414, 422, 427 (1944).

¹⁷⁰ *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944).

¹⁷¹ 531 U.S. 457, 472 (2001).

¹⁷² See *supra* notes 124-125 and accompanying text.

¹⁷³ 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> (quoting Donald McGahn, President Trump’s White House Counsel: “the judicial selection and the deregulatory efforts are really the flip side of the same coin”).

¹⁷⁴ 556 U.S. 502 (2009).

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.”¹⁷⁵

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 *nondelegation* in the face of statutory ambiguity over major policy questions or questions of major political or economic significance.”¹⁷⁶

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.¹⁷⁷ 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%).¹⁷⁸

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?

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.¹⁷⁹ 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*. As Gluck and Bressman found, not many congressional staff members were familiar with administrative law cases.¹⁸⁰ Perhaps more

¹⁷⁵ *Id.* at 515.

¹⁷⁶ *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).

¹⁷⁷ Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: Methods Appendix*, 65 STAN L. REV. (2015), https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/01/Gluck_Bressman_65_Stan._L._Rev._Methods_Appendix.pdf, at 37.

¹⁷⁸ Gluck & Bressman, *supra* note 176, at 1003.

¹⁷⁹ 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 question doctrine cases have used it. See *supra* notes 34–37 and accompanying text.

¹⁸⁰ Gluck & Bressman, *supra* note 176, at 927.

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.

Finally, it does not seem wise to read the survey responses in an overly literal fashion. 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 sometimes they cannot achieve that end.¹⁸¹ 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. The Court’s dramatic 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.

Actually, notwithstanding all of the references to likely congressional intent in the majority opinion in *West Virginia*, I am skeptical about the extent to which the Court actually believes them. Indeed, I know of no commentator, with the exception of Gluck and Bressman and scholars who have relied on their article,¹⁸² who has argued that the major question doctrine does rest on that basis. The general assumption seems to be that the Court is using these assertions as a vehicle or fiction by which it can articulate a view as to the extent to which an agency *should* be able to act without “clear congressional authorization.”¹⁸³

¹⁸¹ 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). 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.” *Id.* at 1004. The excessiveness 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., *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

¹⁸² See Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147 (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 praise here sounds decidedly faint. Again, however, the crucial point is that the authors’ survey data does not support a presumption *against* agency authority.

¹⁸³ See, e.g., Gocke, *supra* note 32, at 972-73, 977-78 (“the theory of congressional intent underlying these major questions cases relies on a legal fiction that the court uses to disguise its normative preference for which institution ought to decide the question at hand — agencies, or courts”); Admin Wannabe [Beau J. Baumann], *What we mean when we say that the major questions doctrine is “made up,”* ADMINWANNABE.COM, July 1, 2022,

One point on which I agree with Justice Gorsuch’s concurrence in *West Virginia* is that the Court has created clear statement principles in a variety of contexts, and this can be a legitimate form of administrative common lawmaking.¹⁸⁴ Indeed, the *Chevron* and *Kisor* deference doctrines are commonly described as fictional presumptions about congressional intent, and I have defended them on that basis.¹⁸⁵ But many questions remain as to the extent to which the major questions doctrine can be justified on normative grounds, and I will examine them in the following sections.

Regardless, the fact that the Court has 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.

B. Nondelegation

Perhaps the most prominent normative explanation for the major questions doctrine is that it is in some sense an outgrowth or relative of a constitutional principle: the nondelegation doctrine. Justice Gorsuch’s concurring opinion in *NFIB* declared that the two are “closely related”¹⁸⁶ 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.”¹⁸⁷ He staked out a similar position in his dissenting opinion in *Gundy v United States*:¹⁸⁸ “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.”¹⁸⁹

Numerous commentators have also discerned a connection between the two doctrines.¹⁹⁰ Whether or not they approve of the major questions doctrine, these commentators seem to regard the logic of this connection as at least plausible. In this section, however, I will offer some reasons to doubt that this justification for the major questions doctrine is really tenable.

<https://adminwannabe.com/?p=109> (“No serious congressional scholar believes that Congress speaks clearly when addressing major questions as a *descriptive* matter.”); Heinzerling, *supra* note 30, at 1938-39.

¹⁸⁴ For further discussion of this topic, see *infra* Part III.D.

¹⁸⁵ Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 132-33 (2021) [hereinafter Levin, *Assault on Deference*]. 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.

¹⁸⁶ *West Virginia*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

¹⁸⁷ *Id.* at 668-69.

¹⁸⁸ 139 S.Ct. 2116 (2019).

¹⁸⁹ *Id.* at 2142 (dissent).

¹⁹⁰ See, e.g., Clinton Summers, *Nondelegation of Major Questions*, 74 Ark. L. Rev. 83 (2021); Gocke, *supra* note 32, 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).

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.”¹⁹¹ 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).”¹⁹² (He wrote this in 2000, so today the latter figure would be 233.) Specifically, in 1935, the Court held two federal statutes to be unconstitutional in *Panama Refining Co. v. Ryan*¹⁹³ and *A.L.A. Schechter Poultry Corp. v. United States*.¹⁹⁴ Subsequent to that “one good year,” the Court has applied a different test: a delegation of authority to an executive official is valid if it [lays] down by legislative act an intelligible principle to which the person or body. . . is directed to conform.” That “intelligible principle” standard is interpreted so loosely that it imposes no practical constraint on congressional delegation. Recently, in *Gundy v. United States*,¹⁹⁵ Justice Gorsuch wrote at length in support of a more intrusive approach,¹⁹⁶ 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 that have been applied in the major questions doctrine cases looks 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*.¹⁹⁷

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 reasons 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.’”¹⁹⁸ 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

¹⁹¹ Art. I, § 1.

