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The New Purpose and Intent in Major Questions Cases

Anita S. Krishnakumar

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Anita S. Krishnakumar

Anne C. Fleming Research Professor of Law
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
202.661.6761
ak1932@georgetown.edu

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MAJOR QUESTIONS, PURPOSE, AND INTENT

Anita S. Krishnakumar

ABSTRACT

The major questions doctrine has undergone a sea change in prominence and importance within the span of just one year. In the ten months between August 2021 and June 2022, the Court invoked the canon three times, using it aggressively to invalidate some of the most high stakes policies implemented by the Biden Administration—including the CDC's eviction moratorium, OSHA's attempt to impose a vaccine-or-test mandate on employees, and EPA's efforts to regulate greenhouse gas emissions. All eyes are now on the major questions doctrine. But most of the commentary to date has focused on the fundamental shift in the balance of powers that the doctrine effects, or on the new factors the Courts has announced for determining whether a particular agency policy is "major" or not.

This paper focuses on two less discussed aspects of the Court's latest major questions methodology—the Court's emphasis on whether the policy at issue fits within the agency's expertise or core functions, and its use of legislative inaction as evidence that Congress has not clearly authorized the agency policy. It argues that the "core function" or "expertise" analysis is similar to the so-called "mischief" rule that modern textualism has largely resisted—and that it is doing a lot of quiet work in these cases. Similarly, the legislative inaction inferences are a form of legislative history that textualists reject in theory but have invoked in a handful of (high stakes) cases. The Court's use of both of these interpretive tools is largely speculative and untethered to objective evidence of legislative design or intent—calling into question both the Court's methodology and its commitment to textualism, at least in high stakes cases. It is also judge-empowering, in that it lacks parameters—other than a judge's intuition—for determining what constitutes an agency's core function or what inference to draw from legislative inaction.

Ultimately, this paper seeks to highlight the new, and in many ways false, forms of purposivism that undergird the latest iteration of the major questions doctrine, and to explore the implications that the Court's reliance on purposive arguments in the major questions cases might have for modern textualism.

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Introduction

The major questions doctrine has undergone a sea change in prominence and importance within the span of just one year. Before the Court's August 2021 decision to vacate a lower court stay on the CDC's COVID-related eviction moratorium, the doctrine was a little-known statutory interpretation canon discussed mostly by Legislation and Administrative Law scholars. Between 1994 and 2020, the Court had employed the major questions canon only six times,[1] and it was not even widely known by that name.[2] By contrast, in the ten months between August 2021 and June 2022, the Court invoked the canon three times; moreover, it used the canon aggressively in these three instances, to invalidate some of the most high stakes policies implemented by the

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[†] Professor of Law and Anne C. Fleming Research Professor, Georgetown University Law Center. I owe deep thanks for valuable insights and conversations to Thomas W. Merrill, Ronald Cass, Ronald Levin, Gary Lawson, and participants at a workshop supported by The Gray Center for the Study of the Administrative State at George Mason Law School. I am especially indebted to my husband, Ron Tucker, for his patience and support with this project. Special thanks also to Dean William Treanor and Georgetown University Law Center as well as The Gray Center for generous research funding. James Nance provided excellent research assistance. All errors are my own.

[1] The six cases were MCI v. AT&T, 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion."); FDA v. Brown & Williamson, 529 U.S. 120, 160 (2000) ("[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."); Gonzales v. Oregon, 546 U.S. 243, 267 (2006) ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable."); Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"); King v. Burwell, 576 U.S. 473, 485-86 (2015) ("Whether [tax] 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."); County of Maui v. Hawaii Wildlife Fund, 140 S.Ct. 1462 (2019) (Alito, J., dissenting) ("Congress must speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.").

[2] *See* West Va. v. EPA, 597 U.S. __ (No. 20-1530) (June 30, 2022), slip op. at 15 (Kagan, J., dissenting) (accusing majority of "announcing the arrival of the major questions doctrine").

Biden Administration—including the CDC's eviction moratorium, OSHA's attempt to impose a vaccine-or-test mandate on employees, and EPA's efforts to regulate greenhouse gas emissions.[3]

All eyes are now on the major questions doctrine. Most of the existing and newly-emerging scholarship about the doctrine seeks to illuminate how the Court has "transformed" the major questions doctrine from one of many factors used at step one of the *Chevron* deference analysis into a super strong clear statement rule that can be overcome only by a targeted statement in the statute's text.[4] Some recent scholarship, for example, has outlined and evaluated the new factors announced in the trio of Biden Administration cases for determining when a particular agency interpretation is "major."[5] These newly-identified factors include the size of the policy's impact (in dollars or number of individuals affected), its novelty, and whether the policy has been the subject of significant political debate.[6] Other recent scholarship has highlighted the monumental shift the Court has worked in constitutional law and separation of powers doctrine, turning the major questions inquiry from a device that acts as a check on executive power into one that checks congressional power as well.[7]

But in addition to announcing new factors for determining *when* an agency interpretation qualifies as "major," these cases also work noteworthy shifts in *how* the Court goes about determining whether a statute "clearly" gives an agency authority to adopt the policy at issue—with important implications for statutory interpretation theory. These more subtle, almost "sleeper" shifts in the Court's interpretive methodology risk getting overlooked amidst the flurry of attention being paid to the most glaring changes in the Court's major questions jurisprudence. This paper focuses on two less discussed aspects of the Court's latest major questions methodology—the Court's emphasis on whether the policy at issue fits within the agency's expertise or core functions, and its use of legislative inaction as evidence that Congress

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[3] Alabama Ass'n of Realtors v. HHS, 141 S.Ct. 2485 (2021) (eviction moratorium); NFIB v. OSHA, 142 S.Ct. 661 (2022) (vaccine-or-test mandate); West Va. v. EPA, 597 U.S. __ (No. 20-1530) (June 30, 2022) (EPA regulations).

[4] *See, e.g.*, Cass R. Sunstein, *There are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Daniel T. Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. __ (forthcoming 2023).

[5] *See* Deacon & Litman, *supra* note __.

[6] *See id.*

[7] Sohoni, *supra* note __.

has not clearly authorized the agency policy. As the paper will elaborate, the "core function" or "expertise" analysis is similar to the so-called "mischief" rule that modern textualism has largely resisted—and it is doing a lot of quiet work in these cases. Similarly, the legislative inaction inferences are a form of legislative history that textualists reject in theory but have invoked in a handful of (high stakes) cases. Notably, the Court's use of both of these interpretive tools is largely speculative and untethered to objective evidence of legislative design or intent—calling into question both the Court's methodology and its commitment to textualism, at least in high stakes cases. It is also judge-empowering, in that it lacks parameters—other than a judge's intuition—for determining what constitutes an agency's core function or what inference to draw from legislative inaction.

This paper seeks to highlight the new, and in many ways false, forms of purposivism that undergird the latest iteration of the major questions doctrine, and to evaluate the implications that the Court's reliance on purposive arguments in the major questions cases has for modern textualism. The paper proceeds in three Parts. Part I outlines the early major questions cases—detailing the relatively little attention that was paid to purpose or intent in those early cases and how rare it was to see the kind of "agency fit" and "legislative inaction" arguments that are common, consistent features in the Court's most recent major questions opinions. Part II describes how the Court's most recent major questions cases use arguments about an agency's presumed area of expertise or core functions to limit the agency's authority, and draws parallels between this line of reasoning and the "mischief" rule often associated with purposive interpretation. It also details the Court's incongruous use of rejected proposals and congressional failure to act as signs that the legislature did not intend to give the agency the authority it seeks—and notes tensions between this interpretive practice and some of textualism's core theoretical tenets. Part III concludes by evaluating the implications that textualist Justices' use of "mischief"-like reasoning and legislative inaction in the major questions cases might have for textualism going forward. Ultimately, it recommends that the Court tie its arguments about agency expertise to objective evidence of statutory design rather than to the Justices' own intuitions—and that the Court abandon references to legislative inaction altogether in its major questions cases.

I. PURPOSE AND INTENT IN EARLY MAJOR QUESTIONS CASES

In its earliest iterations, the concept that has come to be known

as the "major questions" canon paid little attention to legislative intent, or to the fit between an agency's core expertise and the policy at issue in a particular case. Only one of the Court's first three major questions decisions even gestured towards agency expertise as an important criterion—and that decision was based largely on language in the text of the statute at issue. But by 2015, the Court was openly declaring certain types of regulations outside an agency's expertise, with no textual anchor—setting the stage for the modern Court's heavy emphasis on this factor. The story is similar with respect to legislative intent, which received little traction in the early major questions cases, but has played a quietly noteworthy role in the most recent cases to invoke this doctrine. This Part reviews the early major question cases, decided between 1994-2019, chronicling the limited-to-nonexistent role that purpose and intent played in the Court's reasoning and noting where precursors to present-day agency expertise and legislative inaction arguments first surfaced.

A. *First Decade: 1994-2006*

There were three cases decided between 1994-2006 in which the Court invoked some form of major questions argument. In all of these cases, the Court only indirectly referenced purpose or intent. In the first case, it referenced purpose as evidence that the agency policy at issue sought to change a key feature of the statute's design—i.e., that it would work a fundamental, or "major," change. In the second, it referenced both the enacting era Congress's intent and later Congress' failure to act as supporting evidence that the agency interpretation at issue exceeded the agency's statutory authority. In the third, the Court gestured more obliquely towards a lack of fit between the agency's sphere of expertise and the interpretation or policy at issue. This Section outlines these early uses of purpose and intent as corollaries to the major question analysis.

1. *MCI v. AT&T*

The first case widely considered to have articulated some version of the major questions doctrine is *MCI v. AT&T*.[8] *MCI* involved a

[8] 512 U.S. 218 (1994). There is language in an earlier case, *AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980), known as "The Benzene Case," that sounds similar to the major questions concept. *See id.* at 645 ("In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view"). But that language is at best considered a "precursor" to the

challenge to the FCC's decision to exempt nondominant telecommunications carriers from the Communication Act's requirement that all carriers file their rates with the Commission (and charge only the filed rate).[9] The Communications Act authorized the agency to "modify any requirement" contained in the Act;[10] at issue was whether the term "modify" authorized the FCC to make only minor changes to the Act's provisions, or also major changes such as entirely exempting some carriers from the Act's rate-filing requirement.[11] A majority of the Court, in an opinion authored by Justice Scalia, concluded that the term "modify" has a "connotation of increment or limitation" and thus contemplates only minor, rather than "fundamental" changes to the statute's requirements.[12]

In so ruling, the Court relied heavily on dictionary definitions of the word "modify," stressing the Latin meaning of the root "mod."[13] It also made what were essentially purposive arguments about the importance of the rate-filing requirement to the statutory scheme. The Court argued, for example, that the rate-filing requirement was the "centerpiece of the Act's regulatory regime" and "the heart of the common-carrier section of the Communications Act."[14] And it quoted its own prior caselaw declaring that "the duty to file rates with the Commission" had "always been considered essential to preventing price discrimination and stabilizing rates."[15] After concluding that, "[r]ate filings are, in fact, the essential characteristic of a rate-regulated industry," the Court went on to articulate what would become the foundation for the major questions doctrine, opining that, "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[16] In other words, the Court referenced the statute's purpose and design as evidence that the policy change the agency sought

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modern major questions doctrine. *See* Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 182 (2022).

[9] *MCI v. AT&T*, 512 U.S. at 220.

[10] 47 U.S. 203.

[11] *Id.* at 225.

[12] *Id.* at 225-229.

[13] *See id.* at 225

[14] *Id.* at 220, 229.

[15] *Id.* at 230.

[16] *Id.* at 231.

to implement was "essential" or "major"—and then posited that Congress would not have authorized the agency make such a "major" policy shift.

Notably, there was no discussion in *MCI* about the fit between the FCC's expertise and the detariffing policy it had adopted. Nor was there any reference to legislative inaction as a sign of legislative intent. Rather, the Court invoked the statute's goals and design in order to support its argument that the agency's proposed interpretation would unravel the statutory scheme in ways Congress could not have intended to authorize.

2. *FDA v. Brown & Williamson*

Six years later, the Court again commented on the enormity of the regulatory authority claimed by an agency in the course of invalidating the agency's proposed statutory interpretation. *FDA v. Brown & Williamson*[17] involved the FDA's attempt to regulate tobacco products"—after more than fifty years of denying that it had the authority to do so—under a statute that gave the FDA the authority to regulate "drugs" and "devices."[18] A majority of the Court concluded that the statute did not give the FDA authority to regulate tobacco products, relying on a host of interpretive tools including the statute's structure, several other federal statutes in which Congress itself directly regulated tobacco products in a manner similar to the regulations the FDA sought to adopt, and repeated congressional testimony by FDA officials indicating that FDA lacked the authority to regulate tobacco products.[19]

The Court also noted, in passing, what it viewed as two indicia of legislative intent *not* to give FDA authority to regulate tobacco products. The first was the fact that before the FDCA was enacted in 1938, the FDA's predecessor agency, the Bureau of Chemistry, had announced that it lacked the authority to regulate tobacco products under the Pure Food and Drug Act of 1906 and that Congress, in 1929, had considered and rejected an amendment to the Pure Food and Drug Act that would have given the Bureau of Chemistry authority to regulate

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[17] 529 U.S. 120 (2000).

[18] *See id.* at 125; Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U.S.C. § 301 et seq.

[19] *Brown & Williamson*, 529 U.S. at 133-139.

tobacco products.[20] This kind of argument about the meaning of predecessor statutes or the intent of pre-enactment Congresses does not show up again in any of the Court's later major questions cases. The second indicia the Court pointed to was the fact that following the FDCA's passage in 1938, Congress had considered and rejected several bills that would explicitly have granted the FDA jurisdiction over tobacco products.[21] This latter form of legislative process inference—deriving meaning from Congress' failure to act on a specific proposal—did not surface again in major questions cases for twenty years, until 2021, but has become a regular feature in all of the Court's most recent major questions opinions.

Finally, the Court noted that "[t]his is hardly an ordinary case" and that FDA was seeking to "regulate an industry constituting a significant portion of the American economy."[22] After citing *MCI v. AT&T* and making additional comments about tobacco's "unique place in American history and society" and its "unique political history," the Court invoked what has since come to be known as the major questions doctrine, stating that, "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[23] As in *MCI*, the "major questions" point was made at the tail end of the Court's opinion, rather than raised as a threshold question at the outset of its interpretive analysis.

3. *Gonzales v. United States*

Another six years later, in a case called *Gonzales v. United States*,[24] the Court again held that a federal statute did not give an administrative agency (this time, the U.S. Attorney General) the "broad and unusual authority" to regulate in the manner the agency sought.[25] *Gonzales* is a borderline major questions case—counted by some, but not all commentators, as a case that invokes the major questions canon.[26]

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[20] *See id.* at 146.

[21] *See id*. at 147.

[22] *Id.* at 159.

[23] *Id.* at 159-160.

[24] 546 U.S. 243 (2006).

[25] *Id.* at 267.

[26] *Compare, e.g.*, Sunstein, *supra* note __ (declining to mention Gonzales when discussing major questions cases) *and* Timothy A. Roth, *Major Questions Doctrine: Implications for Separation of Powers And the Clean Power Plan*, 29 GEO. ENV. L. REV. 555 (2017) (same) *with* Joshua S. Sellers, "Major Questions" Moderation, 87 G.W. L. Rev. 930, 942 (2019) (including Gonzales in catalogue of major questions cases) *and* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions*

I include it here both for completeness and because the Supreme Court in its latest major questions decision, *West Virginia v. E.P.A.*, included it in the line of major questions cases it recounted.[27]

Gonzales involved the Controlled Substances Act (CSA), which requires physicians who prescribe Schedule II drugs to "obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him."[28] The CSA provides that the Attorney General may deny, suspend, or revoke a physician's registration if the physician's registration would be "inconsistent with the public interest" and provides a statutory list of five factors that the Attorney General "shall" consider in determining whether a physician's registration is "in the public interest."[29] It also authorizes the Attorney General to "promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances";[30] and to "promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter."[31]

At issue was a regulation promulgated by Attorney General John Ashcroft which dictated that prescribing, dispensing, or administering federally controlled substances to assist suicide was not a "legitimate medical purpose," that such practices violate the CSA, and that a physician who prescribed such substances for the purpose of assisted suicide could have her registration revoked as "inconsistent with the public interest."[32] The regulation expressly indicated that this rule would apply even in states, such as Oregon, that had authorized doctors to prescribe medications to assist in the suicide of terminally ill patients.[33] The Court held that the text of the CSA did not authorize the Attorney General to "attempt to define standards of medical practice" in this manner.[34] Specifically, the Court noted that the statute provided a list of factors the Attorney General was required to consider in

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Doctrine, 74 ADMIN. L. REV. 217, 228 (2022) (same).

[27] *See* West Va. v. EPA, 597 U.S. __ (No. 20-1530) (June 30, 2022), slip op. at 18; *id.* at 8 (Gorsuch, J., concurring).

[28] 21 U.S.C. § 822(a)(2).

[29] *Id.* at § 824(a)(4); § 822(a)(2).

[30] *Id.* at § 821 (2000 ed., Supp.V).

[31] *Id.* at § 871(b).

[32] 66 Fed.Reg. 56608 (2001); Gonzales v. Oregon, 546 U.S. 243, 254 (2006).

[33] 66 Fed.Reg. 56608 (2001).

[34] *Gonzales*, 546 U.S. at 259.

determining whether to deregister a physician and that the regulation at issue "does not undertake the five-factor analysis and concerns much more than registration."[35] The Attorney General maintained that the statutory language authorizing him to decide whether a physician's actions are inconsistent with the "public interest" gave him the power to adopt a regulation declaring assisted suicide a violation of the CSA.[36] But the Court disagreed, observing that if that reading were correct, it would mean that the CSA gave the Attorney General "extraordinary" and "unrestrained" power "to declare an entire class of activity outside 'the course of professional practice'"—which the Court found inconsistent with Congress' careful efforts to prescribe a list of limited circumstances under which the Attorney General could deregister physicians.[37]

The Court then gestured at both the major questions doctrine and the statute's purpose. The Court first noted that the authority claimed by the Attorney General was inconsistent with the statute's design—which delegated authority for administering the statute to both the Attorney General and the Secretary of Health and Human Services and required the Attorney General to defer to the Secretary's judgment *on scientific and medical matters*.[38] The Court linked this structural argument to an argument about "expertise," commenting that "[t]he structure of the CSA, then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise" and that "the authority claimed by the Attorney General is both beyond his expertise and incongruous with the statutory purposes and design."[39]

The Court then parlayed its "expertise" point into a subtle major questions argument, declaring that, "[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable"—and citing *FDA v. Brown & Williamson*.

Gonzales marks the first time the Court referred to an agency's lack of expertise in the vicinity of making an (albeit indirect) major questions argument. The Court in *Gonzales* did not belabor the lack of fit between the Attorney General's expertise and the medical judgments

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[35] *Id.* at 261.
[36] See id. at 262.
[37] *See id.*
[38] *See id.* at 265.
[39] *Id.* at 266-67.

embodied in the regulation at issue, stressing instead that the CSA gave another agency, HHS, authority over medical judgments.

B. *Second Era: 2006-2019*

Between 2006 and 2021, the Court invoked the major questions concept only three times. Twice, it did so with no mention of the statute's purpose; once it did so after discussing the mischief the statute was designed to remedy *and* arguing that the agency whose authority was at issue had no expertise regarding the underlying statutory subject matter. This Section describes the Court's reasoning in these three cases.

1. *Utility Air Regulators y Group v. E.P.A.*

In 2014, the Court again briefly mentioned the major questions presumption in a case called *Utility Air Regulatory Group v. E.P.A.*[40] *Utility Air* involved the Clean Air Act's permitting provisions.[41] The CAA charges EPA with formulating national ambient air quality standards (NAAQS) for air pollutants and prohibits the construction or modification of pollution emitting facilities without first obtaining a permit.[42] At issue was EPA's effort to regulate greenhouse gases following the Supreme Court's ruling in *Massachusetts v. EPA*.[43] Specifically, EPA promulgated greenhouse-gas emission standards for passenger cars, light-duty trucks, and medium-duty passenger vehicles and announced a phase-in program through which stationary sources that emit greenhouse gases would be subject to EPA's permitting requirements based on their potential to emit greenhouse gases.[44] As EPA acknowledged, this regulation would increase the number of entities subject to EPA's permit requirements *one-thousand-fold* (from 800 to 82,000).[45] The statutory question before the Court thus was whether the CAA either compelled or permitted a regulation requiring that any stationary source that emits greenhouse gases be subject to the CAA's permitting requirements.