¹⁹² Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

¹⁹³ 293 U.S. 388, 430 (1935).

¹⁹⁴ 295 U.S. 495, 529-42 (1935).

¹⁹⁵ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹⁹⁶ *Gundy*, 139 S. Ct. at 2131-48 (dissent).

¹⁹⁷ 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)).

¹⁹⁸ 142 S. Ct. at 2617 (Gorsuch, J., dissenting).

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.”¹⁹⁹ 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.”²⁰⁰ 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.²⁰¹ 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 peroration on this point has attracted admiration in some quarters,²⁰² but to my mind it is entirely unpersuasive. The problem is that it proves far too much. None of this discussion says anything at all about why there should be a special standard of 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.²⁰³ 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.²⁰⁴ Indeed, this flexible approach to the Vesting Clause has been driven by 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.”²⁰⁵ 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

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2618.

²⁰¹ *Id.*

²⁰² See, e.g., Randolph J. May & Andrew Magloughlin, *NFIB v. OSHA: A Unified Separation of Powers Doctrine and Chevron’s No Show*, S.C.L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4067799.

²⁰³ See *Gundy*, 139 U.S. at 2135-38 (dissent) (setting forth a “test” for identifying unconstitutional delegations).

²⁰⁴ *City of Arlington v. FCC*, 569 U.S. 290, 304 n.3 (2013) (Scalia, J.) (“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.’ Art. II, § 1, cl. 1.”).

²⁰⁵ 488 U.S. 361, 372 (1989)

execution.”²⁰⁶ The Court in *Loving* even found acknowledgment of this proposition in the *Schechter Poultry* case.²⁰⁷ 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.”²⁰⁸ 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.²⁰⁹ Nor has any other advanced nation sought to do 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. 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 help to justify an approach to judicial review of “extraordinary” cases that sets it apart from the inquiries that a court would conduct when reviewing more “ordinary” regulatory issues.

²⁰⁶ *Loving v. United States*, 517 US 748, 758 (1996) (citing 5 Works of Thomas Jefferson 319 (P. Ford ed. 1904) (letter to E. Carrington, Aug. 4, 1787)).

²⁰⁷ *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 appear to be equivalent in substance.

²⁰⁸ *Schechter*, 295 U.S. at 529-30.

²⁰⁹ 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).

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

First, when Justice Gorsuch declared in *NFIB* that “for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine,”²¹⁰ the precedent he offered in support of that assertion was the plurality opinion of Justice Stevens in *Industrial Union Dep’t, AFL-CIO v. American Petroleum Institute*,²¹¹ commonly known as the *Benzene* case. 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.” Justice Stevens wrote: “If the Government were correct in arguing that [the statute does 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*].”²¹²

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. The dissent by Justice Marshall briskly dismissed the Stevens 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*.”²¹³ Then-Professor Scalia similarly wrote at the time that the plurality had invoked the nondelegation doctrine “erroneously, it would seem.”²¹⁴ In addition to being out of line with then-current doctrine, this reasoning has not been embraced by the Court afterwards. 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*.²¹⁵ There, Marshall 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,”²¹⁶ but nevertheless “[t]he line has not been exactly drawn which separates those important subjects, which must be entirely

²¹⁰ *NFIB*, 142 S. Ct. at 668.

²¹¹ 448 U.S. 607 (1980).

²¹² *Id.* at 646 (plurality opinion).

²¹³ *Id.* at 717 n.30 (dissent).

²¹⁴ 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. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457 (2001).

²¹⁵ 23 U.S. 1 (1825).

²¹⁶ *Id.* at 42-43.

regulated by the 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.”²¹⁷

Wayman was an exceedingly insubstantial authority for the distinction that Gorsuch wanted to draw. The question that Marshall addressed in the passage in question 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). The comment that Gorsuch quoted was simply an isolated dictum that Marshall wrote on the way to declaring that procedural rules for the courts were among the subjects of “lesser interest” that the judiciary *could* address through delegated authority. Marshall provided no reasoning and no reference to any prior history, precedent, or practice to amplify on the 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” non-delegable matters—but none ever has.²¹⁸ 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 not 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 v. Southhard*. In *Panama Refining*, the Court did cite to *Wayman* as authority for discussing what Congress *may* do,²¹⁹ 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.²²⁰ In *Schechter Poultry*, the Court did not cite to *Wayman* at all.²²¹

²¹⁷ *Id.* at 43.

²¹⁸ 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.

²¹⁹ *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 426, 429 (1935).

²²⁰ *Id.* at 429-30.

²²¹ *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.

Finally, even if the “important subjects” versus “details” construct could somehow be given a robust and coherent form, it could not very well serve as the basis for defining—and thus justifying—the scope of the major questions doctrine. The two doctrines are not, and in the nature of things cannot be, coextensive.²²² 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 the difference when he stated at the end of the 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.*”²²³ On the other hand, the sphere of the nondelegation doctrine as Gorsuch would like to see it defined would doubtless 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*²²⁴ presented a major question.²²⁵

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.²²⁶ 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 and a practical knowledge of lawmaking.”²²⁷ Although he did not elaborate on the former concept.

²²² See Tom Merrill, *West Virginia v. EPA: Questions About “Major Questions,”* VOLOKH CONSPIRACY, Aug. 28, 2022, <https://reason.com/volokh/2022/07/28/west-virginia-v-epa-questions-about-major-questions/> (“One [nondelegation] doctrine says that Congress may not delegate too much discretion to non-legislative actors . . . The major questions doctrine does not enforce the nondelegation principle in this sense. It is essentially contradictory to say that Congress cannot delegate too much discretion to an agency unless Congress does so clearly.”). For a similar discussion, see Coenen & Davis, *supra* note 190, at 806-07.

²²³ *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (emphasis added). See also *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J.) (drawing a similar distinction).

²²⁴ 139 S. Ct. 2116 (2019).

²²⁵ 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.

²²⁶ Indeed, Dean Manning has argued that the two doctrines are in serious tension: “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.” Manning, *supra* note 190, at 277.

²²⁷ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

Justice Gorsuch did discuss separation of powers themes at length in his concurring opinion.²²⁸ 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 inquire into whether his separation of powers discussion adds any justification for the major question doctrine beyond the points that I have already analyzed.

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.”²²⁹ 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.²³⁰

In this passage Gorsuch quoted from an important article penned by Justice Amy Coney Barrett prior to her appointment to the Court. In that article, then-Professor Barrett maintained that substantive canons can be most readily defended when they are devised in order to promote constitutional values.²³¹ Presumably, her view helps to explain why Justice Gorsuch framed his case for the major questions doctrine in separation of powers terms. He did not mention, however, that Barrett had commented in a footnote to her article that “a canon designed to protect the constitutional separation of powers . . . is probably stated at too great a level of generality to justify departures from a text’s most natural meaning.”²³²

In any event, the logic behind 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. What needs explaining is why, in the name of maintaining the constitutional separation of powers, the Court has set up a presumption that prevents the agency action unless the statutory authority is “clear.” If the

²²⁸ *Id.* at 2617-20 (Gorsuch, J., concurring).

²²⁹ *Id.* at 2619.

²³⁰ *Id.* at 2620 (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 169 (2010)).

²³¹ Barrett, *supra* note 230, at 169-71.

²³² *Id.* at 179 n.331.

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, 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 Barrett:

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."²³³

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 explanation²³⁴ as to why his position applies only to major questions, not all questions, is a reference back to *Wayman v. Southard*,²³⁵ which is a nondelegation case (although that baseline is not very satisfactory in the major questions context, as I have 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 arguments in that opinion. However, his *West Virginia* opinion did bring some additional case law authority into the debate,²³⁶ so I will now turn to an analysis of those cases.²³⁷

²³³ 142 S. Ct. at 2616 (*quoting* Barrett, *supra* note 230, at 169).

²³⁴ *Id.* at 2617.

²³⁵ 23 U.S. 1 (1825).

²³⁶ 142 S. Ct. at 2619 (Gorsuch, J., concurring).

²³⁷ Louis Capozzi has identified a line of nineteenth century cases that he regards as antecedents of the major questions doctrine. Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. (forthcoming 2023), <https://ssrn.com/abstract=4234683>, at 8-10. 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.

One case on which he relied was a very old one: *ICC v. Cincinnati, New Orleans, & Texas Pacific Ry. Co.*,²³⁸ 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 misconception*, but *clear and direct*."²³⁹

An article by Thomas Merrill has discussed the case at greater length, viewing it as an example of what he calls the "exclusive delegation doctrine."²⁴⁰ He defines that doctrine to mean that "[1] agency regulations have the force of law only if Congress has delegated authority to promulgate them. Moreover, [2] a delegation to act with the force of law will not be presumed, but must be clearly intended by the legislature."²⁴¹ I have inserted the numerical subdivisions into Merrill's definition so that I may discuss its two components separately.

I know of no one who takes issue with Proposition 1. It is codified in § 706(2)(C) of the APA and applied routinely in judicial review of agency actions, either with or without *Chevron* analysis. It can certainly be described as embodying separation of powers principles. In his opinion for the Court in *Utility Air*,²⁴² Justice Scalia did speak in those terms when he explained why the EPA "tailoring" rule in that case was unauthorized and therefore unlawful.²⁴³ (As the reader may recall, he did *not* refer to the separation of powers doctrine two 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.'")²⁴⁴ But Proposition 1 is nevertheless a truism, as Merrill essentially recognizes.²⁴⁵

In contrast, Proposition 2 is controversial. It largely overlaps the clear statement rule that appears to emerge from *West Virginia v. EPA*, but it apparently would reach further, applying to

²³⁸ 167 U.S. 479 (1897).

²³⁹ 142 S. Ct. at 2619 (quoting *Queen & Crescent*, 167 U.S. at 505) (emphasis added by Gorsuch).

²⁴⁰ Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2111-14 (2004). As Merrill explains, the railroad in the case was known as the Queen and Crescent line because it ran between the Queen City (Cincinnati) and the Crescent City (New Orleans). *Id.* at 2111 n.55.

²⁴¹ *Id.* at 2112.

²⁴² 573 U.S. 302 (2014).

²⁴³ *Id.* at 327.

²⁴⁴ See *supra* note 51 and accompanying text.