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[40] 573 U.S. 302 (2014).

[41] *See id.* at 307.

[42] *See* 42 U.S.C. § 7410.

[43] 549 U.S. 497, 528 (2009). The Court in *Massachusetts* held that Title II of the Act "authorize[d] EPA to regulate greenhouse gas emissions from new motor vehicles" if the Agency "form[ed] a 'judgment' that such emissions contribute to climate change." *Id.* (quoting § 7521(a)(1).

[44] *See* Utility Air Regulatory Group. v. EPA, 573 U.S. 302, 310-312 (2014).

[45] *See id.* at 322.

A majority of the Court held that the CAA neither compelled nor permitted such a regulation.[46] Specifically, the Court found that requiring permits for sources based solely on their emission of greenhouse gases would be "incompatible" with "the substance of Congress' regulatory scheme"—which consisted of "elaborate procedural mandates" and "costly" application requirements that were "finely crafted" to apply to a *small number* of large sources, not to the large number of small sources that would be forced to obtain permits under EPA's greenhouse gas regulation.[47] After detailing the "excessive demands"[48] that EPA's regulatory policy would impose, the Court observed that, "EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[49] Citing *FDA v. Brown & Williamson* and *MCI*, the Court commented that, "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[50] Significantly, the Court also noted that EPA itself had conceded that the regulatory authority it was claiming would render the statute "unrecognizable to the Congress that designed" it.[51]

Unlike *MCI* and *FDA v. Brown & Williamson*, the Court's opinion in *Utility Air* focused primarily on the practical consequences—i.e., absurd results—that would follow if it upheld EPA's regulations. And while the Court did argue that those consequences were inconsistent with the statute's design, it did not directly invoke congressional intent or purpose—relying instead on structural arguments to support its absurdity point. Indeed, the only reference the Court made to congressional intent was its gilding-the-lily remark noting that even EPA itselfseemed to believe its regulation inconsistent with Congress' design.

2. *King v. Burwell*

One year later, the Court for the first time used the major questions doctrine in a dispositive manner—and one that relied heavily on the mischief the statute was designed to remedy as well as the

[46] *See id.* at 320-21.
[47] *Id.* at 321-23.
[48] *Id.* at 323.
[49] *Id.* at 324.
[50] *Id.*
[51] *Id.*

relevant agency's lack of expertise regarding the statute's subject matter. *King v. Burwell* involved the ACA, a health care reform statute designed to expand insurance coverage.[52] The ACA "requires the creation of an 'Exchange' in each State—basically, a marketplace that allows people to compare and purchase insurance plans."[53] The statute "gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish the Exchange if the State does not."[54] The question presented in *King* was whether certain tax credits, which the Act provides to individuals who fall within a specified income range, are available in states that have a federal exchange rather than one established by the state.[55] The statutory text provides that the tax credits "'shall be allowed' for any 'applicable taxpayer"' and that "the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through 'an Exchange established by the State"' under the ACA.[56] The IRS had addressed the availability of tax credits by promulgating a rule that made them available on both State and Federal Exchanges; several taxpayers who did not wish to purchase health insurance challenged this IRS ruling.[57]

In an opinion authored by Chief Justice Roberts, the Court began its statutory analysis by invoking both the mischief rule and the major questions doctrine. First, the Court described the "long history of failed health insurance reform" in several states, tracing the evolution of health insurance regulation since the 1990s and focusing on Massachusetts's ultimately successful system.[58] The upshot of this history lesson was that Congress deliberately chose to model the ACA on Massachusetts's successful scheme, copying three key components of the Massachusetts statute, including the provision of tax subsidies to low-income individuals who purchased insurance.[59] Second, the Court characterized the ACA—and its tax subsidies provision—as "major" legislation that would have a significant effect on the economy. Specifically, the Court commented that, "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" and that "[w]hether those credits are available on Federal Exchanges is thus a question of

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[52] 576 U.S. 473 (2015).
[53] *Id.* at 473; 42 U.S.C. § 18031(b)(1).
[54] *Id.* at 473; 42 U.S.C. §§ 18031, 18041.
[55] *See id.* at 483.
[56] *See* 26 U.S.C. § 36B(a)-(c).
[57] *See* 26 C.F.R. § 1.36B–2 (2013).
[58] *See* King v. Burwell, 576 U.S. 473, 479-81 (2015).
[59] *See id.* at 481-82.

deep 'economic and political significance that is central to th[e] statutory scheme."[60] Accordingly, the Court insisted that Congress would have spoken more clearly and expressly if it had intended to leave the resolution of this interpretive question to an administrative agency.[61] It then made a brief "expertise" argument, declaring that, "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"—citing *Gonzales v. Oregon*.[62]

King thus built on the glimmer of an expertise argument articulated in *Gonzales* to take the question at issue entirely out of the IRS's hands. (Nevermind that *Gonzales* had referenced the Attorney General's *relative* lack of expertise as compared to the HHS Secretary, noting that Congress had delegated authority over medical decisions to the latter rather than former—rather than made a blanket statement about the Attorney General's inexpertise). *King* also echoed some of the "central to the statutory scheme" type traditional purposive arguments the Court had employed in *MCI*. Finally, *King* did something unique in emphasizing the circumstances, or "mischief," that led to the ACA's enactment—and specifically how Congress modeled the ACA on Massachusetts' similar statute—as part of its major questions argument. The modern Roberts Court has embraced and embellished on the *King* Court's expertise argument, but it has largely ignored or abandoned the more openly purposive "central to the statutory scheme" or "mischief that motivated the statute" forms of argument.

3. *County of Maui*

A few years later, in 2019, Justice Alito's dissenting opinion in *County of Maui v. Hawaii Wildlife Fund*[63] invoked the major questions presumption without mentioning legislative purpose or intent at all. *County of Maui* is different than the other cases discussed above in that the major questions doctrine was referenced in a dissenting opinion authored by a single Justice, rather than in the opinion for the Court. But it is worth discussing briefly, both because it was decided just two years before the flurry of Biden-era major questions cases that have prompted so much recent attention and because it is a case in which the Court referenced the major questions doctrine without making any of the

[60] *Id.* at 485.
[61] *See id.* at 486.
[62] *Id.*
[63] 140 S.Ct. 1462 (2019).

new-fangled expertise or mischief type arguments it invoked in *King v. Burwell*—and would invoke repeatedly in its 2020-2021 term cases.

County of Maui involved a Clean Water Act provision that forbids the "addition" of any pollutant from a "point source" to "navigable waters" without the appropriate permit from the Environmental Protection Agency (EPA).[64] The statutory question was whether the Act "requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source," such as when pollutants released from a plant mix with groundwater, which in turn flows into a navigable river.[65] A majority of the Court held that the Act requires a permit if the addition of the pollutants through groundwater is the "functional equivalent" of a direct discharge from the point source into navigable waters.[66]

Justice Alito dissented, arguing that the statute's text, including a definitional provision and a list of conveyances that fall within the definition, precluded the Court's loose "functional equivalent" test.[67] Justice Alito also decried the dramatic, absurd practical consequences produced by the Court's reading—including the probability that ordinary homeowners with septic tanks would now have to obtain discharge permits[68]—and argued that the Court's interpretation would impermissibly infringe on the State's traditional authority over land and water use.[69] After stressing these arguments, Justice Alito made the additional point that, "the Court's test offends the clear-statement rule recognized in [Utility Air] by expanding the authority of the EPA"—and cited *Utility Air* and *FDA v. Brown & Williamson* for the proposition that, "Congress must speak clearly if it 'wishes to assign to an agency decisions of vast 'economic and political significance.'"[70]

County of Maui was decided a few years after *King v. Burwell*, in which the Court used both the mischief rule and a "fit," or expertise, argument in conjunction with the major questions doctrine. But Justice Alito's *Maui* dissent in no way built on *King*'s use of mischief and

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[64] Federal Water Pollution Control Act, §§ 301(a), 502(12)(A), as amended by the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) § 2, 86 Stat. 844, 886, 33 U.S.C. §§ 1311(a), 1362(12)(A).

[65] *See Maui*, 140 S.Ct. at 1468.

[66] *See id.*

[67] *See id.* at 1484-85.

[68] *See id.* at 1489.

[69] *See id.* at 1490.

[70] *Id.* at 1490-91.

expertise arguments, relying instead on *Utility Air*'s "profound effects" type argument to justify its use of the major questions doctrine.

II. THE SHIFT TO A NEW PURPOSE AND INTENT

This Part examines the three 2020-2021 term cases in which the Court has relied heavily on the major questions doctrine—labeling it as such for the first time and essentially turning it into a canon. Rather than focus on the new triggers the Court has announced for this new version of the canon, the discussion below focuses on the hidden judgments about statutory purpose, mischief, and intent that underlie the Court's interpretive analysis. Section A describes the Court's three most recent major questions cases in detail. Section B unpacks the new, hidden purpose and intent at the heart of the Court's "fitness" and "expertise" arguments. Section C explores the Court's surprisingly regular use of legislative intent and subsequent legislative history in all three cases. Section D similarly discusses how the Court uses practical reasoning as evidence to support its "fitness" arguments in these cases.