²⁴⁵ Merrill, *supra* note 240, at 2113-14 (calling it the "transferability principle," which "has not been in doubt since 1911").

all statutes that are alleged to confer legislative rulemaking authority. Merrill contends that *Queen and Crescent* endorsed Proposition 2. He writes that “the *Queen and Crescent Case* squarely holds that Congress must delegate the power to make legislative rules to an agency before such power can be exercised, *and must do so in unequivocal language*.”²⁴⁶

Both Gorsuch and Merrill interpret the holding of the *Queen and Crescent* case too broadly.²⁴⁷ 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.²⁴⁸

I do agree with Merrill on another point, however: Proposition 2 is not generally followed today. As he 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 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.”²⁴⁹

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.

On a less farfetched note, Justice Gorsuch’s concurrence in *West Virginia* also revisited the plurality opinion in the *Benzene* case.²⁵⁰ This time, in contrast to his argument in *NFIB*, he did not

²⁴⁶ Id. at 2111 (emphasis added).

²⁴⁷ I also cannot endorse Merrill’s contention that *Chrysler Corp. v. Brown*, 442 U.S. 281 (1979), supports the exclusive delegation model as he defines it. See *id.* at 2112-13. As I read that opinion, it supports Proposition 1 but not Proposition 2.

²⁴⁸ Whatever ambiguity was inherent 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 & 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.”).

Two decades after *Queen & Crescent*, the Court decided *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 (1909). Capozzi relies on both cases as support for the major questions doctrine. Capozzi, *supra* note 237, at 11-13. Like the earlier decision, however, *Siler* dealt only with railroad rate regulation and said nothing about any broad administrative law principles.

²⁴⁹ Merrill, *supra* note 240, at 2113. Merrill’s objections to these 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, 549-65 (2002).

²⁵⁰ 142 S. Ct. at 2619 (Gorsuch, J., concurring) (discussing *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607 (1980) (*Benzene*)).

mention the plurality's highly questionable reliance on the nondelegation doctrine.²⁵¹ 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."'²⁵² Although the plurality had not referred to the major questions doctrine, which of course did not exist in 1980, it is noteworthy that, several years ago, Judge Kavanaugh's 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 presumption against the delegation of major lawmaking authority from Congress to the Executive Branch."²⁵³

I would agree that the *Benzene* plurality's position provided a certain degree of support for 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 finding about the significance of a given risk in order to regulate it.²⁵⁴ Although the four dissenters in *Benzene* did not share Stevens's belief,²⁵⁵ his position sounds very much like the kind of 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 1980.²⁵⁶

In a vital respect, however, *Benzene* ultimately did not go as far as 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 such a 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, and in the next section I turn to that question.

²⁵¹ For discussion of the problems with that reliance, see *supra* notes 211–214 and accompanying text.

²⁵² 142 S. Ct. at 2619.

²⁵³ *U.S. Telecom*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc).

²⁵⁴ *Benzene*, 448 U.S. at 645–46 (plurality opinion).

²⁵⁵ *Id.* at 708–15 (Marshall, J., dissenting).

²⁵⁶ 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); *Nat'l Maritime Safety Ass'n v. OSHA*, 649 F.3d 743, 750 & n.8 (D.C. Cir. 2011).

D. Legislative Exclusivity: Of Deliberation and Inertia

In the preceding sections I have maintained that the asserted constitutional underpinnings of the major questions doctrine are unfounded. If that proposition is correct, how much does it undermine the case for the doctrine? The case looks weaker if one accepts Justice Barrett’s theory that substantive canons can be most readily defended when they are devised in order to promote constitutional values.²⁵⁷

However, it is not clear that the Court as a whole agrees with the limitation implicit in Barrett’s thesis. 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 the remark with which Chief Justice Roberts closed his majority opinion 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.”²⁵⁸ 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.”²⁵⁹ Another hint that the Court was thinking in broader terms is that Roberts quoted from a 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 to settle or amend major social and economic policy decisions.”²⁶⁰ Eskridge, a celebrated authority on the law of legislation, had supported this presumption as a principle of statutory interpretation, not as a constitutional canon.

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. Perhaps the Court bases the presumption, at least in part, on administrative common law.²⁶¹

Whatever its rationale, the emergence of the major questions doctrine portends significant problems for our legal system and for the Court itself, as I will discuss in Part IV. Before getting to that discussion, however, 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.

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

²⁵⁷ See *supra* notes 229–232 and accompanying text..

²⁵⁸ *West Virginia*, 142 S. Ct. at 2616.

²⁵⁹ 142 S. Ct. at 2626 (Gorsuch, J., concurring) (quoting *Fletcher v. Peck*, 10 U.S. 87, 136 (1810)).

²⁶⁰ *Id.* at 2613 (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. *U.S. Telecom*, 855 F.3d at 422 (Kavanaugh, J., dissenting from denial of rehearing en banc).

²⁶¹ As mentioned earlier, I have written sympathetically about administrative common lawmaking in other contexts. See *supra* notes 184–185 and accompanying text.

present, however, that is not the Congress we have. Congressional dysfunction is such a familiar phenomenon in our political life today²⁶² that many people simply take it for granted, but I will provide some particulars. 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.”²⁶³ In a survey of experienced senior congressional staff conducted by the Congressional Management Foundation, 76% disagreed with the statement “Congress currently functions as a democratic legislature should” and only 24% agreed.²⁶⁴

Numerous factors have contributed to low productivity in the modern Congress. An obvious factor is the greatly expanded use of the Senate filibuster. Once invoked only occasionally, it is now used routinely as a tool of obstruction by the minority Senate, resulting in the “60-vote Senate.”²⁶⁵ Other factors contributing to Congress’s diminishing capacity for regulatory legislation include increased polarization and partisanship, which result in the decline

²⁶² See Richard J. Pierce, Jr., *Ending Legislative Impotence*, REG. REV., Jul. 13, 2020, <https://www.theregreview.org/2020/07/13/pierce-ending-legislative-impotence/> (“almost 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); Barbara Sinclair, *Is Congress Now the Broken Branch?*, 2014 UTAH L. REV. 703, 703-04 (“developments 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).