A. *2020-2021 Term Cases*

1. Alabama Association of Realtors v. HHS

In late 2021, the Court reviewed a challenge to a nationwide CDC moratorium on evictions of tenants who lived in a county that was experiencing high levels of Covid-19 and who made certain declarations of financial need.[71] In a 6-3 per curiam opinion, the Court held that the plaintiffs had a substantial likelihood of succeeding on the merits of their claim that the eviction moratorium exceeded the CDC's statutory authority (at issue was a stay of a district court decision invalidating the moratorium).[72] The per curiam opinion began almost immediately with a "fitness" argument—noting in its opening paragraph that the CDC had acted pursuant to a "decades-old statute that authorizes it to implement measures like *fumigation* and *pest extermination*"[73] and implying, from the outset, that an eviction moratorium was different in kind from such measures. The Court followed up this general observation by emphasizing that while the relevant statutory provision empowers the CDC to promulgate regulations as "necessary to prevent the

[71] Alabama Ass'n of Realtors v. HHS, 141 S.CT. 2485 (2021).
[72] *See id*. at 2488.
[73] *Id.*

introduction, transmission, or spread of communicable diseases," the statute's second sentence limits the scope of that authority to "act as necessary."[74] Specifically, the Court noted that the second sentence lists several kinds of measures the CDC may take to control the spread of Covid-19 including "inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in [the Surgeon General's] judgment may be necessary"—and reasoned that all of the listed actions "directly relate to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself,"[75] whereas the CDC moratorium relates "far more indirectly to interstate infection."[76] Because, in the Court's view, the eviction moratorium is different in kind from the actions expressly listed in the statute, the Court concluded that it exceeded the CDC's authority.[77]

The Court's emphasis on things like "fumigation" and "disinfection" constitute, at bottom, a scope or fitness argument. The Court was essentially saying that the statute was designed with a core type of CDC conduct in mind—i.e., actions that relate directly to identifying, isolating, or destroying a disease—and that the eviction moratorium falls outside of this core type of conduct. What is interesting about this form of argument is that it involves virtually the same kind of reasoning, or logical inferences, as the mischief rule, a tool widely considered to be purposive in nature and rejected by most textualist judges and Justices. Section B explores the similarities (and differences) between these two forms of argument in greater detail.[78]

After establishing the lack of congruence between an eviction moratorium and the CDC's mandate to prevent, detect, and respond to communicable diseases, the Court then noted that "even if the text were ambiguous," the "sheer scope" of the authority the CDC was claiming would preclude it from upholding the moratorium.[79] The Court cited *Utility Air* and *FDA v. Brown & Williamson*'s presumption that "we expect Congress to speak clearly when authorizing an agency to exercise

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[74] *See id.*

[75] *See id.*

[76] *See id.*

[77] *See id.* ("This downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease that characterizes the measures identified in the statute.").

[78] *See infra* Section II.B.

[79] *Id.* at 2489.

powers of 'vast economic and political significance'" and provided several facts and figures about the scope of the impact that the CDC's moratorium would effect.[80] The Court also noted that the "expansive authority" claimed by the CDC was "unprecedented," as "no regulation premised on [the statute at issue] has even begun to approach the size or scope of the eviction moratorium."[81] This again sounds like a backhanded "fitness" or "scope" argument—or way to demonstrate that the authority claimed by the CDC was out of step with the kind of authority the statute sought to confer on the CDC.

Finally, the per curiam opinion invoked legislative intent and inferences based on Congress' failure to act—two more tools that textualist Justices usually criticize. Specifically, the opinion observed that although Congress knew that the eviction moratorium was about to expire, it "failed to act in the several weeks leading up to the moratorium's expiration" to extend the moratorium.[82] Section C of this Part explores the theoretical implications of such references to legislative inaction.[83]

2. *NFIB v. OSHA*

In early 2022, the Court again invoked the major questions canon, and again did so in a way that emphasized the lack of "fit" between the agency's expertise and the authority it claimed as well as invoked a legislative inaction argument. *NFIB v. OSHA* involved an emergency rule issued by the Occupational Safety and Health Administration (OSHA) that required most employees in the work force to either obtain a Covid-19 vaccine or get tested weekly for the coronavirus.[84] Several states and businesses challenged the rule, arguing that it exceeded the scope of OSHA's authority under the OSH Act.[85] A majority of the Court again agreed, and issued a 6-3 per curiam decision finding that the OSH Act did not empower OSHA to adopt an emergency rule imposing a vaccine-or-test mandate.[86]

Unlike *Alabama Ass'n of Realtors*, the per curiam opinion opened by discussing the enormity of the impact that the rule would

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[80] *See id.*
[81] *Id.*
[82] *See id.* at 2490.
[83] *See* discussion *infra* Section II.C.
[84] NFIB v. OSHA, 142 S.Ct. 661 (2022).
[85] *See id.* at 662; 84 Stat. 1590, 29 U. S. C. §651 et seq.
[86] *See id.* at 663.

have on the workforce and almost immediately invoked the major questions doctrine. The very first paragraph of the opinion noted that OSHA's rule applies to "roughly 84 million workers."[87] And the first substantive paragraph following the Court's recital of facts again repeated the "84 million" workers figure, noting that "this is no 'everyday exercise of federal power'" but rather "a significant encroachment in to the lives" of a "vast number of employees."[88] The opinion also quoted *Alabama Association of Realtors* for the presumption that "we expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[89]

The opinion then moved into what was essentially a "fitness" or "expertise" argument, emphasizing that the OSH Act empowers the Secretary of HHS to set "*workplace* safety standards, not broad public health measures."[90] The opinion repeatedly noted that the statute uses the term "*occupational*" (often using italics to emphasize the word)[91] and argued that this means that OSHA is limited to regulating "work-related" dangers—which do not include Covid-19, since Covid-19 is a "universal risk" that "can and does spread at home, in schools, during sporting events, and everywhere else that people gather."[92] OSHA's blanket mandate, the per curiam insisted, thus "takes on the character of a general public health measure, rather than an '*occupational* safety or health standard.'"[93] The opinion further noted that in the fifty years since the OSH Act was enacted, OSHA "has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace" and argued that this "lack of historical precedent" is a "telling indication" that the mandate exceeds the agency's "legitimate reach."[94] As in *Alabama Ass'n of Realtors*, the Court thus used the agency's past practice as a sign of the statute's scope—i.e., to argue that statute does not give the agency authority over the *kinds* of matters it is now seeking to regulate.

Finally, as in *Alabama*, the per curiam opinion noted in its last

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[87] *Id.* at 662.
[88] *Id.* at 665.
[89] *Id.*
[90] *Id.* (emphasis in the original) (citing See 29 U. S. C. §655(b)).
[91] *See id.* at 665-65 (quoting the term "occupational" four times, and italicizing it three of those times).
[92] *Id.* at 665.
[93] *Id.* at 666.
[94] *Id.*

few paragraphs that a majority of the Senate had voted to enact a resolution disapproving of OSHA's vaccine-or-test mandate regulation.[95] This is a surprising nod to legislative intent for a textualist Court—suggesting, based on legislative record materials outside the statutory text, that the present-day Congress does not approve of OSHA's regulatory action. Section C below explores the theoretical implications of the modern Court's willingness to invoke this form of argument, even while embracing and insisting on a textualist approach to interpreting statutes.[96]

Justice Gorsuch's signed concurring opinion struck similar notes. The opinion began with the major questions doctrine, quoting *Alabama Ass'n of Realtor*s and noting that OSHA's mandate would affect 84 million Americans.[97] It also waxed eloquent on constitutional separation of powers principles and named the "major questions" doctrine for only the second time.[98] But Justice Gorsuch also quickly moved to legislative inaction arguments, noting that although Congress has "adopted several major pieces of legislation aimed at combating Covid-19" it "has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate."[99] More importantly, he noted, "a majority of the Senate even voted to *disapprove* OSHA's regulation."[100] Again, the reference to Congress' failure to act and to a resolution passed by one house of Congress, not signed by President, is striking for a self-proclaimed textualist who has elsewhere denigrated these methods of statutory interpretation.(fn BNSF) Justice Gorsuch's opinion also endorsed the per curiam opinion's expertise argument, noting that "OSHA arguably is not even the agency most associated with public health regulation."[101] Section C below examines the theoretical implications of this interpretive move.[102]

3. *West Virginia v. EPA*

Most recently, the Court in *West Virginia v. EPA*[103] relied heavily

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[95] *See id.*

[96] *See infra* Section II.C.

[97] *See* NFIB v. OSHA, 142 S.Ct. 661, 667-68 (2022) (Gorsuch, J., concurring).

[98] *See id.* at 667 (citing Gundy v. United States, 588 U.S. __ (2019) (Gorsuch, J., dissenting)).

[99] *Id.* at 667-68.

[100] *Id.* at 668 (emphasis in the original, citing a Senate resolution).

[101] *Id.* at 668.

[102] *See infra* Section II.C.

[103] 597 U.S. __ (No. 20-1530) (June 30, 2022).

on the major questions doctrine—and expertise and legislative inaction arguments—to invalidate an EPA regulation called the Clean Power Plan. The Clean Power Plan imposed a "generation shifting" emission reduction requirement on States—which directed that the EPA would set the emissions limit (or pollution maximum) that each State must meet based on calculations that required pollution-emitting firms to shift from coal-fired power plants to natural-gas fired plants and/or from coal or gas plants to renewable power sources, such as wind and solar.[104] In setting emissions limits, the EPA aimed for what it regarded as a "reasonable" amount of shift to cleaner power sources, based on modeling identifying how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply.[105] Several states and coal companies challenged these EPA rules and the Supreme Court, again by a 6-3 vote, upheld these challenges.

The majority opinion, authored by Chief Justice Roberts, again led with the major questions doctrine—not merely quoting the clear statement presumption established in *FDA v. Brown & Williamson*, but walking the reader through a careful summary of several of the cases discussed in Part I.[106] The majority then concluded that, "under our precedents, this is a major questions case" and went on to draw parallels between the Clean Power Plan and the agency actions in the cases it had just described.[107] Among these parallels was the fact that the EPA chose "to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself"—a strong sign, in the Court's eyes, that it had exceeded the authority that Congress "meant" to confer on it.[108] As in *Alabama Ass'n of Realtors* and *NFIB v. OSHA*, then, the Court openly relied on the legislature's inaction, or failure to act, to infer legislative intent.

The next several pages of the Court's opinion detailed the "unprecedented"[109] nature of EPA's generation-shifting requirement, including a reference to hearing testimony by a former EPA

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[104] *See id.* at 8. Alternatively, firms could reduce their overall energy production, build a new clean energy source or invest in someone else's existing facility and then increase generation there, or purchase emission credits as part of a cap-and-trade system. *See id.* at 8-9.

[105] *See id.* at 9.

[106] *See id.* at Part III.A, pp. 16-19.

[107] *Id.* at 20.