²⁶³ Sarah Binder, *Presidential and Congressional Rivalry in an Era of Polarization*, in *RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS* 83, 88-89 (James A. Thurber ed., 7th ed., forthcoming 2022).

²⁶⁴ CONG. MGMT. FOUND., *STATE OF THE CONGRESS 2022*, at 5, https://www.congressfoundation.org/storage/documents/CMF_Pubs/state%20of%20congress%202022.pdf. For multiple perspectives on congressional gridlock, see Symposium, *The American Congress: Legal Implications of Gridlock*, 88 NOTRE DAME L. REV. 2065 (2013).

²⁶⁵ “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. . . . The 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/>. The most recent figures broke even those records, with 298 cloture votes in the 116th Congress (2019-20) and 266 in the 117th (2021-22). United States Senate, *Cloture Motions*, <https://www.senate.gov/legislative/cloture/clotureCounts.htm>.

of internal norms favoring cooperation;²⁶⁶ diminished investment in staff resources²⁶⁷; and factors outside of Congress itself, such as the waning of competitive elections due to gerrymandering, incendiary media platforms, etc.²⁶⁸

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.²⁶⁹ By and large, however, these decisions occur in contexts other than the ones that are most relevant to this article. For example, although Congress has recently passed landmark legislation like the American Rescue Plan Act²⁷⁰ (economic stimulus) and Inflation Reduction Act²⁷¹ (clean energy spending, prescription drug price reforms, etc.) through the use of the reconciliation procedure, which allows circumvention of the filibuster and passage by simple majorities in the Senate, that procedure 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 does sometimes occur in low salience subject areas, “major questions” tend to arise in areas of regulation that are highly polarized by ideological and partisan divisions.²⁷²

More specifically, Suzanne Mettler, a political scientist, reports that 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 that are

²⁶⁶ Steven S. Smith, *Note 1. Gridlock*, STEVE’S NOTES ON CONGRESSIONAL POLITICS, Jun. 19, 2021, <https://stevesnotes.substack.com/p/note-1-gridlock> (“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.”).

²⁶⁷ See, e.g., CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL PRODUCTIVITY AND PROSPECTS FOR REFORM (Timothy M. LaPira et al. eds. 2020);

²⁶⁸ David Blankenhorn, *The Top 14 Causes of Political Polarization*, THE AM. INTEREST, May 16, 2018, <https://www.the-american-interest.com/2018/05/16/the-top-14-causes-of-political-polarization/>.

²⁶⁹ 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>; Simon Bazelon & Matthew Yglesias, *The rise and importance of Secret Congress*, SLOW BORING, Jun. 21, 2021, <https://www.slowboring.com/p/the-rise-and-importance-of-secret>.

²⁷⁰ Pub. L. 117-2 (Mar. 11, 2021).

²⁷¹ Pub. L. 117-169 (Aug. 16, 2022).

²⁷² See Bazelon & Yglesias, *supra* note 269. See also Steven S. Smith, *Note 2. Beneath the Surface*, STEVE’S NOTES ON CONGRESSIONAL POLITICS, Jun. 16, 2021, <https://stevesnotes.substack.com/p/beneath-the-surface> (“we 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”).

public priorities that receive 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.²⁷³

On a related note, a recent article by two legal scholars, Jonathan Adler and Christopher Walker, laments the fact that agencies are regulating through the use of obsolete statutes that were not designed to meet current challenges.²⁷⁴ They offer a wide variety of suggestions as to how Congress might be encouraged to engage in regular reauthorizations.²⁷⁵ In the abstract, I would agree with that goal. But the authors also acknowledge that this goal may be “easier said than done,” because its members 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.”²⁷⁶

Another consequence of the recent transformation in the legislative branch is that “congressional overrides of Supreme Court statutory interpretation precedents have become exceedingly rare.”²⁷⁷ Professor Bruce Huber has explained the consequence of this trend for “interaction” between the branches of government: “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. The court would say, ‘Hey, this doesn’t stand up to scrutiny.’ And Congress would come back and say: ‘You’re right. We’ll fix it.’ And the very next session, you’d get a major amendment to the Clean Air Act or the Clean Water Act. . . . [But now,] with things as polarized as they are, the possibility of amending a statute has diminished to the vanishing point.”²⁷⁸ Even Eskridge acknowledges a “very significant falloff” during the past twenty years.²⁷⁹

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.”²⁸⁰

²⁷³ Suzanne Mettler, *The Polyscape and the Challenges of Contemporary Politics to Policy Maintenance*, 14 Persp. On Pol. 369, (2016); see id. at 379–82 (compiling data).

²⁷⁴ Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1936–37, 1941–46 (2020).

²⁷⁵ *Id.* at 1957–64, 1975–82.

²⁷⁶ *Id.* at 1959.

²⁷⁷ Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 210 (2013).