[108] *Id.*

[109] *Id.* at 24.

administrator declaring that the rule was "not about pollution control" so much as it was "an investment opportunity" for States to switch over to renewable energy sources.[110] This legislative history, the Court argued, showed not only that the rule at issue was unprecedented, but that it "effected a fundamental revision of the statute."[111] Thus, the Court in *West Virginia* went beyond the legislative inaction arguments it employed in earlier major questions cases to now employ, and rely on, traditional legislative history (hearing testimony) of the kind that textualist Justices usually repudiate.

The Court then moved into an extended "expertise" argument that went far beyond the kinds of "fit" and "expertise" arguments it used in earlier cases. First, it noted that the judgments EPA was making in setting emissions levels based on a generation-shifting policy—which involved "projecting system-wide" trends in "electricity transmission, distribution, and storage"—required technical and policy expertise that EPA did not have, or at least that were different from the kind of expertise "traditionally needed in EPA regulatory development."[112] EPA's lack of "comparative expertise" in making such policy judgments, the Court found, rendered it highly unlikely that Congress would have tasked the EPA with the kinds of judgments called for by the generation-shifting policy.[113]

Second, the majority rejected arguments suggesting that allowing EPA to dictate the optimal mix of energy sources makes sense because it helps reduce air pollution, which is a task squarely within EPA's authority.[114] The Court essentially batted away such indirect-path or indirect-connection arguments, declaring simply that they "do[] not follow."[115] For example, the Court noted that while it may be true that forbidding evictions could slow the spread of communicable diseases, allowing the CDC therefore to impose an eviction moratorium "raises an eyebrow."[116] Similarly, it argued, we would not allow or expect the

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[110] *Id.* at 23-24 (citing *Oversight Hearing on EPA's Proposed Carbon Pollution Standards for Existing Power Plants* before the Senate Committee on Environment and Public Works, 113th Cong., 2d Sess., p. 33 (2014)).

[111] West Va. v. EPA, 597 U.S. __ (No. 20-1530) (June 30, 2022), slip op. at 24.

[112] *Id.* at 25 (quoting EPA's own admissions to this effect in EPA Fiscal Year 2016: Justification of Appropriation Estimates for the Committee on Appropriations 213 (2015)).

[113] *Id.*

[114] *See id.* at 26.

[115] *Id.*

[116] *Id.*

Department of Homeland Security to make trade or foreign policy—even though doing so could indirectly decrease illegal immigration; nor would we expect or allow OSHA to impose a generation-shifting requirement on coal plants, even though doing so would likely reduce workplace illnesses from coal dust.[117] As Section B explains in detail, this line of argument is an extended exercise in, essentially, mischief-rule or purpose-based analysis. The Court is, at bottom, telling agencies to stay within the core of their regulatory spheres—and warning them that if they stray beyond that core, they will raise "judicial eyebrows" and likely run into major questions problems.

Following this extensive foray into core functions, the Court returned to and expanded on its earlier legislative inaction argument. Specifically, it noted that the regulatory power EPA "newly" asserted in the Clean Power Plan "conveniently enabled it to enact a program" that Congress had considered and rejected multiple times.[118] The Court then cited several rejected legislative proposals that it viewed as very similar to the generation-shifting requirement, including cap-and-trade schemes and a carbon tax.[119]

In short, in *West Virginia v. EPA*, what had previously been supporting legislative inaction and fitness or expertise arguments came front and center—to become a key focus of the Court's analysis.

Justice Gorsuch's concurring opinion likewise emphasized legislative inaction and "fitness" arguments—although it did not lead with them, as the majority opinion did. First, Justice Gorsuch noted briefly that the Court has "found it telling when Congress has 'considered and rejected'" legislation that is "akin to the agency's proposed course of action."[120] But he suggested that this might be a sign that an agency was attempting to "work around" the legislative process rather than a sign of Congress' intent *not* to authorize the agency to decide the question.[121]

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[117] *See id.*

[118] *Id.* at 27.

[119] *Id.* at 27-28 (citing American Clean Energy and Security Act of 2009, H. R. 2454, 111th Cong., 1st Sess.; Clean Energy Jobs and American Power Act, S. 1733, 111th Cong., 1st Sess. (2009); Climate Protection Act of 2013, S. 332, 113th Cong., 1st Sess.; Save our Climate Act of 2011, H. R. 3242, 112th Cong., 1st Sess.).

[120] *See* W. Va. v. EPA, 597 U.S. __ (No. 20-1530) (June 30, 2022) (Gorsuch, J., concurring), slip op. at 10.

[121] *Id.*

Second, and more significantly, Justice Gorsuch hinted at "fitness" and "expertise" arguments similar to those employed by the majority and by the Court in previous major questions cases. His version noted that sometimes an agency's attempt to "deploy an old statute focused on one problem to solve a new and different problem" can be a warning sign that it is acting without clear congressional authority.[122] This sounds rather similar to a "stay in your lane" or "don't stray from your core function" argument. Justice Gorsuch later expanded on this theme, declaring that an agency's assertion of regulatory authority should be viewed with skepticism "when there is a *mismatch* between an agency's challenged action and its congressionally assigned mission and expertise." And he cited, as examples of such a "mismatch," the lack of "fit" between a public health agency, on the one hand, and the regulation of housing, on the other (in *Alabama Association of Realtors*), and between a workplace safety agency, on the one hand, and "broad public health measures" on the other (*NFIB v. OSHA*).[123]

Justice Gorsuch also encouraged courts to look at an agency's past practice or past interpretations of the relevant statute as evidence of the scope of the agency's authority—arguing that an agency's past failure to regulate the matter at issue should serve as sign that it lacks authority over that matter.[124] As in *Alabama Ass'n of Realtors* and *NFIB v. OSHA*, this is again a form of "scope" or "core function" argument—one that limits the reach of the agency's power based on a "mismatch" between its past and present regulatory actions.

B. *A New Form of Mischief*

This Section explores the parallels between the Court's use of agency "expertise" (or, more accurately, inexpertise) to limit the scope of an agency's authority under the major questions doctrine and the longstanding—but disfavored among textualists—mischief rule of statutory interpretation. It argues that in the end, this form of expertise-based scope analysis enhances judicial discretion as compared to the traditional mischief rule, as well as ignores textualism's focus on date-of-enactment meaning.

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[122] *Id.* at 14.

[123] *Id.* at 15 (emphasis added).

[124] *See id.* at 16 ("Nor has the agency previously interpreted the relevant provision to confer on it such vast authority; there is no original, longstanding, and consistent interpretation meriting judicial respect.").

As noted above, the Court's most recent major questions cases have consistently argued that particular policies or regulations exceed an agency's statutory authority because those policies or regulations fall outside the agency's "sphere of expertise."[125] Such arguments bear a striking, but hitherto unnoticed, resemblance to traditional "mischief rule" arguments—of the kind typically denigrated by textualist jurists. Here is why: The mischief rule instructs courts to consider the core problem, or "evil," that Congress sought to remedy by enacting the relevant statute.[126] If the conduct at issue in a particular case is similar to the "evil" or mischief that motivated Congress to enact the statute, then the statute should be construed to cover the conduct; but if the conduct is not similar to the mischief that motivated the statute, then the statute should be construed *not* to cover the conduct.[127] This parallels how the modern Roberts Court has employed agency expertise in its latest major questions cases—in each case, the Court essentially determined that the relevant agency had authority to regulate certain core subjects (*workplace*-related hazards, emissions, public health), and then concluded that the challenged regulations were *different in kind* from those core subjects (communicable diseases that spread outside as well as within the workplace, energy policy rather than emissions, housing/evictions rather than public health).

But the major questions version of the mischief rule also differs in important ways from the traditional mischief rule. First, it is wholly unconnected to the circumstances surrounding a statute's enactment. That is, it bears no connection to the original problem a statute was designed to solve; rather, it is premised on a mere judicial declaration that an agency lacks the expertise or jurisdiction necessary to regulate the matter at issue. Indeed, whereas judges who invoke the mischief rule typically reference some objective evidence to establish the core problem or evil a statute was designed to remedy—whether in the form of statutory text, legislative findings, legislative history, contemporary newspaper articles, or historical documents[128]—the Court's recent

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[125] *See* NFIB v. OSHA, 142 S.Ct. 661, 665 (2022); West Va. v. EPA, 597 U.S. __ (2022) (No. 20-1530) (June 30, 2022) (Gorsuch, J., concurring) (slip op. at 15).

[126] *See, e.g.*, Heydon's Case (1584) 76 Eng. Rep. 637; 3 Co. Rep. 7 a (Exch.); Samuel L. Bray, *The Mischief Rule*, 109 GEO. L. J. 967, 968 (2021).

[127] *See* Bray, *supra* note __, at 979 (explaining that the mischief rule, as laid out in Heydon's case, "suggest[s] that the interpreter should consider four things: (1) the old law; (2) the defect in the old law; (3) the new law; and (4) how the new law connects to the defect in the old law").

[128] *See, e.g.*, King v. Burwell, 576 U.S. 473, 479-81 (2015) (academic book, hearing testimony, and history of state health reform efforts that preceded the

"sphere of expertise arguments" have stemmed mostly from the Justices' own intuitions.

In *NFIB v. OSHA*, for example, the Court insisted that a statutory provision authorizing OSHA to promulgate "occupational safety and health standards" encompassed only standards that involve *workplace*-related dangers—not dangers that occur both inside and outside the workplace.[129] The Court seemed to base this limitation on its own intuitions about the meaning of the word "occupational"—italicizing the word repeatedly and inferring that it must restrict the agency's authority only to "hazards that employees face at work."[130] In so doing, the Court ignored OSHA's own past practices, which include regulating many dangers that occur both inside and outside the workplace—such as ladders, asbestos, and tractor-safety.[131] In other words, the Court privileged its own intuitions about the scope of the term "occupational" over objective historical evidence of that term's meaning.