²⁷⁸ Adam Liptak, *Gridlock in Congress Has Amplified the Power of the Supreme Court*, NEW YORK TIMES, July 2, 2022, <https://www.nytimes.com/2022/07/02/us/supreme-court-congress.html> (quoting Huber).

²⁷⁹ *Id.* (quoting Christiansen & Eskridge).

²⁸⁰ *Id.* (quoting Lazarus).

Actually, the issue goes well beyond the question of whether Congress is prepared to react to Supreme Court holdings. Expecting that Congress can legislate on a policy question that it has not previously addressed, with all the complications that such an initiative can entail, may be a much heavier lift. That is one reason why Congress often leaves those decisions for agencies to resolve within the framework of existing legislation.²⁸¹

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 does become 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 the framers deliberately made it that way in order to head off “a serious threat to individual liberty.”²⁸² To that end, they required that two Houses of Congress must agree on a new law and the President must concur or be overridden by a legislative supermajority. This design would also, for example, “ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives [and] protect minorities.”²⁸³

It is uncontroversial that bicameralism and presentment are fundamental elements of the constitutional design and were intended as restraints on legislative power.²⁸⁴ 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.²⁸⁵ 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.

²⁸¹ Abigail Moncrieff has argued that the major questions doctrine should be reformulated into a rule of “non-interference”: “when 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 in a position to make an accurate prediction as to whether restraint on their part 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.

²⁸² *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

²⁸³ *Id.*

²⁸⁴ *INS v. Chadha*, 462 U.S. 919, 945-51 (1983).

²⁸⁵ 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 (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. . . . On 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. The minority can kill bills with few or no visible traces, and has no incentive for moderation or

At the beginning of this section I mentioned Professor William Eskridge’s support for the major question doctrine. He has written 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.”²⁸⁶ At the same time, however, he candidly recognizes 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 fabric of the law.²⁸⁷

To my mind, the major questions doctrine, at least as it has evolved in the half-dozen 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.

Elsewhere, indeed, Eskridge has expressed his ambivalence about the major questions doctrine in a more concrete fashion. In an earlier article,²⁸⁸ he propounded a “vetogates” model in which statutes are validated by the multiple “vetogates” or obstacles that they have to survive on the way to enactment. This model resembled Gorsuch’s paean to the unique qualities of the congressional process, but Eskridge’s conception was more flexible. He described, as a potential alternative to congressional action, a “deliberation-rewarding” canon under which

courts should be more willing to allow agency lawmaking initiatives when the agency has followed a democratic-deliberative process that echoes the democratic deliberation entrenched in the vetogates model. Echoing the normative justifications for the Constitution’s Article I, Section 7 vetogates, a deliberation-rewarding canon (a) is supported by the libertarian presumption that regulatory burdens on citizens and companies

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>.

²⁸⁶ ESKRIDGE, *supra* note 260, at 289. As one facet of his argument, Eskridge asserts that congressional drafting staff “overwhelmingly support” the premise of the major question doctrine, because they do not view legislative delegations as extending to such questions. *Id.* The only source he mentions 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 176–181 and accompanying text. However, I think Eskridge’s argument is primarily normative, and I will discuss it as such here.

²⁸⁷ *Id.* at 289–90; cf. Bressman, *supra* note 21, at 779–86 (arguing that the Court should reject significant agency rulemaking that lacks support from the current Congress and the public).

²⁸⁸ William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756 (2012).

ought not be lightly imposed; (b) brings more groups into the agency decision-making process; and (c) presumably yields more democratically legitimate decisions, as espoused by civic republican theory.²⁸⁹

The modern administrative law system does incorporate such deliberation-inducing mechanisms, at least in most of the kinds of highly consequential proceedings that potentially give rise to “major questions.” They include an elaborate rulemaking process,²⁹⁰ executive oversight, and vigorous judicial review of the merits.²⁹¹ Eskridge noted that the Supreme Court has enforced these expectations but also has often rewarded agencies for adhering to them. Accordingly, he suggested that it “would be useful for the Justices to articulate, as a matter of doctrine, what they have been doing as a matter of practice: super-deference for agency decisions reached after a fair and inclusive process of public deliberation.”²⁹²

Ultimately, he concluded that “the Court ought to articulate new canons of statutory interpretation that facilitate effective governance. The canon against major policy shifts is an example of the Court’s effort along these lines,” but “a more promising canon would be the deliberation-rewarding canon discussed above.”²⁹³ I can readily agree that this administrative law alternative is more promising than the major questions doctrine.

IV. OBJECTIONS TO THE MAJOR QUESTIONS DOCTRINE

A. Weakening of Administrative Agencies

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. 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.

²⁸⁹ *Id.* at 777-78.

²⁹⁰ The eviction moratorium and employer mandates underlying *Alabama Association* and *NFIB*, respectively, were exceptions. They were issued without notice and comment pursuant to the APA’s “good cause” exemption, 5 U.S.C. § 553(b)(B), because of what the agency considered “the public health emergency caused by the COVID-19 pandemic and the unpredictability of the trajectory of the pandemic” 86 Fed. Reg. 43,244, 43,251 (Aug. 6, 2021). To this extent, the government’s procedure in these cases bypassed one of the “deliberation-inducing” safeguards that Eskridge’s analysis contemplates. Presumably, however, administrative law should take account of the government’s need for expedited rulemaking in urgent circumstances; the existence of statutory procedures that allow for such expedition recognizes the need for such accommodation. The nature of the pandemic would hardly have been conducive to the ordinary timetable for rulemaking. Indeed, in a companion case to *NFIB*, the Supreme Court upheld a vaccination mandate for health care workers, sustaining the government’s reliance on the APA good cause exemption. *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022).