In *West Virginia v. EPA*, the Court strayed even further from objective evidence of statutory scope—putting forth a version of the expertise and core functions argument that seemed to amount to a "we know it when we see it"[132] standard. The majority opinion, for example,

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Affordable Care Act); Yates v. United States, 574 U.S. 528, 535-36 (2015) (committee report); Bond v. United States, 572 U.S. 844, 848-49 (2014) (preamble to an international treaty and academic books); Lawson v. FMR, LLC, 571 U.S. 429, 448-49 (2014) (newspaper articles and committee report); Adoptive Couple v. Baby Girl, 570 U.S. 637, 649 (2013) (statute's text and committee report); Jefferson v. Upton, 560 U.S. 284, 290 (2010) (precedent); Dean v. United States, 556 U.S. 568, 579 (2009) (Stevens, J., dissenting) (floor statements); Bilski v. Kappos, 561 U.S. 593, 639-40 (2010) (House and Senate committee reports).

[129] NFIB v. OSHA, 142 S.Ct. 661, 665 (2022).

[130] *Id.* at 6.

[131] *See* OSHA Standard 1928.51 - Roll-over protective structures (ROPS) for tractors used in agricultural operations (61 Fed. Reg. 9227, March 7, 1996; 70 Fed. Reg. 77003, Dec. 29, 2005); OSHA Standard 1926.1053 – Ladders (55 Fed. Reg. 47689, Nov. 14, 1990; 56 Fed. Reg. 2585, Jan. 23, 1991; 56 Fed. Reg. 41794, Aug. 23, 1991; 79 Fed. Reg. 20743, Apr. 11, 2014); OSHA Standard 1910.1001 – Asbestos (55 Fed. Reg. 50687, Dec. 10, 1990; 56 Fed. Eg. 43700, Sept. 4, 1991; 57 FR 24330, June 8, 1992; 59 Fed. Reg. 40964, Aug. 10, 1994; 60 Fed. Reg. 9624, Feb. 21, 1995; 60 Fed. Reg. 33343, June 28, 1995; 60 Fed. Reg. 33973, June 29, 1995; 61 Fed. Reg. 5507, Feb. 13, 1996; 61 Fed. Reg. 43454, August 23, 1996; 63 Fed. Reg. 1152, Jan. 8, 1998; 70 Fed. Reg. 1141, Jan. 5, 2005; 71 Fed. Reg. 16672 and 16673, April 3, 2006; 71 Fed. Reg. 50188, August 24, 2006; 73 Fed. Reg. 75584, Dec. 12, 2008; 76 Fed. Reg. 33608, June 8, 2011; 77 Fed. Reg. 17778, March 26, 2012; 84 Fed. Reg. 21458, May 14, 2019; 84 Fed. Reg. 21598, May 14, 2019).

[132] *Cf.* Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating that although he "could never succeed in intelligibly" defining the

stated that it "raises an eyebrow"[133] when an agency seeks to regulate certain kinds of matters that seem (to whom? based on what standards?) only indirectly related to its core functions, or sphere of expertise—without offering any guideposts to establish what specific factors tend to give rise to judicial eyebrow-raising. In fact, at oral argument, Chief Justice Roberts was especially loose about this standard—suggesting that it might simply boil down to what "surprises" individual Justices.[134]

Only in *Alabama Ass'n of Realtors* did the Court offer a serious textual hook for its fitness/expertise argument—making an *ejusdem generis* argument that several terms listed in the statute's second sentence (e.g., "fumigation," "disinfection," "sanitation") indicated that the CDC had authority only over actions that relate directly to identifying, isolating, or destroying a disease.[135] But even that argument depended on judicial inferences about what "fumigation," "disinfection," and "sanitation" have in common—rather than objective, external evidence of the problem the statute was designed to remedy. Such judicial attempts to extrapolate a statute's purpose based on surrounding words in a statutory list, without the benefit of any contextual clues or evidence, is a practice I have elsewhere referred to as "backdoor purposivism."[136]

Because of its dependence on judicial intuition, the Court's use of "expertise" arguments in the latest major questions cases is a sort of faux mischief analysis—one that does not look to actual facts or circumstances surrounding an agency's creation but, rather, simply declares what an agency's core function is and extrapolates from there to the outer edges of an agency's authority.

This faux mischief analysis is, moreover, in some temporal

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kind of hard-core pornography that gives rise to criminal liability, he would "know it when I see it").

[133] West Va. v. EPA, 597 U.S. __ (2022) (No. 20-1530) (June 30, 2022) (slip op. at 26).

[134] Transcript of Oral Argument at 84, West Va. v. EPA, 597 U.S. __ (argued Feb. 28, 2022 2014) (No. 20-1530) (Chief Justice Roberts commenting that "this is kind of surprising that the CDC is, you know, regulating evictions"); *id.* at 85 (Roberts explaining, "It's just you look at it and you say, why is this CDC regulating evictions?").

[135] Ala. Ass'n of Realtors v. HHS, 594 U.S. at __ (2021) (No. 21A23) (Aug. 26, 2021) (slip op. at 5).

[136] *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275-1352 (2020).

tension with modern textualism's originalist focus on a statute's date of enactment meaning. For instead of looking for enactment-era evidence of the scope of the agency's authority—whether in the form of contemporaneous dictionary definitions, newspaper accounts, or legislative history—the Court simply conducts its own anachronistic present-day assessment of whether it makes sense, or "raises eyebrows," or "is surprising" for the relevant agency to regulate the subject matter at issue.

C. A New Use of Subsequent Legislative History

As outlined above, the Court's recent major questions cases also repeatedly and consistently reference Congress' failure to adopt, or even its disapproval of, the agency regulation at issue.[137] These regular references to legislative inaction are problematic for at least two reasons: (1) they are in serious tension with textualist interpretive theory's disdain for subsequent legislative history and thus call into question the modern Court's commitment to textualism, at least in high stakes cases; and (2) they often amount to a false gesture at legislative intent that purports to honor Congress' legislative design while in reality misrepresenting (or unfairly extrapolating) its intent.

Tension with textualist theory. As noted above, the Court's recent major questions cases often point to legislative proposals that Congress has failed to enact as evidence that the agency has exceeded the scope of its legislative authority. Indeed, Congress' failure to extend the eviction moratorium that the CDC ultimately adopted, as well as its previous rejection of cap-and-trade and carbon tax policies featured notably in *Alabama Association of Realtors* and *West Virginia v. EPA*, respectively.[138] But these kinds of rejected legislative proposals, or policies that Congress has declined to adopt, are not the equivalent of duly enacted laws. Rather, they are inchoate remnants of the legislative process that have not gone through bicameralism or presentment and that do not satisfy the Article I, Section 7 formalities that textualists

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[137] *See* discussion *infra* Section II.A.

[138] Ala. Ass'n of Realtors v. HHS, 594 U.S. __ (2021) (No. 21A23) (Aug. 26, 2021) (slip op. at 8) (noting that although Congress knew that the eviction moratorium was about to expire, it "failed to act in the several weeks leading up to the moratorium's expiration" to extend the moratorium); W. Va. v. EPA, 597 U.S. __ (No. 20-1530) (June 30, 2022) (Gorsuch, J., concurring) slip op. at 27-28 (citing several rejected legislative proposals to adopt policies, such as cap-and-trade schemes and a carbon tax, that he viewed as comparable to the generation-shifting requirement at issue).

normally insist upon.[139] Indeed, rejected proposals often are considered by only one house—as was the Senate disapproval resolution mentioned in *NFIB v. OSHA*[140]—and thus cannot even purport to shed light on the intent of the full Congress.[141] Moreover, even if rejected legislative proposals did not have an Article I, Section 7 problem, they would not actually shed any light on the scope of authority that Congress delegated to the agency at issue; all they show is that Congress did not prefer to adopt the policy at issue *itself*—not that Congress decline to give the agency the authority to adopt the policy if the agency should so choose. For all these reasons, there are serious formalist, as well as logical, problems with the Court's reliance on Congress' failure to act as evidence of the scope of an agency's power.

A second issue, or tension, posed by the Court's reliance on Congress' failure to act is that it is temporally inconsistent with modern textualism's date-of-enactment focus. In parallel with constitutional originalism, modern textualists often assert that the relevant date for identifying a statute's ordinary meaning is the date of the statute's enactment—and seek to identify the "original public meaning" that a statute's terms would have had to ordinary citizens at the time when it was enacted.[142] References to the understanding or intent of post-enactment Congresses have no place in such an analysis because they post-date the statute's enactment—often by several decades, as with the OSH Act (enacted in 1970)[143] and the Senate disapproval resolution

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[139] *See* Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 315-16 (2022).

[140] S. J. Res. 29, 117th Cong., 1st Sess. (2021).

[141] *See, e.g.*, Arizona v. United States, 567 U.S. 387, 405-06 (2012) (Kennedy, J.) (House only); Corley v. United States, 556 U.S. 303, 319 (2009) (Souter, J., joined by Kennedy, J.) (Senate); Hertz Corp. v. Friend, 559 U.S 77, 85-88 (2010) (Breyer, J., joined by all textualist Justices) (unanimous) (House); NLRB v. Sw. Gen., Inc., 137 S. Ct. 929, 942-43 (2017) (Roberts, C.J., joined by all textualist Justices) (Senate); Mohamad v. Palestinian Auth., 566 U.S. 449, 459-60 (2012) (Sotomayor, J., joined by all Justices except Justice Scalia in relevant part) (House).

[142] SCALIA & GARNER, *supra* note __, at xxvii (textualists "look for meaning in the governing text [and] ascribe to that text the meaning that it has borne from its inception."); Lawrence B. Solum, *Disaggregating Chevron*, 82 OHIO ST. L. J. 249, 265 (2021) (defining statutory textualism to include "the content conveyed by the text to the intended readers ... at the time the statute was enacted"); Bostock v. Clayton Cty., 140 S.Ct. 1731, 1738 (2020) (Gorsuch opinion commenting that "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment"); *id.* at 1825 (Kavanaugh, J., dissenting) ("The ordinary meaning that counts is the ordinary public meaning at the time of enactment.").