²⁹¹ See generally Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1511 (1992) (discussing these doctrines).

²⁹² Eskridge, *supra* note 288, at 778.

²⁹³ *Id.*

I will not dwell on this critique, because other authors have discussed it in depth,²⁹⁴ and in any event the point is fairly obvious. The central purpose of the doctrine is to bring about at least some curtailment of agencies' powers. 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.²⁹⁵ Also, curtailment of an agency's authority when it makes a "major" decision may 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 observation 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 or group of contexts in which the doctrine may prove to have significant bite are those a rule that is alleged to present 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.²⁹⁶ 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.²⁹⁷ 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 did say 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."²⁹⁸ Similarly, although I do not think Justice Gorsuch has succeeded in locating a constitutional basis for his warnings about misuses of executive power, on a policy level there is no mistaking the depth of his concerns.

²⁹⁴ See *supra* note 11 (listing multiple sources).

²⁹⁵ See Sohoni, *supra* note 123, at 50

²⁹⁶ See *supra* notes 167–172 and accompanying text.

²⁹⁷ *West Virginia*, 142 S. Ct. at 2628–33 (Kagan, J., dissenting).

²⁹⁸ *Id.* at 2609 (opinion of the Court).

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,²⁹⁹ 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, and also because 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 has definitively abandoned *Chevron* deference, nor that it should.³⁰⁰

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.³⁰¹ 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.³⁰²

B. Legitimacy

“Legitimacy” has recently become a prominent topic in discourse about the Supreme Court, as the ideological split between Republican and Democratic appointees to the Court has widened.³⁰³ The discussion has become particularly intense as the current strongly conservative majority has proceeded to bring about dramatic changes in various doctrinal areas.³⁰⁴ 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 insofar as they effectively weave anti-regulatory ideology into the fabric of administrative law itself.

²⁹⁹ See *supra* note 137 and accompanying text.

³⁰⁰ 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 185, at 183-85.

³⁰¹ See Moncrieff, *supra* note 281, at 612 (“the majorness of the policy makes the technocratic expertise and democratic accountability of the [agency] decision-maker more relevant, not less”); Sunstein, *supra* note 18, at 243, 246.

³⁰² See *West Virginia v. EPA*, 142 S. Ct. 2587, 2644 (2022) (Kagan, J., dissenting) (“Whatever else the Court may know about, it does not have a clue about how to address climate change.”); *NFIB*, 142 S. Ct. at 670, 676-77 (2022) (Breyer, Sotomayor & Kagan, 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 30, at 1999-2000.

³⁰³ 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/>.

³⁰⁴ Chris Cillizza, *Trust in the Supreme Court is at a record low*, CNN POLITICS, Sept. 29, 2022, <https://www.cnn.com/2022/09/29/politics/supreme-court-trust-gallup-poll/> (“The court, simply put, is at its lowest ebb in terms of public opinion in the history of Gallup polling.”).

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.”³⁰⁵ He commented that “[g]etting rid of *Chevron* 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.”³⁰⁶ That analysis anticipated the argument I offer here.

To be sure, the major questions doctrine case law is not completely onesided. 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*,³⁰⁷ 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 question doctrine.³⁰⁸ 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.” 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.”³⁰⁹ 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.”³¹⁰ More recently, as I have explained, the policy arguments in Chief Justice Roberts’s and Justice

³⁰⁵ Daniel Deacon, *Judge Kavanaugh and “Weaponized Administrative Law,”* YALE J. ON REG.: NOTICE & COMMENT, July 11, 2018, <https://www.yalejreg.com/nc/judge-kavanaugh-and-weaponized-administrative-law-by-daniel-deacon/> (citing Justice Kagan’s accusation in *Janus v. AFSCME*, 138 S. Ct. 2448, 2501 (2018) (dissent), that the majority had “weaponiz[ed] the First Amendment”).

³⁰⁶ *Id.*

³⁰⁷ 576 U.S. 473 (2015).

³⁰⁸ See *supra* notes 75–76 and accompanying text. Also arguably relevant to this discussion are *MCI Telecoms. 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 was anti-regulatory in the sense that it blocked a Justice Department initiative, 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 30, 64–65 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*, 142 S. Ct. at 2608; see *id.* at 2608–09.

³⁰⁹ *U.S. Telecom*, 855 F.3d at 421 (dissent) (first emphasis added).

³¹⁰ *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>.

Gorsuch's opinions in *West Virginia v. EPA* have strongly emphasized their objections to agency overreach.³¹¹ They certainly do not evince similar concern about agency *underreach*.

Insofar as the major questions doctrine is shaping up as onesided, it may be ushering in an extraordinary turn in administrative law. In effect, it suggests 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 way³¹² (nor, one might add, do functionally comparable standards of review such as *Skidmore*). The deference that it prescribes is helpful to both liberal administrations and conservative administrations, depending on which one is in power at a given time. Similarly, the hard look doctrine constrains both liberal administrations 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 Democratic and Republican 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, let us consider a thought experiment. Suppose a liberal faction were in 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 clause of the Fourteenth Amendment; this foundation would be at least as plausible as the support that supporters 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 adopt standards for judicial review of agency action with 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 may still be 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 doesn't 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 an ideological debate that is under way in society at large. Such a doctrinal move does not look like business as usual. As such, it is decidedly

³¹¹ See *supra* note 298 and accompanying text.