[143] 84 Stat. 1590, 29 U. S. C. §651 et seq. (1970).

enacted in 2021.[144] Indeed, rejected legislative proposals and the like are, in essence, merely subsequent legislative history—i.e., nonbinding commentary or failed attempts to amend made by subsequent Congresses, often long after the statute was enacted.[145] Textualists typically are very skeptical of this form of legislative history—precisely because it has no connection to the enacting Congress.[146]

Faux legislative intent. As with the "expertise" and "fitness" arguments discussed in Section B, the Court's use of legislative inaction, rejected proposals, and disapproval resolutions also produces a sort of misguided, or faux, gesture at legislative intent, rather than a meaningful attempt to discern Congress's legislative design or intentions. Notably, the Court's references to legislative action (or inaction) in all three Biden-era major questions cases have focused on how subsequent, often present-day, Congresses—rather than the enacting-era Congress that drafted the statute—acted when considering whether to legislate a policy similar to the agency regulation at issue.[147] This is problematic for at least two reasons. First, if the Court is concerned about the scope of power that Congress delegated to the agency, then it should be focusing on the behavior of the *enacting* Congress that designed the statute and wrote the delegation into law, rather than on actions taken by later Congresses that had nothing to do with crafting the enabling statute. Second, as textualists long have complained, it is dubious to make inferences about any Congress' intent—enacting or subsequent—based on actions that it fails to take.[148] Indeed, as many have noted, there are

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[144] *See* S. J. Res. 29, 117th Cong., 1st Sess. (2021).

[145] *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 798 (6th ed. 2020) (explaining that post-enactment, or subsequent, legislative history includes proporsals to amend a statute or enact a new and related statute, oversight hearings in response to agency or judicial implementation of a statute, and commentary that seeks to "bend" interpretation of a statute following its enactment).

[146] *See* Bruesewitz v. Wyeth, 562 U.S. 223, 242 (2011) (Scalia opinion commenting that "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation"); Sullivan v. Finkelstein, 496 U.S. 617, 632, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history ... should not be taken seriously, not even in a footnote"); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980) (Rehnquist opinion invoking "the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'") (quoting United States v. Price, 361 U.S. 304, 313 (1960)).

[147] *See* discussion *supra* Section II.A.

[148] *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 749 (2006) (Scalia opinion noting that "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute."); Halliburton v. Erica P. John Fund, 573

numerous possible reasons why Congress might fail to adopt a particular legislative proposal.[149] Further, even if failure to act were an accurate proxy for legislative intent, the materials the Court has cited in its most recent major questions cases, such as the disapproval resolution in *NFIB v. OSHA*, can at best be taken as evidence that the present-day Congress disapproves of the *particular agency policy at issue*, not as evidence that the *enacting* Congress *failed to give the agency authority* to adopt that policy.

In short, the Court's reliance on legislative action and inaction in the major questions cases is problematic both because it is inconsistent with textualist interpretive theory's rejection of legislative intent as an illegitimate interpretive tool *and* because legislative action and inaction are poor, often inaccurate, measures of either legislative intent or the scope of authority conveyed to the agency by the *enacting* Congress. Why then, has the Court repeatedly invoked legislative action and inaction in all of its most recent major questions cases—despite these theoretical disconnects? Part III below explores the possibility that the Court, or its textualist Justices, is simply willing to set aside its usual methodological commitment to textualism in "high stakes" cases or in cases involving important constitutional values.[150]

U.S. 258, 300 (2014) (Thomas, J., concurring) ("'Congressional inaction lacks persuasive significance' because it is indeterminate; 'several equally tenable inferences may be drawn from such inaction.'" (quoting Cent. Bank of Denver, N.A. v. 1st Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994))); Tex. Dep't. of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 571 (2015) (Alito, J., dissenting) ("Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. Congressional inaction cannot amend a duly enacted statute." (citations omitted)).

[149] *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988) (listing several reasons); Rapanos v. United States, 547 U.S. 715, 750 (2006) (Scalia, J.) ("We have no idea whether the Members' failure to act in 1977 was attributable to their belief that the Corps' regulations were correct, or rather to their belief that the courts would eliminate any excesses, or indeed simply to their unwillingness to confront the environmental lobby."); Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 169-70 (2001) (Rehnquist, C.J.) ("'[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.' A bill can be proposed for any number of reasons, and it can be rejected for just as many others." (citations omitted) (quoting Cent. Bank of Denver, N.A. v. 1st Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994))); United States v. Est. of Romani, 523 U.S. 517, 535 (1998) (Scalia, J., concurring) ("Congress cannot express its will by a failure to legislate. The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.").

[150] *See* discussion *infra* Section III.A.

D. Conflating Practical Reasoning With "Fit"

Other scholars have noted the heavy emphasis that the Court's newest major questions cases have placed on the practical impact that a regulation will have.[151] All of the recent Biden-era major questions cases include a lot of figures that illustrate the sheer number of people or business entities that will be affected by the agency regulation at issue.[152] Moerover, the numbers seem to take the place of close textual analysis, dictionary definitions, and other usual hallmarks of textualism.[153] This is, of course, a big deal. Using the sheer size of a regulation's impact to presume a legislative intent *not to delegate* so much authority to the agency is a form of faux legislative intent that depends on the Justices'—rather than the Congress'—judgment about how much regulatory impact is too much.[154]

But this outsized emphasis on practical consequences is not the focus of this paper. Rather, what I want to highlight is that there is more than just big numbers and allegations of overlarge impact going on in the Court's practical arguments in these cases. The Court is also engaging in a sort of functional analysis of how the agency has exercised or interpreted its own authority to regulate in the past. That is, the Court also is looking to the agency's past use of its regulatory authority under the relevant statute to determine the scope of the agency's power. And it is limiting the agency's authority to the outer edges of what the agency has done in the past—as evidence of the "fit" of between the challenged interpretation and the core problem the agency was designed to address. Thus the fact that the CDC has never

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[151] *See* Deacon & Litman, *supra* note __.

[152] *See* NFIB v. OSHA, 142 S.Ct. 661, 662 (2022) (noting that vaccine-or-test mandate "applies to roughly 84 million workers"); Ala. Ass'n of Realtors v. HHS, 141 S.Ct. 2485, 2489 (2021) (observing that "[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium"); West Va. v. EPA, 597 U.S. __ (2022) (No. 20-1530) (June 30, 2022) (slip op. at 10) (commenting that regulation at issue "would entail billions of dollars in compliance costs . . . require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors . . . as well as reduce GDP by at least a trillion 2009 dollars by 2040").

[153] *See* Anita S. Krishnakumar, *Some Brief Thoughts on Gorsuch's Opinion in NFIB v. OSHA, available at* https://electionlawblog.org/?p=126944 (Jan. 15, 2022)/ (noting "stunning" lack of close textual analysis by per curiam and concurring opinions).

[154] This kind of use of practical reasoning to presume legislative intent is a form of what I have elsewhere called "backdoor purposivism." *See* Krishnakumar, *supra* note __.

before sought to regulate housing, or that EPA has never before sought to regulate energy policy, or that OSHA has never before sought to regulate matters involving public health are all used as almost dispositive evidence that these agencies' enabling statutes *do not authorize* them to regulate these matters.

Again, this is problematic for several reasons. First, textualists aren't supposed to care about such functional, or practical, considerations as what an agency has done in the past; they are supposed to care only about what the words in the relevant statute say. So this practical, functional focus on the agency's past practice is again surprising and out of step with modern textualism.

Second, and perhaps more importantly, this form of practical reasoning again amounts to a false gesture towards legislative intent and mischief. Rather than examine Congress' actual legislative design, the Court is making a somewhat lazy or cheap debating point that "the agency itself has conceded this is the extent of its authority, because it has never claimed greater authority before"—a kind of laches argument. But this is a false equivalency because the particular situation or problem the agency is now regulating—i.e., Covid-19, the devastating effects of climate change—has never arisen before and certainly did not exist at the time the agency's enabling statute was enacted.

To make matters worse, the Court actually gets the agency's past practice wrong sometimes—deepening the inadequacy and inaptness of relying on past practice to determine "fit." Recall, for example, that the Court in *NFIB v. OSHA* insisted that OSHA's regulatory authority is limited to hazards that occur only within the workplace—but that this interpretation ignored OSHA's past regulation of several dangers, such as ladders, asbestos, and tractor-safety, that occur both inside *and outside* the workplace.[155]

III. IMPLICATIONS: SOME PROBLEMS AND TENSIONS

This Part explores what the decidedly non-textualist interpretive practices described above indicate about the modern Roberts Court's commitment to textualism. Section A considers some possible defenses or explanations for the Court's nontextual analysis in these cases, including the possibility that it is taking a nontextual approach in order to protect constitutional values that trump interpretive methodology or is

[155] *See* regulations cited *supra* note __.

subordinating methodology to practical considerations for good reasons in high stakes cases. It suggests that these defenses are unsatisfactory and that, at a minimum, they call into question the Court's categorical rejection of other nontextual interpretive tools in cases involving important constitutional values or significant practical stakes. Section B argues that the Court's use of purposive and intentionalist reasoning in its most recent major questions cases is problematic for another reason—because it engages in purposive/intentionalist analysis without any external tether, based almost entirely on the Justices' intuitions. Section B advocates that if the Court continues down the path forged in these cases, it should at least employ contemporaneous, date-of-enactment interpretive sources to ground its fitness and expertise arguments—and should abandon entirely its reliance on the behavior of post-enactment Congresses.

A. *Commitment to Textualism?*

One possible response to the Court's use of subsequent legislative history, "fitness" or core "expertise" arguments, and pragmatic reasoning in its major questions cases is to view these departures from textualist interpretive principles as evidence that the Court is insufficiently committed to textualism as an interpretive methodology. Indeed, Justice Kagan's dissenting opinion in *West Virginia v. EPA* arguably does just that, accusing the Court of abandoning textualism in hard cases: "The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."[156]

This Section considers whether the Court's departures from textualist doctrine in the major questions cases might be justified or defended—on either constitutional or pragmatic grounds—without requiring wholesale abandonment of textualism. One possible defense might suggest that the Court in the major questions cases is justified in taking a different interpretive approach in order to protect important constitutional values—namely, to prevent improper delegations of legislative authority to the executive branch. Notably, at least some of the Court's—and especially Justice Gorsuch's—rhetoric in the Biden-era major questions cases gestures towards such a justification. In *NFIB v. OSHA*, for example, Justice Gorsuch's concurring opinion explained

[156] West Va. v. EPA, 597 U.S. __ (No. 20-1530) (June 30, 2022), slip op. at 28 (Kagan, J., dissenting).

that, "If Congress could hand off all its legislative powers to unelected agency officials, it 'would dash the whole scheme' of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives."[157]

The problem with this argument, as others have noted, is that if a delegation is indeed excessive, then the Constitution would forbid it—not allow it so long as the agency's enabling statute makes especially clear that Congress in fact sought to delegate authority over the matter at issue to the executive branch.[158] In other words, the Constitution provides an on/off switch; whereas the major questions doctrine is more like a movable barrier that can be overcome if a delegation is made with sufficient force.

Another possible defense for the Court's purposive and pragmatic tendencies in the major questions cases, although not one that most textualists would embrace, is that the Court is textualist *except* in high stakes cases. On this theory, when the practical consequences of a particular interpretation are especially significant, the Court shifts from ordinary textual interpretation to a more pragmatic mode of interpretation that takes into account the practical effects of reading a statute to mean X versus Y, the present-day Congress' views about the agency policy at issue, and the agency's historical practice. The major questions cases fit this profile because they involve highly consequential situations in which an agency is claiming the authority to impose regulatory policies that would affect large swaths of the population and implicate the separation of powers between the legislative and executive branches. Ryan Doerfler has argued that courts look at statutory text differently in high-stakes, as compared to low-stakes, cases—finding textual ambiguity more often in high stakes cases.[159] Indeed, Doerfler defends this approach based on insights from the philosophy of language

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[157] NFIB v. OSHA, 142 S.Ct. 661, 669 (2022) (Gorsuch, J., concurring).

[158] *See* Benjamin Eidelson & Mathhew Stephenson, *The Incompatibility of Substantive Canons with Textualism*, 137 HARV L. REV. __, at 48 (forthcoming 2023) ("[W]e know of no originalist argument that Article I's Vesting Clause permits major delegations if but only if the statutes that make these delegations also make especially clear that they are doing so."); Thomas W. Merrill, *West Virginia v. EPA: Right Diagnosis, Wrong Remedy*, at 16 ("But if Congress has exclusive authority to legislate, and cannot transfer this to another branch of government, it makes no sense to say Congress can transfer such discretionary authority by issuing a clear statement authorizing the transfer.") (manuscript on file with the author).

[159] Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 525 (2018).

and epistemology fields, which have long noted that people need to feel a higher degree of certainty to say that they "know" something or that something is "clear" in high stakes situations versus low stakes situations.[160]

The different-rules for-high-stakes cases approach may well explain what the Court is doing in the major questions cases. But if so, it is a somewhat unsatisfying answer—because it boils down, at bottom, to a claim that textualism works, or that textualist jurists stick to their principles, only in cases where the outcome is not significant, and that they abandon textualism's core tenets when the practical consequences really matter.

Moreover, the high stakes versus low stakes dichotomy fails to provide any concrete guidance regarding how a court is supposed to determine whether a *particular* case or statutory interpretation question is high, versus low, stakes. Without some theory, or criteria, for determining what counts as a "high stakes" case, courts and judges are left to their own whims and personal predilections to decide that the practical consequences in a particular case are of the *kind* and *magnitude* that warrant deviation from the textualist playbook. That, in turn, is a recipe for politicized judicial decisionmaking and cherry-picking. Unfortunately, many of the Court's recent major questions cases give the impression of just such politicization: *Alabama Realtors Ass'n v. HHS*, *NFIB v. OSHA*, and *West Virginia v. EPA*, for example, all imply that the conservative Roberts Court defines high-stakes cases as those in which powerful or wealthy business interests stand to lose a lot of money if forced to comply with an agency regulation.

In the end, it is difficult to find a principled basis for reconciling the Court's reliance on fitness, subsequent legislative history, and agency past practice in the major questions cases with textualism's strong stance agains purposivist and intentionalist interpretive tools in statutory interpretation. Indeed, the Court's reliance on these decidedly nontextualist tools in the major questions cases calls into question its categorical rejection of other, similar nontextual and purposive tools—such as the mischief that motivated a statute, or traditional pre-enactment legislative history—in the major questions, and possibly other, cases. That is, one might argue that if the Court considers nontextualist interpretive tools useful in some cases, then it should permit such tools to be considered in all cases—or at a minimum, in the

[160] *See id.* at 542-44.

major questions cases. As the next Section argues, the Court should at least be willing to use traditional purposive tools like the mischief rule and legislative history to help establish the "fit" between an agency's authority and the regulation it seeks to enact, the agency's core "expertise," and Congress' views about the scope of the agency's statutory authority.

B. *Purposivism Without a Tether*

Another problem with the Court's use of purposive tools such as subsequent legislative history, "fitness" and "expertise" assessments, and agencies' past practices is that the manner in which the Court currently employs these tools and arguments lacks any external tether.

When concluding that an agency lacks expertise over a topic it seeks to regulate or that the statute at issue authorizes an agency to regulate X kinds of problems but not Y kinds of problems, for example, the Court's most recent major questions opinions do not look to date-of-enactment era evidence about the subjects the statute was designed to address or the kinds of problems Congress gave the agency power to regulate. That is, the Court's opinions are notably devoid of any references to enactment-era legislative record materials, news accounts, or other historical materials that might establish the scope of the agency's authority, or the "fit" between the agency's original design and its present-day actions. Rather, in lieu of looking at the actual problem Congress was trying to resolve when it established the agency, the Court's current practice is simply to declare that a regulatory policy adopted by an agency exceeds the outer edges of the agency's statutory authority or expertise—based on the Court's own intuitions. In short, the Justices' own individual assessments that an agency action seems "surprising"[161] or "raises an eyebrow"[162] are taking the place of a serious investigation into the scope of authority the enacting Congress delegated to the agency. To compound the problem, when the Court does invoke

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[161] Transcript of Oral Argument at 84, West Va. v. EPA, 597 U.S. __ (argued Feb. 28, 2022 2014) (No. 20-1530) (Chief Justice Roberts commenting that "this is kind of surprising that the CDC is, you know, regulating evictions"); *id.* at 85 (Roberts explaining, "It's just you look at it and you say, why is this CDC regulating evictions?").

[162] *See* West Va. v. EPA, 597 U.S. __ (No. 20-1530) (June 30, 2022) (slip op. at 26) (disputing dissent's claim that there is "nothing suprising" about EPA dictating the optimal mix of energy sources and arguing that even if forbidding evictions may slow the spread of disease, "the CDC's ordering such a measure certainly 'raise[s] an eyebrow.'").

external evidence about the scope of the agency's authority, it has tended to point to the present-day Congress' failure to *itself* adopt the policy now adopted by the agency, rather than to evidence that either the present-day or enacting Congress failed to authorize *the agency* to adopt the policy at issue.

There is a similar problem with the untethered nature of the Court's practical consequences reasoning as well. Specifically, the Court's current approach to the major questions doctrine provides little guidance regarding the *magnitude* of the practical impact that an agency action must have in order to be considered a "major question"—or what kinds of data or evidence should be used to evaluate this practical impact. The upshot of this is that in each case, the Court gets to decide which statistics about impact matter, and where to get them from. There is no standardization about the introduction or reliance on such numbers and figures. In the CDC eviction moratorium case, for example, the Court estimated the financial burden that would be placed on landlords ($50 billion) based on the amount of emergency rental assistance Congress provided in a Covid aid package.[163] This may not necessarily be a good measure of the actual financial burden and, more importantly, the Court has nowhere established a threshold for how much financial burden on regulated parties constitutes too much, or pushes an agency over the major questions line. I have elsewhere noted the need for greater clarity and transparency from the Court regarding what kinds of practical consequences matter and can be counted in favor of or against a particular statutory interpretation.[164] Some more rigor in this regard is much needed.

Finally, the Court's reliance on post-enactment, and often present-day, Congresses' legislative action or inaction is likewise untethered from the question of how much authority an enabling statute delegates to an agency. Aside from the fact that such legislative action or inaction typically shows only a policy disagreement with the agency, rather than any legislative intent about the scope of the agency's authority, the Court's focus should be on enactment-era legislative record materials if it is seeking to determine the "fit" between an agency's action and its design.

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[163] Alabama Ass'n of Realtors v. HHS, 141 S.CT. 2485, 2489 (2021) ("While the parties dispute the financial burden on landlords, Congress has provided nearly $50 billion in emergency rental assistance—a reasonable proxy of the moratorium's economic impact.").

[164] *See* Anita S. Krishnakumar, *Textualism's Fault Lines*, (forthcoming).

I have elsewhere called for the Courts to reference purposive interpretive tools, including the mischief that motivated a statute and legislative history, as a check on the inferences they draw based on textual analysis.[165] The major questions cases constitute a prime candidate for this kind of checking function use of purposive contextual materials because, in such cases, the Court is limiting the scope of statutes that Congress has enacted as well as the authority exercised by the President—so its decisions have the potential to encroach on both of the other branches. In other words, the institutional stakes of getting it wrong are so high in these cases that it seems especially worthwhile to take the step of consulting purposive interpretive resources to make sure that the Court's skepticism that Congress would delegate the policy decision at issue to the agency is accurate. But consulting purposive sources means actually looking at legislative record materials or other contemporaneous evidence that sheds light on a statute's scope—not guessing at or extrapolating the outer limits of an agency's authority based on judicial intuition.

In the end, if the Court continues down the path forged in its most recent major questions cases, this essay advocates that it should at least employ contemporaneous, date-of-enactment interpretive sources to ground its fitness and expertise arguments and should establish clear ex ante rules about what kinds of practical effects are so significant, and so large (in terms of dollars or people affected) that they will prompt a major questions analysis. Moreover, the Court should abandon entirely its reliance on actions taken (or not taken) by post-enactment Congresses, which tend to highlight policy disagreements rather than legislative intent about the scope of an agency's power to regulate.

CONCLUSION

This paper has sought to shed light on the modern Court's use of "fitness," "expertise," legislative inaction, and past agency practice in its most recent major questions cases. It has argued that these new factors, or lines of argument, constitute a new form of purposive analysis that is problematic both because it conflicts with some of textualism's fundamental interpretive tenets and because it invites significant judicial discretion and speculation, with almost no textual or evidentiary tether. And it has argued that in the end, the modern Court can resolve these issues by opening the door to similar purposive tools in all statutory

[165] Krishnakumar, *Backdoor*, *supra* note __.

cases, not just those involving major questions, and/or expanding the universe of purposive resources it uses in major questions cases to include contemporaneous legislative record or other historical evidence regarding the statute's scope.