³¹² Deacon, *supra* note 305.

unhelpful to the Court's effort to present itself as a neutral tribunal that 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.³¹³ In some contexts, criticisms of this sort should be taken with a grain of salt, because many administrative law doctrines implicate judgment calls, and often the Court leaves these gaps intentionally in order to allow for adaptation to disparate situations.³¹⁴ Moreover, when the Court is opening up a new doctrinal path, as one might describe the current moment in the 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 first

In this instance, however, I think the criticism is well founded. As I discussed above,³¹⁵ 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*³¹⁶ and *Biden v. Missouri*,³¹⁷ which didn't 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 hasn't made even the slightest effort to alleviate this uncertainty. Its opinions contain plenty of statements, arguments, and intimations as to what agency decisions do qualify as raising major questions, but not even one

³¹³ See Capozzi, *supra* note 237, at 31 n.245 (compiling fifteen citations asserting the difficulty of the inquiry); Baumann, *supra* note 10, # 5 (“you see this critique [manageability] mentioned basically everywhere in the literature”).

³¹⁴ As I suggested above, the *Chevron* doctrine is one area of administrative law in which openendedness 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 312 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 v. EPA*. It would seem, however, that the indeterminacy problems plaguing the latter doctrine would far overshadow those inherent in the former.

³¹⁵ See *supra* Part II.D.

³¹⁶ 549 U.S. 497 (2007).

³¹⁷ 142 S. Ct. 647 (2022).

sentence identifying or suggesting any situations that would *not* implicate the doctrine. Its posture is entirely on offense, offering nothing explicit to an agency by way of possible defense.³¹⁸ The image the Court presents is one 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 be only a temporary phenomenon. Before long, the Court may, for example, encounter a case in which a lower court has relied on the doctrine en route to reaching a result that the Court cannot abide.³¹⁹ 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 outer boundaries of the doctrine would of course be welcome.

However, the underlying problem of the doctrine's theoretical incoherency 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 *don't* relate to the doctrine's claimed purposes, they will inevitably have an element of arbitrariness about them, no matter how precisely or quantitatively exact they may be on their own terms.³²⁰

V. CONCLUSION

As this article has described, the major questions doctrine initially developed in a somewhat irregular fashion, with continuing expansions that the Court did not explain very clearly.

³¹⁸ 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. *West Virginia*, 142 S. Ct. at 2620-24 (concurrency). The only passage in his concurrence that arguably points toward a situation in which the doctrine would not apply is his remark 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 2623 (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."

³¹⁹ Even in that situation, the Court might well be able to find an escape route if it wants one, such as by not referring to the major questions doctrine at all or by saying that it would reach the same result regardless of whether or not the doctrine applies or not. *Cf. supra* notes 57-60 and accompanying text (discussing cases that have resorted to similar avoidance techniques in the *Chevron* context).

³²⁰ 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 237, at 31-38. However, his reassurances about the feasibility of guidelines to clarify the scope of the major questions doctrine are vulnerable to both of the 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 34, 36, he does not relate them directly to the putative justifications for having a major questions doctrine.

Indeed, one of the principal drivers of these expansions has been the Justices' propensity to characterize their prior holdings more broadly than those precedents warranted. Nevertheless, the doctrine's potential to project a message of skepticism toward agencies taking on large responsibilities without clear congressional encouragement has proved attractive to a constituency within the Court and among commentators. This ensuing development has culminated, for now, with *West Virginia v. EPA*.

The trajectory of the doctrine seems almost certainly headed toward further expansion. It is being widely invoked by litigants.³²¹ That attention is completely understandable, because the boundaries of the doctrine are so ill-defined, and litigants have nothing to lose by trying to benefit 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 the opportunity to do so.³²² The Court's admonition that the doctrine is reserved for "extraordinary" cases may be increasingly incompatible with realities in the courts. And, as I have said, it's not clear what criteria the Court could use to limit the doctrine, even assuming it had the motivation to do so.

Nevertheless, this article has maintained that the Court has not articulated a very clear rationale for the major questions doctrine and probably cannot do so. The doctrine's claims to reflect the actual intentions of enacting Congresses are speculative; its supposed foundations in constitutional principles are dubious; and its implicit premise that Congress can effectively respond to new challenges in a timely fashion seems unrealistic. The inadequacy of these rationales gives rise, in turn, to valid questions about why the Court is subjecting the administrative process to newfound restraints and about the extent to which the doctrine is rooted in the rule of law.

At this point, the likelihood that the Court would simply abandon the major questions doctrine seems remote, but the Court clearly is capable of applying it either broadly or narrowly over time. If this article's thesis comes to be widely accepted, one can envision the possibility that the Court will respond by displaying a greater degree of restraint in its reliance on the doctrine than has yet been evident.

³²¹ Lisa Heinzerling, *How Government Ends*, BOSTON REV., Sept. 18, 2022, <https://bostonreview.net/articles/how-government-ends/> ("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.").

³²² See, e.g., *Biden v. Missouri*, 142 S. Ct. 647, 658 (2022) (Thomas, J., dissenting); *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1925 (2020) (Thomas, J., concurring in the judgment in part and dissenting in part); *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1490-91 (2020) (Alito, J., concurring).